

A PROPOSAL TO GUIDE FUTURE DRAFT
ARTICLE PROVISIONS FOR
A MODEL HARMONISED INTERNATIONAL
COMMERCIAL ARBITRATION LAW CODE
(HICALC) IN THE MIDDLE EAST AND NORTH
AFRICA OR A UNIFORM ARAB ARBITRATION
LAW

Mary Boulos Ayad
Student No 41551060

Presented for the Degree of Doctor of Philosophy in Law at Macquarie
University, 8 October, 2012

I DEDICATION

In Veritate Libertas

*Dedicated in loving memory of my maternal uncle Sameh Édouard Nagiub Ellias
Avocat par excellence and mentor*

And

*Dedicated in loving memory of my paternal uncle Dr Farid Ayad Ayad, former member
of the Egyptian Parliament for whose services in drafting legislation he received a
Presidential Medal of Honour
A lifetime mentor and inspiration*

And

*Dedicated in loving memory of my father Professor Dr Boulos Ayad Ayad, brilliant
scholar of Egyptology, Near East History and Biblical Archaeology and lifetime mentor
whose academic influence and scholarly spirit shines throughout the research and
HICALC*

II DECLARATION

A thesis submitted to the Faculty of Business and Economics, Macquarie University in fulfilment of the requirements for the degree of Doctor of Philosophy in Law.

The work presented in this thesis has not been submitted for a higher degree to any other university or institution. The sources of information used and the extent to which the work of others has been utilised are acknowledged in this thesis.

Mary B Ayad

III ACKNOWLEDGEMENT

The author wishes to thank Professor Peter Gillies for his extremely valuable advice and immense support and uplifting encouragement and Dr. Niloufer Selvadurai for advising. The author wishes to thank the Faculty of Business and Economics for the Macquarie University Research Excellence Scholarship. The author wishes to thank KPMG, the Mercantile Court of Spain, and the Faculty at Instituto de Estudios Europeos - Universidad San Pablo CEU for awarding a prize to this research. The author wishes to thank Ms Radhika Chhotai Kotecha at *Edit-A-Word* for editing of the footnotes, bibliography, and table of contents to an extremely high standard and for general professional editing advice and for her hard work. The author is grateful to Professor Luke Nottage, Sydney University for valuable recommendations and advice. The author is extremely grateful to Professor Bruno Zeller for his patience and kindness. The author wishes to thank Professor Gabriel Moens for his support. The author wishes to thank Professor David Gantz for his support. The author is grateful to Dean Professor Natalie Klein for her valuable support and encouragement. The author wishes to thank former Dean Professor John Hooper for his encouragement and support. The author wishes to thank her PhD colleagues at the Macquarie School of Law for unending encouragement and support. The author wishes to thank LegalWise Seminars and especially Ms Karolyne Cheng-Garner and Professor Bryan Garner of LawProse, Inc., for their generosity and sage advice regarding legal writing. The author wishes to thank the Australian Centre for International Commercial Arbitration (ACICA) and is especially grateful to Professor Doug Jones for his sage insights into the law and practice of international arbitration at numerous conferences in Sydney, Australia and for his support, and wishes to thank Mr Khory McCormick for his support and advice. The author wishes to thank Ms Rashda Rana for her support and mentoring. The author wishes to thank Mr Gregory Ross for his advice and support. The author also wishes to thank Associate Professor Chester Brown and Dean Professor Gillian Triggs of Sydney Law School for numerous conferences and presentations that imparted great learning in the matters of international arbitration, and for their support. The author wishes to thank Mr Stephen Keim, SC, for his support. The author wishes to thank Professor Boutros-Boutros Ghali for his support. The author wishes to thank Professor Ahmed El Kosheri for his encouragement. The author wishes to thank Dr Mohammed Abdel Raouf of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) for his support. The author wishes to thank Professor Tarek Hatem at the American University in Cairo for his support and encouragement. The author wishes to thank her undergraduate and graduate law students for their inspiration and dedication to the study of law. The author wishes to offer special acknowledgement for a debt owed to Mr Bjorn Gehle for his sage advices which have been a guiding light as the author prepared the revised draft of this thesis.

The author wishes to thank her parents, for all that they given to make this thesis possible, especially her late father for whom this thesis is dedicated.

IV LIST OF PUBLICATIONS AND PRESENTATIONS RELEVANT TO THIS RESEARCH

A substantial percentage of this research has been published and presented. It has also received a prize for this paper: Mary Ayad, The Quest of the Holy Grail: A Harmonised international commercial arbitration law code (HICALC) in Investor–State Arbitrations of Oil Concessions and Foreign Investment Treaties and Agreements, 2011 *Madrid international commercial arbitration Centre Journal*. Centro Internacional de Arbitraje, Mediacion y Negociacion Instituto Universario de Estudios Europeos, Universidad San Pablo Marid, Arbitraje, Revista de Arbitraje commercial y de inversiones Volumen IV 2011 March/April, pp. 335-381, March 20, 2011. This paper was presented at the prize awarding ceremony in Madrid, Spain on June 16th, 2012, Real Academia Jurisprudencia y Legislacion, in the Annual Hugo Grotius Lecture before 40 Spanish Kings Counsel, eminent Spanish academicians and the Secretary General of the Permanent Court of Arbitration at the Hague. The Prize was a certificate of recognition and 6000 Euros awarded by KPMG and Universidad San Pablo Centro de Estudios Europeos. This paper deals with the topic of mistrust between western and Arab parties and gives recommendations in the form of revisions to the UNCITRAL and Washington Convention to inform the HICALC.

A Articles – Peer Reviewed in Learned Journals

1. Mary Ayad, international commercial arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region, *Vindobona Journal of Comparative Law and Arbitration* 12.2 (2008): 169-174.
2. Mary Ayad, Harmonisation of international commercial arbitration Law and sharia: The case of pacta sunt servanda v ordre public; The use of ijthihad to

- achieve higher award enforcement, *Macquarie University Journal of Business Law*, *Macquarie Journal of Business Law* 6.2009 (2009).
3. Mary Ayad, Towards a truly harmonised international commercial and investment arbitration law code (HICIALC): enforcing MENA- foreign investor arbitrations via a single regulatory framework: A new map for a new landscape. *Macquarie Journal of Business Law* (2010) Vol 7 285-322.
 4. Mary Ayad, international commercial arbitration Award Enforcement at the Crossroads of Sharia Law and Ordre Public in the MENA: Paving the Golden Path towards Harmonisation, *The Journal of World Investment and Trade* 10.5 (2009).
 5. Mary Ayad, Investor risks due to ‘Sovereign Immunity’ pleas in Court Rulings on Arbitral Award Enforcement of MENA-FI Investments can be mitigated via a Harmonised international commercial arbitration law code, *Journal of World Investment and Trade Volume 11 No.5* (2010), pp. 753-787.
 6. Mary Ayad, Harmonised Commercial Law Principles in Investor–State international commercial arbitrations amongst Euro-Med Partners, *Id-Dritt Law Journal- Maltese Law Student's Society* XXI (2011).
 7. Mary Ayad, The Quest of the Holy Grail: A Harmonised international commercial arbitration law code (HICALC) in Investor–State Arbitrations of Oil Concessions and Foreign Investment Treaties and Agreements, 2011 *Madrid international commercial arbitration Centre Journal*. Centro Internacional de Arbitraje, Mediacion y Negociacion Instituto Universitario de Estudios Europeos, Universidad San Pablo Marid, Arbitraje, Revista de Arbitraje commercial y de inversiones Volumen IV 2011 March/April, pp. 335-381, March 20, 2011.
 8. Mary Ayad, A Harmonised International Commercial and investment Arbitration Law Code (HICIALC) Regulating Judicial Review of Investor–State Arbitration Disputes Can Uphold *res judicata* of Arbitration Awards and Tribunals from Undue Appeals and Annulment due to State Intervention, Vol XV *International Trade and Business Law Review* (2011).
 9. Mary Ayad, The Legal and Economic Implications of World Trade Organisation Ascension By the Gulf Arab States, *Transnational Dispute Management* 3 (2011).
 10. Mary Ayad, The Quest for the Holy Grail of Social Justice: Substantive & Procedural Law Provisions for Amicus Curiae in Investor–State ICSID

Arbitration Law & Practise, Macquarie Journal of Business Law, *Macquarie Journal of Business Law* (2012) Vol 9.

11. Mary Ayad, Australia's Bilateral Investment Treaty (BIT) Stance- an open amicus curiae submission, Macquarie Journal of Business Law, *Macquarie Journal of Business Law* (2012) Vol 9.
12. Mary Ayad, Harmonization of Custom, General principles of law, and Islamic law in Oil Concessions, *Journal of international arbitration* 29, no 5, October 2012: 477-518.
13. Mary Ayad, 'Do Rights of Foreign Investors Fall Within the Scope of International Human Rights Law?' *Id-Dritt Law Journal* XXIII, forthcoming, March 2013.

B Conference Presentations

1. Mary Ayad, 'The Legal and Economic Implications of WTO Accession by the Gulf Arab States,' Gulf Research Centre, Gulf Research Meeting Cambridge. Harker Room, Earth Sciences Building, Downing Site, Cambridge United Kingdom. July 2011.
2. Mary Ayad, 'An Ethnography of Collective Egyptian NGOs,' Common Ground Management Conference. Madrid, Spain Universidad San Pablo, Facultad de Economicas y Empresariales, Thursday, 16 June 2011, 10:25 am.
3. Mary Ayad, 'A Harmonised International Commercial Arbitration Law Code (HICALC) in Investor-State Arbitrations of Oil Concessions and Foreign Investment Treaties and Agreements, Real Academia de Jurisprudencia y Legislacion and Universidad San Pablo Centro de Estudios Europeos' Real Academia Jurisprudencia y Legislacion, Madrid, Spain. June 2011.
4. Mary Ayad, 'Informing the 1958 New York Convention' Macquarie University Faculty of Business and Economics EXPO, Grace Hotel, Sydney, Australia, Nov 2010.
5. Mary Ayad, 'State Intervention, Conflicts and Harmonised Commercial Arbitration Law Code, LSPI -ILTC- IPLC' Pablo Fabra University, Barcelona, Spain, Nov 2010.
6. Mary Ayad, 'Informing the 1958 NY Convention, the UNCITRAL, and Model Law Plus Articles: Integrating General Principles of Civil, Common, and Islamic Law in Foreign Investment and Oil Concession Arbitrations to Draft a Harmonised International Commercial Arbitration Law Code, LSPI- ILTC,' Victoria Hotel, Slima, Malta. Nov 2009.

7. Mary Ayad, 'Informing the 1958 New York Convention, the UNCITRAL and Model Law Plus Articles: Integrating General Principles of Civil, Common, and Islamic Law in Foreign Investment and Oil Concession Arbitrations to Draft a Harmonised International Commercial Arbitration Law Code,' Macquarie University Faculty of Business and Economics EXPO, Hilton Hotel, Sydney, Australia. Oct 2009.

C Articles- Non Journal

1. Mary Ayad, What Now for Egypt? Global Arbitration Review, World Edition, 2 March, 2011, Law Business Research Ltd, London.
2. Mary Ayad, Global View, The Future of the New Egypt, Australian Centre for International Commercial Arbitration (ACICA) News, Vol 2, No 1, (2011).

V TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AJIL	American Journal of International Law
AIPN	Association of International Petroleum Negotiators
AMINOIL	The American Independent Oil Company
AMORC	Ancient Mystical Order Rosae Crucis
ARAMCO	Arabian American Oil Company
ARE	Arab Republic of Egypt
BILC	British International Law Cases
BIT	Bilateral Investment Treaty
BOT	Build, Operate and Transfer Agreements
BP	British Petroleum
CBE	Central Bank of Egypt
Ch Civ	Court of Cassation, Paris, Chapter of Civil Code
CISG	United Nations Convention on Contracts for the International Sale of Goods
C Deo Auctore	Constitutio Deo Auctore
CPL	Civil Procedure Law of the United Arab Emirates
CSOB	Ceskoslovenska Obchodni Banka
D	Roman Digest
DCF	Discounted Cash Flow Method
D Del	US District Court of Delaware
De Civ Dei	De Civitate Dei
Dhs	Dirhams
DIAC	Dubai International Arbitration Centre
DIFC	Dubai International Financial Centre
DIFCAL	Dubai International Financial Centre Arbitration Law
ECCP	Egyptian Code of Civil Procedure
ECHR	European Court of Human Rights
ECJ	European Court of Justice
eg	<i>Exempli grata</i> (for example)
EGOTH	Egyptian General Company for Tourism and Hotels
EHC	Egyptian Hotel Company
ER Comm	High Court of England and Wales, Commercial Court
EU	European Union
EWHC	High Court of England and Wales
FILJ	Foreign Investment Law Journal
F Supp	US District Courts and Specialized Court Cases Federal Supplement
GCC	Gulf Cooperation Council
GATT	General Agreement on Tariffs and Trade
HCA	High Court of Australia
HICALC	Harmonised International Commercial Arbitration Law Code
HKLR	Hong Kong Law Reports
<i>Ibid</i>	<i>Ibedem</i> (the same)
ie	<i>Id est</i> (that is)
ICA	International Commercial Arbitration
ICC	International Criminal Court, The Hague
ICC	International Chamber of Commerce, Paris
ICCA	International Council for Commercial Arbitration
ICC Rules	Rules of Arbitration of the International Chamber of Commerce, Paris
ICJ	International Court of Justice, The Hague

IAI	International Arbitration Institute
IBA	International Bar Association
ICSID	International Centre for the Settlement of Investment Disputes
IA	International Arbitration
IIA	International Investment Arbitration
ILA	International Law Association
ILM	International Legal Materials American Society of International Law
ILR	International Legal Reports
IMC	General Organization for Industrial and Mining Projects
INCOTERMS	International Commercial Terms
ISA	Investor–State Arbitration
ISPRAMED	Institute for Promotion of Arbitration and Mediation in the Mediterranean
ITA	Investment Treaty Arbitration
J Arb	Journal of International Arbitration Kluwer Law International
LCJ	Lord Chief Justice
LE	Egyptian Pounds
Ltd	Limited
LCIA	London Court of International Arbitration
LJ	Lord Justice
LIAMCO	Libyan American Oil Company
LMAA	London under the Rules of the Maritime Arbitrators Association
MAI	Multilateral Agreement on Investment
Med	Mediterranean
MFN	Most Favoured Nation
MENA	Middle East and North Africa
MENA-FI	Middle East-Foreign Investor
ML	Model Law of the UNCITRAL
NCC	National Cotton Company
NAFTA	North American Free Trade Agreement
NBV	Net Book Value
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
No	Number
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
Para(s)	Paragraph(s)
Pres	Presiding Judge of the Mixed Courts of Egypt
Rule	Arbitration Rule
SPP	South Pacific Properties
SLR	Singapore Law Reports
TDM	Transnational Dispute Management
TPC	Turkish Petroleum Company
UAE	United Arab Emirates
UAAL	Uniform Arab Arbitration Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law of International Commercial Arbitration
UNCITRAL Rules	Arbitration Rules of UNCITRAL (1976)
UNIDROIT	International Institute for the Unification of Private Law
US	United States
US	United States (Reports)
NAFTA	North American Free Trade Agreement
Vol	Volume
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
YCA	Yearbook Commercial Arbitration

VI TABLE OF AUTHORITIES

A List of case and legislation

1 *Cases and Awards*

(a) Abu Dhabi Court of Cassation Cases

(Parties during an Arbitration may by Mutual Agreement add Points of Dispute which were not agreed in the original Arbitration Agreement) (Abu Dhabi Court of Cassation, Judgement No 178/19, 27 July 1998)

(Is it possible under UAE Law to Attach Assets Pending the Outcome of Foreign Arbitration) (Dubai Court of Cassation, Judgment No 267/93, 9 March 1996.)

(An Action for Compensation for Tort, committed by the Resignation of an Arbitrator, is subject to the General Principles of Civil Liability) (Abu Dhabi Court of Cassation, Judgement No 219/18, 26 October 1997)

(An Arbitration Award should not deal with a matter not referred to Arbitration by the Parties. The instances of Invalidity of Arbitration Awards stated by Article 216 of the Law of Civil Procedure are Exhaustive) (Abu Dhabi Court of Cassation Judgement No 404/18, 6 May 1997)

(The Dubai Court will Ratify a Foreign Arbitration Award to be Executed in the UAE) (Dubai Court of Cassation Judgement No 267/93, 16 January 1994)

(Arbitrators need not follow strict procedural rules while conducting arbitrations and delivering awards) (Abu Dhabi Court of Cassation No 433/17, 26 February 1997)

(Court may refer all or part of a Dispute to Arbitration. The Ratifying Court controls the Procedural Aspects of the Arbitration Award. Only delay fines are considered as a Compensation for Procrastination and not Interest) (Abu Dhabi Court of Cassation Judgement No 317/18, 30 June 1998)

(If an Extension to an Arbitration Period is Not Granted before its Expiry, any Award Delivered thereafter will be Null and Void) (Dubai Court of Cassation Judgment No 9/96, 13 July 1996)

(The existence of an arbitration clause as a defence must be raised at the first hearing at which a defendant may file its submissions with the Court of Cassation) (Judgement No 13/18, 15 December 1996)

(Arbitration Clauses Are to be Enforced in Accordance with their Terms) (Dubai Court of Cassation Judgment No 6/94, 13 November 1994)

(Actions before UAE Courts will not be Permitted if Parties have Previously Agreed to Foreign Arbitration to Settle any Disputes) (Dubai Court of Cassation Judgment No 61/94, 13 November 1996)

(If Parties agree upon the Arbitrator in their Contract, they may not Apply to the Court to Nominate another Arbitrator) (Dubai Court of Cassation Judgment No 167/94, 13 November 1996)

(b) Courts of the Dubai Financial Centre Cases

Hardt & Another v Damac (DIFC) Company Ltd et al

Taaleem PJSC v National Bonds Corporation PJSC and Deyaar Development PJSC

Corinth Pipeworks SA v Barclays Bank PLC

(c) ICC Cases

Société de Grands Travaux de Marseille (France) v East Pakistan Industrial Development Corporation ICC Case 1803

Solel Boneh International Ltd. (Israel) and Water Resources Development International (Israel) v the Republic of Uganda and National Housing and Construction Corporation of Uganda ICC Case 2321

Westland Helicopters Limited v Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company (AOI) [1984] ICC Case 3879 ICC Court of Arbitration, Case no 3879/AS, 5 March

Westland Helicopters Ltd. v Arab Organisation for Industrialisation, United Arab Emirates, Kingdom of Saudi Arabia, State of Quatar [sic], Arab Republic of Egypt, Arab-British Helicopter Company [1984] ICC Court of Arbitration, Case No 3879/AS

Westland Helicopters United v Arab Organisation for Industrialization [1984] Prejudicial Award No 3879

(d) *ICSID Cases*

Champion Trading Company and others v Arab Republic of Egypt ICSID Case No ARB/02/09 Introductory Note.

Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy B. Wahba v Arab Republic of Egypt Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003, Reported: 19 ICSID Review FILJ 275 (2004); 10 ICSID Reports 400; ICSID Homepage; ITA: IC

Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy B. Wahba v Arab Republic of Egypt Case No ARB/02/9, Award, 27 October 2006. Reported: ITA; IC.

Helnan International Hotels A/S v The Arab Republic of Egypt ICSID Case No 05/19 Award, Memorial on its Objections to Jurisdiction

Helnan International Hotels A/S v The Arab Republic of Egypt ICSID Case No 05/19, Decision on Jurisdiction, 17 October 2006. Reported: ICSID homepage; ITA; IC

Helnan International Hotels A/S v The Arab Republic of Egypt ICSID Case No 05/19, Award, 3 July 2008. Reported: ICSID homepage; ITA

International Centre for Settlement of Investment Disputes Washington, DC, (ICSID) in the proceeding between Joy Mining Machinery Limited (Claimant) and the Arab Republic of Egypt (Respondent), ICSID Case No ARB/03/11 Award on Jurisdiction, date of dispatch to the Parties August 6, 2004

Joy Mining Machinery Limited v The Arab Republic of Egypt ICSID Case No ARB/03/11 Award on Jurisdiction, 6 August 2004. Reported: 19 ICSID Review – FILJ 486 (2004); 44 ILM 73 (2005); 13 ICSID Reports 123; 132 Journal du droit international 163 (2005) (excerpts); ICSID homepage; ITA; IC.

Joy Mining Machinery Limited v The Arab Republic of Egypt ICSID Case No ARB/03/11, Order Noting Discontinuance, 16 December 2005

Joy Mining Machinery Limited v The Arab Republic of Egypt ICSID Case No ARB/03/11

Loewen Group Inc. and Raymond L Loewen v US ICSID Case No ARB (AF)/98/3, Decision on Jurisdiction, 9 January 2001. Reported: 7 ICSID Reports 425; 129 Journal du droit international 217 (2002); ITA; IC

Loewen Group Inc. and Raymond L Loewen v US ICSID Case No ARB (AF)/98/3, Award of 26 June 2003), paras. 226-39 (*Loewen*)

Loewen Group Inc. and Raymond L. Loewen v US ICSID Case No ARB (AF)/98/3, Decision on Supplementation, 13 September 2004. Reported: 44 ILM 836 (2005); 10 ICSID Reports 444; ITA; IC

Middle East Cement Shipping and Handling Co. SA v Arab Republic of Egypt ICSID Case No ARB/99/6, Introductory Note at p. 600. [Award in the Arbitration ARB/99/6 International Centre for Settlement of Investment Disputes]

Middle East Cement Shipping and Handling, Co. SA v Arab Republic of Egypt, Award, 12 April 2002, 7 ICSID Reports 178

Middle East Cement Shipping and Handling Co. SA v Arab Republic of Egypt. Date of Dispatch to the Parties: April 12, 2002

Salini Costruttori S.p.A. and Italistrade SpA. v. The Hashemite Kingdom of Jordan, ICSID Case No. Arb/02/13, Decision on Jurisdiction, 29 November 2004. Reported: 20 ICSID Review- FILJ 148 (2005); 44 ILM 573 (2005); 132 Journal du droit international 182 (2005)

Salini Costruttori SpA & Italistrade SpA v The Hashemite Kingdom of Jordan, ICSID Case No Arb/02/13, Award, 31 January 2006. Reported: ICSID homepage; ITA; IC

Salini Consruttori SpA & Italstrade SpA v Kingdom of Morocco Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001. Reported: 16 ICSID Review- FILJ 469 (2001); 6 ICSID Reports 400; 42 ILM 609 (2003); ITA

Salini Consruttori SpA & Italstrade SpA v Kingdom of Morocco Case No ARB/00/4, Order Noting Discontinuance, 4 February 2004.

Southern Pacific Properties Ltd et al v Arab Republic of Egypt and EGOTH [1983], ICC Arbitral Tribunal

SPP (Middle East) Ltd & Southern Pacific Properties Ltd v Arab Republic of Egypt [1983]

SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH), Case No ARB/84/3 Award on the Merits

SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels EGOTH, Decision on Jurisdiction I, 27 November 1985. Reported: 3 ICSID Reports 112; 16 YB Com Arb 19 (1991) (excerpts); 121 Journal du droit international 218 (1994) (excerpts)

SPP (Middle East) Ltd., Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH) [1993] Award and Dissenting Opinion, 20 May 1992. Reported: 3 ICSID Reports 189; 8 ICSID Review – FILJ 328 (1993); 32 ILM 933 (1993), with correction at 32 ILM 1470

SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH) Decision on Jurisdiction II and Dissenting Opinion, 14 April 1988 Reported: 3 ICSID Reports 131; 16 YB Com Arb. 28 [1991] (excerpts); 121 Journal du droit international 220 (1994)

Trans-global Petroleum Inc. v The Hashemite Kingdom of Jordan ICSID Case No ARB/07/25, the Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, Response of 30 August 2007

Wena Hotels limited v Arab Republic of Egypt [2002] ICSID Case No ARB//98/4. Decision on Jurisdiction, 29 June 1999. Reported: 41 ILM 881; 6 ICSID Reports 74; ITA

Wena Hotels limited v Arab Republic of Egypt [2002] ICSID Case No ARB//98/4. Award, 8 December 2000. Reported: 41 ILM 869; 6 ICSID Reports 89; ITA; IC

Wena Hotels limited v Arab Republic of Egypt [2003] ICSID Case No ARB//98/4 Decision on Annulment, 5 February 2002. Reported: 6 ICSID Report 129; 41 ILM 933 (2002); 130 Journal du droit international 167; ITA; IC.

Wena Hotels limited v Arab Republic of Egypt ICSID Case No ARB//98/4 Decision on Interpretation, 31 October 2005. Reported: ITA; IC

(e) *Oil Concession Cases*

Kuwait v The American Independent Oil Company (AMINOIL), Ad-Hoc-Award, 21 ILM 976. *Aminoil v Kuwait* (1982) 21, ILM 976

ILR 1963, at 117 et seq. Government of Saudi Arabia v Arabian American Oil Co (Aramco) ARAMCO-Award, In, Decision of 23 August 1958, 27 International Legal Reports 117 (1963)

BP v Libyan Arab Republic, 10 October (1973)

BP v Libya 53 I.L.R. 296, (1977)

BP Exploration Comp (Libya) Limited v Government of the Libyan Arab Republic [1973]

Government of Kuwait v Aminoil, Arbitral Tribunal, 24 March [1982]

LIAMCO v The Government of the Libyan Arab Republic, YCA 1981, at 89 et seq.

Liamco v Libya (1981) 20 ILM1

National Oil Corp v Libyan Sun Oil Co 7 33 F Supp 800 US District Court, D Del, March 15, 1990

Ruler of Qatar v International Marine Oil Company Limited, Judgement, International Law Reports, vol 20, 1953 Report

Petroleum Development Ltd v The Sheikh of Abu Dhabi, 18 ILR (1951)

Sapphire Award, ILR 1963, at 136 et seq

Sapphire International Petroleum Ltd v National Iranian Oil Co, 35 ILR 136 (1967); 13 Int'l & Comp LQ 1011 (1964), 35 ILR 136

Sempura Energy International v Argentine Republic ICSID Case No ARB/02/16, Decision on Annulment of 29 June 2010, paras 186-209 (*Sempra*)

Sempura Energy International v Argentine Republic ICSID Case No ARB/02/16, Decision on Jurisdiction, 11 May 2005. Reported: ICSID homepage; ITA; IC

Sempura Energy International v Argentine Republic ICSID Case No ARB/02/16, Award and Partial Dissenting Opinion, 28 September 2007. Reported: ICSID homepage; ITA; IC

Texaco v Libya (1977) 53 ILR 389

Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic, YCA 1979, at 177 et seq (also published in: ILM, 1978, at 1 et seq; Int'l L Rep 1979, at 389 et seq; Clunet 1977, at 350 et seq)

Texaco Overseas Petroleum Comp And California Asiatic Oil Co v Government of the Libyan Arab Republic, [1977]

(f) *Mixed Court Cases*

Bencini & Quistas v Egyptian Government & Government of Sudan, Cairo District Court, 11 April 1910, Pres. Herzbruck, in Hoyle, M, *The Mixed Courts of Egypt*, Graham and Trotman, London, 1991

Daria Sanieh case, Cairo District Court, 2 June 1909, in Hoyle, M, *The Mixed Courts of Egypt*, Graham and Trotman, London, 1991

Heinrich Finck v Egyptian Government, MCA 1 March 1927, Pres. Baviera GTM XVII p 257, in Hoyle, M, *The Mixed Courts of Egypt*, Graham and Trotman, London, 1991

Kildani ve. Haggar v. Fisc Hellenique, MCA, 9 May 1912, BLJ XXIV, p. 330, in Hoyle, M, *The Mixed Courts of Egypt*, Graham and Trotman, London, 1991

The Egyptian Tribute Affair, in Hoyle, M, *The Mixed Courts of Egypt*, Graham and Trotman, London, 1991

(g) *National Cases*

(i) *England*

AIG Capital Partners, Inc v Kazakhstan [2005] EWHC 2239; [2006] All ER [Comm] 11 English High Court

AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan Case No ARB/01/6, Award 7 October 2003. Reported: 11 ICSID Reports 3

R v Sussex Justice ex parte McCarthy (1924) UK

(ii) *France*

Arab Republic of Egypt v Southern Pacific Properties Ltd and Southern Pacific Properties (Middle East) Ltd, Cour d'appel, Paris, 12 July 1984; Cour de Cassation, 6 January 1987 Reported: 3 ICSID Reports 79, 96; 23 ILM 1048 (1984); 26 ILM 1004 (1987); 86 ILR 475, 490 (1991); 112 Journal du droit international 130 (1985)

(iii) *Hong Kong*

Apex Tech Investment Ltd v Chuang's Development (China) Ltd, [1996] 2 HKLR 155

(iv) *Jordan*

No 2. Mahkamet Al Tamyeez, 8 April 2008, *Sucres et Denrées (SUCDEN) v Horizon International Food Trade Co Ltd and Korean-Polish Shipping Co Ltd, owners of the CHOPOL 2, et al v Horizon International Food Trade Co Ltd*

(v) *Pakistan*

SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan Case No ARB/01/13, Procedural Order No 2, 16 October 2002. Reported: 18 ICSID Reports 398

SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan Case No ARB/01/13, Decision on Challenge, 19 December 2002. Reported: 8 ICSID Reports 398

SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003. Reported: 18 ICSID Review – FILJ 307 (2003); 42 ILM 1290 (2003); 8 ICSID Reports 406; 131 Journal du droit international 257 (2004) (excerpts); ICSID homepage; ITA; IC

SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan Case No ARB/01/13, Order Noting Settlement, 23 May 2004. Reported: 8 ICSID Reports 451

(vi) *Slovakia*

CSOB v Slovakia

Csekoslovenska obchodni banka, a.s. v Slovak Republic Case No ARB/97/4, Decision on Jurisdiction, 24 May 1999. Reported 14 ICSID Review- FILJ 251 (1999); 5 ICSID Reports 335; ICSID Homepage; ITA; IC

CSOB v Slovakia

Csekoslovenska obchodni banka, a.s. v Slovak Republic Case No ARB/97/4, Award, 29 December 2004. Reported: 13 ICSID Reports 181; ITA; IC

(vii) *Others*

Affair Chase Manhattan 658 F 2d 875, 892 [1981]

Affair Chorzow no 13, 13 September [1928]

Arrêt sur l'Hôtel des Pyramids, [1985]

Arbitration concerning Buraimi and the Common Frontier between Abu Dhabi and Saudi Arabia, 1955, Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland.

Creighton Ltd (Cayman Islands) v Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar, 6 July 2000, 127 (4) JDI (Clunet) 1054 (2000), Cour de Cassation, 1ere Ch Civ; (2000) XXV Yearbook of Commercial Arbitration, 458

Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara United Nations Commission on International Trade Law 4 May 1999

Jacobellis v Ohio, 378 US 184 (1964)

Livesy v New South Wales Bar Association (1983) HCA

Parsons & Whitmore Overseas Inc v Rakta, 508 Fed 2d 971 [1974].

Radio Corporation of America v China (1941) 8 ILR 26 Permanent Court of Arbitration, The Hague

Société des Grandes Travaux de Marseille v East Pakistan Industrial Development Corporation, Swiss Federal Tribunal [1976]

Patuha Power v Indonesian authorities

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA. [2007] 1 SLR 597, para 57

Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us Inc; TRU (HK) Ltd 126 F 3d 15, United States Court of Appeals, Second Circuit Argued June 25, 1997 to September 10, 1997

Pathua v PLN 14 Mealey's International Arbitration Report (December 1999) pp. B-1 - B-49

Himpurna California Energy Ltd v PT PLN (Persero), ad hoc arbitration under UNCITRAL rules, Final award of 4 May 1999

Wintershall AG v The Government of Qatar (Ad hoc tribunal), 28 ILM 795.

2 Legislation

(a) Egypt

Labour Law no 12 of 2003

Sales Tax Law no 11 of 1991

Banking Law no 162 of 1957

Companies Law no 159 of 1981

Financial Leasing Law no 95 of 1995

Foreign Currency Law no 38 of 1994

Capital Market Law no 95 of 1992

Rules & Procedures of Civil Workers and Incentives

Law 2006-067 Consumer Protection Law

Law 1956-073 on the Exercise of Political Rights

Law 80-2002 Anti-Money Laundering Law

Anti- Money Laundering Regulations for Banks

Executive Regulations of the CBE (Central Bank of Egypt)

Law 2003-88 on the CBE

Banking Sector and Money Law, Decree No 465 of 2005 in Amendment of Provisions of the Executive Regulations of the Mortgage Finance Law

The Banking Sector and Money with its Amendments, Law 2009-10 Regulating Non-Banking Financial Markets and Instruments

Presidential Decree no 4 of 2003 on the Regulation of Guarantee and Subsidy of Real Estate Fund Activities

Presidential Decree Issuing the Statutes of the CBE

Issuing the Executive Regulations of the Banks and Credit Law, Presidential Decree No 187 of 1993

Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Law 1994-027, amended in 1997

The Egyptian Constitution

Egyptian Bilateral Investment Treaties

The 1994 Egyptian Arbitration Law

The Egyptian Code of Civil and Commercial Procedure

(b) *United Arab Emirates*

United Arab Emirates Civil Procedure Code, Federal Law No 11 of 1992, Chapter 4, Art 235, para 1 - 5

Constitution of the United Arab Emirates, Art 7, 22.

(c) *Other*

Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

Article 1 of the Convention for the Unification of Certain Rules Concerning the Immunity of State-owned ships (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934)

Article 1, Statute of the UNIDROIT, UNIDROIT International Institute for the Unification of Private Law, Statute incorporating the amendment to Article 6(1) which entered into force on 26 March 1993, UNIDROIT, 28, Via Panisperna-Rome, official translation approved by the General Assembly at its 45th session on 26 November 1991.

The Hammurabi Code, Art 7, 37, 52, 122, 123, 151 and 152

Code Civil de France, Art 6

ICC International Chamber of Commerce with International Court of Arbitration and with International Centre for ADR Arbitration and ADR Rules in force from 1 January 2012, p 14, Art 6 (3).

International Bar Association (IBA) Guidelines for Drafting international arbitration Agreements, Adopted by a resolution of the IBA Council, 7 October 2010, International Bar Association, Art 22.

The Ottoman Majalla.

Foreign Sovereign Immunities Act of the USA

United Kingdom State Immunity Act 1978.

New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, Article V (2), the public policy clause

North American Free Trade Agreement (NAFTA)

Rhodian Sea Law

Convention for the Unification of Certain Rules Concerning the Immunity of State-owned ships (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934), Art 1

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 1965

Vienna Convention on the Law of Treaties, Article 31(3)(c), 1969

League of Nations, the Protocol on Arbitration Clauses in Commercial Contracts and the Convention on Enforcement of Arbitral Awards

UN Charter

UNIDROIT (International Institute for the Unification of Private Law)

UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules of 1976.

1982 Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments

(d) *Constitutions*

Egyptian Provisional Constitution of the Arab Republic of Egypt, 2011, Article II

Constitution of the United Arab Emirates, Article 7, 22

US Federal Constitution, Amendment Five, Amendment Fourteen.

The 1945 Constitution of the Republic of Indonesia, Chapter XI , Article 29 (1).

Article 1 of the draft Constitution of Qatar.

(e) *Other*

Lex Mercatoria

Lex Petrolea

General Principles of Law

Islamic Principles of Law

VII TABLE OF CONTENTS

I DEDICATION.....	II
II DECLARATION.....	III
III ACKNOWLEDGEMENT.....	IV
IV LIST OF PUBLICATIONS AND PRESENTATIONS RELEVANT TO THIS RESEARCH.....	V
A Articles – Peer Reviewed in Learned Journals.....	V
B Conference Presentations.....	VII
V TABLE OF ABBREVIATIONS.....	IX
VI TABLE OF AUTHORITIES.....	XI
A List of case and legislation.....	XI
1 Cases and Awards.....	XI
(a) Abu Dhabi Court of Cassation Cases.....	XI
(b) Courts of the Dubai Financial Centre Cases.....	XII
(c) ICC Cases.....	XII
(d) ICSID Cases.....	XIII
(e) Oil Concession Cases.....	XV
(f) Mixed Court Cases.....	XVI
(g) National Cases.....	XVII
(i) England.....	XVII
(ii) France.....	XVII
(iii) Hong Kong.....	XVII
(iv) Jordan.....	XVII
(v) Pakistan.....	XVII
(vi) Slovakia.....	XVIII
(vii) Others.....	XVIII
2 Legislation.....	XIX
(a) Egypt.....	XIX
(b) United Arab Emirates.....	XX
(c) Other.....	XXI
(d) Constitutions.....	XXII
(e) Other.....	XXII
VII TABLE OF CONTENTS.....	XXIII
VIII ABSTRACT.....	1
IX SECTION I: INTRODUCTION OF INVESTOR–STATE DISPUTES.....	3

A <i>The Convergence of ICA and IIA</i>	6
B <i>Private International Law</i>	7
1 <i>International Commercial Arbitration</i>	7
C <i>Public International Law</i>	8
1 <i>International Investment Arbitration</i>	8
2 <i>Islamic International Law – Siyar</i>	18
D <i>Research Question</i>	20
1 <i>Objective of the Research- a Uniform Arab Arbitration Law or a Model Harmonised International Commercial Arbitration Law (CODE)</i>	22
2 <i>Objective of the Research -Understanding Adjudicatory Risk in the MENA</i>	24
X SECTION II LITERATURE REVIEW AND METHODOLOGY	29
XII SECTION III: DISTINCTIVE LEGAL FEATURES AND LEGAL TRADITIONS OF THE MENA THAT AN ARAB UNIFORM (HICALC) ARBITRATION LAW MUST ADDRESS	68
A <i>Assessment and Analysis of the Status Quo of the Different Laws and Traditions of the Case Study Countries</i>	68
1 <i>Precedent of Harmonisation</i>	69
(a) <i>Harmonisation of European and Islamic Philosophy- The Golden Age and Ijtihad</i>	75
(b) <i>The Ottoman Majalla</i>	81
(c) <i>The Egyptian Mixed Courts</i>	85
(d) <i>The French legacy</i>	90
(e) <i>The Sanhuri and Lambert Codes</i>	91
B <i>Comparative Analysis of Relevant Differences and Commonalities of the Case Study Countries</i>	93
1 <i>Egypt</i>	94
(a) <i>Bilateral Investment Treaties (BITs)</i>	101
(b) <i>The 1994 Egyptian arbitration law</i>	102
(c) <i>The Egyptian Code of Civil and Commercial Procedure</i>	103
(d) <i>The Egyptian Constitution</i>	106
(e) <i>Specific Egyptian Legislation</i>	108
(f) <i>The United Arab Republic Code of Civil Transactions</i>	113
2 <i>United Arab Emirates</i>	114
(a) <i>The Constitution of the United Arab Emirates</i>	114
(b) <i>The United Arab Emirates Arbitration Law</i>	117
(c) <i>Abu Dhabi Court of Cassation Judgements</i>	123
3 <i>Dubai</i>	124
(a) <i>Dubai International Financial Centre (DIFC)</i>	129
(b) <i>Dubai International Finance Centre (DIFC) Free Zone</i>	130
C <i>Key Matters a HICALC or Uniform Arab Arbitration Law (UAAL) Must Address</i>	132
D <i>Comparative Analysis of Universal Principles</i>	133
1 <i>The Principle of Unjust Enrichment</i>	134
2 <i>The Doctrine of Equity</i>	135
3 <i>The Principle of Justice</i>	140
4 <i>Pacta sunt servanda</i>	142
5 <i>The Doctrine of Due Process</i>	149
6 <i>The Doctrine of Natural Law</i>	152
7 <i>The Doctrine of Fair Contract</i>	153
8 <i>The Notion of Commercial Integrity</i>	155

9 <i>The Doctrine of Charitable Trust</i>	156
10 <i>General Principles of Law</i>	159
(a) The Role of Custom- the Ancient Law Merchant <i>lex mercatoria</i>	162
11 <i>Precedent or stare decisis</i>	176
E <i>Procedural Law</i>	187
F <i>Substantive Law</i>	187
G <i>The Treasure Map to Enforcement</i>	189
H <i>Court Intervention</i>	192

XI SECTION IV: RESULTS AND DISCUSSION OF SUBSTANTIVE AND PROCEDURAL MATTERS REQUIRING REFORM.....	196
--	-----

A <i>Competence De La Competence</i>	197
1 <i>Landmark International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Proceedings</i>	198
(a) <i>Trans-global Petroleum Inc v The Hashemite Kingdom of Jordan (ICSID Case No ARB/07/25)</i>	199
(b) <i>Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (ICSID Case No ARB/02/13)</i>	199
(c) <i>In Helnan International Hotels A/S v The Arab Republic of Egypt (ICSID Case No ARB/05/19) Award</i>	200
(d) <i>Joy Mining Machinery Limited (Claimant) and the Arab Republic of Egypt (Respondent), (ICSID Case No ARB/03/11) Award on Jurisdiction</i>	200
(e) <i>Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (ICSID Case No ARB/99/6)</i>	207
(f) <i>In Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt (Case No ARB/84/3) Award on the Merits</i>	210
(g) <i>Champion Trading Company and others v Arab Republic of Egypt (ICSID Case No ARB/02/9)</i>	211
(h) <i>Government of Saudi Arabia v Arabian American Oil Co (Aramco)</i>	213
2 <i>Civil Law</i>	214
3 <i>Islamic Law</i>	220
(a) <i>Courts of the Dubai International Financial Centre Cases</i>	222
(i) <i>Hardt and Another v Damac (DIFC) Company Ltd et al, March 2010</i>	222
(ii) <i>Taaleem PJSC v National Bonds Corporation PJSC and Deyaar Development PJSC, May 2010</i>	223
(iii) <i>Corinth Pipeworks SA v Barclays Bank PLC</i>	224
<i>Abu Dhabi Court of Cassation Judgements</i>	227
(b) <i>Case 1: Parties during an Arbitration may by Mutual Agreement add Points of Dispute which were not agreed in the original Arbitration Agreement. Abu Dhabi Court of Cassation Judgement No. 178/19, 27 July 1998</i>	227
(c) <i>Is it possible under UAE Law to Attach Assets Pending the Outcome of Foreign Arbitration. Dubai Court of Cassation Judgment No 267/93, 9 March 1996</i>	230
B <i>Expropriation</i>	233
(a) <i>Arbitral Awards: The history of arbitration in the MENA; the early oil concessions</i>	236
(b) <i>Aminoil v Kuwait</i>	244
(c) <i>Saudi Arabia v Arabian American Oil Co (Aramco case)</i>	251
(d) <i>Petroleum Development Ltd v The Sheikh of Abu Dhabi, 18 I.L.R. (1951)</i>	257
(e) <i>Ruler of Qatar v International Marine Oil Company</i>	260
(f) <i>Sapphire International Petroleum Ltd v National Iranian Oil</i>	263

(g) The Washington Convention	266
(h) Buraimi oasis arbitration.....	270
1 Civil Law	276
(a) Henrich Finck v Egyptian Government	276
2 Common Law.....	279
(a) LIAMCO v Libya.....	279
3 Islamic Law	282
4 Article II of the HICALC Expropriation.....	287
C Interest	287
Equity as it Applies to Interest.....	287
(a) Helnan International Hotels A /S and The Arab Republic of Egypt, ICSID Case No 05/19300	
(b) Wena Hotels limited v Arab Republic of Egypt (ICSID Case No ARB//98/4).....	302
1 Civil Law	303
2 Common Law.....	308
3 Islamic Law	309
(a) Abu Dhabi Court of Cassation Judgements.....	310
(i) An Action for Compensation for Tort, committed by the Resignation of an Arbitrator, is subject to the General Principles of Civil Liability. Abu Dhabi Court of Cassation Judgement No 219/18, 26 October 1997.....	310
(ii) An Arbitration Award should not deal with a matter not referred to Arbitration by the Parties. The instances of Invalidity of Arbitration Awards stated by Article 216 of the Law of Civil Procedure are Exhaustive. Abu Dhabi Court of Cassation Judgement No. 404/18, 6 May 1997.....	312
(iii) The Dubai Court will Ratify a Foreign Arbitration Award to be Executed in the UAE. Dubai Court of Cassation Judgement No 267/93, 16 January 1994	314
(iv) A Court may refer all or part of a Dispute to Arbitration. The Ratifying Court controls the Procedural Aspects of the Arbitration Award. Only delay fines are considered as a Compensation for Procrastination and not Interest. Abu Dhabi Court of Cassation Judgement No 317/18, 30 June 1998.....	317
Article III of the HICALC Interest.....	327
D Public Policy Or Ordre Public.....	328
1 Al masalih al mursalah	329
2 The New York Convention.....	332
(a) National Oil Corp v Libyan Sun Oil Corp	338
3 Civil Law	338
4 Common Law.....	347
5 Islamic Law	349
(a) Abu Dhabi Court of Cassation Judgements.....	349
(i) Case 1: If an Extension to an Arbitration Period is Not Granted before its Expiry, any Award Delivered thereafter will be Null and Void. Dubai Court of Cassation Judgment No 9/96, 13 July 1996.....	349
(ii) Case 2: Arbitrators need not follow strict procedural rules while conducting arbitrations and delivering awards. Abu Dhabi Court of Cassation No 433/17, 26 February 1997.....	351
(iii) Case 1: The existence of an arbitration clause as a defence must be raised at the first hearing at which a defendant may file its submissions with the Court of Cassation Judgement No. 13/18, 15 December 1996.....	351
(iv) Case 2: Arbitration Clauses Are to be Enforced in Accordance with their Terms. Dubai Court of Cassation Judgment No. 6/94, 13 November 1994	353
(v) Case 3: Actions before UAE Courts will not be Permitted if Parties have Previously Agreed to Foreign Arbitration to Settle any Disputes. Dubai Court of Cassation Judgment No. 61/94, 13 November 1996.....	355

(vi) <i>Case 4: If Parties agree upon the Arbitrator in their Contract, they may not Apply to the Court to Nominate another Arbitrator. Dubai Court of Cassation Judgment No. 167/94, 13 November 1996.</i>	356
E <i>Sovereign Immunity</i>	368
1 <i>Civil Law</i>	376
(a) <i>Daria Sanieh case</i>	378
(b) <i>Bencini and Quistas v Egyptian Government and Government of Sudan</i>	378
(c) <i>Kildani ve. Hagggar v. Fisc Hellenique</i>	379
(d) <i>Act of State</i>	379
(e) <i>Immunity from Execution As Distinct from Jurisdictional Immunity</i>	384
2 <i>Common Law</i>	387
(a) <i>Arab Republic of Egypt v Southern Pacific Properties, LTD et al (hereinafter 'SPP')</i>	387
(b) <i>Societe de Grands Travaux de Marseille (France) v East Pakistan Industrial Development Corporation, ICC Case 1803</i>	390
(c) <i>Solel Boneh International LTD. (Israel) and Water Resources Development International (Israel) v The Republic of Uganda and National Housing and Construction Corporation of Uganda, ICC Case 2321</i>	390
(d) <i>Radio Corporation of America v China</i>	391
3 <i>Islamic Law</i>	401
F <i>Contributions And Gaps Of International Instruments And Uniform Laws Towards A Uniform Arab Arbitration Law Or Hicalc</i>	403
1 <i>The Washington Convention of the International Centre for the Settlement of Investment Disputes (ICSID)</i>	403
2 <i>UNCITRAL</i>	410
3 <i>The International Bar Association Guidelines for Drafting International Arbitration Agreements</i>	429
4 <i>The Vienna Convention</i>	430
5 <i>The Washington Convention and Vienna Revisited</i>	433
XII <i>CONCLUSION</i>	435
A <i>Res iudicata</i>	435
B <i>Practical Application and Implementation</i>	455
XIII <i>BIBLIOGRAPHY</i>	483
A <i>Books</i>	483
B <i>Articles</i>	491
C <i>Other</i>	495
XIV <i>SECTION IX: SUGGESTED DRAFT ARTICLE PROVISIONS FOR A UNIFORM ARAB ARBITRATION LAW OR MODEL HARMONISED INTERNATIONAL COMMERCIAL ARBITRATION LAW CODE (HICALC)</i>	497
A <i>Preamble</i>	497
1 <i>Article I of the HICALC Compétence de la Compétence</i>	499
2 <i>Article II of the HICALC Expropriation</i>	500
3 <i>Article III of the HICALC Interest</i>	501
4 <i>Article IV of the HICALC Public Policy</i>	501
5 <i>Article V of the HICALC Sovereign Immunity</i>	502

6	<i>Article VI of the HICALC Precedent</i>	502
7	<i>Article VII of the HICALC res iudicata</i>	503
8	<i>Article VIII of HICALC Scope</i>	503
9	<i>Article IX of the HICALC Justice</i>	503

VIII ABSTRACT

MENA law codes are a well-crafted blend of civil and Islamic law in which civil law principles do not contravene with Islamic provisions. They were originally based on Sanhuri's codes to varying degrees. Yet, common law principles derived either from English common law or Islamic customary usages are unidentified and thus ignored. Here, this lacuna is rectified through a comparative analysis of the primary data (eg, cases, statutes and arbitral award decisions), adding common law and uncodified Islamic custom to MENA law codes. The purpose of this comparative analysis is to allow common legal principles found at civil, common and Islamic law to be distilled in the service of creating a new harmonised international commercial arbitration law code (HICALC) or uniform Arab arbitration law (UAAL) for adoption in the MENA.¹ These principles already form part or all of the legal systems in the MENA. They can be readily assimilated into a harmonised or uniform code. Would this new harmonised code lead to higher arbitral award enforcement in the MENA? According to the evidence the answer is yes. The author understands that at the present time the HICALC articles are ambitious and as such they are a beginning point and can initially be taken as a harmonised international commercial arbitration common rule (HICACR).

A brief overview of the history of harmonisation is given. An assessment of the status of the laws and traditions of the MENA was carried out. A comparative analysis of the relevant differences and similarities of the case study countries (Egypt and the United Arab Emirates) was carried out to show the gaps in the laws and areas requiring reform. An analysis of enforcement of arbitral awards was carried out. The unique problems that

¹ The author uses the terms uniform Arab arbitration law interchangeably with the terms harmonised international commercial arbitration law code (HICALC) as suggested names for a new law.

ICA and IIA encounter in the MENA as derived from an analysis of cases and the laws therein are expounded in consideration of matters pertaining to enforcement. A comparative analysis of universal principles which must be included in a new code, including custom, was carried out. An analysis of the unique features and unique needs of the MENA was carried out in order to inform the Draft Article Provisions. An analysis of important international legal instruments dealing specifically with international arbitration and the gaps therein is given. The draft articles for a HICALC or uniform Arab arbitration law were derived as a result of these multiple layers of analysis. The matters of *compétence de la compétence*, expropriation, interest, public policy and sovereign immunity are highlighted as the most important areas requiring urgent reform. The results of this research are suggested Draft Article Provisions for a model Harmonised International Commercial Arbitration Law Code (HICALC) or a uniform Arab arbitration law. Future drafters may refer to and revise these articles for implementation. The synthesis of theory and practice addresses doctrinal matters that arise in international investment arbitrations and international commercial arbitration, with a focus on investor–State arbitrations. This synthesis provides a new theoretical conception of the jurisprudence of international arbitration, particularly in regard to the matters of *res iudicata*, precedent and expansion of arbitral tribunal powers and jurisdiction.

IX SECTION I: INTRODUCTION OF INVESTOR–STATE DISPUTES

We have found the whole extent of our laws which has come down from the foundation of the city of Rome ... to be so confused that it extends an inordinate length and is beyond the comprehension of any human nature. It has been our primary endeavour to make a beginning with the most revered Emperors of earlier times, to free their constitutions (enactments) from faults and to set them out on a clear fashion, so they might be collected together under one Codex, and that they might afford to all mankind the ready protection of their own integrity, purged of all unnecessary repetition and most harmful disagreement (C. Deo Auctore, 1) in the Constitutio Deo Auctore, The Imperial Decree.
 – Justinian

Although this thesis deals with both international commercial arbitration and international investment arbitration, the thrust of this thesis is concerned with arbitrations occurring between a State and a private party due to questions of public policy and sovereign immunity which is activated only when a State is party to a commercial contract. The matter of expropriation is also implicated by a State. Private parties do not have the jurisdiction to expropriate, decide on public policy or claim sovereign immunity. In the MENA context the matter of paying interest ties more directly with public policy when it is an Islamic State that must pay interest- in breach of its own public policy as viewed through the lens of *sharia*. The focus here is investor²-State disputes. Notwithstanding that fact, this thesis does not exclude international arbitration between two private parties (that are not States), because many of the findings are applicable to commercial-commercial disputes. (This is distinct from domestic arbitration which is an entirely different area of law and outside of the scope of this thesis.) The matters of bias, of *compétence de la compétence*, or interest and the absence of precedent, including the

² S Subedi, *International Investment Law, Reconciling Policy and Principle*, (Hart Publishing, 2008) 58: ‘Most treaties define the term ‘investor’ to include a state, state enterprise, a foreign national or a private enterprise of a foreign state that has made an investment in the territory of another state. Traditionally, only those investors that had made an investment or were making an investment enjoyed the protection offered by BITs. ICSID itself does not provide any comprehensive definition of the term ‘investment’. Here, the majority of matters discussed throughout have the greatest impact upon the foreign national.

universal principles cited herein, have direct bearing on both commercial-commercial disputes and on investor-State disputes. The doctrines and recommendations or provisions given are applicable to disputes arising from contracts in which both parties to the contract are a State party. In order to emphasize the import of the thesis beyond the field of international commercial arbitration (hereinafter “ICA” law), it is necessary to frame the topic of ICA law within the proper broad context of dispute resolution between governments and private parties.³ The analysis given here of the UNCITRAL necessitates the inclusion of both ICA and IIA arbitrations. It is important to note the distinction between commercial contracts with commercial-commercial parties, and commercial contracts that do not meet the definition of an investment (by law or by tribunal authority), in commercial-State arbitrations that cannot be called investor-State arbitrations properly, for the reason that they do not meet the criteria and legal rule for investment, even if one party is a private actor and one is a State acting commercially. The provisions and recommendations apply to this category to a limited degree.

Any reforms of the UNCITRAL would have an impact on both forums. For example: ‘Unlike ICSID, there is no single repository of data about investor-State disputes under the UNCITRAL Rules. UNCITRAL itself does not possess or process

³ Most foreign investment disputes and oil concessions fall within the framework of private international law; thus the author submits that the careful negotiation of oil concession disputes is an important regulator of peaceful international relations because of the delicate nature of the relationship between oil-producing states and oil-consuming states. This is especially so in consideration of the fact that the doctrines of public policy, both international and domestic, together with state sovereignty fall within the realm of public international law; equally so with negotiations of foreign investment contracts. Just and equitable arbitration awards as a feasible solution to large commercial disputes such as the outcomes of oil-concession financial investment cases would be a determining factor of interstate relations where cross-cultural misunderstandings can lead to disastrous consequences.

such information.’⁴ Yet, the fact remains that both ICA and IIA arbitrations are both conducted under the UNCITRAL and any discussion and reforms to it necessitate the inclusion of both.

⁴ J Levine, ‘Navigating the parallel universe of Investor–State arbitrations under the UNCITRAL Rules’ in C Brown and K Miles (eds), *Investment Treaty Law Arbitration* (Cambridge University Press, 2011) 375, 369

A The Convergence of ICA and IIA

The convergence of ICA and IIA is found in the fact that IIA falls under both private and public international law. It is apparent when States sign contracts with investors that are commercial but not classified strictly as investments. The matters invoked by investor–State disputes even in these exclusively commercial contracts are similar. Whether a contract is an investment or only a commercial dealing does not prevent the State from resorting to sovereign immunity or public policy in either case. This thesis deals with international commercial arbitration law and practice but many of the recommendations given can be applied to international investment arbitrations which are dealt with under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). The applicability to ICA or IIA or to both is appropriate. In ISA disputes a contract may be seen as an investment or as a commercial contract that does not contain an investment. Irrespective of whether the contract is of an investment nature (or lack thereof), the principles that have applicability to only ISA (eg, expropriation, public policy, sovereign immunity) are identified as such. An investor–State dispute may either be an ICA or IIA proceeding depending on the nature of the commercial element, ie, whether the tribunal finds that it is an investment or not. There is another important reason for the inclusion of ICA and IIA in the same thesis that deals with reforms to the UNCITRAL, *inter alia*. Both of these dispute resolution forums make recourse to the UNCITRAL:

Although the UNCITRAL Rules were not significantly tailored for claims brought by foreign investors against a host State government, they have actually been used in that context since 1981, when the Iran-US claims Tribunal adopted a modified version of the

UNCITRAL Rules for resolving claims in the wake of the 1979 hostage crisis and the subsequent freeze of Iranian assets by the USA. More recently, the UNCITRAL Rules have increasingly been applied to investor–State disputes under bilateral and multilateral investment treaties, in which a State expresses a standing offer to arbitrate investment disputes that an investor can accept at the time a dispute arises.⁵

Any reforms proposed to the UNCITRAL would have equal bearing on ICA and IIA or to investor–State disputes. They would also have ramification for private international law and public international law for the same reason.

B Private International Law

1 International Commercial Arbitration

This thesis deals with international commercial arbitration and international investment arbitration as two separate entities, yet, as a body of law or *corpus lex* which shares common principles. This thesis is concerned primarily with Investor–State (ISA) arbitration. ICSID cases are analysed. The many principles and concepts presented are applicable to both ICA and IIA, or to one. All of the principles apply to ISA arbitrations or commercial–State arbitrations.⁶ Not all of the principles apply to ICA. The author will elaborate in the appropriate section as to the relevance of ICA or ISA or both to the concepts presented. Notwithstanding that sovereign immunity, and expropriation, for example, cannot ever occur in ICA disputes in which both actors are commercial actors, and to a lesser degree, the matter of public policy is limited when both actors are commercial actors. The distinction is complex, technical and refined. The relationship of

⁵ Ibid 372.

⁶ This is the case when the nature of the dispute does not meet the criteria or rule for an investment.

the proposed recommendations and provisions to the appropriate forum based on the different natures of the forums is made clear. Whilst the analysis presented can be adopted by practitioners of either of these well-established and distinct bodies of law according to the appropriate features of either one, there are distinct differences which will be highlighted.⁷

C Public International Law

1 International Investment Arbitration

The international nature of international arbitration disputes that arise requires a comprehensive analysis. The author submits that international investment arbitration, as a result of its inherent nature, overlaps with private international law and public international law. This overlap invokes doctrines of public policy and sovereign immunity including questions on the rights and limits of States to expropriate, if at all. IIA is included because the matter of expropriation falls under investment treaties.⁸ To a lesser degree this overlap may invoke matters related to *compétence de la compétence* as a result of sovereign immunity, although this matter has been settled in international arbitration. The aforementioned doctrines of public policy, sovereign immunity, expropriation and *compétence de la compétence* are addressed in Section IV. The matter of bias is also related to investment arbitration as will be discussed in the postcolonial section. Furthermore, bias is a breach of the fair and equitable treatment standard

⁷ Due to the confidential nature of international commercial arbitration (ICA), the author hopes that many of the matters discussed herein can also help with a theory of jurisprudence in the development of ICA law.

⁸ S Greenberg, C Kee, J R Weeramantry, *International Commercial Arbitration, An Asia-Pacific Perspective*, (Cambridge University Press, 2011) 494: ‘International law recognises that a host state may under certain conditions legitimately expropriate foreign property. Investment treaties confirm this position.’

enshrined in most investment treaties. The author submits that the five areas of substantive and procedural law share the common fact that they fall under public international law. They also fall under private international law.

An incomprehensive analysis of public international law or private international law fails to systematically comprehend the depth and scope of the complexities inherent therein. For example, Article 31 (3) (c) of the Vienna Convention⁹ provides for general principles of law to guide treaty interpretation of international arbitration disputes.¹⁰ Here, the development of international law has occurred in a sporadic manner. This has led to inconsistency and unpredictability in the law and practice of international arbitration. The unsystematic and non-standardised application of either the doctrine of precedent or of general principles of law by arbitral tribunals leads to adjudicatory risk. If the application of Article 31 (3) (c)¹¹ had occurred in a harmonised and standardised manner, would then this problem have occurred? This research remedies this lacuna. It is well-established that changes in one area of international law influence those in other areas.¹² International human rights law is only one example. Inconsistencies in

⁹ *Vienna Convention on the Law of Treaties*, 1969.

¹⁰ *Vienna Convention on the Law of Treaties*, Art 31(3) (c) of the 1969.

¹¹ *Ibid.*

¹² D Steger, University of Ottawa, Former Director, Secretariat to the WTO Appellate Body, Faculty of Law, *Towards a System of International Economic Law: Putting the Investment Genie Back into the Bottle*, at the International Economics Law Interest Group of the Australian and New Zealand Society for International Law and the Sydney Centre for International Law at the Faculty of Law of the University of Sydney, Symposium, Friday, 25 February 2011, University of Sydney Camperdown Campus: ‘With the proliferation of over 2007 bilateral investment treaties and the explosive resort to investor–State arbitration in the same period since the WTO came into existence in 1995, investment arbitration has moved in the opposite direction from the WTO. Rather than a unified, integrated dispute settlement mechanism, a multiplicity of forums and mechanisms under different international arbitration agreements are available for investment disputes. The WTO has an Appellate Body which has contributed to coherence, consistency and predictability by developing an extensive body of jurisprudence and judicial practice in the trade field. The jurisprudence of the Appellate Body has had an influence not only on WTO panels but also on the development of international law generally, and is often referred to by investment arbitration tribunals. In investment arbitration, whilst there has been a tremendous proliferation of agreements and arbitration awards, there is no appellate mechanism. This has led to concerns about inconsistency, incoherence, and

theoretical considerations aside, this trend in divergence is an asset because it allows best practices to develop.¹³ This is particularly the case with investment arbitration, due to ICSID developments influencing the development of international law, particularly in the matter of encouraging reference to precedent, in a non binding manner, to a degree. This is ultimately the practical reason for which the author combines these two areas of international arbitration law.

However, further evidence for the assertions of one of the WTO founders is given in order to establish the urgency for harmonisation and to show that the provisions given in the HICALC address this problem in investment arbitration:

Furthermore, the current fragmented international investment regime may encourage regulatory competition among the various models of international investment agreements. Moreover, the dispute settlement mechanism does not rely on a uniform dispute settlement body, but rests on *ad hoc* arbitration panels with limited State oversight, nor on institutional mechanisms that ensure consistency and predictability in the decision-making process of arbitral tribunals. Therefore, forum shopping and inconsistency of

fragmentation of law. In fact, there have been many examples of tribunals making different and inconsistent rulings on important, substantive legal issues.’ One may infer four separate points from the foregoing statement: (1) the necessity for a principle of precedent across the board (in WTO, ICSID and other Commercial or Investment arbitrations) as a harmonised principle, (2) different ADR bodies share similar problems, not limited to inconsistencies due to a weak manifestation of precedent, (3) The WTO has made an impact on practices in the trade field, included in ICA and IIA outside of the WTO, (4) inconsistency in one ADR mechanism affects other ADR bodies because of the negative impact it has on the development of a *corpus lex* in public international law and private international law and in how those two intersect with one another. Furthermore, ‘It is that inconsistencies in public international law in *ad hoc* tribunals and customary international law are going in different directions and this means that customary international law is also going in different directions.’

¹³ T W Walde, ‘The specific nature of investment arbitration, introduction’ *international investment law emerging from the dynamics of direct investor–state arbitration* in P Kahn, T W Walde, *Les Aspects Nouveaux du Droit des Investissements Internationaux*, (Martinus Nijhoff Publishers, 2007) 47: ‘... individual cases are also more suitable to fully develop and test arguments before empirically identified and assessed factual backgrounds, whilst treaties, negotiated by diplomats, tend to be less aware of the specific legal and factual challenges and more influenced by changing fashion in the political and diplomatic discourse, both on the plane where the media experts, bureaucrats and NGOs deal with broad concepts’.

arbitral awards in dispute resolution seem to be the primary reasons why the creation of a multilateral framework for investment is necessary. It is therefore argued that there is a need for a coherent legal structure for the future of international investment law. If we agree that there are customary international law rules concerning investment, why not create an international framework that codifies the existing rules? Would this framework not serve to provide coherence, predictability and legal security?¹⁴

The author submits that the research and harmonised Draft Provisions of the HICALC given here are a step forward towards addressing the matters of unpredictability, instability and inconsistency in investment arbitration by providing an initial degree of uniformity.

Understanding the practical principles common to both ICA and IIA law allows for an automatic adjusting of the theoretical basis as a natural evolution of law. Thus:

The amount of legal talent and resources- including counsel, fact gathering and experts- that goes into many investment disputes is rare in a normal treaty negotiation. This deployment of expertise is sharpened by the confrontational dynamics of litigation where each argument provokes a counter-argument, each reference a counter-reference, each identification of a relevant factual element a counter-response and where parties leave no stone unturned in their effort to prevail. The adversarial process is as a rule superior to treaty negotiations in its ability to develop the implication of specific interpretative questions in depth.¹⁵

¹⁴ R Leal-Arcas, *International Trade and Investment Law, Multilateral, Regional and Bilateral Governance* (Edward Elgar, 2010) 252.

¹⁵ See above n 13, 47.

This is precisely why ICA theory and practice can inform IIA and the converse is true.

Indeed, the argument can be developed:

Modern changes to the commercial arbitration model, though, start to accommodate the specific nature of investment arbitration: transparency of proceedings and award, professional peer review, amicus briefs and an appreciation by tribunals that they do not work solely for the parties, but also create precedent. In so far, the investment arbitration model moves gradually towards international adjudication, as for example, practised by the International Court of Justice, the World Trade Organisation dispute institutions or the European and Latin American Human Rights Courts. This is why the specific meaning of the treaty language, once created by the treaty drafters, is no longer controlled by the treaty sponsors once treaty language is processed by the professional community of treaty users, in the main counsel, arbitrators, experts and the professional communities. It is hard for the states that sponsor treaties to give up such ownership and control, but almost inevitable if the treaties are meant to be actively applied.¹⁶

Yet, not only is treaty language subject to the above influences and interpretations, but, the author submits, so are international arbitration statutes and precedent dealing with commercial arbitration. Here, harmonisation is already occurring, albeit inadvertently, unconsciously and with dangerous implications. Is it not painfully plain that there is a need for a consciously crafted standard of harmonisation?

Although it is a well-established fact that ICA law and IIA law are separate and distinct areas of law, both must be included within the same rubric of research for another reason. ICA deals with private international law. IIA deals with both private international law and public international law. Yet, they share intersections and commonalities. To

¹⁶ Ibid.

disregard the commonalities within these fields is to diverge from established scholarship,¹⁷ notwithstanding distinctions between ICA and IIA, or between private international law and public international law. For the purposes of harmonisation, international investment arbitration ought to be considered within both realms- public international law and private international law. Here is proof for public international law: it ‘appears as a specialised subject of public international law- an evolving combination of interconnected treaties, customary international law standards and general principles, striving for (and perhaps achieving) universality.’¹⁸ Here is proof for private international law: ‘a specialised subject of international commercial dispute resolution- it presents a series of individual private business disputes based on particular, usually bilateral, treaty and contractual arrangements.’¹⁹

The problem of the sporadic developments within public international law and private international law is caused by inconsistent BIT treaty interpretations, the absence of precedent and inconsistencies in the law and practice of all forms of international arbitration. This is an apropos summary: ‘rather that international investment law inherently brings together these apparently contradictory perspectives, and that it is the amalgamation of these oppositions which gives it such uncertain foundations.’²⁰ Here, it is better to submit the naturally occurring process to deliberate and rigorous

¹⁷ A Mills, ‘The public-private dualities of international investment law and arbitration’ in, C Brown, K Miles, (eds) *Evolution in Investment Treaty Law Arbitration* (Cambridge University Press, 2011) 98: ‘The use of the ‘public-private’ distinction as a lens for the purpose of analysis in this chapter is not intended to imply a claim that the concepts of ‘public’ and ‘private’ are, or can ever be, entirely distinguishable, and certainly not that such distinctions can be made objectively or without normative implications. The problematic character of traditional public-private distinctions has long been recognised by legal theorists, including international legal theorists, and the ambiguous status of international investment law is itself perhaps evidence of this breakdown in practice.’

¹⁸ Ibid 99.

¹⁹ Ibid 100.

²⁰ Ibid 99.

methodologies with an understanding of their implications before it occurs sporadically and with theoretical inconsistencies. Would not the drafting of a uniform Arab arbitration law, based on empirical data, best practices and consideration of the implications of its practice and theoretical contribution to *juris* science address this problem?

Yet, IIA has its historical sources of authority.²¹ The author submits that there are key points of convergence in which ICA and IIA law overlap and this is particularly true in the context of MENA arbitrations. The nexus connecting them is treaty law. The specific point of convergence connecting ICA and IIA law through treaty law is the Vienna Convention.²² As previously stated, the Vienna Convention, through Article 31(3) (c), directs the treaty interpreter to take into account ‘any relevant rules of international law applicable in the relations between the parties’.²³

The integration by the author of customary international law standards and general principles, as set out in the suggested uniform Arab arbitration law, and in accordance with Article 31(3) (c) of the Vienna Convention, incorporates the first view.²⁴ Its inclusion within a thesis dealing with ICA supports the second view, particularly regarding the author’s analysis of ICSID cases that fall under ‘bilateral, treaty and contractual arrangements’.

²¹ See above n 13: ‘Nevertheless, there is room for some other authoritative participants in the process out of which international investment law emerges. First there is the jurisprudence by authoritative international courts- apart from- often brief and not very developed- older claims decisions, the main classical authority are judgements by the Permanent Court of International Justice, later the International Court of Justice, in particular in the inter-war period. Modern international cases come mainly from the human rights courts (European and Latin American) and the WTO dispute resolution bodies: national courts sometimes opine in the context in particular of enforcement of arbitral awards on questions of international law. Law is also applied- and arguable developed- by national quasi-judicial procedures such as determinations or arbitral awards relating to Overseas Private Investment Corporation Investment Insurance Claims.’

²² See above n 9

²³ See above n 10.

²⁴ Ibid.

The author submits that the inclusion of customary law in a uniform Arab arbitration law is essential. To elucidate on the complexities of the inclusion of customary law in investment arbitration sets the groundwork for the feasibility of its inclusion in a uniform Arab arbitration law. The section dealing with *lex mercatoria* deals with custom in a general sense and is a continuation of this discussion. At investment law:

The limits of the permissible and required interpretative reference to customary law seems formulated with some ambiguity, raising important theoretical questions with considerable practical relevance. To consider some of the best-known examples, was the tribunal in *Loewen Group Inc. And Raymond L. Loewen v. US* right to interpret the temporal aspect of the investor's procedural rights in the North American Free Trade Agreement (NAFTA) by reference to the rule of continuous nationality from the customary law of diplomatic protection?²⁵

The *Sempura*²⁶ case is cited as an example of reliance on customary law that lead to an annulment.²⁷ The important questions regarding the use of customary law must be settled:

The *Loewen* and *Sempra* cases show that practical importance of the interpretive relevance of customary law: in the former case, criteria provided by customary law provided one of the two grounds for rejecting the claim, while in the latter case

²⁵ M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks' in C Brown, K Miles (eds) *Evolution in Investment Treaty Law Arbitration* (Cambridge University Press, 2011) 66. *Loewen Group Inc and Raymond L Loewen v US* ICSID Case No ARB (AF)/98/3, Award of 26 June 2003, para 226-39 (*Loewen*).

²⁶ *Ibid.*

²⁷ C Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention, A Commentary*, (Cambridge University Press, 2nd ed, 2009) 889: 'Under the Convention, Art. 52 is the only way of having the award set aside. In particular, domestic courts have no power of review over ICSID awards.' This principle can be incorporated into the HICALC.

impermissible reliance on criteria provided by customary law was the ground for annulment.²⁸

The problem of reliance or impermissibility is theoretical and profound.²⁹ Scholars suggest adopting an ‘intermediate position between general international law rules on sources and interpretation and the practice and case law of investment protection law.’³⁰

Previous scholarship reveals a gap in the matter:

The scope of this chapter is consciously narrow, dealing with the interpretation of investment treaties only by reference to general customary investment protection law. It does not deal with interpretation of investment treaties by reference to non-binding soft law, general principles, special customary law, other treaties or model treaties....³¹

The research fills a gap in the literature by providing reference to general principles. The interpretation of Article 31(3) (c) of the Vienna Convention concerning ‘relevant rules of international law regarding the parties’³² is not well-established. There are two different major schools of interpretation.³³ The technicalities of interpretation³⁴ are outside the

²⁸ See above n 25, 66-67. *Sempura Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on Annulment of 29 June 2010, para 186-209 (*Sempura*).

²⁹ *Ibid*, 67: ‘The methodology for distinguishing required interpretative reliance on custom from impermissible often seems at best unclear.’

³⁰ *Ibid*.

³¹ *Ibid* 68.

³² *Ibid* 70, See above n 10.

³³ *Ibid* 71. ‘First of all, the scope of “relevance” in Art 31(3) (c) may be subject to different readings. At the narrower end of the spectrum, Judge Villiger has suggested that relevant rules “concern the subject-matter of the treaty term at issue. In the case of customary rules, these may even be identical with, and run parallel to, the treaty rule.” (Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 433, quoted by Paparinskis) ‘A number of authors explain relevance primarily by reference to the subject matter of the rules. At the other end of the spectrum, Judge Simma and Theodore Kill have argued for a broad reading under which “Almost any rule of international law will be “relevant” when considered with the

scope of this thesis, however, the author submits that a broader interpretation of “relevance” is necessary. This would resolve technical problems in interpreting (investor–State) treaties according to general principles of law.

In BIT interpretation but also in ICA, arbitrators can be guided by the Vienna Convention³⁵ and in so doing may refer to a number of ‘rules’ of ‘international law’ applicable to the relations between states, such as those mentioned herein including principles drawn from the *lex mercatoria* or other types of international customary law, eg, the principle of *pacta sunt servanda*, which honours contracts between states and investors. What can be concluded from this is that BITs make international legal principles and standards stronger, such as those upon which a uniform Arab arbitration law can be built. Under the Vienna Convention’s³⁶ provision that international law can be referred to by tribunals interpreting BITs,³⁷ the author submits that since provisions serving as the basis of a uniform Arab arbitration law fall under international law, then logically it follows that these provisions can guide the interpretation of BITs. These provisions can extend beyond guiding BIT interpretations, to guide the interpretation of cross-border disputes that are arbitrated in *ad hoc* or institutional arbitrations, in the MENA, under the New York Convention³⁸ which is a treaty and has equal standing at international law as a treaty. In consideration of the inconsistent and non-uniform developments in international investment arbitration law, any movement towards

proper degree of abstraction.” Simma and Kill, *Harmonizing investment protection and international human rights*, 696, quoted by Paparinskis.

³⁴ See above n 25, 67, 95: ‘The interpretation of the treaty rules of investor–State arbitration by reference to customary law of diplomatic protection focuses on relevance in Article 31 (3) (c). Conversely, in the interpretation of primary obligations relevance can usually be taken as a given, and different (often parallel) techniques of relying on custom have to be considered.’

³⁵ See above 10.

³⁶ See above n 9

³⁷ See above n 10

³⁸ *New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1958.

predictability, uniformity and harmonisation is valuable. A final reason for the inclusion of IIA in the same discussion as ICA is the fact that investment and commercial disputes are largely similar.³⁹

2 *Islamic International Law – Siyar*

Islamic law has a branch which deals with international law. It is called the *siyar*.⁴⁰ During the time of the early oil concessions this was not well-known, as is evidenced by the comments of arbitrators who presided over these early oil concession disputes. The words of the members of the tribunal regarding the applicability of Islamic law to the early oil concessions lend themselves to the possibility that Islamic law was not seen as developed enough to have developed a jurisprudence of international law. The fact is it *did* have such a jurisprudence.⁴¹ The sources of the *siyar* were the same sources as those of the *sharia*, with the *siyar* being a subdivision of the *sharia*.⁴² The basis for feasibility for harmonisation of the international law of Islamic law with European international law takes as its precedent the fact that in this respect the *siyar* followed developments in realising that Islamic nations require an international law amongst themselves. This is parallel to the European experience. In this respect, the *siyar* represents an example of yet another principle or doctrine of a general principle of law,

³⁹ R Bishop, J Crawford, W Reisman, *Foreign Investment Disputes, Cases, Materials and Commentary*, (Kluwer Law International, 2005) 9: 'For our purposes, the term "investment" will be used in the context provided by Art 25 of the ICSID Convention- a dispute that arises directly out of an investment. Thus, an investment dispute is not necessarily distinct from a commercial dispute; it is merely one that derives from an investment.'

⁴⁰ C G Weeramantry, M Hidayatullah *Islamic Jurisprudence, An International Perspective*, (Macmillan Press, 1988) 130: 'The Islamic jurists developed a special branch of the *Shari'a*, known as the *siyar*, to deal with questions of international law.'

⁴¹ Ibid: 'Yet even in the earliest days of Islam, obligations such as treaty obligations towards non-Islamic states were accorded full recognition. At a later stage it became clear that even the world of Islam was not one nation state but several and that the world of Islam must necessarily coexist on peaceful terms with the non-Islamic world.'

⁴² Ibid.

ie, the concept of international law can be understood as a general principle of law in that it can be found in both Western tradition (as it is referred to as international law) and at Islamic law as it is referred to as *siyar*. It can be seen as a universal principle of law. The development of the *siyar* within Islamic jurisprudence was advanced:

Islamic international law kept pace with these changing concepts and needs and the *siyar* became, in the words of Majid Khadduri, a foremost modern authority on the subject, “an elaborate and permanent part of Islamic law” (Khadduri and Liebesny, 1995, p. 349.)⁴³ In fact, scholars have put forward the proposition that the Islamic law of *siyar* is amongst the earliest works of international law: ‘The world’s earliest treatise on international law as a separate topic was by Mohammed bin Hasan Shaybani who wrote an Introduction to the Law of Nations at the end of the eight century. This work, recently translated into English, by Majid Khadduri, is available under the title, The Islamic law of Nations (Khadduri, 1966). A second, more advanced treatise was also written by Shaybani. Nor was Shaybani the only writer, as we shall see. Western accounts of the origins of international law (eg, Oppenheim, 1955, vol 1, Chapter 1) tend to omit this phase in their consideration of the history of the subject.’⁴⁴

The purpose of the foregoing discussion regarding the inclusion of Islamic law’s *siyar* is twofold. The first purpose is to provide evidence for the feasibility of harmonisation by showing that Islamic law recognises similar aims as Western international law regarding the regulation of the relations between sovereign States. In connection to this, the concept of general principles of law or universal law is strengthened because this serves to provide another example of such universal or general principles. The second purpose in

⁴³ Ibid.

⁴⁴ Ibid 130-131.

raising the matter of *siyar* is to demonstrate to Western parties that harmonisation is feasible and to demonstrate to Arab parties that harmonisation is not contrary to *sharia* principles based on extant similarities of *sharia* principles with European international law. This will encourage the implementation of a uniform Arab arbitration law.

D *Research Question*

The question investigated herein is: would harmonisation increase arbitral award enforcement? The empirical evidence derived herein establishes that the answer to this important and hitherto under analysed question is yes. The underpinning premise supporting the thesis that harmonisation of relevant principles found at civil, common and Islamic law is possible gains its legitimacy through a comparative analysis of these relevant principles. This comparative analysis examines how they are construed and expressed at Islamic law and compared with principles at either civil or common law, or both.⁴⁵ This thesis is concerned with extracting principles from each that are common to each other and common to Islamic law. In this regard a uniform Arab arbitration law would equally represent the civil, common and Islamic law traditions, since the principles upon which it must be built are principles that are acceptable to all three.

The author has identified specific common principles found at Islamic law, which are shared with either civil or common law or both. The existence of common or ‘universal’ principles attests to the fact that on the basis of these principles,

⁴⁵ J Brinton, *The Mixed Courts of Egypt*, (Yale University Press, 1930) 48: ‘It may be observed, however, in passing that a practical matter the closer one draws to the points of difference the less important they tend to become. Often on closer acquaintance, what appears at first sight to be a substantial distinction turns out to be no more than a difference in nomenclature or procedure. Differences in fundamental legal conceptions are relatively rare.’ The operative term in the author’s sentence in the text above is ‘relevant’. The reason this caveat is included *ab initio* is because there are areas where civil and common Law disagree with one another. This thesis is not concerned with the differences between the three world legal traditions, but with the similarities which occur more frequently at the deeper level of principles.

harmonisation is possible and a harmonised international commercial arbitration law can be drafted therefrom. The author suggests⁴⁶ that from these common principles a harmonised international commercial arbitration law code (HICALC) or uniform Arab arbitration law can be drafted.⁴⁷ Indeed, common, civil and Islamic law share foundational common principles and one such principle is that of arbitration.⁴⁸ The author suggests that harmonisation is perhaps one of the few, if not the only way to deal with the cultural differences between Western and Eastern parties. Globalisation has led to an increase in cross-border disputes. Al Jazy has argued rightly that globalisation in fact demands harmonisation:⁴⁹

As a result of the increasingly developing globalised world economy, the world witnessed a phenomenal rise in commercial disputes crossing the national borders; hence the world needed an effective regime of rules which can settle such disputes. These rules found their base in new international legislation and modern standards on arbitration.⁵⁰

The author agrees with the learned Al Jazy not only on the basis of the strength of the merit of his argument but also on the basis of cultural understanding:

⁴⁶ M Ayad, 'International Commercial Arbitration and Harmonisation of Contract Law with a focus on reform in the MENA,' (2008), 12.2, *Vindobona Journal of International Commercial Law and Arbitration*, 169,174: "It is submitted that a code of international arbitration laws can be derived and implemented to bring about reform in the region and to facilitate international arbitrations in relation to contracts between Arab and European States."

⁴⁷ Ibid 168: "This paper will show that much of the work has been done: there is already common ground on which to build, especially in the states of the MENA many of which have mixed jurisdictions. Similarly, the principles of international law are rooted in monotheistic traditions common to MENA and Europe. Contract law is well-suited to harmonisation. It will be submitted that a multidimensional code which addresses current trends in international arbitration and matters common to both European and MENA states is desirable and achievable. The paper will make recommendations for such a code to be implemented in the MENA states." Thus, this idea in an earlier draft was previously published.

⁴⁸ Ibid 169-170. The idea in this paragraph was first published as part of an earlier draft of this research.

⁴⁹ M Ayad, see above n 46, 169. The idea in this paragraph was first published as part of an earlier draft of this research.

⁵⁰ O Aljazy, at the conference on Aspects of international arbitration in the law and practice of Arab countries, Session III, The reception of new legislation and international standards on Arbitration: The role of the legislator and state courts, presented on 13 June, 2007 at the Cour de Cassation. Paris, France.

Cultural understanding is the foundation of international relations as legal traditions are imbedded in culture. The debate on the harmonisation of law touches upon the very idea of cultural differences and only a proper understanding of the cultural roots underlying legal traditions can place this debate in its proper context.⁵¹

The nexus of globalisation with cultural differences in consideration of the politically sensitive nature of oil concessions or State contracts must be seen in this light:

Arbitration as a feasible solution to large commercial disputes is a means towards fostering diplomatic interstate relations in today's complex global environment where cross-cultural misunderstandings can lead to disastrous consequences. The flexibility of arbitration in a number of areas, particularly in the choice of law throughout the arbitration process makes this method a particularly well suited form of dispute settlement in an international setting. The trend towards acceptance of arbitration by Arab participants is a positive step towards achieving diplomatic relations and global peace.⁵²

1 *Objective of the Research- a Uniform Arab Arbitration Law or a Model*

Harmonised International Commercial Arbitration Law (CODE)

It is necessary to illuminate the desired outcome. It is proposed by the author that a model harmonised international commercial arbitration law code (HICALC) or uniform Arab arbitration law drawn from universal principles of law common to civil, common and Islamic law principles with specific provisions addressing the current gaps in legal instruments can resolve the major problems besetting ICA and bring about a higher rate of arbitral award enforcement. The thesis of this research is that a harmonised

⁵¹ M Ayad, see above n 46, 168

⁵² Ibid 169, 173.

international commercial arbitration law code (HICALC) or uniform Arab arbitration law is feasible and would increase arbitral award enforcement.⁵³ The author has given substantial evidence herein to establish the feasibility and effectiveness of harmonisation. The author submits that the need to make international arbitration more fully acceptable to Arab parties can occur through harmonisation. Case law substantiates this submission.

Drafting a model law is a task for lawyers skilled and experienced in drafting. The scope of the enquiry herein extends only insofar as that amongst the core objectives of the thesis is included the identification of matters to be dealt with in a draft HICALC code or uniform Arab arbitration law and the principles and policies to guide its drafting, whilst acknowledging that the actual drafting of a code will need to be done by others with the requisite skill and experience. Although the author has found that nine areas of substantive and procedural law require reform, this thesis will focus only on five of these areas. The remaining four areas- *pacta sunt servanda*, bias, precedent, and *res iudicata* have been raised in this thesis but it is beyond the scope of the research to elaborate on these areas of substantive and procedural law, beyond what has been given. All nine of these areas of law demonstrate the problems of ICA and IIA in the MENA. They will serve a role in guiding the drafted articles. The author includes an appendix that contains a model for future draft Articles- one which incorporates the research generated herein but will require adjustment and refining by technically experienced lawyers and legislators. To provide a comprehensive and final draft of a HICALC or uniform Arab arbitration law is beyond the scope of this thesis. The draft Articles in the appendix

⁵³ B Zeller, *CISG and the Unification of International Trade Law*, (Routledge-Cavendish, 2007) 3: 'Practically speaking, it is universally accepted that legal risks and costs are reduced if there would be one law and one judiciary dealing with international trade.' This thesis deals with the former, the matter of one law, and is guided by this sage principle previously espoused by the eminent scholar quoted herein.

reflect the research carried out on all nine areas of procedural and substantive law that have been identified as problematic, although the focus of the results of this thesis is the five areas previously identified in order to allow for in-depth coverage. The draft articles are a response to the problem areas which need to be addressed. They should be considered at the starting point for discussion when and if a common rule for the MENA is envisaged.

2 *Objective of the Research -Understanding Adjudicatory Risk in the MENA*

A second aim of this research is to provide information to advise investors or practitioners who are unfamiliar with the MENA as to the precise nature of the adjudicatory risk therein. The lack of information regarding the Middle East and Islamic law has contributed to many of the problems in international arbitration in the MENA. There are factors which are foreseeable by laypeople and experts but there are factors which are unforeseeable by both. In this respect there are factors that may wrongly be perceived as risks but are not, however, due to misinformation, they are seen as obstacles when the case is the converse.⁵⁴ In this context the author will compare two approaches, those of the ostrich and of the oyster to demonstrate why the approach employed herein reflects best practices. This thesis deals with the adjudicatory risk to investors in

⁵⁴ For example, in regard to Egypt, many are surprised to hear of Egypt's liberal policy on interest and history of the Mixed Courts which is in fact favourable to investors and should be taken as a guiding precedent. Egypt's constitution and certain provisions in the civil code protect investors. These factors help to mitigate adjudicatory risk. In regard to Islamic law provisions on the matter of expropriation, it will be shown that high protection is given to investors and private property owners. Thus, where there is fear of adjudicatory risk in these matters, the fear is inflated. On the other hand, the positive campaign by the leaders of the United Emirates and particularly of Dubai to promote it as a haven for investors has led to an impression that doing business there is easy. This is misleading and the author has selected cases from both the former and the later to demonstrate that this is not the case. The matter of adjudicatory risk in the UAE and Dubai is high as a result of automatic court review and provisions that prevent awards from being enforced due to public policy. This will be discussed in the sections on Egypt, the United Arab Emirates, Dubai and expropriation, respectively.

consideration of the fact that a valid and consensual arbitration clause is drafted into the contract. In this sense it is a matter of strictly adjudicatory risk rather than the more broad legal risk (with the exception in the case of *maslaha* or *al masalih al mursalah*). In addition to this, BITs (Bilateral Investment Treaties) entered into contain arbitration clauses that protect investors under contracts with State parties under these BITs. The types of adjudicatory risk -in the context of the MENA - and even considering these legal safeguards (valid, mutually agreed upon, written arbitration clauses, and BITs, *inter alia*) are still relatively high. At no time does the author address the matter when an arbitration clause is absent. The risks would be exponentially multiplied. It is an untenable position. Arbitrations in the MENA context must contend with political risk.⁵⁵

The matter of adjudicatory risk is an inherent consideration of international investment arbitration. This is another reason why IIA is included in this thesis. Foreign investment is different from trade transactions.⁵⁶ The decision to invest initiates a long term relationship between an investor and foreign country.⁵⁷ It involves placing substantial amounts of monies into the project initially with the goal of receiving a rate of return at a later date, perhaps even thirty years later.⁵⁸ Adjudicatory risk differs from political risk notwithstanding any overlap. Court intervention in the MENA is an

⁵⁵ Political risk has a negative impact on foreign direct investment. Several causes for specific types of political risk abound in MENA-FI investment arbitrations. Nationality of investor, expropriation, prohibitions on interest, doctrines of public policy and sovereign immunity, domestic court and government interpretations of legal doctrines and instruments, inconsistent Sharia interpretations and choice of law, *inter alia*, create political risk. A proper regulatory framework is necessary to mitigate these risks. A close analysis of several landmark cases will demonstrate the dangers these factors pose to investors.

⁵⁶ See below n 367, at 3

⁵⁷ Ibid.

⁵⁸ Ibid 3-4. Further, 4: 'A key feature in the design of such a foreign investment is to lay out in advance the risks inherent in such a long-term relationship, both from a business perspective and from the legal point of view, and then to identify a business concept and a legal structure that is suitable not only to the implementation of the project in general but also to minimize risks that may arise during the period of investment.'

example of both due to the fact that independence of the judiciary is compromised therein.

Arbitration is acceptable to the global business community and to Arab parties as evidenced by the growth of regional arbitration centres in the MENA. The author has found in the course of the research that it is widely and wrongly assumed that arbitration clauses are unacceptable to Arab parties. This is empirically untrue. Arbitration has indigenous origins in Saudi Arabia and in pre-Islamic times. At the time of the Prophet and after it became a widespread practice. This is still the case. The matter of unfairly adjudicated oil concession arbitrations led to distrust of western style arbitrations, not to disrespect or offense towards arbitration clauses. An arbitration clause can be appropriately designated to the situation. It is a misconception that Arab parties would be offended if a non-Arab party suggested including an arbitration clause in the contract. The Arab party would accept it over litigation in general practice, but it would then be a matter of selecting the Seat and the applicable law of procedure and relevant laws. From a cultural perspective, arbitration is seen as more face-saving than litigation, even if the procedures are potentially similarly adversarial. Arbitration is seen as less adversarial than litigation, from a cultural perspective. An investor who has signed a contract which contains a valid arbitration clause but has not researched the law of the Seat of the arbitration is placed at unnecessary adjudicatory risk. What is the comparative equivalent of a contract with no arbitration clause whatsoever? This is not an unusual occurrence nor is it one without adjudicatory risk. It has a higher adjudicatory risk than an imprecisely written arbitration agreement.

Indeed, it is not even necessarily a question of the Seat of arbitration but rather what can occur even when a Western Seat is designated but one of the parties to the contract is based in the MENA and can appeal⁵⁹ or refer the matter to their own court and challenge the jurisdiction of the tribunal. This has risks for the investor or non-State party.

(a) *Sucres et Denrées v Horizon International Food Trade Co Ltd (Jordan)*

The case of *Sucres et Denrées v Horizon International Food Trade Co. Ltd (Jordan)*⁶⁰ demonstrates this adjudicatory risk. The facts of this case⁶¹ are as follows. *Sucres et Denrées*, together with *Korean-Polish Shipping Co. Ltd*, and *Horizon International Food Trade Co. Ltd*, signed a charterparty in Paris in which sugar would be imported from Brazil to Jordan's Port of Aqaba. *Korean* owned the vessel, *SUCDEN* was the charterer of the vessel and the sugar's seller, whilst *Horizon* was the sugar's buyer and receiver. The dispute arose because on 15 September 2004 it was found that part of the sugar shipment was damaged. The charterparty contained a clause calling for arbitration in London under the Rules of the Maritime Arbitrators Association (LMAA) in the event a dispute arose from the charterparty. *Horizon* in seeking compensation for the damages to the cargo commenced an action in the Amman Court of First Instance against the appellant, *inter alia*. The result of this led to time delays, *inter alia*:

⁵⁹ See above n 27: 'Annulment is distinct from an appeal. This is apparent from the wording of Art. 53, which provides that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention.' This applies to ICSID. This provision should also be incorporated into the HICALC.

⁶⁰ *Mahkamet Al Tamyeez* [Supreme Court of Cassation], 8 April 2008, No 2353/2007, in Van Den Berg, A, *Yearbook Commercial Arbitration*, Vol XXXIV-2009.

⁶¹ *Ibid* 654.

On 4 June 2006, the Amman Court of First Instance dismissed both petitions and refused to refer the dispute to arbitration. On 30 April 2007, this decision was affirmed by the Amman Court of Appeal. Both courts held that the arbitration clause in the bills of lading was null and void pursuant to the Jordanian Maritime Commercial Law, which provides for the nullity of clauses excluding the jurisdiction of the Jordanian courts over disputes arising out of shipping or maritime carriage documents.⁶²

The Supreme Court of Jordan reversed the decision of the Jordanian lower court and on correct grounds: ‘finding that the prohibition of arbitration in the Jordanian Maritime Commercial Code did not apply as it was superseded by the 1958 New York Convention⁶³ and the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules), which as international treaties prevail over domestic law’.⁶⁴ That decision was given on 8 April 2008. A significant amount of time was lost in court that delayed the arbitration proceedings including the business operations of the parties to the charterparty leading to loss of time and to increase in costs, which is not a viable formula for business matters. This case does not represent a rare occurrence; rather, this is a foreseeable adjudicatory risk. It must be emphasised that this is the risk when there is a valid arbitration clause drafted into the contract.

⁶² See above n 60.

⁶³ See above n 38.

⁶⁴ See above n 60, 654–655.

X SECTION II LITERATURE REVIEW AND METHODOLOGY

The purpose of this section is to provide a critical analysis of the literature⁶⁵ (which ultimately includes primary data sources – laws and cases) to demonstrate gaps in the literature and in the legal instruments in place, and to demonstrate the necessity of a HICALC or uniform Arab arbitration law. A critical literature review of seminal authors on ICA law and IIA law not limited to experts and scholars of public international law and private international law has revealed lacunae in the matter of the theoretical *inter alia* foundations of ICA. There are few analytical or critical scholarly sources addressing the theoretical foundation from which ICA and IIA claim their genesis or the theoretical implications of the development of ICA and IIA.⁶⁶ This matter has bearing on the matter

⁶⁵ The critical literature review included here is intended to introduce the broad topic of harmonisation. As a result of the fact that this is a legal analysis, a more critical literature review of the relevant topics covered in this thesis is found in the appropriate sections throughout the thesis where the literature introduces a legal concept and it thus serves as background for the legal analysis. The reason for this particular structure is to allow the linear flow of the arguments to occur unhindered with the requisite background literature included in the relevant section because this thesis is multi disciplinary and draws upon a wide range of literature for support. Legal commentary is included with the relevant cases thought the thesis in order to create ease of literary flow. Legal commentary is an important and helpful aspect of a critical literature review but to write a lengthy literature review divorced from the legal analysis in a thesis which is based on a comparative analysis is not feasible. The literature review would become cumbersome and the legal analysis would be disjointed from the broader background and scholarly considerations. The comparative analysis is one reason and another reason is the fact that this thesis draws upon a multidisciplinary approach, which is grounded upon a wide range of literature for support. To discuss all this literature in full in the literature review and then return to the same topics in the body of the discussion and results would create two disjointed theses that appear disconnected. To include the literature where relevant, and as part of the critical discussion in the appropriate sections, is more logical and efficient for the reader. For example, the discussion dealing with the matter of expropriation draws upon A El Kosheri and Sornarajah, while the discussion on public policy draws upon Hallaq's work as well as Rida quoted by Hallaq. The section dealing with the matter of the Golden Age of Spain draws upon historical data, including the philosophy of Aquinas, *inter alia*. To move this information into the literature review would detract from the legal analysis therein and create a disjointed thesis with two parallel sections that are unable to support one another. Therefore the material including in this literature review is only meant as a very general and introductory preamble to the important legal topics to be found in the thesis.

⁶⁶ M L Mustill, *Transnational arbitration in English Law, in International Commercial and Maritime Arbitration*, F Rose (ed), (Sweet and Maxwell, 1998) 15: Consequently, we do not find in the writings any general attack on the philosophy of arbitration, nor, with one or two notable exceptions, has there been any attempt by teachers of law to weigh up the new context. Equally, the practitioners have had little to say about the problem. This is not surprising. The procedures of the common law do not conduce to introspection, particularly in the field of procedure. Faced with a practical problem, the Courts look for a

of the doctrine of precedent. The few sources that have been written are arguably not objective in that they present only one side of the story. In the theoretical literature, in which the focus is nearly solely on the procedural considerations of ICA, little has been written to date on the substantial considerations of substantive and procedural law from a theoretical foundation. Most books and journal articles dealing with ICA trace the procedural law of any given arbitration proceeding, from the beginning of the dispute when the contract is breached, to the end of the arbitration proceeding, up to when the award is given, and in many cases, perhaps when the award fails to achieve recognition and enforcement. Even less has been written from an empirical or theoretical perspective or implications thereof with respect to failure to achieve execution⁶⁷ of the award.

Notwithstanding, in these works, there has been little scholarly work on the theoretical foundations of the substantive law of the dispute insofar as substantive law intersects at various points with arbitral proceedings and arbitration procedural law from beginning to end, and insofar as it has bearing on procedural law as it unfolds in practice. The nexus of law with practice is weak, and the nexus of law with theory is weak. The nexus of theory with practice is nearly nonexistent. Scholarly work that has written on the theoretical basis of procedural law does not comprehensively follow through to address actual practice and empirical data within the framework of the nexus of theory with procedure. Certainly, substantive law is left out of this entire formula. Therefore, although the seminal works on ICA law are practical, this practicality in consideration of

sensible solution to the individual case with infrequent recourse to doctrine. Even at this modest level, opportunities to address the theory of arbitration arise very infrequently, only in a handful of cases each year.'

⁶⁷ The matter of sovereign immunity which is divided into immunity from jurisdiction and immunity from waiver, is discussed in the appropriate section.

empirical realities that require a theoretical foundation has limitations. It is dangerous to allow practice to emerge when it is divorced from (i) theory,⁶⁸ (ii) procedural law and (iii) substantive law. With respect to harmonisation as it has occurred throughout history, these three factors have not evolved with practice. Perhaps exceptions to this are the example of the Golden Age of Spain, where theory and philosophy and jurisprudence were harmonised across different religions and traditions, or where procedural and substantive law converged in commercial matters, for example through the *lex mercatoria*.

ICA and IIA law are each a highly technical and complex *corpus lex* which in each case is interdisciplinary. Scholars who have in the past denied the existence or merits of interdisciplinary considerations of ICA have done so incorrectly and they are incorrect to claim that public international law and private international law are completely different fields that should never meet. By remaining separate, the doctrinal matters remain obscured and unresolved, causing negative implications for investors and for States in matters pertaining to the rule of law and international trade. Separating them prevents an objective view and this prevents an opportunity to create a fair regulatory framework that balances the needs of States with the needs of investors in a more tenable manner than what has occurred in practice and in procedure in Investor—State disputes in the MENA. The practical considerations of ICA ought not to be divorced from a correct understanding of the theory. It is the view of the author that ultimately, best

⁶⁸ D Roebuck ‘preface’ in V Bhatia, C Candlin, M Gotti, *Discourse and practice in International Commercial Arbitration, issues, challenges and prospects*, (Ashgate, 2012) xi: ‘The bridge still needs to be built. It will span the gulf which now separates the scientist from the practitioner. Though some of the best contributions to the science have come from practitioners, even they have not always been able to transfer their insights into general practice.’

practices must emerge from correct theory. The major difference between this research and many previous scholarly sources on ICA is that this research puts forth the thesis that (i) ICA as it is practised, and (ii) as it should be practised, is based upon universal standards in the form of general principles of law that are universally recognised, and (iii) as such can be construed as international, and (iv) have certain important theoretical considerations that (v) have implications for the important doctrinal matters that arise in ICA disputes and that (vi) can be distilled into Rules, or a regional treaty, or *ad hoc* arbitration clauses that reflect best practices and can help investors and States whilst maintaining balance and equity, especially in investor—State disputes. The inability to comprehend, analyse and apply these doctrinal principles and their theoretical foundations consistently and predictably means that ICA will not be practised in the best possible manner. Empirical data and evidence from case law and arbitral awards will be given in the thesis.

This research introduces a *theory of international commercial arbitration*, and gives an analysis of the procedural law underpinning ICA law as well as substantive law where it intersect or implicates procedural law, and, in so doing, provides for a substantial analysis of the law of procedure; an analysis that corresponds with reality and resolves many of the practical problems of ICA law. In regard to the matter of substantive law, although the author refers to the UNIDROIT in the context of implementation, matters of substantive law are restricted in the scope of this thesis. It is for this reason that a more comprehensive discussion of the differences between civil law and common law are considered outside the scope of this research. It is also for this reason that the differences within different civil law jurisdictions and within different schools of Islam,

with respect to UNIDROIT or CISG principles are outside the scope of this research.⁶⁹

The focus is primarily procedural with a view to substantive law where it is directly relevant and has bearing to procedural matters. The draft HICALC principles are not even remotely intended to alter or standardise UNIDROIT principles. The substantive law pertaining to a contract is largely restricted to matters where it has bearing on procedure. This means that the differences in civil law with common law and within civil law jurisdictions are minimised. They are also minimised on the basis that the aim of the HICALC is to be adopted and utilised in the MENA, where the civil law codes all have common origins, as will be elaborated in the respective sections. In addition, the widespread adoption of the UNCITRAL means that the differences are further minimised in regard to the procedural aspects and procedural law of ICA practice in the MENA. The matter of substantive harmonisation in the fuller sense of the meaning of the word is outside the scope of this thesis because it enters into the international law of the contract and substantive matters pertaining to the contract which are based on a case by case basis and the inherent nature of a contract. The implication of this is that differing types of contracts such as construction, oil concession, management, engineering, mineral, financial, etc, would have be considered in separate chapters with great detail. This means that reform of the UNIDROIT and the CISG is outside of the scope of this research, at this time.

⁶⁹ The author submits that this topic would make an excellent PhD dissertation for future students. In future, a combination of such a future study with this one would make a significant contribution to improvements in harmonisation and in the law and practice of international commercial arbitration and international investment arbitration, not restricted exclusively to the MENA, but across different jurisdictions globally. The relationship of harmonisation with differences within civil law or differences within Islamic law as it relates to the UNIDROIT or CISG enters into the matters of the substantive law of the contract and is in and of itself an extremely broad topic that would require several years of research. It is outside the scope of reform to procedural law.

This research is interdisciplinary in that it distils the theory in comparative international law in such a manner to allow this important synthesis to guide the drafting of a HICALC. It provides a theory of ICA, one that deals with the procedural considerations of ICA law (and substantive where it has bearing and relevance to procedural law in the MENA climate and suitable to restricted types of contracts), and with direct applications to the practice of ICA; making this research a synthesis of the theory and practice of ICA law.

A preliminary yet comprehensive literature review of two separate but interrelated authorities has revealed the theoretical basis for the feasibility of a model HICALC or uniform Arab arbitration law. The first body of authorities is comprised of the major works of the three religious traditions indigenous to the MENA; namely principles and values derived from the Torah, the Bible, the Quran and Hadiths (traditions). Concurrent with this set of authorities are scholarly treatises on the subject matter. The second body of authorities are the case law, statutes, conventions and arbitral awards relevant to the topic of ICA and to a certain extent, IIA. With respect to this category, secondary commentaries on the primary sources form the majority of the literature review, which is introduced here but discussed critically within the relevant sections as these secondary sources pertain to specific legal doctrines. The largest categories from which universal principles are drawn are those of the general categories principles found at civil, common and Islamic law, with the understanding that on a profound level, many of these principles are derived from the aforementioned religious sources which have shared values, a shared history and shared points of origins, as well as shared evolutions. Here, harmonisation is based on the shared similarities. Included in this second body of

authorities are the legal commentaries or treatises and scholarly works referring to these primary data sources. Principles from public international law including from private international law and the *lex mercatoria* are included. It must be borne in mind that both sets of these (primary) sources are to be regarded primarily as literature for the purposes of the literature review and secondly as data. HICALC principles are also drawn from profound analysis of the legal problems in the MENA with a view to understanding the implications of the empirical data and cases/arbitral awards in light of procedural law (and in rarer cases substantive law), in order to provide a response based on best practices; a harmonised set of Rules (or *ad hoc* clauses or regional treaty) that can span the differences in order to transcend them, so that the problems that occurred in ICA and IIA in the past can be mitigated in the future. Ultimately this is the strongest motivation for focusing on similarities rather than differences. By its very nature, a harmonised law cannot be built upon differences. It requires similar principles as the basis for its foundation. In the past, previous scholarship has focused too heavily on the differences to the exclusion of similarities, thereby depriving itself of opportunities to harness those similarities. Exceptions to this are the Golden Age of Spain and the more recent ‘clash of civilisations’ espoused by Huntington.

The author submits the feasibility of harmonising civil law with Islamic law principles has bases in, eg, *qiyas*,⁷⁰ including historic attempts at harmonising the civil law with Islamic law, such as in the form of the *Majalla* and Sanhuri codes. Examples are given in the sections to follow. A previous attempt of harmonisation of secular law with non-secular law is the following:

⁷⁰ Analogy

A bold effort was made to intellectually integrate Roman law principles with the bodies of law created by the Roman Catholic Church (the Canon law) and the indigenous bodies of customary law regimes created (over the last half-millennium) ... the *ius commune* was this pan-European amalgam of inherited Roman law, the emerging Canon law of the Church, and the pre-existing customary regimes.⁷¹

Evidence for the fact that Eastern and Western cultures do have points of convergence is found in the following: ‘The Medieval *ius commune* was the cultural bridge of the western legal tradition, with Roman law at one temporal post and the early modern nation-State legal system at the other’.⁷² The thread of common law again reveals its power to lead jurisprudence out of confusion and towards the consideration of a clear and consistent standard; a common, harmonising element, which is a foundational pillar to support ICA. Thus, ‘While obviously there were differences and variations in the *ius commune* among European polities (particularly as between England and continent ... there was also a surprising degree of commonality. One of these was in respect to the nature of custom as a source of law’.⁷³ What is interesting here is that the Medieval *ius commune* was born out of practical business needs; the trade between peoples of differing traditions, throughout history.⁷⁴

⁷¹ D Bederman, *Custom as a source of law*, (Cambridge University Press, 2010) 22

⁷² Ibid.

⁷³ Ibid.

⁷⁴ R Fletcher, *The cross and the crescent, the dramatic story of the earliest encounters between Christians and Muslims*, (Penguin, 2003) 100: ‘Sometime in about the 1050s a Jewish lady in Jerusalem wrote to her supplier in Egypt to place an order for “shadhuna qirmiz”. Shadhuna is Medina Sidonia in southern Spain. Qirmiz is dyestuff produced by crushing the beetle *coccum ilicis* which lives in the bark of ilex trees; our word “crimson” is derived from it. About three-quarters of a century later, to be precise on 11 August 1125, an Alexandrian merchant named Ibn Halif died at Almeria in south-eastern Spain in the course of a business trip. We know of these events owing to a chance documentary survival and an inscribed tombstone. They offer two minor examples of the commercial unity of the Mediterranean in that age, which goods and people flowing from one end of it to the other, and of the hegemony within it of Islamic and Jewish businessmen. It was a hegemony that was already being challenged by rivals from the Christian

Custom in the MENA is important:

Apart, however, from the written law, as expressed in the code and the subsequent legislation, there is a second source of law in Egypt, which stands upon an equal footing with the edicts of the legislator. This is usage- *la Coutume*, as it is known- an element which plays an extraordinarily large rôle in regulating the relation of peoples in Mohammedan countries, and which has acquired a peculiar significance in Egypt in that it is the basis of the whole capitulatory system which led to the founding of the Mixed Courts. In a particularly real sense it can be said that in Egypt usage is law.⁷⁵

Customary law can be seen as synonymous with judge-made law, or the common law, as scholars have rightly propounded.⁷⁶ Indeed, this similarity is self-evident. Thus the similarity between Islamic law and common law at the profounder level of principles is plain. The Islamic doctrine of adjudication by *ijtihad* relies upon the doctrines of *qiyas*, and *ijma*. It relies upon precedent, *inter alia*. Yet it also often relies on custom.⁷⁷ Here, the link between adjudication in the Islamic law tradition and adjudication in the common law tradition is similar:

world; specifically and initially from Italy.’ These examples attest to the inherent harmonisation that arguably was in place, at the very least, through custom, in earlier stages in history.

⁷⁵ J Brinton, *The Mixed Courts of Egypt*, (Yale University Press, 1930) 151-152.

⁷⁶ Bederman, See above n 71, at 27: ‘In England, these transformations in the roles of custom took place over three broad periods. In what I refer to here as the “pre-Blackstonian epoch”, two distinctive ideas of customary law emerged from the *ius commune* ... One of these was the idea that the judge-made common law is itself a customary regime.’

⁷⁷ N Brown, *The rule of law in the Arab world. Courts in Egypt and the Gulf*, (Cambridge University Press, 1997) 2: ‘The origin of the current legal system in most Arab countries can be traced back to the Ottoman reforms of the nineteenth century. Before that time, the Ottoman government certainly had a strong interest in the administration of justice, and *qadis* (judges) appointed by the Empire or by its local representatives adjudicated disputes based on a combination of *shari’a* law (Islamic law) and *qanun* (state law, itself heavily based on the *shari’a*). Other localised systems of justice, often informed by custom, operated in specific areas. A series of centralizing reforms throughout the nineteenth century resulted in a more hierarchical system as well as several attempts to codify existing law.’

Common-law reasoning and decision-making has created many difficulties for legal theories, for there are problems in characterizing what the judges are doing (e.g. making law or finding law, and, if ‘finding law’, where is/was the law that is being found?) Historically, some commentators saw common-law reasoning as ‘immemorial custom’/ or ‘law preserved in the memory of man’, John Davies (1615) restated by judges.)⁷⁸

Is it not well established that custom serves as the unifying element between these two legal traditions?

A critical comparative review of the aforementioned literature has revealed that foundational doctrines found at civil and common law are also found at Islamic law, with customary law serving as a harmonising element throughout—making for solid common ground. For example, *inter alia*, internationally recognised general principles of law, found at all three traditions: customary law or customary usage (*lex non scripta*) (unwritten, common law, comparable to the idea of the Sunna or traditions in Islam), equity, reasoning,⁷⁹ good faith, unjust enrichment, breach of contract, *omnia praesumuntur legitime facta donec probetur in contrarium* (presumed to be lawful unless shown otherwise, similar to principles at Islamic law), are found at Islamic law.⁸⁰ At Islamic law the principle of permissibility (*ibahah*)⁸¹ regarding commercial transactions and contracts specifies that they are permissible unless otherwise prohibited. Included

⁷⁸ Bix, see below, n 359, at 36

⁷⁹ W Hallaq, *Sharia, Theory, Practice, transformation*, (Cambridge University Press, 2009) 503, the use of reason in all three traditions does not contradict. The Egyptian intellectual Muhammad Abduh (1905) had this view of judicial reasoning: ‘... sound human reason is, on its own, capable of distinguishing between right and wrong. If there appears to be a contradiction between reason and revelation concerning any particular issue, it is because one or the other has been understood. This doctrine (otherwise known as *dar ta’arud al-aql wal-naql*) received full support in mainstream theological and juristic circles, but Abduh gave it a heavier Mu’tazilite twist in maintaining that reason is not simply a partner of revelation but can in effect displace it as a guide to human action.’

⁸⁰ M Ayad, see above n 46, 173. An earlier version of this research was first published with Vindobona.

⁸¹ M Kamali, Chapter Seven, *Islamic Commercial Law: An Analysis of Futures and Options*, Islamic Texts Society. (Cambridge, 2000) 67, The *shariah* Perspective on Commercial Transactions (Mu’amalat).

amongst these internationally recognised doctrines of law is that of arbitration itself as an accepted practice.

The universality of arbitration as a practice (in reference to this latter point) has its origins in pre-modern history in both Western and Eastern legal cultures. In the former, the famous Judgement of Paris was a legendary arbitration in which Paris the son of Priam was to judge the goddesses Hera, Athena, and Aphrodite according to their beauty.⁸² In spite of the fact that all three goddesses offered Paris bribes, he chose the goddess Aphrodite, knowing that the bribe she offered him, that of Helen of Troy was the one he valued most. He therefore inadvertently caused the Trojan War. One may infer that if arbitration was good enough for the gods and goddesses as an accepted dispute resolution method then it is good enough for mere mortals; the method of arbitration was known in the ancient Greek culture. In Eastern cultures, there are a number of famous arbitrations involving the Prophet himself. Indeed:

Arbitration, the principal form of international dispute resolution, has a long and often troubled history in the Islamic world. Shortly after the founding of Islam, the Treaty of

⁸² E Hamilton, *Mythology, Timeless tales of gods and heroes*, (Grand Central Publishing, 1942) 254–255: ‘They asked Zeus to judge between them, but very wisely he refused to have anything to do with the matter. He told them to go to Mount Ida, near Troy, where the young prince Paris, also called Alexander, was keeping his father’s sheep He was an excellent judge of beauty, Zeus told them. Paris, though a royal prince, was doing shepherd’s work because his father Priam, the King of Troy, had been warned that this prince would someday be the ruin of his country, and so he had sent him away. At the moment Paris was living with a lovely nymph named Oenone. His amazement can be imagined when there appeared before him the wondrous forms of the three great goddesses. He was not asked, however, to gaze at the radiant divinities and choose which of them seemed to him the fairest, but only to consider the bribes each offered and to chose which seemed to him best worth taking.’ Had the opportunity arisen, this would have been a ripe forum indeed for bias challenges including challenges to jurisdiction.

See also D. Roebuck, *Ancient Greek Arbitration*, (Holt Publishing, 2001) for an excellent treatise on the topic of arbitration in the ancient world, and also, W. J. Chriss, *Arbitration in the Ancient Greek World, Alternative Resolutions* 15.4 (2006): 31-35.

Medina of 622 AD, (a security pact among the city's Muslims, non-Muslim Arabs and Jews) called for an arbitration of any disputes by the Prophet Muhammad.⁸³

Additionally, 'Indeed, the Prophet himself resorted to arbitration in his conflict with the tribe of Banu Qurayza'.⁸⁴ The concept of arbitration is alien to neither Western nor Eastern cultures.

The principle of *pacta sunt servanda* (Latin for 'agreements must be kept') is a universal principle that is also found at Islamic jurisprudence as the Quranic injunction upon believing people to fulfil their contracts,⁸⁵ *inter alia*. The universal concept of *pacta sunt servanda* can be traced back to the time of Hammurabi's Code.⁸⁶ The contract is mentioned in seven known articles of the Code of Hammurabi.⁸⁷ The notion of the contract by virtue of reasoning automatically invokes the principle of *pacta sunt servanda*. How can it be a contract otherwise? In ancient Hindu law the concept of *pacta sunt servanda* can be traced to the reign of King Ashoka. Evidence of arbitration in non-Western cultures abound. For example:

Arbitration in China can be traced back to about 2100-1600 BC. Mediation gained an even stronger foothold in China because of Confucianism. Confucius is said to have believed that conflict and litigation were sources of great disharmony which in turn damaged social relationships. Arbitration was also popular in ancient Egypt; it has been

⁸³ A El-Ahdab, *Arbitration with the Arab countries* (Kluwer Law, 2nd ed, 2009) 13

⁸⁴ *Libyan Am Oil Co (LIAMCO) v Libyan Arab Republic* (1997), 20 ILM 1, 41 (1981) [hereinafter LIAMCO award].

⁸⁵ Kamali, see above n 81, at 76.

⁸⁶ S Amin *Research Methods in Law*, (Glasgow: Royston Publishers, 1992) at 54, 'The Code of Hammurabi, the oldest code of laws in the world (discovered in Susa, Persia and now standing in the Louvre Museum, Paris) was enacted by King Hammurabi (cd. 2250 B.C.) whose rule extended over the whole of Mesopotamia from the mouths of the River Tigris and Euphrates to the Mediterranean coast.'

⁸⁷ Art 7, 37, 52, 122, 123, 151 and 152 of the Hammurabi Code. The author submits that the extensive mention of the contract including enforcements of it clearly expresses the idea of *pacta sunt servanda*.

said that until about the mid-20th Century, around 80 % of all disputes would be settled out of court by recourse to a respected and popular elder chosen for his wisdom, integrity and standing in the community. India also has an ancient history of resolving disputes in a three-tiered structure that is comparable to modern-day arbitration. This system continued through until the British arrived in India and made significant changes to the judicial system.⁸⁸

The reason that the following material is included in the literature review (particularly the material from philosophers and jurists during and immediately after the Golden Age of Spain; Avicenna and Averroes, Grotius, the Ottoman *Majalla* and the Mixed Courts) is because this material provides an important analysis of primary data that guided this research and the initial draft of the HICALC or uniform Arab arbitration law. This material must be referred to by future drafters of a HICALC as a guideline. It further elucidates the special features of the MENA.

The literature on IIA and ICA is filled with gaps. However, the author has selected those that are the most important, as well as those that are the most topical to this thesis. The first set of specific gaps deal directly with matters related to harmonisation. For example, extant literature states: ‘The first, and perhaps also the most significant, finding is that the core legal principles of foreign investment protection in different jurisdictions have by and large been harmonised.’⁸⁹ The author disagrees. Core legal principles have not been harmonised. Core legal principles such as the right to protection of private property are universal, yet international law instruments still allow expropriation of investors in host states. These foreign investment principles, and others,

⁸⁸ See above n 8, 4.

⁸⁹ W Shau, *The legal protection of foreign investment, a comparative study*, (Hart Publishing, 2012) 67.

have not been within differing legal jurisdictions. The author will show Islamic law provisions, (e.g. relevant to expropriation) that are in common with other jurisdictions, but that are left out the harmonisation process of international investment. These are principles that offer higher standards of protection than what is found at international law, but perhaps is shared with domestic law throughout the three traditions. Harmonisation has not occurred across different legal jurisdictions. Islamic provisions have been left out. This is the first main gap in the literature and in the law. The connection between harmonisation and precedent is this: standardisation and harmonisation occur in a piecemeal manner. This is discussed in the introduction and the WTO is only one such empirical example of this. The implication is this:

To make matters worse, international arbitration tribunals often offer varied interpretations of such principles. The aforementioned diverse interpretations by different arbitration tribunals on the principles of fair and equitable treatment (FET), most favoured nation and umbrella clauses are telling examples. The harmonisation process therefore still has a long way to go to build up a more solid consensus in international investment protection.⁹⁰

The aim of this thesis is to show that harmonisation is feasible and necessary. The secondary aim of this thesis is to delineate the adjudicatory risk in the MENA. The second aim, the fact of adjudicatory risk, gives support to the need for harmonisation. It is submitted that the examination of legal and adjudicatory risk matters in the MENA helps to contribute to filling the gaps in harmonisation as well as to correcting the piecemeal

⁹⁰ Ibid 68.

evolution of harmonisation, through a HICALC or uniform Arab arbitration law. The second set of gaps deal with matters that pertain directly to questions of procedural law, or any matters of procedure that are relevant to international arbitration. The matters of harmonisation will be discussed first. The major impetus driving the need for harmonisation is globalisation:

Increasingly, we are faced with the paradox that while the number of legal conflicts involving cross-border elements is growing exponentially as a result of the impact of globalisation, at the same time the capacity to deal adequately with these conflicts by legislators, administrations and the court systems in many developing countries in particular remains limited both at present and in the foreseeable future.⁹¹

The legal and business community has already settled the matter of why to harmonise.⁹²

This means that the next logical step to analyse is to what extent harmonisation has

⁹¹ H van Loon, 'Law, international commerce and the formulating agencies—the future of harmonisation and formulating agencies—a perspective from the Hague Conference' in I Fletcher, L Mistelis, M Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, 2001) at 68.

⁹² L Mistelis, 'Is harmonisation a necessary evil? The future of harmonisation and new sources of international trade law' in I Fletcher, L Mistelis, M Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, 2001) 20. A list of advantages of harmonisation is given here: 'First, it facilitates commerce with the lifting of barriers resulting from the complexities of different legal regimes. Secondly, harmonisation of international commercial law creates a legal framework tailor-made for international transactions, disregarding differences in the regulation of domestic transactions. Thirdly, harmonisation normally produces neutral law, *e.g.* the CISG is a system of international sales law which is compatible with both civil and common law. Fourthly, harmonisation often fills a legal vacuum by providing rules in a field where national law was previously non-existent, *e.g.* UNCITRAL Model Law on Electronic Commerce, or obscure, *e.g.* the draft UNIDROIT Convention of Security Rights in Mobile Equipment. Fifthly, *effective* harmonisation substitutes a single law for a proliferation of national laws and thus within the given field dispenses with the need to resort to conflict of laws rules and the opportunity these give for forum shopping. Ineffective harmonisation, on the other hand, results in increased conflict of laws and wider possibilities for forum shopping. Sixthly, harmonisation of law with the collateral reduced conflict of laws results in significant reduction of transactional costs. Seventhly, in a field of law where conflict of laws has little or no role to play, there is increased predictability and legal certainty and consequent reduction of legal risk. Finally, for a number of legal systems harmonisation of law bears fruits of law reform. While in some countries law reform is a complicated and thorny issue, reforms can more easily be achieved once a provision has been adopted at international level.' This thesis is concerned with

occurred and how can it occur in a better manner. The answer to the first question is noted here, whilst the answer to the second question will be examined throughout the remainder of the thesis. It has been noted that much of the work in harmonisation has already been done.

For example:

There is no doubt that during the past 50 years there has been a remarkable degree of harmonisation among nations in the law applied to international commercial transactions. A considerable number of different harmonising instruments has been employed in the realisation of this goal.⁹³

The establishment and mission of the UNCITRAL attest to the genesis of harmonisation within the area of international trade. Indeed MacCormack quotes Resolution 2205: ‘UNCITRAL was established by means of a resolution of the United Nations General Assembly in 1966 and has as its objects “the promotion of the progressive harmonization and unification of the law of international trade.”’⁹⁴ Accordingly, the then Secretary-General of the ICC so succinctly states:

the first premise, the lifting of barriers to commercial transactions or investments with MENA governments, and the second premise, in order to remove the differences in domestic law, in this case they are usually Islamic law. The fifth premise is also relevant in that a single law such as the HICALC is more effective than the layers of domestic laws in any given MENA country including Constitutional provisions, various civil codes, and *sharia* principles from differing Islamic schools. The seventh premise is the most important because it deals with maintaining predictability and mitigating adjudicatory risk, two very important matters in ICA/IIA in the MENA. The final premise is also relevant, in that implementation as an international instrument will create more legitimacy however this is outside the scope of this research and evidence will be given in this thesis that notwithstanding implementation of international harmonised instruments, such as the New York Convention, courts do not necessarily consider these instruments, thus, this cannot be the sole reason for implementation of a harmonised instrument in the MENA. The other reasons, however, are strong justifications and give legitimacy for encouraging harmonisation of law in international commercial matters, and in ICA and IIA in the MENA.

⁹³ Ibid 12.

⁹⁴ G MacCormack, *Secured Credit and the Harmonization of Law, The UNCITRAL Experience*, (Edward Elgar, 2011) 2. Official Records of the General Assembly, Twenty-first Session, Resolution 2205 (XXI), A/RES/2205(XXI), 17 December, 1966 which is available on the UNCITRAL website, www.uncitral.org.

We at ICC are not only experimenting with new ways of encouraging sufficient understanding among businesses without locking them into rules that stand in the way of innovation, we are also working on new ways to bring such rules and guidelines to the business community.

The author submits that a HICALC adopted in the MENA specifically addresses the ICC's goal to bring harmonised law to the business community in a new way, and to make it accessible to Muslim nations, whilst making business therein accessible and safe to navigate for parties from outside the MENA. To date, any serious harmonisation with civil and common law on one hand and Islamic law on the other, arguably has not taken place. Indeed, aside from the creation of 'standard' instruments that are adopted unilaterally in a widespread manner, the type of harmonisation that the author suggests has not take place. Other forms of harmonisation to a lesser degree have occurred, but again this attests to the large gaps in harmonisation. For example, it was suggested that the 1976 UNCITRAL Rules be harmonised with the 1985 UNCITRAL Model Law, in which many of the provisions of the UNCITRAL Model law on International Commercial Arbitration (MAL Model Arbitration Law of 1985) are based on the 1976 Rules.⁹⁵ This would certainly be an improvement but this does not achieve the harmonising scope and degree of harmonising between three different legal jurisdictions. The UNCITRAL's object affirms that 'divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the

⁹⁵ P Sanders, *Has the moment come to revise the arbitration rules of the UNCITRAL?* *Arbitration International*, Vol 20, No 3, 243.

development of world trade.’’⁹⁶ This means that the matter of divergences in domestic laws is a serious problem and the United Nations sagely recognised that harmonisation was the correct way to solve this problem. Another source of legal harmonisation, in addition to the UNCITRAL, is the ICC which has been a leading organisation in harmonisation of practices and rules dealing with matters of international trade.⁹⁷ Thus, the ICC has produced: ‘codes, guidelines, rules, model contracts and model clauses, etc.’⁹⁸ One specific instrument produced by the ICC is that of the Incoterms.⁹⁹ This gives further proof of the fact that much of the work has already been done. Further proof of this is that the UNCITRAL has produced substantive work in harmonisation. Several instruments produced by the UNCITRAL are the Vienna convention on Contracts for the International Sales of Goods, as well as ‘international instruments on many areas of procedural and substantive law such as international arbitration, e-commerce, international payments, procurement and infrastructure development, international transport of goods, and insolvency as well as secured credit.’¹⁰⁰ Although it is true that much work toward harmonisation has been done, still there are gaps that will be more closely scrutinised. Further proof of the need for harmonisation is here: ‘However, the need for certainty and predictability, or indeed uniformity is topical. Convergence of

⁹⁶ See above no 94, 2

⁹⁷ M Cattai, ‘Harmonising commercial law: keeping pace with business,’ in I Fletcher, L Mistelis, M Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, 2001) 38. In fact, ‘The harmonisation of trade terms incorporated in international sales contracts is one of the reasons for ICC’s foundation.’

⁹⁸ Ibid.

⁹⁹ C Schmitthoff, *The unification or harmonisation of law by means of standard contracts and general conditions*, International and Comparative Law Quarterly, Vol 17, July 1968, at 558: ‘The object of Incoterms is to ascertain the greatest common measure of practice current in international trade in the interpretation of these trade terms. This is a process which pertains to comparative law; it is typical for the formulation of standard contracts and, beyond that, all unifying attempts in the law of international trade and will require further attention later. The object of Incoterms is not to improve current practice by laying down what *de lege ferenda* would be desirable.’ Thus, although the Incoterms are an excellent step forward, they contain a gap The HICALC seeks to actively improve current practice.

¹⁰⁰ See above no 94, 11.

legal systems or harmonisation of commercial law will, in the long run, stabilise and strengthen national economies and will create a healthy competition environment.’¹⁰¹

Notable scholars have posed the following urgent questions:

What does it leave for the twenty-first century? Has the twentieth century succeeded in harmonisation? The choice is whether we will opt for a globalisation of commercial and financial law, a gradual convergence of legal regimes through legal and institutional transplants or an international harmonisation though [sic] hard or soft law. What are the objectives of harmonisation in the twenty-first century? And what is the agenda of the formulating agencies? Is it possible to develop a new corpus of legal provisions which is tailor-made for international commercial transactions?¹⁰²

These questions reveal several specific gaps in the literature. The author commends previous instruments such as those noted above, but submits respectfully that the twenty first century has not succeeded in harmonisation. In our increasingly globalised world, harmonisation that leaves out an important legal tradition is still incomplete, notwithstanding previous gains. One may say that the UNCITRAL is in fact, a legal transplant more than it is a genuinely harmonised law. In this regard, the objectives of harmonisation have not yet been fully realised. The author submits that the HICALC, by virtue of being built upon (common) principles and pillars from the three traditions, is a more advanced example of harmonisation than the UNCITRAL. With respect to the final question posed above, the author submits that yes, it is possible to develop a new body of legal provisions tailor-made for international commercial transactions. The research in

¹⁰¹ L. Mistelis, See above no 92, 7.

¹⁰² Ibid 8.

the following sections shows cases and arbitration proceedings that dealt with international commercial transactions under limited circumstances and limited legal provisions. The ensuing suggested draft HICALC provisions are precisely tailor-made to address the concerns raised by the selected commercial transactions found in the cases and arbitral proceedings/awards cited in this thesis. Yet another extremely important gap in the literature and a very specific one is this: ‘One problem that needs to be addressed is that traditional and modern harmonisation alike ignores aspects of public and procedural law.’¹⁰³ The author agrees. Not only does traditional and modern harmonisation ignore public and procedural law, but it has allowed the development of public law, particularly public international law, to take place in an unorganised and unpredictable manner. Moreover, matters of public law and procedural law are central to IIA proceedings and ICA proceedings when they deal either with oil or mineral concessions, administrative contracts, or in the latter case, with *sharia* constructions of Islamic public law. The author addresses the gap in matters of harmonisation with public law by providing for public policy¹⁰⁴ considerations in suggested HICALC provisions as well as by discussing how arbitral tribunals may address matters of public law and public international law by widening the scope of their competence outside the traditional limits. Matters of procedural law requiring reform such as bias challenges and amendments to this effect are also discussed in this thesis. Procedural matters such as *res judicata* are also addressed. The absence of *res judicata* together with a lack of predictability and other forms of adjudicatory risk in the MENA greatly undermines enforcement. The successful resolution of matters of recognition, enforcement and execution of arbitral awards in the

¹⁰³ Ibid 22.

¹⁰⁴ Public policy will be discussed at length in the appropriate section.

MENA context are necessary for fostering trust and legitimacy in the system of ICA and IIA.¹⁰⁵ Another very serious and specific gap in the literature, other than that of public law and procedural law, is in fact, found at international private law. Scholars have rightly stated that there is great divergence or a serious gap, between trade and investment and that this divergence is the greatest within the corpus of private law.¹⁰⁶ This raises the matters of the gap between practice and theory and the gap between practice and law, as well as the gap between theory and law. These gaps should be lessened. International trade agreements normally address harmonisation of private contractual rules in order to establish a transnational specialised private law that regulates trade transactions.¹⁰⁷ Extant trade customs and practices, found at standard form contracts are the usual vehicle for this to take place.¹⁰⁸ But, the gap is here:

This is not an aim shared by International Investment Agreements (IIAs). Such treaties do not seek to harmonise private law relationships. Their focus is on the harmonisation of standards of treatment for foreign investors and their investments on the creation of an international legal obligation on the part of the contracting states to pay heed to those standards in the future development of national regulation.¹⁰⁹

The author agrees with the learned scholar that this is a serious gap. The standards of treatment referred to herein are the matter of the non-discrimination principle and the

¹⁰⁵ M Ayad, 'Harmonization of custom, general principles of law, and Islamic law in oil concessions,' *Journal of International Arbitration* 29, no 5 (2012): 477-518, 482 and 518.

¹⁰⁶ P Muchlinski, 'The rise and fall of the multilateral agreement on investment: lessons for the regulation of international business,' in I Fletcher, L Mistelis, M Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, 2001) 115.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 115-116.

¹⁰⁹ Ibid 116.

MFN clause. These principles are narrow in scope; they are not concerned with harmonisation of laws of differing jurisdictions, thus leaving behind a serious lacuna. Indeed, the aforementioned is not actual harmonisation but simply standardisation of treatment and falls well behind what is needed to harmonise laws in an increasingly globalising world with cross-border disputes that have serious implications to economics and trade in the face of differing and unpredictable domestic legal provisions. However, notwithstanding, the non-discrimination principle is closely tied to expropriation and non-expropriation standards are part of the harmonising goal of IIAs. Although the matter of protection of private property is normally protected by domestic law and by constitutions as a fundamental right,¹¹⁰ the author submits that the current standards of protection are inadequate because case law and arbitral proceeding and award outcomes have all demonstrated that expropriation has occurred to such a widespread extent in the MENA, sometimes without legal justification or compensation, that effective remedies under IIAs and under domestic law are inadequate. The author submits with respect to this fact that because international investment law allows expropriation, in the MENA this has been exploited and higher standards against expropriation must be legislated. The current situation places the burden of proof on the investor whilst giving a wide scope for permissible expropriation. This creates an unbalanced and unfair situation for investors in the MENA, one which is untenable and fraught with adjudicatory risk. For example, 'It is recognised by customary international law that a state enjoys the right to expropriate

¹¹⁰ W Chau, *The legal protection of foreign investment, a comparative study*, (Hart Publishing, 2012) 47: 'The protection of property right is offered by domestic law in almost all of the 22 jurisdictions, which tend to guarantee national treatment (Table 5). Often, right to property of foreigners (and nationals) is provided by the constitution as a fundamental right. The property of foreign investors is thus guaranteed at the highest level of the domestic legal system.'

property of foreign investors located within its territory.’¹¹¹ This is a low standard for protection against expropriation.

Additionally, the right to expropriate by host states is also affirmed by international treaty law. Almost every BIT contains an article on expropriation. Whilst it typically details the conditions and standards of compensation for expropriation, it implicitly affirms the host state’s right to expropriate alien property.¹¹²

The first problem with the extant legislative framework is the fact that some types of expropriation are difficult to prove.¹¹³ Within the MENA context, the combination of liberal laws related to the right to expropriate, combined with matters of prohibition of interest¹¹⁴ and other matters related to intangible assets which may fall under prohibitions at the *sharia*, combined with procedural competence challenges, and with constructions of domestic public policy that are viewed within the *sharia*, in addition to pleas of immunity from jurisdiction and difficulty with immunity from execution, the right of states to expropriate falls within a context of *serious* adjudicatory risk. It has implications for investors and foreign investment that are unique to the MENA climate. In a climate where expropriation occurs without fulfilling the requisite legal conditions, *and* where interest is prohibited, BIT clauses allowing interest to be paid from the date of expropriation to the date of payment are meaningless. The legal framework must be

¹¹¹ Ibid 49.

¹¹² Ibid.

¹¹³ Ibid 50: ‘Direct expropriation or outright nationalisation of an asset is generally easier to establish as there is a physical taking by the states of the relevant assets. However, indirect expropriation or measures equivalent to expropriation are much more difficult to define.’

¹¹⁴ Ibid 53: ‘Most BITs do not have express provisions on the valuation methods for compensation. Many BITs/FTAs simply provide that compensation should be paid without delay, and the compensation should be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. They also provide that the compensation should not reflect any change in value as a result of the intended expropriation becoming publically known. In addition, most BITs stipulate that interests from the date of expropriation to the date of payment should be included in the compensation. Finally, some BITs, such as the Sino-Germany BIT, emphasise that the most favoured nation principle applies to the expropriation provisions.’

competent to address those matters squarely. The second problem is that even in cases where expropriation is illegal, it still occurs. The implication of this is that where it is difficult to defend against direct or tangible expropriation, it is even more difficult to defend against indirect and intangible expropriation.¹¹⁵ The unique features and climate of the MENA require examining the extant law in light of practical considerations therein. The implication of this is that the conditions for expropriation at international law¹¹⁶ are not met, and yet, the investor still finds himself/herself with no legal recourse given the unique MENA climate. Surely this must be remedied. This required a considered analysis by the author of the exact nature of the problems with practical and feasible responses to address those matters pertaining to investor rights in the MENA. Again, consideration of the inherent adjudicatory risks with respect to the MENA is highly relevant to matters pertaining to investor protection and nowhere is this more felt by the losing party than in regard to expropriated property and assets. Further, the right to expropriate would normally have limits and safeguards. In the MENA context, where these limits¹¹⁷ and safeguards are either ignored or undermined due to the overall climate,

¹¹⁵ Ibid 51: 'Although an expropriation clause can be found in every BIT, most of them do not contain a definition of the concept of indirect expropriation.'

¹¹⁶ Ibid 52: 'In most BIT/FTAs, four conditions are required to qualify for a lawful expropriation: (i) for a public purpose; (ii) on a non-discriminatory basis; (iii) in accordance with due process of law; and (iv) upon payment of prompt, adequate and effective compensation.'

¹¹⁷ Ibid 50: 'In Germany, Art 14 (3) of the Basic Law sets forth specific criteria for the constitutionality of an expropriation. According to this article, four elements should be fulfilled: every expropriation must be based on a statutory law passed by the legislation; the intent of an expropriation should be to promote the common good or further national welfare; expropriations need to meet the principle of proportionality; and expropriation should be executed in exchange for reasonable compensation. In France, four conditions must be met to qualify as an indirect expropriation, and the foreign investor will have to prove each and every one of them in case of an indirect expropriation.' In ideal circumstances, the German law would an appropriate response to expropriation. Given the climate in the MENA, particularly at the time of writing, these provisions or similar ones in extant domestic MENA legislation, are simply ignored, as the empirical data will demonstrate. Until overall reform takes place, these problems will not be addressed. However, to wait until such time is untenable because the political and country risk in the MENA is entrenched and protracted. Dealing with the matter directly through strict provisions might bring about reforms that in practice more closely resemble the German legislation. In regard to the French law, if it were applied in the MENA, even if an investor were to prove all four points, it is difficult to enforce.

the right to expropriate must be constructed differently. Indeed, the author submits that these conditions providing for the State right to expropriate, are rarely met in full, if at all. Empirical data from the MENA confirms this. The matter of expropriation that is occurring without the requisite conditions, combined with the unique features of the MENA that create adjudicatory risk, raises the need to rethink the extant legislation providing for the matter of expropriation in the MENA. The author suggests that by raising the standard, even though it will still occur, expropriation will be minimised and controlled. The anecdotal equivalent of this is the situation of dealing with someone who is always late. One way is to tell them never to be late. Clearly, this is not feasible. The author is not actually suggesting that expropriation should never take place. But in light of the MENA adjudicatory risk, it must be controlled. Telling the late party that the meeting will begin at eight in the morning when in reality it is scheduled for ten in the morning means that when they arrive at nine am they will be one hour early and the problem is in practical terms, resolved. The purpose for suggesting such strict provisions in the HICALC is so that curbs to expropriation are encouraged in subsequent reforms in future. Holding a very high standard means that there is greater scope for increasing progress in the direction of lowering unlawful expropriation; e.g. expropriation that occurs without meeting the legally mandated provisions. Thus, by suggesting expropriation ought to never take place, the author hopes that this will encourage less expropriation. The maxim, ‘give an inch, take a mile’, further expounds this principle. The seriousness of the problem in the MENA context will be elucidated in this thesis by way of case examples to support this consideration.

The author suggests that serious reform to the extant regulatory framework dealing with expropriation be considered on the merits of the special needs and unique features of the MENA and how this impacts investor protection in the matter of expropriation. The section on expropriation will give empirical evidence to this end. Thus, the matter of expropriation and the fact that it is has been largely unsettled in case and treaty law, is another specific example of a serious lacuna, both in the law and in the literature. The MAI (Multilateral Agreement on Investment) of the OECD requires closer scrutiny and gives further support for the inclusion of IIA and public international law in the same thesis as one dealing with the matter of ICA. The MAI has been criticised on the following grounds:

The MAI provision on expropriation sought to include the international minimum standards that had become commonplace in BITs. However, its scope was to prove controversial in that it covered not only direct but indirect takings. This approach could cause significant problems for countries with strong regulatory regimes as any act of regulation which limits the capacity of an investment to make profits could be seen as an indirect taking of property.¹¹⁸

The author submits that the MAI standard is a higher standard than the normal provisions against expropriation that deal with tangible property and require compensation for loss. The scope of the proposed draft HICALC provision dealing with expropriation is restricted to this end. The author submits that the matter of indirect taking can only be resolved when the matter of expropriating tangible property is settled. The matter of

¹¹⁸ Muchlinski, see above n 106, 127- 128

expropriating tangle property is far from settled in the MENA. This, combined with the matter of prohibitions against interest (except with minor exceptions) means that before the matters of indirect taking or compound interest can be reformed, the matters of expropriation and interest have to be adequately addressed in law and in practice.

Furthermore, the MAI standard is in contradiction with domestic MENA statutes based on *sharia* law that deal with the matters of interest. The concept of ‘indirect takings’ may fall under constructions of excess profit, or interest and until that matter is better settled in the MENA context, this unresolved status ought not to serve to prohibit provisions that protect investors from direct expropriation of tangible property from being enacted. It is important to note that the MAI discussions did not bear fruit and although some BITs do not include indirect takings (e.g., actions ‘tantamount to expropriation’, many in fact do include indirect takings.

A serious gap in international commercial arbitration has to do with procedural law. Although there are many problems with procedural matters, the author has chosen the matter of bias¹¹⁹ challenges in this thesis, since it is tied to the post-colonial and crusader history in the MENA and has relevance to harmonisation for this reason. Not only that, the matters of bias and bias challenges directly impact upon procedural fairness especially in light of these historical factors which form part of the unique and special

¹¹⁹ The author refers to bias that is related to prejudice, however, bias related to conflicts of interest may apply in cases of “blocks of Western arbitrators” to be discussed in the appropriate section. Notwithstanding, the literature on the matter of bias in the latter instance is more developed than the former which is as of yet unsettled and contains gaps that this thesis addresses in part in appropriate sections. For example W Park in, P Bekker, R Dolzer and M Waibel, *Making transnational law work in the global economy*, (Cambridge University Press, 2010) 579: ‘Most international arbitrators tend to avoid the grosser manifestations of bias. One rarely hears of an arbitrator who asserts that ‘all Portuguese are liars’ or who has a romantic relationship with a litigant’s counsel. The appearance of pre-judgement can take subtler forms, however. One emerging set of trouble spots relates to the confusion faced by some individuals who fill the roles, alternatively, of both arbitrator and advocate. Questionable predispositions might derive from the same individual’s service as advocate in one case and arbitrator in another, when the two proceedings raise similar issues.’ The author suggests that the examples given are perhaps easier to ascertain than the matters raised by the learned Saleh in subsequent sections of this thesis and require attention.

features of the overall MENA climate. The matters of manifest and apparent bias are difficult to pinpoint. Apparent bias is even more difficult to address. Notwithstanding, manifest bias may take place in situations where it is not easy to identify or to prove, even though it has taken place and impacted the overall procedural fairness of an arbitration hearing. The matter of given due consideration and equal weight to the merits of the arguments, evidence and submissions of both sides is not easy to measure quantifiably. Where there is actual prejudice or bias against a party, perhaps on the basis of national origin, it is difficult to prove because the reasoning process in the mind of the arbitrator, or the basis for the decision may have been made according to such considerations, either consciously or unconsciously. When the matter is unconscious, which is common, it is more difficult to prove. This is dealt with in regard to the discussions on changing the law from having arbitrators of different nationalities to making them from different regions. The submissions for why this will be so are included in the requisite sections. The author believes that the ‘I know it when I see it’ threshold test, first espoused by U.S. Supreme Court Justice Potter Stewart,¹²⁰ although a good starting point, demonstrates a specific and technical gap in the technical law that ought to apply to matters of procedural fairness, particularly in light of the fact that procedural fairness and prohibitions against bias are universal standards. Here is the relevance of this test to ICA:

Attempts to define “abuse” in arbitration bring to mind the line by U.S. Supreme Court Justice Potter Stewart reversing a movie theatre’s pornography conviction. Admitting an

¹²⁰ *Jacobellis v Ohio*, 378 U.S. 184 (1964).

inability to define “hard core” pornography, Steward added, “But I know it when I see it.”¹²¹

Furthermore, as a result of the fact that, ‘Like pornography and elephants, abuse in arbitration is often easy to recognise but hard to define, leaving many fuzzy edges that frustrate rigorous discussion,’ the author agrees with the former Vice-President of the London Court of International Arbitration and maintains that the difficulty of addressing bias challenges, whether manifest or apparent, requires that the law be reformed to expand the requirement of an arbitrator to be from a different region, rather than only a different nationality, as a possible way to mitigate the difficulties of the type of abuse of process found in bias challenges as they have bearing on the universal principles upholding procedural fairness. The same applies to bias challenges made in bad faith. These statements attest to the serious gaps in threshold tests to determine abuse in arbitration. The author maintains that clearly worded legal provisions can help with this problem. The matter of bias is important and will be discussed in detail in the relevant section of the thesis on the basis that it is strongly connected with procedural fairness.¹²²

The fundamental principle of procedural fairness that justice be done and appear to be

¹²¹ W Park, ‘Arbitration’s discontents: of elephants and pornography,’ in P Muchlinski, *The rise and fall of the multilateral agreement on investment: lessons for the regulation of international business*, in I Fletcher, L Mistelis, M Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell 2001) 259.

¹²² G Riethmuller, *Civil Procedure* (LBC Info Services, 1999, 1st ed), 7: ‘The principle of procedural fairness (or natural justice as they were formally termed) are taken to their very pinnacle by the system of civil procedure in the supreme courts: it is the implementation of the right to be heard taken to its fullest extent. Thus the rules of service are strict to ensure notice of claims. The rules of pleading and discovery are extensive, to ensure that a party is appraised of precisely the case to be met. The rules for trial ensure that each party has a full and equal opportunity to put its case, and comment on the case of their opponent. The principle that the decision maker must be free of bias is also taken to its highest form. No actual bias need be established before a judge will be disqualified from hearing a case. The test applicable to the judiciary is simply “whether a fair-minded observer might entertain a reasonable apprehension of bias”’: *Livesy v New South Wales Bar Association* (1983) HCA.’

done is arguably a universal construct. The author provides empirical data in the requisite section to demonstrate the universality of His Honour's words; the author agrees with Lord Hewart LCJ: it 'is of fundamental importance that justice should be done but should manifestly and undoubtedly be seen to be done': *R v Sussex Justice ex parte McCarthy* (1924) UK.¹²³ This principle can serve as a harmonising thread across the three traditions. Procedural fairness is the means by which justice and equity are applied. Can there be limits or prohibitions on justice? How can there be any limits to procedural fairness?

Serious problems and gaps in procedure with respect to the matter of jurisdictional competence challenges to be discussed in this thesis have been identified in the literature. For example:

Occasionally, challenges to arbitral jurisdiction form part of strategies to derail proper consideration of a claim. Thus arbitrators must resist requests for interim jurisdictional awards that are only dilatory tactics, while still mindful that some initial jurisdictional determinations do make sense as a way to avoid the cost of hearings on matters beyond their powers.¹²⁴

Evidence will be given in the thesis to show that this problem is ever more serious in the MENA context and accordingly, HICALC provisions to mitigate it are proposed. Another form of abuse is related to court intervention:

¹²³ Ibid 9-10, quoting Lord Hewart LCJ.

¹²⁴ Park, see above no 121, 265.

The best way to avoiding court-related abuse is to choose the right arbitral situs. In this context, the most appropriate model of judicial review is one in which courts exercise limited control over matters of basic procedural fairness while leaving the arbitrators a relatively fairly free rein on the merits of the controversy.¹²⁵

Unfortunately, although this may work in other jurisdictions, this is nearly impossible in the MENA, particularly in the case of the UAE, where evidence will be given to show that there is in fact mandatory court review, and one that is often unfavourable to commercial actors. In light of the MENA climate of bureaucratic problems, non independent and partial judiciaries, gaps in the rule of law, *inter alia*, court intervention ought not to be relied on.

Another very serious problem in scholarship dealing with the matter of ICA and IIA is to what extent arbitrators are able to fill gaps found in the law. There is a gap in the scholarship of jurisprudential theory as to the extent to which equity can and cannot be resorted to. Although in general the author submits that equity has strong merits, the highly adjudicatory risky situation in the MENA combined with its special needs and unique features requires that legislation encouraging higher standards is followed in order to literally bring law and order therein. Investor protection and balanced Investor—State arbitrations do not stand a chance otherwise. The same applies to ICA with commercial—commercial disputes. Most practicing legal counsel based on the MENA would agree with these submissions based on extensive experience. The author submits that on the basis of certain exceptions such as the precedent of the Mixed Courts of Egypt, and the liberal policy dealing with interest (*riba*) in Egypt, as well as other sources, harmonised

¹²⁵ Ibid 268.

principles are more likely to be accepted by States in a climate that is still oversensitive to the impact of the Crusades and to colonialism.

The author submits that on the basis of equity arbitrators should be allowed to fill gaps in the matter of determining interest. The author restricts recourse to equity only to interest within the scope of this thesis in light of the rampant adjudicatory risks in the MENA that have come about in part due to the inability to follow strict black-letter law throughout the history of oil concessions, ICSID arbitrations and other matters, from both sides of the dispute. This fact also has contributed to adjudicatory risk as well as a lack of trust on both sides of the investor—State divide and has contributed to undermining the credibility and legitimacy of ICA and IIA as viable dispute resolution forums in the MENA. The seriousness of this is evidenced in the fact that deviation from black-letter law has not helped in the matter of enforcement, which in turn contributes further to undermining credibility and trust.

An example of a gap in the law from jurisdiction to jurisdiction preventing a standard or harmonised approach to the matter of arbitrators filling gaps is given by the founding father of transnational law:

The simple reference to the fact that “German law allows the adaptation of contracts by arbitrators” while “English law is hostile to the idea of rewriting the contract for the parties” neglects the special scenario of the international arbitral process where aspects of substantive and procedural law are closely intertwined. The drafters of the Model Law,

after extensive discussion, realised this problem. They ultimately refrained from inserting a provision on adaptation and supplementation of contacts.¹²⁶

In their view,

it was difficult to separate questions pertaining to procedural law and questions pertaining to substantive law and that, therefore, the Model Law, as a system of procedural rules, should not contain rules which might touch upon substantive rights of the parties. Thus, in order to determine the power of an arbitrator to adapt or supplement a contract in an individual case, one has to refer simultaneously to three different legal sources: the arbitration agreement, the law applicable to the arbitration (*lex arbitri*) and the law applicable to the substance of the dispute (*lex causae*). It is obvious that within this three-tier system, we are faced once again with the clash of substantive and procedural law mentioned above.¹²⁷

Several implications follow from this. The first is that of the difficulty of separating procedural from substantive law. The author has attempted in the appropriate section to delineate which matters in this thesis deal with procedural and which with substantive law, and in some cases notes where there is an overlap. This is yet another reason for the inclusion of IIA with ICA in the same thesis. Many matters of substantive law and procedural law found at IIA share implications with ICA. Matters of procedural law at ICA have bearing on proceedings at IIA and vice versa in regard to harmonisation. They

¹²⁶ K Berger, 'Power of arbitrators to fill gaps and revise contracts to make sense,' in I Fletcher, L Mistelis, M Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, 2001) 275-276.

¹²⁷ Ibid 275-276.

influence the development of one another. The above quote deals with the matter of the competence of the arbitrator. The author submits that part of the problem impacting this difficulty has to do with competence. Where the arbitrators are more empowered to address matters of substantive law where those matters intersect with procedural matters, they will have the proper competence to make correct decisions. Thus the matter of competence is in fact one area where the nexus of procedural and substantive law meet. In exercising the competence to hear the dispute and where there is a gap in the contract to apply the appropriate law, or under appropriate circumstances, procedurally an arbitrator is deciding on substantive law that may not have been necessarily found in the contract.¹²⁸ Thus, as these examples demonstrate, the matter of procedural law can invoke substantive law, however, harmonising and standardising across procedural law will not address harmonisation across substantive laws such as the CISG or the UNIDROIT and this is outside the scope of this research. In the quote above, it is a fact that arbitrators must refer to three different instruments. They may also have to refer to a legal instrument pertaining to substantive law that is not explicitly found in the contract. This has implications for the reform of procedural law.

¹²⁸ B Gehle, *Dealing with the unknown, which law really applies to your international contract?* International arbitration insights, (Clayton Utz) 18 June 2008, http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20080618/dealing_with_the_unknown-which_law_really_applies_to_your_international_contract.page in International law, and published 25 June 2008 in Mondaq, <<http://www.mondaq.com/australia/article.asp?articleid=62472>> : 'To illustrate this further, the following scenarios show common situations in which the CISG applies but which might not be immediately obvious to the parties involved: Scenario 1: Japanese car parts manufacturer and Australian importer enter into a sales & delivery contract choosing Singaporean law to apply to their contract. Scenario 2: Australian resources company and Chinese steel manufacturer enter into a contract for the delivery of iron ore to China sales contract specifying the laws in Western Australia to govern their contract. Scenario 3: Australian seller and Indonesian purchaser enter into a sales contract without choosing a specific law to govern their contract. What these three scenarios have in common is that the CISG applies although the parties have not explicitly agreed to the application of the CISG (and may not even have considered the application of the CISG at all).'

The procedural matter of competence has intersections with matters of substantive law, and examples are given here. This gap in the laws can be filled with the HICALC provision specifically dealing with competence. Further proof of this gap is here: ‘There is, however, a significant problem with this relationship between the arbitration agreement and the *lex arbitrii*. Only very few arbitration laws contain express provisions dealing with the arbitrators’ authority to adapt or supplement contracts.’¹²⁹ Such clauses, when drafted into the arbitration agreement directly in the contract would mean that where there are gaps in the laws that the arbitral tribunal has to refer to, many are addressed in one single instrument, and this gives the arbitral tribunal greater powers of competence because, the authority for the competence, enshrined in the HICALC, would be found at the contract, which is the main source of authority¹³⁰ in international commercial arbitration notwithstanding extant instrument such as the CISG which may be activated. Here, the author proposes a HICALC instrument which has dealt with important matters of procedural (and substantive law where relevant) within the same instrument thus filling this important gap to a degree.

The author submits that another very serious gap in the literature specifically deals with the status quo of the *lex mercatoria*. The transition from the harmonisation process put forth by the UNCITRAL to that represented by the *lex mercatoria* needs to be explained in the context of the current criticisms of the *lex mercatoria*. The existing literature highlights two major extant gaps in the *lex mercatoria*. One is that it is seen as

¹²⁹ Berger, see above n 126, 278.

¹³⁰ Berger, see above n 126: ‘The arbitration agreement is the basic source of the arbitrator’s powers. Usually, the traditional terminology that “all disputes arising out of or in connection with this contract” are referred to arbitration suffices to invest an international arbitral tribunal with a decision making power that covers all aspects of possible disputes.’

having no methodical foundation.¹³¹ The second major gap is that it is seen as not having the quality of an autonomous legal system.¹³² Furthermore, there are gaps in the literature that address these matters adequately. The author agrees that these two gaps in the *lex mercatoria* are serious. These gaps are addressed herein in the section dealing with customary law. The author further notes that there is a gap in extant literature that adequately deals with the gaps in the *lex mercatoria* and presents a discussion in this thesis to remedy this gap. This gap between theory and practice has been spoken of by other notable learned scholars:

The bridge still needs to be built. It will span the gulf which now separates the scientist from the practitioner. Though some of the best contributions to the science have come

¹³¹ K Berger, *The creeping codification of the lex mercatoria*, Kluwer Law International, The Hague, 1999, at 44: ‘All those who oppose the theory of transnational commercial law object that it has an inadequate methodical foundation. In their opinion, these methodical uncertainties make it impossible to discern and apply the rules and principles that are said to form part of this legal system. This objection carries much weight since it a sound methodical foundation is the *conditio sine qua non* of the legal process as a whole, no matter whether one is dealing with a domestic or international context. Leaving open the question as to the methodical starting point provides a most welcome pretext for all those who regard the *lex mercatoria*-doctrine as a ‘theoretical abstraction’ of the notion of an independent transnational legal system. Therefore, the methodical issue provides one of the major pillars from which the *lex mercatoria*-doctrine derives its legitimacy.’ These implications are discussed in the section dealing with the advantages of the *lex mercatoria*.

¹³² Ibid 89: ‘All the objections discussed so far may be traced back to one general assumption which is always brought forth against the viability of the *lex mercatoria*-doctrine: Transnational law does not constitute a genuine “legal System”. It is argued that mercantile practice, ie the mere reference to the principle “*ubi commercium, ibi ius*”, based on the pragmatic conception of Roman law that the primary purpose of the legal system is to provide society with a means for conflict resolution (“*ubi societas, ibi ius*”), does not suffice to serve as a theoretical foundation for a transnational legal system. In addition, the efforts to provide these theoretical underpinnings are said to be “rather sparse.” The author agrees that there is merit in these criticisms, but only to a limited extent, which the author elucidates more fully in the section dealing with customary law and the *lex mercatoria*. The problem of a lack of theoretical underpinnings is accurate in that the *lex mercatoria* is in fact a practical law, derived from practice. To remedy this perceived lack of theoretical underpinnings, the author gives theoretical and practical reasons throughout this thesis for the justification of the *lex mercatoria* whilst pinning it to the theory given here as it emerged by grounded theory of categories of themes derived from the case law, and as it emerged from the comparative analysis of the three legal systems. The Roman maxim aptly describes the law as derived from practice and this gap in theory is a natural outcome but the author hopes that the theoretical discussions here in contribute to filling this gap in the literature.

from practitioners, even they have not always been able to transfer their insights into general practice.¹³³

The New Lex Mercatoria may be seen as a more advanced stage of harmonisation over the UNCITRAL for this reason:

There are two basic approaches to the harmonization of the laws affecting international commercial transactions. The first, the national approach, is aimed at establishing similar or identical national commercial laws. The second, the non-national approach, focuses on the development of a single commercial law which is largely autonomous from national laws. It is this autonomous commercial law which is generally referred to as the New Lex Mercatoria.¹³⁴

One may argue that the UNCITRAL represents the national approach because it is a standard law that is implemented as a domestic law. It is submitted that the HICALC falls under the category of the New Lex Mercatoria on the basis that it is autonomous from national laws, yet attempts to respect those laws or mitigate differences therein.

The national approach is summed thus:

When the national approach is used, nations adopt similar commercial laws, thereby harmonizing national laws. This result may be effected in three ways: 1) Nations can, by way of international treaty, reciprocally bind themselves to uniform commercial laws; 2) Nations can individually adopt model laws drawn up by international organizations; and

¹³³ Roebuck, see above n 68

¹³⁴ B Cremades, S Plehn, *The new lex mercatoria and the harmonization of the laws of international commercial transactions*, Boston University International Law Journal, Vol 2: 317, 1984, 321.

3) Nations can independently look to international business practices as common substantive guidelines in implementing their commercial laws.¹³⁵

These matters deal with implementation and have consequences that will be discussed in the concluding section of this thesis. With respect to the matter of implementation, notwithstanding that it is largely outside of the scope of this research, the author suggests that where the HICALC is not ratified as a regional treaty it can still be useful by being considered as *ad hoc* arbitration clauses, if not actual Rules. The author suggests that the HICALC, if drafted as a regional treaty, can fall under the first approach. It can also fall under the second approach:

A non-national New Lex Mercatoria would be encouraged if businessmen submit their disputes to arbitration to be decided on the basis of the prevailing standards of the international business community and not national law. These standards would reflect customs as well as general principles of law. The non-national New Lex Mercatoria would be a single autonomous body of law created by the international business community. The non-national approach toward the harmonization of international commercial law is less dependent on national action than is the national approach. However, given the world's present political structure, in particular the overwhelming power of the nation state, any so-called nonnational legal system can only exist with the sponsorship, or at least tolerance, of nations. Such a legal system is therefore best described as autonomous from, rather than independent of, national control. Non-national harmonization is a two step process: first, nations must permit businessmen to avoid the application of national law; and second, a coherent body of law (the New Lex Mercatoria) must be

¹³⁵ Ibid.

established as an alternative. Parties can avoid the application of supplementary national law to the extent that they are free to contract.¹³⁶

The extant gap in the literature and in the existence of a truly harmonised law is more of a concern in the second case. There are greater quantities of literature dealing with increasing harmonisation in the context and scope of the former. However, in the matter of the latter, given that (a) complete harmonisation of civil, common and Islamic law has never been attempted before and (b) suggesting that once it occurs it can be implemented as free standing arbitration clauses (if it is unable to be ratified as a regional treaty) is an entirely new solution to a long-standing problem. There is no literature at all in this regard. The matter of including the HICALC as free-standing arbitration clauses is discussed in the section dealing with implementation. Principles of *lex mercatoria*, embodied in a treaty (e.g., the CISG, or if the HICALC is enacted as a treaty) would be autonomous from national law. In theory, the HICALC could codify various principles of *lex mercatoria*, which if the HICALC is adopted as uniform domestic law, then national legislation would make those principles statutory. Indeed, the fact that a more holistic harmonisation with civil, common and Islamic law has never been attempted in the past attests to the gaps in the literature in this respect.

¹³⁶ See above n 13, 4, Vol 2: 317, 1984, 324-325.

XII SECTION III: DISTINCTIVE LEGAL FEATURES AND LEGAL TRADITIONS OF THE MENA THAT AN ARAB UNIFORM (HICALC) ARBITRATION LAW MUST ADDRESS

This section will elaborate five areas of law¹³⁷ that demonstrate the unique problems and complexities in the area of international arbitration in the MENA. The categories of either procedural law or substantive law are used to classify these five legal areas. Procedural law deals with the law governing the manner by which arbitral tribunals conduct the adjudicatory process of hearing and deciding a case. Substantive law deals with matters relating to the contract. The discussion on Egypt and the UAE will demonstrate the extant gaps and adjudicatory risk in the MENA. A comparative analysis of universal principles will show where the HICALC or uniform Arab arbitration provisions were derived and will demonstrate how these gaps in the case study countries may be remedied.

A Assessment and Analysis of the Status Quo of the Different Laws and Traditions of the Case Study Countries

The purpose of this section is to demonstrate the feasibility of harmonisation, by assessing the status quo of the laws and traditions that are foundational to the case study countries of the MENA. This section provides evidence for the major premise that harmonisation in the MENA context has taken place repeatedly, but in partial instances throughout history. The purpose of this section is also to demonstrate how tradition, culture, religion and legal precedent of the MENA have contributed to the current legal climate to harmonisation. These factors further make the climate amenable to further harmonisation.

¹³⁷ P Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, (Kluwer Law International, 2nd and Expanded Edition, 2004) 137: 'In its Note of 6 April 1999 (Doc.A/CN.9/460) UNCITRAL's Secretariat suggested 13 topics for consideration by the Commission for future work on the M.L. on Arbitration.' Three of those 13 areas are included herein, the matter of sovereign immunity and the matter of interest.

1 *Precedent of Harmonisation*

Historically, regarding the MENA, Islamic and civil law principles have been traditionally partially harmonised at various stages and in various forms of codification through the Ottoman *Majalla*, the case law of the Egyptian Mixed Courts and through Sanhuri and Lambert's codes. At this stage, modern arbitration laws modelled on the UNCITRAL govern MENA arbitrations together with the three major extant international instruments of the 1958 New York Convention, the 1965 Washington Convention¹³⁸ and the UNCITRAL Rules. The triangle model of harmonisation proposed has not yet been attempted. This research adds English common law, and this addition is important, particularly in terms of the doctrine of precedent and regarding questions of bias allegations and bias challenges. The Conventions are binding treaties that the parties are obligated to implement in their national legislation and are more likely to produce uniformity but are more difficult to negotiate.

An assessment of the data of historical precedent of legal harmonisation has found four foundational threads to this research. The first three have been discussed in Part I (and are elaborated in subsequent paragraphs): (1) the need for harmonisation, (2) the feasibility of harmonisation,¹³⁹ (3) doctrines that are a bar to award enforcement, such as public policy,¹⁴⁰ *inter alia* and State sovereignty including certain interpretations of

¹³⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 1965.

¹³⁹ See above n 40, 30: 'Some jurists have sought to trace connections between Islamic law and the Roman Law (see Fitzgerald, 1951).

¹⁴⁰ M Moses *The Principles and Practice of International Commercial Arbitration*, (Cambridge, 2008) 79, 'Although an arbitrator's award cannot be reversed for a mistake of law, it can be challenged if it is against the public policy of a jurisdiction, or if the arbitrator has acted in a way that exceeds her powers. The

sharia by MENA jurists, and (4) formerly substandard or incomplete harmonisation because the gap in previous scholarship on the subject of Islamic jurisprudence defines Islamic law in two contradictory ways: either lacking a common thread of unifying principles, or the other extreme, as rigidly inflexible and inadaptably to modern concerns, particularly in the areas of international business transactions and finance. The implications of this erroneous analysis led scholars and jurists to the false conclusion that Islamic law, including Arab States' laws, are inharmonious with civil and common law. This gap in the analysis ignored the Egyptian Mixed Court case law including Sanhuri's codes.

In the currently rapid changing and evolving political and legal climate of the MENA, it is wise to take a conservative and prudent path in dealing with the sensitive topic of '*sharia* compliance'. As the recent Egyptian elections of parliament members and the president have demonstrated, the rise of Islamic legislators and rulers is the current trend, and only a harmonised approach can ensure that the legal tradition of Islam and the pressures of international trade do not find themselves in an epic clash of civilisations. History has left behind a legacy of profoundly destructive political movements that pre-date colonialism, but have left an equally devastating impact in terms of trust between parties across the East-West divide: the Crusades and the Ottoman Empire, with the later based on a cruel retaliation against the Crusaders. Human civilisation cannot afford another so-called clash of civilisations in this technological and atomic age. The matter of the Crusades and the reactions of the Ottoman Empire are not only matters of adjudicatory risk or of the future of international relations, but reflect

obligation to avoid these problems is tied to the arbitrator's duty to make the best efforts to render an enforceable award....'

historical biases which have created gaps in the understanding of Western parties of Islam and this is yet another justification for the postcolonial approach. Although post-colonialism refers to the more recent occupations of Great Britain and France in the Middle East and North Africa, respectively, similar cultural, hegemonic and theoretical considerations arise as a result of the Crusades. Both historical movements created a sense of bias in the sight of Arab (and African parties to a lesser degree). The impact of colonialism has left a bitter legacy in the Arab and Muslim lands. It is exacerbated by the even darker history of the Crusades, a precursor to colonialism. These two impactful historical events had disastrous consequences on the MENA more than on any other regions classified as ‘developing’ or ‘third world’. The MENA suffered doubly. The absence of the Crusade history in non-MENA developing nations (the African and Asian countries) mitigated the negative effect of colonialism. The impact is negative and contributes to apprehensions of perceived or apparent bias. The matter of bias is discussed in detail in the section on bias for its justification in using the postcolonial approach as part of the methodology for this thesis. The historical fact of the Crusades put in place a legacy of continued misunderstandings of Islam. The bias has not ceased, neither with the Crusades nor with colonialism. The author submits that bias influenced arbitral tribunals in the past, and has continued to influence scholastic reading of Islamic law in the present age.¹⁴¹ It is only harmonisation that can guide the way forward and this

¹⁴¹ See above n 40, 129-130: ‘As the *Cambridge History of Islam* observes (Holt *et al*, 1970, 30), in discussing the difficulties of occidental readers in attaining a balanced understanding of Islam and its Prophet: Another difficulty is that some occidental readers are still not completely free of the prejudices inherited from their medieval ancestors. In the bitterness of the Crusades and other wars against the Saracens, they came to regard the Muslims, and in particular Muhammad, as the incarnation of all that is evil, and the continuing effect of the propaganda of that period has not yet been completely removed from occidental thinking about Islam. In the Islamic world, likewise, an attitude of opposition and intolerance to the Christian world appeared in its literature and to this day there is, unfortunately, some traditional academic writing which exhorts Muslims to adopt an attitude of intolerance of non-Muslims.’

is not exclusively a matter of adjudicatory risk but also one that relates to the mandate of the United Nations Permanent Court of Arbitration, that international arbitration is an important means towards the crucial goal of peaceful relations between States.

Harmonisation is the best way forward on the path to peace just as it is the only way feasible way forward on the path to mitigating adjudicatory risk.

Egyptian law is an established source of harmonisation between Islamic and civil law, and by way of the Mixed Courts, an example of international law that met the standard of *ius cogens* amongst civilised nations. Egyptian judicial interpretations of public policy and of *sharia* principles have an impact on the entire region¹⁴² and are foundational to an understanding of how the laws are enforced in the MENA. Egypt has historically been and remains in the forefront of legal reforms and trends. Notable examples of this are Egypt's rich history of case law and the precedent of the Mixed Courts, which informed the 1948 Egyptian legal codes that successfully harmonised civil and *sharia* principles. These codes, together with Egyptian jurists, were exported in modified forms throughout the MENA, and both are a prominent influence upon the region. Since the days of the jurist Sanhuri, who drafted the codes, common law principles have not necessarily been included in the codes, leaving behind an important gap and the research fills the gap where Sanhuri left off. This legal history therefore

¹⁴² There are two reasons for this. Egypt exports its judges to other MENA countries and Egyptian Muftis and Azhar University scholars set precedents for Islamic interpretation and rulings for all of the Middle East. If 'principles of Islamic law' are now the primary source of legislation in Egypt in accordance with the new Egyptian Constitution of 2011, the interpretative powers of what these principles are and how they should be interpreted will flow out of the hands of the judiciary and into the hands of the religious scholars and in the event of a contradiction in interpretation, it is the religious scholars who will win, by Constitutional right, for they are the ones who are most qualified to determine what is a principle of Islamic law. Given that the majority of seats in the newly constituted Egyptian parliament are composed of a Muslim majority, it is doubtful that the wording of the Constitution will change to make Islamic law (and not principles of Islamic law) only a source of law.

lends these MENA States to a possibility of the successful implementation and application of a more harmonised code of law.

This research gives evidence that Islamic law does contain unifying principles which can be included with civil and common law to be set forth into a *corpus lex* and which are at the same time, possible to apply to modern contracts with complex financial transactions involved. Islamic jurisprudence has historical tools that have been neglected and that allow jurists to both locate these principles and to interpret and apply them to the appropriate context. Due to this gap in the current understanding of Islamic law, there is a resulting gap in the literature regarding harmonisation in the context of including Islamic law principles. A re-reading of *sharia* principles, particularly from the time of the 12th century when the Islamic doctrine of *ijtihad* had not been negated by extremists, demonstrates compatibility with civil and common law principles that is based on a deeper understanding of the spirit of the law including its proper context and intention. As a result of the literature review the author has mapped out four major waves of reform in the MENA that start during the Ottoman Empire and that reflect an overall trend towards harmonisation and serve as a basis for further reforms. The author's analysis covers roughly one hundred years of reform in the MENA. This is apropos in consideration of the Arab Spring, which the author submits represents the fifth major wave of reform. These decisive reforms signify turning points in the history of the region, with Egypt leading in the forefront, with the sole exception of the Ottoman *Majalla* (and the Tunisian revolution). This thesis is about two case study countries Egypt and the United Arab Emirates (UAE) which are both unique countries yet also indicative of some trends in the region, however, although the UAE can to an extent represent Gulf Arab

countries, it has unique features. To do a full analysis of the topic of the Rule of Law (per se) and the entire MENA/Middle East as a region with its highly complex history and politics, is in and of itself a question worthy of several PhD dissertations and is outside of the scope of this research. Egypt and the UAE from a business law sense are relatively and comparatively more stable than some of their neighbouring countries and are the 'good examples' (in contrast to the civil war in Syria and the recent civil war in Libya) although notwithstanding having a long way to go themselves. The answer to this question as to why MENA countries have not adhered to the rule of law is highly complex and encompasses thousands of years of history and an enormous world region and a political topic which is outside of the scope of this dissertation which is an analysis of the legal systems there and what can be done to improve the legal situation through my proposed legal provisions.

However, nevertheless, the MENA countries largely follow the Civil Law tradition v the Common Law tradition. In our Common Law tradition, the parliament and the courts and not the State per se have historically taken precedent, whereas in the Civil Law tradition the State authority held sway over the other branches of governments and historically was challenged for example through the French Revolution which was instigated by the noble and aristocratic families against the State. In the MENA where corruption and a history of dictatorships and rule of man have been standard for literally thousands of years, the question of the complex factors of the rule of law and lack thereof would conceivably require research that is tantamount to an entirely new PhD dissertation and largely outside of the scope of this work here.

(a) *Harmonisation of European and Islamic Philosophy- The Golden Age and Ijtihad*

A chief consideration for Islamic jurists is the nexus between revelation and reason.¹⁴³ Christian scholars¹⁴⁴ argued that ‘it would be impudent for humans to seek to understand the reasons for a rule laid down by God or to attempt to give it a meaning in light of their own reason.’¹⁴⁵ Thus, ‘The resulting containment of free speculation within the bounds permitted by Church doctrine weighed heavily in favour of unquestioning acceptance of dogma, ritual and ecclesiastical rules, and powerfully buttressed the existing political and ecclesiastical structure.’¹⁴⁶ Yet, ‘However, an intellectual movement was astir in the world of Islam which was to have far-reaching effects not only upon the intellectual life of Europe but, through its stimulation, upon the European political order that had held sway for a thousand years.’¹⁴⁷ The author submits that the following represents a pattern of harmonisation that reveals universal principles that extend beyond political hegemony to the foundation of natural law. The influence of two Islamic philosophers, Avicenna (Ali Abu ibn Sina) and Averroes (Ahmed ibn Ruschd) set in place the use of reason with religious and philosophical contexts.¹⁴⁸ The author submits that these philosophers were employing the same reasoning that jurists used to discover the law, namely *ijtihad* and that an Islamic influence of ‘opening the door to

¹⁴³ See above n 40, 94.

¹⁴⁴ Ibid: ‘As late as the thirteenth century, Christian scholars such as the Franciscan Duns Scotus (1265 – 1308), who taught at Oxford.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 95.

¹⁴⁸ Ibid: ‘Two Islamic philosophers known to the Western world as Avicenna (Ali Abu ibn Sina, 980- 1027) and Averroes (Ahmed ibn Ruschd, 1126- 98) paved the way for the release of reason from its strict confinement to pointing out that God did not give man reason without a purpose: it was meant to be used. Whilst fully accepting the word of God in the Qur’an, they taught also that there was room for the coexistence of human reason and the word of God. We must use our human reason to try to understand the word of God. This was known as the doctrine of double truth- there is truth which comes from divine revelation and there is truth which comes from human reason. Of course, human reason will not always enable us to understand God’s reason, but there are some divine rules which we can attempt to understand. Averroes, in particular, advanced this teaching, at Cordova in Spain.’

ijtihad was ushered into European philosophy through the influence of these two philosophers. This movement represents harmonisation on a profounder philosophical level, between the European civil law tradition and Islamic law, whilst also representing examples of principles (such as *ijtihad* and reasoning including other principles) that are universal. The extension of this influence continued from philosophy to law.¹⁴⁹

The influence of Islam extended to scientific inquiry and methods which were not previously part of the methodology of European scientific inquiry.¹⁵⁰

The Islamic influence did not cease with its first impact upon pioneers like Adelard of Bath. An even more important phase occurred when Roger Bacon (d. 1294), a Franciscan friar teaching at Oxford, used the method of scientific inquiry and experimentation to study such phenomenon as refraction, astronomy, mechanics, the rainbow and plants and animals. (Lucas, 1960, p. 180). In his studies of optics, for example, he carried forward the research of Alkindi and Alhazen in relation to parabolic mirrors.¹⁵¹

The influence of Islamic law on European inquiry and methods did not stop at scientific disciplines but extended to law and jurisprudence.¹⁵² The impact of Islamic methods of

¹⁴⁹ Ibid 95: 'The works of Averroes included treatises on jurisprudence, medicine, philosophy, astronomy and grammar. By the end of the twelfth century the most important of his works were translated into Latin and thus entered the mainstream of European thought. One of his works which made a special impact on the West was the *De Substantial Orbis*. This consisted of two treatises dealing with the relationship between the active intellect and man, and with commentaries on Aristotle.'

¹⁵⁰ Ibid 96: 'Experimentation was not in accordance with traditional European methods of inquiry which had tended to centre on the interpretation and unquestioning acceptance of sacred or authoritative writings such as the scriptures or the writings of the Greek philosophers. The Arab tradition was different and was a principle influence in leading Bacon towards this new method which was to blaze a trail for scientific knowledge in general.'

¹⁵¹ Ibid.

¹⁵² Ibid 97-98: 'And Hobbes and Locke were both men of science who brought this scientific method into their philosophical inquiries. In fact the very *Leviathan* of Hobbes was at every point likened to a mechanical contraption working on strings and pulleys. Grotius himself discarded the *a priori* method of reasoning from prior accepted maxims, as had been customary before, in favour of the *ex posterior* method

inquiry and methodology extended to influence European philosophers and jurists, such as Bacon, Hobbes and Locke regarding the former and Grotius regarding the latter.

Grotius' method, of drawing upon general principles of law, is not unlike that employed herein. The switch from *a priori* to *ex posterior* methods of examination of evidence reflects the incorporation of Islamically influenced methods into his development of international law. This represents a successful harmonisation on the profoundest philosophical levels, of Islamic and European philosophy and methods of inquiry; which served to be successful, as Grotius is known as the father of international law. Yet another example of harmonisation of Islamic philosophy with Western philosophy- in this case that of ancient Greek philosophy is through the work of Al Ghazali.¹⁵³

Aristotelian logic and the larger framework from which it originated, Greek philosophy, has left a permanent mark on Islamic thought through Al Ghazali. This represents another example of profound and far-reaching harmonisation between European and Islamic

of examining the evidence first and drawing from it the conclusions which he advanced. This was the foundation on which he built his international law- drawing general principles from the experience of mankind rather than formulating them theoretically separate from an examination of the practical facts of international relations. This was indeed a reversal of traditional methods and was due in no small measure to the scientific spirit of the age.'

¹⁵³ Ibid 99-100: 'Ghazali's work brings together, and indeed takes further, the work of the Greek philosophers regarding the application of the method of logic to interpretation as well as their view of happiness as the ultimate end of man. Aristotelian ideals are visible in his work, but the happiness which is the goal of man is a gift of God, from whom all things proceed, and is one which transcends the span of man's life on earth (see Peters, 1973, 690- 716). Aristotelian logic was harnessed into the service of law and theology in a manner which left its imprint upon Islamic thought for all future time.'

thought at the deepest level.¹⁵⁴ The historical record shows that not only did European thought influence Islamic thought, but apparently it was a two way phenomenon.¹⁵⁵

Al Ghazali's work was not restricted to philosophy, 'Ghazali wrote treatises upon jurisprudence, upon distortions in Islamic ideals, upon errors in philosophers' methods, upon the ultimate happiness of man, upon the just course in matters of belief and upon the revitalisation of the sciences of religion.'¹⁵⁶ The author propounds that the use of *ijtihad* is consistently and clearly delineated throughout Al Ghazali's efforts. Future drafters of a harmonised model HICALC must look to the forerunners of modern harmonisation, such as the aforementioned treatises of Avicenna, Averoes, Grotius and Al Ghazali for profound examples and treatises of harmonisation at the philosophical and fundamental level, in order to inform and guide a properly drafted HICALC. These are rich sources of wisdom and harmonisation that are superior to modern discourses on the 'clash of civilisations' which focus only on superficial differences. The valuable influences of Islamic thought, and Islamic law, extend beyond philosophy, scientific inquiry and Christianity according to the jurist quoted above. They extend so far as to influence modern international law, even beyond influencing Grotius.¹⁵⁷

¹⁵⁴ Ibid 100: 'The framework within which it was employed was the basic position that Islam has an infallible *Imam*, the Prophet, who left his teaching in the Qur'an and the Sunna (Peters, 1973, 703). From these basic positions onwards man must be guided by his own reason. Although this was standard Shafi'i learning, at this point Ghazali parted company with those who relied on analogy and dialectical argument, for he felt deeply sceptical of methodologies that could conceivably lead to opposite results, depending on how one perceived the analogy. He insisted on a more rigorous logic, and required a strict syllogistic demonstration.

¹⁵⁵ Ibid 100: 'It is easy to see why Ghazali's philosophical contributions were influential far beyond the confines of Islam, for their intellectual rigour within the boundaries of the major premises of a given religion were equally applicable to Christian theology. His dual emphasis upon the intellectual and the spiritual, upon externals and internals, likewise influenced all theologians in theistic systems.'

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 109: 'influence of Islamic law on modern international law. This was a very extensive area of influence, the full value of which has yet to be researched. . . many of the most modern concepts of contemporary public international law, such as the principles of humanitarian treatment of prisoners of war, had been anticipated by Islamic law. Its treatises on this specific subject had anticipated by several

The influence of harmonisation in many of these examples was not confined to that of the European upon the Islamic, (although this occurred through the Greek philosophers) but also of the Islamic upon the European, as cited in the factually documented historical examples above. Historical evidence of the fact of harmonisation of Islamic law (and philosophy with European philosophy, scientific inquiry, Christianity, international law and modern public international law) has been given. Here, the historical record provides precedent for harmonisation, one upon which future drafters of a HICALC may draw upon. Within this precedent of harmonisation, the historical record suggests universal principles, such as in this case, the use of reason, or *ijtihad* to discover the law are a valid method across the three traditions. The historical record for precedents of harmonisation shows that universal principles of law do exist, and can be found, either as a result of harmonisation or natural law, *inter alia*. An example of this, i.e, custom and the *lex mercatoria*, discussed in the section on *pacta sunt servanda*, requires elaboration as it is proof of both the historical precedents of harmonisation and universally acknowledged principles.¹⁵⁸

Precedents of harmonisation are a historical fact. The foundation for identifying general principles (such as *pacta sunt servanda*) has already been set. Indeed, the strength

centuries the first emergence of organised writing in the West on the subject of public international law. In fact the eighth-century treatise of Shaybani had been the subject of a four-volume commentary by Shamsal-Aimma Sarakhsi long before the topic became the subject of Western juristic writing.'

¹⁵⁸ Ibid 110- 111: 'The development of commercial law has always followed on the heels of trade. Foreign traders needed protection, trading agreements needed to be honoured, credit arrangements needed to be worked out in elaborate detail. When the Islamic world led the world's trade and commerce these arrangements naturally received much elaboration at the hands of the Islamic jurists. Indeed, this became a natural extension of one of the basic principles of Islamic law that contracts should be honoured and performed in good faith. In a study of the influence of Islam upon law and society by D. De Santillana, the eminent Italian jurist has this to say (De Santillana, 1931, 310): Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (*girad*), and certain technicalities of commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts, and therein lies its enduring merit. In the sphere of international trade, the Arabic word tariff survives as a reminder of the influence of Arab concepts on European commercial law.'

of *pacta sunt servanda* as a general principle of law is as a result of Islamic influences on the civil law to ensure this principle gained in importance in order to protect commercial dealings in past centuries. The civil law also influenced Islamic law and the author suggests that acceptance by Muslim jurists of *pacta sunt servanda* may have occurred as a result of influences of Roman law on Islamic law, even after the decline of the Roman Empire by virtue of the fact that the civil law continued after the decline of the Roman Empire. The doctrine of *pacta sunt servanda* is essential to the practice of international arbitration and another revival of its acceptance by Arab parties has historical and customary precedent, as has been demonstrated.

Future studies may be guided thus:

There is scope for much research on the influences of Islamic law on European law in general. Research along these lines has commenced and a substantial work in four volumes (Abdullah, 1947) compares and contrasts the Islamic and French Civil Codes, highlighting some striking similarities. It is to be hoped that more research along these lines will continue.¹⁵⁹

The comparative analysis of civil, common and Islamic law doctrines in section three of this thesis is a contribution to the gap in the research regarding dealing with the matter of harmonisation between these three traditions. This is more important than the influence of Islamic law upon them, although the author submits that one way that harmonisation came about in the past was through the influence of one tradition upon another. This research demonstrates the feasibility that future drafters of a HICALC will accept influences on the Code that reflect a comparative analysis grounded in identifying general

¹⁵⁹ Ibid 110.

principles common to all three and that can be harmonised with each other, as a revival of the historical record of harmonisation and mutual influences. The historical record verifies that compatibility between Islamic law on one hand and the traditions of civil and common law (which are essentially European) is possible, and that through the influences of all three traditions, has already occurred at various points in history. This section has dealt with the eighth to the thirteenth centuries and the following section will deal with later time-frames. There is a slight overlap in that the rise of the Ottoman Empire occurred around the time of the decline of the Golden Age of Spain and the influences of Islamic law therein.

(b) *The Ottoman Majalla*

Although according to scholars the Ottoman *Majalla*¹⁶⁰ was never implemented in Egypt,¹⁶¹ Ottoman reforms in general are relevant to the case of Egypt.¹⁶² The *Majalla* is still important to this research for three reasons. (1) It represents precedent in that it is a previous attempt at harmonisation of Islamic law with civil law, or a codification of Islamic law: ‘Most countries in the Arab world share comprehensive legal codes, on the Continental Model, that combine elements of French and Islamic law’.¹⁶³ This sets a useful precedent for those who are unfamiliar with Islamic law and culture. (2) The *Majalla* is important because it was in use in many Arab countries and its legacy has left

¹⁶⁰ Saleh, see below n 191, 161–167, 162: ‘... Likewise the *Majalla*, was never put into practice in Egypt; instead National and Mixed Courts used Western materials made available to them and, as expected, court precedents owed a great deal to Western influence, especially the French one.’

¹⁶¹ Saleh, see below n 191, pp 161–167, 161.

¹⁶² Brown, see above n 77, 3: ‘Egypt, technically an Ottoman province but autonomous throughout the century, generally followed Ottoman developments, though the pace and content of reforms sometimes differed. A series of tribunals, consisting of local officials (sometimes supplemented by shari’a trained qadis) was established throughout the nineteenth century that operated alongside the shari’a Courts, ruling on the basis of locally enacted legislation, itself partly based on the shari’a and Ottoman legislation.’

¹⁶³ Ibid 2.

an impact, if not on the civil codes, then on the legal culture: ‘Court systems are similarly based on centralized and hierarchical civil law models’.¹⁶⁴ In regard to the first and second reasons, the following is of merit to the discussion: ‘The culmination of the Ottoman codification effort, the *Majalla*, issued between 1869 and 1877, was intended to be Islamic in content but was based on the Code Napoleon’.¹⁶⁵ The Napoleonic Code, the French Civil Code, represents an interesting example of intra-harmonisation:

It brought together existing rules and implemented many of the new ideas of revolution. The provisions are brief and require judicial interpretation according to its spirit. Its structure is based on its civilian heritage and very broadly follows Justinian’s Institutes (see *corpus juris civilis*). The influence of the Code came from its implementation across Napoleon’s sphere of influence including parts of Italy and Germany. The Code was a successful export, especially to the Americas. Its influence was weakened only when the German civil code (BGB) began to be copied by newer systems.¹⁶⁶

The *Majalla* also represents harmonisation with common law albeit in an incomplete sense.¹⁶⁷ (3) It is important because it does have provisions dealing with arbitration that are important to understand in terms of the legal culture around arbitration and the deeper

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ W Stewart, *Internet-Linked Dictionary of Law*, (Collins, 2006) 296.

¹⁶⁷ Brown, see above n 77, 4: ‘In the other Ottoman Arab provinces, the *majalla* was at least theoretically in effect when the Empire collapsed in the wake of the First World War. The mandatory powers – France in Lebanon and Syria; Britain in Jordan, Iraq and Palestine (as well as Sudan) – attempted in varying degrees to recast the legal system in their own images. Especially in Sudan, Jordan, and Palestine, the British drew on the Indian experience in an attempt to meld the *majalla* or other sources with a common law system. With independence, most countries amended their codes (often with the assistance of Egyptians) and continued or increased the centralization of their court structures.’

values that it evokes. It deals with matters of relevance to arbitration in the MENA context.

It is useful to compare the Ottoman *Majalla*'s provisions to the UNCITRAL Model law. The relevance of Islamic law in the context of the *Majalla* shows the historical view of Islamic law particularly in how it addressed arbitration. Some important provisions in the *Majalla* dealing with arbitration require mention:¹⁶⁸ (1) Islamic law allows the arbitrator to choose the law of proceedings, (2) the Seat of arbitration may occur in a different place than that agreed upon by the parties, (3) oral testimony was required as proof, rather than writing, however, writing was adopted subsequently, (4) the burden of proof rested with the opposing party denying the claim, (5) right of termination before the award was decided was given, however, this was waived if the proceedings had already begun, (6) enforcement was at the discretion of the judges; arbitrators could not enforce the award, (7) restrictions on judges such that they could not rewrite the award or the decision but could review it if the procedural regulations were not followed properly, (8) the arbitrator had to accept the nomination to arbitrate, (9) the arbitrator had to have the same qualities as a judge (in this context they were male, lawyer, Muslim, wise, free, and ethical), (10) the arbitrator's nomination can be revoked at any time, however, the *fiqh* (jurisprudence) set down a standard for a conflict of interest with limitations (ie, not a spouse to a party), (11) most disputes were arbitrable, the restrictions came later.¹⁶⁹

¹⁶⁸ S Houerbi, Director de los Servicios de Solucion de Controversias de la CCI para el Mediterraneo del Este, Oriente Medio y Africa (Tunez), El Arbitraje en un Mundo Global, VI Congreso Internacional de Arbitraje, 19, 20, y 21 de Junio de 2011, Madrid, España, Sede del Congreso, Auditorio Rafael del Pino These provisions were provided by Sami Hourebi as presented in the above conference.

¹⁶⁹ Ibid.

The author's analysis of the *Majalla* provisions on arbitration in comparison to the UNCITRAL Model law provides fascinating results. The *Majalla* endowed arbitrators with more competence and authority than modern instruments in consideration of the fact that the law of procedure was selected by the arbitrator and the Seat of the arbitration could be changed (the location was previously decided upon by the parties). Current civil law practitioners who are uncomfortable with the excessiveness of the common law practice of discovery would relish a reversion to a solely oral testimony as provided for initially in the *Majalla*. Excessive discovery, particularly by US and other common law practitioners as opposed to civil law practitioners, is known to generate excessive documents, costs and time consumption that can be better employed. The burden of proof in the *Majalla*, although questionable, did give the claimant (the equivalent of the investor in modern times) an advantage, as they needed only to put forth their case. Certainly, this provision would add to investor protection and would be welcomed by investors and commercial actors dealing with MENA states. That the arbitration had to be procedurally correct to be valid is no different in the UNCITRAL than it was in the *Majalla*, and that the arbitrator had to accept the nomination and that only in narrow instances of a conflict of interest in which one of the parties was a spouse, *inter alia*, in which they could have them recuse themselves, thus removed the problems of jurisdictional challenge and of bias challenges, either manifest or apparent. The arbitration provisions contained in the *Majalla* can serve as a wise guideline for modern arbitration. These provisions are pragmatic, protective of the investor and avoid many of the modern-day problems affecting international arbitration, such as excessive discovery, challenges to arbitral jurisdiction, bias challenges, and implied sovereign immunity,

including unjust enrichment, and claims of non-arbitrability, since if the State must prove that the claimant is wrong, rather than the claimant having to prove that the claim is true, then protection of the investor is higher against State challenges.

(c) *The Egyptian Mixed Courts*

Most legal practitioners who have worked extensively in the MENA would agree with the author's submission that although many legal provisions and reforms appear *prima facie* as exemplary codes and provisions that make investment protection appear to be a haven, for example in the UAE, or even in Egypt, the fact is that the reality of the situation in practice is complex and the problem of adjudicatory risk is a real risk. This risk is compounded in consideration of the ongoing political and legal changes as a result of the Arab Spring. There is a gap between the law and legal codes and provisions of ICA in the MENA in contrast with the reality of the situation, particularly in consideration of adjudicatory and legal risk which are caused by the inherent problems in the nine identified areas of procedural and substantive law in this thesis. Matters related to (i) *pacta sunt servanda*, (ii) bias challenges, (iii) competence challenges, (iv) *res iudicata*, (v) expropriation, (vi) interest, (vii) sovereign immunity, (viii) public policy and (ix) the absence of a reliable precedent, all create the adjudicatory risk mentioned herein. In addition to this, the manner by which *sharia* law intersects with the aforementioned, together with the gaps in the law, or contradictions (discussed in the section on the UAE), and the implications of the Arab Spring, all contribute to adjudicatory risk. Yet, in regard to Egypt, the Egyptian Mixed Courts are a genuinely exemplary model in terms of *setting*

a precedent of harmonisation and impartiality to foreign investors.¹⁷⁰ The internationality of the Mixed Courts is established.¹⁷¹ The Mixed Courts were based on the French Civil Code,¹⁷² yet they set a precedent for harmonisation of Islamic law with French civil law after their jurisdiction ceased with the creation of Egyptian National Courts.¹⁷³ With the Egyptian Mixed Courts being a legitimate source of precedential law, Egyptian national courts, and MENA regional arbitral tribunal centres should look to Mixed Court case law for precedent, particularly for their impartiality under the most political of pressures, and their absolute fairness to ‘foreigners’ (read: investors) in terms of commercial and other legal matters.¹⁷⁴ The Egyptian Mixed Courts were qualified to handle all legal questions; ‘scarcely any topic of law or judicial administration has not been discussed (and often very elaborately) at some period of the history of the courts’.¹⁷⁵ The case law of the Mixed Courts is still relevant and topical, and particularly in consideration of the Arab

¹⁷⁰ Brinton, See above n 45, xxvii in preface: ‘The Mixed Courts of Egypt stand, above all, for the essential solidarity of justice the world over. They are a witness to the power of the science of law to bind her servants into a common loyalty strong enough to triumph over all considerations of national partisanship and international jealousies. Their example may well give courage to all who are labouring to advance the cause of justice among nations.’

¹⁷¹ Ibid xxvi in preface. Indeed, the precedence of the Mixed Courts may well serve as a model for expanding the scope and powers of arbitral tribunals. National courts do not have the international powers that the Mixed Courts have, which can be compared to international courts of today, however, the Mixed Courts *were* national courts. The Mixed Courts can inform an expansion of arbitral tribunals. Since arbitral tribunals already follow court proceedings, but on an international, rather than national, legal basis, these tribunals can look to the model of the Mixed Courts, particularly new international commercial arbitration Centres in the Middle East, since they have the precedence of the Mixed Courts to fall back on.

¹⁷² Ibid 145: ‘The Mixed Courts of Egypt administer their own law. Founded upon codes, supplemented by statutes, interpreted by over fifty years of judicial decisions, and illuminated by an extensive legal literature, this body of law can fairly invite comparison with that of the leading law systems of the world.’

¹⁷³ Ibid 3: ‘The 1870s saw a protracted (and finally successful) effort to establish Mixed Courts, which had jurisdiction in all civil cases in which a foreign interest was (even remotely) involved. These courts operated according to their own code, heavily drawn from the Code Napoleon. They continued until 1949 when foreign residents became completely subject to the regular Egyptian courts. Following the establishment of the Mixed Courts, Egyptian governments attempted to construct a new, centralized court system, based largely on a French model. Work on the new system and its code was interrupted in 1882 with the British occupation, but was completed in 1883 when the new National Courts began operation. While some effort was made to incorporate Islamic elements, the Egyptian code was far closer to the French than to the Ottoman Majalla.’

¹⁷⁴ Ibid xxiv in preface.

¹⁷⁵ Ibid.

Spring and any subsequent reforms. The implication of these combined features is that the plea of the public policy defence was not overused; the Mixed Courts were impartial and independent from political pressures, acting with absolute fairness to foreign investors. This precedent should guide the drafting of new articles. Few people, both within and outside of Egypt, aside from specialised lawyers and judges, are familiar with Egypt's legacy of the Mixed Courts of Egypt, founded in 1875 by the Khedive Ismail and designed by the then Prime Minister, Nubar Pasha. The Mixed Courts were based on civil codes that were primarily civil law with local principles that harmonised with, rather than contradicted with Islamic principles, whilst drawing on national and international precedent, hence harmonising with the common law tradition. The Mixed Courts dealt with complex disputes that arose that were excluded from being heard in the *sharia*, consular or criminal courts at the time (including special courts that dealt with personal status of non-*sharia* matters, for example in the case of the Copts or other non-Muslim minorities who did not have foreign status under the Capitulatory framework of the time - or dual citizenship.) Cases dealing with sovereign immunity in regard to e.g, Greece, Egypt, and the Sudan, dual or foreign citizens with permanent residence in Egypt concerning financial and investment matters, international banking, sequestration of property of a foreigner (a German at a time when Germany and Egypt were considered to be at war) - formed the majority of cases heard before the Mixed Courts, which, notwithstanding an internationally composed judiciary from a number of different countries were exclusively Egyptian Courts with the judges being considered Egyptian. This unique system effectively and fairly adjudicated foreign investment claims and functioned in the words of its last Judge, an American, His Honour Judge Jasper Yeates

Brinton, as a ‘prototype for the international world courts of today’, for example, the International Criminal Court, the European Court of Justice, and even the International Centre for the Settlement of Investment Disputes. Indeed, such a description is most apt. Indeed, the author submits that in fact the Mixed Courts of Egypt are the prototype of the ICSID forum.¹⁷⁶ The Mixed Courts existed long before the creation of the 1958¹⁷⁷ and Washington Conventions¹⁷⁸ provisions for the legal defence of ‘public policy’ as a reason to set aside awards.

This comprehensive coverage of all questions pertaining to substantive legal doctrines before a national court with an international identity sets strong legal precedent for arbitral tribunals. Arbitral tribunals are inherently international in nature and should therefore be qualified to handle the range of substantive matters raised by any foreign investment or oil concession contract dispute coming before a panel, including those pertaining to international public policy.¹⁷⁹ The precedent of the Mixed Courts to a large

¹⁷⁶ See below, n 213 ‘The mixed nature of the dispute, that is the limitation to cases arising between a State and a foreign national, is in keeping with one of the Convention’s purposes, to close a perceived procedural gap. Legal disputes between individuals or corporations are normally settled before domestic courts. States may settle their legal disputes before the International Court of Justice. However, in mixed disputes, especially arising from international investment relationships, no appropriate forum was seen to exist.’ The Mixed Courts of Egypt also adjudicated cases between foreigners (under the Capitulatory Powers) and States, ie, Egypt, the Sudan and Greece.

¹⁷⁷ *New York Convention on the Recognition and Enforcement of Arbitral Awards* 1958.

¹⁷⁸ See above n 13, 8

¹⁷⁹ The author submits that an accurate analogy is to compare arbitral tribunals to international courts. The reason for this comparison has to do with the jurisdiction of the jurisprudence. Domestic courts can only apply domestic law. It is tangential whether domestic courts apply international law because international law, in so far as it is ratified by a State gains equal legal standing with domestic law. International courts however, must apply international law. An arbitral tribunal is not restricted to the application of domestic law. Furthermore, a domestic court must decide based on domestic public policy. An international court must decide based on transnational public policy. An arbitral tribunal must not decide questions that deal with international public or private law *solely* on the basis of domestic law, particularly if the tribunal hopes to seek recognition of the award in a country that requires that the award not be in breach of the domestic public policy of the country where the award was made. The domestic public policy of the country where it seeks to have it enforced must also be considered because that country will interpret public policy through its own interpretative framework.

degree has been invoked by the author in the new HICALC articles drafted as a result of the research.

The Egyptian Mixed Courts were at one and the same both national *and* international courts and have generated a large body of case law that can adequately be used to inform the creation of reformed rules applied to arbitration tribunals. It is vital to consider Egyptian precedent from the Mixed Courts.¹⁸⁰ In the Egyptian Tribute Affair, Egypt was paying a tribute to Turkey, whereby it paid Turkey's creditors directly. After the Treaty of Lausanne, Egyptian prime minister Saad Pasha Zaghoul suspended payments, leading to an outcry from Turkey's lenders who were counting on Egypt to repay them. The bondholders claimed that Egypt was obligated to maintain payment to them regardless of Turkish sovereignty.¹⁸¹ 'The Procureur-General of the Mixed Courts, van den Bosch, was even moved to declare in court that "*pour une nation, faire honneur a ses dettes est la plus précieuse garantie de son prestige, et la condition première de son crédit devant le monde*" [The foremost guarantee of a nation's standing before the world is in honouring its obligations—author's translation.] . . . and the court held that the Egyptian government was unable to refuse to pay its debts to the bondholders'.¹⁸² What is most interesting is the Mixed Courts' ability to fairly balance the interests of the State with those of the investor, regardless of the complexity of the circumstances. It showed

¹⁸⁰ M Hoyle, *Mixed Courts of Egypt*, (Graham and Trotman, 1991) xxvii, '[T]he impact of the Mixed Courts on this change, not only as a system applying an agreed collection of codes, but also in the way of the jurisprudence of the courts combined with these codes to establish a true rule of law. This in turn led to parallel developments in other Egyptian legal jurisdictions, such as the Native Courts and the Sharia Courts, and eventually paved the way for the Mixed Courts' own dissolution in 1949; by the establishment and consolidation of the rule of law they in fact sowed the seeds for their own end; as they no longer remained a necessary and unique part of the Egyptian legal system.'

¹⁸¹ Ibid 124–125.

¹⁸² Ibid 125, furthermore, 'Egypt's obligation to repay the bondholders was taken as a commercial matter. The principle of *rebus sic stantibus* which was pleaded by the Egyptian government was not applicable because the 1891 loan was repayable over a fixed period of 60 years, and so a change of circumstance was irrelevant.'

fairness towards the investors (or bondholders) even in the face of questions dealing with State sovereignty. This historical legacy of fair and balanced precedential reasoning by the Egyptian Mixed Courts can be distilled and applied to current investor–State disputes, thereby lighting the path to higher enforcement by mitigation of risks that investors must navigate in the dark when dealing with States in the MENA context.

(d) *The French legacy*

The author has already referred to the Napoleonic Code in the context of the Ottoman *Majalla*. The French influence extends beyond the Napoleonic Code. Notwithstanding that the colonial duration of Britain’s involvement in Egypt’s affairs was of a longer duration than that of the French, it is the French legacy that has left its marked footprint upon the Egyptian legal system to a very large degree: ‘French influence was paramount in North Africa, although Morocco is notable for the large degree of Islamic influences in its codes’.¹⁸³ The French legacy is the golden thread that runs throughout the tapestry of Egypt’s well-woven legal system and jurisprudence to this day.¹⁸⁴ Aside from the existence of Islamic law in the Egyptian Constitution,¹⁸⁵ The procedure and substance of the Egyptian legal model in terms of its codes, institutions and processes can be accurately classified as a civil law jurisdiction for the purposes of understanding the proceedings of the *lex arbitrii* in Egypt. Until now the Egyptian

¹⁸³ Brown, see above n 77, 4.

¹⁸⁴ Civil law in Egypt as a direct result of the French involvement in Egypt as far back as Napoleon’s scientific expeditions in 1798 is only one source. It must also be recalled that Egypt was at one time part of the Roman Empire and ruled by Rome. Egypt (Aegyptus, as it was then known) was under the rule of the Roman Empire in 30 BC by Augustus until 641 AD when Islamic conquests occurred, a span of 700 years. In between Roman rule and the Napoleonic expedition, the French crusaders were also present in Egypt. The Seventh Crusade by Louis IX lasted from June 1248 until March 1250. In A Demurger, *The Last Templar: The tragedy of Jacques de Molay, Last Grand Master of the Temple*, (Profile Books, 2005) at 268: 5–6 June 1249, Louis IX captures Damietta, Egypt; 8 February 1250, the Battle of Mansurah occurs.

¹⁸⁵ Art II of the Egyptian Constitution currently states that Islam is *the* source of law, not *a* source of law, as was the case before 1980 in which it was changed to make Islam the primary, and only source of law.

Ministry of Justice is modelled after the French Parquet, or Office of the Prosecutor. In consideration of the fact that that Egypt exports judges and lawyers throughout the MENA, the French civil law tradition travels with them. In consideration of the civil law influence on Egypt in the past, regarding the substantive law dealing with commercial matters, this does not mean that Islamic elements or ‘principles’ are not absent in the Egyptian legal context. Indeed, in consideration of the changes to the Egyptian Constitution of 2011, this topic is worthy of the subsequent discussion in the section devoted exclusively to Egypt.

(e) *The Sanhuri and Lambert Codes*

In March of 1936 a committee was formed to revise the Egyptian Civil Code in anticipation of the end of the Mixed Courts in 1949 and their dissolution into one national court system.¹⁸⁶ A second committee formed in November 1936 was also formed and dissolved in May of 1938 before completing its work.¹⁸⁷ A final committee was formed in 1938 with only Sanhuri and Lambert, who was recommended by Sanhuri, taking consideration of the opinion of the Ministry of Justice, that the codification would be better accomplished by two rather than one person.¹⁸⁸ The draft code completed in 1942 was constructed using comparisons of more than 20 modern codes, Egyptian court jurisprudence and *sharia* and publicly summarised and announced.¹⁸⁹ Sanhuri’s code

¹⁸⁶ E Hill, *Al-Sanhuri and Islamic law: The Place and Significance of Islamic law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971* [Part II], *Arab Law Quarterly*, Vol 3, No 2 (May 1988), 182–218, 182.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

became promulgated as Egyptian Law on 15 October 1949, the day that the Mixed Courts came to an end.¹⁹⁰

Sanhuri and Lambert's Code is noteworthy for four primary reasons. The first reason is that it represents reform that came into being through democratic means and with the consent of the people, for the most part, and has served the countries where it was implemented well. The second reason is that it represents harmonisation between two technically different legal systems: civil and Islamic law;¹⁹¹ yet it solves these differences effectively.¹⁹² The third reason is that it creates a place for equity, which is discussed in subsequent chapters in this thesis and which is necessary to the successful conduct of international arbitration. Indeed, 'For probably the first time in the modern legal history of the Arab Middle East, the Shari'a was officially to back up an important piece of secular legislation. Shari'a principles were to fill the lacunae found in the statutory provisions and in custom'.¹⁹³ The HICALC achieves the same result. The Sanhuri Code, though with utilitarian value, raised debates in parliament and initially encountered resistance that it was not *sharia*-compliant enough.¹⁹⁴

¹⁹⁰ Ibid.

¹⁹¹ N Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, Arab Law Quarterly, Vol 8, No 2 (1993), 161–167, 162: 'Thus, we found in Sanhuri's *Le Califat*, published in French in 1926, that the Shari'a should be adapted progressively to the needs of modern civilisation before replacing the Western-inspired system of law in force in Egypt; until such adaptation was completed, Shari'a law should play a subsidiary role, that is to say, the Shari'a would apply only in the absence of provisions in secular legislation.'

¹⁹² Ibid: 'The draftsman Sanhuri was faithful to his early vision, for Article 1 of the Civil Code of 1948 enjoins judges to issue their judgements in accordance with the letter and spirit of the provisions of the Code itself, failing that, in accordance with custom, and in the absence of custom, in accordance with the principles of Islamic Shari'a. In the absence of the latter, judges will apply principles of natural law and rules of equity, as also instructed by Art 1.'

¹⁹³ Ibid.

¹⁹⁴ Ibid '... [T]he originality and success of the blending operation, although claimed as being total by some architects of the Civil Code, were not fully conceded. Even the magnitude of the blending operation was disputed.'

Thus,

Egypt's Civil Code was enacted in 1948, not by any autocratic rules, but by the people's representatives and following original guidelines conceived by its chief architect, Abd al-Razzaq al-Sanhuri, ordinary politician and outstanding lawyer. The guidelines were successful because they took into consideration the political, social, and legal climates then prevailing in Egypt.¹⁹⁵

The aforementioned Mixed Courts are one such example.¹⁹⁶

The fourth reason is that it has been exported throughout the Middle East, and therefore it is of prime importance to understanding the entire region.¹⁹⁷ The ultimate reason that Sanhuri's Codes are included in this thesis is because they influence all of the Arab civil codes, whilst also demonstrating Egypt's primacy as a regional leader in the MENA.¹⁹⁸ They are also an example of harmonisation.

B Comparative Analysis of Relevant Differences and Commonalities of the Case Study Countries

The purpose of this section is to expound upon the laws and legislative framework of the MENA as well as to elucidate their status quo in consideration of the standing of

¹⁹⁵ Ibid 161.

¹⁹⁶ Ibid: 'Instead, the European powers of the nineteenth century secured the creation of the Mixed Courts which began operation in 1876, using a civil code – and other codes – patterned on their French counterparts. A second Civil Code intended for the National Courts, and likewise patterned on the Code Napoleon, was enacted in 1883. That is to say, that towards the end of the nineteenth century the Shari'a ceased to govern secular transactions for Egyptians and non-Egyptians alike'.

¹⁹⁷ Ibid 166: 'Tributes tend to recur periodically and are often meant to turn to the advantage of those who pay them. That is not the case with Sanhuri. The tribute paid to him is of a different kind; it is the daily use of his codes and treatises. I do not believe that a single day passes without a number of Arab lawyers referring to either one of his civil codes, to al-Waseet or to Massadir al-hagg. Sanhuri's influence on the judiciary of most Arab countries became such that those who belittle the Shari'a's part in his codes and advocate their revision in line with fiqh, do find themselves struggling against the stream.'

¹⁹⁸ Saleh, see above n 191 (1993), 161–167, 163–164, Syria, Iraq, Libya, Kuwait, Jordan and United Arab Emirates.

extant national and international provisions with the Constitutions and legal standing of *sharia* law therein.

1 Egypt

The strength and uniqueness of the formula for harmonisation proposed by the author rests on the fact that it is an honest approach. What is meant by this is that many practitioners, particularly in the MENA, wish to avoid the matter of contradictions in certain Islamic provisions by denying either that these contradictions exist or by asserting that these contradictions are not widespread nor made manifest in the realm of international arbitration, particularly in so-called free zones. The author calls this the *ostrich approach*. Adjudicatory risk cannot and should not be ignored. This is the weakness of the *ostrich approach*.¹⁹⁹ The approach employed by the author is the *oyster approach*. They either pretend, deny or ignore the reality of the existence of Islamic law on two different levels: (1) that it exists as an influence in the MENA states on the basis that it is established as the supreme law of the land per constitutional decree together with a deep cultural reality in the minds of judges, lawmakers, practitioners, etc. and (2) that it is a real consideration of legal thinking, reasoning, adjudication and interpretation, as an ethos. This reality is contrary to what MENA practitioners claim in saying either that Islamic law is exactly similar to Western legal provisions (it is not, not across the board, although there are similarities). This reality is contrary to claims made by MENA

¹⁹⁹ Whilst the ostrich seeks to hide itself from impending perils and dangers, the oyster integrates difficulties in order to produce a treasure- a pearl of great price. This is the approach of the author. Integrating uncoded *sharia* principles into a HICALC in such a manner as that espoused here allows these principles to serve as assets rather than liabilities. Rather than deny the adjudicatory risks that these doctrines may raise (eg, *maslaha*, *inter alia*), they are dealt with directly and integrated in order to produce value, much as the process by oysters of converting harmful elements into treasured pearls. This is most apropos in the context of a country that was once a small pearl-diving village.

practitioners that only what is legally codified of Islamic law in particular statutes can be referred to.²⁰⁰

For example:

You will find that Sharia law is not a law that you can find in a book or textbook or go and pinpoint to a judge in a courtroom and say, “I want you to apply this Sharia law to me because of this”. This is not an acceptable practice in any of the countries that I’m familiar with, with the exception maybe of Saudi Arabia and maybe there are other countries which I’m not familiar with. For sure, most of the Gulf countries and the Middle East countries (and that’s including Lebanon, Egypt, Tunisia, Morocco, Iraq, Kuwait, United Arab Emirates, Qatar), in all these countries you cannot just open the Sharia book or the Quran or the Sunnah and say ‘I want you to apply this principle’. Those countries, according to their constitution, apply a modern codified law. So the reference to the judges in court is to the law of the country that has been enacted in whatever process that the constitution provides for. However, some of the principles in the codified law are derived from Sharia, and the Sharia principles.²⁰¹

In theory, this might potentially be accurate. In practice, if a certain Islamic consideration exists, it can be raised before a judge in a national court, or in parliament or before an arbitration tribunal and for the above given reasons, even if it is not expressly stated in a codified statute, the discretion of judges and constitutional and cultural considerations can allow it to prevail, and this creates adjudicatory risk. Certainly with *sharia* as the constitutional law of many MENA countries and with judicial discretion, as is discussed

²⁰⁰ E Al Tamimi, ‘10th Annual international arbitration Lecture, Islamic Influences on international arbitration transcript’ (Clayton Utz, 8 November 2011).

²⁰¹ Ibid.

in the section on public policy, *inter alia*, *sharia* provisions are applicable. The question that raises adjudicatory risk for investors is: which ones might be raised by the other side and how will the judge respond in consideration of the fact that interpretation is a relatively subjective process and the influence of *sharia* principles is strong. The same practitioner went on to state:

The constitution of most Arab countries says, when you legislate in the country try to derive your legislation from Sharia – it basically says that one of the legislation sources in the country is Sharia. One of the sources. So you'll find all of the law in modern Islamic countries is codified law, based on particular articles under the law. All Arab countries are civil law jurisdictions, so most of the laws come through legislation or court, and some of those principles within the courts come from Sharia.²⁰²

The danger with such broadly general statements is that when made categorically to apply to the entire Middle East and North Africa, they are incorrect. In the case of Egypt, for example, the above quoted statement is incorrect. The Egyptian Constitution states that Islamic law is *the* source of law. Not *a* source of law. The HICALC combines the similar doctrines found at common, civil and Islamic law in such a manner that since it is by its nature *sharia*-compliant, the opportunity to raise arguments based on Islamic law or *sharia* principles against its provisions is practically impossible. This is even more so since if it were the case that it would be implemented it would be an extant codified statutory law. In that case it would neither breach nor contravene the constitution or judicial interpretations. As is discussed in subsequent chapters, a number of Islamic provisions exist to provide a blank cheque for judiciary discretion. The HICALC can

²⁰² Ibid.

mitigate this. Therefore, it would have to be respected. The claims of other practitioners, namely that no one may in practice refer to Islamic legal provisions unless they have already been codified in the Civil Code is not an accurate statement. The approach employed by the author deals with reality in a straightforward manner and lowers adjudicatory risk by facing the potential dangers and resolving them rather than denying them in order to entice investors and then have them encounter unforeseen risks. It is better to enter a situation with full knowledge. If it is true that never under any circumstance can *sharia* provisions that are not codified ever be considered in the mind of a judge or referred to in interpretations of statutes, which is unlikely, then having favourable *sharia* interpretations codified particularly in consideration of the fact that supposedly judges and arbitration practitioners will only refer to the Civil Code, is a guarantee that adjudicatory risk is minimised. This is conditional upon the fact that the case is one in which it is only the favourable provisions that are compatible with Western principles and are fair to both investors and States, or other commercial actors that are codified, since this is the legal authority that the judges are required to restrict themselves to.

The motivation behind this work is in large part an answer to a question posed by an eminent scholar: ‘What steps could be taken to make international arbitration more readily acceptable to Arab parties?’²⁰³

²⁰³ S Saleh, *The Settlement of Disputes in the Arab World, Arbitration and Other Methods, Trends in Legislation and Case Law*, 1 Arab Law Quarterly, 198-204 1986, 198.

The learned Samir Saleh raises the following important points to his question:

(1) The first conclusion is that there can be no definitive conclusion and no forecast can be made when dealing with territories characterised by change, where the legal is overshadowed by the political. (2) It is not on the content of legislation but on the underlying realities that attention should be focused. At this stage the conclusion can best be expressed in the interrogative mode. Which are going to prove the stronger, nationalist tendencies or tendencies receptive to the West? Which is going to prevail, the generally close legal traditions of Islam or the pressure of international trade? These conflicting influences often give rise to paradoxical situations, such as that in Egypt, which was the first of these countries to sign the New York Convention, but where there is evidence of phagocytosis of the international arbitration clause by local provisions; such as that in Oman, whose courts enforce ICC awards even though it as yet has no legislation on the enforcement of awards. (3) A third conclusion must also be drawn at this stage. It is a corollary of the first. In the countries of the Arab Middle East, legal texts identical with those in force in the West take on different meanings when they come to be applied in practice. A legislative vacuum is often filled in judicial practice by local idiosyncrasies in which pressure from the executive power can be sometimes directed.²⁰⁴

These are not rhetorical questions. These questions go to the heart of international commercial arbitration in the MENA in consideration of the Arab Spring. The erudite and prescient words of the learned Saleh, though written nearly three decades ago, are even more topical today. It is as if he predicted the future. The current situation in Egypt, taking consideration of the Arab Spring and the revolution together with a newly elected parliament and president of a different character, necessitates a reviewing of adjudicatory

²⁰⁴ Ibid.

risk in Egypt. Contrary to what the author refers to as the *ostrich approach*²⁰⁵ espoused by some practitioners regarding international arbitration law and practice in the MENA, this thesis takes the approach that it is better to look closely at the situation in the MENA and to identify what is happening and what may foreseeably occur in future decades regarding legal and political reforms and trends.

The topical words of the learned Saleh need to be examined more closely. His wise and insightful analysis is more relevant now than they were when they were written. His prescient words, written in the past, are as apropos today as when first written. He identifies paradoxical situations where law and practice diverge. He warns of different interpretations of the same legal instruments. He cautions that the political winds may turn the tide against Western interpretations. The newly elected Egyptian parliament is composed of a Muslim majority, many of which are held by Azhar scholars including those who would be classified as political Islamists (*salafi*).²⁰⁶

A comparative analysis of current arbitration laws and trends in Egypt and the United Arab Emirates (UAE) by the author was employed to set forth the foundations for reform in ICA law in the MENA. Although Egyptian legislation and jurists have left a strong legacy in the MENA region, Arab civil codes are not replicas of the 1948 Civil

²⁰⁵ The author has coined the term *ostrich approach* to refer to the widespread phenomenon that occurs in the Middle East regarding adjudicatory risk as it intersects in the nexus of legal provisions, customary practices of the region and Western business interests. The ostrich approach favours ignoring certain realities that come about as a result of different legal provisions and customary practices in countries of the region that have Islamic law as the legal system as enshrined by their constitutions in order to appear more appealing to Western investors. The correct approach, as put forth herein by the author is to identify the areas of adjudicatory risk as a result of the aforementioned nexus and to propose solutions to deal squarely with them, rather than hide from them.

²⁰⁶ The Salafi movement is based on the beliefs of those who call for a return to a pure Islam to be implemented in modern times; one that is based on what they consider as being the exact kind of Islam that existed during the time of the Prophet.

Code of Egypt.²⁰⁷ There is therefore a need to understand what legal and historical factors may account for rejection of a harmonised code, confined to questions of harmonisation and public policy.

Egypt has been chosen because it is the most influential source of law in the MENA. Egypt exports both laws and judges throughout the MENA States. MENA law has two sources: the *sharia* and civil law. The Civil Code and commercial law are derived from French law govern governing civil and commercial dealings, with influences of the *sharia*.²⁰⁸ To conclude on the matter of the current situation in Egypt regarding the reconstruction of the Egyptian parliament and how this relates to the importance of the Mixed Courts, it is important to keep firmly in mind that in terms of setting a precedent of harmonisation and impartiality to foreign investors, the precedent of the Egyptian Mixed Courts can serve as a guide.²⁰⁹ Future drafters of a HICALC should closely examine the precedent of the Egyptian Mixed Courts in drafting new provisions. It must be recalled that the Mixed Courts are the source of the Egyptian Civil Procedures Law. Egypt started out as a model of impartiality to foreign investors by way of the Mixed Courts. Although this precedent of impartiality was not followed subsequent to the dissolution of the Mixed Courts, eg, as the ICSID cases regarding *compétence de la compétence* shall demonstrate below, the legacy of the Mixed Courts may be referred to by future drafters for precedent in application to the question of the

²⁰⁷ Saleh, see above n 191, 161–167, 165.

²⁰⁸ Late Dr MIM, Aboul-Enein, ‘preface’ in Alam Eldin, Mohie Eldin I, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* (Kluwer Law International, The Hague, 2000).

²⁰⁹ Brinton, see above n 75, at xxvii in preface: “The Mixed Courts of Egypt stand, above all, for the essential solidarity of justice the world over. They are a witness to the power of the science of law to bind her servants into a common loyalty strong enough to triumph over all considerations of national partisanship and international jealousies. Their example may well give courage to all who are labouring to advance the cause of justice among nations.”

manner by which impartiality to foreign investors may be dealt with in the MENA. With Egyptian courts being a source of precedential law, Egyptian national courts, and MENA and other arbitral tribunal centres should look to Mixed Court case law for precedent particularly for their impartiality under the pressures of domestic policy and their unwavering fairness to ‘foreigners’ in terms of commercial and other legal matters.²¹⁰ The internationality of the Mixed Courts is established.²¹¹ In addition to the precedential legacy of the Egyptian Mixed Courts, there are other strands of impartiality, for example, several legal instruments that protect investors. These are discussed in subsequent paragraphs. Examples of these legal instruments are Bilateral Investment Treaties (BITs) that Egypt has entered into, including the Civil Procedures Code, other legal instruments and provisions in the Egyptian Constitution. A second example of Egypt’s legacy of protection of foreign investors is reflected in the following.

(a) *Bilateral Investment Treaties (BITs)*

In terms of international obligations, Bilateral Investment Treaties (BITs) entered into with Egypt provide protection for investors under clauses that explicitly deal with expropriation, discrimination and unfair treatment.²¹² Egypt is currently a signatory to 69

²¹⁰ Brinton, see above n 75, 1930, xxiv in preface.

²¹¹ Ibid. Indeed, the precedence of the Mixed Courts may well serve as a model for expanding the scope and powers of Arbitral Tribunals. National Courts do not have the international powers that the Mixed Courts have, which can be compared to International Courts of today, however, the Mixed Courts *were* national courts. The Mixed Courts can inform an expansion of arbitral tribunals. Since arbitral tribunals already follow court proceedings, but on an international, rather than national legal basis, these tribunals can look to the model of the Mixed Courts, particularly new international commercial arbitration Centres in the Middle East, since they have the precedence of the Mixed Courts to fall back on.

²¹² *US-Egypt Bilateral Investment Treaty*, 1992, preamble: For example, in the United States- Egypt BIT, effective since 1992, provisions are made for the following points: ‘

(1) Foreign investors are to be accorded treatment in accordance with international law and are to be treated no less favourable than investors of the host country or no less favourably than investors of third countries, whichever is the most favourable treatment (“national” or “most-favoured- nation” treatment) subject to certain specified exemptions.

Bilateral Investment Treaties, including such countries as Australia, Austria, Belgium, Canada, China, Denmark, Finland, France, Greece, India, Italy, Japan, Malaysia, Malta, the Netherlands, Poland, Singapore, Spain, Sweden, Switzerland, the United Kingdom and a number of Arab States. The numerous BITs that the UAE and Egypt have entered into are a vast area of law and require highly specialised treatment. This could very well be a topic of new research and is largely outside the scope of this work. This is a worthy topic of exploration for future research. Although BITs are a source of legal protection for the interests of investors, there are gaps in regard to the unique needs of the MENA context.²¹³

(b) *The 1994 Egyptian arbitration law*

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) has adopted the 1976 UNCITRAL Rules. In consideration of the importance of arbitration to international investment and commercial disputes, Egyptian arbitration and investment laws serve as a solid legal framework to support a future HICALC or uniform Arab arbitration law. In terms of Egyptian interpretations of public policy, a close look at

-
- (2) International law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation.
 - (3) Procedures are to be established which allow an investor to take a dispute with a Party directly to binding third-party arbitration.
 - (4) The provisions on treatment of foreign investment and arbitration, and in particular Egypt's acceptance of international law as the governing law, mark an important achievement for the BIT program and US investment and international arbitration policies.'

²¹³ See above n 27: 'There is little reference to bilateral investment treaties (BITs) in the travaux préparatoires to the Convention (History Vol II, 400). This is hardly surprising considering that at the time of the Convention's drafting BITs had only just started to appear in State practice. The Report of the Executive Directors to the Convention does not mention the possibility of consent being expressed by way of treaties. But it does refer to the possibility of a unilateral offer of consent by the host State through its legislation and the acceptance of that offer by the investor.' This refers to the ICSID Convention and shows the absence of a predetermined construction of the role of BITs as they intersect with ICSID arbitrations.

the 1994 Egyptian arbitration law shows it was changed to privilege public policy.²¹⁴ Law No. 9/1997²¹⁵ adds to Article 1 of the 1994 law the following change: ‘With regard to disputes relating to administrative contracts, agreements on arbitration shall be reached with the approval of the competent minister or the official assuming his powers with respect to public law entities. No delegation of powers shall be authorised in this respect.’ This amendment takes jurisdiction away from parties to an arbitration agreement and their presiding tribunal, delegating those powers to an Egyptian government minister, not to the arbitral tribunal or even an Egyptian court of law. This poses adjudicatory risk in consideration of Egypt’s new government changes. The second part of the amendment reinforces that the sole jurisdiction lies with the Egyptian government by preventing appeal. One of the conditions of Egypt’s new 1994 law of arbitration²¹⁶ is that the contract must not violate Egyptian public policy or *ordre public* for the award to be enforceable.²¹⁷ If an aspect of a contract is deemed incompatible with public order then the award will not be enforced. Interpretations of the doctrine of public interest may vary from that of European nations, and MENA courts follow Egyptian case-law precedent.

(f) *The Egyptian Code of Civil and Commercial Procedure*

The Mixed Courts created the Egypt’s Civil Code,²¹⁸ which deals with investment matters. The Egyptian civil code requires in Article 1,²¹⁹ that in the absence of a lacunae that the judge decide first according to custom, and in the absence of custom, according to

²¹⁴ 1994 Egyptian Arbitration Law No 27, Art 1. (Also known as the 1994-027 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, amended in 1997).

²¹⁵ 1997 Egyptian Arbitration Law No 9 Amendment to 1994 Egyptian Arbitration Law.

²¹⁶ See above n 214

²¹⁷ Egypt: A new law on Arbitration by White & Case International Law Firm, in Arab Law Quarterly 10, 31–33. 1995, 32.

²¹⁸ The Egyptian Code of Civil and Commercial Procedure of 1949.

²¹⁹ Ibid Art 1.

sharia principles and in the absence of that, according to principles of natural justice and the rules of equity. Article 5 of the Civil Code prohibits unlawful benefits.²²⁰ This means that in consideration of the Civil Code, when unlawful expropriation occurs, both the Constitution²²¹ and the Civil Code prohibit it. Expropriation is unlawful without compensation. Article 11 of the Civil Code deals with the legal capacity and legal rights of foreign persons and the applications of Egyptian law.²²² Article 18²²³ dealing with property and Article 19²²⁴ dealing with contractual obligations refers to the law of the place and the law of the domicile and may apply to investors by invoking Egyptian Constitutional provisions to protect investors. Article 24²²⁵ refers to the general principles of private international law applying in the absence of conflict of laws not addressed in preceding articles. Beyond the Constitution and the Egyptian Civil Code, are recent legislation created to protect investors. A number of laws exist to protect not only investors (under the general definition of ‘investment’ as found in ICSID cases): Law of Investment Guarantees and Incentives,²²⁶ the 1997-008 Investment Incentives Law and its Executive Regulation,²²⁷ which sets up a complete legal framework to govern the physical infrastructure of Egyptian resources and other materials relevant to investments including but not limited to land, industrial, transport, petroleum and gas drilling and exploration. The law provides for different types of investors from sole proprietorships to joint stock companies (Articles 12-14),²²⁸ and the establishment of Free Zones and conditions related

²²⁰ Ibid Art 5.

²²¹ *Constitution of Egypt*.

²²² See above n 218, Art 11.

²²³ Ibid Art 18.

²²⁴ Ibid Art 19.

²²⁵ Ibid Art 24.

²²⁶ *Law of Investment Guarantees and Incentives*.

²²⁷ *Investment Incentives Law and its Executive Regulation*, 1997-008.

²²⁸ Ibid Art 12-14.

thereof (Articles 28-58).²²⁹ Another important law is the 1994-027 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, amended in 1997,²³⁰ which incorporates many UNCITRAL provisions and replaces Articles 501- 513 of the Egyptian Code of Civil and Commercial Procedure (Law no. 13 of 1968),²³¹ making administrative contracts (eg, such as contacts with government entities) arbitrable. Article 22²³² allows the Tribunal to rule on its own competence. Article 34(2)²³³ allows for proceedings to continue even if the respondent fails to write a defence. Article 42²³⁴ provides for interlocutory awards. Article 52²³⁵ states that Arbitral Awards issued in accordance with the provisions of this law may not be challenged. Article 53 sets forth 7 conditions that limit nullifying the award. Article 55²³⁶ of this law states that Arbitral Awards rendered in accordance with the provisions of said law have the authority of *res iudicata* provided it does not contravene against three reasonable conditions. Articles 501 to 513 of the Egyptian Code of Civil and Commercial Procedure (ECCP) were previously enacted in Law No 13 of 1968, for the regulation of civil and commercial arbitration, until replaced by a new law modelled after the UNCITRAL Model Law, Law No 27 of 1994.²³⁷ The promulgation of Law No 27²³⁸ is a turning point in the modernisation of Egyptian statute law and for many Arab countries amending their own legislation.²³⁹ It may be seen as a catalyst for a wider movement of modernisation of Arab legislation in line with the

²²⁹ Ibid Art 28-58.

²³⁰ See above n 214.

²³¹ The Egyptian Code of Civil and Commercial Procedure of 1949, amended by Egyptian Code of Civil and Commercial Procedure (Law no 13 of 1968), Art 501-513.

²³² See above n 214, Art 22.

²³³ Ibid Art 34 (2).

²³⁴ Ibid Art 42.

²³⁵ Ibid Art 53.

²³⁶ Ibid Art 55.

²³⁷ S Saleh, *Commercial Arbitration in the Arab Middle East, Shari'a, Syria, Lebanon and Egypt*, (Hart Publishing, 2nd ed, 2006) 337.

²³⁸ *Investment Incentives Law and its Executive Regulation*, 1997-008.

²³⁹ Saleh, see above n 237.

UNCITRAL.²⁴⁰ What requires closer examination is the following fact: ‘Some provisions of the UNCITRAL Model Law have been modified in the process to accommodate local idiosyncrasies’.²⁴¹ Although it is widely known that Egypt has adopted the UNCITRAL, what is not known to many is that it has created customised amendments compatible with its national legislation.²⁴² This means although the UNCITRAL is adopted in Egypt, it may have crucial differences²⁴³ from what is expected, per unique variables present that influence the overall legal climate of Egypt.

(g) *The Egyptian Constitution*

Article II of the Provisional Constitution of the Arab Republic of Egypt (2011)²⁴⁴ maintains the same Article II as that found in the Constitution before it, the 1971 Constitution, amended in 2007.²⁴⁵ The wording of the 2011 article is slightly different, but the meaning is, in essence, the same: ‘Islam is the religion of the State and the Arabic language is its official language. Principles of Islamic law (Shari’a) are the principal source of legislation.’ The wording of the second half of Article II of the pre-2011 revolution Constitution²⁴⁶ is as follows: ‘Islamic law (Shari’a) is the principal source of

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² M El Batouti, S Hanafi, K El Helaly, H Osman, ‘Egypt 18’ in, G De Palo, M Trevor (Eds), NJ Alexander, (Series Ed), *Arbitration and Mediation in the Southern Mediterranean Countries*, (Kluwer Law, 2007) 27: ‘The Egyptian legislature therefore started the development of an arbitration law to replace Art 501 through 513 of the Proceedings Law. In preparing this new arbitration law, the legislature followed the UNCITRAL Model Law of 1985 on international commercial arbitration to a great extent but inserted a number of amendments thereon to suit the custom of national legislation. Various professors of law worked on this law over the course of eight years and it was subject to long and extensive debates in the legislature. Finally, the result of those efforts was the issuance on April 18, 1994, of the Arbitration Law, which entered into force one month later.’

²⁴³ Sanders, see above n 137, 53, ‘The UNCITRAL Model Law is a model only. States, modernizing their arbitration law, may adopt the text as such but may also modify the text of some articles or add other provisions to the text.’

²⁴⁴ *Egyptian Provisional Constitution of the Arab Republic of Egypt*, 2011, Art II.

²⁴⁵ *Egyptian Constitution of Egypt of 1971*, amended in 2007, Art II.

²⁴⁶ See above n 244.

legislation'. Yet, the author submits that although the meaning appears the same on the face of it, the implications arising from the change in wording are important. The pre-2011 Constitution refers to Islamic law.²⁴⁷ The new Constitution²⁴⁸ refers to 'the principles of Islamic law'. This distinction is significant. The first instance refers to the narrowest interpretation of Islamic law. Here, one can reasonably put forth the case that unless 'Islamic law' is codified (and even if it is not), it is still subject to various interpretations. In the second instance, the concept of 'principles of Islamic law' is the source of legal authority. The author submits that principles are less definitive and more easily subject to interpretation, thereby lending themselves to a higher level of vagueness, uncertainty and unpredictability in comparison to 'Islamic law'. Indeed, this is the same argument given by critics of the *lex mercatoria*, or other general principles of law. The change to the Constitution and the ensuing implications are evidence against the argument that Islamic law cannot be invoked in MENA courts unless it is codified. That argument is legally incorrect. Principles, though not codified, are now the primary source of Egyptian law and overarching legal authority. Referring to Islamic principles instead of to Islamic law as the source of legislation creates a dangerous situation. It invites a continuation of unpredictable and inconsistent interpretations of the law, for who can say what a principle really means when its interpretation is influenced by public policy? Here, the value of this research is based on the author's reliance on principles of Islamic law that can be codified. Codifying Islamic principles into a suggested HICALC has provided clarity where the distorted understanding of the principles and the MENA legal context would otherwise lead to the dangers of adjudicatory risk. The change in wording

²⁴⁷ See above n 245.

²⁴⁸ See above n 244.

of the Egyptian Constitution to ‘principles of Islamic (Sharia) law’ is akin to opening Pandora’s Box.²⁴⁹ Yet, regarding future drafts of the HICALC, and unlike Pandora’s Box, one of the benefits for future drafters of the HICALC is that the wording, although vague, is flexible and can allow for less rigid interpretations. This is cause for hope. The author submits that principles are easier to discern and to apply than strict codes. They allow for interpretations of the law that are consistent with the spirit of the law rather than with a rigid fundamentalism.

(h) *Specific Egyptian Legislation*

Egypt has a significant and comprehensive legal framework covering commercial matters. All commercial dealings within the country and amongst trading partners are protected by law: Labour Law no. 12 of 2003, Sales Tax Law no. 11 of 1991,²⁵⁰ Banking Law no. 162 of 1957,²⁵¹ Companies Law no. 159 of 1981,²⁵² Financial Leasing Law no. 95 of 1995,²⁵³ Capital Market Law no. 95 of 1992,²⁵⁴ Foreign Currency Law no. 38 of 1994,²⁵⁵ Rules & Procedures of Civil Workers and Incentives,²⁵⁶ Central Securities Depository and Registry Law no. 93 of 2000,²⁵⁷ Law 2006-067 Consumer Protection Law. This legal system demonstrates an extant legal framework that mitigates legal and adjudicatory uncertainty. Laws that establish legal, political and financial system

²⁴⁹ Hamilton, see above n 82, at 89: ‘She *had* to know what was in the box. One day she lifted the lid—and out flew plagues innumerable, sorrow and mischief for mankind. In terror Pandora clapped the lid down, but too late. One good thing, however, was there—Hope. It was the only good the casket held among the many evils, and it remains to this day mankind’s sole comfort in misfortune.’ Clearly Pandora would have little tolerance for the uncertainty and adjudicatory risk ICA and IIA currently holds as a result of the lack of precedent, *inter alia*, in international arbitration.

²⁵⁰ *Labour Law no 12 of 2003, Sales Tax Law no 11 of 1991.*

²⁵¹ *Banking Law no 162 of 1957.*

²⁵² *Companies Law no 159 of 1981.*

²⁵³ *Financial Leasing Law no 95 of 1995.*

²⁵⁴ *Foreign Currency Law no 38 of 1994.*

²⁵⁵ *Capital Market Law no 95 of 1992.*

²⁵⁶ *Rules & Procedures of Civil Workers and Incentives.*

²⁵⁷ *Law 2006-067 Consumer Protection Law.*

regulation and transparency in general are: Law 1956-073 on the Exercise of Political Rights,²⁵⁸ Law 80-2002 Anti-Money Laundering Law,²⁵⁹ Anti- Money Laundering Regulations for Banks,²⁶⁰ Executive Regulations of the CBE (Central Bank of Egypt),²⁶¹ Banking Sector and Money Law, Decree No. 465 of 2005 in Amendment of Provisions of the Executive Regulations of the Mortgage Finance Law,²⁶² Law 2003-88 on The Central Bank,²⁶³ The Banking Sector and Money with its Amendments, Law 2009-010 Regulating Non-Banking Financial Markets and Instruments,²⁶⁴ Presidential Decree no. 4 of 2003 on the Regulation of Guarantee and Subsidy of Real Estate Fund Activities,²⁶⁵ and Presidential Decree Issuing the Statutes of the Central Bank of Egypt²⁶⁶ and Presidential Decree No. 187 of 1993 Issuing the Executive Regulations of the Banks and Credit Law,²⁶⁷ *inter alia*. Civil codes are not incompatible with Islamic principles. Egypt under the Constitution is an Islamic country yet still follows civil codes. This is a result of Sanhuri's legacy. Reforms fostering economic growth, transparency, and efficiency of the Egyptian financial system can be supported by drafting a harmonised or uniform Arab arbitration law.

The necessity of a legal code containing clearly articulated principles is an age-old problem. It extends back to the Roman Empire. It is an equally relevant matter for ICA. This is more the case in consideration of historical and ongoing difficulties in

²⁵⁸ Law 1956-073 on the Exercise of Political Rights.

²⁵⁹ Law 80-2002 Anti-Money Laundering Law.

²⁶⁰ Anti- Money Laundering Regulations for Banks.

²⁶¹ Executive Regulations of the CBE (Central Bank of Egypt).

²⁶² Banking Sector and Money Law, Decree No 465 of 2005 in Amendment of Provisions of the Executive Regulations of the Mortgage Finance Law.

²⁶³ Law 2003-88 on CBE.

²⁶⁴ The Banking Sector and Money with its Amendments, Law 2009-010 Regulating Non-Banking Financial Markets and Instruments.

²⁶⁵ Presidential Decree no 4 of 2003 on the Regulation of Guarantee and Subsidy of Real Estate Fund Activities.

²⁶⁶ Presidential Decree Issuing the Statutes of the Central Bank of Egypt.

²⁶⁷ Presidential Decree No 187 of 1993 Issuing the Executive Regulations of the Banks and Credit Law.

codifying *sharia* principles at Islamic law. The author's draft international commercial arbitration law code (HICALC) can be considered for implementation in the MENA. The author submits that the ancient Greek notion of *kairos* best describes the ethos of this generation. It is not time in the usual sense. It is the other kind of time. It is distinct from *chronos*. This is an unprecedented opportunity requiring swift action and decisive intention to allow the rare window of opportunity to stay open long enough to bring about positive unprecedented reforms.²⁶⁸ In consideration of the Arab Spring²⁶⁹ and the global rise of ICA, the time is now. This exceptional phase in time can lead to an era of unprecedented reforms if the HICALC drafters move swiftly and decisively. Several historic moments of *kairos* have presented themselves in the past²⁷⁰ to bring about positive reforms. The Arab Spring is yet another historic opportunity. The *kairos* for the HICALC is now. It must happen before another severance of mistrust and misunderstanding occurs.

It is tempting to believe that the topical, apropos and sage words written in 1993 by the learned Nabil Saleh predicted the recent Arab Spring:

Nobody really knows the next direction which will be taken by each and every Arab country. What cannot be ruled out is the emergence, in time of disappointment and turmoil, of a radical leader who could decide to reverse the process which was often

²⁶⁸ The United Arab Emirates and Saudi Arabia have enacted new international arbitration laws. Egypt is in a historical time of unprecedented reform. It is not clear what the Arab Spring will bring. This is an opportunity to take advantage of the lacuna or legal vacuum and put forth urgent proposals for reform.

²⁶⁹ For example, Egypt's newly elected parliament (as of January 2012) will pass new laws. Presenting this research to parliament now is an unprecedented and once-in-a-lifetime opportunity that can influence the course of ICA Law and practice in Egypt (as well as the rest of the MENA) for decades to come.

²⁷⁰ Saleh, see above n 191, pp 161-167, at 161: 'It is expected that legal systems evolve gradually following changes of circumstances. Yet, at times, a sudden turn of direction may take place due to compelling factors, the most common of them being the will of the ruler who enjoys absolute power. Occasionally, and surprisingly, that change of direction may prove to be in the best interests of the people for whom it is intended. Thus, the French Civil Code was mainly the product of Napoleon's will.'

carefully built up and at times imposed by other radical rulers with different ideas such as Ataturk and Husni al-Zaim. Whether or not that new radical ruler would be sincere and aware of the full consequences of his decision has little importance, the result would be the same: the severance of another link with the West.²⁷¹

Whither will the Arab Spring lead?²⁷²

It is hoped that these valuable lessons as result of the history of past international arbitrations can be implemented to inform future arbitration proceedings in ICA and IIA law. The HICALC contains the distilled wisdom from the lessons of the past.

The current MENA situation requires that the existence and re-emergence of Islamic law is not ignored. Scholars have argued that (1) classical *sharia* no longer exists,²⁷³ (2) that Islam is on the rise again,²⁷⁴ and (3) that a methodology of jurisprudence is called for.²⁷⁵ Not only do premises (1) and (2) ideologically contradict

²⁷¹ Ibid 166–67.

²⁷² In August of 2011, the Spanish railway company Renfe signed a US\$10 billion contract with the Kingdom of Saudi Arabia to build the first ever railway in that country. The author submits that this project was encouraged by the Arab Spring and by greater trust between Arab and European parties. This is an example of a positive trend that is in its nascent stages.

²⁷³ Hallaq, see above n 79, 500: ‘The manner of Sharia’s functioning as well as the moral community that permitted and nourished its operation no longer exists.’

²⁷⁴ Ibid 501: ‘... and the passage of time has made the call to restore it ever more intense. If the call has acquired a renewed urgency, it has done so as a response to modernity ...’

²⁷⁵ Ibid: ‘Integral to any conception of Sharia is a theoretical, methodological and, perhaps, hermeneutical system that is expected by modern Muslim intellectuals to underlie the means by which legal norms and rules are to be derived. In other words, a new *usul al-fiqh* is expected to arise out of the ashes of the old system, an *usul* theory that is suitable to the ever-changing conditions of modernity. That a call for the emergence of a (neo) *usul al-fiqh* persist appears to be a function of both necessity and historical legacy. First, in any complex culture, law is self-conscious and necessarily must be anchored in a theoretical discourse that rationalises and justifies law’s prescriptions, its methods, precepts and rationales.’ ‘*Usul al-fiqh* means principles of jurisprudence.’

one another in the discourse within and without Islam, but other scholars²⁷⁶ dispute both premise (1) and (2), therefore it is a debated and controversial subject matter.

The research contributes to filling the currently existing lacunae and provides a jurisprudence and a methodology of jurisprudence that can inform future discourse in Islam; one that is not at odds with the West but in harmony with it, in the interest of effective cross-border trade. This is the value of harmonisation. This is particularly relevant now as the newly elected Egyptian parliamentary seats and presidential office are held by a Muslim majority of Azhar scholars or *salafi* politicians. The reforms proposed are automatically *sharia*-compliant. They are harmonised with Western principles. They can influence future reforms in Egypt. They can prevent potential conflicts in ICA as it is practised in the MENA by preventing the adoption of unfavourable laws to Western parties in the case of legal vacuity. The HICALC prevents the need for the Egyptian parliament to create new ICA laws that are more *sharia*-compliant and less favourable to investors, than the extant ones based on the United Nations Commission on International Trade Law (UNCITRAL), since the HICALC is built upon harmonised principles found at civil, common and Islamic law. Here, the HICALC fills the legal vacuity in Egypt. This will prevent the formation of unfavourable MENA ICA laws in the future.

²⁷⁶ E Al Tamimi argued that there is no such thing as ‘*Shari’a*’ principles that one can present before a judge. This statement is imprecise at best. The author will discuss several Sharia principles that a judge can avail himself of, whether through his own independent interpretation of the law or through suggestions by learned counsel. Not only that, Islamic principles already drafted into legal codes which an investor may be unfamiliar with, can impact the outcome of an arbitration proceeding, and the adjudicatory risk arises when the investor is unaware of the implications of how the code will be interpreted in the context of Islamic legal culture and customary practice. See Essam Al Tamimi, ‘Islamic influences on international arbitration’ (2011) Clayton Utz 10th Annual international arbitration Lecture, <http://www.claytonutz.com/ialecture/2011/transcript_2011.html>

(i) *The United Arab Republic Code of Civil Transactions*

The United Arab Republic Code of Civil Transactions²⁷⁷ contains changes that direct judges to find the grounds for their judgements in the individual schools of jurisprudence in Islam based on a certain order;²⁷⁸ first *Malaki*, then *Hanbali*, and if there is a lacuna, then *Shafi'i* and *Hanifa*, taking into consideration the requirements of public interest (Article 1, first paragraph). Hence judges are directed to derive their judgements not from the provisions of Islamic *fiqh* or the principles of Islamic *sharia*, (general references encountered in earlier codes) rather the judges are directed to derive their judgements from particular teachings in a specified order of preference.²⁷⁹ They are also directed to derive rulings based on public interest. Here, we find a contradiction between Islamic interpretations of law in Egyptian Law and the new Egyptian Constitution. This fact will raise complex matters of legal and adjudicatory risk in consideration of the new Egyptian Constitution's provision that Islamic *principles* are the source of law. The reason for this is because decisions made in Egypt or by Egyptian judges in other MENA countries set (soft) precedent and invoke comity. This is well established. They are considered by MENA judges outside of Egypt. There is therefore a profound difference between the UAE and Egypt. This means there is less regional standardisation or harmonisation and a proportionately higher degree of adjudicatory risk as a result. It reveals the differences in *sharia* interpretations from one country to the next. Article 3²⁸⁰ of the code elevates imperative *sharia* directives and the basic principles of Islamic law

²⁷⁷ United Arab Republic Code of Civil Transactions.

²⁷⁸ Saleh, see above n 191, 161–167, 165: 'Closely based on Jordan's 1976 Civil Code is the UAE Code of Civil Transactions, published at the end of 1985 and put into effect as from 1 April 1986. There are of course inevitable changes but of a limited importance.'

²⁷⁹ Saleh, see above n 191, 161–167, 165.

²⁸⁰ See above n 277, Art 3.

above public order.²⁸¹ There is a difference between the Egyptian legislation and the United Arab Emirates legislation.

2 *United Arab Emirates*

The manner by which judges reason their decisions and weigh *sharia* legal principles over public policy or in support of it, when the aim of *sharia* is to preserve public policy implies that there are occasions where *sharia* overrides or contravenes domestic public policy and is given precedence. This implies that *sharia* principles are taken into consideration by judges in addition to the existence of civil codes and treaties. This complicates risk to arbitrations and investments in which the uncertainty of unknown public policy interpretations is a fact. An analysis of case law stemming from questions related to the nexus of public policy with *sharia* interpretations exposes the weaknesses in the law and provides an opportunity to draft improved articles.

(a) *The Constitution of the United Arab Emirates*

The United Arab Emirates' (UAE) Constitution makes indirect allusions to the doctrine of *maslaha* in Article 22.²⁸² Depending on the judicial opinion, rulings based upon arguments for the value of economic development *in the name of the interest of the people* may be considered, but with the limitations of enacted laws and *sharia* principles. In fact, Article 27 of the UAE Civil Code²⁸³ provides that no law contrary to *sharia* can be applied in instances of the conflict of laws, and public policy and morals are

²⁸¹ A Eldin, I M Eldin (eds) in *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration*, (Kluwer Law International, 2000) 165.

²⁸² *Constitution of the United Arab Emirates*, Art 22: It establishes social justice as the basis of the national economy for the achievement of economic development, increase of productivity, raising the standard of living and the achievement of prosperity for all citizens, all within the limits of the law.

²⁸³ See above n 277, Art 27.

applicable. This point merits elaboration. Here, the relevance of *sharia* provisions to ICA extends beyond constitutional provisions and terminology. It is based on this Article. If no law contrary to *sharia* can be applied, then unmistakably, general *sharia* principles (1) exist and (2) are referenced. If that were not the case in the entire MENA, then a State that is declared Islamic on the basis of its Constitutional provisions (giving the *sharia* the force of law and, in the case of Egypt, the sole source of law), would not be legally bound to uphold its Constitution. This is not the case. The learned Al Tamimi claims that *sharia* based arguments put before the Bench by counsel in the MENA are not considered by the Bench. If that were true, then this article would not be worded as it is and the Egyptian Constitution (and other Constitutions decreeing Islam to be the highest source of law) would not have made provisions for general principles of Islamic law or *sharia*. (3) *Sharia* principles are relevant and (4) can be used as a defence against (a) an existing non *sharia*-compliant law or non-*sharia* principle, or (b) an interpretation of a law which is non *sharia*-compliant. The latter case creates uncertainty and adjudicatory risk. This is particularly the case in Egypt where the entire legal system including the Constitution is under consideration. There are more significant ambiguities between the Constitution²⁸⁴ and the Civil Code,²⁸⁵ and their application that causes problems in award enforcement, for example:

Article 7 of the constitution of the United Arab Emirates establishes the *sharia* as a principle source of legislation, while Article 75 of the Law of the Union Supreme Court of 1973 provides that the Supreme Court shall first apply *sharia* and other laws in force if conforming to the *sharia* principles. It may also apply custom, if such custom does not

²⁸⁴ *Constitution of the United Arab Emirates*, Art 7.

²⁸⁵ See above n 277.

conflict with the principles of the *sharia*. Apart from the provisions of the constitution, Article 1 of the Civil Code refers to *sharia* as the first source of law in case of lack of any legislative provision.²⁸⁶

The Constitution stipulates that the *sharia* is a source of law, rather than the primary source, yet the Civil Code and the law of 1973 of the Supreme Court²⁸⁷ consider *sharia* as the primary source of law.²⁸⁸ This is a contradiction between the Constitution and the Civil Code. The Constitution will always prevail in the event that this incongruity becomes relevant to a dispute which deals with non *sharia*-compliant matters. Since the UAE Constitution establishes the *sharia* as a principle source of legislation, how it addresses the overlap between *sharia* and public policy is an important question: ‘Article 3 of the Civil Code stipulates that public policy rules are those which are not contrary to the basic principle of *sharia*’.²⁸⁹ Here, the implication is that there is a distinction between the *sharia* and public policy.

In the context of the UAE, the question of public policy regarding arbitral award enforcement currently unresolved due to ambiguity caused by a contradiction between Article 7 (2) of the Judicial Authority Law²⁹⁰ and the new Dubai International Financial Centre (DIFC)²⁹¹ law:

Article 7(2) of the Judicial Authority Law states that DIFC judgements are enforceable in Dubai courts provided that they are ‘final and appropriate for enforcement’. This drafting

²⁸⁶ M Saleh, *Application of Islamic law in the Middle East*. (Middle East Legal Services) 7 December 2007, at <<http://www.mondaq.com/article.asp?articleid=52976>> retrieved on 5 February 2009.

²⁸⁷ *Law of the Union Supreme Court of 1973*, Art 75.

²⁸⁸ Saleh, see above n 286

²⁸⁹ *Ibid.*

²⁹⁰ See above n 287, Art 7 (2).

²⁹¹ *Dubai International Financial Centre Arbitration Law (DIFCAL)*.

is somewhat vague because, whilst it seems to import public policy considerations, it does not use the expression ‘public policy’ (let alone a narrower phrase like ‘Dubai public policy’). This creates adjudicatory uncertainty and, it follows, country risk. The ‘appropriateness’ of a DIFC judgement for enforcement in wider Dubai could, for example, be determined by reference to the tenets of public order and policy of the Emirate of Dubai, the UAE, the GCC or the wider international community. The DIFCAL recognition and enforcement articles expressly refer to the ‘public policy of the UAE and so it seems that a domestic reading of the expression would prevail in a situation where a Dubai court considered an application for execution of a DIFC award.’²⁹²

Article 8 of the Dubai Chamber of Commerce and Industry Law No. 2 of 1975²⁹³ and its amendments established the rules of Commercial Conciliation and Arbitration under the ‘Centre for Commercial Conciliation and Arbitration’ of Dubai. The Dubai Financial Centre (DIFCAL), *inter alia*, is strategically positioned as one of the first centres to implement the newest arbitration laws. They are strategically and tactically positioned to benefit from the legal principles stemming from this research.

(b) *The United Arab Emirates Arbitration Law*

Closer scrutiny of the newly revised 2010 United Arab Emirates Arbitration Law²⁹⁴ is required. The UAE doctrine of automatic judicial review of arbitration awards subsequently activates robust court intervention. This phenomenon requires deeper examination. Closer analysis and reform of the doctrine of automatic court review are

²⁹² DIFCAL means the DIFC Arbitration Law. In, S Luttrell, *International Journal of Private Law*, Vol 2, No 1, 2009, pp 31–45, at 42.

²⁹³ *Dubai Chamber of Commerce and Industry Law No 2 of 1975*, Art 8.

²⁹⁴ *United Arab Emirates Arbitration Law*, 2010.

required to bring the UAE in conformity with the 1958 New York Convention²⁹⁵ commitments. Automatic judicial review of arbitral awards leads to country, legal and adjudicatory risk for investors. Uncertainty and unpredictability are created by judicial decisions made in the absence of a clear definition of public policy or in the presence of arcane Islamic law provisions as they are uniquely interpreted in the UAE. The New York Convention²⁹⁶ provides for certain requirements that must by law be fulfilled in the recognition of foreign awards. This is exceedingly problematic in consideration of the fact that the United Arab Emirates has ratified the New York Convention. To make the matter more complex, it is noted that the New York Convention²⁹⁷ has a public policy clause²⁹⁸ which allows for the setting aside of any award that contains provisions against public policy.²⁹⁹

The doctrine of automatic judicial review in the UAE implies that all awards made in the UAE are automatically deemed to be in breach of public policy *until proven otherwise*. Not only is this a reverse of the normal rules of justice, in which the starting point is innocence rather than guilt, but it is important to emphasise that in the MENA, public policy is defined by *sharia*. This confirms that there are impediments to arbitral

²⁹⁵ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (hereafter 'The New York Convention'), 1958.

²⁹⁶ See above n 177.

²⁹⁷ *Ibid.*

²⁹⁸ A Jan VD Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Deventer (Kluwer Law and Taxation Publishers, 1981), 359: The prominence of the New York Convention of 1958 amongst MENA governments increases the use of public policy as an acceptable plea because of the Conventions provision in Article V (2) that recognition and enforcement may be refused by the competent authority in the country of enforcement if it (a) decides the subject is not arbitrable or (b) if recognition would be against public policy.

²⁹⁹ *The New York Convention of 1958*, Art V (2), the public policy clause, which provides: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.'

award enforcement. It demonstrates that there are obstructions to the overall climate of international business and investment. It displays hesitation to comply with the spirit of the New York Convention.³⁰⁰ Automatic court review is in direct contradiction of the spirit of the New York Convention³⁰¹ unless motivation for the court review of an award is to determine if it is against public policy. This is a danger because although the New York Convention³⁰² makes an exception for public policy, it does not state explicitly that what is intended is domestic public policy, although that is the case. Domestic public policy is intended; however the author argues that this ought to change to include transnational public policy as well. The UAE's automatic court review is unquestionably done for the purpose of determining if the award breaches its own domestic public policy. The definition of what constitutes public policy in an Islamic State (by Constitutional decree or by customary practice) differs from standards and tests as those found in Western countries. This creates undue adjudicatory risk. Ratification of the New York Convention³⁰³ in the UAE has not made a difference in practice. Many jurisdictions with laws supportive of arbitration and that have ratified the New York Convention³⁰⁴ still do not have a high enforcement rate.

The doctrine of automatic court review undermines the arbitral tribunal's *res iudicata*. It undermines trust in arbitral tribunal effectiveness. It invites undue appeals through potential 'overturning' of awards. An arbitral tribunal does not have a status of a lower court. It is an august tribunal with binding and final authority. Here, automatic

³⁰⁰ See above n 177.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

court review allows interpretations of public policy that are unforeseen by parties in a dispute. An example of this is given in the discussion dealing with Dubai Court of Cassation cases. This lack of transparency has consequences that act as a barrier to overall trade. Unpredictable outcomes of arbitrated commercial or investment disputes reduce trust in the efficiency and effectiveness of this dispute resolution forum.

The legislation of the United Arab Emirates is examined more closely³⁰⁵ to demonstrate the complexity of these doctrines in this particular case. The case of the UAE is exceptional for yet another reason than those previously mentioned regarding public policy rulings. It does not follow the pattern encountered in other MENA countries in treating an ICA award as *de facto res iudicata*:

³⁰⁵ E Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer Law International, 2003) 29. A closer look at UAE laws is warranted in the area of business laws: 'There are no provisions in the UAE laws providing for the right of parties to agree on the choice of law other than the following: a) article 19 of the UAE Civil Code, Federal Law No 5 of 1985, reads as follows: (i) The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply. (ii) the *lex situs* of the place in which the real property is situated shall apply to contracts made over such property.' This means that flexibility in the choice of law is limited and the *lex arbitrii* may apply. The significance of this was given in section two with the example of the UAE. Further, 30: 'There are also no laws in the UAE which deal with the complicated nature of the conflict of laws when it comes to application. In principle the law in the UAE recognises the parties' autonomy for the choice of law clause, however, in practise (with the exception of family law matters) it is almost impossible to apply foreign law to a transaction in connection with an action heard before the UAE court.' In addition to the UAE Civil Code and Federal Law, a closer look at the Civil Procedures Law is necessary, 31: 'The enforcement of foreign judgements is regulated by Articles 235 and 236 of the Civil Procedures Law. Enforcement of foreign judgments in the UAE is provided for in principle, made acceptable and possible, although the applicable conditions may be difficult to apply. Thus, foreign judgments may be enforced in the UAE if they satisfy the following conditions: (Article 235, 2 (e) that it does not conflict with a judgment or order previously issued by a court in the state and contains nothing in breach of public morals or order in the state.' Additionally, at 31: 'The provisions of the foregoing Article shall apply to the rulings of arbitrators issued in a foreign country. An arbitrator's ruling must have been given in matters which may be arbitrated under the state laws and must be enforceable in the country in which it was issued.' Arbitrability is another legal doctrine and is beyond the scope of this thesis, however, the determination of what is considered arbitrable is settled by law, although in practice this too can give rise to debates.

Arbitral awards must first be approved by the courts before they become enforceable. For domestic awards, the arbitrator must deliver a copy of the award to all relevant parties within five days from the date of the award. The award must then be ratified by the courts for it to have the force of a court judgment and be enforceable.³⁰⁶

Indeed, there is a secondary set of domestic laws, *inter alia*, containing procedures that regulate ICA in the UAE together with the international instruments ratified by the country.

According to the United Arab Emirates Civil Procedure Code,³⁰⁷ Federal Law No. 11 of 1992, Chapter 4, Article 235, paragraphs (1) - (5):

1. Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state.
2. Petition for execution order shall be filed before the Court of First Instance under which jurisdiction execution is sought under lawsuit filing standard procedures. Execution may not be ordered unless the following was verified:
 1. State courts have no jurisdiction over the dispute on which the judgment or the order was passed and that the issuing foreign courts have such jurisdiction in accordance with the International Judicial Jurisdiction Rules decided in its applicable law.
 2. Judgment or order was passed by the competent court according to the law of the country in which it was passed.
 3. Adversaries in the lawsuit on which the foreign judgment was passed were summoned and duly represented.
 4. Judgment or order had obtained the absolute degree in accordance with law of the issuing court.
 5. It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order.

Although the UAE has drafted a new arbitration law,³⁰⁸ it remains to be seen in practical terms how the law will change the practice of arbitration in the UAE. For the present, the

³⁰⁶ P Bourke, B Ambikapathy, A Looke, *Chapter III: The Arbitration Procedure- Arbitration in the Gulf: An Overview in Christian Klausegger*, in P Klein et al, (eds), *Australian Arbitration Yearbook 2008* (Beck CH, Stamfi and Manz, 2008) 329–42, 342.

³⁰⁷ *United Arab Emirates Civil Procedure Code*, Federal Law No 11 of 1992, Chapter 4, Art 235, paragraphs (1) - (5).

Civil Code has a number of implications. It is necessary to establish that the UAE courts do not have jurisdiction to hear the dispute and that the arbitral tribunal did. The correct procedures must be adhered to and the award must be valid and cannot contradict any other judgement made in the UAE or with the public policy of the UAE. This raises the matter of public policy.

Does such judicial review undermine *res iudicata* of arbitral tribunals? What is noteworthy is that these laws are consistent with certain Islamic interpretations that lend themselves to viewing arbitration as non-binding or an arbitral tribunal as not having full competence to determine its own jurisdiction. In consideration of the aforementioned discussion regarding the debate on the binding nature of arbitration in certain Islamic law interpretations, the UAE domestic regulations of judicial review for the implications for ICA are not to be taken lightly. Yet, there is still an exception to the exception: ‘The Dubai International Financial Centre (established in 2004) has its own jurisdiction and a stand-alone arbitration law (the “DIFC Arbitration Law”)³⁰⁹. Awards originating from the DIFC under the DIFC Arbitration Law³¹⁰ are enforceable in Dubai without being subject to the power of judicial review³¹¹ by Dubai Courts. This fact does not extend to the rest of the United Arab Emirates. The DIFC is not the only exception of importance in the region.

³⁰⁸ See above n 294.

³⁰⁹ See above n 306.

³¹⁰ See above n 291.

³¹¹ See above n 306.

(c) *Abu Dhabi Court of Cassation Judgements*³¹²

UAE court cases concerning commercial disputes that were arbitrated (adjudicated before the new UAE arbitration law reforms) demonstrate the Abu Dhabi Court of Cassation's support for arbitration agreements and the laws that regulate international arbitration. This is manifested in the upholding of arbitral awards. This is true even when the Court did not uphold certain provisions in awards that concerned interest. This is even true in consideration of public policy considerations interpreted through the *sharia*, where the Court maintained that the principle of an award is to be upheld. This is true in cases where awards deemed not contrary to public policy were honoured and subsequently upheld. This delineation of principle and interest in an award in order to enforce it reveals a marked respect for reducing trade barriers and improving transparency. This practice advances arbitration as a respected dispute resolution method in the MENA, in consideration of the well-established premise that a reliable, just, effective and efficient system of arbitrating commercial and investment disputes improves trade. Yet, this shows that interest is a contested area. The matter of interest is examined thoroughly in the section on interest.

A review of twelve relevant Abu Dhabi Court of Cassation judgements concerning arbitration cases in 1989–1996 and 1998–2003 has revealed a deficiency of consistency in the judgements. This inconsistency reveals instances when the Court supported arbitration whilst at other times it shows instances where the Court undermined it. Inconsistency increases mistrust and adjudicatory risk. It leads to unpredictability. Inconsistency is a concern as it relates to matters of interest and to public policy. Cases

³¹² The Abu Dhabi Court of Cassation is separate from the Dubai international arbitration Centre (DIAC), which has its own courts.

demonstrating this are discussed partly in this section, however, the cases that deal directly with the matters of *compétence de la compétence*, interest, and public policy are discussed in those sections.

Absent the drafting of arbitration clauses predicting in advance how an Abu Dhabi Court of Cassation judge will rule on a dispute brought before that court, clear international arbitration guidelines dealing with precedent are required so that a uniform standard allowing for predictability and trust can lower adjudicatory risk. The incongruities of Abu Dhabi's Court of Cassation's differing rulings necessitate a standard of precedent. The application of precedent has two threads. The first is regarding precedent applied to arbitral tribunals. The second is the manner by which courts decide similar matters related to the enforcement of arbitral awards. The reviewed twelve cases are discussed in relevant sections.

3 *Dubai*

The absence of precedent and predictability in the MENA is a major cause of legal and adjudicatory risk. The overall inconsistency in the practice of international arbitration is another cause. Here, regarding the MENA specifically, the United Arab Emirates serves as an example of a country with several different legal instruments and jurisdictions. The legal framework of the UAE differs from that of Dubai. Notably, within Dubai, the DIFC Courts are distinct from the Abu Dhabi Court of Cassation. In-depth reviews of the Abu Dhabi Court of Cassation judgements expose the notable

inconsistencies of this court's rulings with those of the DIFC courts, chiefly regarding the doctrine of competence. As a result, the problems inherent in both are starkly revealed.

(a) *Dubai international arbitration Centre (DIAC)*

The creation of the DIAC reflects broader trends in the legal and economic climate of the Gulf Arab countries. The importance of Dubai is:

Having enjoyed an exponential increase in corporate uptake since the Libyan oil nationalisation arbitrations of the 1970s, arbitration is now the preferred means of dispute resolution for international business. In the late 1990s, Dubai emerged as the preferred site for non-Arabs negotiating oil and gas agreements concerning the Gulf States. Benign tax laws and impressive capital works projects ensured that a percentage of parties remained after their business was complete, establishing offices and local subsidiaries. The stability and ostensible neutrality of the United Arab Emirates (UAE)—the federation of seven of which Dubai is a member—made Dubai ideal as a regional command centre for big companies. What emerged as a nodal point for the energy trade in the late eighties is now a head office for a wide range of multinational businesses, many of which have no direct interest in the resource sector.³¹³

The fact that arbitration is the preferred means of dispute resolution has been mentioned in the introduction, however, it is not something that can be mentioned enough.³¹⁴ In

³¹³ S R Luttrell, *Arbitration in Dubai*, 12 *International Trade and Business Law Review*, 140, 2009, 141.

³¹⁴ S Saleh, 1 *Arab Law Quarterly*, 198–204 1985–1986, at 198. The author argues that in a broad sense, alternative dispute resolution has always been preferred by Arab parties over litigation, and this preference is not necessarily an exclusively modern trend, nor is it exclusively a Western one. The foundation for this argument is based on these facts: 'The first point to be established in reply to this question is that the majority of commercial disputes are settled by recourse to the ordinary courts. In the case of disputes between nations of the same country, the next most common method of settlement is conciliation/mediation. This was the method preferred by the Prophet, who made it plain that he was

addition to cultural reasons, today international arbitration helps preserve business ties and to protect corporations and other financial entities and their assets from pre-emptive publicity, *inter alia*, that may be harmful.

The implications of the DIAC's ground breaking progress in the area of attracting foreign capital and as a result, the revision of its federal commercial laws,³¹⁵ is that the process of harmonisation now has a strong foundation. Proof that this regime values business acumen is proven in legal changes built upon an attitude that is amenable to fostering enduring business ties with Western trading partners and investors. These legislative changes by the Emir are part of broader policy changes; continued and strengthened support for trade development in the region. Here, the author's thesis is that WTO accession and policies have led to strengthened support for trade development in the region. This has successively led to (i) broad developments in international arbitration and, (ii) specific developments in international investment arbitration. The gaps in the extant laws substantiate the postulation that the applicability of the recommendations generated through this research will undoubtedly be considered for improvements to the DIAC instruments, and throughout the Emirate's international arbitration legislative

sceptical of judicial proceedings, which were devised by man and therefore fallible. Parties who won their cases by dint of eloquence at the expense of truth were threatened with the direst sanctions. As the Prophet said: "If you bring your dispute before me and one of you pleads more eloquently than the other, so that his eloquence alone persuades me to find in his favour, he will do well to return to his opponent what I have awarded him, for I shall have awarded him a part of hell".³¹⁵ This same scepticism against oratory arts and litigation has been echoed by the great civil law jurists of their times. For example, in Wilkin, R., *The spirit of the legal profession*, Fred B. Rothman and Co, (Colorado, 1981) 17: 'These early lawyers while more than professional clansmen, were also more than legal technicians. The word-jugglers and hide-bound logicians were to them objects of contempt. Cicero voiced his disgust for the tricksters and barkers and Quintilian deplored the "acrobats in eloquence", who, he said, "do not study, understand men, read hearts, appeal to right or eternal justice". In his work on advocacy he said the great lawyer should not only study the edicts of the praetors and the opinions of the jurists, but should also reflect on the nature of happiness, the foundation of morality, and on all that pertains to the good and the true.'

³¹⁵ See above n 313 at 140.

framework. Necessary future legal revisions in consideration of the Arab Spring have a higher potential for enactment.

The process of economic diversification beginning in 2004 occurred at the Federal and Emirate level with the creation of the Dubai International Financial Centre (DIFC), (the free financial zone within Dubai city). Federal Law No 8 of 2004³¹⁶ establishing the DIFC represents a momentous movement in the modification of laws (eg, international arbitration laws). The DIFC has its own arbitration law, the DIFCAL.³¹⁷ The implication of the impact on Western investors and trading partners is the creation of an favourable business climate.

The Arab Spring (in the absence of any other driving force) will ensure that the continuation of this movement in the foreseeable future is probable. Outside of driving factors such as the WTO influence, or the historical developments of international arbitration, there are a number of factors that led to these developments in the UAE. It is substantial that a facilitating amendment to the UAE Constitution was created in order to ensure these revisions in the law occur. It is evidence of the continuance of these positive developments. When the United Arab Emirates (UAE) ratified the (hereafter referred to as the New York Convention or the NYC)³¹⁸ on 13 June 2006 it signalled continued assured commitment to the positive broad development of reducing adjudicatory risk in

³¹⁶ Federal Law No 8 of 2004 establishing the DIFC.

³¹⁷ S R Luttrell, *Int. J Private Law*, Vol 2, No 1, 2009, pp 31–45, at 42, ‘DIFCAL 2008 is a good arbitration law. It is a Model Law instrument. DIFCAL’s Model Law Plus’ content is English in origin, the main sources being the English Civil Procedures Rules (1998) and the LCIA Arbitration Rules. As such it fits well with the rules of procedure of DIFC Courts, which are also English in origin. The influence of contemporary arbitral jurisprudence and theory is also clear in the DIFCAL.’ Certainly the influence of the WTO policy of transparency and reduction to trade barriers can be seen in such a transparent law that is accessible to the English-speaking world and reflects contemporary and international jurisprudence.

³¹⁸ See above n 177.

the UAE for interested investors and trading partners. If the UAE subsequently enacts a federal arbitration law based on the United Nations Commission on International Trade Law (UNCITRAL),³¹⁹ this would be a step in the right direction. Yet, in consideration of the gaps in the UNCITRAL, the revisions would still be incomplete. Here, the implementation of the proposed reforms fills existing gaps.

Consideration must be given to the entire legal framework of the UAE within which Dubai operates. The reason the term ‘framework’ rather than ‘jurisdiction’ is used is because Dubai substantially deviates from the general UAE legislative framework due to having its own courts with their own jurisdiction. There are both valuable elements and drawbacks as a result of this. The Dubai courts represent an overall improvement to the UAE system as a whole, yet, it is noteworthy that these competing jurisdictions create inconsistency. As a result of the improvement, the existence of Dubai’s courts mitigates the negative impact of UAE inconsistencies with the NYC:

Although the UAE is yet to take this step, the creation of Special Economic Zones like the DIFC has raised the status of the UAE in the international commercial community. With the DIFC in place, the Emirate of Dubai is now much closer to being appropriate for use as a seat of international commercial arbitration. This is because these zones have their own commercial and corporate laws (including in the case of the DIFC an arbitration law).³²⁰

Yet, there is an intrinsic danger in the elevated standing of the DIFC before the international commercial community. Adjudicatory risk is dangerously ignored. This

³¹⁹ Indeed it has done so whilst this research was being carried out.

³²⁰ See above n 317, pp 31–45, at 32.

invokes the ostrich approach. The opposite of the ostrich approach is to engage in a rigorously exhaustive and comprehensive analysis of the legal climate. This must occur until both its strengths and weaknesses are wholly understood. It must be followed with a strategically tactical plan implemented to counteract the adjudicatory risks that undermine the strengths inherent to the positive developments in the UAE. This necessitates a candid approach, preferably in consultation with experts. This will insure that an investor has the dual armour of (i) an accurate understanding of the risks involved and (ii) strategic fortification to mitigate them. Yet a better approach is to encourage the UAE to implement and promulgate the recommendations provided to fill gaps in the extant legal framework and to reduce adjudicatory risk.

(a) Dubai International Financial Centre (DIFC)

The Dubai International Financial Centre (DIFC) has its own courts including its own laws.³²¹ It is important to distinguish between the specific courts of the DIFC and other courts in the UAE. In regard to the DIFC:

An interesting feature of the DIFC is that it has its own laws which govern commerce within the DIFC. It also has an independent court system to hear civil cases (although the Dubai Courts retain jurisdiction to hear criminal cases). Since the DIFC Courts were established, there has been on-going debate within the legal community as to the extent

³²¹ R Bell, *Jurisdiction of the DIFC Courts- recent developments*, (Clyde and Co, 2011) at <www.clydeco.com/knowledge/articles/jurisdiction-of-the-difc-courts-recent-developments>

‘The Dubai International Financial Centre (DIFC) is a financial free zone located near Dubai’s central business district. It was established in 2004 to encourage growth in the banking, investment and the financial services sector in Dubai by offering a zero tax rate on income and profits, 100 percent foreign ownership, no restrictions on foreign exchange or capital/profit repatriation, operational support and first class business facilities.’

of the DIFC Courts' jurisdiction. This issue has arisen in three recent cases in the DIFC Courts.³²²

These three cases are discussed in the section dealing with the matters of competence and jurisdiction.

(b) *Dubai International Finance Centre (DIFC) Free Zone*

The creation of the DIAC is an outcome of broader trends in the legal and economic climate of the Gulf Arab countries. The importance of Dubai:

Having enjoyed an exponential increase in corporate uptake since the Libyan oil nationalisation arbitrations of the 1970s, arbitration is now the preferred means of dispute resolution for international business. In the late 1990s, Dubai emerged as the preferred site for non-Arabs negotiating oil and gas agreements concerning the Gulf States. Benign tax laws and impressive capital works projects ensured that a percentage of parties remained after their business was complete, establishing offices and local subsidiaries. The stability and ostensible neutrality of the United Arab Emirates (UAE) - the federation of seven of which Dubai is a member- made Dubai ideal as a regional command centre for big companies. What emerged as a nodal point for the energy trade in the late eighties is now a head office for a wide range of multinational businesses, many of which have no direct interest in the resource sector.³²³

The DIAC shows a marked progressiveness, that: 'The Emirate of Dubai has been especially active in UAE attempts to attract foreign capital. The Emirate's success in this regard has necessitated the revision of its commercial laws, many of which are

³²² Ibid.

³²³ See above n 313.

federal'.³²⁴ It is the author's aforementioned submission that these changes have as much to do with developments in international arbitration overall, and particularly in international investment arbitration. Notwithstanding the influences of international arbitration, it is argued that WTO accession is related to this trend. In terms of Dubai:

The process of economic diversification in Dubai has been accelerated by sound planning at the Federal and Emirate level. The creation in 2004 of the Dubai International Financial Centre (DIFC), a free financial zone within Dubai city, represents a recent step in this programme. The DIFC was established by Federal Law No. 8 of 2004, after a facilitating amendment to the UAE Constitution. Another important step was taken on 13 June 2006 when the [UAE] ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 [...] The vital next step for the UAE is to enact a federal Arbitration Law based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration.³²⁵

The broad policy goals of the WTO are to encourage countries to improve transparency and reduce barriers to trade. The creation of the DIFC is consistent with those aims. Here, in consideration of the larger operational legal framework of the UAE, the DIFC deviates substantially from the general UAE legislative framework. Aside from creating inconsistency this mitigates the negative impact of UAE inconsistencies with the New York Convention. More specifically,

although the UAE is yet to take this step, the creation of Special Economic Zones like the DIFC has raised the status of the UAE in the international commercial community. With the DIFC in place, the Emirate of Dubai is now much closer to being appropriate for use

³²⁴ Ibid 140.

³²⁵ See above n 317, 31–45, 31.

as a seat of international commercial arbitration. This is because these zones have their own commercial and corporate laws (including in the case of the DIFC an Arbitration Law).³²⁶

The DIFC Free Zone is rightly an innovative manifestation of transparency and reduction to trade barriers.

The Emirate of Dubai has taken steps to make modern arbitration law available in special trade zones. The latest and arguably most ambitious zone is the Dubai International Finance Centre (DIFC), which has its own courts and judicial system. In 2004, the DIFC adopted its own law.³²⁷

The significance of the DIAC and the DIFC (with its courts and arbitration law) is a positive development in consideration of the adjudicatory risks inherent in the broader UAE climate. Yet, it must be noted that it is well established amongst practitioners that the DIFC Free Zone Courts do not accept awards that do not have the terms of reference of the contract written into the arbitration award and therefore set them aside. Here, there are hitherto unknown technical and practical realities that must be discovered and taken into consideration. This is applicable even in the case of such a progressive entity as the DIFC Free Zone. Three DIFC Court Cases are closely examined in the section on competence to uncover adjudicatory risk.

C Key Matters a HICALC or Uniform Arab Arbitration Law (UAAL) Must Address

³²⁶ See above n 317, 31–45, 32.

³²⁷ See above n 313, 140.

Universal principles of law are brought in to support the formation of the suggested draft HICALC principles. The author submits that these principles must be included. After the universal principles are addressed the author will show that there are distinctive features of the MENA that an Arab uniform arbitration law must cover. The author will show in that discussion how these principles can resolve the special and distinctive features of the MENA legal climate. The purpose of this section is to show how the author derived the key matters that an Arab uniform law or HICALC must address. Previous sections have identified many of the distinctive characteristics of the MENA that set it apart legally from other regions. This section is a continuation of that comparative analysis. Those distinctive characteristics are analysed and compared further in specific sections dealing with either procedural law or substantive law in the MENA context.

D Comparative Analysis of Universal Principles

The purpose of this section is to provide evidence that harmonisation is possible. This section also shows that where there are gaps in extant principles or instruments they need to be integrated into a HICALC but further refined and made specific, eg, in the case of the *lex mercatoria*. The universal principles represent principles that are common to the three traditions and that support the thesis that harmonisation is feasible. The draft HICALC Articles offered here are built upon many of these universal principles. The author suggests to future drafters of a HICALC to keep these principles firmly in mind. The results and conclusions of the comparative analysis of universal principles are discussed here. These universal principles are the theoretical foundation for the areas of substantive and procedural law requiring reform. The author referred to and applied the

universal principles herein to the analysis of the unique MENA legal framework and cases and in drafting the Draft Provisions for a uniform Arab arbitration law or HICALC.

1 *The Principle of Unjust Enrichment*

Another important principle common to the three legal traditions that this thesis is concerned with is that of unjust enrichment. The principle of unjust enrichment is relevant to the discussions regarding expropriation and interest. The reason the principle of unjust enrichment should be used as a standard extends beyond the fact that it is common to the three relevant legal traditions. It is important because, the author submits, it forms the basis of equity. In this sense the principle of unjust enrichment can inform other principles. For example, it can be the standard used by an arbitral tribunal when a decision on awarding damages and interest needs to be made, or it can help the tribunal address the breach of the contract and can therefore inform upholding *pacta sunt servanda* along with an analysis of the negligence and liability of the breaching party. It can guide the principle of *res iudicata* in that a party already in breach of a contract, causing damages to the other party and having possibly gained from the breach, has an award enforced against it to pay damages and refuses to honour and execute the award, is found to have benefited from unjust enrichment. It can guide the judges who must review or enforce an award in the face of public policy; it should be against the public policy of that State to allow the unjust enrichment of the offending party. This occurs frequently when sovereign immunity from execution is not waived.

2 *The Doctrine of Equity*

The author submits that in general the use of the doctrine of equity goes against the proposed reforms. The author draws upon the principle of equity in one instance only in the discussion regarding interest. One reason that it is generally opposed to the spirit of the reforms suggested is because in the absence of the strict application of the law, the doctrine of equity can lead to unpredictability. It is not common practice in international arbitration for this reason. Thus:

There is an enduring belief that an arbitrator does not necessarily have to apply the law; the obligation is simply to do justice. This may well have been true in former times, but today, an arbitrator is generally expected to apply the law. Nonetheless, there remains a widely-held belief that arbitrators have more flexibility than a judge to soften the impact of a law that appears to work too harshly against one of the parties. There is some truth to this because arbitrators know in most jurisdictions, they cannot be reversed for a mistake of law. Therefore, they may be tempted to render an award that meets their personal standard of justice rather than the letter of the law, particularly if they view a strict application of law as being unfair. This raises the question of what is the arbitrator's obligation with respect to applying the law. Can or should the arbitral tribunal render awards giving each party one-half of what it asked for? Should it consider equitable solutions rather than a strict application of law?³²⁸

The author submits that with the exception of interest (where equity should be applied), a strict application of the law is preferred as this supports increased award enforcement and

³²⁸ See above n 140, 78.

certainty.³²⁹ In consideration of the author's call to reform regarding increasing certainty and predictability by adding precedent to the practise of ICA and IIA, it would be a contradiction to suggest that arbitrators should make decisions based on equity.

Notwithstanding, the doctrine of equity should be applied by arbitral tribunals in the strict sense regarding matters dealing with decisions related to determining interest. The reason for this is explained in the section on equity in regard to interest. The doctrine of equity is a universally recognised principle and the strength of this will aid higher enforcement of awards when decisions regarding interest are made based on more universally determined criteria such as equity rather than on national legal provisions which may countermand with the domestic laws of the MENA. (With the exception of Egypt's liberal legal provisions concerning interest, this is a serious matter for the rest of the MENA States.) The author recommends that the HICALC contain provisions restricting the use of equity exclusively to the determination of matters related to interest. The following discussion will highlight the relationship of equity to determining interest can be best understood through understanding the relationship of unjust enrichment (another universal standard) to that of equity.

This relationship of unjust enrichment (as a minimum standard) to equity is made clear:

The general principle that a person who has obtained a benefit from another, not intended as a gift and not legally justifiable, must repay it or make restitution to or recompense the other party. In many cases, this is founded on an implied promise to repay or on the

³²⁹ See above n 140, 79: 'Today, parties expect that the arbitrator will enforce the law, especially if that law has been chosen by the parties. Studies have shown that only a handful of counsel, in drafting an arbitration clause, will grant an arbitrator the right to decide, a matter *ex aequo et bono*, or as *amiable compositeur*. According to Professor Pierre Mayer, companies who use arbitration are seeking certainty, which they believe will only result from the application of law.'

principle of money had and received. It is a matter of some doubt how far the principle of unjust enrichment has been adopted in English law. The term restitution is increasingly being used to cover the categories where restitution can be claimed for the avoidance of unjust enrichment. In Roman law, this is the principle underlying the quasi-contractual obligations (q.v.) which oblige the party benefited to repay. The same principle is the fundamental justification for the maritime law obligations of salvage and general average.³³⁰

Unjust enrichment is a fundamental principle of law that derives its source from the contract, in the event that part of the contract was fulfilled, the receiver of goods or services is obligated to compensate the giver; in this sense it is connected to *pacta sunt servanda* as the manifestation of it, ie, when the contract is severed or breached in such a manner as the receiver benefits without due compensation provided to the giver, both the principles of *pacta sunt servanda* and unjust enrichment are simultaneously activated.

The term *equity* refers to:

The basic meaning of equity is evenness, fairness, justice and the word is used as a synonym for natural justice. In a secondary meaning the term is used as contrasted with strict rules of law, *aequitas* as against *strictum jus* or *rigor juris*; in this sense equity is the application to particular circumstances of the standard of what seems naturally just and right, as contrasted with the application to those circumstances of a rule of law, which may not provide for such circumstances or provide what seems unreasonable or unfair. A court or tribunal is a court of equity as well as of law in so far as it may do what is right in accordance with reason and justice. The opposition between equity and law is frequently minimised by rules of law laying down flexible standards and conferring

³³⁰ Walker, see below n 404, 1266.

discretionary powers, but in some cases the conflict between what is fair and just and what is lawful may arise. This distinction, sometimes opposition, between law and equity was recognised in Roman law where the actions of the praetors in granting remedies in situations for which the *jus civile* provided no remedy was well recognised.³³¹

After analysis of the nature of an arbitration tribunal, and a diagnosis of the problems, the author submits that equity should be the guiding force in how arbitration tribunals make decisions. The dynamics of an arbitral tribunal (in a three-member panel, and to a certain degree in a one-member panel) are such that although the parties appoint the arbitrator on the basis of trust that the arbitrator will seriously take into consideration the merits of the case of the party which made the appointment, the arbitrator cannot appear to be so biased in favour of ‘his’ party that the other party feels completely alienated, or discriminated against, either in substance or procedure. The third arbitrator, depending on the case, may or may not be predisposed to one or both of the parties. This complexity must be taken into consideration. Therefore, the proposed guideline of using equity can mitigate this situation. This is especially the case when equity and the principle of unjust enrichment remain foremost in the arbitrators’ minds when dealing with a complex hearing. It is understood that what is legal and lawful is at times unfair. This is particularly applicable to matters heard before arbitration tribunals. The law should be reformed to make what is legal more fair. If this cannot be done then the tribunal must decide fairly, in accordance with equity where the law falls short. This argument is in regard to interest.

³³¹ Walker, see below n 404, 424–425.

The use of equity in the MENA is not without precedent; for example, in the case of the Egyptian Mixed Courts. The presence of equity in the Egyptian Mixed Courts is *sui generis* in that it does not occur outside of the MENA.³³² The Charter of the Mixed Courts³³³ provides for two sources of law, one being the codes and the other being equity.³³⁴ The provision for equity in Article 34 of the Charter³³⁵ is as follows: ‘In the case of silence, insufficiency, and the obscurity of the law, the judge shall follow the principles of natural law and equity’.³³⁶ The Mixed Courts set an interesting precedent in calling for the principles of natural law and equity. The author submits that the implication of this provision, *sui generis* as it is, was groundbreaking and genius. The reason for this assertion has to do with the fact that after a proper analysis of the doctrinal problems encountered by arbitration proceedings in the MENA, and after an in-depth comparative law analysis of the universal principles of law relevant to the MENA, the author has found that the Mixed Courts had the answer throughout. Natural law (*lex naturalis*) and equity are precisely the foundational legal and theoretical instruments that can address many of the pitfalls that arbitration proceedings in the MENA are prone to. This fact is even more relevant regarding the gaps found at the Washington Convention.³³⁷ The matters of natural law and equity are discussed in the appropriate sections within this thesis.

³³² G Wilner, *The Mixed Courts of Egypt: A study of the use of natural law and equity*, Georgia Law Journal of International and Comparative Law 407–430, 1975, 407–408: ‘Such a provision does not appear to have a counterpart in other modern legal systems. Neither the Swiss Civil Code nor any other European code permits the judge to make use of these sources of law as the entire basis for a judgment.’

³³³ *Charter of the Mixed Courts of Egypt*.

³³⁴ Wilner, see above n 332, 407.

³³⁵ See above n 333, Art 34.

³³⁶ *Ibid.*

³³⁷ See above n 13, 8.

Another precedent for the use of equity in the MENA occurred before the Mixed Courts. The principle of *istihsan* is a departure from analogy or a breach of precedent. The author submits that *istihsan* is the legal equivalent of the common law doctrine of equity. *Istihsan* is discussed in the context of public policy in subsequent chapters because it has bearing on that matter in the context of international arbitration in the MENA.

3 *The Principle of Justice*

The three legal traditions that impact the MENA (civil, common and Islamic law) must be seen through a deeper lens. The theological origins of these legal systems are well established and profound. The theological origins of these three legal systems not only share a common founding father, Abraham, but have, for hundreds of years at their nascent beginnings, nurtured and informed each other.³³⁸ In contemplating the cultural and legal considerations of the MENA, the author has kept in mind their common origins and their historical intersections, whether through theological influences or customary usage. The discussion in the introduction regarding the French legacy is a more modern continuation of this view that extends this line of reasoning from the earlier history of the MENA to more modern times. Indeed, the author submits that the divide between East and West is not so sharp and that at times it overlaps. Civil and Islamic law have had a long-standing and mutual impact on one another throughout history. Analysis and contemplation of the three monotheistic faiths which are foundational to the legal and

³³⁸ One such well-established example is the assimilation of the deities of Ancient Egypt by the Romans and no less by the Greeks, such that although the names of the various Gods changed, the inherent characteristics or archetypes remained intact. The examples of the British to combine the *Majalla* with local codes, and with the common law, given throughout this thesis are further testimony to this fact.

cultural traditions of the MENA demonstrates the theological and philosophical grounds for harmonisation. The words from Micah in the Old Testament provide a convenient starting point: ‘He has shown thee, O man, what is good and what the Lord requires of thee, but to do justly, and to love mercy, and to walk humbly with thy God’.³³⁹

Each of the three monotheistic world religious traditions (Judaism, Christianity and Islam) upholds the sacred notions of justice and mercy,³⁴⁰ ‘Some analysis of the three monotheistic faiths which underpin several of the world legal and cultural traditions must be undertaken if harmonisation is to be achieved.’³⁴¹ This is one major reason why religious principles common to the countries of the MENA must be drawn upon for the HICALC. Further, ‘Similarly, the common law, civil law and Islamic law also value these notions of justice and mercy. Many rules of law are derived from these fundamental religious ideals. In Islam, Allah is seen as just and merciful.’³⁴² In Christianity, Christ is viewed as the manifestation of God’s free-flowing grace and mercy, whose entire *raison d’être* is to ensure the salvation of His people.³⁴³ The verse from Micah in the Torah encompasses principles found in all three of the legal traditions. The author submits that the notions of justice and mercy, when harmonised with one another, produce the doctrine of equity. Equity is a foundational principle that can harmonise with all three of

³³⁹ ‘He hath shewed thee, O man, what is good; and what doth the LORD require of thee, but to do justly, and to love mercy and to walk humbly with thy God.’ Carroll, R and Pricket, S, *The Bible: Authorised King James Version* (Oxford World’s Classics), Micah 6:8, 1014.

* In, Mary Ayad, ‘International Commercial Arbitration and Harmonisation of Contract Law with a focus on reform in the MENA’ (2008), 12.2, *Vindobona Journal of International Commercial Law and Arbitration*, 169, 170: ‘The Protestant hymn above draws on verses in both the Torah and the Bible and encompasses principles found in all three of the legal traditions. These common principles of law can be invoked to demonstrate the feasibility of harmonisation.’

³⁴⁰ Ayad, Ibid 170.

³⁴¹ Ibid.

³⁴² The first Sura (Chapter) of the Quran begins with the words, ‘In the name of Allah, the entirely merciful, the especially merciful.’ The Quran. Arabic text with corresponding English meanings. 1997, Abdul-Qasim Publishing House, Jeddah, Saudi Arabia, 1.

³⁴³ See above n 46.

these traditions and form the basis for commonality in the doctrinal matters that arise as a result of investor–State disputes in the MENA. Equity is recognised by all three legal traditions. These common principles of law can be invoked to demonstrate the feasibility of harmonisation.

4 *Pacta sunt servanda*

The Master said, 'In hearing litigations, I am like anyone else. What is necessary, however, is to cause the people to have no litigations.'
Confucius, from the Analects of Confucius

The author submits that universal principles should guide the HICALC. The doctrine of *pacta sunt servanda* is most relevant in regard to the discussion on expropriation, including public policy and sovereign immunity. *Pacta sunt servanda* is shown to be a universal principle. The premise that *pacta sunt servanda* should be upheld insofar as possible is based on the fact that without respect for contracts and agreements, our society, including the business of cross-border trade would be thrown into chaos as a result of extreme uncertainty if contracts and agreements are not adhered to. The author submits that it is a matter of public interest that *pacta sunt servanda* be upheld. Therefore *pacta sunt servanda* should be upheld to the highest standard possible. The author submits that there are situations where there may be exceptions,³⁴⁴ but the exceptions are outside of the scope of the research. The purpose of this section is to demonstrate that this is a universally accepted principle and one that would serve to increase higher arbitral

³⁴⁴ *Force majeure*, Act of God, unfair contract, public policy, *inter alia*. These exceptions are outside the scope of this research. The research is mainly concerned with situations that do not fall under these exceptions, or fall under changed circumstances. Other scholars have written extensively regarding these exceptions.

award enforcement, including more certainty in cross-border transactions. One such important example of a principle that is found at civil, common and Islamic law is the principle of *pacta sunt servanda*. It can be argued that the principle of *pacta sunt servanda*, the doctrine foundational to the concept of the sanctity of the contract, is a universally found principle. *Pacta sunt servanda* forms a strong basis for harmonisation. *Pacta sunt servanda* was found in Hammurabi's Code of law, in Mesopotamia, which was a non-European culture. It is found in Islam, which has given rise to cultural elements predominant throughout Asia and the Middle East, and has influenced diverse cultures such as that of India.

Although the author shares the view that arguably the sanctity of the contract cannot be taken lightly and that arguably it is a foundational and fundamental consideration to the order of society, notwithstanding, it is important to understand the doctrine of *pacta sunt servanda* in a modern and commercial context. In the event of extraordinary and unforeseeable circumstances, for example, what are termed 'acts of God', the renegotiation of a contract may be in order. Exceptions to *pacta sunt servanda* are outside the scope of this research and have been addressed in volumes by scholars elsewhere. However, the author agrees that a proper exception to *pacta sunt servanda* is in a *force majeure* clause,³⁴⁵ although the irony here is if a *force majeure* clause can

³⁴⁵ M Sornarajah, *The Settlement of Foreign Investment Disputes*, (Kluwer Law International, 2000) 53: 'A *force majeure* clause is used in international business contracts generally to provide for unforeseen contingencies which may delay the performance of the contract. It provides for the termination of the contract altogether in circumstances where the fulfilment of the obligation becomes impossible or too onerous on one of the parties. It may also provide for variation of terms such as price terms where the changed circumstances make the terms of the original contract unfair to one of the parties. The rapidity with which circumstances change in international situations makes it more vital that there be such clauses in international transactions than in domestic contracts. The typical *force majeure* clause will identify the supervening circumstances, which trigger the suspension or termination of the contract. But, the general view that has been taken of these clauses is that there should not be termination of the contract if the

delineate the *supervening circumstances*, then it is not providing for *unforeseen* contingencies.

Pacta sunt servanda and other standards of substantive law that are derived from international and general principles of law are essential standards, as:

The substantive rules – fair and equitable treatment, no expropriation without compensation, national treatment – are in my view implicit in conferring jurisdiction on international tribunals. If they did not exist, the tribunals would invent them (and have invented them in the past); they could re-invent them again without much difficulty in simply relying on *pacta sunt servanda* and ‘abuse of law’ as foundational principles of law.³⁴⁶

Any contract is supported by *pacta sunt servanda*. All treaties are supported by *pacta sunt servanda*. *Pacta sunt servanda* is the strongest foundation for any system, particularly an international one. The French public international law notion of *pacta sunt servanda*, ‘Principe du droit international public selon lequel les traits doivent être respectés par les parties qui les ont Signés’,³⁴⁷ *pacta sunt servanda* is important because it occurs at the point at which commercial law principles intersect with treaty law and therefore private international law. *Pacta sunt servanda*, as it is a common principle to both public international law and private international law is inherent to both and is therefore a valid legal starting point of common ground in harmonisations.

obligation could have been fulfilled in some way other than the one prevented by the supervening circumstances.’

³⁴⁶ See above n 13, 55–56. ‘It is the principle that according to public international law treaties should be respected by their signatories.’ Translation by the author.

³⁴⁷ Guillien, see above n 347, 490. ‘A principle of international public law according to which treaties ought to be respected by their signatories.’ Translation by the author.

The principle of *pacta sunt servanda* is arguably one of the oldest universal principles of law and most commonly understood to have originated at civil law. Yet, the history of *pacta sunt servanda* can be traced back to several ancient civilisations:

Few rules for the ordering of society have such a deep moral and religious influence as the principle of the sanctity of contracts: *pacta sunt servanda*. In ancient times, this principle was developed in the East by the Chaldeans, the Egyptians and the Chinese in a noteworthy way. According to the view of these peoples, the national gods of each party took part in the formation of the contract. The gods were, so to speak, the guarantors of the contract and they threatened to interfere against the party guilty of a breach of contract so it came to be that the making of a contract was bound up in solemn religious formulas and that a cult of contracts usually developed.³⁴⁸

The concept of the contract and by extension the doctrine of *pacta sunt servanda*, were well developed in ancient Egypt.³⁴⁹ The ancient Egyptians had a well-developed law of contract. The doctrine of *pacta sunt servanda* arose as a result and is older than what is known of it in the Roman context. Disputes of an economic nature were often heard outside of the courts. Arbitration was known in ancient Egypt³⁵⁰ and arbitral tribunals

³⁴⁸ H Wehberg, *The American Journal of International Law*, Vol 53, No 4 (Oct., 1959), 775–786, 775.

³⁴⁹ R VerSteeg, *Law in Ancient Egypt*, (Carolina Academic Press, 2002) 17: ‘We have abundant evidence for law in Egypt. Contracts, wills, accounts of trials, and records of taxation provide useful information. Evidence from the rhetoric and literature supplement these traditional sources too.’ Further, 49: ‘According to McDowell, “most of the cases which came before the knbt [local court] concerned economic transactions. As a rule, these cases involved allegations of breach of contract. Occasionally, the knbt performed the role of a notary; merely witnessing a transaction or a will. A couple of cases from Deir el-Medina may have been heard and decided by a single individual who acted as an arbitrator. There are also a few other disputes that seem to have been adjudicated by small (sometimes three-person) panels, rather than by a full court (knbt).”’

³⁵⁰ The deity Thoth arbitrated godly disputes; thus the concept was well-known in Egypt, lending credibility to the idea that the concept of arbitration is universal. Additionally: ‘Arbitration was also apparently well known in ancient Egypt, with convincing examples of agreements to arbitrate future disputes (used alongside what amount to forum selection clauses) included in funerary trust arrangements in 2500 B.C. and 2300 B.C.’ Mantika, *Arbitration in Ancient Egypt*, 12 J. Arb 155, 158-160 (1957) in, Born, Gary B., *International Commercial Arbitration*, Volume I, Kluwer Law International, 2009, at p22.

either consisted of one or three persons, as is the case today. Therefore, the arbitration of commercial disputes is arguably older than even Islamic custom, and older still than Roman custom.³⁵¹ Arbitration predates Western civilisation³⁵² and once again, the argument that concepts such as arbitration, *pacta sunt servanda* and custom are modern Western constructs is, arguably, false. These concepts and doctrines were an inherent consideration of the ancient Egyptian legal system and this is well established by archaeological history and artifacts. This point emphasises that the doctrine of *pacta sunt servanda* did not arise exclusively or solely in the West but can be traced back to more ancient civilisations.

The French interpretation of the Latin maxim *pacta sunt servanda* is: ‘locution Latine affirmant le principe selon lequel les traités et, plus généralement, les contrats doivent être respectés pour les parties qui des ont « conclu »’.³⁵³ The French understanding is useful for two reasons. The first is that it includes contracts which are under the purview of private international law with treaties, which fall under public international law. The French interpretation understands that *pacta sunt servanda* is a principle common to both. Secondly, the French connotation is valuable in that it enjoins upon the contracting parties to respect their jointly agreed upon contract, with the implication that in a breach there are sanctions, such that the original drafting of the contract must be considered and thought out properly with regard to jurisdictional

³⁵¹ See above n 8, 3: ‘Arbitration in China can be traced back to about 2100-1600 BC.’

³⁵² Ibid 4: ‘Arbitration was also popular in ancient Egypt; it has been said that until about the mid-20th century, around 80% of all disputes would be settled out of courts by recourse to a respected and popular elder chosen for his wisdom, integrity and standing in the community.’

³⁵³ See above n 347, 394. ‘a Latin maxim affirming the principle according to which, treaties are, in general, contracts that should be respected by and for the parties who have concluded them’, or ‘A Latin maxim affirming the principle that in general according to treaties, contracts ought to be respected by the parties which conclude them.’ Translation by the author.

adjudicatory risks in the event of a need for enforcement. It is a matter of practical consideration that a party in breach of a contract is consistently likely to attempt to undermine the award, so adjudicatory risk must be foreseen and accounted for. The common law tort of the breach of contract and the limitations on the circumstances by which a breach of contract can occur, or exceptions to it, is a testimony to the doctrine of *pacta sunt servanda*. The cases supporting this submission fill volumes, both at private international law and in domestic law in regard to commercial contracts, and in the case of public international law in accordance with treaty interpretations. *Pacta sunt servanda* is therefore a major unifying thread that links private international law with public international law.

Pacta sunt servanda is a universal concept which predates civil law and Roman legal culture. In Arabic cultures, which share many common features with Islamic cultures, even a spoken contract must be fulfilled.³⁵⁴ It can be reasonably argued for the purposes of the discussion that Middle Eastern and Islamic cultures are not European, for the purposes of refuting the argument that *pacta sunt servanda* existed only in Western and European cultures. The author submits however that the distinction between Middle Eastern and Islamic cultures on one hand and that of European cultures on the other is not so dramatically decisive. Nor is it without political aims.³⁵⁵ *Pacta sunt servanda* is arguably known in all the world's legal cultures. It is the basis for creating certainty and

³⁵⁴ When someone gives their word, this becomes as binding as a written contract; it becomes a question of honour if it is not upheld, as conveyed by the Arabic proverb, '*kilmiti sharaf*', 'my word is honour', meaning 'my word is my bond'.

³⁵⁵ E Said, *Orientalism*, (Vintage Books, 1979). Edward Said has argued throughout his book that the differences between Middle Eastern and Islamic cultures were exaggerated in order to provide further justification for colonial hegemony, which was based in a socially constructed discourse to make the colonised appear inferior to the colonisers in order to support the colonial system of hegemonic dominance for strategic political ends.

stability in any type of commercial, legal or other transaction that involves any type of commitment. *Pacta sunt servanda* cannot be said to be a solely Western construct and cannot be directly attributable to Roman civil law solely. It is a universal concept that was arguably developed before the Roman Empire and possibly assimilated by the Roman Empire as was the customary usage at the time of the early Roman Republic: ‘The concept of contract was very ill-developed. The distinction between civil and criminal wrongs was not clearly drawn’.³⁵⁶ *Pacta sunt servanda* was borrowed from the Egyptians by the Romans (in much the same manner that the ancient Egyptian gods were eventually Romanised) and is older than the western usage attributed to it, as it is now recognised. Hammurabi’s developed code, within which are provisions regarding the contract predates Roman concepts of the contract.

The exceptions found at common law are not exceedingly different from those found at Islamic law. The principle of *pacta sunt servanda* is a cornerstone of Islamic jurisprudence.³⁵⁷ This establishes the inherent harmony that can be found within and among the three legal traditions of common law, civil law and *sharia* law. This is noteworthy in consideration of the fact that one of the current concerns in the field of ICA is the discomfort of many Arab states to include or accept arbitration clauses in contracts.³⁵⁸ The reason is not because of discomfort with arbitration *per se* but distrust of western arbitrators. In consideration of the reality that Islam is viewed legally both as a way of life and a religion, the author submits that the principle of *pacta sunt servanda* is

³⁵⁶ See above n 331, 1079.

³⁵⁷ Kamali, see above n 81, 67. ‘Ibn Taymiyya has categorically stated that the Quranic address to the people to “fulfil [their] contracts” (5:1) is evidently broad and comprehensive, and naturally comprises every contract that the Lawgiver has not specifically forbidden.’

³⁵⁸ See above n 46, 173.

undoubtedly the most important commercial principle in Islam and it is the principle that holds Islamic commercial jurisprudence together, as it would any other *corpus lex*.

The doctrine of *pacta sunt servanda* is clearly identified at civil, common and Islamic law.

The thread of harmonisation is strong and consistent. It has origins that pre-date Roman civil law, as the examples given of the Hammurabi Code and the ancient Egyptian understanding. This gives breadth to argue that it is a universally acknowledged concept. The author is in agreement with Plato's well-known theory of Forms, an essentialist view that postulates that any material or philosophical entity has its origins in an abstract, albeit existing ideal. These principles can be 'invented' because they are extant; hence, universal law. It is beyond the scope of this work to put forth evidence in support of the Platonic Ideal,³⁵⁹ however, the HICALC shall suffice as strong evidence in this direction.

A discussion on the harmonisation of *pacta sunt servanda* across civil and Islamic law is given in the section regarding precedents of harmonisation.

5 *The Doctrine of Due Process*

The doctrine of due process, or procedural justice is well established, with notable ones particularly regarding American civil procedure dealing with criminal law (right to a fair trial, right to a trial by a jury of one's peers, right to an unbiased jury, *inter alia*), civil procedures in European jurisdictions and human rights law, particularly regarding

³⁵⁹ B Bix, *A dictionary of legal theory*, (Oxford University Press, 2004) 160: 'Plato's effect might be most directly seen (1) in his metaphysically realist beliefs.'

prisoners of war. At Islamic law, the notion of equality before the law can be compared to the doctrine of due process. Supporting evidence from the sources of Islamic law is the following: “The aristocracy of yore is trampled under my feet” said the Prophet in his farewell sermon. There was no room for privilege under a system which subjected all equally to the identical law. The only privilege recognised by Islam was the privilege resulting from piety, good deeds and noble character.’³⁶⁰ The idea of equality before the law is found at Islamic law just as it found at international human rights instruments.

There could not be one law for the powerful and one for the underdog, one for the rich and one for the poor, or one for the conqueror and one for the subject. The principles of the Universal Declaration of Human Rights and the succeeding documents such as the Covenant on Civil and Political Rights and Social and Economic and Cultural Rights were thus implicit in Islam.³⁶¹

The idea of equality, of all people being equal under the law is tied to the idea of one law in Islam. Equality before the law is linked to the doctrine of due process. Islamic law thus recognises due process.

At arbitral tribunal case law, ‘The existence of a procedural fraud having influenced the award is however a ground for refusing its recognition and enforcement.’³⁶² The matter of procedural fraud is a matter of due process; procedural fraud denies due process. Although there are numerous pathways to procedural fraud, here the author is concerned with due process and procedural fraud when they are

³⁶⁰ See above n 40, 76.

³⁶¹ Ibid.

³⁶² J Poudret and S Besson, *Comparative Law of International Arbitration*, (Sweet and Maxwell, 2nd ed 2007) 859.

brought about by bias. A discussion on bias elsewhere in this thesis further elucidates this. The reason the universally acknowledged principle of due process or procedural justice is relevant here has to do with bias challenges³⁶³ because the existence of manifest or apparent bias is not uncommon in the types of arbitrations this thesis focuses on, and might have historically contributed to procedural fraud in bringing inequalities to bear on the decision of the tribunal, and this inequality may have led to injustice. In this manner it may be tantamount to fraud in depriving one of the parties of due process or procedural fairness, and equal standing before the law. This is why the matter of bias must be dealt with more competently through the appropriate legal reforms proposed herein.

The link between due process and arbitration law is seen in the doctrine of impartiality and independence, similar to the same standard imposed upon a judge. At arbitration: ‘The underlying purpose of independence or impartiality requirements is to ensure that the parties are treated equally and that the award is not influenced by an arbitrator’s bias.’³⁶⁴

At international instruments:

Article V(1) (b) of the New York Convention identifies three violations of due process rights on which a court may rely to refuse enforcement: (i) no proper notice of appointment of the arbitrator, (ii) no proper notice of the arbitration proceeding, (iii) the inability of a party to present its case.³⁶⁵

³⁶³ J Lew, L Mistelis, S Kroll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003) 303: ‘The most obvious grounds of challenge are the arbitrator’s lack of impartiality or independence. These concepts are usually not defined in any of the arbitration rules and laws.’

³⁶⁴ See above n 351, 11, 274.

³⁶⁵ Ibid 453.

The scope of (iii) must be expanded to include the inability of a party to be adequately heard by an arbitrator who is biased against the party especially for reasons of prejudice. The two-pronged test³⁶⁶ in *Apex Tech Investment Ltd v Chuang's Development (China) Ltd*, fails because even if a party can show an arbitration could have been different if it had presented its case the main consideration is not if it was allowed to present its case. Manifest bias occurs even when a case is presented but adjudicated unjustly due to prejudice- in cases of bias related to prejudice. It is very difficult to create a test for this, thus recourse to changing the requirement for the arbitrator to be from a different nationality to a different region mitigates this problem. This will be discussed further in Section IV. Further legal provisions at international investment law guard against procedural injustice. The link between fair and equitable treatment and due process is established at international investment treaty law.³⁶⁷

6 *The Doctrine of Natural Law*

The doctrine of natural law is discussed in detail in subsequent sections of this thesis. For the purposes of setting the foundation for demonstrating that the concept of natural law is found at Islamic law, an introduction is given. The universality of the need for natural law is explained:

Successive generations of legal philosophers in all systems have been groping after the

‘higher law’ or the ‘ideal law’ of the ‘natural law’, which stands above all legal systems

³⁶⁶ Ibid 455. [1996] 2 HKLR 155.

³⁶⁷ R Dolzer, C Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2008) 162: ‘The 2004 US Model Treaty in Article 5(2) (a) states that the fair and equitable treatment standard includes the obligation ‘not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principle legal systems of the world’. This would apply to bias, expropriation and to competence challenges in which the party whose arbitral tribunal was disrupted by undue competence challenges faces a delay in due process to have its case heard and damages awarded.

and to which all legal systems should conform. All students of jurisprudence will know how important it is that a set of principles should exist which no ruler is at liberty to ignore. From the time of Plato to Aristotle down to the most modern philosophers, this has been one of the central intellectual issues in jurisprudence.³⁶⁸

The universality of the doctrine of natural law is well established. The doctrine of natural law is understood across all three traditions as a 'higher law' or 'ideal law'. A comparative analysis of this doctrine with Islamic law shows it does not differ in essence. For example:

Islam's solution to this problem is to offer the principles of this higher law in the word of the Qur'an. No ruler, however exalted, is at liberty to depart from any part of this law. He may resort to processes of interpretation to seek to justify some particular action, but should he violate the law, he would have the supreme book of the law cited against him and would have no answer.³⁶⁹

This quote expresses the principle of interpretation which is referred to as *ijtihad* at Islamic law, and, the author submits, is another example of a universal principle of law.

7 *The Doctrine of Fair Contract*

It is the author's submission that the doctrine of fair contract at Islamic law is built upon the principle of *pacta sunt servanda*,³⁷⁰ more so, than at common law. When the elements of offer (*ijab*) and acceptance (*qabul*) are present, a contract is considered formed and as such is considered binding, in which case the doctrine of *pacta sunt servanda* is activated. For example: 'The notion of fairness in contract runs through the

³⁶⁸ See above n 40, 1988, 65.

³⁶⁹ Ibid.

³⁷⁰ Ibid: 'The honouring of one's engagements is stressed in many passages of the Qur'an.'

entire Islamic law of contract. Contract law is free of the technicalities which mar many a European system, particularly the common law system of contract with its technicalities of consideration.’³⁷¹ Furthermore, ‘Islamic thinking analyses the completion of contract by reference to the requirements of offer (*ijab*) and acceptance (*qabul*). Consideration is not essential, unlike in the common law.’ Notwithstanding that however, the Islamic doctrine of fair contract is not unlike those at civil and common law in general, and specifically the Islamic doctrine of fair contract, like expropriation, offers a higher level of protection to the weaker party. It emphasises fairness, such that in the event of an unfair contract based on risk or uncertainty, it can be invalidated. For example,

Fairness to both parties and reciprocity are of the utmost importance, so that, for example, a contract which involves risk or uncertainty even to a party willing to accept it can be invalidated. A buyer may return an article for defect even after he has seen the property.³⁷²

The notion of fairness at Islamic law is connected to interest. Although an entire section is devoted to interest in section three, it is raised here in relation to fairness. Thus, ‘Interest is forbidden, as it no doubt enables the stronger party to make an unfair contract out of the weakness of the other. This rule, as we shall see, has however been circumvented to some extent by juristic interpretation.’³⁷³ It is noteworthy to highlight that juristic interpretation (*ijtihad*) can even be employed regarding such a fundamental topic at Islamic law, that of interest. The notion of fairness in a future HICALC can be invoked regarding the drafting of contracts. Contracts that are unfair would have to be

³⁷¹ Ibid.

³⁷² Ibid 66.

³⁷³ Ibid.

tempered against the doctrine of *pacta sunt servanda*. This means that an exception to *pacta sunt servanda* may be if a contract is on the face of it, unfair. This however, cannot be used as a basis for expropriation; it does not justify expropriation.

8 *The Notion of Commercial Integrity*

There are prohibitions against fraud at common and civil law. This is the case at Islamic law. For example, at Islamic law, the Quran states: “Woe to those who deal in fraud- those who when they have to receive by measure from men, exact full measure but when they have to give by measure or weight to men, give less than is their due. Do they not think that they will be called to account?” (Qur’an, LXXXIII: 1-4).³⁷⁴ Once again, Islamic scholars connect the notion of commercial integrity (and thus contracts in general) with the doctrine of *pacta sunt servanda*- a harmonising thread running throughout Islamic law that deals with commercial (*inter alia*) matters. For example:

‘The notion of honour in all commercial dealings and of the sanctity of the pledged word pervades Islamic trading. “It is not righteousness that ye turn your faces to the East and the West; but righteous is he who believeth in Allah and the Last Day and the angels and the scripture and the Prophets... And those who keep their treaty when they make one, ... Such are they who are sincere. Such are the God fearing” (Qur’an, II: 177).’³⁷⁵

The notion of commercial integrity is related to *pacta sunt servanda* and to fraud. There is an implicit understanding at Islamic law that to breach a contract, a treaty or a trust is dishonest. *Pacta sunt servanda* is arguably the most underlying fundamental principles of Islamic law regarding commercial (secular/ *mu’amalat*) matters. Support for the

³⁷⁴ See above n 40, 66.

³⁷⁵ Ibid.

relationship between *pacta sunt servanda* and honesty, and for the importance of both at Islamic law, is given here:

The Qur'an enjoins trading honesty in the severest terms, with strict prohibitions against the use of false weights and measures. "Give full measure when you measure and weigh with a balance that is straight" (XVII:35), "Give just measure and cause no loss to others by fraud" (XXVI: 181). These and many other passages re-echo the general principle of fairness of commercial dealings.³⁷⁶

9 *The Doctrine of Charitable Trust*

The doctrine of charitable trust is found at common law and at civil law. It is found at Islamic law and it is called *waqf*. Although the technically legal considerations of the trust at Islamic law may differ in their nature from those at Common and civil law, the existence of the concept of the trust establishes the universality of the concept of the trust. At Islamic law:

An owner of a property may create a charitable trust (*waqf*) in his lifetime by deed or by will. Once he does this, the alienation of the trust becomes irrevocable. Views differ between the Hanafi and the Maliki schools on the subsequent ownership of the property. The former hold it belongs to Allah and hence no living person has any rights over it. The latter hold that the founder and his heirs remain owners but without any rights to deal with it.³⁷⁷

³⁷⁶ See above n 40, 66.

³⁷⁷ Ibid: 73.

In regard to the nature of the scope of the concept of a trust at Islamic law, it is wider than at common and civil law.³⁷⁸ Indeed, it has been argued in the past by more than one scholar that the concept of the trust was brought into the common law by way of Islamic law.³⁷⁹ The purpose of this discussion, however is to demonstrate that these concepts are universal and therefore feasible for harmonisation. The matter of who influenced whom is only relevant regarding establishing the universality and thus feasibility of the principle in question. In this case the *waqf* or the trust is found universally. The features of the *waqf* at Islamic law are similar to those of the trust at English law, ‘which are the separation of ownership and enjoyment, the vesting in the beneficiaries of the right of enjoyment and the right of the owner to vest the enjoyment in a succession of beneficiaries - all of which were to be found in the English use.’³⁸⁰

The use of the trust at English common law and the similarity of the trust to the *waqf* are not without historical antecedents. The discussion dealing with the matter of the Crusades has revealed the thread of bias and counter bias occurring between MENA and European or Western parties.³⁸¹ The preceding quote establishes the possibility of

³⁷⁸ Ibid: ‘Charities, mosques, hospitals, schools, the poor, the descendants of the founder may all be beneficiaries. The institution became so important in Islamic countries that a special ministry for *waqfs* was established in most Islamic countries to deal with the administration of *waqf* properties.’

³⁷⁹ Ibid: ‘There is indeed a view that the English concept of trust derives from the institution of the *waqf* or pious foundation in Islamic law- see the detailed argument to this effect by Henry Cattan, a member of the Jerusalem Bar in Khadduri and Liebesny, 1955, 203-18. Among the reasons for such a conclusion are that the Islamic charitable trust antedated by several centuries the doctrine of uses and trusts in English law and that trusts or uses were first introduced in England in the thirteenth century by Franciscan friars (Pollock and Maitland, 1952, vol II, 231): “It is an old doctrine that the inventors of “the use” were “the clergy” or “the monks”. We should be nearer the truth if we said that, to all seeming, the first persons who, in England, employed “the use” on a large scale were, not the clergy, nor the monks, but the friars of St. Francis.”’

³⁸⁰ See above n 40, 74.

³⁸¹ Yet, it did not discuss the possibility of the influence of Islamic law on Western intellectuals and jurists. The historical era where the influential Muslim philosophers and jurists were most active in this regard is the Golden Age of Spain. Yet, there is a historical overlap between these two major historical phenomena, with the Crusades being a time of potential cultural and legal influence by Islamic jurists and philosophers upon Westerners. This idea has been raised in regard to the mysteries surrounding the Knights Templar,

harmonisation, in showing that the concept of trust at common law is not vastly different from that at Islamic law, demonstrating that harmonisation between these two so-called vastly different traditions do contain similar elements. Indeed, they have more in common than civil and common law do in the matter of trusts, yet it is rarely disputed that civil and common law can be harmonised. This attests to the feasibility of harmonisation, in this case, by way of the historical influences of Islam on the common law.

For example:

It will be remembered also that there were several points of contact between the Western world and Islam during the relevant period and that St. Francis, the founder of the order which first introduced the use, went to Egypt during the Crusades in 1219 and was in fact a captive of the Arabs for a short period. Indeed, on two previous occasions St. Francis had unsuccessfully set out for Egypt and for Islamic Spain, thus evincing a particular interest in the Islamic world. Moreover, the English use, and the Roman *fidei commissum* to which it is sometimes attributed, are vastly different from each other, whilst there was a direct link between the burst of intellectual activity in Europe in the thirteenth century and the new ideas of those who had returned from the Crusades having seen another civilisation (see Passant, 1926, p. 331).³⁸²

outside of the scope of this research, but it may be the reason that the concept of the trust, which differs from that of civil law with the common law, but not with the common law and Islamic law, may have been introduced to England.

³⁸² MacMillan, see above n 380.

Western scholars have written that there is a possibility that the *waqf* is the source of the English trust.³⁸³

10 *General Principles of Law*

The author relies on the following conception of general principles of law in including them herein:

They are therefore not national principles having their source in non-state rules, like the rules mentioned above, but transnational principles which apply without regard to the nationality or residence of the contracting parties and which are not confined to the territory of one or more determined states. It is not necessary that they be recognised in all states, in other words that they be universal. It is sufficient they are recognised in a majority of states or in the most important ones, in other words that they constitute the dominant solution of international trade.³⁸⁴

In the complex context of the MENA the mechanism through which harmonisation of the law will ensure the necessity of award enforcement³⁸⁵ is in its ability to uphold the doctrines of *pacta sunt servanda* and *res iudicata*, specifically in cases where the

³⁸³ Ibid: ‘Whatever view one holds on this matter, it must be admitted that the similarities are remarkable and that the developed Islamic notion long antedated the first English gropings towards such a concept- a concept which the celebrated English legal historian Professor Maitland described: “If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea.” (Maitland, 1968, reprint, 129). We must note also that, as Pollock and Maitland observe (1952, vol I, 520) the notion of permanent trusteeship (so well known in Islam) was, in the thirteenth century “as yet unknown to the (English) law”. To quote Maitland (1968) again, on the originality of the concept: “The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder.”’

³⁸⁴ See above n 362, 591-592.

³⁸⁵ R Garnett, H Gabriel, J Waincymer and J Epstein, *A Practical Guide to International Commercial Arbitration*, (Oceana Publications, 2000) 4: ‘The question of enforcement is generally one of the primary concerns in the decision to choose arbitration.’ Thus, a harmonised code that takes a more universal understanding of the principle of *ordre public* without allowing it to serve as a bar against arbitral award enforcement would go a long way towards reducing the risks to foreign investors in MENA states.

possibility of a MENA government (or learned judges and counsel) invoking broader interpretations of Islamic law or public policy, challenges either tribunal jurisdiction, competence or the enforceability of an award. This research, if implemented, will solve these problems through the author's draft harmonised code of ICA law extracted from common general principles of law found at common, civil and Islamic law³⁸⁶ and derived from the complex nexus of practical and theoretical data analysed. Reference to 'general principles of law' and to 'transnational law' shall be made frequently throughout this discussion as appropriate. The author submits that giving a delineated definition of 'general principles of law' and 'transnational law', insofar as it is possible to do so, is necessary. The scope of and authority from which the above are derived are matters that are central to the history of the early oil concessions, including the entire development of international arbitration law. The response to the above questions regarding scope and authority are vital. They are exceptionally vital in consideration of the following submission:

But later formulations discard these provisos. They took three forms: (1) equating general principles with transnational law; or (2) using it as a distinct category of law. Comparative law techniques have alleged to be used for isolating general principles but the arbitrators, having a European legal background, use European systems and then generalise principles culled from these systems into universally applicable principles. In international law, general principles of law constitute a weak source of law. The technique of the use of this source within that system has also

³⁸⁶ In F Kutty, 'The *shari'a* Factor in International Commercial Arbitration' *Loyola of Los Angeles International and Comparative Law Review*, 2006, Vol 28:565, 566: 'It is imperative that Western lawyers and dispute resolution professionals have a reasonable grasp of the general principles of *sharia* or Islamic law, a source of law, of varying degrees, in most nations in the Middle East.'

been to use propositions of the law known in the individual judge's system and to pass them off as universally applicable propositions. This attitude has met with considerable criticism.³⁸⁷

This research serves to justify the second submission that general principles of law should be a distinct category of law, whilst demonstrating that there are universal general principles of law, which are a strong source of law. The comparative law techniques employed herein are universal. Past research was, according to the submission given by the learned M. Sornarajah, not comparative if it was drawn solely from a European context. The author agrees that to conflate public international law with general principles of law has its dangers; not least of which is the fact that the scope and limitations of one may not be applicable or tenable in situations calling for the other. Notwithstanding the aforementioned, the fact that universal principles of law are found is in itself concrete proof that there are principles of law which are common to both public international law and to general principles of law. This research resolves the gap in previous scholarship. The understanding of universal principles of law is supported in two ways. These are the main bodies of legal authority for the comparative analysis: (1) natural law (*lex naturalis*), and (2) general principles of law found (a) at the three traditions which represent several jurisdictions and are thus nearly universal and which are relevant to international arbitration, and (b) principles of law found at public international law and private international law in which there is much overlap within this category. Although the author addressed the above quote made by Sornarajah, other scholars have already refuted it. The view that principles from public international law

³⁸⁷ M Sornarajah, *International Commercial Arbitration, The Problem of State Contracts*, (Longman, 1990) 135.

and principles from general principles of law are not the same and cannot be applied to ICA is irrelevant, based on the following grounds:

The reference to “such rules of international law as may be applicable” (as, for example, in the Washington Convention), or to “the relevant principle of international law” (as the Channel Tunnel Treaty) serve to remind us that it is not the whole *corpus* of law, but only certain specific rules of law that are likely to be relevant in any given dispute.³⁸⁸

(a) *The Role of Custom- the Ancient Law Merchant lex mercatoria*

The importance of ICA is based on the fact that it is the established method of determining international commercial disputes such that most states world-wide have modernised their arbitration laws and created new arbitral centres. The rapidly evolving practice and laws of arbitration have become important research topics in law schools and universities worldwide.³⁸⁹ Parties in Europe and the MENA widely believe that it is better to resolve commercial disputes with arbitration rather than in a municipal court because fair arbitrations resolve problems related to conflicts of national jurisdictions and domestic laws, which may otherwise bar arbitral award enforcement. The MENA region is richly involved with ICA. To understand why harmonisation is crucial it is important to understand the complexity of the problem of the conflict of laws at the heart of the problems in ICA.³⁹⁰ It is necessary to understand that a complex system of international

³⁸⁸ A Redfern, M Hunter, B N Partisides and Constantine, *Law and Practice of International Commercial Arbitration*, (Sweet and Maxwell, 4th ed, 2004) 127.

³⁸⁹ Ibid, 1.

³⁹⁰ Ibid.

treaties and national laws are the only reason why the complex nature of ICA works.³⁹¹ Because there is a problem with these laws contradicting, this is precisely why there is a problem that can only be solved by a harmonised ICA law. When these laws are in discord with one another in the nexus of arbitration and domestic laws, there is no legal jurisdiction to provide necessary infrastructure support.³⁹² Even a basic infrastructure is not enough. The seriousness of the problem needs to be elucidated.

Any extant ICA proceeding can make reference to four different *domestic* sets of laws. The first is the law that governs the clause in a contract designating an agreement to submit to arbitration. The second is the law of the actual arbitration proceedings. The third is the law of the arbitral tribunal that is applied to the substantive matters in dispute before it. The final law governs recognition and enforcement of the award of the arbitral tribunal.³⁹³ These laws within a single extant arbitration usually contradict one another such that the substantive law may be a different system of law from the ones governing proceedings, the clause or the enforcement.³⁹⁴ It is possible for a contract to contain clauses that place it in breach of the public policy of a country. The conflict of laws increases the complexity of ICA tremendously.

To combine questions related to sovereign immunity, bias challenges, jurisdictional or competence challenges, public policy interpretations generally, and public policy interpretations in consideration of varying Islamic law trends in the MENA region increases complexity. At common law, it is a well established principle that

³⁹¹ Ibid 1–2.

³⁹² Garnett, see above n 385, 4

³⁹³ Ibid 2.

³⁹⁴ Ibid 2.

foreign law will not apply when it is contrary to public interest.³⁹⁵ This concept is the same at Islamic law. The nexus of domestic law with public policy in international arbitration is an important matter and necessitates justification for a transnational public policy. In order for any extant arbitration proceeding to be enforced, these four sets of laws must be in harmony with each other.

The evidence is strong that civil and Islamic law and also common law principles may easily be harmonised, particularly through the thread of customary law.³⁹⁶ Historical

³⁹⁵ A Jaffey, *Topics in Choice of Law*, (The British Institute of International and Comparative Law, 1996) 26: 'The well-established principle that foreign law will not be applied when it is contrary to public policy serves two distinct purposes. One consideration is the protection of the public interest of the forum, and its use is exemplified in contract, where, for instance, even though a contract is valid by its foreign governing law, it may be held invalid a rule of English law which is designed to protect the public interest. A similar device is to rely on the construction of an English statute as making it applicable even though the contract is governed by a foreign law. Such uses of public policy are only necessary because of the inadequacy of the ordinary choice of law rules. If these were so formulated and applied as to give due regard to the public interests of countries in the first place, as discussed above, the invocation of public policy in this sense would be unnecessary. The other consideration of public policy is concerned with justice and morality as between the parties. Normally the standpoint of choice of law is that the standards of justice of different legal systems, including the court's own law, are of equal value. The principles of justice at the choice of law level, which we have been considering, do not select as between them on the grounds of some being better than others. The fact remains that for a court its own law represents justice, and exceptionally certain foreign rules, which grossly offend those domestic standards, must be rejected.' The existence of the New York Convention does not fully safe guard in the case of the above, as per the discussion of UAE Court review and public policy.

³⁹⁶ Cockle and Hibbert, *Leading cases on the common law*, (Sweet and Maxwell, 1921) 1: 'The expression 'Common Law' is used in two senses. It means: – 1. The law derived from Custom – as distinguished from that derived from Legislation. 2. The law administered by Courts of Common Law – as distinguished from that administered by Courts of Equity – in which sense it includes statutes dealing with the law administered by Courts of Common Law.' Further 1–2, 'There are also certain trade usages which form part of the custom of merchants. The practical consequence is that general customs are judicially noticed as part of the law of the land (*Brand v. Barnett*, 3 C. B. 519, see Cockle's *Cases on Evidence*, 12); but particular or local customs, except a few which are judicially noticed, eg, the customs of Gavelkind and Borough English, must be proved when it is suggested that they apply in any case. If duly proved, such customs, whether they are local customs, or "customs of the country," such as agricultural customs (*Wigglesworth v. Dallison*, Douglas, 201; see Cockle's *Cases on Evidence*, 293), or trade customs (*Brown v Byrne*, 23 L. J. Q. B. 313; See Cockle's *Cases on Evidence*, 294), may be applied to the case and enforced by the Court, unless contrary to an Act of Parliament. But particular customs, in order to be recognised as legally valid, must generally comply with the following conditions: they must be certain and reasonable (*Broadbent v. Wilks*; *Wilson v. Willes*, see below); compulsory-consistent (*Fitch v. Rawling*, post, 4); continued (*Bryant v. Foot*, post, 4); undisputed – immemorial; but the last-named requirement will not apply to customs of the country (*Tucker v. Linger*, post, 5), nor to trade usages, for many of these of admittedly recent growth have been established (See *Godwin v. Robarts*, post, 6). The common law, using the term in its widest sense, is derived from: – I. Custom. II. Statutes. The two matters of prime importance

examples of codification that achieved this are dealt with in specific sections. They are included in such a manner as to demonstrate that important Islamic principles can be codified, per the suggested articles, thus there is no need for judges to question if the code contravenes with Islamic principles as the research has already been carried out by the author and it is this research that forms the basis for the suggested draft articles in the appendix. This reduces the need for MENA governments to create new *sharia*-compliant codes. This reduces the adjudicatory and legal risks that arise through the doctrines of ‘*ijtihad*’,³⁹⁷ ‘*ijma*’,³⁹⁸ ‘*maslaha*’,³⁹⁹ and ‘*masalih al mursalah*’,⁴⁰⁰ all to be discussed in detail subsequently. These are legal devices which a learned MENA judge may avail himself of at any time, and in contradiction to Al Tamimi’s claim that Islamic principles cannot be invoked in a MENA court.⁴⁰¹ They can and frequently are.

in respect of these are: – I. The ascertainment and proof of custom. II. The interpretation of statutes, owing to the fact that the language of statutes is not always unambiguous.’

³⁹⁷ Independent reasoning in Islamic Jurisprudence. An arbitral tribunal that is empowered to exercise the full jurisprudential tools at its disposal found in *sharia* law, such as reasoning by analogy, independent judgment and interpretation (*qiyas*, *ijtihad*), whilst placing Islamic legal principles within the appropriate modern context, weighing carefully the current public interest of both the parties to the contract with that of the state itself would derive vastly different conclusions from extremists who argue along lines based solely on a 7th century context without which to reasonably draw an analogy.

³⁹⁸ Consensus in Islamic Jurisprudence.

³⁹⁹ *Maslaha* is the Arabic word for public interest. The doctrine of public policy or *maslaha* is central in ICA Law to arbitral award enforcement.

⁴⁰⁰ W El-Malik, *Minerals Investment Under the Shari’a Law*, (Graham and Trotman, 1993) 21, “The meaning of the term *Istihsan*, which is translated by Hamilton as ‘favourable construction’, is a controversial issue. Generally, it means the breach of strict analogy for reasons of public interest, convenience, or similar considerations. Al-Karkhi (d. 340 A.H) defines *Istihsan* as follows: ‘*Istihsan* is that one should take a decision in a certain case different from that on which similar cases have been decided on the basis of its precedents, for a reason which is stronger than the one found in similar cases and which requires departure from *ijtihad* those cases.’ Further, 21, it is also a departure from analogical reasoning (*qiyas jali*) or *ijtihad*. This could be construed as a *carte blanche*. For example, 65, “Although contracts, which are not in conformity with Islamic law, are prohibited and declared invalid by Muslim jurists, economic necessity and public interest (*masalih Mursalah*) justified the recognition of certain contracts which would not otherwise be permissible. For example, the *Bai-bil-wafa* transaction, which is similar to the concept of mortgage with conditionals sale of the common law. The reason given for this departure is that the contract had been in customary use and there is need for it.”

⁴⁰¹ The transcript can be found at Al Tamimi, E., Clayton Utz 2011 10th Annual international arbitration Lecture, Islamic Influences on international arbitration transcript, November, 8, 2011.

Analysis of these four, *inter alia*, adjudicatory tools (unique to the MENA but with comparable common and civil law doctrines) has demonstrated that they are capable of being employed to justify the expansion of arbitral competence and increasing arbitral award enforcement. This means that arguments used by Islamic judges to deny award enforcement can be counter argued with principles from Islam itself, as already drafted into the HICALC by the author. One of the major risks inherent in ICA is the danger of non-enforceability of the arbitral award, due to contentions (by the losing party) related to questions of State sovereignty or *ordre public* (public policy), comparable to the Islamic doctrine of *maslaha*⁴⁰² by MENA jurists. Without harmonisation of ICA law, problems exist which decrease arbitral award enforcement for parties to arbitration clauses who fail to take into consideration national differences; the enforceability of an arbitral award in the form of a civil remedy is the *raison d'être* for arbitration, otherwise it is pointless. What gives legitimacy to the process of arbitration is the guarantee of a civil remedy enforced on the party.⁴⁰³ Any barriers to this end incur risks for parties to a contract who believe in the event of an unfulfilled contract they will receive a just financial remedy compensating them for their losses. To reduce risk, potential barriers to enforceability must be addressed and removed. This will lower risk to foreign investors in oil concession and foreign investment contracts between MENA States and European corporations and ensure streamlined transactions of ICA proceedings and law. In short, enforcement is the ultimate goal. The entire system of ICA breaks down if enforcement is undermined. Although an entire discussion is devoted to *res iudicata* and finality as

⁴⁰² *Maslaha* is the Arabic word for public interest. The doctrine of public policy or *maslaha* is central in ICA Law to arbitral award enforcement.

⁴⁰³ Muller, Sam & Mijs, Wim (eds) *The Flame Rekindled. New Hopes for International Arbitration*, (Martinus Nijhoff Publishers, 1994) xiii–xiv, by Dr Boutros Boutros-Ghali: arbitrations are binding and thus similar to courts.

fundamental doctrines in law, the relationship between custom and enforcement of arbitral awards is significant.

Custom is another common denominator amongst the three legal traditions and may work as harmonising element. Just as custom is the harmonising thread in the three legal traditions, it serves as a valuable factor in ICA and IIA. The reason is because custom has *res iudicata*. This is the case at both Roman law and Islamic law. The principles of arbitration can be traced to customary practice in the Roman Empire:

Procedure was characterised by a division of proceedings into two stages, that *in iure* before a magistrate, at which the claimant made his claim in set words, the defendant replied in set words and the magistrate added his authority to the case being sent for trial, and that *apud iudicem* or *in iudicio* before a person appointed by agreement between the parties from a list of persons kept by the magistrate, who heard the evidence and gave judgment.⁴⁰⁴

The clear similarity in the Roman procedure to the modern arbitral tribunal hearing shows the commonalities: (1) the hearing of evidence, (2) before party appointed sole arbitrator and (3) the ruling of the arbitration tribunal in the form of rendering a judgement. In its essential form, there are many elements that are still present in current practice, although there are additions to the way evidence is heard, including other technical details. What is interesting about the Roman models mentioned above is that they evolved and merged into a hybrid method in which, instead of a party-appointed arbitrator who derived authority from the parties, it was a judge who was established in authority:

⁴⁰⁴ D Walker, *The Oxford Companion to Law*, (Clarendon Press, 1980) 1079.

In civil procedure, there developed in parallel with older procedure the system of *cognitio extraordinaria*, under which the judge used his power of investigation and compulsion to decide issues between private parties. It was not based on agreement of parties but on authority, and the case might be heard by the official whose authority was invoked, or by a delegate from him, or even by settling a formula as under the older procedure.⁴⁰⁵

At Islamic law the *res iudicata* of customary usage is derived from the Sunna or Hadiths (traditions or ‘customs’ of the Prophet which are second only to the Holy Quran, the primary source of law and the literal divine word of God—as seen in Islamic tradition—but still a source of law as equally binding as the Quran where there is no contradiction). At Islamic law, the *res iudicata* of custom is derived from *ijma* (consensus). At Roman law, scholars have put forth that custom had a binding effect due to a sense of legal obligation.

The author submits that this is circuitous logic in that what the Romans constructed as custom is binding because it should be binding. In any case, custom was binding:

what converted a practice, consistently and conscientiously observed by a populace, into a legally binding, cognizable, and enforceable custom. The traditional view of legal historians is that Roman law provided an answer. The “extra ingredient” that catalyzed a mere usage into a binding custom was the sense of legal obligation on the part of communities or individuals following the practice, or what was known in Latin as *opinion juris sive necessitates*, or simply *opinion necessitatis*.⁴⁰⁶

⁴⁰⁵ Ibid 1082.

⁴⁰⁶ Bederman, see above n 7, 20.

Although there is limited historical information regarding the details of the existence of custom during the Roman Empire, custom was not left out of the practise of law.⁴⁰⁷

The reality of the legally binding nature of custom, notwithstanding the absence of historical documentation, is a well established fact:

The nearest thing we have to a theory is in Cicero, *de invent.* 2. 67, where we are told that by custom that is thought to be law which, by the consent of everyone, lapse of time has approved without the aid of statute. And he adds that there are rules of law which are certain because of lapse of time.⁴⁰⁸

The author submits that to follow examples in history where there is an established body of law that previously succeeded in fulfilling the needs and purposes of the international business community is wise and reflects best practices, for example, as the example on the custom of banking, cited elsewhere in this thesis. Since the *lex mercatoria* was in

⁴⁰⁷ A Watson, *Law Making in the Later Roman Republic*, (Clarendon Press, 1974) 170-171: 'It has been noticed, and properly stressed, that the Roman jurists never list custom among the sources of law. These juristic lists, of course, date from the Empire and it is in relation to the Empire, I think, that Thomas, reasonably, says "In Roman Law itself, mores are known to the world through, and depend for their recognition on their being expounded by the jurists". But we are, none the less, left with a problem. Why do jurists (and other writers) attribute a few – but only a few – rules to custom? In each case there must be some reason why it was not appropriate simply to rely on the authority of the jurists for the introduction of the rule. Thus in banking– I suggest in the absence of any evidence– the practice developed of one partner's paying debts incurred by the others. The practice was so regular that in time it became formalized and an action based on it became acceptable to the courts. It is thus a true example of a business custom becoming law. Its development first as business practice then as law can be envisaged without the hypothesis of juristic intervention. Though jurists might have urged the recognition of the rule by the courts, they could not have taken an active part in its formulation. Its restriction to banker's arrangements means that it had to be derived from what people did rather than from juristic theory. Similarly the extension to soldiers of the right to a *legis actio per pignoris capionem* probably followed seizures by soldiers under a claim of right. Since the circumstances in which the *legis actio* was available were set out by statute, it was difficult to make extensions to completely new situations rest upon the authority of jurists, and much easier to ascribe them to customs.'

⁴⁰⁸ Ibid 171.

essence customary law,⁴⁰⁹ the value of customary law as a harmonising thread⁴¹⁰ is given prime importance. Customary law is the basis of the *lex mercatoria*⁴¹¹ just as it is the harmonising thread traversing throughout the three legal traditions and found in the three religious traditions common to the MENA and from which many legal principles or customs have historically emerged. It allows one to navigate the labyrinth of seemingly diverse legal provisions in order to understand the deeper principles in common and to avoid the Minotaur of confusion. Customary law in the Western tradition dates back to the Roman Empire: ‘As a matter of necessity, the Western customary law tradition is a cultural and historical construct that begins with Roman law, continues with its first reception in Mediaeval Europe, and then climaxes with its later intellectual revival and transformation in the nineteenth century’.⁴¹² Indeed, custom⁴¹³ as a valid and legitimate source of law can be traced back to ancient Egypt and is thus one of the oldest and most respected sources of law, and arguably one that is universal. Therefore, customary law is the harmonising thread originating in Roman law, (if not earlier), woven into the entire fabric of the legal systems of the Roman Empire, intertwined with Islamic law, and

⁴⁰⁹ Bederman, see above n 406, 20.

⁴¹⁰ Hamilton, see above n 82, 212–213: ‘Minos’ daughter Ariadne was among the spectators and she fell in love with Theseus at first sight as he marched past her. She sent for Daedalus and told him he must show her a way to get out of the Labrinth, and she sent for Theseus and told him she would bring about his escape if he would promise to take her back to Athens and marry her. As may be imagined, he made no difficulty about that, and she gave him the clue she had got from Daedalus, a ball of thread which he was to fasten at one end to the inside of the door and unwind as he went on. This he did and, certain he could retrace his steps whenever he chose, he walked boldly into the maze looking for the Minotaur. He came upon him asleep and fell upon him, pinning him to the ground; and with his fists—he had no other weapon—he battered the monster to death.’

⁴¹¹ Bederman, see above n 406, 117: ‘The customary norms of international commerce have been a traditional part of what has been called the *lex mercatoria* and *lex maritima*, that body of law respected and followed by merchants and ocean-traders.’

⁴¹² Ibid 16.

⁴¹³ See above n 349, 5–6: ‘Presumably, the vizier and local judges based their decisions on custom. And, theoretically, custom derived from the word of the god-king and his three divine qualities of Hu, Sia, and Ma’at (Authority, Perception, and Justice). In turn, the vizier and local judges must have rationalized that the omniscient will of the king dictated local custom.’

interspersed throughout Medieval Europe thus in the form of English common law. Customary law equally carries weight in private international and public international law and forms the basis of the *lex mercatoria*. Any of these sources of law are an excellent starting point on the way to harmonisation but the *lex mercatoria* has been chosen first as it, by its nature, transcends national boundaries and jurisdictions and posits itself from the outset as an international body of law.

Indeed:

In particular, amiable composition ... whereby an arbitrator resolves a dispute by following concepts of fairness rather than fixed rules of national law, provides a decision-making procedure conducive to the development of *lex mercatoria* since it allows arbitrators to affirm norms of international trade and investment independent on national law. Shared expectations concerning international commercial practices provide an authority that lends validity to decisions based on the new *lex mercatoria*. The development of *lex mercatoria* therefore involves feedback: international businessmen conform to the norms articulated by ICC arbitrators, and ICC arbitrators confirm certain commercial practices have authoritative value as custom.⁴¹⁴

The importance of the role of custom is twofold. First, custom serves as a source of authority within the international business community (the main users of arbitration) as much as it does so within Islamic and common law. Secondly, custom is practical and transcends international borders and jurisdiction. Custom is based on the cultural values of an extant community and in this is why the *lex mercatoria* was as successful as it was

⁴¹⁴ W Craig, W Park, J Paulson, *International Chamber of Commerce Arbitration*, (Oceana Publications, 2nd Printing, 1985) Part VI, Section 35.01,1.

in the past.⁴¹⁵ Any new Rules must be equally derived from the cultural and customary values of the community from which they must achieve their authority. This is where the Model HICALC derives its strength. In order to understand the role of custom at civil law, it must be construed as one of statutory obligation. It had a well regarded role in the Roman Empire.⁴¹⁶

The *lex mercatoria* based on the foundation of custom is an excellent starting point for the harmonisation of laws. Yet, it must be noted that it is only a starting point. Not only did the *lex mercatoria* provide strong authority through custom but also:

a merchant who refused to comply with a commercial court's decision risked his business reputation, or even exclusion from important trade fairs located near the merchant courts. Good faith and equity emerged as a universal compass for the increasingly specific law merchant. New rules and instruments were shaped to meet the demands of trade, based on the principle of creating binding obligations without the formalities of the past.⁴¹⁷

Custom itself was seen as authoritative and as binding. Indeed, the *lex mercatoria*, through ICC tribunal awards, *inter alia*, is a rich source of internationally recognised legal principles.⁴¹⁸ The importance of good faith in business dealings as a keystone

⁴¹⁵ Ibid 12: 'Scholars have proposed at least two seemingly antagonistic views of the process by which members of society conform to rules. One approach has emphasised the communication of law by an elite to the governed. This "top-down" approach admits the role of feedback from the governed as a secondary mechanism for creating law, on the other hand, a "bottom-up" view has looked to the social and cultural values of the community as the ultimate source of law. This latter theory provides a more adequate explanation for the growth of the new *lex mercatoria*.'

⁴¹⁶ Bederman, see above n 71, 17: 'Our knowledge of the role of custom in Roman law – that body of jurisprudence that applied within the Roman Republic and the Western and Eastern Empires (c. 700 BCE – 700 CE) – is based on a handful of legal writings. It was these texts that were transmitted into various iterations of European Civil law as part of the Western legal tradition. From the emperor Justinian's Code some conclusions can be readily drawn, and these reflect directly on the main inquiry of the status of customary law as a positive source of legal obligation.'

⁴¹⁷ See above n 414, in Part VI Section 35.01, 2–3.

⁴¹⁸ Ibid 10: 'Nevertheless, a number of *lex mercatoria* principles do emerge from published awards. Some of these principles relate to matters of procedure and jurisdiction. Others, such as those described in

principle is paramount. This is the case in Western and MENA legal culture and in both cases the doctrine of good faith dates back to the Roman Empire and the early days of Islam.

The doctrines of (i) *pacta sunt servanda*,⁴¹⁹ (ii) customary usage as authoritative and binding, (iii) good faith,⁴²⁰ (iv) equity and (v) the burden of proof on the facts alleged to support a claim⁴²¹ *inter alia* (as discussed in the preceding section regarding universal principles) were recognised principles of the law of the *lex mercatoria*. These doctrines are common to civil, common and Islamic law. In addition to these extant universal legal doctrines, the *lex mercatoria* has another inherent strength, which is the following:

international commercial arbitration seems particularly well suited to application of the new *lex mercatoria*. Drawn from a variety of countries, arbitrators are less preoccupied with national concerns than judges, and may be expected to possess a less parochial perspective, emphasising good faith, general principles of law and the particular equities of the situation.⁴²²

Sections 35.03 (force majeure) and 35.04 (currency stabilisation), relate to substantive questions of contractual interpretation, liability, and quantum of damages. A thorough analysis of these principles of *lex mercatoria* would require a separate book. For present purposes, the reader may simply consider the following enumeration of illustrative principles that ICC arbitral tribunals have applied without reference to national law.’

⁴¹⁹ Ibid 10–11: “(i) *pacta sunt servanda*. This obvious basic principle is given particular resonance by the ICC Rules themselves, which in Article 13(5) require arbitrators in all cases to take into account the terms of the contract. This principle does not, however, permit parties to be totally indifferent to the problems of their co-contractants when significant circumstances have rendered performance difficult. ICC arbitrators are not anxious to give the proverbial “pound of flesh”. They find the *pacta sunt servanda* principle to be tempered by another rule: that of good faith.’

⁴²⁰ Ibid 11: “(ii) renegotiation in good faith. While a party may insist on its contractual rights, it would be ill-advised to refuse any discussion by a contractant harmed by substantially changed circumstances, and who may propose a renegotiation that does not fundamentally deprive the unaffected party of its advantages. Such refusal has been sanctioned by ICC arbitrators.’

⁴²¹ Ibid 11: ‘The burden of proof of facts alleged to support a claim. The principle *actori incumbit probatio* has been applied by ICC arbitrators as a fundamental concept of the international legal community.’

⁴²² Ibid 13.

Yet this very strength is a problem from another point of view. It is precisely at this point that the efficacy and utility of the *lex mercatoria* encounters limits and as a result a gap in the law occurs. The relevance of the *lex mercatoria* regarding transcending national legal processes (for example as espoused by the preamble of the Washington Convention)⁴²³ can be seen here:

There is a similar debate focused on the substantive law governing the contract of the legal relationship between the parties. The arguments in the debate may sound familiar. Why should parties to an international arbitration be required to choose a substantive law of a particular nation, one that is probably more suited to domestic transactions than international transactions? Why shouldn't party autonomy mean that parties can choose to have their substantive rights governed by customary commercial law or general principles of law, or transnational rules of law? These may include nonlegal standards that are generally considered part of the *lex mercatoria*, or the law merchant.⁴²⁴

This quote represents the relevance and justification of a harmonised law to the MENA. The value of the *lex mercatoria* in fulfilling this transcending function over national processes is well established: 'Nonetheless, just as there are types of arbitration where the actual place of arbitration has a less important role, so too there are occasions when the *lex mercatoria* can properly replace or supplement a national legislative law.'⁴²⁵ The author agrees with the general principle of allowing the *lex mercatoria* to fulfil this role, however, as will be demonstrated, there are gaps in the *lex mercatoria*. Although it may appear that the *lex mercatoria* served as a model prototype, the author submits that this is

⁴²³ See above n 13, 8.

⁴²⁴ See above n 140, 60.

⁴²⁵ Ibid.

not the case. The *lex mercatoria* is an excellent model, but it is one that has gaps nevertheless. In consideration of the fact that court intervention in ICA can occur at different stages in the arbitration process, to have a law that does not take into consideration the national or parochial concerns of judges, whilst at the same time inadequately addressing or altogether bypassing these concerns is a problem, for example as in Al Tamimi's approach. Not only is it ineffective to deny legal realities, but it can be the cause of higher ICA costs due to multiple appeals, or lack of enforcement which is tantamount to increasing costs to the investor. Indeed, the cost the investor pays for not structuring arbitration clauses that take into consideration national laws and judicial sensibilities in the MENA is exceedingly steep, in regard to tangible and intangible losses. The reality of the *lex mercatoria*'s strength to transcend national legal processes including the domestic concerns of judges is both a strength and a weakness of the *lex mercatoria*. It is not the only weakness: 'Many practitioners and commentators have criticized the *lex mercatoria* on a number of grounds, but especially on the ground that it is a concept too vague and uncertain to apply.'⁴²⁶ The author agrees, and this is another justification as to why the HICALC, with its specific provisions (as refined by future drafters) can fill a major gap in the *lex mercatoria* whilst availing itself to the strengths therein by adopting many of its general principles.

⁴²⁶ Ibid. Further, 63: 'As noted above, many practitioners resist any reference to the *lex mercatoria*. In drafting a contract, they want a law that is accessible, clear and has an established jurisprudence that can provide some amount of certainty. Arbitrators, as well, even when using some transnational rules to reach a decision, have sometimes been reluctant to say they are relying upon the *lex mercatoria*.' The gaps and weaknesses in the *lex mercatoria* are well known.

A well drafted HICALC by future drafters is therefore a stronger and more effective law than the *lex mercatoria*⁴²⁷ because it does address national concerns of domestic judges whilst transcending them, in favour of ICA. It is both international and national at the same time. In the past, attempts at harmonisation were made but a lack of uniformity led to an awareness of the new *lex mercatoria*.⁴²⁸ Yet, this new *lex mercatoria*⁴²⁹ had limits in what it had to offer. Notwithstanding the inherent limits of the *lex mercatoria*, principles drawn therefrom should be integrated into the HICALC.

11 *Precedent or stare decisis*

The matter of precedent has been raised in the introductory sections of this thesis and it is elucidated here in regard to the MENA context. The author submits that the

⁴²⁷ The *lex mercatoria* is not the only medieval body of customary usage. The financial and banking organisation of the Knights Templar is also another historical example of customary law dealing in financial transactions in medieval times. The Knights Templar formed the first credit payment and created the system of modern banking. It was the Knight Templars who issued letters of credit, for example to decrease the need to carry gold. Refer to Demurger, A., *The Last Templar: The tragedy of Jacques de Molay, Last Grand Master of the Temple*, Profile Books Ltd, 2005, 20–21. Considering that many of the Templars have their origins from many different countries and from both Common Law and Civil law jurisdictions, the existence of a relatively international financial and banking system attests to the value of customary law in forging harmonisation in the interests of more effective international commercial dealings.

⁴²⁸ See above n 414, in Part VI Section 35.01, 1: ‘Attempts at harmonisation of international business law, as well as application of “choice of law” rules, have failed to provide the simplicity desired by the business community. This lack of uniformity in commercial law has led to the emergence of international trade norms referred to as the new *lex mercatoria*, or “law merchant.” The medieval *lex mercatoria* was absorbed into national laws long ago. Increased transnational trade and investment, however, has renewed the legal community’s awareness of the *lex mercatoria*’s potential role in settling international business disputes. ICC arbitration provides a mechanism to further the development of a new *lex mercatoria*.’ The role of custom in arbitration shall be discussed further in subsequent sections. Furthermore, at Part VI Section 35.02, 3: ‘ICC arbitration may be said to contribute to the unification of trade law to meet the needs of international business through the development of an autonomous set of international norms. The customs of the business community may combine with general principles of law to create a system of commercial self-determination. Supranational law based on international customs affords greater flexibility than either national legislation or international conventions, since the domestic legislative process inevitably brings into play interests removed from those of international commerce.’

⁴²⁹ Ibid 2–3. The basis of the *lex mercatoria* is the following: ‘To encourage trade and thereby increase tax revenues, medieval sovereigns permitted merchants to regulate their own affairs so long as they did not impinge on local law. The feudal law concerned itself with land ownership and serious crimes, but manifested a laissez-faire attitude with regard to merchant trade. Sovereigns granted franchises for merchant towns, with special commercial courts granted jurisdiction to settle disputes between merchants, according to their own experience and common trade practices.’

doctrine of precedent, or *stare decisis*, is a universal one. As such, it should be a guiding principle in the creation of the HICALC. The relevance of precedent in consideration of the development of ICA and IIA in the MENA context is important because not only does it address the matter of the inconsistency in the development of these fields of law but it also addresses the unpredictability which in the MENA is exacerbated. Thus reform to the use of precedent resolves the matter of inconsistency and gives a theoretical basis for the development of ICA and IIA particularly in consideration of the manner they are practised in the high adjudicatory risk climate of the MENA. This is particularly relevant in consideration of the unpredictability of the early oil concession disputes and recent ICSID arbitrations. The doctrine of precedent is more appropriate to ISA or IIA disputes, due to its acceptance as a guide in ICSID, but it should be considered for ICA as well. The author takes the Mixed Courts of Egypt as a guide in how they constructed and applied the doctrine of precedent:

To develop their jurisprudence the judges continued to analyse closely the subject matter in issue, and relied on their own previous decisions. The momentum of judicial analysis was thus maintained, and the principle of persuasive precedent established. There was no rule that precedent bound a court inferior or equal, but it became generally accepted that previous decisions carried great weight and were usually followed, although they were open to critical analysis and adaptation to changed circumstances.⁴³⁰

It must be remembered that they chose to bind themselves to precedent. The example of the Mixed Courts in the matter of interest should be followed by arbitral tribunals. Their example reflected a level of flexibility adaptable to the nature of ICA but it was still *res*

⁴³⁰ Hoyle see above n 180, 47.

iudicata. The problem of inconsistency in IIA has been well established. The inconsistency in IIA has contributed to inconsistency and unpredictability across the board in most forums of international arbitration. The increasing inclusion of precedent through appropriate HICALC articles is a valuable remedy to the problems of inconsistency and unpredictability. The purpose of this section is to show that precedent is a universal doctrine and to demonstrate why it should be included in the HICALC.

The doctrine of *stare decisis* or precedent is an ancient doctrine that can be traced back to ancient Egypt⁴³¹ and did not derive solely or exclusively through the common law tradition.⁴³² This refutes any scholarly allegations that certain legal provisions are solely Western and incapable of being harmonised or universalised. The author submits that the doctrine of precedent is a universal one and can be harmonised with Eastern or Western legal systems and provisions. Yet, it must be noted that the connection between the doctrine of precedent and that of custom (which the author submits is the basis of the English common law) is a logical one. The underlying principle upholding precedent is that a decision made by a judge regarding previously decided matters of a similar nature cannot deviate in principle from those made by previous judges. This is not so unlike the nature of custom in which decisions or procedures are followed as they always have

⁴³¹ See above n 349, 20: ‘... Egyptian law was an integrated system of statute, precedent, practice and, to a limited extent, religious principle.’ (T.G.H. James, *Pharaoh’s People: Scenes from life in imperial Egypt* 62 (1984)).

⁴³² Ibid 24: ‘No civilisation has ever been so attached to tradition as the ancient Nile dwellers.’ Further, 24: ‘This reverence for the past influenced the development of law in at least two ways that are actually interconnected. First, judges kept records of their legal decisions in the vizier’s archives so that they could consult them later as precedent. Consequently, and this is the second result of the Egyptian veneration for tradition, Egyptian law was very slow to evolve. The convention of vigorously following precedent meant that laws tended to remain in force without modification for extremely long periods of time.’ (See Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in *The Legacy of Egypt* 294 (J.R. Harris ed. 1971) (Noting that, in the Old Kingdom, the ‘king was in supreme control of legislation, but laws were conceived as expressions of ideal justice. A law promulgated...remained in force so long as it was neither modified nor abrogated...’’).

been. Both the concept of *stare decisis* and that of custom rely on tradition.⁴³³ Not only is the logical link uniting precedent and custom with tradition made clear, but this is connected with the appearance of justice being served, which is implied in the advice given to the vizier in question.

Notwithstanding the critical, comparative and analytical discussion that will follow, the following facts regarding IIA must be made known in regard to the nexus of *stare decisis* and IIA:

Investment arbitration has to be understood as a process with its own culture and dynamics. Academic critics of awards often do not appreciate this particular context and as it influences the outcome – both of the award itself and its reasoning. Investment arbitration is, first, not done by a permanent court. There is therefore less of a pressure within the tribunal towards internal consistency as would or should exist within a standing international court where institutional and personal relations are established and where the court (and its support staff) have developed their own culture, traditions and conventions.⁴³⁴

⁴³³ Ibid 66–7: ‘Egyptian law was slow to evolve and adhered vigorously to precedent. One factor that contributed to both (ie, gradual legal evolution and high regard for past decisions) was the typical ancient Egyptian reverence for the past. Gardiner describes this reverence as a cultural trait that manifested itself as “a conservatism of expression without parallel elsewhere in the world. No other people has ever shown a greater reverence for what was by them termed the ‘time of the ancestors’ ‘the time of the god’, or ‘the first occasion’. Occasionally this love of the time honoured and the typical led to downright falsification.” To some extent, then, partially as a consequence of this esteem for the past, judges relied on both custom and precedent to decide their cases. It seems likely that, at certain periods, they also retained written copies of each judicial opinion. Litigants in the New Kingdom (c. 1552–1069 B.C.) occasionally cited the “law of the Pharaoh” as authoritative precedent. Thus, the Egyptians discovered the utility of following precedent, a concept that we today referred to by the Latin term *stare decisis*. The vizier Rekhmire was explicitly advised to follow the precedents available ... for he who must practice justice before all men is the vizier ... Do not act as you please in cases where the law to be applied is known ...’

⁴³⁴ P Kahn, T W Walde, *Les Aspects Nouveaux du Droit des Investissements Internationaux*, Martinus Nijhoff Publishers, Lieden, 2007, The specific nature of investment arbitration, introduction, international investment law emerging from the dynamics of direct investor–State arbitration, 50.

The implications of these inconsistencies to the overall body of dispute resolution were presented in the introduction. The rest of the chapter is devoted to demonstrating why this is dangerous in terms of theory and practice and will provide recommendations to correct this inherent reality in the nature of international arbitrations. Yet, in consideration of the previously mentioned fact that case law from IIA distils into best practice, the author argues that this can and should ideally lead to constancy, with the help of harmonisation.

The doctrine of precedent is derived from the principle in the Latin maxim: *stare decisis et non quia movere*, to stand by that which is decided and not disturb settled matters. This fact alone gives rise to the insight that civil Roman law has given of its rich legacy to English Anglo-Saxon law. Even at civil law jurisdictions in which courts rely on statute interpretation as the basis for their decisions in current cases, previous decisions are not ignored. Decisions made at civil law jurisdictions are referred to, if not in an official capacity (which is often the case), then in an academic capacity. The principle of *stare decisis* is one such area of law related to ICA disputes that appear before courts, where the civil and common law traditions converge in principle and in practice. Notwithstanding that fact, the aforementioned convergence is not without certain important limits, to be discussed in subsequent paragraphs. Many doctrinal matters that give rise to practical problems in ICA are as yet undecided.

It is a well established fact at common law that precedent (or *stare decisis*), as understood in the common law tradition, in which a judge, when stating the *rationale decisis* on a ruling of any extant case, must take into consideration previous cases, decided by previous judges and cannot deviate drastically from a previously decided case if the material facts and principles of law invoked by that case are similar. This is not so

in ICA. Indeed, by virtue of the nature of arbitration as a flexible proceeding that allows the parties to decide, precedent is difficult to achieve. Yet, taking into consideration learned opinions of scholars, the absence of precedent is a problem for two reasons. The first is that without consistency, predictability and certainty in how arbitral tribunals derive their methods of decision and thereby arrive at those decisions that can provide clear indications of future decisions in like cases, the risk to investors in terms of adjudicatory, country, legal and political risk is high. This results in questioning the merits of arbitration. The second is derived from the first reason and is a direct result of the unpredictability of future decisions of arbitral tribunals due to a lack of the requirement of precedent in deciding ICA and IIA disputes. The lack of precedent in arbitral awards casts doubts in the minds of common law (and other) judges, causing them to question the awards. If awards are decided in a manner that is inconsistent with other awards, this goes against the natural intuition of common law judges, who must rely on precedent as a means of legal reasoning to reach their decisions. Therefore, the author submits that when these awards are brought before common law judges, by virtue of legal training, there will be less legitimacy for these arbitral awards in the minds of those who undergo rigorous training to conform to legal reasoning derived exclusively by analogy and through the guidelines of *stare decisis*, *inter alia*. The well-established doctrine of precedent ensures justice and fairness are served on the basis that similar cases are decided by the same standard, but, the author submits that without precedent, the question (consciously, or as a subconscious result of rigorous training) is, how can we be sure justice has been served?

Precedent must extend beyond either the doctrines of comity or of *ius cogens*. Just as precedent at common law does not prohibit judges from exercising intelligent independent judgement on each and every case that comes before them, so it would not restrict arbitrators from working within the flexibility agreed upon by the parties. The principle behind this line of argument is that just as the *lex mercatoria* succeeded and just as customary usage is an international and universal principle of law that not only works with parties of different cultural backgrounds but works with two parties of the same background; it can give rise to the same solution in case A as it would in case B if two other parties of the same background but in another country, had the same problem. The point is that there exist universal principles and clear solutions to common problems. Custom is based on precedent. Arbitration is based on custom. To oversimplify, arbitration must be based on precedent. The absence of precedent or rather, the absence of uniform standards and predictability from jurisdiction to jurisdiction and arbitral institution to arbitral institution creates uncertainty. This uncertainty undermines ICA and creates legal risk.

Inherent bias built into the system⁴³⁵ is not the only cause for mistrust. The unpredictability of the outcomes of similar awards, such as *Sapphire*, created problems in trust as well, eg:

There is an obvious change of direction in this award. The previous awards had stated the lack of sophistication of the national laws as the reason to look elsewhere. The *Sapphire* Award, however, concentrated on the policy justifications for not applying the host state's

⁴³⁵ Sornarajah see above n 387, 23 'If international commercial arbitration is to escape from the charge of bias, it should dismantle the existing structure which is based on doctrines associated with neo-colonial efforts at the preservation of economic dominance and move towards more acceptable standards which seek a balance between the interests of capital exporting states and those of capital importing states.'

laws thus seeking to universalise the proposition that, however adequate the host state's laws may be to deal with the problem, the foreign investment contract, by nature, is subject to 'general principles of law'. The need for the change of tack was simply that resource exporting states had begun enacting laws governing the exploitation of their resources and it was no longer possible to say that the host state's law was not applied because it lacked sophistication to deal with the problems raised by the contracts for the exploitation of natural resources. The Award dismisses the relevance of such local laws with the casual observation that they are 'often unknown or badly known' to the foreign investor – a strange proposition indeed for as a general principle of law, legal systems do not permit an alien who enters a state to plead ignorance of its laws. There seems to have been a great deal of selectivity in the use of general principles.⁴³⁶

Indeed, though it is argued that domestic law, under any circumstances, should *not* be followed in ICA, and that instead a universal law that harmonises amongst the three legal traditions relevant to the Middle East, (common, civil and Islamic law), should be the guide in order to remedy the situation of bias, mistrust and unfairness. Future scholars ought to examine more of the principles of law which are common to these three traditions and can inform a harmonised ICA code. The argument that early ICA proceedings fostered mistrust and damaged credibility in the entire system has been established. The first reason given has to do with the inherent nature of the system. The second reason has to do with the absence of precedent. This lack of predictability due to an absence of precedent in arbitral awards together with the problem of bias compounds the matter of mistrust. Not only were three landmark cases decided differently and on

⁴³⁶ Ibid 20.

different grounds, but an important case after that deviated⁴³⁷ from an important case before it. This lack of consistency and precedent continues to contribute to lack of predictability and mistrust in ICA. More than one scholar has raised the absence of precedent as a cause for mistrust.⁴³⁸

One of the benefits of precedent is that it contributes to enforcement.⁴³⁹ Yet, precedent alone, in the context of investor–State arbitrations is not sufficient in consideration of the distinguishing features of these types of arbitrations.

⁴³⁷ Ibid 22, ‘The reaction to Texaco was not uniform. Though the arbitral tribunal in *Company Z v. State Organisation ABC* followed Texaco, the Aminoil Award, made by a distinguished tribunal which consisted of Professor Paul Reuter, Professor Hamed Sultan and Sir Gerald Fitzmaurice contained hardly any reference to Texaco. Aminoil, in presenting its arguments to the tribunal, had relied heavily on principles and authorities that support the theory of internationalism. It had relied on the principle of *pacta sunt servanda* and on awards such as the one in Texaco. The tribunal rejected these arguments, holding that whilst it may be possible that a state could agree to bind itself not to nationalise the investment ‘during a limited period of time’, it could not do so for a substantial period of time so as not to take into account the economic and social progress of the national community. It thus struck at the scope of the stabilisation clause which is one of the bases on which the theory of internationalisation rests. Existence of awards such as Aminoil show that there is no consistent authority supporting any uniform principles regarding the theory of internationalisation and that arbitral awards do not support a single coherent thesis in such a way that an argument as to the existence of supranational principles could be built up on the basis of these awards.’ *Company Z v State Organisation ABC* can be found at (1983) 8 YCA 94. The *Aminoil* award can be found at (1982) 21 ILM 976. *Texaco* may be found at (1980) 74 AJIL 134.

⁴³⁸ T Cheng ‘Precedent and Control in Investment Treaty Arbitration’ in Andrea Bjorklund, Ian Laird, Sergey Ripinsky, (eds), *Investment Treaty Law, Current Issues III, Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law*, (British Institute of International and Comparative Law, 2009) pp 149–82, 151, 150:

‘In many investment treaty arbitrations, parties have either unilaterally published the awards or consented to the administering arbitral institution publishing the awards. With disclosure comes public scrutiny. Because international investment law, ie the international legal principles and rules relevant to foreign investments, is a rapidly developing field, it is inevitable that arbitrators occasionally render contradictory awards. These conflicts have raised urgent questions about the extent to which awards are bound by a system of precedent, and, more broadly, whether international investment law is stable and predictable. International arbitrators have acknowledged that these issues may influence both the actual legitimacy and the public’s perceptions of legitimacy of investment treaty arbitral awards, and even international investment law itself. Academics, practitioners and arbitrators are now accordingly actively engaged in discussions to fill this *lacuna*.’

⁴³⁹ Ibid 155: ‘Finally, precedent improves recognition. The rules of precedent provide criteria: (a) for judges to appraise whether a prior decision should be upheld, reversed or applied; (b) for scholars to evaluate judicial decisions and make recommendations to improve the law; (c) for practitioners to determine which decisions to rely on in their advocacy; and finally (d) for the public to appraise the propriety of each judicial decision and the operation of the entire judicial system itself. When a judicial decision has complied with the rules of precedent, that decision may have a constitutive and developmental effect on the law, because it binds future disputes and may cause citizens to adjust their actions in reliance with that decision. It may also have a legitimating effect on the law when the various actors in the system

Precedent is important for creating certainty, predictability and legitimacy.

Notwithstanding, without harmonisation guiding ICA, the creation of precedent is nearly impossible. Precedent requires consistency in interpreting the same law. In consideration of the flexible nature of arbitration to combine one or many laws in any extant proceeding, the possibility for the existence of a *corpus* of consistent and clear precedent guided by *rationes decidendi*⁴⁴⁰ rather than *obiter dicta*⁴⁴¹ is impossible. The lack of precedent contributes to a climate of mistrust. Indeed, ‘given that international investment law now principally develops through case law, the precedential value of each decision, award, and order, is right or wrong, tremendously significant’.⁴⁴² The fact is that modern international investment law is developed out of cases and less from treaties.⁴⁴³ Arbitral tribunal decisions of investment treaty law are establishing international law through decisions on the matters raised by the cases before them.⁴⁴⁴ Arbitral tribunals are not only well-suited to decide on questions of public international law, they are creating international treaty case law which is referred to as if it were formulated as *stare decisis*.

determine that the system is operating properly. Conversely, where a judge has deviated from the rule of precedent, actors may reject that judge’s claim to constitute the law and anticipate future disputes concerning whether the incorrectly decided point of law should be rectified.’

⁴⁴⁰ Latin for “the rationale of the decision” and a fundamental principle upon which the case or the decision stands, as distinct from *obiter dicta*.

⁴⁴¹ Latin for “a comment said in passing” by a judge and included in the body of the court opinion but not forming a necessary part of the court’s decision.

⁴⁴² Commission, P Jeffery *Precedent in Investment Treaty Arbitration*. *Journal of international arbitration* 24(2) 129–58, (Kluwer Law, 2007) 132.

⁴⁴³ Kahn, see above n 434, 46-47. ‘... Modern international investment law develops now mainly out of cases, and less out of treaties. Treaties may provide a jurisdictional basis, a structure of argument and major concepts to start and categorise the required more detailed line of enquiry, but the way treaty language develops into operative law – ie specific principles and rules governing the way tribunals decide – is now mainly a matter of emerging case law. This is the normal way law develops – with codifications either laying a foundation of concepts and structure of arguments at the beginning or, towards the end, collecting and restarting evolved case law. Legislation by a legislator sets the scene and opens the game, so to speak; judicial law-making then takes over the game and develops the specifics of law, sometimes by itself, sometimes in the interaction with the legislators. Once set in motion, judicial law making is not easy to stop or interrupt as the political capital investment necessary for legislation by treaty, in particular multilateral treaties, is hard to mobilise.’

⁴⁴⁴ Commission, see above n 442, 132 in footnote.

‘In order that an opinion may have the weight of a precedent, two things must concur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*.’⁴⁴⁵ Although in international law precedent is not binding, it has become customary to rely on it.⁴⁴⁶ The nature of the common law as that of the doctrine of *stare decisis*, is more flexible in reality than what is taught in constitutional law courses or in a basic understanding of the common law since,

judge-made law (here tribunal-made law) has a tentative, experimental character – if a rule developed does not work out and is rejected by the relevant professional communities, it can be given up and forgotten. If the rule developed works and finds support, it will be followed, with broadening support and acceptance. Eventually, when rules and principles are no longer seriously contested and adopted by tribunals as established truth, arbitral jurisprudence, as any judge-made law, will have become “customary international law”. Treaties can correct, modify and attempt to redirect the flow of jurisprudence; treaties however, take much more time and political capital; they cannot develop the specificity of arbitral judgements and they are much harder to correct. Arbitral jurisprudence can be compared to a competitive market: various solutions to arising interpretative challenges compete for attention and acceptance; there is experimentation going on. The most persuasive solutions will generate a momentum that leads to a “jurisprudence constant”.⁴⁴⁷

⁴⁴⁵ Ibid 134.

⁴⁴⁶ Ibid 134.

⁴⁴⁷ See above n 434, pp 46–7.

The nature of common law or judge-made law (aside from the exercise of discovery) makes it well-suited to the nature of international arbitrations.⁴⁴⁸ As mentioned, in the MENA context, harmonisation with civil and Islamic law in the past left out the common law. The above quote can be read in several ways. The first is that the common law is similar to customary law, and customary law is a source of law within Islamic law and a recognised and binding element within Islamic law. Therefore, the harmonisation of common law with Islamic law is not difficult to conceive. Secondly, the flexibility required in international arbitration necessitates a legal method that is flexible. Finally, the experimental consideration providing best practices is practical and should be valued. It is necessary to learn from the lessons of the past. The HICALC recognises custom and best practices and it allows for party flexibility.

E *Procedural Law*

In regard to procedural law, the matter of *compétence de la compétence* would fall under this category because the matter of competence deals with the right of the arbitral tribunal to hear the dispute- the jurisdiction of the arbitral tribunal to decide on its jurisdiction. This is a matter of procedure. This is not a substantive matter of law pertaining to matters raised in the contract- even in cases where there is a dispute regarding the arbitration clause or the seat of arbitration and that clause has been written into the contract, the matter of *compétence de la compétence* still falls under procedural law.

F *Substantive Law*

⁴⁴⁸ G Badr, *Islamic Law: Its Relation to Other Legal Systems*, *The American Journal of Comparative Law*, Vol 26, No 2, Spring 1978, at 189, regarding Islamic law: 'It may therefore be called a lawyer's law if common law is a judge's law.'

Substantive law deals with matters that arise by way of the contract and governs the merits of the case regarding the legal framework from which the tribunal should arrive at its decision. In regard to the substantive law, the matters of expropriation, public policy and sovereign immunity should fall under substantive law. The author submits that the matters of interest and precedent in the unique context of international arbitration in the MENA can fall into both categories. There is an overlap. In the case of precedent, it is a matter of procedure for judges at common law jurisdictions to follow precedent, first as a matter of procedure. Notwithstanding, precedent would also fall in the category of substantive law because the matters that arise in a case require complex legal analysis by the judge, including thinking by analogy and familiarity with the *rationes decidendi* of previous like cases. This falls within the confines of the substantive law of the dispute. Precedent (in consideration of its current absence to a large degree) ought to be integrated in international arbitration, at the very minimum in ICSID arbitrations, if not as a hard rule or black letter law, then it should be a matter of procedure that precedent be engaged to guide arbitral tribunals in referring to past cases for the sake of consistency. It is a procedural matter first, since it would have bearing on the law governing the manner by which arbitral tribunals must reach their decisions. Yet, it is also substantial in that it deals with substantive matters of law that arise through the course of the dispute or contract and upon which the arbitral tribunal must decide upon in relation to the contract or dispute and beyond the procedural considerations of going about the decision making process. The subject of interest is a concern of the substantive matters arising from the dispute or the contract. Yet, in this case the matter of interest must also be considered procedurally since certain guidelines are given to restrict the amount on one hand, and to

prevent the amount from being exaggeratedly excessive on the other hand. A major concern with interest in the MENA is that it is either forbidden or excessive. These are two extremes and a policy and procedure should be formulated to deal with this matter both procedurally and substantively. Additional to this is the manner by which interest is determined, in order to raise the possibility that an award with interest can be enforced in the MENA in consideration of public policy considerations; as a matter of procedure. This is more applicable to the case of the United Arab Emirates, as the cases cited demonstrate, than the case of Egypt which has a more liberal law.

The following principles should be taken in consideration as foundational to forming the backbone of the HICALC by the drafters and each one is discussed in a separate chapter. They are (1) *compétence de la compétence*, (2) expropriation, (3) interest, (4) public policy, and (5) sovereign immunity. Included within sovereign immunity is the important distinction between an act of State and a commercial act, or *acta gestionis* and *acta imperii*, respectively, as well as the matters of both immunity from jurisdiction and immunity from execution. These five areas emerged as thematic categories through the grounded theory method, a method of social science research. They have each been found to pose significant problems to ICA law and practice in the MENA context and are relevant.

G The Treasure Map to Enforcement

In consideration of the fact that the purpose of the HICALC is to increase arbitral award enforcement, a map of the path to enforcement is delineated. The purpose of this section is to express the theoretical foundation underpinning the comparative analysis.

The areas of procedural and substantive law related to international arbitration proceedings that have been found to be the most relevant to the doctrinal matters affecting ICA are closely examined. Each of these procedural or substantive law matters give rise to problems on the path to enforcement, and these dangers reflect significant gaps in the procedural and substantive laws and doctrinal matters that arise in the course of an arbitration proceeding. Proposed reforms to each of these problems, based on the comparative analysis method and based on universal or general principles is the basis for recommendations that provide Draft Provisions which are incorporated into the HICALC to address them. There is a logical timeline regarding the timing of many of the problems that can occur within any particular international arbitration proceedings. This timeline is explained chronologically for the purpose of clarity. An arbitration proceeding begins with a breach of a contract in which the arbitration clause (if said clause is included) is activated, or in its absence, one that a party to the contract may suggest at the commencement of arbitration. At this stage of the alleged breach of the contract, the doctrine of *pacta sunt servanda* (or rather lack thereof) is invoked and therefore becomes relevant to the substantive law. Expropriation is a serious matter related to the breach of a contract and is a matter which in many cases leads to a breach of contract due to the nature of investor–State contract disputes and disputes dealing with oil or other mineral concessions or the property of the investor in the host State, *inter alia*, eg assets. From this stage, at which the decision to arbitrate reaches the point of no return, the selection of arbitrators is the next procedural element that gives rise to problems in the form of bias challenges. Bias challenges can occur after the award has been decided, but they are based on the choice of arbitrators therefore, logically, discussion of bias challenges would

be most appropriate at this stage. Once the tribunal has been composed, and in the event of the ever ubiquitous jurisdictional challenge, the next arbitral proceeding would be the decision on its competence, at which point challenges to competence and jurisdictional challenges may arise, creating another pitfall. Once the arbitral tribunal begins the decision-making process, the doctrine of precedent (or lack thereof which is more appropriately realistic) is the next pitfall, together with questions of whither interest and how to calculate it. At the next stage, after the tribunal arrives at a decision, if it has been fortunate enough to establish its competence, would herald the next step, which is the recognition of the award. At this stage appeals may be made and more bias challenges may arise. It is at this stage that corruption may be an element.⁴⁴⁹ Corruption can occur at any stage but logically if it happens before a judgement is given the odds are higher in favour of the losing party. This is usually the stage when court intervention is activated.

In certain jurisdictions such as the United Arab Emirates, court review is automatic.⁴⁵⁰ The absence of the doctrine of precedent is an additional problem. Another more technical conceptualisation of the order of proceedings within any extant arbitration, in a general sense, is the following: (i) initiation, (ii) constitution of the tribunal, (iii) pre-hearing stage, (iv) preliminary hearing, (v) written phrase and gathering of evidence, (vi) hearing on the merits, (vii) scheduling, (viii) witness testimony, (ix)

⁴⁴⁹ The losing party may attempt to blackmail the arbitrator by making phone calls and recording them, the implications of this are discussed in detail in S Luttrell, *Bias Challenges, The Need for a Real Danger Test*, (Kluwer Law, 2009) 3. Additionally, for a discussion on corruption outside the scope of this research please refer to A Sayed, *Corruption in International Trade and Commercial Arbitration*, (Kluwer Law International, 2004).

⁴⁵⁰ For a discussion on the implications of this, refer to M B Ayad, *A Harmonised International Commercial and investment Arbitration Law Code (HICALC) Regulating Judicial Review of Investor–State Arbitration Disputes Can Uphold res judicata of Arbitration Awards and Tribunals from Undue Appeals and Annulment due to Court Edit* Vol XV of the *International Trade and Business Law Review* December /January 2011 issue.

experts, (x) pleadings, and (xi) making of an award.⁴⁵¹ After the making of an award, the matters of recognition, enforcement and execution are activated.

Employing a comparative analysis of the three traditions to bring forth harmonised general principles of law distilled from the three traditions and acceptable to all three, allows these pitfalls of adjudicatory risk to be better navigated and mitigated. Five sections, each dealing separately with the matters of expropriation, jurisdiction challenges, interest, public policy and sovereign immunity will elucidate these matters more closely.

H Court Intervention

A major premise foundational to this work is that notwithstanding any supportive roles, in general, court intervention should be avoided insofar as possible in connection with ICA,⁴⁵² in consideration of the inherent nature of international business as transcending national borders and national jurisdictions.⁴⁵³ Court intervention poses adjudicatory risk. The author submits that for an investor to encounter court intervention at any stage in an arbitration proceeding and particularly in the MENA context is very

⁴⁵¹ C Buhring-Uhle, *Arbitration and Mediation in International Business*, (Kluwer Law International, 1996) 94-109.

⁴⁵² See above n 448, in Part VI Section 35.06 at pp 12–13: ‘Party autonomy, or freedom of contract plays an important role in the creation of these norms. When private parties regulate their own legal relationships, the State has in essence delegated to individuals the power to establish law, within certain limits. Party autonomy allows the international business community to create its own regulatory environment through contractual interaction, minimising the impact of national law. Moreover, by means of contract, the business community can establish adjudicatory bodies both to interpret and apply a supplementary law based on non-national commercial custom. Standardized contracts, seeking to crystallize customs and practices existing within a particular trade or commercial sector, have an important role to play in elevating these norms to a higher level of authority. When used frequently within a given commercial sector, these “self-regulatory” standard contracts may provide stability that transcends a particular transaction and create a type of customary law. Most national courts allow contracting parties to choose a substantive national law to supplement contractual stipulations. National attitudes vary, however, as to the extent of this contractual power to choose an applicable national law.’

⁴⁵³ *Ibid* 1: ‘International business transactions by definition implicate the interests of more than one national legal system. These different legal systems may produce contradictory regulations that distort the flow of international commerce and investment.’

much akin to gazing upon the hideous countenance of the snake-haired Gorgon monster⁴⁵⁴ that is Medusa.⁴⁵⁵ Problematically: ‘Finally, even if no application to set aside has been filed, the ruling of the arbitral tribunal remains subjected to the control of the enforcement of the court. Wenger thus correctly qualifies the competence/competence of the arbitral tribunal as relative.’⁴⁵⁶ This raises the doctrine of *res iudicata*. The parties to the dispute must then contend with court review of public policy or even sovereign immunity as doctrinal concerns and pitfalls on the path to enforcement. Arbitral tribunal competence must be expanded by minimising court intervention except where it reviews procedure in accordance with the New York Convention. Court intervention implicates precedent which again, in the case of courts dealing with arbitrations as with arbitral tribunals, the absence of precedent is a problem.⁴⁵⁷ However, it is a bigger problem for tribunals than for courts because at least at common law jurisdictions, courts must adhere to precedent in arriving at their decisions. A well drafted HICALC that is implemented in

⁴⁵⁴ E Hamilton, *Mythology: Timeless tales of gods and heroes*, (Grand Central Publishing, 1942) 200: ‘Medusa was one of the Gorgons. And they are three, the Gorgons, each with wings and snaky hair, most horrible to mortals. Whom no man shall behold and draw again the breath of life, for the reason that whoever looked at them was turned instantly into stone.’ The only way that Perseus could slay the Medusa was to look in a mirror, which served as a shield, rather than gaze at her horrible face and strike her directly.

⁴⁵⁵ See above n 367, at 214: ‘From the investor’s perspective, this is not an attractive solution. Rightly or wrongly, the investor will fear a lack of impartiality from the courts of the state against whom it wishes to pursue its claim. In many countries an independent judiciary cannot be taken for granted and executive interventions in court proceedings or a sense of judicial loyalty to the forum state are likely to influence the outcome of proceedings. This is particularly so where large amounts of money are involved. In addition, domestic courts may be bound to apply the local law even if it is at odds with international legal rules protecting the rights of investors. In fact, in some countries the relevant treaties may not even be part of the domestic legal order. Also the ordinary courts may lack the expertise to deal with the sometimes highly technical questions of international investment law.’

⁴⁵⁶ See above n 362, 2007, at 385.

⁴⁵⁷ This point and the implications thereof are discussed at length in M B Ayad, *The Quest for the Holy Grail: A Harmonised International Commercial Arbitration Law Code (HICALC) in investor-State arbitrations in oil concessions and foreign investment treaties and agreements* Edit Centro Internacional de Arbitraje, Mediacion y Negociacion Instituto Universario de Estudios Europeos, Universidad San Pablo Madrid, Arbitraje, Revista de Arbitraje commercial y de inversiones Volumen IV 2011, March/April, pp 335-381, 20 March, 2011. The author was awarded a prestigious award together with a cash prize of 6000 Euros.

the near future is the shield that allows the investor to battle the Gorgon that is court intervention. The points at which court intervention intersects with ICA shall be discussed in the next section. The current international business climate is not vastly different from that of the times of the medieval *lex mercatoria*.⁴⁵⁸ The undesirability of court intervention is still as relevant now as it was then, if not even more so due to the increase in globalisation and more frequent cross-border disputes occurring from vastly different legal traditions which are coming into contact with a historically unprecedented higher frequency. Court intervention in the MENA context causes a number of problems in international arbitration, not least of which are delays in the proceedings, excessive costs due to undue appeals and the possibility that an award will be set aside for review. The activation of court intervention is the common thread that runs through several of the nine areas of law that were identified as problematic earlier in this thesis, this applies to both areas of procedural and substantive law, for example bias challenges: [procedural], competence or jurisdiction challenges: [procedural], public policy:[substantive], (in the case of the UAE where court review is automatic and the courts are concerned with awards that may go against public policy, may also be viewed as a procedural matter), interest:[substantive- but may be procedural according to the above discussion regarding provisions in the suggested HICALC], (again this applies to the UAE for the same reason as above- interest in an Islamic State is related to public policy),⁴⁵⁹ and *res iudicata*, [procedural] (also related to the UAE). The matter of *pacta sunt servanda* though

⁴⁵⁸ See above n 414, in Part VI Section 35.02, 3: ‘The fractured nature of the contemporary world’s political and legal organisation sharply contrasts with the increasingly transnational character of its economy. International businesses operate as did the medieval merchants whose trade transcended the patchwork of local sovereignties.’

⁴⁵⁹ See above n 367, 279. The matter of public policy is not central to arbitrations conducted under ICSID because: ‘ICSID awards are not subject to annulment or any other form of scrutiny by domestic courts. Rather the ICSID Convention offers its own self-contained system for review.’

identified as important, does not invoke court intervention, unless in the case that the party whose contract has been breached chooses to go to court rather than arbitrate or to initiate court proceedings at the same time as arbitration proceedings,⁴⁶⁰ in which case the court will decide. In cases involving treaty obligations an award is construed as breaching the rights of the State as a sovereign entity, thus the doctrine of sovereign immunity attracts court intervention.⁴⁶¹ These areas of law are important for this reason. Since court intervention is unfavourable to parties to international arbitration the merits for considering these particular areas of law for reform are stronger. As court intervention is an obstacle to enforcement or may lead to non-enforcement or non-execution, including delays, the choice of these areas of law for reform is again, well-thought out, for practical considerations and not only theoretical ones through the use of grounded theory. This final point reflects a convergence of social science and legal methodology to show that the data agrees that these areas of law are in need of reform and were chosen due to their importance to international arbitration and their frequency in causing barriers to enforcement.

⁴⁶⁰ Parallel proceedings.

⁴⁶¹ See above n 367, 215: ‘An additional obstacle to using domestic courts outside the host state would be rules of state immunity. Host states dealing with foreign investors will frequently act in the exercise of sovereign powers (*jure imperii*) rather than in a commercial capacity (*jure gestionis*). Therefore, even in countries that follow a doctrine of restrictive immunity, lawsuits against foreign states arising from investment disputes are likely to be held inadmissible. An explicit waiver of immunity from lawsuit is possible but will be difficult to obtain. In addition to sovereign immunity, other judicial doctrines are likely to stand in the way of lawsuits in domestic courts. The act-of-state doctrine enjoins courts from examining the legality of official acts of foreign states in their own territories.’

XI SECTION IV: RESULTS AND DISCUSSION OF SUBSTANTIVE AND PROCEDURAL MATTERS REQUIRING REFORM

An analysis of the special features and unique needs of the MENA legal climate must take into consideration the following factors: 1) Islamic Law, 2) Islamic culture, the history of 3) the Crusades, 4) colonialism, 5) postcolonial discourse, 6) political Islam, 7) uncodified *sharia* provisions, 8) the influence of civil codes, 9) the early oil concessions, 10) the reactionary ICSID outcomes, 11) the adoption of the UNCITRAL, 12) the adoption of the New York Convention, 13) the influence of Egypt in the region and 14) the Arab Spring. The author has kept all of these factors in mind in drafting the HICALC provisions.

The purpose of this section is to show how principles for the HICALC or uniform Arab arbitration law have been derived through multiple layers of analysis and through the inclusion of universal principles of law and principles extracted from past cases as identified from the case law herein. The purpose of this section is also to highlight the key distinctive and special features and traditions of the MENA legal and adjudicatory climate in order to more directly address those considerations in a new law. This will require a comparative analysis that includes Islamic law as well as cases from the MENA context. A comparative analysis of general and universal principles of law at civil, common and Islamic law will show which principles are most relevant to a new law. This section will give the key substantive and procedural matters that a new law must address- it provides the justification for the inclusion of the principles that have been selected and highlighted.

*A Competence De La Competence*⁴⁶²

The matter of bias challenges has been dealt with earlier in this thesis. The matter of competence⁴⁶³ requires closer scrutiny in the MENA context. The Mixed Courts have set an excellent precedent in the matter of competence that ought to be followed by arbitral tribunals:

It was perhaps a defect of the codes that no procedure existed for settling internal conflicts of jurisdiction between the native and Mixed Courts. However, the greater judicial authority of the latter, together with the continuing reluctance to place too great a reliance on the former, meant for practical purposes the Mixed Courts were masters of their own jurisdiction within the terms and interpretation of the Codes.⁴⁶⁴

Preventing competence challenges under the framework of extant legislation in the MENA is a Sisyphean task. New provisions addressing competence challenges must be specifically enacted. One of the rare certainties in MENA international arbitrations is that automatically occurring objections to arbitral tribunal competence and jurisdiction are a matter of procedure. A review of eight landmark cases⁴⁶⁵ establishes this overall

⁴⁶² R Rana, M Sanson, *International Commercial Arbitration*, (Thomson Reuters, 2011) 149: 'Unlike a judge, an arbitrator does not necessarily have the imprimatur of the state in the exercise of his or her powers. Rather than depriving power from a statute or constitution as with national courts, the arbitral tribunal's power derives from the agreement between the parties; therefore, the scope of its power depends on the breadth of power given to it by the parties.' This is the doctrine of *kompetence-kompetenz* or *compétence de la compétence*.

⁴⁶³ See above n 362, 385: 'However, this ruling is generally not final, but subject to the control of the courts of the seat of the arbitration. Accordingly, several commentaries qualify the ruling as provisional or as an initial ruling.'

⁴⁶⁴ See above n 180, 48.

⁴⁶⁵ *Trans-global Petroleum Inc v The Hashemite Kingdom of Jordan* ICSID Case No Arb/07/25, the Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, Response of 30th August 2007; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan* ICSID Case No Arb/02/13, Decision on Jurisdiction; *Helnan International Hotels A/S v The Arab Republic of Egypt* ICSID Case No 05/19 Award, Memorial on its Objections to Jurisdiction.

pattern. Time-consuming and cost-incurring objections to tribunal jurisdiction or competence occur frequently. By raising adjudicatory uncertainty, they are an example of a hazard in the process of international arbitration due to their invocation of unfavourable court intervention, particularly in light of considerations of due process or the appearance of due process.⁴⁶⁶ The doctrine of *compétence de la compétence* as it is currently understood and practised (that its specific meaning is the power of arbitrators to determine their own jurisdiction), inadequately deals with the problem of increasing competence challenges that international arbitration tribunals encounter. The author recommends that the doctrine of *compétence de la compétence* be expanded.

a. Landmark International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Proceedings

The following eight cases represent examples of procedural objections to tribunal competence or jurisdiction to hear the dispute.

Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt ICSID Case No ARB/99/6, Introductory Note; *Joy Mining Machinery Limited v The Arab Republic of Egypt* (ICSID Case No ARB/03/11) Award on Jurisdiction; *Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt* Case No ARB/84/3 Award on the Merits; *Champion Trading Company and others v Arab Republic of Egypt* ICSID Case No ARB/02/09, Introductory Note; In *Government of Saudi Arabia v Arabian American Oil Co (Aramco)*, Decision of 23 August 1958, 27 International Legal Reports 117 (1963).

⁴⁶⁶ In regard to the matter of due process, the author submits that unwarranted competence challenges that are unfounded in fact and that are motivated primarily by a desire to sabotage or delay proceedings are unethical and are bad-faith dealings. Legal provisions and considerations must be made to constrain these unethical bad-faith allegations. This consideration is examined more closely elsewhere in this thesis.

(a) *Trans-global Petroleum Inc v The Hashemite Kingdom of Jordan (ICSID Case No ARB/07/25)*

In the Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, in which the respondent (The Hashemite Kingdom of Jordan)⁴⁶⁷ *ab initio* objected to the jurisdiction of the tribunal only withdrawing 'its earlier jurisdictional objections communicated to ICSID by its Response of 30th August 2007'.⁴⁶⁸

(b) *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (ICSID Case No ARB/02/13)*

In its Decision on Jurisdiction,⁴⁶⁹ In September of 2003, 'Jordan filed its objection to jurisdiction.' The basis for the respondent's objection to ICSID arbitration was in the following: 'The essential basis of the Claimant's Request concerns a contractual dispute', which Jordan contended that 'Jordan and Italy agreed in their bilateral investment treaty that such contractual claims were governed by the dispute settlement provisions of the Contract, which did not provide for ICSID arbitration'.⁴⁷⁰

⁴⁶⁷ *Trans-global Petroleum Inc v The Hashemite Kingdom of Jordan* ICSID Case No ARB/07/25, the Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, Response of 30 August 2007), 9.

⁴⁶⁸ Ibid.

⁴⁶⁹ *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13, Decision on Jurisdiction, 7.

⁴⁷⁰ Ibid.

(c) *In Helnan International Hotels A/S v The Arab Republic of Egypt (ICSID Case No ARB/05/19) Award*⁴⁷¹

Egypt objected to the jurisdiction of the tribunal: ‘Egypt responded by letter dated 6 March 2006, indicating that it would file an objection to the Tribunal’s jurisdiction at the First Session’. Furthermore, ‘On 31 May 2006, Respondent filed its Memorial on its Objections to Jurisdiction by which it presented its objections to the Arbitral Tribunal’s jurisdiction in regards to the dispute’.⁴⁷²

(d) *Joy Mining Machinery Limited (Claimant) and the Arab Republic of Egypt (Respondent), (ICSID Case No ARB/03/11) Award on Jurisdiction*

This case raises matters related to competence but also related to expropriation and the definition of an asset. The latter has direct bearing on competence matters and on jurisdiction in the case of ICSID because where there is no investment, ICSID does not have jurisdiction.⁴⁷³ In *Joy Mining Machinery Limited v The Arab Republic of Egypt* (ICSID Case No ARB/03/11) Award on Jurisdiction,⁴⁷⁴ Egypt objected to the jurisdiction of the tribunal:

The Respondent has raised three objections to the jurisdiction of the Tribunal, namely: a. The existence of a forum selection clause in the Contract should be respected with regard to all contractual claims. b. The absence of any Treaty breaches that can be attributed to the Egyptian Government. c. That certain conditions required under Articles 25 and 26 of

⁴⁷¹ *Helnan International Hotels A/S v The Arab Republic of Egypt* ICSID Case No ARB/05/19, Award, Memorial on its Objections to Jurisdiction, 6.

⁴⁷² *Ibid.*

⁴⁷³ Art 25 of the ICSID Convention and Article 1 of the Treaty.

⁴⁷⁴ *Joy Mining Machinery Limited v The Arab Republic of Egypt* ICSID Case No ARB/03/11, Award on Jurisdiction, 493.

the ICSID Convention and the Treaty are not fulfilled in this case, in particular the requirement of an investment.⁴⁷⁵

The entire subject matter of the definition of an investment is a topic worthy of closer examination not only insofar as it arises in relation to other important matters concerning arbitration but also as it has bearing on the matter of tribunal jurisdiction and competence. In regard to ICSID jurisdiction, the dispute in question must arise due to an investment dispute according to Article 1 of the treaty. The author submits that the question of what constitutes an investment is a question relevant to other international arbitrations outside of ICSID.

In *Joy Mining*, ICSID received a letter requesting arbitration (by Claimant Joy Mining against Respondent Egypt on 26 February 2003) under the provisions of the United Kingdom – Arab Republic of Egypt Agreement for the Promotion and Protection of Investments of 24 February 1976, hereinafter, the ‘treaty’ or ‘BIT’.⁴⁷⁶ At the first meeting, on 4 November 2003, the respondent formally objected to the jurisdiction of the centre via a Memorial filed at the Seat of arbitration, the Peace Palace in the Hague.⁴⁷⁷ As a result of this Memorial, ‘a schedule was established for the filing of other submissions on jurisdiction’.⁴⁷⁸ This essentially amounted to an initial delay: ‘In accordance with the agreed schedule, the Claimant on January 5, 2004, filed its Counter Memorial on Jurisdiction, and on January 26, 2004, the Respondent filed its Reply, followed by the

⁴⁷⁵ Ibid.

⁴⁷⁶ International Centre for Settlement of Investment Disputes Washington DC, (ICSID) in the proceeding between Joy Mining Machinery Limited (Claimant) and the Arab Republic of Egypt (Respondent), ICSID Case No ARB/03/11, Award on Jurisdiction, date of dispatch to the Parties August 6, 2004, at 488.

⁴⁷⁷ Ibid 490.

⁴⁷⁸ Ibid.

Claimant's Rejoinder on February 17, 2004'.⁴⁷⁹ Hence a delay of over three months, from the date of 4 November 2003 to the date of 17 February 2004, occurred as a result of formal objection to the jurisdiction of the tribunal. The dispute arose from the 'Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project' (the "contract"), executed on April 26, 1998 between Joy Mining Machinery Limited and the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt ('IMC').⁴⁸⁰ The contract was amended 8 November 2000, as 'Amendment Agreement'.⁴⁸¹ The project, located in Egypt's Western desert, was managed by ICM. The contract provided for two stages: replacement of equipment and a new 'First New Longwall System'.⁴⁸² Starting in February 1999, after installation of the equipment on the site began, both parties have claimed performance problems caused by the other party.⁴⁸³ At this stage it is important to highlight that the burden of proof test that is common usage in arbitration is to require that both parties prove or disprove the veracity of the claim made against them.⁴⁸⁴ Notwithstanding this, it is argued that the burden of proof test must lie on the claimant to establish beyond a reasonable doubt that the respondent failed in the performance of the contract. The essence of the dispute is as follows: 'Joy Mining asserts that there were geological problems in the mine site as well as poor management of the project by IMC, whilst the latter asserts that the problems arose from the malfunctioning of the equipment'.⁴⁸⁵ There are three separate allegations here: (1) geological problems in the mine site, (2) poor

⁴⁷⁹ Ibid.

⁴⁸⁰ See above n 477, 491.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ See above n 351, at 338: 'Concerning the burden of proof in international commercial arbitration, each party must prove the facts on which it relies.'

⁴⁸⁵ See above n 477, pp 491-2.

management, and (3) malfunctioning of the equipment. Although these disputes occurred, ‘the Company was paid the full purchase price of the equipment in accordance with the Contract. The guarantees have not been released by IMC and, as mentioned, have been renewed by the Company several times in order to prevent their drawdown’.⁴⁸⁶ Joy Mining’s complaint in essence is that it should have had the guarantees released no later than 31 July 2003, and this frustration was because of the respondent’s failure to follow the provisions of the contract and Amendment Agreement regarding the commissioning and performance tests of the equipment.⁴⁸⁷ The respondent rejected this claim based on the need to commission and test the equipment first with a call for a separate dispute settlement mechanism for the question of performance.⁴⁸⁸ The claimant’s argument is that that this contract is under the purview of the treaty and that this contract is an investment under the treaty, with the respondent’s decision not to release the bank guarantees as a violation of the treaty, and thus amounts to expropriation, or nationalisation, as a result of the impending free transfer of funds.⁴⁸⁹ The Claimant argued that discrimination has occurred and fair and equitable treatment and full protection and security of the investor under the treaty have been violated.⁴⁹⁰ The Claimant argued that the respondent breached its obligations under the treaty, the contract, Egyptian law and statutory duty by expropriation of its investment and wrongfully depriving it of returns on its investment including failing to accord it fair and equitable treatment and full protection and security.⁴⁹¹ The first question to explore is whether the contract is simply a contract or an

⁴⁸⁶ Ibid 492.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid 493.

investment under the treaty. The absence of an ICSID definition of an investment is problematic. A fair and equitable definition is missing. A major tenet of investment treaty law is that a State acting in bad faith is no longer a strong defence. Another important question is: does there have to be a treaty in place for a member State to submit a dispute to ICSID? The allegations of Joy Mining require closer analysis.⁴⁹² Is the withholding of the bank guarantees tantamount to expropriation or nationalisation? Does the prevention of free transfer of funds amount to expropriation and nationalisation? Has discrimination occurred; is there an absence of fair and equitable treatment? Has the provision for protection under the treaty failed? In regard to the respondent's objections to all allegations, claims and jurisdiction, it must be noted that this is a weak defence which undermines Egypt's opposition to all claims and allegations. Had the principle of the standard of the burden of proof fell on the claimant to factually establish beyond a reasonable doubt that the allegations against Egypt were true then there would be no basis to object to jurisdiction. To do so would on the face of it appear to be an admission of guilt; avoiding the facts against it would emerge since both sides would equally have to prove themselves. Two of the three arguments by the respondent against the tribunal's jurisdiction are worthy of elaboration:

(b) The absence of any Treaty breaches that can be attributed to the Egyptian

Government. (c) That certain conditions required under Articles 25 and 26 of the ICSID

⁴⁹² Ibid 493, 'The Claimant further argued: "that the dispute concerns also the breach of the Contract and Egyptian law, particularly the Egyptian Civil Code, because Joy Mining has not been allowed to carry out the commissioning and performance testing of the equipment, the guarantees have not been released and the compensation has not been paid".'

Convention and the Treaty are not fulfilled in this case, in particular the requirement of an investment.⁴⁹³

Ab initio, the absence of a proper definition of investment is a problem. The respondent's reasoning that this contract is not an investment is based on the fact that it considers that the contract is a standard supply agreement for the selling and purchase of equipment and that the operation was free of risk for the claimant.⁴⁹⁴ This implies that risk, by the respondent's own admission, is an element of investment. The respondent argued that bank guarantees are a normal form of payment that cannot be released until the contract is performed and that these bank guarantees did not benefit the respondent nor will a draw down occur.⁴⁹⁵ Accordingly, the respondent argued that under Article 25 of the ICSID Convention and Article 1 of the Treaty that there was no investment.⁴⁹⁶ A lacuna in the ICSID has led to this problem. There is also a deeper problem of the burden of proof. ICSID contains a double burden of proof. If the burden of proof was single (and if precedent was followed), it is more likely the tribunal would have set out to establish factually the existence of evidence provided by the claimant that its allegations of lack of performance of contract by respondent are true. The respondent also cited *CSOB, Fedax, Salini v Morocco* and *SGS v Pakistan*.⁴⁹⁷ The tribunal rejected the *prima facie* burden of proof test on the claimant based on the fact that the nature of the contract in each of these cases is different from this one. The claimant counter-argued that the contract contained two stages, one as the replacement of equipment and the other of the provision of an

⁴⁹³ Ibid.

⁴⁹⁴ Ibid 495.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid 495–6.

entirely new Longwall system from beginning to end.⁴⁹⁸ At this stage it is necessary to point out that the dual phase aspect of the contract implies a significant amount of time. This was a long-term contract and as such the principle of long-term implies an investment. Since the claimant was responsible for the ‘engineering, design and supply of a completely new Longwall system’,⁴⁹⁹ it can be argued that the application of creative and other resources in a contract with a long-term duration, can cause the contract to be construed as an asset since in this case it was as an investment. The second phase of the contract contained both long-term elements including the concept of an asset. Aside from the long-term aspect of the second phase, the first phase provided for the production and maintenance of a stock of spare parts ‘for a period of not less than ten years’.⁵⁰⁰ The claimant asserted that though bank guarantees are a normal component of a commercial contract, that a guarantee of ‘over 97% of the Contract price’⁵⁰¹ is not normal and as such, for this amount, argued to be an investment under Article 1 of the Treaty.⁵⁰² One may reasonably put forth the argument that the bank guarantee of this amount is an asset.

⁴⁹⁸ Ibid 496.

⁴⁹⁹ Ibid 496.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² Ibid: 496, ‘Article 1 of the Treaty includes in the definition of the investment, among other elements, every kind of asset; mortgage, lien or pledge; and claims to money or to any other performance under contract having a financial value.’

(e) *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*

(ICSID Case No ARB/99/6)⁵⁰³

In *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt* (ICSID Case No ARB/99/6)⁵⁰⁴ it was found that ‘before the proceedings began, Egypt raised certain objections to the jurisdiction of the Centre and the competence of the Tribunal’.⁵⁰⁵ Further, ‘In a November 27, 2000 decision, the Tribunal rejected Egypt’s objections to jurisdiction’.⁵⁰⁶ A more creative response from the respondent yielded the following: ‘By letter of May 30, 2000, ICSID circulated a copy of the Claimant’s “Rejoinder on Jurisdiction” received under cover letter of the same day’.⁵⁰⁷ Furthermore, a request to suspend the procedure was submitted.⁵⁰⁸ The purpose of this correspondence was to put the dispute outside of the jurisdiction of the tribunal.

The response of the tribunal was:

By letter of June 26, 2000, ICSID informed the Parties that the Tribunal had reviewed their various submissions. The Tribunal indicated that it did not consider the exchange of Verbal Notes between the Embassy of the Arab Republic of Egypt in Athens and the Ministry of Foreign Affairs in the Hellenic Republic of Greece as representing the

⁵⁰³ *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, Introductory Note at 600, ICSID Case No ARB/99/6, [Award in the Arbitration ARB/99/6 International Centre for Settlement of Investment Disputes. *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*. Date of Dispatch to the Parties: 12 April, 2002.]

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid 600–601 Introductory Note

⁵⁰⁷ Ibid 610.

⁵⁰⁸ Ibid: ‘On June 12, 2000, ICSID received a letter from the Respondent asking the Tribunal to suspend the procedure in view of alleged diplomatic negotiations with the Government of Greece regarding the interpretation of Article 8 of the BIT. A verbal note from the Embassy of the Arab Republic of Egypt in Athens to the Ministry of Foreign Affairs of Greece dated March 28, 2000, and a memorandum from the Egyptian ministry of Foreign Affairs to the Hellenic Embassy in Cairo, dated April 17, 2002, were attached to the Respondent’s letter.’

submission of a dispute between Egypt and Greece concerning the interpretation or application of the 1993 Agreement between Egypt and Greece for the Promotion and Reciprocal Protection of Investments to the procedure set forth in Article 9 of that Agreement. Therefore the Tribunal saw no reason to suspend the present arbitral proceedings.⁵⁰⁹

As with the aforementioned case of *Joy Mining*, this case raises the matter of competence in consideration of Egyptian domestic law. ‘Middle East Cement invoked an ICSID arbitration clause contained in an Agreement between Greece and Egypt for the Promotion and Reciprocal Protection of Investments, which entered into force on April 6, 1995 (the BIT).’⁵¹⁰ The dispute arose when Egypt issued a decree banning Portland cement imports in 1989. This resulted in frustrating Badr Cement Terminal from performing its obligations under the contract. Badr Cement Terminal is the Middle East Cement branch located in Egypt.⁵¹¹ In anticipation of the commencement of proceedings, Egypt objected to the jurisdiction of the centre including the competence of the tribunal.⁵¹² Notwithstanding that there was a BIT, Egypt made an attempt to privilege national laws over the BIT; in this case the tribunal upheld the BIT but the fact that such an attempt could be considered suggests the possibility that a BIT might not necessarily be consistently upheld in consideration of national laws unfavourable to investors. This matter of disregarding extant BITs has great relevance to the matter of expropriation, particularly in *Middle East v Cement* and will be discussed further in that section.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid 601.

⁵¹¹ Ibid 600.

⁵¹² Ibid.

The reasoning of the tribunal regarding the applicable law of the case is worthy of discussion:

Based on the second sentence of Article 42(1) of the ICSID Convention, the Tribunal also concluded that while the Tribunal ‘takes into account the law of Egypt where appropriate, consistent with its decision to consider and accept only claims under the BIT, the Tribunal shall apply the substantive provisions of the BIT for all matters regulated by the Treaty and cannot apply any provisions of national Egyptian law limiting claims found to exist under the BIT.’ Finally, for the Tribunal, the first and second sentence of Article 42(1) of the ICSID Convention also imply ‘that the Tribunal may have recourse to the rules of general international law to supplement those of the BIT’.⁵¹³

In reference to considerations of the merits, the prohibition of cement imports by the Egyptian government was rightly found to be effectively tantamount to expropriation by the tribunal.⁵¹⁴

All of the aforementioned cases demonstrate objections to the tribunal in which case the tribunal was one constituted under ICSID; however, procedural objections to jurisdiction do not only occur under ICSID but also under other tribunals, for example the ICC.

⁵¹³ Ibid 601.

⁵¹⁴ Ibid 601.

(f) *In Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt*
(Case No ARB/84/3) Award on the Merits⁵¹⁵

In this case, for example, in the proceedings before ICSID:

The Tribunal unanimously decides A. To reject the objections to its jurisdiction raised by the Respondent alleging that Article 26 of the ICSID Convention, as well as the pursuit by the Claimants of alternative remedies, bar the claim in the present case; B. To reject the objection to its jurisdiction raised by the Respondent alleging the withdrawal from the Claimant of the benefits of Law No. 43; C. To reject the objection to its jurisdiction raised by the Respondent contending that the provisions of Article 8 of Law No. 43 do not apply to this investment dispute; and D. To stay the present proceedings on the Respondent's remaining objections to the Centre's jurisdiction until the proceedings in the French courts have finally resolved the question of whether the Parties agreed to submit their dispute to the jurisdiction of the International Chamber of Commerce.⁵¹⁶

Furthermore, objections to jurisdiction or competence invite court intervention, which is another problem in international arbitration. For example, in this same case, 'On January 6, 1987, the French Cour de Cassation issued a decision the effect of which was to finally determine that the Respondent had not agreed to submit the present dispute to arbitration under the auspices of the International Chamber of Commerce ("ICC")'.⁵¹⁷

⁵¹⁵ *Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt*, Award on the Merits, for example in the proceedings before ICSID, Case No ARB/84/3, at 332.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid 333.

(g) *Champion Trading Company and others v Arab Republic of Egypt (ICSID Case No ARB/02/9*⁵¹⁸

In *Champion Trading Company and others v Arab Republic of Egypt* (ICSID Case No. ARB/02/09) ,⁵¹⁹ the respondent objected to the jurisdiction of the tribunal on the basis that ‘the individuals acting as Claimants, three brothers who were described as United States nationals in the request for arbitration, in fact also held Egyptian nationality’.

The tribunal’s Decision on Jurisdiction in this case was raised before ICSID under the 1982 *Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments* (hereinafter ‘the Treaty’) by five claimants, who were shareholders of National Cotton Company (NCC), incorporated in Egypt. The claimants’ allegation that Egypt breached the treaty by taking decisions in the cotton industry that affected their investment was not decided on by the tribunal because factors that led to the dispute were judged to be outside the jurisdiction of the tribunal. The basis upon which the tribunal found itself incompetent was because of the alleged nationality of the claimants, who were wrongly found by the tribunal to be automatically Egyptian citizens because of their fathers’ nationality. The tribunal was incorrect in that they stated that Egyptian citizenship is automatic regardless if a father rescinded it. Even if he did not, there are specific legal procedures to be undertaken to claim Egyptian nationality when the father is Egyptian and as such it is not ‘automatically’ conferred. The question to ask is whether the claimants submitted the

⁵¹⁸ *Champion Trading Company and others v Arab Republic of Egypt*, Introductory Note, 272, ICSID Case No ARB/02/9.

⁵¹⁹ Ibid.

required documents to the appropriate Egyptian government offices. If not, then they are not automatically Egyptian citizens. The only exception to this concerns military service and Egyptian national security. The tribunal wrongly decided this case and should have declared that it did have the competence to hear the dispute and render a decision on it accordingly. This is yet another example in which the objection on the jurisdiction of a tribunal prevents arbitration from taking place. In this case, the rights of the investors under the fair and equitable treatment standard were disregarded on the basis of a legal loophole that was based neither on strict black-letter law nor on custom. Had it been the case that the tribunal took the correct view of the investors' nationality, they would have found that the claimant was not technically a host-country national in consideration of the non-consensual and active application for nationality documents through proper procedures. In this light, the tribunal would have had competence to decide the claims. This is another example of the creative use of undermining tribunal competence.

The author submits that in this instance the honourable members of the tribunal were unfamiliar with Egyptian law and therefore erroneously reached the conclusion that they had no jurisdiction. Egyptian nationality can be given to those born of an Egyptian father (and after recent parliamentary reform, an Egyptian mother) outside of Egypt if the applicant submits the birth certificates of the parents including their own birth certificate to the appropriate government ministry for registration. In the absence of this formal step, which claimants the Wahba brothers, who were born overseas, did not do, the tribunal wrongly stated that 'the Parties are in agreement that a child born of an Egyptian father, either within or outside Egypt, automatically acquires at birth Egyptian nationality if at

that time the father holds Egyptian nationality'.⁵²⁰ The term 'automatically' here must be qualified: the formal documentation must be completed. A person 'automatically' qualifies to apply.⁵²¹

(h) *Government of Saudi Arabia v Arabian American Oil Co (Aramco)*⁵²²

In *Government of Saudi Arabia v Arabian American Oil Co (Aramco)*,⁵²³ the government of Saudi Arabia contracted with Aramco to produce and transport its oil. It then signed another contract with AS Onassis, providing rights to oil transport. The government of Saudi Arabia challenged the jurisdiction and the competence of the *ad hoc* tribunal yet sought to expand it by claiming that the tribunal had power to consider future events and to harmonise both the contracts it signed. It did not want the tribunal to maintain jurisdiction over acts of government based on sovereignty. The tribunal rejected the signing by the government of Saudi Arabia of two contradictory contracts as a matter of national sovereignty; the tribunal found that it fell under its jurisdiction to determine whether the Onassis contract infringed Aramco's rights. The panel found that the second contract did infringe upon the first; however, the panel rejected the wider powers that the Saudi government attempted to expand in order to harmonise the two contracts, finding it was not competent to harmonise both contracts.⁵²⁴

The response of the tribunal must be examined closely as it addresses questions related to competence. The arbitrator's role may be compared to that of a judge. Yet, there

⁵²⁰ Ibid.

⁵²¹ This case is a clear example of the dangers of having arbitrators who are unfamiliar with the *lex arbitrii*, the procedural law of the seat and/or the domestic legal system.

⁵²² R D Bishop, 'International Arbitration of Petroleum Disputes: The Development of a 'Lex Petrolea'', (Discussion Paper No 12), (Centre for Petroleum and Mineral Law and Policy, 1997) 2–3. Decision of 23 August 1958, 27 International Legal Reports 117 (1963)

⁵²³ Ibid.

⁵²⁴ See above n 523, 2-3.

are differences. In practice, the arbitrator must be more knowledgeable than the judge. The judge only deals with matters relating to his legal jurisdiction. He or she is only concerned with his own laws and he follows one code of law that addresses both the procedure of the trial and the substance of the dispute.

In the proceeding examples of the eight⁵²⁵ aforementioned cases, all of them, *ab initio*, have an Arab respondent procedurally and automatically objecting to the jurisdiction of the arbitral tribunal.

2 Civil Law

The doctrine of *compétence de la compétence* is the source that gives legality and legitimacy to the arbitrators to hear a dispute and is directly derived from the arbitration clauses in a contract. The doctrine has been under scrutiny because of the source from which it derives its authority.⁵²⁶ The major flaw in this critique is that it denies the existence of the authority. Whether the authority is derived from statute law as with courts, or from the parties' agreement as in arbitration is immaterial once the agreement

⁵²⁵ *Trans-global Petroleum Inc v The Hashemite Kingdom of Jordan* ICSID Case No Arb/07/25, the Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, Response of 30 August 2007; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan* ICSID Case No Arb/02/13, Decision on Jurisdiction; *Helnan International Hotels A/S v The Arab Republic of Egypt* ICSID Case No 05/19 Award, Memorial on its Objections to Jurisdiction. *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6), Introductory Note; *Joy Mining Machinery Limited v The Arab Republic of Egypt* (ICSID Case No ARB/03/11) Award on Jurisdiction; *Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt* Case No ARB/84/3 Award on the Merits; *Champion Trading Company and others v Arab Republic of Egypt* (ICSID Case No ARB/02/09) Introductory Note; In the *Government of Saudi Arabia v Arabian American Oil Co (Aramco)* In, Decision of 23 August 1958, 27 International Legal Reports 117 (1963).

⁵²⁶ See above n 462, pp 151–2: 'As a theoretical issue, the doctrine of kompetence-kompetence has been criticised as circuitous reasoning or a legal fiction. According to this argument, there is no foundation for an arbitral tribunal's authority to decide on its own jurisdiction because the arbitral tribunal's authority derives exclusively from the parties' arbitration agreement. An arbitral tribunal therefore lacks the authority to decide anything unless and until its authority under the parties' arbitration agreement is established. Courts, on the other hand, are said to have jurisdiction to determine their own jurisdiction not only out of the necessity but also because their power depends on statute rather than the parties' consent or permission.'

to arbitrate has been written. Indeed, the agreement to arbitrate then becomes as binding as statute and this is how it ought to be.

There are certain considerations of arbitration that fall under the scope of the jurisdiction or the competence of an arbitral tribunal.⁵²⁷ Indeed, in consideration of the fact that the UNCITRAL gives arbitrators jurisdiction to decide their own jurisdiction,⁵²⁸ the author argues that arbitral tribunal competence must increase, particularly in regard to matters that would otherwise affect enforceability. This means that the author suggests that the jurisdiction of arbitral tribunal competence must expand to give it the scope to deal with matters of public policy, international law, public policy and sovereign immunity more adequately than is currently the case. More so it must do this in a consistent and uniform manner that takes into consideration precedent, *res judicata*, and bias. Arbitration has already gone the way of litigation in a number of important practices. Why should it adopt negative or neutral practices yet exclude best practices? The author calls for expanding and fortifying the jurisdiction and competence of arbitral tribunals to make their powers similar to international courts in consideration of transnational public policy and the existing problems of inconsistency, *inter alia*, of ICA and IIA both internationally and especially in the MENA. This is one possible option, the other is the creation of an international arbitration court in the full meaning of the world, or referral to the ICJ for enforcement as will be discussed in the conclusion. This matter

⁵²⁷ Ibid 152–3: ‘Identity of the parties; identity of the contracts governed by the arbitration clause; formal validity of the agreement to arbitrate; the effect of a problem with the main contract on the validity of the arbitration clause (separability); whether a particular subject can be arbitrated; time limits for commencing proceedings; failure of a condition, possibly contained in an agreement to mediate in advance, which precedes the right to arbitrate; whether an arbitrator may apply a law other than the one expressly chosen by the parties; and whether a jurisdictional remedy can be awarded. Of these jurisdictional issues, the following three situations involve the arbitral tribunal’s power to rule on its own jurisdiction: the existence of an arbitration agreement; the scope of the authority; and public policy.’

⁵²⁸ Ibid 152.

should be given priority now, especially since the UNCITRAL is currently being debated in order to bring about reforms.

Other judicial international bodies can be taken for an example:

When comparing arbitration with adjudication by an international court, using the ICJ Statute and the PCA Rules as examples, it may be useful to begin by emphasising similarities rather than differences. One such similarity is that neither the ICJ Statute nor an arbitral tribunal under the PCA Rules has compulsory jurisdiction; both have only such jurisdiction as may have been conferred by state parties. Thus, jurisdiction may be conferred on the ICJ for refined existing disputes, for further disputes generally, or for particular types of disputes, such as those arising out of the interpretation or performance of a specified treaty. Similarly, the PCA Rules provide that they apply only where the state parties have agreed that the dispute shall be referred to arbitration under those Rules. As under the ICJ Statute, the PCA Rules are intended to apply where parties agree to submit an existing dispute to arbitration or where they agree in a treaty or other agreement to arbitrate any further disputes arising thereunder. Thus, insofar as competence to resolve a dispute, both the ICJ Statute and the PCA Rules are similarly dependent on the will of the parties.⁵²⁹

Therefore, the question of jurisdiction or competence on deciding on matters of public international law, or any other legal matter, whether the case discussed is that of an international court, a treaty or an international tribunal, ultimately is not derived from the court, treaty or tribunal itself, but from the free consent of the State parties, or parties to the treaty or contract. Since all three of these cited examples have equal jurisdiction and

⁵²⁹ Holtzman, M Howard in, Muller, Sam & Mijs, Wim (Eds). *The Flame Rekindled. New Hopes for International Arbitration*. (Martinus Nijhoff Publishers, 1st ed. 1994) 72–3, referring to *Leiden Journal of International Law*, pp 67–79.

competence to decide upon matters brought to them, there is no logical reason why an arbitral tribunal would be less suited than an international court or a treaty to decide the outcome of a dispute brought before it. In consideration of the international nature of an arbitral tribunal and the flexibility in choice of law, this would be a better recourse to deciding matters related to public international law because the inherent problem of narrow State interests and bias would be eliminated.

The recently revised ICC Rules released publically on 12 September 2011,⁵³⁰ but in force from 1 January 2012, demonstrate the trend towards the gradual increase of arbitral tribunal jurisdiction through the doctrine of competence. For example, at Article 6 (3),⁵³¹ it is stated:

If any party against which a claim has been made does not submit an answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary-General refers the matter to the Court for its decision pursuant to Article 6 (4).

The author submits that Article 6 (3)⁵³² expands the competence of any extant arbitral tribunal in the ICC in such a manner that exceeds what has traditionally been the case in the past. Under normal circumstances, suppose a claimant appears before an arbitration tribunal composed according to the contract and arbitration clause as understood by the

⁵³⁰ 2012 ICC International Chamber of Commerce with International Court of Arbitration and with International Centre for ADR Arbitration and ADR Rules of Arbitration in force from 1 January 2012

⁵³¹ Ibid 14, Art 6 (3).

⁵³² Ibid.

claimant. Suppose also the claimant then encounters a respondent who contests the jurisdiction of the tribunal on the basis that the respondent had a different understanding of what constituted the contract or the arbitration agreement. In this case the normal procedure would be that the tribunal would hear both arguments from both parties including rebuttals and in doing so would be engaging in the act of ‘deciding on its jurisdiction’. Ordinarily, the claimant would be in favour of the current tribunal moving forward in hearing and deciding the dispute, whilst the respondent would argue to dissolve the tribunal particularly if there is strong evidence that the respondent is in breach of the contract. In this case the respondent would argue that in the event of a challenge to the jurisdiction that the new tribunal be formed under the domestic law of the Seat absent any rules of procedure. This is usually the case because it is usually investors who bring claims against states for breach of contract in investor–State disputes and thus the State is usually the respondent, which gives it a better chance of avoiding payment of an award if the tribunal is subjected to domestic laws and national courts. If Article 6 (3)⁵³³ of the new ICC Rules creates a proliferating norm, it would prevent respondents from easily challenging the competence and jurisdiction of an extant arbitral tribunal, even in consideration of arguments from the respondent that the tribunal has no jurisdiction on the basis of any disputed contract or arbitration clause, so long as there exists an arbitration clause, even if it was intended for different rules.

The basis for this argument derives its authority from the following wording of Article 6 (3):⁵³⁴ ‘The arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided

⁵³³ Ibid.

⁵³⁴ Ibid.

directly by the arbitral tribunal ...⁵³⁵ Furthermore, the particular wording in Article 6 (3)⁵³⁶ of ‘if any party against which a claim has been made’, means the respondent. This article in conjunction with several others effectively increases arbitral tribunal competence in favour of the investor or the claimant against the State or the respondent. It is the author’s view that this is a positive development in that frivolous and procedural objections to tribunal competence and jurisdiction create lengthy delays and incur excess costs to both parties and obstruct the claimant from having their claims heard properly in a hearing at the first instance, or *ab initio*, leading to further costs.

A review of the eight aforementioned landmark ICSID arbitrations⁵³⁷ by the author, in which the states were Middle Eastern states, yielded several common patterns in these types of arbitrations. In each instance the State’s initial response was an objection of jurisdiction. In all cases, there were lacunae in the ICSID Convention⁵³⁸ that led to the ensuing decision of the tribunal, or lack thereof. In some cases, with the existence of a Bilateral Investment Treaty (BIT), the outcome was based on the application of certain articles of the treaty. In the absence of a treaty the ICSID Convention was applied. Questions of *res iudicata*, expropriation, risk, absences of precedent and definitions of investment, including public policy, created significant lacunae in international arbitration law particularly regarding the ICSID and the 1958 New York Convention. In all of these cases, there was initial loss to the investor due to the original breach of the contract by the State, whether or not it was alleged that the investor was the cause. In consideration of the domination by legal scholars of examples

⁵³⁵ Ibid.

⁵³⁶ Ibid.

⁵³⁷ See above n 526.

⁵³⁸ See above n 138.

of bias against states in the early oil concessions and analysis of the development of ICA and IIA law, it is clear from the outcomes of these contract disputes and these arbitrations that it usually was the investor who was the losing party, at least initially, with the severance or non-performance of the contract on the part of the State, in all cases. It is submitted that only a supplementary law in addition to extant instruments can fill the lacunae identified here and address the legal doctrines that repeatedly appear in these and similar cases. In consideration of the propensity of these states to submit themselves to Islamic law by constitutional decree, and that there are extant principles at Islamic law that could frustrate certain types of financial or other contracts, certain Islamic law principles dealing with Islamic finance can be drafted into the aforementioned HICALC in order to fill the said lacunae.

3 *Islamic Law*

The question of the doctrine of *compétence de la compétence* has been dealt with in regard to the Ottoman *Majalla*. In the case of modern statutory Islamic law, the question of competence continues to be a source of adjudicatory risk. Article 5 of the DIFC Law No. 12⁵³⁹ provides that exclusive jurisdiction by the DIFC Court of First Instance is activated under four circumstances.⁵⁴⁰ These are:

- a. civil or commercial cases and disputes involving the Centre or any of the Centre's bodies or any of the Centre's establishments; b. civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part in the Centre or an incident that has occurred in the Centre;

⁵³⁹ DIFC Law No 12, Art 5.

⁵⁴⁰ See above n 321

c. objections filed against decisions made by the Centre's bodies, which are subject to objection in accordance with the Centre's laws and regulations; d. any applications over which the Courts have jurisdiction in accordance with the Centre's laws and regulations.⁵⁴¹

The situation is further complicated due to the provision of Article 5⁵⁴² 'that the parties may elect to contract out of the DIFC Law No 12 and agree to submit disputes arising under the contract to the Courts of another jurisdiction'.⁵⁴³ A measure was subsequently taken to reduce the potential conflict of jurisdiction between the DIFC Courts and the Dubai Courts.⁵⁴⁴ Yet, since the matters related to the provision are not widely known, there is the danger of the belief that the signing of a contract in the DIFC is sufficient.⁵⁴⁵ Hence the limits of the DIFC. Unless a party is based therein or the contract must be performed in 'whole or in part' in the DIFC, the DIFC Courts have no jurisdiction. Questions as to the vague wording of 'in whole or in part' should be asked, as the definition of 'in part' is tenuous. For example, in the case of Dubai, particularly in respect to the DIFC courts, there is a question as to which court has jurisdiction. The Dubai Courts may claim jurisdiction at the same time as the Courts of the Dubai International Financial Centre.

⁵⁴¹ Ibid.

⁵⁴² See above n 540.

⁵⁴³ See above n 321

⁵⁴⁴ Ibid: 'On 7 December 2009, the DIFC Courts and the Dubai Courts signed a Protocol clarifying the extent of each court's jurisdiction. According to the Protocol, the Dubai Courts and the DIFC Courts agree that the DIFC Courts should have exclusive jurisdiction over civil or commercial cases in disputes involving the DIFC or any company licensed to operate from the DIFC. The DIFC Courts also have jurisdiction over any civil or commercial case or dispute arising from, or related to, a contract or financial transaction that has been performed in whole or in part within the DIFC.'

⁵⁴⁵ Ibid: 'The purpose of the Protocol was to clarify the position of the so-called 'coffee shop' contract where the parties signed the contract in the DIFC but where neither party was based in the DIFC and no part of the contract was performed there. Pursuant to the terms of the Protocol, such contracts will not attract the jurisdiction of the DIFC Courts and must be referred to the Dubai Courts. In order for the DIFC Courts to have jurisdiction, one of the parties must be based in the DIFC or the dispute must arise out of the contract which is performed in whole or in part in the DIFC.'

(a) *Courts of the Dubai International Financial Centre Cases*

Three notable cases highlight the matter of competence: *Hardt and Another v Damac (DIFC) Company Ltd et al*, *Taaleem PJSC v National Bonds Corporation PJSC and Deyaar Development PJSC*, and *Corinth Pipeworks SA v Barclays Bank PLC*.⁵⁴⁶

(i) *Hardt and Another v Damac (DIFC) Company Ltd et al, March 2010*

The dispute in this case arose under the contract in which the claimants alleged that the Damac Group companies failed to perform their contract by not delivering their properties on time, citing authorities of the UAE Civil Code, the UAE Penal Code and DIFC Law.⁵⁴⁷ As to be expected, Damac objected to the jurisdiction of the DIFC Courts. They filed an application on the grounds that the DIFC Courts have no jurisdiction and that the claimant's claim should thus be struck out.⁵⁴⁸ It is important to note that the Damac Group were involved in the transactions related to the purchase of four different residential properties by the claimants: Waters Edge, Wildflower, Ocean Heights and Park Towers. Of these four, Park Towers was the sole property existing within the DIFC.⁵⁴⁹ The decision of the learned Justice Chadwick, to dismiss the claim against DAMAC (DIFC), was based on the fact as he noted, that

while Damac (DIFC) was incorporated in the DIFC, it was not a party to any of the contracts that were the subject of the proceeding. In particular, Damac was not a party to the contracts related to Park Towers, the only property within the DIFC ... and that while

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

Damac (DIFC) was named as a party on the face of the claim form, there were no specific allegations of breach of contract or breach of duty specifically against that company.⁵⁵⁰

The concept of ‘in part’ is vague and misleading because although Damac was based in the DIFC, and ‘the claimants had entered into transactions with various different companies in the Damac Group’,⁵⁵¹ and those properties were not delivered on time, ‘Justice Chadwick’s decision was a straightforward application of DIFC Law No. 10 of 2004. In consideration of the fact that Damac (DIFC) was not a party to any of the relevant contracts and in the absence of any specific allegations of breach of duty against Damac (DIFC), there is no basis on which the DIFC Courts could have assumed jurisdiction over the case’.⁵⁵² Imagine the surprise of the claimants who most likely believed that ‘in part’ referred to the fact that the umbrella company of the group of companies that delivered a property late would be under the jurisdiction of the DIFC Court as a result of being based in the DIFC, and of being a contracting party to a contract that was breached.

(ii) *Taaleem PJSC v National Bonds Corporation PJSC and Deyaar Development PJSC, May 2010*

The dispute in this case arose out of a contract in which Taaleem was one of three owners in the Sky Gardens development.⁵⁵³ The grounds for Taaleem’s filing of procedures in the DIFC Courts were based on allegations that ‘National Bonds offered to procure and finance a 33% interest in Sky Gardens under what amounted to a “Muhabara” agreement. Taaleem also alleged that its liabilities were assumed, with the

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ Ibid.

consent of National Bonds, by Deyaar who then became responsible for the cost of the building'.⁵⁵⁴ This meant that the substance of the allegation was that Deyaar assumed the liabilities of Taaleem.⁵⁵⁵ This predictably and naturally resulted in National Bonds filing an application to dismiss the case due to lack of jurisdiction.⁵⁵⁶ Had that been the end of it, it would have been a straightforward matter of jurisdiction for the DIFC Courts on the grounds that the substance of the dispute dealt with the buying and selling of a property in the DIFC and this fell under Article 5(1)(a) of the DIFC Law No. 12 of 2004.⁵⁵⁷

The cause of the problem was that National Bonds (clearly knowing the time delay value in objecting to jurisdiction as a matter of policy and procedure), filed a claim against Taaleem in the Dubai Court of First Instance.⁵⁵⁸ Here is an example not only of the procedural objection to jurisdiction of an arbitral tribunal (or court in this instance) but of involving national court intervention. Consequently, although the DIFC had jurisdiction, it has adjourned the Taaleem claim until the Dubai Court rules on its jurisdiction.⁵⁵⁹ The interesting consideration is: 'If the Dubai Courts find that they do have jurisdiction to hear the case, then an unusual situation will be created in that both the DIFC Courts and the Dubai Courts will have found that they have jurisdiction to hear disputes arising out of the same set of facts'.⁵⁶⁰

(iii) *Corinth Pipeworks SA v Barclays Bank PLC*

The third case dealing with competence in regard to the DIFC Courts is that of *Corinth Pipeworks SA v Barclays Bank PLC* in which the dispute arose due to a tort

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

which a Greek company filed against the DIFC branch of Barclays Bank. Corinth Pipeworks sold and delivered steel pipes to Afres Ltd, a company registered in the DIFC. Barclays sent Afres emails which Corinth alleged were meant to indicate that on behalf of Ares, Barclays Bank would pay for the pipes, but in fact these emails were falsified and were intended to prevent Corinth from taking action to recover the remaining balance owed to it as a result of an impartial payment from Afres for the pipes it contracted for. Corinth Pipeworks initiated proceedings in the DIFC Courts against Barclays on the bases that the promises made in the emails were false and for the sole purpose of delaying action on the part of Corinth to recover its losses. The decision of the learned Justice Coleman again demonstrates the dangers of the vague wording of the ‘in whole or in part’ clause found in the DIFC Protocol and in paragraph b of Article 5 of DIFC Law No. 12:

Justice Coleman found that the fact that all branches of a corporation may be part of a single legal person with a single corporate name does not result in all of the branches of the corporation being part of a Centre’s establishment. The international corporation is a Centre’s establishment only to the extent to which its branch is authorised to conduct business in the DIFC. As such a claim or dispute “involves a Centre’s establishment” when that claim or dispute is connected with or arises out of the activities of the corporation conducted by its DIFC branch or division.⁵⁶¹

Paragraph a in Article 5 of DIFC Law No 12, and the protocol are rendered irrelevant based on the fact that Justice Coleman found:

⁵⁶¹ Ibid.

that the fact that all branches of a corporation may be part of a single legal person with a single corporate name does not result in all of the branches of the corporation being part of a Centre's establishment. The international corporation is a Centre's establishment only to the extent to which its branch is authorised to conduct business in the DIFC. As such a claim or dispute only "involves a Centre's establishment" when that claim or dispute is connected with or arises out of the activities of the corporation conducted by its DIFC branch or division',⁵⁶²

If 'any of the Centre's bodies or establishments' cannot apply to a party to a contract such as in the case of Barclay's in which it became involved through the use of fraud, with a party to the contract, then the wording of this clause must either be rephrased to include 'excluding any banks which have offices overseas' or be removed.

If the basis of Justice Coleman's decision was strictly on the fact that the jurisdiction could only be activated if the offending party was a direct party to the contract then his decision would not be controversial. Stating 'the Court had no jurisdiction over claims arising out of the conduct of the Bank's Jebel Ali branch any more than it would have over claims arising out of the conduct of the Bank's head office in London',⁵⁶³ conflates the matter by calling into question if a branch of a company is considered to be based in part in the DIFC, rather than addressing the central matter of the problem which is the vague wording of the law and the fact that the bank through its fraudulent relationship with a party to the contract (Afres) opened the door to the jurisdiction of the DIFC by virtue of its location and of its tortuous interference in the contract. The wording and definition of 'a Centre's establishment' in Article 5 of DIFC

⁵⁶² Ibid.

⁵⁶³ Ibid.

Law No 12, paragraph a, is vague and confusing. Subsequent case law will serve to refine this term to delineate what is considered an establishment of the DIFC and what is not, but the problem of the lack of precedent in arbitral cases remains. A definition is required that narrows the scope and application of the term ‘Centre’s establishment’. These aforementioned cases demonstrate that the problem of competence is further complicated by the vague wording of Article 5 of DIFC Law No 12.

4 *Abu Dhabi Court of Cassation Judgements 564*

The matter of *compétence de la compétence* in the MENA can be further understood through analysis of case law from the Abu Dhabi Court of Cassation.

(b) *Case 1: Parties during an Arbitration may by Mutual Agreement add Points of Dispute which were not agreed in the original Arbitration Agreement. Abu Dhabi Court of Cassation Judgement No. 178/19, 27 July 1998*⁵⁶⁵

The dispute in this case arose from a contract that had an arbitration clause but the dispute exceeded the points that were included in the arbitration clause. An action was filed by an Abu Dhabi national against another Abu Dhabi national. The action requested that the court appoint a custodian in a company to manage it until the dispute was resolved.⁵⁶⁶ The claimant requested cancellation of the partnership agreement by the court and to appoint a liquidator to liquidate the assets and interests of both parties to this

⁵⁶⁴ See above n 312.

⁵⁶⁵ R Price, E Tamimi, *United Arab Emirates Court of Cassation Judgements*, 1998–2003, (Koninklijke Brill, 2005) 277–280.

⁵⁶⁶ Ibid.

dispute.⁵⁶⁷ The defendant challenged the jurisdiction of the court based on the grounds that they had agreed to refer any disputes to arbitration.⁵⁶⁸ The Abu Dhabi Court of First Instance appointed a tribunal which rendered an award in January 1994 calling for the termination of the partnership and ordering the claimant to pay the defendant.⁵⁶⁹ The defendant requested the court to uphold the award whilst the claimant requested the court to rehear the dispute.⁵⁷⁰ The Abu Dhabi Court of First Instance held the arbitration clause as null and void and the court decided to hear the case.⁵⁷¹ When the defendant appealed, the court rejected the appeal which then went before the Court of Cassation which cancelled the Court of Appeals judgement to hear the case and referred that court to determine the matter according to the guidelines of the Court of Cassation.⁵⁷² The Court of Appeals dismissed this and upheld the Court of First Instance judgement to consider the arbitration clause null and void and have the matter heard in court.⁵⁷³ The defendant again appealed to the Court of Cassation on the basis that a valid arbitration award existed and could not be set aside, and based on the fact that by mutual party agreement the arbitrator had jurisdiction to hear the matter.⁵⁷⁴ The defendant argued that the court's interpretation that the arbitrator's decision to liquidate the partnership outside the scope of the arbitration agreement was wrong both in fact and in law because the parties had made this application to the arbitrator and the court did not consider this.⁵⁷⁵ On the basis of this argument, the Abu Dhabi Court of Cassation held that the company should be

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

liquidated whilst maintaining that although the jurisdiction of the arbitrator cannot exceed points of dispute identified by the parties, it is still possible to deal with further matters that arise and are submitted to the arbitrator in the course of the proceedings so long as both parties agree.⁵⁷⁶ Essentially the Court of Cassation found that the Court of Appeals was wrong in that it went against what is set out in Article 203 of the Civil Procedure Law (Federal Law No. 11 of 1992).⁵⁷⁷ Article 203 states: ‘The subject of the dispute must be specified in the arbitration document or whilst the case is being heard even if the arbitrators are empowered to effect a composition, otherwise the arbitration shall be null and void.’ The court therefore ruled that, based on Article 203,⁵⁷⁸ points may be raised during the arbitration procedure. The court further found that this was done by agreement and therefore it cancelled the judgement of the Court of Appeals.⁵⁷⁹

Although this case deals with domestic arbitration, the decisions that were arrived at and the pitfalls can occur in an ICA proceeding as well. Notwithstanding that at the end of a very long process the case represents a victory for *res iudicata* and for the respect of arbitral tribunal *compétence de la compétence* by the Court of Cassation, the very process of so many appeals is costly and time-consuming and fraught with adjudicatory uncertainty. This case demonstrates support for arbitration by supporting party autonomy; in this case the mutual agreement to allow arising concerns to be subject to arbitration. However, this case also demonstrates adjudicatory uncertainty and risk.

⁵⁷⁶ Ibid.

⁵⁷⁷ *United Arab Emirates Civil Procedure Law* (Federal Law No 11 of 1992), Art 203.

⁵⁷⁸ Ibid.

⁵⁷⁹ See above n 566, pp 277–280.

(c) *Is it possible under UAE Law to Attach Assets Pending the Outcome of Foreign Arbitration. Dubai Court of Cassation Judgment No 267/93, 9 March 1996*⁵⁸⁰

The Court held a favourable stance towards the jurisdiction of the arbitrators which was a Seat other than that of Dubai notwithstanding other matters raised by the case: ‘In an action filed before the Dubai Courts, the Court held that a company may obtain an attachment against the assets of a Defendant company as security for arbitration proceedings outside of the UAE and request the Court to maintain the attachment and suspend the case pending the outcome of the arbitration proceedings’.⁵⁸¹

The reasoning of the court is straightforward:

The Court of Cassation held, therefore, that the judgments delivered by the lower Courts were wrong in law. The Plaintiffs had the right to commence the attachment action in Dubai, which is quite separate from the arbitration proceedings in England, and request that the Dubai Courts simply maintain the attachment proceedings. A determination of the merits of the case properly falls within the jurisdiction of the arbitrator in England. Accordingly, the Court of Cassation cancelled the judgment delivered by the Appeal Court and again referred the matter back to the Appeal Court to determine in accordance with the guidelines set out by the Court of Cassation.⁵⁸²

⁵⁸⁰ See above n 566, 255.

⁵⁸¹ Ibid.

⁵⁸² Ibid 257.

The decisions to these complex interconnected and topical questions regarding the aforementioned doctrines in the learned minds of MENA judges are important to arbitral award enforcement and mandate the expansion of powers of arbitral tribunals.

The matter of adjudicatory risk necessitates expanded competence and broad jurisdiction of arbitral tribunals. The contrasting differences in the outcomes of the DIAC Court and the Dubai Court decisions demonstrate the need for uniformity and harmonisation not only across countries but within national jurisdictions. However, this harmonisation and uniformity must be based on expanded powers in order to protect from court interference, inconsistency and adjudicatory risk throughout the MENA.

The next section is a detailed discussion of another major problem besetting ICA in the MENA: expropriation.

Article I of the HICALC *Compétence de la Compétence*

- (a) Bad-faith allegations of bias *shall* be penalised as fraud.
- (b) In the event of an extant arbitration clause, the competence of the Arbitral Tribunal *shall not* be procedurally challenged.⁵⁸³
- (c) Bad faith of any type, in procedural challenges of Arbitral Tribunal competence, for example, deliberate obstructions to arbitral proceedings or enforcement, in the form of bias challenges, undue objection to Arbitral Tribunal competence, delays or deliberate sabotage of the proceedings, and bribes, *inter alia*, *shall* be seen as bad faith and subsequently fall under the category of fraud and *shall* be penalised accordingly.

⁵⁸³ The author further recommends that in instances where there is a dispute over different forums that in that instance the forum where they are already seated and where the tribunal is already presiding shall prevail and decide on the dispute. This is given as a recommendation and not as a provision for practical considerations and to mitigate delays and other sabotage tactics that impact the parties acting in good faith. Paragraphs (e) and (g) of Article I expand the scope of the competence and jurisdiction of the tribunal similarly to the powers of a court.

- (d) False allegations of bias or allegations of bias made on the basis of apparent bias without material evidence of manifest bias *shall* be constrained and *shall* therefore require that the claimant bring forth evidence.
- (e) Wilful attempts to sabotage the compilation of an Arbitral Tribunal or the proceedings through a competence challenge *shall* be penalised through provisions set down by the Arbitral Tribunal on the basis that said competence challenge (if done wilfully) is done in bad faith.
- (f) The final decision of a properly conducted arbitration *shall* be legally binding and *shall* be subject to recognition and enforcement.
- (g) National courts *shall not* seek to overturn an Arbitral Tribunal decision or set aside an Arbitral Award except in cases in which there was found to be a mistake in the application of the law to the substance of the dispute or to the proceedings, and in cases of corruption and fraud, or instances of *force majeure* or ‘transnational public policy’.
- (h) In the event of a three-member arbitrator panel, arbitrators *shall not* be of the same nationality of either: (i) any of the parties or (ii) of each other, *nor shall* they be of the same region as (i) any of the parties to the dispute or (ii) each other. The term *region shall* be understood in the broadest sense, eg, Asia–Pacific, Europe, MENA, Latin America.
- (i) In the event of a one-member arbitrator panel, the sole arbitrator *shall not* be of the same nationality as any of the parties, *nor shall* the sole arbitrator be of the same region as any of the parties to the dispute. The term *region shall* be understood in the broadest sense, eg, Asia-Pacific, Europe, MENA, Latin America.
- (j) In the event of a drafted arbitration clause, the consent to arbitrate *shall* be binding on both parties and *shall* be seen to arise solely from the arbitration clause and therefore as a result of the mutual consent of both parties; and *shall not* be rescinded from in the event of a dispute nor subject to challenges to the Arbitral Tribunal based on competence challenges (by which the tribunal is composed as a result of the consent to arbitrate as drafted by a clause in the contract whereby the dispute arises therefrom).

B Expropriation

The purpose of this section is to demonstrate that it is feasible to demand that Arab governments not expropriate. In consideration of Islamic law principles prohibiting expropriation and the growing Islamisation of the MENA (starting with the current political and legal situation in Egypt), the author submits that the answer to this question is yes. The theoretical premise underlying the thesis of this section of the research is the widely acknowledged and well established premise that private property should be protected.⁵⁸⁴ It is beyond the scope of this thesis to argue against proponents of communist ideologies that hold that private property or capitalism are flawed.⁵⁸⁵ The author is of the view that the normative libertarian conception of distributive justice, and not communism, more properly fits with the aims of this thesis- to protect extant property under the best possible ideals.⁵⁸⁶ The author submits that there should be limits to

⁵⁸⁴ *US Federal Constitution*, Amendment 5, Amendment Fourteen. The notion of protection of private property is well established, for example in the US Constitution and at Islamic law. The provisions at Islamic law will be discussed in the section on Islamic law as it deals with expropriation. The Fifth and Fourteenth Amendments to the US Constitution make provisions that the government cannot deprive any citizen of life, liberty or property without due process of law. Indeed, the right to property is seen on par with life and liberty, two fundamental values and human rights. This example further demonstrates the harmonising principle of right to property in common with both US common law and Islamic law. The author is concerned with what the law states and it is outside of the scope of this thesis to discuss the merits of communism over capitalism where the right to private property is protected and where this is a fundamental assumption within this economic and political system.

⁵⁸⁵ This is outside the scope of this work. The author begins with the fact that in the European and MENA jurisdictions, communist forms of government are not the norm, and capitalist systems are already in place. As a result of the empirical fact of extant political systems, the premise that private property should be protected is realistic and reasonable. In this sense the author addresses the situation as it is. It is outside the scope of this research to argue if communism is flawed or if capitalism is ideal.

⁵⁸⁶ J Bonnitcha 'Outline of a normative framework for evaluating interpretation of investment treaty protections' in C Brown, K Miles (eds), *Investment Treaty Law Arbitration* (Cambridge University Press, 2011) 120: 'The libertarian conception of distributive justice is based on entitlement to existing, validly acquired, property rights. This school of thought is most associated with the theoretical work of Robert Nozick.' Further at 120, 'justice requires a host state to compensate a foreign investor for loss caused by interference with the investor's property rights.'

expropriation insofar as is possible.⁵⁸⁷ Indeed, it is already well established that *jus cogens* cannot be used to justify permanent State sovereignty over all resources that can be expropriated.⁵⁸⁸

In regard to the rhetorical question of how far is a State justified in expropriating an investor- the author submits that in the event of exceptions such as *force majeure*,⁵⁸⁹ changed circumstances⁵⁹⁰ or an unfair contract that an argument may be made in Western law for expropriation. Yet, this is not ideal as it disrupts credibility in the system of investor-State contracts. It creates unfairness for the investors. However, Article 62 of the Vienna Convention⁵⁹¹ recognises that ‘a fundamental change in circumstances which existed at the time of the treaty was concluded which radically transforms the scope of

⁵⁸⁷ See above n 367: ‘The rules of international law governing the expropriation of alien property have long been of central concern to foreigners in general and to foreign investors in particular. Expropriation is the most severe form of interference with property. All expectations of the investor are destroyed in case the investment is taken without adequate compensation.’

⁵⁸⁸ I Seidl-Hohenveldern, *Collected Essays on International Investments and On International Organisations*, (Kluwer Law International, 1998) 201: ‘We have set out above the reasons why we reject the Third World claim that permanent sovereignty over all the wealth, natural resources and economic activities forms part of *jus cogens*. Whoever discusses *jus cogens* should never forget that the Vienna Convention on the Law of Treaties has accepted this controversial notion only under the condition that whenever a State invokes the existence of a *jus cogens* rule in order to avoid to honour an [sic] commitment accepted in a treaty, this State has to submit this claim to international adjudication.’

⁵⁸⁹ M Ayad, *The Quest for the Holy Grail of Social Justice: Substantive & Procedural Law Provisions for Amicus Curiae in Investor-State ICSID Arbitration Law & Practise*, Macquarie Journal of Business Law (2012) Vol 9: The author cautions against the use of *force majeure* or other exceptions to *pacta sunt servanda* however where there are cases where a State has entered into a contract where either the contract exploits the State (as in the early oil concessions) or where the contract allows a foreign investor to set up a project that harms the human rights of the local population, There have been several landmark cases that have come before ICSID concerning water rights, including *Aguas del Tunari SA v Bolivia*, *Suez, Sociedad General de Aguas de Barcelona SA*, and *Vivendi Universal SA v Argentina*, *Biwater v Tanzania* with tremendous human rights implications. Moreover, the matter of an investor needing to invoke *force majeure* is also valid. For example the recent *Texana Resources and Cairn Energy Company* dispute with the government of Nepal which may go to international Arbitration. Ekantipur.com, Markets, <<http://www.ekantipur.com/2012/06/11/headlines/2-oil-giants-may-pull-out-of-Nepal/355377/>> Contracts should be well thought out in advance.

⁵⁹⁰ The author agrees with the provisions set out in the Vienna Convention on the Law of Treaties (1969) in principle, in which, see above n 387, 25: ‘The Vienna Convention on the Law of Treaties (1969) represents a compromise between the two doctrines. Article 26 states the doctrine in the following terms: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”’

⁵⁹¹ 1969 Vienna Convention on the Law of Treaties.

the obligations under the treaty will provide a party to the treaty grounds for terminating the treaty.’ Although the author agrees with this in principle, the reality is that arguments have been used in the past to justify changed circumstances and contractual breaches. In both the early oil concessions and the ICSID cases, Arab parties have broken contracts, concessions or treaties- for various reasons, many of which are justified. The reasons for the contractual breaches need to be addressed. One of these is unfairness and bias, both of which have been addressed, in the section on universal law and the section dealing with the methodology, *inter alia*, respectively. However, the author cautions against supporting strong arguments against *pacta sunt servanda*. The situation in the MENA requires reform, and the matter of bias and unfairness needs to be addressed, as does the matter of *pacta sunt servanda*. To leave either of them unresolved maintains the cycle of unfair or biased contracts and broken contracts and expropriation in the MENA. All of this creates adjudicatory and legal risk and uncertainty. The entire system needs to be reformed in consideration of the unique complexities of the MENA.

At Islamic law, the standard against expropriation is higher than that at common or civil law. There is a greater chance of MENA governments implementing a HICALC and taking suggestions for a new code seriously if it has a *sharia* element. This is yet another reason that the author includes Islamic law in the comparative analysis. From what is known of the new governments of the MENA- eg, in the case of Egypt- they are a democratically elected government- it is likely that they would be more prepared than their predecessors to honour contracts and be less likely to expropriate. The discussions regarding the oil concession cases in this section and the discussion on the section dealing with *compétence de la compétence* give examples of cases of expropriation. The author

submits that in the later case of ICSID disputes, this occurred as a result of corruption. Many elements of corruption have been dealt with in Egypt during the revolution and its subsequent reforms. The early oil concessions are demonstrative of the legal problems that arise in investor–State disputes involving a MENA government. The early oil concession arbitration disputes were as a result of certain actions by the State, in regard to investors. One example is the act of expropriation. A brief history of the landmark early oil concessions is given here in order to demonstrate the problems of the past. This historical discussion is followed by a comparative legal analysis of the view of expropriation at common, civil and Islamic law. Although the early oil concession arbitrations raise a number of other legal matters- not only expropriation- the author submits that expropriation is one of the most serious matters that occurred as a result of these concessions and led to disputes that were not properly resolved. This history is a driving factor behind the unsatisfactory ICSID cases that are dealt with in the chapter on competence, which the author argues reflect a reaction (postcolonial), to the early oil concessions. The matter of expropriation can best be demonstrated by way of the following cases.

(a) *Arbitral Awards: The history of arbitration in the MENA; the early oil concessions*

Oil concessions fall under the category of State contracts. State contracts by their nature raise complex areas of law and are much more suited to resolution by arbitration rather than national courts.⁵⁹² State contracts raise the matter of expropriation, or the

⁵⁹² See above n 414, in Part VI Section 36.01 at 17: ‘Close governmental control over national economies, especially in the Third World, has increased the significance to both scholars and practitioners of the sui

potential for expropriation, as States have powers regarding expropriation that private actors vis-à-vis one another do not have. The early international arbitrations amongst the MENA and the Western nations were oil concessions. Indeed, mineral investments are relevant to the Middle East. Mineral investments include oil concessions⁵⁹³ or ‘licenses’. In the past, they were mainly oil concessions. The future natural resources of the region will include natural gas, *inter alia*, with continued reliance on oil. The matter of expropriation was a common theme regarding the early oil concessions. International arbitration in the future will not be confined to solely mineral investments, but also tourist resorts and other investments, all of which may be subject to expropriation. In order to understand the current situation in ICA particularly in investor–State⁵⁹⁴ arbitrations involving Middle Eastern governments, it is important to look to the past.

The learned Professor El Kosheri has grouped ‘agreements related to the exploitation of

generis economic development agreements between governments and foreign private enterprises, often referred to as “State contracts”. They include agreements to build and operate factories, airports, and harbours, or for the exploitation of natural resources. Such agreements generally provide for long-term collaboration, with the foreign enterprise becoming a partner in development, for example, by making a direct investment in local joint ventures or undertaking to manage the project and provide technical training for indigenous personnel. International commercial arbitration is often the only adjudicatory process acceptable to both parties to State contracts. They may feel mutual mistrust of each other’s national courts. A State may seek arbitration to avoid publicity, or to avoid subjection to a foreign State court which may appear as an affront to its sovereignty. The multinational enterprise may fear that the courts of the host country might be unduly influenced by the government, or that without submission to arbitration there may be no certainty of waiver of the State’s immunity.’

⁵⁹³ R Mommer, *Global Oil and the Nation State*, (Oxford University Press, 2002) 118, ‘The concession system in the Middle East was of colonial and imperial origin. When Persia granted the D’arcy concession, in 1901, the country was divided into spheres of British and Russian influence. In Iraq the tug of war for oil concessions began under Turkish rule; then the country was under a British mandate when the most important concession was granted to the Turkish Petroleum Company (TPC) in 1925. The sheikhdoms of Bahrain (1930), Kuwait (1934), and Qatar (1935) granted concessions under British rule. Only Saudi Arabia, which granted its most famous concession in 1933, was an independent kingdom. Every single concession covered a large part, if not all, of the national territory of these countries. The concession term varied between 55 years (Bahrain) and 75 years (Iraq, Kuwait and Qatar), and there were only vague provisions for relinquishment. Hence, the history of Middle East oil is largely the history of a few concessions.’

⁵⁹⁴ Kahn see above n 434, 55: ‘What Elihu Root said in 1910 about the foreign investor was then a long-established wisdom and has not changed one iota by then: “[h]e will probably be at a disadvantage in litigation against citizens of the country. He is less familiar than they with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices.’

hydrocarbon resources' into four categories.⁵⁹⁵ The first category deals with the proper interpretation of the first generation of concession agreements: Abu Dhabi award (1951), the Qatar Award (1953) and the Aramco award (1958).⁵⁹⁶ The author submits that the way these awards were interpreted has had bearing on the outcome of the early oil concession history and therefore they are discussed. This first category shall be relevant. The second category deals with awards related to the confrontation period, described as the abstention by host states from participating in arbitration proceedings as a result of unilateral acts that ended the concession.⁵⁹⁷ The second category thus raises the matter of unilateral acts (expropriation) or other acts that ended the concession contract. In this category are *Sapphire v Iran* (1963), BP (October 1973), Texaco (January 1977) and Liamco (April 1977).⁵⁹⁸ The latter three involved Libya as a State party. This second category is relevant to the discussion. The third category deals with second-generation concessions in which balanced arbitrations were conducted under either the auspices of the International Chamber of Commerce (ICC) or the International Centre for Settlement of Investment Disputes (ICSID), eg *AGIP v Congo*, Case No ARB/77/1).⁵⁹⁹ This period marks the maturation of the case law that emerged through petroleum arbitration, such as in the reasoning of Aminoil (1982) and continued to develop through the findings of the Iran/USA claims Tribunal (1983/1987), and further in Sunoil (1985/1987) as well as ICC Grace Petroleum (1995).⁶⁰⁰ The learned El Kosheri submits that 'these proceedings were marked by full participation of the host State's authorities in front of properly constituted

⁵⁹⁵ A El Kosheri, *International arbitration and petroleum contracts*, Vol IV, Hydrocarbons: economics, policies and legislation, Enciclopedia degli idrocarburi, 2007, 879–898, 879.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

arbitral panels and with the assistance of able foreign counsels. Positive legal contributions were obtained under such balanced circumstances as a result of adequately pleaded cases'.⁶⁰¹ The author respectfully disagrees with the preceding statement.

The thesis of the author is that just as the early oil concession awards in category one and two had errors of law and were biased against Arab parties, a number of subsequent ICSID arbitrations also had errors of law and were, in fact, biased against the investors, who in many cases were Western. These ICSID arbitrations are analysed in detail in the section dealing with the matter of *compétence de la compétence*. The fourth category is distinguished by the new types of disputes in which the economic interests of public entities committed to provide natural resources were opposed within the context of joint operating agreements.⁶⁰² They were concluded with private foreign entities under long-term Build, Operate, Transfer (BOT), *inter alia*, such as *Wintershall v Qatar* (1988), *Himpurna California Energy*, and *Patuha Power* against Indonesian authorities (1999/2000).⁶⁰³ These are currently outside the scope of this research however the analysis herein may provide a useful framework for understanding these cases. The reasons for this will become clear. The importance to investors of understanding the MENA legal and political context, including Islamic law, cannot be overstated: 'Middle East oil and gas resources are controlled by Muslim states – principally Saudi Arabia, Iraq, Iran, the Gulf states, Oman, Yemen, Syria, Libya, Algeria and Egypt.'⁶⁰⁴ Furthermore,

⁶⁰¹ Ibid.

⁶⁰² Ibid.

⁶⁰³ Ibid 879-880.

⁶⁰⁴ El-Malik see above n 400, iv.

The knowledge of Islamic laws is vital for any mineral investor in the Muslim World.

The modern trend in Muslim states is to Islamize the laws and to consider the holy Qu'ran as the constitution of the State. Muslims control a significant portion of the mineral resources and they inhabit many of the globe's most strategic areas. To them, natural resources are the most important present and future commodity. As King Fahd of Saudi Arabia said, 'The main resource to depend upon after God is oil'.⁶⁰⁵

The above quote provides justification for the author's references to Islamic law and thus, religious sources throughout this thesis. Islamic law is the current law of most MENA countries and it gains its legal authority from religious sources and texts, which must be referred to in the context of discussing Islamic law. The author argues based on the following premises that: (1) oil concessions (and investment treaty arbitrations) fall within the framework of public international law, and (2) the careful negotiation of oil concession disputes is an important regulator of peaceful international relations because of the delicate nature of the relationship between oil-producing states and oil-consuming states,⁶⁰⁶ then as a result international commercial arbitrations involving a State party have far-reaching diplomatic ramifications as the overall pattern of oil concession arbitrations has demonstrated over time. Evidence for the foregoing conclusion that international commercial arbitrations with a State party share important features with public international law is based on the fact that these types of arbitrations, by virtue of engaging in a commercial transaction with a State, raise questions related to the doctrines of sovereign immunity and public policy, as is demonstrated in the following landmark

⁶⁰⁵ Ibid 5.

⁶⁰⁶ See above n 46, 169: "The careful negotiation of oil concession disputes is an important regulator of peaceful international relations because of the delicate nature of the relationship between oil producing states and oil consuming states. The outcome of oil concession and other important financial investment cases are a determining factor of interstate relations."

cases. The convergence of private international law with public international law by way of oil concessions or other investment contracts or contracts involving a State party has been discussed in the section on the convergence of ICA and IIA. This fact applies to international commercial arbitrations and to international investment arbitrations; although it is well established that the two are distinct areas, nonetheless overlaps exist. Just and equitable arbitration awards as a feasible solution to large commercial disputes such as the outcomes of oil concessions or financial investment cases would be a determining factor of inter-State relations where cross-cultural misunderstandings can lead to mistrust over time. The matter of mistrust is important in investor–State arbitrations from the point of view of the investor, who is at a natural disadvantage when drafting a commercial or investment contract with a State party.⁶⁰⁷

Indeed ‘the crucial lever for investment risk is who controls and applies the law’.⁶⁰⁸ The HICALC, if drafted as law in the MENA or as arbitration clauses, allows both parties to be on equal ground in terms of a law that is fair to both sides. Hence, the matter of national law as the law chosen by the parties is in practice not as central as lawyers believe it is to the outcome of the dispute. Thus: ‘While the substantive law (national law versus or with international law disciplines may be of some practical relevance it is in effect and practice minor.’⁶⁰⁹

⁶⁰⁷ See above n 13, 55: ‘The main reason and the main effect of modern international investment protection is to balance this pre-existing and inherent structural asymmetry in which foreign investors find themselves: to compensate them for exposure to the host State as contract party, regulator, sovereign and judge by having a forum for disputes that is not controlled by the host State.’ The value of the HICALC is that it does protect investors whilst also not compromising the State in any manner.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

The importance of the early oil concessions in consideration of a colonial and postcolonial backdrop requires elucidation in order to give the proper context for the problems currently affecting ICA:

The petroleum disputes were founding acts. They made arbitration known and recognised. The importance of the financial, political (the redefinition of colonial relations), and the legal (the relationship between sovereignty and the respect of contractual obligations) stakes incited a certain number of important actors from the legal field (high judges, noted practitioners and academics, leading law firms) to become interested and to invest in this mode of dispute resolution. The efforts and intellectual activity that they deployed for resolving these new, exceptional conflicts in a legal manner served to construct the minimum base of knowledge necessary to build a field of practice. They furnished an occasion for a series of investments in knowledge, institutions, and political relations that permitted the basic 'equipping' of this new market. The basic equipment also required rules and the construction of institutions capable of handling the work of international arbitration. All this occurred as if, through the mechanism of great conflicts, a small portion of the profit of the petroleum industry was converted into symbolic capital in the form of a new legal order. At the same time, however, these great arbitration matters occupy only a marginal, if negligible, place in the history of the petroleum industry.⁶¹⁰

This is not the only important contribution of oil concession arbitrations to the area of ICA. The valuable lessons of the early oil concession arbitrations can be distilled to generate a code of best practises or a *lex petrolea*. In addition to a *lex petrolea*, the author suggests that there is a strong argument for attempting to create a body of law from the

⁶¹⁰ Y Dezalay, B Garth, *Dealing in Virtue*, (University of Chicago Press, 1996) 75.

awards of arbitrators in ICSID disputes as well. The suggested draft articles for the HICALC (located in full at the appendix) include legal principles that are derived from an analysis of both the early oil concession arbitrations (*lex petrolea*) and ICSID disputes involving MENA governments. For example, Public awards are the source of customary law. Kuwait identifies this customary law as a *lex petrolea*.⁶¹¹ Indeed, ‘The government of Kuwait argued, in one case, that a sub-species of these disputes has “generated” a customary rule valid for the oil industry—a *lex petrolea* that was in some sort of a particular branch of a general universal *lex mercatoria*’.⁶¹²

Yet, read in a different light, the oil concessions offer a wealth of lessons from the past including a complicated legacy that must now be unravelled, as:

From the standpoint of the developed states, there was a need for the rapid development of such rules. With the end of colonialism, ready sources of raw materials to fuel industries in Europe and the United States had disappeared. There was a need to assure continued supply. The technique of doing this was found in ensuring that states which enter into contracts for the supply of such resources for a period of time cannot resile from those obligations too easily. The best evidence for such agreements is to be found in the petroleum sector where concessions tied up vast areas of petroleum producing land for long periods of time in return for which a small sum, vastly disproportionate in terms of the profits made, was paid as royalty. Doctrine was developed that breaches of such

⁶¹¹ *From Government of the State of Kuwait v American Independent Oil Co (Aminoil)*, Award of 24 May 1982, 21 International Legal Materials 976, 1036 (1982), 9 Yearbook Commercial Arbitration 71, 87 (1984), in, see above n 523, 1.

⁶¹² Ibid.

contracts were international wrongs and that damages may be ordered against such breaches in arbitration.⁶¹³

The perception of unfairness and bias on the part of any outside observer, not least of which by a Middle Eastern party, would not be inaccurate. This historical situation will first be described in the following cases. It is argued in this thesis that there was a reaction to this historical unfairness, which manifested itself in a number of landmark cases, (most notably ICSID cases) as discussed in the section dealing with the matter of *compétence de la compétence*. The historical outcome of the early oil concession cases is a large factor contributing towards undermining the acceptability of international arbitration to Arab parties.

(b) *Aminoil v Kuwait*⁶¹⁴

The problems began with the early oil concessions because many of them were international arbitrations. The case of *Aminoil v Kuwait*⁶¹⁵ raises a number of doctrinal matters, not least of which is inconsistency,⁶¹⁶ for example:

The royalty which was to be paid was two shillings and six pence for every barrel of oil.

The arrangement was to last for sixty years. The terms of the contract were not to be changed without the consent of both parties. Events showed that the agreement was not able to withstand the political and economic changes that took place within the industry.

The agreement was renegotiated on two occasions. The price of oil sky-rocketed during

⁶¹³ Sornarajah see above n 387, 10.

⁶¹⁴ See above n 612

⁶¹⁵ Ibid.

⁶¹⁶ See above n 367, at 76: 'Subsequent cases have also failed to provide a homogeneous jurisprudence. In *Aminoil v Kuwait*, the tribunal concluded that a typical stabilization clause should not be presumed to imply that a state lost the right to expropriate a contract running for a period of 60 years.'

the oil crisis of the 1970s. But, the oil company insisted on paying the same sum of two shillings and six pence per barrel that had been originally agreed upon in the concession agreement. The windfall profits were not due to any inherent merit on the part of the company but to external industry trends. As the company was not willing to part with a larger share of these profits, the state intervened and took over production of the oil. In these circumstances, it is inevitable that a state would intervene. The case nicely illustrates that power balances within long-term contracts involved in the area of foreign investment could shift as a result of external circumstances and that, if the contract proves inflexible, it will provoke a conflict that results in government intervention.⁶¹⁷

The author agrees that an unfair contract in which the price of a commodity in the contract is less than the market price is a cause for concern, particularly in consideration of universal principles that prohibit both unfairness and fraud. When a State is forced into a situation such as the one given above, expropriation or severance of the contract may be the only recourse available to the State. Provisions in a HICALC that address the matter of unfair contracts would remove one of the causes for expropriation. The question of government intervention as an exercise of legitimate sovereign power has been dealt with by other scholars in discussing *Aminoil*:

Nationalisation of petroleum resources, including the famous 1982 AMINOIL award, were considered a legitimate exercise of sovereign power unfettered by the presence of a contractual stabilization clause embodied in the petroleum agreement. The protection against unilateral revocation or modification of the contract by the state through

⁶¹⁷ M Sornarajah, *The International Law on Foreign Investment*, (Cambridge University Press, 3rd ed, 2010) 38–39. *Aminoil v Kuwait* (1982) 21, *ILM* 976.

stabilization clauses is far from a satisfactory solution. Hence, an investor should not rely solely on the protection of clauses the efficacy of which is doubtful.⁶¹⁸

Arguably, this question of government intervention is related both to the doctrines of sovereign immunity and public policy including questions concerning expropriation. It is not only Middle Eastern or Arab scholars who have criticised the early oil concession arbitrations as being unfair, biased and misinformed of basic Islamic law principles and customary usage:

The genesis of the theory could be found in the disputes arising from petroleum concessions in the Middle Eastern states. These were concession agreements entered for absurdly long periods of time giving virtual control over exploitation of petroleum to the major oil companies by principalities which were still British protectorates. The unequal nature of these agreements has been discussed in many works. The arbitrations were charades, often presided over by British judges, to ensure that a legal cloak for the continued control over the oil riches of the region was maintained.⁶¹⁹

The implications of this case (in terms of colonial history and post-colonialism), including others similar to it, have been elucidated:

Concession agreements often effected transfers of sovereign powers over vast tracts of land to foreign corporations for long periods of time, in return for the payment of royalties calculated on the quantity of oil produced at a fixed rate. The system was kept in place by an elaborate web of power exerted by the home state and a concerted dominance exerted within the international system itself by the dominant powers. Some of these

⁶¹⁸ A Z Al Qurashi, 'Renegotiation of International Petroleum Agreements' in *Journal of International Arbitration* 22 (4): 261–300. 2005, 264.

⁶¹⁹ Sornarajah see above n 387, 17.

concession agreements have been subjected to legal analysis as they were subjects of international arbitrations. Thus, in *Aminoil v. Kuwait*, the concession agreement which was involved was originally entered into between the Sheikh of Kuwait, at a time when Kuwait was a protectorate of the United Kingdom, and a US oil company.⁶²⁰

Other scholars have criticised the early oil concessions:

The concession system in the Middle East was of colonial and imperial origin. When Persia granted the D'arcy concession, in 1901, the country was divided into spheres of British and Russian influence. In Iraq the tug of war for oil concessions began under Turkish rule; then the country was under a British mandate when the most important concession was granted to the Turkish Petroleum Company (TPC) in 1925. The sheikhdoms of Bahrain (1930), Kuwait (1934), and Qatar (1935) granted concessions under British rule. Only Saudi Arabia, which granted its most famous concession in 1933, was an independent kingdom. Every single concession covered a large part, if not all, of the national territory of these countries. The concession term varied between 55 years (Bahrain) and 75 years (Iraq, Kuwait and Qatar), and there were only vague provisions for relinquishment. Hence, the history of Middle East oil is largely the history of a few concessions.⁶²¹

Another important implication of *Aminoil v Kuwait*⁶²² raises questions about the doctrine of *pacta sunt servanda* and the principle of precedent. For example,

The reaction to Texaco was not uniform. Though the arbitral tribunal in *Company Z v. State Organisation ABC* followed Texaco, the Aminoil Award, made by a distinguished tribunal which consisted of Professor Paul Reuter, Professor Hamed Sultan and Sir

⁶²⁰ Sornarajah see above n 617, 39. *Aminoil v Kuwait* (1982) 21 *ILM* 976.

⁶²¹ R Mommer, *Global Oil and the Nation State*, (Oxford University Press, 2002) 118.

⁶²² See above n 612.

Gerald Fitzmaurice contained hardly any reference to Texaco. Aminoil, in presenting its arguments to the tribunal, had relied heavily on principles and authorities that support the theory of internationalism. It had relied on the principle of *pacta sunt servanda* and on awards such as the one in Texaco. The tribunal rejected these arguments, holding that while it may be possible that a state could agree to bind itself not to nationalise the investment ‘during a limited period of time’, it could not do so for a substantial period of time so as not to take into account the economic and social progress of the national community. It thus struck at the scope of the stabilisation clause which is one of the bases on which the theory of internationalisation rests. Existence of awards such as Aminoil show that there is no consistent authority supporting any uniform principles regarding the theory of internationalisation and that arbitral awards do not support a single coherent thesis in such a way that an argument as to the existence of supranational principles could be built up on the basis of these awards.⁶²³

The lack of consistency is connected to the doctrine of precedent which has been identified by scholars as a source of unpredictability in international law. The argument that supranational principles underpin a theory of nationalisation or a consistent body of law of international arbitration may be refuted by the following argument:

The establishment of the arbitration tribunal is the product of international law.

International claims tribunals are a hybrid mixture of purely “public” arbitrations and commercial “private” dispute settlement. Therefore, any distinction on the basis of the

⁶²³ Sornarajah see above n 387, 22. *Company Z v State Organisation ABC* can be found at (1983) 8 YCA 94. The Aminoil Award can be found at (1982) 21 ILM 976. Texaco may be found at (1980) 74 AJIL 134.

character or identity of the party should not be entertained, as it will take away the very purpose of the arbitration tribunals.⁶²⁴

It is submitted that precisely because international claims tribunals are a hybrid of public and private international law principles that the common denominator distilled from these sources must be used to inform a Model HICALC. Therefore, general principles of law are essential in addressing the problems that ICA encounters, problems that stem from procedural and substantive doctrines of law that arise from both the arenas of private and public law. Furthermore, regarding the doctrine of *pacta sunt servanda*, the following is relevant:

When a state enters into a contractual relationship with a foreign company several questions arise. One such as, whether the similarity, which may exist between the contractual relations, established by states with private individuals or a body corporate of foreign nationality and a relationship of the same nature, which the state may enter into with themselves are the same? Does it afford juridical grounds for affirming that the principle of *pacta sunt servanda* is equally applicable to such relationships?⁶²⁵

The author submits that the answer to the first question is no, they are not the same; however, similarities arise that bind them to the same fate. It then logically follows that the answer to the second question is yes.

⁶²⁴ Al-Jumah, see below n648, 215.

⁶²⁵ Ibid 215–240, 215–216.

Problems with the Texaco award⁶²⁶ abound: ‘Concerning the law governing the arbitration, the Texaco arbitrator decided that international law alone governed that matter, pointing out that the involvement of a State as a party made it inappropriate to choose the law of the seat of the Tribunal and that possible problems arising out of the enforcement of the award were not within the concern of the arbitrator’.⁶²⁷ This award was made 19 January 1977. The mercurial pattern of awards reveals a marked lack of predictability punctuated with inconsistency. In one instance the *lex arbitrii* was replaced with international law, inconsistently with another award, that provided for the prevailing of the *lex arbitrii* according to that contract. Yet another award reverted to replacing the *lex arbitrii* with international law again, only to be followed by an award which reversed this ruling and allowed the *lex arbitrii* to replace international law. Here, the irreverence for award enforcement, and consequently, for the principles of justice and equity, are evinced in the capricious history of oil concession arbitrations with MENA States. Which jurisdiction may produce a court where an honourable judge replies to learned counsel’s submissions of advocacy for the client with a ruling claiming that the enforcement of the law as it applies directly to the facts of the case has not been considered? Would this be a mockery of justice? What of legal ethics? Would not the general principles of civilised nations be under siege? The penultimate reason counsel pleads before the Bench is to gain relief and prayers for remedies. The ultimate reason is for the final application of the law, manifested as enforcement.

⁶²⁶ *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*, YCA 1979, at 177 et seq. (also published in: ILM, 1978, at 1 et seq.; Int’l L. Rep 1979, at 389 et seq.; Clunet 1977, at 350 et seq.).

⁶²⁷ See above n 595, 884.

The centrality of the doctrine of *pacta sunt servanda* is raised in these two landmark cases: ‘International custom and case law had always sustained the proposition of *pacta sunt servanda*. It has been upheld in many arbitration awards, such as *Aramco–Saudi Arabia Arbitration* of 1958⁶²⁸, and *Sapphire International Petroleum, Ltd*⁶²⁹. v. *National Iranian Oil* of 1963.’⁶³⁰ These cases are discussed in further detail below. *Aminoil* resolved the question of *pacta sunt servanda*: In *Saudi Arabia v. Arabian American Oil Company* the arbitrators found ‘*pacta sunt servanda* fully recognized in Muslim law’.⁶³¹

(c) *Saudi Arabia v Arabian American Oil Co (Aramco case)* ⁶³²

Another important case is that of *ARAMCO v Saudi Arabia*.⁶³³ The author submits that this case represents an example of the complex matters in international arbitration and subsequently are not resolved. In this case, the dispute arose as a result of a contract between the government of Saudi Arabia and ARAMCO to produce and transport its oil.⁶³⁴ The dispute arose when the Saudi Arabian government then signed another contract with A.S. Onassis, ‘giving him a right of priority for the transport of oil for a 30-year period’.⁶³⁵ The facts of the case are as follows. Aramco’s claim was that this

⁶²⁸ ARAMCO-Award, ILR 1963, at 117 et seq.

⁶²⁹ Sapphire Award, ILR 1963, at 136 et seq.

⁶³⁰ S Salah *Commercial Arbitration in the Arab Middle East* (Hart Publishing 2nd ed, 2006) 2.

⁶³¹ Bishop, see above n 523, 2-3.

⁶³² 27 ILR, 1963, 116.

⁶³³ See above n 628.

⁶³⁴ Ibid, 221: ‘The founder of the State of Saudi Arabia, King Ibn Saud, concluded a contract on 29 May 1933 with the Standard Oil Company of California (Socal) on oil exploitation, which granted to that company an exclusive Concession for 60 years in the eastern part of Saudi Arabia.’

⁶³⁵ Ibid.

new agreement 'was in conflict with the terms of the Concession Agreement concluded with them, and had the effect of taking away an acquired right'.⁶³⁶ The government responded in the following way:

By virtue of the Concession Agreement it did not grant to the company the exclusive right for the transportation of oil by sea to foreign destinations. And although there is a right the Onassis Agreement is not in conflict with the Concession Agreement as Aramco has not exercised its right and hence the conflict is of such a nominal character and it is not proved that there is injury caused to the company on the implementation of Royal Decree No 5737.⁶³⁷

The jurisdiction and the competence of the *ad hoc* tribunal was challenged by the Saudi Arabian government whilst it yet sought to expand the *compétence de la compétence* of the tribunal by arguing that the tribunal had power to consider future events and to harmonise both of the contracts it had signed. The government of Saudi Arabia's defence counsel argued that it did not want the tribunal to maintain jurisdiction over acts of government based on sovereignty. The tribunal rejected the signing by the government of Saudi Arabia of two contradictory contracts as a matter of national sovereignty; the tribunal found that it fell under its jurisdiction to determine whether the Onassis contract infringed Aramco's rights. The panel found that the second contract did infringe upon the first; however, the panel rejected the wider powers that Saudi Arabia's government

⁶³⁶ Ibid.

⁶³⁷ Al-Jumah, see above n 634.

attempted to expand in order to harmonise the two contracts, finding it was not competent to harmonise both contracts.⁶³⁸

The complexities inherent in this case attest to much larger matters than are present in this case. The problem has to do not only with a conflict of laws, but also with definitions of what is the *lex arbitrii* including the reasoning of the tribunal in arriving at decisions related to the appropriate choice of law whilst taking into consideration the wishes of the parties. In this case, the author submits that the arbitral tribunal disregarded the choice of law as selected by the parties in the arbitral agreement clause, and circumvented the fact that they followed the precedent of the previous arbitrations, eg Abu Dhabi and Qatar. They set a precedent in the construction of the scope of the *lex arbitrii* including its definition in practical usage. In regard to the first point: ‘the arbitration agreement of 23 February 1955 provided explicitly in art. IV that the Saudi Arabian law governs “matters within the jurisdiction of Saudi Arabia”, specifying that Saudi Arabian law “is the Muslim law (i) as taught by the school of Imam Ahmed Ibn Hanbal; (ii) as applied in Saudi Arabia.”’⁶³⁹ The first part of the argument: (i) there was a valid arbitration clause, (ii) said arbitration clause referred to Saudi Arabian law, (iii) Saudi Arabian law was the *lex arbitrii*, (iv) and therefore Saudi Arabian law was the law that should have been applied to this arbitration on the basis that the arbitration was one of the ‘matters within the jurisdiction of Saudi Arabia’.

The panel of arbitrators began with a similar view as the aforementioned: ‘The Concession Agreement of 29 May 1933 derives its judicial force from the legal system of

⁶³⁸ Bishop, see above n 523, 2-3. Decision of 23 August 1958, 27 International Legal Reports 117 (1963).

⁶³⁹ See above n 595, pp 879–898, at 881.

Saudi Arabia'; "The Concession Agreement is [...] the fundamental law of the parties [...] it fills a gap in the legal system of Saudi Arabia with regard to the oil industry [...] The Concession has the nature of a constitution [...] conferring acquired rights on the contracting parties.'"⁶⁴⁰ According to the above statements, it would be reasonable to conclude that the arbitral panel applied Saudi Arabian law.

The complexity of this case is related to the following facts: as a result of the Saudi Arabian party's objection to jurisdiction on one hand whilst requesting jurisdiction in terms of the first concession, this is not what happened.⁶⁴¹

It was in fact a case of:

The tribunal created three rules which have subsequently become precedent in latter instances: (1) the necessity of resorting to the general principles of law and to apply them in order to interpret, and even supplement, the respective rights and obligations of the parties, (2) and not by custom and practice in the oil business nor by notions of pure jurisprudence, (3) public international law should be applied to the concession when the tribunal believes that certain matters cannot be governed by municipal law, particularly in instances dealing with matters related to sea transport, state sovereignty over territorial waters and the responsibility of the state in the event it breaches its international obligations.⁶⁴²

⁶⁴⁰ Ibid 880.

⁶⁴¹ Ibid 881: 'Nevertheless, as the dispute under consideration related to the interpretation of art. 1 of the concession agreement which provided for granting an "exclusive right, for a period of sixty years [...] to transport, deal with, carry away and export petroleum", and as Aramco claimed that the agreement concluded in 1954 between Onassis and Saudi Arabia infringed the said exclusive right granted under the concession agreement of 1933, the arbitral Tribunal was bound to seek what system or rules of law governed the arbitration itself. That is, the nature of the concession itself and the extent of the rights conferred thereunder as duly construed in conformity with the appropriate canons of interpretation.'

⁶⁴² Ibid.

The author agrees that the above reasoning is the correct manner with which to address the important substantive legal matters pertaining to international arbitration; that general principles of law, particularly in a lacuna, should take precedence over domestic law and that principles of public international law should carry precedent over municipal law and in matters related to international relations. Yet, the tribunal circumvented the application of Islamic law and against the wishes of the parties (or one of the parties as the case may be). This is important is because this precedent created complexities in international arbitrations in the MENA. It left certain legal matters unsettled and allowed for the creation of confusion when it came to matters related to the *lex arbitrii* and this is now a problem in terms of adjudicatory risk in the MENA. The first implication, ‘a) within the context of the said dispute—Aramco v. Saudi Arabia—the law governing the arbitration itself, ie the *lex arbitrii*, was international law, and not the law where the arbitral proceedings took place’,⁶⁴³ means essentially that a precedent was set in which arbitral tribunals, at the request of one of the parties, can ignore the law chosen in the arbitration agreement as the *lex arbitrii*. This is a cause for adjudicatory risk as it creates unpredictability. Further, ‘In addition, it declared the applicable “proper law” to be “the law of the country with which the contract has the closest natural and effective connection—particularly taking into consideration ‘the economic milieu where the operations are to be carried out’”’.⁶⁴⁴ One would reasonably conclude that as an oil concession dealing with resources related to the government of Saudi Arabia is a contract ‘that has the closest natural and effective connection’, that Saudi Arabian law (ie Islamic law) would have been the applicable proper law. According to the above reason, this is

⁶⁴³ See above n 595, 879-898, 881.

⁶⁴⁴ Ibid 881-882.

why the tribunal thus, ‘arrived at the decision to apply cumulatively the English and the Swiss conflict-of-laws systems which both relied upon objective considerations for the purpose of localizing the contractual relationship.’⁶⁴⁵ Not only were the English and the Swiss conflict-of-laws seen as the applicable proper law with which a Saudi Arabian oil concession had the closest natural and effective connection, but ‘after undertaking a lengthy analysis according to the declared comparative law method of characterization adopted by the Tribunal, the “public contract” characterization of the 1933 concession agreement was dismissed on the basis that the Saudi law does not possess a body of administrative law comparable to the French system.’⁶⁴⁶

The comparative research not only offers a body of administrative law that may govern substantive and procedural considerations of international arbitration in the MENA through Islamic principles that are codified, it also demonstrates that many of these principles, in existence at Islamic law, are in actual fact, universal, and as such can be compared to the French system. The result of this thesis is a code of procedural and substantive law that Saudi Arabia can implement to remedy this lacunae in its administrative laws. The problem with the Aramco arbitration is not that the tribunal decided that international law was more appropriate than Saudi domestic law, for in principle this is an important decision and one with which the author agrees, as is discussed in the section on public policy and regarding public international law. The problem with the Aramco arbitration is rather that Saudi Arabian law was seen as either nonexistent or as inferior to the civil law.

⁶⁴⁵ Ibid 881.

⁶⁴⁶ See above n 595, 879–898, 882.

It is this latter point that the author addresses throughout this thesis. Saudi Arabian law is largely Islamic law with the exception of any civil codes modelled on the French civil law, in which case Saudi Arabian law *is* French law. As is demonstrated throughout as a result of the comparative analysis, Islamic law has principles that are compatible with international law. This thesis remedies the misconstruction of and the lack of knowledge regarding the principles and provisions of Islamic law, in which case the author submits that the aforementioned are a result of forces of historical hegemony and colonial and postcolonial fact and discourse. Abu Dhabi is not the only case that demonstrates this point, as is discussed subsequently. The precedent set in the Abu Dhabi, Qatar and Aramco arbitrations was manifested in *Sapphire*.⁶⁴⁷

Two important cases are discussed in order to ‘offer an opportunity to review the position of the State in exercising its contractual rights towards a foreign company’.⁶⁴⁸ They are the decisions of *Abu Dhabi*⁶⁴⁹ and *Qatar*.⁶⁵⁰

(d) *Petroleum Development Ltd v The Sheikh of Abu Dhabi*, 18 I.L.R. (1951)⁶⁵¹

The dispute in *Abu Dhabi* arose over the decision on the question as to ‘whether a concession granted by the Sheikh of Abu Dhabi extended to mineral exploitation of the territorial waters and subsoil of the continental shelf. The argument of the State was that

⁶⁴⁷ See above n 629.

⁶⁴⁸ K Al-Jumah, *Arab State Contract Disputes: Lessons from the Past*, Arab Law Quarterly, Vol 17, No 3 (2002), 215–240, 216.

⁶⁴⁹ *Petroleum Development Ltd v The Sheikh of Abu Dhabi*, 18 ILR, 1951.

⁶⁵⁰ *Ruler of Qatar v International Marine Oil Co Limited*, Judgement, International Law Reports, Vol 20, 1953 Report.

⁶⁵¹ See above n 648, 215–240, 218: ‘The Abu Dhabi Dispute, which took place in 1951, is the first Arab oil arbitration case.’ Also see above n 649.

the Sheikh was quite unfamiliar with the term ‘territorial waters’ and held that the subsoil of the territorial belt is included in the concession’.⁶⁵²

The historical absence of unbiased and learned discourse regarding uncodified Islamic law provisions and customs has led to misunderstandings and a major lacuna in arbitration law in international commercial arbitrations with Arab seats. The famous words of Lord Asquith are a case in point:

In these awards, there is an acceptance that the host country’s laws should be applied to the disputes arising from the concessions. Thus, in the Abu Dhabi arbitration, the arbitrator, Lord Asquith of Bishopstone, gracefully conceded that, ‘if any municipal legal system was applicable, it would prima facie be that of Abu Dhabi’. Such a conclusion was sound in principle but it did not further the objective of alien control over the resources of Abu Dhabi. The principle had to be circumvented. The law of Abu Dhabi was rejected on the ground that ‘it was fanciful to suggest that in this very primitive region, there was any settled body of legal principles applicable to the construction of modern commercial instruments’. Hence, a need arose for some other body of principles to be applied in the resolution of the dispute. A similar technique was adopted in the Qatar Arbitration. The referee, Sir Alfred Bucknill, held that Islamic law, which was the law of Qatar, was normally applicable to the concession agreement. But, he pointed out that, according to the expert evidence given to him, the concession agreement was invalid in Islamic law. As such a result could not have been intended by the parties, the referee ruled that the dispute should be settled ‘according to the principles of justice, equity and good conscience’.⁶⁵³ Similar views were stated in the Aramco Arbitration involving Saudi Arabia.⁶⁵⁴

Indeed, it is demonstrated elsewhere in this thesis that Sir Alfred Bucknill’s expert evidence was incorrect and that Islamic law clearly recognises and honours concessions.

⁶⁵² Ibid.

⁶⁵³ *International Marine Company v Ruler of Qatar* 1953, in, see above n 648, pp 215-240, at 218.

⁶⁵⁴ Sornarajah see above n 387, 18.

Lord Asquith further stated that ‘the Sheikh of Abu Dhabi administers a purely discretionary justice with the assistance of the Qu’ran’.⁶⁵⁵ Criticism of Lord Asquith’s oft quoted statement is multi-tiered:

He has come to such a conclusion without even requesting an expert opinion on Islamic law. The state argued that the doctrine *verba chartarum fortius accipiuntur contra proferentem* or the principle that the rule grants by a sovereign are to be construed as against the grantee. But the Umpire was of the opinion that it is an English rule which owes its origins to the incidents of English feudal polity and royal prerogative, and such rules have little relevance to conditions in a protected state of a primitive order on the Persian Gulf. Lord Asquith then proceeded to apply ‘the principles rooted in good sense and common practice of the generality of civilized nations—as a sort of modern law of nature.’⁶⁵⁶

In this case Lord Asquith did not seek to apply domestic law, neither English nor Islamic. Although the author disagrees with Lord Asquith’s opinion on Islamic law, it is submitted that it still is more correct to apply principles from good sense and common practice. This is not to say that Islamic law lacks the aforementioned. It shall be shown that the opposite is the case. Indeed, to take a starting point for consideration: ‘Not only is it incorrect to say that the Sheikh of Abu Dhabi administers a purely discretionary justice with the assistance of the Qu’ran, but it is to be understood that the Sheikh of Abu Dhabi is supposed to act within the principle of the Islamic framework of Islamic law, and Islamic law is adaptive and flexible enough to be applied to modern commercial transactions’.⁶⁵⁷

Lord Asquith states: ‘And it would be fanciful to suggest that in this very primitive

⁶⁵⁵ Al-Jumaih, see above n 648, 215-240, 218.

⁶⁵⁶ Ibid.

⁶⁵⁷ Ibid 219.

region there is any settled body of legal principles applicable to the construction of modern commercial instruments'.⁶⁵⁸ The whole of this thesis thus is a body of work set to refute this postulate by providing multiple examples to the contrary and by synthesising those Islamic principles in a codified body of law that can be applied to international arbitration in the MENA.

(e) *Ruler of Qatar*⁶⁵⁹ v *International Marine Oil Company*⁶⁶⁰

The dispute in this case arose out of the concession in which Petroleum Development Qatar Ltd notified the sheikh that their right included, *inter alia*, the land lying under the high seas of the Persian Gulf outside of the territorial waters of Qatar. The disputed questions that were debated are the following:

- (1) Whether the concession includes the sea bed and the subsoil beneath the high seas of the Persian Gulf contiguous with such territorial waters, which sea bed and subsoil are more particularly mentioned in the Proclamation issued on 8 June 1949 by HH Sheikh Abdullah bin Qasim al Thani?
- (2) Whether the agreement created a lease or a license?⁶⁶¹

The final decision of the arbitral tribunal leaves no doubt as to the fact that the law was manipulated to serve the objects of the corporation, and as such, this is a case of bias. The unwillingness of the tribunal to accept the provisions given by Islamic law which in this

⁶⁵⁸ See above n 595, 879-898, 880, in the footnote, quoted from ILR, Vol 18, 61).

⁶⁵⁹ See above n 650.

⁶⁶⁰ Al-Jumaih, see above n 648, 215-240, 219. Refer to *Rule of Qatar v International Marine Oil Company* 20 ILR, 535.

⁶⁶¹ Ibid 219-220: 'It was held that the concession did not include the sea bed or the subsoil, or any part thereof, beneath the high seas of the Persian Gulf contiguous with the territorial waters of the State of Qatar. In other words, the Ruler had not, by his agreement in 1935, deprived himself of the right to enter into the principle agreement. And therefore, the respondent company was entitled to proceed to exercise all their rights conferred on them by the principle agreement from the date of the award.'

case protected the State from exploitative measures based on the company's argument that the principle agreement did not constitute a lease but was a licence with interest.

To this the State countered that:

according to Islamic law, which is based on principles of equity, rent always accrues in theory from second to second. Equity does not call on a tenant to pay a sum in advance, for what he has not received, or to pay in advance for a chattel before it is delivered to him. Here the tribunal had to determine the date of payment of the annual rent of the oil concession. As there was no indication as to the law applicable, the tribunal, taking into consideration the objective connecting factors, held that the law of Qatar would be made applicable.⁶⁶²

Here the contradiction in the tribunal's reasoning becomes clear. In consideration of the fact that Qatar technically must follow Islamic law according to Constitutional decree,⁶⁶³ and the fact that the State put forth a solid argument on the basis of merit for why the concession is a lease at Islamic law according to principles of equity, then it must be understood that the law of Qatar and Islamic law in this case should have been the same. Further, 'But after considering the Abu Dhabi case the tribunal relied on the "principles of justice, equity and good conscience"'. The arbitrator, Sir Alfred Bucknill, stated that there were 'weighty considerations against the view'. He adds: 'One is that in my opinion, after hearing the evidence of the two experts in Islamic law, Mr Anderson and Prof Milliot, "there is no settled body of legal principles in Qatar applicable to the

⁶⁶² Ibid 220.

⁶⁶³ Art 1 of the draft Constitution of Qatar: 'Qatar is an independent state. Islam is the state's religion and the Islamic Shariah is the main source of its legislations.'

construction of modern commercial instruments...’’⁶⁶⁴ The arbitral tribunal therefore denied the existence of justice, equity and good conscience that were put forth by the State’s argument through the Islamic law frame work and relied on expert opinions that were misinformed.⁶⁶⁵

Further, El Kosheri quotes Sir Bucknill, who after considering the legal opinions submitted by Professor Milliot and Mr Anderson concluded that he ‘agreed that certain parts of the contract, if Islamic law was applicable, would be open to the grave criticism of being invalid’.⁶⁶⁶ The dangers of peer pressure and public opinion are just as dangerous in international arbitration as they are elsewhere. Further, ‘in order to maintain the validity of the agreement, the referee in the Qatari case considered that “neither party intended Islamic law to apply”, and considered appropriate the reference to “general principles of law” as applicable guidance’.⁶⁶⁷ The entire thesis of this research rests on the premise that there are occasions where Islamic law principles can solve problems in international arbitrations. The learned El Kosheri advises: ‘The painful exclusion of Islamic law as a possible source of solutions in both the Abu Dhabi and Qatar arbitrations, related to the construction and interpretation of Middle Eastern petroleum concession agreements, was not repeated in any subsequent cases’.⁶⁶⁸

⁶⁶⁴ See above n 648, 215-240, 219. Refer to *Rule of Qatar v International Marine Oil Company* 20 ILR, 535.

⁶⁶⁵ See above n 595, 879-898, 881.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid 880.

(f) *Sapphire International Petroleum Ltd v National Iranian Oil*⁶⁶⁹

Sapphire is another case in point demonstrating how the misunderstanding and lacunae in Islamic law scholarship led to unfairly decided arbitrations:

The Sapphire Petroleum Arbitration was the first award to give complete support to the exclusion of the host state's law and the application of public international law. The agreement involved in the dispute was a concession agreement for the exploitation of oil in Iran. Judge Cavin, who was the arbitrator, excluded the application of Iranian law on the ground that it was unlikely, in the view of the enormous capital risks involved in the project, that Sapphire could have accepted Iranian law as the law applicable to the contract as such law could be changed at will by Iran. He held that the law applicable to the agreement was the 'general principles of law' recognised by civilised nations.⁶⁷⁰

The *Sapphire* case (including the three cited Libyan cases) further demonstrates the absence of precedent:

The ideas contained in the Sapphire Award are carried further in later arbitral awards. The three arbitral awards made in connection with the Libyan nationalisation of oil concessions are important landmarks in the theory of internationalisation of foreign investment agreements. Although the three arbitrators came to different conclusions about remedies and procedure, thus indicating the confusion that exists in the area on many points, they agreed that foreign investment agreements containing certain indicia like choice of law clauses, arbitration clauses and stabilisation clauses are international

⁶⁶⁹ See above n 629.

⁶⁷⁰ Sornarajah, see above n 387, 19. *Sapphire International Petroleum Ltd v National Iranian Oil Co*, 35 ILR 136 (1967); 13 Int'l & Comp LQ 1011 (1964), 35 ILR 136.

contracts and that disputes arising from such contracts should be settled according to public international law.⁶⁷¹

The implications of the earlier Abu Dhabi and Qatar cases in terms of questions of choice-of-law and matters related to the *lex arbitrii* have important ramifications for the Sapphire case. The author argues that the problem is not in substituting public international law for domestic law. The problem is a result of the reasons that this was done. Misconstruction or inadequate knowledge was a factor. In consideration of the need for clear precedent and for predictability, it was a problem in that sense. For example:

Attracted by the old colonial negative choice-of-law approach by Lord Asquith in order to justify excluding the application of the host country's domestic legal system, the Swiss sole arbitrator decided to freely "determine which system of law should best be applied according to the evidence of the parties' intention and in particular the evidence to be found in the contract." In this respect, he indicated that, in spite of the fact that the "*lex loci contractus* and the *lex loci executionis* both point to the application of Iranian law", the opposite point of view should be adopted because "the present agreement is fundamentally different from the usual commercial contract envisaged by the traditional rules of private international law."⁶⁷²

Had the case been that the *lex loci contractus* and the *lex loci executionis* were both English or Swiss law, would the tribunal still have chosen to circumvent it for public international law rules? The author submits that the daunting existence of the lack of proper understanding of Islamic law is the source of confusion and unpredictability. An

⁶⁷¹ Ibid 20. *Texaco v Libya* (1977) 53 ILR 389; *BP v Libya* (1977) 53 ILR 296; *Liamco v Libya* (1981) 20 ILM1.

⁶⁷² See above n 627, 879-898, 882.

oil concession or other mineral contract should insofar as possible fall under the laws and rules of private international law on the basis of well established international and general legal principles such as *pacta sunt servanda*, good faith, *stare decisis*, and transnational public policy.

Evidence to support the author's claim that the *lex arbitrii* was rejected in the case of Islamic seats because of the following fact regarding the British Petroleum (BP) case:

Since the sole arbitrator had chosen Copenhagen as the seat of arbitration, he refused to allow the Aramco precedent of submitting the arbitral procedures to international law.

Judge Lagergren decided that the procedural law of the arbitration had to be Danish law as it was the law of the Tribunal's seat, pointing out that such *lex arbitri* would enhance the effectiveness of the award rendered.⁶⁷³

The decision that only public international law could apply to these types of concessionary contracts on the basis that their nature makes them unsuitable for domestic laws or for the *lex arbitrii* was no longer valid. The problem was not domestic law. It was Islamic law. Not only is the implication of this disconcerting, but the tribunal took it further: 'With regard to the substantive legal matters, Judge Lagergren confirmed the rule according to which: "if the parties to the agreement have not provided otherwise, such an arbitral Tribunal is at liberty to choose the conflict-of-law rules that it deems applicable, having regard to all the circumstances of the case."' ⁶⁷⁴

The problem with the aforementioned is not that the tribunal is at liberty to choose the conflict of law rules, but that it has decided that it can (a) ignore precedent and (b)

⁶⁷³ Ibid 883-884.

⁶⁷⁴ See above n 627, 879-898, 884.

ignore a valid extant arbitration clause and (c) change the *lex arbitrii*, ignore it, substitute it or in any other manner undermine the choice of the parties. The overall implication is, of course, a lack of consistency and predictability, adjudicatory risk and undermining the credibility and effectiveness of international arbitration. The reasoning that justifies that arbitral tribunals can decide what they will, how they will, is in direct opposition to the choice of parties. It goes against the spirit of the entire system of arbitration. This is unheard of in a courtroom. Arbitration tribunals are adjudicatory, quasi-judicial bodies. They are governed by law. Circumventing the law for expedient reasons is unjustified and has dangerous implications.

(g) *The Washington Convention*⁶⁷⁵

Art 42 (1)⁶⁷⁶ of the Washington Convention states that in the absence of an agreed upon law, “the Tribunal shall apply the law of the Contracting State” and “other such rules of international law as may be applicable.” Indeed, this is precisely the problem with the early oil concessions. When Western arbitrators attempted to apply the law of the Contracting State, they found that it either ‘did not exist’, or was too ‘primitive’, *inter alia*, and international law was not seen as international law by the non-Western parties.

A HICALC would instantly remedy this conundrum. Article 42 (1) has shown itself to be inadequate in the entire history of investor–State ICA in the MENA, particularly regarding the early oil concessions. Article 42 (2)⁶⁷⁷ prohibits the ‘obscurity’ of the law from being a source of non-decision. In consideration of the fact that in investor–State arbitrations with MENA government seats the odds are likely that the law

⁶⁷⁵ See above n 138.

⁶⁷⁶ See below n 1014, 683–703.

⁶⁷⁷ Ibid.

of the place is Islamic law, and that Islamic law is still obscure not only to Westerners but to many Middle Eastern lawyers, arbitrators and judges alike, Article 42 is impractical, inadequate and unrealistic.⁶⁷⁸ It is naive and past experience requires that a rewriting of the law be considered; one that takes into consideration the realistic challenges and unfolding of ICA, based on experience.

In order to do justice to the history of the early oil concessions, the evidence of both parties must be weighted with due consideration. Great Britain's version is only one half of the facts of the case. The Arab States also have their facts. The author's considered analysis of the early oil concession arbitrations and the ICSID arbitrations is that *overall*, legal scholarship unfairly implicates Western parties. The arguments put forth by the learned Professor Sornarajah represent the bias in scholarship against Great Britain. His analysis is an incomplete assessment of the facts. This dearth of a cogent conceptualisation of the facts prevents an accurate critical analysis of the problems occurring in the current law and practise of ICA. Due to this deficiency, the gap in accurate knowledge of the inherent problems in the law and practice of ICA has surged exponentially. Here, the subtle complexity of this deficiency in objective analysis means that a blind eye is dangerously turned to the culpabilities of Arab States because in the past there was an overemphasis on viewing only the errors of the Western parties. This prevents an accurate assessment of the full facts of the case thereby blocking opportunities to remedy these problems. Here, this research compensates for past gaps in

⁶⁷⁸ See above n 388. Any given ICA proceeding can make reference to four different domestic sets of laws. The first is the law that governs the clause in a contract designating an agreement to submit to arbitration. The second is the law of the actual arbitration proceedings. The third is the law of the arbitral tribunal that is applied to the substantive matters in dispute before it. The final law governs recognition and enforcement of the award of the arbitral tribunal. At any stage, any one of these laws may by default end up being Islamic law and certainly in the case of a foreign arbitral award seeking enforcement in a MENA jurisdiction.

its presentation of an unbiased and accurate assessment of the problems in ICA law. Both parties, the investors and the States, presented their cases and were heard. Section IV of this research is the result of this critical analysis. The one-sided consideration of viewing the history of international commercial arbitrations through an either/or lens has led to an inability to accurately identify the problems therein. In previous legal scholarship the Western parties were implicated in the early oil concessions. At other times the Arab parties were found guilty in their systematic use of challenging arbitral tribunal jurisdiction. A more comprehensive assessment is needed. Here, the truth is that both sides are equally in breach of good faith.

The early oil concessions may indeed have been unfair to the Arab parties,⁶⁷⁹ but recent ICSID and other international commercial arbitrations have left much to be desired to investors in terms of fairness and enforcement. The problem of bias challenges follows the same pattern. It was initially a simple matter to identify it as being symptomatic of the biased colonial attitudes, unfairness and the workings of the ‘mafia’ of the ‘Grand Old Men’, but the pendulum swung the other way when the rise of unfair bias challenges unjustly implicated innocent parties. Throughout this thesis, the standard of fairness and justice has been consistently applied in order to give an accurate and honest depiction of the entire history of the early oil concessions and thus, early arbitrations, so that the remedy accurately addresses the problem. The ailment of ICA as it has been historically practised up until the present age, lies in the misunderstandings and ideological battle between the so-called ‘East’ and ‘West’.

⁶⁷⁹ See above n 648, 215-240, 217: ‘At the outset it can be said that even the majority of passionate supporters of arbitration have admitted that the arbitration in the Abu Dhabi, Qatar and Aramco cases was biased and offered only a mere façade of neutrality.’

Indeed, one of the major problems of the early oil concessions was that when domestic law was sought out to provide guidance to the tribunals, it was found to be lacking. The author is of the view that (1) in consideration of the need for a transnational public policy and (2) because domestic law is inadequate (but not for the historical reasons given; rather because it does not support the first premise and is used to frustrate arbitral awards and further State interests when they are the ones in breach of a treaty or contract), (3) because general principles of law can provide clear guidelines to inform Draft Provisions, that to seek recourse in domestic law is a grave mistake. The matter of expropriation as a response to unjust contracts must be addressed historically. The concession grants favoured investors, this is not necessarily the case currently and the principles raised in this thesis (particularly, eg, unjust enrichment, *inter alia*) can inform a HICALC or uniform Arab arbitration law that can remedy this problem by mitigating the underlying reasons that States expropriate.

Interestingly:

It is the developing states who are the advocates of the ‘relocalisation’ of the contracts to the law of the host states. The first attempt to ‘de-localise’ a state contract is the reference to the ‘general principles’ of law.’ The well-known Anglo Iranian Oil Company Agreement of 29 April 1933 and the Consortium Agreement, of 19–20 September 1954, between Iran and several foreign oil companies are examples thereof. The present practise is to refer to the general principles of law as a subsidiary source of law. The

general principles of law as distinct from international law have been applied in the Abu Dhabi, Qatar and Aramco cases.⁶⁸⁰

The author submits that general principles of law including principles from International public and private law must be applicable to the substantive law applying to arbitration tribunals. The remedy leading to rehabilitation must heal this divide and that is why a harmonised international commercial arbitration law code that is built upon the common principles found at civil, common and Islamic law is the only remedy that can resolve the historical problems, bringing about the trust that will ensure the spirit of cooperation that will uphold enforcement.

(h) *Buraimi oasis arbitration*

A discussion of the Buraimi oasis dispute as a case in point from the view of the other side is given. At the time, and presently, this dispute ‘is seen in some quarters as a crucial test for the future of British influence and prestige not only in the Persian Gulf region but along the whole littoral of Arabia’.⁶⁸¹ This dispute arose between Britain and Saudi Arabia over the future status of the Buraimi oasis, in which

the dispute concerns the ownership of a group of villages situated in the south-eastern corner of Arabia, on the frontier of the Sultanate of Muscat and Oman and the Trucial Shaikhdom of Abu Dhabi. The Saudi Arabian Government has asserted a claim to the

⁶⁸⁰ See above n 648, 215–240, 216: Arbitration concerning Buraimi and the Common Frontier between Abu Dhabi and Saudi Arabia, 1955, Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland.

⁶⁸¹ J B Kelly, *The Buraimi Oasis Dispute, International Affairs* (Royal Institute of International Affairs 1944), Vol 32, No 3 (Jul 1956), 318–326.

sovereignty of these villages – collectively known as the Buraimi oasis – but this claim has been resisted by the Sultan of Muscat and Oman and by the Shaikh of Abu Dhabi.⁶⁸²

What is interesting about this case is that as a result of its special treaty relationship with Abu Dhabi and by direct request by the Sultan, the British government represented both their cases before the Saudi government and an international tribunal.⁶⁸³ The implication of the dispute is that placed in context, the claim of Saudi Arabia to the Buraimi oasis can be seen as a manifestation of a new phase of ongoing Saudi expansion since the late eighteenth century in consideration of its activities in Jordan, Southern Arabia and along the Yemen-Aden border.⁶⁸⁴ The strategic value of the oasis in its location in the north of Oman would allow access to the Trucial Shaikdoms to the north, including the Sultanate of Oman and a buffer zone from the west, notwithstanding rumours of oil deposits.⁶⁸⁵ The British position was not motivated by considerations of oil concessions but rested in its ongoing policy of “safeguarding the independence and territorial integrity of these shaikhdoms and principalities along the western littoral of the Gulf from encroachment by others, whether they be Turks, Persians, Egyptians, or Saudi Arabians.”⁶⁸⁶ Arbitration by an independent international tribunal failed when Saudi Arabia tried to bribe the inhabitants of the oasis into declaring in its favour, whilst also tampering with the impartiality of the tribunal to determine the sovereignty of the Buraimi oasis.⁶⁸⁷ These

⁶⁸² Kelly, see above n 681, 318.

⁶⁸³ Ibid.

⁶⁸⁴ Ibid.

⁶⁸⁵ Kelly, see above n 681, 318–326, 319.

⁶⁸⁶ Ibid 320.

⁶⁸⁷ Ibid.

actions on the part of the Saudi government suggests it feared its case was weak, and on historical and legal grounds this fear is well justified.⁶⁸⁸

Not only does this case speak for the unfair tactics used by Arab States to sabotage arbitration proceedings, but it undermines the generalised argument that the West is unfair and biased against the Arab States. Indeed, this case demonstrates that the opposite is the case, notwithstanding the unethical actions of the Saudi government but also for these reasons:

Britain will continue to be involved in difficulties in Eastern Arabia and the Persian Gulf, as a consequence of defending her own interests and those of States like Kuwait, Bahrain, Qatar and the Trucial Shaikhdoms, whose independence she has guaranteed. Invariably British efforts to fulfil long standing obligations to these States will be made by Arab nationalists to appear as attempts to maintain an outmoded political hegemony in defiance of Arab aspirations. Yet issues like the Buraimi dispute, as has been seen, are not in origin the result of a conflict of Western and Arab interests: if this point is not appreciated both within and beyond the Middle East the fault would seem to lie partly with the British Government for not making the history of the case more widely known.⁶⁸⁹

The current state of ICA as it has been currently practised is ‘a bleak landscape’⁶⁹⁰ characterised by mistrust and injustice occurring on both sides of MENA-FI⁶⁹¹ disputes.

⁶⁸⁸ Ibid.

⁶⁸⁹ Kelly, see above n 681, 318–326, 326.

⁶⁹⁰ In Alan Lupack, *Oxford Guide to Arthurian Literature and Legend*, (Oxford, 2005), the kingdom of the Fisher King is described as a wasteland; bleak and grey where no new life can grow. A terrible oppressive sense of despair permeates the air. Stagnation, gloom and ruin have taken hold. The Fisher King suffers from a mysterious wound, whose origins have been obscured by the cruel passage of time and the destruction that has laid his kingdom to utter waste. This is an apt metaphor for the past and current state of

The problems in ICA, not only in the Buraimi arbitration, are not a result of conflict between Western and Arab interests or even legal principles, but of perceptions that have caused mistrust, and that premise forms the deeper theoretical basis of a harmonised code of law. Neither are Arab and Western interests at odds with one another nor are Arab and Western fundamental principles of law. Both of these submissions represent empirical data, ie, the universal principles given and the example of the Golden Age of Spain, which diverges from scholarly discourse on ‘the clash of civilisations’.⁶⁹² Uncodified Islamic principles left vulnerable to radical interpretations create unnecessary adjudicatory uncertainty and risk for investors dealing with MENA governments. A HICALC harmonises with the general principles of all three of the relevant legal traditions in such a way that a learned MENA judge would not have cause to reject an award on the basis of public policy seen through such *sharia* interpretations, which the 1958 New York Convention⁶⁹³ provides for. The relationship of public policy to *sharia* is this: it is Islamic law in the MENA states which defines public policy. The HICALC would legislate trust.⁶⁹⁴

the law and practice of international arbitration as practised between Arab and European States and in consideration of the past and current global financial crisis of 2008–2011.

⁶⁹¹ MENA- FI designates MENA government and foreign investor parties to a contract. The term was coined by the author.

⁶⁹² A Sen, *Identity and violence, the illusion of destiny*, (WW Norton and Company, 2006), 11: ‘The difficulty with the thesis of the clash of civilizations begins well before we come to the issue of an inevitable clash; it begins with the presumption of the unique relevance of a singular classification. Indeed, the question “do civilization clash?” is founded on the presumption that humanity can be pre-eminently classified into distinct and discrete civilizations, and that the relationship *between different human beings* can somehow be seen, without serious loss of understanding, in terms of relations between *different civilizations*. The basic flaw of this thesis much precedes the point where it is asked whether *civilizations must clash*’

⁶⁹³ See above n 38.

⁶⁹⁴ M Ayad, ‘The Quest of the Holy Grail: A Harmonised International Commercial Arbitration law code (HICALC)’ in *Investor–State Arbitrations of Oil Concessions and Foreign Investment Treaties and Agreements*, (Madrid International Commercial Arbitration Centre Journal, 2011). Centro Internacional de Arbitraje, Mediación y Negociación Instituto Universitario de Estudios Europeos, Universidad San Pablo

The overarching problem leading to the present state of ICA is the lack of trust on both sides of the East–West divide.⁶⁹⁵ This mistrust is a spectre that rises up from the murky depths of adjudicatory risk to haunt ICA proceeding from beginning to end. The problems identified in ICA, from disregarding the doctrine of *pacta sunt servanda* and undermining the contract, to *res iudicata*, contributes to the mistrust in the system and to suspicions of arbitrators. Arbitrators are technically distinct from judges in that they are chosen by the parties and do not serve a national jurisdiction. Yet, the role they undertake collectively is still one of public service. They are adjudicators. They judge disputes. They do not *resolve* the dispute as the term *alternative dispute resolution* incorrectly signifies. Ultimately, one party loses more as a result of the breached contract, whilst arbitrators serve a higher good, in the name of justice, just as judges do, by awarding damages to the party who seeks relief from a contractual breach. This is particularly when arbitrators follow the law rather than equity. To compare arbitrators to public servants as judges (and other public service administrators) is a valid analogy because the role they fulfil is similar. They must decide within the confines of the law chosen by the parties. In both civil and common law jurisdictions a party seeking relief from a contractual breach will submit their evidence to a judge who will decide on the merits of the evidence put forth if they have a valid claim and will award damages to be paid by the breaching party. An arbitration proceeding in principle exists to follow the same objects but without the encumbrance of national legislation and without the inherent bias that one party would encounter in its opponent's courts. In this sense, the arbitrator is the judge of the dispute. The principle of legitimate expectation is automatically activated. This

Marid, Arbitraje, Revista de Arbitraje comercial y de inversiones Volumen IV 2011 March/April, pp 335-381, 20 March, 2011.

⁶⁹⁵ Ibid.

principle is derived from the German administrative courts that ‘held that the actions of the State should be governed by the concept of Vertrauensschutz, the protection of trust’.⁶⁹⁶ This concept has historical antecedents in ancient Egypt.⁶⁹⁷ It can rightly be argued that the highest value of international commercial arbitration is trust. Trust is the Holy Grail of international commercial arbitration law and practice.⁶⁹⁸ The HICALC assures that this trust is restored to ICA proceedings and subsequently, outcomes.⁶⁹⁹ The heart of the causes for mistrust on both sides of history-whether in the early oil concessions, or after in the ICSID concessions is related to the complex matter of expropriation. The act of expropriation reveals a pattern of bias and the need for fair contracts (a general principle of law which is also universal) and the need for respect for *pacta sunt servanda* (also a general principle of law which is universal.) The author submits that the matter of expropriation cannot be seen in isolation from the universal and general principles of law given. The previous sections have addressed the matters of bias, and of fairness including *pacta sunt servanda*. Here, the act of expropriation as it is construed across the three traditions is examined more closely.

⁶⁹⁶ R Thomas, ‘Continental Principles in English Public Law’ in A Harding and E Oruscu, (eds), *Comparative Law in the 21st Century*, (Kluwer Law International, 2002) 122: ‘The Principle of legitimate expectations encapsulates the notion of trust in public administration. The citizen should be able to place confidence in the future activities of the administration in order to enable him to plan his life with both certainty and predictability.’

⁶⁹⁷ See above n 349, 36, justice must appear to be served, and at 44, due process must take place. The understanding that the system must *appear* to be fair as well as *being manifestly* fair represents the understanding that the legal system and governance of a state must ensure that its citizens trust in its processes and institutions such that due process and justice must always take place and appear to take place in order to maintain trust in the legitimacy of the system.

⁶⁹⁸ See above n 694

⁶⁹⁹ Ibid.

1 *Civil Law*

The Mixed Courts were based on Civil Codes. The precedent of the Mixed Courts is an exemplary example of the harmonisation of universal principles as discussed in different relevant sections herein. However, in the matter of expropriation for public policy, the Mixed Courts have set an unfortunate example which is similar to constructions of public policy regarding expropriation in other civil law countries.

(a) *Henrich Finck v Egyptian Government*

This case concerned a German bookseller who was out of the country. His colleague was overseeing his bookstore but was deported on 2 November 1914 as a result of war between Turkey and Egypt with the latter being under martial law. The books were sequestered and losses amounted to LE22, 583 occurred.⁷⁰⁰ The Mixed Court ruled on the basis of: ‘If the claim had succeeded Egypt would have been faced with hundreds of similar cases.’⁷⁰¹ The author submits that sequestration is tantamount to expropriation in effect. The basis of the Court ruling was public policy. Egypt had a duty to protect the private property of its foreign citizens. This should be a guiding principle for any tribunal deciding on matters of expropriation.

The law regarding expropriation today at international treaties⁷⁰² is problematic and needs to be more closely scrutinised. At customary international law and most

⁷⁰⁰ Hoyle, see above n 180, 126.

⁷⁰¹ Ibid.

⁷⁰² Ibid 89: ‘Consistent with the notion of territorial sovereignty, the classical rules of international law have accepted the host state’s right to expropriate alien property in principle. Indeed, state practice has considered this right to be so fundamental that even modern investment treaties (often entitled agreements ‘for the promotion and protection of foreign investment’) respect this position. Treaty law typically addresses only the conditions and consequences of an expropriation, leaving the right to expropriate as such unaffected.’

treaties the legality of expropriation is based on four grounds.⁷⁰³ According to legal requirements, all four requirements must be fulfilled in order for the expropriation to be lawful.⁷⁰⁴ They are: (i) the expropriating act must fulfil a public purpose.⁷⁰⁵ (ii) it must not be prohibitory and discriminatory within the generally accepted meaning of the terms. (iii) It must follow due process under certain treaty provisions.⁷⁰⁶ (iv) it must be covered by prompt, adequate and effective compensation.⁷⁰⁷ The author submits that interest falls within the last category. There are two problems with the law as it stands. The first is that it allows expropriation in the first place and more disconcerting, on the notion of ‘public purpose’ which is tantamount to public policy and will be discussed in that section. The second is that even in consideration of the legal conditions, expropriation occurs where not one of these conditions are fulfilled. The author submits that regarding almost every case cited throughout this thesis, in regard to the circumstances around expropriation rarely if ever have all or even part of these requirements at customary international law or investment treaty law been satisfied. The author refers to ICSID and ICC cases, many cited in differing sections of this thesis.⁷⁰⁸ This is a serious matter and represents injustice and adjudicatory risk to investors. The author suggests at minimum that in accordance

⁷⁰³ Ibid 90-91.

⁷⁰⁴ Ibid 90-91.

⁷⁰⁵ Ibid.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid.

⁷⁰⁸ See above n 461,108: “In *Middle East Cement v Egypt*, the investor had, inter alia, obtained an import license for cement and had operated a ship Egypt subsequently took measures that prevented the investor from operating its licence and seized and auctioned the ship The investor raised a series of claims in respect of which it alleged expropriation. These included but went beyond the import licence and ownership of the ship The tribunal looked at these claims separately and determined in respect of each of them whether an expropriation had taken place. It found that the licence qualified as an investment and that the measures that prevented the exercise of the rights under it amounted to an expropriation. The tribunal examined separately whether an expropriation of the ship had occurred and gave an affirmative answer. Several other claims of expropriation in respect of other rights were also examined but denied for a variety of reasons. Therefore, *Middle East Cement* demonstrates that it is possible to expropriate specific rights enjoyed by the investor separately regardless of the control over the overall investment.’ *Middle East Cement Shipping and Handling, Co SA v Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178.

with *sharia* principles that expropriation on the basis of public policy not be allowed. A better substitute for public policy would be State necessity which would then have to be proven by the State. In consideration of the fact that the law is ignored in most cases and that there is a lacunae between law and practice the author suggests these reforms which are *sharia*-compliant and more likely to be upheld- leading to higher award enforcement and lowered adjudicatory risk.

Civil law recognises as a general principle that expropriation without compensation is wrong and cannot occur unless there is a cause. This is distinct in the case of Switzerland. The limit for it in the case of Switzerland is the doctrine of public policy:

For example, in Switzerland, the party wishing to invoke a violation of public policy when applying to set aside an award under the Swiss private international law Act has to establish concretely what fundamental principle of law is violated by the award. Among these principles are those of *pacta sunt servanda*, the prohibition of the misuse of the law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination, and the protection of those incapable to act.⁷⁰⁹

The important fact that must be emphasised is that it is a well recognised principle at civil law that expropriation without compensation is generally wrong. The fact that it is brought up in connection with public policy is noteworthy and is elaborated in the section on Islamic law dealing with expropriation. Egyptian civil law guarantees protection against expropriation:

⁷⁰⁹ A Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Arbitration International, (Kluwer Law International, 2003) Vol 19, Issue 2, 217–248, 234.

Among the incentives and guarantees of the laws and their amendments, Egypt guarantees protection against expropriation and compulsory pricing, full right to repatriate profits and dividends, unfettered access to land in Upper Egypt, 10-year tax exemption for land cultivation and its subsequent activities related to animal and marine husbandry.⁷¹⁰

It must be noted that:

In Egypt, Article 11 of the 1964 Constitution provides that natural wealth, whether subterranean or within the territorial waters, as well as all its resources and energy, are the property of the state which guarantees their proper exploitation. Other Middle East states not mentioned here follow the same pattern of state ownership of minerals.⁷¹¹

2 *Common Law*

(a) *LIAMCO v Libya*⁷¹²

An important analysis of the landmark case of *LIAMCO v Libya* demonstrates the questions around expropriation at common law. Irrespective of who the actor is, notwithstanding if it is a State actor, expropriation must be seen as a breach of law. It is the taking of private property. In the Swiss tradition expropriation is seen as an affront to the construction of public policy therein. Even national courts outside of the contracting State's own national courts may side with the State.⁷¹³ In *LIAMCO v Libya*,⁷¹⁴ the

⁷¹⁰ *The Middle East*, May 2010, Issue 411, Rhonda Wells, COMESA promotes safer investment networks, 42–43, 43.

⁷¹¹ El-Malik, see above n 400, 56.

⁷¹² See above n 414, in Part VI Section 36.03, 23: 482 F. Supp 1175 (DDC 1980), dismissed as moot, Order, DC, Cir. Nos 80-1207 and 80-1252 (6 May 1981); summarised in VII Yearbook 382 (1982).

⁷¹³ See Pyramid arbitration in which the French Cour de Cassation sided with Egypt, in addition to *LIAMCO v Libya*.

absence of any court's support of a valid award is clear.⁷¹⁵ When the oil company sought recognition and enforcement of the award in the United States,

The judge of the Federal Court of First Instance agreed that he had jurisdiction over the claim under the Foreign Sovereign Immunities Act. As in *Iptrade*, the state had implicitly waived its Sovereign Immunity by agreeing to arbitration. He nevertheless declined to exercise his jurisdiction on the grounds of the act of the State doctrine. In refusing to confirm the award, the judge referred to Article V (2)(a) of the New York Convention, which allows courts to refuse to recognise foreign awards the 'subject matter of which is not capable of arbitration under the law of that country.' In this learned Judge's view, an act of State was an unarbitrable claim.⁷¹⁶

It is submitted that His Honour's learned view did not take into consideration the fact that in this case nationalisation amounted to expropriation. Therefore, questions of act of State aside, had the parties adopted the principles espoused herein that expropriation, even for reasons of public policy, is prohibited, the outcome would have been different. As this is a principle found at Islamic law and as Islamic law is the law of Libya, if a non expropriation principle had been adopted, the company would have had a better outcome if they agreed to have the award recognised in Libya. Suppose the learned counsel put forth the following argument: that (1) this nationalisation amounted to expropriation and

⁷¹⁴ See above n 414, in Part VI Section 36.03, 23: 'In *LIAMCO v Libya*, however, the award creditor fared less well. An American oil company brought suit to enforce an arbitral award against Libya, which in 1973 and 1974 had nationalised rights in petroleum concessions and equipment. Libya had refused to participate in the proceedings. The award was rendered in Geneva on April 12, 1977, by Dr Sobhi Mahmassni, sole arbitrator, in the amount of US 80 million. Relying on the *Iptrade* precedent, the oil company sought to have the award recognized in the District of Columbia.'

⁷¹⁵ See above n 461, at 76: '*Liamco v Libya* stands in stark contrast to the *Texaco* decision. The *Liamco* Award is based on the position that a stabilization clause will not affect the sovereign right to expropriate a contract, that a violation of a contract is not unlawful under international law, and that restitution *in integrum* would amount to an intolerable interference with the sovereignty of the host state.'

⁷¹⁶ See above n 414, in Part VI Section 36.03, 23.

subsequent losses of USD 80 million, not including arbitrator fees, delay payments and interest; (2) expropriation even due to reasons related to public policy at Islamic law is still prohibited, ie it is classified as a crime; (3) an act of State falls under the category of public policy; (4) Islamic law requires that expropriation must be compensated for, under any circumstances; (5) the law of Libya is Islamic law; (6) Islamic law must be applied to this case; (7) a commercial act (*actus gestionis*) is not tantamount to an act of State (*actus jure imperii*); (8) the doctrine of *al masalih al mursalah*⁷¹⁷ (to be discussed in the section on public policy) should be restricted in the case of non-State acts, or commercial acts by States (*actus gestionis*); (9) therefore, the arbitrator's award of USD 80 million to the investor must be enforced against the State of Libya for acting unlawfully on two counts: (i) unlawful expropriation in the name of public policy or as an act of State, and (ii) expropriation without compensation. Would not such a strong submission have won the case?

The LIAMCO⁷¹⁸ arbitration demonstrates the instability in arbitral decision making reasoning:

In determining the Tribunal's rules of procedure, the Liamco arbitrator took a completely different approach by choosing to apply the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. Thus, he avoided engaging himself in the controversy of advocating the direct submission to international law (Aramco and Texaco cases), or to the domestic law of the country where the seat of arbitration is located (Sapphire and BP cases).

⁷¹⁷ Public interest.

⁷¹⁸ *LIAMCO v The Government of the Libyan Arab Republic*, YCA 1981, 89 et seq.

Wisdom may be gained from this decision. Although it follows the regular pattern of inconsistency and adjudicatory risk, it contains virtues and merits. The arbitrator's choice of direct application of the UNCITRAL signifies the arbitrator did not consider concessions different from commercial contracts. Proof of this is that he did not choose public international law principles. Here, the UNCITRAL, as a body of commercial law, is more appropriate than public international law principles. This arbitrator harmonised the 'predominantly contractual nature' of the deed that, at the same time, 'partakes of mixed public and private legal character'.⁷¹⁹

3 *Islamic Law*

In consideration of the manner in which historical oil concession arbitrations and ICSID cases have unfolded, it is a little known fact that Islamic law fully forbids expropriation entirely: 'The right of private property is guaranteed and there is no taking of private property unless it is used contrary to the teaching of Islam (eg, wine, gambling), or if the owner fails to fulfil his obligations'.⁷²⁰ In terms of the Islamic understanding of expropriation (particularly in mineral investments or even property), the Quranic view is more biased on the side of the investor rather than that of the State. Being a State party does not immunise it from responsibility for the consequences of expropriation. This standard is higher than that found at civil or common law. Islamic law provisions expressly affirm that a sovereign government is forbidden from expropriating contracted private property under the guise of public policy.⁷²¹ Where the doctrine of *al masalih al mursalah* may be used to argue in favour of expropriation, the standard

⁷¹⁹ See above n 627, 879–898, 885.

⁷²⁰ See above n 604, 11.

⁷²¹ See above n 604, 115.

protecting private property prevails. Al *masalih al mursalah* cannot protect an act which is classified as a crime under Islamic law, such as theft, and as such it is prohibited with no exception clauses. The taking of private property at Islamic law is classified as theft. The only exception at Islamic law is if the private property itself is forbidden due to its nature in which case any contract arising from it would be null and void. At Islamic law there are no provisions allowing a State party to engage in unlawful acts. Expropriation, whether genuinely in the interests of public policy, is technically forbidden. According to Islamic law, since it is forbidden, it would fall under the category of *haram*⁷²² and be considered a crime; as a theft. According to El-Malik, ‘Under international law, the right of the host states to nationalize is unquestionable, but the aggrieved foreign investor must be compensated’.⁷²³ Although the Mixed Courts of Egypt were objective and balanced in protecting investors’ rights (ironically one of the strongest of criticisms launched against them leading to their eventual dissolution), they did not follow this standard (which if implemented through the HICALC would provide a stronger basis for the reduction of adjudicatory risk), as the case of the German investor in *Heinrich Finck v Egyptian Government* demonstrates.⁷²⁴ El-Malik continues, ‘Expropriation and economic crimes

⁷²² Forbidden, at Islamic law.

⁷²³ See above n 604, 2.

⁷²⁴ *Heinrich Finck v Egyptian Government*, MCA 1 March 1927, Pres. Baviera GTM XVII 257, in see above n 180, 365–366. This case concerned a German bookseller whose claim alleged that the Egyptian Government caused him to suffer loss as a result of the operation and imposition of martial law. ‘Finck left Egypt on 15 October 1914, of his own volition, and had entrusted the management of his bookshop to friends: Schmidt, a German, and Hoffman, an Austrian. On 2 November war broke out with Turkey, and Egypt was placed under martial law. Schmidt and Hoffman were deported and interned in Malta, and the bookshop stock was sequestered and sold. The plaintiff claimed he had therefore lost LE22,583 and alleged that the Egyptian government was to blame because it had entrusted the defence of Egypt to a country at war with Germany, and had thus failed in its obligation to protect German enjoyment of foreign privileges in Egypt. The argument was based on Egypt’s obligation to subjects of Capitulatory powers. If the claim had succeeded Egypt would have been faced with hundreds of similar cases, and so in addition to a straightforward defence that Egypt was not responsible because it had not actually seized or sold the books, the Procureur-General intervened and asked for dismissal of the action on the grounds of the overriding supremacy of Martial Law. Finck claimed that the government was liable because the Council of Ministers,

are prohibited by Islam'.⁷²⁵ Further, 'The right of private property is guaranteed and there is no taking of private property unless it is used contrary to the teachings of Islam (eg, wine, gambling), or if the owner fails to fulfil his obligations'.⁷²⁶ Furthermore, 'All Muslim schools teach that private property and rights are inviolable in relations between individuals as well as in relations with the State. No dissenting voice whatever is raised against this teaching'.⁷²⁷ There is full consensus (*ijma*) on this point in all four schools of Islamic jurisprudence. This view supports the rights of investors and places limits on the scope of the doctrine of State sovereignty if it infringes on investor rights. This is a higher standard than that at common and civil law. It places the investor on equal footing with the State, similar to the status accorded to one State vis-à-vis another based on a treaty.⁷²⁸ This latter understanding demonstrates the convergences of public international law and private international law in terms of a common nexus: that of individual and

on 6 August 1914, had called on the Commander in Chief of the British forces in Egypt to defend the country against any states at war with Great Britain. As this allowed the British to impose martial law, and as his goods were sold by virtue of martial law provisions, he held the Egyptian government liable for his loss, which resulted from the fact that all proceeds of the sales were absorbed in the cost of the sequestration. The Egyptian government was content to plead that it was not responsible for the sequestration, although Finck made it clear that he felt its action in placing the defence of Egypt in British hands was in fear of such an illusory attack as to make the delegation of power a futile, arbitrary and improper act in violation of international law.

The author disagrees with the court's ruling on the basis of justice and equity. In the case of the former, the vast number of potential lawsuits against a State for infringing the individual rights of its citizens, particularly when that infringement is based upon imputed political opinion or discrimination based upon ethnicity, is not a reason to derogate from the obligations of justice. In regard to the latter, had the principle of equity been employed, this particular individual would have been compensated for his losses, which were brought about through the actions of the State. Egypt's defence that because Finck was of German origin and because Germany was in violation of international law at the time, that this justified the internment, sequestration and selling of an individual's private property, one who was a civilian and not accused of any alleged breaches of any law whatsoever, save for his national origin, is on the face of it, unjust.

⁷²⁵ See above n 604, 11.

⁷²⁶ Ibid.

⁷²⁷ Ibid 113.

⁷²⁸ Ibid 115–116, 'Islamic law does not recognise the power of sovereign states to take private property in defiance of contractual terms for the sake of public interest. Sovereignty in Islam vests in God. It is only His Will that should prevail in this world. The Qu'ran says, "Sovereignty is for none but God". The Muslim ruler, as a vicegerent of God on earth, can neither make nor abrogate the divine law. Accordingly, the Islamic state has no overriding right of sovereignty and the state must respect the sacred nature of private property.'

investor rights. As has been demonstrated, Islamic law principles can act as a harmonising element in these two bodies of law. Indeed, the standard for protection against expropriation either with or without compensation is higher than that found in the civil law tradition, eg, even in Swiss law. El-Malik would argue it was settled centuries ago as, ‘The prophet himself during his lifetime did not invoke the so-called “public interest concept” to terminate his contracts with non-Muslim parties in order to take over their property, although certain contracts proved to be against the interests of the Muslim community’.⁷²⁹ This latter point is worthy of elaboration. Not only did the Prophet not invoke public interest to breach any contracts but in fact respected contracts with non-Muslim parties. The doctrine of *pacta sunt servanda* has precedent at Islamic law and tradition. According to El-Malik, ‘One of the least known but most effective legal regimes for the protection of investors is the Islamic legal regime’.⁷³⁰ El-Malik continues, ‘The major feature of Islamic law is that it is adaptive and flexible. As to the mineral industry, the shari’a law lays down the general framework, leaving each generation to enact laws and regulations as required by its time within that general framework’.⁷³¹ If general principles derived from the *sharia* are incorporated into a HICALC (which is the case), the risks to investors in MENA countries can be reduced. El-Malik maintains,

The main and crucial difference between the Islamic constitution and that of other states is that the Islamic constitution is unchangeable and cannot be subjected to amendments,

⁷²⁹ El-Malik, see above n 400, 116. El-Malik gives an even more recent example of this on p 118: ‘In the case of *BP v Libya*, the Libyan government nationalized the BP undertaking on the assumption that the United Kingdom was responsible for the occupation of Arab lands by Iran. The question is whether such reason justifies the taking of BP private property? The answer is in the negative according to both Islamic law and the general spirit of Islam.’

⁷³⁰ Ibid 3.

⁷³¹ Ibid.

because of its divine origin, and God cannot change His opinions. Accordingly, the investor, once aware of the conditions and general principles of the constitution, will be protected, in principle, during the lifetime of his agreement.⁷³²

In theory then, this limits misuse of State sovereignty or sovereign immunity. If an oil concession under *sharia* is legally drafted, nothing can invalidate it unless the investor breaks the terms or engages in fraudulent activities or actions prohibited under Islamic law. The following Quranic verses regarding State sovereignty go so far as to challenge notions of the right of States to nationalise what was once private property, 'The Qu'ran says: (a) "the right of command is for none but Allah. He hath commended that ye follow none but Him. That is the right way (of life)" (b) "None is a partner in His sovereignty"... Accordingly, the real status of an Islamic State is not that of sovereignty but of a vicegerent.'⁷³³ This distinction is important. The Islamic standard dealing with sovereign immunity, (as is the case with public policy and expropriation) is higher in accordance with reasonable and moderate interpretations of Islam. This is a clear Islamic provision that limits the entire concept of State sovereignty and the defence of public policy, especially when the defence of sovereign immunity or public policy is applied outside the scope of an act of State to a commercial contract or concession. If a State is breaching other Islamic principles, such as *pacta sunt servanda*,⁷³⁴ then a Muslim jurist, acting consistently and in accordance with the proper understanding of the spirit of the law, ought, in theory, to rule against such actions. Technically, Islamic law forbids

⁷³² El-Malik, see above n 400, 8.

⁷³³ Ibid 9.

⁷³⁴ Ibid 14, 'Furthermore, the Qu'ran lays down the principles of *pacta sunt servanda*, sanctity of the contract, which is a universal principle in modern law and jurisprudence. The Qu'ran is silent upon some matters. These are to be subjected to the rule of natural permissibility (*Ibaha*), unless they contradict an express provision in the Qu'ran.'

expropriation: ‘The right of private property is guaranteed and there is no taking of private property unless it is used contrary to the teaching of Islam (eg, wine, gambling), or if the owner fails to fulfil his obligations.’⁷³⁵

4 *Article II of the HICALC Expropriation*

- (a) Expropriation *shall* be forbidden in cases of public policy.
- (b) In the event of expropriation, (not as an outcome of public policy) but for reasons of *force majeure*, an act of God or State necessity, *inter alia*, it *shall* be compensated for.

C Interest Equity as it Applies to Interest

A proper and thorough discussion on the topic of foreign investment in the MENA would be inadequate without reference to the debate on interest, both at Islamic law and arbitration law. The problem of interest is further compounded in the MENA when there are unsettled questions at large: ‘There is no consensus on the method of awarding interest in ICA. If money is claimed, interest is sought to be added. Arbitrators invariably accept this request and add interest to the substantial amount awarded.’⁷³⁶ Scholars identify four main problems that a tribunal must decide: whether the debtor is liable to pay interest, the rate of interest to apply, the starting point from which interest has to be paid, and whether interest should be compounded and if so from what date.⁷³⁷

There are problems with the existing guidelines for arbitrators:

⁷³⁵ El-Malik, see above n 400, 11.

⁷³⁶ See above n 363, 656.

⁷³⁷ Ibid.

A tribunal will determine these questions by looking at national laws (which vary considerably), contractual interests and interest as a matter of damages. Where there is no agreement, arbitrators should look at the law governing the arbitration or the arbitration rules which apply. Interest (and its rate) is not specifically covered by any arbitration rules. It is always advisable that the parties provide in their agreement the rate of interest payable on money due or other payments.⁷³⁸

The author submits that there is a gap in the law and these questions should be partially provided for, particularly in the context of the MENA where national laws dealing with interest are complex and vary from jurisdiction to jurisdiction. For example:

Several Islamic countries do not allow interest as part of the award. This is the case for countries having legal systems based on Shari'a. Shari'a expressly prohibits the taking of interest or (riba). Some countries, like Egypt, have departed from this rule of Shari'a and allow for interest. A tribunal which expects its award may be enforced in an Islamic country will make a separate award on interest which may be enforced in other countries where assets of the debtor may be located. In this way the award on interest does not tarnish the award on the merits.⁷³⁹

Although the solution proposed by the scholars above is practical in protecting the actual award, it is not feasible in regard to interest due to the silence of the New York Convention⁷⁴⁰ on immunity from execution as well as Justice Aikens' dictum regarding this matter (both to be discussed in the section on sovereign immunity.) If states are immune from execution of an award- this means that in cases where it is already difficult

⁷³⁸ Ibid.

⁷³⁹ See above n 363, 656-657.

⁷⁴⁰ See above n 177.

to enforce an award against assets it will become even more difficult in the case of an award that deals with interest. This poses serious adjudicatory risk in the MENA. Furthermore, the laws allowing for flexibility for waivers from immunity from execution are compounded by MENA prohibitions against interest. Thus, provisions dealing directly with interest must be given. A harmonised approach to interest that is *sharia*-compliant is recommended.

It is submitted that equity can be the guiding principle for determining matters of interest in the face of varying and strict *sharia* interpretations of interest. Equity is known in Islamic law and in MENA legal tradition and was recognised by the Mixed Courts of Egypt:

Mixed Court judges, whether native or foreign, were able to use this provision to allow their own assessment of public policy and the climate of opinion, as well as the more basic dictates of natural law and equity, so as to decide a case with a fair conclusion.⁷⁴¹

The view of equity at common law is similar, demonstrating the universality of the principle of equity:

The basic principle of equity refers to the deviation from strict compliance with rules that is required by “true justice” or “ideal justice” (as contrasted with ‘legal justice’ – which is justice according to the strict application of the rules laid down). In particular, it is the idea that in unusual circumstances the principles of justice (or the reasons and purposes motivating or underlying the rule) may require deviation from the strict application of the

⁷⁴¹ See above n 180, 21.

rule. The idea of equity in this sense goes back at least to Aristotle (Nichomachean Ethics).⁷⁴²

Equity was seen in ‘recourse could be had to the chancellor or to courts of equity to relieve the parties from injustices caused by the strict application of common-law rules.’⁷⁴³ The reasoning of the courts of equity applies equally to the matter of interest in the MENA. The *Wena* case⁷⁴⁴ will elucidate this point. The *Wena* case⁷⁴⁵ also demonstrates matters related to expropriation.⁷⁴⁶ The merits of the principle of equity as a basis for adjudication for damages can be explained further: ‘One of the reasons that equitable principles in awarding damages are used is that sometimes it is impossible to quantify damages with certainty. Khan quoted Aldrich who noted in his book on the jurisprudence of the Iran–United States Claims Tribunal, said that, “I believe that when they are making a complex judgement such as one regarding the amount of compensation due for expropriation or rights to lift and sell petroleum products, equitable considerations will inherently be taken into account, whether acknowledged, or not”.’⁷⁴⁷ This practice⁷⁴⁸ represents a major strength in arbitral tribunal decision making which can serve it well in terms of ensuring enforcement of awards in the MENA. Equity requires

⁷⁴² Bix, see above n 359, 62.

⁷⁴³ Ibid.

⁷⁴⁴ *Wena Hotels v Egypt*, Award, 8 December 2002, 41 ILM (2002) 896.

⁷⁴⁵ Ibid.

⁷⁴⁶ See above n 461, 205: ‘In *Wena Hotels v Egypt*, agents of EHC had taken over the investment by force. EHC had the status of a public sector company. Its sole shareholder was Egypt, the shareholder assembly was chaired by the Minister of Tourism who appointed one-half of the Directors of the company, nominated its Chairman, and had the power to dismiss members of the Board. Moreover, ECH operated within broad policy guidelines issued by the government and the money of EHC was treated as ‘public money’ by the government.’

⁷⁴⁷ See above n 434, Sabahi, Borzu, *The Calculation of Damages in International Investment Law*, 580–1.

⁷⁴⁸ Ibid 581, ‘The precedents on which the tribunal relied, however, were a mixture of ex aequo et bono and equitable decisions. It is well settled, however, that awarding ex aequo et bono requires the express consent by the parties, which allows the tribunal to ignore the rules of law and awards on the basis of equity.’

the consent of the parties to the arbitration, hence the drafting of a HICALC article to this end.

The author, among others,⁷⁴⁹ is of the view that interest should be awarded; however, the manner in which it is calculated poses adjudicatory risk. Arbitral tribunals are already aware that there are questions⁷⁵⁰ around interest in normal circumstances. In the MENA these questions may be more complex, particularly in consideration of growing trends amongst arbitration tribunal decisions in regard to interest.⁷⁵¹ A little known fact outside of arbitration circles is that many civil law codes,⁷⁵² like Islamic law, prohibit interest. The value of harmonisation is that it will help investors dealing with a number of jurisdictions and not only in the MENA.

The concept of usury has led to contentious debates amongst scholars, both within and without the Islamic tradition. The importance of the debate lies in the fact that definitions of the term have been confused in the past. There is no definition as such in the Qur'an.⁷⁵³ To confuse the term usury with interest in a general sense is erroneous. In terms of a definition, scholars may argue that usury by definition means excessive interest. Yet, the term excessive must be defined and regulated if that is the case.

⁷⁴⁹ Ibid 583: 'Interest should be awarded to ensure full reparation.'

⁷⁵⁰ Ibid 'In awarding interest several different questions arise. One that continues to excite debate is whether interest should be compounded and if so, how frequently.'

⁷⁵¹ Ibid 'Traditionally, tribunals tended to award simple interest, but there seems to be a new trend in favour of awarding compound interest.'

⁷⁵² Ibid 584: 'Nevertheless, there is no consensus on awarding compound interest. Tribunals have given different reasons for denying it. The main reason is the difference in the applicable laws, for instance some tribunals have rejected a prayer for compound interest because the governing law of the contract is that of a civil law country, which prohibits the award of compound interest.'

⁷⁵³ J D Fry, *Islamic law and the Iran–United States Claims Tribunal: The Primacy of the International Law over Municipal Law*, Arbitration International, (Kluwer Law International 2002) Volume 18, Issue 1, pp 105–24, at 116, '... although the Qur'an prohibits *riba*, there is no consensus among Islamic countries as to what constitutes *riba*. As a result, tribunals that have been required to decide a dispute in the context of Islamic law have granted interest.'

Harmonising international commercial arbitration law and allowing for a baseline standard to regulate interest and to define what might be considered ‘excessive’ in terms of percentages or other quantitative measures would go far in putting this matter to rest; particularly so because it has been implicated in preventing arbitral award enforcement, or casting doubts on the fairness of certain arbitral tribunal decisions. This is the case for several landmark arbitral tribunal decisions.⁷⁵⁴ A scholarly comparative analysis of the concepts of *riba*, or interest, and usury is necessary for solving ICA problems in the MENA and can inform a harmonised ICA law code. Scholars have already begun this comparative process⁷⁵⁵ and there has been enough research and data generated by previous scholars to be compiled and used to inform and draft law codes that address the

⁷⁵⁴ The *Wena* case is one such case in which an arbitral tribunal awarded interest as part of punitive damages to be paid by Egypt. The interest rate was extremely high and raised the principal payment even higher.

⁷⁵⁵ C J Mews, I Abraham, *Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective*, *Journal of Business Ethics*, 2007, 72:1–15, 1, for example, ‘usury is a concept often associated more with religiously based financial ethics, whether Christian or Islamic, than with the secular world of contemporary finance. The problem is compounded by a tendency to interpret *riba*, prohibited within Islam, as both usury and interest, without adequately distinguishing these concepts ... in Christian tradition usury has always evoked the notion of money demand in excess of what is owed on a loan, disrupting a relationship of equality between people, whereas interest was seen as referring to just compensation to the lender. Although it is often claimed that hostility towards “usury” has been in retreat in the West since the protestant Reformation, we would argue that the crucial break came not with Calvin, but with Jeremy Bentham, whose critique of the arguments of Adam Smith, upholding the reasonableness of the laws against usury, led to the abolition of the usury laws of England in 1854. There has to be a role for law, whether Islamic or secular in regulating financial relationships. We argue that by retrieving the necessary distinction between demanding usury as illegitimate predatory lending and interest as legitimate compensation we can discover common ground behind the driving principles of financial ethics within both Islamic and Christian tradition that may still be of relevance today. By re-examining past ethical discussions of the distinction between usury and just compensation ... the world’s religious traditions can make significant contributions to contemporary debate.’ Common principles can be drafted and codified into statutes of a harmonised international commercial arbitration law. Moreover, the Jewish tradition also has an important contribution, at 2, ‘There is evidence of interest being charged (with rates of 20% and more) on loans of silver and barely as early as the third millennium BCE in the civilisation of Sumer. Failure to pay these debts created situations of bondage to wealthy landowners, prompting the Babylonian monarch to issue occasional annulment of debt servitude (Van de Mierop, 2005, 28). This testimony to the charging of sometimes high interest provides a context for understanding the strict prohibition of usury, transmitted in the Torah, based on the notion that rich and poor alike are created equally in the image of God. In the Book of Leviticus (25:35–37), any charging of interest is considered as *neshekh* in Hebrew, sometimes translated as biting usury or fenory, and thus morally wrong.’ The common denominator in all three of the traditions found in the MENA (Jewish, Christian and Muslim), is in excessive interest. The term ‘excessive’ must be defined, quantified and legislated, in international commercial arbitration law.

question of ‘interest’ in investor–State arbitrations in the MENA and European-Mediterranean (Euro-Med) context.⁷⁵⁶

According to most Islamic scholars,

The Qur’an distinctly prohibits interest, or *riba*. Saudi Arabia, Qatar, Oman, North Yemen and Iran strictly enforce this prohibition. Other Islamic countries, such as Egypt, Iraq, Kuwait, Morocco and the United Arab Emirates, interpret this prohibition in such a way so as to allow interest in specific circumstances.⁷⁵⁷

The fact that various interpretations and various customary usages in regard to *riba* exist is both noteworthy and calls for further scholarship. What is known about usury in the context of Egypt is as follows, ‘According to the Muslim jurist Mohammed Abudo, the Grand Mufti of Egypt (1899–1905), interest is not prohibited if the money is borrowed for production and not consumption’.⁷⁵⁸ This liberal view has bearing on international commercial arbitrations entered into by Egypt which are of a commercial nature and thus fall under the realm of production. Egypt’s liberal policy goes one step further in recognising interest as a legal right.⁷⁵⁹

⁷⁵⁶ The Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED) which promotes arbitration in the Mediterranean is well positioned to help promulgate the research herein.

⁷⁵⁷ Fry, see above no 753, 111–12. Further, at 112, ‘For example, Kuwait prohibits interest in civil matters, but allows interest in the payment of commercial loans. A prominent arbitration scholar Abdul Hamid El-Ahdab agrees with Kuwait’s allowance of interest in loans but not in such civil matters as contracts of sale. In other situations, interest is allowed to take the form of a service or administrative fee. Countries such as Jordan, Syria, and Egypt, where the Hanafi school of Islamic law prevails, have been able to circumvent the prohibition of interest for centuries by a series of judicial ruses that give the payment of interest a degree of respectability.’

⁷⁵⁸ See above n 400, 90.

⁷⁵⁹ See above n 400, 96, ‘The Egyptian Civil Code and the Middle Eastern countries whose laws are similar to it recognise interest as a legal right. Of course, these countries do not apply the Shari’a law, but most of their laws are derived from the French laws which have been translated into the Arabic language.’ However, at 97, this law has been challenged as against Islamic law whilst the Egyptian Court of Cassation

Several important points must be presented. First,

while international law may permit the compounding of interest, it does not encourage it, much less mandate it. Allowing supposed international law norms, as applied in only a handful of decisions, to override the clear requirements of a host State's law is of questionable merit. In the author's view, the Tribunal would have done better to follow the lead of another ICSID panel in another expropriation case subject to Egyptian law, *SPP (ME) Ltd. and SPP Ltd v. Egypt*, which decided: Article 42(1) of the Washington Convention requires that interest be determined according to Egyptian law because there is no rule of international law that would fix the rate of interest or proscribe the limitations imposed by Egyptian law.⁷⁶⁰

This view is problematic for three reasons. First, in the MENA, not all domestic laws regarding interest are as liberal as the Egyptian one.⁷⁶¹ Second, the Egyptian law still contains limitations impacting certain types of investment contracts whilst subject to expropriation or freezing, would mean severe financial losses.⁷⁶² Finally, the lack of a

has argued that the latter 1980 revision in the Egyptian Constitution cannot be applied retroactively to the older Civil Code, thereby effectively skirting the matter entirely.

⁷⁶⁰ E Schwartz, *Finality at what cost?* The Decision of the ad hoc Committee in *Wena Hotels v. Egypt*, in *Annulment of ICSID Awards*, Emmanuel Gaillard and Yas Banifatemi (eds), (Juris Publishing, 2004) 74.

⁷⁶¹ Many Islamic scholars consider *riba* (interest or usury depending on the interpretation) to be entirely forbidden. For example, in, El-Malik, see above n 400, 89, El Malik quotes the Quran thus, 'That which you give as interest to increase the people's wealth increases not with God, but what you give in charity seeking the good will of God, multiplies manifold'. And, 'their taking interest even though it was forbidden for them'. Also, 'O believers, take not doubled and redoubled interest and fear God'. Additionally, 'Those who devour usury will not stand except as stands one whom the devil one by his touch hath driven to madness. That is because they say trade is like usury. But Allah hath permitted trade and forbidden usury.' But, it is important to note, at 90, 'There is no single meaning of the term *riba*. It is a controversial issue among the Muslim jurists.' Further, at 96, 'The Egyptian Civil Code and the Middle Eastern countries whose laws are similar to it recognise interest as a legal right'.

⁷⁶² Schwartz, see above n 769, 69, 'Indeed, Egyptian law does not even permit pre-judgement interest to be awarded on un-liquidated damages, as in this case, absent proof of any factual financial damages (of which there was no showing in this case). Article 226 of the Civil Code of Egypt provides for interest on a debt but only "if the subject of the obligation constitutes a sum of money, and such amount was defined at the time of the claim," ie, on liquidated sums.' Additionally, '... Egyptian law caps the applicable rate of interest at well below the 9% rate the Tribunal used. Even if Article 226 permitted the award of interest on un-liquidated damages, it would limit the applicable interest rate to 4% in civil matters and 5% in

standard for an arbitral tribunal to follow means that most likely, as in the *Wena* case, domestic law will be ignored because tribunals have the jurisdiction to award interest. Moreover, it is not yet clear what the legal climate in Egypt will be after the new presidential reforms.

The idea of setting standards for the calculation of interest is not new. It is found in Egyptian law and even the UNCITRAL has discussed it.⁷⁶³ The excessiveness and lack of an explanation, without reference to any law, in the context of *sharia* interpretations and Egyptian economic considerations automatically opened a Pandora's Box of implicit public policy and sovereign immunity considerations in their broadest scope. Analogous to Pandora's Box, a HICALC can offer hope to these complex legal questions in the MENA, by resolving the complexities of interest payments fairly. A scholarly criticism of the awarding of interest in the *Wena* case has referred to the fact that the arbitral tribunal did not refer to any law.⁷⁶⁴ Yet, it is well-established that arbitral tribunals are

commercial matters. (Egyptian law limits even the rate of interest to which parties may agree to a maximum of 7%, less than what the Tribunal awarded *Wena*, in the absence of an agreement between the parties.) Egyptian law also prohibits any compounding of interest. The Tribunal's decision to compound quarterly the interest on *Wena*'s lost investment, thus, was contrary to Article 232 of the Civil Code of Egypt, which provides that "[n]o interest shall be charged on frozen interests". Finally, Egyptian law prohibits awarding an amount of interest that, as in this case, exceeds the principal amount awarded.'

⁷⁶³ Sanders, see above n 137, 137, 'In its note of 6 April 1999 (Doc. A/CN.9/460) UNCITRAL's secretariat suggested 13 topics for consideration by the commission for future work on the Model Law on Arbitration.' Of these, sovereign immunity and interest are relevant. Further, at 156, 'At UNCITRAL no proposals were made to insert a provision in the Model Law on interest. Nevertheless many countries adopting the Model Law, in particular common law countries did this. The secretariat's note of 1999 deals with this topic in paragraphs 101–106. Current legislative provisions differ in scope, particularly regarding the level of detail and the issues included.' (para. 102). Paragraphs 103–105 refer to the different ways in which jurisdictions deal with this topic. The Note concludes in paragraph 106 that the Commission may wish to consider whether the question of the power of the Arbitral Tribunal to award interest needs further study with a view to preparing a model legislative provision. Under (a)–(d) the issues this study might cover are enumerated: (a) the sum upon which interest may be charged; (b) the period of which interest is payable, both before and after the award is made; (c) the type (simple or compound) interest and the rate of interest to be applied; (d) all other issues such as the time at which interest is to be paid.'

⁷⁶⁴ Schwartz, see above n 769, 51.

empowered⁷⁶⁵ to decide on questions of interest. The problem remains: how is it calculated? Matters related to interest should be legislated.⁷⁶⁶ The author submits that the doctrine of equity ought to be a guiding principle in the matter of setting a uniform standard of calculating interest. The *Wena* case demonstrates the necessity of this. The contradictory MENA laws on interest and differing *sharia* interpretations necessitate this.

The question of interest is an important factor in the determination of arbitral award enforcement. Further:

The popularity of arbitration as a mechanism for settling disputes between transnational contracting parties has led to standardisation in many areas of arbitration law and procedure. One important aspect of the arbitral process, however, the practice of awarding compensatory interest, has been left behind in the march toward uniformity. To date, arbitral tribunals have failed to adopt a rational and uniform approach for evaluating interest claims. Consequently, resolving interest claims is often an expensive and time-consuming process, fraught with uncertainty, which typically results in inconsistent arbitral awards. This result is particularly problematic in the international arbitration arena: such claims often involve millions of dollars, and because a lengthy period may elapse between the origin of the dispute and the final award, whether an arbitrator awards interest may be as significant, from a monetary standpoint, as the principle claim itself.⁷⁶⁷

⁷⁶⁵ Sanders, see above n 137, 156–60: Several national legislatures allow arbitral tribunals to award interest, such as, Canada, the United States, New Zealand, Singapore, Australia, Bermuda, Hong Kong, Ireland, Malta and Sri Lanka.

⁷⁶⁶ Ibid 160, ‘I am hesitant as to whether UNCITRAL should embark on the exercise of producing a model legislative provision on interest. Consensus on this topic will be difficult to reach. On the other hand, the current situation in which arbitrators and courts deal with this topic does not – in my opinion – require that priority should be given to a model legislative provision on interest.’ In the MENA, the context requires rethinking the situation on interest.

⁷⁶⁷ J Gotanda, ‘Awarding Interest in international arbitration’ *The American Journal of International Law*, Vol 90, No 1 (Jan, 1996), 40–63, 40.

It is necessary to consider the situation of the party to a contract that suffers the actual losses incurred in the breach of the contract including unforeseeable losses and future losses. The economic and financial realities of the climate impacting investors must be taken into consideration in order to reach a just decision on behalf of the losing party in terms of awarding fair compensation for loss and damages. It is the ethical duty of counsel to represent the legal and financial interests of their clients to the best of their knowledge and ability. It would be an act of negligence and a breach of the attorney–client relationship for counsel to fail to take into consideration two important facts: (1) the significant losses incurred to investors and other commercial parties to a disputed contract by way of (a) actual loss due to the breach of the contract, (b) future loss due to the breach of the contract and due to the business relationship and future business opportunities, (c) costs of appeals by the noncompliant party (d) interest appreciation of lost monies and resources (e) non-tangible losses such as loss of face, loss of shareholder confidence, and loss of reputation, *inter alia*, (f) unforeseeable economic conditions of any type that may affect current and future opportunities as a result of the loss of the current contract, ie, rising prices of raw materials, increases in taxes on relevant goods, *inter alia*, and (2) the way awards with decisions that include certain types of interest are dealt with in the MENA. To fail at any one of these steps in advising the investor is tantamount to negligence and failure to perform proper legal services on behalf of the commercial client. The author has found that in the United Arab Emirates Dubai Court of Cassation, the High Court has set aside arbitral awards with compounded interest and has sent them back to lower courts for review, whilst requiring that the claimant who was to be awarded damages be the one to pay for the appeal instigated by the losing party,

causing further loss of profit and loss of time, whilst undermining the whole award such that payment on the principal was delayed because the arbitral tribunal did not take into consideration the sensibilities of MENA judges in terms of how interest was compounded. This adjudicatory risk put the entire award into question even when the court accepted the principal and not the interest, causing delays and losses to the party seeking damages.

The arbitral tribunal is faced with the decision of interest.⁷⁶⁸ It is the author's view that this is one of the most important decisions the arbitration tribunal will make in the service of award enforcement. The question of interest in the MENA is directly tied to the doctrines of arbitrability, *pacta sunt servanda* and public policy. Unless the arbitration clause of a contract clearly stipulates that simple interest will be awarded and that the Seat of arbitration will be the Cairo Regional Centre for International Commercial Arbitration (CRCICA), automatically activating the decision of an Egyptian court if the award is disputed by the losing party, any decisions that an arbitral tribunal makes in regard to interest will determine the entire outcome of the arbitration if the decision is not made with extreme caution and foresight. Aside from the liberal Egyptian view which is discussed in the subsequent sections, contracts with interest have caused problems in terms of recognition or enforcement in the MENA. Examples from the Abu Dhabi Court of Cassation have already been referred to. The problem of interest can cast doubt in the mind of a learned MENA judge of the arbitrability of an award, causing the entire award to be appealed by the losing party and sent back to a lower court for further consideration

⁷⁶⁸ Rana, see above n 462, 279: 'When it comes to the award of interest, the arbitral tribunal will also have to assess: whether interest is to be awarded; and if so, whether such interest should be simple or compound; what rate of interest is payable; what should the period over which interest is awarded (pre- or post-award); and what currency the interest should be in.'

and review, which in practical terms translates as making the entire award questionable until the lower court reviews it (as previously discussed in Abu Dhabi Court of Cassation cases). If parties have drafted interest provisions into the contract⁷⁶⁹ then this is another risk that the entire contract and its binding effect (*pacta sunt servanda*) will be seen as null and void in the MENA. Since the definition of interest and the legality of it is consistently and regularly debated in the MENA under various Islamic law interpretations, interest will raise questions of public policy. The inherent complexity of awarding interest in international arbitration is further compounded in the MENA context:

The problems associated with the awarding of interest stem from the overly complex and sometimes arbitrary methods that arbitrators have used to evaluate interest claims. An arbitrator considering a claim for compensatory interest typically addresses three issues: (1) the debtor's liability to pay interest, (2) the period of time over which interest accrues, and (3) the rate of interest. In resolving these issues, the arbitrator ordinarily looks first to the parties' agreement. If it contains a provision explicitly addressing those questions, resolving the interest claim is a simple matter; interest is awarded in accordance with the agreement. All too often, however, the agreement fails to address some or all of the issues

⁷⁶⁹ Ibid 279: 'The right to interest will depend on a number of different factors. The first thing to consider is the parties' underlying contract. It is not unusual for parties to agree to a contractual provision for levying of interest for late payment. An example of such a provision is: The award shall include interest from the date of any breach or violation of this Agreement, as determined by the arbitral Award, and from the date of the Award until paid in full at a rate to be fixed by the arbitral tribunal. The example above provides for pre-award interest (from date of breach), as well as a post-award interest (from the date of the award). Sometimes there is a clause in the main contract that deals with interest due on late payments. An analogy can be drawn from the way the parties intend to deal with the issue of interest on late payments to the way interest on awards should be handled. It is likely that an arbitral tribunal will take into account such an agreement.' In MENA arbitrations the arbitral tribunal must consider how the local courts will view the matter.

concerning the payment of interest, or is ambiguous as to how the interest claim should be decided.⁷⁷⁰

(a) *Helnan International Hotels A /S and The Arab Republic of Egypt, ICSID Case No 05/19*

No discussion on expropriation is complete without an in-depth case law analysis. In direct breaches of the provisions of Islamic law, particularly Islamic countries⁷⁷¹ which have adopted civil codes (for example, Egypt), expropriation in breach of this prohibition still occurs, which as previously discussed is strictly illegal at Islamic law. In a landmark arbitration award case, *Helnan*,⁷⁷² Egypt had claims of expropriation brought against it in a contractual dispute to which they were a commercial party. The claimant alleged that Egypt expropriated its property in breach of Article 5 of a BIT (Egypt–Denmark). The Danish claimant’s argument is that the breach had been due to alleged reasons of public policy.⁷⁷³ Yet, what is significant to note in the case of Egypt overall is either the inconsistent application of Islamic law or ignoring it altogether.⁷⁷⁴ This inconsistency is relevant not only to matters related to expropriation but to matters that arise from disputes and are related to public policy and to sovereign immunity in terms of defences presented by learned counsel before ICSID and other tribunals. This inconsistency makes for unpredictability. The standards at Islamic law against expropriation, public policy and sovereign immunity are higher and more in favour of individual rights against the State.

⁷⁷⁰ Gotanda, see above n 767, 41–2.

⁷⁷¹ As per Constitutional decree.

⁷⁷² *Helnan International Hotels A/S and The Arab Republic of Egypt, ICSID Case No 05/19*.

⁷⁷³ *Ibid* 19.

⁷⁷⁴ There have been landmark cases in Egypt in the past in which the Court of Cassation, rather than ruling directly on an issue that raised the complexity related to the question of the illegality of a situation per Islamic law, has found a loophole and rendered the point moot for some other practical consideration, thereby effectively avoiding altogether any rulings on certain situations that were argued as ‘illegal’ according to the Egyptian Constitution. The author submits that this was not unintended.

The standard at Islamic law mitigates adjudicatory risk. This is the genius of the HICALC. What the claimants did not know at that time and would have strengthened their case is that Islam forbids expropriation for reasons of public policy (as previously discussed in the foregoing paragraphs). The Egyptian Constitution at the time of writing holds Egypt subject to Islamic law as the sole source of law. The arbitral tribunal rightly awarded Helnan £12.5 million which was paid to them by the competent Egyptian Ministry. Since the Cairo award is *res iudicata* it is beyond the scope of the research to address the matters raised in the appeal. Yet, this arbitration case does raise several legal questions overall, eg, if a State terminates a contract in order to privatise (if it can be proved by the claimant that that was the case) would privatisation be considered public policy or State necessity? Islamic provisions exist which prohibit the former but allow the latter. Even if the claimant had established that Egypt severed its contract for privatisation, it would still have had to establish that such privatisation occurred due to reasons of State necessity and not public policy, in order to get a ruling consistent with Islamic law. The doctrine of State necessity is not as narrow at Islamic law as it is at common law or general principles of international law. Could privatisation—which may have led to expropriation in this case—be seen as *istihsan* or *al masalih al mursslah*?⁷⁷⁵ Terminating a contract due to a breach on the part of a party is valid. If the claimants' contract was breached because their standard of hotel management did not meet the requisite standard, this does not amount to expropriation. This means that the claims of damages for the duration of the 27 years of the contract rest upon shaky ground. Hypothetically, if the contract was breached due to a pretext and amounted to

⁷⁷⁵ See the Islamic law section of Public Policy in the section on exceptions at Islamic law for a thorough discussion on these doctrines.

expropriation, would the amounts of principle and interest be different? Would a different amount of damages and interest apply in the case that a contract was breached due to the claimant acting in bad faith and not fulfilling a contract, as opposed to a case of expropriation for State necessity? And if yes, would not the allegation of expropriation entail higher damages and higher interest, again depending on the basis for the expropriation? If yes, should there not be a standard to regulate a cut-off point that does not exceed either a certain percentage or one that is based on fair compensation to both parties? Would not Islamic law principles in theory prohibit the paying of damages and interest on a contract based on future speculation of profit that cannot be predicted or guaranteed? The answer to the latter is theoretically, yes; speculation (including certain future stock market commodities and insurance) are prohibited at Islamic law. Yet, as previously mentioned, the inconsistent or non-existent application of Islamic law provisions in the MENA countries is still an adjudicatory risk factor that is ever prevalent. Why did Helnan appeal the Tribunal's *res iudicata* award? Were not all these matters hitherto addressed in the first tribunal's hearing? The questions relating to interest are answered in the subsequent section on interest.

(b) *Wena Hotels limited v Arab Republic of Egypt (ICSID Case No ARB//98/4)*

In the case of *Wena Hotels limited v Arab Republic of Egypt*⁷⁷⁶ interest was a decisive consideration. The *Wena* case is a perfect example of the discontent of MENA

⁷⁷⁶ Schwartz, see above n 769, 51, 'The Wena case arose out of a dispute relating to two hotel properties in Egypt: the Luxor Hotel in Luxor and the Nile Hotel in Cairo. Each hotel was owned by the Egyptian Hotel Company (EHC), a State-owned, but legally distinct Egyptian company with a Board of Directors chaired by the Egyptian Minister of Tourism. In 1989 and 1990, respectively, the Luxor and Cairo hotels were leased by EHC to Wena, a small English company. Under the leases, which were to remain in effect for 25 years, Wena undertook substantial renovation and development obligations. During the first years of each of the leases, however, disputes arose between Wena and EHC concerning their respective obligations and Wena ceased all rental payments to EHC for both properties in the fall of 1990. Fruitless negotiations

states on arbitral rulings on questions of interest. Nowhere is the matter of the conflicts of laws more relevant than in the outcome of a momentous ruling on interest. This is an excellent example of why reliance on domestic law alone is problematic. It is not accepted by all parties involved and as such it undermines the credibility of an arbitral tribunal. The *Wena* case is a useful illustration of the way classical *sharia* interpretations can address modern matters of expropriation and interest, including demonstrating the lacunae in public international law in setting uniform and universal standards regarding questions of calculating interest. Had the arbitral tribunal had a HICALC that regulated the calculations of interest, the negative outcome of this case for all involved parties would have been avoided. The arbitral tribunal awarded the sum of US\$11.43 million, a sum which significantly exceeded the principal balance.⁷⁷⁷ Although arbitral tribunals are allowed to decide on interest, the excessiveness of this award requires fair standards.

1 *Civil Law*

An important Roman law principle was that the debtor was not required to pay the rate of interest when it was usurious.⁷⁷⁸

Historically,

between the parties ensued, and, then, on April 1, 1991, EHC forcibly evicted Wena from both hotels. Wena's eviction from the hotels in 1991 set in motion a chain of events that ultimately led to an ICSID arbitration being commenced against the Arab Republic of Egypt by Wena in 1998 for breaches of the 1975 bilateral investment treaty (the IPPA) between the United Kingdom and Egypt. In particular, Wena claimed that Egypt had expropriated or otherwise failed to protect, in accordance with IPPA, Wena's leasehold rights in respect of the hotels. Wena claimed damages of approximately US\$60 million.'

⁷⁷⁷ Ibid 68.

⁷⁷⁸ R Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (Juta and Co, Ltd, 1990)169.

Interest is a sum paid or payable as compensation for the temporary withholding of monies. The practice of interest dates to the time of Roman law, where it was a sum “due from a debtor who delayed or defaulted in repayment of a loan. The measure of the [amount] due for the default or delay was ... the difference between the [claimant’s] current position and what it would have been had the loan been timely and fully repaid”. Today, interest is a standard form of compensation for the loss of the use of money. Ordinarily, it is recoverable without proof of actual loss; damages are presumed because the delay in payment deprives the claimant of the ability to invest the sum owed.⁷⁷⁹

This principle is rightly based in equity.⁷⁸⁰

In the civil law system,⁷⁸¹ the arbitrator not only has the discretion but is obligated to award interest when the claim involves payment.⁷⁸² Civil law countries have different standards for determining the rate, which is not standardised.⁷⁸³

The concept of interest at civil law cannot be discussed without a discussion on damages because interest given on the principal or on the actual loss of monies in a modern contract cannot arise without there first being actual damages. The concept of damages in civil matters existed and can be traced back to 280 BC, at civil law in that

⁷⁷⁹ Gotanda, see above n 769, 41–2.

⁷⁸⁰ Ibid 42: ‘It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach ... Everyone who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties.’

⁷⁸¹ Ibid: ‘France, Switzerland, Germany and Italy.’

⁷⁸² Ibid: ‘... and the claimant has taken the proper steps to place the debtor in default.’

⁷⁸³ Ibid 43: ‘In civil law countries, interest ordinarily runs from the date of default. The rate at which interest accrues, as well as the circumstances in which that rate applies, varies and is usually set by statute. In Germany, for example, the rate is 4 percent; in Switzerland and Italy, 5 percent. By contrast, the legal rate in France is set by the legislature each year and equals the discount rate of the Bank of France on December 15 of the preceding year. The statutory rate will ordinarily not apply if the parties have previously agreed to a different rate of interest. That rate, however, is subject to the public policy against usurious interest.’

‘[t]here were recognised *furtum* (theft) and *injuria* (insult). The *lex aquilia* (possibly 280 BC) gave redress to damage to property’.⁷⁸⁴

In regard to ancient Roman law in comparison with Islamic law, the author observes that there were limitations on usury at civil law in Roman times. The fact that there were limitations on interest designates a common starting point regarding civil law and Islamic law on the matter of interest. Therefore, reasonable limits to the awarding of interest should be taken into consideration in the drafting of a HICALC. For example, at Roman law:

Money-lending transactions, insofar as they extend beyond loans between friends or neighbours, have at all times posed a challenge to the legislator. The borrower is usually in a weak position economically (otherwise he would not be in need of monies), and a strong possibility exists that the lender may be tempted to exploit his predicament. In order to prevent usurious abuses, the State is therefore called upon to interfere and to afford some protection to the disadvantaged party. The Roman legislator responded to this challenge in a twofold way. He tried to combat usurious interest rates and he addressed himself specifically to the situation where sons in power had taken up a loan.⁷⁸⁵

The author observes that the same reason behind the Roman law limitations on interest or usury, is in fact, precisely the same reasoning used at Islamic law- the protection of the weaker party from the strong party. This principle is more closely examined in detail in other sections of this thesis. This validates the author’s premises that logical reasoning by analogy is a universal principle and that harmonisation is feasible. Indeed, the Roman law provisions and regulations of interest, including the prohibitions and sanctions that

⁷⁸⁴ Walker, see above n 404, 1079.

⁷⁸⁵ Zimmermann, see above n 778, 166.

occurred at a time are technical and complex. The author observes that an identifying of the principles supporting the technicalities will serve as a help to future drafters of a HICALC than a literal reading of the provisions at the three traditions. For example:

Yet, there is one area in which the law intervened at an early stage: usurious interest rates. In contracts of loan, the freedom of the parties to negotiate usually amounts to the freedom of the creditor to dictate the terms of the contract. The XII Tables already contained a rule “ne quis unciario feanore amplius exerceret.” The term “unciarium fenus” (interest of 1/12 of the capital) is somewhat enigmatical and has led modern scholars to argue about whether it constituted a ceiling rate of 8 1/3%, 10%, 8 31/2% or 100%. This dispute arises because it is uncertain whether the interest, according to the XII Tables, had to be calculated per year or per month, and whether the calculation was based on a year containing ten or twelve months. It is clear, however, that in case of contravention the usurer incurred a criminal sanction: he had to pay the poena quadruple. In the course of the following centuries, this limit for the charging of interest rates varied; in 347 B.C., for instance, it was cut down by half (fenus semiunciarium). In practice, however, higher interest rates often seem to have been charged and the borrowers were far from being well protected. Therefore, only five years later, a lex Genucia forbade the charging of interest altogether.⁷⁸⁶

The author submits that the similarities of Roman law and Islamic law regarding the matter of interest, can serve as guiding principles for future drafters of a HICALC.

Limits were placed on interest rates and sanctions were introduced:

⁷⁸⁶ Ibid 166-167.

Sulla, therefore, in 88 B.C. seems to have introduced the old *fenus unciarum*. Towards the end of the Republic, however, the so-called *year centesimae usurae* came into use (1/100 per month, ie 12% per year). They were maintained, essentially unchanged, as maximum rates during the imperial times right down to the 6th century. Alexander Severus enjoined senators not to charge interest, but soon thereafter a special limit, the *usurae dimidia centesimae* (6%), was fixed for them. Justinian, under the influence of Christianity, was not favourably disposed towards the charging of interest. He tightened the usury laws and reduced the ordinary maximum rate to 6% and to 4% for senators. A special concession was made to those “*qui ergasteriis prasunt vel aliquam licitam negotiationem gerunt*”: they could charge up to 8%. Regarding policy, it is interesting to see that the problem of usury was tackled in Roman Law by way of penal sanctions.⁷⁸⁷

The principles of fixed rates and of maximum rates were present at Roman law. Penal sanctions were used to deal with usury. The value in consulting guiding principles is to find the principles supporting practices that would be acceptable to all three traditions. Although at certain times at Roman law and in certain interpretations of Islamic law, the complete prohibition by law of interest took place, or was discouraged in both cases, the author does not suggest that this particular principle be employed because it contradicts with current Egyptian legislation allowing interest, and with the absence of analogy at Islamic law for the unique situation of international business as it is practiced today. It goes against current practices and is neither feasible nor necessary. Yet, the other principles of limiting it with a fixed rate and a maximum limit are valuable and are in harmony with the doctrine of equity which can apply to decisions of tribunals in dealing

⁷⁸⁷ Zimmermann, see above n 778, 168-169.

with matters of interest. The concept of protecting the weaker party from the stronger party is related to equity and to prohibitions against unjust enrichment. The author submits that the principle of protection of the weaker party from the strong party can best be served not by outright prohibition but by putting a maximum limit on interest and creating a predictable formula, just as the technical formulas of Roman law were created, and the freedom of arbitrators to determine matters of interest within the guidelines of equity and a formula with a maximum cap. The author submits that these two recommendations can salvage arbitral awards that contain interest. If these principles are drafted into a HICALC and adopted by MENA states, the matter of interest would more likely be standardised and would not serve as a bar to enforcement.

2 *Common Law*

Why is a HICALC relevant to the matter of interest? The HICALC is built upon general principles of law and general principles of international law. This is relevant to determinations of interests as, in a landmark case, ‘the court stated that in determining the standard of compensation for expropriated assets, principles of international law, not merely local law, must be applied.’⁷⁸⁸

⁷⁸⁸ M Leigh, *Banco Nacional de Cuba v Chase Manhattan Bank*. 658 F.2d 875, *The American Journal of International Law*, Vol 76, No 4, Oct., 1992, 848. Also see, I Seidl-Hohenveldern, *Collected Essays on International Investments and On International Organisations*, (Kluwer Law International, 1998) 304: *Banco Nacional de Cuba v Chase Manhattan Bank*. 658 F.2d 875, 892 (1981) ILR 66, 421, 438; the dictum in *Chase*: ‘L’adoption de la règle que la compensation doit être adéquate n’exclut pas la possibilité qu’un quelques cas une compensation moins qu’intégrale pourrait être adéquate.’ ‘The adoption of the rule that compensation should be adequate does not exclude the possibility that in certain cases compensation that is less than complete may still be adequate.’ Translation by the author. This partially addresses the matter of whether to award tangible v. intangible losses and future losses or compounded interest when in situations these three types of compensation cannot be given; at the very minimum there should be adequate compensation.

The law of England is taken as the prime example of the common law of interest:

The laws of England best illustrate the awarding of interest under a common law system.

Of all the major industrialised countries, England gives the arbitrator the most freedom to decide whether to award interest and to determine the applicable rate. The power of an arbitrator to award interest derives from the Arbitration Act of 1950. Section 19A of the Act provides for broad discretion in awarding interest, stating that the arbitrator “may, if he thinks fit, award simple interest.” Interest is customarily awarded under the Act whenever a claimant has been deprived of the use of monies or assets, unless the parties have expressly agreed otherwise.⁷⁸⁹

This law can be adapted into the HICALC and moderately revised to take into consideration the MENA. This means that it must state that interest is to be decided by the arbitrator based on equity and that this shall be agreed upon by the parties with a clause to this effect that includes damages decided on the basis of equity and actual loss, jointly.

3 *Islamic Law*

The matter of interest (riba) in the MENA is important. The author submits that in regard to *sharia*, different interpretations exist from State to State.

Examples of this are cases from the Abu Dhabi Court of Cassation.

⁷⁸⁹ Gotanda, see above n 767, 44.

- (a) *Abu Dhabi Court of Cassation Judgements*⁷⁹⁰
- (i) *An Action for Compensation for Tort, committed by the Resignation of an Arbitrator, is subject to the General Principles of Civil Liability. Abu Dhabi Court of Cassation Judgement No 219/18, 26 October 1997*⁷⁹¹

The claimant in this case filed before the Civil Court of Abu Dhabi on the grounds that the defendant was the president of the arbitration tribunal dealing with a dispute that the claimant had with the Ministry of Works. The claimant alleged that the arbitrator resigned without giving reason and took from the deposit lodged for the expenses of the arbitration the sum of Dhs 20,000.00. The Court of First Instance rejected the case. The claimant appealed to the Court of Appeal which rejected the case and the claimant subsequently appealed to the Court of Cassation, arguing that the Court of Appeal affirmed the ruling of the Court of First Instance although the ruling did not decide upon the original point of the dispute which was the breach by the defendant of his contractual obligation to preside over the hearing. The claimant requested compensation for damages and refund of the sum. The Court of Cassation found merit in the claimant's argument that claiming compensation for damages caused by an arbitrator's wrongs is subject to the general principles of civil liability and subsequently reversed the appealed ruling, ordered the defendant to pay the costs and referred the case to the Court of Appeal for reconsideration. It is usual for an arbitrator to recuse himself in the event of manifest or real bias. The absence of a summary of the defendant's argument or explanation leaves a gap in knowledge. Yet, in this case, the Court of Cassation can be constructed as protecting the principles of ICA in that it intervened when it was appropriate to do so. The fact that it invoked general principles of civil liability as the basis for its reasoning

⁷⁹⁰ See above n 312.

⁷⁹¹ See above n 566, 271– 272.

demonstrates the potential for accepting principles outside of either the *sharia* or its own national civil codes. In consideration of the fact that this is not consistent, however, it cannot be relied upon as precedent. This case demonstrates that the likelihood of the acceptance of the provisions dealing with interest in the suggested HICALC.

(ii) *An Arbitration Award should not deal with a matter not referred to Arbitration by the Parties. The instances of Invalidity of Arbitration Awards stated by Article 216 of the Law of Civil Procedure are Exhaustive. Abu Dhabi Court of Cassation Judgement No. 404/18, 6 May 1997*⁷⁹²

The dispute leading to arbitration arose due to non-payment by the defendant to the claimant for the sum of Dhs 22,082,346.00 plus interest. In rejecting the plea of prescription put forth by the defendant, the tribunal awarded the claimant Dhs 4,905,185.27 with delay fines and remuneration stipulated by the Supreme Federal Judiciary, a sum far less than that which the claimant submitted. The Court of First Instance ratified the arbitration award for the sum that the tribunal ordered, but invalidated the part of the ruling concerning the delay fines and amended the remuneration of the arbitration tribunal. Both parties appealed before the Court of Appeal which in fact reversed the ruling of the Court of First Instance regarding the invalidity of the ruling on the delay fines. The defendant appealed before the Federal Court of Cassation on the basis that the defendant pleaded that the tribunal exceeded its jurisdiction in respect of certain claims. The Court of Cassation held that the evidence substantiated that those claims were within the jurisdiction of the arbitration tribunal. The defendant argued that because the claimant did not expressly request the delay fines that the tribunal was outside of its competence, because it was not specified in the arbitration agreement. The defendant further argued that the whole arbitration should be held as invalid because of this last point. The Court of Cassation held that this final argument does not fall within any provision of Article 216 of the CPL and partially reversed the

⁷⁹² See above n 566, 267– 269.

appealed ruling concerning the delay fines, referred the case back to the Court of Appeal and ordered the claimant to pay 50 per cent of the costs and exempted the defendant from the rest of the costs.

This case demonstrates the problems that a contracting party encounters in choosing Abu Dhabi for the *lex arbitrii*. The endless appeals undermining the *res iudicata* of the award cost the claimant unnecessary expenses, although it was the defendant who appealed further. Initially the Court of Appeal upheld the arbitration tribunal's decisions and reversed the decision of the Court of First Instance to deny payment of delay fines and remuneration. One likely explanation for this, from the point of view of the learned Abu Dhabi judges, is that the Bench considered the payment of delay fines as tantamount to interest. This has implications for how public policy is constructed in the UAE. In addition to problems related to *res iudicata* and interest, the competence of the tribunal was challenged repeatedly and this challenge was used as an attempt to invalidate the entire arbitration and to potentially allow the defendant to escape from paying for the construction of the road in Ras Al Khaimah which the contract stipulated. Clearly the Court of Cassation did not go so far as to allow such a grave injustice as that to occur, however, the conservative stance that they took and the narrow interpretation of competence together with an broad interpretation of what could be construed as having been viewed as interest, is problematic.

(iii) *The Dubai Court will Ratify a Foreign Arbitration Award to be Executed in the UAE. Dubai Court of Cassation Judgement No 267/93, 16 January 1994*⁷⁹³

This case represents two important, albeit contradictory, principles in matters before the Dubai Court of Cassation. On one hand the court will honour foreign arbitration awards. Nonetheless, notwithstanding that fact, the court however must contend with public policy provisions that preclude the awarding of interest. The entire topic of interest are dealt with more thoroughly in subsequent paragraphs devoted to the topic. The court stated: ‘In an action filed before the Dubai Courts, the Court of Cassation held that, provided a foreign arbitration award complied with certain conditions, it would be enforceable in the UAE but the Court will enforce only the principle amount of the award and not the order for interest and costs contained therein.’ The importance of this case to understanding basic adjudicatory risk in the UAE (even in consideration of the newly revised Code of Civil Procedure) merits further discussion.

The facts of the case, *inter alia*, are as follows:

An action brought before the Dubai Court by the owners of a vessel (“Plaintiff” who claimed that they sold a vessel berthed at Sharjah Port pursuant to a sale agreement dated 30 June 1991 to the first Defendant for an amount of US \$770,000. It was agreed in the sale agreement that the first Defendant would lodge ten percent of the purchase price as security. This would be deposited at a local bank account in Dubai in the name of the second Defendant. The first Defendant actually lodged the deposit but subsequently failed

⁷⁹³ Tamimi, see above n 581, 251.

to comply with the terms of the sale agreement. The matter was referred to arbitration in London on 27 April 1993. The three appointed arbitrators decided that the Plaintiff was entitled to withdraw the deposit together with 12 percent interest from 11 July until the date of payment. The arbitrators also ordered the First Defendant to bear all costs, including arbitration costs.⁷⁹⁴

The multiple appeals by the defendant in order to obstruct the award and avoid payment of interest were, to the detriment of the plaintiff, not only successful but also incurred costs that the plaintiff had to bear. This case demonstrates the financial losses that may be incurred as a result of multiple appeals which are themselves related to the adjudicatory risk inherent in MENA arbitrations which are subject to the mercy of domestic laws and provisions, as: ‘The Plaintiffs applied to the Dubai Court to enforce the arbitration award in Dubai. On 27 December 1994, the Court of First Instance delivered a judgement dismissing the Defendant’s argument that the Dubai Court had no jurisdiction to enforce the award and gave an order to execute the same.’⁷⁹⁵ Unfortunately for the plaintiff, this was not to be, as: ‘The Defendants appealed to the Dubai Court of Appeal. The Court cancelled that part of the judgement delivered by the Court of First Instance which ordered the Defendants to pay costs and interest in addition to the ratification of the arbitration award. In all other respects, the Court of Appeal upheld the judgment of the Court of First Instance.’⁷⁹⁶ Furthermore, in addition to the matters of interest and of costs, the court gave its ruling in consideration of public policy:

⁷⁹⁴ Ibid 251.

⁷⁹⁵ Ibid 251.

⁷⁹⁶ Ibid 251–252.

The Plaintiffs appealed further to the Dubai Court of Cassation. They argued that the Court of Appeal was wrong in failing to uphold that part of the Court of First Instance judgment regarding costs and interest. However, the Court of Cassation held that the UAE Courts had no jurisdiction to look into the merits of the case or to deliver a further judgment with regard to costs or otherwise. The Court's role would be limited to enforcing the principle amount of the award and not interest and costs thereon. The Court of Cassation further held that when ratifying the award, the UAE judge will not consider the merits of the case but only ensure that the arbitration was, according to UAE law, proper and executable. It must not contradict any previous judgment or public policy of the UAE and must be made pursuant to an agreement between the parties and be signed by the arbitrator. Additionally, both parties' agreements must have been given due consideration. If these pre-conditions are satisfied, the Court will ratify the award without granting the Plaintiff any other request or remedies.⁷⁹⁷

Thus: 'In this particular case, the Court held that the arbitration award itself could be executed in the UAE, but not the element which dealt with the subject of interests and costs'. The reason is public interest or public policy, but it is public policy in the nexus of Islamic law, as the Constitution of the United Arab Emirates cites Islamic law as the highest authority.

⁷⁹⁷ Ibid 252.

(iv) *A Court may refer all or part of a Dispute to Arbitration. The Ratifying Court controls the Procedural Aspects of the Arbitration Award. Only delay fines are considered as a Compensation for Procrastination and not Interest. Abu Dhabi Court of Cassation Judgement No 317/18, 30 June 1998*⁷⁹⁸

The dispute arising from two contracts which two claimants requested to have terminated from the same defendant and requested payment amounts including delay compensation was held by the arbitral tribunal, which ordered the termination of both contracts and payment of compensation and delay fines. When the award was submitted to the court for ratification, the entire award was ratified except for the delay fines. It further cancelled the remuneration of the tribunal secretary and amended that of the tribunal. All parties then appealed. The Court of Appeal rejected the ruling of the Court of First Instance in relation to the invalidity of the delay fines and cancelled the amendments and the appeal made by the defendant. The defendant then argued before the Court of Cassation that the award was invalid due to breaches of confidentiality and to points being discussed that were not submitted to arbitration. The Court of Cassation held that the court may refer in whole or in part a matter to arbitration and that the ratifying court deals only with the requirement for the arbitrators to comply with procedural laws; it does not deal with matters related to substantive law applied to the dispute unless it is related to public policy. The defendant argued that the delay fines are a kind of usury prohibited by Islamic law and that those fines were calculated and therefore, doubly charged. The court held that ‘it is a well-established practise that delay fines are not akin

⁷⁹⁸ See above n 566 pp 273–275.

to usury, which is forbidden by Islam but rather a means to compensate the creditor for the procrastination of the debtor in discharging his obligation of payment. However, multiple calculation of delay fines is akin to the compound interest forbidden by Islam'.⁷⁹⁹ The court therefore agreed with the defendant's claim that in this case the delay fines were calculated multiple times and therefore invalidated them whilst referring the case to the Court of Appeal for reconsideration and ordering the claimant to pay the cost.

Subsequently the court partially reversed the appealed rules concerning the delay fines. What is interesting about this case is that first of all it invokes the complexities of interest and demonstrates how interest acts as an obstacle on the road to arbitral award enforcement in the MENA context. Secondly, what is of further interest is that although the court defined interest in one way, and said that delay payment is not interest, it still reversed the decision of the Court of Appeal and upheld the decision of the Court of First Instance to invalidate that part of the arbitration agreement that ordered delay payment. In consideration of the fact that the calculation of the delay payment is not given, this leaves a gap in knowledge; however, in the case of interest, the way it is compounded will determine if it is seen as usury or not by the Abu Dhabi Court of Cassation. The other ruling of this Court regarding the matter of competence, reflects respect for and support of arbitral tribunal *compétence de la compétence*. When this court states that it is only able to interfere on matters of procedural wrongs committed by the arbitrators and not those of substantive law (unless they are contrary to public policy), it is showing support for arbitral tribunal *compétence de la compétence*. Yet, the vague notion of public policy as domestic and Islamic public policy must be noted.

⁷⁹⁹ See above n 566 275.

Elaboration on different *sharia* interpretations from jurisdiction to jurisdiction is beyond the scope of this research. The author submits that for a proper understanding of Islamic law, or *sharia*, to occur regarding the matter of interest in the MENA, it is essential to start with the principle of law underlying the reason for the prohibition of interest in the MENA. In addition to this, after the underlying principle is identified and discussed, it is necessary to examine more closely the adjudicatory tools that a Muslim jurist may avail himself (or herself) to. Only when this type of analysis takes place can an accurate understanding and ruling on the matter of interest in the MENA take place. First and foremost, it is a general principle at Islamic law that the *sharia* exists to protect weaker parties from stronger parties, or parties from exploitation. The author submits that this is a general principle of law in any tradition and as such it is a universal principle. Examples within the Islamic tradition abound and are well established, such as protection of widows, orphans, etc. The first understanding of the principle regarding the prohibition of interest is that it was put in place in order to protect poor people (the weaker party) from the rich people (the stronger party). A wealthy lender who could lend out monies and receive interest for it from people who had to borrow it in the first place represents a situation in which exploitation of the weaker party can increase through the use of interest, which would create greater indebtedness of the poorer party, particularly to the richer party. This is the foundational principle underneath the Islamic prohibition of interest. In order for a jurist to make a ruling on interest in the present age, they must be able to apply one of the juristic tools, that of *qiyas* or analogy, to the situation, and to demonstrate that the situation is comparable and that the operative principle that serves as the cause for prohibition, is present. The use of *qiyas* or analogy would occur through the

process of *ijtihad*, or discovering the law. The problem begins when it becomes clear that the situation in the current age cannot compare to the situation at the time of the Prophet. For example, in the case of an investor–State dispute, in which the investor wishes to receive interest as compensation for damages, in order for a Muslim jurist to be able to apply the operative principle of prohibition of interest full scale, they would have to draw an analogy (using *qiyas*) with the situation at the time of the Prophet. The author submits that to compare either a wealthy investor with a rich moneylender, or a wealthy State with a rich man, is an inaccurate analogy and is therefore not analogous and not applicable to *qiyas* (analogy). An investor has means that exceed those of a very poor man (if the comparison is to a wealthy State), and a State is not as vulnerable as a poor man at the time of the Prophet (even a developing nation- for example due to its ability to exert taxes, *inter alia*, upon its citizens and gain an income through that means.) Thus, the analogy is not precise and the first condition of *ijtihad* (discovery): *qiyas*, (analogy) cannot be fulfilled. The operative principle of a weaker party vis-à-vis a stronger party, also cannot be fulfilled. The author submits that this is the operative principle upon which Egypt's liberal interest policy rests. The presence of the doctrine of *maslaha* (public interest) or *al masalih al mursalah*, means that if it is in the public interest of a State, it may circumvent certain *sharia* rulings. This means a State can justify interest (as is the case in Egypt with Egyptian legislation supporting interest), or it means a State can prohibit interest, simply because it is in its public interest not to pay it (and not exclusively because it is poor- as per the poor man analogy). The doctrine of *maslaha* or *al masalih al mursalah*, in the event of gaps in analogy or gaps in *qiyas*, (analogy) means that the *ijtihad* (reasoning, discovery of the law) by the jurist must be filled either by

maslaha, or other considerations that the jurist sees as appropriate within the *sharia*. This means certain adjudicatory risk in the MENA in cases where there is an absence of clear civil legislation. With the exception of Egypt, which does have this legislation that is backed by the authority of the Grand Mufti, this means most MENA countries. This means that until this matter is resolved, MENA legislation of interest (*riba*) (outside of Egypt) will continue to be prohibitive, unless it follows the way of Egypt. This means that the matter of simple or compound interest, or tangible and intangible losses (that have to do with *gharar*- or risk, and future speculation, or possibly insurance in principle) are on the face of them ruled out since these strict *sharia* interpretations can create analogies where none exist. The matter of *gharar* (risk) or speculation can be reasoned out exactly as the matter of interest was. Either a Muslim jurist will find an analogy with a situation at the time of the Prophet and justify the decision to prohibit it on that basis, or it will be found that there is no analogy, and that the decision to fill the gap will be influenced by considerations of *maslaha*, or what is in the interest of the MENA government in question; and not necessarily that of the investor. The author submits that there are no direct analogies with the matter of interest in the current age, nor with certain concepts that are deemed *gharar* (risk) or speculation, nor with certain financial instruments that did not exist. The matter of locating the operative principle is a matter of *ijtihad* but it is also a matter of choosing to compare certain situations which may be dissimilar. The fact that there are many different interpretations of extant financial instruments and of interest attests to the facts that different Muslim jurists have reached different conclusions, either by employing the same means to reach those conclusions or by employing different means. This adds to adjudicatory risk. The author has analysed

the matter of interest from an Islamic law viewpoint and given recommendations that are not contradictory with the *sharia* in order to offer a potential solution.

In terms of interest,

Several countries do not allow interest as part of an arbitral award. Most of these countries are in the Middle East and Africa and have legal systems based on Sharia (Islamic law). The Sharia is based on the teachings of the Koran, Islam's holy book which expressly prohibits the taking of interest, or *riba*. The rationale for prohibiting the payment of interest is threefold: (1) Interest or usury reinforces the tendency for wealth to accumulate in the hands of a few, thereby diminishes man's concern for his fellow man. (2) Islam does not allow gain from financial activity unless the beneficiary is also subject to the risk of potential loss; the legal guarantee of at least nominal interest would be viewed as guaranteed gain. (3) Islam regards the accumulation of wealth through interest as selfish compared with accumulation through hard work and personal activity.⁸⁰⁰

This view is a conservative analysis of the debate on interest. The author has shown throughout this thesis that the understanding of interest in the MENA is complex and when it is hinged upon *maslaha*, discussed in the chapter on public policy, is rendered even more complex. For example: 'Some Islamic countries, such as Egypt, have moved away from Shari'a towards more Western-style legal systems. In these countries, either the payment of interest is expressly permitted in certain circumstances or a similar fee is allowed as a "service" or "administrative" cost.'⁸⁰¹ Additionally,

The laws concerning the awarding of interest in Egypt typify those of Islamic countries that have adopted Western-style legal systems. In Egypt awards of interest are governed

⁸⁰⁰ Gotanda, see above n 767, 47.

⁸⁰¹ Ibid 47–8.

by Article 226 of the Civil Code, which provides that, ‘when the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the claimant, as damages for the delay, interest ...’ The code also provides that interest begins to run from the date the claim is filed, unless the parties agree otherwise or commercial usage fixes another date. Interest accrues at the rate of 4 percent in civil matters, 5 percent in commercial matters, or as agreed upon by the parties. A rate set by the parties may not exceed 7 percent of the debt. In addition, the code expressly forbids the awarding of compound interest. However, arbitrators are permitted to award supplemental damages in certain circumstances, such as where the claimant proves that the actual damages exceed the interest.⁸⁰²

There are cases where a valid argument may be made that interest must be awarded because the debtor acted in bad faith. Hence, a discussion of damages is required. A discussion of interest, in the MENA context, is incomplete without a discussion of the concept of damages. The concept of damages, depending upon how it is calculated, does not only necessarily fall under interest, but in the MENA context may be interpreted as falling in the same category as a number of illegal (*haram*) Western financial concepts according to certain interpretations of Islamic scholars such as, *inter alia*, risk, gambling (futures) and speculation. The language used by the arbitration tribunal in how it calculates interest and damages is important, in addition to the actual formulas employed. Since it is usually not the arbitrators but the financial experts⁸⁰³ who put forth the expert

⁸⁰² Ibid 48.

⁸⁰³ See above n 434, Sabahi, Borzu, The Calculation of Damages in International Investment Law, 536: ‘At the valuation state lawyers do not play the main role; rather the financial experts of the parties are the main actors. They present their theories as to the proper method of valuation in the context of the dispute. Hence,

determination of damages and loss, *inter alia*, the adjudicatory risk in the MENA is automatically elevated as these financial experts are generally completely unaware of how their calculations are perceived nor of the *sui generis* adjudicatory risk involved. The author submits that in the MENA context, a minimum safe standard is that of the Net Book Value,⁸⁰⁴ which although having its legitimate critics, cannot technically be said to contradict any *sharia* tenets; thus minimising adjudicatory risk. In consideration of the fact that speculation is technically considered illegal by some Islamic scholars (it is the grounds on which gambling and certain other stock market commodities are illegal, including the basis for the illegality of insurance, *inter alia*), any method of calculation based on speculation will pose adjudicatory risk for the award. In contrast to the NBV method, the Discounted Cash Flow Method (DCF)⁸⁰⁵ is technically risky in the MENA. The Net Cash Flow is subject to calculations which take into consideration the time value of monies, expected inflation, and risk associated with said cash flow.⁸⁰⁶ Under Islamic

no matter whether the expropriation has been legal or illegal, or whether the act of the state has been identified as a breach of contract, here the opinion of a financial expert can change everything.’

⁸⁰⁴ See above n 434, Sabahi, Borzu, *The Calculation of Damages in International Investment Law*, 565–66: ‘NBV is the difference between an enterprise’s assets and liabilities as recorded on its financial statements or the value of the tangible assets which are subject of claim on the balance sheet, representing their cost after deducting accumulated depreciation in accordance with generally accepted accounting principles. This method is inherently backward looking. One of its virtues is that it is based on attestable documents generated for some other purpose than supporting a claim. As a result, it is less likely to reflect an expert’s bias in favour of a particular party. Its opponents, however, believe that since it bases the valuation on historical costs, it cannot demonstrate the present value of the property, especially in periods of high inflation and where there has been a considerable lapse of time between the date of the purchase of the asset and the date of the balance sheet. Furthermore, the balance sheet fails to reflect certain intangible assets of other important elements of a firm that may contribute importantly to its success; these include contractual rights, management skills, technical expertise, and relationships with customers and suppliers. Finally perhaps the harshest criticism, that has caused some commentators to call the method nonsense and a misnomer, is that it does not reflect the cash generating ability of the enterprise, which is said to be the essence of “economic value”.’

⁸⁰⁵ See above n 434, Sabahi, Borzu, *The Calculation of Damages in International Investment Law*, 566: ‘The DFC Method is relatively new in the world of arbitration. In the past it was regarded with scepticism because it was considered speculative. It is, however, increasingly gaining acceptance within the arbitration community.’

⁸⁰⁶ *Ibid*: *inter alia*, ‘The net cash flow then has to be discounted with a discount rate that reflects the time value of the money, expected inflation, and the risk associated with such cash flow under realistic

law, *gharar* (risk) falls under the category of *haram* and therefore this method could pose adjudicatory risk if it is not reworded. The criticism of this method is accurate insofar as it poses adjudicatory risk in the MENA: ‘Opponents of the method, however, suggest that it is speculative and generates uncertain results, which are often inflated’.⁸⁰⁷ These concerns—‘speculative’, ‘uncertain’ and ‘inflated’—will not attract the support of conservative *sharia* interpretations of the legality of certain Western financial concepts and instruments.

A noteworthy fact that French law was found in essence to not be different from Indonesian and Islamic law in terms of being equally conservative in dealing with the matter of speculation, is shown here:

In Himpurna, the tribunal said that the Indonesian and French Civil Codes “restrict recovery to damages foreseeable at the time of contracting; and require that damages be the ‘immediate and direct result of the breach ... the test to be applied is one of reasonableness and equity’”.

Indeed, Mr Tumbuan could have invoked the familiar Sapphire precedent, where the arbitral tribunal used precisely the words “reasonable and equitable” to award lost profits where no sum could be determined with exactitude.’⁸⁰⁸

Thus, the tribunal created its own solution which should be considered groundbreaking precedent. The use of equity is honoured at Islamic law and the rewarding or awarding of damages in future arbitral tribunal decisions from ‘speculation’

circumstances. The discount rate is calculated by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value.’

⁸⁰⁷ See above n 434, Sabahi, Borzu, The Calculation of Damages in International Investment Law, 567.

⁸⁰⁸ See above n 434, Sabahi, Borzu, The Calculation of Damages in International Investment Law, 580.

to the ‘basis of equity’ reduces the adjudicatory risk in the MENA of putting forth arbitral awards with Western financial concepts that may be classified as illegal by MENA clerics or conservative judges who review these awards on the basis of domestic Islamic public policy. The importance of equity to arbitration awards in the context of the MENA is discussed in previous chapters. At Islamic law, *mu’amalat*, or worldly affairs, are seen as permissible unless proven otherwise,⁸⁰⁹ thus, the principles of equity can be applied to awarding interest, since *ijtihad* is allowed in these matters.

One final submission by the author needs to be given regarding the topic of interest. The author has referred to the Islamic doctrines of *ijtihad* (discovery) and *qiyas* (analogy) previously. For the purposes of this discussion, were the author to engage in *ijtihad* in order to comment on the legality of interest, if it is calculated based on a maximum percentage and on the basis of reasoning by analogy (*qiyas*), the conclusion would be the following. In Islamic reasoning, the prohibition against interest is grounded in the larger principle of the protection from exploitation of a weaker party by a stronger party. At the time of the Prophet, interest was prohibited from occurring on the basis of the argument that a stronger party who was relatively well-to-do, was exploiting the weaker party, who, by virtue of having to request for a loan in the first place, was facing economic hardship by which the interest on the loan would substantially add to the interest. The principle of protection from exploitation (which also applies to expropriation) is the first element in determining the legality or illegality of interest. The second element required in order to reasonably make an argument by analogy is the comparison of two equal entities. In the modern world, there are a number of financial

⁸⁰⁹ Hallaq, see above n 79, 505: ‘... the general principle that, all things being equal and religion being lenient, *mu’amalat* are assumed to be permissible, unless proven to be otherwise.’

entities and financial instruments that did not exist at the time of the Prophet and that have no precedent in the 7th century. The basis for asserting that certain financial instruments and financial entities (such as banks who charge interest rates in certain circumstances) are illegal, is invalidated on the basis that if this decision was arrived at through *qiyas* it is not a valid comparison and the element of exploitation remains incomparable. A situation of a moneylender vis-à-vis a poor man contains elements of exploitation not comparable to and not found in a situation of a multinational or private investor vis-à-vis a State. Indeed, even although one may argue that today, certain multinational corporations have more resources than certain sovereign wealth funds, as some scholars in the past have argued. The fact is that normally State funds exceed those of private investors. Therefore, if there is exploitation involved, it would be exploitation of private investors who have had their property expropriated by wealthy states. It is a general principle at Islamic law that any exploitation of a weaker party in any situation is forbidden, and the Quran and Sunna provide a number of examples of situation that serve as an example of this. A more well-known example is that of protection of widows and orphans, which have parallels in the other traditions. For these same states to turn around and deny the payment of interest on the basis of Islamic legal provisions is in fact an utter contradiction and misinterpretation of the spirit and the letter of Islamic law provisions regarding matters of interest and exploitation.

Article III of the HICALC Interest

- (j) The definition of an investment *shall* be provided for.
- (k) Excessive interest exceeding a certain percentage of a nation's GDP, *inter alia*, *shall* be prohibited.

- (l) In the absence of other guidelines, the tribunal shall use the principle of equity as a minimum standard to decide matters pertaining to awarding of damages and calculating of interest.
- (m) The calculation of damages *shall* be made according to the universally recognised and valid principle of equity in which lost profits *shall* be awarded on the basis of reasonable and equitable grounds in the event that no sum can be determined with exactitude as to the calculation of loss including, *inter alia*, intangible losses.
- (n) In the event that the arbitration tribunal *shall* seek to calculate compound interest, both parties *shall* agree to this provision in the event that a dispute should arise.
- (o) Interest *shall* be decided by the arbitrator(s) based on equity and this *shall* be agreed upon by the parties with a clause to this effect that *shall* include damages decided on the basis of equity and actual loss, jointly.
- (p) In order to preserve certainty and increase the possibility for enforcement, the use of equity shall be restricted with the exception of determining matters related to the awarding of interest, in which case equity *shall* be a guiding force.
- (q) Arbitral tribunals *shall* determine interest according to guiding principles, eg, equity, a standardised formula, and a maximum upper limit.

D Public Policy Or Ordre Public

The precedent of the Mixed Courts of Egypt in the matter of public policy did not decide on public policy per se, but was constrained by virtue of the fact that the purpose of the Mixed Courts was to adjudicate between foreign subjects in regard to commercial matters. In this way the Mixed Courts represent a precursor to not only the ICJ but also to ICSID and ISA tribunals, as they dealt with matters pertaining to individuals with one

another, as in ICA and with individuals against States (eg Egypt, Greece). In this way the precedent they set has direct applications to arbitration tribunals. Their view of public policy was thus:

In 1917 the Mixed Court of Appeal stated that arbitration clauses providing for an overseas arbitration were not generally to be upheld because it was a matter of public policy that the Mixed Courts were the correct forum for foreigners and Egyptians in dispute over contracts to be performed in Egypt. The Mixed Courts were not against arbitration, and there was usually no necessity to supervise arbitrators. Where there was litigation on arbitration it was mostly to do with public policy. It is important to consider however, that the gentle fostering of an arbitration tradition allowed the parallel, albeit minor, development of that form of dispute settlement, so that arbitration became part of the commercial life of Egypt.⁸¹⁰

This precedent of supporting arbitration and not engaging in undue court review should be followed, particularly in the UAE.

1 *Al masalih al mursalah*

Maslaha or *al masalih al mursalah*⁸¹¹ is essentially public interest which determines judicial rulings.

Literally, *maslaha* means benefit or interest; when it is qualified as *maslaha mursalah*, it refers to unrestricted public interest in the sense of not having been regulated by the lawgiver and no textual authority can be found on its validity or otherwise. It is

⁸¹⁰ Hoyle, see above 180, 113.

⁸¹¹ Literally this means public interest.

synonymous with *istislah* and is occasionally referred to as *maslahah mutlaqah* on account of its being undefined by the established rules of the *shari'ah*.⁸¹²

As with the edicts of the praetors, it provides the Muslim jurists with tremendous flexibility in deciding based upon public interest as:

To al-Ghazali, *maslaha* consists of considerations which secure a benefit or prevent a harm but are, in the meantime harmonious with the objectives (*maqasid*) of the *shari'ah*. These objectives, the same author adds, consist of protecting the five essential values, namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of *maslaha*, and anything which violates them is *mafsadah* (evil), and preventing the later is also *maslaha*. More technically, *maslaha murslah* is defined as a consideration which is proper and harmonious (*wasf munasib mula'im*) to the objection of the lawgiver; it secures a benefit or prevents a harm; and the *shari'ah* provides no indication as to its validity or otherwise.⁸¹³

The guiding principle foundational to deciding what is public interest is to secure a benefit or to prevent harm. This is an extremely broad scope. What is beneficial and what is harmful in terms of public interests are widely contested and debated topics. This is one cause of adjudicatory risk. The capricious nature of public interest is that when something is deemed beneficial at one point in time, it may not be so at another and this is another cause of adjudicatory risk. The ostrich approach of denying that Islamic or *sharia* provisions may appear in court is disproved further by the following:

⁸¹² M Kamali, *Principles of Islamic Jurisprudence*, (Pelanduk publications, 1989) 339.

⁸¹³ Ibid 338.

*Istislah*⁸¹⁴ derives its validity from the norm that the basic purpose of legislation (*tashri*) in Islam is to secure the welfare of the people by promoting their benefits or by protecting them against harm. The ways and means which bring benefits to the people are virtually endless. The *masalih* (pl. of *maslahah*), in other words can neither be enumerated nor predicted in advance as they change according to time and circumstance. To enact a law may be beneficial at one time and harmful at another; and even at one and the same time, it may be beneficial under certain conditions, but prove to be harmful in other circumstances. The ruler and the *mujtahid* (jurist) must therefore be able to act in pursuit of the *masalih* as and when they present themselves.⁸¹⁵

This undermines any threshold, test or rule for a fixed and narrow scope of construing and interpreting the law. In fact, the foregoing would be an excellent definition of the terms ‘adjudicatory’ and ‘risk’. The danger of the doctrine of *al masalih al mursalah*, although helpful as a flexible tool, creates unpredictability. It undermines the doctrine of *stare decisis* in Islamic adjudication and Islamic philosophy and jurisprudence (*fiqh*). Yet, one basis for stability is based on the fact that *masalih al mursalah* cannot contravene a Hadith. In the event of a contradiction, the Hadith takes precedence. This is why the HICALC draws upon a number of Hadiths in formulating the HICALC provisions. It does not contravene with any well-established Hadiths. If as Al Tamimi has stated, no one can raise any Islamic principles in an Islamic court before a judge (or arbitral tribunal) for a ruling, then legal provisions that contain within them Islamic principles cannot be ignored by Islamic courts and jurists.

⁸¹⁴ An Arabic term; tantamount to *maslaha* or *al masalih al mursalah* in doctrine.

⁸¹⁵ Kamali, see above n 812, 342: ‘Technically, however, the concept of *maslaha mursala* does not apply to the rulings of the Prophet: when there is a Prophetic ruling in favour of a *maslaha*, it becomes a part of the established law, hence no longer a *maslaha mursalah*.’

2 *The New York Convention*⁸¹⁶

In consideration of the wording of the New York Convention of 1958⁸¹⁷ regarding the public policy clause of Article V (2) (b),⁸¹⁸ the term *public policy* shall be used throughout this discussion. Notwithstanding, it is important to note that the New York Convention's public policy exception, although it is written in English, in terms of doctrinal analysis, refers more appropriately to the French doctrine of *ordre public*⁸¹⁹ which has a broader and profounder meaning than the English language term.

⁸¹⁶ See above n 177.

⁸¹⁷ Ibid.

⁸¹⁸ See above n 362, 856: 'Art V (2) (b) provides that the recognition and enforcement may be refused if the competent authority in the country where recognition and enforcement are sought find that "the recognition and enforcement of the award would be contrary to the public policy of that country." According to several legal scholars, this provision refers to an "international public policy" which is a more restrictive notion than that of public policy. If certain courts have also made this distinction, others do not clearly allow this approach.'

⁸¹⁹ Guillien, see above n 347, 389, In general: 'Vaste conception d'ensemble de la vie en commun sur le plan politique et administrative. Son contenu varie évidemment du tout au tout selon les régimes. A l'ordre public s'opposent, d'un point de vue dialectique, les libertés individuelles dites publiques et spécialement la liberté de se déplacer, l'inviolabilité du domicile, la liberté de pensée. L'un des points le plus délicats est celui de l'affrontement de l'ordre public et de la morale.' 'Broad conception of the entire political and administrative framework of public life. Clearly its continuity varies radically according to the political regimes. Public order is opposed from a dialectic point of view to give public voice to individual liberties and especially the liberty to move--- the inviolability of domicile, and the freedom to reflect. One of the more delicate points is that of their (individual liberties) opposition to public order and morality.' (Translation by the author.)

Further, at Civil law, 'Caractère des règles juridiques qui s'imposent pour des raisons de moralité ou de sécurité impératives dans les rapports sociaux. Les parties ne peuvent déroger aux dispositions d'ordre public.' 'Characteristic of the legal norms that impose for reasons of morality or national security imperatives on social dealings. The parties may not derogate from submission to public order.' (Translation by author).

In private international law, 'Notion particulariste d'un Etat, ayant pour effet d'éliminer toute règle juridique étranger qui entraînerait la naissance d'une situation contraire aux principes fondamentaux au droit national. En matière de conflit de lois, le juge Français peut s'arbitrer derrière l'ordre public pour écarter une loi étranger normalement applicable, lorsque son application porterait atteinte aux règles constituant les fondements politiques, juridiques, économiques et sociaux, de la société française.'

'Particular notion of a State, resulting in the eliminating all foreign legal norms before they lead to the start of a situation which is contrary to the fundamental principles of national law. In the matter of conflict of laws, the French judge may arbitrate behind public order in order to rule out a foreign law normally applicable, until this application of the foreign rules is supported by the essential rules of the fundamental political, legal, economic and social norms of French society.' (Translation by the author).

Public policy is an arbitrary and capricious doctrine made even more unstable by Article V (2) (b) of the 1958 New York Convention⁸²⁰ on the Recognition and Enforcement of Arbitral Awards because it makes an exception for public policy.⁸²¹ The problem lies in the fact that domestic public policy cannot address international concerns and what is needed is a transnational public policy. A review of a number of prominent court cases of MENA jurisdictions (notably the case study countries of Egypt and the UAE) by the author reveals that the danger of public policy is that it is usually interpreted as domestic public policy. The threat that it shall be interpreted as domestic public policy in the narrow sense of that particular country remains as long as the phrase is not reworded or defined clearly.⁸²² The author suggests that at the very minimum the standard or test of a definition of transnational public policy ought to be based on the norms or mores that are fundamental to the general principles of civilised nations. They must take into consideration international concerns and not be exclusively devoted to domestic public policy considerations which are in contradiction with universal principles or widely practised international standards. The international community must arrive at an agreement on what constitutes transnational public policy through consensus and accord.

At general principles of law, 'Lorsqu'un règle de procédure est l'ordre public, sa violation peut être invoquée pour les deux plaideurs, être relevée d'office par le ministre public et par le tribunal saisi. Un moyen d'ordre public peut être présente pour la première fois devant la Cour de cassation ou le Conseil d'Etat.' 'Until a rule of procedure is public order, its violation may be invoked by both litigants, to be lifted from office by the public minister and by the tribunal presiding. An intermediary of public order may appear for the first time before the Court of Cassation or the Council of State.' (Translation by author).

⁸²⁰ See above n 177.

⁸²¹ See above n 362, 859: 'Substantive public policy justifies the refusal of recognition and enforcement of an award when its final result does not comply with the fundamental principles of the state in which recognition is sought.'

⁸²² See above n 362, 857: 'Article V (2) (b) refers to public policy "of that country" which seems to confirm the fact that this concept originates from a state. As noted by Fouchard, Gaillard and Goldman, this provision refers to the "host country's conception, and not to a 'genuinely international public policy...'

Public policy is a major obstacle that an arbitration proceeding encounters on the path to enforcement. Public policy is a complex topic in any jurisdiction and even more complex in the MENA. An arbitration proceeding can encounter public policy matters at two levels. The first is in matters pertaining to determination of the competence of the tribunal⁸²³ in which the arbitrators must take into consideration any public policy considerations that the award implicates. The second is after the proceeding has been completed and the tribunal has issued an award which the losing party has contested in a court, at which time the court then determines if public policy is breached in the recognition and enforcement of the award.

The question of public policy as set forth in the New York Convention⁸²⁴ needs to be reformulated and arbitral tribunals must be given the scope and power to decide on questions related to international public policy. As previously mentioned, the early oil concessions found arbitral tribunals substituting public international law for domestic law but this cannot be conflated with a transnational public policy. In this regard the traditional view of competence to rule on the matter of its own jurisdiction must be expanded to allow the tribunal to rule on public policy at the expense of court interventionist powers to do so. This is what is meant by reforming or amending the New York Convention⁸²⁵ in this regard. The early oil concessions found arbitral tribunals substituting public international law for domestic law but this cannot be conflated with a transnational public policy although it is a step in the right direction. The doctrine of public policy is open to interpretation and domestic public policy is invariably confused

⁸²³ See above n 462, 153.

⁸²⁴ See above n 177.

⁸²⁵ Ibid.

with international public policy, in which a State unjustly attempts to impose its narrow understanding of public policy upon the international global community.⁸²⁶ It is an unfair defence that does not take into consideration the interests of the international community. It is a dangerous doctrine because it is complex and doctrinally undefined, yet extant arbitration law still gives courts the right to reject enforcement when an award is contrary to public order. Domestic public order is conflated with international public order.⁸²⁷ This is why a uniform Arab arbitration law that takes into consideration a commonly understood general principle of public policy would resolve this dilemma. The fact that public policy is doctrinally undefined is made further complex in the MENA context in which it is not only doctrinally undefined but it has a complex relationship with Islamic law interpretations. Attempting to predict what is public policy at any given time is a Sisyphean task.⁸²⁸ An example of this is the recent Arab Spring, especially in the case of Egypt, within which in the span of a single year from February 11, 2011, the definition of public policy changed weekly. This is not conducive to mitigating adjudicatory risk in the MENA.

As the discussion of the inherent contradictions within the UAE legal system governing arbitrations demonstrated, the situation in the MENA becomes more complex when the doctrine of public policy interacts with *sharia* interpretations such that:

⁸²⁶ Berg, see above n 360.

⁸²⁷ A Ouerfelli, Enforcement of Foreign Arbitral Awards in Maghreb Countries. *Journal of international arbitration*, 25-No 2 (2008), 241–56, 254–5.

⁸²⁸ Hamilton, see above n 82, 440: ‘Sisyphus was King of Corinth. One day he chanced to see a mighty eagle, greater and more splendid than any mortal bird, bearing a maiden to an island not far away. When the river-god Asopus came to him to tell him that his daughter Aegina had been carried off, he strongly suspected Zeus, and to ask his help in finding her, Sisyphus told him what he had seen. Thereby he drew down upon himself the relentless wrath of Zeus. In Hades he was punished by having to try forever to roll a rock uphill which forever rolled back upon him.’ One may argue that Sisyphus’ task is in fact easier in that it is predictable, consistent and with precedent.

Some legal texts distinguish between public order and the *sharia*. In Maghreb domestic laws, such a distinction does not exist, contrary to many international conventions concluded either between Maghreb countries themselves or beyond in the Arab and Islamic world. The problem is to determine whether the *sharia* is a component of public order or not. The use of both terminologies means that they are different. This is confirmed by the specificity of Maghreb countries which is opted for a *liace* legal system, even though their constitutions mention their Islamic identity (Article 1 of Tunisian constitution).⁸²⁹

The Islamic concept of public policy necessitates the public good (*maslaha*), and in consideration of the fact of the impact of the Global Financial Crisis on the MENA states, it is in their best interest to promote well-regulated transactions of financial trade and investment without undue risks and complications.

Many of the MENA states have ratified the New York Convention⁸³⁰ of 1958, in which Article V (2) states that recognition and enforcement may be refused by the competent authority in the country of enforcement if it (a) decides the subject is not arbitrable or (b) if recognition would be against public policy. These clauses allow a *carte blanche* situation for countries in the MENA to escape from arbitral award enforcement by posing obstructions. The definition of public policy is not clearly set out in writing; it is a nebulous and ambiguous entity which may at times overlap with *sharia*, and at other times contradict it. Laws in MENA countries that exist to prevent arbitration of certain subject matters usually refer to public policy, thus the first clause of Article V (2) is further reinforced. Maintaining an international standard over the domestic in the case of public policy is one solution to this problem.

⁸²⁹ A Ouerfelli, see above 827, 254–5.

⁸³⁰ See above n 177.

The vagueness of the concept in *sharia* of public interest, or *al masalih al mursalah*⁸³¹ is compounded by the existence of different interpretations of Islam throughout the MENA and in other regions and is a relatively unregulated doctrine and allows jurists to decide public interest at the first instance based on the political tide *du jour*. This deficiency is critical in consideration of current trends in the ‘Islamisation’ of the MENA.⁸³²

If that does not complicate matters, then this fact does: ‘There are as many expressions of Islamic law as there are states in the Muslim world. Islamic law remains the core and focal point and Common law of Muslim countries, but in practice, Islamic law of Egypt differs from that in Pakistan, which both differ from that in Malaysia, and so on.’⁸³³ When discussing MENA juridical interpretations of *sharia* law one would do well to ask which one, for there are many, and this inconsistency in practice must be addressed by a uniform Arab arbitration law. The doctrine of *al masalih al mursalah* must be harnessed for the good of countries like Egypt and the United Arab Emirates in protecting their investment opportunities.

⁸³¹ El-Malik, see above n 400, 25, “‘unrestricted interests and welfare’”, is a principle of legal reasoning whereby new rulings are made which are without precedents or earlier rulings are suspended out of the consideration of the best interests and welfare of the society. As to the Muslim jurist Al-Khuwarizmi, “‘useful purpose’”, Masalih Murssala means “‘The protection and preservation of the object of the *Shari’a* by warding off mischief from humanity”.’

⁸³² Ibid x, foreword by T W Walde, The situation ‘should be compared to the pervasive and fundamental role of constitutional law in continental Europe and the United States. Whilst most Islamic states have incorporated European civil law into their legal systems by adopting codes on specific subject-matters eg contracts, commercial translations, bankruptcy, torts, corporations, tax, investments, mining and petroleum extraction, if there is any specific comprehensive code at all, the current revival of *Shari’a* law means that such legislation of Western origin is scrutinised and discussed in the terms of its consistency with *Shari’a* law, interpreted on the basis of *Shari’a* law and eventually replaced by legislation more in tune with *Shari’a* law, similar to countries where pre-existing law measures up to a new constitution.’

⁸³³ Ibid 4.

(a) *National Oil Corp v Libyan Sun Oil Corp*

There are times when public policy is invoked by states as a valid defence and a transnational public policy definition that allows for this kind of flexibility whilst preventing inappropriate usage would lead to fairness and balance in investor–State arbitrations, for example, in *National Oil Corp v Libyan Sun Oil Corp*⁸³⁴ The United States Supreme Court, in *National Oil Corp v Libyan Sun Oil Corp* stated: ‘To read the public policy defence as a parochial device protective of national political interests would undermine the [New York] Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of “public policy”’.⁸³⁵

3 *Civil Law*

The history of Rome is relevant to the comparative analysis of public policy at civil law and Islamic law. ‘The history of Rome is traditionally divided into three main periods based on the dominant constitutional structure in Roman society during these three periods. These are the monarchy (eighth century BC–510), Republic (509–27 BC) and Empire (27 BC–AD 565).’⁸³⁶ For the purposes of this discussion the author is primarily concerned with the Republic, which is sometimes referred to as the pre-classical period.⁸³⁷ It is during the Republic or pre-classical period that the Praetorian law or the *ius honorarium* was developed to supplement the *ius civile*.⁸³⁸ This development extended into the late classical period or the Empire.⁸³⁹ The author submits that this is

⁸³⁴ *National Oil Corp v Libyan Sun Oil Co* 7 33 F Supp 800 US District Court, D Del, 15 March, 1990.

⁸³⁵ Sheppard, see above n 709.

⁸³⁶ Borkowski’s Textbook on Roman Law, Paul du Plessis, (Oxford University Press, 4th Ed, 2010) 1.

⁸³⁷ Ibid 1-35.

⁸³⁸ Ibid.

⁸³⁹ Ibid.

doctrinally similar to the Islamic doctrine of *masalih al mursalah*, which is subsequently discussed in detail. The basis for this submission is the following fact:

Papinian, a jurist of the late classical period ..., described the *ius honorarium* (which he identified with Praetorian law as: Papinian, Definitions, Book 2: ... that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile*. (D. 1.1.7.1).⁸⁴⁰

The means by which the *ius honorarium* offered flexibility for this new class of legislators who acted as jurists is in the following:

The praetor would ‘aid’ the civil law by granting more convenient and effective remedies for the enforcement of civil law claims. ‘Supplementation’ occurred when the praetor granted a remedy in circumstances for which the civil law did not cater to. For example, the somewhat narrow provisions of the *lex Aquilia* (concerning wrongful damage to property) were significantly extended by the grant of supplementary remedies (see 10.2.5). ‘Correction’ of the *ius civile* occurred less frequently – a praetor would have to exercise the greatest caution in such a case. But he did have the overriding power to act in the interests of the Roman people (when he saw fit to do so) and thus to act in contradiction of the civil law. For example, the praetor could allow an inheritance to be taken by a claimant in preference to the rightful heir under the civil law.⁸⁴¹

⁸⁴⁰ Ibid 35.

⁸⁴¹ Ibid.

The elements of flexibility and of public interest, including the right of the praetor to influence public interest do not differ from the Islamic doctrine of *al masalih al mursalah*, which allows the jurist to make rulings based on public interest. The fact that at Roman law the praetor could contradict the civil code, whilst at Islamic law the jurist cannot rule in contradiction of *sharia* principles is inconsequential on the basis that there are large gaps at Islamic law not covered either by *sharia* or traditions and these are forums for jurists to apply rulings on the basis of what they determine is public interest. Arguably, the powers of the praetors can be similarly compared to the Islamic doctrine of *ijtihad* (discovery) in the sense that the praetors were dedicated to creating better remedies to supplement or correct the civil law. They were concerned with a higher truth or higher justice than the civil code, which at times they considered flawed. The doctrine of *ijtihad* seeks to discover what the *sharia* is, based on absolute ideals of justice and truth, although in the Islamic doctrine the source of these higher and better remedies and ethics was seen as God, whereas in Roman adjudication the source was justice or equity. The unifying similarity between the two doctrines is the idea of *independent reasoning* albeit based on higher values. The common thread which weaves through both Islamic law and Roman law in this example is that of the higher source. The basis for it is natural law (*lex naturalis*). The definition of natural law is as follows: ‘A higher law against which human laws can be measured. Articulated by Aristotle and developed by Cicero, the idea of natural law is an old one. St. Thomas Aquinas adopted the doctrine to Christianity, thus scriptures could provide content to the natural law.’⁸⁴² What is of merit to the discussion is the fact that the doctrine of natural (arguably similar to divine) law

⁸⁴² Stewart, see above n 166, 297.

was developed by a well-known and prominent Roman lawyer and later adapted to Christianity.

Scholars describe the juristic powers of the praetors:

Later, the praetors became more radical, particularly after the *lex Aebutia* c. 150 BC formally recognised the applicability of the formulary system to disputes between citizens: “the history of the praetorian edict reveals itself as a progress from adjective to substantive law” (see Kelly, J.M., “The growth-pattern of the praetors edict” (1966) 1IJ, 349–55). Indeed, by the late republic, the praetors had become the leading reformers within the Roman legal system. Among the important praetorian innovations of that period were the introduction of remedies for robbery, fraud and duress, more effective protection of proprietary interests, and the recognition of informal agreements. More radical still was the development of alternative forms of succession to property on death. The fact that the praetors were able to “correct” the civil law in such important matters demonstrates the extent of their indirect law-making powers in the late republic.⁸⁴³

The interesting fact is that the praetors, as comparable with jurists, were engaged in the process of determining what the law ought to be and subsequently applying that.

Evidence to support this claim that praetors engaged in a process similar to the doctrine of *ijtihad* at Islamic law is found in the following:

The annual Edicts of the magistrates, especially that of the urban praetor, were important for the development of private law because these magistrates were in charge of the courts and the bringing of actions. The same control of the courts also gave these magistrates other opportunities to advance the law. These opportunities can be subdivided basically into three groups. First the

⁸⁴³ See above n 836, 35.

deliberate, conscious use of existing procedure at the *in iure* stage (ie in front of the magistrate) to produce an effect other than that originally envisaged for the procedure. Secondly, the development of new forms of action (without an edict) which in time would be stabilized and the *formulae* of which would come to be published in the Edict. Thirdly, the ad hoc granting of actions which were not envisaged by law or in the Edict, when this seemed desirable; and likewise the refusal of a remedy created by law or Edict when this was considered proper. Of these only the last can rightly be regarded as an invention of the later Republic. The other two are earlier but continued to be important.⁸⁴⁴

In order to determine what the law should be, they would have to refer to guiding principles that they considered more just, or more ‘correct’ than the civil code.

To summarise the role of the praetors according to the quote above, they developed private law, and they did this according to the following methods: (i) the use of procedure for effect other than what was customary, (ii) development of new forms of action without an Edict,⁸⁴⁵ (iii) the *ad hoc* granting of actions not found in the law or Edict,⁸⁴⁶ (iv) the refusal of actions found in the law.⁸⁴⁷ The common denominator across

⁸⁴⁴ Watson, see above n 407, 88.

⁸⁴⁵ Ibid 91: “Thus this second type of development, too, seems to be mainly the result of needs felt in the urban praetor’s court, and he must be given the credit for the earliest and most important new actions created without an edict but which became stabilized with *formulae* eventually published in the Edict.”

⁸⁴⁶ Ibid 92: ‘In D. 9.3.5.12 Servius says it is proper for an *action ad exemplum huius actionis* to be given, in D. 3. 5. 20. (21) pr. That it would be fair for the praetor to give an action.’ Further, ‘Thus the formulation reserved for Severius is rather more tentative. He thought it proper of fair that decretal action be given. His pupils, on the other hand, could hold that a decretal action would be given. This is consistent with the view that for Servius decretal actions were a new phenomenon and the praetor’s readiness to give them (in circumstances judged appropriate by the jurist) could not be regarded as certain, whereas slightly later, in the heyday of Alfenus and Ofilius, the granting of decretal actions could be relied upon as a mere matter of course.’

⁸⁴⁷ Ibid 93: “By 74, 73, or 72 B.C. we have evidence that he could refuse to grant *bonorum possessio* under the terms of his own Edict. And there is proof as early as 70 B.C. the praetor might refuse to allow an action on a claim which was valid at civil law. This power of the praetor was open to abuse, and abused it certainly was. Cicero claims that L. Piso, Verres’ colleague in the praetorship in 74 B.C., filled many books with reports of cases in which he interceded because Verres had decided differently from his Edict. Other praetors also gave *ad hoc* decisions for corrupt purposes.” Further, at 94: “On this view, of course, we must hold that the *plebiscitum* was not rigidly enforced. But this would not be surprising: Asconius tells us that many people were against the law though they did not speak out, and moreover the proper use of these

all four of these advancements of the law is the exercise of independent reasoning, or *ijtihad* as it is called at Islamic law.

This is technically the same process that a Muslim jurist undergoes through the process of *ijtihad*, in discovering what the law should be—in accordance to the *sharia* and the divine will of God—in that tradition. The reasoning process is the same and the outcome is similar. Whether one refers to the source as guiding principles or as God does not in any way undermine the similarities of the praetor in *ijtihad* and the primacy of public policy or public interest as a key consideration of both. This is examined more closely in the section on public policy at Islamic law.

The comparison of *the ius honorarium* at civil law corresponds directly with *maslaha* or *al masalih al mursalah* at Islamic law. The basis for this comparison is in the following: just as various statutes were a main source of Roman civil law, this is the case at Islamic law, notwithstanding that the source therein or *primae causa* is divine, following from that are statutes which, like at Roman civil law, set forth specific principles. Hence, if the starting points are similar, the convergence is clear; from the civil code in Roman law, as from the Islamic texts, in both cases the texts give rise to statutes or statutory provisions. The jurist (praetor/*qadi*) is free to exercise *ius honorarium* or *ijtihad* in the name of public interest or *masalih al mursalah* at his discretion to divine the higher guiding principles. The concept and its manifestation in both legal systems, is the same. This is remarkable due to the fact that *prima facie*, the

powers by praetors could be valuable. The purpose of the law would be served if it hindered the abuse of power, or if it could be invoked against an unprincipled magistrate.” The author submits that ‘the proper use of these powers by praetors’ can be compared to *ijtihad* and can also be compared to the doctrine of *al masalih al mursalah*, as described in this section.

sources of Roman law differ from those of Islamic law, but the author submits that this is a surface difference since guiding principles are invoked. The latter are construed as divine revelation and more fixed. The latter are construed as not subject to subjective human interpretation; the jurist only ‘discovers’ the law. Yet, the methods of ‘correcting’ or ‘supplementing’ the law, particularly for the reason of public interest are similar. This gives rise to the logical conclusion that the universality of legal cultures is more a matter of fact than otherwise thought; it is well-established. Analogy is accepted as an actual source of law at Islamic law. This is similar to the doctrine of precedent in which like cases are adjudicated similarly. This ‘correction’ of law occurs just as frequently in decisions based on *masalah al mursalah* as it did through the *ius honorarium*, even when the source of law is divinely decreed. In terms of adjudicatory risk, both *ius honorarium* (if it were still the case that it was practised) and *al masalah al mursalah* undermine consistency and predictability, and the doctrine of *stare decisis*, thus they create adjudicatory risk. In the case of Islamic law this point is elaborated. Regarding the comparison between civil law and Islamic law,

Though the term *ius civile* is used even by jurists with more than one meaning, such as ‘juristic interpretation’, ‘that part of the law which applies only to citizens’, or in contrast to *ius honorarium* or *ius natural*, yet it is very much a term which is attached to private law.⁸⁴⁸

The use of *ius civile* to mean ‘juristic interpretation’ follows logically from the discussion on the comparison of the praetors’ law advancing competence with those of Islamic Jurists in discovering or interpreting the law. Notwithstanding the comparison with the

⁸⁴⁸ Ibid 95.

praetor, civil law jurists also engage in juristic interpretation or discovery of the law in the process of determining what is meant by codified provisions. This juristic interpretation has been succinctly and eloquently described by Cicero:

For private law suits involving highly important matters depend, in my opinion, on the wisdom of the jurists. For they are often present at the trials and are invited to join the judge's advisers; and they provide weapons for careful advocates who look for help in their skill. Thus, in all these actions in which the words 'in accordance with good faith' are added, or also 'as one ought to behave properly among good men', and above all, in the *action rei uxoriae* which has 'whatever on that account is fairer and better', the jurists should be ready to advise. It is they who have defined fraud, good faith, equity, what a partner owes a partner, what a person looking after another's affairs owes that person, or the reciprocal rights of principle and agent and of husband and wife.⁸⁴⁹

To define such concepts as fraud, good faith and equity, among others, reflects strong independent judgement and interpretation, and the ability to elucidate the spirit of the meaning of codes or in the absence of codes to divine what is the *natural law* in these matters. This is not unlike the process of *ijtihad* in which cases that invoke clear provisions in the Quran, are referring to the extant text of the Quran, or where there is no clear provision in the Quran, this would be comparable to the civil or common law situation of not having a code, as these jurists were able to define working definitions of complex principles and doctrines. The three mentioned herein are arguably universal doctrines.

⁸⁴⁹ Ibid 103.

The author submits that the concept of *ordre public*⁸⁵⁰ is more closely related to a doctrinal rule or principle of law than the vaguer notion of public policy, which is unstable and is tied to political considerations which are capricious. *Ordre public* in the French construction, however more stable, is still *domestic* and as such, the ensuing discussion on the term *public policy* shall also refer to *ordre public*. Courts of various jurisdictions do not differentiate with precision on the differences between these two notions and take both of them as domestic considerations in any case, so the term public policy can also be understood to refer to *ordre public* when it is appropriate, notwithstanding the special meaning given to it by French. The French interpretation of *ordre public* is first and foremost in the general sense a concept which is unstable and changes with invariable regime change. The basic notions that *ordre public* serves to protect may generally be universal in terms of the ordering of society but those values are subject to the morality of changing politicians. In the private international law arena, most relevant to ICA law, *ordre public* is similar to the American concept of American exceptionalism, in which the United States Constitution is seen as the highest legal authority and is subject to interpretation within the confines of American public policy, according to the intention of the framers and cannot accommodate any conflict of law contrary to it, as a result of America's exceptional *sui generis* history, and particularly in consideration of international legal instruments which are classified as foreign law. The French distinction is simply to classify domestic law in the position which in the United States the Constitution holds. Thus, French judges, under *ordre public*, consider that domestic law is based on the particularities of each particular State's notion of public

⁸⁵⁰ *Code Civil de France*, Art 6.

policy and takes precedence to contrary foreign law even when the foreign law is applicable, thus maintaining the right to set it aside.

4 *Common Law*

The concept of public policy at common law has been described:

A very indefinite moral value, sometimes appealed to by Anglo-American courts as justifying a decision. It has been said to be a principle of judicial legislation or interpretation founded on the current needs of the community. It normally prohibits and rarely creates: the standard phrase is ‘contrary to public policy’. It depends not on evidence but on judicial impression of what is or is not in the general public interest. For that reason judges have criticised it as providing an uncertain, even dangerous, standard, an ‘unruly horse’, and have been reluctant to invoke it in unprecedented circumstances.⁸⁵¹

The concept of public policy cannot be the sole deciding factor in judicial considerations of important matters that impact parties outside the jurisdiction of the domestically understood public policy. The same public policy of one country one day may change the next day, but the important interests of those involved require a more stable means of guiding the consideration of judges in their adjudication.

It does not follow precedent and is used inconsistently, in which in one situation public policy may be construed one way and yet in a similar situation at a later date may be construed another way:

⁸⁵¹ Walker, see above n 331, 1015.

It has been referred to as upholding the sanctity of marriage, justifying religious tolerance, maintaining the integrity of political life, justifying the principle that restraints of trade are void unless shown to be reasonable in the interests of the parties and the public, the principle which treats many kinds of contract as illegal and unenforceable at common law, the revival of an old and uncertain crime to justify the punishment of what is obviously undesirable, and in other contexts.⁸⁵²

This should be untenable.

To employ a comparative view: 'The continental counterpart is the concept of *ordre publique* which essentially depends on ideas of natural law'.⁸⁵³ It is the author's view that although the concept of public policy at common law and *ordre public* at civil law have slight variations, that in essence they are similar. As will also be shown at Islamic law, at all three of these legal traditions the concept of public policy gives the judge the discretion, to decide, on the basis of the current political situation, what is wrong. Therefore, the definition of what is wrong under public policy is not objectively solid reality, but is in fact, relative, variable and not based on any stable doctrine or on stable universal principles that can be known intuitively or reasoned out. It essentially gives the judge a *carte blanche* to decide, even against *stare decisis* as the case may be, and without having to give a reasoned answer. Indeed, 'In essence to declare something contrary to public policy is for the judge to declare that he thinks it wrong to allow it. In

⁸⁵² Ibid.

⁸⁵³ Ibid.

many contexts rules originally based on public policy have become so settled that the justification is forgotten, and only statute could alter the rule.⁸⁵⁴ This is dangerous.

5 *Islamic Law*

The following cases give practical insights into the scope and limitations of public policy in the MENA.

(a) *Abu Dhabi Court of Cassation Judgements*⁸⁵⁵

(i) *Case 1: If an Extension to an Arbitration Period is Not Granted before its Expiry, any Award Delivered thereafter will be Null and Void. Dubai Court of Cassation Judgment No 9/96, 13 July 1996*⁸⁵⁶

A thorough familiarity with domestic laws and provisions is necessary otherwise the risk of the nullification of an award is, as:

In an action filed before the Dubai Courts, the Court of Cassation held that an arbitration award will be null and void if delivered after the expiry of the period for issuing the award agreed to between the parties. Any extensions must be granted before the expiry of the initial period.⁸⁵⁷ Notwithstanding the domestic procedures, the court maintained a pro-arbitration stance: ‘The Court of First Instance ratified the arbitration awards.’⁸⁵⁸

The reason the court gave for this ruling was based on the grounds that the fact that the matter of expiry is not a matter of public policy. Therefore, in the express absence of a provision that contradicts public policy, even if the provision contradicts the Civil Code,

⁸⁵⁴ Ibid 1015.

⁸⁵⁵ See above n 312.

⁸⁵⁶ Tamimi, see above n 581, 259.

⁸⁵⁷ Ibid.

⁸⁵⁸ Ibid.

it will not bar the enforcement of an award. This fact is a strong testimony to the power of public policy, which is a factor that must not be taken lightly in the MENA context.

The court reasoned:

The Court of Cassation confirmed that the expiry of the time period mentioned in Article 216 of the CPL is not a matter of public policy. The parties may agree to waive such a right. However, if one of the parties wishes to raise a time-expiry argument, they must do so, before the arbitrator or the Court, at the time when the arbitration award is brought in for ratification. Therefore, if a party raises this defense before the arbitrator, it will continue to be valid unless withdrawn at any stage during the arbitration or before the Court.⁸⁵⁹

Yet, the matter proceeded beyond the Court of First Instance and the award was not ratified because it was in violation of the Civil Procedures Code:

In this case, the Defendants challenged the power of the arbitrator after the period expired. However, the arbitrator chose to proceed with the arbitration. While the Defendants continued to attend the hearings and submit memoranda, there was no evidence before the Court that they simultaneously consented to withdraw their main argument that the arbitration should be suspended as the period for the same had expired. It is not relevant that the Court extended the arbitration period on 25 April 1993 since the extension was granted after the lapse of the original period, and therefore is not a valid extension. A Court order will not resuscitate an arbitration procedure which has already

⁸⁵⁹ Ibid 260.

expired. Accordingly, the Court of Cassation held the arbitration award to be null and void and the Plaintiffs were ordered to bear costs and expenses.⁸⁶⁰

Not only did the Plaintiffs lose the arbitration award and the interest but they also had to pay for a procedure that cost them tremendous loss. This causes serious adjudicatory risk. This demonstrates how public policy impacts MENA decisions on interest.

(ii) *Case 2: Arbitrators need not follow strict procedural rules while conducting arbitrations and delivering awards. Abu Dhabi Court of Cassation No 433/17, 26 February 1997*⁸⁶¹

This case reflects a pro-arbitration stance and one that is amenable to the flexible procedures of an arbitration hearing by allowing the arbitrator or the parties to agree to the procedures without fear that any public policy provision would preclude the arbitration award from being upheld as valid in consideration of public policy. The purpose of including this case is to demonstrate the importance of public policy and unpredictability across the MENA. Therefore the court found:

In an action filed before the Abu Dhabi Court, the Court of Cassation held that in an arbitration the parties and the arbitrators are not obliged to follow strict procedural rules regarding the production of evidence, witnesses and documents relevant to the matter under dispute. There is nothing in public policy or law which prohibits an arbitrator from establishing his own procedural rules and reviewing matters according thereto unhampered by the procedural guidelines normally applicable to court cases.⁸⁶²

(iii) *Case 1: The existence of an arbitration clause as a defence must be raised at the first hearing at which a defendant may file its submissions with the Court of Cassation Judgement No. 13/18, 15 December 1996*⁸⁶³

⁸⁶⁰ Ibid 261.

⁸⁶¹ Ibid 247.

⁸⁶² Ibid 247.

⁸⁶³ Ibid 245.

In an action filed before the courts in Abu Dhabi, the Court of Cassation upheld an arbitration clause contained in an insurance policy although the defendant insurance company had not raised the matter of arbitration on the first hearing of the case. The court held that whilst Article 203 of the UAE Law of Civil Procedure provides that such a 'defence must be raised on the 'first hearing' of the case, these words are meant to refer to the first opportunity both parties have to argue the merits of the case. Only at that time is the defendant required to raise the existence of the arbitration clause as a possible defence.'⁸⁶⁴ The implication of this ruling demonstrates proactive support of arbitration in the United Arab Emirates, when it does not clash with public policy. The reasoning of the court was based on the existence of a valid arbitration clause.⁸⁶⁵ The 'first instance' provision is a commonly upheld standard in various jurisdictions. In the event of a disagreement *ab initio* amongst the parties regarding arbitrating the dispute, in the event that an appeal against court jurisdiction for an arbitration proceeding to be initiated is not made, in the first instance, the court will decide on the matter.

This means that there is adjudicatory risk for parties unfamiliar with this domestic legal provision or parties slow to take action for any conceivable reason:

⁸⁶⁴ Ibid 245.

⁸⁶⁵ Ibid 246: 'The Abu Dhabi Court of Appeal upheld the judgement of the Court of First Instance. The Defendant appealed further to the Court of Cassation. Before the Court of Cassation the Plaintiff argued that the Court does not have jurisdiction to hear the matter, in spite of the arbitration clause in the contract between the parties. It argued that, according to Article 203 (5) of the UAE Civil Procedure Law (the "CPL"), the existence of the arbitration clause should have been raised on the first hearing of the case. Should the Defendant fail to raise its existence as a defence at this point, the Plaintiff argued, it should be precluded from doing so at a later stage. The Court of Cassation held that what is meant by the words "first hearing of the case" is the first opportunity that both parties have to argue the case on its merits and have their arguments considered by the Court. When, it must be asked, has the defendant had an opportunity to submit its defence without reference to the arbitration clause? ... Accordingly, the Abu Dhabi Court of Cassation cancelled the judgement delivered by the Court of Appeal and referred the matter to arbitration.'

Article 203 (5) of the CPL provides (where relevant) as follows: “If litigants agree on arbitration in a dispute, no case may be lodged for such dispute before the courts.

Nevertheless, if a party lodges a case without considering the arbitration clause and the other party does not object at the first hearing, the case may be heard and the arbitration clause shall be considered null and void.”⁸⁶⁶

(iv) *Case 2: Arbitration Clauses Are to be Enforced in Accordance with their Terms.*

*Dubai Court of Cassation Judgment No. 6/94, 13 November 1994*⁸⁶⁷

The matter of the ‘first instance’ is a topical and recurring theme. It is a matter of UAE public policy. If an investor or plaintiff is slow to action due to overseas impediments or other considerations that impact their ability to act in a timely manner against an opponent who has a vested interest in preventing them from doing so, the opportunity for arbitration may be entirely lost, such that:

In an action before the Dubai Courts, the Court of Cassation held that local Courts have jurisdiction to hear a dispute concerning an agreement containing an arbitration clause unless the Defendant or his/her representative challenges the jurisdiction of the Court during the first hearing of the case and requests the matter to be referred to arbitration in accordance with the terms of the agreement. When there is more than one Defendant in a particular case, any Defendant may challenge the jurisdiction of the Court on the date of the first hearing after which he/she has officially become joined in the case. Furthermore, if a Defendant is joined in the case subsequent to the joining of another Defendant who did

⁸⁶⁶ Ibid 246.

⁸⁶⁷ Ibid 253.

not challenge the Court's jurisdiction, the challenge by the subsequent Defendant and resulting transfer to arbitration will also apply to the previously joined Defendant.⁸⁶⁸

The facts of the case underscore the extreme importance of the selection of the Seat of arbitration. It also demonstrates a favourable view to arbitration by the Court:

An action was brought before the Dubai Court by a local company ("Plaintiffs") against three Defendants. The Plaintiffs requested that the Court order the Defendants be jointly and severally liable to pay Dhs 2,000,000 as damages in connection with a dispute as to the purchase and sale of Brazilian coffee. The Plaintiffs also requested the Court to refer the matter to arbitration in Dubai instead of Geneva or Paris, as provided for in the purchase and sale agreement. The Court of First Instance held that Dubai Courts had no jurisdiction over the case and the matter was to be referred to arbitration in Geneva or Paris.⁸⁶⁹

Furthermore: 'The Plaintiffs appealed to the Dubai Court of Appeal. The court upheld the judgment delivered by the Court of First Instance'.⁸⁷⁰ The favourable stance of the court is expressed:

The Court of Cassation further held that, with regard to the place of arbitration, the Court will not rule contrary to the terms of an arbitration clause contained in an agreement.

Therefore, the Court refused to refer the case to arbitration in Dubai since the arbitration clause contained in the agreement provided for arbitration elsewhere.⁸⁷¹

⁸⁶⁸ Ibid 253.

⁸⁶⁹ Ibid 253.

⁸⁷⁰ Ibid 253.

⁸⁷¹ Ibid 254.

(v) *Case 3: Actions before UAE Courts will not be Permitted if Parties have Previously Agreed to Foreign Arbitration to Settle any Disputes. Dubai Court of Cassation Judgment No. 61/94, 13 November 1996*⁸⁷²

This case is a straightforward example of the Court's pro-arbitration stance, in the absence of any provisions to the contrary, and in accordance with public policy:

In an action filed before the Courts in Dubai, the Court of Cassation held that if parties to a dispute agree to arbitrate, it is not permissible for one of the parties to proceed with an action before the local Courts. If, however, one of the parties proceeds with the action before the local Courts, the other party may challenge the jurisdiction of the local Court on the grounds that the parties had agreed to refer their dispute to arbitration. If such a defense is raised at the first hearing of the case after the parties have been summoned and properly represented, the Court will dismiss the case on the grounds that the parties have already agreed to refer the dispute to arbitration. The Court of Cassation further held that if parties have agreed to refer their dispute to arbitration in a foreign country and there is no evidence to show that there would be difficulties in conducting the arbitration in that foreign country, the matter should be arbitrated at the place to which the parties had agreed. It will not be permissible for either of the parties to request the Court to arbitrate the matter locally and the matter must go to arbitration in the place and country agreed upon.⁸⁷³

And further,

The Court of Cassation further held that it was evident that the parties had pre-selected Geneva as the location of the arbitration and there was no evidence in the documents to suggest that there would be difficulties if it was conducted there. The arbitration should

⁸⁷² Ibid 263.

⁸⁷³ Ibid 263.

be held in Geneva and not Dubai. Accordingly, the Dubai Court of Cassation upheld the judgment delivered by the Court of Appeal and dismissed the Plaintiff's action.⁸⁷⁴

(vi) *Case 4: If Parties agree upon the Arbitrator in their Contract, they may not Apply to the Court to Nominate another Arbitrator. Dubai Court of Cassation Judgment No. 167/94, 13 November 1996*⁸⁷⁵

This case represents a straightforward stance in favour of arbitration by the court, in the absence of any provisions to the contrary, demonstrating where domestic public policy is not breached, court intervention will be cooperative:

In an action filed before the Dubai Courts, the Dubai Court of Cassation held that a Plaintiff may not apply to the Court to request the Court to refer a dispute to arbitration or to nominate another arbitrator if the parties had already agreed in their contract to refer their dispute to arbitration and had nominated the arbitrator, unless the arbitrator had resigned, was unable to act or there was a legal reason preventing him from acting as arbitrator. Otherwise, the parties must adhere to their agreement and may not apply to the Court to change the arbitrator or cancel the arbitration clause.⁸⁷⁶

The Court of Cassation reasoned according to the following:

It argued that according to Article 204 of the UAE Civil Procedure Law ("CPL"), the Court had jurisdiction to nominate and appoint an arbitrator if the parties failed to do so. Accordingly, the Plaintiff had the legal right to proceed with the Court action requesting the Court to appoint an arbitrator in this matter. The Plaintiff did not request the Court to

⁸⁷⁴ Ibid 265.

⁸⁷⁵ Ibid 267.

⁸⁷⁶ Ibid 267.

cancel the arbitration clause. It was evident from the facts of this case that despite repeated reminders from the Plaintiff, the Defendant had failed to respond to the Plaintiff's request to refer this matter to arbitration.⁸⁷⁷

It is a little known fact even amongst specialists in the MENA, and even lesser known fact in the West, that Islamic law clearly prohibits executive control of the judiciary. Indeed, Islamic law requires that the judiciary remain independent from the executive. The reforms of Egypt's Gamal Abdel Nasser were completely contrary to basic tenets in classical Islamic jurisprudence. Before the Arab spring, Nasser's reforms, combined with a corrupt executive, have opened the door to the radicalisation of judges. After the Arab Spring, the rise of controversial and debated interpretations of political Islam pose adjudicatory risk. Islamic law explicitly prohibits executive control of the judiciary in clear provisions. The provisions aim to preserve the judiciary as an independent body functioning outside the control of the executive. It remains to be seen what the new president of Egypt will do in regard to the judiciary. Public policy interpretations of a political Islamist differ vastly from those of a learned judge. One who has knowledge of the *sharia*, which is created from the two pillars of the Quran, and the Sunna would decide differently from a political Islamist. One well versed in the domestic civil codes and statutes and the international instruments signed and ratified would hold these instruments as equal to domestic law. A judge versed in jurisprudence, its tools, together with arcane doctrines and classic philosophic treatises on Islamic law occurring throughout history would give rulings that differ significantly from a political Islamist.

⁸⁷⁷ Ibid 268.

Examples of uncertainties and contradictions within and between the United Arab Emirates and Egypt, in the outcomes of arbitral hearings underscore the importance of standardising the laws of the region in order to bring stability to the practice of ICA therein. The uniform Arab arbitration law, or HICALC, gathers best practices from the three indigenous traditions of the MENA. It applies them to a single law, acceptable to both MENA and Western jurisdictions. Here, Arab Constitutions have predominately deigned Islam as the overarching legal authority. Would not referring to principles at Islamic law prevent misuses of political Islam or pleas made in bad faith?

At classical Islamic law protection of investment is built upon three pillars:⁸⁷⁸ (i) pro-public interest/economic welfare, (ii) State intervention is intended to be only regulatory and must be minimised, (iii) pro-investor/pro-investment. In the past, *sharia*-inconsistent rulings made by learned Muslim judges were in favour of mortgages, loans and interest, although these financial commodities are subject to Islam regulations that would prohibit them, if strictly interpreted.⁸⁷⁹ Islamic Courts have ruled in favour of investors even when it was ‘illegal’ to do so. Undeniably, principles drawn from classical Islamic jurisprudence can provide investors with more protection than the MFN clause.⁸⁸⁰ At Islamic law, expropriation due to public policy is forbidden.⁸⁸¹ The author maintains that the main reason these inconsistencies in Islamic legal decision-making occurs is because of the Islamic concept of *maslaha*.

⁸⁷⁸ El-Malik, see above n 400. An analysis of El-Malik’s entire article finds that he sets forth the premises of this argument with empirical and historical evidence for each of the three pillars.

⁸⁷⁹ Ibid.

⁸⁸⁰ Most Favoured Nation clause.

⁸⁸¹ El-Malik, see above n 400.

Hallaq asserts that the new theology of the aforementioned Muhammed Abduh allowed his student Muhammad Rashid Rida to develop the ancient doctrine of *maslaha*.⁸⁸² According to Hallaq, Rida's reformulation of *maslaha* separated it from legal causation, in order to make it acceptable to opponents.⁸⁸³ Hallaq quotes Rida's premises:

Whereas the Prophetic narrative concerning matters of worship (*ibadat*) are infallible, those narratives pertaining to the social and economic transactions of everyday life (*mu'amalat*) are not. None other than the Prophet himself, as admitted by the very Prophetic narrative, erred in some of these matters.⁸⁸⁴

The author submits that Rida's premises in support of *maslaha* can reasonably be supported by *ijma*. Rida's implication is that in everyday matters (*mu'amalat*),⁸⁸⁵ the discretion is at the hands of the judges (who are also infallible) and adjudicatory risk is high.

Hallaq quotes Rida:

God perfected all matters related to *ibadat*,⁸⁸⁶ since these do not change in time or place.

But because of the worldly affairs, the *mu'amalat*, do change from time to time, and from

⁸⁸² Hallaq, see above n 79, 504: 'Abduh's new theology provided his student, Rida, with the necessary tools to appropriate from traditional legal theory certain concepts that the latter would use to rationalize the materialistic exigencies of modernity. The cornerstone of his thesis, and the theses of many after him, rested on the notion of *maslaha*, an important but controversial concept among pre-modern legal theoreticians.'

⁸⁸³ Ibid 504.

⁸⁸⁴ Ibid 505.

⁸⁸⁵ Islamic law, or the *shari'a*, divide religious matters from everyday matters. Although everything falls under Islamic law, some matters are everyday concerns and some are religions. *Mu'amalat* means everyday concerns. *Ibadat* refers to religious matters. The word literally means worship- in the plural.

⁸⁸⁶ Ibid 505.

Islamic law, or the *sharia*, divide religious matters from everyday matters. Although everything falls under Islamic law, some matters are everyday concerns and some are religions. *Ibadat* refers to religious matters. The word literally means worship- in the plural form.

place to place, God laid down only broad and general principles according to which these matters should be treated.⁸⁸⁷

There is no secular distinction in Islam. Everything is non-secular and falls within the religion. Within the religion there are two divisions, matters related to worship and matters that are worldly. Islam delineates the worldly from the religious. Worldly or commercial matters still fall under God's jurisdiction at Islamic law. These broad general principles create adjudicatory risk by leaving matters to judges who may be swayed by political considerations rather than legal ones. Changing judicial discretion is the standard. Hallaq interprets Rida: 'Rida's implication here seems to be that because of this level of generality, plus the falsifiability of the Prophetic narrative, the determination of what the *mu'amalat* means in different times and places remains within the boundaries of man's discretion, not God's.'⁸⁸⁸ For Rida, this means judges can decide according to their personal opinion, ie 'man's discretion', according to the ethos of the times and places and not necessarily according to narrow statutes, hence the 'general and broad principles'. This is the formula that the author has devised for determining adjudicatory risk in the MENA. The following contribute to adjudicatory risk: There are two important principles of Islamic reasoning or (*fiqh*) that allow jurisprudence to be created on a basis that is different from precedent. Both principles consider the justification or test to be what it deemed 'public interest' at the time of the ruling. The first is *istihsan*⁸⁸⁹ and the second is

⁸⁸⁷ Ibid 505.

⁸⁸⁸ Ibid 505.

⁸⁸⁹ W El-Malik, see above n 400, 21, 'The meaning of the term *Istihsan*, which is translated by Hamilton as "favourable construction", is a controversial issue. Generally, it means the breach of strict analogy for reasons of public interest, convenience, or similar considerations. Al-Karkhi (d. 340 A.H.) defines *Istihsan* as follows: "*Istihsan* is that one should take a decision in a certain case different from that on which similar cases have been decided on the basis of its precedents, for a reason which is stronger than the one found in similar cases and which requires departure from *ijtihad* in those cases". Further, 21, it is also a departure

al masalih al mursalah. The author suggests that rather than allow these factors to act as adjudicatory risk, it is wiser to incorporate these dual principles into a draft HICALC. These two principles can also represent a risk in that what is considered ‘public interest’ at any particular time is subject to change according to political or economic considerations. When these Islamic principles are combined with the lack of precedent they cause increased adjudicatory and legal risk in the MENA.

The existence of the principle of *maslaha* is used to justify itself. This fact can be of value in arguing before a MENA judge on the worldly merits of a certain doctrine, or consideration of an arbitration award, but can equally be used by a MENA judge to justify a decision that may not be foreseeable or in accordance with the parties to an arbitration agreement or the party to a dispute wishing to have an award enforced. In this manner, it is similar to the concept of public policy, which is elusive and capricious in its nature. Unless it is harnessed and restrained, it remains a source of adjudicatory risk, as Hallaq highlights Rida:

Rida has already noted that the Quran and the Sunna perfected the doctrinal prescriptions of religious works and ritual laws, the clearly pronounced and segregated category of

from analogical reasoning (*qiyas* *jail*) or *ijtihad*. This could be construed as a *carte blanche*. For example, 65, “Although contracts, which are not in conformity with Islamic law, are prohibited and declared invalid by Muslim jurists, economic necessity and public interest (*masalih Mursalah*) justified the recognition of certain contracts which would not otherwise be permissible.” For example, the *Bai-bil-wafa* transaction, which is similar to the concept of mortgage with conditional sale of the common law. The reason given for this departure is that the contract had been in customary use and there is need for it.’ The comment on customary usage opens up an entirely new sphere of discussion on Islamic law that is beyond the scope of this thesis, but custom is also another common denominator amongst the three legal traditions and may work as an excellent harmonising element.

ibadat. But this is not true of the *mu'amalat*, the “worldly interests” which tend to change with time and place and at every turn require re-elaboration.⁸⁹⁰

Change at every time and place means an absence of reliable precedent, and absence of consistency and adjudicatory risk. According to Hallaq, Rida was able to argue with success that one of the most accepted sources of Islamic law, the *qiyas* or analogy, which creates *fiqh* or jurisprudence in the early history of Islam was used to create the same conclusions that *maslaha* did but less directly.⁸⁹¹

Rida in fact implies that *maslaha* is a fifth source of Islamic law and that it can be as legitimate, authoritative and valid as *qiyas* and that the reasoning underpinning it is the same as that of analogical thinking. Giving something comparable to public policy the same footing as a legal jurisprudential tool is dangerous. It is a double-edged sword. Hallaq quotes Rida’s discussion of a principle that in the absence of other revealed texts, can support *maslaha* in a way that is controversial and alarming:

One such principle is that of necessity (*darura*), which also, at any rate in Rida’s view, overrides any other consideration in the absence of relevant revealed texts. Needless to say, by elevating the concept of necessity to an inductively drawn principle, the Quran and the Sunna would be subordinated to the *maslaha* principles inferred from *maqasid al-sharia*.⁸⁹²

By raising the doctrine of *maslaha* above the Quran and the Sunna, the predictability of Islamic tenets, *inter alia*, would be erased. Adjudicatory risk would prevail.

Notwithstanding that danger, the converse is also true; if *maslaha* could enjoy a position

⁸⁹⁰ Hallaq, see above n 79, 506.

⁸⁹¹ Ibid 507.

⁸⁹² Ibid 507.

amongst the sources of law, then counsel could argue the merits of awarding compound interest, allowing speculation, gambling, *inter alia*, before a judge who agrees with Rida's philosophy and upholds the doctrine of *darura* (necessity). The question of how Egypt's liberal policy regarding interest was created may be answered on the grounds of *maslaha*. What remains unknown to parties' counsel regarding the MENA climate can cause significant losses to them, either directly or indirectly. The lack of knowledge can deprive them of putting forth strong submissions to advocate for their clients.

Hallaq continues:

Other texts pertaining to the customary practises of Muslims are binding unless necessity and/or public interest dictate setting them aside. The fifth and final type of evidence requires that all matters finding no textual support in the revealed sources must be left up to human discretion and decided by the two overriding principles. Following Abduh, Rida asserts that whatever rules are created on the basis of these principles would be valid, since such rational considerations do not contradict revelation.⁸⁹³

Rida's philosophy extends its scope. Although Rida has his critics in scholarly sources,⁸⁹⁴ the extent to which his philosophy has influenced MENA judges should not be underestimated. Insofar as there is danger in straying from predictable methods, there is also danger in a scholarly critique (Hallaq's) that completely undermines modern adaptation of a legal system with cultures and societies that evolve. This is one of the flaws of the *salafi* discourse which functions by using *qiyas* to impose rules on modern practices that did not exist at the time of the Prophet. Although it is logical to presume

⁸⁹³ Ibid 508.

⁸⁹⁴ Ibid 508: 'Rida's anchoring of all law (ie, of mu'amalat, defined by Western legal standards as law proper) in the otherwise limited concept of necessity, which in turn is validated by the principle of maslaha, amounts, in the final analysis, to a total negation of traditional legal theory.'

that according to Islamic law the *sharia* should never change, it is logical to take into consideration the changing needs of human society. Adjudicatory risk occurs on both sides of the spectrum: rigid un-changeability of adaption to situations that are *not* analogous to those of the time of the Prophet, or, capricious and unpredictable changes based on a *maslaha* that is disconnected from *sharia*. Both are dangerous. The author submits that is what criticism against modern adaptations of Islamic law logically leads to, if the reasoning behind it is taken to its fullest implications:

aside from matters of worship and religious ritual, which he insists are to remain within the parameters of revelation, Rida upholds a legal theory strictly anchored in natural law, where considerations of human need, interest and necessity would reign supreme in elaborating a legal corpus. Any revealed text, notwithstanding its epistemological strength, could be set aside if it were to contravene these considerations. His, then, is a theory that constitutes a radical shift from the traditional Sharia, which had a long history of accommodating itself to changing social needs without allowing itself to abandon its hermeneutical ties to revelation.⁸⁹⁵

Although Rida's double-edged interpretations of *maslaha* pose adjudicatory risk, if its principles are harnessed within a uniform Arab arbitration law it can solve problems for investors in the MENA. The problem with Hallaq's criticism of Rida is that the very nature of hermeneutical ties to revelation by definition means that the revelation's application to the specific time and place for which it was revealed is inherently frozen within that time and place and unless a situation in modern times is an exact replica of a situation during the time of the Prophet, the *sharia* cannot be adapted to it. The author

⁸⁹⁵ Ibid 508.

disagrees with Hallaq's understanding and interpretation of Islamic law. This view of Islamic law in and of itself is problematic. There is a debate as to which Quranic verse or Hadith applies, either only to specific situations in the past or in a general sense to apply to the present age. Hallaq's criticism does not explain how the revelations should be interpreted. The author therefore attempted to fill this gap throughout this research, showing modern provisions that are suited to modern financial principles and that do not contradict either classical Islamic jurisprudence or common and civil law principles. Rida is not the only philosopher to refer to *maslaha* and *durarat* (necessity) (plural) and without providing a methodology for how they may function.⁸⁹⁶ The prevalence of these concepts in the minds of MENA judges is assured, but how they will be reasoned out is left to each individual.

Further evidence shows that the legal culture that impacts judicial reasoning in the MENA is complex. Muhammad Said al-Buti⁸⁹⁷ argues that *maslaha* is a valid concept but interprets it to mean not only does it apply to *mu'amalat* (worldly affairs) but it applies also to other-worldly affairs, with the latter being more important than the former and the

⁸⁹⁶ Ibid 510, in regard to Abd al-Wahab Khallaf, 'The same problems also arise in his discussions of Prophetic Sunna. Its most authenticated and binding part, textually as formidable as hermeneutical authority as the Quran, is given an even more ambiguous solution than that accorded the latter. On the one hand, Khallaf appears to argue that this Sunna must continue to be binding at all times and in all places (the traditional position), but on the other hand, he strongly implies that bindingness is contingent on the concomitance of the Prophetic rules with considerations of *maslaha*; namely, when *maslaha* is not served, these rules do not apply.' Scholarly discourse appears to be resistant to modern interpretations of Islam.

⁸⁹⁷ Ibid 511: 'The notion of shar'i *maslaha*, Buti argued, rests on a number of fundamental assumptions, all of which contradict Western utilitarian principles which, at the beginning of his work, Buti briefly expounds through a critique of such figures as Jeremy Bentham and J.S. Mill. The first of such assumptions is grounded in a transcendental conception of legal morality, where *maslaha* and its antonym, *mafsada* (lit. harm), cannot be restricted to this life alone but must take account of the hereafter as well. The second is that *maslaha* cannot be short-sightedly limited to the material considerations of the world and certainly cannot be reduced to hedonism, but must be equally based on corporal and spiritual human needs. Finally, the third assumption is that *maslaha* dictated by religion constitutes the foundation of worldly based *maslahas*, with the consequence that the former has precedence over, and controls, the latter. All that may be found in worldly *maslahas* to contradict the religiously dictated *maslaha* must be relinquished, for the integrity of religious *maslaha* is supreme.'

former being a negative manifestation of Western values. Unfortunately, this interpretation not only increases the complexity of the MENA climate including adjudicatory risk, but scholars share and promote this interpretation in such a manner that it constructs Islam as being fundamentally opposed to western values,⁸⁹⁸ further prohibiting Islamic law from being interpreted as harmonious with Western concepts; even when in fact, it is or can be. The complexity raises this practical consideration: The parties do not know which judge they will encounter; the one who believes that Islamic law can be interpreted to justify any worldly concern (that of the court and the domestic law and not the parties) or the one who believes that it should not and cannot adapt itself to what they consider *immoral* Western values (particularly those dealing with such matters as interest, gambling, speculation, insurance, risk, *inter alia*). A HICALC, based on *sound* Islamic principles, can set the groundwork by giving guidelines for the interpretation of Islamic law to MENA judges; a law which draws upon classical Islamic principles and shows that they are also in harmony with western principles. As much as Buti puts forth the importance of *maslaha*, his view of usury is absolute. For him it contradicts other-worldly considerations: ‘It might be thought, for instance, that *maslaha* requires that *riba* (usury/interest) be permissible, but this is no more, Buti argues, than fanciful thinking contradicting God’s word’.⁸⁹⁹

⁸⁹⁸ Ibid 511: ‘Here, Buti again levels an attack on Western materialist and utilitarian thinkers, accusing them of severe metaphysical myopia. In fact, Buti’s attack is extraordinarily perceptive in that, whilst his concern lies with the Muslim *maslahawi* thinkers, he is fully aware of the Western genealogy of their “myopic” theories. He accurately captures the essence of the ‘Abduh-Rida project that has spread throughout the Muslim world, criticising its advocates as “those who thought *maslaha* to be a second, self-sufficient and independent religion that abrogates whatever of the first [true] religion it sees fit, and declares invalid anything it wants”.’

⁸⁹⁹ Ibid 513.

Yet another lesser known fact of Islamic law, by Muslims and westerners, is that Islamic law is not opposed to integrating with foreign law. The implication of this is that Islamic law is fully capable of creating a transnational public policy on the basis of *maslaha*. This is particularly relevant in creating a HICALC that is an amalgam of civil, common and *sharia* principles. An example of a precedent found at Islamic law is that of the famous Banu Qurayzah arbitration during the time of the Prophet in which the Prophet himself set a precedent that Mosaic law be implemented.

The sacredness of the New York Convention⁹⁰⁰ is firmly established in international law and scholars have rightly argued⁹⁰¹ that it not be reformed or amended. Or, if not in contradiction, then the plea of public policy is too often misused in bad faith and is too often broadly interpreted. A more narrow definition of public policy or a transnational public policy definition given in the HICALC can gently temper the rough edges of the Convention without drastically stirring the waters of equanimity.

Article IV of the HICALC Public Policy

- (a) The definition of public policy shall be understood as ‘*transnational*’ public policy.
- (b) Public policy *shall not* be construed as domestic public policy.
- (c) Public policy *shall not* be construed as Islamic law. Insofar as a State defines its domestic public policy as tantamount to *sharia* principles this shall be held distinct from transnational public policy with the latter being the standard benchmark of public policy considerations as they have bearing on international commercial arbitration.

⁹⁰⁰ See above n 177.

⁹⁰¹ V V Veeder, ‘Is There a Need to Revise the New York Convention?’ (Key Note Speech delivered at The Review of international arbitration Awards, international arbitration Institute, (IAI) Forum, Dijon, 12–14 September 2008) in response to the question of if the United Nations should amend the *1958 New York Convention*, in the Review of International Arbitral Awards, Gaillard, Emmanuel (Ed), 183–94.

- (d) A definition of transnational public policy *shall* be given.
- (e) *Al Masalih al Mursalah* shall be restricted in non-State acts (*actus gestionis*).
- (f) The construction of public policy in the MENA by MENA judges *shall* be a transnational public policy which is allowed under the doctrine of *maslaha*.

E Sovereign Immunity

In arbitrations between private European parties and MENA governments involving oil concessions or important foreign investment, the legal doctrine of State sovereignty is an inhibiting factor in the successful resolution of ICA contracts, leading to diminishing award enforcement and credibility in both arbitration as a valid dispute resolution method and in MENA seats. Resolving the ambiguity surrounding ‘State sovereignty’ as it is used as a defence in international commercial arbitrations would solidify diplomatic ties between MENA and European governments, and this in turn would result in an increase in trade and economic development. Successful and fair arbitrations would increase trust and credibility in the arbitration process, including perceptions of MENA courts to act impartially and without bias towards public policy notions⁹⁰² which are used by MENA courts to uphold the governmental defence of State sovereignty. Arbitration as a dispute-resolution method is appropriate in the MENA context because it removes the adversarial nature⁹⁰³ inherent in a dispute before a court, allowing the government to ‘save face’,

⁹⁰² For an in-depth thesis on the analysis of the use of public policy to indirectly defend the doctrine of state sovereignty by referring to public policy as ‘an act of State’ in order to escape a contractual obligation, please refer to the cases cited and analysed in M Ayad, *The Journal of World Trade and Investment*, October 2009, Geneva, Switzerland: Jacques Werner (editor and publisher). The cases, *Government of Saudi Arabia v Arabian American Oil Co (Aramco)* in Decision of 23 August 1958, 27 International Legal Reports 117 (1963) is in Bishop, see above n 523, 2–3. Discussion Paper No DP 12.

⁹⁰³ The nature of arbitration in regard to being classified as a form of ADR rather than litigation, contributes to this image. The author submits that the practice of arbitration *outside of* western jurisdictions is seen

which in reality is analogous to the need to preserve State sovereignty without necessitating invoking it as a defence to escape from a financial obligation. Foreign investment contracts involve significant sums of monies and this drives global business and economic development, when these contracts are upheld because this increases credibility in international arbitration. A HICALC that standardises the legal principle of State sovereignty would go far in resolving this problem.

The doctrine of sovereign immunity is an obstacle to the recognition and enforcement of arbitral awards and to the proceedings of arbitration tribunals as well. It is a problem because of its inherent nature, but it is also a problem because it opens the door to other problems. Sovereign immunity may be cloaked as public policy, and the author submits that it invites competence challenges thereby undermining the jurisdiction of a tribunal to arbitrate a dispute. Therefore, an implication of this is that not only does it undermine competence, but it undermines arbitrability, particularly in terms of the concept of the dreaded State contract or the *contrat administratif*.⁹⁰⁴ In France, the

more as a form of ADR and less as an adversarial form of adjudication similar to litigation. There is anecdotal evidence for this in China as well as throughout the MENA. Although international arbitration does follow similar patterns to litigation, such as use of counsel on both sides, evidence, discovery, etc, these techniques are not widespread across the board. It is known that American arbitrators are more litigious than even their Continental European counterparts. (See, S. Luttrell, *Bias Challenges in International Commercial Arbitration, The Need For a 'Real Danger' Test*. (Kluwer Law International, 2008), at the introduction and chapter one.) International arbitration is not perceived as binding as litigation due to its history of losing parties failing to pay the award. In litigation, the sentence is enforced. The inability to enforce an arbitral award is an inherent weakness of the system. Notwithstanding the situation in the MENA, the author agrees with the learned Derek Roebuck, in V. Bhatia, C. Candlin, and M. Gotti, *Discourse and Practice in International Commercial Arbitration*, Ashgate, 2012, xii (preface): 'Though the prevailing culture which warps objectivity is usually Anglo-American or at least the cultures of North America and Western Europe, we must be alert to detect the influences which work the other way, for example, that arbitration is of its nature an 'amicable' rather than 'adversarial' process. There is no evidence for that in most jurisdictions.'

⁹⁰⁴ Guillien, see above n 347, 153: 'Contrat passé par une personne publique ou pour son compte est soumis à la compétence et au droit administratifs soit par disposition expresse de la loi: soit en raison de la présence de clauses exorbitantes du droit commun dans ses stipulations, soit parce qu'il confère à son titulaire une participation directe à l'exécution d'une activité de service public. Tous les contrats des personnes publiques ne sont donc pas des contrats administratifs, certains étant soumis aux règles du droit

doctrine of the *contrat administratif* does not necessarily imply that just because a State entity or State representative has entered into a contract that it is considered a *contrat administratif* and thus the contract may still fall under the rules of private international law. This is an important distinction in addressing claims of sovereign immunity in consideration of investor–State disputes that are arbitrated in the MENA where the doctrine of *contrat administratif* may be formulated differently than in France. The fact that the French notion explicitly states that not all contracts entered into by the State or public officials are classified under the rubric of *contrats administratifs* and the fact that certain ones must submit themselves to the rules of private international law should be the standard for commercial–State contracts and can apply to investor–State contracts precluding any specific reason why this should not be the case, for example in applying the standard to those contracts not dealing with mineral resources, *inter alia*.⁹⁰⁵ A review by the author of landmark cases of ICSID arbitrations with MENA State parties reveals that the defence counsel pleaded objection against competence to hear the award. Competence challenges are based on a State’s *implied* sovereign immunity. This is no longer valid if ICA is to be fair and to be built upon principles of justice and fairness. Western⁹⁰⁶ and Islamic concepts of sovereignty in the context of oil concessions are

prive.’ ‘Contracts carried out by state agents or their competent delegates fall under said competence and at administrative law either fall under the acts of agents as expressed in the law: (or as provided by provisions in the law): or because of the presence of exorbitant clauses at ordinary (French) law in these stipulations, or due to the fact that the law confers upon the incumbent direct participation in the execution of activities within the sphere of public service. All contracts of state agents are not then administrative contracts – certain ones fall under the rules of private law.’ (Translation by the author.) This means that agents of the state are accountable to the State or rather that States are bound by the actions of their agents. This has bearing on the discussion dealing with the Pyramids arbitration.

⁹⁰⁵ See above n 367, 159: ‘...the position taken by René-Jean Dupuy in the *Texaco v Libya* decision, who had considered that the theory of administrative contracts had no place in international law.’

⁹⁰⁶ R Mommer, *Global Oil and the Nation State*, (Oxford University Press, 2002) 98, ‘In its most elementary form sovereignty comes down to the power, and hence, the right to grant or deny access to land. There is no way to own a piece of land except through the sovereign power. Once granted, access is still

similar. The Islamic concept of sovereignty in the context of mineral investments provides a strong basis for understanding the classical Islamic doctrine of sovereignty. This view is not necessarily the same as that held by a MENA court.

Many MENA countries have enacted policies to encourage foreign investment.⁹⁰⁷ Notwithstanding, the region has several distinctive features that contribute to the complexities implicated in ICA and investments. One of these factors is the complex relationship of *sharia* principles with the doctrine of sovereign immunity. A regulatory framework influenced by the broad interpretations of the doctrines of sovereign immunity, State sovereignty and Arab nationalism under the umbrella of Islamic law contains within it the potential to either support or obstruct arbitral award enforcement, especially when the doctrine of public policy (*maslaha*) is thrown into this legal–political concoction. Add to this the postcolonial status of many of the countries of the region, and the fact that the early oil concessions reflected their colonial status. All of these factors combined ensure political risk. The interconnection of all of these doctrines and factors, and how they impact each other, requires a precise understanding of how *sharia* principles are used to interpret the doctrines of State sovereignty, sovereign immunity and public policy. A proper understanding of how the courts interpret these doctrines

subject to the eminent domain right of the sovereign, even if this right is exercised in the form of private landed property.’

⁹⁰⁷ M Siddiqi, Investors Position for an FDI rebound, *The Economist*, February, 2010, pp 55–8, 56, ‘Since the early 2000s, several countries have instilled micro business reforms to attract foreign investors into non-oil sectors – the key to export diversification. Changes include more liberal entry, fewer performance criteria and attractive fiscal incentives, as well as more guarantees/protection for investors. The closed sectors where FDI was barred or restricted were opened to competition, mostly in manufacturing and services, but also in natural resource exploration.’ These reforms still do not address the critical issues to foreign investors raised in this article, nor do they address contracts related to natural resources. Further, at 57, ‘Egypt has established free industrial zones in various places, where firms benefit from the provision of infrastructure, tax breaks and a relaxed regulatory climate in which to operate.’ This regulatory climate can be further improved.

demonstrates the necessity of reform to the entire regulatory framework governing ICA disputes and award enforcement, between MENA governments and European investors.

In investor–State investment arbitrations the defence of sovereign immunity may be raised as an obstacle to arbitral award enforcement. This defence is oft used without justification and is invalid, or more precisely, is used in *bad faith*. States entering into commercial contracts are acting as private actors and not as governments. Whilst a commercial contract signed by a State may implicate matters related to public policy, commercial contracts signed by states should be treated in the same manner as those entered into by private parties. Interpretations of the doctrine of sovereign immunity of investor–State contracts between foreign investors and MENA governments necessitate that excessive and undue pleas of sovereign immunity which undermine arbitral award enforcement must be limited in scope exclusively to non-commercial acts or in situations that evoke public policy concerns. To do otherwise reduces credibility in the entire edifice of ICA, which is intended to overcome unfavourable national laws catering exclusively to State interests. In consideration of the necessity in commercial disputes of arbitration to foreign investors, as protection against national court biases, obstacles to arbitral award enforcement are a clear and present danger. The MENA context is beset by other factors that exacerbate the impact of sovereign immunity, such as political Islam, domestic interpretations of legal doctrines, public policy, political risk and court interpretations of *sharia* principles. Broad interpretations of State sovereignty may be upheld by certain interpretations of Islamic law, which is the overarching regulatory framework of most MENA legal systems, even in cases of liberal jurisdictions.

The Washington Convention's Rules⁹⁰⁸ governing ICSID arbitrations may be manipulated due to sovereign immunity concerns. The cases of Egypt (which has hybrid law codes per Sanhuri's blending of Civil and Islamic law) and the United Arab Emirates, or even where the adoption of the UNCITRAL and the 1958 New York Convention⁹⁰⁹ are signed, show there are concerns.

The signing of a contract by a State means that it has submitted itself to the rule of law, regardless of its sovereign status. The inclusion of an arbitration clause means that the State has bound itself to the resolution of the contract, in the event of a dispute. Again, sovereign immunity is not to be equated with State necessity or national security. A State's sovereignty is not undermined by being held accountable for its financial and commercial profit-making actions. The fine distinction between *iure gestionis* and *iure imperii* has already dealt with this matter sufficiently in public international law. Implicit in the plea of sovereign immunity is the doctrine of State sovereignty. Although these two principles are not one and the same, the existence of sovereign immunity points to, or implicates, the doctrine of State sovereignty. In essence, without the doctrine of State sovereignty, the plea of sovereign immunity would have no basis and would fall flat *per se*, *prima facie*. A major consequence of the doctrine of State sovereignty is the plea of sovereign immunity, or in other words, the non-acceptance of the binding nature of arbitration upon its sovereignty. Therefore, State sovereignty and sovereign immunity are directly related to the problem of enforcement based on *res iudicata* because these twin Janus doctrines undermine the binding authority of an arbitral tribunal against a State.

⁹⁰⁸ See above n 138.

⁹⁰⁹ See above n 177.

The manifestation of State sovereignty and sovereign immunity is lack of enforcement.⁹¹⁰

The UNCITRAL Secretariat has identified areas for future work;⁹¹¹ questions of arbitrability, sovereign immunity, decisions by ‘truncated’ arbitral tribunals, liability of arbitrators, the power of an arbitral tribunal to award interest and the discretion to enforce awards that have been set aside in the State of origin. Many of these questions are related to the plea of sovereign immunity. Although the Secretariat has deigned that the question of sovereign immunity has been dealt with, and that the other points have been given low priority,⁹¹² it is argued that they have not been dealt with sufficiently heretofore. It is generally agreed that the plea of sovereign immunity⁹¹³ prevents effective national court judgements on foreign governments.⁹¹⁴ Yet, the same line of reasoning applies in the case

⁹¹⁰ Lalive, in A J van den Berg, ‘International Commercial Arbitration, Important Contemporary Questions’ *ICCA International Arbitration Congress*, (Kluwer Law International, 2003) 2, ‘But I would suggest that the overall picture is perhaps less “rosy” than appears at first sight, and that a more realistic approach should also take into account the many and indeed traditional manifestations of State reluctance to accept binding adjudication by third parties. After all, this phenomenon has long been observed in public international law, eg, with regard to the acceptance by States of the ‘optional clause’ of the ICJ, and the number of objections to the jurisdiction of the International Court. Let me state at the outset that the deep and traditional reluctance of Governments to undertake binding arbitration commitments (in the broad sense of the term “arbitration”) is perfectly understandable and indeed sometimes quite justified, on the part of responsible State authorities. Be that as it may, in spite of the remarkable progress accomplished by some pioneers like the late Aron Broches, it is unlikely that the tendency of States or Governments to object to arbitral jurisdiction will diminish.’

⁹¹¹ F Mantilla-Serrano, A John, *The University of New South Wales Law Journal*, Forum International Commercial Arbitration, Vol 14, No 1, (May 2008) 29–35, 29.

⁹¹² Ibid 30.

⁹¹³ M V Forrestal, ‘Examples of and Reasons for Increased Use of international arbitration’ in, G Aksent, R B von Mehren, (eds), *International Arbitration Between Private Parties and Governments*, (Practising Law Institute, 1982) 46–7: ‘Perhaps the key concern of a private party entering into a contract with a governmental organization is the possibility of enforcing an award against that governmental entity. The principle obstacle to enforcement is the concept of sovereign immunity. The basic notion of sovereign immunity is that the sovereign, as the supreme political authority within an independent nation, is not subject to suit in its own courts or in the courts of other nations unless it consents to being sued. This traditional precept was modified as governments began to engage in more and more transactions that were “commercial” in nature. The rule gradually became that a governmental entity which engaged in a commercial or proprietary activity, as opposed to a governmental activity, was not immune from suit.’

⁹¹⁴ Ibid 44–5: ‘When one of the parties to an international transaction is a foreign sovereign, it is very unlikely that any dispute arising from the transaction will be resolved in any national court system. On the one hand, private parties will not trust the courts of the foreign sovereign and will also anticipate that the foreign sovereign will claim sovereign immunity if it is forced to resolve the dispute in a third country’s court system. The foreign sovereign, on the other hand, will not agree to submit to the court system of another country because this could be perceived as an insult to its national sovereignty. By agreeing to

of ICA, despite the prevalence of the ratification of the 1958 New York Convention.⁹¹⁵ A national court may still refuse to enforce⁹¹⁶ an arbitration award against its own sovereign government, in arbitrations where the government is the losing party.⁹¹⁷ Unless reforms are undertaken to standardise⁹¹⁸ the acceptability of the plea of sovereign immunity with specific and uniform legislation defining it clearly and limiting its scope⁹¹⁹ in commercial matters,⁹²⁰ ICA award enforcement will be undermined. Amendments accounting for

arbitration, the foreign sovereign can provide a consensual mechanism for dispute resolution and thus maintain its sovereign dignity.’

⁹¹⁵ Ibid 45: ‘By facilitating the enforcement of an award against a foreign sovereign, the 1958 New York Convention has been a key factor in the growth of arbitration between private parties and governments. Where an award is given and sought to be enforced in countries which are signatories to the 1958 New York Convention, it is often easier to enforce a foreign arbitral award than a foreign court judgment. Thus it is not necessary that the defendant against whom enforcement is sought to be from a country which is a signatory of the 1958 New York Convention; it is sufficient that the arbitral award was granted in a signatory country and that enforcement is sought in another signatory country. This is, perhaps, the chief value of the 1958 New York Convention, and it is largely responsible for the increasing willingness of private parties to sign agreements with governmental organizations which call for arbitration.’

⁹¹⁶ Sovereign immunity from execution of the award is distinct from jurisdictional immunity and is discussed subsequently.

⁹¹⁷ A T Von Mehren, C Croff, ‘International arbitration Between Private Parties and Governments: Treaty and Statutory Developments’ in, M V Forrestal, ‘*Examples Of And Reasons For Increased Use Of International Arbitration*’ in, Aksen G, R B von Mehren, (Eds) 1982, *International Arbitration Between Private Parties And Governments*, (Practising Law Institute) 78: ‘Even though a private party and a government have agreed to solve their disputes through arbitration, it may happen that when a dispute arises the State refuses to arbitrate. The other party will then go before a national court seeking an order to compel arbitration. The government will argue that the court is without jurisdiction because of sovereign immunity. The issue then is whether an arbitration clause will be construed as a waiver of jurisdictional immunity.’

⁹¹⁸ See above n 46, pp 169–76.

⁹¹⁹ Berg, see above n 298, 53: ‘. . . in the field of sovereign immunity it is not always easy to distinguish between commercial transactions (*acta jure gestionis*) and non-commercial ones (*acta jure imperii*).’

⁹²⁰ Berg, see above n 298, 5353: In the case of ‘High Court of Bombay, 4 April, 1977, *India Organic Chemicals, Ltd v Chemtex Fibres Inc.* et al. (India no 4)’, a case ‘involving, inter alia, transfer of technology, the High Court of Bombay gave a rather restrictive interpretation of the commercial reservation’. The presiding judge stated, ‘In my opinion, in order to invoke the provisions of Section 3, it is not enough to establish that an agreement is commercial. It must also be that it is commercial by virtue of a provision of law or an operative legal principle in force in India’. Further, 54: ‘The commercial reservation refers to the law of the forum for determining what is commercial. Apart from the problem of giving a satisfactory definition of commerce on an international level, the New York Convention does not offer the possibility of a uniform interpretation in this respect. The question whether the commercial reservation will effectively become a stumbling-block for uniform applications of the Convention, depends therefore on the attitude of the courts of the Contracting States towards the Convention. Perhaps, those courts whose domestic law gives a narrow definition of “commerce”, could nevertheless interpret commerce under the Convention in a broader sense by applying by analogy the international public policy test. As we will later see, the courts in several countries have held that what is a violation of public policy under their domestic law, will not necessarily be a violation of public policy on the international level. Thus the field of

uniform and precise definitions of sovereign immunity are necessary to the reform of extant ICA laws such as the UNCITRAL. As a related concept, the doctrine of what is considered ‘commercial’ in the context of an act of State needs to be clearly defined and enshrined in legislated articles. Harmonisation, in the context of the MENA is necessary because (1) in consideration of the existence of several widespread ICA rules, and (2) the contradictions with conflicts of laws within any given arbitration and (3) in consideration of certain matters specific to the MENA, such as political Islam, un-codified *sharia* tenets and the undefined yet broad scope of sovereign immunity, arbitral award enforcement is rendered inefficient.

1 *Civil Law*

Ab initio, it is imperative to distinguish between the sometimes subtle difference of what may be termed ‘an act of State’ (*acta iure imperii*) and a ‘commercial act’ (*acta iure gestionis*), when the agent is a State. The discussion given below will serve to clarify that there is a fine, but clearly delineated distinction between these two concepts.

One of the general principles governing recognition and enforcement according to the New York Convention⁹²¹ which has led to recent problems in the MENA: ‘The New York Convention does not govern states’ immunity and does not prevent a state from raising such defence to resist recognition and enforcement.’⁹²² There is a gap in the New York Convention. ICSID case law demonstrates that this continues to be a problem. This

international public policy is smaller than that of domestic public policy. Mutatis mutandis this test could be the test applied to “commerce”: what is non-commercial in domestic relations may be considered as commercial for the purpose of the Convention.’

⁹²¹ See above n 177.

⁹²² See above n 362, 830.

principle is also in contradiction with the well-established fact that an act of state is distinct from a commercial act. Barring state to state arbitration dealing with acts of state- for all other commercial or investment contracts/treaties- this defence must be restricted.

The MENA has a precedent of delineation of act of state from a commercial act. This precedent is rich in the body of case law from the Mixed Courts of Egypt. The law of the Mixed Courts of Egypt was based on Civil Codes. Three notable cases demonstrating the following principle will be discussed. The Mixed Courts had an advanced jurisprudence in this matter:

They were themselves in favour of an approach that separated the public and private capacity of a sovereign, treating the private nature of his acts as within their jurisdiction.

This attitude was to lead to major developments in later years in the theory of *acta imperii* and *acta gestionis*.⁹²³

The case law of the Mixed Courts of Egypt shows how questions of sovereign immunity were settled. Three landmark cases from 1906 to 1915 were decided in accordance with this principle. The guiding principle in all these cases was: ‘The result was entirely in accord with precedent, and reaffirmed the principle that the non-sovereign acts of government were treated as acts of a private person.’⁹²⁴ Precedent for *acta gestionis* is found in cases of the Mixed Courts.

⁹²³ See above n 180, 14.

⁹²⁴ See above n 180, 82.

(a) *Daria Sanieh case*

In the *Daria Sanieh*⁹²⁵ case of 1909, ‘a claim by the descendants of the Khedive Ismail to a share in the proceeds from the sale of the assets of the *Daria Sanieh*’⁹²⁶ was heard:

Their claim was refused by the Court, on the basis that in 1878 Ismail had used the estates as security for various loans to himself and the government, and when the land was sold some 25 years later it was simply the rightful action of the creditors, and the proceeds were not held on behalf of his family. Consequently no restitution was allowed and the claim failed.⁹²⁷

(b) *Bencini and Quistas v Egyptian Government and Government of Sudan*⁹²⁸

In this case⁹²⁹: ‘The Egyptian government responded with the clear words of the Anglo-Egyptian Convention that set out the status of the Sudanese government as a distinct and separate entity from the Egyptian government.’⁹³⁰

⁹²⁵ Cairo District Court, 2 June 1909.

⁹²⁶ See above n 180, 82: ‘The descendants’ claim was that they were entitled to a share in the sale money because the *Daria Sanieh* belonged to Ismail and his family, and as they were his heirs they were the rightful owners.’

⁹²⁷ See above n 180, 82.

⁹²⁸ *Bencini and Quistas v Egyptian Government and Government of Sudan*, Cairo District Court, 11 April 1910, (Pres. Herzbruck)

⁹²⁹ See above n 180, 81: ‘Two entrepreneurs claimed payment in the Mixed Courts from both the Egyptian and the Sudanese governments for work they had done in Port Sudan, alleging that Sudan was an integral part of Egypt and that therefore the Egyptian government was responsible for Sudan’s debts.

⁹³⁰ See above n 180, 81.

(c) *Kildani ve. Hagggar v. Fisc Hellenique*⁹³¹

This case involved an individual and the Greek Treasury.⁹³² Thus:

Although the latter was a foreign government department the Mixed Courts decided that the same principles would be applied as if it had been a department of the Egyptian government. Thus it was necessary to classify the acts of the Treasury. They were found to emanate from the Greek government as a *personne civile*, and were therefore acts akin to the management of a private business. Consequently, the Mixed Courts were competent to decide the case and the Greek government's plea of sovereign immunity was not accepted.⁹³³

The precedent of the Mixed Courts in applying the principle of distinguishing between an act of state and a commercial act of a private person should be applied in ICA and IIA.

(d) *Act of State*

The matter of sovereign immunity is relevant in commercial disputes occurring between a commercial entity and a State actor. The reason for this premise is based in extant laws and treaties which govern State-to-State relations, in regard to acts of states (*acta imperii*). Cases involving State parties in dispute with one another are relatively straightforward. A review of notable cases involving the doctrine of sovereign immunity demonstrates that the majority involve a commercial actor *v* a State. This fact alone raises

⁹³¹ *Kildani v Hagggar v Fisc Hellenique*, MCA, 9 May 1912, BLJ XXIV, 330.

⁹³² See above n 180, 81-82.

⁹³³ *Ibid.*

the question as to why this is so. It is widely recognised that treaties and general principles of laws of civilised nations are binding upon a state in regard to acts of state or *acta iure imperii*. The clarity in this matter reveals the same logical rationale applied by analogy to cases in which a State engages in a commercial transaction with a commercial actor for commercial motives (*mens rea*), and commercial outcomes, such as profit (*actus reus*). Since the matter of sovereign immunity has already been settled in international law,⁹³⁴ as a doctrine that does not function to allow a State to escape from its obligations,⁹³⁵ then it is in the field of ICA that this doctrine needs to be analysed and therefore due to the primacy of ICA as the preferred method of international dispute resolution, then it is in ICA law that the answer is to be found. Accordingly, if at international law a State cannot claim immunity from jurisdiction in a national court when it has agreed to said submission, then a State that has signed a contract with an arbitration clause or has agreed to arbitration cannot claim the defence of sovereignty. It

⁹³⁴ For example, according to Article 1 of the Convention for the Unification of Certain Rules Concerning the Immunity of State-owned ships (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934) that sea-going ships owned and operated by states are subject to the same rules of liability and the same obligations as those applicable in the case of privately owned ships. Likewise, commercial transactions entered into by states should be subject to the same rules of liability and obligations as those entered into by private actors. The Convention may be found at 2, in A Dickenson, R Lindsay, J Loonam, and C Chance, (eds), *State Immunity, Selected Cases and Commentary, The Preamble of the European Convention on State Immunity, Additional Protocol and Explanatory Reports*, (Oxford University Press, 2004).

⁹³⁵ Art 1 of the Convention for the Unification of Certain Rules Concerning the Immunity of State-owned ships (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934): The Preamble of the European Convention on State Immunity supports this way of reasoning eloquently thus, at 10: 'Taking into account the fact that there is in international law a tendency to restrict cases in which a State may claim immunity before foreign courts; Desiring to establish in their mutual relations common rules relating to the scope of their immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgements given against another State; Considering that the adoption of such rules will tend to advance the work of harmonisation undertaken by the member States of the Council of Europe in the legal field.' Further, in Article 3 of said Convention, at 11: 'A contracting State cannot claim immunity from the jurisdiction of a court of another contracting state if it has undertaken to submit to the jurisdiction of that court.' This principle applies to international commercial arbitration in which the words 'Arbitration Tribunal' may equally be substituted for that of 'court', when a State has agreed to submit to the court jurisdiction of another contracting state, according to Article 3, 'either: (a) by international agreement; (b) by an express term contained in a contract in writing; or (c) by an express consent given after a dispute between parties has arisen'. An arbitration clause in a contract in an international commercial arbitration between a government and investor fulfils all three of these conditions.

is logical that a uniform application of sovereign immunity and definition, restricting its usage as a defence in commercial transactions between states and investors, follows from already established general principles of law regarding State obligations engaged therein as states. Indeed, if states cannot escape their obligations even when acting as a 'State', how could they do so when acting as a commercial entity? To allow sovereign immunity to serve as a defence against a State obligation that should be carried out is to engage in faulty reasoning and to be swayed by partiality, bias and political agendas. A clause hitherto restricting sovereign immunity as a defence to commercial transactions needs to be included in extant and new ICA law instruments. In international commercial arbitrations involving cases in which a commercial act has political ramifications for a State requires reasoning that distinguishes between the commercial act and the responsibilities bound by it on one hand, and the political act and the obligations towards to the State to enable it to uphold its sovereign identity. From a normative stance, and according to the democratic principles of a representative government, ideally the situation ought to be that the following statement is a fact: states do not exist to serve themselves, but the common good of their citizens together with the international community. Realistically, this is far from the case. Preserving sovereign immunity when it is at odds with the inherent nature of a State to protect the interests of those it serves is to conflate the meaning of public order with tyranny. The blurring of what is considered an act of State (*acta imperii*) with what is considered a commercial act or rather a non-political act (*acta gestionis*) is a means used by states to escape from binding judgements or arbitrations that are either costly or contradictory to a strictly domestic public policy. It is to conflate two entirely separate doctrines.⁹³⁶ To claim that a commercial act be viewed

⁹³⁶ Berg, see above n 298, 53280: 'In the former case of acts *jure imperii*, the State enjoys an absolute

as an act of State is an effective obstruction of justice for the foreign investor. A State party to a commercial contract that contains an arbitration clause has waived its right to plead sovereign immunity by virtue of the fact that it has signed a commercial contract and is acting as a private party, thereby rendering its immunity irrelevant.⁹³⁷

Oil concessions are of a different nature than investment contracts in that they raise challenging matters impeding the clear demarcation of *acta imperii* from *acta gestionis*. Professor Ahmed El Kosheri has argued in the past that they are different from other contracts that states enter into. The concept of *contrat administratif* in Egypt is important. In the past, one may argue that oil concessions were unfavourable to MENA governments and that oil concessions by their nature raise concerns of public policy, which in turn is related to sovereignty.⁹³⁸ Since any large-scale investment venture, particularly one involving major State resources such as mineral and petroleum resources, may have bearing on matters related to the public policy of a nation, this line of reasoning is not valid to the use of sovereign immunity as a defence. A commercial venture entered into by a State can always be said to have elements of public policy by virtue of the nature of

immunity from suit, whereas in the latter case of acts *jure gestionis*, which includes the conclusion of a commercial transaction with a private party, the State cannot claim immunity from suit. This distinction is known as the doctrine of restricted immunity.'

⁹³⁷ Ibid 372–3: 'Furthermore, the Court could have referred to its own – correct – reasoning that it had jurisdiction over Libya. In respect of this question the Court had held on the basis of the United States Foreign Sovereign Immunities Act of 1976 that where Libya has agreed to arbitrate in another country, this constituted an implicit waiver of sovereign immunity. If the agreement to arbitrate constitutes a waiver of immunity, the logical conclusion would have been to hold that the agreement to arbitrate should also be honoured.' It follows then that the agreement to arbitrate waives immunity, meaning that the State is responsible for any judgement enforced upon it as a result of the outcome of an arbitration in which it is a losing party.

⁹³⁸ Qurashi, See above n 618, 261–300. 2005, 264. 'Nationalisation of petroleum resources, including the famous 1982 AMINOIL award, were considered a legitimate exercise of sovereign power unfettered by the presence of a contractual stabilization clause embodied in the petroleum agreement. The protection against unilateral revocation or modification of the contract by the state through stabilization clauses is far from a satisfactory solution. Hence, an investor should not rely solely on the protection of clauses the efficacy of which is doubtful.'

the actor. This argument is *non sequitur* in that public policy is still a separate doctrine from sovereign immunity. Entering into a commercial contract for commercial reasons ought to be the threshold test for the application of the plea of sovereign immunity. The nature of the contract or concession itself, including any matters that it raises, should be evaluated, not the actors or parties to the contract. Insight into the Egyptian definition of *commercial*, which is comprehensive and reflects how the Egyptian government conceives the doctrine of a commercial act can be found at its own law:

In defining when arbitration is considered ‘commercial’ the Egyptian legislature followed the Model Law, note 2, that the term should be given a wide interpretation. Article 2 of the Arbitration Law stipulates that: ‘Arbitration is commercial within the scope of this Law if the dispute arose over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, in particular, the supply of commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, tourist and other licenses, technology transfer, investment and development contracts, banking, insurance and transport operations, exploration and extraction of natural wealth, energy supply, the laying of gas or oil pipelines, the building of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the establishment of nuclear reactors.’⁹³⁹

All of these are considered commercial acts. As found at case law, when the same government that enacted this legislation engaged in these acts, it then turned around and attempted to construe its commercial acts as being acts of State. More interesting is the construction of the term *commercial*, that it ‘should be given a wide interpretation’. In fact, it is given a narrow scope for the opposite is usually what happens. One cause is a

⁹³⁹ See above n 242, 29–30.

due to the construction at civil law of administrative contracts as distinct from commercial contracts.⁹⁴⁰ The sole distinction is that the State is the actor in an administrative contract even if the act is commercial. This needs to be reformed. In Egypt, ‘Law 9 of 1997, adding the following paragraph to Article 1 of the Arbitration Law: “in regard to administrative contract disputes, the arbitration agreement shall have the approval of the concerned minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorised therefore”’,⁹⁴¹ places the arbitration agreement in the hands of the government rather than an arbitral tribunal. This serves to undermine the arbitration clause and arbitral tribunal competence in investor–State arbitrations. This matter is more closely scrutinised in the discussion of *Arab Republic of Egypt v Southern Pacific Properties, Ltd. et al.*

(e) *Immunity from Execution As Distinct from Jurisdictional Immunity*

The previous section addressed the matter of jurisdictional immunity.⁹⁴² This section addresses immunity from execution.⁹⁴³ Immunity from execution stands as a barrier to

⁹⁴⁰ A M S Wahab, *An overview of the Egyptian legal system and legal research*. Globalex, <www.nyulawglobal.org/globalex/Egypt.htm>, retrieved 31/10/2009, published October 2006, ‘It is worth noting that the classical dichotomy of public and private law has resulted in the crystallisation of a separate set of legal rules applicable to transactions involving the state (or any of its institutions, subsidiaries, or state-owned enterprises) acting as a sovereign power. This entailed the establishment of the Egyptian Council of State (Conseil d’Etat), which are administrative courts vested with the power to decide over administrative disputes pertaining to administrative contracts and administrative decrees issued by government officials. These courts apply administrative legal rules, which are not entirely codified, and hence the scope of judicial discretion, in so far as no applicable legislative rule exists, is ample in consideration of the established precedence laid by the supreme courts.’

⁹⁴¹ See above n 939, 28.

⁹⁴² See above n 351, 474: ‘there is a wide-ranging consensus that state immunity from suit does not apply to commercial activities (ie *acts jure gestionis*), as opposed to purely governmental activities (ie *acts jure imperii*), to which immunity applies.’

⁹⁴³ Ibid: ‘Two forms of state immunity are relevant to international arbitration: jurisdictional immunity and immunity from execution.’

enforcement of the award in practical terms of obtaining the assets to fulfil the award.

Thus:

State immunity, also known as sovereign immunity, may constitute a defence in a court action to enforce an award against (1) a state or state entity or (2) a private corporation (i) wholly owned by a state or (ii) in which the state is a majority shareholder. The New York Convention is silent about state immunity. The principle may enable a state that is a party to an international arbitration to claim immunity from the enforcement powers of another state.⁹⁴⁴

There is a problem with the gap in extant international conventions and case law in civil law countries has in fact been deciding in this lacunae.⁹⁴⁵ However, not all states decide similarly and in the MENA the silence of the New York Convention⁹⁴⁶ is arguably a problem. Moreover, immunity against execution is not covered by the UNCITRAL Model Law or ICSID regimes. There is a significant gap in the law. Indeed, common law countries decide differently: ‘Justice Aikens’ treatment of section 14(4) of the UK State Immunity Act 1978 in *AIG Capital Partners Inc v Kazakhstan* is also noteworthy. That provision states that the property of a foreign state’s central bank is immune from enforcement in English courts.’⁹⁴⁷ Scholars recommend that: ‘To be absolutely sure that a state is not immune from the enforcement or execution of an arbitral award, an express

⁹⁴⁴ Ibid 473.

⁹⁴⁵ Ibid 475: ‘In France, the *Cour de Cassation* in *Creighton v Qatar* held that a state’s acceptance of arbitral rules that stipulate something similar to Article 28 (6) of the ICC Rules is sufficient to waive both immunity from jurisdiction and immunity from execution.’ *Creighton Ltd (Cayman Islands) v Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar*, 6 July 2000, 127 (4) JDI (Clunet) 1054 (2000), *Cour de Cassation*, 1ere Ch Civ; (2000) XXV Yearbook of Commercial Arbitration, 458.

⁹⁴⁶ See above n 177.

⁹⁴⁷ See above n 351, 476. *AIG Capital Partners, Inc v Kazakhstan* [2005] EWHC 2239; [2006] All ER [Comm] 11 English High Court.

waiver of a state's immunity from execution should be included in the arbitration agreement.⁹⁴⁸ The author submits that this is an inadequate and temporary solution that fails to address the inconsistencies in the law and practice of international arbitration law. A legal provision must be made to this end. Immunity from execution ought to be treated in the same manner as jurisdictional immunity in which: 'In international arbitration, a waiver of a state's immunity from the supervisory jurisdiction of the courts at the seat of arbitration may be implied from the state's agreement to arbitrate'.⁹⁴⁹ This ought to be the standard. Immunity from execution undermines the merits of the agreement to arbitrate as well as final enforcement. As the author has submitted throughout this thesis, an arbitration proceeding is carried out with the ultimate goal of finality and most awards provide for damages by way of monies paid as compensation to the losing party by the breaching party. Immunity from execution is in opposition to the entire spirit of enforcement of arbitral tribunal awards. Essentially the separability doctrine does not apply to immunity from execution: 'On the other hand, taking into account the importance attached to sovereign immunity, it is questionable whether by entering into an arbitration agreement a state party intends to waive its immunity for proceedings everywhere in the world.'⁹⁵⁰ In fact, the seriousness of the problem to investors needs to be elucidated: 'The fact that a state cannot claim immunity from jurisdiction does not necessarily mean that the state is not immune from the actual execution of the award. In most laws the exceptions to immunity from execution are narrower than the exceptions to immunity from jurisdiction.'⁹⁵¹ In legal scholarship execution is considered an intensive

⁹⁴⁸ Ibid.

⁹⁴⁹ Ibid 474.

⁹⁵⁰ See above n 363, 747.

⁹⁵¹ Ibid 750.

interference with state rights.⁹⁵² Further, ‘there is often the fear that generous execution of awards will prevent foreign states from contracting since their property will be amenable to measure of execution.’⁹⁵³ Therefore the matter of immunity from execution is far from settled and remains a matter of serious adjudicatory risk.⁹⁵⁴ Legal scholars refer to the principle of *pacta sunt servanda* as a guide to enforcing waivers of immunity from execution because it is implicit in Article 54 of the ICSID Convention.⁹⁵⁵ The author agrees. However, this is immediately contradicted by Article 55 of the ICSID Convention which allows immunity from execution.⁹⁵⁶ This contradiction has serious implications for arbitral award enforcement.

2 Common Law

(a) *Arab Republic of Egypt v Southern Pacific Properties, LTD et al (hereinafter ‘SPP’)*

The author submits that the French Cour de Cassation decision on SPP supports immunity from execution by denying the jurisdiction of the tribunal and denying Egypt’s payment to SPP. This is a dangerous precedent. Although other cases⁹⁵⁷ correct this the

⁹⁵² Ibid.

⁹⁵³ Ibid.

⁹⁵⁴ Ibid 751: ‘Contrary to the position concerning immunity from jurisdiction, arbitration agreements are not in themselves considered to be a waiver of immunity from execution. Until recently only a few authors have voiced support for such an interpretation of the arbitration agreement although there might be good reason to do so.’

⁹⁵⁵ Ibid: ‘Art 54 ICSID Convention provides that by entering into an arbitration agreement the state also undertakes to honour the award. Therefore the principle of *pacta sunt servanda* should prevent a state from relying on its sovereign immunity to avoid commitments entered into freely and intentionally.’

⁹⁵⁶ Ibid: Art 55, The Washington Convention.

⁹⁵⁷ Ibid 752: ‘The decision of the French Cour de Cassation in *Creighton v Qatar* has given support for a double waiver of immunity.’ *Creighton Ltd (Cayman Islands) v Minister of Finance and Minister of*

problem is unsettled.⁹⁵⁸ The rule ought to be that agreement to arbitrate implies waiver of jurisdictional immunity and waiver of immunity of execution.

The importance of this case is chosen on the basis of the following consideration: ‘Philippe Kahn, in his parallel French report, rightly emphasizes the foundational role of the ICSID Convention and the first ICSID Cases, particularly *SPP v. Egypt* and *AAPL v. Sri Lanka*’.⁹⁵⁹ *SPP* is important because it further opened the door to increased competence⁹⁶⁰ of the arbitral tribunal, weakened sovereign immunity and strengthened arbitrability and the consent to arbitrate.⁹⁶¹ For example,

The potential of this casual suggestion started to emerge when the seminal landmark case *SPP v Egypt* tribunal read direct, immediate “consent” into an Egyptian law and considered the “arbitration agreement” by way of a simple communication by the investor.⁹⁶² This was not an inevitable conclusion.⁹⁶³

Internal Affairs and Agriculture of the Government of the State of Qatar, 6 July 2000, 127 (4) JDI (Clunet) 1054 (2000), Cour de Cassation, 1^{re} Ch Civ; (2000) XXV Yearbook of Commercial Arbitration, 458.

⁹⁵⁸ See above n 363, 752: ‘It is doubtful whether other countries will follow that decision.’

⁹⁵⁹ See above n 434, 48.

⁹⁶⁰ *Ibid*, pp 57–8: ‘Many investment laws, treaties and official statements had favourable sounding references to international arbitration which rapidly turned into bitter jurisdictional challenges once a real dispute approached on the horizon. I would doubt that the Egyptian officials and draftsmen involved ever suspected that they were creating a way to sue them internationally without a specific arbitration agreement. What before had been to politicians and public relations people a harmless statement without much consequence turned, now into a very serious legal commitment subject to bitter jurisdictional challenges. Egypt then, as most Governments thereafter, contested vividly the interpretation that a “good will” statement should be read as an “offer”, ie the main step towards a legal commitment.’

⁹⁶¹ *Ibid*, 57: ‘Under the “first generation” of investment arbitration, the arbitration paradigm was respected: ICSID arbitration required as any arbitration, a specific agreement of the parties to submit a particular dispute or future disputes. But this adherence to the commercial arbitration started to become looser. Already in the drafting of the ICSID Convention, some references were made suggesting a splitting of the “offer” and “consent” which together make up an agreement; a suggestion then raised was that the “offer” could be, for example, in a national investment code. I would be surprised if Mr. Broches who made that suggestion or any of the delegates ever imagined that the arbitral jurisdiction by treaty – rather than by specific arbitration agreement – would by 2005 become the most frequent jurisdictional foundation for investment arbitration.’

⁹⁶² *Ibid*, pp 57–8: ‘*SPP v Egypt* could have read the Egyptian statute as nothing more than what Governments were much more easily ready to say – ie that they had no objection in expressing in non-committing ways a “preference” for arbitration, but that they did not want to get by such general statements

The nexus of the provisions of a BIT with national law leads to unforeseen precedent. The danger of this is that it invokes sovereign immunity and leads to jurisdictional challenges of arbitral tribunal competence. Yet, in the interests of fairness, it puts the State at an unfair disadvantage, which, realistically, will cause the State to react in a manner that may increase adjudicatory risk.⁹⁶⁴ Although there is a separate chapter on the doctrine of competence in this thesis, it shall be discussed insofar as it relates to sovereign immunity. A HICALC properly mitigates the challenges to competence when national law and bilateral treaty provisions, both tools as the disposal of the State, threaten to undermine arbitral tribunal jurisdiction.

Further pursuant to this line of reasoning, Wetter analyses the question of the doctrine of sovereign immunity and act of State/sovereignty may be effectively used by a State or State owned entity as a bar to arbitral award jurisdiction even in the presence of a valid arbitration agreement.⁹⁶⁵ He cites four notable cases⁹⁶⁶ in which the invocation of the pleas of sovereign immunity were rejected but each for different grounds. The fact that the pleas were rejected based on different grounds reflects several intuitive ideas.

into a quite serious legal commitment; a real commitment to arbitration should, in this view, require a specific arbitration agreement signed by the competent officials of both the state and the company, in one single document – as was the standard practice both in commercial arbitration and the contract-based state-investor arbitration cases known until that date.’

⁹⁶³ Ibid, 57.

⁹⁶⁴ Ibid, 58: ‘Borzu Sabahi points out, in a comment, that the Egyptian Government changed its investment law to protect itself against similar suits. See Paulsson, “Arbitration without privity”, in Walde T (ed), *The Energy Charter Treaty*, 1996.’

⁹⁶⁵ G J Wetter, ‘Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals’ in *Journal of international arbitration*, Vol 2, No 1 (1985), 7–20, 7.

⁹⁶⁶ Ibid: ICC Case 1803, *Société de Grands Travaux de Marseille (France) v East Pakistan Industrial Development Corporation*, ICC Case 2321, *Solel Boneh International Ltd. (Israel) and Water Resources Development International (Israel) v the Republic of Uganda and National Housing and Construction Corporation of Uganda*, ICC Case 3493, *SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH)*, and ICC Case 3879, *Westland Helicopters Limited v Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*.

The judges intuitively sensed that the plea was inappropriate and had to search for judicial justification backing up their initial reaction. Concurrently, the fact that different grounds were used reflects the lack of uniform interpretation or limits to the scope of the doctrine of sovereign immunity.⁹⁶⁷ Two of these cases are discussed below.

(b) *Societe de Grands Travaux de Marseille (France) v East Pakistan Industrial Development Corporation*, ICC Case 1803

In *Société de Grands Travaux de Marseille (France)*, the plea of sovereign immunity was found inadmissible.⁹⁶⁸ The arbitrator maintained, *inter alia*, that immunity is not an absolute principle.⁹⁶⁹ The arbitrator then determined that Bangladesh was acting *jure gestionis*.⁹⁷⁰

(c) *Solel Boneh International LTD. (Israel) and Water Resources Development International (Israel) v The Republic of Uganda and National Housing and Construction Corporation of Uganda*, ICC Case 2321

In *Solel Boneh International Ltd. (Israel) and Water Resources Development International (Israel)*, the arbitrator refused to allow public international law principles

⁹⁶⁷ Ibid.

⁹⁶⁸ Ibid 8, 'The arbitrator considered the question whether the principle of sovereign immunity "disabled" him from granting leave to the claimant to join the People's Republic of Bangladesh as a defendant in the proceedings before him (on the ground of it being the universal successor to the dependant).'

⁹⁶⁹ Wetter, see above 965, 8, '[A]s a matter of law, that, according to the case law of the Swiss Federal Court, the principle of the immunity of foreign States from legal process is not an absolute rule of general application. The Federal Court draws a distinction between the foreign state acting as a sovereign (*jure imperii*) or as a subject of a private right (*jure gestionis*). Only in the first case can it invoke the principle of immunity from process. In the second case the foreign state can be sued before the Swiss Courts; even execution can be levied against it.'

⁹⁷⁰ Ibid 8.

(sovereign immunity), to apply to an investor–State contract,⁹⁷¹ rejecting the plea of sovereign immunity.⁹⁷² The arbitrator argues that (1) statutory law exists regarding the position of a sovereign State as a defendant (2) the agreement between the parties should be the source of law (3) in the event of a lacunae, ‘customary’ law as the source of law should be the guide (4) the immunity doctrine is not applied uniformly (5) immunity means that states *res jure imperii* are not allowed to sue each other, or their agents (6) the doctrine can only apply to states vis-à-vis states.⁹⁷³ Wetter maintains that the distinction between acts *iure gestionis* and *iure imperii* is irrelevant in the context.⁹⁷⁴ This may be true insofar as arbitral tribunals consider the pleas of sovereign immunity that appear before them, but many arbitral awards are set aside by national courts on the basis of either sovereign immunity, or its Janus twin, public policy. The ensuing discussion on the distinction between a commercial act and an act of state is important in informing a HICALC.

(d) *Radio Corporation of America v China*⁹⁷⁵

The major obstacle to the enforceability of oil concession awards is the exception of *ordre public*, which can be invoked to nullify a contract or cause its award to be set aside. In *Radio Corporation of America v China*: ‘It is a correct rule known and recognised at common law as in international law, that any restriction of a contracting government’s right must be effected in a clear and distinct manner. Contracts affecting

⁹⁷¹ Ibid 9, ‘Sovereign immunity may operate as a bar to the exercise of jurisdiction or prevent enforcement measures but does not per se interfere with the legal relationship between the parties as defined in a contract or otherwise. Such a view has ample support both in common law (The El Condado no 23 B.I.L.C. (1939 S.C.) 413 p 430) and Swedish law (The Toomas no 1, and 2 H 1944 p 266 An. Dig. 1943–45 p 61, 112).’

⁹⁷² Ibid 9.

⁹⁷³ Ibid 10.

⁹⁷⁴ Ibid 15.

⁹⁷⁵ *Radio Corporation of America v China* (1941) 8 ILR 26 Permanent Court of Arbitration, The Hague

the public interest are to be construed liberally in favour of the public'.⁹⁷⁶ The problem with this general and vague rule is the inability to define what is in favour of the public. Indeed, what is at times in favour of the public can end up being against the interests of the government.⁹⁷⁷ The effective use of oil concession and foreign investment contract arbitrations between MENA and European seats can therefore further diplomatic relations and increased economic development may be brought about by a harmonised ICA law that standardises the scope of sovereign immunity.

SPP is important because it influenced arbitral tribunal decisions and therefore the law. This is further proof of the aforementioned thesis by learned scholars that arbitration tribunals, by way of the parties and their learned counsel can change the direction of treaty interpretation.⁹⁷⁸ The implication of this to the theory and practice of ICA and IIA cannot be taken lightly. In this sense as well, a tribunal decision functions much like a court ruling in setting precedent, as is the custom at common law.

Public policy or sovereign immunity, which are at times conflated, is given as an example of political and adjudicatory risk in the case of the *Arab Republic of Egypt v*

⁹⁷⁶ S Toriguian, *Legal aspects of oil concessions in the Middle East*, (Hamaskaine Press, 1972) 43.

⁹⁷⁷ Ibid 44, 'In other words, limitations on sovereignty will not be presumed and shall not be recognised unless expressly stipulated, and the provisions of a concessionary agreement concerned with a public interest shall be interpreted in favour of the public whose interest is represented by the government. This view forms the core of the continental systems of administrative law. It is interesting to note that the arbitrators involved in the above case were lawyers trained in the French administrative law tradition, whilst the arbitrators in the previous case mentioned above, where a strict state liability view was enunciated and adopted, had a Common law background.'

⁹⁷⁸ See above n 434, 58: 'With the legal revolution the *SPP v Egypt* case introduced (and we can only appreciate now the seminal role of that case for modern investment arbitration) the door was open to further drafting and doctrinal experimentation. The most important one was to draft treaties in a way that the text reasonably clearly indicated that the government did more than just emit friendly public relations noises, but actually committed oneself. This seems to have been pioneered by French, US and UK Bilateral Investment Treaties (BITs) since the late 1970s. We do not know if this drafting change was related to the *SPP v Egypt* jurisdictional award of 1995, but presumably the idea casually raised by Aaron Broches in the early 1960s must have been fermenting since then and had reached the BIT negotiators at least in the early 1980s.'

*Southern Pacific Properties, Ltd. et al.*⁹⁷⁹ This case is a clear demonstration of why arbitrations must be held legally binding, why arbitral tribunal competence must have broader jurisdiction over properly conducted arbitration hearings, why the plea of public policy must be narrowly construed and why a harmonised ICA law can solve the dilemma foreign investors encounter as a result of appeals of awards that should be enforced. In the case of the *Arab Republic of Egypt v Southern Pacific Properties, Ltd. et al.*, it is interesting to note how Egypt decided that the contract implicated *part of the public domain* only after the signing of a foreign investment contract. Yet, the historical standing of the pyramids at Giza meant they were already considered related to the public domain. Of further consideration is that a State agent's authority was rescinded in consideration of the signed contract. It is noteworthy that there was a valid arbitration agreement. Further consideration of the facts is necessary: the cancellation of the project, the nullification of the contract, the award to the claimant. The Egyptian government appealed to the French Court of Appeals of Paris held in the same city as the Seat of arbitration, the ICC Court of Arbitration. Yet, the outcome holds the most interest: because the Egyptian government claimed there was no arbitration agreement and that it did not enter into this contract (because the State agent had no authority), the French Court of Cassation upheld the decision of the Paris Court of Appeals, based on the dual

⁹⁷⁹ Sornarajah, see above n 387, 259–60, 'In *SPP v Egypt*, the project for constructing a tourist complex in pursuance of a contract between SPP Ltd and the Egyptian General Company for Tourism and Hotels (EGOTH) was interrupted by political opposition to the project. The government intervened, rescinding the contract, and the subsequent arbitration implicated both the state tourist agency and the government. The political storm created by the project and the subsequent governmental intervention were both beyond the control of the tourist agency. The tribunal, though it conceded this point, took the view that the tourist agency and the government could not be separated.' Refer to *SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Ltd, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH)*.

Egyptian government claims.⁹⁸⁰ The dissenting opinion of the tribunal provides a reasonable explanation for the events that transpired and is examined more closely below.

This outcome raises several critical questions: was there an arbitration agreement? Is the Egyptian government a party to a contract by proxy through a government minister? Does 'public domain' serve as a valid reason for nullification?⁹⁸¹ Should arbitrations be legally binding or subject to appeal? In the case of the public domain, another hotel/tourist complex, the MENA-Oberoi including a highway having been built near the Giza plateau. Being part of the public domain did not stop these projects.

According to the facts of the case,⁹⁸² 'On September 23, 1974, Southern Pacific Properties, Ltd. (SSP), a company organized and headquartered in Hong Kong, entered into an investment agreement with the Egyptian Minister of Tourism, who was representing the Arab Republic of Egypt (ARE), and the Egyptian General Organization for Tourism and Hotels (EGOTH), an Egyptian State-owned corporation'.⁹⁸³ Generally, a State or a government as an abstract entity is composed of elected or nominated individuals assigned with particular tasks regarding the legal, political and administrative functions of the needs of the State.⁹⁸⁴ A Minister of Tourism, unless acting as an

⁹⁸⁰ Ibid, 260, 'Throughout the arbitration, the Egyptian government maintained that it was not a party to the contract. The Paris Court of Appeal upheld the challenge to the jurisdiction of the arbitration tribunal. This could be regarded as rejection of the general thesis of the *nexus* between a state agency and the government which pervades the tribunal's award. The inference is therefore permissible that the tribunal's failure to apply the *force majeure* principle, on the basis of the link between the state agency and the government, without some objective evidence of control, was incorrect. The incident provides an illustration of how changed circumstances could justify recession or renegotiation of the original contract.'

⁹⁸¹ Ibid, 260.

⁹⁸² Refer to *Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt* (Case No ARB/84/3) Award on the Merits.

⁹⁸³ R August, *International Business Law. Texts, Cases, and Readings*, (Pearson Education, 2004, 4th ed) at 250.

⁹⁸⁴ Sornarajah, see above n 387, 260, the tribunal maintained: 'On the facts, there can be little doubt that the events of May/June 1978 were beyond EGO.T.H.'s reasonable powers of control. If it was a decision taken

individual and conducting a sales transaction for his own personal benefit, is most likely an agent of the State or representative. He must not be construed as acting independently. The nature of the Minister of Tourism's role as a State representative is written out in detail in the contract in specifying that he was to 'supply the roads and other infrastructural elements necessary to make the sites accessible'.⁹⁸⁵ A supplemental agreement was drafted, 'including a statutory provision that put the tourist complexes and their development under the supervision of the Minister of Tourism'. Pursuant to said supplemental agreement was a signed 'statement' that spelled out the terms⁹⁸⁶ of the contract in terms of its legality: 'In addition, a "statement" signed by the two parties (EGOTH and SPP) was attached. This said that EGOTH's obligations under the agreements were contingent on receipt of all necessary government approval and of satisfactory results from a feasibility study'.⁹⁸⁷ Indeed,

State-owned companies or organizations have attempted to rely on acts of their governments as exonerating them from liability under *force majeure* provisions or otherwise, and in such a context have sought to deny the right of international arbitral tribunals to inquire into the motives of the act and the legal inter-relationship between the

at the highest levels of State on a matter simply as one of *force majeure*, we would be faced with the difficult question of whether the extremely close connection between EGO.T.H. and the government, exemplified by the fact that EGO.T.H. was at all times under the control of the relevant minister, permits the doctrine of *force majeure* to be applicable.' The tribunal clearly considered that it was the government that entered into the contract and that it was the government that nullified it. Any further ruling denying these facts is baffling.

⁹⁸⁵ Ibid, 250.

⁹⁸⁶ Ibid, 17, '... the December Agreement contained no element of ambiguity whereby the Government, in becoming a party to it, could have reasonably doubted as to its being bound by the arbitration clause contained therein.'

⁹⁸⁷ August, see above n 983, 250.

State and such State owned company or organization. It is submitted that such pleas must be equally fair.⁹⁸⁸

EGOTH was able to withdraw from the contract on account of an act of parliament. The French Court of Cassation's ruling for the Egyptian government, de facto nullified EGOTH's obligation to the investor, whilst it simultaneously denied EGOTH was acting on behalf of the Egyptian government. The justification of legislative powers overriding the contract may be construed as falling under *force majeure*, however, this was not invoked and in this case it is debatable in consideration of the fact that the same government that signed the contract dissolved it, albeit by an act of parliament. In regard to the question regarding the valid arbitration agreement:⁹⁸⁹ 'The Supplemental Agreement contained one final important provision (one that was not in the original three-party agreement): an arbitration clause'.⁹⁹⁰ With respect to the 'the Supplemental

⁹⁸⁸ Wetter, see above 965, 15.

⁹⁸⁹ Ibid 12, "May we only recall, as a summary conclusion, the recent opinion stated by *Delaume*, ["State Contracts and Transnational Arbitration", *Am. J. Int. Law*, 1981], 786: 'In the absence of an express waiver of immunity, the question arises whether submission to arbitration should be regarded as an implicit waiver of immunity. The overwhelming weight of authority calls for an affirmative answer. Decisions of arbitral tribunals, treaty and statutory provisions found in the European Immunity Convention, the SIA, and the FSIA, and the pronouncements of domestic courts, all concur that a state party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement.'" Furthermore, at 10, "In this connection it may be noted that the Washington Convention of 1965 to concerning the settlement of investment disputes in which Convention both Uganda, United Kingdom and Sweden have adhered, reflects the view that once the parties have agreed to arbitration as a method of settling disputes no plea of sovereign immunity could stop the arbitration proceedings. The issue whether the subject-matter of the present dispute is a matter *jure gestionis* or *jure imperii* has also been argued by the Parties on each side. From what I have said above it follows that this distinction is of no relevance once the parties have agreed upon arbitration." Additionally, at 12, "The view that an arbitration agreement constitutes an implicit waiver of sovereign immunity was again recently accepted by an eminent arbitral tribunal in ICC Case 3879, *Westland Helicopters Limited v. Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*. The arbitral tribunal, in an important interim award, rejected the plea of sovereign immunity for the following reasons: "... it is necessary to distinguish between immunity from jurisdiction and immunity from execution; only the former enters into consideration here. According to the view accepted in Switzerland, as elsewhere, the signing of an arbitration clause implies the waiver of this ground."

⁹⁹⁰ Sornarajah, see above n 387, 250.

Agreement signed and dated by both EGOH and SPP⁹⁹¹ and the ‘Minister of Tourism added the words “approved, agreed and ratified”, and then his signature’.⁹⁹² Thus the ‘supplemental agreement’ signed, was mutually agreed upon and further its provisions were honoured such that, ‘On that same day, December 12, 1974, the Egyptian Minister of Housing and Reconstruction told SPP that the *government* would indeed provide the roads and other infrastructural elements up to the boundaries of the sites’.⁹⁹³ Steps were taken to begin fulfilling the contract, ‘Subsequently, ETDC was incorporated, title to the land was transferred to it, the Minister of Tourism approved the master plan, the feasibility study was completed, financing was obtained, and construction was begun’.⁹⁹⁴

The tribunal found:

Egypt (the ‘Government’) had become a party to the relevant agreement (referred to as the ‘December Agreement’) and engaged its responsibility with respect to the performance of a number of obligations thereunder and had also become bound by the arbitration clause contained therein. The tribunal decided that the governing law of the December Agreement was the law of Egypt construed so as to include such principles of international law as may be applicable and that the national laws of Egypt can be relied upon only in as much as they do not contravene said principles.⁹⁹⁵

The government claimed canceling the hotel project was an act of State based on a legislative and executive nature. The tribunal interpreted this as a plea of sovereign immunity,⁹⁹⁶ according the following reasons, *inter alia*, ‘in the absence of an express

⁹⁹¹ Ibid.

⁹⁹² Ibid.

⁹⁹³ Ibid.

⁹⁹⁴ Ibid 250.

⁹⁹⁵ Wetter, see above 965, 10–11.

⁹⁹⁶ Ibid 11.

waiver of immunity, a submission by a State to arbitration should be regarded as an implicit waiver of immunity and that a State party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of an agreement'.⁹⁹⁷ When this plea is used to challenge a fair arbitral tribunal ruling to uphold a contract and the case goes to court, the same logic no longer applies before a national court. This is a primary reason for a uniform Arab arbitration law. Distinguished scholars have commented on this case and rightly argued for renegotiation.⁹⁹⁸ Had there been a HICALC code in place, the subsequent decisions following this case would have been consistent with a broad definition of public policy or at the least, a strong argument for *force majeure*. Yet, it is questionable policy that political opposition to any government constitutes a reason to negate a longstanding investment contract. If this were consistently applied across the board, it would set an undesirable precedent in which investment contracts elsewhere would be at risk of being nullified without adequate compensation to investors. This is not the way forward. A HICALC can ensure balance and fairness for both investors and states. The claims of SPP and the subsequent ICC decision are correct. In consideration of the heritage of the pyramids of value to the international community the contract could have been renegotiated to a location without encroaching on the Pyramids site, or a different plea could have been entered at the court calling for extenuating circumstances and stating explicitly that the award was contested

⁹⁹⁷ Ibid 14.

⁹⁹⁸ Ibid 250–51, '*SPP v Egypt* illustrates these points. Its facts may be recounted. A regime which was losing touch with its people entered into an agreement with a Hong Kong based subsidiary of an American company for building a tourist complex near the pyramids. Political opponents of the regime, sensing the growing unpopularity of the government, presented the project as an indication of the government's disregard of the cultural past of the Egyptian people and incited nationalist sentiments against the Sadat regime. The matter was debated in the Egyptian legislature and a decision to terminate the project was taken. The circumstances of the dispute illustrate the difficulties attendant on a state contract. Although an investor can hope to make handsome profits from such a project, the risks involved are also great.'

because of the environmental encroachment upon the site, thereby invoking *force majeure*, or a change in circumstances. Yet, the French Court of Cassation in disregarding the fact that a government representative did sign the contract in question and disregarding an extant arbitration agreement sets a dangerous precedent against the *res iudicata* of arbitral tribunal decisions, through the use of legal loopholes to set aside an arbitration award, whilst also maintaining a broad interpretation of the doctrine of sovereign immunity.

The implications of this case are grim. Precedent has been set whereby a court can nullify an agreement based on “non-existence” reasons, even when there are valid reasons to justify invalidating an award or contract and even when these valid reasons can be invoked. The inconsistency of the decision requires closer scrutiny as to why these loopholes were used, rather than the legitimate use of the plea of genuine transnational public policy. Environmental damage or encroachment of the Egyptian pyramids is considered a matter relevant to transnational public policy and not exclusively a matter of Egyptian domestic policy. The privileging of these two particular reasons sets unfavourable precedent for their use in the future in order to enable States to escape contracts and arbitration awards. Although other arbitral decisions may not have consequences with implications to transnational public policy considerations as the Pyramids arbitration did, they nonetheless have negative implications for investors. If public policy were invoked, then the precedent would have been based on allowing that to be a legitimate plea. The French Court of Cassation had an opportunity to engage the doctrine of *transnational public policy* since the Pyramids at Giza are part of the heritage of the international community. It was a matter of both *force majeure* and transnational

public policy. If the court explicitly referred to transnational public policy as the basis for its ruling it would have set a fine precedent, together with the groundwork in creating a proper legal definition and construction of transnational public policy. However it did not take the opportunity to do this and by ruling as it did without giving adequate reasons it contributed to unfavourable precedent in the matter of sovereign immunity. The implication of the court's decision made in accordance with undisclosed reasons essentially undermines the use of transnational public policy as a legitimate plea, especially as the dissenting opinion puts forth consideration of the existence of a secret contract which was in breach of domestic and transnational policy. It would be logical to assert that the secret contract was the one considered invalid by the Court of Cassation in consideration of an extant valid contract which was not entered into by the minister in question.

Scholars allude to the fact that public policy and State sovereignty are pleas that complicate simple commercial matters: 'In terms of form, it may outwardly so appear by being styled a legislative or executive act, but it may equally assume the shape of a private commercial transaction identical to one made by non-State subjects'.⁹⁹⁹ It is important to consider that 'to exempt from the scrutiny of international arbitral tribunals all acts of sovereignty would be tantamount to negating the binding character as such of international agreements to which states or State entities are privy'.¹⁰⁰⁰ To do so compromises the inherent value of ICA. It is conceivable that in the case of EGOTH, the French Court of Cassation made a clandestine public policy consideration. However, it is argued that the High Court, in reviewing the case, gave equal merit to the dissenting

⁹⁹⁹ Ibid 19.

¹⁰⁰⁰ Ibid.

arbitrator's opinion. The implication requires elucidation. If a High Court can so readily undermine an arbitral tribunal decision without being required to give a considered reasons. This compromises the legal provisions making ICA tribunal decision binding. Unless there are valid reasons why an arbitral tribunal decision is contested, the dissenting opinion cannot prevail. A High Court must give reasons. Transparency is not the only reason for this. The decisions of a High Court in any jurisdiction create binding precedent above and beyond those of an Appeals Court for that precise reason; they cannot be appealed. In consideration of the dissenting opinion, it is clear that without stating it, the French Court of Cassation determined its ruling and reasoning on the basis of public policy considerations requiring the award to be set aside. The construction of the public policy was in part related to sovereign immunity and in part related to force majeure as a result of parliamentary decisions. It was wholly a matter of domestic public policy when the situation more readily lent itself to being classified as a real example of a situation that would fall under transnational public policy. The complexity of this case demonstrates the importance of clear language and definitions as well as transparency in giving reasons for rulings.

3 *Islamic Law*

Islamic law limits State sovereignty in *acta iure gestionis*, such that, 'The great Muslim economist, Ibn Khaldun (1332–1406), warned against State intervention in economic activities, and stated that the main function of the State is regulatory'.¹⁰⁰¹ Court intervention in international arbitration, such as in the case of the UAE where it is

¹⁰⁰¹ El-Malik, see above n 400, 58. Further, 74, 'The role of the state under Islamic law, in economic life, is very restricted and is almost always confined to the regulatory side. There are many Islamic writers who regard the expanding economic role of the state in modern times as unhealthy and want the Islamic system to check this tendency.'

automatically applied goes against the spirit of Islamic law in this regard, and even when the New York Convention¹⁰⁰² is more flexible.

The prohibitions of the judiciary by the executive and the protection of investment at Islamic law, discussed in the section on public policy are also applicable to the waiver of sovereign immunity of jurisdiction and execution in cases in which the State has engaged in commercial acts because these tenets have direct bearing on the outcome of investment.

In regard to the matter of state sovereignty:

It is interesting to note that the Western doctrine of the immunity of the sovereign and the rules stemming from it as “the King can do no wrong” and “the King cannot be sued in his own courts” have never been universally accepted principles. In the Islamic legal system, for instance, “[t]he State as such does not enjoy anything that can be called a prerogative right in Islamic law. The very concept of sovereignty as Western thought understands it, is alien to Islamic law.” Muslims believe that the only true sovereign of the universe and all that it contains is God Almighty. In the Quran we read: Unto Allah belongeth the Sovereignty of the heavens and the earth and whatsoever is therein, and He is able to do all things.” No Muslim state can therefore claim absolute sovereignty as conceived of in the West.¹⁰⁰³

This thus applies to sovereignty of execution as well as jurisdictional sovereignty.

Article V of the HICALC Sovereign Immunity

- (a) Sovereign immunity must be interpreted narrowly.
- (b) The doctrine of sovereign immunity *shall not* apply to *actus gestionis*.

¹⁰⁰² See above n 177.

¹⁰⁰³ G Badr, *State Immunity: an Analytical and Prognostic View*, (Martinus Nijhoff Publishers, 1984) 75.

- (c) The definition of *acta gestionis* shall be given.
- (d) Immunity from jurisdiction *shall* not be separate from immunity from execution.
- (e) An agent of the State is legally acting on behalf of the State and as such *shall* be considered as having bound the State to the contract.
- (f) Commercial acts of a State (*acta gestionis*) *shall* be deemed as arbitrable.

F *Contributions And Gaps Of International Instruments And Uniform Laws
Towards A Uniform Arab Arbitration Law Or Hicalc*

This section provides a closer examination of the international instruments and uniform laws that have bearing on international arbitration. This analysis was taken with a view to the relative contributions and gaps of each of the instruments and how principles derived herefrom can guide the new law. The purpose of this section is to show where the instruments have gaps and to propose a new law that fills these gaps but also incorporates relevant principles from these extant instruments with the goal of addressing the distinctive and special features of the MENA legal climate.

1 *The Washington Convention of the International Centre for the Settlement of Investment Disputes (ICSID)* ¹⁰⁰⁴

The 1965 Washington Convention reflects harmonisation and standardisation in Investment Disputes. The intention of harmonisation is explicit in the preamble which states:

¹⁰⁰⁴ See above n 138 (Also referred to as the 1965 Convention.)

The Contracting States considering the need for international cooperation for economic development, and the role of private international investment therein; bearing in mind that disputes may arise in connection with such investment between Contracting States and nations of other Contracting States; recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases.¹⁰⁰⁵

The terms “international cooperation” and “international methods of settlement” reflect the founders’ understanding that an instrument that can transcend “national legal processes” is necessary. These terms lend to an implicit and explicit understanding that a harmonised or universal instrument is the way forward. Although the Washington Convention does not represent an actual harmonised law drawn from common denominators in different legal jurisdictions, it represents a universal legal instrument that has been accepted by the international community by way of member States who have signed and ratified it, similarly to the New York Convention. These instruments are forerunners of a HICALC. The aims of the HICALC are consistent with the aims enshrined in the preamble of the Washington Convention.¹⁰⁰⁶ The HICALC can operate as an instrument of regional cooperation that propounds an international method of settlement which transcends national legal processes, alongside extant instruments. The discussions in Section III dealing with public policy further elucidate the spirit of the aim of the Washington Convention.¹⁰⁰⁷ All the reforms suggested in this thesis follow the spirit of the intention of the drafters of international instruments such as the Washington

¹⁰⁰⁵ ‘Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’, Preamble, (International Centre for the Settlement of Investment Disputes, 1965)

¹⁰⁰⁶ See above n 138.

¹⁰⁰⁷ Ibid.

and New York Convention, and are true to the spirit of the UNCITRAL which has served as a template throughout the MENA and represents an *international* or *universally accepted* legal instrument that transcends national legal processes. The HICALC aims to reform the gaps in extant instruments in a manner that is appropriate to the MENA context. Due to the focus of the Washington Convention¹⁰⁰⁸ on investment disputes, this section applies to international investment arbitration, under the auspices of ICSID, which therefore invokes investor–State disputes. This section focuses on these types of disputes exclusively. Notwithstanding the aforementioned however, the author submits that the discussion regarding reforms to arbitrator nationality and region including bias has applicability to all forums of international arbitration proceedings, with a strong emphasis on Investor–State disputes. This is due to the history of the development of international arbitration law in favour of Western investors against developing States as clearly elucidated by the learned Sornarajah. Notwithstanding this fact, in any extant international arbitration dealing with a dispute arising from a contract, even one signed by commercial actors, the panel of arbitrators (in the event that there is more than one arbitrator) should also be different from the nationality (and region) or any of the parties on account of the problem of perceived or actual manifest bias. This point regarding bias has applicability to ICA. The real application of this rule banning same nationality would be in the following situation. Say an Arab commercial party (State) contracted with a western commercial private person. The panel of arbitrators had three arbitrators, say one from the UK, one from the Netherlands and one from France. As I have quoted in the thesis, this creates the impression of a block of western arbitrators and is reminiscent of colonialism. It is this type of situation that I am hoping to avoid as it goes into the matter

¹⁰⁰⁸ Ibid.

of perceived procedural unfairness. What this means is that it is as important that justice appear to be served as it actually is served. The impression of bias with such a composition will automatically raise very serious issues in an already sensitive situation. It is simply not true that someone from the same geographic region has a monopoly on the technical and practical matters of an arbitration proceeding. In fact, an arbitrator is chosen for their technical expertise in the industry whether construction, management, financial or agricultural disputes. I could arbitrate a proceeding in any country of the world that dealt with international management due to my practical experience of advising managers of international management practices that are beneficial to cross-cultural teams. I could do this with respect to a dispute that originated in Malaysia for example or in Russia due to the nature of the industry. The same applies to construction disputes. An experienced civil engineer would be well suited to arbitrate anywhere. It is well known in practice that arbitrators are chosen for their technical industry knowledge more than geographic knowledge.

The Washington Convention¹⁰⁰⁹ of the International Centre for the Settlement of Investment Disputes (ICSID) must be analysed in the nexus of the doctrine of bias and the aforementioned analysis of the history of ICA,¹⁰¹⁰ ie, the postcolonial approach. A more comprehensive¹⁰¹¹ analysis and innovative reading of the Washington Convention is in order. Of the Washington Convention's¹⁰¹² 75 articles, a mere six of those vast pages have direct relevance to the matters of essential substantive and procedural law problems

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ See above, n 694. This submission is an earlier version of this thesis that was published in Madrid Journal and for which it won a 6000 Euro prize and a prestigious award ceremony given at the real academia de jurisprudencia y legislación Madrid.

¹⁰¹¹ Ibid.

¹⁰¹² See above n 138.

pertaining to investor–State arbitrations, raised invariably by MENA governments (eg, competence.) The six articles of consideration for analysis here are articles 13, 14, 38, 39, 42 and 52. The Washington Convention¹⁰¹³ has gaps regarding legal provisions that have bearing on the procedural law of arbitrations. Article 13(1)¹⁰¹⁴ allows for the possibility of a composition of an arbitral panel of four members who may be nationals of the contracting State. In consideration of the complexities of arbitral tribunal dynamics, the danger of this non-regulation of nationality in the ICSID Convention¹⁰¹⁵ is paramount. Article 13(2)¹⁰¹⁶ sets out the prohibition of maintaining ten persons on a panel of the same nationality, just as it should be a similar requirement in the UNCITRAL (or HICALC). This should be extended from ‘nationality’ to ‘region’, especially in a case of *a block of ten* arbitrators. In other words, the standard must be set at a higher threshold so that the tribunal is not composed of members who are all from the same region. The reason for this must be understood from postcolonial discourse. The author submits that the historical legacy of colonialism has created a reaction (evidenced by disputes arising from ICSID arbitrations). The matter of colonialism in combination with the Crusades in the history of the MENA has direct bearing on this. It makes the negative impact of colonialism stronger. The reality of colonialism was not a matter of nationality *per se*, but more broadly of region. The historical record establishes that colonialism occurred by a grouping of nations, from a distinct region, in regard to another grouping of nations, from another distinct region, ie, it was predominantly the fact that it was European nations who colonised a number of African, Asian, Middle Eastern and Latin American nations. This

¹⁰¹³ Ibid.

¹⁰¹⁴ The full text of the Convention may be found at Yearbook of Commercial Arbitration, AJ van den Berg (ed), Vol XVI (1991) 683–703.

¹⁰¹⁵ See above n 138.

¹⁰¹⁶ See above n 1014.

fact needs to be highlighted. It was not a few nations within these regions that were colonised, but most of them. Indeed, the historical record proves that colonialism was a matter of regional colonisation by one region over one or more regions. To address the matter on the level of nationalism, from a postcolonial perspective, is inadequate. It denies the postcolonial legacy. It does not address the ongoing matters of apparent and manifest bias which are both a direct consequence of that legacy. The deeply entrenched colonial attitudes have not died out. The perception of the existence of colonial attitudes in the MENA, from the view of formerly colonised nations and regions remains. This is evidenced by anecdotal evidence including literature cited in this section. To deal with the problem of bias directly, it is necessary to remain sensitive to the sensibilities of the formerly colonised nations and regions and to change the provision dealing with nationality to the broader one of region. The matter of nationality is tied to bias in the sense that bias is seen as occurring when a large bloc of arbitrators from the same region, particularly a Western or former colonial region or nation, are on a panel, as in the case of three arbitrators or in the case of ICSID panels. The matters of bias, *post-colonialism* and the provisions on nationality must be seen together. Changing the appropriate Article in the ICSID Convention¹⁰¹⁷ and the UNCITRAL to provide for different regions would resolve this problem.

There is another important reason why nationality ought to be changed to region and this has to do with the nature of investment disputes:

Investment disputes differ in several respects from ordinary commercial disputes.

Frequently the amount in dispute is remarkable and the issues may have considerable

¹⁰¹⁷ See above n 138.

political implications. Disagreements often concern the objectives of the investment, the repatriation of revenues and the ultimate control and benefit of the investment. The investment may relate to vital infrastructure the completion of which is of significant importance for the national economy.¹⁰¹⁸

It is right to conclude thus: ‘These factors influence the conduct of the arbitration in various respects. In the composition of the tribunal the nationality of the arbitrators may become a more important issue than in ordinary commercial arbitrations.’¹⁰¹⁹

Article 14¹⁰²⁰ requires that a person serving on the panel has competence in the fields of law. In consideration of the fact that many investor–State arbitrations are held with MENA governments in which the *lex arbitrii* may be of a total or partial composition of Islamic law, it is doubtful that this condition is in reality fulfilled. The early oil concessions and many of the ICSID cases cited here attest to the dangers of having arbitrators who are unfamiliar with the *lex arbitrii*. Here, the author cautions investors and lawyers who draft and sign MENA contracts without arbitration clauses and without researching the *lex arbitrii*, or the procedural law of the Seat of arbitration and/or the domestic legal system. An arbitrator must have some expertise or understanding of the nature of the contract of the dispute at hand, for example, construction, engineering, management, farming techniques, *inter alia*, that have bearing on the technical reasons for the breach of the contract. Indeed, this is a common basis for the selection of one particular arbitrator over another. Competence in the fields of law is not necessarily the most important value. Yet, one of the reasons for the disastrous outcomes of the early oil

¹⁰¹⁸ See above n 363, 763.

¹⁰¹⁹ Ibid.

¹⁰²⁰ See above n 1014, 683–703.

concession arbitrations was the deficiency of legal competence of practitioners dealing with Islamic law. This deficiency in Islamic law competence as it has bearing on ICA and IIA is remedied through the HICALC. In the absence of the legally relevant competence, the author submits that an internationally competent arbitrator or an arbitrator with *diplomatic skills*¹⁰²¹ (even one versed in hybrid mediation–arbitration techniques) can be of higher value to the parties than one solely or exclusively versed in law (when it is different from the *lex arbitrii, inter alia*). Once again, the outcomes of the early oil concession arbitrations and the MENA ICSID arbitrations confirm this.

2 UNCITRAL

The influence of the UNCITRAL on the modern laws of arbitration in the MENA is vast. The existence of the UNCITRAL gives credence to the logical view that harmonisation is accepted, feasible, supportive of best practices and a contributor to higher award enforcement. The UNCITRAL has acted as a standardising and harmonising source of law for international arbitration law in the MENA through the UNCITRAL Model Law.¹⁰²² The author has reviewed the UNCITRAL thoroughly,

¹⁰²¹ The Director General of the Chartered Institute of Arbitrators, Michael Forbes-Smith, stated at an arbitration conference before the panel that his appointment was not in connection with having a law degree but to his having been a diplomat of the British Diplomatic Service. Asia–Pacific Conference, Chartered Institute of Arbitrators, Sydney, Australia, Sofitel Hotel, May 27–29, 2011.

¹⁰²² J Lookofsky, *The Harmonization of Private and Commercial Law: Towards a European Civil Code*, (Stockholm Institute for Scandinavian Law 1957–2009) Comment on the Symposium Organized by the Dutch Presidency of the European Union, the Hague, (Scheveningent), 27 February, 1997, at 119: ‘Promulgated under the auspices of the United Nations, the UNCITRAL Model Law of International Commercial Arbitration is one example of a successful paradigm which a number of countries around the world have elected to use as a basis [sic] the development of new and progressive domestic legislation. Another is the much-praised UNIDROIT *Principles of International Commercial Contracts* (1994). In some respects the model law method resembles harmonization by treaty. But since a model law is but a model, the legislative function remains in the hands of the *national* legislator. National laws are

particularly the articles making provision for international arbitration. As a result of the widespread implementation of the UNCITRAL, either as a result of full implementation, or modified articles of the UNCITRAL, its impact and influence is strong in the MENA. The author has found that there are areas in the UNCITRAL that require reform in the MENA context. Article 14 of the UNCITRAL requires that an arbitrator exercise independent judgement. In consideration of the fact of the complex and little-known dynamics of arbitration tribunals, including the pressure to be faithful to the appointing parties whilst not appearing biased against the other party, this clause is naive and does not address the nature of an arbitral tribunal dynamic nor does it seek to resolve the inherent complexities therein. Independent judgement, as perceived, is impossible. This raises the matter of bias again, although not necessarily bias related to colonial or postcolonial attitudes and reactions. Notwithstanding the well-known discussion by Dezalay, whose discussion of the negative perception of the nature of the pool of

harmonized *only to the extent* that individual states *elect* to follow the paradigm, ie, by adapting the model to the needs of the individual legal system concerned.’

With respect to the matter of harmonisation being widely accepted, the existence of the UNCITRAL, and the UNIDROIT, which is a harmonised/standardised law and the fact that it has been widely accepted, is proof that harmonisation as a concept is accepted. Further proof of this is in the widespread acceptance of instruments such as the New York Convention. Moreover, a number of journal articles and working papers attest to the feasibility of harmonisation: (1) Arthur S. Hartkamp, Modernisation and harmonisation of contract law: objectives, methods and scope, paper to be delivered at the Congress to celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law, Rome, 27-28 September 2002, on ‘Worldwide Harmonisation of Private Law and Regional Economic Cooperation’, The Hon Justice C.R. Einstein and Alexander Phipps, Trends in International Commercial Litigation Part II- The future of foreign judgement enforcement law, Supreme Court NSW, Lawlink, speech, Jose Angelo Estella Faria, Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?, Rev. Dr. Unif. 2009, Fabien Gelin, Peeking through the form of uniform law: international arbitration practice and legal harmonization, 2009, outlined in the Canadian report on arbitration prepared for the 1st thematic congress of the international academy of comparative law held at Mexico City on 13-15 November, 2008. Much of the information with respect to harmonisation is based on the widespread acceptability of harmonising instruments but not enough empirical studies have been carried out to show its impact beyond the empirical fact that it has led to better standards and improved predictability and thus suggests effective award enforcement. There is a dearth in the literature and in this respect my research fills an ever important gap by contributing cutting edge analytical reasoning with empirical evidence to support the already accepted claim that harmonisation is feasible and contributes to better practices of international arbitration as well as higher enforcement. This is included in the text of thesis in a footnote on page

arbitrators as an exclusive club,¹⁰²³ or as a mafia, is oft quoted at international arbitration conferences, the author submits that in consideration of the personal, cultural, and legal, *inter alia*, biases of any particular arbitrator, the absence of other legislation to safeguard against such potential biases is a danger. It is a danger for the arbitrator as much as it is a danger for the potential of actual or manifest bias occurring. This must be seen in consideration of historical occurrences and perception of bias and the absence of legislation to prevent bias; particularly as a result of the history of colonialism and its legacy, including the history of the Crusades and their legacies.

Article 38 provides that in the event that if after 90 days no tribunal has been constituted, the Chairman may appoint the arbitrators if they are not nationals of either party of the arbitration. This is the same problem with Article VI of the UNCITRAL. Restricting nationality is insufficient in consideration of the enormous historical and perceived political and regional biases. The scope of the restriction must be widened from nationality to region. Article 39 provides for a majority of non-nationals unless otherwise designated by agreement of the parties. Article 38 and 39 do not adequately address the matter of bias on the same grounds that Article VI of the UNCITRAL also fails to this end.

The UNCITRAL Arbitration Rules¹⁰²⁴ require closer study. Article V of the UNCITRAL allows for the appointing of arbitrators. Article V¹⁰²⁵ reads: ‘If the parties have not previously agreed on the number of arbitrators (ie one or three), and if within 15

¹⁰²³ See above n 610, 8.

¹⁰²⁴ The text of the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules of 1976 may be found on the UNCITRAL web page at http://www.uncitral.org/uncitral_texts/arbitration/1976arbitration_rules.html Retrieved 20 September 2010.

¹⁰²⁵ Ibid.

days after receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed'. In the first instance, it is the parties' responsibility to appoint arbitrators. In consideration of the prevalent concern of bias by Middle Eastern parties or arbitrators, this article allows them to select the number of arbitrators, however, whether it is one or three, is not sufficient to address the matter of bias. Although it is understood that arbitrators (like judges) must be free of bias and impartial, no individual human being can be free of personal or cultural biases, whether an arbitrator or a judge, and an amendment to this article, or an entirely new rule incorporated into a HICALC, to the effect that the sole arbitrator must be from a third region of the world that differs from either that of the European investor or the MENA State, or that of the three arbitrators, and that no more than one can represent one region of the world, should be drafted. The reason is because such an article would protect the arbitrators from the perception of bias and from bad faith allegations of bias. It may even protect them from manifest bias. In the event of the appointment of one arbitrator, Article VI (1) (a)¹⁰²⁶ allows for the nomination of the names of one or more persons, of whom one would be selected to serve as an arbitrator. However, in practical cases, this is not always feasible due to the potential unavailability of a selected arbitrator. In the event that Article VI (1) (a)¹⁰²⁷ is not fulfilled, Article VI (1) (b)¹⁰²⁸ allows the submission of a person or institution to serve as an appointing authority. Article VI (2)¹⁰²⁹ and articles VI (3) (a) (b) (c) (d)¹⁰³⁰ and Article VI (4)¹⁰³¹ of the

¹⁰²⁶ Ibid.

¹⁰²⁷ Ibid.

¹⁰²⁸ Ibid.

¹⁰²⁹ Ibid.

¹⁰³⁰ Ibid.

¹⁰³¹ Ibid.

UNCITRAL rules deal with the procedures for the appointment of the sole arbitrator, in the event of a non-agreement (Article II)¹⁰³² and according to a list-procedure of names (Article VI [a] – [d]) ;¹⁰³³ however, if the procedure cannot be fulfilled for any reason, the appointment is at the sole discretion of the appointing authority (Article VI [3] [d]),¹⁰³⁴ again leaving wide scope for potential bias or for the perception of bias. This article effectively removes the choice of arbitrators entirely from the hands of the parties or increases the possibility of one party exerting force or influence on another, or the possibility of the perception thereof. Article VII (1)¹⁰³⁵ provides that the two appointed arbitrators, in a case in which there are to be three, shall chose the third as the presiding arbitrator of the tribunal. Again, Article VII (1)¹⁰³⁶ removes the choice of the presiding arbitrator from the hands of the parties. Judicial review of arbitral awards should closely examine the choice of arbitrators. Future scholarly work should analyse if there is a direct correlation between arbitrators thus chosen (by means remote from the direct appointment by the parties themselves) and the outcome of the case, and if the cases were decided fairly; if the arbitral tribunal arrived at a decision that weighed the merits of the case of each party equally, or if there was a correlation (direct) with cases in which arbitrators chosen indirectly were more in favour of the party where the names of one of the list were those left over after all other names were crossed off (Article VI [3][b])¹⁰³⁷ Since both parties can cross off names this leaves names that are prioritised differently by the different parties. The ones selected will inherently reflect the bias (conscious or

¹⁰³² Ibid.

¹⁰³³ Ibid.

¹⁰³⁴ Ibid.

¹⁰³⁵ Ibid.

¹⁰³⁶ Ibid.

¹⁰³⁷ Ibid.

otherwise) of the appointing authority who appointed the arbitrator(s) (Article VI [1] [b])¹⁰³⁸ as a list of names, since the existence of an appointing authority means no sole arbitrator was selected. This is the reason for an appointing authority. Article VI (4)¹⁰³⁹ ‘advises’ the appointing authority to ‘have regard to such considerations as are unlikely to secure the appointment of an independent and impartial arbitrator and shall take into account also the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties’.¹⁰⁴⁰ Once again, the matter of postcolonial perceptions on the part of a member of a formerly colonised region or nation may not be foremost in the mind of an arbitrator who is not aware of these sensibilities. In the hegemonic discourse of intercultural relations- it is the weaker party that is more aware of the power dynamic against it- as there are natural human defence mechanisms that prevent the party with more power from fully realising how that power is perceived and construed. It takes a sensitive person to understand the concerns of a weaker party- particularly in consideration of historical political hegemonic dynamics such as those of colonialism and the Crusade and their legacy. It should be a clear injunction and enshrined in the rules that the arbitrator must not only be of ‘a nationality other than the nationalities of the parties’, but beyond this, that an arbitrator must not be from a region of the world as that of another arbitrator¹⁰⁴¹ and possibly must even be from a region of a legal and cultural

¹⁰³⁸ Ibid.

¹⁰³⁹ Ibid.

¹⁰⁴⁰ Garnett, see above n 385, 167.

¹⁰⁴¹ Saleh, see above n 237, 120-122. ‘The recurring Western arbitral majority vote is seen as securing international awards in favour of the Western party. In this respect the problem has been freely expounded in a paper by a distinguished Syrian lawyer in front of an Arabic-speaking audience. In this paper, which purports to describe the common plight of Arab countries with regard to international arbitration, elaborates in fact specifically Syrian grievances. The basic ideas laid down in the paper may be summed up as follows: (i) The majority for making an international award is generally a Western majority: the chairman is appointed by international arbitral institutions and at least one arbitrator is appointed by a non-Arab party. Thus, both chairman and at least one co-arbitrator are non-Arab. (ii) Very few Arab arbitrators have

tradition distinct from the other arbitrators that differs vastly from, and has no political agendas or public policy considerations closely to either of the other arbitrators¹⁰⁴² or parties.¹⁰⁴³ This again is derived from an understanding of the double legacy of colonialism and the Crusades on the perceptions of people from developing nations, which were in most cases the nations that were colonised. (The element of the Crusades strengthens this argument as it applies to the MENA more than to any other developing

been involved in international arbitration. (iii) The application of Arab laws is generally avoided. (iv) In view of (i), (ii), and (iii), a proposed remedy is submitted: in order to safeguard Arab interests affected by a recurring Western majority, the chairman of an international arbitral tribunal should not be authorized to determine a dispute according to a law in which he is not conversant, ie a law which does not belong to his own legal system. In other words, an adjustment between the nationality of the chairman of an arbitral tribunal and the applicable law would allow the chairman to competently deal with and apply his own law, thus securing, *inter alia*, the appointment of an Arab chairman when an Arab law is applicable. Whilst the observations made under (i), (ii), (iii) are correct, it is submitted that the proposed remedy under (iv) seems to be unrealistic, arguable for the following reasons: (i) The Western majority as described by the distinguished Syrian lawyer derives from a preconceived idea that there is a systematic Western solidarity of the same sustained virulence as the Arab regional solidarity. (ii) The proposed remedy would, in practice, replace a Western majority by an Arab minority, which in its growing current of political bitterness would lose the chance of being independent and impartial. (iii) Moreover, the independence and impartiality of arbitrators do not necessarily derive from a given language and a given legal culture and there is no reason to systematically trust or distrust an arbitrator on the grounds of his nationality. In addition, retaining the criteria of applicable law for selecting a chairman may face technical difficulties as in many instances, eg failing the choice of parties, the applicable law may not be determined at the outset of the arbitral process, at the stage of composition of the arbitral tribunal, but at the ultimate stage, the award making. A tentative remedy or rather a mitigating factor would possibly be found in a carefully selected human infrastructure by international bodies, neither recruited in the industrialised world which may hold a different legal perspective to that of developing countries, nor, systematically, in the Arab world, thus attempting to transcend the economic interest of the West and the regional solidarity of the Arab Middle East.' Three basic facts emerge from this discourse (i) inherent bias due to regional affiliations, ie 'the Western majority' have created mistrust on the side of the Arab parties, (ii) nationality is implicated in that it is tied to one's overall regional affiliation, and (iii) it is not feasible to impose any domestic law, whether Western or Arab on an ICA, because this is also a form of bias and defeats the purpose of ICA in transcending domestic laws; thus, the conclusion is that in order to form 'a carefully selected human infrastructure' with the purpose outlined in the aforementioned paragraph, clear rules as the ones recommended herein are required, in which no more than one arbitrator or member of an arbitral tribunal, including the chairman, the presiding arbitrator or the appointing authority, may originate from a single region. The tribunal must be thoroughly international and must not represent any single nationality, legal culture, developed or developing part of the world or any single region, and this requirement must be legislated.

¹⁰⁴² Ibid, 347–348, 'The second issue is one also connected to the real or supposed majority and has to do with the independence of arbitrators. Independence is generally considered, *rationae personae*, as required for the relationship of an arbitrator to the parties and not *inter* arbitrators: the non-Western arbitrator sits with Western arbitrators whose fellowship is often woven around a complex web of cases, either as counsel or as arbitrators. This contributes to promoting closer understanding between the Western arbitrators.'

¹⁰⁴³ See above n 694. This entire section of bias is an earlier version of this thesis that was published in Madrid Journal and for which it won a 6000 Euro prize and a prestigious award ceremony given at the real academia de jurisprudencia y legislación Madrid.

region of the world). This particular change would make considerable differences to the law, practice and outcomes of ICA, with benefits to the international community. As long as there is a perception of a *block of Western arbitrators* as discussed by the learned Samir Saleh, trust in the system of ICA is impossible. However, if this perception is resolved by preventing such congregations in the first place, credibility in ICA will be ensured. The outcome of the early oil concessions, *inter alia*, contributed to this perception.¹⁰⁴⁴ The author submits that this perception can be traced to the historical fact of colonialism. Indeed, Professor Sornarajah's arguments that international arbitration law developed to serve the interests of investors and subsequently the Western States to which they belonged, represents a neo-colonial attitude that did not go unnoticed by Arab, African, Asian and Latin American parties. This perception is still an unresolved matter in ICSID arbitrations and it is submitted that it is not a coincidence that the same Western States which engaged in the so called 'neo-colonial or neo-imperial' aspirations are none other than the former colonial nations. The fact that colonialism involved mainly a group of Western nations from that region of the world that colonised African, Asian, Middle Eastern and Latin American nations, each of the four aforementioned representing different regions, the need to separate arbitrators by region and not nationality is significant and can increase the value and enforcement of international arbitration. Although there are merits for drawing upon the expertise of a regional specialist who shares the same regional background as one of the parties, the danger of actual or perceived bias may undermine the benefits. Insofar as it is possible, the author takes the normative view that arbitral tribunals should be as impartial as possible for such

¹⁰⁴⁴ Ibid.

a flexible party-chosen forum of adjudication, and appear to be as impartial as possible, in consideration of postcolonial concerns.

Article VII (1)¹⁰⁴⁵ states, ‘If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator for the tribunal’. However, Article VII (2)¹⁰⁴⁶ states that ‘if within 30 days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed’: then in Article VII (2) (a)¹⁰⁴⁷ it is provided that ‘the first party may request the appointing authority previously designated by the parties to appoint the second arbitrator’. The justification for selecting arbitrators from different regions finds legitimacy in the overall manner by which arbitrators are selected, and this fact contributes to a negative perception, one that appears biased and one that undermines the overall legitimacy and efficacy of ICA law and practice.¹⁰⁴⁸

¹⁰⁴⁵ See above n 1024.

¹⁰⁴⁶ Ibid.

¹⁰⁴⁷ Ibid.

¹⁰⁴⁸ Ibid.

Also please see, Saleh, Samir, see above n 237, 347–348, ‘In mixed international arbitration involving Western parties and Asian, African or Middle Eastern parties, the main criticism made by the “exotic” parties relates to the process being conducive to a pre-constituted majority, inasmuch as one co-arbitrator is generally appointed by the “exotic” party and two members of the tribunal, including the chairman, are appointed by the Western party. The latter is often appointed by an arbitral institution based in the West. According to critics, despite judicious selection of arbitrators by, eg, the ICC (International Court of Arbitration) from neutral European countries, the result in practice is one of a Western majority closely connected by cultural, economic and industrial solidarity. Hence, according to these same critics, political neutrality has no impact on the economic and legal mechanisms of commercial arbitrations. It is submitted that criticism of this inherently recurring majority finds as a counterpart, on the other side of the barrier, a regional solidarity arising from poverty, inferiority complexes and residual anti-colonial sentiments.’ Frequently, the minority arbitrator is treated as some kind of poor relation. His input remains furtive. If the minority opinion is one expressed with a certain degree of forcefulness, eg in ICC practice, the Court will not always act on this in accordance with art. 27 of the Rules (“The Court may also draw the attention of the arbitrator to points of substance”), but rather will often make use of the lever of the minority opinion to remedy the weaknesses in the draft majority decision. The dissident opinion is then considered as supportive padding and not as a springboard for new considerations and potential substantive improvement.

The matter of the ‘club of arbitrators’¹⁰⁴⁹ has been identified by many scholars.¹⁰⁵⁰

In consideration of this perception of a club, or a ‘mafia’, any legislative attempts to demonstrate that this is not the case and to minimise this perception will result in lowered incidences of bad faith allegations of bias and higher award enforcement. Or, according to Article VII (2) (b),¹⁰⁵¹ if that fails the Secretary-General of the Permanent Court of Arbitration at The Hague can be requested to designate the appointing authority. Article VII (3)¹⁰⁵² provides that if there is still no agreement regarding the presiding arbitrator,

The problem ultimately lies in the balance of composition of a tribunal, with the aim being to eliminate the stumbling block of the pre-constituted majority, whether real or imaginary.’

¹⁰⁴⁹ Cheng, see above n 438, pp 149-182, 180, ‘Historically, there has been remarkable uniformity in the community of arbitrators. Detlev Vagts has described the community of international arbitrators as “an exclusive club in the international arena” whose members “are automatically” brought into almost any major dispute.... However, the developments in legal education and legal industries around the world in the latter half of the 20th Century has resulted in the emergence of skilled practitioners in many parts of the world eager to gain entry into the purported “exclusivity club”.’

¹⁰⁵⁰ See above n 610, 8, ‘Only a very select and elite group of individuals is able to serve as international arbitrators. They are purposely selected for their “virtue” – judgement, neutrality, expertise – yet rewarded as if they are participants in international deal-making. In more sociological terms, the *symbolic capital* acquired through a career of public service or scholarship is translated into a substantial cash value in international arbitration. Not surprisingly, scholars are not the only persons interested in the somewhat mysterious world of international arbitration. Many lawyers would very much like to get into this line of work. A number of leading US lawyers, for example, especially those who have attained a formal retirement age, have reacted to the subject matter of our research by inquiring how they can enter the world of international commercial arbitration, a world that they often perceive as a rather closed and arcane European club.’ Furthermore, 23, ‘There are individuals who, for example, teach at low-prestige schools, work in unknown law firms, or produce scholarship that is deemed too marginal, who cannot gain access to this world no matter how much they write, attend conferences, or in general profess the faith. Others need not even profess the faith or write about arbitration to enter the field more or less at the top One of those who fits the profiles of those just described stated simply, it is “not that hard to get into the club”.’ Furthermore, 23, ‘A prominent London solicitor thus stated, “I started roughly twenty years ago” with an ICC case in Geneva: “The chairman of the tribunal was Claude Reymond, who has now become a firm friend. Michael Mustill...[now Lord Mustill of the House of Lords] was one of the other arbitrators. And it was quite a good introduction ...to the mafia”.’ And finally at 50, ‘The potential problem confronted by outsiders and invoked by the ICC secretariat is evident in the words of a leading arbitrator of the new generation, “This is a mafia. There are about, I suppose, forty to fifty people in Western Europe who could claim that they make their living doing this. I’m one of them. It took me, oh, probably close to fifteen years to get to the point that when I go as I do regularly to the Swiss Arbitration Association meeting twice a year, or I go to an ICC gathering, or an ICCA gathering that I will know and be recognised, and know and talk to a number of, you know, the leading figures. And if you ... that’s how you just get into it. Now why is it a mafia? It’s a mafia because people appoint one another. You always appoint your friends—people you know. It’s a mafia because policymaking is done at these gatherings.”’

¹⁰⁵¹ See above n 1024.

¹⁰⁵² Ibid.

then the procedures in Article VI¹⁰⁵³ are to be followed. This means that the same problems inherent in articles VI (3) (a–d)¹⁰⁵⁴ are invoked again. The question of nationality and regionality must be legislated more narrowly. One of the most ironic considerations of ICA is that in both modern and traditional forms, both parties are to agree upon the arbitrator(s). This freedom of choice gives arbitration flexibility, and serves to lessen the adversarial nature¹⁰⁵⁵ of the process, arguably making it slightly different from litigation in which it is clear that it is one side against the other. In instances where both parties can agree to a sole impartial arbitrator, the non-adversarial nature of ICA is brought out. Notwithstanding, in the event that a three-arbitrator scenario is selected, each side would, understandably due to the pursuit of its interests, choose the one arbitrator most inclined to its own side, as an *advocate*, to defend the party before the other arbitrator and the presiding arbitrator. In this sense, bias can never be fully eradicated. Herein is found the paradox of arbitration as an alternative to litigation on one hand, as parallel to it on the other. Yet, possibilities for change are real and efforts to this effect have been made.¹⁰⁵⁶

Article IX does not take into consideration the complexity of the nature of the dynamic within an arbitration tribunal and vis-à-vis the parties:

¹⁰⁵³ Ibid.

¹⁰⁵⁴ Ibid.

¹⁰⁵⁵ Anecdotal evidence from China, *inter alia*, supports the view that international arbitration is perceived as less adversarial than litigation. Indeed, practitioners know that an award may be just the start of the final round of negotiation.

¹⁰⁵⁶ See above n 610, 47, ‘The secretariat of the Court of Arbitration of the ICC makes no secret of its desire to open the market of arbitration beyond the narrow circle of the grand old men.’ Further, 47, ‘As one key representative of the secretariat mentioned, ‘There was an effort to broaden the pool.’ And new nationalities were also brought in partly because “it’s important for the perception of the ICC as being international. And it’s important in the perception of international arbitration as an institution, it’s being universal”.’

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.¹⁰⁵⁷

In cases of manifest conflicts of interest it would be a simple matter to disclose this. Yet, in consideration of the fact that each party will attempt to choose the one arbitrator who is most inclined to its case, it is naive to expect that a prospective arbitrator will be one hundred percent impartial and in many cases may not even be consciously aware of any cultural or other biases that would predispose him to one side over another. An independent body should have the discretion to review the impartiality of an arbitrator beforehand to deal with potential bias and disqualify him before an arbitration proceeding commences, in the event of manifest bias. The existence of such an independent body can serve as a deterrent to bad faith allegations of bias in that if it cannot be proven that bias occurred and if there is a reasonable belief that such a claim was made in bad faith, a penalty may be incurred for attempts to thwart an arbitration proceeding.

In terms of fairness, the language of Article XV(1) is general, vague, imprecise and lacking in specific directions that give practical instruction to the arbitrator(s): ‘Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his

¹⁰⁵⁷ Garnett, see above n 385, 168.

case'.¹⁰⁵⁸ Depending on the law governing the procedure itself, the only way fairness, justice and equality can be quantified is if each party is given an equal opportunity to raise at the appropriate time any information and defences having relevance to their claims or the merits of their case. Yet, there is no way to measure, guarantee or legislate after that stage that each argument will be weighed and considered equally on its merits by each arbitrator(s) in any particular arbitration. At that stage, at the stage of the decision, all that is left is trust, and hope. But if trust has not been previously legislated then doubt will remain as to the fairness of the outcome, and this doubt will weaken enforcement and undermine credibility in the entire system of ICA. This point has direct bearing on the discussion regarding due process and procedural fairness in this thesis. This is especially the case as common law and other judges who review an award will take into consideration these points. Therefore, the articles must be revised in such a way as to give instruction on the procedure to ensure fairness, without stifling the flexible nature of the process.¹⁰⁵⁹ This is particularly important in consideration of postcolonial sensibilities.

Article XX reads:

During the course of the arbitral proceedings either party may amend or supplement his claims or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the

¹⁰⁵⁸ See above n 1024.

¹⁰⁵⁹ See above n 694. This entire section of bias is an earlier version of this thesis that was published in Madrid Journal and for which it won a 6000 Euro prize and a prestigious award ceremony given at the real academia de jurisprudencia y legislación Madrid.

amended claim falls outside of the scope of the arbitration clause or separate arbitration agreement.¹⁰⁶⁰

The discretion of the appropriateness of amendments to the claim or defence, and its jurisdictional scope, lies with the tribunal. If there is no trust in the tribunal's impartiality or fairness at this stage, an arbitration party may have cause to doubt the decision and the entire proceedings that it is based upon, and thereby appeal it.

Article XXII reads: 'The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements'.¹⁰⁶¹ Here the tribunal decides who to give a chance to provide further evidence in their favour. What if they are perceived as being biased and of not giving one side a further chance to adequately present evidence that would help its case? What if the time limit they chose is unfair to one party and the evidence cannot be obtained in the time they designate? What if certain evidence is not weighed with due consideration?

Uncertainty undermines trust in ICA and creates the opportunity for the possibility of bad faith claims of bias. Article XXIV (1) reads: 'Each party shall have the burden of proving the facts relied on to support his claim or defence'.¹⁰⁶² This Rule is on the face of it, inherently biased, against (usually), the State. It is a fundamental principle of law that it is the guilt of a party that must be proven beyond a reasonable doubt (for example, this is a constitutionally mandated provision according to United States criminal

¹⁰⁶⁰ See above n 1024.

¹⁰⁶¹ Ibid.

¹⁰⁶² Ibid.

law, specifically in the due process amendments of the Fifth¹⁰⁶³ and Fourteenth Amendments¹⁰⁶⁴ in the Federal Constitution of the United States.¹⁰⁶⁵ The reasonable doubt standard differs from the rule of the balance of probabilities which is a lower standard and one found at civil law procedure). The reason the author refers to the higher American standard of burden of proof derived from criminal proceedings for a civil business dispute, rather than the customary principle of ‘preponderance of the evidence’ is simply to make it more difficult for the claimant to prevail. This is particularly the case in investor-state arbitrations where the state may have control of most of the relevant documents, which it may choose not to divulge. This is one reason why the burden of proof may shift several times; once the claimant makes a *prima facie* case the burden shifts to the respondent to rebut and the respondent may have an unfair advantage. It is possible to demonstrate objectively by presenting evidence that supports a claim of guilt, whereas it is infinitely more difficult to provide concrete evidence beyond a reasonable doubt to prove one’s innocence. This is a cornerstone principle at common law and the reason why a jury at criminal law proceedings is necessary. Anyone may make allegations against another person at anytime but to prove innocence against allegations beyond a reasonable doubt is more difficult than to prove with fact and evidence that the allegations are in fact true. The burden of proof must lie with the claimant in establishing proof beyond a reasonable doubt with concrete evidence that the claims and allegations put forth against the accused party, or the defence are based in fact and demonstrate beyond a reasonable doubt the guilt of the other party in breaching a contract in bad faith. To do otherwise, to maintain a burden of proof to prove innocence, is wrong. A system

¹⁰⁶³ 1787 Constitution of the United States of America, Amendment Five.

¹⁰⁶⁴ Ibid. Amendment Fourteen.

¹⁰⁶⁵ Ibid. Amendment Five, Amendment Fourteen.

based on a fundamentally unjust premise cannot, in its final outcome and decisions, be just. This article should be reworded, or a relevant article pursuant to the above discussion should be included in a HICALC and made as a supplementary law to the UNCITRAL Rules. This problem places arbitrators at risk of being unjustly accused of bias. If the accuser knows that simply raising doubt as to the impartiality and the independence of the arbitrator is enough to disqualify an arbitral proceeding or to obstruct an award, then such bad faith allegations can continue. But if the principle of innocent until proven guilty is standardised, and applied equally, both to the arbitral proceedings and to any cases of allegations of bias against arbitrators, many of the problems besetting ICA would be resolved through this single change of shifting the burden of proof to the accusing party to substantiate their claim, whether they are in a proceeding or making allegations against an arbitrator. To insist otherwise leaves innocent people at risk of false allegations and this is in complete violation of all known standards of justice and fairness universally.

The New York Convention¹⁰⁶⁶ deals largely with exceptions to enforcement. The UNCITRAL deals with rules on basic procedures and in the selection of an arbitrator. Another set of rules, Article XXXIII (1),¹⁰⁶⁷ deals with the law applicable to the substance of the dispute. Article XVI (2)¹⁰⁶⁸ deals with the place of arbitration and this can invoke the *lex arbitrii*. One HICALC addressing each of these can simplify matters. The near total confidentiality of ICA proceedings means that tremendous guesswork is

¹⁰⁶⁶ See above n 177.

¹⁰⁶⁷ See above n 1024.

¹⁰⁶⁸ Ibid.

involved in the actual understanding of how the New York Convention¹⁰⁶⁹ and the UNCITRAL, including other laws and regulations impact the outcomes of arbitral award decisions. Although decreasing confidentiality is not called for, legislating higher trust can supplement lacunae where confidentiality prevents transparency and analysis. Important reforms to the UNCITRAL must be made as a result of its predominant usage in the MENA. The matter of reform must occur at the source of the law, and one of the main sources of MENA international arbitration laws is in fact the UNCITRAL. In consideration of the postcolonial context, the reforms dealing with bias are exceptionally important. The discussion regarding bias elucidated the nexus of bias and *post-colonialism* with reforms to the UNCITRAL, (and the Washington Convention),¹⁰⁷⁰ in particular the ones referring to nationality and region of the arbitrator. Without arbitral award enforcement the risks to foreign investors are high. The extant law on ICA, the UNCITRAL, is not capable of resolving many of these differences.¹⁰⁷¹ This point is relevant to the discussion in regard to the MENA because the UNCITRAL is prevalent and most adoptions of it are made with minor variations that are considered well-suited to the national legal system and to domestic laws rather than to the needs of the international business community and individual investors. In some cases the modifications are minor whereas in others they may be more varied. The UNCITRAL is

¹⁰⁶⁹ See above n 177.

¹⁰⁷⁰ See above n 138.

¹⁰⁷¹ See above n 911, 29, For example, ‘when drafting arbitration clauses and settling on the seat of arbitration, parties, rightly or wrongly, often omit to examine in detail the arbitration statute of the seat, but choose that seat principally for reasons of convenience (for example, physical proximity) or, more commonly, neutrality. In practice, this leads to difficulties. With astonishing frequency, parties to an arbitration agreement will find themselves hostage to a series of unanticipated national particularities which depart from conventional and usual arbitration practice, and were never envisaged at the time they entered into the agreement. Arbitrators, too, are occasionally caught off-guard by these national specificities, fail to take them into account, and find that their awards are subsequently set aside. “Uniform” provisions such as those of the Model Law, go a long way to avoiding such situations.’

the main instrument that regulates ICA. There are gaps due to the inadequacy of the UNCITRAL. This is the case generally, however it is more so the case in consideration of the other doctrinal matters that have been raised throughout this thesis which have special relevance to the MENA and serve to increase the complexity of ICA law and practice.

National laws on arbitral procedure are inadequate due to their focus on domestic arbitration. This leads to a discrepancy between arbitration rules and national laws especially in matters of public order, which is a problem in the field of ICA law. The intention of the UNCITRAL Model Law was to bring about uniform standards in ICA proceedings. However, it needs reform. The UNCITRAL Secretariat has identified areas in the Model Law for future work to achieve uniformity: questions have been raised regarding sovereign immunity, decisions by ‘truncated’ arbitral tribunals, the doctrines of arbitrability, the liability of arbitrators, the power of an arbitral tribunal to award interest, and the discretion to enforce awards that have been set aside in the State of origin.¹⁰⁷² A uniform law, however, could be designed to address the specific challenges posed by ICA and modern practice.

This research fills an important gap in the UNCITRAL by suggesting draft articles (see appendix) that will increase the actuality of arbitral award enforcement. Although, the UNCITRAL is an improvement over the early oil concessions as discussed in subsequent paragraphs, it still requires reform due to gaps which create adjudicatory

¹⁰⁷² Ibid 22: ‘If the arbitration process runs into difficulties – the party, the advocate, the arbitrator and (it is important to note) the judge, who may be concerned with finding a solution to the problems – we all want to know that whatever answer is thought to be in accordance with justice can be enforced by reliable and potent mechanisms. These are very little discussed at arbitration congresses, and are scarcely touched upon by the Model Law.’

risk¹⁰⁷³ in the MENA. The implication of the conflict of laws is that trust amongst parties from different legal jurisdictions or traditions is undermined because the overall legitimacy of ICA Law and practice is questionable whilst there remain contradictions in the outcomes, lack of consistency, lack of predictability and lowered enforcement as discussed throughout this thesis.

¹⁰⁷³ The author prefers the term *adjudicatory risk*, which is synonymous with legal risk: the potential or foreseeable loss arising from uncertainty in legal proceedings. However, legal risk is broader in its scope in that it refers also to the risk that parties may not be legally able to enter into their contract, or because of a law that prevents the entering into or enforcement of the contract. It is also used in reference specifically to financial contracts in which the lifetime of the contract may be superseded by a change in the law or in policy. Adjudicatory risk is more precise in that it deals specifically with the actual proceedings that have bearing on the contract in question, more specifically than any existing law or change in the law but in the adjudication of the contract. It takes it as a given that the contract is lawful and valid and that the law remains constant. However, in the case of *al maslaha al mursalah* or *maslaha*, to be discussed in subsequent sections, the term adjudicatory risk can very well be substituted for legal risk.

3 *The International Bar Association Guidelines for Drafting International Arbitration Agreements*

Article 22 of the International Bar Association Guidelines for Drafting International Arbitration Agreements recommends the following:

As a general rule, the parties should set the place of arbitration in a jurisdiction (i) that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), (ii) whose law is supportive of arbitration and permits arbitration of the subject matter of the contract, and (iii) whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process.¹⁰⁷⁴

The IBA Guidelines contain a significant gap. The author notes that even in jurisdictions (notably the UAE) where the New York Convention¹⁰⁷⁵ has been ratified, it is not implemented in practice. More startling is that even when UAE law is supportive and the courts support the arbitral process, there are still substantial problems in the extant legal framework. This includes other MENA states. Here, significant adjudicatory risk is involved. The analysis of the UAE cases (in the competence section and public policy section) further examines the nature and causes of the UAE's inherent adjudicatory risk. There are cases that show that public policy was used as a reason for the court to refuse the enforcement of an award. The absence of a transnational definition of public policy combined with *sharia* notions of domestic public policy means that public policy

¹⁰⁷⁴ 'International Bar Association (IBA) Guidelines for Drafting international arbitration Agreements' Adopted by a resolution of the IBA Council, 7 October 2010, International Bar Association, Art 22.

¹⁰⁷⁵ See above n 177.

constructions in the UAE contribute to adjudicatory risk. Yet, other cases show consistency and support for arbitration. Overall, the pattern of cases shows inconsistency. The analysis of UAE cases and law profoundly elucidates inconsistencies inherent in MENA adjudication of arbitration awards regarding enforcement and finality.

4 *The Vienna Convention*¹⁰⁷⁶

The Vienna Convention¹⁰⁷⁷ on the Law of Treaties is the foundational principle in supporting the use of harmonisation successfully. Article 31 (3) (c) ‘provides that the treaty interpreter *shall* take into account “any relevant rules of international law applicable in the relations between the parties”’.¹⁰⁷⁸ Furthermore, ‘pursuant to Article 31 (3) (c), “every treaty provision must be read not only in its own context, but in the wider context of general international law, *whether conventional or customary*”’.¹⁰⁷⁹ The Vienna Convention¹⁰⁸⁰ directs an arbitral tribunal that deals with a BIT, for example one that covers the contract that occurs between a foreign investor and a MENA government to consider ‘any relevant rules of international law’.

Therefore a body of law based on an improved *lex mercatoria*, or principles derived from custom would fulfil Article 31 (3) (c) of the Vienna Convention¹⁰⁸¹ insofar as the *lex mercatoria* and the general principles of law derived from custom are applied to the

¹⁰⁷⁶ See above n 591.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ G Verhoosel, ‘The Use of Investor–State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law’ in *Journal of International Economic Law* 6(2), 493–506, 503. See also, I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), 139, in Verhoosel, 503.

¹⁰⁷⁹ Ibid.

¹⁰⁸⁰ See above n 591.

¹⁰⁸¹ Ibid.

parties. The implication of this is that not only should arbitral tribunals dealing with BITs follow the principle enshrined in the Vienna Convention's provision to take into consideration international law, but so should *ad hoc* or institutional ICA tribunals presiding over a MENA State party. ICA tribunals which have a State party as one of the contracting parties in a dispute that arises (even if not a dispute under a BIT), should refer to the principles of international law in considering their decision. The HICALC would fulfil these requirements. The *lex mercatoria* is relevant international law. It is commercial, not public international law. Nevertheless, notwithstanding that it is not technically part of public international law, it is still international and must be considered under the scope of private international law. The principles drawn from the *lex mercatoria* or from other sources of international law should be classified within the rubric of international law and therefore under the scope of Article 31 (3) (c) of the Vienna Convention.¹⁰⁸² A future model HICALC, as derived from principles from public international law and private international law, fits squarely within the jurisdiction of Article 31 (3) (c) of the Vienna Convention¹⁰⁸³ since it is formed by 'relevant rules of international law applicable to the parties' and this restriction to international law includes both 'conventional and customary' international law sources. The HICALC, if ratified regionally, should be considered under the framework of international law because it is built upon principles of law that are universally recognised and that have coequals in all of the world's jurisdictions, including principles recognised by, and comprised of, international law.

¹⁰⁸² Ibid.

¹⁰⁸³ Ibid.

The Vienna Convention¹⁰⁸⁴ requires parties to act in good faith. It elevates the status of general principles of law to a central position. The principle of good faith is a general principle of law, and arguably, an international principle of law. Definitions of certain provisions in general principles of law are, however, vague. Prominent practitioners have cautioned:

The terminology is confusing and that there are valid questions as to how to apply these transnational rules, particularly as an element of international ordre public, such that arbitrators refer to transnational rules in an ‘unscientific’ fashion, ie, the *lex mercatoria*, general principles of law, or the general principles of the *lex mercatoria* which is in fact distinct from the *lex mercatoria* itself. These are seen as magic words which open doors more effectively than state law and this led to the Unidroit principles in 2004.¹⁰⁸⁵

This distinction is important. The scientific and technical approach herein allows the general principles of the *lex mercatoria*, *inter alia*, to be of practical service to international arbitral tribunals. The formula here is based on scientific principles and sound legal drafting to expand the construction of public policy to a broader definition than that of the restrictive limits of State laws, in order to create support for an international *ordre public*, supported by transnational rules which can address the needs of the international business community in a more effective manner. This can occur through the support of the HICALC. The appropriateness of a law that is based upon the customary usage and the needs of a particular industry is a historical fact of the extent to

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Y Derains, VI Congreso Internacional, El Arbitraje en un Mundo Global, Madrid, del 19 al 21 de Junio 2011, Auditorio Rafael del Pino, Sede del Congreso, Madrid, Spain, Dialogue: Bases del Derecho de los Negocios: Dialogo Intercultural, paraphrased from the translation of Spanish to English.

which the aforementioned led to the development of the common law.¹⁰⁸⁶ Older still than the *lex mercatoria* and yet another *harmonised corpus lex* based on custom and on transnational rules adopted to a particular trade, is the example of the Rhodian Sea Law.¹⁰⁸⁷

5 *The Washington Convention*¹⁰⁸⁸ *and Vienna Revisited*

That there is a lacuna in the law necessitates a more specialised law than the general field of international law, one that limits the definition and usage of the doctrine of sovereign immunity. States have pleaded immunity on the grounds of State sovereignty in order to avoid fulfilment of a contract or an arbitral award in the past; however, this is an inadequate defence as:

the conclusion of an arbitration agreement is generally regarded as a waiver by the state of its immunity from jurisdiction. However, whether this also involves a waiver of immunity from execution is still debated although it may seem logical to reason that once a state has validly entered into an arbitration agreement, the state should also be bound by the outcome of the arbitration proceedings. An award, rendered against a state should be enforceable against property of the state unless this is earmarked for public services.

However, this reasoning is not generally recognised. The Washington Convention, for

¹⁰⁸⁶ See above no 388, 128, ‘It seems appropriate to ask whether or not a particular group of bankers or merchants, or traders, may develop their own special Rules of conduct which gradually acquire the force of law, either by themselves or by incorporation into national law or international treaty. Experience suggests that the answer to this is a cautious “yes”. Indeed, in the past this is how much of our law developed.’

¹⁰⁸⁷ Ibid 128, ‘Columbus, for example, tells of the early maritime codes such as the Rhodian Sea Law which dated from the second or third Century B.C. and which was of great authority in the Mediterranean. For its principles were accepted by both Greeks and Romans and its memory lasted for a thousand years. This was an early form of transnational law, as indeed was the celebrated *Consolato del Mare* which, again according to Columbus: “throughout the Middle Ages, reigned supreme in the Mediterranean until the advent of sovereign states, national legislation superseding the customary law of the sea, so often incorporating many of its Rules.” Thus it is noteworthy that these customs of the sea were later superseded by legislation. The implication is that they were the customary source of authority for the law.

¹⁰⁸⁸ See above n 138.

example, clearly distinguishes between immunity from jurisdiction and immunity from execution. For the later reference is made to the law in force in the contracting state (Article 55). This distinction is also found in the Vienna Convention on Diplomatic Relations of April 18th, 1961. Article 32(2) of the Convention states that a waiver of immunity from jurisdiction ‘shall not be held to imply waiver of immunity in respect of the execution of the judgment for which a separate waiver shall be necessary’. The plea of sovereign immunity and in particular immunity from execution has given rise to many court decisions. Special legislation, like the Foreign Sovereign Immunities Act of the USA and the State Immunity Act of the United Kingdom, has been enacted to regulate this issue. An abundance of literature exists on the subject. Harmonisation attempts have also been made . . . ¹⁰⁸⁹

This is a compelling argument for harmonisation of ICA law. This is a compelling argument for reform in the area of State immunity; whether immunity from jurisdiction or immunity from execution. State immunity undermines the binding effect of arbitration. Once a State has agreed to an arbitration clause, there is no consistently logical or valid reason for it to fail in its legal obligation, particularly due to public policy, political or economic reasons, in consideration of the fact that without evidence to the contrary, the outcome of the arbitration and the decision of the arbitration tribunal are fair and just. The Vienna Convention¹⁰⁹⁰ raises the question of the binding nature of arbitration. By drawing a distinction between ‘immunity from jurisdiction’ and ‘immunity from execution’, the binding nature of the outcome of an arbitration proceeding; the

¹⁰⁸⁹ P Sanders, in, Muller, Sam and Mijs, Wim (Eds) *The Flame Rekindled, New Hopes for international arbitration*, 1994, Leiden Journal of International Law, pp 91–7. (Martinus Nijhoff Publishers), pp 93–4.

¹⁰⁹⁰ See above n 591.

‘execution’, is undermined and this absence of *res iudicata* becomes re-enforced

Immunity in both instances ought to be waived.

XII CONCLUSION

In the concluding analysis the author will examine how the doctrine of *res iudicata*, so essential to enforcement, is viewed in the three traditions in the unique context of the MENA.

A *Res iudicata*

It is a well-established fact amongst practitioners that it is very difficult to enforce a foreign court judgement in the MENA, particularly in the GCC States.¹⁰⁹¹ This applies to arbitral awards. The author submits that the real reason for this is due to the national laws of the MENA which are in practice and in theory, opposed to international conventions. Evidence for this statement was given in the section dealing with the legislation of the UAE. Moreover, the instruments inherently have gaps which allow this situation to continue in the MENA: ‘Even within the framework of the New York Convention, the recognition and enforcement procedure is governed to a large extent by the national law of the state where recognition and enforcement are sought.’¹⁰⁹² More problematic still: ‘Indeed, Art.III of the Convention provides that the enforcement will be granted “in accordance with the rules of procedure of the territory where the award is

¹⁰⁹¹ Childs T, King and Spalding International LLP, ‘London International Oil and Gas Dispute Resolution: Recent Changes in the Middle East’s Legal Landscape’ AIPN International Conference, 28 September, 2010, Doha, Qatar.

¹⁰⁹² See above n 362, 868.

relied upon”.¹⁰⁹³ This means that the matter of finality or *res iudicata* is of the utmost importance. The doctrine of *res iudicata* is found at common, civil and Islamic law. The doctrine of *res iudicata* is essential to enforcement: ‘The enforcement of international arbitration awards occurs within a complex legal framework. This framework includes both international arbitration conventions and national arbitration legislation’.¹⁰⁹⁴ Domestic laws and international conventions are not the only reasons that it is difficult for parties who have been awarded to receive assets in compensation.¹⁰⁹⁵

Annulment has bearing upon enforcement and must also be discussed. Without a guarantee that the arbitral award rendered by the tribunal is enforced, the entire proceeding and the costs incurred therein, including the value of the original contract, are challenged by the court.

In legal terms the matter of *res iudicata* is established:

The decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* reflects the generally accepted position on the finality of arbitral awards in international commercial arbitration. The Court of Appeal held that ‘[e]rrors of law or

¹⁰⁹³ Ibid.

¹⁰⁹⁴ G Born, ‘Recognition and Enforcement of international arbitration Awards: Basic Principles’ in G Born, *International Commercial Arbitration: Commentary and Materials*, Part Three: Chapter 11. (Kluwer Law International 2001, 2nd Ed.) pp 703–78, 703.

¹⁰⁹⁵ I Seidl-Hohenveldern, ‘Collected Essays on International Investments and On International Organisations’ (Kluwer Law International, 1998) 304: ‘As to Bystricky’s objections to the various attempts of Western courts to liquidate a foreign company’s assets situated in their territories and, therefore, untouched by a nationalization measure adopted in the country of origin of the company, I agree with him on one point only, ie, that it would be ridiculous to regard these assets as *bona vacantia*. It is exactly on these grounds that Western courts regard those who, at least from an economic point of view, are the owners of the company’s properties, also as the legal owners of these assets.’ This is the same view put forth by the English Court regarding this matter.

fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court.¹⁰⁹⁶

However, this does not address the matter of procedural fraud which cannot be narrowly or strictly classified under law or fact when it occurs as bias and cannot be objectively measured.

In practical terms, the matter of enforcement of an award against a noncompliant party requires that the recognition and execution of the award are held in a jurisdiction where the noncompliant or losing party holds assets, thus: ‘Obtaining a court order that permits an award creditor to enforce the award is not the end of the process. That order must be executed against assets in order to achieve the ultimate goal: obtaining cash or other assets to satisfy the award.’¹⁰⁹⁷ Indeed: ‘There is a paucity of empirical evidence as to the ultimate success of enforcement actions in international arbitration and most information derives from anecdotes.’¹⁰⁹⁸ This is arguably a serious matter in the MENA as noted by experienced counsel of King and Spalding International LLP who give empirical data, quoted elsewhere in this thesis. This practical fact must be considered simultaneously with an understanding of the court in said jurisdiction, if that court has a pro-arbitration history and will be willing to enforce the award, particularly if the noncompliant party is another sovereign State. Even in cases of commercial–commercial disputes a Mareva injunction to freeze the assets of the losing party of an arbitration hearing in order to support the award may not be easily enforced.¹⁰⁹⁹ In consideration of

¹⁰⁹⁶ See above n 351, 412. [2007] 1 SLR 597, para. 57.

¹⁰⁹⁷ Ibid 470.

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ P Sellman, *Law of International Trade*, (Old Bailey Press, 2003, 4th ed), 317: ‘A claim for an interlocutory injunction, such as a Mareva injunction to restrain the defendant from dealing with his assets

the absence of precedent as an unrecognised requirement of arbitral tribunal decision making, determining the pro-arbitration stance of any specific court requires closer scrutiny and analysis of the overall pattern of their decisions and the grounds justifying their rulings.

The practical necessity of requiring that the country of enforcement be the same place where the assets of the losing party are held raises the question of the matter of whether that same country's courts will be supportive of the arbitral award. These are matters need to be taken into consideration whilst drafting the contract and the arbitral award, and the fiduciary duty towards the client in this cannot be taken lightly. Notwithstanding a validly constructed arbitration clause, jurisdictional and other challenges may obstruct a tribunal from making an award and the award may be challenged. The matter of researching the *lex arbitrii* to guide the construction of arbitration clauses is insufficient. The matter of reform has to be dealt with at the legislative and policy level through the enactment of a uniform Arab arbitration law or a HICALC. In the MENA, the practical consideration of choosing a jurisdiction in which the losing party holds assets simultaneously with a pro-arbitration court increases adjudicatory risk for enforcement and reflects the complexities of MENA international arbitrations. The clear implication of this is that when enforcing an award against a losing Arab State or commercial party in the MENA, the most likely countries to hold their assets will be other Arab States and therefore it will be necessary to deal with the

in the jurisdiction is not sufficient ground for the court to assume jurisdiction under this head when the defendant is domiciled in a non-contracting state to the Brussels Convention.' Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. Egypt is not a signatory and neither is the United Arab Emirates. Of the 35 contracting parties only one MENA party has acceded and that is Bahrain. WIPO World Intellectual Property Organisation http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=19.

adjudicatory risk raised therein.¹¹⁰⁰ The author is of the view that the most feasible route to enforcement is to seek enforcement of the award in the Seat of the arbitration itself. In the case of the MENA, this means encountering the legal environment therein and taking into consideration the adjudicatory risks of the inadequate or contradictory regulations that deal directly with enforcement. In the case of annulment: ‘The grounds which are available for annulling an international arbitral award in the place of arbitration are defined principally by national law’.¹¹⁰¹ The fact that national law is the major, or sole, determinant of the definition of the grounds for annulment is well established in the interpretation of international conventions: ‘international arbitration conventions have generally not been interpreted as imposing limits on the grounds that may be invoked to annul an arbitral award, leaving the subject almost entirely to national law’.¹¹⁰² The dangers of submitting contracts to national or domestic legislation are significant. Perils await the foreign investor who relies on domestic law. This has been discussed in regard to the topic of court intervention, or court review. Article V of the New York Convention¹¹⁰³ places limits upon the grounds which allow annulment to occur, however, notwithstanding the limits in place through the New York Convention, the tentacles of domestic law can extend into the future (in practice) and strangle an arbitration award before it is enforced. For example:

the predominant tendency of contemporary arbitration legislation (including the UNCITRAL Model Law) is to limit the grounds on which an award can be annulled to

¹¹⁰⁰ The only practical and feasible exception to this is if the losing party holds assets in a Swiss bank, in which case the Swiss court would review the award.

¹¹⁰¹ Born, see above n 1095, 2553.

¹¹⁰² Ibid.

¹¹⁰³ See above n 177.

ones paralleling those permitted, for non-recognition of an award, under Article V of the New York Convention. This legislative (and judicial) approach is consistent with the objectives of the international arbitral process and in particular the parties' desire for a single forum for the final, expeditious resolution of their disputes. Nonetheless, a number of states continue to recognize grounds for annulling arbitral awards that extend beyond those paralleling Article V, sometimes including a measure of judicial review of the merits of the arbitral tribunal's decision.¹¹⁰⁴

What occurs in practise does at times differ from the provisions of Article V of the New York Convention. The matter of court review is not restricted to states such as the United Arab Emirates. There are a number of authorities that support the view that Article V of the New York Convention¹¹⁰⁵ is broad. In other words: 'Most national courts and commentators have therefore concluded that the New York Convention imposes no limits on the grounds which may be relied upon to annul an award in the arbitral seat. A U.S. Appellate court decision in *Yusuf Ahmed Alghanim & Sons WLL v. Toys "R" Us, Inc.* illustrates this analysis.¹¹⁰⁶

The above discussion demonstrates the dangers of relying solely on national law and the need for a uniform Arab arbitration law or HICALC which is adopted by states on an equal par with their national laws and regulations.

In order for the legally binding nature of arbitration to be honoured, all parties, including judges, must take the view that *res iudicata* shall be upheld. This is so whether it is a court judgement or an arbitral award. It is a fundamental principle of law that no

¹¹⁰⁴ Ibid.

¹¹⁰⁵ See above n 177.

¹¹⁰⁶ Born, see above n 1094, 2553. *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us Inc; TRU (HK) Ltd* 126 F.3d 15, United States Court of Appeals, Second Circuit Argued June 25, 1997 to September 10, 1997.

one may be tried twice for the same allegation. This principle must be applied to ICA in that no one should have to defend their claim twice. To do otherwise renders private international law and ICA law unfair. The value of more effective enforcement is that it creates trust in IIA and ICA law, and in doing so increases investor confidence in international arbitration. This confidence leads to reliance on international arbitration as a viable dispute-resolution method. Effective enforcement of international arbitration awards from the view of a private investor may be compared to the Golden Apples of the Garden of Hesperides, said to confer immortality on whoever ate of them.¹¹⁰⁷ Like the fabled Garden of Hesperides, the quest to achieve effective enforcement is beset with challenges and hurdles. Like Hercules' task of finding the Golden Apples of the Garden of Hesperides, achieving effective enforcement in the form of higher rates of enforcement is the most difficult task that international arbitration must contend with.

One of the dangers of State intervention in arbitration is that it undermines *res iudicata*. If, in a criminal-law proceeding, a man was tried twice for the same crime, the public would be outraged, human rights activists would protest and judges would argue for public morality against a gross miscarriage of justice. If *res iudicata* is abandoned as a principle of law in a commercial dispute, an investor whose contract was breached would be subject to double losses; the loss of the contract *per se* plus subsequent profit

¹¹⁰⁷ Hamilton, see above n 82, 234: 'The eleventh labour was the most difficult of all so far. It was to bring back the Golden Apples of the Hesperides, and he did not know where they were to be found. Atlas, who bore the vault of heaven upon his shoulders, was the father of the Hesperides, so Hercules went to him and asked him to get the apples for him. He offered to take upon himself the burden of the sky whilst Atlas was away. Atlas, seeing a chance of being relieved forever from his heavy task, gladly agreed. He came back with the apples, but he did not give them to Hercules. He told Hercules he could keep on holding up the sky, for Atlas himself would take the apples to Eurystheus. On this occasion Hercules had only his wits to trust to; he had to give all his strength to supporting that mighty load. He was successful, but because of Atlas' stupidity rather than his own cleverness. He agreed to Atlas' plan, but asked him to take the sky back for just a moment so that Hercules could put a pad on his shoulders to ease the pressure. Atlas did so, and Hercules picked up the apples and went off.'

and the loss of paying for appeals or not receiving a full, or any award (as evidenced by the UAE Court cases and ICSID cases). This is the equivalent of a debtor being fined twice, or a failed bank liquidated doubly. This is unethical. There are scholars who argue that public law principles have no place in commercial or investment law. Yet, one flaw in their argument, *inter alia*, is that ethical considerations, from the point of view of philosophy and jurisprudence, ought (as Kant has argued) to be applied across the board. It is established in criminal and civil proceedings and law, that *res iudicata* is a sacred principle. Why should this not be the case at arbitration law? Why should the legally binding decision of a properly conducted arbitration be disregarded? Would the testimony and unanimous decision of a jury concerning the innocence of the accused be rescinded? This would be a breach of public interest.

Yet, judicial review of arbitration awards is a regular occurrence, and a case already decided is often exhumed, dissected and reassembled as a travesty of what it once was. This is a problem. There are of course reasons for appeal; however, there are numerous pleas that open the door to an abuse of the appeal process. This undermines arbitral award enforcement including ICA overall. That an arbitral tribunal decision is legally binding means that it has the same *res iudicata* standing as that of a court of law. Tribunal decisions are oft treated as no more than a fancy mediation. The rejection of a tribunal's competence or jurisdiction is related to the principle of *res iudicata*. The finality of *res iudicata* is a manifestation of the competence and jurisdiction of the deciding body. Undermining *res iudicata* is tantamount to the denial of jurisdiction or *compétence de la compétence*; the legal ability of an institutional body to execute its jurisdiction in deciding a case.

Enforcement cannot occur without finality and finality cannot occur in cases in which it is claimed the award was decided based on bias or bad faith, or in considerations of public policy or sovereign immunity pleas, *inter alia*. Without a guarantee of enforcement, trust decreases further and ICA law loses credibility. A doctrine related to consideration of enforcement is in the term ‘binding’. What is even more disconcerting is that

the percentage of cases in which enforcement is refused or if the award is subject to annulment seems, however, to be increasing. This is especially so if the non-reported cases are taken in consideration, mainly in developing countries, such as my own country, Egypt, where the number of annulled arbitration awards and of the court decisions refusing to grant enforcement is practically impossible to ascertain with precision.¹¹⁰⁸

Effectiveness means finality of the award and enforcement. This means that neither actual fraud nor the perception of fraud can exist in order for the doctrines of *res iudicata* and *estoppel* to be upheld. Finality and enforcement however, are two distinct but interrelated concepts.

The ancient doctrines of *res iudicata* and *estoppel* are well established universally. These principles are related to competence in that once the competence of a judicial body is established, its decisions and rulings are in principle, *res iudicata*, and as such, only subject to judicial review or appeal if and when there is doubt that said judicial body carried out its duties procedurally or substantially correctly in consideration of the

¹¹⁰⁸ A Kosheri, *Enforceability of Awards: Some Additional Problems*, ICCA Congress Series No 12 (2005), pp 337-45, 337.

appropriate law.¹¹⁰⁹ These principles apply to arbitration tribunals including courts. The question of jurisdiction or competence for an arbitral tribunal to hear certain matters is a straightforward question of law and is legislated. Yet, it cannot decide on questions of public policy. If a dispute invokes public policy it can stop the arbitration at one of two levels; the question of the substance of the dispute can prevent the arbitrability of the dispute, or in the event of a completed proceeding, it can be appealed by the State on the basis that it is against the public policy of the State (either domestic or international public policy) if the award is executed or enforced.¹¹¹⁰ To further complicate things, under certain Islamic interpretations, the binding¹¹¹¹ nature of arbitration is disputed.¹¹¹² Another consideration of *compétence de la compétence* would be the statute of limitations on the tribunal in terms of time limits to deciding the dispute. This question of

¹¹⁰⁹ Matters that deal with appeals are outside of the scope of this research, as are matters that give exceptions to *pacta sunt servanda*, *inter alia*.

¹¹¹⁰ Tamimi, see above n 305, 34, 'An application for the execution of the judgement will be denied if: 1) it is contrary to the Shari'a principles, the Constitution or the public policy of the country where the application was made.'

¹¹¹¹ El-Malik, see above n 400, 127: 'The use of arbitration clauses for future disputes was not practised in the early period of Islam and the binding force of the arbitration award is a controversial issue among the four Islamic schools. Whatever the case is, arbitration is governed by the law of contract, and accordingly the binding effect of the arbitration depends on the terms of the arbitration agreement and the maxim of *pacta sunt servanda*.' It is a moot point that the four schools disagree on the binding nature because if a party to an arbitration proceeding agrees by contract (arbitration clause) to settle a dispute by arbitration, they have, by default, legally bound themselves to the outcome. Otherwise, the clause would be rendered moot as well and that would be in violation of the concept of upholding contracts and promises at Islamic law. The principle of *pacta sunt servanda* or keeping the 'ahd is a sacred duty in Islamic jurisprudence. The keeping of or lack thereof must be answered for on Judgment day by the believer. The separability of an arbitration clause from a contract does not negate that the arbitration clause as well as its outcome must be fulfilled as a contract. Further, there is no logical connection between future disputes and the binding nature. Once the agreement to arbitrate is decided it would be redundant to deny its binding outcome. In that case, why arbitrate in the first place?

¹¹¹² Fry, see above n 753, 106–10, 'Islamic law is unclear as to whether tribunals have jurisdiction to issue binding judgments. Imam Shafi'i, a prominent Islamic law scholar, argued that arbitral awards are enforceable only if the parties agree with the award, thus leaving no jurisdictional element to the arbitration. Other scholars believe that if an individual is authorised to arbitrate under the Qur'an in order to resolve a dispute, then that individual is authorised to issue judgments of a binding nature that can literally resolve the dispute. Even under the rationale employed by Shafi'i, tribunals have jurisdiction to make binding decisions based on contractual provisions providing such jurisdiction. Therefore, it seems to be consistent with Islamic law for a tribunal to have jurisdiction when the Islamic country has granted jurisdiction to the tribunal, such as Iran granted in signing the Claims Settlement Declaration.'

statute of limitations once competence has been decided should be standardised in legislation.¹¹¹³ A scholarly analysis of the different schools of Islam regarding the binding nature of arbitration and in the competence of an arbitral tribunal to hear the dispute is important in drafting a harmonised international commercial arbitration code.

The first step towards enforcement is the inclusion of arbitration clauses in a contract stating that arbitrations are final and binding. Even when an award has been accepted as final and binding, problems may still remain. The wording of legal provisions is the reason. For example,

The first draft of NAFTA had a single article on investor–State dispute settlement, which was proposed by the United States. Paragraph 3 of that article provided that an arbitral award resulting from an arbitration under the UNCITRAL Arbitration Rules, the ICSID Additional Facility or any other Rules used for the matter would be ‘final and binding on the parties to the dispute’. Each party undertook to carry out the award without delay and

¹¹¹³ *Ibid*: ‘Only the Hanafi school of Islamic law has taken a position on statute of limitations. Under Islamic law, tribunals are not subject to any set time-limits if the contracting parties do not specify one. However, the arbitral tribunal is bound to follow any contractual provisions regarding a time-limit.’ The importance of consent of parties is a common principle at Islamic law and this principle should be studied further and analysed more closely. For example, the idea of consent of parties to the outcome of arbitration is seen in the Shafi’i school of Islam as more binding than an abstract principle of binding tribunals. The concept of consent of parties to the time limit again raises the principle of consent of parties to primacy. Arbitration as legislated both internationally and at Islamic law is founded on the principle of consent of parties. However, to allow parties to consent to an outcome only when it is to their preference undermines the arbitration process itself as a dispute-resolution method and favours only the party that gets its way. This is not something that can remain legally unlegislated. A consensus at Islamic law (*ijma*, the process of reaching agreement amongst scholars) must address the binding considerations of arbitration in order to bring about uniformity. Fry, see above no 753, 110, ‘Islamic law recognises an individual’s freedom to enter into a contract and the sanctity of such a contract, as long as its provisions are not prohibited by Islam. The Qur’an unequivocally demands obedience to contracts: “O ye who believe! Fulfil (all) obligations”. Islamic law scholars sometimes call the entire chapter where this verse is found the *Chapter of Contracts*. Islamic law scholars have also declared that “men shall be permitted to make all the transactions they need, unless these transactions are forbidden by the Book or the Sunna”.’ The implication of this, arguing from within an Islamic law framework, is that once parties to an arbitration have entered into the ‘contract to arbitrate’, or agreed to an arbitration clause, they must be bound to the outcome, otherwise the sanctity of the contract, or the concepts of *pacta sunt servanda* or *rebus sic stantibus* (let the contract stand), is in grave danger. *Pacta sunt servanda* is widely accepted within Islam, particularly based on the aforementioned Chapter of Contracts.

to provide for the enforcement in its territory. This provision was modified in the May 1, 1992, text to delete the reference to arbitration being conducted pursuant to rules other than the ICSID and UNCITRAL Rules. The May 13, 1992, draft added a paragraph stipulating that an investment dispute would be considered to arise out of a commercial relationship for purposes of the New York and Inter-American Conventions. This version stated that an award would be final and binding, would be carried out without delay, and that the Parties would provide enforcement mechanisms for such awards, subject to the Inter-American, New York and ICSID Conventions. A provision was included stating that no Party would give diplomatic protection or bring a claim for damages or restitution of property unless the other Party had failed to abide by the award pursuant to the New York Convention.¹¹¹⁴

The provisions for ‘finality’ and ‘binding’ are necessary yet incomplete. Here, reference to the New York Convention¹¹¹⁵ once again gives priority to the public policy clause. In essence it succeeds in undermining said ‘finality’ and ‘binding’ natures of arbitral awards. The very fact that enforcement continues to suffer obstacles points to the reality that, in practice states and investors hesitate to give finality its due place in ICA. The alternative is the ideal:

States have traditionally preferred the finality of investor–State awards, in preference to ‘consistency and correctness’. Following the decisions in *SGS* and *Lauder*, however, the commentators have argued that ‘consistency and correctness’ ought to outweigh finality. In this article, it is argued that, based on the available evidence, the ‘tide has not turned’: states and investors continue to prefer finality over consistency and correctness. It is

¹¹¹⁴ M Kinnear, A Bjorklund, J Hannaford, *Finality and Enforcement of an Award, Investment Disputes under NAFTA, An Annotated Guide to NAFTA*, Chapter 11.1, Art 1136 (Kluwer Law International, 2006), pp 1136-1- 1136-41, at 1136-1.

¹¹¹⁵ See above n 177.

further argued that, based on this position, reform ought to be considered to seek to protect the finality of investor–State arbitral awards.¹¹¹⁶

The eight landmark ICSID arbitrations with Arab parties¹¹¹⁷ reviewed herein engaged a comparative law analysis that yielded several common patterns in these types of arbitrations. In each instance the States' initial responses were an objection to jurisdiction. In all cases, there were lacunae in the ICSID arbitrations that led to the ensuing decision of the tribunal, or lack thereof. In some cases, with the existence of a Bilateral Investment Treaty (BIT), the outcome was based on the application of certain articles of the treaty. In the absence of a treaty, the ICSID Convention was applied. Questions of *res iudicata*, expropriation, risk, lack of precedent and of definitions of investment, including public policy, all pointed to significant lacunae in the international arbitration law particularly in regard to the ICSID and the 1958 New York Convention. In all of these cases, there was initial loss to the investor due to the original breach of the contract by the State, whether or not it was alleged that the investor was the cause. In consideration of the domination by legal scholars of examples of bias against states in the early oil concessions and analysis of the development of ICA and IIA law, it is clear from

¹¹¹⁶ J Clapham, 'Finality of Investor–State Arbitral Awards: Has the Tide Turned and is There Need for Reform?' *Journal of international arbitration* (Kluwer Law International 2009) Volume 26, Issue 3, pp 437–66, 437.

¹¹¹⁷ *Trans-global Petroleum Inc v The Hashemite Kingdom of Jordan* ICSID Case No Arb/07/25, the Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, Response of 30 August 2007; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No Arb/02/13, Decision on Jurisdiction; *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No 05/19 Award, Memorial on its Objections to Jurisdiction. *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Introductory Note; *Joy Mining Machinery Limited v The Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction; *Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt*, Case No ARB/84/3 Award on the Merits; *Champion Trading Company and others v Arab Republic of Egypt*, ICSID Case No ARB/02/09, Introductory Note; *In the Government of Saudi Arabia v Arabian American Oil Co (Aramco) Inc*, Decision of 23 August 1958, 27 International Legal Reports 117 (1963).

the outcome of these contract disputes and the outcome of these arbitrations that the investor usually came out the losing party, at least initially, with the severance or non-performance of the contract, on the part of the State, in all cases.

The principle of *res iudicata* in the face of increasing unjust and bad-faith allegations of fraud, bribery, bias and partiality can protect both ICA and arbitrators from the aforementioned. The view of English Courts in case law is sound, pragmatic and refreshing in consideration of the problems besetting ICA in regard to public policy and allegations of fraud. Yet, the conservative French courts do not share the same progressive view: ‘The Paris Court of Appeal appears more willing to carry out a full-scale review’.¹¹¹⁸ This view undermines credibility in ICA and lowers enforcement. A landmark case¹¹¹⁹ demonstrated precisely this when the Paris Court of Cassation ‘overturned’ an arbitral tribunal’s legitimate decision without giving reasons. The judicial review denied the existence of a legitimate arbitration agreement and denied that the competent government authority whose signature bound the State to the arbitration agreement had the jurisdiction to act as a representative of the State. The court did not base the decision on public policy but it ‘overturned’ an arbitral tribunal’s decision to not accept a plea of State sovereignty. This decision by the court of arbitral tribunal decisions as if they were those of a ‘lower court’ and subject to appeal is another factor that undermines the *res iudicata* of an award. An arbitrator has the same status as a judge vis-à-vis an arbitral tribunal that a judge has vis-à-vis a court. To interfere with judicial decision making of an arbitrator applying the law to the facts of a case renders *res*

¹¹¹⁸ Sheppard, see above n 709, pp 217–48, 245.

¹¹¹⁹ Refer to *SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH)*.

iudicata of an arbitration hearing irrelevant and makes arbitration pointless. Only a properly legislated law protects arbitral tribunals from unnecessary meddling¹¹²⁰ by the courts, thus protecting the credibility and enforceability of the decisions of arbitrators.

The aforementioned discussions on bias, precedent, public policy, State sovereignty and considerations of *res iudicata* have established how interconnected and relevant all these doctrines are to ICA effectiveness. The question of effectiveness cannot be fully and properly addressed until these other questions of doctrines are decided in the context of universal standards. The existence of appeal and annulment undermine effectiveness of the entire ICA process and its credibility, but the fact that at the end an award may be annulled especially undermines effectiveness.

The importance of arbitral award enforcement is not a new priority.¹¹²¹ In fact:

The origins of the International Court of Justice – the World Court – owe much to the Peace Movement, and its particular preoccupation with international arbitration and

¹¹²⁰ L Nottage, R Garnett, *International Arbitration in Australia*, (The Federation Press, 2010) 1: ‘Yet that inherited English tradition traditionally involved extensive court supervision of arbitral processes and outcomes. In the United Kingdom itself, that may have been linked to the large numbers of lay arbitrators (with minimal legal training) appointed from among businesspeople in specific spheres (such as global community trades) to resolve disputes that often involved primarily issues of fact rather than law. But judicial supervision also fitted the English system of barristers often being appointed to arbitrate (the more legalistic) disputes, then being appointed judges, who may have liked to ‘keep their hands in’ so as to be able to present themselves more credibly as arbitrators upon retirement from the Bench.’

¹¹²¹ J A Philip, ‘A Century of Internationalisation of international arbitration: an Overview’ in, M Hunter, A Marriot, V V Veeder, (eds), *The Internationalisation of international arbitration LCIA Centenary Conference*, (Graham & Trotman) 26: ‘It is remarkable in that at a very early stage, far in advance of any similar developments in respect of judgements, states accepted the desirability of recognition and enforcement of foreign arbitral awards. In 1923 and 1927 respectively, under the auspices of the League of Nations, the Protocol on Arbitration Clauses in Commercial Contracts and the Convention on Enforcement of Arbitral Awards were adopted.’

adjudication as the means of peaceful settlement of international disputes and indeed of the avoidance of war.¹¹²²

Regarding the importance of the Permanent Court of Arbitration, former United Nations Secretary-General Kofi Annan has affirmed that it has a long and distinguished history in carrying out the mission of the United Nations Charter as set out in Articles 1 and 33 by settling international disputes by peaceful means, in conformity with the principles of justice and international law because arbitration is among the methods of peaceful settlement.¹¹²³ Indeed,

The settlement of disputes between states by judicial action is only one facet of the enormous problem of the maintenance of international peace and security. In the period of the United Nations Charter the use of force by individual States as a means of settling disputes is impermissible. Peaceful settlement is the only available means.¹¹²⁴

The negotiation of oil concessions¹¹²⁵ and foreign investment contract disputes are critical to diplomatic relations. Our interdependent international economy brings into

¹¹²² M Hunter, A Marriot, V V Veeder, (eds), *The Internationalisation of international arbitration LCIA Centenary Conference*, (Graham & Trotman) 8.

¹¹²³ K Annan, Secretary-General United Nations, Foreword, at vii. *Permanent Court of Arbitration, Basic Documents, Conventions, Rules, Model Clauses and Guidelines*, (Peace Palace, The Hague, 1998)

¹¹²⁴ I Brownlie, *Principles of public international law*, (Clarendon Press, Oxford, 4th Ed, 1990), 708. See also, at 708, the UN Charter, Arts 2(3), 2(4), and 33, and at 709, 'Before conciliation appeared as an established technique, the process of arbitration had long been a part of the scene, having the same political provenance. However, the practice of arbitration evolved as a sophisticated procedure similar to judicial settlement. Modern arbitration begins with the Jay Treaty of 1794.'

¹¹²⁵ A R Araque, in R Mommer, *Global Oil and the Nation State*, (Oxford University Press, 2002), 118: 'The concession system in the Middle East was of colonial and imperial origin. When Persia granted the D'Arcy concession, in 1901, the country was divided into spheres of British and Russian influence. In Iraq the tug of war for oil concessions began under Turkish rule; then the country was under a British mandate when the most important concession was granted to the Turkish Petroleum Company (TPC) in 1925. The sheikhdoms of Bahrain (1930), Kuwait (1934), and Qatar (1935) granted concessions under British rule. Only Saudi Arabia, which granted its most famous concession in 1933, was an independent kingdom. Every single concession covered a large part, if not all, of the national territory of these countries. The concession term varied between 55 years (Bahrain) and 75 years (Iraq, Kuwait and Qatar), and there were

contact transnational commercial disputes more frequently than ever before. Many of the new rules are an amalgamation of new international legislation and modern arbitration standards.¹¹²⁶ These rules need to be made more effective. Globalisation, as it has led to higher transnational commercial disputes and to an interdependent economy, necessitates a harmonised body of ICA/IIA law that is acceptable to the entire global community and not only to Western nations. The goal of harmonisation is a primary way to reduce the risk of unenforceable awards.

The New York Convention¹¹²⁷ dealing with the recognition of foreign awards has an important role to fulfil in ensuring effective enforcement. The recognition of foreign awards is imperative to the effectiveness of arbitral award enforcement. Provisions in the New York Convention¹¹²⁸ that allow states to escape from this obligation undermine international arbitration. These two longstanding principles, of *res iudicata* and the broad doctrine of *estoppel*, together with finality, imply the binding nature of the arbitral decision. The thread of public policy runs throughout the entire fabric of ICA and any related doctrines therein. It is impossible to discuss *res iudicata* and any related doctrines thereof without further reference to public policy, particularly in consideration of the foregoing analysis of the ways in which public policy undermines arbitral award enforcement and credibility in ICA. The reason that public policy is a problem in ICA is because as it is construed broadly, it undermines the *res iudicata* of arbitral awards:

only vague provisions for relinquishment. Hence, the history of Middle East oil is largely the history of a few concessions.⁷

¹¹²⁶ Conference on Aspects of international arbitration in the law and practice of Arab countries. Session III. The reception of new legislation and international standards on Arbitration: The role of the legislator and state courts. Omar MH Aljazy, PhD MCIARB. 13 June, 2007. Cour de Cassation. Paris, France.

¹¹²⁷ See above n 177.

¹¹²⁸ Ibid.

In restricting the concept of public policy and applying an international public policy standard, the courts have recognised the importance of *finality* – which is itself a consideration of public policy. Since an overly broad interpretation of the concept of public policy defeats arbitral finality and the objectives of arbitration, the public policy exception is narrowly construed.¹¹²⁹

Finality, or *res iudicata*, as a doctrine should be legislated as the domestic public policy and the legislation of nations. It is a consideration of public policy that it should be upheld as equally as other public policy concerns. The doctrine of the finality or *res iudicata* of awards requires that it is upheld equal to other public policy concerns. This forms the basis of justice and fairness for the arbitration process. Why should *res iudicata* of arbitration decisions be any less important to a country than other public policy or national interest considerations? In due consideration of the importance of ICA in fostering harmonious international relations amongst States, *res iudicata* of arbitral awards should be the foremost priority of any nation's public policy and national interests. Indeed:

It has been said that it would be contrary to public policy to enforce an award that was contrary to, and inconsistent with, the prior judgment of a local court on the same subject matter. This is expressly referred to in the legislation of some countries, for example Egypt. The English courts have also held that the principle of *res iudicata* is a rule of public policy. An award that disregarded, or was in conflict with, an order of the Indian

¹¹²⁹ Sheppard, see above n 709, pp 217-48, 228.

High Court relating to the same dispute was accepted by the Indian Supreme Court as potentially being contrary to public policy (but it found no conflict on the facts).¹¹³⁰

One approach to dealing with public policy in the event it undermines *res iudicata* has to do with preventing judicial review:

As to whether the court should allow a re-opening of the facts, Colman J., at first instance, concluded that the public policy of giving effect as far as possible to the finality sustaining international arbitration awards and discouraging re-litigation outweighed, on the facts of this case, the public policy of discouraging international corruption. The judge emphasised that the conclusion was not to be read as in any sense indicating that the Commercial Court was prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption was referred to high calibre ICC arbitrators and duly determined by them, it would be entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission. The majority of the Court of Appeal (Mantell L.J. and Sir David Hirst, Waller L.J. Dissenting) agreed with Colman J. that, on the facts of that case, the attempt to re-open the facts should be rebuffed.¹¹³¹

It is recommended that the Draft Provision Article dealing with matters related to *res iudicata* be taken directly from the International Bar Association (IBA) Guidelines Article 84, which reads:

When the parties wish to emphasize the finality of arbitration and to waive any recourse against the award, the following language can be added to the arbitration clause, subject

¹¹³⁰ Ibid 241.

¹¹³¹ Ibid 245.

to any requirement imposed by the *lex arbitri*: Any award of the arbitral tribunal shall be final and binding on the parties. The parties undertake to comply fully and promptly with any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.¹¹³²

The author submits that in consideration of the complexities of judicial review in the MENA region, that in the HICALC explicit reference to the *lex arbitrii* as a choice of law be refrained from. The reason is because if the *lex arbitrii* was that of the United Arab Emirates, for example, the provision of automatic judicial review would render this clause meaningless. In cases where the *lex arbitrii* is that of Malaysia, the first part of this article must be withdrawn because Malaysia has a Sharia Council¹¹³³ which undertakes automatic judicial review of arbitration awards. The only way to mitigate this is if both parties agree in advance to the finality of the award and allow it to be enforced without having recourse to either the courts (in the case of non-compliant courts) or any other institutional entity such as the Sharia Council. The scope of *res iudicata* is defined insofar as the International Court of Justice is concerned, particularly in Articles 59, 60, and 61.¹¹³⁴

Post-colonialism takes into account the unique history common to the MENA region and Europe. Not only would a more universal and more harmonised law prove valuable, and not only do principles that contribute to such a law already exist throughout legal and social history, but there could very well be ‘one right answer’ or ‘best practice’

¹¹³² International Bar Association (IBA) Guidelines for Drafting international arbitration Clauses. Adopted by resolution of the IBA Council, 7 October 2010, International Bar Association.

¹¹³³ S Rajoo, Director of the Kuala Lumpur Regional Arbitration Centre, Malaysia, at the Chartered Institute of Arbitrators Asia–Pacific Conference, 26–28 May 2011, Sofitel, Sydney, Australia.

¹¹³⁴ S Rosenne, *Interpretation, Revision and Other Recourse From International Judgements and Awards*, (Martinus Nijhoff Publishers, 2007), 43.

in the form of harmonisation and universal standards to resolve the problems that inhibit the efficiency of ICA. This is the current stance of the United Nations in creating the UNCITRAL.

Precedent distilled from *lex petrolea* may inform setting forth precedent from which general principles of law contributing to a harmonised code may be employed. The background research generated as a result of this thesis including the drafted articles provides valuable recommendations applied to the MENA.

B Practical Application and Implementation

The practical application of the research, as explained in the section dealing with the objectives of this research in the introduction, is to bring forth the relevant research and background material in order to allow future drafters of a HICALC to draft a code that draws upon civil, common and Islamic law sources. This section analyses extant instruments to show where there are gaps (to a greater degree beyond the aforementioned analysis of instruments in the preceding section) so that the suggested draft HICALC or uniform Arab arbitration law provisions can fill these gaps. This research supports future drafting of this code by identifying common principles to the three traditions and the justification for this, which took place through the comparative analysis of the three traditions. The secondary practical application of the research is to offer recommendations that extend beyond guiding the drafting of the HICALC (which is provided for in the provisions offered in the appendix), and to suggest guidelines on the implementation of the HICALC once the drafting is finalised by future scholars. A HICALC may either be an entirely new law governing ICA, or a set of amendments to an

extant instrument. It may stand alone or as part of a reform process, as the UNCITRAL is already being revised and reformed. In consideration of the prevalent ratification of the 1958 New York Convention,¹¹³⁵ perhaps amendments to it may be more feasible than the implementation of an entirely new law. Since this uniform Arab arbitration law is mainly addressing the problems that occur in MENA-FI arbitrations, it may be implemented in the region as part of the Euro-Med reform and EU trends towards unification, standardisation and harmonisation of laws overall. The Euro-Med Dialogue can bring EU reforms to the MENA. Since the UNCITRAL is either widely ratified in the MENA, or is the basis of many of the MENA countries' arbitration laws, either the addition of amendments to extant instruments, or the creation of an entirely new set of rules can be drafted. It should be clear that a legal instrument supplementing, amending or reforming the three main instruments of ICA, those of the New York Convention, the Washington Convention¹¹³⁶ and the UNCITRAL, is required.

A HICALC can be presented as a free-standing legal instrument to be ratified alongside extant instruments such as the New York Convention¹¹³⁷ since it is arguably one of, if not the most, important legal instrument dealing with the matter of the recognition and enforcement of foreign arbitral awards. This may be more feasible than calling for reform of the New York Convention.¹¹³⁸ As presented throughout this thesis, though the countries mentioned here have ratified the Convention, national legislation or court decisions are oft in contradiction to it.

¹¹³⁵ See above n 177.

¹¹³⁶ See above n 138.

¹¹³⁷ See above n 177.

¹¹³⁸ Ibid.

The Draft Provisions of the HICALC can be used to supplement extant arbitration clauses, either with institutional or *ad hoc* arbitrations. They can be used in conjunction with extant institutional rules such as the UNCITRAL, the UNIDROIT and in areas where the aforementioned are silent or where there is a gap or an inadequacy in the law. A guiding principle for the implementation of the HICALC is this:

More than ever before, it becomes evident that harmonisation is by no means synonymous with unification; harmonisation is a process which may result in unification of law subject to a number of (often utopian) conditions being fulfilled, such as, for example, wide or universal geographic acceptance of harmonising instruments which effectively substitute all pre-existing law. To the extent that harmonisation of law is sporadic and incomplete, in practice, most harmonising laws are designed to work within and with existing laws.¹¹³⁹

The author submits that this is the guiding principle in implementation of the HICALC or uniform Arab arbitration law. The matter of implementation must be taken into consideration in regard to legal instruments. These legal instruments may be divided into two categories, international and national. Within the first category, consideration must be given as to how a HICALC would interact or intersect with extant instruments and within the extant framework of international law. Within the second category, consideration must be given regarding any potential contradictions between the HICALC and extant legislation. Care has been taken throughout this research to identify existing contradictions in extant instruments of law, for example in regard to the UAE and the matter of the contradiction of its domestic provisions regarding court review with

¹¹³⁹ Mistelis, see above n 96, 4.

provisions of the New York Convention. None of the suggested HICALC provisions contradict provisions of any extant instrument, whether national or international. The matter of automatic court review needs to be considered by future drafters of a HICALC; it is outside the scope of this research. Most Arab States have followed the UNCITRAL in drafting it into their ICA laws. These domestic arbitration laws may have revised provisions that are not exact copies of the UNCITRAL because the UNCITRAL Model Law is flexible to allow countries to adopt its rules and then modify them based on their unique legal needs. This means that future drafters of a HICALC must examine the national legislation of all of the MENA countries if the HICALC is implemented as a regional instrument. A uniform regional instrument applicable to international arbitration is not without precedent as a recent *ad hoc* arbitration tribunal concerning a dispute arising between a Saudi Arabian investor and Indonesia has been allowed to invoke a little-known investment treaty signed by member states of the Organisation of Islamic Cooperation for the first time in history.¹¹⁴⁰ This means that there is potential for an instrument such as the HICALC or a uniform Arab Arbitration law to be signed as a regional treaty. This thesis deals exclusively with the domestic legislation of only two countries, that of Egypt and the United Arab Emirates. The domestic legislation of other Arab countries may differ from what is enacted in Egypt and the UAE. A regional instrument to which all the Arab States are signatory is a feasible potential for the implementation of the HICALC or a uniform Arab arbitration law.¹¹⁴¹ This would follow

¹¹⁴⁰ S Perry, 'Doors Open to Claims Under Islamic Treaty' in *Global Arbitration Review*, 8 August, 2012.

¹¹⁴¹ See above n 1022, 115: 'Other Civil Code-advocates would rather achieve their harmonization goal by the drafting and ratification of a special regional treaty, just as significant segments of private international law have been harmonized previously by supplementary agreements between EU Member States, eg, the 1968 Brussels Convention on Jurisdiction and Judgments and the 1980 Rome Convention on the Law Applicable in Contractual Matters. Indeed, the purpose of such treaties can hardly be separated from the goals set forth in the more fundamental EC/EU treaties of Rome and Maastricht (and Amsterdam). (Quite

the pattern in the MENA in which there are other successful region instruments. Insofar as future drafters of a HICALC take into consideration domestic legislation or, alternatively, if Arab States sign a HICALC as a regional treaty, it must be borne in mind that any domestic legislation that contradicts it ought to hold less precedence in the legal hierarchy and be required to be reformed accordingly. The author does not foresee an obstacle in implementation because, as already noted, many of the domestic arbitration laws of Arab States have provisions that are exact or similar to the UNCITRAL and the suggested HICALC does not contradict the UNCITRAL but fills gaps. In contradictions with extant domestic laws, the HICALC as a regional treaty ought to have precedent. In regard to extant instruments, future drafters of a HICALC should take caution to not contradict extant instruments such as the New York Convention, the Washington Convention,¹¹⁴² *inter alia*, but rather should fill gaps such as those that have been identified in this research. To the extent possible for the author, the suggested HICALC presented herein does not in any way contradict extant international instruments' provisions and the matter of contradictions with national instruments only applies if the HICALC is actually implemented in the future and after much revision beyond what is offered herein as a result of this research. Notwithstanding the foregoing discussion, the author is of the view that the matter of implementation is essentially outside of the scope of this research. The information presented in this thesis regarding the actual draft articles

apart from treaty-harmonization originating at the regional level, additional harmonization has been indirectly achieved through international legislative efforts. Most prominent is the 1980 UN Convention on Contracts for the International Sale of Goods (CISG), ratified by most EU Member States. In the same (international) category we find the 1955 Hague Convention on the Law Applicable to International Sales of Goods and the 1973 Hague Convention on the Law Applicable to Product Liability.)' These recommendations for a uniform European Civil Code are equally applicable to a uniform Arab arbitration code or HICALC. The author is of the view that a regional treaty is feasible.

¹¹⁴² See above n 138.

and implementation is intended only to serve as a guide. It is ultimately designed to work to fill the gaps in extant instruments.

If the HICALC or uniform Arab arbitration law is not implemented as a regional convention that exists alongside with the New York Convention¹¹⁴³ and ICSID Convention or other BITs, as a supplement, then the recommended Draft Provisions can be taken as part of an arbitration clause to any contract that involves an Islamic or Middle Eastern government party. In consideration of the fact that even when international conventions or investment treaties are signed and ratified as law equal to domestic statutes, it has been shown that there are contradictions between these instruments and domestic laws or customary usage in the MENA. Therefore, in regard to the matter of how the HICALC would interact with national constitutions especially when they might provide very different solutions under Islamic law, the matter is dealt with in consideration of the fact that the HICALC is *sharia*-compliant and its articles can be used as arbitration clauses. The same applies to extant national arbitration laws and other national legislation eg, provisions related to the ordering of interest, found at Civil Codes. This allows for a higher possibility for enforcement when it can be shown to a MENA judge that the contract contained HICALC articles in the arbitration agreement which are on the face of it, *sharia*-compliant. Taking the HICALC articles or uniform Arab arbitration law provisions provided herein as free standing rules to be drafted into specific contracts can help lawyers and their investor clients mitigate adjudicatory risks in the MENA, when these provisions are added to contracts with Arab parties in which case both parties consent to the contract. For example, these recommendations can also be put

¹¹⁴³ See above n 177.

forth before ISPRAMED¹¹⁴⁴ which serves to foster arbitration between and amongst Arab and Mediterranean countries. The arbitral tribunals and courts would have to take these matters more seriously in such cases. Article 34 (1) of the ACICA Rules,¹¹⁴⁵ in contrast with Article 33 (1) of the UNCITRAL¹¹⁴⁶ may also be read to include the HICALC, for example, it allows for the allowance of principles upon which many of the HICALC provisions are built such that:

The reason for this particular wording of Art. 34.1 of the Rules was to allow the tribunal to apply national laws as well as customary principles such as the *lex mercatoria*, the UNIDROIT principles of International Commercial Contract, the ICC INCOTERMS 2000 or the ICC Uniform Customs or Practice for Documentary Credits 2007 (UCP 600) which are, strictly speaking, not ‘law’ but customary ‘rules of law’ or ‘principles of law’. If the tribunal were bound to apply the conflict of law rules, as for example required by the UNCITRAL Arbitration Rules, such ‘rules of law’ would not be applied to the substance of the dispute, as the conflict of law rules will in most circumstances only point to the substantive law of a State.¹¹⁴⁷

The ACICA Rules¹¹⁴⁸ are certainly a step in the right direction.

1 *Unidroit*

The relevance of the UNIDROIT to the discussion is significant, however, most notably:

¹¹⁴⁴ The Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED).

¹¹⁴⁵ ACICA Rules, Art. 34 (1).

¹¹⁴⁶ UNCITRAL Rules, Art. 33 (1).

¹¹⁴⁷ B Gehle, *The Arbitration Rules of the Australian Centre for International Commercial Arbitration*, *Vindobona Journal of Comparative Law and Arbitration*, (2009), Vol 13, 25-274, 270. ACICA Rules, Art. 34 (1), UNCITRAL Rules, Art. 33 (1).

¹¹⁴⁸ See above n 1145.

Probably the most important development in the field of transnational law is that of the *lex mercatoria*. This new law draws on the sources of law which have already been mentioned, including public international law and the general principles of law. It also draws on the Unidroit principles of international commercial law (“the Unidroit principles”) and the 1998 principles of European contract law.¹¹⁴⁹

Here is an example of a law that harmonises general principles of law, general principles of transnational law, principles of European contract law and the UNIDROIT. The existence of the *lex mercatoria* is a refutation of the claim that general principles of law and transnational law are incompatible. Indeed, the origins of the *lex mercatoria*, just like the Napoleonic Code, can be found in the Roman *ius gentium*: ‘The late Professor Goldman, who named this new “law” and who contributed to its development, refers to it as having had “an illustrious precursor in the Roman *ius gentium*,” which he describes as “an autonomous source of law proper to the economic relations between citizens (*commercium*) and foreigners (*peregrine*)”’.¹¹⁵⁰ Never has this fact been more relevant to investor–State disputes in the MENA than now.

The overarching goal of the International Institute for the Unification of Private Law as set forth in Article 1 of the Statute of UNIDROIT is ‘to examine ways of harmonising and coordinating the private law of States, and to prepare gradually for the adoption by the various States of uniform rules of private law’.¹¹⁵¹ Furthermore, ‘Its

¹¹⁴⁹ See above no 388, 129.

¹¹⁵⁰ Ibid.

¹¹⁵¹ Art 1, Statute of the UNIDROIT, The full text may be found at <<http://www.UNIDROIT.org/english/principles/main.htm>> UNIDROIT International Institute for the Unification of Private Law, Statute incorporating the amendment to Article 6(1) which entered into force on 26 March 1993, UNIDROIT, 28, Via Panisperna-Rome, official translation approved by the General Assembly at its 45th session on 26 November 1991, at 2: ‘L’Institut International pour l’Unification du Droit Prive a pour objet d’étudier les moyen d’harmoniser et de coordonner le droit prive entre les Etats ou

purpose is to study needs and methods for modernising, harmonising and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.’¹¹⁵²

This research is consistent with the Statute of UNIDROIT Article 1(a): ‘prepare drafts of laws and conventions with the object of establishing uniform internal law; (b) prepare drafts of agreements with a view to facilitating international relations in the field of private law; (c) undertake studies in comparative private law’,¹¹⁵³ through the drafting of the HICALC as presented herein. According to Article 12(1) of the Statute of the UNIDROIT: ‘any participating Government, as well as any international institution of an official nature, shall be entitled to set before the Governing Council proposals for the study of questions relating to the unification, harmonisation or coordination of private law’,¹¹⁵⁴ and Article 12(2), ‘any international institution or association, the purpose of which is the study of legal questions, may put before the Governing Council suggestions concerning studies to be undertaken.’¹¹⁵⁵

The author recommends that future drafters of a Model HICALC include this thesis when a HICALC is put forth before the UNIDROIT in order to increase harmonisation within the MENA. Involvement with the UNIDROIT including other

entre les groups d’Etats et de préparer graduellement l’adoption par les divers Etats d’une législation de droit privé uniforme.’

¹¹⁵² From the UNIDROIT Overview on the webpage. The text may be found at <<http://www.UNIDROIT.org/dynasite.cfm?dsamid=103284>>

¹¹⁵³ *UNIDROIT International Institute for the Unification of Private Law*, Statute incorporating the amendment to Art 6 (1) which entered into force on 26 March 1993, UNIDROIT, 28, Via Panisperna-Rome, official translation approved by the General Assembly at its 45th session on 26 November 1991, at 2. The full text may be found at <<http://www.UNIDROIT.org/english/principles/main.htm>>

¹¹⁵⁴ Art 12 of the Statute of the UNIDROIT, UNIDROIT International Institute for the Unification of Private Law, Statute incorporating the amendment to Article 6(1) which entered into force on 26 March 1993, UNIDROIT, 28, Via Panisperna-Rome, official translation approved by the General Assembly at its 45th session on 26 November 1991, at 10.

¹¹⁵⁵ Ibid.

international bodies will launch the study of improving standardisation of laws in international commercial arbitrations between European and other parties on one hand and Middle Eastern parties on the other hand in order to increase arbitral award enforcement and to ensure that the HICALC principles are seen on an equal par with the *lex mercatoria* principles and as a body of international law. Although the HICALC is designed for the MENA context, the valuable practical and theoretical considerations recommended have wider applications in harmonising international commercial arbitration law.

The HICALC is consistent with the UNIDROIT principles as set out in the Preamble of the UNIDROIT Principles of International Commercial Contracts of 2010,¹¹⁵⁶ which sets forth the provisions that:

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.¹¹⁵⁷

¹¹⁵⁶ The full text may be found at <<http://www.UNIDROIT.org/english/principles/main.htm>>

¹¹⁵⁷ *UNIDROIT Principles of International Commercial Contracts 2010*, Preamble. The full text may be found at <<http://www.UNIDROIT.org/english/principles/main.htm>>

In the event that the Model HICALC provisions set forth are adopted as law in the MENA, the UNIDROIT may be used to supplement them according to the specific provisions guiding its use as set out in the Preamble.

Certain articles found at the UNIDROIT that are relevant to the law and practice of international commercial and international investment arbitration in the MENA should be used as guides in drafting the HICALC. This will allow the HICALC to function as the substantive law of the contract in such a manner that it will anticipate and address the adjudicatory risks inherent in conducting an arbitration proceeding in the MENA in the event of a dispute. Article 1.3, for example, deals with *pacta sunt servanda*: ‘(Binding character of the contract) A contract validly entered into is binding upon the parties. It can only be modified and terminated in accordance with its terms or by agreement or as otherwise provided in these principles’.¹¹⁵⁸

The actual drafting and implementation are matters that will need to be addressed in the future and be done so by the appropriate institutional bodies. The author submits that the UNIDROIT is one such appropriate institution with a history of successful drafting and implementation. For example, the purpose of the UNIDROIT is compatible with the aims of this study, such that: ‘Unidroit's basic statutory objective is to prepare modern and where appropriate harmonised uniform rules of private law understood in a broad sense.’¹¹⁵⁹ The author has discussed the intersection of private law with public law in the introduction. This is not incompatible with the aims of the UNIDROIT as:

¹¹⁵⁸ UNIDROIT, *Principles of International Commercial Contracts 2010*, Art 1.3. The full text may be found at <<http://www.UNIDROIT.org/english/principles/main.htm>>

¹¹⁵⁹ UNIDROIT Overview. The full text may be found on <<http://www.UNIDROIT.org/dynasite.cfm?dsid=103284>>

‘However, experience has demonstrated a need for occasional incursion into public law especially in areas where hard and fast lines of demarcation are difficult to draw or where transactional law and regulatory law are intertwined.’¹¹⁶⁰ The matters dealing with substantive law herein including the conflict of law is appropriate to the UNIDROIT: ‘Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules; they will only include uniform conflict of law rules incidentally.’¹¹⁶¹ The author suggests that the HICALC should be considered for implementation as a regional convention, again compatible with the general workings of the UNIDROIT and in accordance with its usual procedure as: ‘The uniform rules drawn up by Unidroit have, in keeping with its intergovernmental structure, generally taken the form of international Conventions, designed to apply automatically in preference to a State’s municipal law once all the formal requirements of that State’s domestic law for their entry into force have been completed.’ If this is not possible, the author agrees with UNIDROIT’s solution of the following in which the HICALC is presented as a model law:

However, alternative forms of unification have become increasingly popular in areas where a binding instrument is not felt to be essential. Such alternatives may include model laws which States may take into consideration when drafting domestic legislation or general principles which the judges, arbitrators and contracting parties they address are free to decide whether to use or not.¹¹⁶²

In the event a regional convention or model law is deemed not feasible for the HICALC by the implementing body, a third alternative exists: ‘Where a subject is not judged ripe

¹¹⁶⁰ Ibid.

¹¹⁶¹ Ibid.

¹¹⁶² Ibid.

for uniform rules, another alternative consists of the legal guides, typically on new business techniques or types of transaction or on the framework for the organisation of markets both at the domestic and the international level.’ In this regard, the author submits that this thesis forms such a guide in its current form. In regard to a regional convention, ‘ Generally speaking, “hard law” solutions (ie Conventions) are needed where the scope of the proposed rules transcends the purely contractual relationships and where third parties’ or public interests are at stake as is the case in property law.’¹¹⁶³ In this final case the author submits that this is a matter that must be left for the implementing institutional bodies to decide in conjunction with the relevant Government authority. A first step to implementation is the presentation of this research to the UNIDROIT, in which case the UNIDROIT procedure would potentially be activated.¹¹⁶⁴

Many of the member states of UNIDROIT are MENA governments:

Full participation in Unidroit committees of governmental experts is open to representatives of all Unidroit member States. The Secretariat may also invite such other

¹¹⁶³ Ibid.

¹¹⁶⁴ Ibid: ‘Once a subject has been entered on Unidroit’s Work Programme, the Secretariat, where necessary assisted by experts in the field, will draw up a *feasibility study and/or a preliminary comparative law report* designed to ascertain the desirability and feasibility of law reform. Where appropriate and funding permitting, an economic impact assessment study is also carried out. The report, which may include a first rough draft of the relevant principles or uniform rules, will then be laid before the Governing Council which, if satisfied that a case has been made out for taking action, will typically ask the Secretariat to convene a *study group*, traditionally chaired by a member of the Council, to prepare a *preliminary draft Convention* or one of the alternatives mentioned above. The membership of such study groups, made up of experts sitting in their personal capacity, is a matter for the Secretariat to decide. In doing so, the Secretariat will seek to ensure as balanced a representation as possible of the world’s different legal and economic systems and geographic regions. A preliminary draft instrument prepared by the study group will be laid before the Governing Council for approval and advice as to the most appropriate further steps to be taken. In the case of a preliminary draft Convention, the Council will usually ask the Secretariat to convene a *committee of governmental experts* whose task it will be to finalise a *draft Convention* capable of submission for adoption to a *diplomatic Conference*. In the case of one of the alternatives to a preliminary draft Convention not suitable by virtue of its nature for transmission to a committee of governmental experts, the Council will be called upon to authorise its publication and dissemination by Unidroit in the circles for which it was prepared.

States as it deems appropriate, notably in light of the subject-matter concerned, as well as the relevant international Organisations and professional associations to participate as observers.¹¹⁶⁵

The process set out by UNIDROIT for an international convention would then be followed, or serve as a model.¹¹⁶⁶ The author believes that the UNIDROIT should be the first choice of an institutional body to approach for implementation due to its harmonisation experience in this matter.¹¹⁶⁷ The UNIDROIT is well-suited to address the matter of the implementation of the HICALC due to its extensive experience in research and drafts of harmonised laws that have succeeded in being implemented.¹¹⁶⁸ It is submitted that only a supplementary law in addition to extant instruments can fill the lacunae identified here and address the legal doctrines that repeatedly appear in these and similar cases. In consideration of the propensity of these states to submit themselves to Islamic law by constitutional decree, and that there exist principles at Islamic law that could frustrate certain types of financial or other contracts, it is submitted that certain

¹¹⁶⁵ Ibid.

¹¹⁶⁶ Ibid: 'A draft Convention finalised by a committee of governmental experts will be submitted to the Governing Council for approval and advice as to the most appropriate further steps to be taken. Typically, where it judges that the draft Convention reflects a consensus as between the States represented in the committee of governmental experts and that it accordingly stands a good chance of adoption at a diplomatic Conference, the Council will authorise the draft Convention to be transmitted to a diplomatic Conference for adoption as an *international Convention*. Such a Conference will be convened by one of Unidroit's member States.'

¹¹⁶⁷ Ibid: 'Unidroit makes its expertise in the field of legal harmonisation available to developing countries or regions and countries in economic transition, in particular, also with a view to promoting uniform law in those parts of the world. It also offers technical assistance with the drafting of national and regional legislation, a prime example being its co-operation with the Organisation for the Harmonisation of Business Law in Africa (OHADA). At the request of that Organisation, Unidroit prepared a preliminary draft OHADA Uniform Act on contract law, largely inspired by the Unidroit Principles. Moreover, Unidroit provides assistance in implementing and publicising Unidroit instruments and activities, including training and research in respect of uniform law. A research scholarships programme, funded largely by outside donors, enables the Unidroit Library to host a certain number of researchers each year.'

¹¹⁶⁸ Ibid: 'Unidroit has over the years prepared over seventy studies and drafts. Many of these have resulted in international instruments.'

Islamic law principles can be drafted into the aforementioned HICALC in order to fill the said lacunae.

Since the HICALC mainly addresses the problems that occur in MENA-FI arbitrations, it can be implemented in the region as part of the Euro-Med reforms and EU trends towards unification, standardisation and harmonisation of laws overall. In this regard it can take the form of a regional treaty. The Euro-Med Dialogue can bring EU reforms to the MENA. Since the UNCITRAL is either widely ratified in the MENA or is the basis of many of the MENA countries' arbitration laws, either additional amendments to extant instruments or an entirely new set of rules can be drafted. It should be clear that a legal instrument supplementing, amending or reforming the three main instruments of ICA; the New York Convention, the Washington Convention¹¹⁶⁹ and the UNCITRAL, harmonisation can be the saving grace of ICA in consideration of the historical mistrust and understandings.

C Theoretical Implications of the research

At the beginning of this research the author posed the question: if harmonisation of the laws of the MENA with civil and common law took place, would arbitral award enforcement increase? Evidence was presented to establish that the absence of harmonisation across the three traditions contributed to the unique problems in the MENA. Common principles distilled from the three traditions were employed to form the foundation of a HICALC or uniform Arab arbitration law, with suggested provisions presented in the appendix.

¹¹⁶⁹ See above n 138.

The recommendations set forth herein would not only be valuable reforms as applied to the MENA. They have applications to the Australasian trading climate. There are wider applications to other regions due to the common thread of Islamic law found at many of the Constitutions of the Commonwealth of Nations; countries that are amongst Australia's trading partners. This includes the Asia Pacific region- again due to the fact that Islamic legal culture or law, if not actually enshrined in the constitution, still has an impact on the enforcement of awards, particularly in Malaysia. The law can be applied to Commonwealth member states, particularly the ones that have promulgated Islamic law in their constitutions, with their trading partners, such as Indonesia,¹¹⁷⁰ and South East Asian countries (Pakistan, Bangladesh). These recommendations may set a precedent for integrating cultural understanding in a codified arbitration law based on general and universal principles of law.

The globalised economy depends on the outcomes of both ICA and IIA¹¹⁷¹ because it is the most widely used form of international commercial dispute resolution involving significant sums of monies and long-term high-risk investments. Arbitration has benefits to those engaging in commercial transactions that outweigh litigation. The director of the Kuala Lumpur arbitration centre in Malaysia recently stated China is doing

¹¹⁷⁰ The 1945 Constitution of the Republic of Indonesia, Chapter XI, Art 29 (1), 'The State shall be based upon the belief in the One and Only God.'

¹¹⁷¹ See above n 13, 43-44: '... investment arbitration, ie the resolution of investment disputes between a private investor and a host state by arbitration. International investment law, a now distinct category of international economic law, has emerged slowly over the centuries: rooted in the international law protection of aliens, exercised by their home states, it is in theory primarily based on treaties. Treaties have as a rule provided quite general standards for treating aliens and now the distinct and new category of foreign investors. The language of these cases is as a rule open to variegated interpretations and allows both a very restrictive or a very extensive scope of the rules. The true shape, character and contours of international investment law have, however, been determined by judicial and now mainly arbitral determination in individual cases, with foreign claimants and host state defendants ("respondents").'

so well economically because they resort to arbitration on a regular basis.¹¹⁷² In the context of Middle Eastern cultures, arbitration, in addition to its other benefits, has benefited commercial transactions and led to increases in economic growth. It allows the parties to save face, facilitating the preservation of business relationships rather than an adversarial approach.¹¹⁷³ It maintains the confidentiality of the parties, preventing investor confidence from being unduly affected whilst keeping the media out of high-profile cases.

In consideration of the existence of the potentially narrow and strict interpretations of public interest, or *maslaha*, at Islamic law by some scholars, as previously discussed, any movement towards a relatively flexible but just understanding of an international definition of transnational public policy accepted globally and enshrined in a harmonised ICA code would be beneficial to setting a guideline or standard for a broader interpretation of public policy; one which responds to increasing globalisation yet cultural diversity of parties involved in cross-border arbitrations. This research has provided articles based on general principles of law in harmony with the three legal traditions that can form the basis for rules to be incorporated as amendments to UNCITRAL. The analysis generated by this research underpinning the creation of the draft HICALC, including the drafted articles themselves, would be valuable reforms if applied to the MENA. The UNCITRAL cannot be complete unless it is informed by cross-cultural sensitivity to elements at Islamic law. A uniform Arab arbitration law that balances and takes into consideration the three legal systems (civil, common, and

¹¹⁷² S Rajoo, 15 October 2010 remarks at 'Financial Review International Dispute Resolution Conference', Four Seasons Hotel, Sydney, in a conference attended by judges, MPs, arbitrators, directors of arbitration centres, lawyers and scholars.

¹¹⁷³ This is because it is derived from an indigenous culture of conciliation in which it was customarily used to reconcile marriage partners, *inter alia*, thus having non-litigious connotations.

Islamic) of European and Middle Eastern states involved in disputes together, whilst integrating the common principles into a unified code of rules or best practices, will greatly facilitate satisfactory arbitrations that lead not only to a higher incidence of award enforcement but foster cross-cultural understanding and diplomatic State relations including continued contractual and commercial relations between parties at dispute.

UNCITRAL has been criticised for creating rules that do not have a specific common historical background.¹¹⁷⁴ This is why a law informed by the three legal traditions, general principles of law and oil concession law (*lex petrolea*) would fill this gap. One of the criticisms of UNCITRAL is that it is not respectful of the sensibilities of members of localised cultures and customs:

UNCITRAL has to a large extent cast the mould for international rules, but a question remains as to whether its rules are specific enough to meet the users' needs. One point of view is that rules which spring out of no country's background lack an essential 'something'; like Esperanto, they lack the breath of life because they have no history. Rules and language both need history. They have to be born and develop out of a specific situation in order to have the capacity to go on developing to meet changed needs.¹¹⁷⁵

This is precisely why a *lex mercatoria* or, more appropriate to oil concession disputes a *lex petrolea* can be developed based on the Model HICALC and can lead to a synthesis of general principles of law derived from the three legal traditions cited herein. This development of a *lex petrolea* can guide the development of a harmonised code of law.

¹¹⁷⁴ XO De Zylva, R Harrison, (Eds), *International Commercial Arbitration, Developing Rules for the New Millennium*. (Jordan Publishing), xxxiv.

¹¹⁷⁵ Ibid, in the introduction.

The key to reform and the pathway to increasing acceptance of Arab Seats is to return ICA law to its indigenous origins. This has never been more important than it is now: ‘international commercial arbitration in its countries of origin lives in an atmosphere which is sharply different from that which has traditionally pervaded the Arab world. Failure to appreciate this may lead to disappointment when initiatives are taken to integrate the Arab world with international arbitration as currently practiced’.¹¹⁷⁶ It is only a question of returning arbitration to its cultural and customary origins; arbitration as it is practised today has become time consuming, costly, and excessively litigious and has therefore deviated from its origins. As of the end of 2008, ‘A Working Group of the United Nations Commission for International Trade Law (“UNCITRAL”) is in the process of revising the UNCITRAL Rules of Arbitration (“Rules”)’.¹¹⁷⁷ Now is the time to introduce cross-cultural sensitivity.¹¹⁷⁸ Indeed, this is one of the ‘unique challenges involved in revising the rules’.¹¹⁷⁹ This means that ‘. . . the Rules need to be “acceptable in countries with different legal, social and economic systems”. They need to account for all legal traditions.’¹¹⁸⁰ Everyone needs to agree with the Rules: ‘. . . only those changes which are universally considered necessary, or proposals which are watered down to the lowest common denominator of views in the room, will be

¹¹⁷⁶ Michael Mustill, *Lord of Appeal in Ordinary*, in A J Van Den Berg, (ed) with the cooperation of the TMC, (Keynote speech delivered at Asser Institute, Institute for private and public international law). International Commercial Arbitration and European Law. International Council for Commercial Arbitration Conference, Bahrain, 14–16 February 1993. International arbitration in a Changing World, 1994. (Kluwer Law International) 14.

¹¹⁷⁷ L Judith, ‘Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules’ *The University of New South Wales Law Journal Forum International Commercial Arbitration*. Vol 14 No 1. May 2008, at 4.

¹¹⁷⁸ N Jean-Claude, International Commercial Arbitration yearly lecture sponsored by Clayton Utz Law Firm. Supreme Court, Sydney, Australia, Wednesday, 5 November 2008.

¹¹⁷⁹ See above n 1177, 5.

¹¹⁸⁰ Ibid 6.

adopted'.¹¹⁸¹ The need to harmonise ICA law is no longer disputed. It is a question now of to what degree. Harmonisation is already underway; however, it has not yet achieved a uniform standard.¹¹⁸² A consideration of ICA law reform, in line with harmonisation, would be to simplify it. Ironically, it originated in the MENA states, and perhaps returning it to its simple origins would make it once again an effective method of dispute resolution that would lead to a higher rate of arbitral award enforcement.¹¹⁸³ The Model HICALC arbitration clauses proposed here are straightforward yet fully capable of dealing with the complex matters of law raised in the MENA impacting ICA therein. The regular and customary usages of these proposed clauses will be the salvation of ICA; reviving the wasteland to the glorious kingdom envisioned by those proponents of the *lex mercatoria* and of the drafters of the Charter of the Permanent Court of Arbitration at The Hague.

Reform has never been more important than it is now, as currently, 'international commercial arbitration in its countries of origin lives in an atmosphere which is sharply different from that which has traditionally pervaded the Arab world. Failure to appreciate

¹¹⁸¹ Ibid.

¹¹⁸² See above n 911, 29: 'Many practitioners aspire to an international commercial arbitration system that is "uniform" and as far removed as possible from its purely domestic context. Indeed, some eminent commentators freely contend that international commercial arbitrators "have no forum", or conversely, enjoy the benefits of a multitude of forums, namely those forums that will recognise and enforce their awards. Whilst this position is not without its difficulties and detractors, it nevertheless serves to underscore the increasingly globalised nature of international arbitration law and practice, and the mounting demands that international arbitration be guided by essentially the same basic principles, regardless of whether the seat of arbitration is in Melbourne or Mexico City. It is against this background that the secretariat of the United Nations Commission on International Trade Law ("UNCITRAL"), in consultation with other international interested parties", conceived the UNCITRAL Model Law ("Model Law").'

¹¹⁸³ 'The procedures come to resemble a parody of a trial in court, with none of the court's power to make the disputants, and more importantly their lawyers, do what ought to be done. A new arbitral regime should aim to put arbitration firmly back where it started, as an integral part of the world of commerce, answering the needs of commerce by furnishing the quickest, cheapest and most commercially informed way to a decision consistent with the basic principles of natural justice.' In, see above n 1176, 19.

this may lead to disappointment when initiatives are taken to integrate the Arab world with international arbitration as currently practiced'.¹¹⁸⁴ Here is the rationale for a uniform Arab arbitration law. The UNCITRAL Model law is distant from the *sharia*.¹¹⁸⁵ An improved harmonised UNCITRAL informed by cross-cultural sensitivity¹¹⁸⁶ to elements at Islamic law would return ICA law to its simple origins. This would make it acceptable to Arab jurisdictions whilst decreasing risk to foreign investors based on expropriation, competence challenges, pleas of public policy and State sovereignty and non-awarding of interest; making it once again an effective method of dispute resolution that would lead to a higher rate of arbitral award enforcement.

In hindsight, it is a simple matter to apply the historical outcome of oil concession arbitral awards to the letter of the law and to perceive clearly where the law, or lacunae in the law, fell short in preventing the problems that led to the creation of dangerous precedent in ICA. Yet, to ignore the lessons of history would not be wise. Now it is necessary to gather the knowledge generated through nearly one hundred years of ICA proceedings from the early oil concessions to the present and to apply that knowledge to an improved law.

A HICALC will serve as a bridge to ensure uniformity in procedure in arbitrations amongst Euro-Med parties in investor–State mineral and other arbitrations. It can do this by distilling the common principles of law found within the three religions of the region, Judaism, Christianity and Islam, and the three legal traditions of civil, common and

¹¹⁸⁴ Ibid 14.

¹¹⁸⁵ See above n 1123, 17.

¹¹⁸⁶ See above n 1177, 4–6, as well as, see above n 1178, and see above n 911, 29, together with, in see above n 1176, 19.

Islamic law, indigenous to the Euro-Med region as a holistic entity. This is important in consideration of the fact that Euro-Med collaborative projects and institutions such as ISPRAMED,¹¹⁸⁷ *inter alia*, continue to be necessary in the Mediterranean and as more North African nations update their international arbitration laws, more collaboration will be needed. Articles drafted in a HICALC can address the unique problems in ICA that beset the field, particularly in the MENA. The outcome of such a law would be greater predictability and consistency in arbitral tribunal decisions and in court judicial review across the world. This would bring about higher credibility of ICA and higher award enforcement. It would lower legal and political risk by mitigating adjudicatory uncertainty. In consideration of foregoing discussions of the evolution of investment treaty arbitration, a positive perception on the part of Arab participants in ICA disputes is a critical determinant of diplomatic interstate relations. It is a critical determinant of international trade.¹¹⁸⁸ The author submits that the negotiation of oil concessions and

¹¹⁸⁷ The Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED) which promotes arbitration in the Mediterranean is well positioned to help promulgate the research herein.

¹¹⁸⁸ The Permanent Court of Arbitration/Peace Palace Papers, 'Strengthening Relations with Arab and Islamic Countries through International Law, E-Commerce, the WTO Dispute Settlement Mechanism and Foreign Investment' in *The Permanent Court of Arbitration/Peace Palace Papers: Papers emanating from the Fourth PCA International Law Seminar*, International Bureau of the Permanent Court of Arbitration, (eds) October 12, 2001 (Kluwer Law International, 2002). At the Fourth Permanent Court of Arbitration (PCA) International Law Seminar in 2001 attendees were told: 'Consequently, several Arab states have introduced new arbitration legislation and have adhered to international arbitration Conventions.... In the field of international commercial arbitration, the hostile attitude of Arab countries which was originally due to the disappointing outcome of some well-known arbitration cases, seems to be changing. The Arab world is opening up to commercial arbitration in the international context... The Arab world, being involved more than ever in international trade, consequently has become more inclined to accept arbitration as an appropriate means of resolving disputes arising out of this trade. International trade and international arbitration are bound together.'

foreign investment contract disputes are critical to diplomatic relations.¹¹⁸⁹ The history of oil concessions is in fact quite brief.¹¹⁹⁰

Arbitration is amongst the methods of peaceful settlement.¹¹⁹¹ As a historical fact, the early arbitrated oil concession¹¹⁹² disputes had disappointing results for Arab states. Yet, former United Nations Secretary General Kofi Annan has affirmed that it has a long and distinguished history in carrying out the mission of the United Nations Charter as set out in Articles 1 and 33 by settling international disputes by peaceful means, in conformity with the principles of justice and international law.¹¹⁹³ Here, the trend towards the acceptance of arbitration by Arab participants is a positive step in achieving strong diplomatic relations and peace amongst nations. Does this not highlight the importance of this Court and of international arbitration as a keystone in promoting peaceful relations amongst MENA and Western States?

Our interdependent global economy brings into contact parties from different legal and cultural backgrounds. This means that transnational commercial disputes have a

¹¹⁸⁹ In M Ayad, 'International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region' in *Vindobona Journal of Comparative Law and Arbitration* 12.2 (2008): 169–174, at 169.

¹¹⁹⁰ See above n 1125, 118: 'The concession system in the Middle East was of colonial and imperial origin. When Persia granted the D'Arcy concession, in 1901, the country was divided into spheres of British and Russian influence. In Iraq the tug of war for oil concessions began under Turkish rule; then the country was under a British mandate when the most important concession was granted to the Turkish Petroleum Company (TPC) in 1925. The sheikhdoms of Bahrain (1930), Kuwait (1934), and Qatar (1935) granted concessions under British rule. Only Saudi Arabia, which granted its most famous concession in 1933, was an independent kingdom. Every single concession covered a large part, if not all, of the national territory of these countries. The concession term varied between 55 years (Bahrain) and 75 years (Iraq, Kuwait and Qatar), and there were only vague provisions for relinquishment. Hence, the history of Middle East oil is largely the history of a few concessions.'

¹¹⁹¹ See above n 1123.

¹¹⁹² R Bishop, J Crawford, W Reisman, *Foreign Investment Disputes, Cases, Materials and Commentary*, *Kluwer Law International*, 2005, at 216: 'Historically, early grants of mineral rights were made through the use of the classic concession. The characteristics of this agreement were: (1) a grant of rights to mineral development over a vast area of acreage; (2) for a relatively long period; (3) providing to the multinational corporation extensive control over the schedule and manner in which the mineral reserves were developed, and (4) reserving few rights to the sovereign, except the right to receive payment based upon production.'

¹¹⁹³ See above n 1123.

higher frequently of occurring than ever before. Many of the new rules are an amalgamation of new international legislation and modern arbitration standards.¹¹⁹⁴ These rules need to be made more effective. ‘International commercial arbitration, boosted by the success of the New York Convention, operates on a worldwide basis. The Arab world is no stranger to international arbitration.’¹¹⁹⁵ Globalisation, as it has led to higher transnational commercial disputes and to an interdependent economy, necessitates a harmonised body of ICA law that is acceptable to the entire global community and not just Western nations. The goal of harmonisation is a primary way to reduce the risk of unenforceable awards. The overall effect of a HICALC would lead to higher international economic development and regional development, particularly in the case of the MENA including the aforementioned cases. A HICALC will foster diplomatic relations with neighbouring states and overall diplomatic relations amongst nations. It would increase international commerce by reducing barriers to trade.

The penultimate outcome would be higher arbitral award enforcement. Ultimately, successful arbitration outcomes can thereby contribute to diplomatic interstate relations, fulfilling the mandate of the Permanent Court of Arbitration at The Hague. This research has topical applications in consideration of the revolutionary changes affecting the MENA. This new Code is groundbreaking and the legal climate in the MENA is now ripe for these reforms to be implemented therein. The scope of the substantive law and procedural law matters under the purview of this thesis are covered comprehensively yet also broadly in scope. A comparative law analysis was undertaken

¹¹⁹⁴ *Conference on Aspects of international arbitration in the law and practice of Arab countries*. Session III. The reception of new legislation and international standards on Arbitration: The role of the legislator and state courts. M H Omar Aljazy, PhD MCIARB. 13 June, 2007. Cour de Cassation. Paris, France.

¹¹⁹⁵ See above n 1123, 99.

and arcane Islamic provisions that can help investors are presented in order to influence future laws in the MENA. It offers advice and guidelines for an actual law code that can be refined by future drafters and implemented in the near future, one that is acceptable to both Western and MENA parties. A theory of jurisprudence of international arbitration is given for the first time in the history of the field, through an exposition of the principles that should be included and the empirical rationale for this.

The penultimate submission the author wishes to make, before presenting the suggested draft articles of the HICALC in the appendix, is one in favour of stronger and more active means of enforcement of ICA awards. The International Court of Justice (ICJ) has a long and honourable history in the enforcement of international arbitration awards.¹¹⁹⁶ Notwithstanding the fact that many of the arbitrations the ICJ has heard are not commercial in nature, for the purposes of investor–State contracts, where it has been shown herein that public international law and private international law converge at the nexus of investor–State or commercial–State contracts, the author submits that the ICJ is well-positioned to uphold international awards, even if they deal with commercial matters (private international law matters) when a State is involved. This is due to the fact that the involvement of a State party raises certain public international law matters, not least of which any matters related to relevant BITs. There is considerable precedent found at the ICJ and as this thesis has demonstrated, the convergence of public international law with private international law is within the purview of ICA and IIA in investor–State disputes or in commercial disputes involving a State party. This aforementioned convergence lends itself to the appropriate forum and the author submits that the ICJ,

¹¹⁹⁶ For a thorough discussion on ICJ International Judgments and Awards, see above n 1134.

with its longstanding experience and rich precedent of dealing with important State matters that implicate public policy, is an appropriate forum. Scholars such as Sornarajah and El Koshery have rightly previously argued that contracts involving States are of a different nature than those without a State party. The author agrees with these learned scholars and maintains that due to this fact, an enforcing body with the mechanisms to uphold international awards is needed. The ICJ, in contrast with the ICC and the Permanent Court of Arbitration, is in fact, a court that has the power to enforce international law upon states. In the final analysis, it is the enforcement of international arbitration awards that determines the overall effectiveness of the system of ICA and IIA law and practice. The author's statements with respect to the ICJ are qualified in that the ICJ can serve as a prototype with certain limits. The value of including this idea is that it is a new contribution and will open the door to further discussion. Moreover, there is a project at The Hague currently working to harmonise foreign judgements. It can open the door to States accepting such review power over arbitration awards in future. This recommendation of enforcement, together with the implementation of the HICALC will most assuredly ensure the effectiveness of these two important bodies of law; ICA and IIA law. A harmonised law is necessary but the penultimate step to effective arbitration award enforcement would be the institution of an ICA Court. For, without enforcement, even a harmonised law is weak. In the sage and prophetic words of the learned Judge Howard M Holtzman,

To dream the impossible dream. . . These are the words sung by Don Quixote in *The Man From La Mancha*. Perhaps they apply equally as I set out to tilt at the windmills of national sovereignty by suggesting that a valuable task for the 21st Century would be to

create a new international Court that would take the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitration awards.¹¹⁹⁷

His Honour Holtzman describes the court:

The new international Court for resolving disputes on the enforceability of arbitral awards that is proposed, is designed to remove the risks inherent in the present regime of the New York Convention which, as noted, requires recourse to municipal courts—most often in the loser's country. The new Court would have exclusive jurisdiction over questions of whether recognition and enforcement of an international arbitration award may be refused for any of the reasons set forth in Article V of the New York Convention.¹¹⁹⁸

If the submissions herein seem ambitious, let us look to the scholars of the past for inspiration; scholars who were not afraid to propose new and groundbreaking ideas for their generations, as:

From the past, we know that the present system of international commercial arbitration is the work of relatively few men who dreamt great dreams, which were adjudged impossible by many of their contemporaries. Can we not derive lessons and encouragement for the future from the great initiatives and successes in the past of the Cecils, Davids and Eisemanns, as the world economy develops and changes still further?

¹¹⁹⁷ H Holtzman, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in M Hunter, A Marriot, V V Veeder, (Eds), *The Internationalisation of international arbitration LCIA Centenary Conference*, (Graham & Trotman), 109.

¹¹⁹⁸ J A Philip, A Century of Internationalisation of international arbitration: an Overview, in, M Hunter., A Marriot, V V Veeder, (Eds), *The Internationalisation of international arbitration LCIA Centenary Conference*, (Graham & Trotman), 112.

Can the seeds of new ideas for that future not be sown now, in our time, by new dreamers of “impossible dreams”?¹¹⁹⁹

The relevance of these wise words to the current global financial crisis is starkly obvious, and no matter how ambitious a project it is to implement a harmonised ICA law code, now is the time to plant the seeds for the impossible dream that will become tomorrow's deliverance. This research overcomes historical obstacles including intellectual discourses that have for centuries succeeded in setting Eastern and Western cultures in an 'us' versus 'them' dichotomy. These discourses have prevented scholars from considering the option of engaging in such a comparative study as the one undertaken herein, and prevented them from approaching the three different legal traditions as being on equal standing. Although learned scholars have mentioned this latter point, as the earlier quote by the learned Veeder attests to, this is to a large degree the extent of previous scholarship. The comparative approach of the author shows that there are harmonising principles of law common to all three traditions and can be drafted into a code that brings understanding to the once obscure realm of ICA and IIA law in the MENA.

¹¹⁹⁹ Ibid 3.

XIII BIBLIOGRAPHY

A Books

Aksen, G; von Mehren, R B; (Editors), *international arbitration Between Private Parties and Governments*, United States: Practising Law Institute (1982)

Al Tamimi, Essam; *Practical Guide to Litigation and Arbitration in the United Arab Emirates*, Kluwer Law International, (The Hague, 2003)

Al Tamimi, Essam; Price, R, *United Arab Emirates Court of Cassation Judgements*, 1989–1997, Kluwer Law International, (1998)

Alam, Eldin; Mohie, Eldin I; in *Arbitral Awards of the Cairo Regional Centre for international commercial arbitration*, preface, MIM Aboul-Enein, in 2000, Kluwer Law International, the Hague

Amin, S H; *Research Methods in Law*, (Glasgow: Royston Publishers 1992).

Araque, A R; in Mommer, R, *Global Oil and the Nation State*, (Oxford University Press, 2002)

August, R, *International Business Law. Texts, Cases, and Readings*, (4th Ed) (Pearson Education Ltd, Australia, 2004)

Badr, G, *State Immunity: an Analytical and Prognostic View*, (Martinus Nijhoff Publishers, 1984)

Berger, K; Power of arbitrators to fill gaps and revise contracts to make sense, in Fletcher, I; Mistelis, L; Cremona, M; *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, London, 2001, 275-276)

Bhaba, H, *The Location of Culture*, (Routledge, London, 1994)

Bhatia, V; Candlin, C; Gotti, M, *Discourse and Practice in International Commercial Arbitration*, (Ashgate, 2012)

Bishop, Doak R, *International Arbitration of Petroleum Disputes. The Development of a “Lex Petrolea”* Center for Energy, Petroleum and Mineral Law and Policy. CPMLP Discussion Paper No DP 12. (Scotland 1997)

Bishop, R; Crawford, J; Reisman, W; *Foreign Investment Disputes, Cases, Materials and Commentary*, (Kluwer Law International, 2005)

Bix, B, *A dictionary of legal theory*, (Oxford University Press, 2004)

- Born, G; Part Three: Chapter 11. *Recognition and Enforcement of international arbitration Awards: Basic Principles*, in Born, G, international commercial arbitration: Commentary and Materials (2nd Ed) (Kluwer Law International 2001)
- Brinton, Jasper Yeates; *The Mixed Courts of Egypt*, (New Haven: Yale University Press, 1930)
- Buhring-Uhle, C; *Arbitration and Mediation in International Business*, (Kluwer Law International, 1996)
- Brown, C; Miles, K; eds, *Evolution in Investment Treaty Law Arbitration*, (Cambridge University Press, 2011)
- Bonnitcha, J; *Outline of a normative framework for evaluating interpretation of investment treaty protections*.
- Brown, N; *The rule of law in the Arab world. Courts in Egypt and the Gulf*, (Cambridge University Press, 1997)
- Brownlie, I; *Principles of public international law*, (Clarendon Press, Oxford, 4th ed, 1990)
- Campbell, Enid; Fox, Richard; Kewley, Gretchen; *Student's Guide to Legal Writing*. (The Federation Press, 1998)
- Carroll, R; Prickett, S; *The Bible: Authorised King James Version* (Oxford World's Classics), Micah 6:8. p 1014
- Cheng, Tai-Heng; 'Precedent and Control in Investment Treaty Arbitration,' pp. 149-182, at 180, in, Bjorklund, Andrea; Laird, Ian; Ripinsky, Sergey (eds); *Investment Treaty Law, Current Issues III, Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law*, British Institute of International and Comparative Law, 2009
- Cockle & Hibbert; *Leading cases on the common law*, (Sweet and Maxwell, 1921)
- Coulson, Noel James; *Conflicts and Tensions in Islamic Jurisprudence*, (Chicago, 1969)
- Craig, W; Park, W; Paulson, J; *International Chamber of Commerce Arbitration*, (Oceana Publications, 2nd Printing, 1985)
- Crone, Patricia; *Roman, Provincial and Islamic law. The origins of the Islamic patronate*. (University of Cambridge, 1987)
- De Motte, E, *The Grail Quest, Search for transcendence*, Rosicrucian Order AMORC, Australia

De Palo, G; Trevor, M (Eds); Alexander, N J, (Series Ed), *Arbitration and Mediation in the Southern Mediterranean Countries*, (Kluwer Law International 2007), Egypt, (El Batouti, M; Hanafi, S; El Helaly, K; Osman, H), at p. 18, in, Egypt, (El Batouti, M., Hanafi, S; El Helaly, K; Osman, H)

Demurger, A; *The Last Templar: The tragedy of Jacques de Molay, Last Grand Master of the Temple*, (Profile Books 2005)

Dezalay, Yves; Garth, Bryant G, *Dealing in virtue*, (University of Chicago Press, Chicago, 1996)

Dickenson, A; Lindsay, Rae; Loonam, J; Chance, C; (eds), *State Immunity, Selected Cases and Commentary, The Preamble of the European Convention on State Immunity, Additional Protocol and Explanatory Reports*, (Oxford University Press, 2004)

Dolzer, R; Schreuer, C, *Principles of International Investment Law*, (Oxford University Press)

Fazio, S; *The Harmonization of International Commercial Law*, (Kluwer Law International, 2007)

Fletcher I, Mistelis L, Cremona M, (eds), *Foundations and Perspectives of International Trade Law*, (Sweet and Maxwell, 2001)

Fletcher, R; *The cross and the crescent, the dramatic story of the earliest encounters between Christians and Muslims*, (Penguin, 2003)

MacCormack, G; *Secured Credit and the Harmonization of Law, The UNCITRAL Experience*, (Edward Elgar, UK, 2011)

Mistelis L, 'Is Harmonisation A Necessary Evil?' *The Future of Harmonisation and New Sources of International Trade Law*

Fry, James, D; *Islamic law and the Iran–United States Claims Tribunal: The Primacy of the International Law over Municipal Law*, *Arbitration International*, (Kluwer Law International 2002, Vol 18, Issue 1)

Forrestal, M V; *Examples of and Reasons for Increased Use of international arbitration*.

Garnett, R; Gabriel, H; Waincymer, J; Epstein, J; *A Practical Guide to international commercial arbitration*, (Dobbs Ferry, New York: Oceana Publications, Inc, 2000)

Gillham, Bill; *Case Study Research Methods*, (London: Continuum, 2000)

Greenberg, S; Kee, C; Weeramantry, J; *International Commercial Arbitration, An Asia-Pacific perspective*, (2011)

Government of the State of Kuwait v American Independent Oil Co. (Aminoil), Award of 24 May 1982, 21 International Legal Materials 976, 1036 (1982), 9 Yearbook Commercial Arbitration 71, 87 (1984), in Bishop, R. Doak, *International Arbitration of Petroleum Disputes: The Development of a "Lex Petrolea"*, Centre for Petroleum and Mineral Law and Policy, 1997, Discussion Paper No DP 12

Greenberg, S; Kee, C; Weeramantry, J Romesh; *international commercial arbitration, An Asia-Pacific Perspective*, (Cambridge University Press, 2011)

Guillien, R ; Vincent, J ; sous la direction de Guinchard, S ; et Montagnier, G ; Termes Juridiques, 10^e édition, Dalloz 1995

Hallaq, W; *Sharia, Theory, Practice, transformation*, (Cambridge University Press, 2009)

Hamid Ahdab A; *Arbitration with the Arab countries* 13 (2nd ed 1999)

Hamilton, E; *Mythology, Timeless tales of gods and heros*, (Grand Central Publishing, New York, 1942)

Holtzman, H; 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards,' in Hunter, M; Marriot, A; Veeder, VV, (Eds), *The Internationalisation of international arbitration LCIA Centenary Conference*, Graham & Trotman

Holtzman, Howard, M; in, Muller, Sam and Mijs, Wim (Eds); *The Flame Rekindled. New Hopes for international arbitration*, *Leiden Journal of International Law*, pp 67–79. (Martinus Nijhoff Publishers, The Netherlands, 1994)

Hoyle, M; *Mixed Courts of Egypt*, (Graham and Trotman, 1991)

Hunter M; Marriot, A; Veeder, V V; (Eds), *The Internationalisation of international arbitration LCIA Centenary Conference*, Philip, J A; *A Century of Internationalisation of international arbitration: an Overview*, in, Graham & Trotman Limited

Jaffey, A; *Topics in Choice of Law*, (The British Institute of International and Comparative Law, 1996)

Kahn, P; Walde, T W; *Les Aspects Nouveaux du Droit des Investissements Internationaux*, (Martinus Nijhoff Publishers, Lieden, 2007) Walde, T W; *The specific nature of investment arbitration, introduction, international investment law emerging from the dynamics of direct Investor–State arbitration*

Kamali, M, *Principles of Islamic Jurisprudence*, (Pelanduk publications, Malaysia, 1989)

King James Version, Exodus 20:1–17 and Deuteronomy 5:4–21

Kinnear, Meg; Bjorklund, Andrea; Hannaford, John, *Finality and Enforcement of an Award, Investment Disputes under NAFTA, An Annotated Guide to NAFTA Chapter 11.1*, (Kluwer Law International, 2006), Art 1136

Kunkel, Wolfgang; *An Introduction to Roman Legal and Constitutional History*, (Oxford: Clarendon Press, 1996)

Lando, O; *European Contract Law*

Leal-Arcas, R; *International Trade and Investment Law, Multilateral, Regional and Bilateral Governance*, (Edward Elgar, 2010)

Leon, H; *The Jews of Ancient Rome*. Updated Edition. (Hendrickson Publishers, Peabody, Massachusetts, 1960)

Levine, J; *Navigating the parallel universe of Investor–State arbitrations under the UNCITRAL Rules*.

Luttrell, S, *Bias Challenges, the need for a real danger test*, (Kluwer Law, The Hague, 2009)

Mills, A; *The public-private dualities of international investment law and arbitration*.

Mustill M L; ‘Transnational arbitration in English Law,’ in *International Commercial and Maritime Arbitration*, F Rose (ed), (Sweet and Maxwell, 1998)

Mommer, R; *Global Oil and the Nation State*. (Oxford University Press, 2002)

Moses, M; *The Principles and Practice of international commercial arbitration*, (Cambridge, 2008)

Muller, Sam and Mijs, Wim (eds) *The Flame Rekindled. New Hopes for international arbitration*, (The Netherlands: Martinus Nijhoff Publishers, 1994)

Nottage, L; Garnett, R, *International Arbitration in Australia*, (The Federation Press, 2010)

Park, W in, Bekker, P; Dolzer, R; Waibel, M; *Making transnational law work in the global economy*, (Cambridge University Press, 2010)

Paparinskis, M; *Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks*

Paul du Plessis; *Borkowski’s Textbook on Roman Law*, (4th Ed), (Oxford University Press, 2010)

Price, R; Tamimi, E, *United Arab Emirates Court of Cassation Judgements*, 1998–2003, (Koninklijke Brill, 2005)

Poudret, J; Besson S, *Comparative Law of International Arbitration*, (2nd ed), (Sweet and Maxwell Ltd, 2007)

Punch, Keith, F C, *Developing Effective Research Proposals*. (Sage Publications, 2006, 2nd ed)

Quran, The Arabic text with corresponding English meanings. (Abdul-Qasim Publishing House, 1997)

Ramberg, J; *Synchronisation of Contracts of Sale, Carriage, Insurance and Financing in International Trade*

Rana, R; Sanson, M, *international commercial arbitration*, (Thomson Reuters, Australia, 2011)

Redfern, Alan; Hunter, Martin; Blackaby, Nigel; Partisides, Constantine (4th Ed), *Law and Practice of international commercial arbitration*, (London: Sweet and Maxwell, 2004)

Riethmuller, G; *Civil Procedure* (LBC Info Services, New Zealand, 1999, 1st ed)

Roebuck, D; preface, xi, in Bhatia, V; Candlin, C; Gotti, M; *Discourse and practice in international commercial arbitration, issues, challenges and prospects*, (Ashgate, 2012)

Rosen, Lawrence, *The Anthropology of Justice. Law as Culture in Islamic Society*. (Cambridge University Press. Cambridge, 1st ed, 1989)

Rosenne, S, *Interpretation, revision and other recourse from international judgements and awards*, (Martinus Nijhoff Publishers, Leiden, 2007)

Said, E, *Orientalism*, (Vintage Books, United States, 1979)

Saleh, Samir, *Commercial Arbitration in the Arab Middle East, Shari'a, Syria, Lebanon and Egypt*, (Hart Publishing, Oxford and Portland, Oregon, 2nd ed, 2006)

Sanders, P, *The Work of UNCITRAL on Arbitration and Conciliation*, (Kluwer Law International, Second and Expanded Ed, 2004)

Sarcevic, P, (ed), *International Contracts and Conflicts of Laws, A Collection of Essays*, (Graham and Trotman, London, 1990)

Sayed, A; *Corruption in International Trade and Commercial Arbitration*, (Kluwer Law International, The Hague, 2004)

Schreuer, C; Malintoppi, L; Reinisch, A; and Sinclair, A; *The ICSID Convention, A Commentary* (Cambridge University Press, 2nd ed, 2009)

Schwartz, E; *Finality at what cost?* The decision of the ad hoc committee in *Wena Hotels v Egypt*, in *Annulment of ICSID Awards*. Emmanuel Gaillard and Yas Banifatemi (eds), (Juris Publishing, New York, 2004)

Seidl-Hohenveldern, I; *Collected Essays on International Investments and On International Organisations*, (Kluwer Law International, 1998)

Sen, A; *Identity and Violence, the Illusion of Destiny*, WW, (Norton and Company, New York, 2006)

Shau, W; *The legal protection of foreign investment, a comparative study*, (Hart Publishing, 2012)

Sornarajah, M; *International Commercial Arbitration: The problem of State Contracts*. (Longman, Singapore Publishers, 1990, Singapore)

Sornarajah, M; *The Settlement of Foreign Investment Disputes*, (Kluwer Law International, 2000)

Sornarajah, M; *The International Law on Foreign Investment*. (Cambridge University Press, 3rd ed, 2010)

Spivak, G; *Selected Subaltern Studies*, (Oxford University Press, 1988)

Stewart, W; *Internet-Linked Dictionary of Law*, (Collins, 2006)

Subedi, S, *International Investment Law, Reconciling Policy and Principle*, (Hart Publishing, 2008)

The Permanent Court of Arbitration/Peace Palace Papers. Strengthening Relations with Arab and Islamic Countries through International Law, E-Commerce, the WTO Dispute Settlement Mechanism and Foreign Investment, in *The Permanent Court of Arbitration/Peace Palace Papers: Papers emanating from the Fourth PCA International Law Seminar, October 12, 2001*, International Bureau of the Permanent Court of Arbitration, (eds) (Kluwer Law International, 2002). At the Fourth Permanent Court of Arbitration (PCA) International Law Seminar in 2001.

Theodorides, Aristide; The Concept of Law in Ancient Egypt, in *The Legacy of Egypt* 294 (J R Harris ed. 1971) in Ver Steeg, R., *Law in Ancient Egypt*, (Carolina Academic Press, Durham, North Carolina, 2002)

Thomas, Robert; Harding, A; Oruscu, E (eds); *Continental Principles in English Public Law, in Comparative Law in the 21st Century*, (Kluwer Law International, 2002)

Toriguian, Shavarsh; *Legal aspects of oil concessions in the Middle East*. (Hamaskaine Press, 1972)

Van Den Berg, Albert Jan; *International Commercial Arbitration, Important Contemporary Questions, ICCA International Arbitration Congress*, (Kluwer Law International, 2003)

Van Den Berg, Albert Jan; *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, (Kluwer Law and Taxation Publishers, 1981)

Van Den Berg, AJ; *Yearbook of Commercial Arbitration*, (ed), Vol XVI (1991)

Veeder, V V; 'Is There a Need to Revise the New York Convention?' (Key Note Speech delivered at The Review of international arbitration Awards, international arbitration Institute, (IAI) Forum) 12–14 September 2008, in response to the question of if the United Nations should amend the 1958 New York Convention, in the Review of International Arbitral Awards, Gaillard, Emmanuel (Ed)

VerSteeg, R.; *Law in Ancient Egypt*, (Carolina Academic Press, Durham, North Carolina, 2002)

Von Mehren, A T; Croff, C; *international arbitration Between Private Parties and Governments: Treaty and Statutory Developments*, in, Forrestal, M V, *Examples of and Reasons for Increased Use of international arbitration*, in, Aksen, G; von Mehren, R B; (Editors) *international arbitration Between Private Parties and Governments*, (United States: Practising Law Institute, 1982)

Walker, D; *The Oxford Companion to Law*, (Clarendon Press, Oxford, 1980)

Watson, Alan; *Law Making in the Later Roman Republic*, (Oxford, Clarendon Press, 1974)

Weeramantry, C G; Hidayatullah, M; *Islamic Jurisprudence, An International Perspective*, (Macmillan Press, London, 1988)

Wilkin, R; *The spirit of the legal profession*, (Fred B Rothman and Co, Littleton, Colorado, 1981)

Zeller, B; *CISG and the Unification of International Trade Law*, (Routledge-Cavendish, 2007)

Zimmermann, R; *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (Juta and Co, Ltd, Cape Town, 1990)

B Articles

- Abdel Wahab, M S; 'An overview of the Egyptian legal system and legal research' (Globalex, October 2006)
- Al Qurashi, Zeyad A; 'Renegotiation of International Petroleum Agreements' in *Journal of international arbitration* 22 (4): 261–300. 2005
- Al-Jumah, K; 'Arab State Contract Disputes: Lessons from the Past,' in *Arab Law Quarterly*, (Vol 17, No 3, 2002)
- Ayad, M; 'international commercial arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region' in *Vindobona Journal of Comparative Law and Arbitration* 12.2 (2008): 169-174
- Ayad, M; 'Harmonisation of international commercial arbitration Law and sharia: The case of pacta sunt servanda v ordre public;' in *The use of ijtiḥad to achieve higher award enforcement*, (Macquarie University Journal of Business Law, 6, 2009)
- Ayad, M; 'Towards a truly harmonised international commercial and investment arbitration law code (HICIALC): enforcing MENA- foreign investor arbitrations via a single regulatory framework: A new map for a new landscape' in *Macquarie Journal of Business Law* (2010) Vol 7 285-322
- Ayad, M; 'international commercial arbitration Award Enforcement at the Crossroads of Sharia Law and Ordre Public in the MENA: Paving the Golden Path towards Harmonisation' in *The Journal of World Investment and Trade* 10.5 (2009)
- Ayad, M; 'Investor risks due to 'Sovereign Immunity' pleas in Court Rulings on Arbitral Award Enforcement of MENA-FI Investments can be mitigated via a Harmonised international commercial arbitration law code' in *Journal of World Investment and Trade* Vol 11, No 5 (2010), pp 753-787
- Ayad, M; 'Harmonised Commercial Law Principles in Investor–State international commercial arbitrations amongst Euro-Med Partners,' in *Id-Dritt Law Journal- Maltese Law Student's Society* XXI (2011)
- Ayad, M; 'The Quest of the Holy Grail: A Harmonised international commercial arbitration law code (HICALC) in Investor–State Arbitrations of Oil Concessions and Foreign Investment Treaties and Agreements, 2011' in *Madrid international commercial arbitration Centre Journal*. Centro Internacional de Arbitraje, Mediacion y Negociacion Instituto Universario de Estudios Europeos, Universidad San Pablo Marid, Arbitraje,

Revista de Arbitraje commercial y de inversiones Volumen IV 2011 March/April, pp 335-381, 20 March, 2011

Ayad, M; 'A Harmonised International Commercial and investment Arbitration Law Code (HICIALC) Regulating Judicial Review of Investor–State Arbitration Disputes Can Uphold *res judicata* of Arbitration Awards and Tribunals from Undue Appeals and Annulment due to State Intervention' *International Trade and Business Law Review* (2011), Vol XV

Ayad, M; 'The Legal and Economic Implications of World Trade Organisation Ascension By the Gulf Arab States' (TDM 3, 2011)

Ayad, M; 'The Quest for the Holy Grail of Social Justice: Substantive & Procedural Law Provisions for Amicus Curiae in Investor–State ICSID Arbitration Law & Practise,' in *Macquarie Journal of Business Law* (2012) Vol 9

Ayad, M; 'Australia's Bilateral Investment Treaty (BIT) Stance- an open amicus curiae submission,' *Macquarie Journal of Business Law* (2012) Vol 9

Ayad, M; 'Harmonisation of Custom, general principles of law, and Islamic law in Oil Concessions,' *Journal of international arbitration*, October 2012, forthcoming.

Badr, G; 'Islamic Law: Its Relation to Other Legal Systems,' *The American Journal of Comparative Law*, Vol 26, No 2, Spring 1978

Bederman, D; 'Custom as a source of law,' (Cambridge University Press, 2010)

Bell, R; 'Jurisdiction of the DIFC Courts- recent developments,' (Clyde and Co, 2011)

Bos, Maarten; 'A Methodology of International Law,' (Elsevier Science Publishers B V, 1984)

Bourke, Patrick; Ambikapathy, Bilal; Looke, Andrew; Chapter III: The Arbitration Procedure- Arbitration in the Gulf: An Overview in Christian Klausegger, in Peter Klein, et al, (eds), *Australian Arbitration Yearbook 2008*, (CH Beck, Stamfi and Manz 2008)

Clapham, Jason; 'Finality of Investor–State Arbitral Awards: Has the Tide Turned and is There Need for Reform?' *Journal of international arbitration* (Kluwer Law International 2009) (Vol 26, Issue 3)

Commission, Jeffery, P; 'Precedent in Investment Treaty Arbitration' in *Journal of international arbitration* 24(2) 129–58, 2007. (Kluwer Law)

Cremades, B; Plehn, S; 'The new lex mercatoria and the harmonization of the laws of international commercial transactions,' in *Boston University International Law Journal*, Vol 2: 317, 1984, 321

Den Berg, A; *Yearbook Commercial Arbitration*, Volume XXXIV-2009.

Derains, Yves; VI Congreso Internacional, El Arbitraje en un Mundo Global, Madrid, del 19 al 21 de Junio 2011, Auditorio Rafael del Pino, Sede del Congreso, Madrid, Spain, Dialouge: Bases del Derecho de los Negocios: Dialogo Intercultural, paraphrased from the translation of Spanish to English

El Kosheri, A; 'International arbitration and petroleum contracts, Hydrocarbons: Economics, policies and legislation, Enciclopedia degli idrocarburi, 2007' Vol IV

El-Malik, Walied; 'Minerals Investment Under the Shari'a Law,' (Graham and Trotman 1993)

Gehle, B; Dealing with the unknown, which law really applies to your international contract? International arbitration insights, Clayton Utz, 18 June 2008, <http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20080618/dealing_with_the_unknown-which_law_really_applies_to_your_international_contract.pagein> International law, and published 25 June 2008 in Mondaq, <<http://www.mondaq.com/australia/article.asp?articleid=62472>>

Gehle, B; 'The Arbitration Rules of the Australian Centre for International Commercial Arbitration,' in *Vindobona Journal of Comparative Law and Arbitration*, (2009), Vol. 13, 25-274.

Gotanda, J; 'Awarding Interest in international arbitration,' in *The American Journal of International Law*, Vol 90, No 1 (January, 1996)

Hill, Enid; 'Al-Sanhuri and Islamic law: The Place and Significance of Islamic law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar,' 1895–1971 [Part II], *Arab Law Quarterly*, Vol 3, No 2 (May 1988)

Kamali, M H; Chapter Seven, The Shariah Perspective on Commercial Transactions (Mu'amalat), *Islamic Commercial Law: An Analysis of Futures and Options* 2000, Islamic Texts Society, (Cambridge)

Kelly, J B; 'The Buraimi Oasis Dispute, International Affairs' in *Royal Institute of International Affairs* 1944, Vol 32, No 3 (Jul 1956)

Kutty F; 'The sharia Factor in international commercial arbitration,' *Loyola of Los Angeles International and Comparative Law Review*, Vol 28:565, (2006)

Leigh M; *Banco Nacional de Cuba v Chase Manhattan Bank* 658 F.2d 875, The American Journal of International Law, (Vol 76, No 4, Oct, 1992)

Levine, Judith; 'Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules' in *The University of New South Wales Law Journal Forum international commercial arbitration*, Vol 14, No 1, May 2008

Lookofsky, J; *The Harmonization of Private and Commercial Law: Towards a European Civil Code*, Stockholm Institute for Scandinavian Law 1957-2009, Comment on the Symposium Organized by the Dutch Presidency of the European Union, (the Hague, Scheveningen, 27 February, 1997)

Lupack, Alan; *Oxford Guide to Arthurian Literature and Legend*, (Oxford 2005)

Luttrell, Sam R; *International Journal of Private Law*, Vol 2, No 1, 2009

Luttrell, Samuel R; *Arbitration in Dubai, 12 International Trade and Business Law Review*, 140, 2009

Mantilla-Serrano, Fernando; John, Adam; *The University of New South Wales Law Journal*. (Forum international commercial arbitration, Vol 14, No 1, May 2008)

Mews, Constant J; Abraham, Ibrahim; *Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective*, *Journal of Business Ethics* (2007) 72

Mustill, Michael; 'Lord of Appeal in Ordinary, England,' in Van Den Berg, Albert (ed) with the cooperation of the TMC. Asser Institute, Institute for private and public international law. international commercial arbitration and European Law. International Council for Commercial Arbitration Conference, Bahrain, 14–16 February 1993. international arbitration in a Changing World. (Kluwer Law International, The Netherlands, 1994)

Ouerfelli, Ahmed; Enforcement of Foreign Arbitral Awards in Maghreb Countries. *Journal of international arbitration*, 25-No 2 (2008)

Perry, S; 'Doors Open to Claims Under Islamic Treaty, Global Arbitration Review,' Wednesday, 8 August, 2012

Sanders, P; 'Has the moment come to revise the arbitration rules of the UNCITRAL?' *Arbitration International*, Vol 20, No 3, at p 243

Saleh, Nabil; 'Civil Codes of Arab Countries: The Sanhuri Codes,' in *Arab Law Quarterly*, (Vol 8, No 2, 1993)

Saleh, S; 'The Settlement of Disputes in the Arab World, Arbitration and Other Methods,' in *Trends in Legislation and Case Law*, (1 Arab Law Quarterly, 198-204, 1986)

Saleh, Samir; 1 Arab Law Quarterly, 198–204, 1985–1986

Schmitthoff, C; 'The unification or harmonisation of law by means of standard contracts and general conditions,' *International and Comparative Law Quarterly*, (Vol 17, July 1968) 558

Sheppard, Audley; 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,' *Arbitration International*, (Kluwer Law International, 2003, Volume 19, Issue 2)

Siddiqi, M; *Investors Position for an FDI rebound*, (The Economist, February, 2010)

The Middle East, Rhonda Wells, COMESA promotes safer investment networks, (May 2010, issue 411)

Van Majid, Saleh; *Application of Islamic law in the Middle East*, Mahkamet Al Tamyeez [Supreme Court of Cassation], 8 April 2008, No. 2353/2007, in Middle East Legal Services, 7 December 2007

Verhoosel, G; The Use of Investor–State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law, *Journal of International Economic Law* 6(2), 493–506, at p. 503. See also, Sinclair, I; *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984)

Wehberg, Hans; *the American Journal of International Law*, (Vol 53, No 4, Oct 1959)

Wetter, Gillis J; 'Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals' in *Journal of international arbitration*, (Vol 2, No 1, 1985)

White & Case International Law Firm, 'Egypt: A new law on Arbitration,' in *Arab Law Quarterly* 10, pp. 31–33. 1995

Wilner, G; *The Mixed Courts of Egypt: A study of the use of natural law and equity*, Georgia Law Journal of International and Comparative Law.

C Other

Official Records of the General Assembly, Twenty-first Session, Resolution 2205 (XXI), A/RES/2205(XXI), 17 Dec, 1966, which is available on the UNCITRAL website, www.uncitral.org

Al Tamimi, E; Clayton Utz 2011, *10th Annual international arbitration Lecture, Islamic Influences on international arbitration transcript*, 8 November 2011.

Aljazy O; at the conference on Aspects of international arbitration in the law and practice of Arab countries, Session III, The reception of new legislation and international

standards on Arbitration: The role of the legislator and State courts, presented on 13 June 2007 at the Cour de Cassation, Paris, France,

Annan, Kofi, A; Secretary-General United Nations, Foreword, at p. vii. Permanent Court of Arbitration. Basic Documents, Conventions, Rules, Model Clauses and Guidelines, 1998, Peace Palace, The Hague

Ayad M, 'Do Rights of Foreign Investors Fall Within the Scope of International Human Rights Law?' in *Id-Dritt Law Journal XXIII*, March 2013

Houerbi, Sami; Director de los Servicios de Solucion de Controversias de la CCI para el Mediterraneo del Este, Oriente Medio y Africa (Tunez), El Arbitraje en un Mundo Global, VI Congreso Internacional de Arbitraje, 19, 20, y 21 de Junio de 2011, Madrid, España, Sede del Congreso, Auditorio Rafael del Pino

Jean-Claude Najar; international commercial arbitration yearly lecture sponsored by Clayton Utz Law Firm, (Supreme Court, Sydney, Australia, Wednesday, 5 November 2008)

Steger, Debra P; University of Ottawa, Former Director, Secretariat to the WTO Appellate Body, Faculty of Law, Towards a System of International Economic Law: Putting the Investment Genie Back into the Bottle, at the International Economics Law Interest Group of the Australian and New Zealand Society for International Law and the Sydney Centre for International Law at the Faculty of Law of the University of Sydney, Symposium, Friday 25 February, 2011, University of Sydney Camperdown Campus

Sundra Rajoo; remarks at 'Financial Review International Dispute Resolution Conference', Four Seasons Hotel, Sydney, 15 October 2010

UNIDROIT Overview: <<http://www.Unidroit.org/dynasite.cfm?dsmid=103284>>

WIPO World Intellectual Property Organisation

<http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=19>

Ekantipur.com, Markets: <<http://www.ekantipur.com/2012/06/11/headlines/2-oil-giants-may-pull-out-of-Nepal/355377/>>

XIV SECTION IX: SUGGESTED DRAFT ARTICLE PROVISIONS FOR A UNIFORM ARAB
ARBITRATION LAW OR MODEL HARMONISED INTERNATIONAL COMMERCIAL
ARBITRATION LAW CODE (HICALC)

‘Every Law is the Invention and Gift of the Gods’

Demosthenes

The suggested draft Articles appearing below are intended only as a guide for future drafters of a HICALC. These codes are a direct result of the research presented herein. The major principles serving as the foundations for the code are the universal principles of law discussed in this thesis including the common principles of law found at civil, common and Islamic law. Both threads of principles, ie, the universal and the ones common to the three traditions, were derived through the comparative analysis the author engaged in as a result of this research. These provisions are a direct result of the multiple layers of comparative analysis undertaken herein. They are a response to the distinctive and special features of the MENA legal climate; its laws, traditions, history and unique concerns.

A Preamble

Viewing with appreciation the gains of instruments such as the New York Convention, the ICSID Convention, the UNCITRAL;

Noting with approval their widespread acceptance and having considered further the serious gaps in the aforementioned instruments;

Taking into consideration the difficulty inherent in encouraging States to enter into regional treaties;

Guided by the principles of harmonisation, general principles of law and the comparative analysis and *travaux préparatoires* herein;

Reaffirming these provisions address the unique problems occurring in ICA and IIA in the MENA;

Emphasising the need for establishing legitimacy and credibility for the validity of international arbitration as a dispute resolution method on the pathway to peace;

Declaring the importance of the enforcement of international arbitration awards to this end;

Deeply concerned with the current situation of adjudicatory risk and limited enforcement of arbitral awards;

Recognising the exceptions to *pacta sunt servanda* and limits to provisions against expropriation, *inter alia*;

Affirming the gains already achieved in the field;

Emphasising the provisions of this Code are a compilation of principles of law that are common to civil, common and Islamic law traditions of the MENA;

Observing the *lex arbitrii* must be understood to be in effect the *lex situs* in terms of procedure;

Recognising the selection of the Seat of arbitration determines the law governing the proceedings;

Strongly urges that these HICALC clauses be formulated as a regional treaty intended for adoption in the MENA, or a supplementary set of rules/or *ad hoc* arbitration clauses;

Requests in the event of a conflict of laws, or a *lacunae*, or domestic legal provisions therein that are not favourable to the parties of the arbitration, *inter alia*, the prevailing law *shall* be the HICALC, in whole or in part, and by mutual party agreement; Further requests that these suggested articles be considered by institutional bodies and State parties for implementation in the manner deemed appropriate.

1 *Article I of the HICALC Compétence de la Compétence*

- (a) Bad-faith allegations of bias *shall* be penalised as fraud.
- (b) In the event of an extant arbitration clause, the competence of the Arbitral Tribunal *shall not* be procedurally challenged.
- (c) Bad faith of any type, in procedural challenges of Arbitral Tribunal competence, for example, deliberate obstructions to arbitral proceedings or enforcement, in the form of bias challenges, undue objection to Arbitral Tribunal competence, delays or deliberate sabotage of the proceedings, and bribes, *inter alia*, *shall* be seen as bad faith and subsequently fall under the category of fraud and *shall* be penalised accordingly.
- (d) False allegations of bias or allegations of bias made on the basis of apparent bias without material evidence of manifest bias *shall* be constrained and *shall* therefore require that the claimant bring forth evidence.
- (e) Wilful attempts to sabotage the compilation of an Arbitral Tribunal or the proceedings through a competence challenge *shall* be penalised through provisions set down by the Arbitral Tribunal on the basis that said competence challenge (if done wilfully) is done in bad faith.
- (f) The final decision of a properly conducted arbitration *shall* be legally binding and *shall* be subject to recognition and enforcement.
- (g) National courts *shall not* seek to overturn an Arbitral Tribunal decision or set aside an Arbitral Award except in cases in which there was found to be a mistake

in the application of the law to the substance of the dispute or to the proceedings, and in cases of corruption and fraud, or instances of *force majeure* or ‘transnational public policy’.

- (h) In the event of a three-member arbitrator panel, arbitrators *shall not* be of the same nationality of either: (i) any of the parties or (ii) of each other, *nor shall* they be of the same region as (i) any of the parties to the dispute or (ii) each other. The term *region shall* be understood in the broadest sense, eg, Asia–Pacific, Europe, MENA, Latin America.
- (i) In the event of a one-member arbitrator panel, the sole arbitrator *shall not* be of the same nationality as any of the parties, *nor shall* the sole arbitrator be of the same region as any of the parties to the dispute. The term *region shall* be understood in the broadest sense, eg, Asia-Pacific, Europe, MENA, Latin America.
- (j) In the event of a drafted arbitration clause, the consent to arbitrate *shall* be binding on both parties and *shall* be seen to arise solely from the arbitration clause and therefore as a result of the mutual consent of both parties; and *shall not* be rescinded from in the event of a dispute nor subject to challenges to the Arbitral Tribunal based on competence challenges (by which the tribunal is composed as a result of the consent to arbitrate as drafted by a clause in the contract whereby the dispute arises therefrom).

2 *Article II of the HICALC Expropriation*

- (a) Expropriation *shall* be forbidden in cases of public policy.
- (b) In the event of expropriation, (not as an outcome of public policy) but for reasons of *force majeure*, an act of God or State necessity, *inter alia*, it *shall* be compensated for.

3 *Article III of the HICALC Interest*

- (a) The definition of an investment *shall* be provided for.
- (b) Excessive interest exceeding a certain percentage of a nation's GDP, *inter alia*, *shall* be prohibited.
- (c) In the absence of other guidelines, the tribunal shall use the principle of equity as a minimum standard to decide matters pertaining to awarding of damages and calculating of interest.
- (d) The calculation of damages *shall* be made according to the universally recognised and valid principle of equity in which lost profits *shall* be awarded on the basis of reasonable and equitable grounds in the event that no sum can be determined with exactitude as to the calculation of loss including, *inter alia*, intangible losses.
- (e) In the event that the arbitration tribunal *shall* seek to calculate compound interest, both parties *shall* agree to this provision in the event that a dispute should arise.
- (f) Interest *shall* be decided by the arbitrator(s) based on equity and this *shall* be agreed upon by the parties with a clause to this effect that *shall* include damages decided on the basis of equity and actual loss, jointly.
- (g) In order to preserve certainty and increase the possibility for enforcement, the use of equity shall be restricted with the exception of determining matters related to the awarding of interest, in which case equity *shall* be a guiding force.
- (h) Arbitral tribunals *shall* determine interest according to guiding principles, eg, equity, a standardised formula, and a maximum upper limit.

4 *Article IV of the HICALC Public Policy*

- (a) The definition of public policy shall be understood as '*transnational*' public policy.
- (b) Public policy *shall not* be construed as domestic public policy.
- (c) Public policy *shall not* be construed as Islamic law. Insofar as a State defines its domestic public policy as tantamount to *sharia* principles this shall be held

distinct from transnational public policy with the latter being the standard benchmark of public policy considerations as they have bearing on international commercial arbitration.

- (d) A definition of transnational public policy *shall* be given.
- (e) *Al Masalih al Mursalah* *shall* be restricted in non-State acts (*actus gestionis*).
- (f) The construction of public policy in the MENA by MENA judges *shall* be a transnational public policy which is allowed under the doctrine of *maslaha*.

5 *Article V of the HICALC Sovereign Immunity*

- (a) Sovereign immunity must be interpreted narrowly.
- (b) The doctrine of sovereign immunity *shall not* apply to *actus gestionis*.
- (c) The definition of *actus gestionis* *shall* be given.
- (d) Immunity from jurisdiction *shall not* be separate from immunity from execution.
- (e) An agent of the State is legally acting on behalf of the State and as such *shall* be considered as having bound the State to the contract.
- (f) Commercial acts of a State (*actus gestionis*) *shall* be deemed as arbitrable.

6 *Article VI of the HICALC Precedent*

- (a) In like cases, Arbitral Tribunals *shall* consider decisions made by previous tribunals to guide them in making consistent decisions; *stare decisis* *shall* be a guiding principle in order to maintain consistency in the fields of international commercial arbitration Law, international investment arbitration Law, public international law and private international law, and in order to restore credibility and legitimacy to international commercial arbitration.

7 *Article VII of the HICALC res iudicata*

- (a) Any Award of an Arbitral Tribunal *shall* be final and binding on the parties. The parties *shall* undertake to comply fully and promptly with any award without delay and *shall* be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. (Adopted from the IBA *Guidelines for Drafting international arbitration Clauses*.)
- (b) Judicial review of arbitral tribunals *shall* be restricted to determine the public policy considerations of an award *after* a tribunal has given its decision.

8 *Article VIII of HICALC Scope*

- (a) The Arbitral Tribunal *shall* consider any applicable rules of international conventional or customary law of relevance to the parties to the dispute.
- (b) In the absence of a valid arbitration clause, the HICALC, in whole or in part, *shall* be employed according the agreement of the parties.
- (c) In the absence of a valid law or a conflict of laws dealing with the procedural and substantive elements of a dispute, the HICALC, in whole or in part, *shall* be employed according to the agreement of the parties.
- (d) The HICALC can be used to supplement the UNIDROIT in the event that the parties have not chosen a law to govern their contract, or the parties have agreed to use the general principles of the *lex mercatoria, inter alia*.

9 *Article IX of the HICALC Justice*

- (a) Unjust enrichment *shall* be prohibited.

- (b) In the event of judicial review of an Award, with challenges of (i) apparent bias and/or (ii) sovereign immunity, the judge *shall* uphold the principle of equity as a guide to deciding the case.
- (c) Notwithstanding the law of procedure chosen by the parties, the Arbitral Tribunal *shall* be required to ensure that equal time and consideration are given to both parties to put forth their arguments, defend their claims and provide evidence, including equal consideration given to the merits of the arguments of both parties in order to ensure a just, fair and equitable outcome. This *shall* be done by way of clear guidelines to the counsel of both parties as to the structure of the proceedings in terms of time frames and the manner in which evidence will be submitted, heard and considered, and by transparency in the manner in which the hearings will be conducted.
- (d) Due process of the law must be given consideration; justice must *be* done and justice must *appear* to be done.
- (e) Parties to a dispute *shall not* be made to defend their claim twice.