



CARDIFF UNIVERSITY

**International Contracting and Commercial Arbitration:
An Analysis of the Doctrine of Harmonisation and Regionalism
With Special Reference to the Middle East Region**

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Summary of Thesis

This dissertation seeks to contribute to the development of the comparative study of international commercial arbitration by focusing on the Middle Eastern experience in commercial dispute resolution. Theoretical and practical criticism is offered and suggestions for an improved regional legislative framework are made.

With the ever-increasing importance of international trade to Middle Eastern countries, research upon the effective dispute resolution mechanisms of commercial arbitration has become imperative. The process of harmonisation of commercial arbitration has become the subject of wider international and regional research studies, and the aim of this work is to contribute to the field in the context of the Middle Eastern region. This thesis examines “regionalism” and the process of harmonisation in international commercial arbitration. Within the philosophical framework of international commercial arbitration, international contract principles and dispute resolution mechanisms, the objective is to analyse existing cultural deviations and boundaries, and ascertain how these have prevented effective law reform within the region itself, obstructing the harmonisation process.

Despite regional variations, in practice the process, of harmonisation is essential if the Middle East is to benefit from and participate in the phenomenon of globalisation.

Whilst regional culture has become increasingly significant, harmonisation of commercial arbitration has become more urgent.

The thesis argues that harmonisation with the international commercial arbitration Model Law can be achieved when the concept of regionalism is taken into consideration. Different aspects manifested within regionalism regarded as legal cultural deviation can be accommodated, making for an efficient arbitration law reform in accordance with the international accepted substantive and procedural principles of the UNCITRAL Model Law.

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Abbreviations

AAA:	American Arbitration Association.
AAAI:	Arab Association for International Arbitration.
AALCC:	Asian-African Legal Consultative Organisation.
ADR:	Alternative Dispute Resolution.
CCP:	French “Code of Civil Procedure”.
COCOM:	Coordinating Committee for Multilateral Export Controls.
COGSA:	Carriage of Goods by Sea Act.
CPCC:	Code of Civil and Commercial Procedure (Tunisia).
CRCICA:	Cairo Regional Centre for International Commercial Arbitration.
CSCD:	Committee for Settlement of Commercial Disputes of the Ministry of justice.
DCCI:	Dubai Chamber of Commerce and Industry.
DIAC:	Dubai International Arbitration Centre.
EC:	European Commission.
EDA:	Economic Development Agreements.
EU:	European Union.
FAA:	Federal Arbitration Act (American).
IBRD:	International Bank for Reconstruction and Development.
ICA:	International Court of Arbitration.
ICAL:	International Commercial Arbitration Law (Bahrain).
ICC:	International Chamber of Commerce.
ICSID:	International Centre for Settlement of Investment Disputes.
IMF:	International Monetary Fund.
LCIA:	London Court of International Arbitration.
MERCOSUR:	The Southern Cone Common Market / Mercado Común del Cono Sur: (Argentina, Brazil, Paraguay, and Uruguay).
NAFTA:	North Atlantic Free Trade Agreement.
NCCUSL:	National Conference of Commissioners on Uniform State Laws.
NCPC:	New Code of Civil Procedure (Nouveau code de procédure civile).

NIE:	Newly Industrialising Economy.
OHADA:	Organisation pour l'Harmonisation du Droit des Affaires en Afrique / Organisation for the Harmonisation of Business Law in Africa.
OPEC:	Organisation of Petroleum Exporting Countries.
RICO:	Racketeer Influenced and Corrupt Organisations Act.
UAE:	United Arab Emirates.
UN/ECE:	United Nations Economic Commission for Europe.
UNCITRAL:	United Nations Commission on International Trade Law.
UNDP:	United Nations Development Programme.
UNIDROIT:	Institut international pour l'unification du droit privé (International Institute for the Unification of Private Law).
VIAC:	Vienna International Arbitral Centre.
WB:	The World Bank.
WIPO:	(World Intellectual Property Organisation), based in Geneva, Switzerland, the WIPO Arbitration and Mediation Centre was established in 1994 to offer Alternative Dispute Resolution (ADR) options.
WTO:	World Trade Organisation.

Glossary

‘Adam: Non-existence, non-existence of the object of a contract, often leading to gharar (risk).

‘Adat: Plural of A’da meaning Habit.

‘Ahd: Injunction, pledge, vow, compact, contract, obligation, promise.

‘Alem: Scholar.

‘Aqd: Literally, knot, tie; obligation, compact, the conclusion or ratification of a compact or oath; in fiqh, juridical act; more narrowly, legal relationship created by offer and acceptance.

‘Aqda: To make a contract.

‘Ayb: Defect, defect in goods giving the purchaser the right to cancel the sale.

‘Ayn: an existing, tangible thing considered as unique and individual; a thing (Latin, res).

Ahkam Tafsiliyya: Positive Law.

Al qada’: Judicial procedure, the administration of justice.

Al Wajib: Obligatory act

Al-Haram: Prohibited act.

Allah: God.

Al-Makruh: Distasteful act.

Al-Manduh: Recommended act.

Al-Masalih al Mursalah: Public interests.

Al-Mubah: Legally indifferent.

‘Araf: Customs-Plural of U’rf.

‘Ariya: One form of rent contract.

Awfu bil Uqud: Fulfil contractual obligations.

Aynama Kanat al Muslaha Fa Thamma Shar Allah: Where muslaha is, there is the divine law.

Ba’ith: Motive.

Batil: Nugatory, void, false, what is wrongful.

Bay’ mu’ajjal: Credit sale, sale with payment of the price at a specific later time.

Bay’: Sale.

Bida’: Innovation.

Darar: Damage, harm, loss.

Fatawa: Plural of fatwa; a legal opinion issued by a scholar of fiqh.

Fatwa: A legal opinion given by a legal advisor, or Mufti.

Fiqh: The science of Shar'ia Jurisprudence.

Fuqaha': Jurists.

Gharad: Purpose.

Gharar: Literally, peril, risk, hazard, risk, uncertainty. Also, it means the risk of uncompensated loss to one party to a contract and corresponding gain to the other due to uncertainty of contractual obligations or unforeseen circumstances.

Ghazw Fikri: Intellectual assault.

Ghazw Hadari: Cultural assault.

Hadith: An anecdote recording an action or statement of the Prophet Muhammad. A hadith consists of an account of the action or statement and a list of names of persons who transmitted it orally up to the time it was first recorded in writing (Isnad), ending with the name of an eyewitness to the event or statement.

Hadiths: Plural of Hadith.

Hakam: Arbitrator, the person who is authorised to settle differences between disputants.

Hanafi: One of the four Sunni schools of law, founded by Abu Hanifa.

Hanbali: One of the four Sunni schools of law, founded by Ahmad Ibn Hanbal.

Hijaz: Arabic name of territories of Mecca and Medina before Saudi Arabia came into existence. It actually refers to much of Arabian Peninsula.

Hisba: Commercial Institution to supervise equitable environment for the exchange of goods in the early Islamic era.

Hiyal: Singular of hila, legal artifices or stratagems.

'Ibadat: Acts of worship; compare mu'amalat. Ijtihad: literally, personal effort by a qualified fiqh scholar to determine the true ruling of the divine law in a matter on which the revelations are not explicit or certain.

Ibaha: Permissibility.

Ibn Qayyim Jawziyya: Muslim Scholar (1292-1350 C.E.).

Ibn Rushd: Muslim Scholar (1126-1198 C.E.).

Idafa: Extension.

Ijara: Hire.

Ijma': Consensus of scholars and leading men of a certain past epoch regarding a point of law. One of the four main sources of Islamic jurisprudence (*usul al-fiqh*).

Ijtihad: Another form of main sources of Islamic jurisprudence in which scholars give interpretation on legal points.

Ikhtilaf Al-Ra'y: A difference of opinion regarding a point of law on which there is no consensus among the four schools.

Imam: Person who could be a scholar, or leader.

Iqtiran: Concomitance.

Istisna': Exception.

Ja'iz: An adjective applied to a contract that is revocable at any time by either party.

Jahala: Ignorance, lack of knowledge; indefiniteness in a contract, often leading to finding of gharar (risk).

Lazim: Binding, enforceable.

Madhhab: Opinion or school of law.

Mahall: Subject.

Mahasin Al-tijara: Benefits of trade.

Majallat Al-Ahkam Al-Adliyah "Majallah": The first codification of commercial law published by the Ottoman Empire in the nineteenth century based on the teachings of the views of some jurists of the Hanafi School.

"Majallat Al-Tahkim: Tunisian Arbitration code Law 42 of 1993.

Majles Urfi: Custom council.

Maliki: One of the four Sunni schools of law, founded by Mali Ibn Anas.

Manhaj: Pathway: set of general rules that are followed by researchers.

Masalah : Interest.

Madhhab: Rite.

Mazalim: Plural of Mazalama, a grievance or injustice. Refers to a special legal procedure invoking the direct authority of the sovereign to review all judgements and right all wrongs without being bound by Shar'ia rules of procedure or evidence.

Mestera: Morocco Code of Civil and commercial Procedure.

Min Muqtadayat Al-'aqd: The contract purpose.

Muawya Bin Abi Sufyan: Name of the Fifth Islamic Caliph in Syria, (661-680 C.E.). He reigned from (661-680 C.E.)

Mufti: A legal advisor authorised to issue a Fatwa.

Muftiyin: Plural of Mufti.

Muhakkam: An arbitrator, synonymous with a Hakam.

Mul'am lil-'aqd: Appropriate to the contract.

Mumalaha: Partaking of salt and bread.

Muqtada: Essential.

Musafaha: Hand-Shaking.

Musalaha: Reconciliation.

Musharaka: Partnership or company; used in modern Islamic law for forms of partnership.

Muslahat Al-Umma: The public welfare

Nahaja: Follow a clear way or pathway.

Nizam Wadi: Statutory Legislation.

Qadi: A judge, magistrate.

Qudat: Judges.

Qard: Loan.

Qaw'aid 'Amma: General principles.

Qiyas: Analogy, one of the four main sources of the Shar'ia.

Qur'an: The Holy Book of Islam, believed to be authored by God Himself. The most important source of Islamic Jurisprudence.

Rabia' al Awwal: Islamic Calendar month usually between (April and May)

Riba: Interest.

Sabab: Cause.

Sanhuri: Egyptian Jurist, architect of the Egyptian civil code 1848. Many Arabs have adopted his school of thought.

Shafi'i: one of the four Sunni schools of law, founded by al-Shafi'i.

Shari'a: literally, "a clear path to water." Islamic Law as derived from the Qur'an and the Sunnah of the Prophet through Ijma', Qiyas and public interest considerations. It purports to regulate all aspects of the life of a devout Muslim.

Shart: Condition, stipulation.

Shi'a: Literally, a party, faction, or sect. Refers to the party of Ali, the fourth Khalif, to whom the Shi'i sect traces its origin, and to whose descendants Shi'i Muslims attach special importance.

Shi'ites: Muslims who follow the Shi'a doctrine.

Shurut: Plural of Shart; 1. Stipulations; 2. genre of legal formularies.

Siyasa Shariyya: Doctrine that ruler may issue a regulation for public interest.

Sulh or Sulha : Amicable settlement, reconciliation or settlement of a dispute.

Sultan: The sovereign of a Muslim state.

Sunnah: The Sunnah of the prophet is one of the four main sources of Islamic Law. The Sunnah of his companions and immediate successors, where they agree, constitutes the most binding form of Ijma’.

Sunni Mujtahids: Scholars of Sunni School.

Sunni: Pertaining to orthodox Islam, as opposed to, for example, the Shi’i sect. The schools of law discussed in this thesis are those accepted by all orthodox, Sunni Muslims, who consider that all four schools provide acceptable interpretations of the Shar’ia.

Ta’assub Madhhabi: Doctrinal Fanaticism.

Ta’liq: Suspending.

Tahkim: Arbitration.

‘Ulama’: Plural of A’lim, wise man, expert, scientist. Refers here to legal and religious scholars of the Shar’ia.

‘Uqud: Plural of A’qd meaning contract.

‘Urf: Custom.

Usul al fiqh: Literally, the roots of the fiqh; the source of law; fiqh legal philosophy and hermeneutics. Also, means Shari’a Methodology.

Wa’d: promise.

Wasata: Mediation.

List of Cases

1. Aminoil Case (1982). pp.111, 124.
2. Anglo-Iranian Oil Company Case (1933). p.121.
3. Aramco Case (1958). pp.101,104,147,151, 152,153, 154,169.
4. Cairo Case No. 41 of the 114th judicial year (1994). p.222.
5. Cairo Case No. 42 of the 115th judicial year (1995). p.210.
6. Cairo Case No. 62 of the 113th judicial year (1993). p.201.
7. Cairo Case No. 84 of the 119th judicial year (1999). p.211.
8. Cairo Commercial Case No. 64 of the 113th judicial year-Egypt (1993). p199.
9. Drew v. Drew (1921). p.37.
10. Fincantieri-Cantieri Navali Italiani SPA vs. oto Metara (1992). p.52.
11. Fujita Corporations vs. The Qatar Ministry of Municipial Affaires and Agriculture (1995). p.185.
12. Hickman vs. Taylor (1947). p.62.
13. Holford vs. Lawrence (1695). p.60.
14. Indian Overseas Banks vs. Ibrahim al Shirawai (1996). p.180.
15. Liamco Case (1979). p.101.
16. Mitsubishi-Motor Corp. vs. Soler Chrysler-Plymouth (1985). pp. 37,54.
17. Norjarl vs. Hyundai (1990). p.156.
18. Norwegian Loans Case (1957). pp. 112,113.
19. Petroleum Development Ltd vs. Abu Dhabi (1951). pp.151,153,169.
20. Pyramids Case (SPP) (1988). pp.111.112.
21. Qatar vs. International Marine Oil company Ltd (1953). pp. 151,153, 154,169.
22. Questech Inc. vs. Ministry of Defence of the Islamic Republic of Iran (1985).
p.107.

23. *Rodriguez de Oujas vs. Sharon/ American Express, Inc* (1989). p.55.
24. *Sanderson vs. Armour & Co.* (1922). p.215.
25. *Sapphire Case* (1967). pp.100,101.
26. *Scherk vs. Alberto-Culver Co.* (1974). p.54.
27. *Scott vs. Avery* (1855). p.37.
28. *Shearson/ American Express Inc. vs. McMahon* (1987). pp.38, 55.
29. *Socobelge Case* (1960). p.126.
30. *Topco/Calasiatic Case* (1981). p.101.
31. *Tunnel Indemnity Case* (1986). p.106.
32. *Vimar Seguros Y Reasegueros, SA vs. M/V Sky Reefer* (1995). p.39.
33. *Vynior's Case* (1609). p.25.
34. *Wilko vs. Swan* (1953). pp. 54, 55.

List of Statutes

I. Model Law:

1. UNCITRAL Model Law 1985.

II. Statutes:

1. Algerian Arbitration Decree No. 9 of 1993.
2. Bahraini Arbitration Law No. 9 of 1994.
3. Egyptian Commercial Arbitration Law No. 27 of 1994.
4. Iraqi Code of civil and Commercial Procedure Code of 1969.
5. Jordanian Commercial Arbitration Law No. 31 of 2001.
6. Kuwaiti Arbitration No. 11 of 1995.
7. Lebanese Arbitration Law No. 90 of 1993.
8. Libyan Arbitration Law No. 49 of 1972.
9. Morocco Arbitration Law of 1981.
10. Sultanate of Oman Commercial Arbitration Law No. 47 of 1997.
11. Palestinian Arbitration Law No. 3 of 2000.
12. Saudi Arbitration Regulation of 1983.
13. Sudanese Civil and Commercial Procedural Law of 1971.
14. Syrian Commercial Law of 1952.
15. Tunisian Commercial Arbitration Law No. 42 of 1993.
16. UAE Commercial Transaction Law No. 18 of 1993.
17. Yemeni Arbitration law of 1992.

III. Conventions:

1. The Amman Arab Convention on Commercial Arbitration, 14/4/1987.

IV. Regional Centres:

1. Abu Dhabi Commercial Conciliation and Arbitration Centre.
2. Dubai Chamber of Commerce and Industry (DCCI).
3. Dubai International Arbitration Centre (DIAC).
4. The Bahrain Centre for International Commercial Arbitration (BACICA).
5. The Cairo Regional Centre for International Commercial Arbitration.
6. The GCC Commercial Arbitration Centre.

CONTENTS

Summary.....	i
Acknowledgements.....	ii
Abbreviation.....	iii
Glossary.....	v
List of cases.....	x
List of statutes.....	xii
Contents.....	xiii

Chapter One: Introduction

1.1 Introduction.....	1
1.2 Analytical Framework.....	2
1.3 Research Statement	4
1.4 Scope of The Thesis and Its Hypothesis.....	6
1.5 Methodology.....	8
1.6 Cartography of The Thesis.....	9

PART ONE

Regionalism and Commercial Arbitration: Philosophical Analysis

Chapter Two:

Harmonisation and Regionalism: General Concept

2.1 General Concept.....	11
2.2 Harmonisation Regimes.....	15
2.2.1 UNCITRAL Model Law.....	15
2.2.2 Lex Mercatoria.....	17
2.3 Arbitration Law Reform and The Impact of Regionalism.....	18

Chapter Three:

Philosophical Basis of Legal Theory Underlying Modern International Commercial Arbitration Law

3.1 Positivism Legal Theory and Modern Arbitration Law.....	23
3.2 Normative Aspect of Modern Commercial Arbitration Law.....	26
3.2.1 The Concept of “Competition”.....	26

3.2.2 The Concept of: “Individualism”	33
3.2.3 The Concept of: The “Role Of Merchants”	42
3.2.3.1 In the Development of the Law	42
3.2.3.2 In The Establishment of “Merchant Courts” and “Court Sponsored Arbitration”	44
3.3 Institutional Aspects of Modern Commercial Arbitration Law	47
3.3.1 The Concept of “Anti-Statism”	47
3.3.2 Western Concept of “Anti-Statism”	48
3.3.3 Some Features of Anti-Statism in Western Legal Culture	51
3.4 Coercive Aspect of Modern Commercial Arbitration Law	57
3.4.1 The “Contract Nature” of the Modern Arbitration Law	58
3.4.2 The “Judicial Character” of Modern Arbitration Law	63

Chapter Four:

Philosophical Basis of the Legal Theory Underlying International Commercial Arbitration Law in The Middle East Region

4.1 Normative Aspect of Commercial Arbitration in the Middle East Region	67
4.1.1 Middle East “Collectivism” Value Orientation	68
4.1.2 The “Given Law” Concept	74
4.2 Institutional Aspects of Commercial Arbitration in the Middle East Region	83
4.2.1 The Concept of “Statism”	83
4.2.2 Evidence of Statism in the Middle East	84
4.2.3 Why Statism in the Middle East?	85
4.3. Coercive Aspects of Commercial Arbitration in the Middle East	90
4.3.1 The Contract Nature of Arbitration in the Middle East	91
4.3.2 Judicial Character of Arbitration in the Middle East	93

PART TWO

Regionalism and Applicability of Modern Law: Analysis of International Contract Principles

Chapter Five:

International Arbitration Contract Principles: Analysis of Modern Arbitration Law and Western Perceptions

5.1 Introduction.....	95
5.2 Harmonisation of International Contract Principles.....	96
5.2.1 UNCITRAL Rules.....	96
5.2.2 UNIDROIT Rules.....	97
5.2.3 The Brussels Convention.....	97
5.2.4 The Rome Convention.....	98
5.2.5 Functions of Aforementioned Conventions.....	98
5.2.6 Regionalism and Harmonisation of International Contract Principles.....	99
5.3 International Contract Principles: Harmony and Diversity.....	100
5.3.1 Sanctity v. Flexibility of International Contract Principle.....	100
5.3.1.1 Sanctity Contract Principle “ <i>pacta sunt servanda</i> ”.....	101
5.3.1.2 The Flexible Contract Principle.....	104
5.3.2 Monism v. Dualism in the Context of the International Contract Principle.....	109
5.3.2.1 Arguments for the Monist Contract Principle.....	111
5.3.2.2 Arguments for the Dualist Contract Principle.....	115
5.3.3 Contractual Freedom versus National Public law.....	117
5.3.4. Legal Nature of International Contracts.....	120
5.3.4.1 International Treaties versus Administrative Contracts.....	120
5.3.4.2 International State Contracts are not International Treaties.....	122
5.3.4.3 International State Contracts are not Administrative Contracts.....	122
5.4 Modern Arbitration Law: The Proper International Contract Principle.....	123
5.4.1 The Contractual Perspective.....	124
5.4.2 The Procedural Perspective.....	124
5.4.3 State Immunity Perspective	127

Chapter Six:

International Arbitration Contract Principles: Analysis of Middle East Perceptions

6.1 Introduction.....	129
6.2 The Role of Tradition and Ethics in Middle Eastern Commercial Contracts.....	130
6.2.1 The Role of Tradition in Forming International Contract Principles.....	130
6.2.1.1 “Friendly Negotiation” Clause.....	130
6.2.1.2 The Importance of Relations.....	131

6.2.1.3 Subordination of Written Contract.....	132
6.2.1.4 Commercial Justice.....	132
6.2.2 The Role of Islamic Law in the International Commercial Contract.....	134
6.2.3 Principles of Islamic Contract Law.....	135
6.2.3.1 Non-Binding (<i>Ja'iz</i>) versus Binding (<i>Lazim</i>) Contract Principles.....	135
6.2.3.2 Contract on Future Things.....	136
6.2.3.3 Choice of Special Condition.....	138
6.2.4 Implication of Islamic Contract Law.....	141
6.2.4.1 Absence of Formalism.....	141
6.2.4.2 Freedom of Contract.....	143
6.3 Regional Perceptions of International Contract Principles.....	145
6.3.1 Flexibility over Sanctity of International Contract Principle.....	146
6.3.2 Public over Private International Contract Principle.....	149
6.3.3 Dualism over Monism International Contract Principle.....	150
6.3.3.1 The Application of General Principle of Law.....	151
6.3.3.2 Denial of the Application of International Law.....	153
6.3.4 Contemporary Issues in the Adjudication of International Contracts in the Middle East.....	156

PART THREE

UNCITRAL Model Law and Modernisation of Regional International Commercial Arbitration

Chapter Seven:

Impact of the UNCITRAL Model Law on the Middle East Region

7.1 Background of Harmonisation.....	163
7.2 Historical Background and the Process of Codification in the Middle East.....	164
7.3 Implications of the UNCITRAL Model Law in the Middle East Region.....	165
7.3.1 Countries Adopting the UNCITRAL Model Law.....	167
7.3.2 Countries Adopting Islamic Law.....	171
7.3.3 Countries Adopting the French Approach.....	174
7.3.4 Countries Adopting Mixed Statutory Arbitration Laws.....	178

Chapter Eight:

Adoption of UNCITRAL Model Law Principles

8.1 General Overview.....	189
8.2 UNCITRAL Model Law Operative Standards: Main Features.....	192
8.2.1 Scope of Application.....	193
8.2.1.1 “Commercial”.....	193
8.2.1.2 “International”.....	195
8.2.1.3 Administrative Contract.....	199
8.2.1.4 Separability Clause.....	203
8.2.2 Party Autonomy.....	204
8.2.2.1 Autonomy to Determine the Composition of the Arbitral Tribunal.....	205
8.2.2.2 Party Autonomy Over Conducting Arbitral Proceedings.....	206
8.2.2.3 Rule Applicable to the Substance of Dispute.....	209
8.2.3 Strengthening the Tribunal’s Power.....	210
8.2.3.1 Competence of the Arbitral Tribunal to rule on its own Jurisdiction.....	210
8.2.3.2 Challenges to the Arbitrator.....	211
8.2.3.3 Power to Order Interim Measures.....	215
8.2.4 Restriction Upon Court Intervention.....	217
8.2.4.1 Effects of Arbitration Agreement.....	219
8.2.4.2 Setting Aside the Award.....	220
8.2.4.3 Recognition and Enforcement of the Arbitral Award.....	222
8.3 Evaluation.....	227

Chapter Nine:

Moving toward Modernisation of Regional International Commercial

Arbitration Law

9.1 Introduction.....	236
9.2 Reflecting on Competing Claims.....	236
9.2.1 Islamic Law and the Ground Rules.....	236
9.2.1.1 Reform in light of the Primary Source of Islamic Methodology.....	237
9.2.1.2 Reform in light of the Secondary Source of Islamic Methodology.....	244
9.2.1.3 Fatwa and Reform.....	246
9.2.1.4 Islamic Public Policy and Reform.....	248
9.2.1.5 Reform Experiences.....	249
9.2.2 Statism: A Barrier of Refprm.....	250

9.2.2.1 Arguments Used to Justify Statism.....	250
9.2.2.2 Effects of Statism.....	251
9.2.2.3 Needs for an open Regulatory Institution.....	252
9.2.3 Cultural Estoppel.....	254
9.2.3.1 Arguments used to Justify the Cultural Estoppel.....	254
9.2.3.2 Challenging the Cultural Estoppel Claim.....	256
9.3 Theoretical Paradigm: Comprehensive Dispute Resolution.....	258
9.3.1 Equity of the UNCITRAL Model Law.....	258
9.3.2 Introducing Alternative Dispute Resolution.....	260
9.3.2.1 Reasons to Introduce ADR.....	260
9.3.2.2 ADR in What Form?.....	265
9.3.2.3 Evaluation of ADR Mechanism.....	269
9.4 Mechanism of Reform: Practical Implication.....	270
9.4.1 Instituting Intraregional Harmonisation Process.....	270
9.4.2 Unification of Regional Dispute Resolution Centres' Rules.....	272

Chapter Ten: General Conclusion

10.1 Main Findings.....	276
10.2 Contribution.....	281
10.3 Further Research.....	282
10.4 Practical Implications of the Research.....	283
10.5 Limitations.....	283

CHAPTER ONE: INTRODUCTION

1.1 Introduction

“The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission’s 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”¹

The Model Law constitutes a sound and promising basis for the desired harmonisation and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to states of all regions and different legal or economic systems of the world.²

The form of a Model Law was chosen as the vehicle for harmonisation and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to desired harmonisation and be in the best interests of the users of international arbitration, who are primarily foreign parties and their lawyers.³

This thesis is about harmonisation of international commercial arbitration laws with reference to the Middle East region. The legitimacy of this research is based on the fact that the importance of international commercial arbitration is being increasingly recognised in today’s global economy. In the mid-Nineteenth Century in Europe and US, arbitration was regarded as a “bastard remedy” and arbitrators as “caricatures of their judicial sibling.”⁴ However, with the increased boost of international business

¹ Explanatory note (1) by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration.

² Explanatory note (2) by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration.

³ Explanatory note (3) by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration.

⁴ See Thomas E. Carbonneau, *Arbitral Justice: The Demise of due Process in American Law*, 70 Tul. L. Rev. 1945, 1947 (1996). The precise reasons for the common law hostility towards arbitration are unknown, but some scholars surmise that they trace back to English judges’ almost complete reliance on fees from cases for their income, which meant that arbitrators were unwelcome competitors. See John R. Allison, *Arbitration Agreement and Antitrust Claims: the Need for Enhanced Accommodations of Conflicting Public Policies*, 64 N.C.L. Rev. 219 224 (1986). A second possible reason is the

across national boundaries whether in areas of international trade and investment, international arbitration as the global preferred method for resolving international commercial disputes cannot be overemphasised:

“Today, the scene has changed; almost all international agreements contain arbitration clauses. International arbitration holds an exalted status and is commonly revered as vital to world trade. The trends of the world economy and the potential of international business are matters of concern for every national country”.⁵

Not surprisingly, tremendous efforts have been made to ensure that national legislations fit within the accepted global standard system as provided by the UNCITRAL Model Law. Therefore, any nation interested in the global economy should adjust its law to accommodate the demand of international arbitration. Thus, “International arbitration has transformed itself from a ‘bastard remedy’ to ‘crown prince’ of international dispute resolution”.⁶ The main concern remains to establish universal acceptance of the UNCITRAL Model Law.

1.2 Analytical Framework

Epistemology about harmonisation of international law - in general - has emphasised the great influence of “differences of legal culture” on the harmonisation process of international law. T.O. Elias, President of the International Court of Justice (ICJ) 1981 to 1985, has explored how “differences in legal culture” might affect the behaviour of international entities in any attempt to harmonise international law.

To analyse the impact of different legal cultures between the Developed and Developing Countries, Elias investigated how the relationship between North and South countries in its political, economic and social aspects can influence attitudes towards various rules of international law. He explored the impact of implementing GATT rules and regulations in respect of the exercise of sovereign rights of states.⁷

centuries-long struggle by the early courts for jurisdiction and their consequent unwillingness to surrender it. See Catherine A. Rogers, (2002). Fit and function in Legal ethics: Developing a code of conduct for international arbitration. *Michigan Journal of International Law* p. 4

⁵ (Rogers, C.2002).

⁶ (Rogers, C.2002).

⁷ See T.O. Elias, (1992). *New Horizons in International Law*. Matrinus Nijhoff, London. pp. 212-216.

He concluded that: “ it is important, however to distinguish conflicts of interest from conflicts of values, and conflicts of power, a distinction not often made in discussing problems of international trade and disposal of natural wealth and resources. A conflict of values produces a stalemate but conflicts of interest and power are subject to certain dynamic political and social forces, which today are overwhelming agents of process and evolution”.⁸ Therefore, Elias sought to answer his research question by examining the macro aspects of different societies, indicating how they give meaning and influence the different legal attitudes, and finally highlighting the social forces behind legal behaviour.

Bedjaoui, another former president of the (ICJ) has analysed the historical experiences of both parties to international contracts, and how different legal cultures have led to very different interpretations of international rules and available remedies.

He critically analysed the 1970s campaign within the UN for achieving what became known as the New International Economic Order (NIEO). In his analysis he showed how economic and political aspects influenced the attitude of countries of the South to achieve certain rules of international law regarding natural resources and economic affairs.⁹ He explored how legal culture affects an understanding of the international law-making process, highlighting how the argument of Western origin of international law has been used for the suggestion of further development of international law.

An analysis of “differences in legal culture” helped these two influential international law scholars to establish an analytical framework which enabled them to gain in-depth understanding, and to show how shared social values affect attitudes towards international law in general.

Based on the aforementioned epistemological studies, this research will be conducted employing the comparative law approach and examining cultural values and their interaction with the legal system. This analytical framework is intended to examine, discuss, and analyse pre-existing international arbitration law to determine, understand and interpret social forces behind the attitudes and behaviours towards harmonisation of international commercial arbitration. This interpretation will be based on social and political dimensions. The best rationale for this analytical framework is provided by Kurt Sontheimer:

⁸ Ibid.

⁹ See Bedjaoui Mohammad, (1979). *Towards a New International Economic Order*. New York, Holmes & Meier. pp.167- 187.

“Every political culture is connected to a certain part of a tradition which came into being in history and has sustained its existence till the current time. A political culture in a particular society rooted in the sustainability of historic, political consciousness and behaviour manners, which has a part to play, more or less, in history and moment. Our interest in history firstly arises from our wish to know what has been extended from the past till the current time and to what degree we can realise reasons in history for contemporary phenomena.”¹⁰

1.3 Research Statement (Problems, Aims, Purposes and Challenges)

In an era of globalisation, Middle Eastern countries are obliged to establish efficient and promising economic policies in order to meet the needs of their citizenry. They must ensure that such policy is well developed to fit within the international system. The aim should be to engage effectively in international trade and to promote foreign direct investment. Otherwise, the legal framework will lag behind the expectation at the domestic and international level. In this context, an international commercial dispute resolution mechanism is considered an area of high concern for national corporations as well as multinationals and transnational corporations.

Despite the Middle East’s importance in terms of economic trade and the uniqueness of its legal system based on Islamic Law and other multilayered legal systems in an era of globalisation, a review of the literature reveals scant attention paid to this region. Existing studies have focused mainly on differences in legal culture between common law family in the UK and US and civil law family in Continental Europe, and other regions, for example, Latin America, East Asia and Africa.

Research studies in regard to harmonisation of international commercial arbitration law in the Middle East region have not previously been carried out. There are knowledge gaps; therefore, the research aim is to add the Middle East perspectives to the extant literature. Moreover, the research will emphasise the significance of examining the impact of legal cultures on attempts to harmonise international commercial law.

¹⁰ See Mi Jian, (2002). Chinese Legal Culture: In a Western Scholar’s Eyes. *Journal of the History of International Law* vol. 4 pp. 167-168. Kluwer Law International.

The research aims to examine the impact of regionalism on establishing a harmonised international commercial arbitration law in the Middle East. In so doing, the work seeks to examine and evaluate the regulation environment in the Middle East in the context of certain legal, historical, social, political and economic factors which influence law reform.

The study also aims to contribute to the general understanding of the social and legal theory of commercial arbitration which exists in the Middle East and explore how it interacts with the international standard of commercial arbitration in attempts to enhance the harmonisation process of international commercial arbitration.

Thus, the work aims to provide policy makers with a comprehensive understanding of what arbitration law reform is required. Further, it aims to provide a comprehensive paradigm for international commercial arbitration law reform in the Middle East and to offer a practical mechanism to establish such reform.

Several challenges faced the researcher in his endeavour to achieve comprehensive research. First, after the tragic events of September 11, calls for critique, evaluation and reform in the Middle East were viewed with suspicion and became highly sensitive political issues. Calls for reform aroused hostility from among those fervently committed to Islamic factions and their supporters. Reform and legislative environment was and is viewed less sympathetically if it is related to Western models. Second, the Middle East region is not a coherent whole. It has inconsistent multilayered legislations, different jurisprudences, historical backgrounds and political systems which made this research particularly challenging.

At the outset, there was a choice of two possible research approaches to examine international commercial law reform. The first was to compare the existing commercial arbitration laws in the Middle East to the UNCITRAL Model Law as a tool for reform. The second was to compare and scrutinise every detail of jurisdictional differences separating the Middle East and the West. Taking into consideration that their two legal systems are shaped differently as a result of different customs and attitudes, the latter option was chosen.

This choice allows for more comprehensive presentation and understanding of commercial law reform in its legal, social, economic and political contexts. For this reason, John Austin's legal philosophy of positivism will be used.

Because the Middle East is facing waves of different political and religious factions, countries in the region are in process of social, political and economic transition. Those fervently committed to Islamic factions are seeking to advocate Islam not only as a religion but also as the primary influential element in every aspect of life. Such intention inevitably makes Islamic Law a major focus of attention of this research for critique and analysis.

Another area of concern is that public policy and legislative process is invariably politically influenced, and critique might be viewed as antagonistic to the state or government concerned. Accordingly, the research is required to address several main areas, namely, culture, Islamic Law, and public policy issues. Any evaluation might be viewed as politically motivated.

It is therefore not surprising that in-depth studies in the research field are relatively rare, and, where they do exist, deal with the study topic at the national country level and descriptive rather than evaluative. For these reasons, understandably, research in the present study area is inadequate and insufficient.

1.4 Scope Of The Thesis And Its Hypothesis

The Middle East region usually refers to Arab and non-Arab states (mainly Turkey, Iran and Israel). It is important to emphasise that the scope of the research will cover only the Arab Middle Eastern states. The reason for this limitation is that these states share the same historical, cultural, economic as well as geographical factors.

Turkey for example, has deep historical connections with Europe, principally because it was the heart of the Byzantine Empire. Turkey has been a long-time member of NATO and also sees itself as a prospective candidate for European Union membership. Furthermore, Turkey has adopted the secular traits in government that predominate in Europe and the West in general.¹¹

Because its relationship with the Arab Middle Eastern states is based upon religion and geographic proximity, Iran is sometimes included in the Middle East region.

However, Iran differs in terms of its Islamic Madhhab from the rest of the Arab Middle Eastern states as Iran follows mainly the Shi'ite doctrine.

¹¹ See www.Wikipedia.net

Due to geographic reality Israel is sometimes considered a Middle Eastern state, but does not share similarities with the other Arab Middle Eastern states in terms of history, religion, or economy.

Finally, the scope of the research will focus upon those Arab states which are members of the Arab League, this being the principal Middle East regional organisation.

The analytical framework and research statement help to define the scope of the research and its hypothesis. This study will seek to examine the hypothesis that regionalism can affect the success or otherwise of the establishment of a framework for harmonisation of international commercial arbitration, and influence the process of harmonisation. The study attempts to answer three main research questions: First, to what extent does the Middle East region have different concepts of international commercial arbitration? Second, what is the legislative environment in regard to conducting law reform? Finally, does, and if so how, this region comply with international commercial arbitration concepts different from its own?

In so doing, this thesis seeks to identify the underlying factors that influence the attitude of Middle East countries towards commercial arbitration law reform as well as certain peculiar problems or limitations of these countries that prevent them from participating in the reform to harmonise international commercial arbitration law.

The scope of the research can be justified on the basis that the goal of comparative law research is not to make uniform legal systems. Comparative law works not only for intellectual gains, but also as a catalyst for developing ideas and solutions.¹² It is an inspiring mechanism for legal thinking especially if there is concern to avoid direct transplantation of foreign legal concepts into the host body of the national-regional legal system by taking the regulatory environment into consideration.

This mechanism has to consider the socio-economic, political-cultural, and systematic differences of the respective jurisdictions. Through comparison, we can learn and sharpen our judgement, but we should avoid imitating blindly.¹³

A cross-cultural inquiry that combines philosophical discussion of controversial international commercial arbitration law issues with a detailed history of the evolution of commercial arbitration discourse in the West as well as in Middle East over the last

¹² See Hoecake Mark Van (2004). *Epistemology and Methodology of Comparative Law*. Hart Publishing. Geoffrey Samuel, *Epistemology and Comparative Law: Contribution from the Sciences and Social Sciences*. He discusses the importance of comparative law. on pp. 38-42.

¹³ *Ibid.*

hundred years will be conducted. The research scope will consider what modifications may be necessary to achieve the goal of harmonisation of international commercial arbitration law. Such approach may help to minimise and avoid problematic aspects of the transplantation of the UNCITRAL Model Law into the Middle East.

1.5 Methodology

The methodology for this thesis is characterised largely by its deductive premise, that is, that regionalism in terms of the regulatory environment is inadequate to effect and promote law reform. This premise refutes the implicit and explicit assumptions made by policymakers that the law is, in fact, up to the task.

Consequently, this thesis starts from the position that the surrounding regulatory environment is inadequate. The task of this thesis is to identify whether this is so, and to explore the nature of those deficiencies. Evidence will be gathered to prove or disprove the premise. This research findings and conclusions are derived largely from library-based documentation, systematic search of the legal literature and case law in relation to the main research questions formulated for examination, critique and analysis.

Further references, namely, books and other legal periodicals have been obtained from other libraries, mainly from the Institute of Advanced Legal Studies, London School of Oriental and African Studies and British Library. Secondly, the use has been made of electronic sources, which are more-up-to-date.

Particular emphasis is given to gathering Middle East countries' statutes and legislations. Direct contact was made with embassies, law firms and officials to obtain details of existing commercial arbitration laws in the region. The aim is to review international commercial arbitration in the Middle East in light of the UNCITRAL Model Law to show the effectiveness, deficiencies and limitations of legal reform.

During such contacts, a number of informal interviews were carried out to focus on a number of issues of concern and to obtain a clear understanding and better appreciation of current issues related to the research hypothesis and questions. Due to the requirement of confidentiality, some of the information obtained and names and sources are not quoted.

1.6 Cartography Of The Thesis

The study will be divided into three parts. The first part will deal with the questions: in what ways has international commercial arbitration law been developed in its social context and how have the two jurisdictions of the West and Middle East region interpreted it in light of their different socio-legal cultures?

The key issue is to examine whether the Middle East region has different concepts of international commercial arbitration. A general analysis of the doctrine of harmonisation of international commercial arbitration and regionalism will be undertaken. Chapter Two will outline attempts to harmonise international commercial arbitration law taking into account the impact of domestic and regional legal cultures in these attempts, tracing how far this concept has been developed at the international level. Examples of other regions will be given, e.g. (Europe, Latin America, East Asia and Africa).

For the reason explained earlier, Chapter Three will apply John Austin's legal philosophy of positivism to discuss and analyse the three main aspects of this legal philosophy (normative, institutional and coercive) in relation to the development of international commercial arbitration law in the West in order to explore how Western regional values have influenced its nature and character, and additionally, how it has facilitated the establishment of the UNCITRAL Model Law as a modern harmonised international code of practice.

The same legal philosophy will be applied to the Middle East region in Chapter Four in attempts to compare and explore the main features, characteristics and social forces that have influenced the legal aspects of the dispute resolution mechanisms with regard to international commercial arbitration.

Part Two of the thesis will deal with international commercial arbitration contract principles. Chapter Five will examine and investigate the controversy surrounding commercial arbitration contractual principles. It will explore the concepts of the legal theories applicable to international contracts, mainly to the state contract and its agencies, as well as private persons in attempts to explore how Western regional legal concepts have influenced the principles and clauses of the Model Law.

Chapter Six will continue the analytical discussion of the international commercial arbitration contract in the Middle East region, identifying regional perceptions of international contract principles. This chapter will examine the role of the ethics and tradition in developing commercial contract principles in the Middle East. Particular

emphasis will be paid to Islamic Law and an examination of its underlying principles and implications for the international commercial arbitration contract will be undertaken.

Part Three will focus on the modernisation and reform of commercial arbitration and dispute resolution in the Middle East. Chapter Seven will examine the impact of the UNCITRAL Model Law on the Middle East Region. First, it will examine the impact of the historical legacy on the development of commercial arbitration law, and then identify what limitations prevent application of the UNCITRAL Model Law in the region. In this respect, the chapter will explore why and how these limitations have been expressed by Middle East countries and the position that has been taken in law and in practice towards international commercial arbitration.

Chapter Eight will examine the experience of four Middle East jurisdictions (Egypt, Oman, Tunisia and Jordan) towards introducing the UNCITRAL Model Law into their legislation. The chapter will analyse the extent to which these countries comply with the principles of the Model Law. Further, it will compare and evaluate reform legislation in the aforementioned four countries relating to the UNCITRAL Model Law in attempts to determine areas of modifications, why and their effectiveness.

Chapter Nine will identify areas for future reform of international commercial arbitration law. First, it will reflect on legal, cultural, socio-economic core arguments which act as obstacles to reform. Finally, the chapter will assess whether reform is essential, and whether the UNCITRAL Model Law can be accommodated within regional values.

Chapter Ten will assess the hypothesis and the research questions in light of the main findings. The research contribution will be summarised, research implications and future research proposed.

CHAPTER TWO

Harmonisation and Regionalism: General Concept

2.1 General Concept

International trade is currently subject to numerous domestic legal systems that differ radically in their jurisprudential heritage and their political and cultural context.¹ The possibility of mutual misunderstanding, confusion, and cultural clashes is significant, especially where the lawyers for one or both parties are not experienced in international commercial arbitration. A cultural clash between practitioners from the common law and civil law traditions, unfortunately, sometimes leads to delays and increased tension during the arbitration process and in extreme cases, even a loss of faith in the tribunal process.² Therefore, trade disputes require a highly developed understanding of cultural factors.³

Cross-cultural awareness requires an understanding that we inevitably see the world around us through spectacles fashioned by our own experience. This involves a web of predispositions, assumptions, and behavioural patterns.⁴

Professor Speiser makes a persuasive case for finding the origins of many of our legal concepts in ancient Mesopotamia from the middle of the third to the end of the first millennium B.C., where he finds that:

“The legal tradition concerned is closely integrated in spite of the underlying differences in date, geography, political background and the language.” *Inter alia*, he reminds us of Mesopotamian legal precepts that laws reflect truths which are timeless and impersonal; that the interpretation of laws must be entrusted to professional judges and that these judges must look to precedents. In this law, the written document found its high place and this was but one of the legal concepts passing on

¹ See Amy H. Kastely, Reflection on the International Unification of Sales Law: Unification and Community, NW. J. Int’L. & BUS. 574. p.11.

² See Bernardo M. Cremades, Managing Discovery in International arbitration. Dispute Resolution J. Nov.2002/Jan.2003.p.73.

³ See Martin Hunter, International Commercial Dispute Resolution: The Challenge of the Twenty-first Century. Arbitration International, Vol. 16, No.4, LCIA, 2000. p.388.

⁴Ibid.

with trade and the shifts in political influence through the Phoenicians, the Hittites, the Egyptians and so on into Greece and Rome.”⁵

Having established the need for cross-cultural awareness in international arbitration throughout the many years of work on the unification of international trade law, participants in the debate have engaged in an ongoing discussion of the goals and methods of the project. Recurrent in the conversation has been the idea that unification both requires and facilitates the formation of an international community with common practices through the use of a common legal language. The dual goals of facilitating international commerce and promoting international harmony are often articulated.⁶ Unification of trade law inevitably entails changes in the legal outlook of courts, scholars, practitioners, and traders throughout the world.⁷

At this point, it is important to draw attention to the influence of “regionalism”⁸ on the ultimate goal of harmonisation in international arbitration. From a common interest in geographical, cultural, economic, agricultural, or mineralogical issues, states have organised themselves from time to time on the basis of common economic-interests, by negotiation, for example, regional trade agreements, delimitation in river routes or shared seabeds, transportation on great European river systems, and shared interest in the production and consumption of commodities such as wheat, sugar, coffee, and tin.⁹

⁵ Speiser, “Cuneiform Law and the History of Civilisation,” 107 Proceedings, Am. Philosophical Soc. 536-541 (1963) and references in his footnotes. Prof. Ada B. Bozeman’s skilful tapestry of politics and culture in *International History* (1960), carries the thread of law as one essential part of the pattern from the time and regions with which Prof. Speiser deals up to the present era. *Supra* 30. In Amy H. Kastely. p.351

⁶ *Supra* 4. p.3

⁷ *Supra* 4.p.11

⁸ Regionalism is a term in international relation that refers to the expression of a common sense of identity and purpose combined with the creation and implementation of institutions that express that particular identity and shape collective action within a geographical region. This is in contrast with regionalisation, which is the expression of increased commercial and human transactions in a defined geographical region. Behind the process of regionalisation lies the concept of regionalism. This can be seen as the normative aspects, or values, that underlie regionalisation, e.g. the (contested) European identity. However, it is also a theoretical tool for analysis of international relations. For example, the concept of security regime in regional security would not be possible without the analytical tool of 'regionalism'.

⁹ See Philip C. Jessup, a judge, International Court of Justice, in *Diversity and Uniformity in the Law of Nation*. *American J. of Int'l Law*. p.356.

Under this phenomenon of “Regionalism”, the interest of each geographical-cultural grouping is in making its own jurisdiction an attractive venue for commercial arbitration. The common approach is a continuation of reform of arbitration laws and institutions in the region on the one hand, and the endorsement of cultural values in the version of these local legal frameworks on the other.

In this way, harmonisation can come about more rapidly in one region of the world than in other regions where arbitration practice and the relationship between arbitration and the courts is the outcome of history and precedent.¹⁰ If progress in harmonisation in the wider international community is slower than in the European context, for example, this is because, as Professor Eric Stein states:

“Even within a nation-state, a legal norm is the ultimate expression of the will and values of the society; only after the conflicting economic and social forces have been composed may the resulting consensus crystallise into a general norm.”¹¹

England in the Middle Ages affords an example of changing social values and ‘modernisation’ of commercial practice within a nation state. From this time through to the early modern period, the process of “loveday” arbitration came under increasing pressure. An increasingly litigious society was reshaping arbitration – a conciliatory process - to suit its needs. Potential abuses of the process and changing notions of community undermined the legitimacy of the loveday arbitration,¹² which eventually fell by the wayside as a historical anachronism.

Douglas has observed: “from the Dark Ages through to the end of the Middle Ages, arbitration was a conciliatory process exhibiting most of the characteristics of conciliatory processes. Its function to reconcile rather than to judge was embodied in the medieval institution of the “loveday”. Loveday arbitrations were true alternatives to litigation (lawdays); the process and function were as different from those in litigation as their function. From the late Middle Ages through to the early modern period, the conciliatory process came under increase pressure. An increasingly

¹⁰ See W. Laurence Craig, (1995). Some Trends and Development in the Laws and Practice of International Commercial Arbitration. *Tex. Int'l L.J.* 1995. p.34.

¹¹ Stein, (1964). “Assimilation of National Laws as a Function of European Integration,” 58 *A.J.I.L.* vol.1 No.2 p.350.

¹² See Douglas Hurt Yam, (1995). Commercial Arbitration in Old England (602-1698). *Dispute Resolution Journal*, p.68.

adjudicative society was reshaping arbitration - a conciliatory process - to suit its needs. Potential abuse of the process and changing notions of community, competition and individualism undermined the legitimacy of loveday arbitration.”¹³ Thus, merchant communities were able to change the character of arbitration from the “loveday” arbitrations which were a form of mediation to “lawday” arbitrations which were true processes of litigation.

By the end of the Seventeenth Century, the term “loveday” and the institution it described had fallen completely out of use. The last reference to lovedays in the legal literature is in 1694 and is significant because it clearly links modern arbitration with the medieval loveday. The author of *Arbitrium Redivivum* notes that:

“Something in the Saxon or Old English, [arbitrement] was called a *Love-Day*, because of the Quiet and Tranquillity that should follow the ending of the controversie.”¹ Conciliatory arbitration was losing its institutional support, being over shadowed by the legal process, and failing to meet the needs of its potentially greatest user, the commercial community.¹⁴

Thus, the significant role of merchants was one which the first arbitration act dated from 1698 reinforced as a consequence of the inefficiency of common law courts in applying mercantile law. Regarding the growing dominance of the commercial community in the development of arbitration, Blackstone observed:

“Experience having shown the great use of these peaceable and domestic tribunals, especially settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law, the legislature has now established the use of them.”¹⁵

¹³ See Douglas H. Y., Commercial Arbitration in Old England (602-1698), p. 68. *Dispute Resolution Journal*. 1995.

¹⁴ *op.cit.* 1, p. 72. *Arbitrium Redivivum: or the law of Arbitration; collected from the Law-Book both Ancient and Modern, and deduced to these times: Wherein the whole Learning of Awards or Arbitrements is methodically treated with Several Forms of Submissions by way of Covenants and Bond: As also several Forms of Arbitrements or Awards [by the author of Regula Placitandi] (London, 1694) p.2*

¹⁵ See supra note 38. 3 BI. Comm. 17 p. 72.

The Industrial Revolution and increasing economic specialisation led to the development of trade and industry associations whose rules provided for and encouraged the use of arbitration by its members.¹⁶

The same could be said about differences in social values between different regions. In some cultures, for example, the context of the former Soviet Bloc countries, more attention is given to the unique circumstances of the commercial relationship. Thus, a Romanian might view a British approach as inflexible and disrespectful to the personal ties involved; whereas the Briton might view the Romanian approach as creating an unjustified exception in favour of a friend, and even nepotism in the Arab Middle East where emotional and family ties play an important part in problem-solving. Recognising and responding appropriately to these cultural differences is an important element in commercial arbitration.¹⁷

The implicit rule to be emphasised here is that “Regionalism” will influence the doctrine of harmonisation of international commercial arbitration rules; each region differs in its cultural, social, and legal background, but each one should be sensitive to these differences prevailing in others.

2.2 Harmonisation Regimes

The overwhelming majority of nations agree on certain universal harmonisation regimes that govern international commercial arbitration. For our purposes, these universal regimes can be distilled down to the Lex Mercatoria and the UNCITRAL Model Law.

While most legal systems appear committed to these regimes, it will be demonstrated that this consensus at the core exists only in abstract generalities, an embracing of ‘themes’ rather than specifics.

2.2.1 UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration (1985) Law was developed within the framework of the United Nations and was drafted by international experts whose extensive *travaux* preparatoires are readily available.¹⁸ The UNCITRAL remains a model law rather than a convention or a uniform law because it was known that obtaining multilateral agreement on a precise text would be

¹⁶ See supra note 43.

¹⁷ Trompenaars and Hampden-Turner, (1997, 2nd Edn). *Riding the Waves of Culture: Understanding cultural Diversity in Business* pp. 39-40. See supra note 18 in Martine Hunter of International Commercial Dispute Resolution, 2000. p.389.

¹⁸ Supra, 12, p.21.

difficult, due to wide variations between existing regional national laws. The hope was to encourage progress towards a recognised norm rather than to insist on uniformity.¹⁹

“It was never expected that the Model Law would be enacted in all the principal arbitration centres in the world. These states have long-established arbitration laws and practices; the tendency has been to modify those laws while remaining within the original statutory frameworks.”²⁰ In the same respect, Redfern (1995) has suggested that, “it is unrealistic to expect that such interim measures can be taken only by courts at the seat of arbitration. But if the right of courts to grant interim measures in connection with arbitration is generally recognised, the conditions under which such measures may be granted are not currently uniform, and neither the Model Law nor the relevant conventions provide standardised limitations on the scope of interim and provisional measures, or other means of avoiding conflict.”²¹

One of the primary developments towards recognising differences among national states towards the Model Law²² is the Commission’s welcoming of the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration. “It was generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.”²³

Thus, in reports presented at that commemorative conference, various suggestions were made regarding some of the problems identified in practice so as to enable the Commission to consider the future direction of work by the UNCITRAL in the field of disputes settlement.²⁴

¹⁹ Supra, 12, p.16.

²⁰ Supra, 12, p.16.

²¹ D. Alan Redfern, Arbitration and Courts: Interim Measures of Protection—Is the Tide About To Turn? *Texas International Law Journal* p. 71.

²² Supra, 4, p.11.

²³ See Renaud Sorieul, Update on Recent Developments and future Work by UNCITRAL in the field of International Commercial Arbitration. *Journal of International Arbitration* 17(3): 163-184, 2000. Kluwer Law International. p.164.

²⁴ Ibid. p.163.

2.2.2 Lex Mercatoria

The second key attribute of harmonisation of commercial arbitration is the popular use of the “lex mercatoria”.²⁵ This unwritten law of merchants was developed as a means to permit arbitrators to tailor decisions to accommodate customary trade practice and the principles that guided international trade law.²⁶ Lex mercatoria was developed during the primacy of Western European-dominated international trade.²⁷ And it is also true that many Non-Western legal systems have been heavily influenced by Anglo-American or Western European jurisprudence.²⁸ But is the lex mercatoria universal?

Although the lex mercatoria is conceived as a universal and pervasive underlying arbitral decision in international commerce, the majority of jurists now believe that the lex mercatoria has not attained such universality.²⁹ As arbitrators come from diverse legal backgrounds, such as common law, civil law, socialist law, and Islamic law, their interpretations of the same customs and usages of international commerce are unlikely to be consistent.³⁰ Regionalism has also impeded the development of a consistent body of rules of the lex mercatoria because of its tendency towards divergence.

²⁵ According to Goldman (1983), the “Lex mercatoria” is not new. He has noted that it has its precursor in the Roman *ius gentium*, the body of law that regulated the economic relations between foreigners and Roman citizens. Other authors, Schmittoff, C. Chia-jui (ed.) (1988) go further back in time and trace the origins of the Lex Mercatoria in the Ancient Egyptian or in the Greek and Phoenician sea trade of the Old ages. In any case, it is the *law merchant* of the Middle ages where the historical roots of the Lex Mercatoria can truly be found. The flourishing of international economic relations in Western Europe at the beginning of the eleventh century caused the formation of the law merchant, a cosmopolitan mercantile law based upon customs and applied to cross-border disputes by the market tribunals of the various European trade centres. This law resulted from the effort of the medieval trade community to overcome the fragmentary and obsolete rules of feudal and Roman law which could not respond to the needs of the new interlocal and international commerce. Merchants created a superior law, which constituted a solid legal basis for the great expansion of commerce in the Middle Ages. For almost eight hundred years uniform rules of law, those of the merchants, were applied throughout Western Europe among traders. For further discussion see Ana Mercedes (2002) lex mercatoria, Rettid pp.46-56

²⁶ Dezalay & Garth, supra note 36, at 295.

²⁷ The substantial difference between the Sales convention and the uniform law among several socialist states is discussed in comment, the Convention on Contract for the International Sale of Goods and the General Condition for Sale of Goods. Amy H. Kastely, Supra note 149.p.13.

²⁸ *Ibid.*

²⁹ Mustill, supra note 149, at 40. Abul F.M. Maniruzzaman. The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration. 1999. Am. U. Int'l L. Rev. 657pp.11

³⁰ *Ibid.*, p.11.

2.3 Arbitration Law Reform And The Impact of Regionalism

With the dramatic increase in international arbitration and a related recognition that international arbitration provides the only viable means of resolving trade disputes,³¹ the issue of harmonisation of commercial arbitration laws has become increasingly important. The arbitration caseload has more than doubled during the last five years, from 320 cases in 1997 to 672 in 2002, according to the American Arbitration Association. The Paris-based International chamber of commerce (ICC), which has led the world in international arbitration, confirmed this dramatic growth. A record number of 593 cases came before the ICC, and in 2002 the International Court of Arbitration (ICA) registered more than 80 new cases for a single month.³²

Although the Model Law is meant to provide common standards for arbitration law, the issue of accommodating regional identity has also become increasingly significant.

Cross-cultural clash and the impact of regionalism upon dispute settlement procedures may be illustrated by the incompatibilities or divergences of approach between regions.

In Europe, for example, the two major law families exhibit different characteristics. The “civil law” family based on Roman law, has produced legal systems characterised by a primary law-making approach of comprehensive codifications,³³ while the common law family is an organically grown body of case law supplemented by relative unextensive statutes with a narrower scope.³⁴

Harmonisation of international commercial arbitration has emerged as the pre-eminent means for resolving disputes that arise between different legal cultures³⁵

³¹ “[P]rivate dispute resolution among commercial men is as old as commerce itself.” W. Lawrence Craig, *Some Trends and Development in the Law and Practice of International Commercial Arbitration*, 30 *Tex. Int’l L.J.* 1,5 (1995) for a more detailed description of the ancient history of arbitration, see Thomas J. Stipanowich, *Punitive Damage in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 *B.U. L. Rev.* 954, 954 n.3 (1986) (citing Frances Kellor, *American Arbitration* 3 (1948)) (dating commercial arbitration back to the time when “Phoenician and Greek traders roamed the ancient world” and to “the desert caravans of Marco Polo”); Will Durant, *The Story of Civilisation: our Common Heritage* 127, 361 (1935) (“The ancient Sumerians, Persians, Egyptians, Greeks, and Romans all had a tradition of arbitration.” The development of a formal system of private dispute resolution is attributable to the medieval English courts of fairs and boroughs, which could adjudicate disputes between merchants and traders at markets and fairs. For an expanded history of international arbitration, see Craig, *supra*, at 2-11 (tracing the important milestones in the development of modern international arbitration) See Catherine A. Rogers. *Supra* note 27. *Fit and function in Legal Ethics*.p.4.

³² See Sue Reisinger, (2003). *Arbitration increases overseas as a means of avoiding court in international trade.* www.judicialaccountability

³³ *Supra*, 1.p.3.

³⁴ *Ibid.*

³⁵ *Supra*, 23 pp.17-18

including the aforementioned two legal families. Therefore, international arbitral procedure and practice has evolved by adopting and harmonising elements of common law and civil law traditions. The wide difference between common law and civil law approaches provides an excellent illustration of “cultural clash” impeding harmonisation of international commercial arbitration.

In the United Kingdom, for example, reform was prompted by widespread dissatisfaction among foreign parties with the “case stated” method of judicial review. This method permitted parties to appeal on questions of English law and have them decided by British courts, either during the arbitral process or after an award. Parliament eliminated this substantially unrestricted right of appeal on questions of law with the Arbitration Act of 1979. Even though, in 1989, the Department Advisory Committee recommended against the adoption of the Model Law, noting that the Model Law was influenced by civil law concepts, and that historically there had been a closer relationship between the arbitral process and the court in common law jurisdictions, the British Arbitration Act 1996 codified statutory and case law principles in a form and language which is intended borrowed from the Model Law in style if not in substance.³⁶

With respect to the UK Arbitration Act 1996, parties giving “reasonable opportunity” rather than “full opportunity” (UNCITRAL Model Law), would be sufficient, considering an appropriate balance between the parties’ autonomy and efficiency.³⁷ The parties are free to agree the seat of the arbitration in their arbitration agreement (article 3). If the parties fail to agree the seat of the arbitration, an arbitral (or any other) institution or person vested by the parties with powers to do so may designate the seat (article 3(b)). Where no arbitral seat has been designated or determined, and there is a connection with England and Wales or Northern Ireland, the court may still exercise its powers under the 1996 Act for the purpose of supporting the arbitral process (article 2(4)).³⁸

The parties are free to agree how their disputes are to be resolved, subject only to those safeguards necessary to protect the public interest. By virtue of article 33(1)(a)

³⁶ English Draft Arbitration Bill, in U.K. Dept. of Trade & Industry, Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill, reprinted in 10 *Arb. Int'l.* 189 (1994) *Supra* 157. see *supra* 12 p.18.

³⁷ JCA newsletter No. 9. January 2001. Japan commercial Arbitration Association.

³⁸ See Wilmer Hale, Wendy Miles and Giorgio Mandell, (2006). *International Arbitration: England and Wales.* www.iclg.co.uk

of the 1996 Act the tribunal is required to adopt procedures suitable to the circumstances of a particular case (article 33(i)(b)) and must comply with that general duty in conducting the arbitral proceedings and in making all decisions relating to matters of procedures and evidence (article 33(2)).³⁹

In principle, intervention by national courts in the arbitral process should be minimal. Nevertheless, the national courts have jurisdiction to act in support of arbitral proceeding and, in particular, may deal with procedural issues in relation to: the enforcement of peremptory orders of the tribunal (article 42); securing attendance of witnesses (article 43); the taking and preservation of evidence, making orders relating to property, sale of goods, granting of interim injunctions or the appointment of a receiver (article 44); and the determination of a preliminary point of law (article 45). It is worth noting that the parties may agree to exclude a large part of the national courts' powers.⁴⁰

France's legislative approach to the reform of arbitration law is arguably totally different from that of the United Kingdom. The new provisions give the parties almost unlimited freedom to provide for their own arbitration procedure, either by specific agreement or by incorporating a set of rules, without requiring them to refer to a national law of procedure. Where they have not done so, such power is given to the arbitrator. NCPC article 1494 provides:⁴¹

“The arbitration agreement may, directly or by reference to a set of arbitration rules, define the procedure to be followed in the arbitral proceedings; it may also subject them to a given procedural law.”

Other European countries, including Belgium, Italy, Austria, and the Netherlands, have followed this modernisation trend to varying degrees.⁴²

In America, the NAFTA dispute settlement procedure has been characterised as primarily “facilitative,” ultimately leaving control over dispute resolution with the parties. Representative of this facilitative approach, the dispute settlement aspects of the NAFTA are a mish-mash of procedures negotiated to allow the redress of separate

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* p.18.

⁴² See *Supra*, 176, 177, 178, 179 *op.cit. supra*, 12 p.20.

disputes differently.⁴³ Chapter 20 of the NAFTA sets out the general rules for resolving disputes concerning the rights and obligations that arise out of the NAFTA by creating a three stage procedure involving (a)consultation between the parties; (b) utilisation of the good offices, conciliation and mediation provided by the Free Trade Commission; and (c) nonbinding arbitration.⁴⁴

In contrast to the general facilitative approach of the NAFTA, the MERCOSUR utilises dispute settlement procedures that lead to binding arbitral results.⁴⁵ Remarkably, the MERCOSUR dispute settlement in practice relies much more on diplomatic negotiations than the rules-based approach to settling conflict, as countries have generally opted not to utilise the binding system.

In the rest of South and Central America and Mexico, regionalism concepts can be found in the contexts of the power of arbitrators. Arbitrators are very much like judges in State Court proceedings. The arbitrator-judge identity finds its most striking example in Colombia and Ecuador, where the arbitrator is vested with some sort of *imperium*. Indeed, in both these countries, an arbitral tribunal may actually take and execute certain provisional measures without judicial assistance and may even directly call on the police force for assistance in enforcement.⁴⁶

One of the most important characteristics of the new legal developments in arbitration in the region is that laws have been carefully drafted in order to reduce the intervention of the judge.⁴⁷ In this respect, while most of the laws have been inspired by the New York Convention and UNCITRAL Model Law, Latin America countries have made enormous effort and have accomplished great progress in ADR during the last five years under the influence of the region as legal culture.⁴⁸

In Asia, by contrast to the Model Law concept, legal reform has been influenced by the regional dispute settlement culture which more frequently seeks a “harmonious” solution, one which tends to preserve the relationship, rather than one which, while

⁴³ See generally, Gary N. Horlick & Amanda DeBusk, *Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 27 J.W.T. 21 (1993) (providing a general negotiating history and overview of the NAFTA dispute settlement procedures). See supra note, 52 J. Michael Taylor Dispute Settlement under FTAA an Apparent Melding of WTO, NAFTA and MERCOSUR Approaches, *Journal of Int'l Arbitration* 19(5) 393-422, 202. Kluwer Law International, p.400.

⁴⁴ *Ibid.* p.401.

⁴⁵ *Ibid.*

⁴⁶ See, Art. 32 of Colombian Decree 2279 of 1989 and Art. 9 of Ecuador Law of 4 September 1997. The Arbitrators have the same power in the case of the enforcement of orders relating to evidence. *op.cit.* p.141.

⁴⁷ *Ibid.* pp. 141-142.

⁴⁸ *Ibid.* p.142.

arguably factually and legally “correct,” may severely damage the relationship of the parties involved.⁴⁹ Thus, going back thousands of years, in China, for example, there is a concept known as *li*, which concerns the social norms of behaviour within the five natural status relationships: emperor and subject, father and son, husband and wife, brother and brother, or friend and friend.

Li is intended to be persuasive, not compulsive and legalistic, a concept which governs good conduct and is above legal concepts in societal importance. The governing legal concept, *fa*, is compulsive and punitive. While having the advantage of legal enforceability, *fa* is traditionally below *li* in importance.

The Chinese have always considered the resort to litigation as the last step, since it suggests that the relationship between the disputing parties can no longer be harmonised. Resort to litigation results in loss of face, and discussion and compromise are always to be preferred. Over time, the concepts of *fa* and *li* have become fused, and the concept of maintaining the relationship and, therefore, face, has become part of the Chinese legal system. The same can be said for other Asian legal systems. A noted commentator has described the Korean method of dispute resolution thusly:

“Dispute settlement, after all, does not occur in a social vacuum. The settlement defines, or redefines, status, rights and obligations, both for the disputants themselves and for some other people. Status expectation may be reaffirmed, weakened, strengthened, or altered, and all this has some effect on subsequent relationships and social action”⁵⁰

Finally, despite the arguments of the legal comparison difficulties with African law, it has been said that the dispute resolution process has an underlying logic that makes it comparable to Euro-American legal thought and procedure despite regional variations.⁵¹

⁴⁹ For a more general discussion of this area, see M. S. Donahey, “Mediation and Conciliation in the Asia/Pacific Region: Sites, Centers and Practice,” Doyle’s Dispute Resolution Practice, Asia-Pacific, Para. 85-000. CCH International (1992) Supra 2, M. Scott Donahey, Seeking Harmony: Is the Asian concept of conciliator/ arbitrator applicable in the West? *Dispute Resolution Journal*. April 1995. p.74

⁵⁰ *Ibid.* pp.74-75.

⁵¹ Herskovits insisted that, the evidence shows that; throughout the East African area, despite tribal variations, the dispute-settling process has a logic that makes it “as a whole comparable, in terms of ethical assumption and procedural regularity, to Euro-American legal thought and procedure, however different the forms in which they are cast may be.”

CHAPTER THREE

Philosophical Basis of Legal Theory Underlying Modern International Commercial Arbitration Law

3.1 Positivism Legal Theory and Modern Arbitration Law

Given the concept of the doctrine of harmonisation of international commercial law, this part will address the question of how modern commercial arbitration law has evolved. The question will be answered by analysing the legal philosophy which underlies this modern law. For this purpose, legal positivism theory will be used. While it is true that legal positivism can be distinguished from its rival, natural law (non-positated), it cannot easily be distinguished from its other rival, legal realism.¹

Labelling cultural traditions is always a difficult task, and even more so in the case of a comprehensive theoretical approach, therefore, legal positivism will be used as an analytical tool. According to Sadowski (2004),² this conceptual philosophy allows for the separation of the law as an object of study to convey the social manifestations of the law and obedience to it. Natural law theory is based on the belief in the existence of universal objective values that can be apprehended by human reason, while legal positivism assumes moral values to be rooted in specific cultural and social contexts.

Considering how broad the definition of “legal positivism” has become, and given the large varieties of historical and cultural contexts in which it has flourished, it is possible to say that legal positivism is an “essential contested concept”. It is a notion that is likely to be interpreted in quite different ways, even if it has a conceptual core which is commonly agreed upon.³ The primary difference between positivism and realism legal theory is that the latter manifests the judicial will and not the legislative⁴: it maintains that the law is a system of commands, rules, norms, emanating from the sovereign as legislator.⁵

¹ See Keekok Lee, *The Positivism Science of Law*. 1989. Gower Publishing Company. p. ix.

² See Mark Zirk-Sadowski, (2004). *Legal Epistemology and transformation of legal cultures*. Hart Publishing. Oxford and Portland Oregon. p. 21.

³ See Giorgio Pino, (1999). *The Place of legal positivism in contemporary constitutional states*. Law and philosophy. Vol. 18. Kluwer Academic Publishers. p. 515.

⁴ Ibid.

⁵ Ibid. p.191.

Thus, positivism has been defined and understood in many ways.⁶ “It has been argued that the history of positivism coincides more or less with the history of modern science. It is essentially a philosophical response to the new science. Common to its various conceptions is the underlying theme of generating order in the universe not by means of theology or metaphysics, but by the application of scientific method to the study of natural/social phenomena as well as moral and legal ones.”⁷ For example, positivism legal theory had a role in the reform and regeneration of post-revolutionary French society. To quote Kolakowski:

“Comte’s whole doctrine, including the theory of knowledge, becomes intelligible only when grasped as a grandiose project for universal reform encompassing not only the sciences but all spheres of human life. Reflection on the France of his day led him to the conviction that the organisation of society needed overhauling from top to bottom, and that one prerequisite was reform of the sciences and of methods of thought generally. Reform of the sciences, he believed, would make it possible to create an as yet non-existent science of society, without which social life could not be reconstructed on rational foundations. Uniform organisation of the totality of human knowledge was indispensable to pave the way for a fully-fledged science to be known as ‘sociology’, which alone would make it possible to transform collective life.”⁸

Above all else, positivism is a search for order through science, and when that method is applied to the study of social/ normative phenomena, the knowledge that it yields can be used to reform society, so that there can be progress without disorder and order without stagnation.⁹

⁶“Positivism is a theory of history in which improvement in knowledge is both the motor of progress and the source of social stability (Comte). Positivism is a theory of knowledge according to which the only kind of sound knowledge available to humankind is that of science grounded in observation (Comte). Positivism is a unity of sciences thesis according to which all sciences can be integrated into a single natural system (Comte). Positivism is a theory of history in which the motor of progress that guarantees the emergence of superior forms of society is competition between increasingly differentiated individuals (Spencer). Positivism is a theory of meaning, combining the phenomenism and legalistic method, and captured by the principle of verifiability, according to which the meaning of a proposition consists in its method of verification (Logical Positivism). Positivism is a theory of knowledge according to which science consists of a corpus of interrelated, true, simple, precise and wide-ranging universal laws that are central to explanation and prediction... (Hempel).” p. 63.

⁷ Ibid. p. 164.

⁸ Ibid. p.63.

⁹ Ibid. p.52.

According to legal positivists, mainly influenced by John Austin¹⁰, there are primarily three general and important features of the law – namely, normative, institutionalised, and coercive. The normative dimension serves as a guide for human behaviour. It is institutionalised in that its formulation, application, and modification are, to a large extent, performed or regulated by institutions. It is coercive in that obedience to it, and its application, is internally¹¹ guaranteed, ultimately, by the use of force. Thus, if a body of rules or norms is claimed as a legal system in the positivistic sense, it must satisfy all these characteristics.¹²

Therefore, legal positivism as a general philosophy will be used as an analytical tool in order to identify the general trends from Western and Middle East cultural perspectives that relate to international commercial arbitration.

The weakness of using this legal philosophy is related to the criticism of legal positivism that, in one way or another, it fails to give morality its due. A theory that insists on the *facticity of law* (the social facts defining the “free choice” within which the individual may determine his actions) seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralised.¹³ Accordingly, positivism's critics maintain that the most important features of law are not to be found in its source-based character, but in the capacity of law to advance the common good, to secure human rights, or to govern with integrity.¹⁴

At the centre of positivist legal theory, Modern International Arbitration Law has tempered most of the concepts and characteristics of Western commercial practice. It will be shown in the next chapter that positive theory, applied with such success in the context of western European commercial law, is inappropriate in the Middle East

¹⁰ The first stage of the development of positivism which-for this reason- called original positivism was the positivism of John Austin. This framework of legal positivism has never, in fact, been challenged, although it has been significantly modified by analytical philosophy. The refined version of legal positivism primarily represented by Hart.

¹¹ According to MacCormick, on the internal aspect of norms' in legal reasoning and legal theory, one should distinguish the cognitive and the violation aspects. The cognitive internal point of view is characteristic of those who, being members of a group, do not regard a rule as their own.

¹² Joseph Raz, (1980). *The Concept of a Legal System* (2d ed. 1980). Supra note 179. See Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contract: A Challenge for International Commercial Arbitration*. *Am. U. Int'l L. Rev.* 657, 1999. pp14

¹³ See Stanford Encyclopedia of Philosophy. www.plato.stanford.edu/entries/legal-positivism/

¹⁴ Ibid.

where different cultural norms make its wholesale and unqualified transferability problematic, notwithstanding its acceptance in highly generalised terms.

First, regarding the “normative” dimension of the theory, the analysis will reflect upon competition, individualism, and the role of the merchant. Second, regarding the “institutionalised” aspect of the theory, Anti-Statism will be discussed. Finally, the analysis will discuss the approach to contracts, and judicial characteristics of arbitration in the “coercive” dimension of the theory.

3.2 Normative Aspect of Modern Commercial Arbitration Law

This part will examine the attitude in the West toward international commercial arbitration, and the impact of this behaviour upon the development of the modern commercial arbitration law.

3.2.1 The Concept of “Competition”

The various “merchant communities” of international trade comprise a worldwide society whose needs and customary rules are determined by the economic character of the relationships that are created within it.¹⁵ Competition between these interest groups could be considered the main focus of commercial arbitration. The starting point, therefore, is to consider the competition between the different courts in old Europe¹⁶, with particular relevance to the United Kingdom

Interjurisdictional Competition in United Kingdom

This part will highlight the concept of competition in the United Kingdom, mainly between monarchical law and merchant law. The Church was a major trader¹⁷ and merchants could and did take some types of dispute to ecclesiastical courts¹⁸. In addition, many of the major fairs were held at important priories and abbeys, so it was clearly in the interest of the church’s leaders to remain on good terms with the merchant community by offering them a source of dispute resolution that would

¹⁵ See generally Berthold Goldman, *Lex Mercatoria*, *Forum International* No. 3, Nov. 1983, at 1, 1-24., see *Ibid.* p.13.

¹⁶ The discussion is about the time between (602 and 1698).

¹⁷ See Bowes, W. A. (1923). *The Romance of the Law Merchant: Being an Introduction to the Study of International and Commercial Law with Some Account of the Commerce and Fairs of the Middle Ages*, pp.9. See Bruce L. Benson, *To Arbitrate or To Litigate: That Is the Question*. p.121. *European Journal of Law and Economics*, 8: 91-151 (1999). Kluwer Academic Publishers.

¹⁸ In England, the collective classification of particular courts that exercised jurisdiction primarily over spiritual matters. A system of courts, held by authority granted by the sovereign, that assumed jurisdiction over matters concerning the ritual and religion of the established church, and over the rights, obligations, and discipline of the clergy.

recognise their customs and practice, at least when they did not conflict with canon law.¹⁹ Therefore, around the twelfth century, some European kings²⁰ began systematically collecting and codifying the customary rules of the Law Merchant,²¹ and asserting claims to legal authority in competition with other claimants such as the Roman Church (canon law), and powerful aristocracy (manor law). They clearly wanted to claim authority over commercial matters as well. After all, commerce was an increasingly important source of wealth creation, and control of its rules might allow kings to capture part of that wealth.²²

In the United Kingdom, merchants were given a right of Royal appeal. The appeal could be taken to the Chancellor and the King's Council, and in this way the appearance of Royal backing of the Law Merchants was created, while simultaneously a roll for the Royal Courts in enforcement of commercial law was established. Importantly, by creating the possibility of appeal, the Law Merchant was made to appear to be less decisive law.²³

The early notion of "forum shopping" and venue for arbitration was established. For example, if a forum was expected to favour one party, and the other could demand the use of or appeal to an alternative, the parties would tend to compromise on the forum that would be least biased and therefore most fair.²⁴

Rowley (1989, at p.371) explains, "The competitive nature of early common law evolution provided a powerful impulse for the law to reflect the interest of litigants and, in this sense, to be efficient... the royal courts succeeded by providing the best available justice, reflecting not least the preference of merchants and money lenders attracted to England by the development of foreign trade".

Such competition between the common law courts probably also reduced the impact of subjugation to the Law Merchant somewhat, even after most of the prerogative courts and other alternatives were eliminated as effective competition. Common law judges refused to recognise the Law Merchant as a distinct branch of law, however, in

¹⁹ Ibid.

²⁰ Kings; Henry VIII and later by Elizabeth's reign.

²¹ See Berman, H. J. (1983). *Law and Revolution: The Formation of Western Legal Tradition*, p.341. Cambridge, MA: Harvard University Press. See *Supra* 10, p. 121.

²² Ibid. p.120.

²³ Ibid.

²⁴ Ibid.

contrast to other European counties, and they rejected some of its important principles.²⁵

Later in the Sixteenth century, Parliament aligned with the common-law courts against the Royal Courts. Such alignment took the position of Parliament asserting the Common-Law Courts, claim as the supreme source of the law, by attacking all other sources of law. For instance, the great common law jurist and parliamentarian, Sir Edward Coke, who was intimately involved in the struggle between parliamentary and Royal authority, ruled that the decisions of merchant courts could be reversed by common law judges, claiming that the merchant courts' purpose was to find a suitable compromise while judges ruled on the legal merits of the case (*Vynior's Case* [1609] 4 Eng Rep302).²⁶ Commons (1924, p.303) suggests, "The capitalist system has been built up, as we have seen, on the enforcement and negotiability of contracts, [but it was] ...difficult...for the lawyers of the Sixteenth and Seventeenth Centuries to authorise the custom of merchants in enforcing promises and buying and selling them."²⁷

More generally, demands for a unified court system increased in England, particularly during the Nineteenth Century, and ultimately (in1875) the three common law courts were merged under a single Supreme Court.²⁸ However, competition from commercial arbitration intensified in England during the same period that saw mounting pressure to centralise and create one court of the common law (Benson 1989, 1998f).

Thus, early codifications and interjurisdictional competition meant that the customary laws of the Law Merchant provided the foundation upon which the state enforced commercial law.²⁹ However, in some jurisdictions - consider England - the Law Merchant was ultimately altered and at least partially absorbed.³⁰

Interjurisdictional Competition in the USA

Commercial arbitration was in widespread use in each of the British Colonies almost three centuries before modern arbitration statutes were passed, and after the revolution, arbitration remained in use in all of the states.³¹ The use of commercial

²⁵ Ibid. p.124.

²⁶ Ibid.

²⁷ Ibid. p.124.

²⁸ Ibid. p.126.

²⁹ See supra note 10.

³⁰ Ibid. p.121.

³¹ Ibid. p.128, for more details see, Benson (1995, 1998) for evidence and references.

arbitration developed during the colonial and post-revolutionary periods in spite of judicial hostility. Later in the Nineteenth Century, hostility lessened in several state courts (MacNeil 1992; Benson 1995a, 1998f), but arbitration continued to evolve both in states where the courts were relatively receptive and states where they were not (Benson 1995a, 1998f).³²

As legal diversity³³ continued to prevail among states of the United States in many respects, particularly in commercial and financial matters, it became evident that diversity in legal rules was distinctly disadvantageous, and measures to secure uniformity were adopted. When the American Bar Association was founded in 1878 it dedicated itself in part to securing “uniformity of legislation throughout the nation.” Twelve years later, the Association appointed a Special Committee on Uniform States Laws, and in 1892 was held the first National Conference of Commissioners on Uniform State Laws, in which all States of the Union now participate. Over one hundred of the uniform laws which the conference drafted and approved are still current, although the number of States which have enacted them varies from one subject to another.³⁴

A principal outcome of the NCCUSL has been efficient uniformity. A research found that, whatever the motivation of the NCCUSL and state legislatures, factors such as jurisdictional competition and competition between interest groups have led state legislatures to enact efficient laws in uniformity.³⁵

In fact, competition has several dimensions; the first is interstate competition. One important implication to be emphasised here is that interstate competition has ended state legislators’ monopoly over special charters and liberalised the law on other matters, including commercial arbitration.³⁶ Further, the NCCUSL has never clearly articulated the appropriate scope of uniformity.

³² Ibid.

³³ Prior to passage by New York (1920), New Jersey (1923), the federal government (1925), Oregon (1925), Massachusetts (1925), Pennsylvania (1927) and California (1927), of statutes commanding their law courts to enforce arbitration agreements and rulings, agreements to arbitrate were generally not considered binding under US common law, and at least for a portion of US history prior to the 1920s, hostile judges felt free to overturn arbitration decisions if one of the parties chose to litigate.

³⁴ See Philip C. Jessup, Diversity and Uniformity in the Law of Nations. P.354, *The Am. J. Int’l. L.* Vol.58

³⁵ See Larry E. Ribstein and Bruce H. Kobayashi. An Economic Analysis of Uniform State Laws. p.132. *J. of Legal Studies*, Vol. XXV, Jan. 1996. University of Chicago.

³⁶ Ibid. p.135.

Another area of competition is the influence of interest groups. Interest groups - mainly business oriented - support inefficient uniformity, since they have little incentive to seek uniform adoption of a law that can be easily avoided by contract.³⁷ Usually such interest groups may participate in drafting and lobbying for NCCUSL proposals that both are appropriately uniform and serve the groups' interest by maximising their power.³⁸

Such competition amongst interest groups leads to another type of competition: that is, the Federal versus State law competition. Some of the NCCUSL's proposals are consistent with the public interest theory of uniformity but nevertheless may not be widely adopted because of opposition by powerful interest groups.³⁹ In respect to competition between the Federal and State law, "proponents of uniform state laws see them as a solution to the problem of inconsistent and hard-to-find state laws that avoid the need for a federal solution that would shrink state autonomy. Although federal legislation can achieve these goals as well as or better than state uniform laws, since complete state uniformity is rare, proponents of uniformity have long rejected a federal solution."⁴⁰ Indeed, some advocates of uniform state laws view uniform laws as a way of averting the greater evil of Federal Law.⁴¹

Although business-oriented interest groups may have a smaller advantage at the federal level than they do in the uniform lawmaking process, it does not follow that any particular group can dominate state legislatures to achieve a *uniform* state law.⁴²

One feasible improvement that is consistent with the NCCUSL's goals is to focus its work on procedural, commercial, and probate statutes instead of attempting to promote uniformity wherever there is inconsistency,⁴³ because in the long run it has been emphasised that the best solution to the problem of inefficient and inconsistent state laws may be more competition among the states rather than more uniform laws, and the most important lesson is that one should be sceptical about the production of law by any rule making elite.

³⁷ Ibid, p.154.

³⁸ Ibid.

³⁹ Ibid. p.155.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid. p.169.

⁴³ Ibid. p.187.

Market Competition

Because merchants and consumers can choose to buy from someone else,⁴⁴ the competitive market concept in international commercial arbitration will be discussed as primarily concerned with the Western idea of maintaining a reputation for fairness in arbitration institutions and procedures. The dual objectives to be mentioned here are the influence of the perception amongst Western jurists on how the idea of competition in international commercial arbitration helps to develop the arbitration procedural law on the one hand, and how it helps to develop international arbitration in other parts of the world on the other hand.

In oil arbitration cases involving oil rich countries such as Abu Dhabi, Qatar, Iran, and Libya, where Western interests are at stake,⁴⁵ arbitrators have broken away from the traditional positivist rules, as they have not been found suitable⁴⁶ for international transactions in the ever-growing circumstance of interdependence of the international community. The efforts of western jurists are aimed at securing their multinational corporations' foreign investment in the developing world and the preservation of the political and economic power of the western world.⁴⁷ As two authors⁴⁸ recently observed:

“The law and legal practice directed to the north-south disputes, for example, developed to reflect the interests of Western business in avoiding national courts and laws. And merchants found the services useful and valuable also because the perceived autonomy and universality of the *lex mercatoria* enable the Western merchants to ensure - at least statistically - their domination and their profits in their business relations with ex-colonial governments. Stated simply, autonomy and universality are not only consistent, but also closely related to the subordination of law to economic and political power.”⁴⁹

⁴⁴ See supra note 10, p.124.

⁴⁵ For more details, see *Petroleum Development (Trucial Coast) Ltd. V. Sheikh of Abu Dhabi*, 18 I. L. R. 144 (1951) (per Lord Asquith). *Ruler of Qatar v. International Marine Oil Co., Ltd.*, 20 I. L. R. 534 (1953) (per Alfred Buknill). *Sapphire International Petroleum Ltd. V. National Iranian Oil Co.* (1963), 35 I. L. R. 136 (1963) (per Cavin). See supra note 8, p.20.

⁴⁶ Arbitrators interpreted the common choice-of-law provision in the Libyan cases for example, in three different ways. No doubt, different arbitrators with different philosophies in the three different cases were likely to reach different conclusions on the same issues.

⁴⁷ *Ibid.* p.20.

⁴⁸ Yves Dezalay and Bryant G. Garth, (1996). *Dealing in virtue: international commercial arbitration and construction of a transnational legal order.* *Texas international Law journal.* pp. 397-407.

⁴⁹ op.cit.

Another Western scholar has also noted that “the so-called *lex mercatoria* is largely an effort to legitimise as “law” the economic interests of Western corporations.” Thus, if arbitrators are perceived as the instrumentality of Western economic and political power, arbitration as an institution will not prosper globally. Hence, it proves to be a challenge for arbitrators to develop a balanced arbitral jurisprudence that will be acceptable universally.⁵⁰

As mentioned above, the concept of competition helped to develop international commercial arbitration in other parts of the world, but other factors usually influenced the choice of arbitration sites. European sites for example, were generally considered acceptable not only in disputes with European parties, but also with parties from Africa or the Middle East, in part because many African and Middle Eastern legal systems were derived from European civil codes.⁵¹

In addition to the preferred sites for ICC arbitration, other neutral forums gained popularity based on political and geographical preference. Indeed, between 1980 and 1988, the ICC supervised arbitrations in sixty- three countries around the world.⁵² For instance, the Vienna International Arbitration Centre (VIAC) was created in 1975 and has developed into a well known international arbitration institution, frequently called upon by parties from all over the world.⁵³ Vienna has since become an important centre for East-West arbitrations because of its proximity to Eastern European countries and its acceptability to COCOM members.⁵⁴

Based upon the same geographical convenience or political acceptability, parties have become attracted to the site of the Arbitration Institute of the Stockholm Chamber of Commerce, which has since become an important centre for international arbitrations involving Russia and states of the former Soviet Union, and China as well.⁵⁵ Finally, Kuala Lumpur is the home of the regional Centre for Arbitration, set up by the Asian-

⁵⁰ *op.cit.* pp.20. See Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and Construction of a Transnational Legal Order* 98 (1996); see also Frank E. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 *Tex. Int'l L. J.* 397, 407 (1986).

⁵¹ See W. Laurence Craig, *Some trends and developments in the laws and practice of International Commercial Arbitration*, pp. 8. *Tex. Int'l. L. J.* 1995.

⁵² *Ibid.* p.10.

⁵³ As of September 2001, the Vienna International Arbitral Centre administered 70 cases. See Andreas Reiner, *The 2001 Version of the Vienna Rules* p. 661. *J. Int'l. Arb.* 18 (6): 661-668, 2001. Kluwer Law International.

⁵⁴ See *supra* note 43, p.9.

⁵⁵ *Ibid.*

African Consultative Committee with the cooperation of the Malaysian government, which provides for administration of international arbitration under the UNCITRAL Rules.⁵⁶

The growth of arbitration will be fuelled, as always, by the needs of international business, but the direction it will take, and particularly the choice of arbitration sites, will also be a function of geography.⁵⁷ In short, there are more players, more rules and more referees in the game, but the character of the game is unchanged: the strongest players will still make most of the rules, supply most of the referees, and win most of the time.⁵⁸

3.2.2 The Concept of “Individualism”

The second element of the normative concept of positivism legal theory of international commercial arbitration modern law is the concept of “individualism”.

Ideology of Individualism in International Commercial Law

Traditionally in Continental Europe the concept of the state has been very important, and there is a greater sense of people ‘belonging’ to the state. This ‘belonging’ carries with it expectations about responsibilities that the state owes to its people and is expected to fulfil. Examples of these responsibilities are providing centralised police forces, stronger central bureaucracies, and less concern for the ideologies of individualism.⁵⁹ Modern Western ideology of international commercial law has been characterised by individualism.⁶⁰ The Franciscan monk, William of Ockham (1285-1349?), translated then developing “individualism”⁶¹ into philosophical and legal thought.

⁵⁶ Ibid. p.33.

⁵⁷ Ibid.

⁵⁸ See John W. Head, *Supranational Law: How The Move Towards Multilateral Solutions is changing the character of “International” Law*. p. 20. *Kan L. Rev.* 605 1994.

⁵⁹ See George P. Gilligan. *The Origins of UK Financial Services Regulation*. P. 4. *Complaw*. 1997, 18 (6) Sweet & Maxwell Limited.

⁶⁰ See Andreas Buss. *The Evolution of Western Individualism*. p. 20. *Religion* (2000) 30, 1-25. Academic Press.

⁶¹ Individualism is a moral, political, and social philosophy, which emphasises individual liberty belief in the primary importance of the individual, and in the “virtues of self-reliance” and “personal independence”. “Individualism” embraces opposition to authority, and to all manner of controls over the individual, especially when exercised by the political state or “society”. It is thus, directly-opposed to *collectivism*. It is often confused with “egoism”. Societies and groups can differ, in the extent to which they are based upon predominantly “self-regarding” (individualistic, and arguably self-interested) rather than “other-regarding” (group-oriented, and group, or society-minded) behaviour. There is also a distinction, relevant in this context, between “guilt” societies (e.g. medieval Europe), (“internal reference standard”), and “shame” societies (e.g. Japan, “bringing shame upon one’s

“Law is the expression of the will and power of individual legislators; the term is used to designate the social recognition of the power of the individual, and no natural or social order exists beyond that upon which the individuals decide. Power has become the functional equivalent of order and hierarchy. The modern conception of the individual as a value comes to mind here.”⁶²

Indeed, the principal function of the social order was to protect individual rights. In the following centuries to Axial Age civilisations and early Christianity, the idea of natural law dominated social thinking and contributed to the development of inward individualism. Natural Law theories are sometimes divided into classical and modern. In the classical version man is a social being⁶³ and the basis of law is the social and political order in conforming to the order of nature. Modern natural law theory thus does not involve social beings but instead self-sufficient individuals.⁶⁴ The socialist objectives of the post-Revolutionary East European government militated against individualism to an extent, but ultimately its pursuit of social justice and the coincident influence of natural law principles fostered a predominantly individualist conception.

Individualism was not the sole watchword of the revolutions which ushered in and characterised Western national legal systems, rather it extended to characterise the international law.⁶⁵ “Western Europe constituted ‘the original international community within which international law grew up gradually through custom and treaty. The community which arises within such conventional treatments is a

ancestors”) with an “external reference standard”, where people look to their peers for feedback, as to whether an action is “acceptable” or not (also known as “group-think”). The extent to which society, or groups are “individualistic” can vary from time to time, and from country to country. For example, Japanese society is more group-oriented (e.g. decisions tend to be taken by consensus among groups, rather than by individuals), and it has been argued that “personalities are less developed” (than is usual in the West). The USA is usually thought of as being at the individualistic (its detractors would say “atomistic”) “end of the spectrum”, whereas European societies are more inclined to believe in “public-spiritedness”, state “socialistic” spending, and in “public” initiatives.

⁶² Ibid. p. 13.

⁶³ Such a relation between people is a *social power* relation, as distinct from a *productive power* relation. The will of one human is subordinated to the other’s will, which thus has power of command. The execution of commands by a subordinate is a change brought about in the subordinate’s actions and is thus a manifestation of power emanating from the superior. *The great question and dilemma of the social being is how individual human freedom can be reconciled at all with social power relations.*

⁶⁴ Ibid. p.16.

⁶⁵ See Francesca Klug. Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights. Pp.2-3, E. H. R. L. R. 2001, 2, 241-243. Sweet and Maxwell Limited.

community of sovereign states ... the process is thereby begun of determining whether such a community knows of values other than the sovereign identities of its individual members - whether the 'community' becomes more than the mere collection of its parts, or to use Franck's word, 'the system's values, aims, and effects' and the extent to which (if at all) the community' is prepared to admit other than states within its following."⁶⁶ Thus, one can find that international law has recognised each of the actors within the international system for what they are- whether they be states, international institutions, individuals or corporations.⁶⁷ Such a definition has been influenced by the concept of personal liberty and protection of human rights in the international economy.

Roughly speaking, liberalism traditionally suffers from two important problems in connection with relations between groups, individuals and states. One problem is that, keen as it is to place the individuals in the spotlight, liberalism has difficulty in coming to terms with groups, be they tribes, or minorities, or indigenous people. Yet if only out of strategic concerns, the liberal will also have an intuitive affinity with such groups, precisely because they help form an alliance against the overzealous ambitions of the state.⁶⁸ Therefore, some communitarians stress that liberalism is based on the false premise that the individual is largely responsible for his own identity; while other say individuals are always part of larger social groups, from family to neighbourhood to tribe to, eventually, nations or states; thus individuality is, at least in part, a product of community.⁶⁹ Having described how the concepts of individualism and liberalism are deeply rooted in Western culture, their impact cannot be appealed on the process of the development of harmonised arbitration rules as they expand to include economic activities.

Hayek and other defenders of liberty rights, for example, believe that human rights and market freedoms are, in effect, one and the same thing. They understand the

⁶⁶ See Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law: Peace*, vol. I (9th edn, 1992), at 87. Also see the Case concerning Military and Paramilitary Activities in and against Nicaragua: *Nicaragua v. United States of America*, ICJ Reports (1986) 14, at 133 (paragraph 263). See, further, N. Wheeler, *Saving Strangers: Humanitarian Intervention and International Society* (2000), at 28

(Describing the rules of sovereignty and non-intervention' as 'the constitutive rules of international society') *supra* notes 23 & 24 in Dino Kritsiotis, *Imagining The International community*. p. 4. *European Journal of Int'l. L.* 2002 13 (961).

⁶⁷ *op.cit.* p. 15.

⁶⁸ See L. Henkin, 'International Law: politics, values and functions', See Th. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism*, p. 418. Oxford University Press. *International J. on Minority and Group Rights* 7: 411-420, 2000. Kluwer L. International.

⁶⁹ *o.p.cit.* p.416.

human rights functions of international economic law not only in terms of promoting the availability and accessibility of traded goods, traded services and open markets that are essential for the fulfilment of many social human rights, but also in guaranteeing freedom, non-discrimination, rule of law and social justice (e.g. in the Bretton Wood and WTO agreements) in a coherent manner that empowers citizens, contains state power and reinforces individual rights.⁷⁰

Furthermore, they believe that individuals can be empowered through decentralised and more complex market governance mechanisms which treat citizens as legal subjects rather than mere objects.⁷¹ It has been argued that, given the everyday experience of a billion people who can survive only by trading the fruits of their labour in exchange for goods and services indispensable for their personal self-development, this should be recognised as a human rights problem rather than merely as a legislative or administrative task to be left to ‘benevolent governments’.⁷² Teson has emphasised another dimension of the individualism paradigm in international law, where he confronts the traditional foundation of international law through a moral critique:

“Traditional foundations are illiberal and authoritarian because they unduly exalt state power. All exercise of power must be morally legitimate. Roughly, an exercise of power is morally legitimate when it is the result of political consent and respect the basic rights of the individuals subject to that power. If international law is to be morally legitimate, therefore, it must mandate that states respects human rights as a precondition for joining the international community. Immanuel Kant was the first to defend this thesis, and for that reason I will call it the Kantian theory of international law.”⁷³

It has been argued that Teson has been too modest in his view regarding the extent to which the ideas of “normative individualism”⁷⁴ now inform law and practice at the

⁷⁰ See Ernst-Ulrich Petersmann. Taking Human Dignity, Poverty and Empowerment of Individuals more Seriously. P. 2. *European J. of Int'l. L.* 2002.13 (845).

⁷¹ *Ibid.* p.4.

⁷² *Ibid.* p.2.

⁷³ See Teson, Fernando R. (1998), *A Philosophy of International Law*. pp.1-2 (Boulder: Westview Press); see in Christopher Harding, *Statist assumption, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty first century*. p. 108. *Non-State Actors and International Law 1: 107-125*, 2001. Kluwer Law International.

⁷⁴ Kagitcibasi (1997) distinguished normative individualism, with its emphasis on individual rights and avoidance of the oppression of the in-group, from relational individualism, with its emphasis on the distance between self and in-group. We do not have, as yet, specific measures of each of these aspects, or many variables, in addition to the vertical and horizontal dimensions, that may define different kinds

international level. While there is clearly much that is in an abstract sense ethically persuasive in his argument, it also possesses in a more empirical sense a very significant resonance in a good deal of political and normative practice at the international level over the last fifty years or so.⁷⁵ This is most evident in the emergent body of humanitarian norms which seeks in various ways to provide an international guarantee of individual rights and interests. But it is also possible to go a stage further and identify a significant normative dynamic - especially in the European-international context - which is driving the development of a detailed and effective body of rules which are manifestly indicative of 'normative individualism'.⁷⁶ Frank (1999),⁷⁷ exposes another puzzle for international lawyers - how to reconcile the state's role as the protector of individual rights with the reality that the power may be abused or ignored, that what is intended to improve the lot of individuals turns out to make their condition worse.⁷⁸

Self Regulation

The concept of 'individualism' in international commercial arbitration law can be more effectively reinforced if understood as a process of self regulation. It has been said that, conferring equal individual rights enables a higher degree of legal autonomy, empowerment and responsibility of individuals, and a more decentralised 'self-enforcing constitution', than does a paternalistic reliance on authoritarian regulation of personal freedom.⁷⁹ Two examples of the self-regulatory process are helpful in this regard; the first will be London's financial markets, and the second is the development of the *lex mercatoria*.

First, all English markets (e.g. metal exchange, grain, and other trading activities) and not just London's financial markets have long-held traditions of self-regulation. They are legally grounded in the law merchant and common law, and have at their heart the belief that commerce is a domain of private transactions. The private regulatory structures of the City's markets therefore reflect national characteristics and are

of individualism and collectivism (Triandis 1994). Specially, we need to examine differences between the relationship of self to close in-group, distance in-group (e.g., state), neutral out-group (e.g., strangers) and hostile out-group (e.g., people with whom one has a zero-sum relationship), in private and public settings, that are characterised by differing levels of tightness. See Harry C. Triandis (2001). Individualism-Collectivism and Personality. *Journal of Personality*. P. 920.

⁷⁵ *op.cit.* p.108.

⁷⁶ *Ibid.*

⁷⁷ In his latest book, the *Empowered Self: Law and Society in the Age of individualism* (1999), Frank discussed the role of the state to protect human rights.

⁷⁸ See Colin Warbrick, Introduction to the Symposium. p2. *EJIL* 2002 13 (902).

⁷⁹ See *Supra* note 60. p.4.

partially explained by the relative weakness of the central state,⁸⁰ or alternatively by its unwillingness to intervene, guided by *laissez faire notions*.

Moreover, the essentially private character of the Bank of England and the Stock Exchange has moulded the self-regulatory system of the UK financial-services sector.⁸¹ By the end of the nineteenth century the importance of London's financial markets to the UK economy was manifested in the fact that one-fifth of the nation's wealth was invested in company shares.⁸²

Evidence shows that any significant regulatory developments have been largely influenced by constituent interest groups. These groups have achieved their regulatory autonomy through their reflexive interaction with external economic and political structures.⁸³ It has also been observed groups consistently defeat or deflect external attempts at regulatory intervention, and routinely consolidate their own regulatory authority and system of self-regulation.⁸⁴ To maintain their regulatory authority and to preserve their self regulatory traditions, they utilise their shared social and political connections, their lobbying power, and the financial services industry's strategic importance.

Secondly, the basic concepts of modern Western mercantile law - *lex mercatoria* "the law merchant" were formed by the concept of self regulation, and, even more importantly, it was then that mercantile law in the West first came to be viewed as an integrated, developing system, a body of law" (Berman 1983, p.333). In fact, the commercial revolution could not have occurred without the rapid development of this system of law (Berman 1983, p.336). This legal system evolved spontaneously within the decentralised merchant community, rather than being produced by centralised state government.⁸⁵

⁸⁰ See supra note 51, p. 4.

⁸¹ Only in recent times has the stock Exchange become more open and more publicly accountable. The Bank of England was nationalised by the Bank of England Act 1946, but the process of choosing the governor has remained unchanged and nationalisation has had virtually no effect on the bank's methods of operation. See generally R Eatwell, *The 1945-1951 Labour Governments* (London: Batsford Academic, 1979) see supra note 51. pp.6

⁸² See G.Robb, *White-Collar Crime in Modern England, Financial Fraud and Business Morality, 1845-1929* (Cambridge: Cambridge University Press, 1992).

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ See supra note 10.

Party Autonomy

Party autonomy,⁸⁶ the freedom of individuals or self determination of legal relations by individuals according to their respective will - and the limits of party autonomy - comprises one of the fundamental issues of national contract and private law, perhaps the most fundamental.⁸⁷

In the United Kingdom, following Holt and Mansfield⁸⁸, British courts were increasingly willing to enforce contracts as businessmen wanted them to be enforced. However, in light of competition and applying customary law merchants, things began to change, English courts began pulling back from the doctrine of revocability in *Scott v. Avery* (5H.L. Cas.811 (1855)), holding that contracts to arbitrate specific future disputes were binding, although contracts to arbitrate “any disagreement arising under the term of the contract” were revocable. In Scotland, the doctrine was explicitly rejected in *Drew v. Drew* (2 Macqueen’s Cases on Appeal (1855)), as it was recognised to be in direct conflict with the general common law doctrine of binding contracts.⁸⁹

As to the impact of individualism, in Europe, the fundamental freedom of individuals is manifested as the basic goal of the EC Treaty and designed to extend party autonomy across borders. The contract is the instrument of party autonomy. In the internal market place, party autonomy means not only orthodox contractual freedom, but also and more importantly, the freedom to choose the law applicable and thereby also has to do with domestic mandatory law.⁹⁰

⁸⁶ International arbitration is a consensual, contractual process. At its heart is the cardinal principle of party autonomy, according to which parties enjoy wide latitude in structuring their arbitration arrangements so as to suit their particular needs. Implicit in this scheme of flexible arbitral self-government is an understanding that the rules stipulated by the parties as governing their arbitration will bind the arbitrators and administering institutions in performance of their respective functions. See Hoellering, Michael F.(1998). International Arbitration agreements: a look behind the scenes. *Dispute Resolution Journal*.

⁸⁷ See Stefan Grundmann, Information, Party autonomy and Economic Agents in European Contract Law. p.269. *Common Market Law Review* 39: 269-293, 2002. Kluwer Law International.

⁸⁸ The late seventeenth century, particularly with Sir John Holt, and the eighteenth century with Lord Mansfield, saw common law decisions once again explicitly drawing upon customs and usages of English merchants as a source of changes in English common law. Mansfield even instituted the use of merchant juries to consider commercial disputes. While Mansfield’s role in reviving customary sources of legal changes in common law was particularly important (there were political motivations behind Mansfield’s efforts), another significant impetus appears to be the fact that as international trade became relatively more important, common law courts were forced to compete with foreign courts and legal systems to regulate international commerce. Benson (1999) pp. 125-126.

⁸⁹ See supra note 10 p. 126.

⁹⁰ See supra note 74 p. 270.

In the United States, cases have reflected that the American's legal system has defended party autonomy according to arbitration contract law. In the *Mitsubishi case* (1985)⁹¹, a case with international dimensions, the US Supreme court rejected the considerations⁹² and concluded:

“that concern of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result will be forthcoming in a domestic context.”⁹³

⁹¹ This landmark case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, raised and decided the question of the arbitrability of *antitrust claims*. In the judgment by five to three votes, anticompetitive conduct is subject to arbitration'. See Robert B. Von Mehren (2003) *The Eco-Swiss Case and International Arbitration*. Arbitration International, Vol. 19, No. 4. p. 465.

⁹² The Court rebutted the argument that the public interest involved in the private enforcement of the antitrust laws militated against a tolerance for arbitration of these claims by rejecting the fundamental premise of the argument, especially as presented by the United States. The Court simply noted that the private damage remedy - by which is presumably meant the treble damage remedy - can be sought outside American courts. The Court reasoned that a tribunal appointed to decide claims arising under American law should be bound to decide the claims in accord with the law of the country giving rise to the claim that, therefore, the Sherman Act should continue to serve both its remedial and deterrent function. *Ibid*

⁹³ The issue of whether domestic antitrust claims are arbitrable has yet to reach the US Supreme Court. Lower courts, however, have already answered this question in the affirmative. *Kotman Elecs. V. JBL Consumer Prods. Inc.*, 93 F. 3d 724 (11th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997); *Coors Brewing Co. v. Molson Breweries*, 51 F. 3d 1551 (10th Cir. 1995); *GKG Caribe, Inc. v. Nokia-Mobira, Inc.*, 725 F. Supp. 109 (D. Puerto Rico 1989); *Cindy's Candle Co., Inc. v. WNS, Inc.*, 714 F. Supp. 973 (N. D. III. 1989).

With regard to the general significance of *Mitsubishi* for antitrust litigation we should bear in mind Andreas F. Lowenfeld's remark, that antitrust claims submitted to arbitration almost exclusively arise in the context of counterclaims among parties to an agreement once the contractual relationship has become invalid. Companies squeezed out of the market by rivals or seeking to prevent a merger among competitors do not resort to arbitration because they have no contractual relationship with the persons or entities against which they seek relief: Andreas F. Lowenfeld, 'The Mitsubishi Case: Another View' in (1986) 2 *Arbitration International* 178 at p. 180. See Patrick M. Baron and Stefan Liniger, *A Second Look at Arbitrability Approach to Arbitration in the United States, Switzerland and Germany*. p.30 *Arb. Int'l*. vol. 19, No. 1, LCIA 2003.

In *Shearson/American Express, Inc. v. McMahon* (1987)⁹⁴ similar to *Mitsubishi case*, the US Supreme Court held that a party who agrees to arbitrate a statutory claim cannot forego the substantive protection afforded by the statute. Rather, it trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. Furthermore, as in *Mitsubishi*, the US Supreme Court emphasised that the potential complexity of certain matters is in itself not sufficient to ward off arbitration.⁹⁵

Finally, in *Vimar Seguros Y Reaseguros, SA v. M/V Sky Reefer et al.* (1995)⁹⁶, the issue at stake was whether a foreign arbitration clause in a bill of lading would be invalid under [COGSA §3(8)] because the selection of a foreign forum in conjunction with the choice of foreign law might lessen the liability of a carrier in a sense prohibited by the provisions of COGSA. Based upon the notion that the “United States should be a trusted partner in international trade, along with the idea that US courts ‘will have the opportunity at the award-enforcement stage to ensure that the

⁹⁴ *Shearson/American Express, Inc. v. McMahon* decided on June 8th, 1987. Respondents were customers of petitioner Shearson/American Express Inc. (Shearson), a brokerage firm registered with the Securities and Exchange Commission (SEC), under customer agreements providing for arbitration of any controversy relating to their accounts. Respondents filed a suit in the Federal District Court against Shearson and its representative (also a petitioner here) who handled their accounts, alleging violations of the antifraud provisions in 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and SEC Rule 10b-5, and of the Racketeer Influenced and Corrupt Organisations Act (RICO). Petitioners moved to compel arbitration of the claims pursuant to 3 of the Federal Arbitration Act, which requires a court to stay its proceedings if it is satisfied that an issue before it is arbitrable under an arbitration agreement. The District Court held that respondents' Exchange Act claims were arbitrable, but that their RICO claim was not. The Court of Appeals affirmed as to the RICO claim, but reversed as to the Exchange Act claims.

⁹⁵ *Ibid.* p. 31. See also, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *supra* n. 12 at 638.

⁹⁶ The contract at issue in this case was a standard form bill of lading to evidence the purchase of a shipload of Moroccan oranges and lemons. The purchaser was Bacchus Associates (Bacchus), a New York partnership that distribute fruit at wholesale throughout the Northeastern United States. Bacchus dealt with Galaxie Negoce, S. A. (Galaxie), a Moroccan fruit supplier. Bacchus contracted with Galaxie to purchase the shipload of fruit and chartered a ship to transport it from Morocco to Massachusetts. The ship was the M/V Sky Reefer, a refrigerated cargo ship owned by M. H. Maritima, S. A., a Panamanian company, and time chartered to Nichiro Gyogyo Kaisha, Ltd., a Japanese company. Stevedores hired by Galaxie loaded and stowed the cargo. As is customary in these types of transactions, when it received the cargo from Galaxie, Nichiro as carrier issued a form bill of lading to Galaxie as shipper and consignee. Once the ship set sail from Morocco, Galaxie tendered the bill of lading to Bacchus according to the terms of a letter of credit posted in Galaxie's favour. The US Supreme Court concluded that “Because we hold that foreign arbitration clauses in bills of lading are not invalid under COGSA in all circumstances, both the FAA and COGSA may be given full effect. The judgement of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.” See US Supreme Court collection No. 94-623.

legitimate interest in the enforcement of the... Laws has been addressed, the US Supreme Court affirmed the arbitrability of the matter.”⁹⁷

Another necessary aspect of party autonomy is the role of arbitrators. Since arbitration itself is based on party autonomy, modern arbitration law emphasises that it must be respected in the context of arbitration.

The arbitrator’s revision of the parties’ contract by substituting the applicable law, however equitable, should be prohibited in principle for the sake of the sanctity of the contract.⁹⁸ Thus, one may argue that if an arbitrator applies any law other than the parties’ chosen one, the parties’ expectations will be frustrated.⁹⁹ Professor Riesman has observed; “it is unfair to the parties and dangerous for the future of arbitration if arbitrators can arrogate to themselves a change of the rules once parties have selected a set of them to govern their transactions.”¹⁰⁰

On a final point, the concept of party autonomy in arbitration predicates that the binding authority of an award derives solely from the agreement of the parties, and not from national law.¹⁰¹

3.2.3 The Concept of The “Role of Merchants”

3.2.3.1 In the Development of the Law

In the arena of commercial arbitration law, modern international commercial arbitration laws have been developed within the constant interaction between state and private individuals (merchants). One of the most noticeable Western characteristics is that commercial arbitration law is not a static phenomenon, but rather a process of continuing political adaptation within a regulatory setting, in which actors can erode existing law and lobby for change.¹⁰²

⁹⁷ *op.cit* 19, p. 32. See, *Vimar Seguros Y Reasegueros, S. A. v. M/V Sky Reefer et al.*,

⁹⁸ *op.cit.* 8, p.8. See Henri Mazeaud et al., *Traite Theorique et Patrique de la Responsabilite Civile Delictuelle et Contractuelle* sec. 1, at 735 (6th ed. 1965); George Ripert, 81 *La Regle Morale dans les Obligations Civiles*; see also UNCITRAL Draft Model Law for International Commercial Arbitration, art. 34 (2), in 24 *I.L.M.* 1302, 1314 (1985); 585 *Abs 2 Allgemeines B < umu> regerliches Gesetzbuch [ABGB] (Aus.)*, reprinted in 1 *International Handbook of Commercial Arbitration* (Pieter Sanders ed., 1998); Belgium Judicial Code art. 1074, reprinted in 1 *International Handbook of Commercial Arbitration* (Pieter Sanders ed., 1998); The Netherlands Code of Civil Procedure, Art. 1065 (1), reprinted in 12 *Y.B. Comm. Arb.* 370 (1987); United States Arbitration Act, February 12, 1925, sec. 10, reprinted in 1 *International Handbook of Commercial Arbitration* (Pieter Sanders ed., 1998).

⁹⁹ See *supra* note 8.

¹⁰⁰ W. Michael Reisman, *System of Control in International Adjudication and Arbitration: Breakdown and Repair* 95 (1992) *op. cit. supra* note. 8 p .8

¹⁰¹ See Roy Goode, *The Role of Lex Loci Arbitri in International Commercial Arbitration.* p.24 *Arb. Int’l.* vol. 17 No. 1. LCIA, 2001.

¹⁰² See George P. Gilligan, *The Potential of Socio-Legal Approaches in the Development of Company Law.* p. 127. *Comp. Law.* 2000, 21(4), 127-128.

Socio-legal approaches are useful in demonstrating that commercial arbitration law is a social and political process, not a value-neutral and automatic system. It is not a “given”, but is more often a basis for negotiation for major players. Power bases in the production of law and regulation can include: professional groups; established institutional and social structures; interdependent relationships between different markets; and national political priorities.¹⁰³ Certainly these forces have been present in the regulatory changes that have accompanied the development of the law from a very early time to the most recent trends in the era of globalisation. Unsurprisingly, they are present also in the current policy reform processes in the West and other regional blocs.

As merchants began to transact business across political, cultural and geographic boundaries they came into contact with foreign trade practices. Many trade practices in different localities were found to have much in common, but where conflicts arose or where innovative trade practices were developed, those practices which proved to be most effective at facilitating commercial interaction tended to supplant those that were less effective.

By the end of the Twelfth Century many important principles of commercial law were international in character.¹⁰⁴ Mitchell (1904) states: “From these foundations and most particularly in Europe, the continued evolution of rules and legal institutions in European commercial society was spontaneous and undersigned. This “customary nature of the Law Merchant was by far the most decisive factor in its development: it made the law eminently a practical law adapted to the requirements of commerce; and as trade expanded and new forms of commercial activity arose - negotiable paper, insurance, etc.-custom everywhere fashioned and framed the broad general principles of the new law”.¹⁰⁵

More importantly, the development of private dispute resolution systems can be traced back to medieval Europe, when merchants and traders from different regions would assemble at markets and fairs to do business; this led to the development of

¹⁰³Ibid.

¹⁰⁴ See supra note 10. p.118

¹⁰⁵Mitchell 1904, pp.7-9; Bewes 1923, p. 138; Berman 1983, pp. 350-355), as in Bruce L. Benson, to arbitrate or to litigate : that is the question. p.118. Also for more details, see Mitchell, W. (1904).p.12. An Essay on the Early History of the Law Merchant, pp.7-9.

both the special procedures for dealing with mercantile matters and a substantive law of merchants, the “*lex mercatoria*”.¹⁰⁶

These socio-legal approaches to the merchants’ activities influenced the development of commercial arbitration laws at the domestic and international levels. First at the domestic level by providing foreign merchants with substantial protection against potential discrimination under local laws, including local customs. Accordingly, by the early Thirteenth Century various communities of traders could turn to the Law Merchant as an integrated system of principles, concepts, rules and procedures. The rapid evolution of the Law Merchant continued through the Thirteenth, Fourteenth, and Fifteenth Centuries so that as commercial opportunities expanded, commercial law became even more objective, precise, uniform and integrated, and its dispute resolution procedures became more formalised. Merchants established their own participatory courts for several reasons; for one thing, merchants needed their own courts so they could be sure that their own rules would be enforced.¹⁰⁷

3.2.3.2 The Establishment of “Merchants Courts” and “Courts-Sponsored Arbitration”

The previous part examined how the merchant community played a major role in the outcome of commercial arbitration rules taking advantage of individualism, conflict and competition. This part will examine the role of merchants in establishing their courts (the merchants’ courts) and significance in the development of commercial arbitration law.

Merchants naturally used the urban courts which evolved from the earlier market courts, and which they, the merchants, continued to dominate. The availability of numerous alternative disputes resolution forums, including the merchant courts of the fairs and markets, meant that the Law Merchant remained a source of protection against the growing centralised power of the king. Indeed, as Hayek explains:

“The growth of the purpose-independent rules of conduct which can produce a spontaneous order will... often have taken place in conflict with the aims of the rulers who tended to try to turn their domain into an organisation proper. It is in the *ius gentium*, the law merchant, and the

¹⁰⁶ *op.cit.* 43, p. 3 For a discussion of international enforceability of obligatory awards, see Rene David, *Arbitration in International Trade* 366-72 (1985).

¹⁰⁷ *op.cit.* 10, For more details, see Berman, H. J. (1983). *Law and Revolution: The Formation of Western Legal Tradition* pp. 350. Cambridge, MA: Harvard University Press. See also, Trakman, L. E. (1983). *The Law Merchant: The Evolution of Commercial Law*, pp.15. Littleton, Co: Fred B. Rothman and Co.

practices of the ports and fairs that we must chiefly seek the steps in the evolution of law which ultimately made an open society possible.”¹⁰⁸

These commercial courts were constituted by merchants (commercants) either individually or through participation in companies.¹⁰⁹ Merchant court judges were merchants chosen from the relevant merchant community (fair or market), and when technical issues were involved, merchants experts in the relevant area of commerce could be chosen as judges.¹¹⁰

Perhaps the most widely cited characteristics of the merchant courts were their speed and informality. This characteristic was in response to the needs of merchants, and another reason for participatory merchants courts. Merchants of the time had to complete their transactions in one market or fair and quickly move to the next, so a dispute had to be settled quickly to minimise disruption of business affairs.¹¹¹

In further developments, powerful members of England’s merchant community saw advantages in having royal and later parliamentary authority established over commercial matters.¹¹² In this context, one early development in the gradual process of absorption of the Law Merchant was cooperation by royal authorities in applying it. Merchants clearly found it beneficial to shift the burden of enforcement. The growing political power of domestic merchants was a significant factor leading towards more royal and then parliamentary influence over commercial matters. In the later stage, as a result of the growing political power of domestic merchants, they exercised more significant influence over commercial matters, as they influenced state courts to sponsor arbitration, arguing lawyers and state judges often had no knowledge of commercial issues. The growing demands of the commercial community upon the courts probably encouraged court-sponsored arbitration since this met many of its dispute processing needs.¹¹³ These court-sponsored arbitrations were meant to provide a method of expediting the resolution of cases whenever judicial resources were scarce, disputants too powerful, or issues too sensitive, or when the subject matter was

¹⁰⁸ *op.cit* 10. p.121 Hayek, F. A. (1973). *Law, Legislation, and Liberty*, pp.81-81. vol. 1, University of Chicago Press.

¹⁰⁹ *op.cit*.43, p.4.

¹¹⁰ *op.cit* 10.p. 119.

¹¹¹ *Ibid*.

¹¹² *Ibid*. p.123, see Olilvie, M. H. (1984). “Review of Leon Trakman’s *The Law Merchant: The Evolution of Commercial Law*.”, p.115. *Canadian Bar Review*. 62, 113-116. Also see Benson, B. L. (1989). “The Spontaneous Evolution of Commercial Law.” *Southern Economical Journal*. 55, 644-661.

¹¹³ *op.cit*. supra note 89. pp.70-71.

unsuitable for jury determination or required specialist knowledge or expertise.¹¹⁴ Under such pressure, courts began granting requests to make out-of-court submissions subjects of rules of court. According to Kyd,

“This practice does not appear to have begun before the reign of Charles II [late 17th century] for the reports of that period show that it was not before the latter end of that reign that the courts granted their interference without reluctance.”¹¹⁵

Nevertheless, each case meant the payment of fees from which the justices derived much of their living. Competition between the courts for legal business became very bitter with the result that the boundaries of jurisdictions became much less definite or precise. The judges resorted to any subterfuge to attract cases into their courts.¹¹⁶ Thus, early judicial defenders of the revocability doctrine spoke of the courts’ interest, suggesting that the common law judges of England saw arbitration as an undesirable threat to their control of dispute resolution. Still, arbitration remained an option if merchants were willing and able to apply reputation sanctions¹¹⁷.

The late Seventeenth Century, particularly with Sir John Holt, and the eighteenth century with Lord Mansfield, saw court decisions once again explicitly drawing upon customs and usage of English merchants as a source of change in English common law.¹¹⁸

International Arbitration Agreements

In England as elsewhere, pressures from the commercial community were not to be denied. Fierce judicial opposition to arbitration gradually gave way to a wary acceptance of it but under the closest judicial scrutiny, and it was only in the latter half of the twentieth century (and in England, only in the past two decades) that courts finally came to terms with the fact that parties to arbitration agreements want privacy, confidentiality and finality in the settlement of their disputes, and view judicial intervention in the arbitral process or in the review of awards as a measure to be taken only in exceptional circumstances.¹¹⁹

¹¹⁴ Ibid. p.69.

¹¹⁵ S. Kyd, A Treatise on the Law of Awards (London 1791) pp.10-11.

¹¹⁶ See supra note 10.

¹¹⁷ Reputation sanctions as merchants could operate on their political-economic leverage.

¹¹⁸ See supra note 95.

¹¹⁹ See supra note 84.

In summary, because of powerful merchants' role, arbitration is no longer perceived as a tolerated encroachment upon the State's monopoly over justice, but as the ordinary means of resolving international commercial disputes. For parties to an international transaction, arbitration usually affords legal protection and security equal to, if not greater than, that offered by state courts.¹²⁰

3.3 Institutional Aspects of Modern Commercial Arbitration Law

Considering the second aspect of John Austin's concepts of positivism legal theory, this part of the chapter will examine the concept of Anti-Statism as the most institutionalised framework for developing modern international commercial arbitration law in the context of Western legal culture.

3.3.1 The Concept of "Anti-Statism"

It has been shown in the previous part of this chapter how factors within the normative aspect framework of legal positivism in Western legal culture have influenced the development of commercial arbitration law. In this section of the chapter, it is important to examine how Western society came to adopt and institutionalise the new concepts of modern commercial arbitration law. What were the broader cultural consequences of this?

At this point it is important to emphasise that the dispute resolution procedures found in any culture reflect and express its metaphysics and its values. Further, the dispute procedures, because they are so public, dramatic, and repetitive, are in turn one of the processes by which social values and understanding are communicated.¹²¹

The relationship between Western society's culture and its socially-approved means of dealing with disputes has intrigued procedural comparatists and social theorists for decades. Notwithstanding wide acceptance that there is such a relationship, its relevance to pragmatic work of procedural reform remains controversial. The importance of the issues has grown as the globalisation of business and personal activity has created incentives to transplant or harmonise procedures across borders.¹²²

¹²⁰ Homayoon Arfazadeh, *Arbitrability under the New York Convention: the Lex Fori Revisited*. p.78. *Arb. Int'l*. vol. 17. No. 1, LCIA, 200.

¹²¹ See Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*. p. 2. *Am. J. Comp. L.* 2002.

¹²² *op.cit.* 109, pp. 5. For a thorough and insightful discussion of examples and relevant developments, see Gerhard Walter & Fridolin M.R. Walter, *International Litigation: Past Experience and Future Perspective* (2000). See also Taruffo, *supra* n. 1, at 14-18 (describes efforts to harmonise procedures).

3.3.2 Western Concept of “Anti-Statism”

The concept of “Anti-Statism” can take several forms. Some versions of anti-statism stress the idea of sovereignty, noting that this can be located in groups other than the state. These versions fit well with the way, for example, Indian tribes, religious groups, and similar organisations function, evidencing unofficial but state-like authority and law.¹²³ In these versions of anti-statism, an individual belongs to two sovereign groups: state and church or state and tribe. Another version of anti-statism views the individual as belonging to many different kinds of groups, some voluntary and others not, only some of which can comfortably be called sovereign.

Dama Hac Ska (1986)¹²⁴, offers an alternative to the adversarial/inquisitorial categorisation of procedural systems. He posits two dimensions along which types of government can be plotted. The first is concerned with the “structure of government,” i.e., its “character” of authority. The second is concerned with the “legitimate function of the government”, more specifically, views on the purpose to be served by the administration of justice.¹²⁵

He argues that “a nation’s procedures will reflect these fundamental attitudes about government and that this dynamic is observable, albeit imperfectly, in the real world.” Although he does not undertake a country-by-country comparison of procedures, he often distinguishes between continental and Anglo-American systems. He shows how a particular process flows from basic predilections about the form of governmental organisations, and that these vary with historical experiences of particular places. Dama Hac Ska thus shares the view that the cultural grounding of modern disputing institutions is very deep. It is for this reason that, as he notes, “what appears normal in one system can seem grotesque in another.”¹²⁶

To describe the character of procedural authority, Dama Hac Ska’s distinguishes the hierarchical ideal from the coordinate ideal: the structure of the authority (hierarchical or coordinate) informs the process used by that authority. “The hierarchical ideal

¹²³ For an exercise in formal pluralist analysis along these lines, see Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. (1987-88) (analysing the relations between church and state in the United States and using religion as an example of non-state authority). See Carol Weisbord, *Emblems of Federalism* p. 2 U. Mich. J. L. 1992.

¹²⁴For more details see Mirjan R. Dama Hac Ska, (1986) *In The Face of Justice and State Authority: Comparative Approach to the Legal Process*. New Haven, London, Yale University press.

¹²⁵ Dama Ska does not claim that political organisations and goals are the only determinants of legal processes. Significantly, he acknowledges the limits imposed by “existing inventories of moral and cultural experience, the fabric of inherited, beliefs, and similar considerations.

¹²⁶ *Faces of justice*, p. 66.

essentially corresponds to conceptions of classical bureaucracy. It is characterised by a professional corps of officials, organised into a hierarchy which makes decisions according to technical standards”.¹²⁷

The coordinate ideal is “defined by a body of non-professional decision makers, organised into a single level of authority which makes decisions by applying undifferentiated standards.”¹²⁸

The second determinant of the process is the “disposition” of the government to be either a “reactive” or “activist” state. The former simply provides a framework within which citizens pursue their own goals. The administration of justice is typically engaged in conflict-solving. Not so the activist state. It embraces a particular model of the good life and strives to achieve it. Justice can be characterised as engaged in implementing policy. “The legal process of a truly activist state is a process organised around the central idea of an official inquiry and is devoted to the implementation of state policy.”¹²⁹

Dama Hac Ska’s achievement was to create “a framework to examine the legal process as it is rooted in attitudes towards state authority and influenced by the changing role of government.”¹³⁰ While insisting that political factors “play a central role in accounting for the grand contours of procedural systems,” he adds that a government’s choice of procedural arrangements is limited by “existing inventories of moral and cultural experience, the fabric of inherited beliefs and similar considerations.”¹³¹

Here, Dama Hac Ska’s approach is to explore two different sets of antipodes of state authority character: hierarchical versus coordinate authority and the reactive state versus the activist state. These will be discussed in following sections to show that the harmonisation process of commercial arbitration law has been positively influenced by the Western anti-statism type of state authority (as hierarchical ideal and reactive). In contrast, the Middle Eastern statism type of state authority (as coordinate ideal and activist) negatively affects the harmonisation process as will be discussed in the next chapter.

¹²⁷ Faces of justice, pp. 17

¹²⁸ Ibid, pp.38.

¹²⁹ Ibid, 147

¹³⁰ Ibid, pp. 240

¹³¹ Ibid pp. 241

Reactive Disposition of the State

The early arguments for stringent national control of arbitral proceedings (a system of privatised justice) were based primarily upon state concerns with justice. It is argued that, “it is the highest interest of the state to maintain the principle of judicial review of arbitration, not only to develop the law, but also to ensure the administration of justice and thus to avoid the risk of arbitrariness.”¹³²

Western culture found itself facing tension caused by the inherited autonomy of systems of commercial arbitration as privatised judicial systems and the apparent need for these systems to be controlled by, and accountable to, public systems of justice. Western culture was thus obliged to choose between the following two arguments; the public policy argument and the delocalisation argument. The public policy argument contended that the state should have jurisdiction over commercial arbitration given the issue of conflict of laws and national courts’ readiness in appropriate cases to apply a foreign law to a dispute and recognise and enforce judgements of foreign courts. The state’s jurisdiction over commercial arbitration would protect the legitimate expectations the first was the public policy argument and the second was the de-localisation argument of parties to the dispute who would suffer injustice if their reasonable reliance on the applicability of the law having closest connection to the matters at issue were to be frustrated.¹³³

In contrast to such arguments, delocalisation theory¹³⁴ supported international commercial arbitration founded upon party autonomy. In general, it is argued that rather than concerning themselves with abstract notions of justice in dispute

¹³² F. A. Mann, *Private Arbitration and Public Policy*, 4 CIV. Just. Q. 257, 267 (1985). See Theofrastous, Theodore C., *International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localisation*. *Western Reserve J. of Int’l. L.* 1999, vol. 31, 2/3 p.3.

¹³³ *op.cit* 84, pp. 31-32. See Dicey and Morris on the Conflict of Laws (2000, 13th ed.), para. 1-006.

¹³⁴ This theory is well established and has influenced the wording of international conventions from the Geneva Protocol of 1923 to the New York Convention of 1958. The Geneva Protocol states “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place”. This is an example of the of dualism concept in international commercial arbitration practice. On the one hand, the parties have a considerable degree of autonomy in respect of the way in which the arbitration is conducted, with the parties being free to decide on the procedural rules they wish to adopt, expressed by their will. On the other hand, the law of the country in the territory where the arbitration takes place, the *lex arbitri*, possesses the powers to support the arbitral process and intervene where required. See William Langton, (2006). *Is Delocalised Arbitration a viable option in international commercial arbitration?* www.Williamlangton.blogspot.com.

resolution, parties seek complete autonomy, or certainly very high levels of it, in the arbitration process as the most efficient means of settling disputes.¹³⁵

The delocalisation theory has, however, been criticised for in fact undermining the concept of party autonomy. If, following annulment of the award, the parties engage in fresh arbitration, appointing the same or a new panel of arbitrators, and pursue the proceedings to a second award, why should not the consensual basis of the new arbitration proceedings, and implicit acceptance of the nullity of the original award, be respected? Why should the will of the parties be disregarded? And if it is conceded that it should not be disregarded, we are left with the position of two separate, and possibly conflicting, awards covering the same dispute, both of them having to be treated as valid under the theory of delocalisation.¹³⁶

Conflict between the parties' objective to have a private legal system in which their autonomy is respected and the state's concerns to maintain its national courts' jurisdiction over the arbitration procedures on the one hand and gain the benefit of international trade on the other, demonstrates clearly the reactive disposition of the state in Western culture. The following part will discuss some features of anti-statism in Western culture.

3.3.3 Some Features of Anti-Statism in Western Legal Culture

Over the past several decades, the concept of de-localisation has had a dramatic impact on the international accords which govern arbitral proceedings and awards. Though early conventions clearly favour state control, later conventions and declarations demonstrate a willingness to balance individual objectives against those of the state. The desire to fix proceedings to the state is evidenced by the language of the Geneva Protocol of 1923, whereby "the arbitral procedure and constitution of the arbitration were governed by similar language found in the Geneva Convention for the Execution of foreign arbitral awards of September 26, 1927, which had the effect of mandating that the constitution of the tribunal and the arbitral procedures be in conformity with the law of the place of arbitration and be governed by the *lex loci arbitri* of the situs."¹³⁷

¹³⁵ *op.cit.* 123, p. 4 See e.g. Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, 52 *Disp. Resol. J.* 24, 25 (1997) (equating party autonomy to the commercial freedom to contract).

¹³⁶ *op.cit.* supra note 84 p.33.

¹³⁷ *op.cit.* 123. See LDIP art. 190(2) (Switz.), translated in *Switzerland's Private Law*, supra note 154.

A response to what some felt to be the unworkable nature of these agreements came in the form of the 1958 New York Convention on the Recognition and Enforcement of Arbitral awards. The enactment of this convention marked a turn towards increasingly de-localised international commercial arbitration. The most significant step towards de-localisation at the national level has come from the Model Law developed by the UNCITRAL and adopted in 1985. Unlike the New York or Geneva Conventions, the Model Law was intended as *a lex loci arbitri*¹³⁸ for any state which decided to adopt it.¹³⁹

Furthermore, international arbitration with participants from each side of the common law-civil law divide has traditionally required arbitrators to follow the practice of one party or the other at each stage of the arbitration. In recent years, however, converging practices have emerged that embrace elements of both systems.

These converging practices are rapidly gaining acceptance in international arbitration as a middle ground acceptable to parties from both sides of the divide.¹⁴⁰ It is unlikely that the common law and civil law approaches to advocacy and proof will ever fuse into a single set of procedures for international arbitration; nor is it desirable that they should.¹⁴¹ In the following part, the concept of anti-statism in Europe and the USA will be discussed to see to focus how it improves the harmonisation process of international commercial arbitration.

Anti-Statism in Europe

The localisation tradition was the English requirement of the “special case” or “case stated” procedure in arbitration. This procedure, dropped by the Arbitration Act of 1979, not only provided for the English High Court to hear challenges to any award granted in England, but also provided for the uniquely English concept that the arbitral proceedings could be challenged before the arbitral forum had reached a conclusion termed the “consultative case”.¹⁴²

¹³⁸ A Latin term for “law of the place where arbitration is to take place” in the conflict of laws. See Gary L. Benton, (1997). *The Arbitration of International Technology Disputes under the English Arbitration Act 1996. Arbitration International*, vol. 13, No. 4. LCIA. p. 361

¹³⁹ *Ibid.* p. 5. See also, Martin Hunter et al. *The Freshfield’s Guide to Arbitration and ADR*. 32 (Kluwer 1993). Although, in the case of Europe, it would seem that the Model Law has been more inspirational than legally effective. As of this point, only Scottish and British arbitration laws have been largely based on the Model Law.

¹⁴⁰ See Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration. Arb. Int’l.* vol.18, No. 1, LCIA, 2002. p. 59.

¹⁴¹ *Ibid.* p.65.

¹⁴² *op.cit.* 123, p. 3. See *Relaxation of Inarbitrability and Public Policy checks on U.S. and Foreign Arbitration: Arbitration out of Control*. Although some questions of fairness may be couched in terms

In the 1960s and 1970s there was considerable debate about which European country provided the best legislative conditions for international commercial arbitration.¹⁴³ European nations that have recently or are in the process of adopting arbitration laws have tended to favour a de-localised, pro-autonomy approach to the law. This means that the sites of arbitral proceedings matter less, and maximum party autonomy is generally found in any of the nations which have updated their arbitral laws in the last two decades.¹⁴⁴

As a result, the law governing international commercial arbitration in European nations has become increasingly de-localised in recent years, and this trend is spreading.¹⁴⁵ A considerable number of European countries having recently revised laws to accommodate the demands of international arbitration (including France, Belgium, the Netherlands, Switzerland, the United Kingdom, and recent modification in Italy and Germany). Generally, these laws have demonstrated preference for de-localised arbitral proceedings.¹⁴⁶ However, all European nations have not subscribed to complete delocalisation.¹⁴⁷

For example, French law does not provide any special procedures for international arbitration, but where the parties have not expressly chosen to be governed by French procedural law, the arbitrators are free to apply the arbitration procedures agreed to by the parties, including foreign arbitration law procedures if the parties so agree.¹⁴⁸

Under the Swiss regime, a state, a state-held enterprise or a state-owned organisation, as a party to an agreement, can neither rely on its own law for the purpose of challenging its own capacity nor can it invoke its own laws to contest the arbitrability of the dispute at hand. Thus, a state cannot frustrate arbitration by denying its capacity to enter into an agreement providing for the arbitration of disputes by arguing, for example, that the arbitration clause had not been approved by a specific council.

of control and comfort with the arbitral process on the part of the judiciary. Also see Carig et al. *International Chamber of Commerce Arbitration* (2nd edn. 1990) (discussion of traditional constraints on the choice of Arbitration Law (*lex arbitri*))

¹⁴³ *op.cit.* 43, p. 8. See Michael J. Mustill, *Arbitration: History and Background*, *J. Int'l. Arb.* June 1989, at 43.

¹⁴⁴ See *supra* note 123, p. 11.

¹⁴⁵ *Ibid.* p.9.

¹⁴⁶ *Ibid.* p.6.

¹⁴⁷ *Ibid.* p.3.

¹⁴⁸ *op.cit.* 43, p. 9. The Judgement of July 5, 1995 (*Monier v. Scali Freres*), *Cour d'appel de Paris*, reprinted in 1956 *Revue De L'arbitrage* [*Rev. Arb.*] 48. A dispute regarding the quality of sale of goods arose under a contract providing for arbitration in Paris which was "to follow English jurisdiction exclusively." The court found that the parties had waived any right to appeal under French law as they had agreed that the arbitration was to be governed by English procedural law which the court found (perhaps erroneously) did not provide for appeal in the circumstances.

Similarly, a state cannot deny the objective arbitrability of a dispute by employing the argument that the controversy involves a matter which is not arbitrable under its own laws.¹⁴⁹ In *Fincantieri-Cantieri Navali Italiani SpA v. Oto Melara* of June 1992, the Swiss Federal Tribunal (Bundesgericht) held that the issue of arbitrability has to be determined irrespective of the validity of the contractual obligations under the Lex clause. As a result, foreign (as well as Swiss domestic) mandatory rules of law do not function as barriers to arbitrability. The *Fincantieri* case not only underlines the existence of an arbitration-friendly environment in Switzerland, but also illustrates the Swiss tendency to lessen statutory or other limitations and to reduce the impact of public policy concerns with regard to arbitrability. Swiss courts expect arbitrators to apply public policy rules with all other rules of law in settling disputes that have been put forward to them.¹⁵⁰

Anti-Statism in the United States of America

Historical Position of Courts

Prior to the passage by New York (1920), New Jersey (1923), the Federal Government (1925), Oregon (1925), Massachusetts (1925), Pennsylvania (1927) and California (1927), of statutes commanding their common law courts to enforce arbitration agreements and rulings, agreements to arbitrate were generally not considered binding under US Common Law, and at least for a portion of US history

¹⁴⁹ Article 177(2) of Swiss Private International Law Act (PIL) has been a legislative milestone in international commercial arbitration: Switzerland was the first country to explicitly restrict the objections of states and state-controlled organisations disputing arbitrability by invoking their own national law. The PIL incorporated ‘those fundamental ideas which are embodied in a whole series of important arbitral awards’: see Marc Blessing, Introduction ideas to Arbitration: Swiss and International Perspectives (2000), p. 183. For a sample list of such awards see Blessing, *supra* n. 31 at pp. 9, 27-28.

¹⁵⁰ *op.cit* 78, pp. 35. Seminal in this respect is case law developed in the area of competition law. Many contracts with perceived adverse effects on competition provide not only for arbitration in Switzerland but also for the application of Swiss law. Because of the validity of such contractual arrangements, one might be inclined to think that Switzerland provides a ‘safe haven’ as far as potential violations of (usually mandatory) competition laws are concerned, for example, contravention of European antitrust laws, as such laws could potentially be evaded by employing a contractual regime that explicitly excludes the application of European competition law. This, however, is by no means so: in *Ampaglas v. Sofia* (Chambre de Recours du Tribunal Cantonal du Canton de Vaud, De’cision du 28 Octobre 1975, commentated in (1981) III Journal des Tribunaux 71), the Chamber de Recours of the Canton of Vaud held obiter dictum that an arbitrator is entitled to scrutinise a contract under the notion of arts 85 st seq. of the EC Treaty, irrespective of contractual provisions seeking to limit such a standard of review. The holding of *Ampaglas* was confirmed by the Bundesgericht in *G. SA v. V. Spa* in 1992 (BGE 118 II 193), where the court held that arbitral tribunal sittings in Switzerland not only have authority, but are obliged to scrutinise a contract as to whether it is in compliance with EC competition laws.

prior to the 1920s, hostile judges felt free to overturn arbitration decisions if one of the parties chose to litigate.

How the Position Has Changed

In the United States, the development of a concept regarding arbitrability is predominantly a matter of case law. The courts, over time, have set forth limitations to the parties' freedom to arbitrate disputes in specific areas of law, namely, with respect to controversies arising in connection with such areas of law that were traditionally considered to be within the exclusive domain of state and federal courts.¹⁵¹ As a result, certain types of cases, in particular those involving strong public interest, were considered as being non-arbitrable. Over the last couple of decades, however, US courts have more and more taken an arbitration-friendly view. As a consequence, the effects of public policy considerations limiting the arbitrability of certain types of controversies have been reduced as will be discussed in cases.¹⁵²

Scherk v. Alberto-Culver Co. (1974), marks the beginning of a more liberal approach of the US Supreme Court towards arbitration. The case involved the questioning of the arbitrability of claims under the Securities Exchange Act of 1934.¹⁵³ Some 20 years prior to this decision, in *Wilko v. Swan (1953)*, the US Supreme court had held that disputes under the Securities Act of 1933 were not arbitral. It reasoned that the right of an individual to select a judicial forum could not be waived under the Securities Act of 1933. The US Supreme Court also voiced concerns with respect to the review of an arbitrator's decision on securities law matters by the courts, and it finally concluded that the effectiveness of the remedies available under the Securities Act of 1933 would be lessened in arbitration as compared to judicial proceedings.¹⁵⁴

In such cases, the need for international commerce to enforce arbitration procedures would prevail over other public policy considerations.¹⁵⁵

¹⁵¹ See supra note 78, pp.28-29.

¹⁵² See *Vimar Seguros Y Reaseguros, S.A.v. M/V Sky Reefer et al.*, 515 U.S. 528 (1995); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991) *Shearson/ American Express, Inc. v. McMahon*, 428 *op.cit.* 78, p. 29. U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.* 417 U.S. 506 (1974); *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F. 3d 1110 (3d Cir. 1993); *Saturday Evening Post Co. v. Rumbleseat Press Inc.*, 816 F. 2nd 1191 (7th Cir. 1987); *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F. 2nd 228 (2d Cir. 1982); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819 (E.D.N.Y. 1995).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* *Scherk v. Alberto-Culver.*

“The invalidation of such an agreement [to arbitrate] ... would reflect parochial concepts that all disputes must be resolved under laws and in our courts... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our law, and resolved in our courts.”

In *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.* (1985), the US Supreme Court expanded the general guidelines established in *Scherk* to antitrust disputes, which until that time had been deemed to be non-arbitrable. Prior to *Mitsubishi*, the opinion prevailed that the state and its courts have the duty and responsibility to promote national interests by enforcing antitrust law. Arbitration, with its confidential and private character, was perceived as not suited for the resolution of antitrust matters. It was feared that public interests might be unjustifiably excluded ‘behind the closed doors’ of an arbitral proceeding. The US Supreme Court concluded:

“That concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”¹⁵⁶

In *Shearson/American Express v. McMahon* (1987), the court expanded *Mitsubishi* to allow arbitration of claims arising under Racketeer Influenced and Corruption Organisations Act (RICO) 1964 and the Securities Exchange Act of (1934) because the arbitration clause in question covered such claims. The *McMahon* court relied on the Federal Arbitration Act (FAA) 1954 to allow arbitration of the claims under the 1934 Act even though section 29(a) voids a waiver of any provision of the Act. The court stated that this language only applies to the substantive, as opposed to procedural, provisions of the 1934 Act. The *McMahon* court also stated affirmatively that the burden of proof was on the party opposing arbitration of claims arising under the statute.¹⁵⁷

¹⁵⁶ *Ibid.* p.30.

¹⁵⁷ *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987) (stating that, by its terms, § 29 (a) only forbids waiver of substantive obligations under the ’34 Act). (Requiring claimants to demonstrate congressional intent to expect a statutory claim from FAA coverage to avoid arbitration). See Brian K. Van Engen, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of*

In *Rodriguez de Oujias v. Sherason /American Express, Inc.*(1989), the court held that an agreement to arbitrate statutory claims, including those brought under the 1933 Act, was enforceable. In reaching this holding, the court found it necessary to overrule *Wilko v. Swan*, which had previously held that the 1933 Act prohibited waiver of a judicial forum. The Gardner-Denver Court had relied on *Wilko* to some extent, but the *Rodriguez* Court made no mention of the effect of this ruling on the *Gardner-Denver* line of cases.

This shows how the concept of anti-statism has developed over time within US courts' decisions that a dispute is arbitrable (subject to arbitration) if it involves any sort of economic interest, regardless of whether the underlying transaction is commercial or private in nature, and whether the respective controversy involves civil, administrative or public law, or international public law.¹⁵⁸

In summary, the change in the reviewed position in Europe and the United States illustrates a steady trend towards a more liberal approach regarding acceptance of arbitration in disputes that involve a great degree of public interest. This shows the shift of the focus of state control over arbitration procedures to a different stage, yet international arbitration as an "institution" has taken a significant step forward since it is positively advocated for the harmonisation process of commercial arbitration.

3.4 Coercive Aspect of Modern Commercial Arbitration Law

This part of the chapter will focus on the third aspect of John Austin's legal positivism theory, which is the "coercive" concept, in an attempt to examine the process of acceptance of international commercial arbitration in the West. At the centre of the controversy is the need to explain the basis on which such a parallel and private method of dispute settlement gained acceptance and obedience. The point here is to focus on two views to explain the legal character of obedience concepts; first is the "contract nature" of modern commercial arbitration law, and second is the "judicial character" of the modern law.

Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend. p. 400. J. of Corporation Law. 1996.

¹⁵⁸ Ibid. p. 34. See also, Marc Blessing, 'The New International Arbitration Law in Switzerland, A Significant Step Towards Liberalism' in (1988) 5 *Journal of International Arbitration* 9 at p. 24; see also Frank Vischer, 'Artikel 177' in Anton Heini et al. (eds, IPRG-Kommentar (1993), p. 1500; Bucher, supra n. 30 at p. 41; Ruede and international en Suisse (1989), p. 305; Walter, Bosch and Bronimann. Internationale Schiedsgerichtsbarkeit in der Schweiz (1991), p. 58; Briner, supra n. 30 at p. 317.

3.4.1 The “Contract Nature” of the Modern Arbitration Law

In Western legal cultures, the contract tends to constitute a complete definition of the relationship between the parties. Arbitration as a contract is built on a number of factors, all pointing to the control which the parties themselves, more than the courts or the legislator, have over the process. To begin with, in a normal commercial transaction the parties are not compelled to enter arbitration. They will initially have voluntarily entered into this particular method of settlement. It is also the fact that the parties have agreed to be bound by the award of the tribunal even if enforceable against them. However, if the parties choose to treat the award as not binding it will lose its effect, in which case it may be regarded as a mere attempt at friendly settlement.¹⁵⁹

These rules came to dominate the Law Merchant “commanding merchants to do that which they themselves had promised to do”. The agreement was the overriding factor in regulating business conduct. Thus, many rules developed about and through contracting, and much of the merchant courts’ business was focused on contract issues.¹⁶⁰ Not surprisingly, such a rule was behind the success of arbitration in Old England, in Liverpool, which led to its adoption by other trade groups (firstly by large commodity dealers e.g., corn, oil seed, cotton and coffee followed by stock dealers and produce merchants) in other locations, including London, within a short period of time.

Then professional associations of architects, engineers, estate agents and auctioneers took up the practice, regularly putting arbitration clauses in all contracts to guarantee that disputes over transactions would not go into government courts. “By 1883 a correspondent of the *London Times* could write that ‘whole trades and professional have virtually turned their back on the courts’...Once ‘private courts’ were tried their advantages quickly became apparent”.¹⁶¹

¹⁵⁹ See George Elombi, *Arbitration of International Commercial and Investment disputes: Are the Misgivings of Developing States justified?* p. 44, 1996. Un-published thesis.

¹⁶⁰ *op.cit.* 10, p. 119 See Trakman, L. E. (1983). *The Law Merchant: The Evolution of Commercial Law*, Littleton, CO: Fred B. Rothman and Co. pp. 18, 10.

¹⁶¹ *Ibid.* p. 127. Wooldridge, W. C. (1970). *Uncle Sam, The Monopoly Man*, New Rochelle, NY: Arlington House. p. 99.

Intention of the Parties

Regardless of the different views as to whether the contract is made at the moment when a letter of acceptance is posted or the moment when the letter is received,¹⁶² the contract's conclusion by "offer" and "acceptance" is a common principle. It is said that arbitration is based on a contract by two or more persons in dispute to have their differences settled by a neutral third party.

The contract therefore arises from the parties' desire to see the dispute resolved in a manner and following the rules determined by them or their appointees on their behalf. In that sense, the process is entirely theirs as created and controlled by them. It is the parties' intention that appoints the arbitrators, determines the issues to be resolved and sets out the procedure for the arbitrators. Even though the convention's formation provisions use the terms "offer" and "acceptance", it would be a mistake to assume that these words carry the detailed meanings given to them in Anglo-American or Western European law.¹⁶³ In general, the contract is based on and regarded as the expression of the parties' will, provided that in doing so they stay within the limits of the law.¹⁶⁴

Alan Redfern and Martine Hunter (1991)¹⁶⁵ consider the agreement between the parties to an arbitration as "the foundation stone of modern international commercial arbitration", as no arbitration will take place without the consent of the parties involved in the dispute.

Redfern highlights the overriding importance of consent in arbitration proceedings by reference to well known cases, in which the Court of Appeal of Paris, and later the French Supreme Court,¹⁶⁶ reversed an ICC award on the grounds that the government of Egypt was not bound by the arbitration clause to which it was not a party.¹⁶⁷ Unlike litigation, therefore, one party cannot by unilaterally initiating the process compel the other disputant to a settlement by arbitration. The entire institution is thus based on

¹⁶² See Philip C. Jessup, *Diversity and Uniformity in the Law of Nations*, p. 353. *Am. J. Int'l. L.* 1964 vol. 58.

¹⁶³ See Amy H. Kastely, (1988). *Reflections on the International Unification of Sales Law: Unification and Community: A Rhetorical analysis of the United Nations Sales Convention*. p. 14. *NW. J. Int'l. L. & Bus.* 574.

¹⁶⁴ See *supra* note 157.

¹⁶⁵ See Alan Redfern and Martin Hunter. *Law and Practice of International Commercial Arbitration*. Second edition 1991. Sweet and Maxwell. p. 74.

¹⁶⁶ *op.cit.* 157, p. 52. Decision of 6 January 1987 [1988] 13 *Yearbook Comm. Arb'n.*

¹⁶⁷ *op.cit.* 157, pp. 52, See also ICSID awards on jurisdiction of 27 November 1985 and 14 April 1988, including the annulment award on jurisdiction of 14 December 1989 [1991] 16 *Yearbook Comm. Arb'n.*, pp. 19, 28 and 40 respectively, where an ICSID tribunal accepted jurisdiction. The award on the merits of 20 May 1992 is reported in [1993] 8 *ICSID Rev., -FILJ.*, 328

the principle that the process is consensual in nature and that, in the absence of that consensus, it will not come into existence.

The same could be said about the common law system. In the United States in 1925, Congress enacted the Federal Arbitration Act 1954 (FAA) which was intended to place arbitration agreements on an equal grounding with other, more accepted contractual arrangements. More importantly, it was made mandatory for the courts to stay court proceedings pending arbitration in accordance with the agreement. According to the Supreme Court, the FAA:

“Establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defence to arbitrability.”¹⁶⁸

In addition, Section 3 of the Federal Arbitration Act FAA, provides that, “[i]f any suit or proceeding is brought ... upon any issue referable to arbitration under an agreement ..., the court... shall on application of one of the parties stay the trial of the action until such arbitration has been had ...” This provision demands that, should a court determine that an issue is covered by a written agreement that provides for arbitration, the court must stay proceedings and allow arbitration of the covered issue or issues. The Supreme Court maintains that this provision “leaves no place for the exercise of discretion by a district court in the matter. This basically means that once a court finds an issue is within the scope of an arbitration agreement, it has no jurisdiction over the issue. However, a court must stay proceedings under these circumstances only if the FAA applies to the agreement containing the arbitration clause.¹⁶⁹ Further, under Section 4, an aggrieved party can apply to the competent court for an order directing that the arbitration proceed as provided for the contract, thus ensuring specific performance of the agreement.¹⁷⁰

¹⁶⁸ *op.cit.* 152, p. 393. See Also, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (discussing the presumption of arbitrability created by congressional enactment of the FAA).

¹⁶⁹ *Ibid.* pp. 393-394. See also the discussion the purpose and function of the FAA, the rejection of arbitration for statutory claims under *Gardner-Denver*, and the allowance of arbitration of statutory claims under the *Mitsubishi* trilogy. Also see 9 U.S. C. §§ 1-2 (1988) (providing the exceptions to the FAA and naming the types of agreements covered by the FAA).

¹⁷⁰ For an overview of the specific enforceability of an arbitration agreement in the United State see Born, Gary B., *International commercial Arbitration in the United States. Commentary and Materials*, Kluwer, Deventer, 1994, pp. 183-191.

While this ruling occurred before the common law doctrine of binding contracts was fully formed, as common law began enforcing all contracts to which parties intended to bind themselves,¹⁷¹ courts in Common Law countries typically would not order such a contract variation in litigation because they felt they lacked authority to write or rewrite the contract for the parties. We find German law and the laws of some other civil law continental European countries confer somewhat wider power to judges for variation of contracts in order to adapt them to a fundamental change of circumstances.¹⁷² The question underlying the issue of forum-specific arbitration law is whether, in the name of party autonomy and seeking higher levels of certainty, parties should be completely free to choose the forum, procedure, and substantive rules of an arbitral proceeding, without limitation by national legislation.¹⁷³

Binding Authority

As per Roman law, Western culture provided arbitrators as private judges with binding authority over contractual matters.¹⁷⁴ Therefore, the parties had little control over the process. The cause remained pending within the jurisdiction of the court; once they submitted, parties could not revoke the arbitrator's authority without the court's consent, nor wilfully hinder the arbitral proceedings, nor refuse to abide by the award without exposing themselves to penalties for contempt just as if they had impeded the judicial process or ignored court judgement.¹⁷⁵ The idea that arbitration has its origin and exists only by virtue of the agreement of the parties concerned is not merely an abstract principle of Western arbitration theory.¹⁷⁶ In *Holford v. Lawrence*

¹⁷¹ *op.cit.* supra note 10, p. 123.

¹⁷² *op.cit.* 123, p. 2. For a brief comparative analysis, see *Adaptation and Renegotiation of Contracts in International Trade and Finance* (ed.) Horn (1985). See Norbert Horn, (2000) *The Development of Arbitration in International Financial Transactions*, pp. 283, *Arb. Int'l.* vol.16, No. 3, LCIA, 2000

¹⁷³ Becoming in effect, an "a-national Arbitration." see Hans Smit, *A-National Arbitration*. 63 *Tul. L. Rev.* 629, 631 (1989).

¹⁷⁴ *op.cit.* 43, p. 3. The difference between the award of the arbiter, which did not have any effect in law, and that of the arbitrator, which created a contractual obligation (although without executory force), was destined to have an influence on the concept of arbitration as spelled out in modern civil codes, and the issue of whether arbitration is a matter of contract or of procedure. Professor David's magisterial study of arbitration from a comparative law point of view is a unique resource. For an overview, see Rene David, *Arbitration in International Trade: A Book Review*, in *The Art of Arbitration* 89 (Jan C. Schultsz & Albert J. van den Berg eds., 1982). For a view of arbitration from earlier times based on classical sources, see Douglas M. Macdowell, *The Law in Classical Athens* 203-11 (1978).

¹⁷⁵ *op.cit.* 89, p. 71. It was not until about 1670 that courts became more willing to use attachment as the penalty just as in contempt.

¹⁷⁶ See supra note 157, p. 52.

(1695), the court upheld the power of the judge to compel the parties to abide by the award.¹⁷⁷

As a consequence, it has been said that parties should avoid any ill-considered compromise in their arbitration clause, where the cardinal sin of drafting an arbitration clause is ambiguity.¹⁷⁸ Too often parties agree to arbitration as the form of dispute resolution, but give little attention to the form the arbitration should take. It can be a very expensive mistake to treat the drafting of an arbitration clause lightly. The choice of the arbitration institution, the arbitration rules that are to apply, the number of arbitrators, the place of the arbitration, and the applicable substantive law should all be carefully considered.¹⁷⁹

If the undertaking is honoured and the parties cooperate in the arbitration in important respects, the law does not interfere with their freedom to direct the conduct of the process and its outcome. They define the issues to be resolved, they appoint the members constituting the tribunal, they determine the scope of the tribunal's jurisdiction (which they may further limit or terminate altogether), and they set out the procedure and decide what material to accept or exclude in evidence. In general, however, the trend is to confer the tribunal with wide powers to decide on all or most of these issues. For that reason the award itself has sometimes been regarded as an act of the parties themselves, brought about through the agency of the tribunal.¹⁸⁰ Further, the parties can vary the award if they choose to do so.

Thus, the parties retain control at all three stages of the process: they bring it into existence; they determine the procedural and substantive issues and, eventually, the outcome of the arbitration. It is particularly this capacity to exercise overall control of the process and the fact that it is the agreement of the parties which makes this possible, including an agreement to be bound (or what the law regards as such), that strengthens the contractual nature of the process.¹⁸¹

¹⁷⁷ *op.cit.* 89, p. 72. As shown by the case of *Hide v. Petit* (1670) 1 Ch. Cas. 185, 22 E. R. 754 (Ch.), (1695) 88 E. R. 1182 (K.B.)

¹⁷⁸ In the content and drafting of the arbitration agreement see generally W. L. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (3rd edn. Oceana Publications, 2000), chs. 6-9. See Bernardo M. Cremades (Nov. 2002/ Jan. 2003). *Managing Discovery in International Arbitration*, p. 76. *Dispute Resolution Journal*, Nov. 2000/ Jan.2003.

¹⁷⁹ *Ibid.*

¹⁸⁰ See *supra* note 157, p. 46.

¹⁸¹ *Ibid.*

3.4.2 The Judicial Character of Modern Arbitration Law

The “Judicial Character” of modern arbitration law will be examined as the second aspect of obedience to commercial arbitration law in Western legal culture. Reference will be made to similarity with the practice of ordinary courts of law in civil and judicial matters in support of the judicial character of arbitration. It is treated as judicial in that it is essentially a “method”, i.e. a procedural means of settling a dispute.

Judicial Characteristics of Arbitration

The traditional Western view is that the conciliation process should be separate from the arbitration process and that the same person who acts as conciliator should not act as arbitrator in the same dispute. It is thought that offers to compromise and disclosures of confidential information made during the conciliation process might affect the ability of the conciliator to act as an arbitrator in the same dispute.¹⁸²

Further, the Western view of the role of arbitrator is as unbiased seeker of the “truth”, who then strictly applies the law to the truth which has been discovered and renders a decision based solely on such application without regard to its effect upon the parties’ relationship. An example of the prohibition of the combined roles is the United Nations Commission on International Trade Law is (UNCITRAL) Rules of Conciliation which do not permit a conciliator to act as an arbitrator in the same dispute. Often Western statutes and rules (e.g. the California Code of Civil Procedure) merely express a disposition against such a combined role.¹⁸³

Pierre Lalive (1984) has emphasised that a neutral arbitration site has three characteristics: equal treatment of the parties (concrete neutrality); non-allegiance to any relevant political “bloc” (political neutrality); and an appropriate legal environment (judicial neutrality).¹⁸⁴

The concept of the judicial character of arbitration brings into focus debate about the cultural deviation between the common law and civil law arbitration procedures. In one aspect of arbitration procedure - disclosure of information - the philosophy of common law discovery is that “prior to trial every party to a civil action is entitled to

¹⁸² See M. Scott Donahey, (1995). Seeking Harmony: Is the Asian concept of the conciliator/ arbitrator applicable in the West? p. 76. *Dispute Resolution Journal*, April 1995.

¹⁸³ Ibid. p.78. See also, Optional Conciliation Rules of the International Chamber of Commerce, art. 10; California Code of Civil. Procedure. Section 1297. 393

¹⁸⁴ *op.cit.* 43, p. 7. See also Pierre Lalive, on the Neutrality of the Arbitrator and of the Place of Arbitration, in Swiss Essays on International Arbitration 23 (Claude Reymond & Eugene Bucher eds., 1984).

the disclosure of all relevant information in the possession of any person, unless the information is privileged. The seminal US Supreme Court decision *Hickman v. Taylor* (1947) described the discovery process in the Federal Rules of Civil Procedure as having a “vital role in the preparation for trial ... as a device ... to narrow and clarify the basic issues between the parties, and ... for ascertaining the facts or information as to the existence or whereabouts of facts, relative to those issues....”. The Court said, “The way is now clear, consistent with recognised privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial....”¹⁸⁵

In contrast, the civil law systems of Europe emphasise the principles that each party has the burden of providing its own case, and that the opposing party should not be forced to incriminate itself, or assist in the case against it. As a leading Swiss lawyer has explained, “We feel that the principle *onus probandi incumbat alleganti* (The Burden of proof rest upon he who alleges) excludes the possibility of obtaining the help of the court to extract evidence from the other side.”¹⁸⁶

As a result, it is not uncommon that judges, particularly in civil law countries, put some pressure on the parties to reach a settlement. In common law countries, with their more adversarial procedures, the role of the judge is historically more limited and the parties become the driving forces behind the proceedings. Keeping this in mind, arbitrators with parties from a common law background are often very careful to avoid taking an active role in promoting a settlement. Blatant pressure from the arbitrator and even unsolicited proposals are often seen as possible reasons to challenge the impartiality of an arbitrator. Therefore, direct settlement proposals are usually only given if the parties explicitly require the tribunal to do so.¹⁸⁷

Here, the converging practice tends to be accommodation of both traditions. Arbitrators will generally accept written legal arguments in whatever format the parties prefer them, whether as briefs or as pleading notes, and will generally listen to whatever style of oral argument the lawyers wish to present. Most international lawyers now expect code provisions, commentary, and case law to be advanced as persuasive, with the relative weights assigned to each influenced by the substantive law that applies to the dispute.¹⁸⁸

¹⁸⁵ *op.cit.* 175, p. 74. C. A. Wright, *Law of Federal courts* (4th edn. West Publishing, 1983) at 500.

¹⁸⁶ *Ibid.* p. 74.

¹⁸⁷ See *supra* note 169, p. 294.

¹⁸⁸ See *supra* note 133, p. 65.

International arbitrators now expect to hear experts presented by the parties, either by reading their reports or by hearing their oral testimony, or both.¹⁸⁹ Most arbitral tribunals now allow counsel for the parties to question witnesses first before they ask their questions, if only for the sake of projecting an impression of even-handedness. That impression is generally well served by allowing the parties to ask the difficult questions, and for the tribunal to do so only if the questions asked by the parties fail to bring out the points in which the tribunal is interested.¹⁹⁰ At best, the judicial procedure characteristics have been maintained.

Another aspect of the judicial character of arbitration procedure is the scope of the arbitral tribunal. In this sense, the tribunal is strictly limited to the specific question placed before it by the parties and it has to deal with the matter in equity, law and fact. Such an issue raises the question of tribunal authority. It has been said by George Ridgeway (1923) that a judge in a domestic court is invested with the power of the state and can ultimately enforce his or her will on the parties, using the power of the state to punish, if necessary. Arbitral tribunals derive their authority from the consent of the parties and, although they might ultimately have considerable power over recalcitrant parties, in practice, tribunals prefer to encourage voluntary compliance and avoid testing the limits of their authority.¹⁹¹

This idea is clear in the ICC Arbitration Rules of 1923¹⁹² which provides only that the parties are “honour bound” to carry out the award of the arbitrators. It is expected that moral norms and “the force that businessmen of a country can bring to bear upon a recalcitrant neighbour” will be sufficient to ensure respect of arbitral awards.¹⁹³

The court retains an inherent jurisdiction over the process and, therefore, can exercise its discretion when converting the award into a judgement and can intervene in the

¹⁸⁹ Ibid. p. 64.

¹⁹⁰ Ibid. p. 63.

¹⁹¹ op.cit. See supra note 175, p. 77.

¹⁹² The most important and oldest institution in the field of arbitration is the International Chamber of Commerce, Paris. The International Court of Arbitration of the International Chamber of Commerce (the "ICC") is the arbitration body of the ICC. The Court does not itself settle disputes. The function of the Court is to provide necessary facilities for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the ICC if so empowered by an arbitration agreement between the parties.

¹⁹³ op.cit. 43, p. 4. See George Ridgeway, Merchants of Peace 322 (1938), quoted in W. Laurence Craig, William W. Park & Jan Paulsson, An International Chamber Of Commerce Arbitration xxi (2d ed. 1990).

event of arbitrator error or misconduct. Therefore, arbitration takes place directly under the court's supervision and has to conform to judicial standards. The award has to be one which the court will enter as a judgement, and because the arbitrators can impose their award through the court, they can issue unicentric (conclusively deemed acceptance of the award), non-conciliatory awards conforming to the style of the judicial award.¹⁹⁴

Arguably, the problem of balance begs the question of control. When enforcement depends on the goodwill and cooperation of the participants, the parties are allowed complete control over the process without court intervention. If courts are to be used to enforce the process, to what extent should they be allowed to control the process? The answer evolved over the next two centuries.¹⁹⁵ Overall, the establishment of an effective adjudicative use of arbitration increased the possible level of coercion in out-of-court references.

¹⁹⁴ op.cit. See supra note 89, p. 71.

¹⁹⁵ Ibid. p. 72.

CHAPTER FOUR

Philosophical Basis of the Legal Theory Underlying International Commercial Arbitration in the Middle East Region

The previous chapter considered the philosophical legal theory underlying modern international commercial law by applying John Austin's concept to modern international commercial arbitration to explain how this law has been developed and to highlight its main characteristics. It shows that modern international arbitration law has been created and developed in ways which predominantly reflects Western legal culture and legal philosophy.

This chapter will now examine in a similar light the philosophical legal concept of international commercial arbitration as understood in the Middle East region. The chapter will analyse significance differences of legal thought between the two regional perceptions as a direct product of regionalism. The purpose is not to examine in general these differences, or the legal cultural deviation, since this in itself is not the aim of this research, rather, the objective is to show later how these differences – regional legal, culture - influenced attempts to harmonise the modern arbitration law in the Middle East region.

4.1 Normative Aspect of Commercial Arbitration in the Middle East Region

Chapter Three critically analysed the normative concept of Modern commercial arbitration law constrained by social norms. We saw it broken down into main characteristics, in which “competition”, whether inter or intrajurisdiction, enhanced its continuous reform and development. The analysis also showed how one of the most important characteristics of the Western philosophical phenomenon of “individualism” emerged in ideological legal thinking and was reflected in the “party autonomy” and “self-regulation” of commercial law. It also showed how the normative concept of “merchants’ behaviour” in the West was an essential factor in development of the modern law, whether at the national level by merchants establishing their own courts, or at the international level as shown in the development of international arbitration agreements.

In the Middle East region, the scheme is reversed. The emphasis shifts from the individual to the general. The collective interest is paramount and individualism submerged. The existence of the collectivism concept is rooted very deeply in the Middle East region and dominates the culture in general and legal thinking in particular. This domination is a consequence of socio-economic, customary and religious factors.

4.1.1 Middle East Collectivism

It has been already shown how the concept of individualism dominates the culture of legal thinking in modern commercial arbitration law. It also has been said that this concept “favours tasks over relationships, individual reward over group reward, competition over cooperation and individual accountability over group responsibilities”.¹ Overall, it is difficult to argue that this concept has not left the modern international commercial arbitration law without its fingerprint.

In the first place, individualism was partly the product of industrialisation. Liberalism in social, political and economic thought, and particularly the role of the individual in society, was also in part the product of the new means of production and accumulation of wealth. Private arrangements were regarded as the best means of producing goods and securing progress. The intervention of the state, if at all, on behalf of the rest of the community was to be minimal. Private arrangements and private interests should in all circumstances be upheld, unless the public interest was affected in a material way, and there were compelling reasons why they should not be given effect to. The interest of the general public became of secondary importance and, in any case, its depended on the extent to which individuals were free to pursue private goals. It was the belief that it would not be in the interest of the public if the state, acting for the community, were to interfere excessively in privately arranged deals. What was just and fair for individuals was, through them, also fair and useful to the rest of the society.²

This concept was emphasised by the work of Thomas Hobbes; he treated the individual, instead of the group, as the ultimate and basic unit of society. All human activity was considered as the product of the individual’s will. This view is found not

¹ See Parkes, et al., 2001. See David Pitts and Yuseok Moon, Individualism, Collectivism & Transformation Mediation. Pp. 4. Annual Conference of the International Association for Conflict Management. Salt Lake City, Utah.

² See George Elombi, Arbitration of International Commercial and Investment Disputes: Are the Misgivings of Developing States Justified? Unpublished PhD thesis, p.86. Centre for Commercial Law Studies. Queen Mary & Westfield College, University of London.

only in Hobbes, but also in Kant, according to whom the free will constitutes the only source of legal obligations and justice. Although Jean Jacques Rousseau emphasised the “social contract”, he spoke of it not as overriding the social order but as the outcome of the manifestation of the will of individual members of society to ensure that the property and liberty of each were protected. The social order would therefore be nothing other than the aggregate of the individual will of the members who constitute it.

Nature of Collectivism

In 1700s there was limited private ownership – in terms of type of investment – so that the elements of individualism were absent. There was no mass industrial production and no dependence on it, on trade or on accumulated wealth, moreover, members of the society depended economically and socially on each other.

This interdependence was bound to give rise to a collective perspective of life which in part explains the above difference in the relationship between the position of the individual and that of the group in the West and in the Middle East region.³

In Middle East communities, the existence of society is not accounted for on the basis of a contract, be it a “social contract”. Society, it has been argued, is the product of nature and not of man’s free will. The society is viewed not as an aggregate of individuals, each with his own personal rights and liberties, all grouped together in a “contract” but rather in terms of groups, with the family, instead of Hobbes’ and Rousseaus’ individuals, viewed as the basic social unit. The village, the clan and the tribe are treated as the larger groups.

Today, that unit would be extended to include the modern state. The units are all part of one social organism and held together not by any contract but, initially, by nature through the bond of kinship (for the family) and subsequently through the influence of other social and natural factors (in the case of the village, the clan, the tribe and the state). Whereas Rousseau and Hobbes viewed society as an aggregate of individuals,⁴ Middle East communities see and treat the society itself as the basic unit.

The society is an aggregate of itself. The separate identity of its individual members disappears or is simply regarded as never having existed, in preference for the collective identity of the society, against which every individual action is subject.⁵

³Ibid.

⁴ Ibid., p. 88.

⁵Ibid.

Group interest takes precedence over private interests and justice is regarded from the point of view of what is primarily in the public interest. In the Middle East region the “social contract”, if such a thing is recognised, exceeds the private contract if not in time, certainly in importance. The validity of any private arrangement (contractual or not) is measured by reference to its public utility. This is so because in the main the needs of the individual are seen as part of the needs of the wider community to which s(he) belongs.⁶

With the aforementioned in mind, it becomes necessary to ask how this philosophical divergence affects commercial arbitration agreements. Not surprisingly, any private arrangements are subject to the interest of the rest of the community, which is considered paramount. It is the community interest which validates or invalidates all private arrangements. It provides the standard by which private bargains are tested and upheld or rejected. The freedom of the individual does not arise independently but is acquired from the society which confers it.

Once the contract is validated in terms of the society any breaking of a contract is regarded not only as a wrong done to the other contracting party, but primarily as a disruption of an existing social order. The imbalance thus created has to be restored by a process which emphasises the greater need for harmony in the society than upholding the private rights of the particular individual on whose side the law might appear to be. There should be no individual winner or loser. There remains only the group as winner. However, if the harmonising process breaks down, there will also be only one loser, personified in the group.⁷ In view of customs and traditions in the Middle East, as in other Eastern societies, close personal relations have a pervasive influence in almost all kinds of human transactions. An individual is viewed in the total context, that is, as a son, as a nephew, or the like. This is in contrast to the detached and impersonal relations that characterise Western industrialised societies where functional relationships usually prevail.⁸

⁶ Ibid., p. 86.

⁷ Ibid., p. 90.

⁸ See J.A. R. Nafziger and R. Jiafang, “Chinese Methods of Resolving International Trade, Investment, and Maritime Dispute,” 23 *Willamette L. Rev.* 619, 621 (1987). See M. Scott Donahey. Seeking Harmony: Is the Asian concept of the conciliator/arbitrator applicable in the West. p. 75. *Dispute Resolution Journal*. April 1995.

Collectivistic culture focuses on relationship development at the expense of task completion, satisfying friends and associates at the potential expense of one's self, and social motivation instead of competition.⁹

Finally, this concept also finds its accommodation from a religious point of view; social justice in Islam is a central value. Some even contend that this value is uncompromising:

“The Islamic perception of the socio-economic process is dynamic and its insistence on social justice is uncompromising. This is because injustice disrupts social harmony and, for that very reason, is unethical.”¹⁰

Collectivism and Counter Arguments to the Criticism

Historically, the debate over the plausibility of group rights has focused on whether groups can have morally significant interest. Authors like Michael McDonald (1991)¹¹ allege there is nothing awkward about collective rights because groups have all the necessary features of a right-holder. McDonald writes:

“Individuals are regarded as valuable because they are choosers and have interests. But so also do communities make choices and have values. Why not then treat communities as fundamental units of value as well?”¹²

Others balk at the proposal to regard groups as intrinsically valuable. Michael Hartney argues:

“... people generally believe that communities are important because of their contribution to the well-being of individuals. Such a view is a part of what

⁹ op.cit. See supra note 15, p.4.

¹⁰ See (Quoting Boisard Marcel, *Humanism in Islam* 110 (English translation, American Trust Publications 1987) (“If for example, [in Islam] private property and individual initiatives are recognised as opposed to collective communism, they are strictly limited, which is contrary to Western liberalism.”)) See Amir H. Khoury. *Ancient and Islamic sources of intellectual property protection in the Middle East: A focus on trademarks*.p.18. *The Journal of Law and Technology* (2003)

¹¹ Michael McDonald, “Should Communities Have Rights? Reflection on Liberal Individualism,” *The Canadian Journal of Law and Jurisprudence* 4 p. 237. In, Christopher Heath Wellman, (1999). *Liberalism, Communitarianism, and Group Rights*. *Law and philosophy* 18: 13-40, p.15.

¹² Michael McDonald, “Should Communities Have Rights? Reflections on Liberal Individualism,” *The Canadian Journal of Law and Jurisprudence* 4 (1991):p. 237. As quoted by Christopher Heath Wellman. *Liberalism, Communitarianism, and Group Rights* p.15. *Law and Philosophy*18:13-40 (1999) Kluwer Academic Publishers.

might be called value-individualism: only the lives of individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings. The opposite view we might call 'value collectivism': the view that a collective entity can have value independently of its contribution to the well-being of individual human beings. Such a position is counter-intuitive, and the burden of proof rests on anyone who wishes to defend it."¹³

The Liberals¹⁴ are concerned to protect the individual's sphere of dominion. Since each individual may order his own affairs as he sees fit, however, it seems liberals cannot object if everyone unanimously agrees to waive their individual autonomy in favour of the group's dominion. However, even this unanimously accepted move is worrisome to liberals, since it precludes individuals from rationally revising choices in areas where the group now has dominion.¹⁵ As Allen Buchanan (1975)¹⁶ explained, this is an important reason to protect future choices, even when the particular liberty presently strikes one as unimportant. Secondly, as Terry Price has pointed out, nothing near unanimity can be reached among groups most urgently in need of collective rights.

"Groups imperilled because of dwindling numbers and splintering values are often most in need of special group rights, but they also experience dissension which prevents any general agreement (let alone unanimity) about collective control and finally, even if all the adults in a group are willing to waive their individual rights, a liberal state might block such a measure on behalf of the group's minors. Given its aversion to

¹³ Michael Hartney, "Some Confusions Concerning Collective Rights," *The Canadian Journal of Law and Jurisprudence* 4 (1991): p.297. As quoted by Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights* p.15. Law and Philosophy 18:13-40 (1999) Kluwer Academic Publishers.

¹⁴ Liberals refer to those who believe in liberalism. Liberalism, the philosophy or movement has as its aim the development of individual freedom. Because the concepts of liberty or freedom change in different historical periods, the specific programmes of liberalism also change. The final aim of liberalism, however, remains fixed, as does its characteristic belief not only in essential goodness but also in human rationality. Liberalism assumes that people, having a rational intellect, have the ability to recognise problems and solve them and thus can achieve systematic improvement in the human condition. Often opposed to liberalism is the doctrine of conservatism, which, simply stated, supports the maintenance of the status quo. Liberalism, which seeks what it considers to be improvement or progress, necessarily desires to change the existing order. A. Arblaster, (1986). *The Rise and Decline of Western Liberalism*.

¹⁵ *Ibid.*, p. 28.

¹⁶ In his essay, "Revisability and Rational Choice," *Canadian Journal of Philosophy* 5 (1975); 396-408

paternalism, liberalism is opposed to restricting an adult's sovereignty in the interest of that individual's well-being. Liberals need have no qualms, however, about interfering on behalf of a minor or someone otherwise without full autonomy. The state's prohibition of a group's legal right would be justified on these grounds.¹⁷

Kymlicka (1989)¹⁸ argues for group rights by emphasising the good of cultural membership as an important ingredient for meaningful choice and self-respect, and then urging that this good is maximally secured by extending special collective rights to cultural groups. Kymlicka begins by affirming liberalism's insistence upon equality of opportunity for resources, well-being, and self-respect. What liberals have failed to appreciate, Kymlicka emphasises, is that the good of cultural membership is often an important ingredient of one's well-being and self respect.¹⁹

Kymlicka utilises the communitarian observation that:

“Humans are not isolated “atoms” who find and assess value independently of others, but instead are responsive to cultural and other groups which help limit and define the valuable life. The choice as to what type of life is most meaningful is ultimately made by the individual, but the range of options one finds promising is defended and shaped by the cultural membership with which s(he) identifies. Choosing and living a life one finds meaningful is a challenge for each of us, but doing so without identifying with a particular culture or by aligning oneself with an imperilled culture is a much more daunting task.”²⁰

What Kymlicka emphasises, then, is that one's culture is actually a vital resource, and because of liberalism's egalitarianism, the liberal state must thus ensure each person's culture is healthy and capable of fostering meaningful lives.

The second step in Kymlicka's argument is that often cultures can be fortified only if they are given rights as a group. The idea here is that persons often act individually in a manner that weakens the culture, so the only way to secure a culture is to extend the

¹⁷ Ibid.

¹⁸ Will Kymlicka, *Liberalism, Community, and Culture*. Oxford; Oxford University Press, 1989, Chapters 7&8.

¹⁹ Ibid., p. 29. For expansion and commentary upon this argument, see Allen Buchanan's discussion in *Secession*, pp.52-64.

²⁰ Ibid., p. 30.

group's collective control over certain areas. For instance, imagine that a given culture is being weakened by the influx of "outsiders." To combat this, the imperilled culture could be strengthened with either property or language laws. Property laws might prohibit individuals from selling their property to persons of whom the group as a whole does not approve, and language laws could prohibit people from publicly speaking or displaying written signs in a language other than that favoured by the imperilled culture.²¹

Liberals are hostile towards group rights because the latter occupy a domain that might otherwise be allotted to individual control. One might argue that the liberal focus upon the individual leaves no room for group control because individual rights "rule out" collective dominion. An objector to this approach insists that the nature of rights allows them to protect the individual from the concerns of the collective; a right is valuable because it is a "trump" that fortifies an individual's position against the weighty balance of public interests. To be a liberal, according to this theory, is to understand that individual liberty can never be outweighed by group concerns because the moral rules from which individual rights are deduced are immune to the competing interests served by group rights. According to this argument, an individual's moral rights exist only because of moral rules, and the latter rule out the possibility of group rights.²²

Therefore, liberalism cannot rule out group rights because moral reasoning does not take the form necessary antecedently to *rule out* this (or any) option, and because there are moral reasons the liberal must respect *in favour* of some collective rights.²³

4.1.2 The "Given Law" Concept

One of the main differences in respect of the normative aspect of the legal philosophy of modern international commercial arbitration law and its perception in the Middle East is that, in the West, the concept of "competition" and the "role of the merchants" played a significant role in law making and its development, while the concept of "Given Law" dominated the normative legal thinking in the Middle East region.

²¹ Ibid.

²² Ibid., p. 35.

²³ Ibid., p. 36.

The Concept of Islamic Law

The concept of law in Islam is different from that under the Romano-Germanic and Common law families of law. Three key aspects are particularly important to understand how it differs.²⁴

The first is the role of the divine in law. St Augustine and Thomas Aquinas advocated a Christian version of the natural law doctrine.²⁵ They made a distinction between man made law (positive law) and divine law. Divine law constitutes natural law. Any positive law contrary to divine law is not law. In the West, the natural law doctrine eventually gave way to positivism, where law properly speaking is man-made and determined by the legislature.

Islamic law is the epitome of the expression of the natural law doctrine. However, unlike the Christian or European version of natural law, divine law from the Islamic point of view is not bereft of content. It is expressed in the Islamic law.

The second is the comprehensive nature of law. “Under Islamic law, all human actions have legal significance. Actions fall into one of these categories: *al-Wajib* (obligatory act), *al-Mannduh* (recommended act), *al-Haram* (prohibited act), *al-Makruh* (distasteful act) and *al-Mubah* (a legally indifferent act).”²⁶ Schacht (1964)²⁷ correctly described Islamic law as ‘the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.’

The third is the duty of Muslims to live according to Islamic law. The divine nature of law, its comprehensiveness and its being obligatory make Muslims consider law as part of religion. To them, religious ethics and morality form an integral part of the same normative process. It is obligatory for Muslims to regulate their lives according to Islamic law. A Muslim cannot ‘opt out’ of Islamic law completely or partially in any transaction, based on the concept that God, “*Allah*”, the creator of man is the lawgiver and lawmaker. To impose on a Muslim any man-made law that contradicts divine law is not government but an oppression. The Muslim is not bound to obey such oppressive government, and the perverted laws emanating therefrom.²⁸

²⁴ See AA Oba, *Islamic Law As Customary Law: the Changing Perspective in Nigeria*. P.821. *International and Comparative Law Quarterly* 15: pp. 817-850.

²⁵ See Dennis Lloyd, *The Idea of Law* (Harmondsworth: Penguin Book, 1981), 78-81.

²⁶ See A. A Oba, *Islamic Law As Customary Law: the Changing Perspective in Nigeria*. *International and comparative Law Quarterly* 15: p. 821.

²⁷ See J. Schacht, (1964). *Introduction to Islamic Law*. Oxford University Press.

²⁸ *op.cit.* 35, p. 822. There is no obedience to human being ordering disobedience to Allah; nor obey any whose heart We have permitted to neglect the remembrance of Us, one who follows his desires, whose case has gone beyond all bounds’: *Surat al-Kahf* 18:28; and ‘And follow not the binding of those who

The Importance of Addressing Islamic Law.

Addressing questions of international commercial arbitration in the Middle East region, while ignoring the relevant historical, moral, conceptual, and legal background of Islam, will only afford a distorted view. This holds true even if the “past” does not provide a “codified” legal system or reveal (formal) roots of the current commercial arbitration regimes in this region.²⁹ For the purpose of the remainder of this chapter the following assumptions will be made.

- (i) Generally, Islam has a substantial influence on most countries in the region.³⁰
- (ii) Islam provides Muslims with a comprehensive way of life. Its teachings touch upon all aspects of life, including civil and commercial matters.³¹
- (iii) Today, we are witnessing a reassertion of Islam in the Middle East and around the world. Therefore, recognition of its presence and effects is warranted. One commentator recently pointed out, “Islamic law is relevant to modern-day business throughout the Middle East, and its importance is increasing.”³²
- (iv) Islamic law provides a comprehensive legal and political system. Consequently, Islamic law does not accept rules that negate its principles. Therein lies an additional danger of continued tension between conflicting concepts of modern international commercial arbitration in the region.³³
- (v) In order to critically examine the present commercial arbitration legal system in the Middle East region, it is important to have a clear understanding of basic principles in Islamic law pertaining to commercial arbitration. This understanding may also assist in providing a viable solution or improvements to the current legal system of the region.
- (vi) If the basic principles of the competing legal systems (in the area) emerge as compatible, then this compatibility may further assist in the stability of the commercial arbitration regime in the region.³⁴

are extravagant - who make mischief in the land, and mend not their ways’: *Surat Shu’raa*, 26:151-2. The Prophet is also quoted as having said: ‘there is no obedience due to any creature (no matter who they are) if they order to sin against Allah)’ and ‘He who commands you to sin has no authority over you’, both quoted in Abdul Rahman I Doi, *Shari’ah: The Islamic Law*.

²⁹ *op.cit* Supra note 25 p.5.

³⁰ Azmi et al., (referring to Al-Shaykh Allmam Ibn Taymiyyah, Public duties in Islam: The Institution of Hisba (Muhtar Holland Trans. The Islamic Foundation 1982) *op.cit.* see Supra note 25, p. 4.

³¹ See Supra note, 25 p. 5.

³² *op.cit.* 25, p. 5. See also, Howard L. Stovall, Arab Commercial Laws-Into Future, (1999).

³³ *Ibid.*

³⁴ *Ibid.*

General overview of the structure and hierarchy within Islamic law

Codified Law

The Qur'an:

The *Qur'an* is Islamic Holy Scripture and the most authoritative source of Islamic law. Indeed, it is the most central and highest source of Islamic law. It is regarded as being of divine origin and as containing God's (*Allah's*) revelations to the Prophet Mohammad. Much has been written regarding the divinity of the *Qur'an* and its overwhelming impact and influence on the life of Muslims. Such analysis would fill volumes and is outside the scope of this research.

The Sunnah:

The *Sunnah* is the collection of recorded sayings ("*Hadiths*") and deeds of the Prophet Mohammad. The *Sunnah* constitutes the accepted holy tradition as dictated by the Prophet Mohammad. Consequently, the *Sunnah* is intended to serve as a model of conduct for all Muslims. In addition to this function, the *Sunnah* also complements the *Qur'an* by setting rules for matters that the *Qur'an* is silent on.

Idjma:

The *Idjma* is the "collective" consensus on a point of law by religious scholars authorised to interpret the *Qur'an* and *Hadith* of the *Sunnah*.

Non-Codified Law

Qiyas:

The *Qiyas* "is a strict legal-reasoning method of analogy, which is referred to only when there is "nothing directly on a point in the foregoing sources of Islamic law." The *Qiyas* is referred to only where a point of departure is clearly established from the *Qur'an*, *Sunnah*, or *Idjma*. In addition, the *Qiyas* does not form a precedent since its rules are applied to the facts in a narrow fashion. In this regard, unlike common law systems, Islamic law does not have binding precedents."³⁵

The revelations compiled in the *Qur'an* and in the *Hadith*, together with the *Ijma* and *Qiyas*, constitute the *Shar'ia*—the Divine Islamic Law (literally "the path to water"). The *Shar'ia* was developed and formulated during the first three centuries after the Prophet Mohammad's death and attempts to address all aspects of life.³⁶

³⁵ See Amir H. Khoury, (2003). Ancient and Islamic sources of Intellectual Property Protection in the Middle East: a focus on trademarks. *Journal of Law and Technology*. p. 5.

³⁶ *Ibid.*, p. 6. See Also, Steven D. Jamar, The Protection of Intellectual Property Under Islamic Law, 21 Cap. U.L. Rev. 1079, 1081-82 (1993). For a discussion on how various human actions are classified by

Ijtihad:

The term “*Ijtihad*” in Arabic means, “The struggle for understanding.” *Ijtihad* is employed by Islamic scholars and judges in order to resolve a problem that has not been dealt with previously by any of the above sources of Islamic law.

The popular view in Islam is that only select religious scholars who are perceived to possess integrity and intellect should attempt to interpret the *Qur’an* and the *Hadith*.

Non-Shar’ia law

Non-*Shar’ia* sources of law are intended to compensate for a “lacunae”. These sources deal with aspects and issues on which all sources of the *Sharia* law are collectively silent. The underlying principle is that non-*Sharia* norms must not conflict with the *Shar’ia* law. Hence, compliance with the principles of the *Shar’ia* law is a pre-condition to the validity of any legal norms formulated within a non-*Sharia* context.

Inter-Religious Divisions

In addition to this hierarchy within Islamic law, various divisions are found in Islam itself. The most substantial division is between the *Shi’ites* and the *Sunnis*. Both of these groups consist of several different religious schools of thought (“*Madhhab*” or “*rites*”). Each rite bears the name of its founder. Within two centuries of Islam, four major schools of religious thought and interpretation developed within the *Sunni* group:

Hanafi: (also known as the “Kufa” or “Iraqi” school). *Hanafi* is the oldest of the four schools. Its followers are mainly located in Turkey, India, Pakistan, and Afghanistan.

Maliki: (also known as “Medina”). This school’s influence is largely in North Africa.

Shafi’i: This school enjoys control in South India, Southern Asia, and East Africa, as well as the Arabian coastline.

Hanbali: This school is the most traditional of the four, and its followers are primarily located in Saudi Arabia.

Some contend that these divisions make Islamic law far less “monolithic”. Others disagree with this view and contend that these schools of thought are more closely related to each other than the various Christian religions are.

the *Shar’ia*, see Arthur Goldschmidt, Jr., *A Concise History of the Middle East* 43-90 (6th edn., Westview Press 1999). Goldschmidt notes that:

The *sharia’ah* tries to describe all possible human acts, classifying them as obligatory, recommended, neutral, objectionable or forbidden by God, the supreme legislator. In addition to some commercial and criminal laws, the *Shar’ia* covers rules about marriage, divorce, child rearing, other interpersonal relationships, property, food and clothing, hygiene and manifold aspects of worship.

Manifestations of International Commercial Arbitration in Islam

What we know of classical commercial law allows a provisional synthesis of a long history of Islamic law into certain characteristics which afford a perspective on the present-day relationship between Islam and business.

The relevance of the common law of Islam can be approached through the historical framework that Fernand Braudel (1972)³⁷ introduced in his study of trade patterns in the Mediterranean world. This French historian calls the long wave or the long structure *longue dur'ee* (Macrohistory), and is helpful in understanding how fourteen centuries have come to bear on the world of business in Islam. For this purpose, the Islamic law of trade is a useful indicator.³⁸

Islam encourages trade: a long list of specifications is found in the *Qur'an* - with regard to contracts, the necessity of certainty, the central importance of ethics, the strict requirements of honouring one's obligations, of putting them in writing, the permissibility of trade and its importance, and the famous sentence in the second *sura* (chapter) about how trade has been allowed by God.³⁹ In fact, the *Qur'an* contains a number of verses that specifically recognise trade and compel fair dealing therein. Among the most notable verses in this regard are the following:

"God has allowed commerce and prohibited Riba (interest)." (Qur'an 2:275).

"Believers Honour your contracts." (Qur'an 5: 1).

"Woe to the fraudsters." (Qur'an 9: 29).

These verses form some of the basis of how trade should be conducted according to Islam. Clearly, these verses emphasise not only the central importance of trade but also equally the ethics of trade. The first element is the centrality of trade, the universal respect it carries in Muslim civilisation, and the importance of commerce as the nerve of the city and of regional exchange. The free movement of goods is a key element in the structure of original Islam through to the present period. The fact that the Prophet Muhammad started his career as a caravan merchant is unique to the Islamic Prophecy.⁴⁰ The original textual tradition of Islam and Islamic law acknowledges the importance of commerce, including the securing of long-distance trade, market sanctity and security, both at the ethical and the practical levels.

³⁷ See, Fernand Braudel (1972). *The Mediterranean and the Mediterranean World in the age of Philip II* Vol. 1 London: Fontana.

³⁸ See Hilary Lewis Ruttley and Chibli Mallat, (1996). *Commercial Law in the Middle East*. P.19. Graham & Trotman.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Whatever the reality of trade in the early Islamic *hijaz*, the tradition of an Islamic Prophet-merchant is firmly established and developed across the centuries. In addition to the already mentioned centrality of trade terms in the *Qur'an*, it has extols the virtues of commerce in detailed and supportive argument as did Dimashqi (11th century CE) in his *Mahasin al-tijara*.⁴¹

Other manifestations advocate the concept of commerce much like capitalism; Islam recognises “accumulation, in the form of commodities that can be exchanged (rather than its use-value), as part and parcel of the overall dynamics of economic advance. However, the ethical and norms perceptions of the two systems lead to varying results with respect to this “accumulation.”⁴² While capitalism in the West as we have already seen insists on exclusive individualism and self-interest as a propelling engine of economy, Islam sees the need to contain individualism and “self-interest” within the limits of its principles, since “all wealth belongs to God, who desires that it be owned equitably by all mankind.” In this respect, it has been observed that “Islamic economics is based neither on the unlimited freedom of unbridled capitalism nor on public ownership that results in total denial of individual ownership and freedom.”⁴³

Fairness and good faith in commercial dealings and incorruptibility in the administration of justice are considered to be corner stones of the Sharia. It has therefore been concluded that unfair competition is regarded as illegal and “damaging conduct.” Hence, the perpetrator of an act that is found to be unfair competition is required to make up for the damage.⁴⁴

In sum, Islam guarantees personal freedoms so long as these do not injure the freedom of others or negate the ethical norms of conduct generally accepted by Muslim society; “thus contemporary Islam can sympathise with the basic capitalist principle

⁴¹ *op.cit.*47, p.20. It was Published in Cairo 1318 AH, and discussed at length in S.D. Goitein, A Mediterranean Society, Vol. 1, Berkeley.

⁴² See supra note 47. Hilary Lewis Ruttlely and Chibli Mallat, (1996). Commercial Law in the Middle East. P.7 Graham & Trotman.

⁴³ *Ibid*, p.7. “Quoting Ayatullah Sayyid Mahmud Taleghani, Society and Economic in Islam (R. Campbell, trans., Mizan Press 1982).

⁴⁴ *op.cit.* 25, p. 12 See also, Ida Madieha Azmi, Spyros M. maniatitis & Bankole Sodipo, Distinctive signs and Early Markets: Europe, Africa, and Islam, in *persp. On intell. Prop.: The Prehistory and Dev. Of Intell. Prop. Sys.* Vol. 1, 123, 132 (Alison Firth, ed., Sweet & Maxwell 1997); see Sidney A. Diamond, The Historical Development of Trademarks, 65 *Trademark Rptr.* 265, 266-67 (1975); William Henry Brone, A Treatise on the Law of Trademarks and Analogous Subjects 5 (2edn., Little, Brown & Co. 1898) (submitting that the word “brand” derives from the Anglo-Saxon Verb Meaning “to burn”).

of private ownership of wealth-producing assets and against the extremes of personal wealth possible under *laissez faire* capitalism.”⁴⁵

The Impact of Islamic Law and Rules of Conduct in the Middle East Region

Apart from Lebanon, in all other Arab countries it has been said that Islam is widely perceived by both religious and legal scholars to constitute “a complete way of life”. The laws of these countries are influenced to some degree by the *Shar'ia*.⁴⁶ Coleman (2001)⁴⁷ asserts that the law is a normative social practice that purports to govern behaviour. But how can the rules of law secure their claims to govern our behaviour? The answer is that they are all rules that acquire the claim to govern because they are authorised by a more fundamental rule called the rule of recognition. The rule of recognition, according to Coleman, is the fundamental rule of a legal system.⁴⁸ In general, the idea seems to be that norms are subordinate to the rule of recognition.

Islam As a Rule of Recognition

Based on Coleman’s concept of recognition, religious scholars recognise that “Islam is a religion, an ethic, and a legal system all in one.”⁴⁹ Another source explains that the Islamic religion is not limited to the spiritual fulfilment or enlightenment of the individual, but rather extends to all matters pertaining to a way of life. According to that source, “*Din*” – the Arabic word for religion – “encompasses theology, scripture, politics, morality, law, justice and all other aspects of life relating to the thoughts or actions of men.”⁵⁰

In this regard, the difference between Islamic law and civil and/or common law systems is twofold:

- (a) Where the latter is secular human law subject to change by legislators, the former is regarded fundamentally as a divine law – and, as such, basically immutable.
- (b) While Western law tends to address what may be adjudicated in courts, Islamic law takes the whole of human conduct for its field.

⁴⁵ Ibid., p. 17. See John Cumming, Hossein Askani & Ahmad Mustafa, *Islam and Modern Economic Change*, See Also, (John L. Esposito, ed., Syracuse U. Press 1980).

⁴⁶ Ibid, p. 22. Qur’an, Surah Al-Furq’an Makki, 25:67.

⁴⁷ Jules L. Coleman, (2001). *The Practice of Principle*. Oxford University Press.

⁴⁸ See Supra note 3 pp. 493-494.

⁴⁹ See Hilary Lewis Ruttley and Chibli Mallat, (1996). *Commercial Law in the Middle East*. p.22, Graham & Trotman.

⁵⁰ Ibid., p. 22. See also Roberts, who adds, “It is not that religion dominates the life of a faithful Moslem, but religion, in this comprehensive sense, is his life.”

It appears that Islamic law covers all aspects of a Muslim's life and is considered to be a divine law that commands all and draws a line between good and evil. Islamic law does not seem to fall within any of the various schools of jurisprudence, including the historical, Realist, or even the Natural law schools.

It is widely accepted that the *Qur'an* contains "principles of religious belief, moral virtues, and a general legal system governing aspects of human behaviour."⁵¹ Hence economic thought and practice in Islam functions within ethical principles, and the comprehensive purpose of Islam extends to all spheres of life, including civil and commercial issues. For example the *Qur'an* urges fair trading and outlaws every form of fraud, false measures, lying and cheating.

Another important feature of Islam is that it focuses on the individual and his duties to God and to his fellow men. Consequentially, Islamic law is perceived to be a "Doctrine of Duties."

The influence of the religion is all the more important for having made itself felt in the regulation of every material or spiritual action of individuals.⁵²

We can understand therefore why the "*fiqh*" goes beyond the limits assigned to law in contemporary juridical systems, and more particularly in the Western system. This is why many questions relating purely to morality or to religion in Western law come within the competence of the Muslim jurist, who has to make judgements of importance on moral, religious, social or merely human actions in commercial activities which are of no concern to the Western jurist. The Muslim is under an obligation to conform to certain imperative injunctions which come from revelations of his religion, ones whose basis is fundamentally moral. Among the principles related to commercial dispute we may cite:

The principle of equity: "*God doth command you to render back your trust to those to whom they are due; and when ye judge between man and man that ye judge with justice.*" (Qur'an 4: 58)

The principle of equality: "*But if ye turn back, ye shall have capital sums; deal not unjustly, and ye shall not be dealt with unjustly.*" (Qur'an 2:279)

⁵¹ The value of Qur'an in the Eyes of Muslims. See www.balagh.net/English/Qur'an.

⁵² See Nayla Commair-Obeid. *The Law of Business contracts in the Arab Middle East, a theoretical and practical comparative analysis (with particular reference to modern legislation)*. p.11. Arab and Islamic Law Series, 2002. Kluwer Law International.

4.2 Institutional Aspects of Commercial Arbitration in the Middle East

4.2.1 The Concept of “Statism”

The previous chapter discussed how the concept of “anti-statism” was rooted deeply in modern international commercial arbitration. Historical evidence of state reaction towards the demands for change has been given to highlight how this concept has influenced the development of commercial arbitration. Moreover, it has been shown how de-localisation of international commercial arbitration evolved in favour of party anatomy, and how judicial interference with party anatomy was viewed as depriving parties to arbitration of predictability, finality and confidentiality. A national, stateless, delocalised system where there is no connection to any national legal system is the common trend of modern international commercial arbitration. It has been called the private legal system. The fixed arbitration procedure found in the New York Convention (1958) is a good example. Further, the UNCITRAL Model law is considered the most significant step towards de-localisation.

Contrary to Western legal culture, “Statism” is the dominant concept related to institutionalised international commercial arbitration in the Middle East region.

Before addressing institutional concepts of “Statism” in the Middle East, it is important to show how this concept fits within the institutional theory of law.

McCormick and Weinberger have endeavoured to bridge the gap between legal theory and the sociology of law. In their view, “an important question for legal and social theory is what role legal rules and regulations should play as factors guiding human conduct, both with respect to individual conduct and social relations. Weinberger advocates that ‘our grasp of the legal norms must include insights into their functions - the jurist must always ask: How does the legal institution function as an institution? What is the effect on society of the regulation under consideration? McCormick and Weinberger claim that the institutional theory of law provides a conceptual framework for analysing of legal phenomena from a socio-legal point of view.”⁵³

Weinberger nevertheless characterises institutions as “*framework-systems of human action [which] have a core of practical information*, pointing to the fact that an institution is a condition for the determination of actions but that it is, usually, not

⁵³ See Massimo La Torre, (2005) Institutional theories of law. Jurisprudence, legal theory and philosophy of law. See also, Weinberger, O., *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht, Boston and London: Kluwer Academic Publishers, 1991). p.24. See Muriel De Groot and MirJan Oude Vrielink. *Legal theory and Sociological Fact*. pp.251-252. *Law and Philosophy* 17:251-270, 1998. Kluwer Academic Publishers.

sufficient on its own to determine the action and to provide the basis for a mode of action.”⁵⁴

Therefore, the analysis of the institutional concept of commercial arbitration in the Middle East will focus on the statism framework in this region.

4.2.2 Evidence of Statism in the Middle East

The meaning of Statism can be defined as centralised bureaucratic governance⁵⁵ in controlling international commercial arbitration. This part of the chapter will highlight some fundamental problems related to this concept with regard to commercial disputes and commercial arbitration.

Statism in Ancient Islam

State control over commercial activity in the Middle East region is not a recent trend, it is ancient and modern. *Hisbah* was an Islamic legal and commercial institution that was entrusted with the task of supervising and enforcing fairness in the exchange of goods. This duty was further reinforced with the legal duty to amend any unjust enrichment in commercial transactions.

The importance of *Hisbah*, namely, to “command what is good and to forbid what is evil,” has led some to classify *Hisbah* as a religious institution. This reflects the high regard given by Islamic law to fair dealing in trade. Some scholars even consider this Islamic institution with its far reaching authorities as the most important institution of the Islamic State.⁵⁶

The function of *Hisbah* expanded in scope to the function of market inspection as the Islamic empire grew. Thus, during the *Abbasid* era, the new office of “*Mohtaseb*” (head of *Hisbah*) was formally created. The *Mohtaseb* carried out the duty of quality control over host traders, crafts and professions, including doctors, millers, bankers blacksmiths, bookbinders, booksellers, butchers, slaughterers, fryers, sausage makers, perfumeries, tailors, educators, grain sellers, confectioners, silk manufacturers, apothecaries. In view of the many types of professions that the *Mohtaseb* oversaw, his duties extended well beyond the mere inspection of weights and measures. Indeed, the

⁵⁴ Ibid., at 256.

⁵⁵ See Hirst, Paul. From Statism to Pluralism UCL Press 1997. p. 503.

⁵⁶ Amin Haji, Institutions of Justice in Fatimid Egypt (358-567 H/ 9691171 AD), in Islamic Law: Social and Historical Context 198, 207 (Aziz Al-Azmeh, Routledge, 1988); See supra note, 25. p.13.

detailed manuals of *Hisbah* reveal that the *Mohtaseb* carried out numerous different functions.⁵⁷

Additional Legal and Administrative Bodies

In terms of authority and duties, the *Mohtaseb* intermediated between religious judges (“*Qadi*”) and the “*Mazalim*” tribunals. In terms of enforcement, *Mazalim* tribunals assisted the *Mohtaseb*. These tribunals were essentially a forum for complaints of injustice perpetrated by the strong against the weak. Even where no formal complaints were lodged, the *Mohtaseb* was still entitled to investigate occurrences and issues, since he had a mandate to investigate compliance with any of the state’s regulations.⁵⁸

Common Recent Trends

Statism continues to dominate legal thought in Middle East. The attitude of the Arab world towards this concept is the same regardless of changes in international economic and legal theories in an era of globalisation. Middle Eastern countries still use the concept as a tool for governing and managing almost all commercial transactions in their societies. In many of these countries, since the famous Aramco award, which pitted the government of Saudi Arabia against the American oil company, a lesson has been learnt by the wealthiest government in the Arab world: any administrative contract, that is a contract involving the state or one of its branches, will not, by law, include an arbitration clause without express permission from the Council of Ministers. In one way or another, this is the case in most Middle East Arab countries, an arbitration agreement cannot be effective if rejected openly by legislation or hampered by administrative means.⁵⁹

4.2.3 Why Statism in the Middle East?

As mentioned above, it is important to understand the concept of statism in the Middle East in its general framework-system of human action. In other words, it is important to analyse what is the basis for this mode of action. In this respect, two main aspects may be mentioned as to why Middle East countries have not engaged in the harmonisation process of modern International Commercial Law and why they

⁵⁷ Some sources such as Nihayat al-Ratabah, report 40 separate duties assigned to the Mohtaseb. Other sources such as Ibn-Ukhuwwah report 70 different functions. For an illustration of the scope of duties and powers of the Mohtaseb, see Serjeant, R.B., A Zaidi Manual of Hisbah of the Third Century (H) (1952) vol.27, Revista Degli Studi Orientali 1 See supra note, 25 pp.14

⁵⁸ Commenting that the “ambit of hisbah comprises three main categories of action” what concerns God and religion (e.g. neglect of Friday prayer) what concerns man (e.g. failure of water supply) and issues that involve both (e.g. enforcing parental duties)). See supra note, 25 p.14.

⁵⁹ See Chibli Mallat, A comparative critique of the arbitration process in the Arab world. p. 7. Lebanese Review of Arab Arbitration. 1996. vol. 1 issue 3.

have been very keen to defend their concept of statism. Firstly, the socio-legal base and then the spiritual and religious bases will be discussed.

Socio-Legal Base

Regarding the socio-legal aspect, statism was based on the concept that modernisation and reform in Middle East countries require centralised governments. In pre-modern systems like Middle East countries where “traditional social forces, interests, customs and institutions are strongly entrenched”,⁶⁰ a central and strong state having the power and authority to mould/persuade/force/ push/ urge social agents along a given developmental path is required.⁶¹ Such contention supports Huntington’s (1968)⁶² insistence on the need for a strong state in modernising transitional societies. He stated:

“To cope successfully with modernisation, a political system must be able, first, to innovate policy, that is, to promote social and economic reform by state action...these [modernising] societies differ from the United States in the number and strength of the sources of opposition to modernising reform. The change or destruction of these traditional forces requires the concentration of power in the agents of modernisation... it thus seems reasonable to conclude that in a modernising society, policy innovation will vary more or less directly with the concentration of power in its political system.”⁶³

In Huntington’s view, democracy can come about only gradually, and in a phased and planned manner. Most of the process of modernisation, importantly, requires concentrations of power. Such a view is expressed in ongoing arguments in the Middle East defending statism and rejecting reform.

Statism is also required in reaction to modern Western commercial arbitration as a foreign product. Arbitration of commercial disputes has been emphasised in the legal thinking of the Third World in general and the Middle East in particular as a tool

⁶⁰ Ibid., at 1093.

⁶¹ Ibid., at 1094.

⁶² Quotation from "Huntington's 1968 classic, "Political Order in Changing Societies," which has for many years been a textbook for developing world authoritarian leaders. Another of his books, "The Soldier and the State" was and still is required reading in national security theory for numerous military leaders, including those of the Salvadoran military. P.1093. *Third World Quarterly*, 1999. vol. 20 No. 6 1089-1107.

⁶³ Ibid., p. 1089-1107.

which strongly reflects the unique genius of the Western mind. The criticism remains the same: that the environment of international commercial arbitration in all respects and at all stages of the process is heavily weighted in favour of Western countries.⁶⁴

Afro-Asian jurists took the following view in the 1970s in Kuala Lumpur, Baghdad and Doha with regard to the already established arbitration institutions, which:

“had their own rules for conduct of arbitrations which did not work out particularly favourably for the developing countries, particularly in the matter of venue, choice of arbitrators, and also fees and charges liveable by the institutions concerned. Since most of these institutions functioned under the auspices of chambers of commerce and other associations of trade, it was difficult to visualise the manner or the means by which practical steps could be taken to effect modification of the rules of such institutions to bring them in conformity with the interest of the developing countries.”⁶⁵

For Samir Saleh⁶⁶, “international or *foreign* arbitration is generally held on foreign territory according to foreign rules of procedure and substantive laws and before a majority of foreign arbitrators”.⁶⁷ Gerold Herrmann also notes that “in the Arab countries, the attitude is one of hostility, disillusion or distrust”⁶⁸ The suggestion is that international arbitration in commercial matters is necessarily “foreign” to the Arab party.

The Spiritual and Religious Bases

According to the statism concept, many believe that “the state, not the individual, is now the spiritual centre of society.”⁶⁹ Government assumes a moral importance that

⁶⁴ Tibor Varady, (2002). International commercial arbitration: a transnational perspective. Kluwer Law International. In Transnational Arbitration and state contract, *Hague Academy of International Law*, Centre for studies and research in International Law and International Relations, 1988, pp. 83. see supra note 16, p. 19.

⁶⁵ Ibid., at 20. See supra note 14, Asian –African Consultative Committee, Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), Secretariat of the Committee, New Delhi, p. 136, cited by Sornarajah, M. *Infra*, note 29 p.8.

⁶⁶ See Samie Saleh, Commercial Arbitration in the Arab Middle East: Shar’ia, Syria, Lebanon, and Egypt. Hart publication.

⁶⁷ Ibid., at 20. See supra note 16 The Settlement of Dispute in the Arab World: Arbitration and other Methods-Trends in Legislation and Case Law” (1986) 1 Arab L.Q., 198, p.199.

⁶⁸ Ibid., at 21. See Supra note 21, 22. Asante, Samuel K.B. “The Perspectives of African Countries on International Commercial Arbitration” (1993) 6 *Leiden Journal of International Law*, 331.

⁶⁹ See George R. Delaume, (1987). Transnational Arbitration and the State Contract. See supra note 24, at p. 617.

outweighs individuals' claims. Statism does not speak of government as a collection of bureaucrats, agencies, and limited constitutional powers but as the embodiment of the collective good, a community itself. Statists believe government should make decisions for individuals. Since individuals usually prefer to make their own decisions, coercion and compulsion become necessary correctives. Accordingly, to some, 'statism teaches that we are the children, and government is the parent.'⁷⁰

In fact, statists are looking for far more than a material embrace in the arms of big government. The French economist Frederic Bastiat commented as follows:

“The state is that great fictitious entity by which everyone seeks to live at the expense of everyone else.” In statist terms, this is what is called “community,” and anyone who questions this equation is accused of opposing “shared values” and the common good.⁷¹

Walzer observed that “the sovereign rights of state are no longer based on individual rights to life and liberty but rather on “the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves.”⁷² For him, the “state should respect the individual’s rights if and only if “there exists a “fit” between the community and its government”. Such a “fit” exists in every state in which a people [is] governed in accordance with its own traditions,” in which its form of regime reflects “a widely shared view or way of life”.⁷³

Accordingly, it has been said that “there are clear variations as to the nature of the ties between the state and Islam, and varying degrees concerning the position of Islam rules as the state’s valid law. In these cases, each state decides or formulates the extent and scope of the *Sharia*’s application within its legal system.⁷⁴ In order to understand the legitimacy of the injunctions, one must see them in the general framework of the Islamic system.”⁷⁵

⁷⁰ Ibid., at 618.

⁷¹ Ibid.

⁷² “The Moral Standing of States,” Michael Walzer, *Philosophy & Public Affairs* 9, no. 3 (spring 1980). See Gerald Doppelt, *Statism without Foundations*, p.398. *Philosophy and Public affairs*, vol.9, No.4 (summer, 1980), 398-403.

⁷³ Ibid., at 399.

⁷⁴ See John Cummings, Hossein Askani & Ahmad Mustafa, *Islam and Modern Economic Change*, 25, 36 (John L. Esposito, ed., Syracuse U. Press 1980). See supra note 25 p.23.

⁷⁵ Ibid., at 24.

Muslims see in Islam a religion which provides a set of fundamental principles upon which the state should be established and administered which, taken to its absolute form, results in the creation of a theocracy. Consequently, it has instituted a system of duties which must necessarily be imposed on the believers as ritual, moral and legal obligations which are on the same level and which submit to the authority of the same religious imperative.⁷⁶

Contrary to the Anti-statism concept which influenced the development of modern commercial arbitration, and for the sake of the concept of statism, we can see nowadays the attitude of those in the Middle East who are committed Islamists and like-minded government officials who defend statism and want religion to play a bigger role in everyday life, and want to make the rituals of the Islamic faith legally enforceable for Muslims.

They are striving to establish religious credentials and seeking the creation of an Islamic state and pushing for a bigger role for Islamic law.⁷⁷ Some have described the defenders of statism as 'normgivers', either seen as being rational and deliberating persons who base their decisions on moral considerations, religious beliefs or empirical interests, or as irrational and emotionally driven people, who are governed by passions and ideologies.⁷⁸ Such differing views are seen in most countries in the Middle East.

The significant difference between modern international commercial arbitration law and the statism concept in the Middle East is that if the concept of the individual is undermined, the community's perception of justice is also bound to change. The nature of arbitral justice is also bound to reflect the conceptual background in the Middle East in that, in the relationship between group and private interests, the group stands out victorious. Whenever they are in conflict with the general interest, individual rights and freedoms, no matter how fundamental they may be, are bound to be compromised.⁷⁹ This has led to a growing number of moderate Muslims becoming concerned about the implications of enforcing statism for a country's economic and social aspects.⁸⁰

⁷⁶ See supra note 58, p.3 quoted; Schacht, *op.cit.*, p.20 et seq.

⁷⁷ See John, McBeth. The case of Islamic Law, p.3. Far Eastern Economic Review. 2002: 165, 33.

⁷⁸ See Michael Baurmann. Legal Authority as a Social Fact. P.294. Law and Philosophy 19:247-262, 2002, Kluwer Academic Publishers.

⁷⁹ See supra note 16, p.89.

⁸⁰ *op.cit.* supra note 84, p.2.

4.3 Coercive Aspects of Commercial Arbitration in the Middle East

The previous chapter addressed the 'coercive' concept of obedience in modern international commercial arbitration using John Austin's positivism legal theory. It showed that "arbitration as a contract was based on the doctrine of freedom of the contract, which arose out of the political and economic thought of the 18th and 19th centuries in Europe and in the West in general."⁸¹

The analysis highlighted two main concepts how international commercial arbitration as private method of dispute settlement gained acceptance and obedience, firstly, by analysis the "contract nature", secondly, through an analysis of the "judicial character" of the process. In accordance to these two characters, the main argument focused on the characteristics that modern international arbitration agreement is "irrevocable" as a "contract" or as "process". The following section will consider the coercive nature of arbitration and obedience to the international commercial arbitration contract in Middle East region and how they differ from the Western legal characteristics.

At first sight, the coercive nature of arbitration in Middle East can be explained on grounds of contract in Islamic law, which comprises two categories: "the first consists of ritual regulations (*Ibadat*) set down for religious and spiritual purposes. The second category, (*Mu'amalat*), is comprised of the rules required to administer and organise the community. This category also provides social rules to guide the relationship between individuals and their communities. Islamic law regulates everything from ritual obligation to property rights, giving unity to an Islamic society and organising all of its activities into a meaningful whole. Commercial arbitration contracts fall within the second category."⁸²

In Middle East countries and according to Islamic law, arbitration is classified as a contract. To a large extent, it remains a contract of an unusual character since it is still not recognised as binding as all other contracts. The process can be brought to an end either by agreement of both contracting parties (since it is consensual) or, by a unilateral act of either of them.⁸³

⁸¹ *op.cit.* See supra note 16, p. 87.

⁸² *op.cit.* See supra note 16, p.82.

⁸³ *op.cit.* See supra note 16, p. 95.

4.3.1 The Contract Nature of Arbitration in the Middle East

The contract regime in the Islamic system can be seen almost exclusively in the work of the *fuqaha*, followed somewhat later by the practitioners, who tried to soften the principles established by the “*exegetes*”.⁸⁴ The Islamic contractual system is above all empirical, and has been constituted as a result of the questions put to the practitioners and the solutions given by them to the litigation they had been called on to arbitrate.⁸⁵

According to El-Ahdab, “a view attributed to the *Imam Shafi'i* holds that “awards are only enforceable if the parties agree and thus arbitration will not have a binding character but be closer to conciliation.” There is no theory of contract in classical Islamic law, nor is there any general theory of obligation such as one finds in Roman or French law. So only certain specified contracts in Islamic law are binding and arbitration does not fall into any of the specified categories.”⁸⁶

El-Ahdab states “that under the Medjella (the first civil codification of Muslim law under Ottoman rule) the appointment of arbitrators could be revoked at any time unless the court had authorised or approved their appointment. In this case, arbitrators became delegates of the judge and their appointment could no longer be revoked.”⁸⁷

To Samir Saleh and Sayed Hassan Amin, “arbitration in Islamic law is said to be of the nature of a contract of agency, from which a party can withdraw unless it has been made for the benefit of a third party or confirmed by a judge. This view, which is shared by all the Islamic schools of jurisprudence, except the *Malikis*, stem from the fact that the authority of the arbitrator, unless confirmed by a judge, is revocable by any of the parties at any time before the award is made.”⁸⁸

Saleh notes that “arbitration clauses (as distinguished from a submission) are not even referred to in *Sharia* jurisprudence. As in the old Belgian and French civil codes,

⁸⁴ Exegetes, pl. exegetai Lit. “interpreter.” A group of officials who expound the proper procedure in situations which raise unusual questions of religious law. Their activity is attested in several cases, all of them homicides; and in each case they are responding to an inquiry by an individual rather than as expert witnesses before a court. In one case they also offer advice to a litigant, implying that this was something more than their regular function of interpreting the law. See S.C. Todd, selections by Michael de Brauw, edition of March 16, 2003 page 34 of 50.

⁸⁵ *op.cit.* See supra note 58, p. 4.

⁸⁶ *op.cit.* See supra note 16, p. 95.

⁸⁷ See Abdul Hamid El-Ahdab, (1999). Arbitration with the Arab countries, 2nd edition. Kluwer Law International.

⁸⁸ See Samir Saleh (2005). Commercial arbitration in the Arab Middle East. Hart Publishing. p.76 Also, see Amin Sayed Hassan, (1991). Legal System of Kuwait. Rayston. p. 54.

arbitration is only referred to as a submission of an existing dispute to a settlement by a neutral third party. [In the circumstances, undertaking to submit to arbitration before the existence of a dispute would be void in Islamic law, not only because it is not recognised by the *Shar'ia Law*], but also on account of its not being capable of compliance with the conditions prescribed for the validity of a reference after the dispute has arisen.”⁸⁹

The requirements as stated by Saleh are: “(a) that there should be a dispute in existence; (b) that the parties should give their consent to the reference of the dispute to arbitration; (c) an acceptance of the designated arbitrator(s) to enter the reference, and (d) that the dispute should be determined in accordance with the principles of Islamic law. It is important to be concerned with the first three requirements since the fourth does not arise until after the dispute has been decided by the arbitrator. Since an arbitration clause cannot meet the first requirement it cannot be enforced.”⁹⁰

Saleh seems at first to suggest that the clause may be treated in the same way as an ordinary term of the contract and upheld as such. However, the same author immediately dismisses the suggestion on the grounds that by providing for an arbitration clause the parties will be relying on a future and unknown event as a condition upon which operation of that clause depends. Such a condition will be regarded as void since Islamic contract law frowns upon uncertainties. Saleh points out that:

“[i]f, as it is believed, the settlement of a dispute is considered the main object of an arbitration agreement, in inserting an arbitration clause the parties would be agreeing on the intervention of a future and unknown event. This uncertainty, save for a few exceptions in future sales restrictively recognised by the Hanafis, would be a grounds for the annulment of the arbitration clause, and it would be considered “*batil*” (null and void). If the existence of a dispute is considered a non fundamental element of arbitration, a mere suspensive condition on the occurrence of which the arbitration clause - valid ab initio - would become enforceable, the arbitration clause can be challenged on another ground: arbitration contracts are among the contracts which cannot be conditional according to the Hanafi and Shafi'i schools.

⁸⁹ Ibid., p.136.

⁹⁰ Ibid., p.84.

Furthermore, the very concept of the suspensive condition does not exist in the Maliki and Hanbali schools.”⁹¹

Amin states that “in the *Shafi’i* school, the authority of the arbitrator is, at the will of any of the parties to the proceedings, revocable at any time, even after it has been confirmed by a judge. This seems unique to the *Shafi’i* school. In the other schools, in the absence of the continuing consent of both parties, the authority of the arbitrator to proceed with his function ceases unless prior to entering the submission he had previously been confirmed in that role by a judge of a regular Islamic court, whereupon his authority to proceed on the reference becomes a delegation of the powers of a judge and irrevocable by the parties.”⁹²

4.3.2 Judicial Character of Arbitration in the Middle East

Islamic law gives the main stages of the arbitration process separate treatment. Whereas the arbitration agreement itself is not regarded as binding; the award, on the other hand, is binding. This is so because the system treats the award as comparable to a judgement, thus rendering it final, binding and enforceable against the parties. For Saleh, the implication is that although one party can withdraw from the process at any time by revoking the authority of the arbitrator, he forfeits that opportunity once the award is made. So, although Islamic arbitration may start in law as a non-binding arrangement, it assumes considerable significance after the award is made. As far as the arbitration agreement itself is concerned, the legal effect of not treating it as binding in Islamic law is that it is probably not a contract in the modern sense.⁹³

The fact that arbitration is in the said region’s system not regarded as founded on a contract has many consequences which reflect on the differences between the concept as understood in the practice of modern international commercial arbitration and in many Middle Eastern countries. One of the effects is that both the agreement and the process itself are revocable. One of the parties can revoke the agreement or withdraw from the process without being in breach of contract. In many of the systems, this right exists at any time before the award is issued.⁹⁴

The difference between arbitration as understood in the West and arbitration in many Middle Eastern countries lies in the character of arbitration and particularly in the

⁹¹ Samir Saleh (2005). Commercial arbitration in the Arab Middle East. Hart Publishing. p. 173.

⁹² Amin Sayed Hassan, (1991). Legal System of Kuwait. Rayston. p. 62.

⁹³ *op.cit.* 91.

⁹⁴ *op.cit.* See *supra* note 16, p. 99.

overall attitude to the function of adjudication generally. Both have implications for arbitration as an alternative form of dispute settlement. One implication is concerned with the acceptance of arbitration in its present form in these countries.⁹⁵

Another implication arises in relation to the contribution of Middle Eastern countries to the evolution of the concept and the practice of arbitration itself in international trade. Both implications are related in their bearing on the general attitude to the role of adjudication. It would appear that the neglect or ignorance of the perception in many developing countries, including Arab Middle Eastern countries, of the function of adjudication accounts to a significant extent for the attitude of Third World parties to arbitration in matters of international trade.⁹⁶

⁹⁵ *Ibid.*, at 108.

⁹⁶ *Ibid.*, at 109.

CHAPTER FIVE

International Arbitration Contract Principles: Analysis of Modern Arbitration Law and Western Perceptions.

5.1 Introduction

The aim of this chapter is to examine precisely how the contract doctrine devotes its energies to describing and policing the divide between the different perceptions of the international arbitration contract between the West and Middle East. It will argue that the most elemental need for contracting across the jurisdictional boundaries of different legal regimes is not for a uniformity of laws but for pre-contracting certainty regarding which jurisdiction's laws will be applicable to the contract and which jurisdiction's adjudicatory system will assume effective responsibility for dispute resolution with regard to the contract. Also of importance is the enforceability of an arbitral award issued by the effective commercial dispute resolution tribunal.

Therefore, harmonisation of international commercial arbitration, and not only the law applicable to international contracts, must be universally applicable, and also should be uniformly interpreted and applied to ensure the real meaning and efficacy of such law does not vary according to jurisdictions. Comparing the different perceptions of international contract principles between the West and Middle East thus becomes essential.

This chapter will start by considering the need for harmonised international contract principles in the area of international business. Then it will refer to some of the harmonisation trends in the West to overcome difficulties in applying a national contract law in respect of an international business contract. Since Western countries have different perceptions of contract principles, this chapter will examine and investigate the controversy and competing legal theories surrounding international contract principles.

Finally, in an attempt to explore the harmonisation process of international commercial arbitration contracts, the chapter will examine which of the Western legal theories of international contract principles has been introduced at the international level and in particular to the language of the harmonised UNCITRAL Model law. How significantly this Western perception of international contract principles as merged in the clauses of the UNCITRAL Model Law differs from the perception of



international contract principles in the Middle East will be discussed in the next chapter.

International Business Contract

International business contracts involve parties from different countries and their contractual obligations usually have to be performed in more than one country. As a consequence and because of the very nature of the international business contract, special contractual law cannot be purely national since this would lead to different contract laws being applied to the same contract.¹

Accordingly, it is very difficult for parties entering into international contracts in which a choice of law governing the contract or a choice of adjudicating forum so resolve contractual disputes has been made in the contract not to overlook the necessity of first examining the practical consequences of these choices. If any applicable jurisdiction were to reject such choices of law and forum, whether outright or through an application of its conflict of laws rules, then the parties need to understand the consequences of such rejection and the effective nullification of their contractual provisions, and to take measures accordingly. In any case, where no choice of law or forum has been made in a contract, the parties should also be equally interested in determining what laws will be applicable to the contract and what forum will adjudicate contract disputes under the applicable conflict of laws rules.²

This situation leads us to consider the need for harmonised international contract law principles. At this introductory stage it is worth mentioning some of the significant steps taken in Western legal culture in this regard.

5.2 Harmonisation of International Contract Principles

5.2.1 UNCITRAL Rules

The United Nations Commission on International Trade Law (“UNCITRAL” or “Commission”) developed the UNCITRAL Arbitration Rules (“Rules”)³ to arbitrate international trade disputes between countries with different legal, social, and economic systems. Currently, many international privatisation contracts provide that future disputes will be resolved through binding arbitration under the “Rules”.⁴

¹ See European Principles of Contract Law, The Need for International Contract Law Principles. International Contract Adviser. Winter 1998. Vol. IV, No. 1 p.15.

² See National and State Private International Law Statutes. International Contract Adviser. Winter 1998 Vol. IV, No. 1p.54.

³ UNCITRAL Arbitration Rules (1976) Adopted by the General Assembly on December 15, 1976).

⁴ One example is a privatisation contract for the sale of a Czech enterprise by the Czech Republic (selling country) to a German Corporation (private foreign investor). The contract provides for all

5.2.2 UNIDROIT Rules

Reference to this example is made to emphasise that harmonisation according to “a model framework” is better achieved than “a convention - base framework”.

The International Institute for the Unification of Private Law (“UNIDROIT”) is an independent international organisation whose purpose is to examine ways of harmonising and co-ordinating the private law and to prepare gradually for the adoption by states of uniform rules of private law. The eligibility of a subject for unification will to a large extent be conditional on the perception of a state’s willingness to accept changes to its municipal law rules in favour of a new international solution on that subject.⁵

The uniform rules drawn up by the UNIDROIT have traditionally tended to take the form of international conventions designed to apply automatically in preference to a state’s municipal law upon completion of all the formal requirements of the state’s domestic law for their entry into force. However, the low priority which tends to be accorded by governments to the implementation of such conventions and the time it tends to take for them to enter into force have led to the increasing popularity of alternative forms of unification in areas where a binding instrument is not felt to be essential. Such alternatives include model laws which states may take into consideration when drafting domestic legislation.⁶ Considering the importance of the above, this makes the harmonisation of international contract principles of commercial arbitration within a model framework like the UNCITRAL Model Law most significant as will be discussed later in the coming chapters eight and nine.

5.2.3 The Brussels Convention

The Brussels Convention is another example of a solution developed by the West to overcome and to avoid the greatest legal difficulty facing international business contracts, that is, application of conflict of laws. The key point the Convention addressed is that, contract disputes may be litigated in the jurisdiction of the “place” of the performances of the contractual obligation as determined by the controlling law

disputes to be resolved through binding arbitration under Rules. See John D. Franchini, 1994. *International Arbitration under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*. *Fordham Law Review*. See supra 4, p.1.

⁵ See *Unidroit and International Contracts*. *International Contract Adviser*. Vol. VI, No. 4. Autumn 2000. p.47.

⁶ *Ibid.*, p.48.

for the contract, nor where a tort is involved, litigation may take place where the allegedly tortious event or damage occurred.⁷

Thus, recognition and enforcement of subsequent civil and commercial judgements in the EU is nearly automatic under the Brussels Convention. There are six grounds under Article 27 and 28 for refusing recognition and enforcement of judgements. These are: the public policy, protection of defendants' right, irreconcilable conflict with an existing judgement in the enforcing state, and a conflict between the judgement court and the enforcing court on the preliminary question.⁸

5.2.4 The Rome Convention

A significant example to show difference between the perception of the West and the Middle East on international contract principles is the principle of contractual choice of law. The Rome Convention principally deals with contractual choice of law. It provides both for the selection by contractual parties of a designated choice of law and the procedural designation of an applicable law of contract by the courts when the parties have made no effective contractual choice of law. It affirms the right of parties to commercial contracts to designate the law which will govern their contracts. Member states, courts are bound by law to honour such choice of law. Where no designations have been made, the law of the country most closely connected with the contract will apply. In practice, the national law with the closest connection with the contract will normally be that in which the party which is to affect the "characteristic performance" resides.⁹ How such principles differ according to the Middle East perception will be discussed in the next chapter.

5.2.5 Functions of Aforementioned Conventions

Having mentioned the above examples as tools developed by the Western legal culture the question remains, do these tools give the expected outcomes to cover the problems associated with international business contracts? The UNIDROIT Principle of International Commercial Contracts, for example, and the other Conventions are more than multilateral efforts to establish the law governing international commercial contracts. Such efforts reflect the desire of the international business community to be

⁷ See the Rome Convention on the Law of Contractual Obligation/ Brussels Convention on Jurisdiction and Enforcement of Judgements. *International Contract Adviser Winter 1998*. vol. IV, No. 1. p.50.

⁸ *Ibid.*, p.51.

⁹ *Ibid.*, p.48.

able to rely upon a universally-accepted body of legal principles applicable to each and all of their international commercial agreements.¹⁰

5.2.6 Regionalism and Harmonisation of International Contract Principles

Given the above given examples, does regionalism have any effect on the harmonisation of international contract principles? This section will examine how regionalism is a core factor behind the establishment of The European Principles of international contract and how the latter were intended to be principles and rules reflecting common solutions to problems of contract law within Europe as a region.

This is of particular importance because of the need to find some way to bridge the fundamental gap between the civil law and the common law of contract for use within the Single Market of the EU. Creating such common rules for European contracts requires the reconciliation of a number of quite different European assumptions and practices regarding international contracts. As the result, the Commission on European Contract Law issued the first component of European Principles in 1995.¹¹

The key element to be mentioned here is regionalism's influence on the process of harmonising international contract principles in Europe. When the drafting of the European Principles began, there was serious doubt as to whether the UNIDROIT Principles could be successfully devised or would be accepted by the international legal and business community. Consequently, the European Principles were drafted to fulfil European requirements when or if the UNIDROIT Principles failed to materialise or proved to be inadequate.¹² In other words, the European Principles are designed to operate within a single economic market. The EU Single Market blurs any distinction between intra-EU "international" contracts and domestic contracts and provides a high degree of harmonisation of the EU legal regimes for consumers and other commercial contract transactions. In contrast, the UNIDROIT Principles are intended to operate globally, but not domestically, and to function within markets with widely disparate legal and economic regimes.¹³

It has been argued that if the European Principles are used to form the basis for the Common European Code of Private Law (as contemplated by EU Parliament resolutions of 26 May, 1989, and 6 May, 1994), this would move them out of the

¹⁰ Q&A: What Is "The Inter-American Convention on the Law Applicable to International Contracts? International Contract Adviser. Autumn 1997, Vol.III, No. 4, p. 37.

¹¹ *op.cit.* Supra note 2, p.16.

¹² *Ibid.*, p.25.

¹³ *Ibid.*

category of a competing set of non binding principles applicable to international contracts and into the realm of mandatory statutory law applicable to specific transactions. In addition, because of the greater degree of shared principles and conditions of EU member states when compared with the general global community of nations, it was possible to formulate the European Principles with greater breath, detail, and precision than was or could ever be possible with the UNIDROIT Principles, which sought to reconcile essentially dissimilar and ultimately irreconcilable legal, economic, cultural, and political positions from around the world. This makes the European Principles more complete as a body of rules governing contracts and, therefore, more useful for those in agreement with the underlying legal principles from which they were drawn.¹⁴ This clearly shows the strong influence of regionalism in any attempts to harmonise international contract principles.

5.3 International Contract Principles: Harmony and Diversity

After discussing the impact of business contracts upon the emerging need to harmonise the principles of international contracts and the attempts taken by the West to achieve this goal on the one hand and the effects of regionalism on these attempts on the other, this part of the chapter will describe some of the competing international contract principles. The aim is to show the areas of diversity and competing claims among these principles. Such diversity among international contract principles will be critically examined to find which of these Western principles has been introduced into the UNCITRAL Model Law on International Commercial Arbitration. As mentioned earlier it is extremely important to compare and show how these principles differ, from the Middle East perception, if harmonisation of international commercial arbitration is to give the expected outcome and be universally accepted, implemented and interpreted.

5.3.1 Sanctity versus Flexibility of International Contract Principles

The sanctity and flexibility of international contracts are the most significant competing principles in respect to international business contracts in general and international commercial arbitration in particular. In the following part, each principle will be discussed, and later which of these Western principles has been adopted and introduced within the harmonised UNCITRAL Model Law clauses will be examined.

¹⁴ Ibid.

5.3.1.1 Sanctity Contract Principle “*pacta sunt servanda*”

In the West, the fundamental right of conclusion of contract is protected by two important principles; ‘the contract is the law of the parties’, and ‘*pacta sunt servanda*’,¹⁵ agreements are to be observed at all costs. These two general principles are applicable to agreement between states as well as between private persons. In other words, they are recognised as rules of the private law of the contract governing the agreements entered into between private parties and are also recognised as rules of the law of treaties governing the agreements between states.¹⁶

In the following commercial arbitration cases, apart from the legal arguments raised in them, the aim of the discussion is to show the supremacy of the sanctity principle of the commercial arbitration contract over the flexibility principle within Western legal culture.

In the *Sapphire* award (1967)¹⁷, it was held that “it is a fundamental principle of law which is constantly being proclaimed by international courts, that contractual obligation undertaken must be respected. The rule ‘*pacta sunt servanda*’ is the basis of every contractual relationship”.¹⁸

¹⁵ *Pacta sunt servanda* (Latin for “the pact must be respected”) is a Brocard, a basic principle of civil law and of international law. In its most common sense, it refers to private contracts, stressing that contained *pacta* and clauses are laws between the parties, and implies that the non-fulfilment of respective obligation is breach of the pact. The general principle of the correct behaviour in commercial praxis, that also implies the *bona fide*, is a requirement for the efficacy of the whole system, so the eventual disorder is sometimes punished by the law of some systems even without a direct damage suffered by any of the parties. The rule of *pacta sunt servanda* is based on good faith; this entitles states to require that obligation be respected and to rely upon the obligation being respected. This good faith basis of treaties implies that a party to a treaty cannot invoke provisions of its domestic law as justification for a failure to perform. From Wikipedia legal dictionary.

¹⁶ See Hamid Reza Nikbakht Fini, 1990. Unpublished thesis. *State Contract and Arbitration*. p.26. See *Supra* 14, (The Principle *pacta sunt servanda* is recognised by the Vienna Convention on the Law of Treaties. Article 26 of the Convention provides that: “every treaty in force is binding upon the parties to it and must be performed by them in good faith”)

¹⁷ In *Sapphire Int’l Petroleum Ltd. V. National Iranian Oil Co.*, the arbitrators were influenced by certain considerations and in particular:

- (1) the fact that “the arbitration should be governed by a law procedure, and that it should be subject to the supervision of a State authority, such as the judicial sovereignty of a state”
- (2) the need to facilitate the enforcement of the award: by providing for arbitration as an exclusive mechanism for resolving contractual disputes, the parties to an agreement, even if one of them is a state, must, however, be presumed to have intended to create an effective remedy. The effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitrator is international law—generally is smaller than of an award founded on the procedural law of a specific legal system and partaking of its nationality. See George R. Delaume, (1981). *State Contract and Transnational arbitration. The American Journal of International Law*. vol. 75. p. 11 *Supra* note 35.

¹⁸ *Ibid.*

In the case of *Topco/Calasiatic (1981)*¹⁹ the sole arbitrator by referring to two awards of *Aramco (1958)*²⁰ and *Sapphire (1963)* said: “no international jurisdiction whatsoever has ever had the least doubt as to the existence, in international law, of the rule ‘pacta sunt servanda’... the maxim pacta sunt servanda should be viewed as a fundamental principle of international law”.²¹ This principle was also upheld by the sole arbitrator in the *Liamco(1979)* case²². The Tribunal held that “it is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the state of the contract in which it is inserted and continues in force even after the termination.”²³

Thus, the sanctity of commercial arbitration contract principles has been determined. The question remains why this contract’s principles have such effects in Western legal culture and what are their scope? It has been argued that the ‘*pacta sunt servanda*’ principle has a moral basis as one of the fundamental principles of international law, and it constitutes part of the ‘*ius cogens*’²⁴. The scope of the ‘*pacta sunt servanda*’ principle is designed as a rule applicable to agreement between two equal parties, i.e., two sovereign states or two private parties. But most legal writers and jurists have

¹⁹ The view prevailed in the *Aramco* and the *TOPCO/Calasiatic Award*, the arbitrator held that the arbitration was directly governed by international law on the following grounds:

- (i) “The jurisdiction immunity of states (the principle *par in parem non habet jurisdictionem*) excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases.”
- (ii) “Considering the jurisdictional immunity of foreign states, recognised by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which an interference by the latter state would constitute an infringement of the prerogatives of the state which is a Party to the arbitration. This would render illusory the award given in such circumstances. For these reasons, the Tribunal finds that the law of Geneva [i.e. the law of the seat of the Tribunal] cannot be applied to the present arbitration.
“it follows that the arbitration, as such, can only be governed by international law, since the parties have clearly expressed their common intention that it should not be governed by the law of Saudi Arabia, and since there is no grounds for the application of the American law of the other party. This is not only because the seat of the Tribunal is not in the United States, but also because of the principles of complete equality of the parties in the proceedings before the arbitrators,” See Kenneth J. Vandeveld, (1988). *The Bilateral Investment Treaty Programme of the United States. Cornell International Law Journal*. vol. 21, pp.202 supra note 37.

²⁰ See, *Arabia v. Arabian American Oil Company (Aramco)*, 27 I.L.R. 117, 168 (1958).

²¹ See George R. Delaume, (1981). *State Contract and Transnational arbitration. The American Journal of International Law*. vol. 75. p.11 Supra note, 37.

²² *Libyan American Oil company (LIAMCO) v. Government of the Libyan Arab Republic*.

²³ See R Doak Bishop, (2000). *International arbitration of Petroleum Disputes: the development of a ‘Lex Petrolea’*. *Cepmlp Journal*. p.4.

²⁴ A norm of general international law is accepted and recognised as something to be respected, and not to be deviated from. Easily accepted by the Natural Law School, but there is no agreement on its substance. An example is the prohibition on the use of force to settle conflicts. See Howard Fienberg, *International Law definitions*.

extended this principle to the contract entered into between states and private persons.²⁵

Application of the principle of sanctity of contract extends to international commercial arbitration contracts. Thus, these contracts are binding on the parties and neither of them is entitled, unilaterally, to modify or abrogate the contract.²⁶

In regard to its scope, it is worth mentioning that sanctity of contract is so significant in Western culture, even if one of the international contract parties is a state where it cannot exercise its sovereign power in legislation to alter or modify the contract. This point is much disputed when examining the Middle Eastern perception of international contracts as will be emphasised later.

In the West, some jurists reason that “a state cannot by exercising its legislative sovereignty, take measures to alter or discharge its contractual obligation or nullify the contract. In these circumstances, the contract may be brought to an end by the mutual agreement of the parties or by the decision of an impartial tribunal, i.e., any action, such as abrogation or modification, affecting the continued validity of the agreement should be taken by the consent of the parties or should be referred to a dispute settling body. Thus, it is not only admitted that the contracting state is not only a party to the contract, but a sovereign legislator that does not have the right to alter or modify the contract unilaterally.”²⁷

Therefore, unsurprisingly, various state contracts commonly contain a clause designed to stabilise or freeze essential terms of the contract against non-commercial risk. In other words, the stability clause provides for stability of rights of the parties to the state contract and prohibits the state recourse to its legislative or administrative power to modify or nullify the contractual rights or connected commercial benefits of the private contracting party without his consent.²⁸

²⁵ Wehberg, H.: “Pacta sunt Servanda”, *American Journal of International Law*, 1959, p.775; Lalive, J. F. : “Contracts Between a State or a State agency and a Foreign company”, 13 *International and Comparative Law Quarterly*, 1964, p.987 *Oxford Journal* vol. 13 No. 3.

²⁶ Ibid.

²⁷ (it is said that if the doctrine of *rebus sic stantibus* is to apply to international contracts it would be more limited than its application in the international law of treaties to which the principle is applicable in a very limited extent) See Von Mehren, R.B. and P. N. Kourides: “International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalisation Cases”. *American Journal of International Law*, 1981 vol. 75, pp.530-532.

²⁸ For an early illustration see, e.g. Article 21 of the Anglo-Iranian Oil Company agreement of 1933 which provided that “...The company formally undertakes to have regard at all times and in all places to the rights, privileges and interests of the Government and shall abstain from any action or omission which might be prejudicial to them. ... This concession shall not be annulled by the Government and the terms there-in contained shall not be altered either by general or especial legislation in the future or

5.3.1.2 The Flexible Contract Principle

Having discussed the sanctity of contract in Western legal culture, it has to be mentioned that scholars counter the absolute sanctity of the contract and stress the need for flexibility in the performance and legal effect of international commercial contracts. They generally point to the nature of such contracts which affect the scope of governmental functions, and the national economic development, and are often related to natural resources or public utilities.

In reference to classic forms of Middle East contracts with principally West European and North American companies, they are most often in the field of natural resources. They mostly have to be concluded over a long period, 20, 40, or even 60 years, and are usually connected with ownership, control agreements and complex fiscal regimes. For these reason, implementation of the flexibility principle in international contracts has been argued since there very nature is likely to require the necessity of alteration, modification and readjustment from time to time or even sometimes abrogation.

Regarding the flexible contract principle in international commercial arbitration, the following section will examined some of the most common arguments raised in its defence and discuss some relevant Western – Middle Eastern cases.

The Public Interests Argument

Referring to natural resources type of international commercial contract between the West and Middle East, defenders of the flexibility contract principle argue that, these kinds of international business contracts are basic instruments of public policy and closely connected with the interests of the host-Middle Eastern-country to promote and direct its economic development. Thus, they cannot be separated from changes in political and economic conditions of a country.

Accordingly, since these countries are concerned with the economic welfare of their citizens, these cannot bind themselves to relationships with individuals that might in time derogate from that welfare. On the other hand, the party who voluntarily contracts with a foreign state, takes into account the probabilities of performance by the state and subjects himself to the law of that state. The consequences of this reasoning is that, contracts cannot be situated in the province of private contracts and

by administrative measures or any other acts whatever of the executive authorities”, - see J.C. Hurewitz: II “Diplomacy in the Near and Middle East, A Documentary Record 1914-56, 322(1956). Similar stipulations have been provided for in most of the recent oil concession agreements, such as Kuwait-Shell and NIOC-Pan American Agreements. See supra note 16, pp.40 supra note 63.

private law, which are devised to apply to transactions of movable goods in a market regime, but are public character contracts and lie more in the domain of public law, under which contractual provisions on the grounds of public policy, unfairness or inequity can be modified or transmitted.²⁹

Geiger (1974)³⁰, in his comparative survey came to the conclusion that, “economic development agreements are binding on both parties. They are, however, subject to the government’s prerogative of unilateral modification in the public interest. Such modification may be brought either by general legislation or administrative action directly interfering with the agreement”³¹

Denial of International Status Argument

Another argument used to defend the flexibility principle is that, international contracts should be governed by the law of the host state and that public international law is not applicable to them. The denial of international status to commercial contracts is mainly because individuals are not subjects of international law.

Such argument was raised by The Permanent Court of International Justice in the Anglo-Iranian Oil Company (1952) case concerning a dispute over an agreement of 1933 between the Iranian Government and the Anglo-Persian Oil Company. It held that “The new concessionary contract did not regulate any public matters directly concerning the two Governments. It could not possibly be considered to lay down the law between the two states”³²

In the *Aramco (1958)* arbitration, the tribunal rejected a contention made on behalf of the company that “an oil concession should be assimilated to an international treaty governed by the law of Nations, and also held that as the agreement was between a state and private corporation, not between states, it was not governed by public international law”.³³ Accordingly, this decision has two consequences: first, any change to the law of the state party which changes the agreement partly or wholly will

²⁹ See B. Sen (1988) *Diplomat’s Handbook of International Law and Practice*, third revised edition. Nijhoff Publisher.

³⁰ See Geiger R. (1974). *The Unilateral changes of Economic Development agreement*. *International and comparative Law Quarterly*. Vol. 23, p. 87.

³¹ *Ibid*, p.102.

³² See Bing B. Tia, (1998). *The regime of straits in international law*. Oxford University Press. p. 180, 191.

³³ See M. Al-Saeed, (2002). *Legal protection of economic developments*. *Arab law Quarterly*. vol. 17, No. 2. p. 21.

not be considered as breach of contract; and secondly, given a breach of contract, it will not per se be a breach of international law.³⁴

F.A. Mann (1983), countered the view that the modification or abrogation of state contracts involves a breach of international law and stated that the doctrine “stems from a fundamental error which would not have arisen if public international lawyers had due regard to the character and teachings of private international law: in the type of case where there is room for the problem at all under customary public international law, no breach of contract in fact occurs and , consequently, the principle of *pacta sunt servada* is not infringed. Contracts are governed by the law determined by the private international law of the forum. That law “not merely sustains but, because it sustains, may also modify or dissolve the contractual bond”.³⁵

Crawford J. (1997)³⁶ quoting Foighel, (1982)³⁷ stated that “the fact that nationalisation is not a breach of international law cannot be altered by the fact that nationalisation destroys contract rights, for example, a concession which the nationalising state granted to a foreign company. There is no rule in international law that gives greater degree of protection to rights secured by contract than to other rights of property.”³⁸

The Changed Circumstances Argument

Another argument for defending flexibility in international contract principles is changed circumstances. It has been argued that if the principles of public international law such as *pacta sunt servanda* do apply to international contracts, there are other international legal principles, such as changed circumstances (*clausal rebus sic stantibus*), which constitute expectations to that principle. Article 62 of the Vienna Convention on the Law of Treaties which determines the scope of the *clausal rebus sic stantibus* shows that even in the field of inter-state agreements the principle of sanctity of contract is not absolute.³⁹ It provides that:

³⁴ Ibid.

³⁵ See F. A. Mann, (1983). England Rejects Delocalised Contract and Arbitration. *International and Comparative Law Quarterly*. vol. 33. p. 194-195.

³⁶ See James Crawford, (1997). State Practice and International Law in Relation to Unilateral Secession. Paper, University of Cambridge.

³⁷ Isi Foighl, (1982). Nationalisation: A Study in the Protection of Alien Property in International Law. Greenwood Publishing Group. Oxford.

³⁸ Ibid.

³⁹ See Geiger, R. “The Unilateral Changes of Economic Development Agreements” *International and Comparative Law Quarterly*. 1974, p.100. Geiger suggests that sanctity of contract has never been treated as an absolute and unqualified principle neither by public international law governing the relations between states nor by general principles of law recognised by any of the major legal systems.

“A fundamental change of circumstance which has occurred with respect to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of these circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the scope of obligation still to be performed under the treaty”.⁴⁰

Some international jurists hold the view that the maxim of *clausal rebus sics stantibus* (the changed circumstances) is a reservation and an exception in international law to the principle *pacta sunt servanda*; and this concept is now generally accepted. The doctrine was considered in the *Tunnel Indemnity (1986)*⁴¹ case wherein the tribunal

He maintains that state contracts are not treaties; even so, he argues that in the field of treaty relations the *clauaula rebus sic stantibus* in a very restrictive sense constitutes an exception to the doctrine of *pacta sunt servanda*.

⁴⁰ Vienna Convention on the Law of Treaties in Brownlie: “Basic Documents in International Law”, 3rd Edn., 1983 Oxford.

⁴¹ Contract between the Secretary of State for Transport and Channel Tunnel Group Limited Clause 24 referred to the: Exceptional Circumstances and Force Majeure

24.1 None of the parties to this Agreement shall be liable for any failure or delay in complying with any obligation under this Agreement to the extent that such failure or delay has been caused directly by Exceptional Circumstances or by any other event or circumstance presenting the characteristics of force majeure such as:

- war (whether declared or undeclared);
- invasion, armed conflict or act of foreign enemy;
- riot, insurrection, act of terrorism, sabotage, criminal damage or the threat of such acts;
- nuclear explosion, radioactive or chemical contamination or ionising radiation;
- any effect of the natural elements including geological conditions which it was not possible to foresee and to resist;
- strike of an exceptional importance;
- behaviour of one party causing serious and certain damage to another party;

to the intent that in particular, but without limitation, the time allowed for the performance of the obligations referred to in Clause 10 shall be extended accordingly.

24.2 Any party claiming that it has been prevented from fulfilling any of its obligations under this Agreement by reason of an Exceptional Circumstance or any other event or circumstance referred to in Clause 24.1 will notify all other parties immediately in writing, stating the basis of the claim.

24.3 Any party wishing to dispute the validity of a claim which has been notified under this Clause will give written notice of dispute to the party making the claim within 28 days of the date of the notice of claim stating the grounds on which such claim is disputed.

24.4 If neither the notice of claim nor the notice of dispute has been withdrawn within 28 days of the date of the notice of the dispute, the matter shall be submitted to arbitration in accordance with the provisions of Clause 40.

24.5 If the notice of claim is not contested or if the notice of dispute is withdrawn within 28 days, all parties shall be deemed to have accepted the validity of the claim.

24.6 A party shall not be entitled to rely upon Clause 24.1 where that party by act or omission has seriously aggravated the relevant Exceptional Circumstances or other event or circumstances referred to in Clause 24.1.

mentioned the possible application of the doctrine where unforeseen circumstances had destroyed the economic basis of the concession and made performance by the concessionaire impossible. In this case, application of the doctrine was considered a measure which could help the concessionaire receive an equitable return on its investment agreement.⁴² Such changing circumstances and force majeure clauses are commonly used in the Middle Eastern international contracts.

In the case of *Questech Inc. v. Ministry of National Defence of the Islamic Republic of Iran* (1985)⁴³, chamber one of the Tribunal (Bockstiegel, Chairman) applying the principle of *clausal rebus sic stantibus* observed that “changes which are inherent parts and consequences of the Iranian Revolution must be taken into account. The chamber continued: the fundamental changes in the political conditions as a consequence of the revolution in Iran, the different attitude of the new Government and the new foreign policy especially towards the US which had considerable support in large sections of the people, the drastically changed significance of highly sensitive military contracts especially those to which US companies were parties, are all factors that brought such a change of circumstances as to give the respondent a right to terminate the contract”.⁴⁴

Administrative Contract Argument

The final argument worth mentioning is the administrative contract legal argument to defend the flexibility of international contracts. This argument relies very strongly on

24.7 The giving of notice invoking Clause 24.1 shall not release the party giving the notice from the requirement to take all reasonable steps to mitigate the consequences of the relevant Exceptional Circumstances or other event or circumstance referred to in Clause 24.1.

24.8 Except as specifically provided to the contrary, no party shall be relieved of its obligations under this Agreement by reason of impossibility of performance or any circumstances whatsoever outside its control.

⁴² See Robert Knutson, (2004). Common law development of the doctrine of impossibility of performance and frustration of contract and their use and application in long-term concession contracts. LCIA. Kluwer Law International

⁴³ The claim in this case arose out of a contract that was part of a project to modernise and expand Iran's electronic intelligence gathering system. The project, known as "IBEX", was also involved in the Tribunal's Award No. 180-64-1 of 27 June 1985 in *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*. The contract in this case provided for the Claimant, Questech, Inc. ("Questech"), to evaluate the planning and implementation of a training programme conducted by the Claimant in the *Sylvania* case, and to certify student achievement in the programme. Questech alleged that the Respondent, the Ministry of National Defence of the Islamic Republic of Iran ("the Ministry of Defence") breached the contract in 1979. The Ministry of Defence alleged that the Claimant breached the contract, and it interposes a counterclaim. An Interim Award was issued in this case requesting the Government of Iran to move for a stay of proceedings before the Public Court of Tehran with respect to claims brought by the Ministry of Defence that were identical to its counterclaims before the Tribunal (Interim Award No. ITM 15-59-1 of 1 March 1983).

⁴⁴ See Loukas Mistelis, (2001) Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law. Sweet & Maxwell. Iran-US Claims Tribunal Reports 9 (1985-IIO), p. 107 (AWD, 191-59-1, sep. 20, 1985).

administrative law theory which a considerable number of Middle Eastern countries adopts in their legislation as will be discussed in the next chapter.

The administrative contract argument refers to the municipal practice of states regarding their contracts with private persons as public contracts, which even though they are binding on both parties and the maxim *pacta sunt servanda* is still applicable, are limited by the inherent overriding power of the state. In addition it is contended that none of the major legal systems recognise a rigid meaning for the *pacta sunt servanda* principle, but that it is subject to consideration of good faith and equity.⁴⁵

Contracts between states and private enterprises for the purpose of economic development can be found in virtually every legal system. In France as in other legal systems, the public law concept is based upon the fundamental difference between the sovereign state and private persons. The German doctrine regards this inequity as the main feature of administrative law. Another criterion of public law which is specially emphasised by French legal theory is its close relationship to needs and interests of the public service.⁴⁶

They are closely related to the interests of the host country to promote and direct its economic development. According to the argument of the administrative contract, economic development agreements are not treaties. They are characterised by the fundamental inequality between the contracting parties, sovereign states on one side and private persons on the other. Consequently, even though state contracts are binding on both parties, they are, however, subject to the government's prerogative of unilateral modification in the public interest. Such modification may be brought either by general legislation or administrative action directly interfering with the agreement.⁴⁷

5.3.2 Monism versus Dualism in the Context of the International Contract Principles

In attempts to harmonise international business contracts, the previous section of this chapter discussed the competing legal arguments of sanctity versus flexibility of international contract principles within Western legal culture. This part will discuss other competing arguments concerning the harmonisation of international contract

⁴⁵ See: "Fair and Equitable Treatment Standard in International Investment Law". Working paper on international investment number 3/2004. OECD.

⁴⁶ Ibid.

⁴⁷ For further evaluation see *infra*, Chapter Five: "Concluding Remarks and Evaluation". See *supra* note 113. *op.cit* 16, p.54.

principles, that is, monism⁴⁸ and dualism⁴⁹ principles. The aim of such comparison is to highlight some of the differences between Western legal culture and Middle East countries in respect to law applicable to international commercial arbitration contracts. Generally speaking in the West, in contrast to Middle East, the monism contract principle rather than the dualism principle is the notion applied to international contracts as will be discussed later.

In respect of what sort of law is applicable to international contracts, the internationalisation of international contract theory has been developed.⁵⁰ It has been said that, “the theory of internationalisation of international contracts poses some of the hardest questions that relate to both public and private international law. The theory suggest that, no matter what law the parties to such contract choose as the proper law of the contract, *international law superimposes their choice and is applied automatically as the overriding governing law*. Thus, where the law of the host state applies as the sole applicable law, either by virtue of the parties’ express choice or by the conflict laws rule of closest connection in the absence of such choice, the theory of internationalisation triggers off not only the theoretical controversies of monism versus dualism of public international law but also the issues of party autonomy and the doctrine of the proper law of the contract in private international law.”⁵¹

⁴⁸ Monism: This theory characterises international and municipal law as a single legal system with municipal law subordinate to international law. Hence, in the Netherlands, all treaties and the orders of international organisations are effective without any action being required to convert international into municipal law. This has an interesting consequence because treaties that limit or extend the powers of the Dutch government are automatically considered a part of their constitutional law, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Convention on Civil and Political Rights. In states adopting this theory, the local courts automatically accept jurisdiction to adjudicate on lawsuits relying on international law principles. See American hearing dictionary.

⁴⁹This theory regards international and municipal law as separate systems so that the municipal courts can only apply international law either when it has been incorporated into municipal law or when the courts incorporate international law on their own motion. In the United Kingdom, for example, a treaty is not effective until it has been incorporated, at which time it becomes enforceable in the courts by any private citizen, where appropriate, even against the UK Government. Otherwise the courts have a discretion to apply international law where it does not conflict with statute or the common law. The constitutional principle of parliamentary supremacy permits the legislature to enact any law inconsistent with any international treaty obligations, even though the government is a signatory to those treaties. See American hearing dictionary.

⁵⁰ See M. Sornarajah, (2004). International Contract Law on Foreign Investment. Cambridge University Press. p. 423.

⁵¹ See A.F.M. Maniruzzaman, 2001. State Contracts in Contemporary International Law: Monist versus Dualist Controversies. EJIL, Vol. 12, No. 2, 309-328. p. 309

There seems to be a trend towards the law of the host state being viewed as the law applicable in international contracts. According to this trend, Middle Eastern countries' laws will be applied when contracts are made with foreign investors. For example, in the contract between the Arabian American Oil Company and Saudi Arabia the Islamic Shar'ia law was the applicable law.⁵²

However, many Western developed countries are also often found to insist on the application of their own national law to natural resources international contracts. From their point of view, the performance of such international contracts takes place in the territory of the host state, which considers itself well placed to insist that the application of its own law is desirable and practical in day-to-day operations. The law of a state may sometimes mandate this to contract by reference to its own national law.⁵³

At this point, the issue under consideration is, in the context of harmonisation of international contract principles, whether or to what extent harmonised international commercial arbitration law has any role to play in the situation where the proper law of the contract is some municipal law, and the contract has its being in that law as the proper law of the contract.

This issue will be examined based on some arguments presented in the debate on the relationship between international law and municipal law, and reference will be made to some international commercial arbitration cases.

5.3.2.1 Arguments for application of the Monist Contract Principle

As mentioned above, monist principles in Western legal culture give little weight to the proper law or applicable law notion based on the doctrine of the autonomy of the will of the parties, especially if the parties' choice is the law of the host state in the context of an international business contract. This is principally because of the supremacy of international law they maintain over municipal law. This has created a tension in private international law relates to the choice-of-law issue in the context of international contracts.

“Some jurists who support the automatic internationalisation of international contract from the monist point of view justify their stance to superimpose international law on

⁵² See Sornarajah, (1997). Power and Justice in Foreign Investment Arbitration, *Journal of International Arbitration*. See Pogany (1992), Economic Development Agreements. 7 ICSID Rev-FILJ. The author of the Article affirmed the trend towards the localisation of state contracts in the petroleum sector, as confirmed in a number of interviews he conducted with oil industry executives. p.103.

⁵³ See A.F.M. Maniruzzaman, (2001) p.310.

such contracts by subjective and objective considerations. Thus, internationalisation theory turns out to be a ‘cocktail theory’ that serves both international law theories (monists) and practitioners (internationalists) equally.”⁵⁴

In commercial arbitration cases involving some Middle Eastern countries and Western party, the monist principle has been raised. In the Pyramids case (the SPP 1988 case)⁵⁵ for example, the ICC tribunal accepted that Egyptian law was the proper law of the contract. But the tribunal took the view that international law could be deemed as part of Egyptian law and therefore concluded:

“We find that reference to Egyptian law must be constructed so as to include such principles of international law as may be applicable and that national laws of Egypt can be relied upon only in as much as they do not contravene said principles.”⁵⁶

The arbitral tribunal’s conclusion that “the principle of international law overrides internal legislation in the event of inconsistency attributes supremacy to international law over municipal law, and is generally an expression of the monist doctrine. Moreover, party autonomy would be disregarded when it designates a particular municipal law and such designated law would be disregarded when it designates a particular municipal law.”⁵⁷

This principle was followed by an ad hoc tribunal in the *Aminoil* case (1982)⁵⁸. The tribunal applied primarily the law of Kuwait which had, in the tribunal’s view, international law as an integral part of it. However, the tribunal was not faced with a

⁵⁴ Ibid., p.311.

⁵⁵ *Middle East Ltd. And Southern Pacific Project v. Egypt and EGOTH* (988). In this case, the Egyptian General Organisation for Tourism and Hotels (EGOTH) and Southern Pacific Properties (SPP) entered into an agreement to the construct of two tourist centres, one of which would be located near the Giza pyramids. Due to a worldwide campaign against the agreement, the Egyptian government cancelled the project, and declared the area around the pyramids public property. A French appellate court reviewing the decision of the arbitration panel, the International Centre for Settlement of Investment Disputes (ICSID), held that the counter-signature of the agreement by the Minister of Tourism, preceded by the words “approved, agreed and ratified,” did not bind Egypt as a party. The Egyptian law governing EGOTH explicitly gave it a separate legal personality regarding commercial transactions. EGOTH also possessed an independent organisation, budget, and was subject to the same tax laws as governed private companies. Thus, where a state enterprise has a separate legal identity that may allow it to declare force majeure in light of actions by the state, the corporate veil may not be pierced simply because the state approved the contract. Therefore, for the state enterprise to be able to declare force majeure regarding an action of the state, it must first have a separate legal identity. That is, it must have the ability to unilaterally enter into binding contracts in commercial transactions. See Christopher Scott Maravilla, (2002). *The Ability of a State-Owned Enterprise to declare Force Majeure Based upon Action of State. Journal of International and Comparative Law at Chicago-Kent*. vol. 2, p.5.

⁵⁶ Ibid.

⁵⁷ See Maniruzzaman, (2001) supra note 55.p. 318.

⁵⁸ *American Independent Oil Company v. Kuwait* (1982) in 66 ILR 519, 21 ILM 976.

conflict between a principle of international law which it considered applicable and a rule of Kuwait law. The tribunal has said: “the different legal elements do not always and everywhere blend as successfully as in the present case. Since no conflict arose between the two laws, the issue of the primacy of the one over the other did not need to be dealt with in practice. Had there been any conflict as such, it might be that the tribunal would have attached supremacy to international law.”⁵⁹

Such a view, also held by the ICC tribunal in the *Pyramids case* (1988), may perhaps be an assertion that international law leaves the matters concerned entirely within the reserved domain of municipal law and when the former becomes an integral part of the latter by way of incorporation or transformation it stands as a higher norm.⁶⁰

The position did not differ in the *Norwegian Loans case* (1957)⁶¹. Sir Hersch Lauterpacht⁶² observed:

“It may be admitted... that an ‘international’ contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the Serbian and Brazilian loans. However, this does not mean that national law is a matter which is wholly outside the orbit of international law. National legislation ... may be contrary, in its intention or efforts, to the international obligation of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law is for that reason at the same time outside the sphere of international law is both novel and, if accepted subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law.”⁶³

⁵⁹ Ibid., See Brownlie, *supra* note 18, at 32.

⁶⁰ Ibid., See Jennings and Watts, *supra* note 24, at 82.

⁶¹ The Proceedings in this case of certain Norwegian loans, between France and Norway, had been instituted by an Application of the French Government which requested the Court to adjudge that certain loans issued on the French market and on other foreign markets by the Kingdom of Norway, the Mortgage Bank of the Kingdom of Norway and the Smallholding and Workers' Housing Bank, stipulated in gold the amount of the borrower's obligation and that the borrower could only discharge the substance of his debt by the payment of the gold value of the coupons and of the redeemed bonds. The Application expressly referred to Article 36(2) of the Statute of the Court and to the Declarations of Acceptance of the compulsory jurisdiction made by France and by Norway. For its part, the Norwegian Government raised certain Preliminary Objections which, at the request of the French Government, which the Norwegian Government did not oppose, the Court joined to the merits. See ICJ, case summaries

⁶² Vice President of the International Court of Justice in the Norwegian Loans Case, 6 July 1957.

⁶³ See the Case of Certain Norwegian Loans, ICJ Reports (1957) vol. 9. p. 312.

Regarding the same case, Brownlie (1998) noted: “in his [Lauterpacht’s] work, monism takes the form of an assertion of the supremacy of international law even within the municipal sphere, coupled with well-developed views on the individual as a subject of international law.”⁶⁴ He also observes that “such a doctrine is antipathetic to the legal corollaries of the existence of sovereign States, and reduces municipal law to the status of pensioner of international law.”⁶⁵ Those jurists who agree with the monist-naturalists that a state contract will always be subject to international law despite any municipal law being chosen by contracting parties as the sole proper law of the contract.”⁶⁶

Thus, Judge Lauterpacht’s opinion in the *Norwegian Loans case* “cannot be the authority for internationalisation of a state contract since such a contract on its own does not create an international obligation, even though international law is designated by the contracting parties to be the governing law of the contract. This is especially true in the context of any international commercial arbitration which is particularly of private character or rather ‘quasi-international.’”⁶⁷

Further, “Professor Jennings (1965)’ view is based upon the unitary concept of law comprising both the branches of law, municipal and international. In his monist approach, international law assumes primacy over municipal law. Such primacy is supposed to prevail in both international and municipal spheres. In fact, in fashioning his arguments Jennings is verging on the possibility of an international law of contract.”⁶⁸

Moreover, he seems to have elevated the individual on the level of international law as its subject. It thus appears clear from Jennings’ view that, whether the contract is governed by municipal or international law, any simple breach of contract would be a

⁶⁴ See Brownlie, *Principles of Public International Law* (5th edn., 1998) 32.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p.313, See Schwebel, *International Arbitration: Three Salient Problems* (1987) 108-115 and 125-143; and Schwebel, *Justice in International Law* (1994) 425-435. See generally Philip Allott, *Eunomia - New Order for a New World* (1990); and Allott, ‘The Concept of International Law’, 10 *EJIL* (1999) 31-50.

⁶⁷ *Ibid.*, See generally F. Lalive, ‘Contracts Between a State or a State Agency and a Foreign Company, Theory and Practice: Choice of Law in a New Arbitration Case’, 13 *ICLQ* (1964) 987, at 997; Bourquin, ‘Arbitration and Economic Development Agreements’, in *Selected Readings on Protection by law of Private Foreign Investments* (1964) 99, at 111 and 113; van Houtte, ‘International Arbitration and National Adjudication’, in C.C.A. Voskuil and J.A. Wade (eds), *Hague-Zagreb Essays 4 on the Law of International Trade* (1983) 312, at 322-327.

⁶⁸ See R.Y. Jennings, (1965). *Rules Governing Contract between States and Foreign Nationals*, at Sir H. Lauterpacht, *ICJ Reports* (1962). Quoted by A.F.M. Maniruzzaman, (2001).

breach of international law and would thereby engage state responsibility vis-à-vis the alien.”⁶⁹

5.3.2.2 Arguments for the application of the Dualist Contract

Principle

The dualists’ argue that municipal law will be applicable to international contracts because it will be valid and operative in the municipal sphere. Accordingly, the municipal law has primacy over the international law. In the case of inconsistency between international law and the municipal law, the domestic court will usually give the priority to the municipal law.

The supremacy of international law over municipal law has been denied by many writers when municipal law is the exclusive choice of law. Thus, in the words of Dr Mann⁷⁰:

“As a matter of public international law no State can rely on its own legislation to limit the scope of its international obligations. But this rule contemplates obligations governed by public international law and has no bearing upon the scope of obligations which are subject to a system of municipal law, such as the law of the Debtor State. If under the latter system of law no breach of contract occurs, it is not open to public international law to assert the contrary. Where the Debtor State does wrong to its alien creditor, public international law may impose a delictual liability. The existence of a tort towards the creditor’s State is independent of any question of breach of contract.”⁷¹

This view has attracted vigorous support in recent legal literature on the subject. Dr Mann has defended his view as follows: “To hold the parties to their own choice of a legal system as the proper law of their contract and to judge the existence or non-existence of a ‘breach’ by the law so chosen is imperatively demanded by any legal order which cherishes certainty, equitable treatment, and sound results. So there can be no “breach” of contract unless there is a breach in the proper law, and no law other than the proper law of contract, and unless the contract is changed according to that

⁶⁹ Jennings, *Supra* note 8, at 177-178.

⁷⁰ F.A. Mann. (1959). *The Proper Law of Contract Concluded by International Persons*. *British Yearbook of International Law* (vol. XXXV), p. 34.

⁷¹ *Ibid.*, See Mann, *supra* note 24, at 315; S.K.B. Asante, ‘Stability of Contract Relations in the Transnational Investment Process’, 28 *ICLQ* (1979) 401, at 406. See also the *Serbian Loans case*, 1929 *PCIJ Series A*, No. 20, at 20; and the *Norwegian Loans case*, *ICJ Reports* (1957) 31.

law or by virtue of that law, there cannot be any breach of contract in international law.”⁷²

It seems that “Dr Mann would not object to the interaction of municipal and international laws when both laws are jointly the designated proper law of contract. Thus, for him, it is the proper law that matters, and not the interaction itself between the two if it is permitted in the choice-of-law provision. For justification of his thesis, he resorted to the private international law of the forum of arbitration, the *lex fori* theory. He suggested that “we must still start from private international law to subject the contract to international law”.⁷³

It thus appears from Dr Mann’s standpoint of the jurisdictional theory of arbitration that an international arbitral tribunal is the bound forum (used of the law of the country in which an action is) or the seat of the arbitral tribunal, i.e. the *lex fori*. This is perhaps to affirm the supremacy of municipal law over international law from the standpoint of municipal courts. As alluded to earlier, in state practice there seems to be a tendency for municipal courts to apply municipal law when it is inconsistent with international law, unless the former has made a provision for the application of the latter.⁷⁴

Nevertheless, another line of the argument that, “it cannot be denied that one of the parties to a state contract, i.e. the state, is a subject of international law, and that that law governs its conduct by providing certain international minimum standards with respect to the treatment of aliens or foreign counterparties. And no matter what the choice of law of the contract is, whether municipal or otherwise, since one of the parties to such a contract is a sovereign state the international minimum standards of state conduct must apply to that effect.”⁷⁵

From this perspective, international law is to that extent supreme over municipal law as an objective standard. Most legal systems do in fact conform to such international law requirements in requiring lawful exercise of a state’s prerogative rights vis-a-vis aliens or foreign counterparties. Professor Bowett has observed:

⁷² Ibid. See Mann; supra note 24, at 315.

⁷³ See A.F.M. Maniruzzaman, p. 318.

⁷⁴ Ibid.

⁷⁵ Ibid, p. 323, See Jennings, supra note 8, at 181-182; see also Bowett, supra note 24, at 936-937; and Olmstead, ‘Economic Development Agreements Between States and Aliens: Choice of Law and Remedy’, 48 California Law Review (1960) 424.

“The argument that the State’s conduct is governed by international law adds very little to the substantive requirements, except in the extreme situation of a State claiming, by virtue of its own municipal law, prerogatives not generally recognised to the State under most systems of law, such as the right to discriminate against aliens or the right to refuse all compensation.”⁷⁶

By saying that the specific municipal law as the sole proper law of the contract must conform to the requirements laid down by international law governing the conduct of states is not to suggest that international law supplants the proper law as the system in which the contract has its base, or origin.⁷⁷

Looked at from the standpoint of private international law, the freedom of choice (autonomy of will) of the parties should, in principle, be respected, which is also a rule of international law. Professor Bowett thus comments regarding the Pyramids case:

“Whenever there is a contractual choice of specific municipal legal system as the proper law, the choice is to that legal system per se. There is no renvoi to international law, and thereby to other municipal systems generally, vis the concept of ‘general principles of law’ as a part of international law”.⁷⁸

5.3.3 Contractual Freedom versus National Public law

Another area of competing arguments in respect to harmonising international contracts is the conflict between the choice of contracting parties and the public law notion. It has been mentioned earlier in this study that the legal philosophy of modern international commercial arbitration has created a doctrine of contract in which the concept of parties will seem perfectly acceptable.

As the UNCITRAL Model Law spreads throughout the world, the issue remains whether it is possible to have a coherent legal doctrine in the field of international commercial contracts. This part of the chapter will show how the private choice and public law concepts appear most clearly when harmonisation of international arbitration contract principles has to be considered.

⁷⁶ Ibid. See Bowett, *supra* note 24, at 937.

⁷⁷ Ibid., See Jennings, *supra* note 8, at 181.

⁷⁸ Ibid., p.324, See Bowett, *supra* note 24, at 932, n.12.

Arguments for the application of the Contractual Freedom Principle

In the West, courts traditionally have refused to enforce private contractual choice of law clauses if enforcement would result in the displacement of the forum's applicable public law. Professor Henri Battifol (1982) explained, "It is [only] natural that the public law of the forum should prevail over private choice. Consequently, the same is true of choice of forum clauses - if the contractually designated forum would fail to apply the applicable public law of the forum before which the dispute has been brought, the latter forum will simply ignore the clause."⁷⁹ Such position is in conflict with the fundamental right of individuals to enter into a contract, simply as an act of will and as exercise of a moral virtue.⁸⁰

In an attempt to explain the relationship between arbitrability and public law, Professor Thomas Carbonneau (1986) comments as follows: "Arbitrability serves as [the] instrument by which to exempt matters of vital national importance from the reach of private adjudication."⁸¹

Further, the assumed of the inarbitrability of public law claims was so pervasive at the time of the drafting of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), that the Swiss delegate to the Convention proposed changing the reference to "Foreign Arbitral Awards" in the Convention's title to "Arbitral Awards in Private Law."⁸²

Nevertheless, this position has changed in the West and the principle of arbitrability is widely recognised as the autonomy of parties to international contracts to designate the law that applies to their transactions and the forum in which they will resolve their disputes. Within this context, parties to international contracts are free to designate the law or principles that will govern their transaction to the exclusion of all otherwise

⁷⁹ See Henri Battifol, (1982). *Public Policy and Autonomy of the Parties: Interrelations Between Imperative Legislation and the Doctrine of Party Autonomy*, quoted by Philip J. McConaughay, 2001. *The Scope of Autonomy in International Contract and Its Relation to Economic Regulation and Development*. Columbia J. Transnational Law. pp.4-5

⁸⁰ *Ibid.*, p8.

⁸¹ Thomas E. Carbonneau, (1986) *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*. J. Transnat'l L. 265, 295 (1986). Quoted by Philip J. McConaughay, 2001. *The Scope of Autonomy in International Contract and Its Relation to Economic Regulation and Development*. Columbia J. Transnational Law.

⁸² *Ibid.*, See also U.N. Conference on International Commercial Arbitration, Summary Record of the Twenty-Third Meeting, June 9, 1958, E/Conf.26/SR. 23 12 September 1958, reprinted in III *International Commercial Arbitration*, C. 203 (Ggaja ed. 1979).

applicable law. They are free to arbitrate privately any disputes that might arise among them to the exclusion of otherwise compulsory public court litigation.⁸³

In the context of international commercial arbitration, the New York Convention, modern national arbitration laws, and national judicial deference have combined to enable parties to international transactions to elect a virtually complete divorce between their private commercial arbitration procedures and awards on the one hand, and any significant national “control mechanisms” or judicial review, on the other. Moreover, when contractual choice of law is exercised in the context of international commercial arbitration, the scope of autonomy becomes even greater.⁸⁴

The main reason for such change in Western legal culture is the nature of commercial contracts in that unlike in most national courts, applicable law in arbitration may include the *lex mercatoria* (Law of Merchant), *amiable composition* (arbitrators are not bound by any procedure and settlement of dispute through mutual concession), *ex aequo et bono* (according to what is right and good), or even rules or principles of the parties’ own making.⁸⁵

Consequently, within the realm of matters otherwise governed by private law, it is fair to say that Western nations have largely ceded to parties to international commercial transactions virtually complete freedom and control over the law, rules or principles that will govern their relationship, and over the procedures and outcomes that will govern the resolution of their disputes.

The same is true of contractual promises to privately arbitrated international commercial disputes and of the final awards that emanate from arbitrations. The value of autonomy lies in its universality, of which the New York Convention is a principal guarantor.⁸⁶ By virtue of their accession to that Convention, nations, to-date, have agreed to honour written agreements to privately arbitrate international commercial disputes to the exclusion of national court jurisdiction and to enforce the awards that result from these arbitrations to the exclusion of national judicial review. Moreover, the judiciaries of these nations, by and large, have reinforced autonomy in the context of private law by acknowledging explicitly what is only implicit in the New York Convention - the complete freedom to designate applicable law, to the exclusion of otherwise applicable law, in the context of private arbitration. Thus, it is the virtually

⁸³ Ibid., p.1.

⁸⁴ Ibid., at supra notes 30 and 33.

⁸⁵ Ibid., pp. 4-5.

⁸⁶ Ibid., p. 6.

almost universal recognition of contractual autonomy in international transactions that enables commercial parties to reliably select an applicable law and arbitral forum to the exclusion of all non-selected alternatives.⁸⁷

It has been argued that autonomy in international contracts offers indispensable benefit for international commerce – and the opportunity to create new principles and procedures for governance and dispute resolution in West/non-West commercial relationships, where fundamentally different understandings often exist with respect to the role of law and contracts in the structure and governance of commercial relationships. This opportunity, which is increasingly important for international commerce in light of the burgeoning trade between West/non-West, exists because contractual autonomy in international transactions enables commercial parties to select a virtually complete divorce between their private arbitral procedures, choice of applicable law, and final arbitral awards on the one hand, and any significant national control mechanisms or judicial review, on the other.⁸⁸

Similarly, it has been argued that a significant virtue of autonomy in international contracts is a capacity to accommodate the emergence of new principles and procedures for dispute resolution in West/non-West commercial relationships in light of the fundamentally different understandings that often exist in such relationships with respect to the role of law and contracts in the resolution of disputes.⁸⁹ To this extent, the arbitrability of international commercial contract with public law claims represents a significant difference and debate in respect to the contractual freedom principle.

5.3.4 Legal Nature of International Contracts

5.3.4.1 International Treaties versus Administrative Contracts

After discussing competing claims surrounding international contract principles, this part will discuss the diversity of its legal nature. Such arguments in respect to the legal nature of international contract will be obvious with the stand position taken by the Middle East and its effects on harmonisation of international commercial arbitration as one form of international contract.

⁸⁷ Ibid.

⁸⁸ Many leading commentators consider the absence of national judicial “control mechanisms” on international arbitration to be a source of major problems for international transactions. See *Supra* note No. 89 at p.6.

⁸⁹ Ibid.

Binding and the legal value of contracts cannot be determined unless the applicable law of these contracts is recognised, thus, attention will be given to the main legal principles which have constituted the proper law of international contract, and particular reference will be made to contracts between states and foreign investors because they are the most common type of international contract in the Middle East and usually natural development contracts.

Despite the shared general characteristics of international state contracts, diversity of interpretation of the legal nature of these contracts influences the dispute resolution mechanisms. Lord McNair (1986)⁹⁰ cites the following general characteristics and legal features pertinent to such contracts:

(i) They are made between a government on the one side, and on the other, a foreign individual or corporation owing its legal existence to the laws of a foreign state;

(ii) They are commonly contracts for some long-term exploitation of natural resources involving the expenditure of capital in setting up permanent installations for the duration of the agreement;

(iii) The rights created are not purely contractual but are more assimilated to rights of property;

(iv) They confer extensive incentives to foreign investors, such as complete freedom from export and import duties, exemption from taxation and, in some cases, special facilities with regard to foreign exchanges and exemption or reduction in rates;

(v) Many of these agreements are governed partly by public law and partly by private law;

(vi) There need not be any close connection between the host state and that of the investor;

(vii) They usually make provision for arbitration in the event of dispute.

The legal nature of international state contracts is uncertain and controversial. Their character and legal nature have never been manifestly determined. The basic consideration underlying the ongoing controversy in this respect is whether there are inherent, in the relationship between the contracting public entity and the private foreign party, certain non-negotiable aspects of power and duty of the state concerned

⁹⁰ Lord McNair, (1986). *The Law of Treaties*. Oxford University Press. p. 153.

to serve the social and economic welfare of its people by the exercise of its sovereign legislative and administrative powers.⁹¹ In the following part, the two common arguments used by the West will be discussed.

5.3.4.2 International State Contracts are not International Treaties

It has been argued that international state contracts are not in fact treaties, since one of the parties is a private individual or corporation. Superficially, they look very similar to treaties, both in their negotiation and drafting. However, they cannot be regarded as treaties since they are not between the subjects of international law. This view was stated by the International Court of Justice in the *Anglo-Iranian* case, when rejecting the British contention that the 1933 Concession agreement between the Persian Government and the Anglo Persian Oil Company had a double character - both as a concession agreement and a treaty between the two governments. The Court said that the agreement:

“... was nothing more than a concession agreement between a government and a foreign corporation. The United Kingdom Government is not a party to the contract: there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the Contract the Iranian Government cannot claim from the United Kingdom any rights which it may claim from the company nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signature of the Iranian Government and Company has a single purpose; the purpose of regulating the relations between the Government and the Company in regard to the concession. It does not regulate in any way the relations between the two governments.”⁹²

5.3.4.3 International State Contracts are not Administrative Contracts

The determination of whether international state contracts include administrative contract or not is important. In the sense that *droit administratif* is understood in French law and in countries which adhere to this concept, administrative law is understood as a separate and autonomous branch of law which covers a wide field that

⁹¹ Ibid., p.154.

⁹² Anglo - Iranian Oil Co. case (United Kingdom v. Iran), International Court of Justice, Reports, 1952, p.112. See supra note 19. *op.cit* 110. p.154.

includes administrative contracts, acts and powers, administrative courts and state liability.⁹³

Administrative contracts (*contracts administratifs*) are contracts concluded by the state or public authorities which are governed in countries that apply the *droit administratif* by legal rules and principles which, in some respects, substantially differ from the rules and principles applicable to ordinary civil contracts. The fundamental principle of *contract administratif* is recognition of the unilateral powers of the public powers of a public authority to control or modify the execution of the contract in the public interest. However, the exercise of this power is subject to the payment of adequate compensation for any losses resulting from the modification of the contractual provisions of the contract. The proper use of such power in the public interest is supervised by the administrative courts.⁹⁴

Thus, the legal nature of the contracts concluded between a state and foreign private person stems from the legal rules governing the contract. But it should be stated that there are no well-settled and world - wide accepted international legal rules regarding the legal position of such contracts.

Not only writers and scholars but also judges and states have different views on the extent of the legality of state contracts. The source of controversy is the validity of state contracts and the extent to which the state may assert, by virtue of its sovereignty that it is not obliged to perform the stated terms of a contract. In fact, in some aspects, there is a clash of interests between the two parties, the foreign private party insists on immunisation and rigidity of contract and tries to restrain the government from freedom of action and obtain a maximum return. This is the position usually taken by Western investors doing business in the Middle East. The state party, on the other hand, demands more flexible contractual advantages, or imposes additional duties or takes some measures, unilaterally, to alter or nullify the contract using administrative contract arguments.⁹⁵

5.4 Modern Arbitration Law: The Proper International Contract Principle

Having discussed the most common competing claims surrounding international contract principles in the West, it is the Western regional perception of international contract principles with which the chapter is most concerned, since it is the most

⁹³ Wikipedia, legal dictionary.

⁹⁴ Ibid.

⁹⁵ *op.cit.* supra note 16. pp. 24-25.

significant determining which of the Western principles has been adopted in the harmonised UNCITRAL Model Law.

In this context, it has been emphasised that the Western understanding of sanctity rather than flexibility, monism rather than dualism and respected contractual choice rather than public law contract principles has dominated the legal thinking in respect to international commercial arbitration contracts. Such understanding has been introduced to the language of the harmonised Model Law of international commercial arbitration.

Sanctity of the contract and an arbitrators' power to 'fill the gaps' are presented as example to show how sanctity of the contract principle and respected contractual choice of the parties have been introduced to the harmonised international commercial arbitration Model Law. These examples will be analysed from the contractual, procedural and the state immunity perspectives.

5.4.1 The Contractual Perspective

It has been said that "the contractual perspective relates to the natural weakness of complex long-term 'relational' contracts. Time factors make these contracts vulnerable to the changes of technological, political or economic circumstances or the omission of certain contractual provisions. Given the significance of long-term contracts, these problems are 'a fact of life' and arbitrators as the natural judges of international trade and commerce should be able to cope with them. However, their resolution requires a balancing of two antagonistic classical principles of contract law. The principle *pecta sunt servanda* stands for the sacrosanct character of the parties' initial agreement. The notion of *clausula rebus sic stantibus* reflects the idea of creating a certain flexibility of the initial party agreement over the duration of the contract in order to maintain the initial economic equilibrium. On this contractual plane, a decision in favour of or against an arbitrator's power to fill gaps or revise contracts depends on how the 'eternal dilemma between the ideal of sanctity of contracts and the need for commercial flexibility is resolved.'"⁹⁶

5.4.2 The Procedural Perspective

The procedural perspective relates to the traditional view of arbitration as it is reflected in Article 7 (1) of the UNCITRAL Model Law on International Commercial Arbitration and provisions of other domestic arbitration laws. These provisions are

⁹⁶ See Klaus Peter Berger, 2001. Power of Arbitration to Fill Gaps and Revise Contracts to Make Sense. *Arbitration International*, vol. 17, No. 1 p.1.

said to reflect a concept of arbitration that is limited to traditional legal ‘disputes’, requiring from the arbitrator a ‘yes or no’ decision with respect to a party’s non-performance or violation of contractual duties.⁹⁷ It is argued that this procedural notion of arbitration is incompatible with the creative character of decisions required in cases of adaptation and gap-filling which involve the evaluation of economic issues and rewriting of the parties’ contract.⁹⁸ From this perspective, gap-filling and contract adaptation are not arbitrable, unless the arbitrator is freed from the constraints of substantive law and is authorised by the parties to act as ‘*amiable compositeur*’.⁹⁹

During drafting of the UNCITRAL Model Law, the question was discussed whether a provision dealing with the problem of contract revision and gap-filling should be included. Discussions in the Working Group revealed one decisive classification that could and should be made here, a distinction relating to the prior authorisation by the parties. The same differentiation has been made in many arbitral proceedings such as the *AMINOIL* arbitration.¹⁰⁰

If the parties have authorised the arbitrators to adapt or supplement the contract, in these cases, “the principle of *pacta sunt servanda* does not speak against but in favour of the arbitrators’ competence to reshape the contract. They are called upon to implement the agreement of the parties on gap-filling or contract adaptation. Such an authorisation may be included in the standard arbitration agreement. Thus, in ICC Arbitration No. 7544, “the parties had authorised the tribunal to decide on all disputes arising out of the contract including changes of the contract itself. By including such a clause in the contract, the parties made it clear beyond doubt that they considered the fair distribution of mutual profit and gains over the duration of the contract more important than legal certainty.”¹⁰¹

⁹⁷ Ibid., See the statement of the German delegation during the drafting of the model Law in UN Doc. A/CN.9/263, para. 15: ‘the activity of the arbitral tribunal is concentrated on the interpretation and application of contractual agreements and legal provision’.

⁹⁸ Ibid., See also supra note 8. Vagts, in *International Investments Disputes: Avoidance and Settlement* (ed. Rubin and Nelson), (1985) at pp. 29, 36 et seq.)

⁹⁹ Ibid., See also supra note 9. Fouchard, Gaillard, On *International Commercial Arbitration* (1999) No. 37.

¹⁰⁰ *Kuwait v. The American Independent Oil Company (AMINOIL)*, ILM 1982, 976, 1015: ‘there can be no doubt that ... a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract - unless that right is conferred upon it by law, or by express consent of the parties’; see Mann, supra n. 18

¹⁰¹ Baur, in *Festschrift Steindorff* (1985) at pp. 511- 512. In Klaus Peter Berger, (2001). *Power of Arbitrators to fill Gaps and Revise Contracts Make Sense. Arbitration International Journal.*

Thus, the primacy of party autonomy in international commercial arbitration may have a decisive influence on the determination of an arbitrator's power to adapt contracts or fill gaps.

If no express or implied authorisation can be found in the contract, the arbitrators are left with a difficult task. They have to look for legal authority to intervene in the parties' contract without their consent. Such an authorisation can be found in the applicable law, i.e. the arbitration law or the law applicable to the substance of the dispute. This search for authority is made difficult mainly for two reasons. First, the absence of a provision in the contract allowing adaptation or gap-filling necessarily emphasises the principle of sanctity of contracts. Second, even if the arbitrators conclude that adaptation or gap-filling is just and fair in a given case, the complex interaction between procedural law and contract law often stands in the way of such a modification or supplementation of the parties' rights under the contract.¹⁰² Therefore, sanctity of the contract is the dominant principle of modern international commercial contract, in which the arbitration contract is the basic source of the arbitrator's powers.

As Norbert Horn has stated: "No court or arbitrator in the world, at least in international business transactions, can render an award that could serve as the legal basis for a complex future cooperation against the will of one of the parties."¹⁰³

Finally, the sanctity principle of international contracts does not mean there is no place for adjusting the terms of contract for gap-filling according to the good faith doctrine.

In his Report to the Tenth International Congress on Comparative Law as well as in his magnum opus on Arbitration in International Trade, Rene David pursued the idea of a uniform concept of arbitration comprising traditional dispute settlement as well as contract adaptation and gap-filling. In his view, the strict distinction between the two kinds of decision-making should be given up as a relic from the nineteenth century:

"The arbitrators may be given by the parties the task of solving a legal dispute or of intervening in the regulation of the contractual relationship. In both cases the situation is, in essence, the same... it is artificial and in many respects deplorable that a distinction should be drawn between the two varieties of arbitration: the one aiming at the settlement of a legal dispute, the

¹⁰² Ibid., pp.5-6.

¹⁰³ Ibid., p.13.

other at the regulation of a contractual relationship. In both cases, the same technique is resorted to, the same result is aimed at, and the application of the same rules is desirable.¹⁰⁴

5.4.3 State Immunity Perspective

A key question in international commercial arbitration is whether sanctity of contract applied to state sovereignty in which a government or its instrumentality has voluntarily committed itself to arbitration.¹⁰⁵

It has been said that governments, when they enter the marketplace, continue to be very different from other entities.¹⁰⁶ There are reasons for this. In free-market countries, government officials and commercial sectors have found an accommodation for their various common and cross-purposes in the doctrine of sovereign immunity when they are haled into foreign courts. To be sure, the doctrine of absolute immunity could sometimes causes grief to private individuals.¹⁰⁷

The last century witnessed a struggle in courts, legislatures, arbitration tribunals and diplomatic conferences, to fashion a new legal order that could accommodate, on the one hand, the claims of governments for an immunity sufficient to permit them to conduct their activities with a degree of autonomy consistent with their sovereignty under international law, and, on the other, the claims of private participants in the international economy who insisted that all actors in the international system must operate under some rule of law because law is an indispensable part of the environment of productive economic activities. The political and legal struggle produced a new accommodation, based on a restricted sovereign immunity in foreign courts: immunity from judicial jurisdiction for public or political acts, but not for commercial acts. Even public acts could lose their immunity if there were waivers, which could, in some jurisdictions, be expressed by consent to arbitration.¹⁰⁸

In the landmark *Socobelge* case, an international commercial arbitration tribunal was asked by the Greek Government not to apply a contract which the Greek Government had breached, because Greece was involved in a complex and tenuous international debt workout, nominally under the aegis of the League of Nations. The arbitral

¹⁰⁴ David R. (1985), *Arbitration in International Trade*. No. 425; see also David, *supra* n. 2, at 285; Sanders, *supra* n. 12, at p. 142. *op.cit* 103.

¹⁰⁵ W. Michael Reisman, 2002. *International Arbitration and Sovereignty*. *Arbitration International*, vol. 18, No. 3. LCIA. p.236.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, p.231.

¹⁰⁸ *Ibid.*, p. 232.

tribunal rejected the claim and issued an award in favour of the private company. Years later, when the Permanent Court of International Justice was asked by the Greek Government to review and set aside that award on these very political grounds, the Court held in favour of the arbitration award. Subsequent tribunals have not always had as clear a vision as the Permanent Court but have usually reached the right conclusion.¹⁰⁹

¹⁰⁹ Ibid., p.238.

CHAPTER SIX

International Arbitration Contract Principles: Analysis of Middle East Perceptions

6.1 Introduction

Despite the diversity of international contract principles, the previous chapter critically examined how the sanctity of the contract is rooted deeply in Western legal culture. In the process of harmonising of international contracts, chapter Five showed that sanctity of contract is the most dominant contract principle in Modern Arbitration Law, and how an understanding of regionalism positively affects and facilitates the harmonisation process when it takes regional understanding into consideration.

This chapter will examine contract principles found in the Middle East, how international principles of contract are perceived in the region, and whether there are any dominant contract principles. As the international community during the decades following World War II struggled to provide a transnational regulatory and adjudicatory infrastructure for international commerce so, developing nations, including Middle Eastern countries, are today struggling to devise legal institutions that

- (i) transcend methods of interaction within known communities and facilitate economic exchange among strangers,
- (ii) accommodate in some culturally neutral way transactions including parties from completely different legal systems or traditions,
- (iii) operate independently of government, and if possible, with the government's promise not to interfere with the operations and decisions of these institutions,
- (iv) require little public investment, but are somehow capable of providing in the near term some of the functions of a public legal infrastructure that typically take decades to fully mature, and that
- (v) despite all these features, somehow leave each nation's sovereignty intact. They are trying to solve this dilemma by turning to the principle institutions of autonomy in international contracts: private arbitration and contractual choice of applicable law.¹

¹ Philip J. McConaughay, 2001. The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development. *Columbia Journal of Transnational Law*. p.4.

The first part of the chapter will examine the role of *ethics and tradition* in understanding Middle Eastern contract principles. The second part will examine the impact of *Islamic Law* on commercial contract principles. The third section will analyse the regional perception of international contract principles. Finally, the chapter will address some contemporary issues of International Contracts in the Middle East.

6.2 The Role of Tradition and Ethics in Middle Eastern Commercial Contracts

Like other Asian countries, the Middle Eastern traditional supposition is that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values - such as preserving the relationship, avoiding disputes, and reciprocating accommodation - that may control far more than the written contract itself and how a commercial relationship adjusts to future contingencies.² In the following part, how the Middle Eastern tradition of commercial contracts differs from the West will be examined.

6.2.1 The Role of Tradition in Forming International Contract Principles

6.2.1.1 “Friendly Negotiations” Clause

A core term in many Middle Eastern commercial contracts is the “friendly negotiations” or “confer in good faith” clause. It captures the essence of contractual obligation in Middle Eastern as well as Asian tradition. Such clauses typically recite that, if differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably. The Western view of such clauses is that they impose no real obligation at all; at most, they represent a mechanism for making unenforceable requests for novation, or perhaps an initial formality in a multiple-step dispute resolution process culminating eventually in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in the Middle East. From a traditional Middle Eastern perspective, a “confer in good faith” or “friendly negotiation” clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. Characterising a “confer in good faith” or “friendly negotiation” clause as a “dispute resolution” clause tempts a misapprehension of its essential nature, for no “dispute exists if all of the

² Philip J. McConnaughay, 2001. Rethinking the role of Law and Contracts in East-West Commercial Relationships. *Virginia Journal of the International Law Association*. p.7.

parties to the contract share such understanding of its evolving and responsive (through good faith conference and friendly negotiations) nature.³

This understanding of the “friendly negotiation” and “confer in good faith” clause, however, does not mean that real disputes do not arise in Middle Eastern commercial relationships. Just as the written contract defines the parameters of reasonable behaviour in a Western commercial relationship, so too does the contract, together with the other traditional values to be discussed, define the boundaries of reasonable commercial behaviour in Middle Eastern commercial relationships. The non-performance of obligations, or performance outside of these values, or refusal to adjust to reasonable demands due to changing circumstances, or unreasonable demands for adjustment, can all give rise to disputes in Middle Eastern commercial relationships no less serious and potentially destructive of the mutual enterprise than those that arise in the West. Both the process by which the dispute is resolved, and the values that inform its resolution, however, once again fundamentally differ in Middle Eastern traditions from those that we know in the West. Just as contracts are relational in Middle Eastern traditions, so too is commercial justice.⁴

6.2.1.2 The Importance of Relations

The second traditional aspect of commercial contracts in the Middle Eastern region is relational values. The primacy of relational values in the Middle East has contributed traditionally to a significant aversion to seeking outside assistance for the resolution of private disputes. Great shame accompanied resort to third-party adjudication, and the source of the shame was twofold. First, the pursuit of compulsory adjudication involved an unseemly emphasis on private interests in societies where individual interests always were subordinate to those of the group; it was as if participating in adjudication involved a public display of selfishness. Second, the resort to adjudication was humiliating and involved a significant “loss of face,” for it was attended by an implicit admission that an opponent lacked respect to “yield” or “give way” and settle the dispute privately. Even if the parties to a dispute overcame their aversion to outside assistance, relational values still defined both the substantive

³ See also Gidon Gottlieb, *supra* note 81, at 568 (“[The character] of juridical activities in relational societies” includes “the negotiation and renegotiation of juridical instruments accepted [in the West] as binding.”); Macneil, *supra* note 77, at 396 (“The Chinese see the institution of contract, resolution of contractual disputes, and contract law as different parts of one integrated whole... . This has not been the case in the United States.”). As in *supra* note 2. pp7. See *supra* note 92 p.27.

⁴ See Henderson, *supra* note 12, at 174 (noting that in Confucian philosophy, “justice [is] relational”). *op.cit supra* note 2. p.7. See *supra* note 93 p.27.

justice they sought to achieve, and the dispute resolution techniques and procedures used to deliver that particular conception of justice.⁵

6.2.1.3 Subordination of Written Contract

Consistent with the subordination of written law and contracts in the ordering of commercial affairs, and with the commensurate elevation of relational considerations such as status, harmony, reciprocal adjustment, and actual circumstances, the objective of dispute resolution in the traditional Middle East was not the ascertainment of legal rights and allocation of blame and entitlement, as it is in the West, it was a peaceful resolution, reconciliation, whatever the result. The merits of the outcome were not irrelevant, but in the Middle Eastern tradition had far more to do with relative status, actual circumstances, reciprocal adjustment, and maintaining the relationship than with the terms of any contract or law antecedent to the dispute. One might describe the parallel between Western and Middle Eastern and other Asian commercial dispute resolutions as the objective of each to achieve the “expectation interests” of the parties, but the comparison would convey falsehood if the completely different contents of the expectations were not noted as well. Middle Eastern commerce is as dependent as Western commerce on the “predictable” resolution of disputes; but “predictability” in the Middle Eastern tradition drives not from “legal predictability”, as conceived in the West, but from the fact that there will be a conclusion to the dispute, and in most cases, the conclusion will provide a basis on which the commercial relationship may continue.⁶

6.2.1.4 Commercial Justice

This version of commercial justice requires dispute resolution techniques and procedures different from those best suited to yield the “legally correct” outcomes favoured by the Western legal tradition. Mediation and conciliation, for example, traditionally have been strongly preferred over arbitration or other compulsory adjudications for the resolution of commercial disputes precisely because they are more likely, if successful, to provide a basis on which to continue the commercial

⁵ See Philip M. Chen, *Law and Justice: The Legal System in China 2400 B.C. to 1960 A. D.*, at 4 (1973) (“If you are aggrieved, going to court is an admission that the other person does not have sufficient respect for you to settle properly outside of court. It is, therefore, an admission of lost face.”); Cohen, *supra* note 87, at 1208 (“A lawsuit caused one to lose “face” since it implied either some falling from virtue on one’s own part ... or, what was also embarrassing, the failure to elicit an appropriate concession from another as a matter of respect for one’s own “face.”) See *infra* note 115 for citations to scholars whose work suggests that traditional aversions to public litigation may have resulted more from structural than cultural factors. *op.cit* 3. p. 7. See also *supra* note 96, p. 28.

⁶ *Ibid.*, p.8.

relationship. Even judges and arbitrators charged with the adjudication of disputes in the Middle East routinely make intermittent efforts to mediate the disputes, meeting privately with each party and engaging in *ex parte* (on behalf of only one party, without notice to any other party) communications, and they see no particular problem with resuming their adjudicative role - and perhaps even imposing an outcome based on information they have learned during mediation – if their efforts to mediate fail. This conduct, of course, is alien to conventional Western notions of judicial impartiality, but perfectly consistent with Middle Eastern notions of the values and objectives that should govern the resolution of commercial disputes.⁷

Relational considerations also make privacy an essential aspect of Middle Eastern commercial dispute resolution traditions, at least in a judicial context. Privacy is an aspect of international commercial arbitration in the Western tradition as well, but it clearly is valued more highly in the Middle East. For example, the privacy of commercial arbitration offers a reduction in the humiliation and loss of face traditionally associated with seeking outside assistance for the resolution of disputes. Privacy also promotes intermittent mediation and conciliation, the preferred mechanisms of dispute resolution in Middle Eastern and other Asian countries. And whether in the context of mediation and conciliation or arbitral adjudication, private proceedings are far more conducive than public proceedings to all sorts of wide-ranging and often proprietary discussions that might lead to the preservation of an imperilled commercial relationship. Similar considerations also explain the importance in Middle Eastern dispute resolution traditions of arbitral discretion not to issue written opinions explaining decisions and awards; explanatory attributions of blame and blamelessness more appropriately attend “legally correct” outcomes, not relational ones, and the failure of commercial relationships, not their resurrection.⁸

In sum, traditional Middle Eastern beliefs and practices with respect to the role of law and contracts in the ordering of the governance of private commercial affairs are fundamentally different from those of the Western legal tradition. The primacy of law

⁷ *Ibid.*, p.8.

⁸ Philip J. McConaughay emphasised in his *supra* note 107, at p.29 that: “He do not intend his depiction of this contrast to suggest a preference for Asian over Western outcomes, for without the “equalising” effects of law, relational outcomes clearly will tend to preserve, rather than address, any social and /or economic inequities that might be present in any given relationship. However, such outcome determinative disparities are less likely to occur in the world of cross-border commerce, and the deep Asian preference for relational justice and dispute resolution mechanisms exists in that context as well.”

and its moral force in the “deal closing” written contract terms in the West becomes seemingly elastic, “relationship beginning” predictions in the East. The procedural regularity and judicial impartiality essential to legally correct commercial justice in the West become the procedural irregularity and ex parte mediation essential to relational commercial justice in the East.⁹

6.2.2 The Role of Islamic Law in the International Commercial Contract

Until the second half of the Nineteenth Century, Islamic law applied in nearly all Muslim countries with regard to the law of obligations and contracts. Islamic law must in this context be understood to comprise the law that is revealed, the teachings of the different schools and sects, customary practice, as well as an inevitable measure of foreign influence and alterations impelled by performance and passage of time. In practice, Islamic law is instanced by old decisions of Cairo *Shari'a* courts (Chehata 1969, 55-56), by official registers and private appearances in places like Riyadh, Jeddah, Oman, the Yemen, Damascus and Baghdad, and by the much heralded manuscripts of the Cairo Geniza (Goitein 1964, 314-357 and Udovitch 1970, 289-303).¹⁰

From the second half of the Nineteenth Century onwards, the Islamic law of contracts was affected by Western law, as a result, a composite legal system emerged which was not always systematic, and still in the process of adaptation. Until the nineteenth century, there is little doubt that Islamic ethics, directives and prohibitions pervaded the field of contracts and obligations. However, according to life's exigencies and contact with other cultures, countries in the Middle East have rapidly created a more lenient legal system parallel to the theoretical legal structure. The *Shari'a* is never purely idealistic and speculative, but in the mean time, there are no other coherent systems of law which can compete with its position in Islamic countries.¹¹

It also has been mentioned, that since the Nineteenth Century, the *Shari'a* has lost its exclusivity to govern financial transactions in Middle Eastern countries to a combination of sacred and secular laws. In countries such as Saudi Arabia, Oman or Yemen, where Islamic law remains dominant, a substantial number of mundane statutes curtail the *Shari'a's* ascendancy significantly. Conversely, where in other

⁹ Ibid.

¹⁰ Nabil A. Saleh, Financial Transactions and The Islamic Theory of Obligations and Contracts. In Chibli Mallat, 1988. Islamic Law and Finance. Graham & Trotman. London. pp.13-14.

¹¹ Ibid., p.14.

countries secular laws seem to take precedence, the *Shari'a* has not been completely supplanted. Government stances can be divided into several categories:

- Those that have transformed their entire internal commercial and mainly, financial systems to an Islamic form, for example, Sudan
- Those that embrace Islamic Law as a national policy while supporting dual commercial tracks (Bahrain, Kuwait, United Arab Emirates, Qatar);
- Those that neither support nor oppose Islamic law within their jurisdictions (Egypt, Jordan, Palestine, Iraq and North African countries); and
- Those that actively discourage a separate Islamic Law presence (Saudi Arabia, Yemen and Oman).¹²

The legal currents which exist side by side, the *Shari'a* and secular statutes or their combination, have ill-defined and ever shifting spheres of application. Practice, which also includes rulers' unpredictable dictates, adds another uncertainty to the principles of international commercial contract by creating or superseding the law as a matter of fact. To identify the legal rules governing a given problem is therefore an arduous task.¹³ The difficulties are compounded by the actual interpretation and practical implementation of the rule as will be discussed in section IV below.

6.2.3 Principles of Islamic Contract Law

6.2.3.1 Non-Binding (*Ja'iz*) versus Binding (*Lazim*) Contract Principles

All of the nominate contracts are either *Ja'iz*, meaning non-binding or revocable at will, or *lazim*, meaning binding and irrevocable. A contract may be *Ja'iz* to one or both of the parties. If a contract is *Ja'iz* to a party, that party may terminate the contract prospectively at any time, even if the contract declares it irrevocable or fixes its duration. Termination does not affect acts already taken under the aegis of the contract. Indeed, a *Ja'iz* contract is so by its very nature (i.e., this trait is an "essential term" or *muqtada*). Examples of the *Ja'iz* contract are agency and partnership contracts. The *lazim* contract, on the other hand, binds a party both retrospectively and prospectively.

The paired concepts of *Ja'iz* and *lazim* afford another way to organise the nominate contracts. Contracts that are *Ja'iz* to both parties include partnership (all forms), agency, deposit, loan (*'ariya*), and reward. Others are *Ja'iz* for both parties until

¹² Frank E. Vogel and Samuel L. Hayes, III, 1998. *Islamic Law and Finance, Religion, Risk, and Return*. Kluwer law International. p. 10.

¹³ *Ibid.*, p.15.

delivery, including gift, loan (*qard*), and pledge. Still others can be terminated by one of the parties, such as pledge by the pledgee (after delivery), or guarantee by the obligee. *Lazim* contracts include sale, lease, compromise, assignment, and rescission.¹⁴

That so many basic contracts are treated as *Ja'iz*, and that this trait in a contract cannot be amended, shows once again how in Islamic law the parties consent is the basic for legitimacy. *Ja'iz* contracts require more than agreement at the moment of contracting; they demand the parties' continued satisfaction. Otherwise, the scholars tell us these contracts will be void, usually for reasons of *gharar*.¹⁵

What aspects of the above analysis affect modern international arbitration contracts? First, generically defined goods are vastly more common in modern commercial societies than they were in Medieval times. Outside of real estate and sales between private individuals, few items sold are unique. Most goods are to some degree standardised and fungible (meaning goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit) and are purchased by description, not identification. This means that Islamic law's degree of tolerance for delay, largely confined to sales of *'ayn*, may prove inadequate in today's society.¹⁶

Second, the bilateral execution of the contract is fundamental to the operation of modern economics. Through contracts, parties expect to be able to gain security for a future performance without paying fully for that performance in advance. Even with no advance payment or performance, modern laws build a reciprocally secure arrangement; the parties mutually undertake either to perform or to respond in damages for all attendant losses. Modern law would see an advance payment requirement as unfair in denying the paying party the ability to refuse performance if the other party should default. But Islamic law, as summed up in the *al-kali*' maxim (forbidding sale of "delay for delay"), systematically opposes this logic.¹⁷

6.2.3.2 Contract on Future Things

Reference to contract on future things (in which the Islamic law literatures usually gives an example of a sales contract as selling fruit before being well grown) is made because contracting on the dispute resolutions mechanism in international commercial contracts falls within this category.

¹⁴ Ibid., See chapter 5 (Islamic Law of Contract.) p. 111.

¹⁵ Ibid., p.112.

¹⁶ Ibid., p.121.

¹⁷ Ibid., p.122.

In reality not all Muslim scholars have been unappreciative of practical pressures and practical needs; thus the teaching of the *Maliki* author *Ibn Rushd*, who said that in case of necessity (*darura*) and when the future inception of the subject-matter is certain, such as when during one harvest fruits are produced in connected succession, a sale contract of the whole harvest would be valid (*Ibn Rushd* 1981, Vol. 2, 156).¹⁸

Although many other authors have shared Ibn Rushd's views, Ibn Qayyim al-Jawziyya especially addressed the problem. *Ibn Qayyim* denounced the confusion between a non-existent subject-matter and uncertainties which cast doubt on the future existence of the subject-matter. What the *Shari'a* condemns, he concludes, is not non-existence but uncertainty (*Ibn Qayyim al-Jawziyya* 1970, vol. 1, 357-361).¹⁹

Contemporary Arab authors and legislators have been only too happy to rely on this approach. They have focused their attention on *gharar* and disregarded the question of the thing's non-existence. And it is most probably in the wake of *Ibn Qayyim's* precedent that the provisions of article 129.1 are to be found in Iraq's Civil Code of 1951. These provisions read in translation: "The subject-matter of an obligation may be non-existent at the time of contracting, provided its future existence is possible and provided it is determined in a way which dispels want of knowledge (*jahl*) and risk (*gharar*)". Qatar followed suit (see Article 33 of the 1971 civil and commercial Law).²⁰

Even the more traditionalist Jordan's Civil Code of 1976 contains provisions to the effect that 'the subject-matter of a contract may be a thing in future provided risk (*gharar*) is averted' (article. 160.1). In the following Article 161, risk (*gharar*) is equated to an exorbitant want of knowledge. The Explanatory Memorandum of the Jordanian Civil Code (p.155) tells us that the *Hanafi* School of law deems as a requisite that the subject-matter of a contract be in existence at the time the contract is concluded. But it considers that it may not be necessary in contracts such as hire (*ijara*), *Salam* (a sale with an advance payment for future delivery) and manufacture (*istisna'*).²¹

Kuwait's modern legislators share that view. Not only does Article 168 of the 1980 Civil Code stipulate that 'the subject-matter of a contract may be a thing in the future unless its existence is dependent upon pure chance', but also the accompanying

¹⁸ Ibn Rushd 1981, *Bidayat al-mujtahid wa-nihayat al-muqtasid*. Dar al-ma'rif, Beirut.

¹⁹ Ibn Qayyim al-Jawziyya 1970, *I'lam al-muwaqqi'in*, Dar al-Jeel, Beirut. *op. cit* supra note 10. p. 20.

²⁰ *Ibid.*

²¹ *Ibid.*

Explanatory Memorandum (p.138) emphasises that exceptions and qualification to the *Shari'a* principle (i.e. no thing in the future can be the subject-matter of a contract) are so numerous that it can be said that the principle does not receive application except when material (*gharar*) cannot be averted.²²

Consequently, it can be said that in contemporary Arab codification, averting material (*gharar*) has replaced the *Shari'a* requisite for the existence of the subject-matter at the time the contract is concluded. Material (*gharar- uncertainty*) and not the absence of the subject-matter cause voidance of contracts in the eyes of Arab legislators.

In practical terms, after *Ibn Qayyim*, *Sanhuri* and other scholars in the Arab world, contracts on future things are deemed valid provided they do not include a material element of uncertainty, risk or speculation.²³

6.2.3.3 Choice of Special Condition

Arbitration clauses fall within this definition. Choice of special condition (*shurt*) is restricted under the *Shari'a* but not under contemporary statutes. As Professor Coulson has posed the question of 'special condition' (*shurt*) as follows: '[In Islamic Law] each nominate contract is strictly, and usually simply, defined in terms of its purposes and effect, and the question is how far, if at all, may the parties vary this rigid scheme by introducing agreed special terms and appendages to the particular contract they are purporting to conclude' (Coulson 1984, 51).²⁴

The answer offered by the different schools of law is that a special condition can be added to the pre-fixed terms and conditions of a nominated contract only if some specific requirements are met. These requirements vary from one school to the other. *Hanafi* teaching as an example, provides that a special condition is readily and validly accepted as an appendage to a contract if it is necessary to the contract (*min muqtadayat al-'aqd*), for example, the vendor retaining possession of the object of a sale until the time he receives payment; or if it is appropriate to the contract (*mula'm lil-'aqd*), such as the vendor asking for a pledge to secure payment of a sale price; or if the condition is customary to the inhabitants of the place where the contract is concluded.²⁵

The remaining schools have adopted different criteria. The *Hanbali* School is considered the most lenient of those schools with regard to the problem. Under its

²² Ibid.

²³ Ibid.

²⁴ Ibid., p.23.

²⁵ Ibid.

teaching the validation of a special condition is the rule unless it falls within one of the two following categories:

- (a) If it conflicts with the objective or the essence of the transaction, such as when the vendor requires that the buyer shall not sell or otherwise dispose of what he has acquired.
- (b) If the special condition is contrary to a specific prohibition in the *Shari'a*, such as when the Prophet Muhammad disallowed the presence of two conditions in one contract.

The two conditions which are proscribed, according to the *Hanbali* interpretation, are those which bring an advantage to one of the contracting parties without being necessitated by or appropriate to the contract itself.²⁶ The classic example of the combination of two such conditions in one contract is when the buyer of grain requires that the vendor mills it and carries it to him. But when the conditions, whether two or more, are necessary or appropriate to the contract itself, such as a sale made contingent upon the presentation of a pledge together with another security, then the conditions are valid.²⁷

The Impact of Choice of Condition on Region Legislation

Divergences in the Region

Contemporary Civil Codes in the region evidence two contradictory positions. Kuwait's Civil Code, for example, has not adopted any of the *fiqh* teachings with regard to special conditions, which in the circumstances would have been *Maliki*' teaching; what has been chosen is not too different from what is expected to be seen in any Western-inspired secular statute, namely, that 'a contract may contain any condition agreed by the contracting parties provided it is not prohibited by law, Public Policy or good morals' (Para. 1 of Art. 175).²⁸

By contrast, para.1 of article 164 of Jordan's Civil Code (which is identical to article 34 of Qatar's Civil and Commercial Law) sums up *Hanafi* teaching with respect to special conditions. It states in translation: 'A contract may contain a condition which confirms its content or is appropriate to the content or is found in customs and habits'. On the other hand, para.2 of the same article, is contrary to *Hanafi* teaching and reads as follows: 'A contract may also contain a condition which is to the advantage of one

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid., p. 24.

of the contracting parties or to a third party provided it is not prohibited by the legislator or is not contrary to Public Policy or morals, otherwise the condition is cancelled but the contract remains valid unless the cancelled condition was its motivation, in which case the contract is also cancelled.’²⁹

Investigating the Legality of the Contractual Cause (*sabab*)

In relation to contracts, cause (*sabab*) means the motive (*ba’ith*) which actually induces the parties to enter a given contract, but it also means the purpose of contracting (*gharad*). Both meanings relate to the intent of the contracting parties.³⁰

Broadly speaking, the various Islamic schools of law have approached the matter of legality of the cause in two different ways: the first approach relies on the opinion that respect due to legal acts leads to taking into account the ostensible intention and disregarding the inner or real intention, even if the latter contradicts the former.³¹ This means motives are not given a great value. The second approach is based on the belief that motive should be scrutinised in the light of moral and religious principles.

This means that a transaction is to be measured against the degree of purity of the contracting parties’ intention.

For the *Hanafis* and *Shafi’is*, the ostensible meaning conveyed by the apparent terms of a contract is taken into account when the real inner intention is not easy to detect; the real intention, however, prevails when recognisable.³²

Malikis and *Hanbalis* take a different stand and give great significance to real motives behind the apparent legal act (and indeed all acts) provided they are known to both parties.

Consequently, motives for the *Malikis* and *Hanbalis* determine the validity or invalidity of a contract whether or not they are identified in such a contract. Two examples of void contracts (cannot be legally enforced and no longer of any effect) under *Hanbali fiqh* as a consequences of this illegality are the sale of grapes intended to be transformed into wine and the sale of arms intended to stir up trouble.

The basic rule taught by the schools of law that puts emphasis on real motives even when unapparent, is that a contract which in itself fulfils all the criteria of validity and in all appearances contains no element of illegality, may yet be a nullity on the grounds that it is inspired by improper motives. On the other hand, the *Hanafi* and, to

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid., p.25.

a lesser extent, the *Shafi'i* school of law consider that it is not the function of the courts to investigate what stands behind apparently genuine transactions or to unveil their real inspiration. In addition, the law of contract is being increasingly affected by the resurgence of legal *moralism* based on the dicta of the *Qur'an* and the *Sunnah*. That is to say, the real purposes of contracts will be increasingly investigated and taken into account especially in the Gulf area where *fiqh* spurns legal stratagems (*hiyal*) and requires disclosure of the real (*sabab*).³³

Here again the example of the 1980 Kuwaiti Civil Code and 1976 Jordanian Civil Code will help to show how they have dealt with the concept of cause (*sabab*). It is no accident that article 165 para. 1 of Jordan's Civil Code defines (*sabab*) as being the immediate intended purpose (*gharad*) of the contract; whereas article 176 para.2 of Kuwait's Civil Code defines (*sabab*) as being the motive (*ba'ith*) which induces a contracting party to conclude a contract provided that such a motive is known to the other contracting party.³⁴

The explanation for this difference is simple: the *Hanafi* School prevails in Jordan whereas the *Maliki* School holds authority in Kuwait. However, both legal systems stress that (*sabab*) should be in existence as well as lawful (article 176 para. 1, Kuwait; article 165, para, 2, Jordan) and both legal systems make room for establishing the real cause (*sabab*) when there is doubt on the veracity of the apparent one (article 178, Kuwait; article 166 para. 2, Jordan).³⁵

6.2.4 Implications of Islamic Contract Law

6.2.4.1 Absence of Formalism

The most fundamental difference between Western international contract principles and those in the Middle Eastern region is that, in the past, a written contract and a contract not committed to writing had exactly the same value with regard to legal enforceability. For both forms of contracts it was only the testimony of those who witnessed them which established their existence (Tyan 1945, 11 and 72).³⁶

Because writing was not convenient or possible during the first century of Islam (because many Muslims at that time were unable to read and write), contracts were often concluded by a witnessed exchange of words and that was deemed sufficient to

³³ Ibid.

³⁴ Ibid., p.26.

³⁵ Ibid.

³⁶ Ibid., p.15.

tie the contracting parties together ('*aqda*, the verbal root of '*aqd* - contract or transaction - means to tie up, to make a knot).³⁷

For more complex contracts or more orderly contracting parties, when writing was resorted to, it had to be witnessed as well. Contracts of trivial importance could even be concluded by mere conduct (*mu'atat*) with few words exchanged and with no need for witnesses.³⁸

Other contracts could only be perfected by the subject-matter passing from hands of one contracting party to the other such as the loan of a non-fungible article, pledge or gift. The point to be emphasised here is that, as a general rule, contracts under Islamic law grew without formalism if we accept the requisite for uttering explicit words, in the past or present tense,³⁹ which are indicative of the contracting parties' intentions.⁴⁰ Contracting parties might clap or shake hands in order to close the bargain, but these were local customs which, technically speaking, had no part in the conclusion of the transaction.⁴¹

This lack of formalism found in the *Shari'a* Contract Law was remarkable compared to the existing formalistic laws of neighbouring Byzantine⁴² and Sassanian⁴³ Empires. One likely reason for the Islamic informality in the contracting technique is the *Qur'an's* concern to spare the Islamic community from any undue hardship (*Qur'an* XXII, 78), that concern being a distinctive feature of the teaching of Islam. A better guarantee for the respect of contracts and transactions was not deemed ceremonial but

³⁷ Ibid.

³⁸ *Mu'atat* is when the offer and acceptance are expressed by an act with no need for any formula. For example, when a shopper tenders five dirhams to a trader and takes two melons from the stall, and the trader takes the money and remains silent. See supra note 4. p.15. op.cit.10.

³⁹ A promise to contract is not, as a matter of principle, valid by *Shari'a* standards. Thus the contracting parties are urged to make use of the past tense or, less satisfactorily, the present tense, which indicates there is no separation in time between their intention to transact and the transaction they pass. See supra note 5. p.16. op.cit 10

⁴⁰ Expressing the intent means other than words, such as nodding, is not valid except for the mute. Contracts by mere conduct were first tolerated with respect to trivial subject-matters only. See supra note 6 p.16. op.cit. 10

⁴¹ Ibid., p.16.

⁴² *Byzantine Empire* is the term conventionally used since the 19th century to describe the Greek-speaking Roman Empire during the Middle Ages, centred at its capital in Constantinople. In certain specific contexts, usually referring to the time before the fall of the Western Roman Empire, it is also often referred to as the Eastern Roman Empire. See Wikipedia

⁴³ The Sassanid Empire or Sassanian Empire (in Persian: *Sassanian*) was the name given to the kings of Persia (Iran), during the era of the third Persian Empire, from 224 AD until 651 AD. The dynasty ended when the last Sassanid Shah, Yazdegerd III, lost a 14-year struggle to drive out the early Caliphate, the first of the Islamic empires. The empire's territory encompassed parts of today's Iran, Iraq, Armenia, Afghanistan, eastern parts of Turkey, (during Khosrau II's rule of Egypt, Jordan, Israel, Lebanon), eastern parts of Syria, north west India, Pakistan, Caucasia, Central Asia and Arabia. See Wikipedia.

observation of the divine injunction ‘O ye who believe fulfil [your] contracts’ (Qur’an V,1).⁴⁴

Nowadays, written evidence is deemed essential with respect to a growing number of transactions and contracts, often as a requirement and a response to international trade and investments and not necessarily as the expressed wish of the contracting parties. Accordingly, international contracts are requested to be in writing and must be properly registered; otherwise they have no value. Thus, the advantage that the *Shari’a* offered to Muslims in their dealings has faded away. But, equally, the disadvantages that accompanied a strict interpretation and implementation of the *Shari’a* law or contract have also considerably diminished as the constraining factors have lost ground.⁴⁵

6.2.4.2 Freedom of Contract

The second most important implication of Islamic contract principles for the harmonisation process of international commercial arbitration contracts is the freedom of contract concept.

Despite the general obligation to uphold contracts, not all contractual arrangements are condoned by the texts. The *Hadiths* raise a number of specific obstacles to freedom of contract. The most important *hadith* involves a transaction of the Prophet’s Muhammad wife ‘*Aisha*, who desired to buy and then free a certain slave, *Barira*.⁴⁶ This *hadith* has highly troubling implications for freedom of contract. It suggests that the very terms of contracts, not to mention contracts themselves, must be prescribed by God’s writ. Unless a term is positively allowed by revelation (“in the Book of God”), it is nugatory (of no real value), the parties’ agreement

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ It is related that 'A'isha said, "Barira came and said, 'I have a freedom-contract with my owners for nine *awqiyas*, with one *awqiya* every year. Help me.' 'A'isha said, 'If your people like, I will give it to them all at once and then I will set you free. but your *wala'* will be with me ' a Barira went to her owners and they refused to let her do that. She said, 'I offered that to them and they refused until they kept the *wala'*.' The Prophet Muhammad heard about that and asked me about it and I told him. He said, "Take her and set her free and give them the condition of the *wala'*. The *wala'* is with the one who sets free." 'A'isha said, "The Prophet Muhammad stood up among the people and praised and glorified Allah. Then he said, 'Following on from that: why is it that some men among you make conditions which are not in the Book of Allah? Any condition which is not in the Book of Allah is invalid even if it is stipulated a hundred times. The decision of Allah is truer and firmer. What is wrong with some men among you who say, 'Set free, so-and-so, and I will have the *wala'*. The *wala'* is for the one who sets free.'" Chapter 53. Chapter on the Mukatab Sahih Collection of Al-Bukhari.

notwithstanding. Contractual terms are treated here as if they were part of fundamental morality, conclusively and exclusively fixed by revelation, like the *Qur'an's* prescriptions as to the types and degrees of relationship within which persons may marry.⁴⁷

Moreover, as with all legal systems prior to the nineteenth century, “Islamic contract law is expressed not as a general theory but as rules for various specific contracts - laws of sale, lease, pledge, and so forth.”⁴⁸ The closest thing to a general law of contract is the contract of sale (*bay'*), used by Muslim jurists as a prototype and analogy for all other contracts.⁴⁹

From the perspective of modern contract law which honours virtually any genuine commercial contract having lawful purpose, this characteristic of Islamic contract law instantly raises questions. May one create new contracts? How exclusive and binding are the rules of the standard contracts? May one add to or vary from the terms prescribed by the *Shari'a*? In other words, to what extent does Islamic law admit freedom of contract?

The *Qur'an* emphasises fulfilling one's pacts or undertakings. The *Sunnah* is more resistant to free contracting imposing narrow limits on “stipulations,” i.e. terms of contracts other than those dictated by *fiqh*. Recall particularly the “*Barrira*” *hadith* which condemned any term “not in the Book of God”. What position does classical law take on the issue of freedom of contract?⁵⁰

New Contracts

In general, classical *fiqh* rarely discusses the idea of contractual freedom outside the standard contract types. The most relevant controversy is whether, in the absence of a specifically applicable revealed divine ruling, contracts and stipulations are presumed to be lawful or unlawful. *Ibn Taymiyya* takes a strong position:

“The underlying principle in contracts and stipulations is permissibility (*ibaha*) and validity. Any [contract or stipulation] is prohibited and void only if there is an explicit text [from the *Qur'an*, the *Sunnah* or the consensus or a

⁴⁷ *op.cit.* 12. pp.67-68.

⁴⁸ See Mohammad Daud Bakar. *Contracts in Islamic Commercial Law And Their Application in Modern Islamic Financial Systems*. Iqtisad Al Islamy, Islamic Economics, p.36.

⁴⁹ *op.cit.* 12. See Islamic Law of Contract. p.97.

⁵⁰ *Ibid.*, p.98.

qiyas [analogy] (for those who accept *qiyas*) proving its prohibition and voiding.”⁵¹

At the other extreme from *Ibn Taymiyya* is the now-extinct “Literalist” or *Zahiri* school. This school argues that contracts, as private lawmaking, seek to alter the divine legal status of things, which can be done only with affirmative divine authority. The other *Sunni* Schools reject this narrow view, yet, as *Ibn Taymiyya* asserts, their position is not that different since, although they profess the principle of permissibility (*ibaha*) as he does, in practice they confine themselves to elaborating contract rules by analogy to revealed precedents.⁵²

Stipulations

In classical law, “debates concerning freedom of contract did not concern new contracts, but rather when standard contracts could be altered or combined. Stipulations were divided into three types: 1) condition (*ta’liq*, literally “suspending”) - the conditioning of a contract on a future event; 2) extension (*idafa*) - delaying the beginning of the contract until a future time; and 3) concomitance (*iqtiran*) - varying the terms of the contract. In all cases, if the law finds the stipulation void, the contract may or may not be void also: the results vary casuistically.”⁵³

6.3 Regional Perceptions of International Contract Principles

Previous chapters showed how the principle of sanctity of contract was the most dominant contract principle in Western legal culture and how such legal thinking has been reflected in Modern Commercial Arbitration Law. This part of the chapter will critically examine Middle East regional perceptions of international contract principles. It will argue that such perceptions reflect regional legal thinking which has been influenced by a mixed understanding of regional traditions, Islamic contract law principles as well as Western contract principles when these principles match regional legal culture. Overall, it will argue that still under such mixed understanding, there are strong regional legal traditions and these are found in Islamic contract principles and affects commercial contract experiences. In general, a significant difference still exists between Modern international contract principles and those in the Middle East. In the following pages, such differences will be examined.

⁵¹ *Ibn Taymiyya*, al-Fatawa, 3:474. See also *idem*, Qawa'id, 112; *idem*, Nazariyyat, 226; etc. See *supra* note 3. p.98. *op.cit.* 12.

⁵² *Ibn Taymiyya*, al-Fatawa, 4:47 off.

⁵³ *Ibid.*, p.100.

6.3.1 Flexibility over Sanctity of International Contract Principle

As has been discussed in the previously, unlike in the West, in legal traditions as well as in Islamic contract principles, contracts do not have stability or sanctity characteristics. There has been no formality in contract theory either in tradition or in Islamic contract law. Referring to legal arguments used to deny the theory of contract stability and sanctity, the theory of administrative contract has been one of several used. Thus, the adoption of administrative contract theory in most Middle East countries became justifiable.

The concept of *droit administratif* was adopted by many Middle East countries, whether they were under the influence of the French legal system such as Morocco, Tunisia, Lebanon and Algeria, or were never French colonies. In particular, Arab-Islamic legal traditions facilitated the reception of French public law characterisation in all of the 22 member countries of the Arab League, as well as non-Arab Islamic countries in both Asia and Africa. When many Arab Islamic countries gained independence after the Second World War, the Egyptian model, which was based on French traditions, was introduced and formally adopted by many Arab states such as Syria, Libya, Kuwait, Qatar, United Arab Emirates, as well as Iraq and Sudan.⁵⁴ The question thus arises as to whether administrative law applies to international contracts?

Despite the fact that many have argued that administrative contract law does not apply to international contracts, this perception has been emphasised more frequently in Middle Eastern commercial arbitration cases.

It has been argued that Arab countries which adopted the French model recognise two categories of contracts. First, the categories of private contracts exclusively subject to the rules contained in the civil and commercial codes, and second, the category of public contracts, which are called administrative contracts, and which are, to a certain extent, governed by a special set of public law rules (administrative law). Only

⁵⁴ Mansour Al-Saeed, 2002. Legal Protection of Economic Development Agreement. Arab Law Quarterly. Kluwer Law International. p.155. See also his supra note 22. (... See Cattan Henry, The Law of Oil Concessions in The Middle East and North Africa, New York: Oceana Publications Inc., 1967, p. 75; El-Kosheri A and Raid T, "The Law Governing a New Generation of Petroleum agreements: Changes in Arbitration Process", 1 ICSID Review-*Foreign Investment Law Journal*, 1986, p. 26.

particular types of contracts which are concluded by the state or public authorities are regarded as administrative contracts.⁵⁵

An answer to the question whether administrative law applies to international contracts will depend upon the nature of the contract itself. *Contrats administratifs* have been defined as:

“... Contracts which the administration [the government or its representative], concluded with private persons, corporations, or other departments to regulate and facilitate public utility, and which include provisions unparalleled in private law contracts. Where administrative contracts are concerned, the governmental has exclusive power to place restrictions on these contracts which the other party to the contract has to observe. Any disputes arising from such contracts have to be resolved within the legal system according to the administrative law.”⁵⁶

Oil industrial contracts have considerable weight among other international contracts; thus how such contracts have been treated is very important for highlighting regional perceptions. According to Cattan: “an oil concession in the Middle East has always been treated as a contract between the State and the concessionaire which is governed by ordinary rules of contract”.⁵⁷ It has been noted that some *contrats administratifs* provide provisions which regulate a multiplicity of legal relationships: e.g. the State, the contractor, and the users. The concessionaire assumes the duty to perform on behalf of the state or public authority a service for the public. Such service may, for example, be the supply of gas, water, electricity or transportation. In contrast, no such relationships arise in the case of an oil concession which is restricted to the contracting parties and does not undertake the performance or management of a public service.⁵⁸

Also, it has been previously asserted by the French Conseil Etat that a mining concession is not a public service concession. For example, in its opinion of 19 December 1907, it said:

⁵⁵ Ibid., See also Al-Tammawi Soliman, *General Basis of Administrative contracts: A Comparative Study*, (5th edn), Dar Al-Fiker Al-Arabi, 1991, p. 53.

⁵⁶ Al-Fayad Abraham, *Administrative contract: The Public Theory and its application in Kuwait and Comparative Law*, Kuwait: Al-Fallah Press, 1981, p. 9; Al-Tammawi Soliman, *op.cit.*, p.59).op.cit. 51.p.156.

⁵⁷ M Al Saeed, (2002). *Legal Protection of Economic Development Agreements*. Arab Law Quarterly vol. 12 No. 2. Brill Academic Publisher. p. 163.

⁵⁸ Ibid.

“if the term concession is used in administrative law to designate numerous acts of a different nature, the identity in designation involves no necessary assimilation whatsoever between these various acts; in particular, no analogy can be established between the concession of public works by which an authority entrusts to a private corporation the management of a public service under conditions determined specially in each case and for a limited duration, and the concession of mines by which the public authority institutes a perpetual ownership under the regime fixed by the law of 21 April 1810-27 July 1880.”⁵⁹

In the Aramco case, the public service concession was distinguished from the oil concession in arbitration between the Arabian American Oil company (Aramco) and the Government of Saudi Arabia when the Government of Saudi Arabia argued for the application of *droit administratif* to the concession agreement. The Arbitration Tribunal ruled:

“Aramco’s concession could not be viewed as a public services concession, because it does not involve any users, nor any dues to be paid by the public, which does not have recourse to the concessionaire’s service. To turn a concession into a public service, it is not enough that the exploitation of some national resources is of extreme importance to the economy of the conceding State, or even that the State’s financial stability is dependent on such exploitation. The company has no duty to manage continuous and permanent services to the benefit of third parties (users). Its prosperity and its solvency depend on economic and political circumstances. This situation explains why no *cahier des charges*, containing the law of the service, has been annexed to the concession contract. The status governing the company does not involve, therefore, any “act-condition” in the sense of French law; the State cannot intervene in order to modify the clauses of the concession.”⁶⁰

The Tribunal also observed that:

“Mining and oil concessions are not public services concessions because they do not include any provision in favour of users. To use the words of Planiol: “The mine is not destined to public use and is exploited by the concessionaire in his own private interest”. The concessionaire enjoys a

⁵⁹ Cattan Henry, p. 81. *op.cit.* 51 p.157.

⁶⁰ Saudi Arabia v. Arabian Oil Company (Aramco), 27 International Law Report, p. 215. *op.cit.* 51.p. 158.

nearly total freedom and is neither bound by clauses concerning maximum tariffs for sales nor by prohibitions of preferential tariffs which are the usual features of the *cahiers des charges* in public services concessions. Mining concessions are not public works concessions either, because the mineral deposits become the property of the concessionaire who, at the end of his concession, will have to return them to the state with their exploitable substance and sometimes even exhausted.⁶¹

Finally, it should be said that the term “*contract administratif*” is usually restricted to three classical types of contracts, i.e. concessions of public utilities, public works and public procurements, and case-law established by the French *Conseil d’Etat*. Thus, international contracts concluded by a public authority, which are of prime importance, particularly in the modern world, are not classified within the enumerated categories of a *contract administratif*.⁶²

Although it has been noted that an international contract does not constitute a *contract administratif* and thus cannot be subject to the application of administrative law, such arguments do not prevent the parties in the region which possess the concept of administrative law to subject their contracts to *droit administratif*.⁶³

According to *droit administratif*, Middle Eastern states are required to compensate the contractor for both direct losses and lost profits, should the government unilaterally terminate the contract. Thus, the financial equilibrium of the contract is preserved upon payment of full compensation of any loss suffered as a direct consequence of government action⁶⁴ taken upon justification of regional perception of the principle of flexibility of contract.

6.3.2 Public over Private International Contract Principles

The public law character can be seen basically in the increasing role of government interference in economic life: e.g. unilateral drafting in advance of the conditions of a transaction by public authorities, the legislative approval of which is ordinarily prescribed for the grant of an oil concession, and state-owned resources whose alienation is regulated by statute.

⁶¹ Ibid., p. 161.

⁶² Ibid., p.158.

⁶³ Ibid., p. 159.

⁶⁴ Curtis Christopher, p. 335. *op.cit.* 51. p. 159.

Modern Arab writers are agreed on emphasising the predominant public character of the oil contract. As Elwan noted:

“Do not forget that a country does not exist in oil contracts as a private law person, but in the capacity of a sovereign. Thus, the private characterisation of these contracts is reduced, at the same time their public characterisation is doubled, especially under the growing interference of the government. Although the parties to the contract freely negotiate in order to conclude agreements, the situation is changing at present, because of the increasing organising power of the government side. As a result of establishing investment legislations in these countries, the freedom of the parties has become restricted re this legislation. Even for the countries that do not adopt investment legislation and do not possess oil legislation, there are many legal restrictions on the freedom of contractual parties. This means that despite the existing relationship between the host country and the foreign contractor, the contract contents are not determined in free negotiation of the parties.”⁶⁵

The public law character has received a constitutional basis in the various Arab countries which include in their constitutions a provision emphasising that natural resources are the property of the state whose task it is to ensure the proper exploitation thereof in the best interests of the national economy.

For example, in the case of Kuwait, Article 21 of the Kuwaiti Constitution provides that: “Natural resources and all revenues are the property of the state. It shall ensure their preservation and proper exploitation, due regard being given to the requirements of state security and the national economy”.⁶⁶

6.3.3 Dualism Preferred over Monism International Contract Principles

In international contracts it is important that the contracting parties choose a dispute settlement mechanism, (mainly international arbitration) whether institutionalised or *ad hoc*, without expressing the applicable law governing their contractual relationship. This issue is considered controversial in the area of international law. Different laws and principles have been suggested as being applicable to contracts between states and foreign investors. However, there is no general consensus. Some proclaim the application of the *lex contractus*, while others restrict the application of the law of the

⁶⁵ Elwan Mohammed, p. 310; Rabah Khasan, *op.cit.*, p. 188; Mughraby Muhamad, *Permanent Sovereignty Over Oil Resources: A Study of Middle Eastern Oil Concessions and Legal Changes*, Lebanon: Catholic Press, 1966. *op.cit.* 51 p. 161.

⁶⁶ *op.cit.* 51. p.161.

contracting state or transnational law or general principle of law or international law.⁶⁷

In other words, the arbitrator is not under any obligation to follow a national private international law system, whether one pertaining to the state in which the arbitration takes place, or of any other national system. This section will argue that Middle East countries adopt the Dualism principle over the Monism Principle, drawing upon the analysis of differences between these two approaches in chapter five.

6.3.3.1 The Application of the General Principles of Law

The idea that economic development agreements can be governed by general principles of law was presented by Lord McNair (1961)⁶⁸. He argued that “the system of law applied to these agreements cannot be public international law *stricto sensu*, because these agreements are not inter-state agreements and do not deal with inter-state relations. He suggested that the legal system of law most likely suitable for the regulation of these agreements and the adjudication of disputes arising out of them is “the general principles of law recognised by civilised nations”.⁶⁹

A number of international contracts include provisions which stipulate the application of one of the general principles, such as “good will” and “good faith”, or the application of the principles of law common to the contracting parties and, in the absence of such common principles, then by and in accordance with the principles of law recognised by civilised nations in general.

A good illustration of this trend can be seen in Article 35(1) of the concession between the Government of Kuwait and the Kuwait Shell Petroleum Development Company Ltd of 1961 which states:

“The parties base their relation with regard to these agreements on the principle of goodwill and good faith. Taking account of their different nationalities this agreement shall be given effect and must be interrelated and applied in conformity with the principles of law common of Kuwait and England and, in the absence of such common principles, then in conformity with the principles of law normally recognised

⁶⁷ Ibid., p.163.

⁶⁸ See Lord McNair, (1961). *The Law of Treaties*. Oxford University Press. Quoted by Khbar Rasulov, (2003). *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity*. *The European Journal of International Law*. vol. 14, No. 1. p. 164.

⁶⁹ Ibid.

by civilised states in general, including those which have been applied by international tribunals.”⁷⁰

Similarly, Article 39 of the Agreement concluded between the Sheik of Kuwait and the Arabian Oil Company of Japan of 1958 first refers to the “principles of goodwill and good faith”. Then it provides for the application of the “principles of law common to Kuwait and Japan and, in the absence of such common principles, then in conformity with the principles of law normally recognised by civilised states in general, including those which have been applied by international tribunals.”⁷¹

The general principle of law has been confirmed by international arbitration cases. Most of these cases deal with oil concessions. In the arbitration between the Arabian American Oil Company (Aramco) and the Government of Saudi Arabia, the Arbitration Tribunal held that:

“Matters pertaining to private law are, in principle, governed by the law of Saudi Arabia, but with one important reservation. That law must, in case of need, 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, in particular whenever certain private rights – which must inevitably be recognised to the concessionaire if the concession is not to be deprived of its substance - would not be secured in an unquestionable manner by the law in force in Saudi Arabia.”⁷²

“In the arbitration between the ruler of Qatar and the International Marine Oil Company Ltd (1953), the arbitrator found that the parties intended the agreement to be governed by the principles of justice, equity and good conscience. In the Abu Dhabi case (1951), the arbitrator, Lord Asquith of Bishopstone, held that he had to resort to the general principles of law, as a form of the modern law of nature.”⁷³

Nevertheless, it has been argued that it is not for international legislations in different countries to agree on an applicable ruling in one specific matter. Thus, some jurists hold the view that these principles are just general suggestions which consider the

⁷⁰ See M. Saeed, (2002). Legal Protection of Economic Development Agreements. *Arab Law Quarterly*. vol. 17, No. 2. p.159.

⁷¹ *Ibid.*, p.165. Basic Oil Concession Contracts (Middle East), Supplement No. 1.

⁷² Saudi Arabia v. Arabian American Oil Company (Aramco). Quoted by M. Saeed, (2002). Legal Protection of Economic Development Agreements. *Arab Law Quarterly*. vol. 17, No. 2. pp. 150-176.

⁷³ *Ibid.*, p. 166. See International Marine Oil Company v. Ruler of Qatar, 20 International Law Report, 1953.

basis of different legal systems. If so, it will be difficult for the contracting parties to predict clearly their rights and duties if their agreement is subject to such principles.⁷⁴

6.3.3.2 Denial of the Application of International Law

Chapter Five critically examined how it had been suggested by Mann that contracts between states and aliens can be governed by international law if that law is chosen by the parties to be the proper law of the contract. He observed:

“it is possible, however, for contracts between parties, only one of whom is an international person, to be subject to public international law ... 9a) According to the theory referred to, a contract could be “internationalised” in the sense that it would be subject to public international law *stricto sensu*, therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly that same manner as in the case of a treaty between two international persons; but that, on the other hand, it would be caught by such rules of *jus cogens* as are embodied in public international law.”⁷⁵

In the arbitration between Aramco and the Government of Saudi Arabia, the Arbitration Tribunal rejected the contention that an oil concession should be “assimilated to an international treaty governed by the Law of Nations” and held that as the agreement had not been concluded between two States, but between a State and a private American corporation, it was not governed by public international law.⁷⁶

For these reasons, a number of developing countries, including many in the Middle East, stipulate in their internal legislations and international contracts the application of their own municipal law to these agreements. This view was adopted by the Organisation of Petroleum Exporting Countries (OPEC) Resolution XVI.90,⁷⁷ regarding the declaratory statement of petroleum policy in member countries.

The Resolution recommended to member countries that “all disputes arising between the Government and operators shall fall exclusively within the jurisdiction of the competent national courts or the specialised regional courts, as and when established”⁷⁸

⁷⁴Ibid.

⁷⁵ Mann F A, “The Proper Law of Contracts concluded by International Persons”, *op.cit.*, p. 43; and the same author, “The Law Governing State Contracts”, 21 *The British Yearbook of International Law*, 1944, p. 20. *op.cit.* 51 p. 167.

⁷⁶ Saudi Arabia v. Arabian American Oil Company (Aramco), *op.cit.*, p. 165. *op.cit.* 51. p.169.

⁷⁷ OPEC Resolution XVI. 90 of the Sixteenth Conference held in Vienna from 24 Th. To 25 Th. June 1968. See Basic Oil Laws and Concession Contracts (Middle East), Supplement No. XXXI, p. c-1. *op.cit.* 51 p. 169.

⁷⁸ *op. cit.* p. 169.

Hence, the local law of these contracting states is applied to disputes arising from these contracts. The Libyan Petroleum Law of 1995 as amended in 1965 provides that the contract “shall be governed by and interpreted in accordance with, the principles of law in Libya which are consistent with principles of international law ...”.⁷⁹ Thus, the Libyan legislation does not adopt the notion of internationalisation of the state’s contracts; however, it adopts the notion of subordination of the local law to international law. In other words, the Libyan law applies in all cases unless it differs from international law.

In the dispute between *Petroleum Development Ltd* and *Abu Dhabi* (1951), Lord Asquith decided that: “This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi.”⁸⁰

Sir Alfred Bucknill, the arbitrator in the arbitration case between the *Ruler of Qatar and the International Marine Oil Company Ltd of (1953)* decided that:

“If one considers the subject matter of the contract, it is oil to be taken out of the ground within the jurisdiction of the ruler. That fact, together with the fact that the ruler is a party to the contract and had, in effect, the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, and the fact that the agreement was written in Arabic as well as English, points to Islamic law, that being the law administered at Qatar, as the appropriate law.”⁸¹

This award was confirmed by the *Aramco* case in which the Arbitration Tribunal found; “the concession of 4 Safar 1352, corresponding to 29 May 1933, derives therefore its judicial force from the legal system of Saudi Arabia, the *Shari’a*, the divine Law of Islam, supplemented by royal Decree No. 1135, of *Rabie al Awal* 1352, corresponding to 17 July 1933.”⁸²

The Tribunal also found that: “matters of private law are, in principle, governed by the law of Saudi Arabia but with one important reservation. That law must, in case of need, 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, in particular whenever certain private rights - which must investable by deprived of its substance -

⁷⁹ Ibid., See also “Kronfol Zouhair, op. cit., p. 76”.

⁸⁰ See *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, op.cit. p. 534. op.cit. 51p.170.

⁸¹ See K.M. AL-Jumah, (2002). Arab State Contract Dispute: Lesson from the Past. *Arab Law Quarterly*. vol. 17. No.3 See also *International Oil Company v. Ruler of Qatar*.

⁸² Ibid., See also *Saudi Arabia v. Arabian American Oil Company*, op. cit., p. 167.

would not be secured in an unquestionable manner by the law in force in Saudi Arabia.”⁸³

The application of municipal law has been adopted by a number of Middle Eastern governments contracts concluded with foreign investors. The choice of law clause was prescribed in the mining contract between the *Democratic Republic of the Sudan* and the *Japanese Group* of 1976, which explicitly states in Article 12: “This Agreement shall be governed by and constructed in all respects in accordance with the law of the Sudan. Sudanese courts shall have jurisdiction to determine any matter arising from the Agreement.”⁸⁴

National legislation of some host countries also provides such provisions. For example, Article 3 of the Saudi Arabian Council of Ministers’ Resolution No. 58, dated 25 June 1963, provides that:

“The law applicable to disputes to which the state is a party shall be determined in accordance with the established general principles of private international law, the most important of which is the principle of the application of the law pertaining to the place of execution. Government agencies may not choose any foreign law to govern their relationship with such individuals, companies, or private organisations.”⁸⁵

In Kuwait, there is a systematic policy which, recently, has been adopted by the government, that in all contracts between foreign investors and government ministries or institutions, Kuwaiti law shall be the law of the contract.

A number of writers argue against application of the municipal law of the contracting host state in the contract in question. Most of their arguments are based on what has been stated in previous arbitration awards. For example, in the *Aramco* case, the Tribunal stated: “The regime of mining concessions, and consequently, also of oil concessions, has remained embryonic in Muslim law and is not the same in the different schools ... *Hanbali* law contains no precise rule about mining concessions and is silent a fortiori about oil concessions”.⁸⁶

In the Abu Dhabi case, Lord Asquith asserted: “But no such Law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance

⁸³ See Paul Streeten, (1994). Economic Progress and Prospects in the Third World: Lessons of Development Experience Since 1945. *Journal of Economic Literature*. Vol. XXXII. p. 1938.

⁸⁴ El-Sheikh Fathi El-Rahman, op. cit., p. 241. Also, see Article 21, 22 of the contract between Yacimientos Petroliferos Fiscales (a national Argentinian oil company) and Pan American International Oil Company of 1957. See 3 International Law report, 1964, p. 359. p. 171.

⁸⁵ See International Law Report, 1964, p. 45.

⁸⁶ See Saudi Arabia v. Arabian Oil company (Aramco), op.cit., p. 163. op. cit. 51. p.172.

of the Qur'an; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments...”⁸⁷.

In the Qatar case, Sir Alfred Bucknill declared: “... I have no reason to suppose that Islamic Law is not administered there strictly, but I am satisfied that the law (sic) does not contain any principles which would be sufficient to interpret these particular contracts”.⁸⁸ This argument has been invalidated in recent times since most of the developing countries, including Middle East countries, have developed advanced legal systems obtained from Western laws, which is no justification for not applying the national laws of these countries in these contracts.⁸⁹

From the above discussion, it seems there are two clear regional perceptions of international contract principles, the first, the application of the municipal law of the contracting state, and the second, the flexibility of the international contract affording the right to modify the contract. Therefore, in practice, regional legal culture in respect of international contracts is always there and plays a significant role in any harmonisation process.

6.3.4 Contemporary Issues in the Adjudication of International Contracts in the Middle East

Previous sections of this chapter have focused upon the impact of regionalism in relation to Middle East perceptions of International Contract Principles; this section will focus on a very prominent aspect of international commercial contract principles, that is, the nature of the contract between the arbitral parties and arbitrators. What is vitally important to analyse here is the precise difference between Modern international contract law and the Middle East with regard to the arbitrator's legal status according to international arbitration contracts.

Arbitrators are free to create their own express contract with the parties setting out their rights, responsibilities, and liabilities regarding the arbitration. Unfortunately, as arbitrators do not regularly enter into a separate contract with the parties for the provision of arbitral services, a different method is necessary to determine the terms and conditions of the *receptum arbitri* (This term is used in Roman law to express the

⁸⁷ See *Petroleum Development Ltd v. Sheikh of Abu Dhabi*, op.cit., p. 534.

⁸⁸ See *International Marine Oil Company Ltd v. Ruler of Qatar*, op.cit., p.534. op.cit. 51 p.172.

⁸⁹ *Ibid.*, p.173.

agreement to submit to arbitration and to have an informal assumption of a guarantee for a specific effect or specific result).⁹⁰

Immunity versus Liability

Before discussing the immunity and liability of arbitrators under these two different legal cultures and the impact of regionalism in respect of this issue, it is worth discussing arbitrators' relationship to the arbitration contract. In general, arbitrators must accept their appointment in writing, but it is unclear whether this "acceptance" creates a distinct contract between the parties and the arbitrators.

Under modern law, as well as in Middle East countries, arbitrators are part of the arbitration agreement with differences. In *Norjarl v. Hyundai* (1990), for example, the court explained that the "arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to the arbitration agreement which becomes a trilateral contract."⁹¹ Another English court pointed out that arbitrators become parties to the arbitration agreement by accepting appointments under it.⁹²

This perspective is also accepted in some Arab Middle Eastern countries. For example, in Lebanon and Yemen, an arbitrator becomes a party to the agreement to arbitrate and has a contractual relationship with the parties that may result in contractual liability. In these countries, arbitrators may also be bound by the terms of the parties' arbitration agreement⁹³ particularly because of the influence of the civil law tradition and Islamic law,⁹⁴ it is likely that such liability can be based upon the contract. However, because of religious tradition it is also necessary to consider Islamic Law sources, mostly the Qur'an and Shar'ia to determine liability. As has been discussed in this chapter, the Qur'an emphasises 'fulfilling one's obligation' as

⁹⁰ See Susan D. Franck, 2000. *The Liability of International Arbitrators: A Comparative analysis and Proposal for Qualified Immunity*. *New York Law Journal of International & Comparative Law*. p. 2-3.

⁹¹ *Norjarl v. Hyundai*, [1991] 1 Lloyd's Rep. at 536.

⁹² Susan D. Franck, p. 3.

⁹³ Traditional Shari'a scholars suggest that an arbitrator should expressly accept his appointment. But modern jurists tend to assert that the agreement of the parties alone to execute an arbitration agreement is not sufficient, and instead, the consent of the arbitrator must be obtained. The *Shari'a* does not specifically indicate, however, whether this arbitration agreement must be in writing. See Saleh, *supra* note 22, at 39-40. *op.cit.* 84. *supra* note 47. p.27.

⁹⁴ Various Islamic codes have imported the Western concept of an irrevocable mandate and can prevent an arbitrator from being removed, except through established court procedures. In contrast, under tradition established in the Shari'a, the parties' appointment of an arbitrator is revocable at any time prior to the delivery of the award. See Saleh, *supra* note 22, at 24, 39-44. *op.cit.* 84. *supra* note 48. p. 27.

the fundamental principle that governs contracts⁹⁵ and which can create a basis for arbitrator liability.⁹⁶ At the same time, “service contracts [are] of a dubious nature, [and] are also outlawed on the basis of illegal *Mahall* [subject matter] and (*sabab*) [motivating cause].”⁹⁷ Ultimately, however, it is necessary to consult the *Qur’an*, the *Shari’a*, and the Code of the relevant country before making a final determination.⁹⁸

Express Immunity of the Arbitrator

When originally proposed, the UNCITRAL Model Law did not contain an express provision making arbitrators liable or immune from their acts or omissions. The Model Law’s legislative history indicates that the issue of arbitrator liability was specifically ignored because “the liability problem is not widely regulated and remains highly controversial.”⁹⁹ However, some countries addressed this issue when adopting the Law.

The United Kingdom’s Arbitration Act 1996 provides arbitrators with a statutory basis for immunity in tort, contract, or otherwise.¹⁰⁰ Section 29 provides an arbitrator with general immunity for anything done or omitted in the discharge or purported discharge of his functions as arbitrator. There are only two specific situations justifying liability: (1) if an arbitral act or omission is done “in bad faith,”¹⁰¹ and (2) if

⁹⁵ See Rayner, *supra* note 46, at 87. The *Qur’an* also states that, “O ye who believe, respect your contractual undertakings” and “He authorised what he did not forbid.” Peter Sanders, General Introduction on Arbitration in Arab Countries, in *International Handbook on Commercial Arbitration* 6 (1998).

⁹⁶ Under the *Qur’an*, arbitrators are required to judge according to the provisions of the *Qur’an* and arbitrate with observance of the rules of fairness and justice. See Saleh, *supra* note 22, at 15-16. *op.cit.* 84. *supra* note 51. p.27.

⁹⁷ See Rayner, *supra* note 46, at 156. *op.cit.* 84. *supra* note 52. p.27.

⁹⁸ *op.cit.* 84. p.27.

⁹⁹ Howard M. Holtzman & Joseph E. Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 1119 (1989) citing First Secretariat Note, A/CN.9/207, para. 70. See also *id.* at 1443, 1148-50 (providing the legislative history of the rejected provision regarding arbitrator liability). *op.cit.* 84. see *supra* note 213. p.42.

¹⁰⁰ See Peter Sanders, National Report on England, in *International Handbook on Commercial Arbitration* 30 (1998). This broad statutory immunity, however, does not protect an arbitrator from liability incurred by reason of resigning. Sections 29 (3) and 25 do provide for the potential liability of an arbitrator for his withdrawal from the arbitration. The parties are free to agree with an arbitrator of the consequences of resignation regarding entitlement to fees or expenses and any liability. See Arbitration Act 25 (1). Otherwise, a resigning arbitrator must apply to a court for: (1) relief from liability or (2) an order regarding fees and expenses. See Arbitration Act 25 (3). In making the determination about liability, the court will consider whether the resignation was reasonable. See Arbitration Act 25 (4). This provision is unique because it allows an arbitrator to go to court prospectively to obtain a “grant [of] relief from liability” incurred by reason of resignation. See Arbitration Act 25 (3)(a). *op.cit.* 84. see *supra* note 220. p.42.

¹⁰¹ One important critique of the 1996 United Kingdom Arbitration Act is that it does not expressly define “bad faith,” but rather leaves the judiciary to interpret this term. Thomas Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 *Tul. Mar. L.J.* 131, 143 (1997). Currently, under English law, “bad faith” means actual malice or actual knowledge of the absence of any power to

a court determines withdrawal is unreasonable.¹⁰² Although immunity under the Arbitration Act is fairly broad, unlike the U.S. approach, it is qualified to give parties a remedy for an arbitrator's international misconduct.¹⁰³

The immunity of arbitrators from suit is partly based upon the doctrine of judicial immunity and often on whether an arbitrator's responsibilities are functionally comparable to those of a judge. In essence, although some countries evaluate arbitral immunity on the basis of contractual obligation, others determine the scope of arbitral immunity by evaluating an arbitrator's similarity in status to that of a judge.

Form of Liability of the Arbitrator

Unlike most Western countries, many Arab countries create express liability for improper resignation. In these countries there is a tendency to base liability on faults such as inappropriate withdrawal, failure to render an award, and general failure to abide by the terms of appointment. As there is no indication in these countries of immunity, however, liability probably extends to all negligent acts and breaches of duty.

Express Liability

In Qatar, an arbitrator is liable to the parties if he withdraws without serious grounds. Similarly, in Tunisia, the 1993 Arbitration Code does not provide any immunity for arbitrators and, instead, expressly subjects an arbitrator to damages if he "withdraws without good reason."¹⁰⁴ Libya also has a law that does not create immunity but instead provides for an arbitrator's liability for withdrawal without good reason.¹⁰⁵ Under the Lebanese Code of Civil Procedure (1985), the law expressly provides that an arbitrator "will become liable" if he withdraws without sufficient reason.¹⁰⁶

discharge the function at issue. See Sanders, National Report on England, *supra* note 220, at 31-32; see also *Melton Medes v. Securities and Inv. Bd.*, [1995] 3 All. E.R. 880, 890 (defining "bad faith" in a narrow sense that "a moral element is an essential ingredient. Lack of good faith connotes either (a) malice in the sense of personal spite or desire to injure for improper reasons, or (b) knowledge of absence of power to make the decision in question.")

¹⁰² See English Arbitration Act of 1996, 25.

¹⁰³ *op.cit.* *supra* note 84. p.11.

¹⁰⁴ See Peter Sanders, National Report on Tunisia, in *International Handbook on Commercial Arbitration* (1998) (citing 1993 Tunisia Arbitration Code, art. 11). In Bahrain, under domestic arbitration law, if an arbitrator withdraws without good cause, he may be liable in damages. See El-Ahdab, *supra* note 13, at 108 (citing Bahrain code of Procedure, art. 234. Although there is a Bahraini International Arbitration Act, no provision within this statute expressly addresses the issue of arbitrator liability).

¹⁰⁵ See Peter Sanders, National Report on Libya, in *International Handbook on Commercial Arbitration* 5 (1998) (citing Libyan Code of Civil and Commercial Procedure of 1953, art. 748).

¹⁰⁶ See Lebanon New Code of Civil Procedure, art. 769 in El-Ahdab, *supra* note 13, at 864.

However, in international arbitration, parties may opt out of this provision through agreement.

Other Arab countries create liability for resignation but add additional bases of liability. In Syria, if arbitrators resign except for a serious reason they may be required to compensate the parties.¹⁰⁷ Moreover, since arbitrators are not subject to the same procedure for judicial liability, arbitrators are liable for any negligence or fault committed during the arbitration.

Under the Kuwait: Arbitration Law of 1980, there is only one stated ground for an arbitrator's liability. Specifically, "if the arbitrator, without serious grounds, refrains from acting after having accepted his mission, he may be liable in damages to the parties."¹⁰⁸ But, because arbitrators are also required to accept their appointment in writing, failure to abide by duties enumerated in the arbitration law is likely to lead to liability. Morocco has a similar scope of arbitrator liability. Under the Arbitration Act of 1974, "arbitrators cannot refuse to act once they have started, else they shall have to pay compensation to the parties for the damage thus caused."¹⁰⁹

Saudi Arabia applies traditional Islamic law principles to the issue of arbitrator immunity. Although there is one primary basis for liability, its potential is quite broad. The *Qur'an* contains the basic principle that, "he that mediates in a good cause shall gain by his mediation; but he that mediates in a bad cause shall be held accountable for its evil."¹¹⁰ Under this general principle, an arbitrator can be liable for negligence in "failing to take note of important documents made by one of the [parties]."¹¹¹ Essentially, an arbitrator is liable for nearly any fault he commits which results in damage to any party. Although there was a regulation proposed to hold arbitrators liable for inappropriate withdrawal, this was never enacted. Instead, Article 11 of the 1983 Arbitration Regulation of Saudi Arabia provides that if the parties remove an arbitrator who was "not the cause of such removal," the arbitrator may "claim compensation" against the parties.¹¹² It is not clear, however, that the failure to enact a

¹⁰⁷ See Syrian Code of Civil Procedure, art. 514 in El-Ahdab, supra note 13, at 928 and Saleh, supra note 22, at 100. *op.cit.* 84. see supra note 268. p.46.

¹⁰⁸ Kuwait Law No. 38, art. 178 in El-Ahdab, supra 13, at 885.

¹⁰⁹ Act of 28 September 1974, art. 313.

¹¹⁰ Sanders, supra note 276, at 17 (citing Koran, Al-Nisa (Women) 4:85).

¹¹¹ Salah Hejailan, National Report on Saudi Arabia, in 4 Yearbook of Commercial Arbitration 162, 167 (1979). *op.cit.* 84. see supra note 289. p.47.

¹¹² *Ibid.*, See El-Ahdab, at 27-28 (citing Arbitration Regulation of Saudi Arabia, art. 11).

legislative provision will provide immunisation against the otherwise broad potential for arbitrator liability in Saudi Arabia.

Implied Liability

In several Arab countries, the potential liability of an arbitrator is quite broad. In Iraq (no evidence of change post-Sadaam), after accepting appointment, “an arbitrator may not decline to act without a just cause.”¹¹³ Although this does not expressly create liability, at least one commentator asserts this becomes a part of the *receptum arbitri* and is an implied basis of liability. The potential scope of immunity, however, is never discussed.

Although the Egyptian Code of Civil and Commercial Procedure of 1968 provided for arbitrator liability for resignation without comprehensively adopting the UNCITRAL Model Law, there is no express provision for arbitrator liability or immunity.¹¹⁴ Although some have asserted that the duties implied by the 1994 Act create the basis for liability, this is not necessarily certain.

Jordan’s Arbitration Act (1952) does not contain an express provision for liability, under the current law an arbitrator is generally not liable if he refuses to perform his mission; but if a party can prove a link between the damage and the refusal of an arbitrator to act, the general rules of liability apply.¹¹⁵

Yemen has a similar standard of liability. Although arbitrators are not required to accept in writing, the arbitrator is a party to the agreement to arbitrate and is contractually bound to perform according to the agreement and is potentially liable for any breaches.¹¹⁶ Overall, the potential for liability in these countries is quite extreme in comparison to that prevailing in common law countries.¹¹⁷

Implications of Regional Variations

The application of different laws to the same contractual relationship between the parties and the arbitrators will contravene the idea of uniform treatment of these contracts. This can result in unjustifiable discrimination against arbitrators where they

¹¹³ Ibid., See also 1969 Iraq Code of Civil Procedure, art. 260, in El-Ahdab supra note 13, at 837.

¹¹⁴ Ibid., See El-Ahdab. Law Concerning Arbitration in Civil and Commercial Matters, supra note 13, at 821-35.

¹¹⁵ However, in the new Jordanian Arbitration Act (2001), there are no express provisions for arbitrator liability, instead, there are uniform standards allowing for dismissal of an arbitrator and the setting aside of the award.

¹¹⁶ See Yemen Presidential Decree No. 22-1992 Issuing the Arbitration Act, art. 4 at 755.

¹¹⁷ See Susan D. Franck, (2000). The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity. *New York Law Journal of International & Comparative Law*. p.16.

live in countries with higher standards of liability. If the domicile is the applicable law, however, there is a greater probability that the arbitrator will be familiar with the proper standard of liability and act accordingly. Ultimately, this slight increase in certainty does not justify the significant variations in arbitrator liability. Particularly as it can result in variations among the behaviour of arbitrators, there can be unacceptable varying levels of arbitrator performance. For example, within the same panel, US arbitrators could covertly engage in fraud without fear of repercussions while Saudi Arabian arbitrators adhered to the strictest letter of the law. Although not all arbitrators behave in the same way, this startling inconsistency in behaviour significantly undermines the respect for and integrity of the international arbitration process,¹¹⁸ or the prospect for evolution of a coherent, harmonised set of international rules.

In summary, i) in the West as well in the Middle East, arbitrators become a party to the agreement to arbitrate and have a contractual relationship with the parties; ii) Arbitrator personal liability varies between states mainly between Western and Middle Eastern countries; iii) occasionally, there is uncertainty as to whether municipal or international rules govern arbitral contracts; iv) while Western legal culture provides arbitrators with a basis for immunity, that of the Middle East provides liability of arbitrators; v) the UNCITRAL Model Law's legislative history ignored the issue of arbitrator liability because it is highly controversial; and vi) The contractual status of arbitrators *vis a vis* the original contracting parties who are in dispute varies.

¹¹⁸ Ibid., p. 18.

CHAPTER SEVEN

Impact of the UNCITRAL Model Law on the Middle East Region

7.1 Background to Harmonisation

In order to address issues caused by global differences between national laws in different jurisdictions, such as the applicable law for dispute resolution, the unification of arbitration laws was attempted. The aim of the UNCITRAL Model Law on International Commercial Arbitration, which was adopted in 1985, is to facilitate harmonisation of national laws between which considerable disparity exists.

Designed for use by states with different legal, social and economic systems and intended to develop “a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.”¹, the UNCITRAL Model Law was drafted with input from arbitration experts representing legal cultures from around the world (including civil, common, and Islamic law traditions), with the purpose of creating a “crucible for the evolution of international commercial arbitration.”²

The Model Law took a flexible approach which allowed states to modify articles adopted from it according to their demands and traditions or to use the law as an authoritative internationally accepted standard or benchmark for the reform or new enactment of laws³ more accessible and transparent to foreign lawyers.⁴

The Model Law’s flexibility is an advantage in influencing national laws towards uniformity of law tempered to accommodate regional or local diversity; it provides commonly accepted basic standard. This basic standard has been derived from consensus achieved among different schools of legal thought, e.g., common, civil, Islamic. Although states adopted the Model Law can modify it to cover both domestic and international arbitration, the Model Law was specifically designed for

¹ See Marshall J. Breger, Shelby R. Quast (2000), Article international commercial arbitration: a case study of the area under control of the Palestinian Authority. *Case Western Reserve Journal of International Law*. 185, p.9.

² See Jan Paulsson, Third world participation in International Investment Arbitration, 2 ICSID Review. –*Foreign Investment Law Journal*. vol. 19, No. 23 (1987). In Charles N. Brower; Jeremy K. Sharp, (2003), International Arbitration and the Islamic World: The Third Phase. *The American Journal of International Law*, vol. 97, no. 3 (Jul., 2003), 643-656. p.650.

³ Explanatory Note by the UNCITRAL secretariat on the Model Law on International commercial Arbitration, 3 says, “The form of a model law was chosen as the vehicle for harmonisation and improvement in view of the flexibility it gives to States in preparing new arbitration laws”.

⁴ See Gerold Herman, Does the World Need Additional Uniform Legislation on Arbitration? 15 *Arbitration International Journal*, “11, 212-13 (1999).

international commercial arbitration. It has proved popular internationally and has become a benchmark by which the quality of national arbitration laws is judged.

The structure of the Model Law covers all stages of the arbitral process, beginning with the arbitration agreement and ending with the recognition and enforcement of the arbitral award.⁵ Further, a system is established for sharing information between practitioners regarding court decisions and arbitral awards interpreting the Model Law. UNCITRAL Notes on Organising Arbitral Proceedings (“UNCITRAL Notes”) were also published to facilitate international commercial arbitration practice.⁶

Consequently the Model Law has contributed to the development and harmonisation of national laws on arbitration and arbitration practice through its adoption or adaptation into each jurisdiction.⁷ The Model Law provides those countries without a modern arbitration law with a complete system of arbitration that is recognised by and acceptable to the international community. Now, there are “Model Law countries in all continents, of all sizes and all stages of economic development, covering altogether more than one-quarter of the world’s territory,”⁸ thus reflecting a worldwide consensus on the principles and important issues of the practice of international commercial arbitration.

7.2 Historical Background and the Process of Codification in the Middle East

Within the process of codification in the Middle East, emphasis will be placed on historical roots to reflect the differences rather than the similarities between the various jurisdictions in terms of their legal makeup.

Codification of commercial arbitration varies from one country to another due to historical reasons. Saudi Arabia for example, is the most vigorous adherent to traditional Islamic legal and constitutional norms. In contrast with other Arab States, the positive (Western inspired and secular) laws of the commercial field are subordinate and supplemental to classical Islamic law (*fiqh*), to the limited extent that company and commercial laws have been codified in the country.

In Contrast to Saudi Arabia the other Gulf States; for historical reasons they have been exposed to Western-British-legislation, but have maintained their Islamic law jurisprudence. In their codification of commercial law, they have been influenced by

⁵ See Model Law, *supra* note 112, reprinted in 24I.L.M. 1302.

⁶ See Roberto Ceccon, (1997), “UNCITRAL Notes on Organising Arbitral Proceedings and the Conduct of Evidence”. *Journal of International Arbitration*. 67-68. in *Commercial dispute Processing: The Japanese Experience and Future*. Yasunobu Sato. Unpublished thesis 2000.

⁷ See Model Law, *Supra* note 112, Art. 1(This law applies to international commercial arbitration).

⁸ See Herman, *supra* note 115, at 212.

the civil French/Egyptian model as a basis for enacting commercial legislation around the time of their independence, the first among them being Kuwait (Law 15 of 1960) and the latest, the United Arab Emirates (Law 8 of 1984 put into effect by Law 13 of 1988). Another example is Bahrain which departed from the hitherto dominant English common law (in Law 28 of 1975) tradition to follow the Egyptian system, itself inspired by French law.⁹

Egypt is another example of how historical factors influence the codification of commercial law. In 1949 Egypt adopted a civil code borrowed mostly from the French Civil Code, yet incorporated elements of Islamic law. Commercial law reform in the late 1980s and early 1990s was intended to play a major role in transforming Egypt from a relatively closed socialist economy into an open capitalist one.¹⁰ Furthermore, Egypt was among the first to codify the commercial arbitration law according to the UNCITRAL Model Law.

Lebanon is the classic example in which its domestic law has long been displaced by a Western-oriented French legal system of commercial laws and regulations. A wide range of corporate, financial, commercial, investment and arbitration law reforms have been implemented as part of a programme of legislative modernisation which has taken place after the civil war (1975-1990).¹¹

From a historical perspective, codification of commercial arbitration law in the Middle Eastern countries can be classified into four main categories: countries adopting the UNCITRAL Model Law, countries adopting an Islamic Law approach, countries adopting the French approach and finally countries adopting the mixed statutory approach as will be discussed in detail in the following section.

7.3 Implications of the UNCITRAL Model Law for the Middle East Region

This part of the chapter will examine implications of the international harmonisation process, and the UNCITRAL Model Law in particular, on the development of arbitration laws in the Middle East.

It will be demonstrated that there is no consensus among countries in the region with regard to the incorporation of provisions of the UNCITRAL Model Law in domestic arbitration legislation as a tool for global harmonisation of arbitration laws. Differing approaches towards adopting the UNCITRAL Model Law in the Middle East region

⁹ See Hilary Lewis Ruttley and Chibli Mallat, (1995). *Commercial Law in the Middle East*. Centre of Islamic & Middle Eastern Law. pp. 3-6.

¹⁰ Ibid.

¹¹ Ibid.

will be identified. In addition, how and why various operative commercial arbitration laws have been enacted will be addressed. While in the West, the following countries have adopted the UNCITRAL Model Law; Australia, Austria, Bulgaria, Canada, Croatia, Cyprus, Denmark, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Norway, Poland, Spain, Ukraine, United Kingdom and Northern Ireland: Scotland, USA: California, Connecticut, Illinois, Oregon and Texas.¹²

In regard to the Middle East, the main finding shows that only five of eighteen countries in the region (Bahrain, Tunisia, Egypt, Oman and Jordan) have promulgated commercial arbitration laws which adopt the principles of the UNCITRAL Model Law. Consequently, international commercial arbitration in the region can perhaps be described as a patchwork comprising local tradition, European laws, and terminology sometimes derived from classical Islamic law.¹³ Countries in the Middle East can be classified within four categories according to the development of arbitration laws and the harmonisation process.

Table 7.1 Showing the Different Approaches towards Harmonisation of Commercial Arbitration

1.	Countries which have Adopted the UNCITRAL Model Law	Bahrain, Tunisia, Egypt, Oman and Jordan
2.	Countries which have Adopted the Islamic Law Approach	Saudi Arabia and Yemen
3.	Countries which have Adopted the French Approach	Algeria, Lebanon, Morocco and Syria,
4.	Countries which have Adopted a Mixed Statutory Approach	Kuwait, United Arab Emirates, Palestine, Libya, Sudan, Iraq and Qatar

The analytical framework will show that, countries in the region can be organised into four main legislation categories mainly based historical reasons. Further, because multinationals advocate global trade and foreign direct investment with regional blocks rather than small domestic markets, such a policy is likely to have a negative impact upon the region. Moreover, international trade and investment within the

¹² See www.uncitral.org

¹³ See Chibli Mallat, (2000) "An introduction to Middle East Law" and his supra note 1. In "Commercial Law in the Middle East: Between Classical Transactions and Modern Business". Am. J. Comp. L. 81(2000).

Middle East region will be constrained by national commercial arbitration legislation boundaries. Traders will have to make deferent contract provisions in each country and foreign corporations will not be able to easily circumvent restrictions across boundaries. As a consequence, the Middle East region will have small-scale global trade and investment. Therefore, policy makers should care not only about their national legislation but also about divergences across the region in general and show a greater interest in regional integration of commercial arbitration law if they want the region to be open to the world economy.

7.3.1 Countries Adopting the UNCITRAL Model Law

Main findings show only five countries out of eighteen in the Middle East region have adopted the UNCITRAL Model Law. These countries are: Bahrain (law No. 9 of 1994), Tunisia (law No. 42 of 1993), Egypt (law No. 27 of 1994), Oman (Decree No. 47 of 1997) and Jordan (law No. 31 of 2001). In the following section, why these countries have adopted the UNCITRAL Model Law will be briefly discussed. How the Model Law has been adopted, introduced and its implications will be investigated in detail in the next chapter.

Bahrain

Despite a historical background similar to other Middle East countries, mainly in the Gulf region, Bahrain has been able to introduce international commercial arbitration law reform. Surprisingly, it has adopted the exact form and wording of the UNCITRAL Model Law. Thus, it is worth discussing the historical factor in Bahrain's legislative process that did not prevent it from following the harmonisation process.

Before World War I, arbitration in its modern sense was unknown in Bahrain. There had been a traditional system for settling disputes through a council called the *Majles Orfi*,¹⁴ its members selected on the basis of custom.

Following World War II, Bahrain became the central location for the British army, navy and air forces in the region and, as a result, the country was exposed to the British legal system as were other Gulf States.¹⁵ The first order in council came into effect in 1925, and from then until 1959 Bahraini's and other Muslim Arabs were subject to the jurisdiction of the local *Sharia*' courts which existed in parallel with the

¹⁴ *op.cit.* 11, p. 316.

¹⁵ See S.H. Amin, Middle East Legal System; *supra* note 20, See Ahmed A. Mohamed Al-Suwaidi. The finance of international trade in the Gulf Arab States: a comparative study between Conventional and Islamic Banking systems with special Emphasis on the United Arab Emirates. Unpublished thesis, university of Exeter 1991. p. 52.

British courts. From 1959 until 1971, there was a gradual transfer of jurisdiction to the local Bahraini courts, either by Order in Council or Regulation.¹⁶

After independence, in 1971 Bahrain issued its first Law of Procedures, including arbitration provisions which resembled the old French rules of arbitration embodied in the previous Egyptian Law of Civil and Commercial Procedures. The Law of Civil and Commercial Procedure was issued in 1972 and the Commercial law No.107 of 1987 was based on Egyptian and Kuwaiti Codes.¹⁷

In accordance with its role as a regional centre for offshore banking, financial, insurance and commercial activities, on 16 August 1994, Bahrain promulgated the International Commercial Arbitration Decree Law No. 9 of 1994 (ICAL).¹⁸ According to Article (1) of the ICAL, the law is applicable to international commercial arbitration unless otherwise agreed by the parties.¹⁹ The term arbitration covers any arbitration whether or not administered by a permanent arbitral institution.²⁰

Recourse to a court against an arbitral award may be made by an application to the High Civil Court of Appeal for setting aside only if the party making the application satisfies the conditions in the law.²¹ The Law consists of four articles only. Article 1 provides that the UNCITRAL Model Law will be applicable to every international commercial arbitration contract unless otherwise agreed by the parties. Article 2 of the Law provides that the provisions of Bahrain's Civil and Commercial Procedures Act 1971 shall not be applicable to any international commercial arbitration contract.

Egypt

The last three decades have witnessed important steps in Egypt towards the modernisation of its laws in the field of international commercial arbitration. In 1959, Egypt acceded to the 1958 New York Convention on Recognition and Enforcement of

¹⁶ Ibid., p.52.

¹⁷ Ibid., p.53.

¹⁸ Anonymous, International arbitration law enacted (1995). Euromoney Publications Plc, Cardiff University Proquest databases. p. 1.

¹⁹ Ibid.

²⁰ Ibid., p.2.

²¹ These conditions are: a party to the arbitration agreement is under some incapacity; the arbitration agreement is not valid under the law to which the parties subjected it; the party making the application has not been given proper notice of the appointment of an arbitrator or of the arbitral proceedings or is otherwise unable to present this case;

The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decision on matters beyond the scope of the submission, or the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties; or the subject matter of the dispute is not capable of settlement by arbitration under the law of the State of Bahrain or the award is in conflict with the public policy of the State of Bahrain.

Foreign Arbitral Awards (1958 N.Y. Convention). Later, in 1974, Egypt acceded to the 1965 Washington Convention of the International Bank of Reconstruction and Development (IBRD) which established the International Centre for the Settlement of Investment Disputes (ICSID).²²

In 1982, Egypt signed a bilateral investment treaty with the United States, which entered into force in 1992. This treaty defines the right of individual investors with respect to their investments in the other contracting country and protects their ability to secure arbitration in a neutral forum.²³

In 1994, Egypt promulgated the Law Concerning Arbitration in Civil and Commercial Matters (the Arbitration Law No. 27 of 1994), which adopted the principles of the UNICTRAL Model Law of Arbitration to bring its arbitration laws within international standards.²⁴

The importance of the Egyptian Arbitration Law lies in the fact that it has primarily influenced Oman.²⁵

Original draft of the 1994 Law followed the Model Law in limiting its scope of application to international arbitration only. However, when referring the draft to the People's Assembly, it was decided that the Law should apply to all arbitrations, whether domestic or international, concurrently providing special rules for the latter.

Jordan

During the Ottoman Empire, the rules of *Al Majalla* were the applicable law. After the establishment of Jordan as an independent political entity in 1922, steps were taken towards modernising its system of law. In 1933, a law was enacted which included provisions on arbitration. In 1953 a Law of Arbitration was enacted. The 1953 law reflected the influence of English law on arbitration. The Jordanian Law does not permit arbitrators to be authorised to act as amiable compositeurs. It adopts the English approach of giving an umpire jurisdiction to determine the dispute himself if two-party appointed arbitrators fail to agree on an award. Moreover, the law follows the English approach of giving the courts considerable powers of intervention in arbitrations.²⁶

²² Ibid.,p.314.

²³ See Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Sep. 29, 1982, US-Egypt, S. Treaty DOC. No. 99-24 (1986), 21 I.L.M. 927, 1982. op.cit. 1, see supra note 142, p.42.

²⁴ op.cit. p.315.

²⁵ Ibid.

²⁶ Ibid., p.320.

Jordan has been recently engaged in international arbitration; it acceded to agreements on enforcing arbitral awards concluded within the Arab League (1952, 1985).²⁷ In 1972 it acceded to the IBRD Washington Convention. In 1979 it acceded to the New York Convention. Jordan has active relations with international arbitral institutions.²⁸ In 1989, Jordan began its economic reform programme, with a concentration on trade liberalisation. In an effort to create a friendly investment environment, Jordan continued the reform in 1995 with new and amended laws.²⁹ On September 16, 1995, the Jordanian parliament approved the Law for the Protection of Investment. This law applies to investment by non-Jordanians in the Kingdom. Law No. 16, Article 33 provides a settlement mechanism.³⁰ In 2001, Jordan continued the process of reform, influenced by the UNCITRAL Model Law, and promulgated the Commercial Arbitration Law No. 31 of 2001.

Oman

Oman applied the Shari'a rules, Islamic law according to the Idadi doctrine, which resembles to a great extent Sunni doctrine. However, unlike other Arab Gulf countries, Omani legislators acknowledged the fact that economic development and the encouragement of investment required the enactment of new and modern Omani laws on arbitration. So it was decided to issue a new Law of Arbitration in Civil and Commercial Disputes based on the same lines and principles of the UNCITRAL Model Law. On 28 July 1997, the law was enacted by the Sultani Decree No. 47 of 1997. The Law is a replica of the Egyptian Arbitration Law.³¹ Such legislative attitude has very important implications for the harmonisation process of international commercial arbitration in the region as whole as will be discussed later in chapter nine.

Tunisia

Until the closing year of the Nineteenth Century, Tunisia applied the Shari'a rules, primarily the Maleki doctrine. In 1881, Tunisia became a French Protectorate. From

²⁷ Jordan signed the Arab League Convention of Judicial Cooperation (Riyadh Convention). This Convention signed on 6 April 1983, repealed the previous 1952 Arab League Convention on the Enforcement of Judgement and Awards and came into force in October 1985. Also, it signed the 1983 Amman Arab Convention on Commercial Arbitration.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See Law for Promotion of Investment of 1995, Law No. 16(1995), reprinted in business laws of Jordan (Feb. 1998). *op.cit.* 1 see supra note 144, p. 42.

³¹ *op.cit.* 3. p.316.

that time and since its independence in 1956, its laws were codified and influenced by French law. In 1967 Tunisia acceded to the New York Convention.³²

In the 1980s and 1990s, active legislative steps were taken towards encouraging foreign investment. One of the main steps taken in this regard was the enactment of a new law on international commercial arbitration which diverged from the French influence and adopted the principles of the UNCITRAL Model Law. The Arbitration Code, *Majallat Al Tahkim*, was issued by Law No. 42 of 1993 on 26 April 1993.

The Tunisian Law takes a different approach in adopting the principle of the Model Law. The Law differentiates between international and domestic arbitration. The principle of the UNCITRAL Model Law is applicable mainly to international commercial arbitrations, while the rules applicable to domestic arbitration give the state courts more powers of supervision over decisions of arbitral tribunals. More details will be provided in the next chapter.

7.3.2 Countries Adopting Islamic Law

Saudi Arabia

Saudi Arabia has a long history of applying Islamic law according to the *Hanbali* doctrine. Here it is essential to examine how Saudi arbitration rules have responded to the requirements of the international harmonisation process and why they remain faithful to the Kingdom's own legal tradition.

From the early days of oil exploration until the 1950s arbitration was the primary means of resolving disputes between Saudi and foreign companies. Saudi Arabia adopted arbitration as a dispute resolution mechanism in the Code of the Commercial Court of 1350 AH (1931).³³ The Code entitled disputants to resolve their disputes by means of arbitration.

The defeat of the Saudi Arabian Government in the *Aramco arbitration case*³⁴ of 1958 was the direct reason for the unpopularity of international arbitration in Saudi Arabia. Further, Saudi Arabia was also influenced by cases such as *Petroleum Development Ltd v. Sheikh of Abu Dhabi* and *Qatar v. International Marine Oil*

³² Ibid.

³³ Saudi Arabia Commercial Court Regulation, issued under Royal Decree M/32 of 1/15/1350 A.H. (1931 A.D.). These rules did not recognise the validity of an agreement to submit future disputes arising from a specific contract to arbitration.

³⁴ The dispute concerned the right of the state to transport oil produced by a national company. The arbitral tribunal decided that the producing company, Aramco, had an exclusive right to transport the oil any way it chose. The award ruled that the Saudi law which was that agreed upon by the parties as the law applicable to the dispute - was insufficient for the purpose and should be complemented by other sources of law.

*Company Ltd*³⁵, because the arbitrators paid no consideration to Islamic values. Saudi Arabia considered the arbitrators lacked basic knowledge about the *Shari'a* and its basic principles applicable to commercial transactions.

As a result of its dissatisfaction with the decisions in these cases, the Saudi government in 1963 forbade all government agencies from resorting to arbitration without prior approval from the Council of Ministers. This policy remains in effect today, despite the 1980 Saudi ratification of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which provides for arbitration under the auspices of the World Bank. An ICSID arbitration clause has never been approved by the Council of Ministers, and commercial arbitration was not governed by a comprehensive set of rules until 1983.³⁶ The arbitration regulation of 1983 serves two important objectives of the Saudi government. First, it provides a comprehensive, uniform set of rules which are accessible to foreign businesspersons and their legal counsel. The Regulation is designed to allay their fears over the previous lack of judicial and legislative support for commercial arbitration. Second, it establishes governmental control not only over arbitration procedure in general, but over the actual arbitration proceedings by providing for supervision by governmental agencies, courts, or perhaps the Chambers of Commerce and Industry.

Thus, the extensive supervisory role played by the government is perhaps the most significant feature which emphasises the concept of statism in Saudi Arabia arbitration laws.

The Authority³⁷ will presumably be the CSCD in most commercial disputes; the Grievance Board in disputes with a government agency that has received permission to arbitrate; or the competent *Shar'ia* court in a case involving real estate.

³⁵ In the *Qatar* award, the Arbitral Tribunal contended that the *Shari'a* does not contain any principles sufficient to interpret the concession agreement. It further said that the *Shari'a* does not possess a body of legal principles applicable to a modern commercial contract.

³⁶ The Saudi Arabia Commercial Court Regulation contained a few limited rules on arbitration, allowing the court to confirm the appointment of arbitrators (but not to appoint arbitrators should a party fail to do so) and requiring the court to review the award prior to enforcement. The 1931 rules were formally repealed in 1983, but had been seldom utilised for some time prior.

³⁷ Article (5) of 1983 Law provides "Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute. The said instrument shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration. Copies of the documents relevant to the dispute shall be attached." Further, Article (6) provides "the authority originally competent to hear the dispute shall record applications of arbitration submitted to it and shall issue a decision approving the arbitration instrument."

Representatives of Chambers of Commerce which promulgated their own arbitration rules in 1980, argue that their organisations also should be considered by the Authority in appropriate cases.

As a result of the lack of clear procedures and judicial support, arbitration between private parties has been sporadic. For example, arbitration rules agreed between the parties in advance have not been enforced and it is unclear how awards are to be enforced, especially if they are rendered outside Saudi Arabia. The Saudi government is dissatisfied also because arbitrations are frequently conducted under foreign rules both inside and outside Saudi Arabia.³⁸

Three aspects of the procedure established by the 1983 regulation have caused particular concern among foreign commentators. First, while the regulation recognises the validity of a contractual clause calling for arbitration of future disputes, it is not clear how such a clause is to be enforced if one party refuses to cooperate when a dispute arises. Second, commentators are unsure about the extent to which Saudi law must be applied to the substance of the dispute. Third, the Regulation does not specify the grounds on which the competence or appropriate authority may set aside or refuse to execute an award.³⁹

In general, due to historical reasons, the legal system has not kept pace with the modernisation process. As a result, foreign investors complain that Saudi international commercial law is inadequate.⁴⁰

Yemen

Yemen codified Islamic law while at the same time (contrary to Saudi Arabia) followed modern trends in different fields of international commercial arbitration law. One example of this was legislation on arbitration passed in 1981. On 29 March 1992 Yemen replaced the 1981 legislation with a new law. This followed the unification of North and South Yemen. The 1992 law differentiated between domestic and international arbitrations. It adopted the principles embodied in the New York

³⁸ Awards rendered outside Saudi Arabia are still notoriously difficult to enforce in Saudi Arabia. Foreign awards must be embodied in a foreign judgement and even then are subject to a *de novo* review procedure by the Saudi government and or a Saudi court of competent jurisdiction, which will apply Saudi law to the substance of the dispute and perhaps review factual determinations as well before enforcement is possible. Naturally, such procedures negate many of the advantages of international arbitration.

³⁹ See George Sayen (2003). *Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia*. U. PA. J. INT'L. 211. p. 3. See also *supra* note 53.

⁴⁰ *Ibid.*, See also Saba, *Saudi Arabia Investment Climate: Its Risks and Returns*, Middle East Executive report., October 1986.

Convention and the principle of part autonomy⁴¹. Parties to an international arbitration may agree on an applicable law other than Yemeni law. They may choose any foreign language, and a place of arbitration situated outside Yemen. The award will be final if the parties so agree, or if arbitrators have been authorised to act as amiable compositors (Ruling according to equity, rather than law to give the arbitral tribunal greater flexibility to reach fair results, which otherwise may not be possible through strict application of law). Apart from these two situations, an award may be appealed. The 1992 law embodies the *competence de la competence* principle (related to the respective power of arbitrators to determine their tribunal jurisdiction). The principle of the separability of the arbitration agreement also applies if the agreement was concluded in the form of an arbitration clause. Thus, an allegation of nullity or termination of the contract will not affect the validity of the arbitration clause if it is valid in itself.⁴² In sum, Yemeni law in comparison to Saudi Arabia law is more advanced in the light of modern commercial arbitration principles.

7.3.3 Countries Adopting the French Approach

The legal systems in Middle East countries, generally speaking, are based on the French legal system (Franco-German) that includes Civil Law. Other countries have based their legal systems on the ‘Anglo-Saxon legal system’, which includes Common law. This creates discrepancies when interpreting and applying clauses within the boundaries of local civil and commercial code.

Algeria

Algeria was hostile to international arbitration for some time after independence. However, in order to seek more advantageous international trade terms and to attract foreign investments, this attitude had to change. Some bilateral agreements with other states included recourse to arbitration in case of disputes. Decree No. 9/1993 was issued on 25 April 1993 to amend the Procedural Law (section 4), and included provisions on international commercial arbitration. The 1993 Decree was inspired by the French Law of Arbitration of 1981 and the Swiss Private International Law Act of 1987.⁴³

⁴¹ The principle of party autonomy is reflected in the consensual nature of the parties’ choice to have their claims arising out of their contractual relationship submitted to arbitration; in the selection of the arbitral tribunal; and the applicable law and the autonomy afforded to the parties in structuring the proceedings.

⁴² See M.I.M. Aboul Enein (1999). *The Development of International Commercial Arbitration Laws in the Arab World*, p.318. British Library.

⁴³ *Ibid.*, p.316.

The 1993 Decree introduced the principle of party autonomy in international commercial arbitration. Accordingly, the parties are free to choose the applicable law on the procedures and on the substance. The courts still have a considerable role in cases where proceedings are hindered, such as where a party is reluctant to appoint an arbitrator. However, two criteria must be fulfilled for an arbitration to be international and to be subject to the provisions of the 1993 Decree. First, like the French law of 1981, the dispute must relate to the interests of international commerce. Second, it is required that at least one of the parties must have its place of business or domicile abroad.⁴⁴

Lebanon

In 1983, Lebanon issued Law No. 90/1983 on arbitration. Even though there are some slight differences, the Lebanese law on international arbitration is closely modelled on the French Law of 1981. The provisions on national arbitration are also copied from the French Law, with a few changes.⁴⁵

For international arbitration provisions to apply, the dispute must relate to the interests of international commerce. This is a purely economic criterion which does not take into account such factors as the nationality or residence of the parties and arbitrators, the place of the arbitration or the place where the contact was concluded.⁴⁶

According to Article 814 of the Lebanese Code of Civil Procedure, arbitral awards, be they foreign awards or awards rendered in Lebanon in the context of an international arbitration process, are enforced after being vested of the *exequatur* (vested final recognition) provided that the concerned parties substantiate their existence and the absence of a manifest inconsistency with Lebanese private international law public policy.⁴⁷

The existence of the arbitration is corroborated by exhibiting the minutes and an original copy of the arbitration agreement (or duly certified copies thereof). If these documents are in a foreign language, a certified translation thereof should be provided.⁴⁸

⁴⁴ *Ibid.*, p.317.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ See Fadi Moghaizel, Chafic Nehme (1997). *Setting business in Lebanon*. International Company and commercial Law Review. p.6.

⁴⁸ *Ibid.*

In order to define the validity of international awards, articles 809 to 815 stipulate that internal arbitration awards are vested of the Res Judicata (Binding force) on their rendering.⁴⁹

With respect to the enforcement of international awards, the Code of Civil Procedure lays down a more liberal treatment than the one reserved for the enforcement of foreign courts' judgements. All that is required for an international arbitration award to be enforced in Lebanon is a writ of execution which is duly constituted by the award itself (or a duly certified copy thereof) vested with the enforcement title exequatur granted by the Beirut First Degree Court or the court of the place of the international arbitration taking place in Lebanon.⁵⁰

When an award rendered abroad is denied recognition or enforcement, the concerned party is entitled to file an appeal against the decision of denial on the grounds that the arbitral award is not in breach of public policy. When a foreign award is acknowledged to be valid or granted the exequatur by the Lebanese competent court, the interested party can file an appeal against the court decision on the following grounds:⁵¹

- (i) The absence of an arbitration agreement, its invalidity or expiry;
- (ii) the arbitral tribunal was not formed in accordance with the law;
- (iii) the arbitral tribunal awarded more than was requested, ultra petite;
- (iv) the basic rights of defence have not been observed;
- (v) the award infringed public policy.

No retrial or further examination of the merits of a case will be allowed in Lebanon outside the above mentioned grounds. Finally, it is worth pointing out that although Lebanon is not a party to the 1958 New York Convention on the Mutual Recognition and Enforcement of Foreign Arbitral Awards, Lebanese domestic law provides an equal protection to foreign arbitration awards.⁵²

Morocco

In 1912, Morocco became a French Protectorate. Before then, it had applied customs and rules derived from Islamic law according to the *Malki* doctrine.

From 1913, Morocco enacted legislation and codes influenced by French law. Morocco continues to be influenced by the old French law on arbitration, since it has

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid., p.7.

not changed its rules of arbitration following independence in 1956. Arbitration is governed by the provisions of the *Mestera* (Code of Civil and Commercial Procedure), which adopted the French law approach, with all its negative effects. However, several bilateral international agreements introduced some modern arbitration provisions, albeit limited in application to the scope of those agreements, and in the same vein as the French Arbitration Law of 1981.⁵³

Under the Morocco Law of Arbitration (1994), persons having the legal capacity to do so can agree to arbitrate.⁵⁴ Hence, the law allows arbitration on any commercial, civil or social matter. The most significant exclusion is the one concerning the state, particularly public entities, which do not have the right to settle their disputes by arbitration. This can be explained by the fact that arbitration does not permit the compulsory intervention of the public prosecutor and matters involving the interests of the state or public entities can be litigated before any court. This incapacity was reinforced in 1993 by the creation of administrative courts having exclusive jurisdiction over disputes involving administrative contracts and claims for damages caused by acts and activities of public entities.⁵⁵ However, there are some exceptions to this principle, and the state may have recourse to arbitration in matters involving foreign loans and oil agreements with foreign companies. In addition, the state is required to submit to arbitration any dispute involving investment agreements entered into with foreign private investors under the Washington Convention (1965 ICSID Convention), and Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Moroccan case law has further contributed in easing the restriction on the state to submit its disputes to arbitration, and the restriction does not apply to public, industrial or commercial entities when the contract has an international scope.⁵⁶ In addition, the law does not allow arbitration for matters involving acts or property governed by administrative law. This rule aims at prohibiting the state and public entities from resorting to arbitration, which runs counter to international practice.⁵⁷

⁵³ *op.cit.* 19, p.317.

⁵⁴ Article 306. Law of Arbitration 1994.

⁵⁵ See Mohamed El MerNissi, (2002). Arbitration in Morocco: Realities and Perspectives. *Journal of International Arbitration* 19(2): 179-183. Kluwer Law International. p.180.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p.183.

Syria

After independence in 1941 and following the termination of the French Mandate in 1944, Syria began modernising its legislation. In 1949, it enacted a Civil Code, a Commercial Law and Penal Code. In 1952, it enacted its Law of Civil Procedures, which includes provisions on arbitration. These provisions resemble the provisions of earlier Egyptian law. According to the Syrian system of arbitration there is voluntary arbitration based upon the agreement of the parties, and compulsory arbitration, influenced by the systems of Socialist countries, applies with regard to contracts of the Ministry of Defence, agricultural disputes, labour disputes, some property disputes, customs disputes and disputes between public sector parties. Compulsory arbitration is also used, according to Islamic law, in cases of family disputes between spouses.⁵⁸

7.3.4 Countries Adopting Mixed Statutory Arbitration Laws

This section will examine how the revised international commercial arbitration law within this category of countries governed by mixed statutory provisions basically influenced by Islamic Law principles, and Secular and Western-inspired statutory law. Such statutory laws were introduced in the Middle East countries during the colonial era and eventually given validation by Muslim jurists, such as the *Sanhuri* (the main architect of the Egyptian Civil Code of 1948 after which so many Arab civil codes are modelled.)⁵⁹

Kuwait

The new Kuwaiti Law of Judicial Arbitration No. 11 of 1955 aims to release the commercial sector from the complex and time-consuming procedures associated with the traditional state judiciary system.⁶⁰

The Kuwaiti Law of Arbitration No. 11 of 1995 has a mixed arbitration, where certain provisions put parties into contradictory positions, allowing one party the liberty of resorting to arbitration, while depriving the other of this right. This is stipulated with to arbitration requested by individual, natural, and judicial persons of the private sector against any governmental bodies or state-owned companies, unless the dispute

⁵⁸ *op.cit* 19, p. 318.

⁵⁹ See Nabil A. Saleh, (1988) *Financial Transactions and the Islamic Theory of Obligations and Contract*. In Chibli Mallat (*Islamic Law and Finance*). p. 26.

⁶⁰ See Mashael Abdulaziz Alhajeri, (2000) *A Critical approach to the Kuwaiti law of Judicial arbitration No. 11 of 1995 with Reference to the UNCITRAL Model Law on international Commercial arbitration*. *Arab Law Quarterly*, 48-62, Kluwer Law International. p. 51.

has already been tried and brought before the courts. The latter parties cannot object to arbitration.⁶¹

Procedural problems which have been incorporated within the new law concern the unbalanced formation of the arbitral panel. The arbitral panel is now composed of five members, three judges and two arbitrators, whereas, it had only been three following the abolition of Article 177⁶² of the Civil and Commercial Procedure Law No. 6 of 1960 (CCP Law). Thus, the judiciary is the dominant element in this new formation. This change triggers the concern that this domination by the judiciary is in contradiction with the very concept of arbitration, which basically establishes the litigants' free will to choose their arbitrators.⁶³

As the panel in the judicial arbitration is formed mostly of judges, and it practises a compulsory jurisdiction with regard to governmental bodies, an award rendered by the arbitral panel enjoys the force of an adjudicated order, and is fully enforceable in conformity with the proceedings prescribed in the Civil and Commercial Procedure Law (CCP law) No. 38 of 1980.⁶⁴

Limitation to the Parties' Autonomy

The new arbitration law submits contracts containing arbitration provisions concluded after its enforcement to its jurisdiction without reference to a specific arbitration system. It has limited litigant's free choice of the arbitration authority they can resort to, and restricts the parties' ability to make a free decision, especially since they might prefer to resort to ordinary arbitration rather than the judicial arbitration system.⁶⁵ For the aforementioned reasons, it has been argued that the parties' freedom of choice is very much restricted in this respect, as the Law predetermines most of the arbitral issues, thus depriving the litigants of the true advantages of arbitration.

The Kuwaiti Law also has substantive problems with regard to the boundaries of the arbitral panel's jurisdiction.⁶⁶ Questions are raised with regard to the extent of the arbitral panel's jurisdiction to disputes arising between individuals and governmental bodies, and whether it encompasses administrative decisions and administrative contracts, for example, public works contracts. The jurisdiction of the arbitral panel is restricted by that of the Administrative Court, which has sole jurisdiction over all

⁶¹ Ibid., p.52.

⁶² Article 177 of the CCP provides that the tribunal shall consist of three arbitrators.

⁶³ Ibid.

⁶⁴ Article 9 of the CCP Law No. 38 of 1980.

⁶⁵ Ibid., p. 57.

⁶⁶ Ibid., p. 59.

administrative disputes. For all the above mentioned arguments, arbitral panels have no jurisdiction with respect to administrative disputes.⁶⁷

The position of the courts

It seems that the Kuwaiti legislature does not fully accept the concept of arbitration. This position leads to applying rigid judicial rules in the arbitration arena. A good example is the significant role that has been assigned to form in arbitral awards. With regard to the question of whether or not an arbitral award should be rendered in the name of His Highness the Amir of Kuwait, the Court of Cassation answered in the affirmative:

“... Article 53 of the constitution stipulates that the judicial power is carried out in the name of the Amir within the constitutional limits, and article 16 of the Amir Decree No. 19 of 1959 on the Regulation of judiciary stipulates that “awards are rendered in the name of the Amir of the State”, this means that with regards to all awards – including those of arbitrators - failing to mention they are rendered in the name of the Amir as the said article has stated is an omission of a substantial declaration that is essential to its validity, which results in it being absolutely void with regard to public order...”⁶⁸

United Arab Emirates

Before the independence of the United Arab Emirates (UAE) in 1971, the applicable law on civil and commercial matters was Islamic law according to the *Hanafi* doctrine included in *Al-Majalla*. After independence, legislation reflected a mixture of Western and Islamic law.⁶⁹ The legal framework of the United Arab Emirates (UAE) is essentially made up of three parts: Federal and Local rules (including legislation); Codified law; and Islamic legal principles. At the statutory level, the position is simple. Under article 121 of the UAE constitution, the Union (as the UAE is sometimes known) has exclusive power when it comes to major legislation dealing with contract and civil obligation; company law; and procedural matters.⁷⁰

In 1993, the UAE issued the Commercial Transaction Law No. 18, "the Commercial Code". This code is the last of the basic Codes and has far reaching implications and consequences for those engaged in commerce, industry, banking and finance.⁷¹ It is

⁶⁷ Ibid., p. 60.

⁶⁸ Ibid., p. 61.

⁶⁹ *op.cit.* 19, p. 319.

⁷⁰ See Shane Sayers Kennedys, (2000). *Doing Business in the United Arab Emirates*.

⁷¹ See Dawoud Sudqi El Alami (1994). *The Law of Commercial Procedure of the United Arab Emirates*. p. 12. Graham & Trotman.

one of the three major codes: the Civil Code, the Code of Commerce and the Code of Civil Procedure. In broad terms, the Civil Code sets out general contractual principles and covers certain types of business agreements (for example, construction contracts). The Code of Commerce, on the other hand, governs commercial transactions and relationships between merchants. All three codes are heavily influenced by Egyptian and European laws. Like other civil law countries codification, the UAE codes express general abstract concepts and rules drawn from Roman law. The writings of Al-Sanhoury, 1934 (Egyptian jurisconsult who endeavoured to combine in his writing principles of Islamic law and civil law, mainly the French civil code) are particularly significant when deciding how to apply such concepts and rules in individual cases.⁷²

Under Article (1) of the Civil Code, if the judge cannot find a relevant provision in the code, he must rely on Islamic Shari'a law. Article 1 then lists (in order of priority) the various juristic texts –or other legal authorities –the judge should use. In any event, when interpreting the provision of the Civil Code, the judge must act in accordance with general principles laid down by Islamic jurisconsults. A major influence here is the *Majalla*, especially its first 100 articles. These set out general principles, particularly regarding interpretation. Because the *Majalla* is a code, it easier to access and tends to have more weight in practice than the juristic authorities listed in Article 1 of the UAE Civil Code.⁷³

In applying *Shar'ia* law in civil and commercial matters, courts in the United Arab Emirates have in the past often had, and may well continue to have (though to a lesser extent), recourse to the *Al-Majalla*.⁷⁴

Two issues in respect of the Code should be noted. First, for the purpose of this Code, “commercial activities” are defined as any transactions carried on by a businessman in connection with his business, and the legal presumption is that everything done by a businessman is deemed to relate to his trade unless proved otherwise.⁷⁵ The UAE Civil Code broadly defines the commercial to include both the economic and financial criteria of the transaction.

Second, the distinction between a "civil" and a "commercial" transaction (a distinction peculiar to civil law jurisprudence) is not clarified, leaving considerable uncertainty as

⁷² *op.cit.* 47.

⁷³ *Ibid.*

⁷⁴ *op.cit.* 47.

⁷⁵ *Ibid.*, p.18.

to how to reconcile the law contained in the Civil Code with, for example, the existing Dubai contract Law based upon English Common Law.⁷⁶

In regard to validation of the party autonomy principle of arbitration contracts in UAE, a recent Dubai Court of Cassation case (Petition No. 240/2001, dated 8/12/2001), demonstrated that courts will recognise the parties' choice to submit a dispute to arbitration. The case confirmed that Article 203 of the Civil Procedure Code provides that if parties have agreed upon arbitration, they have no right to resort to the court, unless the same parties at any stage amend the clause.⁷⁷ The decision also confirms the Middle East perception that arbitration contract can be revocable based on parties' decision.

In regard to the enforcement of foreign arbitral awards in the UAE, a recent judgement delivered in the appeal of the *Indian Overseas Bank v. Ibrahim al Shirawai* (1996) and another Dubai Court decision have raised considerable doubt as to whether a foreign arbitration award will be enforceable in the UAE.⁷⁸

UAE is not party to the New York Convention. Although the Civil Procedure Code provides the theoretical provision for courts to recognise a foreign arbitration award based on the grounds of Article 203, in practice, parties obtaining a foreign award will find its enforcement difficult.⁷⁹

This is evident in a decision of Dubai's highest court, the Dubai Court of Cassation, which rejected an application to enforce a foreign arbitration award for paid up charter hire against a UAE-based charter. The application was issued by a sole arbitrator in the UK. In rejecting the application, the Dubai Court of Cassation's judgement was consistent with previous court of appeal and court of first instance judgements, although somewhat different in its reasoning.⁸⁰

The reason for rejection was simply that the UAE has not signed the 1958 New York Convention. As a result, foreign arbitration awards, where there is no treaty between the UAE and the place of arbitration, cannot be enforced in the UAE courts.

⁷⁶ Ibid., p.13.

⁷⁷ Arbitration can often be the best course in the GCC. (2003) Lloyd's List International. p.1.

⁷⁸ See Essam al-Temimi's Comment on *Indian Overseas Bank v. Ibrahim Mohammed al-Shirawi*, cited in Chibli Mallat (2000) Commercial Law in the Middle East: Between Classical Transactions and Modern Business. *The American Journal of Comparative Law*. vol. 48. p. 137.

⁷⁹ *op.cit.* 54.

⁸⁰ See Richard Briggs, AlTamimi & Company (2000). Foreign arbitration clauses in charter parties- a UAE perspective. p. 1.

It had been previously decided in lower UAE courts that it would be possible to enforce a foreign arbitration award if there was genuine reciprocity between the two countries in accordance with the principles for enforcement of foreign arbitration awards set out in Articles 235 and 236 of the UAE Federal Law No. 11 of 1992 (the Civil Procedure Code 1992). This was to be evidenced by documents showing that the arbitration award was enforceable, and actually enforced, in the country where the award was obtained first.⁸¹

However, this argument was also rejected by the Dubai Court of Cassation, which stated that it was simply not possible to enforce a foreign arbitration award in accordance with Articles 235 and 236 due to the UAE not having signed the 1958 Convention.

It has long been suspected that it is difficult to enforce foreign arbitration awards as the UAE is not signatory to the Convention, although cases heard in the lower courts have been inconsistent on this point. However, this country's Court of Cassation judgement contradicts previously consistent judgements of the Dubai and Sharjah Court of First Instance, which rejected the jurisdiction of UAE courts on the basis that a foreign law and arbitration clause signed and accepted by both parties existed in the charter party.⁸²

Two different arguments have been used to reject charter party claims. The first due to the presence of a foreign law and arbitration clauses in the contract, and the second due to the UAE not acceding to the New York Convention. In such situations, a foreign claimant has no forum to bring a claim against a UAE-based defendant.

Dubai has been taking steps independently to update and implement new commercial arbitration rules. Commercial arbitration in Dubai was previously largely supervised by the Dubai Chamber of Commerce & Industry. The DCCI published rules of commercial conciliation and arbitration in 1994, but these are widely recognised as being in need of modernisation.⁸³

What is not clear is how the new Federal Arbitration Law, the UAE Civil Procedure Code (which contains provisions relating to commercial arbitration) and the new

⁸¹ Ibid.

⁸² Ibid.

⁸³ See Terence Witzmann and James Abbott (2004). Ringing the changes: recent development in UAE law: Dubai is updating arbitration rules and reviewing the Maritime Code.

Dubai International arbitration Centre (DIAC) rules will interact with each other when it comes to enforcement of arbitration awards.⁸⁴

To date, the UAE courts have been quick to set aside arbitration awards and render their effect null and void. Before an arbitration award can be enforced it must be reviewed by a judge and “validated” by the UAE courts.⁸⁵ This shows that UAE Law does not take the main principle (limitation of court intervention) of international commercial arbitration into consideration.

Palestine

Commercial arbitration law in Palestine has been derived from a variety of sources, mainly Ottoman, British and Jordanian law. Like other Middle East countries, *Al-Majalla* (the codified Islamic Law) is the applicable law in Palestine in civil and commercial matters.

During the British Mandate on Palestine, Britain began to revamp the Ottoman law in a variety of areas including the procedure and recognition of arbitrations.

“In Gaza, the Palestinian National (PNA) Authority administered the British Mandatory Arbitration Ordinance of 1926, “with pre-1967 legislation by the Egyptian governors and the Gaza Assembly, and PNA enactments” until 2000 Jordanian arbitration law No. 18 of 1953 governs the West Bank.”⁸⁶

Arbitration law No. 3 of 2000 was promulgated in Palestine. The scope of this law covers both domestic and international arbitration, whether *ad hoc* or *institutional* commercial arbitration. Whilst Article 3 of the law considers the arbitration “internal” if the subject of the dispute is related to international commerce taking place in Palestine, it gives a very general definition for “international arbitration” to cover matters related to “Economic, Commercial and Civil matters” in the given conditions. This is similar to the position taken by the UAE in its broad definition of commercial activities and is consistent with the modern trends adopted in the UNCITRAL Model Law.

Another area showing similarities with modern trends is the law’s emphasis on the (*separability concept*), where the arbitration clause remains valid even if the contract is null and void. Nevertheless, the law has been influenced by the concept of

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ See Marshall J. Breger, Shelby R. Quast (2000). International Commercial Arbitration: A Case Study of the Areas Under Control of The Palestinian Authority. *Case Western Reserve Journal of International Law*, pp. 8-9.

statism. In certain cases defined in the law, the Ministry of Justice will appoint an arbitrator from its recognised arbitrators, list without mentioning the criteria or the qualifications for becoming an arbitrator.

The arbitral tribunal itself can ask the jurisdictional court for its interpretation regarding any issue raised during the arbitral process without a request from the parties. Also, the arbitral tribunal can act as (*amiable compsitore*) and offer conciliation with or without a request from the parties. Such position reflects the collectivism concept of arbitration to maintain harmony of the society.

Despite the fact that the tribunal decision will be *res judicata*,⁸⁷ the law does not determine the court of jurisdiction for submitting an application to set aside or for recognition and enforcement of an arbitral decision, especially in case of international arbitration.

As regards the enforcement of foreign arbitral awards, article 48 adds more difficulties on parties to enforce the arbitral award if the decision is not compatible with international conventions and agreements in force in Palestine. Such difficulties arise from the legal personality issue which prevents the Palestinian Authority from being a party in international conventions or treaties. Legislators could avoid such difficulties if the reciprocity principle was incorporated.

Libya

In 1970, a law was enacted which forbade the settlement by arbitration of disputes arising from administrative contracts. In 1972, the legislature realised that this had negative effects upon foreign investment, consequently, the law was repealed by law No. 49/1972. As a result, the arbitration of disputes arising only from administrative contracts concluded with foreign entities was permitted on an exceptional basis and following approval by the Popular Committees (which act as the Libyan Parliament).

In 1973, legislation was enacted to authorise chambers of industry and commerce to conciliate and arbitrate between domestic or foreign parties who agree to submit their disputes to them. In 1975 legislation was enacted which conferred upon the Popular Committees a power to conciliate and arbitrate between citizens who agree to submit their disputes to them. However, according to articles 20 and 21 of the law on

⁸⁷ It is a common law doctrine meant to bar re-litigation of cases between the same parties in court. In this respect it means the arbitral award is final.

Petroleum Investments, which was promulgated by Law No. 25/1955, petroleum disputes must be settled by arbitration, unless the parties agree otherwise.⁸⁸

Sudan

Sudan has had an exceptional and different experience in formulating its legal system. It started by applying Ottoman law prior to becoming part of the British Empire in 1898. In 1900, the British authorities enacted a procedural law which included a mixture of rules applied in some Indian provinces, some Ottoman rules, and rules applied in some British African colonies.

Since 1971 there has been a trend to distinguish Sudanese legislation from British influence. In that year, civil and procedural laws were enacted which were influenced by former Egyptian and French laws, replacing the previously applicable laws in these fields. However, in 1974 these laws were repealed and Sudan issued new laws that reflected the British laws.

Sudan's law of arbitration is greatly influenced by English law. It permits arbitrators to seek the opinion of the courts in the disputes submitted to them; and they must abide by the court's opinion. The courts are authorised to correct and amend the decisions of the arbitrators and to resubmit the cases to them for review. The courts may also set aside awards and adjudicate upon disputes themselves. The law does not permit arbitrators to settle the disputes as amiable compositors. It provides for compulsory conciliation before arbitration if the judge having jurisdiction so decides, or if the agreement of the parties provides for it.⁸⁹ International arbitration is not popular in Sudan mainly because of ineffective foreign direct investment activities. However, a strong feeling among members of the legal profession that it is necessary to enact a new and advanced law on arbitration to encourage foreign investments, especially in regard to oil exploration activities, has recently emerged.

Iraq

Iraq is typical of a mixed statutory approach. It applied the rules of the *Majallah* prior to British occupation. In 1915, the British authorities enacted a new system of law derived from laws applicable in India. In 1920, application of the Ottoman law was resumed and lasted until 1956. Since then, Iraq, in enacting new legislation, has drawn upon the following sources:

1. Islamic law according to the Hanafi doctrine;

⁸⁸ *op.cit.* 19, p. 319.

⁸⁹ *Ibid.*, p. 320.

2. English law;
3. Egyptian law;
4. Socialist laws providing for compulsory arbitration in disputes between public sector entities. In 1977, however, Iraq enacted a law requiring such disputes to be settled by administrative courts instead of by compulsory arbitration.

In 1965 Iraq enacted its Code of Civil and Commercial Procedures, which included in Articles 139-149 provisions on arbitration. In 1969, a new Code of Civil and Commercial Procedures was enacted. Chapter II deals with arbitration (Articles 251-276). The arbitration provisions resemble the old French-influenced Egyptian law. This situation has particular significance for international arbitration. Prevailing circumstances in Iraq during the last two decades have not encouraged reform of legislation in the relevant fields.⁹⁰

Qatar

For settlement of commercial disputes, Qatar is not a member of the International Centre for the Settlement of Investment Disputes (ICSID) known as the Washington Convention and is also not a signatory to the New York Convention of 1958 on the same subject. Qatar, however, accepts binding international arbitration of investment disputes between the Government of Qatar and foreign investors.⁹¹ Resorting to arbitration to solve disputes can be more binding if clearly stipulated in contracts. Effective Qatari laws – Civil (Qatar Law of Procedure of 1990) and Shar'ia (Islamic law) - have provided mixed statutory means for arbitration. *In Fujita Corporation vs. The Qatar Ministry of Municipal Affairs and Agriculture* (1995),⁹² the Court of

⁹⁰ Ibid.

⁹¹ See Legal environment of Qatar, [www.Armerican.edu/Qatar/legal environment](http://www.Armerican.edu/Qatar/legal%20environment).

⁹² Fujita Corporation of Japan entered into a contract with the Ministry of Municipal Affairs and Agriculture to build the University of Qatar. Article 67 of the contract between the two parties specified that any dispute arising between the parties should be referred to arbitration to be conducted according to the laws of the State of Qatar. Such dispute did arise and Fujita called on the Ministry to appoint its representative in the suggested arbitration tribunal to adjudge the dispute. When the Ministry replied negatively Fujita applied to the Higher Civil Court asking that the Ministry of Municipal Affairs and Agriculture be ordered to nominate its arbitrator. The Ministry responded by raising a number of objections to such action and the court decided after hearing both parties that Article 67 of the contract concluded between the two parties was null and void because at the time the contract was made there was no arbitration system in the State of Qatar, hence the Court's decision that the only venue open to the parties was the Civil Court of Qatar. The court decided that it has the authority to look beyond the literal meaning of the text of Article 175 and refuse to end the proceeding if it appears that public interest demands such action. In this particular case it was apparent that the judgement of the Court of First Instance might have an adverse effect on the rights of persons who had entered into agreement to refer their dispute to arbitration before the passage of the 1990 law of Procedure. Further, the Court decided that as the aim of the legislature is to uphold the decision of the

Appeal decided that the Civil Court was wrong and that the agreement to refer their dispute to arbitration was valid and lawful despite the argument raised that at the time of the contract there was no arbitration system in Qatar. To-date, Qatar does not have a special law of arbitration other than the Law of Procedure of 1990.

As consequences, Middle East countries rely on a vast and complex legal infrastructure for resolving disputes concerning their regional and international economic activities. Middle East countries cannot continue to abide by this inconsistent legal system, they have to consider the impact of their limited participation in the ever growing system of international arbitration. This situation has led such countries to challenge the existing legal framework, and crucial efforts to establish a coherent international commercial arbitration law in the region based on modern international commercial arbitration legislation become essential.

court of first instance and prevent the party who opts to abandon his appeal from starting new proceedings, the court shall have the authority to reject an application made under Article 175 of the law of Procedure if it can be proved that the aim was to serve a purpose other than that which was envisaged by the legislature. See Dr. Najeeb Bin Mohamad Ahmed El-Nauimi Law Office publications.

CHAPTER EIGHT

Adoption of UNCITRAL Model Law Principles

8.1 General Overview

As has been mentioned in the last chapter, five Middle Eastern countries (Bahrain, Egypt, Oman, Tunisia and Jordan) have adopted the UNCITRAL Model Law in their jurisdictions. This chapter firstly will therefore examine why these five jurisdictions have introduced new arbitration rules based on UNCITRAL Model Law main principles, to what extent principles have been modified and implications for arbitral proceedings. As regards the first issue, economic and jurisprudence factors were behind the adoption of the Model Law in Bahrain, Egypt, Oman, Tunisia and Jordan. Bahrain adopted exactly the same provisions of the UNCITRAL Model Law in the Appendix to its law No. 9 of 1994 to promote economic development.

Tunisian arbitration legislation was governed for a long time by the Code of Civil and Commercial Procedures 1959 Articles (258-284). The previous the 1910 Code has been silent on the subject of arbitration, probably because this was appropriate to the nature of the legal system in force at that time (before independence), which was the inquisitorial system.¹

Under the French protectorate, scattered laws regulated arbitration in specific fields, such as the decree of 30 December 1935 relating to arbitration of disputes between tribes on collective lands.

After independence, and following promulgation of the Civil and Commercial Procedures Code in 1959 (CPCC), arbitration drew the attention of Tunisian legislators, and 25 articles were subsequently devoted to arbitration, its procedure and the enforcement of arbitral awards. At that time, the legal system regulating arbitration was inspired by French law.²

Shortcomings of the CPCC included ambiguity of certain provisions, complexity of remedies at law, and numerous lacunae, particularly in the international context, which were dealt with by only one section, namely, section 277, which merely treated an award made abroad as a foreign judgement for the purpose of the authorisation of enforcement.

¹ See Abedwahab El-Behi (2003). *Analysis of the Tunisian Arbitration Code*. International Business Lawyer. British library. p. 25. (An inquisitorial system is a legal system where the court or a part of the court is actively involved in determining the facts of the case, as opposed to an adversarial systems where the role of the court is solely that of an impartial referee between parties.).

² Ibid.

Due to increasing awareness of the importance of a procedure for settling disputes, particularly with regard to foreign parties, reform became necessary. The authorities set up a Reform Commission in 1977. Unanimously, legal theorists, decision-makers and practitioners called for the updating, simplification and clarification of the existing legislation. It was necessary to promote the independence, effectiveness and continuity of arbitration, while at the same time ensuring the protection of the parties.³ In recent years, globalisation and the growing interdependence of economies and opening of markets encouraged Tunisian legislators to provide several guarantees to both foreign and national investors. The appearance of the UNCITRAL Model Law accelerated the decision to revise the texts of international arbitration laws.

The major initiative was in the form of the draft submitted to the Tunis Chamber of Commerce and Industry, which favoured the setting-up of a Centre for Conciliation and Arbitration, which would be primarily concerned with domestic arbitration. The Tunis-French Chamber of Commerce and the Bar Association had on their side established think-tanks on the subject.⁴

Tunisian legislators then began to consider reform and update of both internal and international arbitration due to arbitrations' increasing importance in the new economic policy of Tunisia, particularly with regard to international relations where recourse to arbitration is intended to be a fundamental legal safeguard granted by Tunisia, as the host country, to foreign investors.⁵

The modernisation of arbitration has been combined with prudence; the system is dualistic, consists of two fundamental sections, one for international arbitration and the other for domestic arbitration. With regard to international arbitration, and the adoption of the principles of the UNCITRAL Model Law, the legislature took to heart the statement of one writer who stated, 'to accept rules proposed by a world body is to show conformism of the right kind'.⁶ As a result, 26 April 1993 marked a turning point for arbitration in Tunisia. Law No. 42 of 1993 created a Code related to arbitration that entered into force six months after its promulgation.⁷

Many other measures were also taken, such as signing of an association agreement with the European Union in 1995 and adoption of WTO agreements, revision of the

³ See Kalthoum Meziou (1995). *The Tunisian Code of Arbitration*. MECLR. British Library, p.55.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See *supra* note 1, p. 25.

Trade Code, and promulgation of laws on Competition and Intellectual Property. Being based on the provisions of the UNCITRAL Model Law, the legislators' intention was to harmonise Tunisian arbitration law with that of the international community.⁸

Arbitration in Oman was not codified. It was governed by the Muslim Ibadite doctrine⁹ (Modern Khawarij¹⁰ are sometimes called Ibadites after Abu Allah Ibn Ibad (ca.660-ca.715)) whereby arbitration agreements are considered valid but not binding, contrary to arbitral awards which it held to be binding on the parties.¹¹

Jurisprudence filled this gap by incorporating precise provisions, which organised and governed arbitration, into the Sultanate Decree No. 32 of 1984. This laid down the statutes of the Board for Settlement of Commercial Disputes. An entire chapter (Articles 59-68) is devoted to arbitration.¹² This was the first time arbitration law in Oman was codified.

When law-makers noted that the absence of a neutral body to settle disputes in international commercial contracts could be an obstacle to the development of investment in Oman, they endorsed arbitration, granting national and international guarantees to foreign investments, by providing for means to resort to arbitration. When Omani jurisprudence and law-makers conceived of a modern and advanced Arbitration Act, applied the fundamental rule of Muslim law that "It must be possible to make easy what is difficult".¹³

With particular relevance and importance to foreign companies conducting business in Egypt, the law-makers recognised that the arbitration provisions of the Code on Civil and Commercial Procedure were archaic and impractical,¹⁴ and there was therefore a need for reform and to modernise arbitration law and procedural. They

⁸ Ibid.

⁹ A full examination of the Ibadite *fiqh* would be of the highest interest, as the separation of its line of descent goes far the formation of any of the orthodox systems and it must have been codified to a greater or less extent by Abd Allah ibn Ibad himself. See the development of Muslim theology. www.sacred-text.com.

¹⁰ Meaning "those that seceded" were members of the earliest sect in Islam that left the followers of Ali. Khawarij considered that Ali made a mistake in looking for a compromise with Mu'awiya. For this reason they are not considered as Shi'ite by some commentators. See Kharijite Islam, www.GlobalSecurity.org

¹¹ See Abdul Hamid El-Ahdab (1997). The New Omani Arbitration Act in Civil and Commercial Matters. *Journal of International Arbitration*. British Library. p.59. See Article 14 of Sultanate Decree No. 32 of 1984.

¹² Ibid.

¹³ See Alastair J. Hirst (1995). Court Decisions on Commercial Arbitration in the Sultanate of Oman. *Middle East Commercial Law Review*. vol. 1 No. 2. p.77.

¹⁴ See The New Egyptian arbitration law (1995). Middle East Fox & Gibbons. British Library. p. 62.

aimed to provide a detailed and modern procedural framework for all arbitration conducted in Egypt or any international commercial arbitration conducted abroad where the parties agree to submit to the provisions of the 1994 Law, in order to bring Egypt in line with the various international conventions on arbitration to which it is a party.

To achieve these aims, the law-makers adopted the UNCITRAL Model Law with limited modifications. On 18 April 1994, the Egyptian People's Assembly enacted Law No. 27 of 1994 on Civil and Commercial Arbitration. The new law came into force on 22 May 1994.¹⁵

Jordanian Law of 1953 was outdated and suffered from deficiencies. The same economic argument was used to reform Jordanian arbitration law as was used in the context of Egypt. Jordan's law-makers promulgated Arbitration law No. 31 of 2001. This law does not distinguish between domestic and international arbitration. Notably, Jordan is party to two standard international arbitration conventions: the Convention on the Settlement of Investment Disputes between States and Nationals of other States, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Jordan also signed and ratified the Arab Convention on the Enforcement of Judgements. At this point in time, the general observation is that moving towards the international harmonisation process is achievable.

8.2 UNCITRAL Model Law Operative Standards: Main Features

This section will examine how the four main principles and standards of the UNCITRAL Model Law (the scope of application, party autonomy, strengthening tribunal power, and restriction of court intervention) have been introduced into Egypt, Oman, Tunisia and Jordan, respectively. Bahrain will not be examined since it has adopted the exact version of the UNCITRAL Model Law. Comparison with the Model Law will be made to determine whether there have been areas of modifications, and if so, their implications.

¹⁵ See Tarek F. Riad (2000). Arbitration and Legal Business Environment in Egypt. *Journal of International Arbitration* 17(5): 169-191, p. 180.

8.2.1 Scope of Application

8.2.1.1 Commercial

In defining the term “commercial”, the UNCITRAL Model Law provides, in a footnote to Article 1, that the term should be given broad interpretation in the context of arbitration.¹⁶

The definition of "commercial" under the Egyptian Arbitration Law 1994 is consistent with the UNCITRAL Model Law's philosophy. However, some distinctions are discernible. Whilst the UNCITRAL Law's definition of "commercial" is in a footnote to Article 1, under the Egyptian Arbitration Law of 1994, the definition of "commercial" is a substantive provision.¹⁷

The UNCITRAL Model uses the word "commercial" to describe the nature of the legal relationship covered by it. The Egyptian Law has replaced this with more expansive wording, that arbitration is commercial if the dispute arises out of a legal relationship having an “economic nature”.¹⁸ What is "commercial" under the Egyptian Law is intended to be all-inclusive.

The economic nature of a legal relationship is the applicable criteria rather than the traditional one.¹⁹ The law renders or deems commercial many, if not most, activities which are strictly speaking civil under the Egyptian Commercial Law. It is also clear that activities provided for in Article (2)²⁰ are not exclusive; these have been listed as

¹⁶ Model Law, Article 1, supra note 112:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transactions for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

¹⁷ See Article 2 of the 1994 law.

¹⁸ Under Article (2) of this law, an arbitration is commercial if the dispute concerns a legal relationship of an economic nature, contractual or non-contractual, such as the supply of commodities or services, commercial agency, construction works, engineering or technical expertise, industrial or tourist licensing, the transfer of technology, investment, development contracts, banking operations, insurance, carriage, the exploration and extraction of natural resources, the supply of energy, the laying of gas and oil pipelines, the construction of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the construction of nuclear reactors.

¹⁹ See Mahmoud Samir El-Sharkawi, (1999). *New Trends in Egyptian Law. Journal of International Arbitration* 16(1):5-24. British library. p.8.

²⁰ Article (2) provides, arbitration is commercial if the dispute concerns a legal relationship of an economic nature, contractual or non-contractual, such as the supply of commodities or services, commercial agency, construction works, engineering or technical expertise, industrial or tourist licensing, technology transfer, investment, development contracts, banking operations, insurance, carriage, the exploration and extraction of natural resources, the supply of energy, the laying of gas and oil pipelines, the construction of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the construction of nuclear reactors.

examples only. It can be concluded that Egyptian law has taken the UNCITRAL position that the term commercial should be given a wide interpretation. Accordingly, now most disputes concerning contractual and non-contractual relationships may also be submitted to arbitration with the exception of administrative contracts as will be discussed later.

The Tunisian law of 1993 makes no reference whatever to the commercial element: the validity of the arbitration agreement therefore comes down in essence to the question whether the dispute is capable of arbitration.²¹ The Tunisian law adopts the former standard principles of 1959 (Civil and Commercial Procedure Code) CPCC. Matters relating to public policy, disputes concerning nationality or personal status, and matters where compromise is impossible are excluded from arbitration. Under Article 7, the State, local authorities and public establishments of an administrative character are still prohibited from referring disputes to arbitration, but this prohibition is limited to internal relations. Consequently, Tunisian arbitration law confirms the Middle East tendency towards statism and has not adopted the UNCITRAL principle of wide interpretation of the term commercial.

The Omani Arbitration Act of 1997 presents a broad definition of commercial arbitration and gives the concept “commercial” an economic meaning.²² The principle adopted by the Act is that arbitration is not allowed in matters which cannot be subject to compromise.²³ Omani law has adopted a general principle in this respect. However, some difficulties remain because there is no clear distinction between matters which can be subject to compromise and arbitral matters. In some matters, which cannot be subject to compromise, there is doubt as to the possibility to resort to arbitration, even within the framework of the 1997 Act.²⁴

The Jordanian law of 2001 was inspired by Articles 1(1), 7(1) of the Model Law as well as articles (1and10) of Egyptian law. It provides that, “the provisions of this law shall apply to every conventional arbitration conducted in the Kingdom and to civil or commercial disputes between parties of public or private law persons whatever the legal relationship (contractual or not).”²⁵

²¹ *op.cit.* 3, p. 56.

²² See (Article 2) of the Omani law of 1997.

²³ *op.cit.* 10, p. 61.

²⁴ *Ibid.*, p.62.

²⁵ Article (3) of Jordanian Law.

The point to be emphasised here is that the law has followed the principles of UNCITRAL Model Law. In addition, the term commercial has been given wider interpretation than that by the other three countries as the law shall be applied to all commercial disputes with narrow interpretation of the civil term (taking into consideration that the law cannot be applied to all disputes in relation to personal matters) and wide interpretation of the commercial term. More importantly, it will be applied to commercial disputes raised in relation to administrative contract. Thus, Jordan is giving up the concept of statism in this regard, a significant step towards meeting the principles of the Model Law

8.2.1.2 International

Egypt's and Oman's laws have adopted exactly the same wording in defining "international" arbitration. In this respect, whatever will apply in Egypt will apply in Oman. To understand the position of both Egyptian and Omani law, it is useful to compare the relevant provisions of the Model Law, with the corresponding provisions of Egypt's and Oman's arbitration laws. The Model Law deems arbitration to be "international"²⁶ in three cases.²⁷

The first is where the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states. The second is where one of the following places is situated outside the state in which the parties have their place of business: the place of arbitration if determined in, or pursuant to, the arbitration agreement; any place where a substantial part of the obligations of the commercial relationship is to be performed; or the place with which the subject-matter of the dispute is most closely connected. The third is where the parties have expressly agreed that the subject-matter of the arbitration relates to more than one country.

Egyptian and Omani arbitration laws have modified the criteria of "international" given in the Model Law by adding a fourth criterion which must always exist with the other three.²⁸ In doing so, their laws, as in most of their provisions have been to a

²⁶ Arbitration is "international" if the parties "have their places of business in different states," the place of arbitration or substantive part of the relationship is outside the state in which the parties have their business, or "if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country." Article 1 (3) of the Model Law.

²⁷ See Mahmoud Samir El-Sharkawi, (1999). *New Trends in Egyptian Arbitration Law. Journal of International Arbitration*. vol. 16, No. 1. Kluwer Law International. p. 9.

²⁸ An arbitration will thus be considered "international" whenever its subject-matter is a dispute related to "international commerce" in any of the following cases:

1. If the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement.

great extent influenced by the philosophy of the Model Law, while at the same time retaining many unique provisions. The definition of “international” in Article (3) of the Egyptian and Omani Laws is process-specific (regulated by a range of sectors).²⁹

Under these two laws, arbitration is deemed international if its subject-matter concerns a dispute related to “international trade”.³⁰ The two laws have also provided for another case which does not exist under the Model Law; if the parties agree to submit their dispute to a permanent arbitral institution situated in [Egypt- Oman] or abroad.³¹ It should be emphasised that in order to deem arbitration as international, the subject-matter of the dispute must always and essentially be related to international trade according to the four cases stated in article (3). Three cases are taken from the Model law and a fourth has been added by the two countries’ arbitration law.³²

Accordingly, the Arbitration Law applies to arbitrations having their venue in Egypt/ Oman as well as to those arbitrations taking place abroad, and to which the parties have agreed to apply the provisions of the Law. It should be noted here that the Laws differ from the Model Law, which applies only to arbitrations taking place in the state adopting it. It should also be emphasised that the application of this Law to arbitrations taking place in Egypt and Oman is by no means mandatory. The Law is based on the principle of 'party autonomy'; thus, parties may agree to apply a foreign procedural or substantive law to an arbitration taking place in Egypt or Oman.³³

The importance of determining whether arbitration is international or domestic can be seen in the following examples:

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2. If the parties to the arbitration have agreed to resort to a permanent arbitral organisation or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.
 3. If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one State.
 4. If the principal places of business of the two parties to the arbitration are situated in the same State [and, it may be noted, not necessarily in the Arab Republic of Egypt] at the time of the conclusion of the arbitration agreement, but one of the following places is located outside the said State:
 - a) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it;
 - b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed;
 - c) the place with which the subject matter of the dispute is most closely linked.

²⁹ See Kamel Ben Salah (2000). An Overview of the Tunisian Arbitration Regulations. *Journal of International Arbitration*. vol. 17, No. 3. Kluwer Law International. 19, p. 141.

³⁰ See Article 3 of the Egyptian Law of 1994.

³¹ See Article 3 (ii) of the Egyptian Law of 1994.

³² *op.cit.* 26, p. 10.

³³ See M.I.M. Aboul-Enein. (1999). The Development of International Commercial Arbitration Laws in the Arab World. *Arbitration*. Vol. 65(4) British Library. p. 315.

According to the first paragraph of Article 9 of the Egyptian Arbitration Law, in matters referred to the ordinary courts for arbitration, unless otherwise agreed upon, the competent court is, in the case of domestic arbitration, the one which possesses original jurisdiction and, in the case of international arbitration, the Cairo Court of Appeal. In the Omani case, for domestic arbitration, the commercial court is the court of jurisdiction, and in the case of international arbitration, the Appeal Division of the Commercial Court will have the jurisdiction.

According to the first paragraph of Article 54 of the Egyptian law, and according to the same Article in Omani law, a legal action for annulment of an arbitral award must be brought, in the case of an “international” arbitration, before the Cairo Court of Appeal or any other the parties select, and in the case of domestic arbitration, it must be brought before the Court of Appeal that would have had the original jurisdiction.³⁴ These two examples reflect the intention of legislatures in both countries to give international arbitration fast procedures to reduce time and cost consumption.

The Tunisian law of 1993 is formally divided into three parts: Chapter 1 (common provision), chapter 2 (domestic arbitration), and chapter 3 (international arbitration), but the chapters are not completely harmonised. The arbitration will be “international” according to the definition given in Article 48 of the law.

Similar articles are found between chapters 2 and 3, dealing with domestic and international arbitration. Such lack of harmony is explained by the aim of adopting as many provisions of the Model Law as possible without alteration and in the same sequence. In this respect, conformism may have been taken far.³⁵ In other words, within the Tunisian law many UNCITRAL Model Law articles have been introduced although not in the same sequence as in the Model Law. Rather, they have been repeated more frequently for domestic as well as for international arbitration procedures.

The validity of an arbitration agreement concluded by the state depends on whether it is international. Here there is a problem of reconciliation between Articles 7 and 48. The latter begins by repeating in full the definition in the Model Law.³⁶ Arbitration is international if the contract relates to international commerce or the flow of money and goods across borders; but international arbitration may also be contractual, that is,

³⁴ *op.cit.* 26, p. 10.

³⁵ *op.cit.* 3, p. 55.

³⁶ See Article (3) of the Model Law.

decided on by the parties merely by situating the place of arbitration abroad or stipulating the existence of connections with more than one country. After repeating the list found in the Model Law, the wording of the Tunisian law avoids excessive details and adds a general definition: arbitration is international if ‘generally, it concerns international commerce’, thus adopting the principle of Article 1492³⁷ of the French Code of Civil Procedure.

Article 7 proceeds differently; it recognises an arbitration agreement in a contract concluded by the state where international relations of an economic, commercial or financial nature are involved. Here, the international element does not concern the arbitration, but the relationship itself. This is an objective concept which excludes contractual stipulation for international arbitration.³⁸ Thus, any agreement is valid for commercial arbitration if it involves international relations irrespective of its contractual stipulation.

However, Article 47 (1) excludes from the scope of Tunisian Law the application of international arbitration proceedings organised under multilateral or bilateral conventions, including specific provisions on international arbitration.

Accordingly, all disputes which are regulated by any bilateral or multilateral treaty which includes specific provisions on arbitration settlement are excluded from the scope of application of the Tunisian Law.³⁹

One of the important implications of making the distinction between domestic and international arbitration is that the rules relating to international arbitration differ from those applicable to domestic arbitration. In domestic arbitration, arbitrators are entitled to rule on their own jurisdiction, but appeal against their decision is only possible in conjunction with an appeal against their final award (Article 26).

Another difference is found in Article 46, which states that the provisions of the Civil and Commercial Procedure Code apply in domestic arbitration (as long as they are not contrary to the provisions of the law) whereas such provisions do not apply as such to international arbitration.⁴⁰ This ensures the enforcement of a final arbitral award without the interference of other domestic legislations.

³⁷ Article 1492 of the France-Code of Civil Procedure-Book IV. Arbitration in force in 14 May 1981. It states, “arbitration is international if it implicates international commercial interest.” See UN. www.lexmercatoria.org.

³⁸ *op.cit.* 3, p. 56.

³⁹ *op.cit.* 28, p. 141.

⁴⁰ *Ibid.*

Unlike the three other arbitration laws, the Jordanian arbitration law of 2001 does not distinguish between domestic and international arbitration. Furthermore, the law has restricted the applicability of the Civil Procedure Act for nullifying the arbitral award. According to Article (48), “arbitral awards rendered in accordance with the provisions of this law may not be challenged by any of the means provided for in the Law of Civil Procedures. However, an action for nullification of the arbitral award may be instituted in accordance with the provisions of Articles 49, 50 and 51 of this law”. This article significantly assure international party that the enforcement of a final arbitral award will not be subject to any other domestic legislations other than in cases mentioned in the 2001 Law.

8.2.1.3 Administrative Contract

A significant point of introducing the Model Law in the Middle East region is the position taken regarding arbitrability of administrative contracts⁴¹. The following section will show that arbitration is considered perfectly legal in administrative contracts in Egypt, Oman, Tunisia and Jordan, where the state or government is a party. The point to be emphasised here is that modification to the Model Law has been made to retain some state control over the arbitration process. Such modifications represent and reflect the legal culture concerning international contract principles in the Middle East.

As regards the nature of the parties to whom the Arbitration Law is addressed, Article 1 of the Egyptian 1994 law indicates that the Law shall apply to all arbitrations in Egypt, between public or private law persons, notwithstanding the nature of the legal relationship giving rise to the dispute.⁴² Thus, the Law will be applicable if one or both parties are public sector bodies. As for the nature of the dispute, it is permissible for the parties to agree to refer disputes concerning civil, commercial or administrative contracts to arbitration.⁴³

⁴¹ “Administrative contract” includes an agreement in which: at least one of the parties is an administrative agency or a person acting on behalf of the State, which exhibits the characteristics of a concession contract; or a public service contract; or a contract for the provision of public utilities; or a contract for the exploitation of natural resources.

⁴² See Amazu A. Asouzu, (1996). The Egyptian Law Concerning Arbitration in civil and Commercial Matters. *African Journal of International and Comparative Law*. vol.8, No. 1, p. 140.

⁴³ See Notes: Domestic Courts’ Obligation to Refer Parties to Arbitration. *Arbitration International*. vol. 17.No. 3, p. 315.

Furthermore, Article 1 has wider implications, not only as it relates to a situation where the State of Egypt or its administrative organs and a private party are involved in an arbitration to be conducted in Egypt, whatever the legal relationship might be, but, also, where the commercial arbitration has an international dimension and is to be conducted abroad, on the agreement of the parties. In this situation, the Law will be applicable even if the State or its organ and a private party are involved.⁴⁴

Thus, the Law brings into the scope of its application disputes arising from administrative contracts between the government of Egypt or any public sector entity and private entity. This position reverses a decision rendered by Egypt's Administrative Court on 20 February 1990, which stated that disputes arising from administrative contracts involving the government or any public entity could not be settled by arbitration.⁴⁵

There should therefore be no doubt from the phrase "regardless of the nature of the legal relationship of the dispute" that the Arbitration Law is applicable to disputes arising from civil, commercial or even administrative contracts. However, some opinions doubt the application of this Law to administrative contracts, even with the express statement found in the Explanatory Memorandum to the Arbitration Law draft which states that disputes arising from contracts between private or public persons may be subject to this Arbitration Law.

This certainly should have eliminated any controversy, because, first, the *conseil d'état* (State Council) Law allows disputes arising from administrative contracts to be submitted to arbitration, and second, there have been several concurring legal opinions issued by the Legal Opinion Department of the State Council.

However, and in spite of these, there have been controversial judgements to the contrary by the administrative courts.⁴⁶ An opinion of the Legal Opinion Department determined that disputes arising from administrative contracts may not be submitted to arbitration, thus altering the Department's previous opinion.⁴⁷

As a result, the Arbitration Law was amended by Law No. 9 of 1997 enacted on 13 May 1997 to confirm its original position, and to emphasise that disputes arising from administrative contracts may be referred to arbitration, subject to the approval of the

⁴⁴ *op.cit.* 41, p. 140.

⁴⁵ See Skalakany law office, Cairo. (1995). *New Arbitration law in Egypt. Arbitration and Dispute Resolution Law Journal*. vol. 1. British Library. p.74.

⁴⁶ *op.cit.* 26, p.6.

⁴⁷ *op.cit.* 42, p. 315.

minister having jurisdiction. It is even permissible, according to Article 10(1), to refer non-contractual disputes to arbitration.⁴⁸

The 1997 Law added another paragraph to Article 1 of the Arbitration Law, providing the following:

“Concerning disputes related to administrative contracts, the agreement to submit such dispute to arbitration must be by the consent of the competent minister, or whoever enjoys similar authorities with regard to public entities, and in this regard, delegation of power is not permissible.”⁴⁹

It is clear from the above text that the amendment has not established a new rule, as the administrative contract is subject to arbitration. This was expressly determined and well settled by Article 1 of the Arbitration Law. The only new rule established by the amendment is the essential requirement for a competent minister’s consent or that of whomever enjoys similar authority as previously stated.

According to Article 1, it is also clear that both contractual and non-contractual disputes should be submitted to arbitration. This is confirmed where this law allows the conclusion of an arbitration agreement before a dispute arises and is valid whether it exists as a clause in a contract or it is a separate agreement. It is also possible to conclude an arbitration agreement after a dispute arises and even if a related action is pending before the courts (Article 10)⁵⁰

The Cairo Court of Appeal's decision on 19 March 1997 in Commercial Case No. 64 of the 113th (1993) judicial year rendered an important judgement concerning the legality of arbitration in disputes relating to Egyptian administrative contracts. The Court indicated that the agreement to refer disputes to administrative contracts to arbitration is perfectly legal.⁵¹

⁴⁸ Ibid.

⁴⁹ *op.cit.* 26, p. 6.

⁵⁰ See Habib Malouche (1991). Recent Development in Arbitration law in Tunisia. *Journal of International Arbitration*. vol.8 (2) 23-31. British library. p. 26.

⁵¹ The Court of Appeal reiterated that the government authority’s claim that the arbitration clause in an administrative contract is null and void despite being signed by this same governmental authority, is not only illegal, but is equally contrary to the principle of the necessity to execute the obligation in good faith whether in civil or in administrative contracts.

Further, the Court added that such claim was also contrary to the agreed upon rules relating to international commercial arbitration, that the State or the governmental authority cannot refrain from applying an arbitration clause contained in its own contracts by relying on local legislative constraints and that adoption of the opposite view would also affect the confidence that must prevail in their dealings with other parties and also negatively affects foreign investments. See Tareq F. Raid (2000). Arbitration and the Legal Business Environment in Egypt. *Journal of International Arbitration*. vol. 17, No. 5 Kluwer Law International. pp. 180-181.

The Omani 1997 Law took the Egyptian position; it explicitly provides that juristic persons of public law may enter into an agreement to arbitrate. Under the Omani Law, State organisations may enter into agreements to arbitrate without any need for a later approval. It has been argued that a State - whatever its strength - is in a very strong position against a co-contracting party because it will generally draft the clause of the contract and the general conditions,⁵² which protects the State and juristic person⁵³ of the public law. Under such conditions, the insertion of an arbitration clause will have no consequences for the interests of the state and will not prejudice its sovereignty. However, Omani law has not covered the question of the capacity of foreigners to enter into an agreement to arbitrate, nor the question of which law is to be applied in order for them to do so.⁵⁴ Omani arbitration law does not mention the capacity required of private law persons to enter into a valid agreement to arbitrate and, consequently, the provisions of *Shari'a* are applied. This means that the signature to such an agreement requires the capacity to dispose of one's rights.⁵⁵ Therefore, minors and persons under a disability, a person suffering from a terminal illness and bankrupts may not resort to arbitration.

According to Tunisia's Arbitration Law of 1993, the legislature distinguished between domestic and international arbitration. The State, government agencies and other public entities are not entitled to submit to arbitration in domestic cases, but they are entitled to do so in international cases with respect to disputes arising from international relations of an economic or financial nature which are governed by Chapter Three of the Tunisian Arbitration law of 1993.

The law adds one condition that submission to international arbitration by the public entities is governed by the Prime Minister's circular letter dated 20 June 1994, which recommends *inter alia*:

- to use Tunisian law and Tunisian arbitration regulations;
- to refer to arbitral institutions in Tunisia; and
- to avoid amiable composition clauses.

⁵² *op.cit.* 10, p. 62.

⁵³ This relates to organisations of public law, which are gatherings of people, and foundations, which are gatherings of property, as entities that can be subjects of rights. This enables organisations, etc. to participate in transactions in the name of the organisation and to own immovable assets, and simplifies the processing of legal matters.

⁵⁴ *op.cit.* 10, p. 63.

⁵⁵ *Ibid.*

The Jordanian Arbitration Law of 2001 also applies to arbitrations to which the government is party.⁵⁶ Jordanian law provides that capacity is required for those who enter into a valid arbitration contract, and they cannot enter into arbitration in matters that can be settled by conciliation.⁵⁷

8.2.1.4 Separability Clause

A Separability clause relates to the validity of the arbitration clause, where the arbitration contract is null and void. This principle is considered one of the main features of the UNCITRAL Model Law. In general, in the Middle East when the contract is considered null and void this covers all the terms and conditions of such contract, including the arbitration clause. It is important to examine the attitude of the four jurisdictions of Egypt, Oman, Tunisia and Jordan towards this principle.

The Egyptian Law of 1994, like the Model Law, recognises that an arbitration clause is independent of and separate from the other contractual obligations⁵⁸ so that the nullity, rescission or termination of the contract shall not affect the arbitration clause, provided the latter is valid per se.⁵⁹

The Court of Appeal's decision on 31 December 1997 in Case No. 62 of the 113th (1993) judicial year confirmed this principle. It rendered a judgement which indicated that Article 23 of the Arbitration Law of 1994 provided that, "the Arbitral Clause is deemed to be an agreement that is independent from the other conditions of the contracts and that nullity, rescission or termination of the contract shall not affect the arbitral clause therein, provided such clause is valid per se". The Court thus decided that nullity, rescission or termination of the contract does not have any effect on the arbitral clause under consideration.⁶⁰

Article 10 (3) of the Omani Arbitration law of 1993 adopted the same position. The doctrine of autonomy or severability of the arbitration clause is based on the idea that this clause is a contract within the contract; in other words, arbitration clauses are a contract equivalent to the basic contract. Thus, the judge of the main issues is the judge of the ancillary issue and the judge of the contract is also the judge of the arbitration clause contract.⁶¹ According to the Omani law of 1993, where reference is made in a contract to another document containing an arbitration clause, this is

⁵⁶ See Article (3) of the 2001 law.

⁵⁷ See Article (9) of the 2001 law.

⁵⁸ See Article (23) of the Arbitration law of 1994.

⁵⁹ *op.cit.* 41, p. 148.

⁶⁰ *op.cit.* 14, p. 181.

⁶¹ *op.cit.* 10, p. 63.

considered a valid agreement to arbitrate, provided that such reference clearly makes such a clause an integral part of the contract.⁶²

The Omani law also provides that the arbitration clause is an independent agreement, separate from the other clauses of the contract. The law authorises the arbitral tribunal to settle the question of its own jurisdiction whenever a defect in the arbitration clause is argued. One reason for this is that the law cuts short any dilatory tactics. As a result, it will ensure the arbitration goes smoothly, avoiding the situation where one of the parties refuses to participate in it. Consequently, the arbitral tribunal has no jurisdiction. The law provides that the fact that a party appoints its arbitrator or participates in his appointment does not deprive it from the right to raise such an argument.⁶³

The Tunisian law of 1993 and Jordanian Law of 2001 took the same position regarding the independence of the arbitration clause from the contract. According to Article 22 of the Jordanian law, “an arbitration clause shall be treated as an agreement independent of the other terms of the contract. The nullity, revocation or termination of the contract shall not affect the arbitral clause therein, if such clause is valid by itself.”

Regarding this point, the Tunisian Law of 1993 once again distinguishes between “international arbitration” and “domestic arbitration”. Whilst Article 61 authorises arbitrators in “international arbitration” to decide their own jurisdiction in relation to the arbitration agreement, nullity and revocation of the contract will not affect the arbitration clause and will be treated independently from other terms of the contract. In Article 3 the legislator validates the arbitration clause based on the contractual agreement. Further, if the arbitration clause is contained in another contract relevant and equivalent to the basic contract, the latter must be mentioned without any ambiguity that the arbitration clause is valid per se.

8.2.2 Party Autonomy

The second main strand in the UNCITRAL Model Law places emphasis upon party autonomy by allowing parties the freedom to choose how their disputes should be determined. In this section, validity, scope and limitation of choice of law by the party will be examined in the four cited jurisdictions (Egypt, Oman, Tunisian and Jordan).

⁶² Ibid., p. 61.

⁶³ Ibid., p. 63.

Party autonomy in this context is defined as “the autonomy of the parties to decide on all aspects of an international arbitration procedure. These concepts are expressly provided in the articles of the Model Law which provide the parties with the autonomy to agree on: “the composition of the arbitral tribunal”, “the conduct of arbitral proceedings, and “the rules applicable to the substance of the dispute”.⁶⁴

8.2.2.1 Autonomy to Determine the Composition of the Arbitral Tribunal

Nationality of Arbitrators

Under the Model Law, parties are given the autonomy to choose the arbitrator provided that “no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.”⁶⁵ While the Tunisian Law, Article 56 (1) confirms party autonomy without any modification in this respect, the Omani law, Article 16 (2), Egyptian law Article 16 (2) and Jordanian Law Article 15 (B), have modified the provision in the Model law by omitting one of the classical restrictions found in Islamic *Shari'a* law, that arbitrators have to have the same capacity as judges, i.e. they have to be “male, wise, free, Muslim and fair”. These three laws provide that it is not required that the arbitrator be of a “given gender” or “nationality” unless the parties agree otherwise.⁶⁶ This clearly means that an arbitrator may be a male or female and may be a national or foreigner.

Number of Arbitrators

The Model Law provides in Article (10) that the parties can determine the number of arbitrators; however, if the parties do not provide for the number of arbitrators, the “number shall be three.”⁶⁷ Under the Egyptian Arbitration Law Article 15(1), the parties are allowed to determine the composition of the arbitral tribunal and the appointment of a sole arbitrator or more than one arbitrator, and in the absence of such agreement their number must be three. Omani Law under Article 15(1) and Jordanian law under Article 14(a) have taken the same position. Under Egyptian Article 15 (2), Omani law Article 15 (2), and Jordanian law article 14(b), if the arbitrators are more than one their number must be uneven otherwise the arbitration

⁶⁴ See Karl-Heinz Bockstiegel, (1997).The Role of Party autonomy in International Arbitration. Dispute Resolution Journal (The Principle of party autonomy is fundamental to arbitration in general and to international arbitration in particular). pp. 28-29.

⁶⁵ See Article (11) of the Model Law.

⁶⁶ See Article 16 (2) of the Omani law of 1993, Egyptian law of 1994 and Article 15(B) of the Jordanian Law of 2001.

⁶⁷ See Model Law Article 10. For the text of the Model Law, see UNCITRAL Model Law 40th Session. Supp. (No. 17), annex I, U.N. Doc A/40/17.

will be null and void. Tunisian Law Article 55 provides that the arbitrator number must be uneven, and in the absence of agreement the number must be three. Accordingly, the laws in these countries adopt the principle of party autonomy and provide that the parties are free to agree upon the number of arbitrators. There is no requirement for an arbitrator to be of a particular gender or nationality, unless otherwise agreed by the parties or determined by these laws. These arbitration laws only intervene if the parties are unable to choose the arbitrators.

Majority Rule

Majority rule⁶⁸ is adopted in all four arbitration laws. However, the parties have the freedom to decide otherwise. Omani Law Article 40, Egyptian Law Article 40, Tunisian Law Article 74 and Jordanian Law Article 38 adopt the position of the UNCITRAL Model Law. While Egyptian and Omani laws add that the rule of majority applies after deliberations conducted in the manner determined by the arbitral tribunal, Tunisian and Jordanian laws that the chairman of the tribunal has the power to order interim measures if the parties or other tribunal members authorise him to do so.

The three arbitrators may have three different opinions, resulting in a situation where there is no majority. One might also arrive at a situation where it is impossible to make an award.

8.2.2.2 Party Autonomy over Conducting Arbitral Proceedings

The Model Law is characterised by allowing the parties to choose the procedure to be followed by the tribunal. The scope of party autonomy in this respect covers areas like, equal treatment of parties, choice to determine the rule of procedure, place of arbitration, commencement of arbitral proceeding and language to be used in arbitration. The choice of party autonomy in these areas will be examined in the four given jurisdictions.

Equal Treatment of Parties

The most important aspect of the Model Law Article 18 is that it ensures that the parties will be treated with equality and each will be given a full and fair opportunity to present their case. Article 26 of Egyptian law, Article 63 of Tunisian law, Article 26 of Omani law and Jordanian Law Article 25 take the same position. This basic rule

⁶⁸ Is defined as the rule that requires more than half of arbitral tribunal members who cast a vote to agree in order to make an arbitral award decision.

circumscribes most steps to be taken by the parties and the arbitral panel, before and during the proceedings.

Determination of Rules of Procedure

The Model Law allows the parties to determine the rules of procedure⁶⁹. This rule is considered one of the fundamental principles of arbitration. In Egypt as well as Oman, under Article 28, parties may agree on the rules of procedure to be followed by the arbitral tribunal different from those laid out in their laws⁷⁰, including their right to adopt the rules of any arbitration institution or centre, in Egypt or abroad; and in the absence of such agreement the arbitral tribunal may select the procedures that it deems appropriate, provided that the provisions of this law are observed.⁷¹ Thus, parties are free to subject arbitration to the procedural rules of an international organisation such as the ICC or any other organisation.⁷² In the absence of such an agreement, the tribunal may, without prejudice to the provisions of the law, adopt procedures it deems suitable.⁷³ The same concept is emphasised under Article 24 of Jordanian law.

Tunisian Law under Article 64 grants freedom to parties to agree on the procedure to be followed in the conduct of the arbitral proceedings. They may have recourse to institutional arbitration. The rules of the institution may also be applied in the framework of an ad hoc arbitration if the parties so decide.⁷⁴ However, failure on agreement does not give rise to the application of mandatory state rules. It is for the arbitrators to determine freely the procedure to be followed. Their power is limited only by observance of the fundamental principles of civil and commercial procedure and, in particular, the right to a fair hearing.⁷⁵

The Place of Arbitration

Like Article 20 of the Model Law, Article 28 in both Egyptian and Omani arbitration law, allows the parties to choose the place of arbitration, to be conducted in Egypt, Oman or abroad. In the absence of agreement, the arbitral tribunal must determine the place with due regard to the circumstances of the case and convenience of the parties. If there is no agreement as to where the arbitration will take place, according to

⁶⁹ See Article 19 of the Model Law.

⁷⁰ See Article 28 of Egyptian as well as Omani Arbitration Laws.

⁷¹ See Article 25 of both Egyptian and Omani Laws.

⁷² *op.cit.* 10, p. 62.

⁷³ *Ibid.*, p. 75.

⁷⁴ See Article 64 of the Tunisia Arbitration law.

⁷⁵ *Ibid.*

Article 39 in both laws, the tribunal decides, based on convenience and appropriateness.⁷⁶ As a result, there is nothing to prevent the arbitral tribunal from meeting at any other place it deems appropriate to hear the parties, witnesses or experts, to review the documents or inspect goods or property, to hold discussion among arbitrators, or for any other reason. The same is said according to Article 27 of Jordanian law. Parties have the same autonomy to decide the place of arbitration according to Articles 65 and 66 of Tunisian arbitration law.

Commencement of Arbitral Proceedings

The Model Law under Article 21 guarantees party autonomy in commencement of arbitral proceedings. Both Egyptian and Omani law under Article 27 of each one, provides that, unless otherwise agreed by the parties, the arbitral proceedings start on the day when the respondent receives the claimant's "Request for Arbitration". This rule further demonstrates how the will of the parties can govern the procedures. Article 26 of Jordanian law provides that, unless otherwise agreed by the parties, arbitral proceedings will commence on the day arbitral tribunal formation is completed. The situation is different in Tunisian law; according to Article 68, parties may agree on the time limits of arbitral proceedings. Either party may amend or supplement his claim or defence during the proceedings unless the arbitral tribunal considers it inappropriate with regard to the time of the request for amendment. Thus, Tunisian law is silent on the party autonomy principle in regard to the commencement date of the dispute; it only refers to the time-limit of statement of claim and defence. This point is particularly important because parties cannot predetermine the duration of the arbitration procedure, which is one of the main characteristics of arbitration to avoid a long procedure. The circumstances described here, may lead to a situation where tribunal jurisdiction is closer to litigation than arbitration. In other words, the Tunisian law has not been inspired by the Model Law.

Language

The Model law provides that, "the parties are free to agree on the language to be used in the arbitral proceeding."⁷⁷ Failure to reach such agreement by the parties means, the arbitral tribunal shall determine the language to be used in the proceeding. Under Egyptian law Article 29, Omani law Article 29 and Jordanian law Article 28, unless the parties have agreed to another language, the arbitration shall be conducted in

⁷⁶ *op.cit.* 10, p. 75.

⁷⁷ See the UNCITRAL Model Law Article 22.

Arabic.⁷⁸ Under Tunisian law Article 67 parties have to agree on the arbitration language(s); in the absence of such agreement the arbitral tribunal will decide the language(s).

Article 29 (1) of Egyptian and Omani laws applies this rule to the parties' statement, written memoranda or oral pleading, in addition to any order or award made by the arbitral tribunal. Article 29 (2) of both laws states that the arbitral tribunal is entitled to order the enclosure of a translation of any submitted documents into the language used in the arbitral proceedings. Article 28 (b) of Jordanian law gives the same condition.

8.2.2.3 Rules Applicable to the Substance of the Dispute

The Model Law provides that parties can choose the rules of law applicable to the substance of the dispute.”⁷⁹ Article 28 (1) of the Model Law provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Accordingly, in choosing the applicable law, the parties are not bound by the laws of any specific state.

But, in case there is no agreement as to the applicable law, according to the Model Law, when adjudicating the merits of the dispute the tribunal shall apply the substantive law it considers most closely connected with the dispute and take into account the conditions of the contract and relevant usages of trade in similar transactions.⁸⁰

With regard to the merits of the dispute, once again, in Egypt as well as in Oman, under Article 39 (1) in both laws, the arbitral tribunal must apply the rules agreed by the parties. Where the parties agree upon the application of the law of a certain country, the substantive law will be the applicable law. In the absence of agreement on the applicable substantive law, the arbitral tribunal must apply the substantive law most closely connected with the dispute Article 39(2).

Jordanian law under Article 36(a) confirms the party autonomy principle to agree on the substantive law applicable to the issue in dispute. The parties are therefore given the freedom to choose the system of law of a given state, the substantive rules in that law shall be followed and not its rules relating to conflict of laws.

⁷⁸ See Article 29 of the Egyptian law and the Omani law.

⁷⁹ See Article 19(1), 28(1) of the UNCITRAL Model Law. See the text in UNCITRAL Model Law 40th Session, (No. 17), Annex I, U.N. Doc. A/40/17

⁸⁰ See (Article 28) of the UNCITRAL Model Law.

With regard to Tunisia, the Tunisian legislature has departed from the wording, if not the principles, of the UNITRAL Model.

Article 73 gives the parties absolute freedom to choose the applicable rule. Under sub-section (1), the arbitral tribunal ‘shall decide disputes in accordance with the law designated by the parties’, and under sub-section (3), ‘the arbitral tribunal may decide in accordance with the rules of equity if it is expressly authorised to do so by the parties’. These provisions set out the principle that the arbitrator should apply the rules chosen by the parties. The arbitrator settles the dispute in accordance with the law chosen by the parties. He does not have to assess the justification for that choice, but is required to apply the chosen law. Thus, Article 73 confirms this rule found in the Model Law.⁸¹

Notably, the substantive rules in that law of the state chosen by the parties shall be followed and not its rules relating to conflict of laws. This principle, which is stated in the Model Law, is not expressly found in the Tunisian law, but refers to the principle traditionally accepted in contractual matters in the Tunisian law.⁸²

Therefore, the doctrine of party autonomy as has been analysed in the scope and the validity of international commercial arbitration may be viewed as an express recognition of the rule of “freedom to contract” that had not previously been stated in any of the four given jurisdictions. This is a very significant step taken by these countries to meet the condition of the Model law in regard to validating party autonomy in areas always considered sensitive (choice of foreign arbitrators, foreign procedural and substantive rules).

8.2.3 Strengthening the Tribunal’s Power

8.2.3.1 Competence of the Arbitral Tribunal to Rule on its Own Jurisdiction

One important principle adopted by the Model Law under Article 16 is the doctrine of “competence de la competence”, by virtue of which the tribunal shall have jurisdiction to rule on its own jurisdiction. This continues to indicate, among other things, the trend towards minimising the interference of courts over the arbitral process as will be discussed in the coming section.⁸³

Egyptian and Omani Laws under Article 22 of each one adopt this principle. Jordanian Law under Article 21 adopts the same principle using almost the same

⁸¹ See Article 37 of the Tunisian Law No. 42 of 1993.

⁸² *op.cit.* 3, p. 57.

⁸³ See Article (16) of the UNCITRAL Model Law.

wording as Egyptian and Omani laws. Tunisian law provides the arbitral tribunal with the power to decide on its own jurisdiction under Article 61.

The Model Law authorises the parties to start arbitral proceedings with 30 days. In this regard, the Egyptian, Omani, Jordanian and Tunisian laws defer⁸⁴: They allow the parties to set the time limit agreed by them to start arbitral proceedings after they have been informed by the arbitral tribunal of the competence decision. Unlike the other three, the Tunisian law states that such arbitral procedure should be submitted with the defendant statement and the Tunisian tribunal should decide the case within 3 months of the date of submission.

Most importantly, unlike the Model Law, the procedure will be suspended under the Tunisian law.⁸⁵ On this point, Egyptian, Omani and Jordanian laws are inspired by the Model Law which does not suspend the arbitral proceedings⁸⁶.

However, Egyptian, Omani, Jordanian and Tunisian laws then go further than the Model Law, as they provide that arbitrators have jurisdiction on their own jurisdiction, including objections based on the non-existence, extinction or nullity of the agreement to arbitrate as well as those based on the question of whether the agreement to arbitrate covers the subject in dispute.⁸⁷ The Model Law provides in this respect that arbitrators have jurisdiction to settle all questions relating to the existence or validity of the agreement to arbitrate.

8.2.3.2 Challenges to the Arbitrator

The Model law provides that an arbitrator may not be challenged except where circumstances give rise to serious doubt of his impartiality or independence.⁸⁸ The Egyptian, Omani, Jordanian and Tunisian arbitration laws provide that an arbitrator must accept his appointment in writing, and at the time of acceptance also, the arbitrator must point out and disclose any circumstances likely to give rise to doubts as to his independence or impartiality.⁸⁹

Thus, these countries adopt the rule foreseen in the Model Law where an arbitrator may not be challenged, except where circumstances give rise to serious doubt

⁸⁴ See Article 21 (2) of the Egyptian and Omani Law, Article 21 (b) of the Jordanian law, and Article 61 (3) of the Tunisian law.

⁸⁵ See Article 61 (3) of the Tunisian law.

⁸⁶ See Article 22 (3) of the Egyptian and Omani law, as well as Article 21© of the Jordanian law.

⁸⁷ (Article 22 (1)) of the Egyptian and Omani laws, Article 21(a) of the Jordanian law and Article (61) of the Tunisian law define these bases.

⁸⁸ See (Article 12 (2)) of the Model Law.

⁸⁹ See Article 16 (3) of the Egyptian and Omani law, Article 15© of the Jordanian law, See also, Article 11 of the Tunisian law.

concerning his impartiality or independence. The Cairo Court of Appeal's decision on 25 November 1998 in Case No. 42 of the 115th (1995) judicial year, confirm this principle according to Article 16(3).⁹⁰

Here, it must be emphasised that Omani⁹¹ and Tunisian⁹² laws go beyond Egyptian and Jordanian laws, specifying that, if such circumstances arise out of his appointment or during the proceedings, the arbitrator must take the initiative to inform the parties to the arbitration and the other arbitrators thereof.

According to these four arbitration laws, there has been substantial progress and development in this matter. An arbitrator may be dismissed only if there are serious doubts as to his impartiality or independence and (qualifications agreed upon by parties' in case of the Tunisia Law according to Article 57(2)).

The application for dismissal may not be submitted by the party who has selected or participated in the selection of the challenged arbitrator, unless for a reason that appears after the appointment was made.⁹³ Tunisian law is silent on this point.

Egypt as well as Oman followed the Model Law whereby the dismissal application must be submitted to the arbitral tribunal which hears the arbitration and the challenge must take place before the arbitrators themselves. The application must contain reasons and must be submitted within 15 days of the date the applicant becomes aware of the composition of an arbitral tribunal or the reasons justifying the recusant. Unless the arbitrator withdraws, the arbitral tribunal must decide thereupon.⁹⁴

⁹⁰The court stated that: Article 16 (3) of the Arbitration Law provides that: "the arbitrator when accepting the mission entrusted to him", must disclose "any circumstances which cast doubt on his independence or neutrality", and Article 53 of the Law provides that: "an action for the nullity of an Arbitral Award is admissible" if the arbitral panel was constituted or the arbitrators were appointed contrary to the Law or the agreement between the two parties.

The judgment mentioned that, in this case, the arbitrator appointed by one of the parties accepted his mission without disclosing that he was a partner in the law firm defending this same party.

The Court added that this fact was only discovered after the arbitral award was pronounced, and the Court decided that the arbitral award was null and void for its contradiction of the Arbitration Law. See also, *supra* note, 15, p. 181.

⁹¹Article 16 (3) of the Omani law provides that: "the arbitrator must accept his mission in writing. At the time of acceptance, the arbitrator must point out any circumstances likely to give rise to doubt as to his independence or impartiality. If such circumstances arise out of his appointment or during the proceedings, the arbitrator must take the initiative to inform the parties to the arbitration and the other arbitrators." See also, *supra* note, 33. p. 315.

⁹²Article 57 (1) of the Tunisian law provides that: "a person at the time of offering him the possibility of becoming an arbitrator, he must disclose all circumstances which may cast doubt on his independence and impartiality, and he must inform the parties if such circumstances rise during the proceedings.

⁹³ See Article 18 (2) of the Egyptian and Omani law, and Article 17(b) of the Jordanian law. See also, *supra* note, 20, p. 14.

⁹⁴ See Article 19 (1) of the Egyptian and Omani law.

Where the dismissal application is denied, the applicant may challenge this decision within 30 days of being notified, before the Commercial Court (national arbitration) Appeals Division thereof in the case of Omani law⁹⁵ and to the Court of Appeal in Egyptian law⁹⁶. There is no recourse against the court's decision in this respect and its decision is not subject to any type of appeal.

The challenge to the arbitrator was under the judicial control of the constitutionality of Egyptian arbitration law and exclusively entrusted in Egypt to its Supreme Constitution Court.⁹⁷

The Court passed a judgement on 6 November 1999 in Case No. 84 of the 19th (1999) judicial year, which directly bears on the subject of the constitutionality of Article 19 of the Egyptian arbitration law, which provides in its Sub-clause (1) that the arbitral panel decides on the request for its own challenge.⁹⁸ The Court stated that this Article 19 of the Egyptian Law is unconstitutional and in contravention of Articles 40, 65, 67, 68 and 79 of the Constitution which guarantee equality before the law, subjection of the State to the law, the right of defence and the right of litigation.

Jordan and Tunisia contrary to the Model law, did not adopt this principle. In Jordan, the dismissal application must be submitted to the Court of Jurisdiction, whose decision will be final.⁹⁹ In Tunisia, the arbitral tribunal does not resolve the matter

⁹⁵ *op.cit.* 12, p. 66.

⁹⁶ See Article (9) of the Egyptian law, and Article 18(a) of the Jordanian law.

⁹⁷ *op.cit.* 14, p. 181.

⁹⁸ The plaintiff in this case had previously requested the challenge a member of an arbitral panel which was determining a dispute in which the plaintiff was a party and the arbitral panel had rejected his request. The plaintiff then brought the case before the Supreme Constitutional Court, arguing that allowing the arbitral panel to decide upon the challenge of its own members contravenes the necessity of neutrality that is guaranteed by the Constitution for those engaged in judiciary activity. Therefore, it is contrary to the basic principle of equality before the law as provided in the Constitution.

The Supreme Constitutional Court mentioned the judicial nature of arbitration that is based upon a voluntary agreement between the parties and which results in negation of the right of the judiciary to review the disputes subject to arbitration.

The Supreme Constitutional Court pointed out that the right of recourse to the arbitrator is linked to the basic rights of litigation that are necessary for all judicial actions and is also closely linked to the right to litigate as provided in the Constitution that necessitates independence and impartiality in the authority that dispenses justice.

The Supreme Constitutional Court then stressed that Article 69 of the Constitution guarantees the right of defence as a cornerstone of the rule of law and that subjection of the State to the law means that its legislation may not encroach upon the rights and guarantees which are considered in democratic States as the basis for the existence of the rule of law.

The Supreme Constitutional Court finally stated that the Article which was the subject of the recourse allowed the arbitral panel the right to decide upon its own challenge, and that this is contrary to the values of justice and to the principle of impartiality of the judicial act in favour of one category of litigants to the detriment of another. The Court stated that it is therefore unconstitutional and in contravention of Articles 40, 65, 67, 68 and 79 of the Constitution which guarantee equality before the law, subjection of the State to the law, the right of defence and the right of litigation.

⁹⁹ See Article 18(a) of the Jordanian law.

itself; the arbitrator who is challenged may withdraw, the other party may accept the challenge or, failing that, the matter may be brought before the Tunis Court of Appeal, with the consequence that the arbitral proceedings will be suspended.¹⁰⁰ As aforementioned, like the decision of the Court of Jurisdiction in Jordan¹⁰¹, Tunisian Court of Appeal¹⁰² decisions will not be subject to appeal in respect of the dismissal application.

In the Egyptian, Omani and Jordanian laws, neither the request to challenge the arbitrator nor recourse against the decision of the arbitral tribunal suspends the arbitral proceedings.¹⁰³ In contrast, Tunisian law states that, Tunisia Court of Appeal must, within 45 days, decide on the application for challenge to the arbitrator, and during this time the proceedings will be suspended.¹⁰⁴

Here, the following question could be raised: why should the arbitral proceedings continue after the application for the challenge has been made to the state court whereas such proceedings before the state courts are suspended until a decision is made on the challenge of arbitrator?

In this regard, it could be argued that suspension of the arbitral proceedings takes into account the fact that state courts are required to make a decision in a short time. This does not prejudice the arbitral proceedings because the court's decision to granting or rejecting the challenge is not subject to any means of recourse.

One rationale behind the decision not to suspend the procedure is that the three laws attempt to assure and guarantee that the proceedings will continue. In this situation, there is an arbitration which continues, despite the fact that one of the parties is not satisfied with the arbitrator and despite the fact that the challenged arbitrator will feel hurt and probably not objective.

Also, these laws foresee another possibility which might threaten the proceedings, namely where an arbitrator is unable to perform his mission, fails to perform his task or interrupts the performance thereof in a manner which causes undue delay to the arbitral proceedings. Egyptian and Omani laws under Article 20 of each, provide that if the arbitrator does not withdraw in these cases and the parties have not agreed his removal, then the Commercial Court in Oman and the Cairo Court of Appeal may

¹⁰⁰ See Article 58 (2) of the Tunisian law.

¹⁰¹ See Article 18 (a) of the Jordanian law.

¹⁰² See Article 58 (3) of the Tunisian law.

¹⁰³ See Article 19 (4) of the Egyptian and Omani Laws, and Article 18© of the Jordanian law.

¹⁰⁴ See Article 58 (3) of the Tunisian law.

remove him upon the request of either party. The Court of Jurisdiction in Jordan under Article 19 and the Tunisian Court of Appeal under Article 59 may remove the arbitrator. It seems therefore that, the challenge to an arbitrator presented to the state court, does not lead to the suspension of arbitral proceedings. If the arbitral award is made before the court decides on his removal, the court's decision will be rendered null and void because the award will have been made before the arbitrator is removed.¹⁰⁵

8.2.3.3 Power to Order Interim Measures

The Model Law under Article 17 guarantees the arbitral tribunal power to order interim measures.¹⁰⁶ Egyptian and Omani laws under Article 42 of each, allow the arbitral tribunal to issue interlocutory or partial awards and to order provisional or conservatory measures during the proceedings upon the request of either party prior to issuing its final award. Jordanian law under Article 41 also allows the arbitral tribunal to issue interim awards prior to final awards. Under Article 74 of Tunisian law, with the agreement of other arbitrators, the president of the tribunal may issue interim measures. He can issue these interim measures alone in a case where there is no majority among the arbitrators.

During the course of arbitration, parties may agree upon settlement; in this case does the arbitral tribunal have the authority to issue interim measures? Article 41 of the Egyptian and Omani laws, Article 39 of the Jordanian law and Article 76 of the Tunisian law accommodate the possibility that the parties to the dispute may reach a settlement among themselves before the arbitration proceedings have been concluded. In the first three cases, the condition of the settlement should be presented to the tribunal, which will then issue a decision equivalent to the arbitral award, which shall contain the provisions of the settlement. In the case of Tunisia, the tribunal will issue a decision to finalise the arbitral proceedings. In the case of ordering interim measures, the decision rendered by the arbitral tribunal which contains the conditions of the settlement will terminate the proceedings. In addition, such decision has the same force as an arbitral award as far as enforcement is concerned.

¹⁰⁵ *op.cit.* 28, p.146.

¹⁰⁶ Article (17) says: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

Egyptian and Omani laws under Article 45 (1) give the arbitral tribunal a period of 12 months in which to conduct the arbitration proceedings and issue its award. The tribunal may extend the deadline by a maximum of six months at its discretion. If an award is not rendered by the deadline, either party may request the President of the Cairo Court of Appeal to set a new deadline or terminate the proceedings, and in the case of Oman, the Commercial Court to which the dispute may have been brought.¹⁰⁷

Article 37(1) of the Jordanian law authorises the arbitrators to extend the deadline of arbitral procedures if not finalised within the time limit of 12 months.

During the arbitral proceedings, if a matter falling outside the scope of the arbitral tribunal's jurisdiction is raised, if, for example, a document submitted to it is challenged for forgery, or criminal proceedings are undertaken on the alleged forgery or for any other criminal act, the arbitral tribunal under Article 46 of Egyptian and Omani laws as well as Article 43 of the Jordanian law may decide to proceed with the subject-matter of the dispute without reliance on the incidental matter raised on the document alleged to be a forgery or on the other criminal act. The arbitral tribunal may also suspend the arbitral proceedings until a final decision is made in this respect. In this case, the period of time granted to the arbitral tribunal to make the award is suspended.

In the above two cases, Tunisian law does not provide a special article to treat these cases in the same way as the other three countries' laws. Nevertheless, the arbitrator-in general- under Tunisian law may take any measure, within the scope of his competence, provided that the arbitral tribunal has not started the proceedings. When the arbitral tribunal starts the proceedings, it may adopt any provisional measures falling within its competence.

The president of the tribunal of the first instance, in the jurisdiction of the place of arbitration, provides an authorisation to enforce any provisional or preliminary decision made by the arbitral tribunal.

The solution for international arbitration is not specified. A decision has simply been made that the request for protective measures before state courts is not in itself incompatible with the arbitration law. Consequently, it is not forbidden to go to state courts while the arbitration process is taking place.¹⁰⁸

¹⁰⁷ See Article 45 (2) of the Egyptian and Omani Law as well as Article (9) in both laws in which the procedure to refer to the court of jurisdiction is determined.

¹⁰⁸ *op.cit.* 1, p. 28.

The interim measures taken by the tribunal under Tunisian law are subject to appeal to the Tunisian Court of Appeal. Article 61(3)¹⁰⁹ provides that the Tunisian Court of Appeal is required to deliver its judgement within a period not exceeding three months. Further, and in order to avoid a hasty award by the arbitrator which might be set aside, the above-mentioned article bars the continuance of the arbitration procedure until a decision is made by the appeal judge.¹¹⁰

8.2.4 Restriction upon Court Intervention

If an agreement to arbitrate cannot be recognised and enforced by a court when there is non-compliance with it by a party who institutes a competing or parallel suit in relation to the matters agreed to be referred, arbitration will degenerate into ordinary court-room litigation and will lose much of its practical attractiveness and efficacy.¹¹¹ Therefore, limiting the courts' interventions in the arbitral process has been advocated by supporters of international commercial arbitration and, in fact, was one of the main objectives behind the Model Law.

Article 8¹¹² of the Model Law helps limit court interference by requiring the parties to refer to arbitration.¹¹³ Article 8 (1) of the Model Law is designed to keep the arbitration before the relevant tribunal and out of the national court and under Article 8 (2) it may only refuse to refer the parties to arbitration in the event that the agreement is null and void, inoperative or incapable of being performed.¹¹⁴

To determine the extent of the courts' interference according to Article 8 of the Model, the following question may be raised: what is the effect of an arbitration agreement upon a party's right to raise the matter before the court?

This question has been addressed and it was answered most succinctly by Lord Dunedin in *Sanderson v. Armour & Co (1922)*¹¹⁵: "If the parties have contracted to

¹⁰⁹ See Article (61) of the Tunisian Law.

¹¹⁰ *op.cit* 49, pp. 26-27.

¹¹¹ *op.cit* 41, p.147.

¹¹² Article (8) says: 1. A court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

¹¹³ See Notes Domestic Courts' Obligation to Refer Parties to Arbitration. Arbitration International, Vol. 17(3). LCIA, 2001. p.314.

¹¹⁴ *op.cit* 42, p.315.

¹¹⁵ See Hew Dundas, (2006). Sisting of Legal Proceedings for ADR. In this case, he quoted Lord Dunedin who decided that "the court is obliged to sist (stay) legal proceedings where there exists an arbitration agreement between the parties covering the dispute. The court is wholly precluded from

arbitrate, to arbitration they must go”. Article 8 (1) essentially creates the same consequences and as mentioned above the referral is generally considered to be an obligation not a possibility. This is due to the mandatory language of this Article: “A court ... *shall* ...refer parties to arbitration”. This idea has been upheld by courts and by respected authors in the field of international commercial arbitration.¹¹⁶

The trend in favour of limiting court involvement in international commercial arbitration, reflects the view that, “parties to an arbitration agreement... prefer expediency and finality to protracted court battles”¹¹⁷, found under Article 5¹¹⁸ of the Model Law, which states that, beyond the instances of possible court intervention according to this law (the Model Law), “no court shall intervene.” Accordingly, Effects of the Arbitration Agreement, Setting Aside of the Award, and Recognition and Enforcement of Arbitral Awards (Articles 35 and 36) will be examined as instances of court intervention in the four given jurisdictions (Egypt, Oman, Jordan and Tunisia).

8.2.4.1 Effects of the Arbitration Agreement

Egyptian arbitration law as well as Omani arbitration law under Article 13, Jordanian law under Article 12 and Tunisian law under Article 52 clearly state that where there is a dispute before a court in respect of a contract containing an agreement to arbitrate, it is open to the defendant to object to the continuation of the proceedings. In this eventuality the court is obliged to reject the case¹¹⁹ and must rule *fin de non recevoir*¹²⁰ (no right to bring it before the court) if so pleaded by the defendant in the action and before submitting any demands or pleading any defences. While these laws repeat the provisions of the Model Law, Tunisian law provides that the court must decline jurisdiction if a party so requests when submitting his first statement on the substance of the dispute.¹²¹

inquiring into the merits of the dispute, this being reserved to the Arbitrator(s).” *Introduction to Scottish Mediation Network Staff*. p.2.

¹¹⁶ *op.cit.* 113, p.315.

¹¹⁷ See Explanatory note by UNCITRAL Secretariat on the Model Law International Commercial arbitration on www.uncitral.org/english/texts .

¹¹⁸ The article says that “In matters governed by this law, no court shall intervene except where so provided in this Law.

¹¹⁹ *op.cit.* 10, p. 62.

¹²⁰ The French term means: “An exception or plea founded on law, which, without entering into the merits of the action, shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called prescription, or that there has been a compromise, accord and satisfaction, or any other cause which has destroyed the right of action which once subsisted.” See www.datasegment.com online dictionary.

¹²¹ *op.cit.* 3, p. 55.

The Egyptian, Omani and Jordanian laws use the following expression: “the court...shall hold the action inadmissible”: this expression gave rise to discussion because it means that the court must declare that it has no jurisdiction.

The approach adopted by the Egyptian law followed by Omani law(which uses the terms¹²² used by the Egyptian law) and the Jordanian law (which in the second paragraph in relation to starting or commencing to make award authorises the parties to agree otherwise)¹²³ is based on the argument that an agreement to submit a dispute to arbitration is, in fact, a waiver of the right of litigation before the courts. Thus, as pleading non-acceptance of legal action is a procedural matter,¹²⁴ it must be pleaded before the court, which is not entitled to make such a ruling on its own motion or initiative.

Further, the Egyptian Court of Cassation held that the contractual nature of arbitration means that the effect of the lack of jurisdiction is not preemptory and consequently the courts do not have to raise their own lack of jurisdiction on their own motion; it has to be raised before any discussion of the merits of the case, or the parties are deemed tacitly to have waived this provision. Omani and Jordanian arbitration laws comply with this principle.¹²⁵

With regard to this point, the Tunisian law distinguishes between domestic and international arbitration. According to Article 19, which regulates domestic arbitration, state jurisdictions shall declare themselves incompetent on the request of the most diligent party¹²⁶. This issue is not of a public nature; therefore the court cannot raise it automatically.¹²⁷

In international arbitration, Article 52 stipulates that the arbitral tribunal shall declare itself incompetent if one of the parties requests this *in limine litis* (in due time). It can declare itself competent only if the arbitration contract is null and void, inoperative or unlikely to be executed.¹²⁸

¹²² The terms “...-the defendant must raise this plea before submitting any demand or defence on the merits of the case, -such a judicial action does not prevent the arbitral proceedings from being commenced or continued, nor does it prevent the making of the award.” The Jordanian law adds “unless agreed otherwise by the parties”.

¹²³ *op.cit.* 10, p. 66.

¹²⁴ *op.cit.* 26, p. 12.

¹²⁵ *op.cit.* 10, p. 65.

¹²⁶ This expression usually refers to a reasonable party who seeks to avoid harm to another contracting party. Failure to show due diligence (also known as due care) is viewed negligence. Often the arbitration contract will specify that a party is required to provide due diligence. www.Wikipedia.org.

¹²⁷ *op.cit.* 1, p. 26.

¹²⁸ *Ibid.*

The defendant's defence must be made before any demands or a pleading against the legal action have been served or he has taken no other action in the proceedings by way of the submission of another petition or pleading, which could be construed as acquiescence to the court action.¹²⁹ If such an action is made before the court, arbitral proceedings can still be started or continued and the award can even be made. This shows the explicit intention of these laws to separate arbitral proceedings from any legal action, whatever its purpose. Thus, the legal proceedings do not paralyse the arbitration.¹³⁰

8.2.4.2 Setting Aside the Award

In principle, awards are final and may not be challenged. This is to guarantee a quick settlement, which is needed in commercial disputes in particular.¹³¹ Article (34/2/b) of the Model Law provides two cases for application for setting aside the arbitral award: if the court finds that "(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the State, or (ii) the award is in conflict with the public policy of the state."¹³²

Egyptian and Omani arbitration laws under Article 52(1) as well as Jordanian law under Article 48 and Tunisian law under Article 78 do not allow for appeal against an award. Nevertheless, under Egyptian and Omani law, the validity of an award may be challenged in some exclusive cases according to Article 53.¹³³ Article 54(1) provides that the legal action shall be brought within 90 days of the date when the party against whom the award is to be enforced is notified. This is permissible even if such party had waived the right to challenge the award before it was made.¹³⁴ The same principle regarding the setting of time limits is also found in Jordanian law under Article 50, that legal action must be brought within 30 days.

In Tunisian law, the recourse to annulment differs between domestic and international arbitration. In domestic arbitration, the arbitral award is, first, subject to setting aside only if the parties expressly decide to lodge an appeal against an arbitral tribunal. However, this possibility is not permitted when arbitrators have the power to settle the

¹²⁹ *op.cit.* 10, p. 62.

¹³⁰ *Ibid.*, p.65.

¹³¹ *op.cit.* 26, p. 19.

¹³² See Article (34) of the Model Law regarding application for setting aside as exclusive recourse against an arbitral award.

¹³³ In addition to the two cases mentioned in the Model Law, Article 53 provides 6 more cases. For more details see Article 53.

¹³⁴ *op.cit.* 26, p. 22.

dispute in accordance with rules of equity. Moreover, if the award is confirmed, the competent jurisdiction orders the enforcement; if it is invalidated, it is decided on the merits.¹³⁵

Concerning the time-limit as well as the court of jurisdiction, the Tunisian law according to Article 43 provides that, the recourse to annulment shall be brought within 30 days from the notification of the award. It should be submitted before the Court of Appeals.¹³⁶ When the award is annulled, and on the request of the parties, the court shall decide on the merits, with the same powers vested in the arbitrator. When the recourse to annulment is not accepted, such rejection confers leave of enforcement to the award.¹³⁷

In international arbitration, according to Article 79 (3), recourse must be made to the Tunisian Court of Appeals, which has exclusive competence, within three months (90 day as in Egypt and Oman) from the date when the claimant received the award. When the annulment is declared, the court may decide on the merits, on the request of all the parties, as an *amiable compositeur*. Rejection of the recourse to annulment confers leave of enforcement to the award.¹³⁸

Contrary to the Model Law, the four countries' laws have adopted a time-limit for requesting setting aside of an arbitral award, which could lead to a situation where the time-limit for requesting setting aside has expired. This situation could have been avoided if these laws had adopted the principle of the Model Law, nevertheless, it is a positive contribution to ensure *res judicata* (the matter cannot be raised again) of the arbitral award to avoid unnecessary delay.¹³⁹

Egyptian arbitration law, unlike Omani, Jordanian and Tunisian arbitration laws' distinguishes between international and domestic arbitration with reference to the court of jurisdiction for nullification of the arbitral award. Concerning international commercial arbitration, the legal action must be raised before the Cairo Court of Appeal according to Article 54 (2). However, in cases other than international commercial arbitration, the parties are entitled to agree to raise the legal action before the Court of Appeal in any given Court of Jurisdiction. In the context of Oman, the Appeal Division of the Commercial Court will be the court of jurisdiction for all cases

¹³⁵ *op.cit* 1, p. 28.

¹³⁶ *Ibid*, p.29.

¹³⁷ *Ibid*.

¹³⁸ *op.cit.* 10, p. 81, see also *supra* note, 1, p. 28.

¹³⁹ *Ibid*.

according to Article 54(2). Under Article 49(b) of the Jordanian law, the court of jurisdiction has jurisdiction to decide such cases. The Tunisian Court of Appeal under Article 78(1) will decide the cases.

The implication of such difference between the two laws may be stated as follows: according to Omani arbitration law, in international commercial arbitration the Appeals Division of the Commercial Court will have jurisdiction over a request for setting aside, whether the arbitration takes place in Oman or abroad. Even if the arbitration is not international commercial arbitration, the Appeals Division has jurisdiction to decide on all requests for setting aside.

This is contrary to the rule that these requests should initially be submitted to the Court of the First Instance. This was done for two main reasons. First, the speed for settling the request for setting aside the award and, secondly, the fact that the purpose of the request is to settle a question of the validity or nullity of an award. This is why it was deemed useful to submit this right of recourse to the Court of Appeal instead of a court of the first instance.¹⁴⁰ This argument could be stated regarding Tunisia, but will not stand for the Jordan where in international arbitration cases the need for speedy settling of the request cannot be overemphasised.

Although all four countries laws were greatly inspired by Article 34 of the Model Law as for cases where a legal action for nullity of an award may be raised, it should be noted that both Egyptian and Omani laws under Article (53/1/iv) as well as Jordanian law under Article 49(4), (but not Tunisian law where reasons for annulment are based on the provisions of the Model Law), include a case not found in the Model Law, this being that an award may be declared void where the award has not applied the substantive law determined and agreed upon by the parties to the arbitration. The importance of such provision is quite clear and practical, especially where international arbitrations are concerned.

Finally, these laws explicitly provide that the request for setting aside does not result in suspending the performance of the award.¹⁴¹

8.2.4.3 Recognition and Enforcement of the Arbitral Award

Court restriction on arbitral procedures is one of the main features of the Model Law, where recognition and enforcement of the arbitral award by a court is obligatory

¹⁴⁰ Ibid, p. 84.

¹⁴¹ Ibid.

unless one of the grounds for refusing recognition and enforcement referred to in Article 35¹⁴² of the Model Law applies.

Egyptian law as well as that of the other three countries have followed the Model Law, and thus the classic position of enforcement of an arbitral award has radically changed. All four countries laws provided that if all requirements as to form and procedure are met, an award will have the status of *Res Judicata*, will *prima facie* be enforceable, and will be subject to nullification on very limited grounds.

Significantly under Article 57 of Egyptian and Omani law, an action for a nullification of an award will not, in itself, give rise to a stay of enforcement. In order for a party to achieve this he is obliged, under Egyptian and Omani law, to present the court with persuasive reasons which would justify a stay. The court will therefore not be inclined to order a stay unless it is satisfied that there is a greater probability that the nullification action will succeed.

In order to prevent enforcement of awards being delayed, both Egyptian and Omani laws specify under the same Article 57 certain time limits within which action must be taken. In particular, if a court receives a petition for a stay, it must issue a ruling within 60 days of its submission. A court's ruling can be submitted for appeal to the appropriate court within a further 30 days. If a court upholds a submission for a stay on the grounds of possible nullification of an award, the court has to issue its judgement on the nullification action within six months of its ruling on the stay.¹⁴³

Unlike Egyptian and Omani law, under Article 82 of Tunisian law, regarding an action for nullification or stay of enforcement, the Tunisian Court of Appeal may stay its decision for recognition and enforcement of the award. The Jordanian law is silent on this important point.

As a result, Egyptian and Omani laws have been inspired by the modern legal framework found in the Model law in respect of this point, which aims to promote

¹⁴² Article (35) of the Model Law uses the obligatory language to enforce the arbitral award. It says under item (1). that, "An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 36."

And under item (2). The Model Law provides that a party applying for enforcement of an award "shall supply the duly authenticated original award or ... certified copy thereof, the original arbitration agreement (,)" and (3) if the agreement is not in the official language of the state, "a certified translation."

¹⁴³ See Mike Reddy, (1995). Egypt Arbitration – New Law. *Middle East Commercial Law Review*. vol. 1(1) British library. pp. 3-4.

arbitration as an efficient means of dispute resolution, more than Tunisian and Jordanian laws.

The Egyptian, Omani, Jordanian and Tunisian laws have radically altered the position for parties seeking to enforce an arbitral award. Under the previous and traditional provisions of the Code of Civil and Commercial Procedures, like so many other countries, the unsuccessful party in arbitration could attempt to overturn the award in new court proceedings. As this would involve what would amount to a fresh evaluation of the entire case, and given that proceedings to enforce the award would in the meeting be stayed, the entire process could be delayed by a number of years.¹⁴⁴

However, under Article 58 of the Egyptian and Omani laws, Article 54 of the Jordanian Law and Article 81 of the Tunisian law, arbitral awards will have *res judicata* status, will be fully enforceable, and will be subject to nullification on only very limited grounds. These grounds¹⁴⁵ are the same in both Egyptian and Omani laws.

With regard to Egypt and Oman, the order for enforcement of an award may not be granted unless the competent judge is satisfied that it does not violate public order, and that it has been duly notified to the person against whom enforcement is sought (Article 58(2)(b) and (c)). The Cairo Court of Appeal's decision on 2 October 1997 in Case No. 41 of the 114th (1994) judicial year issued a judgement in respect of the public order argument. The Court found that allowing interest over the maximum allowed by the law does not violate public order.¹⁴⁶

¹⁴⁴ Ibid.

¹⁴⁵ The grounds are set out under (58) of both Egyptian and Omani law as:

- the award contradicts an earlier judgement by an Egyptian court on the same dispute,
- the award contradicts Egyptian Policy,
- the unsuccessful party did not receive valid notification of the award against them.

In the Omani case, The president of the Commercial court must sure that the award:

- does not contradict a judgement previously rendered by the Omani courts on the subject-matter in dispute;
- does not violate the public policy of the sultanate of Oman;
- was properly notified to the parties against whom it was rendered.

¹⁴⁶ One of the reasons for the appeal in this case was that the judgement which was the subject of the appeal was null and void because it allowed for an interest over the maximum allowed by law, which maximum is of public order in accordance with Egyptian law.

The Court of Appeal mentioned in this case that Article 39 (4) of the Arbitration Law provides that:

"The Arbitral Panel may, if it has been expressly empowered to act as an '*amiable compositeur*' by agreement between the two parties to the arbitration, adjudicate the merits of the dispute according to the Rules of Justice and Equity without being bound by the provisions of Law."

The Appeal added that in view of the above there is no contradiction to public order, in this case, if the arbitral panel decides that the interest rate mentioned in its judgement is consistent with the rules of justice and equity, even if this interest rate is over the maximum allowed for by law, because this

Also, the order may not be granted unless the competent judge is satisfied that it does not contradict another judgement previously rendered by an Egyptian or Omani court concerning the same subject-matter of the dispute (Article 58(2) (a)).

In fact, determining such a matter is difficult (if not entirely impossible) from a practical point of view. This is simply because the enforcement application is submitted by the party in whose favour the award has been made to the president of the competent court. A further difficulty arises where an enforcement order is granted as it may not be appealed, whereas an order for refusal of enforcement may be appealed before the court (Cairo Court of Appeal in the Egypt case and the Appeal Division of the Commercial Court in Oman) as referred to in Article (9) in both laws, within 30 days (Article 58(3)).¹⁴⁷

It is only possible to appreciate the facilities granted by the Jordanian, Egyptian and Omani arbitration laws by comparing them with the Model Law. Indeed, the Model Law foresees several reasons to suspend enforcement of the award, which largely exceed the cases foreseen by the aforementioned three laws. Comparison also shows that the Jordanian law ensures the enforcement of the award much better than the Egyptian, Omani and Tunisian laws. The control of the court of law is limited to two conditions in the case of Jordan, and three conditions in Egypt and Oman as previously mentioned.¹⁴⁸ Here, Tunisian arbitration law adopts conditions almost identical to those laid down by the Model law while making some amendments concerning public policy.

Whereas the Model Law annuls the award or refuses authorisation for enforcement if the court finds that ‘the award is in conflict with the public policy of the state’, Tunisian arbitration law under Article 81(2) provides that the award must be contrary to ‘public policy within the meaning of private international law’, which may be described as a more liberal attitude towards restriction of court interference in the enforcement of an arbitral award.

With regard to enforcement of foreign arbitral awards, other than the two conditions laid down in the Jordanian law, enforcement will cover awards rendered inside or outside Jordan. In Egypt, an award issued pursuant to an arbitration that has taken place outside Egypt may be enforced in Egypt if it is covered by or does not

judgement is based upon the agreement of the parties to apply the rules of justice and equity and not the provisions of the law.

¹⁴⁷ *op.cit.* 26, p. 22.

¹⁴⁸ *op.cit.* 10, p. 80.

contradict any of the international conventions to which Egypt has adhered to according to Article (1), and if it satisfies the condition set out in Article (58). Egypt is a signatory state to: The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards; the Washington Convention of 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States; and the Convention of 1974 on the Settlement of Investment Disputes Between The Arab States and Nationals of Other States.

This is not the case under Omani law. The provisions of the Omani law are only applicable to awards made in Oman. Awards made abroad, where the parties have agreed to submit them to Omani law, are subject to the provisions of Sultanate Decree No. (13) of 1997.¹⁴⁹ This modified the rules of the Board for Settlement of Commercial Disputes and replaced it with the Commercial Court. This decree added a new chapter VII, dealing with enforcement of foreign judgements and awards.¹⁵⁰

Tunisian law distinguishes between domestic and international arbitration. For international arbitration, the reasons for refusal of enforcement are similar to the reasons for annulment. The Tunisian Court of Appeals, before which a request of recognition or enforcement is laid, may stay its judgement if a request for annulment is presented, whether in the country where the award was rendered or in the country by virtue of which laws it was rendered.¹⁵¹

In the absence of a convention or a treaty, according to Article 79 foreign awards shall be recognised or enforced only in case of reciprocity, irrespective of the country where rendered.¹⁵² In this respect, Tunisia has ratified certain multilateral treaties and conventions relating to arbitration and enforcement of awards (New York Convention 1958, ratified in 1967, Washington Convention (ICSID), ratified in 1966; and the multilateral Investment Guarantee Agency Convention, ratified by Tunisia in 1988) and bilateral treaties governing enforcement of arbitral awards with certain countries (Algeria, Lebanon, Morocco, Germany, Italy, France).

¹⁴⁹ Sultanate Decree No. 13/97, published in *the Omani Official Gazette* No. 596.

¹⁵⁰ Article (11 of Chapter VII of Sultanate Decree No. 13/97 relating to the enforcement of foreign judgements and awards provides that: "1. Judgements and awards made abroad may be enforced in the Sultanate of Oman under the same conditions of enforcement as those judgements of the Omani courts in the foreign country," Article 121 provides that "the provisions of the preceding article apply to awards made abroad. The award must have been made in an arbitral matter according to Omani law and be enforceable in the country where it was made." See also, *supra* note 12, p. 82.

¹⁵¹ *op.cit* 1, p. 29.

¹⁵² *op.cit* 28, p. 150.

For domestic arbitration under Article 33, the arbitral award can be subject to a spontaneous enforcement by parties or a forced enforcement by an order of the President of the court of First Instance or the district judge in the jurisdiction in which the award was rendered.¹⁵³

8.3 Evaluation

The above findings from a comparative analysis of arbitration laws in Egypt, Oman, Tunisia and Jordan suggest these countries have generally been open to the idea of adopting the UNCITRAL Model Law. However, in-depth comparison reveals that where modifications have been made with regard to the four main features of the Model Law, certain contradictions and negative consequences can be identified. First, it is obvious that in regard to the scope of application, Egypt, Tunisia and Jordan have restricted application of the law in cases where the state or one of its agencies is a party to the contract (certain measures are required before the law can be applied, mainly the government's approval). Bearing in mind that most international contracts in the Middle East usually involve the state or one of its agencies, the applicability of the arbitration law will be restricted. Thus posing potential problems for foreign investors in the future and contradicts with premise on which the reform was based, namely to promote foreign direct investment.

Secondly, despite the advanced steps taken in adopting the principle of party autonomy, such advanced steps will be in conflict with the restriction required by certain countries, mainly Tunisia, to apply the domestic law in the case of state contracts. In other words, the first two features of the Model Law are in contradiction and reconciliation between them is required.

Thirdly, there are contradictions between elements of the third feature of the Model Law, that is, the strengthening of tribunal power. Although all four countries have adopted the principle of *competence de la competence* of the arbitral tribunal, two countries directly (Tunisia and Jordan) and two indirectly (Egypt and Oman) have referred the challenge to arbitrators to the state court to decide rather than to the arbitral tribunal itself. Further, the interim measures which can be issued by the tribunal are subject to appeal before the state court in the case of Tunisia. In other words, these contradictions practically restrict the adoption of the third principle of the Model Law (strengthening the arbitral tribunal's power).

¹⁵³ *op.cit.* 1, p. 29.

Lastly, the fourth feature of the Model Law, which ensures restriction of court intervention, has been modified to give national courts more power to intervene. In addition to what have been mentioned in this regard, more grounds have been given for national courts to set aside arbitral awards. The court may decide on the merits of the dispute in the case of Tunisia which reflects the statist character of the Tunisian Code.

Despite the significant steps taken by Egypt, Oman, Tunisia and Jordan towards adopting the UNCITRAL Model Law, it cannot be asserted that these countries have fully adopted the main four features of the Model Law, since study findings point to the will of these countries to retain some of their traditional position in regard to commercial arbitration, reflecting their legal philosophies as has been discussed in Chapter Four and Chapter Six.

A summary of the adoption of the UNCITRAL Model Law principles by Egypt, Oman, Tunisia and Jordan.

	UNCITRAL Main Features	UNCITRAL Model Law	Egypt Law No. 9 of 1994	Oman Law No. 47 of 1997	Tunisia Law No. 42 of 1993	Jordan Law No. 31 of 2001
1	<p>Scope of Application</p> <p>*Commercial</p> <p>The Significance</p> <p>*International</p>	<p>Wide Interpretation of <i>commercial</i> Term</p> <p>International in three cases:</p> <p>*Business in different states.</p> <p>*If certain places situated outside the state in which parties have their business.</p> <p>*Subject matter related to more than one country.</p>	<p>Economic criteria</p> <p>More disputes can be submitted to arbitration. But still maintains the statism concept</p> <p>If subject matter related to international trade</p> <p>All the three cases in the Model Law and adds a fourth one:</p> <p>*If parties agree to submit their dispute to a permanent arbitral institution situated in Egypt or abroad.</p> <p>Distinguishes between</p>	<p>In cases not subject to compromise.</p> <p>Difficult to determine</p> <p>Same as Egypt</p>	<p>No Reference</p> <p>Adoption of statism concept</p> <p>Uses the words of the Model Law but not in the same sequence.</p> <p>Adds general definition: arbitration is international if 'generally, it concerns international commerce'</p> <p>Influenced by the French Code of civil Procedure Article 1492 of 1981.</p>	<p>Very wide interpretation</p> <p>Gives up the concept of statism</p> <p>No distinction between international and domestic arbitration.</p> <p>Restricted applicability of Civil Procedure Act.</p>

	<p>The Significance</p> <p>*Administrative Contract</p> <p>The significance</p>	<p>The Model Law ensures the validity of an arbitration contract when a state or its organs is a party.</p>	<p>international and domestic arbitration</p> <p>Adopts the principle of party autonomy. Parties may agree to apply foreign procedural or substantive law.</p> <p>Ensures a fast and economic international arbitration procedure by reference to the Cairo Court of appeal</p> <p>In the 1994 law, Administrative contract is valid, but, amendment to Article 1 that agreement to submit dispute to arbitration must be by the consent of the competent minister.</p> <p>These four countries (Egypt, Oman, Tunisia and Jordan), did not fully adopt the Model Law principle by placing some restriction on validating a arbitration contract when the</p>	<p>Appeal will be made to Appeal Division of Commercial Court.</p> <p>State organisations may enter into agreement to arbitrate without any need for later approval.</p>	<p>Multilateral and bilateral agreements are not covered by this law.</p> <p>Validity of agreement is related to nature of international relation more than to contract stipulation.</p> <p>State and its organs are restricted to use Tunisian regulation for international arbitration.</p>	<p>Ensures enforcement of final arbitral award without interference from other domestic legislation.</p> <p>Provides more certainty to foreign parties.</p> <p>Arbitration is valid with government party, but cannot enter into arbitration in a matter that can be settled by conciliation.</p>
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			state or its organs are a party to that contract. This situation adds more difficulties to foreign contracting party.			
	*Separability Clause	Arbitration clause is valid when the contract is null and void.	Adopts the UNCITRAL principle, the clause remains valid	Arbitration clause is independent from the agreement.	Adopts the principle that the clause will be treated independently.	The clause is valid based on the contractual agreement.
2	Party Autonomy					
	*Autonomy to compose the Tribunal	Ensure parties autonomy to compose arbitral tribunal. No person shall be precluded by reason of his nationality. Number of arbitrators are, according to parties decision, otherwise must be three. Arbitrator decides according to majority rule.	Moved away from classic Shari'a law (arbitrator should be male, wise, free, Muslim and fair) One or more, in absence of agreement must be three. Same as the Model Law	Ensures autonomy, no restrictions of given gender or nationality. If more than one, must be uneven. Same as the Model Law	Same as Egypt and Jordan. No restriction. Same as Oman Modified to give the chairman the power to order interim measures.	Kept the Model Law without modifications. Number must be uneven, in absence of agreement must be three. Took the position of Tunisia.
	*Party Autonomy over Conducting Arbitral	Ensures parties' autonomy to choose the arbitral procedure in regard to equal	Took the position of the Model Law without modifications.	Took the position of the Model Law without modifications.	Took the position of the Model Law without modifications, except it is	Took the position of the Model Law without modifications.

	<p>Proceedings</p> <p>*Rule Applicable to Substance of dispute</p>	<p>treatment, determination of rules of procedure, place of arbitration, commencement of arbitral proceedings, and the language.</p> <p>Provides that the tribunal will decide the dispute according to rules chosen by the parties.</p>	<p>Tribunal will apply rules agreed by the parties. Parties can agree to apply law of certain countries. In absence of agreement, tribunal can apply substantive law most closely connected with the dispute.</p>	<p>Same as Egypt.</p>	<p>silent about the date of commencement of arbitral proceedings and gave the tribunal power to decide on amendment by either party.</p> <p>Absolute freedom to choose the applicable rule. Tribunal can decide in accordance with rule of equity if authorised by the parties.</p>	<p>Parties are free to decide the system of law of a given state, substantive rules, not its rules relating to conflict of laws to be followed.</p>
3	<p>Strengthening the Tribunal Power</p> <p>* Competence de la competence</p>	<p>Tribunal shall have jurisdiction to rule on its own jurisdiction.</p>	<p>Principle has been adopted. The scope of the jurisdiction is wider than the Model Law.</p>	<p>Principle has been adopted similarly as the Egyptian law.</p>	<p>Principle has been adopted.</p>	<p>Principle has been adopted. Further procedure will be suspended while the tribunal decides its jurisdiction.</p>

	<p>*Challenge to the Arbitrator</p>	<p>Arbitrator may not be challenged except where circumstances give rise to serious doubt of his impartiality or independence.</p>	<p>Inspired by the Model Law and application should be submitted to tribunal. A denial application will be brought to Court of Appeal.</p>	<p>Arbitrator takes the initiative to inform the parties and withdraw. Application to challenged arbitrators submitted to the tribunal. A denial application will be bought to Appeal division of Commercial Court.</p>	<p>Arbitrator takes the initiative to inform the parties and withdraw. Contrary to the Model Law, application will be submitted to Court of Appeal.</p>	<p>Same as The Model Law, arbitrator will be challenged in case of serious doubts. Contrary to Model Law, application will be submitted to Court of Jurisdiction.</p>
	<p>*Power to order Interim Measures</p>	<p>Arbitral tribunal has the power to order interim measures.</p>	<p>Have the power to issue interim measures upon the request of either party. In case of settlement before the final award, tribunal should issue a decision equivalent to the award.</p>	<p>Same as the Egyptian.</p>	<p>Tribunal President alone may issue the measures in case there is no majority among arbitrators. In case of settlement, it must be presented to the tribunal to issue a final award according to conditions of settlement and finalise the procedure. Challenge to interim measures brought before the Court of Appeal.</p>	<p>Tribunal has the power to issue interim measures before the final award. In case of settlement, it should be brought before the tribunal to issue a decision equivalent to the award.</p>

4	<p>Restriction on Court Intervention</p> <p>*Effect of Arbitration Agreement</p>	<p>Limits court interference by referring parties to Arbitration.</p>	<p>Court is obliged to reject the case where the agreement contains an arbitration clause. Court should declare it has no jurisdiction.</p>	<p>Same as Egypt.</p>	<p>Distinguishes between domestic and international arbitration. In domestic, the court shall declare incompetence upon the request of the most diligent party. In international arbitration, the court shall declare incompetence only if the agreement is null and void.</p>	<p>Same as Egyptian and Omani laws.</p>
	<p>*Setting Aside Award</p>	<p>Two cases only: If the subject matter of dispute is not capable of settlement by arbitration. If the award is in conflict with public policy.</p>	<p>Award may be challenged in some (7) exclusive cases even if the party had waived the right to challenge the award.</p>	<p>Same as Egypt.</p>	<p>Distinguishes between domestic and International award. In domestic arbitration, only if parties expressly decide to lodge an appeal against an arbitral tribunal. In international arbitration, the Court of Appeal</p>	<p>Same as Egyptian and Omani Laws.</p>

	<p>*Recognition and Enforcement of Award</p>	<p>Court is obliged to recognise and enforce the award unless certain grounds for refusal apply.</p>	<p>Arbitral awards will have <i>res judicata</i> status, will be fully enforceable, and will be subject to nullification on only very limited grounds. These grounds are: contradicts previous court decision, contradicts public policy, and the award has correctly been informed.</p>	<p>Same as the Egyptian law.</p>	<p>decides on the merits. Adopts the exact Model Law clause.</p>	<p>Unlike the other three laws, Court intervention has been limited to two cases only.</p>
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CHAPTER NINE

Moving Toward Modernisation of Regional International Commercial Arbitration Law

9.1 Introduction

Previous chapters examined the legal aspects influencing the process of harmonisation of international commercial arbitration law in the Middle East and provided comparative proof that regionalism plays a significant role in creating a legislative environment which makes the Middle East countries to a large extent reluctant to participate in the global process of harmonising international commercial arbitration law by adopting the UNCITRAL Model Law. Previous chapters also showed that Middle Eastern commercial arbitration laws suffer from outdated, multilayered, and inconsistent legislations. Accordingly, the case for international commercial arbitration law reform has been established.

International commercial arbitration is no doubt a viable way to process cross-border commercial disputes, mainly because arbitration criteria and procedures have become standardised through the UNCITRAL Model Law. However, arbitration cannot yet bridge all the cultural gaps between the parties, most notably, between the conciliation culture as found in the Middle East region and the adversarial culture in the West.¹

This chapter will propose that in response to globalisation, regional legal culture values and norms should not act as barriers to the introduction of accepted international principles of international commercial arbitration into the Middle East region since regional norms can be accommodated.

9.2 Reflecting on Competing Claims

This section will consider arguments against arbitration law reform in Middle East countries. These arguments are founded upon Islamic law, the capacity of the state, and cultural estoppels.

9.2.1 Islamic Law and the Ground Rules

Islamic law is a crucial dimension in the debate on legal reform in the Middle East region. In light of Islamic Shari'a methodology (*Usul al-fiqh*)², this section will argue

¹ See Bernardo M. Cremades, (1998). "Overcoming the clash of legal Culture: The Role of Interactive Arbitration" *Arbitration International* vol. 14 No. 2, p.159, cites Ahmed Sedek El-Kosheri, "Is There a Growing International Arbitration Culture in the Arab-Islamic Culture?" 47-48 in Van Den Berg (ed.)

² The Islamic science of methodology is mainly concerned with laying down procedural rules and principles in accordance with which the deduction and induction of details of substantive Islamic principles, rules and rulings are regularised, standardised and free from possible fallibilities. In Mahdi

that under the ground rules of Islamic Law, reform is achievable and the basic principles of international commercial arbitration law can be introduced into the legal system of Middle East countries, where some³ argue that they cannot adopt and incorporate modern international commercial arbitration law because it might alter existing notions of the moral order.

Islamic Methodology (*Manhaj*)

Manhaj according to the Arabic dictionary means “clear way or pathway”. It originates in the word *nahaja*, which means “to follow a clear way or pathway”. *Manhaj* in research means a set of general rules that are followed by the researcher in collecting and organising the various ideas and information of the research in order to attain optimum results.⁴

By applying Islamic Law methodology, it will become clear that, the main features of international commercial arbitration are acceptable according to the primary as well as the secondary source of this methodology this methodology; thus, reform will not contradict the Islamic Law.

9.2.1.1 Reform in light of the Primary Source of Islamic Methodology (*Manhaj*)

Validity of the Arbitration Concept

Arbitration is an integral part of the Islamic Law: both the term and the concept are mentioned in the *Qur'an*, and it has been traditionally practised in the Middle East for more than 1,400 years.⁵

The validity of arbitration is recognised by the four primary sources of the *Sharia*; the *Qur'an*; *Sunnah*;⁶ *Idjma'* (consensus of opinion) and *Qiyas* (reasoning by analogy). Further, not only is the concept recognised, but a debate exists between classical Muslim jurists concerning the character of arbitration.

According to one view, arbitration is a form of conciliation close to *amiable composition* which is not binding on the parties. Those favouring this view hold that

Zahraa, (2003). Unique Islamic Law Methodology and the Validity of Modern and social science research methods for Islamic research. *Arab Law Quarterly*, Koninklijke Brill, p. 216.

³ Saudi Arabia, and Sudan

⁴ *op.cit.* 2 p. 226.

⁵ See Yahya Al-Samaan, (2001). Dispute Resolution in Saudi Arabia. p. 71 in Yearbook of Islamic and Middle East Law. Volume 7, General Editor Eugene Cotran. Published for the Centre of Islamic and Middle East Law at the School of Oriental and African Studies, University of London.

⁶ The acts and sayings of the Prophet Muhammad. He recognised and practised arbitration. He appointed arbitrators and accepted their decisions. He also acted as arbitrator on several occasions to resolve disputes arising between individuals and tribes. He acted as an arbitrator in the dispute between several Arab tribes regarding which of whom would have the honour of lifting and placing the Black Stone after rebuilding the Kaaba. He also chose arbitration to settle the dispute between himself and Bani Anbar.

the arbitrator's decision is neither binding nor final, unless it is accepted by the parties. Thus, arbitration does not have any jurisdictional nature, but is close to conciliation. Proponents of this view deploy the following verse from the Qur'an:

“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever the All Knower, Well Acquainted with all things”.⁷

The second view is that the *Shari'a* recognises arbitration in its binding modern sense. This view is based on the following verse from the Qur'an:

“Verily Allah commands that you should render back the trusts to those, to whom they are due, and that when you judge between men, you judge with justice”.⁸

If one is authorised to judge, one is authorised to make judgements with a binding decision.

Issue of Terminology

It should be noted that one of the elements that has caused confusion and misunderstanding as to the difference between arbitration and conciliation in Islam is that Islamic Law uses the word “*Hakam*”.⁹ The word refers in its strict sense to a person who is ‘authorised’ in a specific mission. Accordingly, the word can be used in its broad sense to refer to an authorised person with power to settle differences between disputants by suggesting settlement or helping them to reach it, or by issuing a binding decision to settle their dispute. The agreement of the parties determines the type of the authorisation in each case. As a result of differences between scholars, understanding of the meaning of the word in its terminological sense in Islamic Law, some think Islamic Law recognises only two types of arbitration: arbitration that leads to binding decisions, and arbitration that leads to non-binding decisions. Islamic law, in fact, recognises the differences between conciliation (that ends with a non-binding decision) and arbitration that leads to binding decisions. Conciliation is permitted

⁷ The Holy Qur'an 4: 35.

⁸ The Holy Qur'an 4: 58

⁹ See I. Abul-Enein, (2000). “Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes”. *J. Arab Arbitration*. Vol.2 p.2.

under Islamic Law in civil, commercial, family and other matters as long as it does not permit acts against God's commands or the matter settled by conciliation falls within the ambit of the rights of God, i.e. crimes and their sanctions.¹⁰

Approaches taken by the Four Islamic Schools

Detailed arbitration rules are not expressed in the Qur'an: the Qur'an has laid down the general rule mentioned above and it is the duty of Qualified Muslim jurists to elaborate and develop it in accordance with the needs of the community within the general framework of Islam.¹¹ Although arbitration is recognised by the four major Islamic schools, every school gives emphasis to certain unique themes.

The Hanafi School

The scholars of this school emphasise the contractual nature of arbitration and hold that arbitration is legally close to agencies and conciliation. They hold that an arbitrator acts as an agent on behalf of the disputant who has appointed him. The Hanafi School stresses the close connection between arbitration and conciliation. Thus, to them an arbitral award is closer to conciliation than to a court judgement, and is of lesser force than a court judgement. Nevertheless, under this School the disputing party cannot be relieved from being obligated to obey the award because the agreement to resort to arbitration binds the parties like any other contract.¹²

The Shafi School

According to the Shafi School, arbitration is a legal practice, whether or not there is a judge in the place where the dispute has arisen.¹³ However, according to this School, the position of arbitrators is inferior to that of judges, since arbitrators' authority is liable to be revoked up to the time of issuance of the award.

The Hanbali School

Under the Hanbali School, a decision made by the arbitrator has the same binding nature as a court's judgement. Thus the award made by an arbitrator (who must have the same qualifications as a judge) is imposed upon both of the parties who chose him.¹⁴

¹⁰ Conciliation according to Islamic law is a separate subject. The purpose of mentioning this issue is to show that Islam recognises the difference between conciliation and arbitration.

¹¹ See Zeyad Alqurashi, (2003). *Arbitration Under Islamic Shari'a*. Oil, Gas & Energy Law Intelligence. p. 3.

¹² Ibid.

¹³ See Samir Saleh (1984). *Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law*. Graham & Tortman. London. p.22.

¹⁴ Ibid, cites, Abul Hamid El-Ahdab. *Arbitration with Arab Countries* (Kluwer Law International, 1999). p.16.

The Maliki School

The Maliki School has great trust in arbitration, accepting that one of the parties can be chosen as an arbitrator by the other disputing party. This is explained by the fact that one party relies upon the conscience of the other party.¹⁵ Unlike the other three schools, this School stresses that an arbitrator cannot be dismissed after commencement of the arbitral proceedings.

Impact of Different *madhahib* on Reform of Commercial Arbitration Law

When Muslims began to codify Islamic law, such as when the Ottomans drafted the first Islamic code the Majalla, they had to decide which madhhab would take precedence: would they adopt a Hanafi, Maliki, Hanbali, or Shafi'i madhhab?

Despite the fact that a commercial arbitration agreement is valid according the primary source of Islamic fiqh (Qur'an and Sunnah), certain differences in the context of commercial arbitration procedure exist as a consequence of differences in madhahib (for example, Shafi'i and Hanafi permit the revocation of arbitrators at any time before rendering the award).

At the outset, it might seem that reform could create difficulties; for example, arbitration procedure in Kuwait according to Maliki's madhhab differs from arbitration procedure in Egypt according to Hanafi's madhhab. Nevertheless, taking into consideration the doctrine of *takhayyur* the process of selection between the different madhahib should allow reformers to operate effectively. Further, reform and modernisation are better achieved away from doctrinal fanaticism, and (*ikhtilaf al-r'ay*) different madhahib should enhance the reform process.

Main Features of Arbitration under the Four Islamic Schools

To comprehensively reflect on the aforementioned Islamic Law claim main features of modern international commercial arbitration law will be examined to show that this claim will not stand in light of in-depth research on the ground rules of the Islamic law. In other word, the examination in the following section of main principles of modern international commercial law will show that the Islamic law does not conflict with commercial law reform's modern principles.

Arbitration Agreement

According to all schools of Islamic law, the arbitration agreement is the principal basis for conferring upon arbitrators the power to issue binding decisions. The use of

¹⁵ Ibid.

arbitration as a method for the settlement of disputes under Islamic Law depends upon the full and valid consent of the parties.

Whether the arbitration agreement should be in writing or oral is not discussed by any school in the *Shari'a*. However, in the leading case between Caliph “Ali Ben Abi Taleb” (the Fourth Caliph) and “Muawya Bin Abi Sufyan”¹⁶, the two parties agreed to appoint two arbitrators in written deed which stated the names of the arbitrators, the time limit for making the award, the applicable law, and the place of issue of the award.¹⁷

As part of an international commercial contract, the arbitration clause usually deals with disputes that might potentially arise from the contract. A pertinent question is whether arbitration is valid under Islamic *Shari'a* law for disputes which do not exist at the time of contracting but might be arise in the future?

The doctrinal writing of the four *Shari'a* Schools deal with the use of arbitration in existing disputes, therefore are silent about arbitration for disputes which might arise in the future.

This issue has been and continues a subject of controversy among some classical scholars of *Shari'a*. Such silence in early times should not mean that arbitration is prohibited in such disputes. According to the principle of freedom of contract under Islamic *Shari'a*, parties are free to include any clause in their contract as long as it does not permit acts against God's commands,¹⁸ such as the incorporation of ‘interest’ (Riba) clauses.

A division of opinion between authorities on the *Shari'a* prevails over whether the consent of the parties to go to arbitration is required only at the time of the agreement

¹⁶ When the third Caliph, Othman, was killed by a mob, the other Companions encouraged Ali to take the Caliphate. Because Othman was violently killed, Ali proved cautious about receiving the office too readily, since this might link him with the murder of Othman. When he did accept, upon the urgings of the other Companions, Ali felt that the tragic situation was mainly due to inept governors. He therefore dismissed all the governors who had been appointed by Othman and appointed new ones. All the governors, excepting Muawiya, the governor of Syria, submitted to his orders. Muawiya declined to obey until Othman's blood was avenged. The Prophet's widow Aisha also took the position that Ali should first bring the murderers to trial. Due to the chaotic conditions existing during the last days of Othman it was very difficult to establish the identity of the murderers, and Ali refused to punish anyone whose guilt was not lawfully proved. Ali had difficulties establishing his legitimacy, and by the time he requested Muawiya to give him the oath of allegiance, the Syrian population was generally of the opinion that Ali was responsible for Othman's murder; thus, Muawiya refused to pay him allegiance. The two men confronted each other with their armies at Siffin in early 657, where Muawiya called for arbitration. The arbitration solved nothing, but it did serve to delegitimise Ali in the eyes of some of his supporters. The debate over this case caused a major split in Islam into Sunni and Shiite branches.

¹⁷ Walid, El-Malik, *Mineral Investment Under The Sharia Law* (London: Graham & Tortman 1993) p. 127. In Zeyad Alqurashi see supra note 14.

¹⁸ *op.cit.* 13 p.10.

or does the consent continue until the issuance of an award by the arbitrator(s). Some classical Muslim jurists question the binding nature of an arbitration agreement. To them, an arbitration agreement is a revocable option rather than a contractual undertaking. This idea was incorporated in *Al-Majalla*¹⁹ where some codifications included arbitration rule to be applied during the Othman Empire.

However, according to contemporary Muslim scholars, this view is obsolete, superficial and ill-founded.²⁰ The modern trend in Islamic law is to consider the arbitration agreement binding upon the parties once it has been entered into. Parties are also bound by the decision of the arbitrators.

This view is based on the direct application of the general principles of Islamic Law derived from the Qur'an when it states: "Oh you who believe fulfil your agreement."²¹ This meaning was also stressed by the Prophet Muhammad in the famous Hadith, "Believers should honour their engagements". It may be concluded that the view that receives most approval and application in the legal profession is that arbitration agreements are binding and no party is permitted to withdraw from any agreement freely concluded with others unless the agreement is not valid for some reason.

As to the formalities of arbitration procedures relating to the place of arbitration appointment of arbitrators the Qur'an is silent. Accordingly, they are within the discretionary powers of the parties.

Arbitral Tribunal

Once the disputing parties have agreed to resolve their dispute by arbitration, they should reach an agreement on the appointment of the arbitrator(s). The parties may specify the arbitrator(s) by name or they may define the arbitrator(s) by a certain position without specifying the name. If parties agree on arbitration but do not appoint the arbitrator(s), the arbitration may not take place.

The four schools of Islamic Shari'a are silent on the possibility of appointing arbitrators by a third party. However, there is nothing under the Shari'a that prohibits the appointment of the arbitrator(s) by a third party. Thus, it is left to the freedom of the contracting parties to decide whether they want such appointment made by a third party or not.²²

¹⁹ Article 1848 of *Al-Majalla* (the Islamic Civil Law Code established during the Ottoman Empire)

²⁰ Abdul Razak Al-Sanhuri, *Masader Al-Haq*, Vol. 1, (Cairo: Dar Al-Nahda Al-Arabia, 1968) p .80.

²¹ Qur'an 5: 1.

²² *op.cit.* 13.

According to the four Islamic Law Schools, there are no restrictions on the number of arbitrators. The matter is left to the parties to appoint one or more arbitrators and the number may be odd or even. However, if each party appoints an arbitrator, and the two arbitrators authorise a third one, the majority rule may be applied if the parties give their consent.

As to the revocability of arbitrators by one of the parties, the Maliki School prohibits revocation after the procedure has started. The Shafi and Hanafi Schools permit the revocation of arbitrators at any time before rendering the award. However, the view that receives most approval and application in the legal profession is the view of the Maliki School, which provides that the appointment of arbitrators is irrevocable after the procedure has commenced, except by mutual agreement of the disputing parties.²³ This view seems to be most appropriate because it meets the requirements of the international business community.

The Applicable Law

In disputes where one party is non-Muslim, choosing of a non-Islamic legal system to settle such disputes is recognised by the Maliki, Shafi'i and Hanbali Schools as valid. However, recourse to a non-Islamic system is only valid²⁴ as long as the rules to be applied to the contract do not expressly violate provisions of the Qur'an or Sunnah.

Arbitrability According to Islamic Law

According to the four Schools of Shari'a arbitration is not authorised in matters relating to the "Rights of God". The area of arbitrability is large, covering criminal law as well as patrimonial rights, and resembles the area of public policy in modern laws.²⁵ The Qur'an nevertheless excludes certain subjects, such as guardianship of orphan, which must be referred to courts law. Apart from subjects excluded, any other dispute should be just as cable of being resolved by arbitration as by a national court. Accordingly, disputes arising out of commercial transactions are arbitral.

Enforcement of an Arbitral Award

According to the Maliki, Hanbali, Hanafi and the majority of Shafi'i scholars, an arbitral award is as enforceable as a judge's judgement. The schools of Islamic Shari'a differ somewhat on the binding nature of a judgement reached through

²³ See George Sayen (2003). Arbitration, Conciliation, and the Islamic Tradition in Saudi Arabia. U. Pa. J. Int'l Economic Law. p. 10.

²⁴ The Prophet Mohammad in a well known case in Islamic history called "Banu Quraydah" accepted the application of customary and Mosaic law instead of Islamic law.

²⁵ *op.cit.* 17. p.47.

arbitration. A minority of Shafi' scholars hold that the final award has to be acceptable by both parties before it becomes binding upon them, thus reducing arbitration to a purely conciliatory procedure from beginning to end. Hanafi scholars hold that a judge should not enforce an award unless he agrees with it. The majority of Shafi'i scholars and the Maliki and Hanbali schools are of the opinion that the decision of an arbitrator has the same legal status as a *qadi's* (judge's) judgement.²⁶

The Hanbali School is particularly insistent on this point, stating that a *qadi* should not refuse enforcement merely because of a difference of opinion (*ikhhtilaf al-ray*). This doctrine sounds encouraging from a Western standpoint for the harmonisation process of modern international commercial law because it confirms the enforcement.

9.2.1.2 Reform in light of the Secondary Source of Islamic Methodology

It has been emphasised above that arbitration as a concept and principle is valid under the primary source of Islamic law methodology. Accordingly, those using the moral order argument of Islamic law against introducing reform have no legal basis for such argument. It may therefore be asked why the reform process in countries adopting Islamic law argument facing difficulties?

Such difficulties may be associated with use of the secondary source of Islamic law methodology, mainly in Saudi Arabia, which takes the Islamic law claim position, and not because there is a contradiction between Islamic law and the main principles of international commercial arbitration as has been previously demonstrated.

As a result, the following part proposes that arbitration reform can be successfully introduced by using the secondary source of Islamic law methodology. It will also argue that arbitration reform is imperfect in countries adopting Islamic Law claim position, mainly Saudi Arabia, because the application of the secondary source of Islamic law methodology is vague and unsystematic.

The Eclectic Device (Pragmatic Attitude)

It seems that the methodological approach used in Saudi Arabia is pragmatic rather than theoretical. The main reason for this attitude is that the Wahhabis²⁷ have different

²⁶ op.cit.23.

²⁷The term "Wahhab" (*Wahhābiya*) refers to the Sunni fundamentalist Islamic movement's founder Muhammad Ibn Abd al Wahhab (1703-1792). It is the dominant form of Islam in Saudi Arabia and Qatar. The Wahhabis claim to hold to the way of the "*Salaf as-Salih*", the 'pious predecessors' as earlier propagated mainly by Ibn Taymiyya, his students Ibn Al Qayyim and later Muhammad Ibn Abdul Wahab and his followers. Wahhabis do not follow any specific maddhab (method or school of jurisprudence), but claim to interpret the words of the prophet Muhammad directly, using the four

legal methodology; they have adopted Ibn Taymiyya's legal theory, including the rejection of *taqlid*²⁸, but at the same time have retained, unaltered, the classical Hanbali positive law without worrying about the contradiction involved (methodology and no methodology at the same time). The Hanbali attitude towards the Islamic methodology (*Usul al-fiqh*) of systematic analogy (*Qiyas*) and the consensus (*Ijma*) of the *fukah* remains very weak.²⁹

The moralistic Hanbali School cannot provide answers to all the challenges of the modern era. In fact, the ruling circles show some tolerance with regard to other schools. This attitude is prompted by practical – economic and political – considerations. Therefore, one can find as early as the era of King Abdul Al Aziz in the 1920s surprising tolerance towards the other Sunni schools. The King denounced doctrinal fanaticism (*ta'assub madhhabi*) and suggested judging each case on its merits. He instructed *qadis* to give their decisions according to the school whose doctrine was, in their view, the most effective with regard to the matter in hand.³⁰ If that was the case at that time, obviously it is more essential in this era.

Contractual Stipulations

The doctrine of contractual stipulation, which is peculiar to the Hanbali School, has been utilised as a means to introduce reforms. All the *Sunni* schools except the Hanbali School, hold that contractual relations are exactly defined by law in terms of rights and duties which cannot be stipulated against, even by the consent of the parties. The Hanbali school, relying on the Qur'anic precept that Muslims shall fulfil their contracts (*awfu bil-uqud*) (5:1), maintains that the parties are free to determine relations between them. Hence the Hanbali rule is that every stipulation agreed upon between the parties as part of the contract is valid and must be fulfilled, unless it is specifically forbidden by the Shari'a or is contrary to the nature of the contract.³¹

maddhab for reference. However, they are often associated with the Hanbali maddhab. Wahhabists see their role as a movement to restore Islam from what they perceive to be innovations, superstitions, deviances, heresies and idolatries.

²⁸ *Taqlid* is a term sometimes used in a derogatory sense to denote blind following, and is allegedly what inspired the Wahhabi movement to eradicate forms of Sufism that in their view had departed significantly from both the spirit and practice of Islam. Perhaps because of the pervasiveness of the Wahhabi influence, the connotative values of *taqlid* are decidedly negative

²⁹ See Aharon Layish, (2004). Saudi Arabian Legal Reform as a Mechanism to Moderate Wahhabi. *Journal of the American Oriental Society*, vol. 107, No. 2 p. 283.

³⁰ See J. Goldberg (1981), "Abd al-Aziz Ibn Saud and the Wahhabi Ideology; Reflections on a Paradox." *Hamizrah Hehadash*. vol. 30, p.285.

³¹ *Ibid*.

In Saudi Arabia, if stipulations are applied to introduce reforms in contractual relationships of various kinds, mainly in petroleum concessions granted to American companies, then, the intentional reform process in commercial arbitration law can be appealed under the same doctrine.

Al-Masalih Al-Mursalah (public interest)

According to the traditional doctrine of *Siyasa Shariyya* (*Shari'a* oriented policy), the ruler may make administrative regulations in the public interest, provided that no substantive infringement of the *Shari'a* is involved. This doctrine is recognised also by the Hanbali School, which links it with the *Masalha* (public interest) condition. It has been used in Saudi Arabia when the ruler defines the powers of *Shari'a* Courts restrictively whilst setting up an extra-*Shar'ia* judicial system by establishing administrative courts.³² If this doctrine is used as aforementioned, then the public interest argument can be used for legal reforms mainly in the area international commercial arbitration law can be introduced to promote foreign direct investment.

Ijtihad

The reopening of *ijtihad* was, in the opinion of the Modernist School of Muhammad Abduh, a highroad to reforms by the authorised exponents of the *Shari'a*. In 1976, a conference of religious functionaries and intellectuals from all over the Arab world met in Riyadh. It resolved, *inter alia*, to establish an academy of Islamic law in which senior *fuqaha* (jurists) and *'ulama* (scholars) were to participate in order to revive the collective (*jama'i*) *ijtihad* and thereby to contend with the challenges presented by the modern era. In a declaration marking the opening of the fourth meeting of that academy, King Khalid of Saudi Arabia suggested that it was better to solve problems by way of *ijtihad* than by statutory legislation (*nizam wadi*).³³

So far, we cannot point to any *ijtihad* based legal reform affected by legislation. On the other hand, there are those who find instances of *ijtihad*, in the classical sense of this term, in the decisions of the (*qadis*) Judges.

9.2.1.3 Fatwa and Reform

Theoretically, there is no temporal legislative authority in Saudi Arabia. Such an authority is contrary to the conception of a theocracy in which law is given by revelation as interpreted and identified by the competent *fuqaha*. Sensitivity to the

³² Ibid.

³³ Ibid.

theocratic image is so great that it is not permitted to use terms connoting statutory legislation in a Western sense with all the attendant negative associations.³⁴

The Fatwa as an Instrument for Reforms

The *muftis*, the authors of religious–legal opinion, play an important role in Arab countries and it is in Saudi Arabia that they are given a position of strength unparalleled in any other Muslim country. The theocratic character of the state, which does not, in theory, recognise any legislative authority, causes the government to rely on the *fuqaha* (jurists), competent exponents of the *Shari'a*, to provide religious legitimation to the reformist policy by finding support for it in religious–legal sources, thereby preserving internal stability and legitimacy of the regime in the eyes of society.³⁵

The Attitude of Muftis toward Reforms

The attitude of the *muftis* towards the legal reforms is divided. There are many instances of opposition, such as the defeat of the attempt to codify *Shari'a* law on the initiative of the King of Saudi Arabia, Abdul Al-Aziz, and resistance to legislation on labour relations, social insurance and penal matters. There has been opposition to the application of *ijtihad* and *maslaha* as mechanisms for introducing reforms;³⁶ this is related to the problem associated with the use of secondary source of Islamic law methodology as has been examined.

Strong criticism has been voiced against reformist legal opinions which, in the view of critics, give a distorted interpretation of the Qur'an in order to adapt it to the demands of modern life, in disregard of the Sunnah.

Most fatwas in modern areas, such as worship, personal status, science and medicine, technological inventions, reaffirm the Orthodox, conservative position.

The main reason for opposition of the muftis to reforms is the puritan character of the Wahhabiyya, which rejects every adjustment to changing conditions as *bid'a* (innovation in a pejorative sense).

The main obstacle to the introduction of reform is associated with methodological issues rather than substantial issues of international commercial law and, for this reason, the need for the development of *maslaha*, the public interest doctrine, is essential.

³⁴ Muhammad 'Abd al-Jawad Muhammad, *Al-Tatawwur al-Tashri' fi il-Mamlaka al Arabiyya al Sa'udiyya*. see supra note 29.

³⁵ *Ibid.*, p. 288.

³⁶ *Ibid.*, p.298.

This argument is consistent with that of some other Muslim *'ulama* (jurists) who stress the importance of *maslaha* for adjusting Islamic law, which, in their opinion, is based on a rationalist approach to the conditions of a modern society. They seek support from *Ibn Qayyim al-Jawziyya*³⁷ (1292- 1350 CE), who, according to them, placed *maslaha* on an equal footing with the Shari'a: "Wherever *maslaha* is, there is the divine law" (*aynama kanat al-maslaha fa-thamma shar Allah*).³⁸

They distinguish, within the Shari'a, between immutable general principles (*qawaid a'mma*) and the positive law (*ahkam tafsiyya*) based on those principles. In their opinion, the Qur'an based positive law cannot be understood without reference to *maslaha*, and since the latter changes in the course of time, there is nothing to prevent corresponding changes in the positive law.

9.2.1.4 Islamic Public Policy and Reform

Given the fact that Islamic law is considered to be the prevailing law in the Middle East, public policy acquires a distinct Islamic character. Unsurprisingly, Islamic law is prominently integrated into the framework of public policy, thus, has an impact on any international commercial arbitration law reform.

Islamic public policy does not represent a set of fundamental principles on which the legal order is based, but rather a number of specific rules. It appears that the common denominator of these rules is their mention in the Qur'an, which renders them directives ordained by God and hence essential rules of Islamic law.³⁹ These God-given rules are by their very nature considered to be immutable.

When considering the main features of international commercial arbitration law, evidence above shows that they do not conflict with Islamic public policy. Therefore,

³⁷Sham Al-Din Muhammad Ibn Abi Bakr, Ibn al-Qayyim al-Jawziyya. He was born in a small farming village near Damascus, Syria in 691 A.H./1292 C.E, and he studied under his father who was the local attendant (*qayyim*) of *al-Jawziyya* school. Later on, he pursued his quest for knowledge at the hands of renowned masters and scholars of his epoch, as well as he studied the works and teachings of *sufi* masters known in his time. His schooling centred around Islamic jurisprudence, theology, and the science of prophetic traditions. In the year 712/ 1312 at the age of 21 he joined the study circle of *Imam Ibn Taimiyyah* who kept him in his company as his closest student and disciple, who later on became his successor. Most scholars of the time have acknowledged his profound knowledge of Qur'anic interpretation, commentaries on the prophetic traditions, and theology. His extensive knowledge and understanding of Qur'anic commentaries surpassed even some renowned theologians in Islamic history. See Dr. Salah al-Sawi (1994), *al-Thawabit wa al-Mutaghayyirat*, Cairo, *al-Muntada al-Islami*., p.66.

³⁸ Ibid., p.290.

³⁹ See Maurits S. Berger (2002). *Conflict Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor*. Am. J. Comp. L. pp. 587-588.

Islamic public policy is not the often quoted “safety valve” to prevent unwanted consequences from foreign laws but rather a mechanism for upholding Islamic law principles.⁴⁰

9.2.1.5 Reform Experience

Commercial law reforms have been introduced into Middle East countries. Such reforms are generally in agreement with the Shari’a and fall within the scope of *Siyasa Shariyya*, they do not conflict with any religious legal permission or prohibition.

The first of these reforms was in 1860; the Ottomans adopted as their own, without changes or adaptation, the French Commercial Code of 1807. In 1863 and 1880, the Ottomans also freely borrowed the French Maritime Law and the Law of Civil Procedure, respectively. This borrowing extended to other European sources, including the Swiss, German, English, and Italian codes of law.⁴¹

Later, with the emergence of nation-states after World War I, there were attempts at synthesising Islamic and European laws, and in this process it was Egypt that led the way.

Even in Saudi Arabia, important reforms in commercial law were inspired by Ottoman, Arab and Western legislation where courts of the chambers of commerce applied regulations based on the Ottoman Commercial Code of 1850, which in turn was based on a French model and has no trace of the Shari’a in it.⁴²

These regulations did not conflict with the Shari’a law of transactions and did not permit anything prohibited or prohibit anything permitted or in conflict with any [Qur’anic] text or any tradition or consensus (*wa-du’n an tuhallil haraman aw tuharrim halalan aw tu’arid nassan aw sunnatan aw ijma’an*).⁴³ It may be concluded that reform of arbitration law is recognised as valid under Islamic law since it does not permit what is prohibited by the Islamic Shari’a.

⁴⁰ Ibid., p.593.

⁴¹ See Wael B. Hallaq, (2003). “Muslim Rage” and Islamic Law”. Hastings L.J. p.1713. See supra note; on these and other “reforms,” see Norman Anderson, Law Reform in the Muslim World (1976); N.J. Coulson, a History of Islamic Law (1964).

⁴² *op.cit.* 29, p.281.

⁴³ Ibid., p.288.

9.2.2 Statism: A Barrier to Reform

This part will reflect on statism, which dominates Middle East countries, constituting an obstacle and barrier to reform. If reform is to achieve its aims, national governments should be willing to adjust to the expanding need to regulate international arbitration by giving up the state's monopoly over legislations of an economic character, for example, international commercial arbitration law, and facilitating other interest groups' involvement in the legislative process.

In order to reflect on this claim and to assess the success of statism, it is important firstly to highlight the arguments used to justify statism, and, secondly, to argue that these have led to lack of an effective dispute resolution mechanism, which, in turn, has proved to be an obstacle for promoting efficient foreign direct investment in the Middle East.

9.2.2.1 Arguments Used to Justify Statism

As has been discussed in chapter three, statism is one of the main paradigms of development of international commercial arbitration law and the most important institutional framework in the Middle East region.

After independence, many developing countries in the Middle East adopted statism. Several reasons have been advanced to explain the choice of statism in post-independence in these countries as a development path, and the abandonment of the institutional frameworks imposed on them by colonial governments. The hope was that greater government participation in the economy would provide the state with the resources needed to alleviate mass poverty and significantly increase the national welfare. As Krueger has remarked,⁴⁴

“[t]he role of the government was widely perceived to include not only the infrastructure and social overhead activities which had been carried out by governments in industrialised countries during their development, but also the direct responsibility for economic activities traditionally regarded as being in the private sector, including agricultural marketing, establishment and management of hotels and other tourist services” (Krueger 1992, 7-8).

These countries opted for statism, as a development model that emphasised government control of resource allocation, minimised the function of the market, and granted the state significant power to intervene in private exchange, as well as to own

⁴⁴See John Mukun Mbaku, (1994). *The Political Economy of development: an empirical analysis of the effects of the institutional framework on Economic development. Studies in comparative International development.* p.5.

and control productive resources.⁴⁵ Eventually, the state came to dominate the economies of most Middle East countries.

Many considered the state as the most important actor in the war against mass poverty and deprivation,⁴⁶ and were willing to grant it significant power to intervene in private exchange so that it could aggressively confront poverty.

Many indigenous elites of the time believed that the state was the only institution capable of reconstructing and rehabilitating societies and communities that had been devastated by colonial exploitation.⁴⁷

Development economists of the time argued that the state was the only institution capable of successfully organising the large, highly expensive, risky and complex development projects needed to meet rising public obligations and deal with poverty, as well as provide employment opportunities for a restless population and enhance the ability of emerging economies to participate competitively and gainfully in the global economy.⁴⁸

The general ethos of the period favoured expansion of the welfare state and public management of the economy.⁴⁹ Therefore, in such countries the state came to dominate the legislative process, becoming the sole player in setting the economic regulations in order to meet such goals.

9.2.2.2 Effects of Statism

Many scholars believe that increased state regulation of economic activities contributes to poor economic performance and usually leads to a misallocation of resources. In addition, it is believed that government regulation of the economy also imposes significant costs on entrepreneurs and the economic system, distorts economic incentives, and destroys the signalling ability of prices, resulting in lower levels of economic output.⁵⁰

As the evidence from more than three decades of statism and massive control of economic activities with excessive emphasis on the state sector has shown, the Middle East legal system, dominated by a statism philosophy, is currently unable to give efficient and quick responses to international commercial disputes. The multilayered,

⁴⁵See John Mukum Mbaku (2003). Entrenching Economic Freedom in Africa. *Cato Journal*, vol. 23, No. 2 p. 218.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ op.cit. 43.p. 4.

outdated, inconsistent arbitration laws have led to bureaucracy, delays, high cost, and the attendant frustration involved in arbitral proceedings, contributing to a lack of confidence in the efficiency of commercial arbitration laws.

Statism has promoted and facilitated nepotism, bureaucratic corruption, and has constrained the effective development of viable economic infrastructures.⁵¹

In some countries, excessive government regulation has encouraged rent seeking, most of which has exhibited itself through high levels of bureaucratic and political corruption, nepotism, political violence, and perverse economic policies (Mbaku and Paul 1989; Kimenyi 1989; Mbaku 1992a).⁵²

9.2.2.3 Need for an Open Regulatory Institutions

A situation where the state has the exclusive right and there is no rule of law without state monopoly, stands in sharp contrast with the philosophy of arbitration, which is a consensual process by nature, at all levels of the process.

Investors typically worry about whether local laws and institutions will discriminate against foreign interests or whether local regimes are capable of adequately responding to claims by foreign investors. Effective investment legislation, mainly international commercial arbitration law, should strike a balance between the recognised need for sovereign states to regulate economic activity within their territorial boundaries, and the need to create a stable environment within which international investment, trade and commerce can operate.⁵³ In this regard, freedom to contract, which allows individuals engaged in domestic and foreign trade the right to enter into mutually beneficial exchanges, is a fundamental right that should be guaranteed.

Not surprising, this point had been emphasised by the major international organisations in order to promote an efficient global economy as well as reiterate the importance of discretionary legislation (non-mandatory legislation)⁵⁴ in economic regulations.

⁵¹ *Ibid.*, p. 6.

⁵² *Ibid.*

⁵³ See Why Asia needs a regional insolvency pact; *International financial Law Review*. London 2004. Section 3. p. 2

⁵⁴ For the majority of discretionary legislation, the legislature in absent of any prejudice direction only sets out certain criteria for other interest groups to participate and to develop new legislation *prima facie* consistent with their interests. For more details see Xinji Wang, (2001). A New Paradigm for Understanding Mandatory and Discretionary Legislation Under WTO Agreement. *Perspectives*. vol. 3, No. 3. p. 4.

The United Nations Development Programme has remarked that, “freedom is a necessary condition to liberate the creative energies of the people to pursue a path of rapid economic development”⁵⁵ (UNDP 1992, 27).

As stated by the World Bank (2002:6), the active participation of different powers in society in open institutional regulation will enhance economic development: “effective institutions are those that are incentive-compatible.” Formal, as well as informal rules should function together to advance the interest of society. The most effective formal institutions are those that complement informal structures and provide the people with a well-integrated system of incentives for trade and investment.

The World Bank report adds that institutions serve three very important functions. First, they provide traders with information about other traders, significantly enhancing their ability to anticipate the behaviour of others engaged in similar activities. Second, institutions define and enforce property rights as well as contracts. Unless property rights within an economy are well defined and enforced, entrepreneurs are not likely to invest in productive activities. Third, institutions can raise the level of competition in markets and significantly improve resource allocation. In competitive markets, resources flow to those uses deemed most valuable by consumers, not politicians. The fact that underdeveloped countries must recognise is that free-market competition enhances innovation, development of new knowledge, and economic growth.⁵⁶

Further, the IMF, in its 2003 report entitled “Effects of Financial Globalisation on Developing Countries: Some Empirical Evidence,” observed: “Preliminary evidence also supports the view that in addition to sound macroeconomic policies, improved governance and institutions have an important impact upon a country’s ability to attract less volatile capital inflows and its vulnerability to crisis.”⁵⁷ Policymakers might be reluctant to encourage active participation of interest groups in order to retain state monopoly of legislation, but different approaches should be taken if reform is to be achieved.

Accordingly, the first step to introducing international commercial arbitration law reform in Middle East countries will be their willingness to accommodate the interests

⁵⁵ *op.cit.* 43, p.6.

⁵⁶ *op.cit.*44, p.222.

⁵⁷ *op.cit.* 43, p. 2.

of companies, non-governmental arbitration institutions and other interest groups. The significance of this step will be reflected by the development of the dispute resolution process and constant changes and new solutions in arbitration, creating a more favourable environment for commercial arbitration.

As a result of the development of international commercial arbitration laws through a bottom-up, people-driven, inclusive, and participatory process, people's ability to claim ownership of the laws and commitment to ensure their survival will be greatly increased.

9.2.3 Cultural Estoppel

Cultural estoppel⁵⁸ raises the question of cultural deviation and its influence on Middle East international commercial arbitration law reform. A further question, in turn, arises. What do Middle East countries in general think about cultural aspects in relation to international commercial arbitration law reform and do they have common attitudes towards this law?

To answer these questions, the need to reflect on the "cultural estoppel claim" becomes essential because this issue will affect the reform process. This section will propose that any reform should take the cultural element into consideration, and cultural deviations should be dealt with through cultural tolerance not cultural estoppel.

9.2.3.1 Arguments Used To Justify the Cultural Estoppel Claim

The question should be asked why and how the cultural estoppel claim has been justified. It has been argued that, cultural deviation as it relates to international arbitration is particularly significant because legal practitioners are often strongly devoted to the procedures of their own legal systems (out of habit alone or otherwise).⁵⁹ Further, the extent of the differences are so substantial that they are always keen on the application of the rules of their own system, rather than of international harmonised codes.

Some commentators identify a Western "intellectual assault" (*ghazw fikri*) and "cultural assault (*ghazw hadari*) on the Middle East world,⁶⁰ when discussing reform,

⁵⁸ The term estoppel is derived from the old French word "estouper" meaning "to stop up". It refers to the argument that culture prevents Middle East countries from committing to commercial arbitration law reform because the latter contradicts what already exists.

⁵⁹ See Julian D M Lew, Laurence Shore, (1999). International Commercial Arbitration: Harmonising cultural Differences. *Dispute Resolution Journal*. Vol. 54, No. 3 p.6.

⁶⁰ See William E. Shepard, (1996). Muhammad Said al-Ashmawi and the Application of the Shari'a in Egypt. *International Journal of Middle East Studies*, vol. 28, No. 1, p. 51.

and argue that the way to deal with these assaults is by cultural estoppel. As a result, no effective and adequate reform has been introduced in the region.

For Middle East countries, the basic philosophy of dispute resolution is different; here it is based on *Sulh* (settlement), *Musalaha* (reconciliation), *Musafaha* ('partaking of salt and bread' i.e. hand-shaking), and *Mumalaha* (breaking bread together). Arbitration and *Sulha*, a form of community mediation, are the two forms of alternative dispute resolution currently used outside the (court system).

“The purpose of *Sulha* is to end conflict and hostility among people so that they may conduct their relationships in peace and amity. The communal Arab ritual of *Sulha* is a non-Western indigenous application of the process of acknowledgement, apology, compensation, forgiveness, and reconciliation.”⁶¹

Because of the influence of the Middle East social environment, it advocates the amicable resolution of disputes. Going to court in open confrontation or litigation is considered by many to be an aggressive act, unlike Western culture that considers it a way to resolve disputes. Going to court is thus likened to an insult rather than a means of settlement.⁶²

This means the decision to go to court may not only affect the contract in hand but also jeopardise future contracts.⁶³ Therefore, it is likely that, when out-of-court settlement fails, it is going to be difficult, if not impossible, to reach an equitable decision. In such a social environment, foreigners have to learn non-confrontation and less visible ways to resolve disputes.

Because of the role of the customary law, habits (*'adat*, plural of *a'da*) and customs (*a' r'af*, plural of *'urf*) have become embedded, including the domestic legal profession and judiciary, and become part of their being and culture.⁶⁴

It is well known that *'urf*, or local customary law practice, plays an important contributory role to the distinctiveness of Middle East dispute resolution mechanisms. *'Urf* has been accepted as a basis for rulings and judgements, provided it does not

⁶¹ See Marshall J. Breger, Shelby R. Quast, (2000). Article International Commercial Arbitration: A Case Study of the Areas under Control of the Palestinian Authority. Case W. Res. J. Int'l 185. p.12.

⁶² See Osama E.K. Daoud and Omarm. Azzam (1999). Sources of disputes in construction contracts in the Middle East. Technology, Law and Insurance. p.92.

⁶³ Ibid.

⁶⁴ See Besim S. Hakim, (1993). The Role of 'Urf in shaping the Traditional Islamic City. Islam and Public Law Classical and Contemporary Studies. Edited by Chibli Mallat. p. 142.

contravene or contradict local values and principles, resulting in the legitimisation of local dispute resolution as part of ‘*urf*, which, in turn, contributes to the formal legal system.

Some acknowledge that the role of ‘*urf* within the legal system is complex and, as a result, has to require people to abandon their customs is a very difficult process.⁶⁵

Further, because of the role of ‘*urf* in the legal system, in sharp contrast, in the larger Middle East, individuals involved in conflicts are more likely to resort to the official legal system to settle their disputes. At the initial hearing, the judge asks the parties if they wish to arbitrate or mediate. With the consent of parties, judges may enquire whether the parties want conciliation. Thus, in the Middle East, formal arbitration judgements are (often) enforceable on the basis of honour and social pressure.

Finally, individuals are expected to fulfil obligations appropriate to their social position and in respect of the social hierarchy. Harmony is built on loyalty, social identity and preservation of the community. All these features require the submergence of individualism in favour of harmony in a community.⁶⁶

9.2.3.2 Challenging the Cultural Estoppel Claim

The point to be emphasised here is that, taking into consideration the above arguments, it is crucial that reform should find a way to resolve the cultural relativism⁶⁷ versus cultural imperialism⁶⁸ issue. What is needed is defence of a universal standard of international commercial arbitration in such a way as to allow for different cultural interpretations and, at the same time, avoids the pitfalls of cultural essentialism.⁶⁹

It should perhaps be noted that in defending this view, one must simply avoid taking the idea that international commercial arbitration is a dominant Western-derived product for granted. Indeed, historic analysis shows that international commercial

⁶⁵ *op.cit.* 60, p. 12.

⁶⁶ See Edwin H. W. Chan (1997). Amicable dispute resolution in the People’s Republic of China and its implications for foreign-related construction disputes. *Construction Management and Economic Journal*. vol. 15. p.540.

⁶⁷ Cultural relativism is the idea in cultural anthropology that standards of good and evil vary from culture to culture. For example what is considered to be good in certain societies might be considered bad in others. For more details See Wikipedia.

⁶⁸ Cultural imperialism is the idea that promoting the culture of one nation over that of another. In the Middle East, Western legal culture is often associated with large economically powerful states that want to promote their legal thought in the Middle East countries. For more details See Wikipedia

⁶⁹ Cultural essentialism is the concept and theory social order has to be maintained through the prevailing cultural framework derived from the socio-historical context. See Heiner Bielefeldt (2000). “Western” versus “Islamic” Human Rights Conceptions? : a Critique of Cultural Essentialism in the Discussion on Human Rights. *Political Theory J*. vol. 28, No. 1. p.92.

arbitration has not been the natural result of any “organic” development based on a particular culture.⁷⁰

The rejection of cultural essentialism, however, does not imply that cultural aspects become altogether meaningless. On the contrary, culture can be a powerful motive towards practical commitment to commercial arbitration. Hence the question remains as to how to maintain the connection between international commercial arbitration and cultural tradition without getting trapped in the culturalist fallacy (the conservative argument which assumes everything boils down to culture)⁷¹. The Culturalist fallacy binds citizens and elites together and fosters their identity in making and implementing common decisions in legal reform and bearing the consequences that derive from them.⁷²

The Middle East can learn to accept a different culture without submerging those differences that need to remain. Japan for example, has retained its basic values while modernising its commercial arbitration law.⁷³ Middle Easterners should be able to make similar efforts.

China is another example of a country having its own culture and responding to the growing importance of foreign trade and market economy. Pursuant to the ‘Open Door’ policy in the 1980s, a legal framework for resolving foreign-related disputes was gradually established. The basic approach is to retain the informal system widely used for resolving domestic disputes and to apply the same principles to foreign-related disputes.⁷⁴

At the same time it has been observed that the culture underlying private adjudication in the West, is likely to be gradually neutralised by a conciliatory culture, which is identified as supporting East Asian tradition, which emphasises harmony and conciliation in a community. Sanders comments:

“The wisdom of the Far East is gradually being introduced into our world as well”⁷⁵

A final example comes from the Middle East region where two different approaches have been adopted as discussed in the previous chapter. In the first, countries prefer to keep international arbitration laws separate from domestic arbitration laws as in the

⁷⁰ *op.cit.* 59. p. 51.

⁷¹ See Stein Ringer (2005). *With Good Reason, Rational Choice and Relativism*. Cyberpoles. p. 6.

⁷² See Furio Cerutti, (2005). *Constitution and Political Identity in Europe*. Nomos Baden. p. 5.

⁷³ See Yasunobu Sato (2000). *Commercial Dispute Processing: the Japanese Experience and Future*. Unpublished thesis, University of London. p. 300.

⁷⁴ *op.cit.* 65. p. 541.

⁷⁵ *op.cit.* 72. pp. 221-223.

case of Tunisia and Bahrain law reform. The other prefers to apply international commercial arbitration principles to domestic laws, as in the case of Egypt, Oman and Jordan. The aforementioned examples show that no society can claim to comply with commercial arbitration law reform unless it is willing to undertake political and cultural reforms.

In short, harmonisation of cultural differences in international arbitration practice should proceed with relative ease. However, if flexibility, tolerance, and persuasive arguments are lacking, procedural harmonisation will be a lost cause.

9.3 Theoretical Paradigm: Comprehensive Dispute Resolution

The previous section has examined and reflected on the main competing claims in relation to the reform process and concluded that reform is not only necessary and achievable, but key areas of concern which should be identified and taken into account to ensure that the reform process will meet its objectives. This section will propose a theoretical paradigm for reform and emphasise the need to introduce with it an alternative dispute resolution (ADR) mechanism in an attempt to achieve a comprehensive model of reform. Before examining the theoretical paradigm for alternative dispute resolution mechanisms, it is necessary to assess the equity of the UNCITRAL Model Law.

9.3.1 Equity of the UNCITRAL Model Law

As time passes, more jurisdictions are influenced by the Model; at the same time, due to the very nature of the Model Law itself, it is inevitably a paradigm in its treatment of the arbitration process. It is not a complete code and needs in any event to be supplemented. The Model Law does not prevent states from adopting its provisions with modification.⁷⁶ Moreover, it should be updated in the light of the diversity of the new legislations based on it and its actual practice.⁷⁷

The main reason to include the theoretical paradigm for reform with ADR is the influence of cultural aspects as has been discussed in the previous section of this chapter. Taking the skeletal nature of UNCITRAL Model Law into consideration, the question remains: is it flexible enough for such modification?

⁷⁶ *op.cit.* 72. p.196.

⁷⁷ *Ibid.*, pp. 203-204.

A number of recent international arbitration statutes, based upon the UNCITRAL Model Law, envisage a separate process of conciliation prior to or at least apart from the arbitration proceeding.⁷⁸

For instance, whilst the Netherlands and some common law countries, such as Australia, Canada, Hong Kong and some states of the USA, have inserted provisions regarding mandatory consolidation, the English Arbitration Act 1996 only provides a voluntary provision along the line of party autonomy. The English approach would be wise if arbitration institutions could articulate it in their standard terms. The Arbitration Act 1996, like the Model Law, does not contain any provision regarding conciliation.⁷⁹

Sanders (2004) suggests that the adoption of the Model Law inspired the insertion of rules on conciliation in many countries and that the appearance of provisions regarding conciliation in modern arbitration laws is a new phenomenon. Not only in the Far East, but also in several European countries, notably Germany, it is not uncommon for arbitrators also to act as conciliators. Even in the United Kingdom, conciliatory elements do not seem to be traditionally unknown in arbitration.⁸⁰

Indeed, for effective reform and if the international business community seeks a set of rules better suited to the parties' needs, then parties should not stop half-way at arbitration, but should move to the ADR (mediation and conciliation) context to ensure a focus on their own sense of justice rather than on that of the arbitrator.

This restriction is necessary for two reasons: first, equitable principles arguably "cannot be interpreted in the abstract; [they] refer back to the principles and rules which may be appropriate in order to achieve an equitable result; second, the achievement of true justice cannot be accomplished through a method by which the arbitrator is allowed to impose a personal sense of equity, for the security of legal relations would thereby be reduced, and arbitrary decisions would abound".⁸¹

To globally harmonise the arbitration regime and other dispute processing mechanisms as well as day-to-day arbitration practice, cross-cultural communication

⁷⁸ See Alan Scott Rau and Edward F. Sherman (1995). Symposium on International Commercial Arbitration: Article: Tradition Innovation in International Arbitration Procedure. *University of Texas International Law Journal*. vol. 89. p. 9.

⁷⁹ *op.cit.* 72 pp. 204-205.

⁸⁰ Peter Sanders (2004). *The Work of UNCITRAL on Arbitration*. Second and Expanded Edition. Kluwer Law International.

⁸¹ See Karyn S. Weinberg, (1994). Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria and Amiable Composition. *B.U. Int'l L.J.* pp. 252-253.

and a multi-cultures approach are required to promote globalisation of the commercial community where various cultures coexist and conflict with each other.⁸² Thus, together with developing other ADR techniques, the combination of conciliation with arbitration should now be sought to complement one other for a more efficient, comprehensive mechanism.⁸³

9.3.2 Introducing Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is a process of dispute resolution falling between simple negotiation between the parties, to conciliation, mediation, consolidation and adversarial determination by arbitration. Mediation is by far the most frequently used option.⁸⁴ It comes from the Latin root “*mediare*”- to halve. In Chinese it means to step between two parties and solve their problem, and in Arabic it indicates manipulation. For Westerners, “mediation” is a procedure that is used increasingly for conflict resolution.⁸⁵ This section will examine why ADR should be considered an area of concern in any reform of international commercial arbitration in the Middle East and in what form.

9.3.2.1 Reasons for Introducing ADR

In the West, the influence of liberalism and rational – choice theory⁸⁶ view resolution primarily through an individualistic perspective. That is, conflict is seen as something residing with individuals and individual ‘rational’ choices, and thus resolution needs to focus at this level.⁸⁷

This differs markedly from the Arab-Islamic conception that focuses on the importance of community cohesion, with individual rights often subsumed by the perceived interests of the greater community. Most notably, at the initial hearing the judge asks the parties if they wish to arbitrate (*tahkim*) or mediate and seek

⁸² *op.cit* 72, pp. 204-205.

⁸³ *Ibid.*

⁸⁴ See Michael Robinson (2001). Arbitration and Alternative Dispute Resolution. Law Notes: Legal information from the Law Firm of Michael Robinson. p. 24.

⁸⁵ See James A. Wall, Jr.; Ann Lynn (1993). Mediation: A Current Review. J. of Conflict Resolution, vol. 37, No.1. p. 160.

⁸⁶ These sociologists and political scientists have tried to build theories around the idea that all action is fundamentally ‘rational’ in character and that people calculate the likely costs and benefits of any action before deciding what to do. This approach to theory is known as rational choice theory. See John Scott, (2000). Rational Choice Theory, From Understanding Contemporary Society: Theories of the Present. Edited By G. Browning, A. Halcli, and F. Webster. Sage Publications. p.1.

⁸⁷ See Benjamin MacQueen, (2004). Civil War, Islamic Politics, and conflict Resolution in the Arab Islamic World. Deakin University. Paper was presented to the 15th Biennial conference of the Asian studies Association of Australia Canberra 29 June – 2 July 2004. pp. 11-14

conciliation (*sulh*). These methods of conflict resolution are well established in the Middle Eastern societies and manifested as locally – grounded approaches to conflict resolution.

The legal anthropologist Lawrence Rosen has discussed the philosophical underpinning of the Islamic court system and jurisprudence as follows:

“Within the cultural context the purpose of law is not to impose an abstract norm but to put people back in the position of being able to negotiate their permissible relationships. The courts are the agencies not of the state but of the community and aim to enforce its prevailing values and practices, to stabilise relation between contending parties and to increase their capacity to manage their social relations. The courts are concerned with cultural not logical consistency, with the coherence of the community’s way of life rather than with the abstract formal consistency of legal norms and precedents”⁸⁸

While it may make sense for Middle Eastern society to follow the customary law or *sulha* (*conciliation*) for resolution of local disputes where the *qudat* (*Judges*) operate as mediators at the local level, most international investors require a more familiar and standard form of arbitration which is consistent and with characteristics which are recognisable from a Western secular perspective.

As shown in Chapter Four, Middle East countries share a conciliation culture in which mediation/conciliation is in principle understood as the primary method for dispute processing, not as an alternative to litigation. For commercial dispute processing, non-confrontational dispute processing has recently become more accepted as the principal method for processing a dispute while maintaining the business relationship, which, is in most cases, a prime concern to the parties. Thus, it should be considered as one of the main drivers of the reform process.

But does the Model Law allow such introduction and modification? Sanders points out that conciliation which is associated in particular with the Far East, where it is still preferred to arbitration or litigation, is now being adopted in legislation by a

⁸⁸ As quoted by Merry, Sally Engle, (1990). The Culture of judging – The anthropology of Justice: Law as Culture in Islamic Society by Lawrence Rosen. Columbia Law Review. December 1990. vol. 90, Issue 8, p. 2311.

number of countries - ironically when adopting the Model Law into which UNCITRAL refused to incorporate conciliation provisions. This is because conciliation is considered useful in implementing arbitral proceedings in practice. Further, businessmen choose arbitration because it offers the possibility of reconciliation in order to maintain the business relationship.⁸⁹ Thus, the relationship between the parties should be duly articulated, in particular, to achieve a consistent and efficient solution in harmony with party autonomy between the parties.

If the cultural arguments for taking ADR into account for any reform in the Middle East remain, the question arises as to how far the introduction of ADR in the said region will be acceptable to parties from other jurisdictions? In short, despite the different rationales, the development of alternative dispute resolution systems and techniques is now widespread in many jurisdictions.

The past decade has seen significant expansion in the acceptance and use of mediation as a process for handling disputes. That expansion has been particularly marked in the legal and business sectors. Indeed, practitioners in the ADR field observe that mediation has begun to replace arbitration as the ‘process of choice’ in the ADR (Alternative Dispute Resolution) “market,” including institutional users like courts and major private consumers of ADR like businesses.

Arguments to explain the increased use of ADR in other jurisdictions may be expressed as follows.

First, ADR will maintain parties’ relationships. Alternative dispute resolution has been the most popular option in solving commercial disputes between major corporations to-date and it has been effective in commercial disputes.⁹⁰

According to Heiden (1999),⁹¹ a trial can have negative outcomes. A victory in court does not mean a company wins a moral or a public relations victory. “Winning in court can give you money,” he says. “It does not give you ideas or customers.”

⁸⁹ *op.cit.* 72. p. 205.

⁹⁰ See Amy I. Stickel (1999). ADR will become a growing factor in commercial disputes. *Corporate legal times*. August 1999. p. 38.

⁹¹ See Thomas J. Heiden reasoning for the growing use of ADR quoted by Amy I. Stickel (1999) in her article; ADR Will Become a Growing Factor in Commercial Disputes. Business Litigation. *Corporate Legal Times*.

The advent of ADR has led to many disputes being ultimately resolved through mediation or negotiation. It involves a cooperative process with the intent to restore relationships rather than declare a winner and loser. Such a dispute resolution method may help repair parties' relationships and be beneficial.⁹²

Secondly, the "market demand" argument; whatever may be said of the early growth of the "modern mediation movement," there is consensus that the current "expansion" is due to a marked increase in the use of what is commonly referred to as "evaluative mediation" in the commercial domain as well as in other conflicts.⁹³

The market referred to here includes both private and institutional consumers, and lawyers, and cases comprising commercial and business matters. In these areas, mediation has increasingly become an evaluative and directive process - "directive" meaning the mediator not only offers judgements but exerts substantial pressure on the parties to accept them.⁹⁴

This is justified, however, as a necessary and desirable response to a strong demand from mediation consumers for just this kind of process.⁹⁵

Further, some commentators see the growth in evaluative mediation as a positive development, brought about by better understanding among clients of what they want from mediators. This suggests that, as mediation has become more widely used and more familiar, consumers of the process have come to realise the value of, and therefore demand, more substantive involvement from the mediator.

Especially in cases that are headed for, or are already in the legal system (where the parties generally, but not always, have lawyers), mediation clients have become frustrated and dissatisfied with mediators who refuse to offer substantive information and outcome predictions, on the grounds of "preserving party self-determination."⁹⁶

Thus, the current expansion in mediation represents a growth in demand for mediation as a "low-risk" evaluation/settlement conference process, taking place mostly "in the shadow of the law" in court-related venues, with the demand fuelled primarily by

⁹² See Matt Arbaugh, (2002). Making Peace the Old Fashioned Way: Infusing Traditional Tribal Practice into Modern ADR. *Pepperdine. Dispute Resolution L. J.* p.319.

⁹³ See Robert A. Baruch Bush (2002). Substituting Mediation for Arbitration: The Growing Market for Evaluation Mediation, and What it Means for ADR Field. *Pepperdine Dispute Resolution Law Journal*. vol. 3 p.113.

⁹⁴ *Ibid.*, see *supra* note 9, "In light of what she perceives as the increasingly coercive character of evaluative mediation, Professor Welsh has analogised its practice to that of a judicial settlement conference."

⁹⁵ *Ibid.*, pp.113-114.

⁹⁶ *Ibid.*, p.116.

courts, other public agencies, and lawyers (or parties who expect to be engaged with them).

This growth is the result of a more educated consumer who better understands what mediation has to offer, after decades of exposure to the process, and is prepared to take advantage of it when presented with a form of practice that is genuinely helpful.⁹⁷

Thirdly, as a response to judicialised arbitration, perhaps ironically the move towards a more protective process may have accomplished precisely what it was intended to avoid. Making the arbitration process more protective automatically inevitably makes it more formal, cumbersome, expensive, and contingent. In other words, it makes arbitration more like the judicial process itself. Nor are the effects of these “reforms” limited to certain kinds of cases; the reformist impulse, coupled with the increasing involvement of lawyers as advocates in arbitration, have begun to change the shape of arbitration practice generally. The result has been a movement towards a “judicialised” form of arbitration, resembling adjudication itself more than the original arbitration process.⁹⁸

In response, it has been said: “consumers are not stupid”. If the product no longer meets the need for which it was originally sought, it loses its appeal. The reform of arbitration began to a decline in popularity, beginning in the late 1980s. This is where the new set of facts, concerning developments in mediation practice and use emerged. Finally, ADR is a collection of ideas for encouraging disputants to play a greater role in settling their own differences, for providing greater flexibility in processing their own claims, and for doing so,⁹⁹ no one argues that any given alternative method would be universally applicable to all cases. If there is value in the ADR, it is because it often provides flexibility and a greater sense of satisfaction to the parties involved in the dispute.¹⁰⁰

According to Fleming, (1986): “the dispute settlement is a dynamic process. The parties who participate in it will make adjustments designed to improve their respective positions. When they do, the “new” may become the “old” and a new life cycle, demanding change, will begin. For that reason, the success of ADR will depend

⁹⁷ Ibid., p.117.

⁹⁸ Ibid., pp.120-121.

⁹⁹ See Robben W. Fleming, (1986). Reflections on the ADR Movement. Cleveland State. *Law Review*. p.528.

¹⁰⁰ Ibid., p.524.

heavily on its ability to continually evaluate its own work, and to change its outlook in order to adapt to new conditions.”¹⁰¹

9.3.2.2 ADR in What form?

In order to determine what form of ADR could be introduced into Middle East international commercial law reform, it is necessary to learn from the UNCITRAL Model Law and the arbitration legislation of other countries. It is important to examine how the ADR mechanism has been introduced into other jurisdictions. The most common procedures are mediation or a combination of mediation and arbitration. The latter procedure is a unique resolution mechanism to resolve foreign-related disputes in China. This method should be recognised and supported in any future arbitration law reform in the Middle East. The following part will examine this procedure in comparison to other common methods of ADR, namely, negotiation and mediation.

Negotiation

Negotiation means that parties in dispute negotiate or talk among themselves to resolve the conflict or to work out a compromise between themselves. This is the simplest and very often the quickest way of settling commercial disputes, because the parties themselves are in the best position to know the strengths and weaknesses of their own cases. Therefore, they are in the best position to discuss and work out compromise amongst them. Further, there is no legal formality involved, so they are able to save a great deal of time in reaching a common solution.

This is the ‘soft approach’, preferred in Asian including Middle East countries’ culture because of its ability to maintain harmony and good relationships between people. More importantly, it is able to ‘save the face’ of the disputants, thereby maintaining the business relationship between them.¹⁰²

Mediation

Different notions come to mind when talking about mediation. Consequently, when the question arises as to what exactly the mediator should do when working towards achievement of agreement, the answer differs substantially among mediators. The

¹⁰¹ Ibid., pp. 528-529.

¹⁰² See Margaret Wang (2000). Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce? *Arbitration International* vol. 16. No. 2. p. 191.

problems and concerns depend to some extent on how the mediator tries to achieve his goal.¹⁰³

Here, two main factors can affect the effectiveness of the role of mediator. First is the mediator's ideology. According to (Stein 1985), "In addition to culture, training, and context, the mediator's ideology serves as a strong influence for tactic selection. To this end, mediators' reading of the conflict, mediators' culture, their training, as well as the context and mediators' ideology, determine the techniques employed in mediation."¹⁰⁴

The second factor affecting the effectiveness of mediation efforts is the parties' motivation to negotiate and reach an agreement. "Like the motivation to agree, the parties' commitment to the mediation process increases the effectiveness of the mediators' techniques. Hiltrop (1989) reports, for instance, that settlement is highest when mediation is sought by both sides. Similarly, Carnevale, Lim, and McLaughlin (1989) report that settlement is positively correlated with receptivity to mediation. Consistent with the effects of motivation to reach agreement and commitment to the mediation process is the effect upon the parties' relationship."¹⁰⁵

Combination of Mediation and Arbitration

In developing a model for harmonised international commercial arbitration as a dispute resolution mechanism, it is important to recognise the existence of two methodological parameters within the Middle East region. First is commercial arbitration according to the Islamic law context, and second is social justice in terms of culture, ethics and tradition. This distinction is vital because it is neither sufficient nor acceptable to generate reform in the Middle East without careful review of validation processes and limitations in light of these two parameters. Islamic Law and customary practice are two important sources of legislation. These two sources are themselves quite capable of accommodating harmonisation within the wider cultural context in which they are found. Therefore, any reform of commercial arbitration processes in the Middle East has to achieve validation from the perspective of Islamic law principles (fiqh) as well as from the cultural dimension.

Accordingly, the suggested theoretical paradigm has equated arbitration as a valid concept according to Islamic fiqh, and mediation as a valid concept in terms of

¹⁰³ See James A. Wall, Jr.; Ann Lynn, (1993), Mediation: a Current Review. The Journal of Conflict Resolution. vol. 37, No. 1 p. 170.

¹⁰⁴ Ibid., pp.170-174.

¹⁰⁵ Ibid.

culture, ethics and tradition. Accordingly, reform does not lead to the demise of Middle Eastern basic principles and fundamental concepts.

Mediation-arbitration is a combination of mediation and arbitration. The process is intended to allow the parties to profit from the advantages of both dispute settlement procedures. As mentioned before, this method is China's unique innovation in that arbitration is combined with mediation, a method known as the "med/arb".

It should be further noted that a mediator may act as an arbitrator in the arbitral proceedings and the legitimacy of meeting by arbitrators during the process of mediation should be accommodated, so as to provide a basis for a combination between arbitration and mediation.¹⁰⁶

The question is: why should this form be taken into account. What about different practices and expectations of the parties from different cultural, economic and legal backgrounds? To answer these questions, it is important to analyse the main legal aspects of this method.

The Characteristics of Mediation/Arbitration

The benefit of this method comes from its characteristics as follows:

The "Mediator and arbitrator is the same person (which is not the case in 'stand-alone' mediation); the mediation is an integral part of the arbitration, in the same tribunal; a mediated settlement will be handed down as an enforceable arbitration award. If such settlement is reached, the same tribunal automatically will revert to arbitration proceedings; mediation will be carried out only at the request of both parties, without obligation and the mediation process will be extremely informal and flexible. There is no set rule to be followed; a tribunal may conduct mediation in any way it deems appropriate".¹⁰⁷

The Mediator's Role

It is essential to examine the role of the mediator in order to assess its uniqueness. It has been indicated that the main role of a mediator is to investigate the facts and set out clearly to the parties the weaknesses and strengths of their claims. Then, the parties are encouraged to reassess each other's underlying problems and compromise wherever possible.

The mediator's role can be summarised as follows:

¹⁰⁶ See Song Lianbin, Zhao Jian and Li Hong (2003). Approaches to Revision of the 1994 Arbitration Act of the People's Republic of China. *Journal of International Arbitration*. vol. 20 No. 2. p.188.

¹⁰⁷ *op.cit.* 65, p. 543.

“To suspend the arbitration proceedings and commerce mediation at any time during arbitration if both parties agree to settle their dispute by mediation; to facilitate communication between the parties, including holding ‘caucus sessions’; to investigate actively and understand the parties’ underlying problems and intentions. Without being under any obligation to give reasons, the mediator may suggest solutions to the parties, whether possible; information obtained during the mediation process must not be disclosed or re-used by the mediator or the parties on other occasions; to assist in drafting a settlement agreement and had it down as an enforceable arbitration award if settlement is agreed between the parties and if settlement is unlikely, or if the parties do not want to continue further, the mediator will conclude the mediation stage and revert to an arbitration process, with the same tribunal.”¹⁰⁸

Impact of the Combined Mediation/Arbitration Mechanism

In advocacy of this form of ADR in international commercial arbitration law reform in the Middle East, the argument can be based that the combined mediation/arbitration mechanism has been producing successful results in similar conciliation legal culture like China. It is not surprising therefore, that this method has attracted much attention in the international dispute resolution community. It has been argued that, this procedure offers important advantages:

“Time and resources are saved by avoiding the need to proceed through a different tribunal if mediation fails; the success rate is higher than in ‘stand-alone mediation; the mediation settlement will be handed down as an enforceable arbitration award, in contrast to ‘stand alone’ mediation awards which constitute only a contractual obligation and after the mediation process, whether settlement is achieved or not, the parties will understand each other better. This tends to preserve good relationships after the final award.”¹⁰⁹

¹⁰⁸Ibid.

¹⁰⁹ Ibid., p.544.

9.3.2.3 Evaluation of the ADR Mechanism

Since ADR is collateral, informal, relationship-based model of conflict resolution, it usually fit better within a collectivist culture.¹¹⁰ This method is no longer only applied in traditional conciliation culture. It is often used in Europe, and in USA.

In Europe, the 2002 European Commission's Green Paper on *Alternative Dispute Resolution in civil and commercial law* has raised for formal consideration by Members States whether there should be EU legislation governing a wide spectrum of ADR mechanisms with civil litigation procedure. In the context of current EU momentum towards harmonisation of certain aspects of the civil litigation procedure of Member States in relation to commercial disputes, the desirability of the United Kingdom at least exploring the feasibility of an ADR Act would seem to be strongly demonstrated.¹¹¹

The English rules which are based on the Woolf Report place considerable emphasis on efforts to reach a settlement. Whether this will also lead to a change in arbitration attitudes cannot yet be predicted with any certainty. However, the 1996 English Arbitration Act requires arbitrators to adopt suitable procedures to avoid unnecessary delay.¹¹²

In the United States, the courts can appoint a special master and require parties to first try resolving their dispute through ADR.¹¹³ Further, in a research report on alternative dispute resolution (ADR) services in the United States (Brett *et al.*, 1996) found that about 78% of cases referred to mediation were resolved, and mediation had a number of other advantages over arbitration: mediation participants are more satisfied than arbitration participants with the process, its implementation and outcome, as well as with its effects on the parties' relationship.

Fellows and Hancock (1994), indicated that, culture has a significant impact on domestic issues and disputes. The success in resolving domestic disputes in China with the combined mediation/arbitration practice has much to do with Chinese culture and with a lack of alternative for locals.¹¹⁴

¹¹⁰ See David Pitts and Yuseok Moon (2002). Individualism, Collectivism & Transformative Mediation. Paper prepared for submission to the 15th annual conference of the International Association for Conflict Management, Utah. p. 5.

¹¹¹ See Sir Anthony Colman, (2003). ADR: An Irreversible Tide? *Arbitration International*, vol. 19, No.3 LCIA, p.304.

¹¹² See Norbert Horn (2000). The Development of Arbitration in International Financial Transactions. *Arbitration International*, vol. 16, no. 3. LCIA, p. 295.

¹¹³ *Ibid.*

¹¹⁴ *op.cit.* 65, p. 544.

Major international arbitration institutions have been developing their ADR facilities and capabilities with understandable urgency, because these mechanisms are market-driven. The AAA, the ICC, ICSID, the LCIA and WIPO all promote their own sets of conciliation or mediation rules; and there are now also many domestic organisations around the world offering mediation services, particularly in the USA and other parts of the common law world.¹¹⁵ A mediated agreement in “pure” mediation is generally enforceable as a contract. But such a settlement is not covered by the New York Convention. Thus, a court will not give a mediated agreement the same deference it gives an arbitral award. The question thus arises as to whether a mediated settlement in the med/arb process is enforceable like an arbitral award.¹¹⁶

After a through examination of all the relevant factors as above, if ADR is searching for new directions in an increasingly globalised world where the role of ethics is given more primacy, and if leading jurists in the world are calling for the teaching of comparative law and legal pluralism as an acknowledgement of the fact that human societies are not discrete objects of their own, like flotsams and jetsam in the rivers of time, but are closely interconnected, and if ADR is enshrined in Muslim juridical thought and if Muslims in the Diaspora come from legal pluralistic backgrounds and are practising legal pluralism, then, might the time have arrived for all these issues to be looked at in an integrated fashion?¹¹⁷

9.4 Mechanism for Reform: Practical Implication

This part will suggest a practical mechanism for introducing international commercial arbitration law reform in the Middle East region. First, it will suggest the institutional mechanism for harmonising process, and second, reflect on the role of existing regional conventions as well as regional dispute resolution centres in the reform process.

9.4.1 Instituting an Intraregional Harmonisation Process

Because of the similarity of concept, circumstances and purpose, a practical example suggestion is to establish an institution for international commercial arbitration law reform in the Middle East within the Arab League, similar to the African OHADA.

¹¹⁵ See Martine Hunter (2000). International Commercial Dispute Resolution: The Challenge of the Twenty-first Century. *Arbitration International*. vol.16, No. 4. LCIA. p. 383.

¹¹⁶ See James T. Peter (1997). Note & Comments: MED-ARB In International Arbitration. *The American Review of International Arbitration*. Juris Publishing. p.3.

¹¹⁷ See Mohammad M. Keshavjee (2002). “Alternative Dispute Resolution: Its Resonance in Muslim Thought and future Directions”. The Institute of Ismaili Studies. p. 207.

OHADA is the French name translated as the Organisation for Harmonisation in African Business Law.¹¹⁸

Like Middle East laws, most African laws were unreformed laws from the colonial era that had often become grossly out-of-date. In addition, acknowledgement of existing commercial legal instruments in member countries was not widespread among their citizens or even among their legal professionals.¹¹⁹

As a collaborative effort to enhance access to international trade law information for the joint benefit of African countries, OHADA exists under the treaty on the Harmonisation of business law in African signed in Port Louis, Mauritius, on October 17, 1993.

As October 1, 2001, sixteen African states were members of OHADA. Following the African model, the institution suggested for the Middle East region will be able to restore the legal and judicial security of economic activities in order to promote investors' confidence and to facilitate international trade. The institution should have the following objectives: (a) make available to each country common commercial rules that are both simple and adapted to their current economic conditions; (b) promote arbitration as a speedy and confidential means of settling commercial disputes; (c) improve the training of judges and auxiliary officers of justice; and (d) encourage the setting up of a Middle East Economic Community.

Similar to the African structure of OHADA, the new institute suggested for the Middle East could be formed from the four institutions responsible for formulation and implementation of its new international commercial arbitration law.

The Council of Arab Ministers of Justice meets regularly to adopt by unanimous vote the proposed uniform international commercial arbitration law. The Permanent Secretariat is attached to the Council of Ministers and is responsible for the preparation of uniform law in consultation with the governments of Middle East countries. The advanced regional School of Magistracy is attached to the Permanent Secretariat. It is responsible for the training of judges and auxiliary officers of justice of their countries. The Common Court of Justice and Arbitration has the following attribution: it is consulted for its advisory opinion on draft uniform law before its

¹¹⁸ See OHADA- a Source of Harmonised African Commercial Law, (2002). International Contract Adviser, vol. 3 No. 13. p. 3. Kluwer Academic Publishers.

¹¹⁹ Ibid.

submission and final adoption by the Council of Ministers, and also on the interpretation and application of uniform law.

The OHADA experience shows it is possible to establish a uniform arbitration law based on the UNCITRAL Model Arbitration Law. The OHADA model has been applied to all member states, whether the arbitration involves parties from an OHADA country or from a foreign state. The law is modern and flexible; its purpose is to promote arbitration as an efficient means to settle disputes. Further, the Rules of Arbitration of the Common Court of Justice and Arbitration set out the functions of the Court with regard to arbitration and other jurisdictional matters.¹²⁰

If that is the case, and remembering what Thomas Jefferson wrote to a friend in 1816, “I am certainly not an advocate for frequent and untried changes in laws and institutions, but I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truth disclosed, and manner and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”¹²¹, as well as what Gabriel Wilner said, “...the effort must go beyond merely educating the governments and business and legal circles in developing countries of the advantages of the process...”¹²² for the same result to be expected in the Middle East region.

9.4.2 Unification of Regional Dispute Resolution Centres’ Rules

The second practical suggestion to introduce international commercial law reform is unification of existing regional dispute resolution centres’ rules. In 1983, the establishment of the Arab Amman Convention on Commercial Arbitration¹²³ was agreed. In 1987, fourteen Arab states convened the Amman Arab Convention on Commercial Arbitration, which was modelled on the Washington Convention. The Amman Arab Convention was intended to establish the Arab Centre for Commercial Arbitration in Rabat, Morocco. The requirement is that all proceedings shall be

¹²⁰ *Ibid.*, p. 13.

¹²¹ The writing of Thomas Jefferson 40 (Lipscomb ed.), as quoted in Stein and Hay, *Cases and Materials on the Law and Institutions of Atlantic Area* iii (1963); and in the work of Philip C. Jessup (1964). “Diversity and Uniformity in the Law of Nations.” *The American Journal of International Law*. vol. 58. p. 343.

¹²² *op.cit.* 65.

¹²³ This Convention was convened to establish the Arab Centre for Commercial Arbitration and rules therefore. The centre was to be seated in Rabat, Morocco. In fact, it has not been established.

conducted in Arabic; this, however, has limited the Centre's appeal outside the Arab states.¹²⁴

Despite twelve¹²⁵ countries signing the convention, the Centre has never been established and to-date, no commercial dispute has been settled or even referred to arbitration under the Amman Convention. One reason could be the difficulties associated with having different commercial arbitration laws among the members state. In other words, the inconsistency of legal framework in Middle East region have negatively impacted on the establishment and the function of the Amman Convention. On the other side, Egypt agreed to establish the Cairo Regional Centre for International Commercial Arbitration (AALCC). The Centre was apparently responsible for Egypt's 1994 Arbitration Act, which is said to have influenced, in turn, other Arab states, attempts to modernise their arbitration laws. Following the enactment of Egypt's Arbitration Act, the Centre began to receive significant numbers of cases. To-date, 320 international matters have come before the centre - in recent years at the rate of approximately 50 per year.¹²⁶

In contrast to the Amman Convention, the enactment of the Egyptian 1994 Law based on the UNCITRAL Model Law has helped the Cairo Regional Centre for International Commercial Arbitration become a stronger presence for arbitration in the Middle East, as well as have a positive impact on trade in Egypt. The main lesson to be learnt from these two examples is the strong relationship between establishing harmonised international commercial law reform based on the UNCITRAL Model Law and the effectiveness of regional dispute resolution centres.

Further, numerous national arbitration centres have sprung up in the Middle East, including 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 (which applies the 1976 UNCITRAL

¹²⁴ See Charles N. Brower and Jeremy K. Sharpe (2003). International Arbitration and the Islamic World: The Third Phase. *The American Journal Of International Law*, vol. 97, No. 3 p. 654. See Also Mahir Jalili (1990). Amman Arab Convention on Commercial Arbitration, *Journal of international Arbitration*.

¹²⁵ These twelve countries are: "Algeria, Iraq, Jordan, Lebanon, Libya, Morocco, Palestine, Sudan, Syria, Tunisia, UAE and Yemen." Countries not signing the convention: "Bahrain, Egypt, Kuwait, Oman, Qatar and Saudi Arabia."

¹²⁶ See Charles N. Brower, Jeremy K. Sharpe (2003) International arbitration and the Islamic World: The Third Phase. *The American Journal of International Law*, vol. 97, No. 3. p.654. See also Fathi Kemicha, The Emergence of New Arbitration Centres in the Arab World, in *Law of International Business and Dispute Settlement in The 21st Century: Libera Amicorum Karl-Heinz Bockstiegel 371, 373* (Robert Briner, L. Yves Fortier, Klaus Peter Berger, & Jens Bredow eds., 2001).

Arbitration Rules); the Kuwait Centre for Commercial Arbitration; and, in the United Arab Emirates, the Abu Dhabi Centre for Conciliation and Arbitration, and the Dubai Centre for Arbitration and Conciliation.

In order to further encourage the use of arbitration, the Arab Association for International Arbitration (AAAI, according to its French acronym) was created in 1991. Its goals are to establish arbitration in the curriculum of legal studies in the Arab world; promote arbitration in the Arab Chamber of Commerce “so that arbitration becomes the rule for the settlement of disputes relating to national and international commerce and that resort to national courts becomes the exception”; and stimulate the development of modern, progressive arbitration legislation.¹²⁷

The proliferation of rules and protocols of arbitration centres all vying for a place in the sun, if not supremacy, in the Arab world, may be more a sign of weakness than of strength. The absence of any serious reported arbitration in Rabat, despite a genuine attempt in the Amman Convention of 1987 to set it up as a major and supreme centre for commercial arbitration is one example of such weakness.¹²⁸

More generally, arbitration centres, in the existing multilayered outdated arbitration legislations to which several jurisdictions have adhered, have apparently tried to circumvent this weakness, but the problem has become more complex because of the existing situation. This complexity has become more obvious with a long string of statutes setting aside arbitration awards granted, by freezing them, subjecting them to various appeals, or simply ignoring them.¹²⁹ Therefore, the necessity of reform to focus on the impact of regional centres to adopt or to elaborate a coherent, modern legal framework to guide international commercial practices has become somewhat obvious.

It can be observed that international commercial arbitration systems in the region supported by numerous domestic substantive and procedural legislations have proven inappropriate or unsuitable for the processing of disputes involving cross-border commerce or business. As commercial activities become more global, the greater becomes the need for global processing.

¹²⁷ Ibid., p. 655. See also, Abdul Hamid El-Ahdab (1992). Why Create the Arab Association for International Arbitration? *INT’L ARB.*, vol. 29 No. 31 (“The role of the AAAI is indeed to help the ICC in this task by communicating the case law, academic writing and legislation of Arab countries in a regular manner and by co-operating with it in the ... performance of awards in these countries.”).

¹²⁸ See Mohamed El Mernissi (2002). Arbitration in Morocco. Realities and Perspectives. *Journal of International Arbitration*. vol.19 No. 2. Kluwer Law International. p. 136.

¹²⁹ Ibid.

Any reform of international commercial arbitration in the Middle East region should be compatible with global standards based on the Model Law. Given the unique features of the Model Law, certain cultural and ethical norms make it particularly unsuitable if it has been simply transplanted without adjustment to take account of local customary and cultural values and norms.¹³⁰ Thus, reform becomes more than simply organising a draft of law; it has to go far beyond simple articles of dispute resolution mechanisms to reflect on main factors which can facilitate the modernisation of regional laws so that regionalism assists and enhance the harmonisation process of the Model Law.

Several questions have been examined to show how the core social values and harmony can be preserved and maintained since where “reason is silent; conflict between rival values cannot be rationally settled.”¹³¹ Other areas still pose challenges and it has been argued they should be open to change if international commercial arbitration law reform is to be effective.

¹³⁰ See Catherine A. Rogers (2001). *Between Cultural Boundaries and Legal Traditions: Ethics in International Commercial Arbitration*. Social Science Research Network. pp. 86-87.

¹³¹ *Ibid.*, p. 77.

CHAPTER TEN

General Conclusion

As a result of the global process of harmonisation of international commercial arbitration law, this thesis has reviewed and analysed the impact of the doctrine of regionalism in terms of the cultural, legal, social and historical factors which exist in the Middle East region. An understanding of these factors is vital in determining whether regionalism as a concept in the context of the Middle East can sustain or facilitate the harmonisation process in international commercial arbitration law.

10.1 Main Findings

Regionalism in the context of the Middle East has different values and cultural norms regarding dispute resolution mechanisms and, in particular, international commercial arbitration, from those found in the West, which have significantly influenced the development of the legal framework of the UNCITRAL Model Law. The hypothesis proposed in Chapter One has been supported, in that the regionalism doctrine in the Middle East region negatively affects the successful establishment of a framework for harmonisation of international commercial arbitration law. In respect of the first research question, the findings identified areas of differences between Middle Eastern and Western legal culture with regard to international commercial arbitration, and explained how such differences exist in terms of socio-legal and cross-cultural comparative social values. As regards the second research question, the Middle East region can comply with international commercial arbitration concepts and its values can be accommodated and maintained within the framework of the UNCITRAL Model Law. Any further misgiving of the Middle East region to the global process of harmonisation is unjustified.

The main chapter findings are as follows: Chapter Two showed that the harmonisation process is not a new phenomenon; it is a continuous process, and the development of the *lex mercatoria* and evolution of the UNCITRAL Model Law should be understood in this way. Despite the fact that the UNCITRAL Model Law is a standard framework for universal harmonisation, evidence from other regions, shows that cultural deviation exists within Europe “differences between civil and common law”. Further, other regions like NAFTA, MERCOSUR, Latin America, Asia and Africa have regulated their laws differently, emphasising the impact of regionalism on the legislative framework of international commercial arbitration. This chapter has provided the bases for pursuing discussion.

By applying John Austin's theory of legal positivism to the Western region, Chapter Three explained how commercial arbitration has been developed within Western culture. Firstly, normative concept was analysed to clarify the behaviour in the West towards the development of modern international commercial arbitration. Tracing commercial arbitration history in this region, evidence shows interjurisdictional competition in the UK as well as the USA, and market competition for hosting commercial arbitration cases for economic reasons played a significant role in the development of modern international commercial arbitration law. The normative concept explains how the Model Law was developed spontaneously from the basic desire to see trade disputes settled, and harmonisation can be best explained in terms of the need to produce goods and services.

Further, the normative concept showed how the Western concept of individualism played a significant role in its development since the concept of party autonomy, considered a fundamental characteristic of commercial arbitration, is fully respected and acknowledged in the said culture in terms of recognising the arbitral contract developed by the parties. Thirdly, it showed how merchants played a major role in establishing their own courts, which applied the *lex mercatoria* developed by them whereas commercial arbitration was developed as a private mechanism for dispute settlement.

The second concept of positivism legal theory - the institutional concept - explained how modern commercial arbitration law has developed as Western societies have adopted anti-statism in the legislative process. Evidence from Europe and USA showed how the positions of states have changed over time in favouring development of the law by giving up the traditional position taken by legal systems and allowing other lobbying and interest groups to have their role in the legislative process. The coercive concept of John Austin's positivism legal philosophy explained how commercial law has been obeyed and fulfilled. The contract's nature in terms of the intentions of the parties as well as the binding authority is fully respected under the judicial character of law and this character has been introduced into the UNCITRAL Model Law.

Using the same legal philosophy Chapter Four showed how the Middle East region has different social and legal values. Contrary to Western competition values, the Middle East has the concept of "given law". This concept has its base within the religious values of Islamic law which is derived from the Qur'an and Sunnah, thus,

there is no need to compete with others for establishing law. Further, this chapter showed how the concept of collectivism dominates the Middle East region's culture. According to this concept, and contrary to the West, harmony of the community not the interest of individual is the core concern. In other words, individuals cannot agree on matters contrary to group values or which could negatively affect the community, and if they do, the agreement will be null and void. Considering the second concept of John Austin's positivism legal philosophy, the state in the Middle East has a position contrary to that in the West. The state's monopoly in terms of statism is the general attitude in the legislation process.

Interest groups' activity to advocate their interests does not exist; the state is considered the only legitimate power to protect the interests of the society as a whole. Regarding the coercive aspect, contrary to the West, an arbitration agreement is revocable if the final tribunal's decision has not been issued. In other words, to promote the harmony of society, the most important concern is not to "judge" but rather to settle the dispute. Therefore, judging the dispute in terms of winner or loser should be the last choice, thus, unsurprisingly an agreement is revocable, favouring mutual resolution of the dispute.

Chapter Five showed how the Western region is very keen to harmonise international commercial contracts and showed some of the major steps taken to accomplish this. Further, it showed competing theories governing international contracts in relation to the state contract in general, and how Western cultural theories favoured some over others. It showed western values favour sanctity of the contract over flexibility. Contract conditions must be fully detailed in clauses and each clause is expected to be fully executed by contract parties. It also showed western legal culture favoured monism over dualism, that one set of legal rules are applied to international contract. Despite the public law argument, western values favour arbitrability of the contract with public law elements. These perceptions can be seen incorporated in the framework and clauses of international commercial arbitration law.

In order to seek and give meaning to Middle East perceptions of international contract principles, Chapter Six examined and showed that the Middle East has perceptions about contract principles that differ from those adopted in western culture. Many factors were identified as influences the formation of this different perception and understanding. Tradition and ethics favour the conciliation character of the contract. Islamic Law also plays a significant role in Middle East perceptions of the contract.

Fundamental validation of the contract is not referred to the intention of the parties, rather, to the principles of Islamic Law. Both the motive and reason should be valid according to Islamic Law to validate the contract. Reference to certain contract conditions in Islamic Law, i.e. “to contract on future thing”, and “choice of special condition” are similar to international commercial contract principles’ reference to potential contractual issues not actual ones. Contracting on a future issue is a unique condition in Islamic Law which requires in general that the contract’s subject should exist at the time of contracting. Accordingly, the Middle East’s contrary position to the West has different concepts of international commercial contract that favour flexibility over sanctity, public over private and dualism over monism. Finally, while arbitrators are immune under the Western principle of the contract, they are liable for their acts according to the Middle East principle of contract.

In examining the impact of the UNCITRAL Model Law in Middle East region, Chapter Seven provided evidence of misgivings as to the Middle East’s participation in the global harmonisation process of international commercial arbitration law. The chapter indicated that the Middle East region has a complex, outdated, and multilayered legislation framework. Further, countries can be categorised into four different categories in respect of their approach to international commercial arbitration. Five countries, Bahrain, Tunisia, Egypt, Oman and Jordan, of eighteen countries in the Middle East have adopted the UNCITRAL Model Law. The second category (Saudi Arabia and Yemen) has adopted the principle of the Islamic Law concept to govern commercial disputes and their settlement. The third category (Algeria, Lebanon, Morocco and Syria) uses the French approach mainly for historical reasons. The fourth category (Kuwait, United Arab Emirates, Palestine, Libya, Sudan, Iraq and Qatar) has adopted a mixed statutory approach to arbitration laws (Islamic Law and secular Western-inspired statutory during the colonial era.)

Analysis of how the UNCITRAL Model Law has been introduced in these five countries was undertaken in Chapter Eight, and showed that some Middle East perceptions of the contract principle have been adopted. The Dualism principle has been adopted in the case of Bahrain and Tunisia. Egypt has issued a supplementary article favouring public over private contract principles. In other words, the state contract in Egypt is subject to administrative law and is not allowed to be arbitrated spontaneously before certain procedures have been obtained first. All five countries share the flexibility principle of the contract in that in cases where parties have

reached agreement before the arbitral tribunal decides the dispute, the arbitral tribunal issues its decision according to the conditions of such agreement. Most importantly, almost all main features of the UNCITRAL Model Law are maintained in their legislation.

Chapter Nine showed that the UNCITRAL Model Law can be introduced to the Middle East region provided it accommodates local values. This chapter reflected on the competing arguments used to deny the reform and participation in the global process of harmonising international commercial arbitration based on the UNCITRAL Model Law. It showed that such arguments can be appealed, and will not withstand insightful critical analyses and evaluation. On the one hand, it is argued by Saudi Arabia and other countries that Islamic law should govern and be applied to international commercial contracts. This argument directly or indirectly suggests that modern international law cannot be introduced in these jurisdictions. Reference to Islamic methodological showed the principles, concepts and framework of international commercial arbitration law are valid according to primary and secondary sources of Islamic methodology. The chapter also, defined why reform is problematic and showed how it could be introduced. Other social forces such as cultural estoppel should not work as a barrier to reform. An open regulatory system, rather than, statism and state monopoly of the legislation process, should be seriously considered to ensure efficient law reform. The second part of this chapter suggested a theoretical paradigm of comprehensive dispute resolution based on the UNCITRAL Model Law. This paradigm suggested introducing the ADR mechanism of mediation/arbitration as a tool for dispute resolution since it could take the region's conciliation social values into account, is an accepted tool within the framework of the UNCITRAL Model Law, and other regions, for example, China, have introduced the mechanism in their arbitration law. Further, this chapter suggested a mechanism for introducing law reform by instituting the reform process among the eighteen countries in the region under the umbrella of the Arab League based on the experience of African countries that have used the OHADA reform mechanism.

The chapter also suggested unification of regional dispute resolution centres' rules to promote a comprehensive reform framework. Thus, the UNCITRAL Model Law could be incorporated into Middle East regional legislations despite differences in cultural values; regionalism could promote and add to the harmonisation process of international commercial arbitration law, and not act as a barriers.

10.2 Contribution

The Middle East should face the reality that its commercial activities will inevitably include cross-border commercial disputes. Harmonisation requires a new system that reflects global standards of the UNCITRAL Model Law. This thesis makes a valuable contribution to the discussion on the way in which harmonisation of commercial arbitration can be pursued in the Middle East. This issue has not been previously researched in such a comprehensive manner.

By applying theories accepted in the West, the thesis adopted Western positivism legal theory to undertake a thorough analysis of the legal culture displayed in commercial arbitration legal system in the Middle East. It examined pre-existing Middle East national laws and prevailing cultural values, and legal environment according to the scope of this Western philosophical legal framework in order to explain regional legal values within a structure of this legal theory. Further, it has identified the cultural deviation issue within a cross-cultural and comparative law analysis.

It identified areas where important cultural differences exist between the Middle East Region and Modern International Commercial Arbitration law, including differences between arbitration legal systems which exist within the region. Thus, applying western positivism legal theory to analyse Middle Eastern legal culture values makes the research arguments more convincing and persuasive.

The thesis provides broad knowledge of the historical source of Middle East commercial arbitration legal culture. Starting from the historical legal concepts and thoughts of Arab society, it undertook a systematic analysis on the evolution and development of international commercial arbitration legal systems in major historical periods in the Middle East. In this sense, it has provided a summary of Middle East legal culture regarding dispute resolution mechanisms.

Moreover, the thesis has merged theoretical and practical aspects within the context of international commercial arbitration awards to offer mechanisms to handle multi-valued international commercial disputes. It suggests a comprehensive theoretical paradigm.

It generates a proposition that reforms are more likely to succeed if their designers adjust them to the cultural environment, thus supporting the argument that regional values can add to the global activities of the harmonisation process of international commercial arbitration law. In addition, a clear understanding of the guidelines for the

reform and development of Middle East international commercial arbitration legal systems has been achieved. Towards this end, this thesis can be used to assess the stability of transplanting legal aspects of the UNCITRAL Model Law to the Middle East region.

It also provides dual awareness of the harmonisation process. On the one hand, it assures Middle East countries that they will have access to an efficient mechanism to solve potential disputes which might arise from an international contract by offering decision-makers certainty that their regional values will be accommodated within the accepted international legal standards of the UNCITRAL Model Law for commercial dispute resolution legislations.

On the other hand, it offers the Western comparative law literature detailed analyses of differences and similarities existing with Middle East commercial arbitration culture displayed in their legal norms. Thus, it shows the legal science how Middle East cultural deviations should not be viewed as barriers to the global harmonisation process but rather as crucial elements to ensure successful reform of international commercial arbitration.

10.3 Further Research

It seems appropriate to include in this thesis the consideration of other areas requiring further research, which, although necessary in international commercial arbitration, are beyond the remit of this study:

1. Assessing the effects of current legislation of international commercial arbitration on Middle East national economies.
2. Explanatory studies on the role of legal professionals, mainly lawyers, judges and academics as well as other interest groups like corporations, multinationals and non-governmental organisation (NGOs) promoting the reform process.
3. Explanatory studies to formulate a code of conduct in relation to international commercial arbitration reflecting common legal values accepted by all countries within the Middle East region.

It is hoped that with comprehensive and extensive studies being carried out in the suggested areas of further research, comprehensive measures can be adopted to establish a model law of reform incorporating a regional code of conduct within the framework of the UNCITRAL Model Law of international commercial arbitration.

10.4 Practical Implications of the Research

According to World Bank data, the Middle East suffers from insufficient foreign direct investment. The data¹ indicates:

Data Profile	2000	2003	2004
Merchandise trade (%of GDP)	50.0	52.1	55.1
Foreign Direct Investment, net inflows US\$	4.1 billion	5.6 billion	5.3 billion.
Long-term debt US\$	121.2 billion	137.9 billion	141.0 billion.

This work has suggested the establishment of an institution which has the mandate for the harmonisation process, overseen by the Arab League. This suggested institution will facilitate research and propose practical measures. This new institution will assist other agencies involved in the legislation process, and decrease the level of state monopoly. As a consequence of this practical mechanism, expected outputs will enable countries to overcome the inconsistency of intraregional commercial arbitration law, and enable national economies to engage more effectively in the global context.

10.5 Limitations

Necessarily, a thesis on international commercial arbitration will focus on this aspect of law and practice; however, cases materials from the region are limited in availability. Due to the confidential nature of commercial arbitration procedure, detailed arbitral cases are not accessible in the region. Moreover, there have been a limited numbers of arbitral cases over the last two decades because of outdated legislation which exists in the Middle East. Another limitation is the limited number of countries that have introduced reform into their commercial arbitration legislations. Baring in mind the aforementioned limitations and the existing negative impact of the state's monopoly over legislation, this research suggests that unless fundamental reform to existing arbitration law is implemented, the Middle East region will find itself lagging behind the global harmonisation process of international commercial arbitration which may, in turn, have detrimental trade and investment consequences. The research has provided a legal framework for policy-makers to introduce coherent international commercial arbitration law reform in the Middle East region.

¹ See www.devdata.worldbank.org/external/cpprofile.asp?SelectedCountry

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