

HARMONISATION OF INTERNATIONAL COMMERCIAL ARBITRATION LAW AND SHARIA

THE CASE OF *PACTA SUNT SERVANDA VS ORDRE PUBLIC* THE USE OF *IJTIHAD* TO ACHIEVE HIGHER AWARD ENFORCEMENT

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International Commercial Arbitration is the preferred method of dispute resolution between parties from different legal jurisdictions precisely because of its flexibility in the choice of law. Yet, that same flexibility poses risks to award enforcement; different jurisdictions perceive *ordre public* and international public order differently. Empowering arbitral tribunals to decide on questions related to international public order by privileging the concept of *pacta sunt servanda* would go far in reducing these risks. An understanding of the interplay between ICA law and the Sharia would lend to facilitation of ICA award enforcement. Allowing arbitral tribunals, particularly those in the MENA to employ *ijtihad* would circumvent obstacles to award enforcement based on privileging *ordre public* over *pacta sunt servanda*. Extracting general principles of law from the Civil, Common and Sharia law traditions is possible and would expand arbitral tribunal competence to decide on matters that would normally be left to national courts. Sharia law does contain principles of law common to the Civil and Common law tradition that can be applied to ICA disputes to ensure award enforcement and lower risks to foreign investors.

Harmonisation of the International Commercial Arbitration (ICA) laws of the states of the Middle East and North Africa (MENA)¹, many of which have mixed jurisdictions, with those of leading European seats is now possible. Common, Civil and Sharia² law systems share many principles and one such example is Arbitration

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¹ Saleh, Samir. *Arab Law Quarterly*, Vol. 1, No.2. (Feb., 1986), pp. 198-204. "The countries of the Arab Middle East as defined for the present purposes are Syria, Lebanon, Jordan, Iraq, Egypt, Libya, Kuwait, Bahrain, Saudi Arabia, Qatar, the United Arab Emirates, Oman and the Republic of North Yemen."

² Kutty, Faisal, "The Sharia Factor in International Commercial Arbitration", 2006, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 28:565, p. 566. "It is

law. Contract law and ICA are well suited to harmonisation with the Sharia. A multidimensional code which integrates common principles of law between the current ICA and the Sharia is both desirable and achievable. An understanding of Islamic jurisprudence, particularly of *ijtihad*, and *urf* will facilitate arbitral award enforcement particularly in disputes related to oil concession and foreign investment contracts. Harmonisation of ICA law requires privileging *pacta sunt servanda* over *ordre public*. The latter at times is used as a justification for Sharia law and at others opposes it.

It is submitted that a code of ICA laws that can be derived and implemented to bring about reform in the region and to facilitate the smooth transaction of ICA as applied to contracts between Arab and European States must take into consideration concepts from the Sharia. "The constitutions of the Arab States prescribe the Sharia as a source of legislation (Kuwait, Bahrain, the UAE); in some (Qatar, and since 1980, Egypt)- it is the main source of legislation."³ "Additionally, there are many other incidents of the modern commercial contract which could be assailed at the Sharia."⁴ "We thus have an overall scenario where in many Arab States the Sharia could be applied in a commercial transaction, even if in general it is not so applied. This makes for basic uncertainty."⁵

Higher award enforcement can be brought about by returning arbitration to its roots; Arbitration as it is practiced today has become time consuming, costly and therefore deviates from its origins, further, at the time of this writing the UNCITRAL or Model law is being debated, and now is the time to introduce greater cross-cultural sensitivity.⁶

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". "Muhammad Asad, the prominent Islamic thinker, narrowed down the Sharia to 'definitive ordinances of the Quran which are expounded in positive legal terms, known as *nusus*.'" In Kutty, see Muhammed Hashim Kamali, Source, Nature and Objectives of Sharia, 33 ISLAMIC Q. 211, 217 (1989). "In Comparison, Islamic law is far broader and includes those rules and laws that have been derived using sources and methodologies for deriving law sanctioned by Islamic jurisprudence, as well as all the quasi- Islamic laws in existence in Muslim countries as a result of colonialisation and secularisation. In Kutty, See Irshad Abdal Haqq, Islamic Law; an Overview of Its Origins and Elements, 7 J. Islamic L. & Culture 27, 31-33 (2002); John H. Domboli & Farnaz Kashefi, Doing Business in the Middle East: A Primer for U.S. Companies, 38 Cornell Int'l L.J. 413, 418-19 (2005).

³ Ballantyne, William. (1987). Arab Comparative and Commercial Law. The International Approach. Volume 1. The Sharia and its relevance to modern transnational transactions. The settlement of disputes through arbitration joint ventures. Graham & Trotman. International Bar Association (publisher). First Arab Regional conference, Cairo 15-19 February, 1987, paper 1, the Sharia and its Relevance to Modern Transnational Transactions, at p. 6.

⁴ Ibid 7.

⁵ Ibid.

⁶ Najjar, Jean-Claude. ICA yearly lecture sponsored by Clayton Utz Law Firm. Supreme Court, Sydney, Australia. Wednesday November 5th, 2008.

One of the risks inherent in ICA is the danger of non-enforceability of the arbitral award, perhaps due to contentions related to state sovereignty or *ordre public* in which, “the losing party would honour the award. . . . Nowadays, things are different. In so many large international arbitrations the defendant will do everything to postpone the moment of the award.”⁷ “Hence, there is reason for caution, as regards the interaction between the Arab world and the world of international arbitration. The UNCITRAL Model Law is distant from the Sharia.”⁸ These risks can be reduced by harmonisation. A harmonised code that takes a more universal understanding of the principles of *ordre public* and the Sharia 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.

In regards to compiling general principles of laws to decide what type of arbitration law is desired:

“the proponents of the legislation must decide upon and create the necessary mechanisms for the enforcement by the court of whatever supervisory, controlling and reinforcing powers may be conferred upon it. To the persons involved in a dispute which is being submitted to arbitration it is the efficacy of the mechanisms, not the purity of the doctrines, which matter. 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.”⁹

That the Model Law is in urgent need of reform is indeed an uncontested fact. The direction of reform must be two fold; first, to harmonise between Common, Civil and Sharia law for greater credibility among all parties involved, and secondly to ensure that the procedures are simple and reflect the original method of arbitration as it originated in the MENA.

This is the appropriate time to delve into a deeper understanding of Sharia principles to create common ground, level the playing field for involved parties, regardless of cultural differences; thereby removing the barriers against the acceptability of ICA that render the awards unenforceable. One means to removing barriers to arbitration and making it acceptable to Arab states is by identifying principles of substantive law common to the three legal traditions of Common, Civil

⁷ Keynote speech, Michael Mustill, Lord of Appeal in Ordinary, England, in Van Den Berg, Albert (ed) with the cooperation of the T.M.C. 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, at p. 16.

⁸ Ibid 17.

⁹ Ibid 22.

and Sharia law in order to bring about a more evolved code of law applicable to arbitration. In fact, since the days of Sanhuri, there has been a gap. It is necessary to pick up where Sanhuri left off. Globalisation demands harmonisation.¹⁰

Globalisation is not the only phenomenon impacting the need for and future of ICA. Economic realities that began at the end of 2008 and span across the Western world and in parts of Asia, such as the recession and drop in interest rates, are drawing forth a response from advocates of Islamic finance, who claim only their financial products and institutions are reliable because they do not engage in high risk financial undertakings; the perceived cause of the global economic crisis. Even twenty years ago, Ballantyne commented: “. . .a glance at the existing Western banking system would seem to provide an immediate argument in favour of the Sharia.”¹¹

The author predicts that there will be an increase in ‘Islamic’ financial products and services. This will be reflected in and will influence future contracts, validity of contracts and enforceability of arbitral awards where the MENA states are involved. This requires an educated understanding of the Sharia.

The key difference between arbitration and mediation is the legally binding aspect of arbitration. The guarantee of the enforceability of an arbitral award is the *raison d’être* for arbitration, otherwise it is pointless. Obstacles lead to risks for parties to a contract who believe that in the event of an unfulfilled contract a just financial remedy compensating them for their losses is enforceable. To reduce risk, potential barriers to enforceability must be addressed and removed. One major difficulty is the interpretation of *ordre public* (*maslaha*) by Muslim jurists. Harmonisation is the chief way to reduce risks of unenforceable awards. Conflicts between customary and civil law principles with Sharia need to be addressed and resolved.

An understanding of the implementation of Sharia and trends in ICA law in the Egyptian juridical context is necessary, as well as in Jordan, Bahrain and the United Arab Emirates.¹² The Sharia, as it is applied and understood in Egypt has strongly influenced the majority of the MENA states. The most remarkable aspect of the

¹⁰ Aljazy, Omar M.H. June 13th, 2007. Cour de Cassation. Paris, France. “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.” 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. . . June 13th, 2007. Cour de Cassation. Paris, France.

¹¹ Ballantyne, above n 3, 10.

¹² Aljazy, above n 10, 219 “In the Arab Middle East, religious considerations play a major role in both the acceptance and success of the arbitral process. By examining the main features of arbitration in the Shari’a, we can understand the legal environment that governs arbitration in the Arab countries. As Samir Saleh put it, ‘Arbitration Law under Arab Systems cannot be fully understood without the preliminary study of [Shari’a] as a common background. Behind the Statues of most Arab Countries and in the mind of an Arab party, counsel or arbitrator, lies a rich layer of Shari’a. Without a working knowledge of this, a western jurist cannot grasp the essence of arbitration in the Arab Middle East.’”

Sharia in the Egyptian context has to do with firstly, Egypt's tradition of pluralism: mixed courts and a mixed jurisdiction, making it appropriate as a starting point for harmonisation. Secondly, by export of its codes as template laws Egypt has greatly influenced the legal systems of many of the countries in the MENA region.¹³ An understanding of Civil law is necessary for understanding MENA Countries legal systems.¹⁴

A discussion of harmonisation of law between civil and/or common law traditions with Islam in the context of Egypt would not be complete without reference to Sanhuri.¹⁵

Egypt has been an exporter of legal codes and practices. "Sanhuri's influence on the judiciary of most Arab countries became such that those who belittle the Sharia's part in his codes and advocate their revision in line with fiqh, do find themselves struggling against the stream".¹⁶

What makes the Sharia remarkable in the Egyptian context is the fact that as it has been interpreted and implemented by Sanhuri's code, it contains within it customary law and civil law principles:

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

¹³ See, Brown, Nathan. J. *The Rule of Law in the Arab World. Courts in Egypt and the Gulf*, Cambridge University Press, 1997. "Most countries in the Arab world share comprehensive legal codes, on the Continental Model, that combine elements of French and Islamic law. Court systems are similarly based on centralized and hierarchical civil law models. 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."

¹⁴ Saleh, Nabil. *Civil Codes of Arab Countries: The Sanhuri Codes*. Arab Law Quarterly, Vol. 8, No. 2 (1983), pp. 161-167, at p. 161. "The Majalla (the Ottoman code of obligation) was never implemented in Egypt. Instead, the European powers of the nineteenth century secured the creation of '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 Sharia ceased to govern secular transactions for Egyptians and non-Egyptians alike." This was case until the Egyptian Constitution was rewritten to make Sharia the primary source law rather than a source of law. This view also does not take into consideration modern judicial interpretations in Egypt regarding questions of ordre public or disputes that are contrary to Sharia.

¹⁵ Please see, Arabi, Oussama. *Al-Sanhuri's reconstruction of the Islamic law of contract defects*. Journal of Islamic Studies. 6:2 (1995) pp. 153-172 at pp 153-154, "The jurist, Abd al-Razzaq Ahmad al-Sanhuri (1895-1971), is a leading Egyptian authority in modern Arab legislation and the principle architect of the present Civil Codes of Egypt, Iraq and Syria. As a major figure of the intersection of traditional Islamic culture with modernity, al-Sanhuri has left an indelible mark on contemporary Arab societies. Besides his pioneering work in lawmaking and codification and its far-reaching consequences, al-Sanhuri's colossal efforts extended to the critical explication and justification of legal precepts, resulting in decisive contributions to Modern Arab and Islamic Jurisprudence."

¹⁶ Saleh, above n 14, 166.

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 Sharia. In the absence of the latter, judges will apply principles of natural law and rules of equity, as also instructed by Article 1. For probably the first time in the legal history of the Arab Middle East, the Sharia was officially to back up an important piece of secular legislation. Sharia principles were to fill the lacunae found in the statutory provisions and in custom.¹⁷

It is a living harmonised code of Civil and Common law. This existing marriage of a code civil together with customary usage makes the Egyptian code a model for harmonisation. Indeed, this attests strongly to the possibility of harmonising a law of ICA, since such harmonisation already exists in the Egyptian model, which has been implemented by the majority of MENA states

According to an interview with Dr. Ahmed Kosheri: “The mixed courts in Egypt were in the past, during the 2nd half of the 19th Century and ended in 1949. They left a legacy of rich case law and jurisprudence. In 1882 the National courts employed the codification of civil and procedure codes as the case in France. There was in existence two parallel systems. In Egypt, business, contracts are close to the French system.”¹⁸ In legal disputes involving commerce, Egypt follows the Hanafi school of Islam. In the Hanafi school, concerning arbitrations of which financial matters are the subject, if the qadi decides that the award conforms to his doctrine, he will confirm it, otherwise; it will be set aside.¹⁹ “In Malaki, Shafi’i and Hanbali schools the award does not need a qadi’s confirmation since, according to these schools, an award already has the characteristics of a court judgement.”²⁰ This means that although the other countries have a more lenient policy, Egypt’s position as leader in the region may play a factor in how awards are enforced even if the school limits the qadi’s discretion. Therefore, an understanding of the interaction of Franco-Egyptian law with Sharia is essential to comprehend the laws of Arab states.

Most of the MENA jurisdictions have experience in achieving harmony between civil and common law traditions and the tenets of Sharia:

The function that the draftsmen of the Egyptian Civil Code of 1948 intended for the Sharia was to blend a certain number of Sharia principles with the Western legal concepts forming the bulk of the Code. While it cannot be denied that the new law Civil Code contains a number of principles and concepts taken from Sharia law or chosen because they conform to the Sharia, the originality and success of the blending operation, although claimed as being total by some architects of the Civil Code, were not fully conceded.”²¹ This gap leaves tremendous room for reform and harmonisation.

¹⁷ Ibid 162.

¹⁸ Kosheri. Ahmed. Interview. Cairo, Egypt. August 5th, 2008.

¹⁹ Saleh, above n 14, 66

²⁰ Ibid

²¹ Ibid 162.

In the event of a lacunae in the Egyptian civil code; “The sharia is one source from which a rule or principle may be derived in default of any relevant provision in the code, or custom (‘urf). (Per. Art. 1 of the Code).”²² However, today, in the Egyptian constitution the Sharia is the primary source of law.

The Gulf States have been greatly influenced by Egypt in their lawmaking to which Bahrain is often cited as an example.²³ The acceptance of ICA in the case of Bahrain can be found in the Quran, the primary source for the Sharia.²⁴ Bahrain’s positive perception of arbitration as a dispute resolution method that is supported and validated by the Quran, one of the sources of the Sharia, makes arbitration a legally acceptable method. Although the Bahraini Law of ICA has accepted much of the Model Law,²⁵ Article I of the Constitution defines Bahrain as “a fully sovereign, independent Islamic Arab state.”²⁶ Article II reads thus, “The religion of the State is Islam. The Islamic Sharia is the principle source for legislation.”²⁷ The

²² Al-Azmeh, Aziz (ed). *Islamic Law, Social and Historical Contexts*. 1988. Routledge. London, at p. 171. Hill, Enid, on commenting on J.N.D Anderson’s commentary of Sanhuri’s Code, in, *Islamic law as a source for the development of a comparative jurisprudence, the ‘modern science of codification’ (1): theory and practice in the life and work of Abd al-Razzaq Ahmad Al Sanhuri (1985-1971)*.

²³ Al Radhi, Hassan. *Judiciary and Arbitration in Bahrain*. A historical and analytical study by Kluwer Law International. London. 2003. “The Egyptian influence in all legislation and judicial fields has pushed the legal system to adopt Egyptian legislation and court precedents. It must be mentioned that the Egyptian legal system in legislation and the judiciary is largely copied with minor modifications from and is largely influenced by French law. The Egyptian scholar Sanhuri who laid down the basis of the modern legal system in Egypt based it mainly upon French laws and doctrines. In consequence of the aforementioned facts, the legal system in Bahrain embraces the Romano-Germanic law family through the influence of Egyptian law which relied mainly on the French law, and the French legal system is one of the most important members of the Romano-Germanic family.” However, there are differences among the MENA countries in the placement of the Sharia in the order of the legal system. Although Sanhuri’s code places it last, after the Civil Code, and custom, the Egyptian constitution refers to it as the primary source of law.

²⁴ Welcoming address of H.E. Shaikh Abdullah Bin Khalid Al Khalifa, Minister of Justice and Islamic Affairs, in Van Den Berg, Albert (ed) with the cooperation of the T.M.C. 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. The Netherlands, 2. “if ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they seek to set things aright Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things” the Minister of Justice and Islamic Affairs for the State of Quran sets down the legal basis and validity of arbitration for his country. He continues in the same vein, “Thus the method of arbitration acquired the force of custom, heritage and faith and the Arab psyche became accustomed to a protective fence of respect, appreciation and acceptance for this mode of settlement.”

²⁵ Ibid. “Bahrain drew abundantly from several model regulations for commercial arbitration while framing its own laws for commercial arbitration. Many states contributed to this through the United Nations Commission on International Trade Law (UNCITRAL) so that the Bahraini Law could be as close to the Model Law as possible, particularly as the country is set on the road to encouraging an investment drive.”

²⁶ Constitution of the Kingdom of Bahrain, Article I.

²⁷ Ibid Article II.

existence of Sharia law must be taken into consideration as a possible influence on arbitral award enforcement.

The United Arab Republic Code of Civil Transactions is based on Jordan's 1976 Civil Code. However, it contains changes that direct judges to find the grounds for their judgements from the Madhabs (schools of jurisprudence in Islam) based on a certain order; first Malaki, then Hanbali, and where there is a lacunae, then Shafi'i and Hanbali, taking into consideration the requirements of public interest. The judges are directed not to take derive their judgements from the Sharia or fiqh, but from particular teachings in a specified order of preference. Further, Article 3 of the code elevates imperative Sharia directives and the basic principles of Islamic law above public order.²⁸ How judges reason their decisions and weigh the Sharia over public policy is a question worthy of exploration, particularly when the aim of Sharia is to preserve public policy. This implies that there are occasions where Sharia contradicts public policy and is given precedence. This adds risk to arbitrations and investments in which the uncertainty of knowing if and how public policy will or will not be enforced is high. Indeed, the fact that public policy can be invoked to set an arbitral award aside is one such risk, but placing Sharia over public policy seems to increase the uncertainty. Answers to the question of when Sharia is deemed contradictory to public policy would lower the uncertainty. Indeed Sharia is distinct from *ordre public*.²⁹ However, it is often invoked in the name of *ordre public*. Sharia law gives support to *maslaha* or *ordre public*. Jordan like other MENA states has implemented most principles of the Model Law.³⁰

However, the Sharia is still an important source of law and this fact cannot be ignored:

Jordan's Civil Code was enacted in 1976 and came into force on 1 January 1977. It has distinctive features compared to earlier codes of the area. Indeed, like other codifications, the 1976 Civil Code does contain parts directly derived from Islamic fiqh (jurisprudence) and other parts which were declared by the architects of the Code not to contradict Islamic Sharia, but undoubtedly the most distinctive feature of the 1976 Civil Code is that it enhanced the position and status of the Sharia, for based on its

²⁸ Saleh, above n 14, 165.

²⁹ Ouerfelli, Ahmed. Enforcement of Foreign Arbitral Awards in Maghreb Countries. *Journal of International Arbitration*, 25-No. 2 (2008), pp. 241-256, at pp. 254-256. "Some legal texts distinguish between public order and the Shari'a. 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."

³⁰ Aljazy, above n 10, "The Jordanian law has adopted the well established doctrine in arbitration competence, competence that entails that the arbitral tribunal has the jurisdiction to rule on its own jurisdiction, this is evident by the wording of Article 21 in the new law. The Jordanian law has also clearly recognized the classic notion of severability or autonomy of arbitration clause. It is a well established fact that arbitration is one of the fundamental ways in which contracted disputes may be settled in Jordan."

methodology it has set out means of inducing and interpreting legal rules, and that in itself is a turning point in the history of the legal systems of the area ... judges are urged, when passing judgement, to rely on the provisions of the Islamic fiqh if no statutory provisions are available, and failing that on custom, and when custom is non-existent on principles of equity.³¹

In Egypt, where there is a lacunae in the Civil law, judges apply Sharia first, then custom, then equity. In Jordan, the order of choice of law is reversed and Islamic fiqh is given precedence over custom. This highlights the importance of a comparative understanding of Islamic Sharia and the need for a harmonised code. Additionally, if a Civil code based on harmonised general principles of law extracted from Civil, Common and Sharia law, the problems posed by the lacunae would be less prevalent.

It can be demonstrated that Islamic law contains unifying principles which can be set forth into a corpus lex and which are not at the same time impossible to apply to modern concerns. Inherent to Islamic jurisprudential tradition are tools that allow jurists to both locate these principles and to interpret and apply them in the appropriate context.

Analysis of trends in ICA and in the MENA, particularly that of the reassertion of Sharia as Ballantyne pointed out by two decades ago together with globalisation necessitates a view towards harmonisation as well as a reinterpretation of Islamic law. Nowhere is this more relevant than in the proper understanding of the concept of maslaha in which a number of prohibited financial dealings common to western contracts fall. Debates related to maslaha fall under the idea of state sovereignty, forming obstacles to the sacred concept of *pacta sunt servanda* which dates as far back as Hammurabi's code. The contract is mentioned in seven known articles.³² A reinterpretation of sharia along the lines of traditional *ijtihad* requires an understanding of the spirit of the law as well as its proper context and intention. The concept of maslaha necessitates the public good, and given the circumstances of MENA economies, it is in their best interest to promote smooth transactions of financial trade and investment without undue risk. *Ijtihad* is a time honoured Islamic jurisprudential tool.

Arbitral tribunals are to ICA what judges are to National courts.³³ The arbitrator, like the judge, has a moral duty to uphold that incorporates a deeper understanding

³¹ Saleh, above n 16, 164.

³² Articles 7, 37, 52, 122, 123, 151 and 152. The extensive mention of the contract as well as enforcements of it clearly express the idea of *pacta sunt servanda*.

³³ See, Sayed, Abdulhay. *Corruption in International Trade and Commercial Arbitration*. 2004. Kluwer Law International. The Hague, The Netherlands, at pp. 9-11, "The Arbitrator, the Judge of International Trade, is the repository of certain immanent ideals, of which he or she is the guardian. Though they are appointed pursuant to a contract, they are invested in a mission that transcends the parties contract, enabling them to be censors of such contracts and not servants to the parties' passions. The missions of both the Arbitrator and the State Judge are complementary, as regularly emphasized. They both converge in the pursuit and protection of a certain set of ideals, of which most of the

of the law, its scope and purpose and its ethical and moral intent. In the discussion on *maslaha* it will become clear that this is a relevant moral issue critical to the future of the MENA region, particularly for economic wellbeing.³⁴ The competence of a judge to interpret and apply a law is broad in scope and is fulfilled by the office of the judge.³⁵ The same freedom must exist for arbitral tribunals, and their legal reasoning, or *ijtihad* must be considered as legitimate and as binding as the original arbitration that took place in Mecca in 622. The debate between *ordre public* and its implications and *pacta sunt servanda* can be resolved by increasing arbitral tribunal competence to choose and interpret the law, thereby contributing to harmonisation. This is not an alien concept to Islam.

The way to minimise risk to foreign investment contracts with disputable clauses is to look at the spirit of the law and its intention. The realities of globalisation cannot be ignored and though they did not exist at the time of the founding of Islam, Islam, if interpreted properly, can provide tools applicable to a modern age to allow appropriate jurisprudence to address modern problems. One of the themes within classical Islamic jurisprudence in terms of adjudication and discretion is that Sharia law is divinely inspired, and as such, its interpretation is not left to the personal opinion of the jurist or the arbitral tribunal, but rather to discovery of the intent behind the divine law and its appropriate application. In this context, law is not

positive law is the incarnation. In conducting his or her mission an Arbitrator is probably capable of knowing human laws that run against moral rules, but is unable to give them effect by virtue of the dictates of the moral rule. Another version would hold that an Arbitrator has the authority to discard the application of such human laws if they run contrary to such moral ideals, despite the contrary choice of the parties. One line of thought specifically asserts that an Arbitrator is always able to find the legal incarnation of such moral ideals, in rules of public policy that require application despite the parties' agreement. For others, such moral ideals need not be mediated by law, but can very well apply directly, so long as they are universally recognized. Thus Arbitrators must become suppressors of the parties' choices if such moral rules so require."

³⁴ See, Moustafa, Tamir. *Law and Resistance in Authoritarian States: The Judicialisation of Politics in Egypt*, in Moustafa, Tamir and Ginsburg, Tom. *Rule by Law. The Politics of Courts in Authoritarian Regimes*. Cambridge University Press. 2008, at p. 135, "The quality of a legal system in a host nation is a major element of the investment climate. The investor is forced to make at least implicit judgments about certain elementary concepts of justice, continuity, and predictability as dispensed by the legal system. The presence of a strong, independent, and competent judiciary can be interpreted as an indicator of a low propensity to expropriate...If this judicial system is strong, independent, and competent, it will be less likely to 'rubber stamp' the legality of an expropriation and more likely to accede to a standard of fair compensation. The effect of this would be to lower the propensity of the host nation government to expropriate (Truitt 1974: 44-45). This line of reasoning can be applied by analogy to the role of the Arbitrator in the system of International Commercial Arbitration.

³⁵ Hallaq, Wael B. 2004, *The Formation of Islamic Law*. Edited by. Ashgate Publishing. Great Britain., p. 205. Hallaq cites, Abramski-Bligh, Irit. *The Judiciary (Qadis) as a governmental-administrative tool in early Islam*. "...many regulations do not derive from the Quran or the Sunna but rather from the qadi's independent judgement (*ijtihad*), thus the importance of appointing a man with piety, shrewdness and religious knowledge ('ilm) in that order of importance.

created but pre-existing and adjudication requires simply the extrapolation of the law. This is a similar idea to that of Montesquieu, which was criticised:

“The image of the judge, in the eyes of Montesquieu, is the image of a man skilled in finding his way in the hidden paths of the forest of legislation. But his opinion is flawed with the accepted error that these paths always exist and all their talent lies only in uncovering them. Montesquieu did not consider that the paths are sometimes not marked by the legislature at all, and the judge himself must mark them.”³⁶

Discovery of the intent of the law is more important than a literal interpretation. The danger of literal interpretation can lead to missing the essence and purpose of what the law intends. This applies to any law, whether divine, natural, or man-made. Without an understanding and application of the intent of the law the Muslim jurist has failed in his or her obligation to discover the law. However, the idea that the judge must fill in the lacunae is not an alien concept in classical Islamic jurisprudence. Judicial discretion is at the basis of the fatwa, (individual opinion or ruling), and although the judge is obligated to discover the law, it is impossible to separate the interpretation of the judge from the ruling itself; the subjective element cannot be ignored. The existence of four madhabs (schools of thought) in Islam is a testimony to the fact that legal texts cannot be interpreted in exactly the same way. Classical Islamic jurisprudence accepts this fact and allows for cases in which there is not consensus. This means that the concept of discretion exists in Islamic jurisprudence, which is different from the political Islamist view that this is always only one answer to any given problem and it should be applied across the board, to different cases. This view is similar to that of Dworkin who sees adjudication as merely a simple exercise in interpretation with no room for discretion, in which there is only one legally correct answer.³⁷

Arbitrators must not have undue restrictions to interpret the law but restrictions that reflect moral and ethic limitations, rather than limitations on the role of the Arbitrator.³⁸ The principle of *ijtihad*³⁹ can be used to increase Arbitral competence,

³⁶ Barak, Aharon. *Judicial Discretion*. Yale University Press. New Haven. 1987, at p. 5.

³⁷ *Ibid* 28-29.

³⁸ Sayed, above n 33, 23. “Arbitrators must uphold the ideal of autonomy. They are also generally receptive to the idea that the immediate purpose of trade is profit making. Autonomy from national regulation has long been regarded as indispensable for the realization of free trade. Autonomy from outside regulation (national and transnational), as exemplified by the tendency of reducing constraints on international trade to ever-lower minima, has also represented a commendable ideal. Arbitration is viewed as yet one realization of this autonomy in practice. Arbitrators of international trade are viewed as the trustees of this autonomy. They are governed, so to speak, by a moral rule of autonomy. Their primary focus is always directed towards finding solutions in connection with contracts in accordance with which they are appointed. They exhibit disinterest with any questioning of the validity of the contract by any party. Some may regard any such move as particularly shocking since questioning the validity of the contract by one party appears particularly incompatible with its initial commitment to the realisation of an effective and valid deed.”

particularly in cases that involve contracts that contain forbidden elements in Islamic law or issues of substantive law that may invalidate them. A central concept to *ijtihad* (and also analogy and independent reasoning) in its interpretative function is to interpret the law within the appropriate concept. This very idea demands an almost reinterpretation of concepts found in Islam today that date back to the early days of Islam, for example, that of *riba*. According to Dr. Ahmed El Kosheri, at the time of the Prophet, the prohibition against *riba* was intended to protect the (financially) weaker party from the exploitation of unlawful gain at their expense by the stronger party. Today, when States and multinational corporations enter into contracts that involve *riba*, the context is different. The danger of exploitation or of a vulnerable weaker party is greatly minimized. A state or multinational are not at risk the way a vulnerable individual who borrows money to have to pay it back at high interest would be.⁴⁰ The context is different and it is necessary to understand the purpose and intent of laws within their proper context. An Arbitral Tribunal that is empowered to exercise the full jurisprudential tools at its disposal found in the Islam tradition such as reasoning by analogy, independent judgment and interpretation and placing Islamic principles within the appropriate modern context, weighing carefully the current public interest of both the parties to the contract and the state itself would derive vastly different conclusions from those who argued along lines based solely on 7th century context without an appropriate comparison point from which to reasonably draw an analogy.

The Arabic language is built on the three letter system which forms the base of root words that give rise to words with related connotations and meanings. “On the basis of the Quran the word *qada* can be understood as God’s eternal decision or decree concerning all beings (later interpreted as ‘predestination’). But the root *q d y* literally implies ‘to consummate’ or ‘to carry out one’s duty’ as well as ‘to determine’ and ‘to decide’. Thus, the term *qadi* provided a much more inclusive and suitable description of the general representative of the authority than the restricted, older term *hakim* (literally ‘arbitrator’, later ‘judge’ as well.)”⁴¹ The meaning of the word *qada* from which the word *qadi* derives, is clear. The law is already decided, as it were, and it is the judge who is to discover God’s decision and apply it. This means that there must be general principles of law inherent within the *sharia* and can be found either in a case by case study or by classifying Quranic decrees by

³⁹ See, Weiss, Bernard. *Interpretation of in Islamic Law: The Theory of Ijtihad*, in Edge, Ian. *Islamic Law and Legal Theory*. New York University Press. 1996, at p. 274, “*Ijtihad* roughly corresponds to what in Western jurisprudence is called ‘interpretation’. The two terms are, of course, not exact equivalents, because their lexical meanings are not the same and because *Ijtihad* includes an activity which is not normally subsumed under interpretation. Nonetheless, there is a definite correspondence between the two, for the greater part of the activities entailed in *Ijtihad* are indeed interpretative activities. To attempt to draw a rule from a recognized source is tantamount to interpreting the source. On the other hand, those Arabic terms which may seem to present themselves more readily as equivalents of ‘interpretation’ such as *tafsir* and *tawil*, actually have meanings in classical Arabic (though not necessarily in modern Arabic) which are more specialized than that of legal interpretation in the broad sense intended here.”

⁴⁰ El-Kosheri, above n 18.

⁴¹ Hallaq, above no 35, 182.

category. This has previously been done, and this was what Sanhuri did for contract law in sharia with his code, while comparing it to civil law.

Ijtihad as a juristic tool and fundamental principle of Islamic law is fluid and evolving. It is based upon discovery of general principles of law and requires specific qualifications to achieve:

“The theory of ijtihad presupposes that the process of producing rules is a process of elucidating that which is present but yet is not self-evident. In principle, the Muslim jurist never invents rules; he formulates, or attempts to formulate, rules which God has already decreed and which are concealed in the sources. These rules which constitute the ideal Law of God, exist objectively above and beyond all juristic endeavour.”⁴²

Hallaq gives a summary of Ibn Rushd’s classification of jurists into three groups. The first two groups he delineates do not have the qualifications or the rights to engage in ijtihad.

However, the third group of jurists,

“were able to reason on the basis of the revealed texts and the general principles of the school. Their knowledge encompassed the following topics: the legal subject matter of the Quran; abrogating and abrogated verses; ambiguous and clear Quranic language; the general and the particular; sound and weak legal hadith; the opinions of the Companions, the Followers, and those who came after them throughout the Islamic domains; doctrines subject to their agreement and disagreement; the Arabic language; and methods of legal reasoning and the proper use of them in textual evidence.”⁴³

The third group have the freedom to exercise ijtihad (which may lead to the discovery of an unprecedented legal ruling),

“since they have perfected the tools of original legal reasoning on the basis of the revealed texts. The qualifications permitting them to practice ijtihad are not a matter of quantitative memorisation of legal doctrines; rather, they are the refined qualities of legal reasoning and an intimate knowledge of the Quran, Sunna, and Consensus. But how are these qualifications to be recognized? Ibn Rushd maintains that acknowledgement of an accomplished jurist who has reached such a distinguished level of legal learning must come from both the community of legal specialists in which he himself lives, and from the jurist himself. The judgment is thus both objective and subjective. To derive positive legal rulings from the texts of revelation or from the general precepts laid down by the founders.”⁴⁴

⁴² Weiss, above no 39, 274.

⁴³ Hallaq, above n 35, 3 Hallaq gives a summary of those qualified to engage in ijtihad according to the Andalusian jurist Abu al-Walid Muhammed Ibn Rushd (d. 520/1126).

⁴⁴ Ibid 3-4.

Thus the sources of current Islamic rulings on financial services as well as sound contracts must meet these qualifications.⁴⁵ This means the jurist cannot rely on the previous opinions of preceding scholars alone, but must hold the qualifications to make independent legal reasoning based on the analysis of the text using the proper tools at his or her disposal to discover unprecedented legal principles. This implies that the jurist has freedom and that these legal principles indeed exist to be discovered. It is exactly the well qualified qadi who must take on this task. Hallaq states that Ibn Rushd maintains that qadis are less qualified for *ijtihad* than *mujtahids*.⁴⁶ Moreover, a judge who rules, “on a matter requiring *ijtihad*, would require that his decision be subject to judicial review, by jurists who are properly qualified.” The fundamental principle on which *ijtihad* is built is based on the simple fact alone that a sole independent jurist with extensive knowledge and qualifications must arrive at the discovery of the law, without relying on either one of the Islamic schools alone, or on simply the opinions of other scholars. The jurist must be fully capable to arrive independently and to substantiate the reasoning behind how the law was discovered.

Further, only a qualified jurist may employ *ijtihad*, not a head of state or an executive power.⁴⁷ The concept of an independent and powerful judiciary emerged

⁴⁵ Ibid 4-5. In fact, “no one is entitled to issue fatwas . . . unless he is able to investigate the textual sources of the law by means of the proper tools of legal reasoning. Put differently, if the jurist is unable to reach this level of competence, then no matter how extensive his knowledge of (Malikite) Law he lacks the necessary qualifications of a Mufti. Thus, the prerequisite is the attainment of *ijtihad*, and *ijtihad*, Ibn Rushd seems to say cannot be confined to any particular school or to boundaries preset by any other *Mujtahid*, be he a contemporary, a predecessor or even the founder of a school.”

⁴⁶ Ibid 5. They cannot rule in cases that have no precedent but, “They are obligated to seek the opinion of a mufti who is qualified to practice *ijtihad*, whether or not this mufti is to be found in the locality where the Judge presides. Here, Ibn Rushd is merely acknowledging an age-old practice where jurists were in the habit of soliciting the opinion of a distinguished mufti.”

⁴⁷ Ibid 179, 209. “According to Islamic theory, the sharia (holy law) is independent of any political control. Even the caliph, the head of the Islamic community, is accountable to the sharia and must obey and protect it. Theoretically, this belief confers a special role on the ulama, the scholarly guardians and interpreters of the sharia. From the earliest days of the Islamic polity, the ulama have enjoyed *du jure* autonomy and independence in religious questions from the arbitrary will of the caliph.” See also, “There are however a number of differences in the Roman and Islamic views on the role of the jurists. For one thing, the work of the Roman jurist was always circumscribed by the on-going legislative activity of the State, whether represented by popular assemblies, the Senate or the Emperor. Great as it was, juristic authority never completely monopolized Roman jurisprudence. *Auctoritas Prudentium* is virtually supreme and is jealously protected against any interference from the State. The Islamic State upholds the Law and enforces it, but has no right to make law. In the classical Sunni theory of the caliphate, the ideal caliph was pictured as a qualified jurist; but as such he was simply first among equals. He certainly had no exclusive right to expound law or to delegate this function to others. Hierarchically, jurists intervene between God and the State. The Law of God is empirically available only in the formulations of jurists. It may not be found in the enactments of the State nor in the decisions of courts qua decisions of courts.” From this reading it is clear that the authority of deciding what is public interest and what is a valid contract lies in the hands of the jurists and not that of the State. It is clear that the role of religious interpretation, i.e. law, was never intended to

in classical Islam under the reign of Harun al Rashid who formalized their political station. This political role of the qadi gained in importance under the Mu'tazilite caliphs.⁴⁸ "Not long after Harun's reign, the position of chief qadi in the governmental hierarchy reached its apogee; its incumbents were in some respects second in power only to the caliph."⁴⁹ "Even in the Middle Ages, which are outside of the period examined here, it was the chief qadi, and not the vizier, who defined the ideological norms of the Islamic polity. In these definitions, he served both as an independent tool of the administration and an independent ideological power- the only lawful representative of the sharia."⁵⁰ Historically, the qadi was also the head of the office of caliph's guard, which is the police force.

If we transfer this principle to Arbitral tribunals, the vested authority is with the arbitrators, and not the States.

Arabi, in discussing Sanhuri's view of Islamic law states, "Al-Sanhuri sees his remoulding of Islamic legal doctrines as a rejuvenation via their adaptation to modern economic and social conditions. Certainly he is not of the opinion-prevalent in some orientalist circles-that Islamic law is dogmatically fixed and incapable of renewed life and development. In his discussion of the role that Islamic law should play in the revision of Egypt's Civil Code, he is critical of the static view of historians of Sharia, and contrasts it with the more dynamic appraisal of jurists: 'Islamic laws is justly described by the impartial jurists as one of the . . . most sophisticated juridical systems in the world. Indeed, it is the only system whose legal logic equals that of Roman law. It enjoys an incontestable plasticity and is susceptible of evolution. . . Islamic law has undergone considerable variation and could easily place itself at the level of contemporary civilization. . . thus if some orientalists, like professor Snouke Hurgronge and Goldziher have alleged that Islamic law is immutable and incapable of evolution, this is because they have viewed it as historians and not as jurists'."⁵¹ Sanhuri is an example of the discretionary role of the jurist in discovering and interpreting the law within the

reside in the hands of the State, and was bequeathed to the jurists. The judicial powers rested in the hands of the learned jurists and not the political ruler: "Although the ulama functionaries depended on the arbitrary will of the ruler for their appointment and continued service, they did possess a certain autonomy of judgment, and would in fact often remind the caliph of his duty to obey the Sharia. When the qadi al-Anbari wrote to al-Mansur that many Islamic regulations derived solely from the qadi's independent judgment (ijtihad), by implication he was excluding any judgment by someone who was not an 'alim. True, the ulama were not independent in political matters, but they were the only ones who could grant legitimation to political acts."

⁴⁸ Hallaq, above n 35, 180.

⁴⁹ Ibid 199.

⁵⁰ Ibid 210.

⁵¹ Arabi, Oussama. Al-Sanhuri's reconstruction of the Islamic law of contract defects. *Journal of Islamic Studies*. 6:2 (1995) pp. 153-172 at p 156 quoting Sanhuri; Al-Sanhuri, 'Le Droit Musulman comme element de refonte du Code Civil Egyptien', in *Introduction, a l'Etude du Droit Compare*, Librairie Generale de Droit et de Jurisprudence (Paris, 1938), vol. 2, p.622.

appropriate context. This is consistent with the idea that *ijtihad* needs to continue to be a living part of Islamic jurisprudence and Sharia law.

In the English Common law tradition, law was made by judges.⁵² The ability of judges in Islam to extract principles of law from cases by discovering the law is similar to this. Sanhuri also gives consideration to judicial law-making.

Furthermore,

... much of English contract and trust law remains, as yet, precedent based. In these precedents, there are detectable lines of principle. However, as the number of precedents has increased enormously with the natural progression of the years, so the principles that originally lay behind the precedents have become obscured. Styn LJ in the Court of Appeals in England has complained of the inadequacy of the practice on the part of counsel simply reading large numbers of cases to the court rather than elucidating for the court the 'argument' (or principle) that lay behind the cases.⁵³

The same process by which general principles of law have been extracted from cases by precedent in the Common law tradition can be applied within Sharia to do the same. Indeed, it is the author's contention that this what Sanhuri was able to do leading to drafting a code of law that harmonised Sharia with Civil law principles in practice.

This is not a simple process but it is also not new to the Common law tradition.⁵⁴

Notwithstanding these significant challenges, no one would deny the need to extract general principles of law that are based upon a proper understanding of the underlying intent and context of the law. Why would this be any different in the

⁵² De Zylva, Martin Odams and Harrison, Reziya. In the introduction (the Editors), *International Commercial Arbitration. Developing Rules for the New Millennium*. (Eds). 2000. Jordan Publishing Limited, at p. xxxii. "Once, English law and in particular, English contract and trust law, was devised by people who also had the task of deciding disputes- i.e. judges. One of the aims of the English judges who developed, for example, contract law principles, was to make our principles of trading law similar to that of the other nations that we traded with."

⁵³ Ibid xxxiii.

⁵⁴ Ibid "sometimes, there will be something of the order of 200 cases on a principle first established in the early nineteenth century, as so many were. The system of precedent in England is not well adapted to cope with this. Recent cases, or even a survey of nineteenth century cases, may obscure the true principle. Each case concentrates on the particular problem before the court. Not all of them seek to set out the underlying principle; some may simply refer to it, or to parts of it. Sometimes, an expression as it is used today means something different from its early nineteenth century meaning. Yet no one would wish or be able to cite 200 cases to the court. Thus, the problem is an acute one. The search for the real principle in a host of modern and less modern precedents is rather like looking for the small centre of jam in a nearly jam-less doughnut. Yet one might think that clear principles are just what the international community needs."

case of Sharia law when cases that occurred in the 7th century onwards must be reviewed, and principles that apply to modern times reflecting evolved circumstances would honour the spirit of the law rather than principles taken out of context distorting the underlying intent of the law.

The comparison between Islamic law and Common law rests upon several key points. Both use precedents and cases from which to derive general principles of law. Both also use analogy in order to make use of precedent. Hunter, quoting Lord Goff is a case in point: “The historical fact that common lawyers have been reared on a diet of case law has had a profound effect on our judicial method. Common lawyers tend to proceed by analogy, moving gradually from case to case...we tend to reason upwards from the facts of the cases before us, whereas our continental colleagues tend to reason downwards from abstract principles embodied in a code. . . continental Europeans love to proclaim some great principle and then knock it into shape afterwards. Instead, the boring British want to find out first whether, and, if so, how these ideas are going to work in practice.”⁵⁵

Sharia law in some ways embodies both Civil and Common law methods. One of the benefits of Sanhuri’s previous work in harmonising civil law with Sharia principles is that Sharia law as it is understood and implemented in the MENA countries is a hybrid of statutes (Civil law) and case by case analogy leading to precedent in which general principles of law are extracted (Common law).

Public awards are the source of customary law. Kuwait identifies this customary law as a *lex petrolea*.⁵⁶ “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*.”⁵⁷

This is precisely why a *lex mercatoria* or more appropriately to oil concession disputes, a *lex petrolea* can be developed and can lead to a synthesis of general principles of law derived from the three legal traditions cited here. This development of a *lex petrolea* can guide the development of a harmonised code of law.

A *lex petrolea* based on ‘urf would go far in harmonising current ICA law with the Sharia because the Sharia considers ‘urf or custom to be binding. The idea of precedent in Sharia is similar to that in English Common law. In this vein then, when oil concession dispute cases form a body of law, one can argue that this *lex petrolea* can be supported by Sharia tenants respecting urf.

⁵⁵ Ibid 5.

⁵⁶ 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 Bishop, Doak, R. *International Arbitration of Petroleum Disputes: The Development of a “Lex Petrolea”*. 1997. Centre for Petroleum and Mineral Law and Policy. Discussion Paper No. DP 12, at p. 1.

⁵⁷ Ibid.

Shalakany claims that Sanhuri imposed an Islamic essence into what is basically a Franco-American code.⁵⁸ Shalakany's argument implies that there is no common thread of Islamic principles thereby reducing Islamic case law to unconnected rulings, much as Lord Asquith argued that Islamic law does not contain sufficient provisions for modern commercial disputes. What is interesting to note is that perhaps the code appears as such because the principles contained therein can be found in both the Civil and Sharia traditions, and true to classic jurisprudence in both traditions, Sanhuri's genius lay in the fact that he used all legal adjudication tools at his disposal to discover and interpret the law within the appropriate context, leaving any lacunae to be filled by Muslim jurists according to principles of Sharia. Sanhuri's code was essentially a comparison and harmonisation between Civil and Sharia law. What he left out was a comparative analysis of Common law with the Sharia. His code is a step in the right direction, but it is not complete. With his code the implementation of his code in a number of Arab States, this lacunae had wide-reaching repercussions for ICA law disputes. Given that both Islamic and Common law rely upon custom, harmonisation is possible.

The question of defining custom in Islamic law or the Sharia as a whole has been a subject of discussion since the 12th century. This would be considered a recent phenomenon in light of Islamic jurisprudence.⁵⁹ In the 12th Century the prominent scholar, Muhammad ibn Muhammad al Ghazzali in, *al-Mustasfa min ilm al usul* defined "'urf as what is accepted by the people and is compatible to their way of thinking and is normally adopted by those considered to be of good character."⁶⁰ In the 15th Century, Ali ibn Muhammad al-jurjani in *al Tar'rifat* defined it as "action or belief in which persons persist with the concurrence of the reasoning powers and which their natural dispositions agree to accept as right".⁶¹ In the late 19th Century, Ali Haydar, in *Sharh Majallat al-Ahkam al-adliyya* defined it as "a habit or a way of doing things that is constantly repeated, and which settles well and is accepted by people considered of good character."⁶² Further definitions reflect these elements of customs or habits in actions. "Later scholars realised that the status of 'urf within fiqh is as complex as other areas in jurisprudence.⁶³ Prominent scholars⁶⁴ refer to verse 7:199 in the Quran as the basis for sanctioning 'urf. For our purposes, the translation of the verse can be rendered as follows: 'Take things at their face value, bid to what is customary (or accepted by local tradition), and turn away from the ignorant'. The fuqaha (jurists) saw in this verse a clear acceptance of 'urf, which

⁵⁸ Shalakany, Amr. *Between identity and redistribution: Sanhuri, genealogy and the will to Islamise*. Koninklijke Brill NV, 2001. *Islamic Law and Society* 8,2 at pp. 201-204.

⁵⁹ Hakim, Besim S, in *The Role of 'Urf in Shaping the Traditional Islamic City*, at. p. 142, in, Mallat, Chibli (ed). *Islamic Law and Finance*. 1988. Graham and Trotman Limited.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid 143.

constitutes the seed of a tree of knowledge which was later developed by them as one of the pillars for interpreting and developing the law.”⁶⁵

“There is a well known fiqh principle attributed to Sarakhsi: ‘That which is established by ‘urf is like that which is established by the texts’. Article 45 from the Ottoman Civil Code (Majallat al-ahkam al-adliyya) reaffirms the principle: Stipulating by ‘urf is like stipulating by text’. The nature of a ruling which is based on ‘urf’ can change if ‘urf’ changes with time. Thus rulings must reflect ‘urf’ as practiced and understood in a specific time and place. Therefore, a judgment based on a specific localized ‘urf’ is only implemented in that particular locality and cannot be emulated by another community with different customary conditions.”⁶⁶ This is a critical point to keep in mind. Sharia accepts case by case reasoning based on relative situations.

The pre-existing acceptance of custom by Sharia is a common point for harmonisation between Sharia and Common law as:

“...Sanhuri provides in the first article that, in the silence of the code and legislation concerning a matter, reference shall be made first to custom, and in the absence of custom, to ‘the principles of the sharia’. In the absence of these, the judge is to apply ‘principles of natural justice and rules of equity’. Making custom the prime reference point in the absence of existing legal rules is itself a Sharia principle.”⁶⁷

According to Hill, “the Hanafi School, Sanhuri notes, considers custom as a source of law, ‘not by virtue of the principle of consensus, but according to another principle, that of istihsan (judicial preference).”⁶⁸ According to Chafik Chehata: ‘The Islamic judge, like every other judge, applies rules established by custom and usage. . . Ibn ‘Abdin [13th Century A. H. Hanafi jurist] has affirmed that general usage creates a general rule. Sanhuri also noted this feature of Hanafi jurisprudence in one of his earliest works.”⁶⁹

Ballantyne, in highlighting one of the challenges of Sharia to modern commercial law by stating, “one of the great difficulties of the Sharia is that in the field of contract, adapted to the circumstances at the time, it did not deal with general principles, but rather with specific cases, case by case, and with a series of nominate contracts. This obviously makes it very difficult to extract principles appropriate in the modern context,”⁷⁰ also raises an excellent point of comparison with Common law. Common law is judge-made law which relies upon deciding each case almost as *sui generis* with the authority of precedent as the guiding principle. To the author’s mind this is exactly how Islamic law was accumulated. Additionally, it is

⁶⁵ Ibid

⁶⁶ Ibid 147.

⁶⁷ Al-Azmeh, above no 22, 171.

⁶⁸ Ibid 151.

⁶⁹ Ibid 171.

⁷⁰ Ballantyne, above n 3, 11.

possible to find general principles of law in the Common law tradition. The same is true with Sharia. The challenge is not in the case by case method, or in finding general principles of law. It lies rather in formulating accurate analogies that are valid points of comparison between the contracts of old and modern financial transactions.

In the final analysis the question of order public must be addressed:

“The concept of public order is one of the most complex in modern legal systems. All the doctrinal studies which have tried to define it have been unsatisfactory. Nevertheless, this difficulty has not prevented legislators from continuing to give courts the right to sanction its violation. In the field of arbitration, a national judge is empowered to reject enforcement because an award is contrary to public order. Many questions are, in respect inevitable: What is public order? Which public order do we mean? Is it the domestic public order? Is it the international public order as conceived by the local system? Is it the transnational one? A number of authors take the position that it is the transnational public order.”⁷¹

One of the conditions of Egypt’s 1994 new law of arbitration is that the contract must not violate Egyptian public policy or *ordre public* for the award to be enforceable.⁷² This is vital. If an aspect of a contract is deemed incompatible or contrary to public order or interest then the award will be set aside. This shows how important the concept of public interest is to financial investment and oil concession contracts between European and MENA States, particularly when the understanding and interpretation of what constitute *ordre public* or interest may vary from that of European nations.

According to Sornarajah, “The enforcement of arbitral awards made in foreign investment disputes has been far more difficult an issue than the enforcement of an arbitral award made in other transnational disputes involving private parties. The difficulties stem from the presence of a sovereign party.”

He continues with,

“The theory assumes that the best protection for foreign investment in a developing country is to have a law other than the law of the host state apply to it. So, the contract is lifted out of the host State’s law and subjected to a supranational system, such as public international law, general principles of law or *lex mercatoria*. The assumption is that if a dispute were to arise, the arbitrators settling the dispute would apply the law indicated. The issue then

⁷¹ Ouerfelli, Ahmed. Enforcement of Foreign Arbitral Awards in Maghreb Countries. *Journal of International Arbitration*, 25-No. 2 (2008), pp. 241-256, at pp. 254-255.

⁷² See, Egypt: A new law on Arbitration by White & Case International Law Firm in 10 Arab Law Quarterly 31-33. 1995, at p. 32.

arises as to whether the award based on such a nebulous system should be enforced by a domestic court.”⁷³

The idea of general principles of law and International Ordre Public have demonstrated their value throughout the history of civilised nations as a check against the aggressive actions of ‘uncivilised’ nations that seek only their own interests, against Public International Law and even against their own citizens. The value of the concepts of *ius cogens* and International Ordre Public as valid is undisputed. The need for *pacta sunt servanda* is clear in this context. Without it and International Ordre Public, the world would fall prey to anarchy. Justification for this line of reasoning privileging *pacta sunt servanda* over state sovereignty and supports cooperation among the international community can be drawn from the theory of utilitarianism of John Stuart Mill who argued that the greatest good must serve the largest number of people. The interdependence of the global community requires the utmost in state cooperation as a general principle of law and as such the concepts of *pacta sunt servanda*, *ius cogens*, and Public International Law must take precedence over state sovereignty; without stable contracts and treaties, and their enforcement, our interdependent world would be plunged into a state of anarchy. Indeed, this is why the concept of *pacta sunt servanda* does exist in most of the world’s legal systems, including those outside of Europe.

The possibility that Roman law influenced Islamic law cannot be ruled out. This could explain why Sanhuri, who studied in France and was well familiar with civil law found it feasible to harmonise Civil and Sharia law, because the existence of Civil law principles may well have been an inherent part of Islamic law and therefore did not contradict with it. Both the ideas of *pacta sunt servanda* and *maslaha* may possibly be traced back to Roman law.⁷⁴

⁷³ Sornarajah, M. *The settlement of foreign investment disputes*. 2000. Kluwer Law International, at p. 289.

⁷⁴ In Crone, Patricia. *Roman, Provincial and Islamic Law. The origins of the Islamic patronate*. 1987. University of Cambridge, appendix 2 at pp. 104-105. According to Crone, Goldziher believed that the most profound influence of Roman law on the development of legal opinion in Islam was *maslaha* or *istishlah*. He claimed it identical to ‘the Roman standard of the *utilitas publica*, which gives the interpreter of the law the right . . . to wrest a plain and unambiguous law into something quite different, in the interests of public weal’. Crone interprets this as Goldziher’s understanding of the ‘Papinian’s invocation of *utilitas publica* in justification of the praetor’s right to supplement and correct the *jus civile*.’ However, Crone claims that the praetor did not, ‘twist the meaning of unambiguous laws in the interest of public welfare, but rather to supplement, qualify and in the long run undermine a body of traditional law by edictal legislation; and to this activity there is no parallel in Islam. Moreover, the expression is usually employed in a different sense, that is, in justification of the interests of the state when these conflict with the rights of individuals: what the Romans called *utilitas publica*, the Muslims less euphemistically called *jawr al-sultan* or *darura*, ‘the tyranny of the authorities’, or ‘necessity’. Goldziher’s *maslaha* has more in common with the phrase *utilitatis causa receptum* which is precisely an expression for departure from strict legal reasoning for the sake of an equitable result. . . . But the Roman expression lacks the overtones of charity which the Muslim *maslaha* share with the rabbinic *mippene tiqqun ha-’olam* or *mippene tiqqanah* of so-and-so.

The tension between state sovereignty or *ordre public* and *pacta sunt servanda* can be demonstrated by a classic case in the history of ICA in the area of Oil Concession disputes. In the Government of Saudi Arabia v. Arabian American Oil Co. (Aramco),⁷⁵ the government of Saudi Arabia had contracted with ARAMCO to produce and transport its oil. It then signed another contract with A.S. 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 indeed 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.⁷⁶

The response of the tribunal is interesting in that it addresses questions related to competence-competence, state sovereignty, public interest and *pacta sunt servanda*. One can argue that signing the second contract was in the public interest of the Saudi Government, thus the tribunal privileged the principle of *pacta sunt servanda* over public interest. Public interest and State sovereignty can at times overlap, but the tribunal ruled that was not the case here. However, if one argues that signing the second contract is an act of state sovereignty, then, viewed in this vein, the preference of the tribunal in privileging *pacta sunt servanda* over national sovereignty would be clear. Although the tribunal refused to consider the second contract as falling into the category of acts defined under national sovereignty, the tribunal did in fact maintain that the principle of *pacta sunt servanda* take precedence over the concept of State Sovereignty. If the tribunal had explicitly designated the second contract as falling under state sovereignty it would have set a stronger precedent of privileging *pacta sunt servanda* over state sovereignty, e.g., it could have declared that although the signing of the second contract fell within the sphere of state sovereignty, it would still privilege the sacredness of the contract under the principles of *pacta sunt servanda*. By not seeking to expand its competence to harmonise both contracts the panel indirectly privileged the concept of *pacta sunt servanda* by maintaining the original contract that Saudi Arabia entered into. Seen in this light, privileging *pacta sunt servanda* over state sovereignty serves to challenge precedent in the customary law of oil concessions. The concept of *pacta sunt servanda* for the enforcement of arbitral awards particularly in cases where the possibility of an Arab state using differences in Sharia law to challenge either the jurisdiction of the tribunal or the enforceability of an award concerning foreign investment contracts that may contain financial

⁷⁵ Bishop, above n 56, 2-3.

⁷⁶ Ibid.

services that are at odds with strict concepts of Islamic finance is important. One of the inherent risks that can lead to challenges of arbitration awards is the danger of privileging state sovereignty or public interest over *pacta sunt servanda*. Depending on interpretation, some foreign investment contracts that contain western financial instruments not adhere to strict definitions of Islamic finance can either be seen as for or against public interest. The common denominator with state sovereignty and *ordre public* is that they both serve the interest of the state. In this sense a judgement based on *ordre public* does not necessarily represent that of the public international order.

The concept of *pacta sunt servanda*, though upheld by Sharia can be negated by *ordre public*.⁷⁷

This final point is critical to the debate. Since Islamic law considers oil concession contracts to be in the public interest or *maslaha* of the entire Islamic community represented symbolically by the sovereign, then these contracts must bring about benefits to the community. Logically the major benefit must be economical and financial, contributing to the material enrichment and profit of the Islamic community. Any prohibitions against profit in this particular case must be scrutinized as contradicting with the concept of the public good or *maslaha* in Islam. It is noteworthy to point of that restrictions on the profits from oil concessions would logically be against the interest of the Islamic community. However, the risk (and contradiction) is that strict interpretations on the prohibition of profit in Sharia may also be applied to certain financial investment contracts.

The five chief defences to a claim for breach of an international obligation, force majeure, coercion and duress, corruption or bribery, necessity and fundamental changes of circumstances (*rebus sic Stantibus/imprevisio*)⁷⁸ can be invoked in the

⁷⁷ Al Qurashi, Zeyad A. Renegotiation of International Petroleum Agreements. *Journal of International Arbitration* 22(4): 261-300. 2005, at pp. 275-276. "Under Islamic (Sharia) every lawful contract must be observed. This principle is supported by the following verse from the Holy Quran: 'Oh you who believe, observe covenants.' The leading commentators are agreed that the above words apply to all contracts. Nonetheless, Islamic law recognizes a very restricted concept for excuse from contractual performance. For an event to excuse performance it must be unforeseeable at the time of concluding the contract, fundamental in character and render the performance of the contract onerous. In addition, the event must be beyond the party's control and must affect the substance of the contract. Furthermore, the event also must be threatening the party with excessive loss exceeding the benefits expected from the continuation of the contract. In such cases the judge is empowered to adapt the parties' obligations taking into account the interests of both parties. The judge can also terminate the contract if he considers that its termination is in the interest of both parties, provided that just compensation is paid to the other party. However, contracts relating to the exploitation of natural resources belong to a special category under the Islamic law of contract. There seems to be a consensus in current Islamic opinion that under Islamic law, the ownership of natural resources belongs to the Islamic community and the Sovereign grants concessions on behalf of the Islamic community in whom the ultimate right of property is vested."

⁷⁸ Bishop, Doak, R., Crawford, James, Reisman, Michael. *Foreign Investment Disputes. Cases, Materials and Commentary*. Kluwer Law International. 2005, at pp. 1171-1244.

name of public interest or *maslaha*. For example, the deciding factor in force majeure is the concept of impossibility of fulfilling an obligation. The definition of impossible should not be taken for granted. A Muslim jurist could argue the impossibility of violating God's divine laws. In *Saudi Arabia v. Arabian American Oil Company* the arbitrators found, "pacta sunt servanda fully recognized in Muslim law."⁷⁹

Sornarajah claims that the concept of *pacta sunt servanda* is not a general principle of law⁸⁰, not common to the world legal traditions, but only part of European civil and common law. This is incorrect. The concept of the sanctity of the contract, *pacta sunt servanda* was found even in Hammurabi's code of law, in Mesopotamia which was a non-European culture. It is also found in Islam, which has given rise to cultural elements predominant throughout Asia and the Middle East, and has even influenced diverse cultures such as that of India. These regions and cultures are not European. Sornarajah refers to the following example, ". . . *pacta sunt servanda* continues to remain a 'mere incantation' without legal substance, though it is predictable that it will be invoked by those who support the particular model of foreign investment protection based on the theory of the internationalised contract. *Pacta sunt servanda* forms the very basis of the theory of internationalisation and provides a weak and insecure foundation for it."⁸¹ 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. In Arabic culture, which can overlap with Islam, even a spoken contract must be fulfilled. 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', literally, 'my word is honour'.

According to Sornarajah,

"The Vienna Convention on the Law of Treaties recognises that where a treaty is made in conflict with a *ius cogens* principle, the treaty obligation will lose its force. It must follow that the obligation to arbitrate contained in a contract or even in a treaty, bilateral or multilateral, cannot give jurisdiction to a tribunal to pronounce on matters implicating a *ius cogens* principle. The idea is that the principle implicates international public interests that are inherently incapable of being pronounced upon by ordinary arbitral tribunals. This would apply not only to ad hoc tribunals, but also to tribunals specifically created to deal with foreign investment disputes by bilateral agreements or even to ICSID, a tribunal created by a multilateral treaty."⁸²

⁷⁹ Ballantyne, above n 3, 9.

⁸⁰ Sornarajah, above n 73, 263: "When it is claimed that *pacta sunt servanda* is a general principle of law, a principle that protected European business interests at a given period of history is isolated and imposed on the world as a universal principle."

⁸¹ *Ibid* 266.

⁸² *Ibid* 187.

Sornarajah's argument contains two flaws. The author submits that it is the arbitral tribunal that is more suited to decide questions of international public interest or *ius cogens*, particularly those relevant to the international commercial community, than a court or diplomatic intervention; which are not impartial toward narrow state interests. Sornarajah draws an analogy between a treaty that is in conflict with international public law (*ius cogens*) and an arbitral tribunal, either one that is *ad hoc* or created by treaty. This analogy is false. It is *non sequitur*. A treaty is an agreement between two States, and represents only one law. An arbitral tribunal is a neutral forum that exists to find a solution for a legal dispute using the appropriate law as chosen by the parties themselves. The concept of a treaty that violates public policy is a contradiction in itself; international public law is derived from the treaties themselves, from relations between states, whereas international public law is not directly derived from arbitral tribunals, but from the outcome of the settlement of the dispute. The common denominator between arbitral tribunals and treaties is the fact that both can derive their authority for creating international public law from custom, yet this is the very concept that Sornarajah is opposed to as a source of international public law. An arbitral tribunal, by its nature is perfectly suited to decide on questions of international public law, particularly because of its impartiality, especially in the political arena, and because of its international character, which is superior to narrow state interests. In practice, the arbitrator is more knowledgeable than a judge. Judges deal only with matters relating to their legal jurisdictions and are only concerned with their own laws; following one code of law that addresses both the procedure of the trial as well as the substance of the dispute.

Due to the fact that the inherent nature of the international commercial arbitration proceedings are governed by five different legal systems, e.g., the arbitration contract may be governed by one law, the law governing the capacity of the parties to enter into arbitration, the substance of the dispute by another, the jurisdiction or the seat of the arbitration by the law in force there or by changes by the arbitrators per their contract, and the law governing the enforcement of the arbitration award, which may be one or two laws,⁸³ the arbitrator must understand and be able to apply the fine points of law from several legal traditions of the world (Common, Civil and Sharia); this exceeds the role of the judge.

The UNCITRAL Model law, if it balances and takes into consideration general principles of law extracted from the three legal systems (Civil, Common and Sharia) of its parties to integrate them into a unified code of rules or best practices would ensure enforced arbitration awards. Privileging *pacta sunt servanda* and international public order over *ordre public* will ensure arbitral award enforcement and lower foreign investment risks in the MENA region. This can be achieved by an understanding of Sharia and more empowered arbitral tribunals. An empowered arbitral tribunal with full jurisdiction to decide on questions of public international

⁸³ Redfern, Hunter and Blackaby. *The law and practice of international commercial arbitration*. 2004, Sweet and Maxwell, at pp 77-78

law related to commercial disputes would lower risks to foreign investors in the MENA. Reopening the 'gates of ijtehad' would be one such means to achieve these goals.