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COMMENT

The Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention

I. INTRODUCTION

Growth in international commerce and increased globalization have resulted in an increase in international conventions aimed at alleviating problems resulting from commercial disputes that transcend national borders.¹ With the current effects of the American financial crisis being felt in all major economies, the reality of increased globalization is more apparent than ever.² Along with increased globalization, there has been an increase in the volume of international arbitrations.³ For instance, 599 new arbitrations were filed with the International Chamber of Commerce in 2007, compared with 593 in 2006.⁴

With the increased globalization has come an increase in financial interactions between the Middle East and the West. The Middle East is no longer viewed only as a source of natural resources such as oil, but is becoming a place of financial investment in places such as Dubai and Bahrain. The increasing commercial diversity and contact with the Middle East has resulted in growth in arbitration agreements. This growth has been spurred by an increase in Middle Eastern arbitral institutions such as the Joint Arbitration Centre launched in February 2008 by the Dubai International Financial Centre and the London Court of International Arbitration.⁵

In the past few decades, in response to the growing commercial contact between the Middle East and foreign parties, Middle Eastern nations have signed onto several international conventions concerning foreign trade.⁶ These nations have also increased the number of bilateral investment treaties among them. Along with the signing of these international conventions and treaties, there has

1. Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East*, 21 N.Y. INT'L L. REV. 1, 1 (2008); see also *The Globalization Index 2007*, FOREIGN POL'Y, Nov./Dec. 2007, at 68; Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 211 (1994).

2. *The Globalization Index*, *supra* note 1, at 68.

3. See INT'L CHAMBER OF COMMERCE, ICC IN 2008, available at http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/ICC_2008.pdf.

4. *Id.* at 4.

5. Press Release, Dubai Int'l Fin. Centre/London Court of Int'l Arb., *The Launch of the DFIC/LCIA Arbitration Centre* (Feb. 17, 2008), available at http://www.lcia.org/NEWS_folder/news_archive6.htm.

6. See, e.g., The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Countries who have signed the Convention include: Bahrain, March 15, 1996; Lebanon, August 25, 2003; Saudi Arabia, June 7, 1980; Syria, February 24, 2006; UAE, January 22, 1982. List of Contracting States, <http://icsid.worldbank.org/ICSID/ICSID/DocumentsMain.jsp> (follow "List of Contracting States and Other Signatories of the Convention (ICSID/3)" hyperlink).

been growth in regional conventions aimed at promoting economic growth within the Middle East.

With the growing interdependence among nations and the increased contact between the West and the Middle East, Western parties must have a firm understanding of the dispute resolution methods and legal principles adhered to in Middle Eastern nations.⁷

This article will provide an overview of Shari'a law with respect to arbitration. Section I provides an overview of principles of Shari'a and its development. Section II discusses Islamic jurisprudence and the different schools of Islamic jurisprudence. Section III provides a discussion of the different schools of Islamic jurisprudence. Section IV provides a history of arbitration in the Middle East from the period before Muhammad to today. Section V gives a brief overview of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Sections VI and VII discuss issues regarding choice of law in an agreement to arbitrate under the ICSID Convention. Section VIII discusses the ICSID arbitration decision of *Southern Pacific Properties v. Arab Republic of Egypt*⁸ as an example of a how a tribunal's choice of law analysis could possibly be against the ideals of Shari'a.

II. SHARI'A

Today the world has three main legal systems⁹: civil law, common law, and Shari'a or Islamic law.¹⁰ The word Shari'a comes from the Qur'an, where God is quoted as saying:

Then we put thee
On the (right) Way
Of Religion: so follow
Thou that (Way).¹¹

Shari'a is translated to mean "rites," "the right way of practicing the religion," or simply as "the way."¹² Shari'a is thus the guide for all aspects of a devout Muslim's life¹³ and also a major source of law for almost all Middle Eastern nations.¹⁴

7. Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 566 (2006).

8. *S. Pac. Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID (W. Bank), Case No. ARB/84/3 (1992).

9. See Kutty, *supra* note 7, at 566.

10. While Shari'a and Islamic law are not equivalent, for the purposes of this paper the terms will be used interchangeably. Shari'a goes beyond what most Westerners would recognize as law and provides guidance on things such as prayer, the month of fasting, and moral questions among others. See Frank Griffel, *Introduction*, in SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 1 (Abbas Amanat & Frank Griffel eds., 2007).

11. THE HOLY QUR'AN 45:18.

12. Griffel, *supra* note 10, at 2; see also THE HOLY QUR'AN 45:18.

13. Almas Khan, *The Interaction between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 793 (2006).

14. Kutty, *supra* note 7, at 566.

The Qur'an is the primary source for Shari'a.¹⁵ Muslims believe the Qur'an to be the word of God, relayed through the Prophet Muhammad.¹⁶ Within the Qur'an is guidance on how to conduct every aspect of one's life, including legal, social, political, and economic matters.¹⁷ The Qur'an offers few legal rulings; rather, it lays down guidelines and general principles for the attainment of an ideal society.¹⁸

While the Qur'an is the primary source of authority, much of Shari'a is developed from the secondary sources of the Sunnah and the *hadith*.¹⁹ The Sunnah are the normative behaviors, decisions, actions, and tacit approvals and disapprovals of the Prophet.²⁰ The *hadith* are the sayings of the Prophet.²¹ Although some scholars will incorrectly use the terms interchangeably, the Sunnah are compilations of the *hadith*.²² The Sunnah were compiled beginning in the third century into six collections that Muslims view as canonical.²³ The Sunnah clarify and provide guidance on issues on which the Qur'an is silent;²⁴ however, the Qur'an and the Sunnah do not provide answers to all future legal problems. Therefore, Muslim jurists try to reduce new cases to existing ones by use of *qiyas*.²⁵

"*Qiyas* is reasoning by analogy to solve a new legal problem."²⁶ Muslim scholars employ *qiyas* by taking the text of an existing legal problem within the Qur'an or Sunnah and applying the reasoning to the legal problem at hand.²⁷ For the ruling to have the force of law, the principle must be consistent with the wording of the Qur'an or traditions of the Prophet.²⁸ This is the third source of Shari'a, beneath both the Qur'an and the Sunnah in importance.²⁹

The fourth source of Shari'a is *ijma*, which is the consensus of legal scholars.³⁰ This is comprised of *qiyas* and *ijtihad* that have been completed and had a

15. See *id.* at 584; see also Griffel, *supra* note 10, at 3 (stating the centrality of the Qur'an stems more from theological considerations than its ability to generate substantive legal rulings from its text).

16. Geoffrey E. Roughton, Note, *The Ancient and the Modern: Environmental Law and Governance in Islam*, 32 COLUM. J. ENVTL. L. 99, 101 (2007).

17. See *id.* at 101-02.

18. See Griffel, *supra* note 10, at 3; Kutty, *supra* note 7, at 583.

19. See Khan, *supra* note 13, at 793-94; Kutty, *supra* note 7, at 585.

20. The Sunnah were recorded after the Prophet's death by scholars. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW 1, 13 (Hisham M. Ramadan ed., 2006); see Kutty, *supra* note 7, at 585.

21. Information about the Prophet's actions and legal decisions were collected from oral reports and gathered as Hadith. Griffel, *supra* note 10, at 3.

22. See Roughton, *supra* note 16, at 102.

23. See Kutty, *supra* note 7, at 585; Griffel, *supra* note 10, at 3.

24. T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 60 (1997).

25. See Griffel, *supra* note 10, at 3.

26. See Kutty, *supra* note 7, at 586.

27. ANWAR AHMAD QADRI, ISLAMIC JURISPRUDENCE IN THE MODERN WORLD 71 (1st ed. 1963).

28. *Id.*

29. See Griffel, *supra* note 10, at 3. *But see* QADRI, *supra* note 27, at 71 (stating that there are conflicting opinions as to "the scope and validity of *Qiyas* as a source of the law").

30. See Griffel, *supra* note 10, at 3. The legitimacy of the *ijma* within one school of Islamic jurisprudence may differ from that of another Islamic school of thought. Because of divisions among Muslims, the *ijma* of the Sahaba constitute the only documented *ijma*-based source of law that is universally recognized. Abdal-Haqq, *supra* note 20, at 17-18.

consensus develop around them.³¹ *Ijtihad* is the act of deriving rules consistent with the first principles of Islam.³² This act is undertaken by an individual who participates in *ijma*.³³ While different schools of Islamic jurisprudence differ on how consensus comes into being, all agree on its authority in relation to the law and matters of religion.³⁴ Shari'a in principle is allowed to change in accordance with changing circumstances, and this is done through *ijma*, *qiyas*, and *ijtihad*.³⁵

Followers of Islam are divided into two groups, Sunni and Shi'a (also spelled Shiite or Shiah). Ninety percent of Muslims are Sunni, with the remainder being Shi'a.³⁶ There are two principal differences between Sunni and Shi'a.³⁷ First, the Shi'a are "found principally in Iran, Iraq, Syria, and Lebanon" and "believe that leadership of the Muslim community . . . must be a man who is a descendant of Muhammad."³⁸ They are awaiting the emergence of a leader from the line of the prophet who will embody the wisdom of the Twelfth Imam.³⁹ In the interim, they rely on ayatollahs⁴⁰ for leadership.⁴¹ This belief that Muslim leadership must be provided for by a descendant of Muhammad is not found in the Sunni branch of Islam. While differing views on the leadership of the Muslim community is the primary difference, another difference between the two branches that exists regards the use of *ijtihad* as source of Islamic law.⁴² Within Shi'a, this practice is viewed as a legitimate source of law; however, Sunni forbids the use of *ijtihad*.⁴³

The Qur'an, the Sunnah, *qiyas*, and *ijma* comprise Shari'a for Sunni Islam.⁴⁴ However, "[i]n Shiite Islam the actions and sayings of imams, particularly the first imam, 'Alī ibn Abī Tālib, and the sixth, Ja'far al-Sadiq, are an important additional source" of Shari'a.⁴⁵ In addition to the sources of Shari'a, *urf*, or custom, is of significance in the context of international commercial arbitration because "many of the rules of international commercial arbitration have evolved to the level of custom."⁴⁶ "All schools of Islamic jurisprudence accept *urf* as a supplementary source of rules of law;" however, "custom cannot change a mandatory rule of the Shari'a."⁴⁷

31. See Kutty, *supra* note 7, at 588.

32. *Id.* at 586.

33. Abdal-Haqq, *supra* note 20, at 17.

34. QADRI, *supra* note 27, at 68.

35. See Kutty, *supra* note 7, at 587.

36. See Abdal-Haqq, *supra* note 20, at 9.

37. *Id.*

38. *Id.*

39. *Id.*

40. A high-ranking Shiite religious authority regarded as worthy of imitation in matters of religious law and interpretation. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 130 (4th ed. 2002).

41. Abdal-Haqq, *supra* note 20, at 9.

42. *Id.*

43. *Id.*

44. See Griffel, *supra* note 10, at 3.

45. *Id.* at 4.

46. See Kutty, *supra* note 7, at 589.

47. *Id.*

III. SCHOOLS OF ISLAMIC JURISPRUDENCE

To describe and explore Shari'a, Muslim scholars employ the academic discipline of *fiqh*, or Islamic jurisprudence.⁴⁸ This practice developed as a way for Muslims to determine answers to challenging problems after the death of the Prophet.⁴⁹ Within 300 years of his death, "at least nineteen schools of jurisprudential thought, or in Arabic, *madhhabs*," developed.⁵⁰ Today, five schools have survived and each has its own interpretation on Islamic jurisprudence.⁵¹ The five schools of Islamic jurisprudence are the Hanafi, Maliki, Shafi'i, Hanbali, and Ja'fari schools.⁵²

"The Ja'fari school is adopted by most Shi'a while the other four are Sunni schools of jurisprudence."⁵³ Variations in Shari'a arose between the schools as a result of differences in the weight that each school places on the sources of Shari'a.⁵⁴ The differences between the four Sunni schools may be attributed to the rules of interpretation of word meanings and grammatical construction; the availability, authenticity, conditions of acceptance, and interpretation of *hadith*, and the treatment of conflicting *hadiths*; and lastly, methods of using and even the very decision to use certain principles of reasoning and the emphasis placed on each, including *ijma*, *qiyas*, the customs of Medina people, use of individual and collective opinions of the companions of the Prophet (*sahaba*), juristic preference (*istihsaan*), *istislah*,⁵⁵ and *urf*.⁵⁶ Learning the differences between the schools regarding a particular subject matter within Shari'a is important because different countries have adopted legislation that adheres to the *ijtihad* of one or more of the particular schools of Islamic jurisprudence.⁵⁷

The Hanafi school emphasizes the contractual nature of arbitration,⁵⁸ and arbitral awards are "characterized by the use of subjective opinions (*ra'y*)."⁵⁹ *Ra'y* is used to when there is no direct guidance from the Qu'ran or Sunnah.⁶⁰ Resolving disputes through *ra'y* is similar to that of *ijtihad*.⁶¹ Hanafi closely associate arbitration with conciliation, resulting in the award being of lesser force than that of a court judgment.⁶² Although the awards are more like conciliation than a court judgment would be, a party is bound to fulfill the obligation created by the award

48. Griffel, *supra* note 10, at 3.

49. Abdal-Haqq, *supra* note 20, at 24.

50. *Id.*

51. *See id.* at 25.

52. Twibell, *supra* note 24, at 62.

53. *Id.*

54. Griffel, *supra* note 10, at 3.

55. *Istislah* means public good. *Istislah* is a norm employed by Muslim jurists to solve perplexing problems that find no clear answer in sacred religious texts. The Anglo-American counterpart of *istislah* is the doctrine of public policy. *See* SAMIR SALEH, *COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST* 452 (2d ed. 2006); *see also* QADRI, *supra* note 27, at 78-79.

56. Abdal-Haqq, *supra* note 20, at 28-29.

57. For example, "Syria, Egypt and Jordan have adopted the Hanafi school of jurisprudence, while Morocco, Algeria, and Kuwait have adopted the Maliki school." Twibell, *supra* note 24, at 66.

58. *See* Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 175 (2006).

59. SALEH, *supra* note 55, at 8.

60. *See* JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 37 (1st ed. 1964).

61. *Id.* at 46.

62. Gemmell, *supra* note 58, at 175.

because the initial agreement to arbitrate the dispute binds the party just like any other contract.⁶³ “Followers of the Hanafi school are found principally in Afghanistan, Guyana, India, Iraq, Pakistan, Surinam, Syria, Trinidad, Turkey, and to a more limited extent Egypt.”⁶⁴

The Maliki school’s distinguishing characteristic is its reliance on the customary practices of the people of Medina as a source of evidence of how the Shari’a should be applied.⁶⁵ The Maliki trust in arbitration can be seen by the fact that this school allows one of the disputants to be chosen as an arbitrator by the other disputing party.⁶⁶ This school does not allow for an arbitrator to be removed after the commencement of the arbitration proceedings.⁶⁷ Followers of this school are found in Algeria, Bahrain, Chad, (Upper) Egypt, Kuwait, Mali, Morocco, Nigeria, Qatar, and Tunisia.⁶⁸

“The Shafi’i school is based on the methodology developed by Muhammad Idris ash-Shafi.”⁶⁹ One commentator states that this school is eclectic because it has borrowed from both the Hanafi and Maliki schools.⁷⁰ For the Shafi’i, “arbitration is a legal practice; however, the position of arbitrators is inferior to that of judges [because] arbitrators . . . may be removed by the parties up to the time of the issuance of the award.”⁷¹ Adherents of Shafi’i jurisprudential thought are found in Egypt, Indonesia, Kenya, Malaysia, Philippines, Sri Lanka, Surinam, Tanzania, and Yemen.⁷²

The Hanbali school is said to be the most conservative of the schools.⁷³ “It is the system of methodology upon which Saudi Arabian law is based.”⁷⁴ Arbitrators are required to have the same qualifications as those of a judge.⁷⁵ Followers of this school of thought find decisions by an arbitrator to have “the same binding nature as a court’s judgment.”⁷⁶ Arbitral awards have a *res judicata* effect on both parties.⁷⁷

“The Jafari . . . school is the recognized Shi’a school of jurisprudence.”⁷⁸ Under Jafari jurisprudence, the methodology for determining Shari’a requires one

63. *Id.*

64. Abdall-Haqq, *supra* note 20, at 26.

65. *Id.* at 27.

66. Gemmell, *supra* note 58, at 175. Allowing a disputing party to act as the arbitrator in the dispute diverges from ethical standards of international commercial arbitration. This can be seen in the IBA Rules of Ethics which state that arbitrators shall be free from bias, where one possibility of bias is a direct relationship between the arbitrator and disputant. INT’L BAR ASSOC., IBA GUIDELINES ON CONFLICT OF INTEREST IN INTERNATIONAL COMMERCIAL ARBITRATION 20 (2004), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

67. Gemmell, *supra* note 58, at 175.

68. Abdall-Haqq, *supra* note 20, at 27.

69. *Id.*

70. Gemmell, *supra* note 58, at 175.

71. *Id.* at 176.

72. Abdall-Haqq, *supra* note 20, at 27.

73. Gemmell, *supra* note 58, at 176.

74. Abdall-Haqq, *supra* note 20, at 28.

75. Gemmell, *supra* note 58, at 176.

76. *Id.*

77. *Id.*

78. Abdall-Haqq, *supra* note 20, at 29.

to go first to the Qur'an, then the Sunnah of Muhammad,⁷⁹ and lastly the *ijtihad* of the Imam.⁸⁰ The Shi'a are found primarily in Iran, Iraq, and Lebanon.⁸¹

IV. THE MEDJELLA

While the Shari'a has not been written down in its entirety, an early, albeit Western-influenced,⁸² codification of Shari'a was written in the late 1800s.⁸³ This law was called the Medjella⁸⁴ and was enacted in Ottoman Empire.⁸⁵ The civil law covered the law of contracts and obligations and of civil procedure. It was promulgated as the Ottoman Civil Code in 1877.⁸⁶ The purpose of the law was to provide the secular tribunals in Ottoman Empire "with an authoritative statement of the doctrine of Islamic law."⁸⁷ However, several commentators argue that "strict Islamic law is by its nature not suitable for codification because it possesses authoritative character only in so far as it is taught in the traditional way by one of the recognized schools" of Islamic jurisprudence.⁸⁸ While the Medjella is no longer in effect,⁸⁹ Western scholars refer back to the Medjella for guidance on certain issues regarding Islamic law and, relevant to this article, the legality of arbitration under Shari'a.

V. HISTORY OF MIDDLE EASTERN ARBITRATION

Arbitration in the Middle East dates back to the pre-Islamic period.⁹⁰ If two parties could not resolve their dispute through negotiation, they were free to choose an arbitrator (*hakam*) to aid in settling the dispute.⁹¹ The *hakam* was chosen for his personal qualities, such as his reputation or the fact that he was competent in deciding disputes.⁹² The choice to have the party's dispute sent to arbitration was optional.⁹³ Should the disputing parties choose arbitration, the arbitral award was not legally binding.⁹⁴ Because awards were not legally binding, parties

79. The range of acceptable hadith is restricted to those traditions that were related or narrated by a Shi'a imam descended from the Prophet Muhammad's bloodline. *Id.*

80. *Id.*

81. *Id.*

82. The Medjella was influenced strongly by French civil law. Implementing Western ideals into law was common among Muslim nations who had been subject to colonization. Griffell, *supra* note 10, at 8-9.

83. SCHAFF, *supra* note 60, at 92.

84. Also transliterated Mejelle, Majalla, Medjelle, Megelle, or Mecelle.

85. SCHAFF, *supra* note 60, at 92.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 93. The Medjella remained in force in the states which were once part of the Ottoman Empire; however, most states have replaced it with new legislation. It still remains as a basis for law in Cyprus, Israel, and Jordan. *Id.*

90. *Id.* at 7.

91. *Id.*

92. *Id.*

93. Kutty, *supra* note 7, at 590.

94. *Id.*

were often required to provide security, “either property or hostages,” before arbitrating their dispute to ensure compliance with the arbitrator’s decision.⁹⁵

The Qur’an approves the use of arbitration, as demonstrated in a passage regarding a matrimonial dispute, stating:

And if you fear a breach between the two,
Then select an arbitrator from his family,
And an arbitrator from her family;
If then the two desire peace,
God will make agreement between them.
Surely, God is Knowing, Informed.⁹⁶

Furthermore, the practice of arbitration was affirmed by Muhammad. There are two instances in which the Muhammad affirmed the use of arbitration.⁹⁷ In one instance, Muhammad was involved in a dispute between himself and a Jewish tribe.⁹⁸ To resolve this dispute, Muhammad agreed to have the dispute submitted to a third party to be arbitrated.⁹⁹ The second instance where Muhammad affirmed the use of arbitration was when he agreed to arbitrate a conflict between Arab and Jewish tribes.¹⁰⁰ The use of arbitration as a dispute resolution mechanism has also been confirmed by *ijma*.¹⁰¹

Prior to the 1940s, arbitration in the Middle East was viewed as an acceptable form of dispute resolution; however, during the period between the 1940s and the 1970s, Middle Easterners viewed arbitration with skepticism.¹⁰² This was a time when Middle Eastern nations granted concessions to foreign oil companies allowing them to explore and drill for oil. These concessions generally gave an oil company fifty-year rights to the land and included agreements to arbitrate disputes that might arise.¹⁰³ The arbitrations that came about from these agreements resulted in a “negation of domestic Islamic law in favor of ‘general principles of law’ that were firmly rooted in the laws of Western jurisdictions.”¹⁰⁴ There are five international arbitrations from this period that scholars cite to illustrate the negation of Islamic law.¹⁰⁵

In the case of *Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi*, Lord Asquith,¹⁰⁶ the arbitrator, acknowledged that Abu Dhabi law should

95. SCHACHT, *supra* note 60, at 8.

96. THE HOLY QUR’AN 4:35.

97. Gemmell, *supra* note 58, at 173-74.

98. *Id.* at 174.

99. *Id.*

100. *Id.*

101. KUTTY, *supra* note 7, at 590.

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

103. *Id.* at 643-44.

104. *Id.* at 644.

105. See generally *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 1 INT’L & COMP. L. Q. 247 (1952); *Tex. Overseas Petroleum Co. v. The Gov’t of the Libyan Arab Republic*, 53 ILR 389 (1979); *B.P. Exploration Co. v. The Gov’t of the Libyan Arab Republic*, 53 ILR 297 (1979); *Libyan American Oil Co. v. The Gov’t of the Libyan Arab Republic*, 20 ILM 1 (1981); *Saudi Arabia v. Arab Am. Oil Co. (ARAMCO)*, 27 ILR 117 (1963).

106. Lord Asquith was an English barrister, judge, and law lord.

govern the dispute; however, he stated that “it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”¹⁰⁷ Lord Asquith went on to state that the agreement “invite[s], indeed prescribe[s], the application of principles rooted in the good sense and common practice of the generality of civilized [sic] nations.”¹⁰⁸ The result of Lord Asquith’s choice of law analysis resulted in the application of English law and a decision against Abu Dhabi.¹⁰⁹ In rejecting the law of Abu Dhabi, Lord Asquith was stating that there was no general law of contract within the Shari’a.¹¹⁰

Another major development were the cases of *Texas Overseas Petroleum Co. v. The Gov’t of the Libyan Arab Republic*, *B.P. Exploration Co. v. The Gov’t of the Libyan Arab Republic*, and *Libyan American Oil Co. v. The Gov’t of the Libyan Arab Republic*, collectively the Libyan cases.¹¹¹ These arbitrations came about when each oil company requested arbitration after the Libyan government nationalized the properties of the three separate foreign oil companies.¹¹² The Libyan cases presented a situation where there were three separate arbitrations with identical factual backgrounds and legal documents that were to be resolved with identical choice of law clauses.¹¹³ The choice of law clauses called for the arbitration to be decided using Libyan law and international law, as relevant.¹¹⁴ The Libyan government lost each case; however, the arbitrator for each case based his decision on a different legal analysis.¹¹⁵ In each case the arbitrator was required to determine the proper procedural law to apply.¹¹⁶ Each arbitrator chose a different set of procedural rules to govern the arbitration and gave a different reason for the particular choice.¹¹⁷ The arbitrators also had different reasoning when dealing with the question of whether *restitutio in integrum* was an appropriate remedy in each of the disputes.¹¹⁸ These three arbitrations had the result of causing Middle Eastern distrust of the Western arbitral process.¹¹⁹

Another major development in Middle Eastern arbitration during this period was the arbitration of the dispute between the Arabian American Oil Company (ARAMCO) and the Saudi Arabian government.¹²⁰ This arbitration resulted in a ruling against Saudi Arabia.¹²¹ The panel held that Saudi laws had to be “interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence,” because

107. *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, *supra* note 104, at 250-51.

108. *Id.*

109. Brower & Sharpe, *supra* note 102, at 644.

110. Kutty, *supra* note 7, at 591.

111. See generally *Tex. Overseas Petroleum Co. v. The Gov’t of the Libyan Arab Republic*, 53 ILR 389 (1979); *B.P. Exploration Co. v. The Gov’t of the Libyan Arab Republic* (1979), 53 ILR 297; *Libyan American Oil Co. v. The Gov’t of the Libyan Arab Republic*, 27 ILR 117 (1963).

112. Gemmell, *supra* note 58, at 177.

113. *Id.*

114. *Id.*

115. *Id.* at 177-78.

116. *Id.* at 178.

117. *Id.*

118. *Id.* at 178-79.

119. *Id.* at 179.

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

121. Kutty, *supra* note 7, at 591-92.

ARAMCO's rights could not be "secured in an unquestionable manner by the law in force in Saudi Arabia."¹²² Ultimately, this decision resulted in Saudi Arabia prohibiting government agencies from participating in arbitration.¹²³

The next period of arbitration in the Middle East was between 1970 and 1980. This was a time when the Middle East saw a rapid growth in wealth as a result of increased Western demand for Middle Eastern oil exports. Middle Eastern states during this time were becoming frustrated with the legal obligations they had been saddled with from the oil concessions of the previous decades.¹²⁴ This frustration resulted in Middle Eastern nations breaking contractual obligations with foreign oil companies, nationalization of oil concessions, and rejection of arbitrations invoked by Western companies.¹²⁵ At the same time, these nations had little legislation regarding arbitration and had not been participating in the global growth of international arbitration.¹²⁶

Although arbitration in the Middle East was somewhat troubled during the period between World War II and 1980, beginning in the 1980s, Middle Eastern nations became more friendly toward, and increased their participation in, international arbitration. Several Middle Eastern nations acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and also to the ICSID Convention.¹²⁷ These nations have also developed "arbitration-friendly" domestic arbitration laws¹²⁸ and have set up regional and international arbitration centers.¹²⁹ This shift has created an environment more open to international arbitration; however, contracting parties must be aware of the differences between nations. Nations within the Middle East still have differences with respect to what disputes may be arbitrated and also how enforceable an arbitral award may be.

VI. THE ICSID

In the early 1960's the International Bank for Reconstruction and Development undertook to establish a forum where disputes involving international in-

122. *Id.* at 592.

123. *Id.*

124. See Brower & Sharpe, *supra* note 102, at 645-46.

125. *Id.* at 646.

126. *Id.*

127. Kutty, *supra* note 7, at 593.

128. *Id.* The "arbitration-friendly" legislation has ranged from the adoption of Western models (ex. Lebanon and Qatar) to the adoption of the UNCITRAL Model Law (ex. Bahrain, Iran, Jordan, Oman, Tunisia)).

129. *Id.* Saudi Arabia opened an international commercial arbitration center on March 15, 2009. Also, the Dubai International Financial Centre launched a joint venture with the London Court of International Arbitration in which they created an arbitration center in Dubai for the settlement of financial disputes. See DFIC/LCIA Press Release, *supra* note 5. Other Middle Eastern arbitration centers are the Cairo Regional Center for International Commercial Arbitration created in 1978, the Arab Centre for Commercial Arbitration created in 1987, the Arbitration Centre at the Chamber of Commerce and Industry of Beirut, the Conciliation and Arbitration Centre of Tunis, the Bahrain Centre for International Commercial Arbitration, the Kuwait Centre for Commercial Arbitration, the Abu Dhabi Centre for Conciliation and Arbitration, and the Dubai Centre for Arbitration and Conciliation to name a few. See Brower & Sharpe, *supra* note 102, at 654.

vestment could be resolved.¹³⁰ This forum was established when the International Centre for the Settlement of Investment Disputes was created pursuant to the 1965 ICSID Convention.¹³¹ The Centre allows parties to submit their disputes to either arbitration under the 1965 ICSID Convention or arbitration under the 1978 ICSID Additional Facility Rules.¹³² As of January 2010, there were 144 ICSID contracting states,¹³³ including all the major industrialized states.¹³⁴

The Convention sought to remove major impediments to the international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment settlement disputes.¹³⁵ The drafters of the Convention recognized the need for a neutral dispute resolution forum for investors who were “wary of nationalistic decisions by local courts and to states that (were) . . . wary of self-interested actions by foreign investors.”¹³⁶ The goal of a neutral dispute resolution forum can be seen in the Preamble of the Convention.¹³⁷

Today it is clear that the Convention has met its goals of reducing risks to foreign investment. The Convention’s efficacy can be seen by the “proliferation of bilateral investment treaties,” indicating a substantial increase in interest in foreign investment.¹³⁸ Within many of these bilateral investment treaties is the option to employ ICSID dispute resolution.¹³⁹

While the Centre allows for parties to submit their disputes to either the 1965 ICSID Convention or arbitration under the 1978 ICSID Additional Facility Rules, there are significant procedural differences that must be understood before agreeing to use one of these dispute resolution forums. Article 25(1) of the Convention states that for the Centre to have jurisdiction over a dispute under the ICSID Convention, the dispute must arise directly out of an investment between a contracting state and a national of another contracting state.¹⁴⁰ This means that the dispute must be one arising out of an investment and not simply an ordinary commercial transaction. The host state must be a contracting state to the Convention.¹⁴¹ The investor must show that it is a national of a contracting state.¹⁴² In the investment agreement, the parties must have consented to submit their dispute to the Centre.¹⁴³

130. LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION 1* (Kluwer Law International) (2004).

131. *Id.*

132. Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16 ICSID REV.: FOREIGN INVESTMENT L.J. 20, 20 (2001).

133. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Apr. 10, 2006 [hereinafter ICSID Convention]. Only Contracting States and nationals of Contracting States may submit their investment dispute to ICSID arbitration. *Id.* at 18.

134. REED ET AL., *supra* note 130, at 1.

135. ICSID—International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (follow “About ICSID” hyperlink) (last visited Mar. 11, 2010).

136. See REED ET AL., *supra* note 130, at 3.

137. See ICSID Convention, *supra* note 133, Preamble.

138. REED ET AL., *supra* note 130, at 4.

139. *Id.*

140. See ICSID Convention, *supra* note 133, art. 25.

141. John P. Bowman, *Dispute Resolution Planning for the Oil and Gas Industry*, 16 ICSID REV.: FOREIGN INVESTMENT L. J. 332, 367-68 (2001).

142. *Id.*

143. *Id.*

Parties may also enter into ICSID arbitration non-contractually.¹⁴⁴ “Local investment laws and international treaties make it possible for private investors to initiate ICSID arbitrations against host governments even when there is no contractual agreement between them.”¹⁴⁵ “[I]n 2000, ICSID reported that two-thirds of the [thirty-eight] arbitrations pending had been brought under an instrument other than an arbitration clause”¹⁴⁶ Consent to ICSID arbitration may be given by the host state through its investment laws or in a bilateral investment treaty.¹⁴⁷ Should this be the case, a private investor’s consent to ICSID arbitration may be expressed by initiating arbitration under the ICSID Convention, relying on the host state’s advanced consent.¹⁴⁸

In drafting the Convention, the drafters intentionally left out a definition for investment.¹⁴⁹ ICSID tribunals look to several elements about the transaction to determine if the transaction in question qualifies as an investment.¹⁵⁰ While the term is flexible, the arbitration of *Mihaly International v. Sri Lanka* is an example of the boundary for the term.¹⁵¹ In that case the tribunal declined jurisdiction because they found that the expenses incurred in finalizing a contract between the parties did not rise to the level of an investment under the Convention.¹⁵²

Another jurisdictional issue can arise should a contracting state limit the scope of consent given to ICSID disputes. Article 25 of the ICSID Convention provides in paragraph 4 that:

[a]ny Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States.¹⁵³

An example germane to this article is Saudi Arabia’s notification disallowing ICSID arbitration for questions pertaining to oil and pertaining to acts of sovereignty.¹⁵⁴ Confirming that a state has not made such a notification prior to finali-

144. See REED ET AL., *supra* note 130, at 35.

145. *Id.*

146. *Id.*

147. See ICSID Convention, *supra* note 133, art. 25 (The Centre has jurisdiction over disputes which the parties to the dispute consent in writing to submit to the Centre.); Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV.: FOREIGN INVESTMENT L.J. 1, 6 (2004).

148. Sacerdoti, *supra* note 147, at 6.

149. See REED ET AL., *supra* note 130, at 14; see also Sacerdoti, *supra* note 147, at 13 (stating that while the ICSID Convention contains no definition of “investment,” and BITs normally contain broad definitions, the defense of lack of jurisdiction because of the absence of an investment, though often raised, has rarely if ever prevailed).

150. REED ET AL., *supra* note 130, at 15.

151. See *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/002 (2002)

152. *Id.* at 159.

153. See ICSID Convention, *supra* note 133, art. 25.

154. ICSID—International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (follow “Member States” hyperlink) (last visited Mar. 20, 2010); REED ET AL., *supra* note 130, at 23 (Other countries that have given such a notification are China, Jamaica, Papua New Guinea and Turkey.).

zation will ensure the investor that the dispute will be arbitrable under the Convention. Investors can find this information by checking the ICSID website¹⁵⁵ or contacting the World Bank.

“The rules concerning the form of awards rendered under the ICSID Convention do not differ substantially from other international commercial arbitration rules.”¹⁵⁶ Under the Convention, the award must be in writing and signed by the members of the tribunal who voted for it.¹⁵⁷ Under the Convention, the award must also “deal with every question submitted to the tribunal, and shall state the reasoning upon which it is based.”¹⁵⁸ Decisions on questions posed to the tribunal shall be decided by a majority vote.¹⁵⁹ Article 48(4) of the Convention allows for an arbitrator to attach his individual opinion, whether it be dissenting or concurring.¹⁶⁰ Awards rendered under the Convention are not published without the consent of both parties.¹⁶¹

The Convention provides that awards and pecuniary obligations stemming from awards are to be recognized by each state “as if it were a final judgment of a court in that State.”¹⁶² However, investors have little recourse should a state “refuse to recognize, enforce and execute ICSID awards in spite of their Convention obligations.”¹⁶³ An investor is barred from bringing an action against the “State in its own name, but must rely on its home State to institute proceedings on its behalf.”¹⁶⁴ This action is specifically allowed for under Article 64 of the Convention.¹⁶⁵

The principal advantage to ICSID arbitration is that the dispute resolution is self-contained.¹⁶⁶ Before the Convention, state sovereign immunity had impeded private parties’ ability to enforce favorable awards.¹⁶⁷ Awards rendered under the Convention are “binding on the parties and not subject to any appeal or to any other remedy except those provided for in [the] Convention.”¹⁶⁸ Article 53(1) of the Convention precludes parties from challenging awards by appealing to national courts or resorting to “any other remedy except those provided for in this Con-

155. ICSID—International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited Mar. 11, 2010).

156. REED ET AL., *supra* note 130, at 89.

157. ICSID Convention, *supra* note 133, art. 48(2).

158. *Id.* art. 48(3). Shari’a also requires that arbitrators state the reasons upon which the award was based. See ABDUL HAMID EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 49 (2d ed. 1999).

159. ICSID Convention, *supra* note 133, art. 48(1). While there has been little scholarly writing regarding whether arbitral awards must be made by unanimous vote or simply majority vote for them to be valid under Shari’a, under the Medjella awards had to be decided by unanimous vote. See EL-AHDAB, *supra* note 158, at 49.

160. ICSID Convention *supra* note 133, art. 48(4).

161. *Id.* art. 48(5).

162. *Id.* art. 54(1).

163. REED ET AL., *supra* note 130, at 109.

164. *Id.*

165. “Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.” ICSID Convention, *supra* note 133, art. 64.

166. Bowman, *supra* note 141, at 367.

167. Sacerdoti, *supra* note 147, at 5.

168. ICSID Convention, *supra* note 133, art. 53(1).

vention.”¹⁶⁹ Article 26 mandates that the review regime set forth under the Convention is exclusive.¹⁷⁰ Remedies allowed for under the Convention are revision,¹⁷¹ annulment,¹⁷² or interpretation of an award.¹⁷³ The Convention also allows the tribunal to stay enforcement of an award pending the tribunal’s decision on revision, annulment, or interpretation.¹⁷⁴

Also provided for under the ICSID Convention is conciliation.¹⁷⁵ Either party to a dispute may submit a request for conciliation, and as with arbitration, both parties must consent to conciliation before proceedings begin.¹⁷⁶ Conciliation under the ICSID Convention is a non-binding form of alternative dispute resolution.¹⁷⁷ Under the Convention, this form of dispute resolution has seen little use.¹⁷⁸ As of 2003 there have only been three requests for conciliation under the Convention.¹⁷⁹ Although conciliation has been little used, it could be a valuable dispute resolution tool for Shari’a compliant countries and investors because of the approval that has been given of conciliation within Shari’a.¹⁸⁰

In addition to the ICSID Convention, the Administrative Council of the Centre adopted the Additional Facility Rules, which allow for certain proceedings that do not fall within the Centre’s jurisdiction under Article 25(1) of the Convention.¹⁸¹ These proceedings include fact-finding and conciliation or arbitration proceedings for disputes that may not rise to the level of an investment dispute that arise between parties, one of which is a contracting state or national of that state and the other party is not. Because these proceedings reach claims that are outside the jurisdiction of the Centre pursuant to the Convention, the Convention does not apply to Additional Facility arbitrations or conciliations.¹⁸² As a result of the Convention not applying, Additional Facility awards are not subject to the provisions regarding enforcement like awards rendered under the Convention.¹⁸³ Thus to aid in the enforcement of an Additional Facility award, the Additional Facility Rules require that Additional Facility arbitration proceedings be held in a state that is a party to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁸⁴

169. *Id.*

170. *Id.* art. 26 (Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy).

171. *Id.* art. 51(1).

172. *Id.* art. 52(1).

173. *Id.* art. 50(1).

174. *Id.* arts. 50-52.

175. *See id.* arts. 28-35.

176. REED ET AL, *supra* note 130, at 11.

177. *Id.*

178. *See id.* at 12.

179. *Id.*

180. *See EL-AHDAB, supra* note 158, at 16.

181. INT’L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTES, ADDITIONAL FACILITY RULES, available at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>.

182. ICSID Additional Facility Rules, art. 3.

183. REED ET AL, *supra* note 130, at 10.

184. ICSID Additional Facility Rules, art. 19.

VII. CHOICE OF LAW

When agreeing to submit disputes to international arbitration, scholars state that there are four questions of applicable law in an ICSID arbitration.¹⁸⁵ The questions are “(a) what law governs the validity of the arbitration agreement? (b) what law governs the arbitration proceedings themselves? (c) what law applies to the substance of the dispute? and (d) in the event of a conflict regarding the substantive law, under what law is the conflict to be resolved?”¹⁸⁶

A. *Validity of the Arbitration Agreement*

The validity of the arbitration agreement itself is governed by Articles 25 and 26 of the Convention and the express terms of the parties' agreement.¹⁸⁷ “There is no need for the parties to select a law governing the validity of [the] agreement; it is governed by the Convention and therefore by international law.”¹⁸⁸ However, this could be in opposition to principles of Shari'a law. Shari'a has placed limitations on what disputes are arbitrable and what agreements to arbitrate are valid.¹⁸⁹ What disputes may or may not be arbitrated will vary based on what school of Islamic jurisprudence is followed by the state or individual.¹⁹⁰

Under the Hanafi school, non-arbitrable disputes are those that involve fixed punishment and criminal sanction.¹⁹¹ However, disputes that have been explicitly authorized by the Hanafi include “marriage and divorce matters, and in sale, loan and guarantee contracts.”¹⁹² “Maliki writers allow arbitration in all financial cases and compensation cases resulting from injuries.”¹⁹³ The Shafi'i school also allows for arbitration of financial matters.¹⁹⁴ The Hanbali school authorizes arbitration in all financial cases but may forbid it for certain criminal and family related matters; however, some Hanbali scholars appear to allow for arbitration in all cases without restrictions.¹⁹⁵

Aside from the arbitrability of certain matters, another concern arises when discussing whether an agreement to arbitrate is a violation of Shari'a due to the speculative nature of an arbitration agreement. Under Shari'a law, there appear to be two problems with agreements to arbitrate future disputes, namely: “(i) an undertaking to execute in the future an essentially revocable contract under [S]hari'a; and (ii) an undertaking to resort to arbitration before the existence of a dispute.”¹⁹⁶ However, it appears that an agreement to submit a future dispute to

185. REED ET AL., *supra* note 130, at 29.

186. *Id.*

187. *Id.*

188. *Id.*

189. SALEH, *supra* note 55, at 36-37.

190. *See id.* at 37-38.

191. *Id.* at 37. Some Hanafi scholars, however, contend that instances involving criminal sanction are arbitrable. *Id.*

192. *Id.*

193. *Id.* at 38.

194. *Id.*

195. *Id.*

196. *Id.* at 39.

arbitration could be as validly binding as other contracts.¹⁹⁷ While this is the consensus among modern practitioners, it is believed not to be in conformance with Shari'a principles and appears to be influenced by Western concepts and Western statutes.¹⁹⁸

Furthermore, one commentator writes that academic writers on Muslim law distinguish between valid and invalid arbitration clauses based on a number of factors.¹⁹⁹ For an arbitration clause to be valid the clause must be necessary to the contract, appropriate to the contract, and commonly used in transactions.²⁰⁰ Arbitration clauses generally found to be invalid are treated as one of two types.²⁰¹ "In the first category, only the clauses in question themselves are void, but the contracts remain valid."²⁰² "These are clauses which, in fact, have no interest for the parties and their performance cannot be requested."²⁰³ In the second category, not only will the clauses be invalid, but the whole contract in which the agreement to arbitrate is embedded will also be found to be invalid.²⁰⁴ The latter category of invalid clauses are those which contain *riba* (interest), clauses creating a double contract hiding interest, and clauses resulting in *gharar* (risk).²⁰⁵ One example of *gharar* would be a clause that includes a waiver of the right to produce evidence through witnesses.²⁰⁶

Under ICSID, when addressing the question of whether or not the arbitration agreement is valid, one looks only to international law.²⁰⁷ Should international law not align with Shari'a law, as many times it does not, it would appear that finding an arbitration agreement which is invalid under Shari'a law to be valid for purposes of the ICSID Convention could pose a problem should the party following Shari'a law lose and bring this issue up at the annulment stage.²⁰⁸ However, several states that follow Shari'a have joined the ICSID Convention possibly without concern for this point.

B. Law To Govern the Arbitral Proceedings

Article 44 of the Convention addresses the applicable procedural law governing the arbitration.²⁰⁹ The proceedings are to be conducted in accordance with the

197. *Id.* Quranic principles require strict adherence to contractual commitments. This comes directly from the Qur'an which states: "O ye who believe! Fulfill your engagements." THE HOLY QUR'AN 5:1.

198. SALEH, *supra* note 55, at 39-40.

199. See EL-AHDAB, *supra* note 156, at 26-28.

200. *Id.* at 26.

201. *Id.* at 27.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* *Gharar* does not apply to business risk, but to speculative or unconscionable risk. Noor Mohammed, *Principles of Islamic Contract Law*, in UNDERSTANDING ISLAMIC LAW, *supra* note 19, at 95, 100. See also Gemmell, *supra* note 58, at 180-81.

206. EL-AHDAB, *supra* note 158, at 27.

207. REED ET AL., *supra* note 130, at 29.

208. ICSID Article 52(1) allows for a request for annulment on the ground that there was a serious departure from a fundamental rule of procedure. ICSID Convention, *supra* note 133, art. 52(1)(d).

209. The ICSID Article 44 states:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is

procedural provisions of the Convention, which can be found in Articles 41 to 49.²¹⁰ Article 44 allows for the parties to modify the procedural law so long as the modification is in accordance with the ICSID Arbitration Rules in effect on the date when the parties consented to arbitration.²¹¹ However, the parties cannot select a national procedural law or other international arbitration procedural rules to govern the ICSID arbitration.²¹² Parties should not invent procedural variations or “improvements” on the ICSID procedural framework in their arbitration agreement, as there are mandatory provisions in the ICSID Convention and the various sets of ICSID rules.²¹³

Shari'a law does not require the arbitrator to comply with the procedure that is followed within the courts.²¹⁴ The overarching procedural requirement under Shari'a is that all parties act in good faith when dealing with each other.²¹⁵ The requirement of good faith comes directly from the Qur'an, which states:

O ye who believe!
 Reverence God and
 Abandon what remains of usury,
 If you are believers.
 But if you do (it) not,
 Then beware of the war on the part of God and His Messenger,
 But if you turn (to God)
 Then yours be your capitals;
 Oppress not,
 And be not oppressed.
 But if a person be in straitened circumstances,
 Then give him time till he be in easy circumstances.²¹⁶

“Five fundamental principles of practical scope and importance can be extracted from” the application of the principle of good faith.²¹⁷

One principle that perhaps goes against the ICSID Convention is whether, under Shari'a law, a decision may be made by the arbitrator before hearing both parties. Article 45 of the Convention states that if a party fails to appear or

not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

ICSID Convention, *supra* note 133, art. 44. See also REED ET AL., *supra* note 130, at 29-30.

210. See ICSID Convention, *supra* note 133, arts. 41-49

211. *Id.* art. 44.

212. REED, *supra* note 130, at 30.

213. *Id.*

214. EL-AHDAB, *supra* note 158, at 43. Shari'a believes that substantive truth should prevail over procedural technicalities. This can be seen in the hadith of the Prophet Muhammad who stated:

I am only a man, and when you come pleading before me, it may happen that one of you will be more eloquent in his pleading and, as a result, I will adjudicate in his favour according to this speech. If it so happens and I give an advantage to one of you by granting him a thing which belongs to his opponent, he had better not take it because I would be giving him a portion of hell.

Nudrat Majeed, *Good Faith and Due Process: Lessons from the Shari'ah*, 20 ARB. INT'L. 97, 108 (2004)

215. See Majeed, *supra* note 214, at 103.

216. THE HOLY QUR'AN 2:278-79.

217. SALEH, *supra* note 55, at 54.

present his case, the other party may request the tribunal to render an award.²¹⁸ In principle, an arbitrator strictly adhering to Shari'a during the arbitration is not authorized to decide the dispute without hearing both parties to the dispute; however, in practice a decision may be made should certain strict requirements first be met.²¹⁹ Under Shari'a the requirement to appear before the tribunal is a sacred duty and "failure to appear incurs divine punishment."²²⁰ Should a party fail to appear, the tribunal must look to the distance between the defaulting party's residence and the location of the arbitration to determine the proper procedure for summoning the defaulting party.²²¹ Depending on the distance, the arbitrator will determine what type of notice must be given to the defaulting party before moving on with the arbitration.²²² Should the defaulting party continue to refuse to appear, the arbitrator will make a decision about the dispute based on the evidence presented by the appearing party.²²³ The award rendered is to be treated like any other judgment and will only be reviewed if it violated a Shari'a tenet.²²⁴

The pragmatic approach to default under Shari'a is similar to that of the default rules set forth in the ICSID Convention and ICSID Arbitration Rules.²²⁵ During an ICSID arbitration, failure of a party to appear or present its case allows the tribunal to render an award on the issues presented at the other party's request.²²⁶ However, the tribunal may do so only after notifying the defaulting party of the request to proceed.²²⁷

C. Applicable Substantive Law and Choice of Law Disputes

The scholars Reed, Paulsson, and Blackaby argue that the parties should strive to agree on the applicable substantive law when drafting the agreement to arbitrate.²²⁸ Article 42 of the Convention states that "the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."²²⁹ However, "in the absence of such agreement," the second sentence of Article

218. ICSID Convention, *supra* note 133, art. 45(2).

219. See SALEH, *supra* note 55, at 55-56; EL-AHDAB, *supra* note 158, at 43 (stating that "[b]oth parties must be heard and the award must contain a statement indicating that the arbitrator has heard both parties.>").

220. SALEH, *supra* note 55, at 56.

221. *Id.* The Islamic schools of jurisprudence differ on the proper procedure to follow should a party not appear. The most protective of the defaulting party is the Maliki school which requires that if "clear-cut evidence is not submitted by the appearing party, the defaulting party must be subject to a rogatory commission by the (arbitrator) at (the defaulting party's) place of residence before being summoned." *Id.* at 56, n.249. The Hanafi, Shafi'I and Hanbali schools simply require *prima facie* evidence of the appearing party's rightful claim. *Id.*

222. *Id.* Different schools calculated short and long distance differently. These distances were initially based on the time it took one to walk to the arbitration site; however, the distances have now changed due to the use of modern transportation. *Id.* at 56, nn.249, 251.

223. *Id.* at 56.

224. *Id.*

225. See generally, ICSID Convention, *supra* note 133, art. 45; INT'L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTES, ADDITIONAL FACILITY RULES, Arbitration Rule 42 available at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>

226. ICSID Convention, *supra* note 133, art. 45(1).

227. REED ET AL., *supra* note 130, at 87.

228. *Id.* at 30.

229. ICSID Convention, *supra* note 133, art. 42.

42(1) states that, “the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”²³⁰ When the agreement lacks a choice of law provision, the second sentence of Article 42(1) “has consistently been interpreted and applied as requiring that ICSID tribunals . . . apply rules of international law in lieu of any domestic law provisions that would be contrary to international law.”²³¹ One commentator has stated that “ICSID tribunals have frequently applied rules of customary international law either under the first or second sentence of Article 42(1)” of the Convention.²³² Because of the self-contained character of the Convention and the fact that Article 52(1) of the Convention allows for annulment on the ground of “manifest excess of powers,” this provision is extremely important.²³³ For purposes of an annulment request, “[a] manifest excess of power can take the form of the failure to apply the law applicable under Article 42 of the Convention.”²³⁴

Shari'a requires that arbitrators adjudicate disputes solely according to Shari'a.²³⁵ Should one party to an international arbitration agreement be Muslim, it will often be stipulated that Shari'a governs all disputes arising from the contract.²³⁶ However, should the contract be silent regarding the applicable substantive law, it appears that the second sentence of Article 42 of the Convention requiring the use of both the contracting state's law and international law goes against Shari'a principles.²³⁷

In theory, should a contracting state have legislation based solely on Shari'a and agree to ICSID arbitration but, in the agreement, fail to stipulate the substantive law governing the dispute, the imposition of international law, as required in Article 42, would be violative of Shari'a law. One author states that this is because the Qur'an “does not acknowledge the existence of another system of law capable of competing with [S]hari'a.”²³⁸ This is shown in the Qur'an, which states:

And indeed, He has sent down upon you in the Book
(The commandment) that when
You hear the signs of God disbelieved and mocked at
Then sit not with them till they engage in some other news—
If you did so, you also would become like them—
Surely, God is going to gather together the hypocrites and the disbelievers
in hell.²³⁹

“The basic principle, as elaborated by the Hanafi school, entails the mandatory application of both procedural and substantive rules of Shari'a.”²⁴⁰ However,

230. *Id.*

231. Sacerdoti, *supra* note 147, at 23.

232. *Id.* at 24.

233. *See id.* at 43.

234. *Id.*

235. SALEH, *supra* note 55, at 43.

236. *See* Khan, *supra* note 13, at 798.

237. *See* SALEH, *supra* note 55, at 43.

238. *Id.* at 43 n.193 (citing Madkūr Muhammad Salām, AL-QADĀ' FIL ISLĀM 127 (Cairo, 1964)).

239. THE HOLY QUR'AN 4:140.

this principle is mitigated by allowing the use of conciliation,²⁴¹ a form of dispute resolution also allowed for in the Convention.²⁴² While the use of conciliation is allowed under Shari'a, this only avoids the requirement of the use of strict procedural rules of Shari'a but still requires the strict use of Shari'a substantive rules on conciliation.²⁴³

In practice, it appears to be that should the above scenario occur, the analysis set forth above holds true. This can be seen in Saudi court rulings and legislation that fail to recognize Western conflict of laws principles and automatically apply Saudi laws.²⁴⁴ This also appears to be the case in the United Arab Emirates, where the constitution of the state provides that "a main source of law is the Shari'a."²⁴⁵

VIII. THE SOUTHERN PACIFIC PROPERTIES CASE

The case of *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* gives an example of the value of ICSID arbitration.²⁴⁶ The dispute arose from a joint venture between Southern Pacific Properties (SPP), the Egyptian Minister of Tourism, and the Egyptian General Organization for Tourism and Hotels (EGOTH).²⁴⁷

"EGOTH was at the time a public sector enterprise under the control of the Minister of Tourism."²⁴⁸ In 1974, EGOTH and SPP entered into an agreement to develop tourist complexes near the pyramids by Cairo.²⁴⁹ Initially the agreement was allowed for under Egyptian law;²⁵⁰ however, the development encountered political opposition in late 1977 because opponents to the project claimed it posed a threat to undiscovered antiquities.²⁵¹ Because of this threat, Egypt claimed the land that was designated for the development site, making it legally impossible to continue the development.²⁵²

On December 7, 1978, SPP filed a claim with the ICC in Paris against the Minister of Tourism and EGOTH.²⁵³ The Minister of Tourism objected to the jurisdiction of the ICC stating it never agreed to arbitration.²⁵⁴ However, the ICC tribunal rejected this objection and rendered an award against the Minister of Tourism.²⁵⁵ The award was appealed on March 28, 1983, to France's Cour

240. SALEH, *supra* note 55, at 43.

241. *Id.*

242. ICSID Convention, *supra* note 133, art. 28.

243. SALEH, *supra* note 55, at 43.

244. David J. Karl, Note, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 167-70 (1992).

245. Kutty, *supra* note 7, at 614; EL-AHDAB, *supra* note 158, at 711.

246. *See generally*, S. Pac. Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID (W. Bank) Case No. ARB/84/3, at 328 (1992).

247. *Id.* at 343.

248. *Id.*

249. *Id.*

250. *Id.* at 347.

251. *Id.* at 348.

252. *Id.*

253. *Id.* at 348-49.

254. *Id.*

255. *Id.* at 349.

d'Appel where the award was annulled on the grounds that the Minister of Tourism was not a party to the arbitration agreement between SPP and EGOH.²⁵⁶ On August 15, 1983, SPP notified the Minister of Tourism that SPP was reserving its right to ICSID arbitration, which was allowed under Egyptian law.²⁵⁷

During the ICSID arbitration, the arbitrators addressed the issue of applicable substantive law.²⁵⁸ The parties disagreed over whether the substantive law was to be Egyptian law or the law of the contracting state (Egyptian law) and such rules of international law as may be applicable.²⁵⁹ The arbitrators found the disagreement regarding how to apply Article 42 to have no practical significance because even had the parties agreed to apply Egyptian law, this would not preclude the applicability of international law in certain situations.²⁶⁰ One of these situations is where *lacunae*²⁶¹ exist in the law to which the parties had agreed.²⁶² Here, the arbitrators reasoned that where *lacunae* occurs in Egyptian law, the parties cannot be said to have agreed on a law that does not exist.²⁶³

The dispute over the substantive law to be applied was relevant because the Minister of Tourism argued that the acts of Egyptian officials upon which SPP was relying were legally non-existent or absolutely null and void under Egyptian law.²⁶⁴ In applying international law to supplement Egyptian law where *lacunae* existed, the arbitrators found the state liable under international law for the acts of its officials.²⁶⁵

As previously stated, Article 42 of the Convention allows for the parties to choose the applicable substantive law to govern the dispute.²⁶⁶ However, the arbitrators in this case intentionally refused to address whether the parties had agreed for Egyptian law, instead stating that international law would govern when *lacunae* exist.²⁶⁷ The use of international law over host state law has been affirmed in other cases.²⁶⁸ In *Amco v. Indonesia*, the tribunal stated, “[W]here there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict.”²⁶⁹ “Thus international law is fully applicable and to classify its role as ‘only’ ‘supplemental and corrective’ seems a distinction without difference.”²⁷⁰ This approach seems to mimic that of the approach used by arbitrators in the Abu Dhabi,²⁷¹ Libyan,²⁷² and ARAMCO²⁷³ arbitrations, dis-

256. *Id.*

257. *Id.*

258. *Id.* at 350.

259. *See id.* at 350-51.

260. *Id.* at 352.

261. Gap in the law of the state. OXFORD AM. DICTIONARY AND THESAURUS 936 (2006).

262. W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV.: FOREIGN INVESTMENT L.J. 362, 374 (2000).

263. *S. Pac. Properties*, ICSID (W. Bank) Case No. ARB/84/3, at 351.

264. *Id.*

265. *Id.* at 352.

266. ICSID Convention, *supra* note 133, art. 42.

267. *See S. Pac. Properties*, ICSID (W. Bank) Case No. ARB/84/3, at 351.

268. *See generally* REED ET AL., *supra* note 129, at 30.

269. *Id.* (quoting *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Case (1990), 1 ICSID REPORTS 569, 580 (1993)).

270. *Id.* (quoting *Amco Asia Corp.*, ICSID Case No. ARB/81/1, Award in Resubmitted Case (1990) 1 ICSID REPORTS 569, 580 (1993)).

271. *See generally, Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. L.Q. 247 (1952).

cussed *supra*. In the decision rendered in the *Southern Pacific Properties* case, the arbitrator not addressing party agreement and choosing to use international law appears in line with the decisions of previous arbitrations, some of which caused Middle Eastern skepticism of the Western arbitral model. The effect of the second sentence of Article 42(1) on Middle Eastern willingness to employ ICSID arbitration could be a matter for further study.

The arbitrators in the *Southern Pacific Properties* case determined damages owed in a manner that is against both Egyptian law and Qur'anic principles.²⁷⁴ The arbitrators began by determining the total value of loans owed by ETDC to SPP.²⁷⁵ These loans provided for an interest payment by ETDC on the loans in an amount greater than allowed for under Egyptian law.²⁷⁶ The loans also allowed for compounded interest, which is prohibited under Egyptian law.²⁷⁷ The Ministry of Tourism argued that Egyptian law should be applied and the interest disallowed; however, the arbitrators looked to the loan agreement between ETDC and SPP and found that the contract was governed by English law, which allowed for the interest rate set forth in the contract and also for compounded interest.²⁷⁸ In determining the damages owed based on the expropriation of ETDC by the Egyptian government, the arbitrators computed a value that had in it an interest computation that was not allowed for under Egyptian law.²⁷⁹

In computing the damages owed for the expropriation of ETDC, the arbitrators rested their reasoning on the fact that the value, with interest computed at the contractually set rate, was the value of the property expropriated by the Egyptian government.²⁸⁰ The arbitrators stated that this was the appropriate determination of the value of the contractual right SPP had against ETDC when ETDC was expropriated.²⁸¹ The determination of the amount goes against Egyptian law,²⁸² while not based on pure Shari'a principles elements of Shari'a can be seen, and against the Qur'anic prohibition on *riba*.²⁸³

Article 52(1) allows for a request for annulment of an award on one or more five grounds set forth therein.²⁸⁴ One of these grounds is that the Tribunal has manifestly exceeded its powers.²⁸⁵ Ad hoc committees have found a tribunal to have manifestly exceeded its powers when it exceeded the remedies available to it under the applicable law.²⁸⁶ In the case at hand, a request for annulment was

272. See generally, *Texas Overseas Petroleum Co. v. The Gov't of the Libyan Arab Republic*, 53 ILR 389 (1979); see also *B.P. Exploration Co. v. The Gov't of the Libyan Arab Republic*, 53 ILR 197 (1979); see also, *Libyan American Oil Co. v. The Gov't of the Libyan Arab Republic*, 20 ILM 1, 34-35 (1981).

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

274. See *S. Pac. Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, (1992).

275. *Id.* at 390-92.

276. *Id.* at 391.

277. *Id.* Compound interest is also prohibited under Shari'a. See Kutty, *supra* note 7, at 604.

278. See *S. Pac. Properties*, ICSID Case No. ARB 84/3, Award, at 391-92.

279. *Id.* at 391.

280. *Id.* at 391-92.

281. *Id.*

282. *Id.* at 391.

283. See Kutty, *supra* note 7, at 604.

284. ICSID Convention, *supra* note 133, art. 52(1).

285. *Id.*

286. REED ET AL., *supra* note 130, at 99.

submitted to the Centre on May 27, 1992.²⁸⁷ The case was settled by the parties, and the annulment proceeding was discontinued at the request of the parties.²⁸⁸ While the reason for the request for annulment was not published and the case was settled prior to annulment proceedings,²⁸⁹ whether a committee would find the arbitrators allowance of interest, while against both Egyptian law and Shari'a principles, in the computation of damages as grounds for annulment or revision of the award is a matter needing more scholarly study.

A similar result was reached in the case of *Wena Hotels Ltd. v. Arab Republic of Egypt*.²⁹⁰ The Centre had jurisdiction over the case based on a bilateral investment treaty between Britain and Egypt.²⁹¹ The tribunal found the government of Egypt responsible for the expropriation of Wena, a British hotel management company.²⁹² Egypt requested an annulment of the decision on three grounds.²⁹³ Egypt argued that the tribunal manifestly exceeded its powers by failing to apply the applicable law of the host state.²⁹⁴ The second ground for annulment upon which Egypt relied was that there was a "serious departure from a fundamental rule of procedure" resulting in a deprivation of Egypt's right to be heard.²⁹⁵ Egypt's third ground for annulment was that the award "failed to state the reasons on which it [was] based" and that not all questions submitted to the tribunal were addressed.²⁹⁶ The ad hoc committee rejected the annulment request.²⁹⁷ In particular it held that the tribunal properly applied Article 42 by applying relevant portions of the U.K.-Egypt bilateral investment treaty and other international law without regard for Egyptian law.²⁹⁸ This decision revealed that in disputes for which the Centre has jurisdiction by means of a bilateral investment treaty, tribunals will employ portions of the bilateral investment treaty and international law in deciding disputes rather than a particular national law.²⁹⁹

IX. CONCLUSION

Although arbitration within the Islamic Middle East has seen periods of distrust of international arbitration, its use has grown over the past few decades. This growth requires Western parties to have an understanding of the basic legal principles of Shari'a and how these principles have affected legislation in countries

287. ICSID—International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (search "SPP Properties," click "ICSID Case No. ARB/84/3") (last visited Apr. 9, 2010).

288. *Id.*

289. *Id.*

290. See generally, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB 98/4, Decision on Annulment (2002), 41 ILM 933 (2002).

291. REED ET AL., *supra* note 130, at 103.

292. *Id.*

293. *Wena Hotels Ltd.*, 41 ILM at 938.

294. *Id.* at 939.

295. *Id.* at 944-45 (quoting ICSID Convention, *supra* note 133, art. 52(1)(d)).

296. *Id.* at 946 (quoting ICSID Convention, *supra* note 133, art. 52(1)(e)). It should be noted that the alleged conduct of the tribunal are all against principles found within Shari'a. See Kutty, *supra* note 7, at 616.

297. REED ET AL., *supra*, note 130, at 103.

298. *Id.*

299. *Id.* at 46.

influenced by Islam. Also, the increasing diversity in commercial opportunities in the Middle East continues to grow as locations such as Dubai continue to diversify their economies. These hubs of increased economic activity have attracted foreigners to both invest capital and provide services in the form of construction and development. Bilateral investment treaties between Middle Eastern nations and Western ones generally have the option to employ ICSID arbitration or arbitration under the Additional Facility Rules. Knowledge of the rules associated with these arbitral institutions is imperative for lawyers providing guidance to international firms participating in investment activity abroad.

The foregoing has provided a brief introduction into principles associated with Shari'a, an introduction into ICSID arbitration, and considerations to be made regarding choice of law within an ICSID arbitration. While ICSID provisions generally do not go against principles found within Shari'a, there appears to be a conflict concerning the choice of law provision found within Article 42. The aforementioned Egyptian ICSID decisions appear to have similar disregard for Egyptian law that arbitrators in the ARAMCO and Qatari arbitrations had. How Middle Eastern nations react to decisions such as these is a subject for more study, as that is beyond the scope of this article.

Consideration for the principles followed by nations who follow Islamic law will aid in further development of international commerce between the West and the Middle East. This consideration will also aid in the increased use of Western arbitration mechanisms by the Middle East.

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