Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution

George Khoukaz

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I.   INTRODUCTION

When a cross-border commercial dispute takes place, parties run into several jurisdictional problems because the involved parties are in two (or more) different countries. The courts of the claimant's country will have a hard time forcing the foreign breaching party to abide by their decisions. On the other hand, the courts of the breaching party are likely to favor their nationals vis-a-vis a foreign party. To avoid this problem, commercial partners turn to the arbitration process where a third party will make the decision. Recognizing the growing importance of international arbitration as a method to settle international commercial disputes, a number of countries came together and drafted what later became known as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (The "New York Convention" or "The Convention") in 1958.[1] The Convention seeks "to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards."[2] Throughout the years, the Convention gained widespread recognition with more than 150 signatory States.[3]

Despite the Convention's international standing and effectiveness, some of its notions conflict with *sharia*-based legal system. This Comment aims to address the current international arbitration system from a *sharia* perspective by highlighting the similarities and differences between the two, and to suggest a solution to the existing conflicts which will be explained below.

1. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NAT'L COMM'N ON INT'L TRADE L., [hereinafter *New York Convention*] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Mar. 20, 2017).

2. *Id.*

3. Since the enactment of the Convention in 1958, an increasing number of States consented to abide by the rules of the Convention by signing it. A signatory State declares its intent to apply the Convention when applicable. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),* UNITED NAT'L COMM'N ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 20, 2017)

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A.   *Understanding the Middle-East*

The Muslim World tends to be depicted through the media as a religiously homogenous region, with all those living in it belonging to one group or one sect. A very basic understanding of Middle-Eastern politics and history reveals that such an illustration of the Muslim Middle-Eastern world is far from true. Few people (usually those who have a particular interest in the Middle-East or specialists in the field) are aware of the different competing sects of Islam, let alone what differentiates these sects from one another. For example, a 2006 *New York Times* article found that "most American officials [who were] interviewed [didn't] have a clue" about the difference between *Sunnis* and *Shia* in the Middle-East.[4] These findings are particularly troubling because they reflect a general lack of knowledge and understanding of Middle-Eastern religious and political make-up, which entails an inability to address and incorporate the interests of these Middle-Eastern states into the larger international system.

B.   *Purpose and Outline*

The goal of this Comment is to address the relationship between Middle-Eastern Islamic countries with the rest of the world from an international commercial arbitration perspective. To do that, we will first briefly address the historic sectarian divide between the two main sects in Islam—*Sunna* and *Shia*—which will allow the reader to gain a better understanding of the theoretical differences within Islam, resulting in different legal systems and competing political interests. Section II will also briefly address the modern history of both the Kingdom of Saudi Arabia (KSA) and the Islamic Republic of Iran (Iran) because these two countries are currently the powerhouses of both *Sunni* and *Shia* Islam, respectively, and are considered as the torchbearer of the *Sunni* and *Shia* causes. Section III will highlight the differences between the Islamic conceptualization and understanding of commercial arbitration versus the current, Western-based system of transnational commercial arbitration. Section IV will address the proposal of developing a homogeneous intra-Islamic transnational commercial arbitration structure which will serve as the first step in the process of bringing Islamic Middle-Eastern States into the international commercial arbitration (ICA) system.

C.   *Terminology*

It is quite important to highlight—for the sake of clarity—a couple of interrelated points before delving into the historic details of the division between *Sunni* and *Shia* Muslims. It is critical to understand that Islam, as a religion, is not exclusive to some national origins or geographic locations. In this sense, the word "Muslims" shall not be interchangeably used with the words "Arabs" or "Middle-Eastern." There is an important difference between being a Muslim and being an Arab.[5]

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4. Jeff Stein, *Can You Tell a Sunni From a Shiite?*, N.Y. TIMES (Oct. 17, 2006), http://www.nytimes.com/2006/10/17/opinion/17stein.html.

5. *Profile: Arab League*, BBC NEWS (Feb. 5, 2015), http://www.bbc.com/news/world-middle-east-15747941; *Lebanon Fast Facts,* CNN LIBRARY (Jan. 26, 2017, 11:01 AM), http://www.cnn.com/2013/09/03/world/meast/lebanon-fast-facts/.

Equally applicable is the fact that being Arab does not necessarily entail a belonging to the Muslim faith. These terms are wrongly used interchangeably in common parlance, and such an error should be noted and avoided.

II.   HISTORY OF THE SUNNI/SHIA SPLIT

A.   *The Rise of the Prophet Muhammad and the Subsequent Split in Islam*

The following section will provide a historical background to the rise of Islam as a religion, and the subsequent division resulting in two currently competing sects. It is the author's belief that an understanding of the centuries-old religious conflict will provide the reader with a better understanding of Middle-Eastern legal and political differences.

Unlike other monotheistic religions, the separation between State and religion does not exist in Islam.[6] The well-known Christian maxim "render unto Caesar the things which are Caesar's; and unto God the things which are God's" is practically non-existent in Islam.[7] The breakup between State and religion is lacking in Islam simply because "the founder of Islam was his own Constantine, and founded his own state and empire. He [the founder of Islam] did not therefore create—or need to create—a church."[8] Subsequently, during the early years of Prophet Muhammad's reign, "Muslims became at once a political and a religious community, with the Prophet as head of state."[9] In other words, Islamic religious teachings influenced the political structure in place; therefore, it is indispensable to have an understanding of the religious background whenever one addresses the political, financial, and legal structure of theological-based regimes such as the ones in Iran and the KSA. This point might be confusing or hard to conceptualize for some Western readers; however, it is a key point that needs to be kept in mind.[10]

Muhammad's endeavor to initiate a new religion, Islam, started in the seventh century in the city of Mecca, located in the Arabian Peninsula (currently in KSA). His attempt was faced with resistance and hostility, and he soon had to flee Mecca to Medina—an event known as the *hijra* (the migration)—in 622,[11] where he established the first Islamic State.[12] Soon thereafter, Muhammad started his ambitious plan of expanding the borders of his newly-created state by capturing new territories in the name of Islam.[13] By the time Muhammad died, he achieved the "seemingly impossible objective of uniting the warring tribes of Arabia in the name of Islam."[14] Upon his death, Muhammad had no surviving sons to succeed him[15] and a major

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6. BERNARD LEWIS, THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR 6 (2004).

7. *Id.*

8. *Id.*

9. *Id.*

10. Andrew M. Bennett, *Islamic History & Al-Qaeda: A Primer to Understanding the Rise of Islamist Movements in the Modern World*, 3 PACE INT'L L. REV. ONLINE COMPANION 316, 324 (2013).

11. Adam Oler, *A Brief Introduction to the Sunni-Shi'ite Struggle: Six Key Points*, 35 THE REPORTER 2, 3 (2007).

12. Bennett, *supra* note 10, at 324.

13. *Id.*

14. *Id.* at 325.

15. Oler, *supra* note 11, at 3.

disagreement emerged in deciding who should be the next leader of the Islamic *umma*.[16]

Two arguments were developed by two groups of followers who previously used to get along.[17] The first group, compromising the majority of Muslims, claimed that the *caliph*—the deputy, or successor of Muhammad—should be chosen from the group of companions to Muhammad.[18] In this sense, the *caliph* should be chosen based on his competency and knowledge of Muhammad's thoughts. The second group, compromising the minority of Muslims, disagreed with the first group, arguing that blood and family kin should be the decisive factor in the selection of the *caliph*.[19] This second group (later known as the *Shia*) supported Ali's (Muhammad's cousin and son-in-law who married his daughter Fatima)[20] candidacy relying on a statement made by Muhammad about Ali, saying "whoever has me as a master has him as a master."[21]

This minority of Muslims declared Ali as the rightful successor to Muhammad, and gave him the title of "*Imam,*" meaning the "leader of the community."[22] The majority group, however, did not endorse Ali's candidacy, and Ali was passed over in favor of another prominent follower of Muhammad, Abu Bakr.[23] More than twenty years later, Ali came to power as the fourth Caliph of the Islamic *umma*.[24] Nonetheless, Ali's rise was faced with some resistance and opposition by another group known as the *Umayyads* (led by Muawiyah, the governor of Syria), who assassinated Ali in 661.[25] Despite the tragic murder of Ali, the *Shia* did not give up their plan, and the *Shia* of Khufa convinced Husayn, Ali's son, to lead them against the *Umayyads*.[26] None of the promised military support from Khufa materialized, and Husayn and his supporters were slaughtered in Karbala (located in today's Iraq).[27]

The battle of Karbala had an exceptionally immense impact on the *Shia* because it reflects the betrayal of the Muslims of Khufa,[28] and the struggle to power between the supporters of Ali and those who oppose them (meaning between what later became known as the *Sunnis* and the *Shia*).[29] Furthermore, the main motivation of the *Shia* since the massacre of Karbala is to right the historic wrong that they had to suffer,[30] and their ultimate goal is to bring justice to their own usurped rights.[31] The events of Karbala "nourish the intellectual and experiential, the elitist and popular aspects of the *Shia* until this very day."[32]

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16. Bennett, *supra* note 10, at 325.
17. *Id.* at 325-26.
18. Bennett, *supra* note 10, at 326.
19. *Id.*
20. *Id.*
21. Vali Nasr, The Shia Revival: How Conflicts Within Islam Will Shape the Future 1137-38 (2006).
22. Oler, *supra* note 11, at 3-4.
23. Bennett, *supra* note 10, at 326.
24. *Id.* at 327.
25. *Id.*
26. Oler, *supra* note 11, at 4.
27. *Id.*
28. *Id.*
29. Emmanuel Sivan, *Sunni Radicalism in the Middle East and the Iranian Revolution*, 21 Int'l J. Middle E. Stud. 1, 5 (1989).
30. *Id.*
31. *Id.*
32. *Id.*

The schism in Islam between the *Sunnis* and the *Shia* was established because of this battle, and led to "the development of two distinct religious, legal, and cultural practices within the two sects."[33] The importance of this split should not be underestimated because, "just as past intra-Christian disputes shaped European politics, so the *Sunni/Shia* conflict continues to shape [until today] the history of the Islamic World and the broader Middle-East."[34]

B.   *The Rise of Modern Middle-Eastern Theocratic Regimes: A Brief Overview*

The importance of this historical background lies in the fact that two Middle-Eastern regional powers have adopted theocratic regimes which rely on the competing sectarian ideologies mentioned above. The current Saudi regime structure should be understood as an alliance between Muhammad ibn Abd al-Wahhab and Muhammad ibn al-Saud in 1744. This alliance was strengthened by an exchange of oath and a marriage between Wahhab's daughter and Saud's son,[35] bringing two influential tribes together resulting in a military and religious sphere of power.[36] Boosted by new recruits and supported by a religious authority, al-Saud embarked on a mission to unify Arabia. More than a century later, in 1926, Saud's descendant, Abd al-Aziz, brought the competing local tribes under his own rule, and appointed himself as King of Saudi Arabia.

Shia account for about 90% of Iranians, some 70% of the people living in the Persian Gulf region, and have a significant presence in the region spanning from Pakistan to Lebanon (passing through Iraq and Syria).[37] Those 140 million *Shia* were, historically, oppressed by the *Sunni* regimes in their respective countries,[38] and the Iranian Islamic revolution of 1979 provided them with an opportunity to emancipate. During the 1970s, the Iranian Shah Mohammad Reza Pahlavi failed to implement any effective economic development plans.[39] Instead, he adopted increasingly authoritarian policies which antagonized the conservative *Shia* population and their clerics, as well as the professional working class.[40] *Shia* Islam was seen as a viable alternative to the Shah's failing plans, and protesters used *Shiite* religious symbols that "linked the early struggles of Ali to the contemporary efforts against the Shah."[41] Upon the exile of the Shah in early 1979, and the subsequent fall of his regime, Ruhollah Khomeini was invited back from his exile in France to Iran to lead the opposition movement.[42] Upon his return, Khomeini was named the leader of Iran, and soon thereafter he put in place a unique system of Islamic gov-

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33. Bennett, *supra* note 10, at 331.

34. NASR, *supra* note 21, at 1134.

35. Birol Baskan & Steven Wright, *Seeds of Change: Comparing State-Religion Relations in Qatar and Saudi Arabia*, 33 ARAB STUD. Q. 96, 102 (2011).

36*. Id.*

37. Vali Nasr, *When the Shiites Rise*, 85 FOREIGN AFF. 58, 58-59 (2006).

38*. Id.*

39. Bennett, *supra* note 10, at 352.

40*. Id.*

41*. Id.*

42*. Id.*

ernance that "elevated the *Shia* clerical establishment to the primary source of political and legal authority."[43] *Shiite* theology became the source and the basis of the Iranian political and legal structure.

III.   THE COMPATIBILITY OF *SHARIA* LAW TO THE INTERNATIONAL COMMERCIAL ARBITRATION SYSTEM: ASPIRATIONS AND LIMITATIONS

A.   *The Perception and Role of Alternative Dispute Resolution in Islamic and Pre-Islamic Societies*

Arbitration—both in its local and international roles—exists and is adopted in the Islamic Middle-East. Nowadays, the existence of arbitration centers in some Islamic Middle-Eastern countries, such as Bahrain and the United Arab Emirates, reflects a centuries-old custom of incorporating and relying on arbitration within Islamic communities.[44] However, the concept of arbitration has a shaky history in the Islamic world; with a "roller coaster-like" experience.[45] In fact, current arbitration models in the region do not reflect what is usually referred to as "modern" or "Western" arbitral systems.[46] This is due to the fact that as illustrated above, and unlike in the West, religion plays a drastic role in shaping the political and legal structure; and it thus influences the conceptualization of arbitration in the Middle-East.[47] Therefore, it is crucial to take into account the historical and religious context in order to understand arbitration in the Middle-East.[48] Furthermore, understanding the Middle-Eastern experience will be helpful to grasp the dilemmas in other Islamic communities, which have a geographical presence beyond the Middle-East region.[49]

Pre-Islamic Middle-Eastern societies have adopted several dispute resolution methods, which are influenced by local social norms. Historically, dispute resolution in the Middle-East put the collective interest above the individual's; the system is guided by an overarching goal of preserving the interests of the community, the family, and the tribe over the interests of the individual involved in the dispute.[50] In this sense, a peaceful settlement that serves the collective interest is more beneficial to the community over a dispute between two individuals.[51] Locals would perceive conflict as a destructive element which threatens stability and harmony, and is likely to destroy the normative order in place.[52] This is why the system was geared toward a speedy and peaceful dispute resolution. Such an understanding of conflict resolution is in sharp contradiction with the Western perception of conflicts: conflict in the West was (and still is) perceived as a positive factor which "acts as a

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43. *Id.*

44. Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 590 (2006).

45. *Id.* at 591.

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

47. *Id.*

48. *Id.*

49. Kutty, *supra* note 44, at 568-69.

50. Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration* 2 (London Sch. Of Econ. Islamic Law and Law of the Muslim World Research Paper Series, Paper No. 08-45, 2008).

51. *Id.*

52. *Id.* at 18.

catharsis to redefine relationships between individuals, groups and nations and makes it easier to find adequate settlement or possible solutions."[53]

The Middle-Eastern visualization of conflict is influenced by local political factors.[54] In a fragmented, tribal pre-Islamic Arabia, collective-oriented dispute resolution was the sole alternative to an armed conflict between the competing tribes.[55] In fact, this perception of dispute resolution was cemented (rather than transformed) with the rise of Muhammad and his expansionist goals:[56] the tribal form of justice which existed during *Jahiliya*—the pre-Islamic period in the history of the Middle-East—evolved into a hybrid political and legal system with the rise of Muhammad and the expansion of Islam.[57] Muhammad relied on the local systems of disputes resolution—*sulha* and *tahkim*—in order to strengthen his hold over the political system.[58] In this sense, Muhammad had no interest in an "alternative" dispute resolution system, away from the courts—as in the West—but rather made sure to keep the two systems merged together in order to increase his political power and control over his community.[59] In fact, Muhammad attached great importance to being appointed as a *hakam*[60] by his followers, because it allowed him to be in a position of a decision-maker, and it renewed their belief and trust in him as a prophet and as a fair, unbiased, trustworthy person.[61] Therefore, alternative dispute resolution systems were developed and used for different purposes in the Islamic Middle-East vis-à-vis in the West.

B.   *Comparing Islamic ADR Methods to Their Application in the West: Similarities and Differences*

Such a contrast provides both benefits and drawbacks: on the one hand, the historical purpose of dispute resolution under Islamic law is, as seen above, quite different from Western arbitration; however, on the other hand, the Koran suggests that Western and Islamic dispute resolution systems might have a common ground which we will discuss below. As mentioned above, Islam recognizes two main methods of dispute resolution: *sulh* and *tahkim*. *Sulh*[62] is like the Western concept of negotiation and mediation, where parties reach negotiated compromise with or without the assistance of a third party.[63] The importance of *sulh* should not be underestimated, since it is a component of every broader dispute resolution initiative

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53. *Id.*
54. George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 U. PA. J. INT'L ECON. L. 905, 923 (2003).
55. *Id.*
56. *Id.* at 923-24.
57. *Id.* at 924.
58. *Id.*
59. *Id.*
60. *Hakams* (literal translation to "referees") were persons of considerable importance, although they did not hold any political power as a rule. A general belief that *Hakams* were divinely inspired individuals who sought to solve a dispute between the parties by making a final decision which ought to be respected and enforced by the laters. *See* Sayen, *supra* note 54, at 923-24; *see* JOSEPH. SCHACT, AN INTRODUCTION TO ISLAMIC LAW 6-22 (1964).
61. Al-Ramahi, *supra* note 50, at 7.
62. *Sulh* is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party. In Islam, it is ethically and religiously the superior way for disputants faced with conflict. *Id.* at 2-3.
63. Al-Ramahi, *supra* note 50, at 2.

within Islam.[64] In this sense, *sulh* could be resorted to by any of the parties, the third party, or even the judges in a trial proceeding.[65]

Tahkim is the other well-established dispute resolution mechanism which could be roughly compared to arbitration in its Western sense.[66] *Tahkim* is a pre-Islamic concept which was later adopted by Muslims and approved by the Koran.[67] However, unlike Western arbitration which results in a binding award, *tahkim* fully relies on the free will of the parties for the enforcement of an award. Interestingly, the parties' willingness to agree to enforce the award depends heavily on the credibility of the arbitrators.[68] Islamic history reveals that the prophet highly encouraged his community to arbitrate (in its *tahkim* sense) their disputes, and to abide by the decisions made.[69] Muhammad himself abided by an arbitrator's decision, and in few cases, acted as a *hakam*.[70] *Tahkim*, however, diverged from Western arbitration: when Muawiya became the first Caliph of the *Umayyad* dynasty,[71] he developed a fairly structured judicial system[72] which required the approval of a *quadi* (court judge) before the enforcement of an arbitrator's decision.[73] As a result, *tahkim* became a "very different" institution from arbitration as it is known in the West.[74]

Numerous other differences between Islamic and Western alternative dispute resolution methods exist. For example, there is no clear indication about the validity, under *sharia* law, of arbitration clauses to resolve future disputes.[75] The *tahkim* process relies on the party's willingness to submit the matter to resolution when the dispute arises, and not before that.[76] In this sense, the validity and enforceability of an arbitration clause (in its Western sense) is questionable under *sharia* law.[77] Such a shocking notion—from a Western perspective—is due to the fact that *tahkim* was not classified as part of the law of contract,[78] and as such, future agreements to arbitrate are not necessarily binding under *sharia* law.

C.   The Practical Consequences of the Clash Between the Two "Systems"

Nowadays, the fact that Muslim countries have signed the New York Convention[79] does not necessarily bring any certainty in terms of enforcement of a dispute

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64. *Id.* at 3.

65. *Id.*

66. Kutty, *supra* note 44, at 589.

67. *Id.* at 589-90.

68. *Id.* at 590.

69. *Id.*

70. *Id.*

71. Muawiya ibn Abu Sufyan (died 680 AD.) was the founder of the Umayyad dynasty. His clan, which had resisted Muhammad and his message longest and most vehemently, eventually won political control over the Islamic community in 658 AD. *See Umayyad Caliphate*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e2421 (last visited Mar. 26, 2017).

72. Sayen, *supra* note 54, at 927.

73. *Id.*

74. *Id.*

75. *Id.* at 930-31.

76. *Id.*

77. *Id.*

78. Sayen, *supra* note 54, at 928.

79. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention," is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of

because of the Convention's "public policy" exemption under section V(2)(b).[80] The exemption allows any signatory country to refuse the enforceability of an award on public policy grounds.[81] For Islamic countries, a decision that conflicts with the *sharia* will also be in conflict with their public policy interests, and may serve as ground for vacating an arbitral award. In fact, both Iran and KSA are using this provision quite frequently: Akkadaf states that the KSA "does not recognize or enforce agreements of foreign jurisdictions" and Iran "recognizes foreign awards conditionally."[82]

The difficulty lies in the fact that *sharia* and secular Western law have different interpretations as to what constitutes "public policy interests." Therefore, an arbitral award made in the U.S., for example, is unlikely to take into consideration *sharia* law concerns and the enforcing party will have trouble enforcing the award in *sharia*-based countries. This discrepancy is caused by a lack of an agreed-upon, uniform, definition of "public policy" under the New York Convention.[83] Even though the drafters of the Convention have rightly failed to conceptualize the term "public policy," this has resulted in a situation where—as illustrated below—*sharia*-based countries were put at a disadvantage at the international stage. This disadvantage led to a widening gap between what will be called the "*sharia*-based system" and the "international system."

The gap between the two systems has effects beyond the interpretation of the "public policy" exemption. For example, inconsistencies arise as to the applicable arbitration and commerce law when the site of the arbitration is in a *sharia*-based country. Three major international arbitration cases involving Islamic parties during the mid-twentieth century[84] undermined Islamic domestic law in favor of the "superior" Western law.[85] In the *Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi* case, the arbitrator recognized the applicability of Abu Dhabi's Islamic law in solving the dispute, yet later on went to undermine its validity because "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."[86]

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foreign arbitral awards and the referral by a court to arbitration. It "seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards." The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. *See New York Convention*, *supra* note 1.

80. Gemmell, *supra* note 46, at 187-88.

81*. Id.* at 188.

82*. Id.* at 189; *see also* Fatima Akaddaf, *Application of The United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible With Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 24 (2001); Williams Mullen, *Dispute Resolution In Saudi Arabia Is Based On Islamic Law*, 2 MIDEAST UPDATE 1 (1997).

83*. See New York Convention*, *supra* note 1.

84*. See* Petroleum Dev. (Trucial Coast) Ltd. v. Sheik of Abu Dhabi, 18 I.L.R. 144 (1951); Ruler of Qatar v. Int'l Marine Oil Co., 20 I.L.R. 534 (1953); Saudi Arabia v. Arabian Am. Oil Co., 27 I.L.R. 117 (1958).

85. Kutty, *supra* note 44, at 591.

86*. Id.*

This dark and pessimistic depiction of the conflict between the two mechanisms, however, should not eliminate the hope of conciliation. Despite the numerous differences between the two sides, intellectuals and legal scholars might be able to find some common ground to work on. As discussed above, we should not forget that the concept of dispute resolution has a long history in the Middle-East even before the rise of Islam.[87] Furthermore, several scholars equates *tahkim* or *sulh* to arbitration (in its Western sense) and tend to use the two words interchangeably. Despite the differences mentioned above, the Koran does in fact recognize arbitration (in its Western sense) in theory: "a third person chosen by the parties to resolve their disputes either through conciliation or adjudication."[88] The point is that *sharia*-based countries can incorporate most of the ICA concepts into their own laws, and despite the differences between the two systems, efforts should be made to converge them closer to each other's.

Arbitration under Islamic law, however, has few dissimilarities to the international system which should be noted. For example, under the *sharia*, the scope of arbitration is unclear, and remains open to interpretation: the Koran explicitly provided for the use of arbitration for family disputes only, and the companions of Muhammad used it to resolve disputes involving goods and chattels.[89] These two examples might look like a limitation on the scope of arbitration, and they probably are. However, it should be kept in mind that the *sharia* allows for the evolution of the law; it permits legal rules to evolve and adapt to changing circumstances.[90] In fact, one of the reasons for the prophet's resistance to the codification of Islamic law is to preserve the *sharia*'s fundamental character as an evolutionary system.[91] This lack of clear rules allows Islam to evolve and adopts to changing circumstances "because these disagreements injected Islamic laws with the degree of flexibility necessary for a religion which proclaimed itself suitable for all times, all people, and all societies."[92]

D.   *Recapitulating the Main Idea*

To sum up, the *sharia* is compatible with international arbitration, and several Islamic countries have started the process of joining the international arbitral system that is in place. However, difficulties arise when international customs and practices conflicts with the *sharia*. Past events (such as the cases mentioned above) led to a build-up of inconsistencies between the two systems, while failing to adequately address these differences. Stemming from this idea is the suggestion that, to bridge the gap, Islamic communities should develop an "Islamic-friendly" arbitral system which aims to homogenize the diverse legal interpretations of arbitration within the Islamic World, and then work on molding those concepts into the larger international arbitral system. The practicality of such a suggestion, however, is not as easy as it sounds. This Comment will highlight below a number of diverse and competing views and interpretations exist within the Islamic World itself.

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87. *Id.* at 589.
88. Al-Ramahi, *supra* note 50, at 12.
89. Kutty, *supra* note 44, at 598.
90. *Id.* at 587.
91. *Id.* at 589.
92. *Id.* at 622.

IV.   ARBITRATION AS A POLITICAL AND COMMERCIAL CATALYST

A.   *Introduction: Islamic Law and International Arbitration*

The current international arbitral system was developed based on Western legal interpretations.[93] Such a "one-sided" international system has caused some suspicion and caution by developing countries, including Muslim states.[94] This author is not dismissing the practical possibility of creating a homogenous international system which considers the different values and ideals—that is not the intention of this Comment. Instead, the proposal that will follow below—the creation of a regional intra-Islamic system—is to be one step in the lengthy process of reaching the end goal of building an all-inclusive international system. Such a reasoning is built on the assumption that the Islamic world (and the Middle-Eastern Islamic world, in particular) has its own internal differences and paradoxes in issues relating to transnational commercial arbitration; and it probably makes more sense to address these regional differences before incorporating them into the larger international system.

Islamic law should not be undermined nor dismissed as inefficient because, whether we like it or not, it has shaped the national laws of at least forty-five States, and is a major legal system in today's world.[95] In other words, legal scholars and international practitioners need to understand the Islamic legal system in order to better serve their clients.[96] The major difficulty with addressing and grasping Islamic law is that it varies significantly from one place to another.[97] It is usually argued that there is not "one *sharia*" but "various *sharias*."[98]

B.   *Inconsistencies Within Islamic Law: Difficulties of Finding a Common Ground*

Unlike State-based systems, *sharia* law has no codified authoritative body on which one can rely.[99] This diversity of *sharias* is due to two main reasons: the first, and most important, is that there is a number of schools of thoughts that apply different methodologies in interpreting Islamic law.[100] In fact, there are four classical schools—*Hanafi, Maliki, Shafi'i,* and *Hanbali*—which together compose the generally accepted authority for *Sunni* Muslims.[101] *Shia* Islam, on the other hand, has its own school of law—the *Ja'afari* school—which was developed by the sixth *Shiite* Imam, Ja'afar al Sadiq.[102] The second reason is that various Islamic states adopt

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93. S.H. Amin, *An Islamic Approach to International Commercial Arbitration*, 1 J. ISLAMIC L. 203, 205 (1996).

94*. Id.*

95*. Id.*

96. Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East*, 21 N.Y. INT'L L. REV. 1, 4 (2008).

97. Nicholas Foster, *Islamic Commercial Law: An Overview* 11 (2006), http://www.indret.com/pdf/384_en.pdf.

98*. Id.*

99*. Id.*

100. Wakim, *supra* note 96, at 7.

101*. Id.* at 8.

102*. Id.*

different schools' interpretations in varying extents.[103] Furthermore, the weight accorded to each school within a certain country "ebbs and flows with national preference" throughout time.[104] An interesting example is the United Arab Emirates, where the Civil Code states that if no interpretation can be found in the Code, then the judge must rely on the four *Sunni* schools of law.[105] Article One of the Code goes even further by ranking the schools against each other's: priority should first be given to the *Maliki* and *Hanbali* schools, and if no appropriate answer is found, the judge can then rely on the *Shafi'i* and *Hanafi* schools.[106] Each country adopts a different ranking, and some states rely on some schools, while excluding others.

Several examples could be used to illustrate the above-mentioned lack of uniformity within Islamic law. For example, there is no consensus among the four leading *Sunni* schools on the issue of whether an arbitral award is binding on the parties.[107] *Hanafi* teachings, for example, hold that arbitral decisions are similar to reaching a compromise where enforcement of the outcome depends on the parties' willingness to abide by it.[108] However, "the school's views are not easily classified into this limited category."[109] Although *Hanafi fiqh* suggests that arbitration is closer to conciliation, some jurists have suggested that the arbitrator has a judge-like function—providing binding decisions.[110] Similarly, there is no unanimous agreement among the Islamic schools on what types of disputes fall within the scope of arbitration.[111] Notably, the four *Sunni* schools share a common view that financial matters are arbitrable, but there is no further consensus both within the four *Sunni* schools and between the other Islamic schools of jurisprudence.[112] A number of other examples could be provided, however, for the sake of brevity, the discussion will be limited to the two examples above.

C.   *Failing Efforts to Join the International Arbitration System: Brief Historical Background*

Despite the above-mentioned unpredictability between the different Muslim legal schools, there have been numerous efforts to harmonize the situation.[113] With the rise of transnational trade, and the increased international interest in ICA during the 1950s, Arab states were interested in putting efforts toward taking part in the international system rather than constantly rejecting it.[114] With this purpose in mind, Middle-Eastern Arab (and in some cases Islamic) states worked toward the adoption of few regional conventions with the ultimate goal of encouraging and facilitating international commercial arbitration in the region.[115] In 1952, the Arab

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103. *Id.* at 11.
104. *Id.*
105. Daniel Brawn, *Commercial Arbitration in Dubai*, 80 INT'L J. ARB., MEDIATION, & DISP. MGMT. 1, 2. (2014).
106. *Id.*
107. Wakim, *supra* note 96, at 32.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 36
112. *Id.*
113. Wakim, *supra* note 96, at 20.
114. *Id.* at 19.
115. *Id.*

League adopted the "*Arab Convention on the Enforcement of Foreign Judgments and Arbitral Awards*" which required contracting states to enforce foreign arbitral awards without adjudicating the merits of the underlying case—subject to some procedural safeguards.[116]

The Arab Convention was soon thereafter superseded by the Riyadh Convention (1983) which, essentially, prohibits local courts from examining the substance of the dispute, and limits the courts' role to either enforcing or rejecting the award.[117] By that time, a significant number of Middle-Eastern states had already signed the New York Convention, which diminished the relevance of the Riyadh Convention.[118] The third and last regional convention came in 1987 with the adoption of the Amman Arab Convention.[119] It called for the adoption of the Arab Center for Commercial Arbitration in Morocco, but this center was rarely (if ever) used.[120]

This brief overview highlights two main relevant points: the first is that there is a general hope and interest by some Middle-Eastern states to develop and create a homogeneous arbitration system; while the second point is that all those efforts of creating a regional arbitral structure have failed miserably. In fact, international conventions—which are usually criticized for being exclusive and against the interests of the Muslim states—such as the New York Convention, are much more prominent and effective within Middle-Eastern states compared to the regional conventions mentioned above.[121]

D.   *A Regional Institution with Multifaceted Purposes: A proposal*

The proposal of this Comment is for the creation of an institution which considers the historic divisions between *Sunnis* and *Shia*, while emphasizing the similarities between the two sects. This center shall serve as the mean for the ultimate goal of bridging the political and legal gaps between the different states in the Middle-East—mainly between KSA and Iran, the powerhouses of *Sunni* and *Shia* Islam respectively—by working on harmonizing the different *sharia*-based interpretations of transnational arbitration. Such a suggestion assumes that most efforts mentioned above, which were initiated through the Arab League, have failed miserably; and the Arab League has failed, as a Pan-Arab institution, to bring those countries closer together in terms of commercial arbitration.

Furthermore, a basic understanding of both the historic and modern Middle-Eastern politics shows that religion (and sectarian differences) is being used as the main fuel to drift neighboring states further apart from each other's. Stemming from this observation is a humble opinion that efforts which consider the interests of Islamic law are more likely to find receptive ears within the Middle-East, and would be more effective in triggering political cooperation rather than confrontation.

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116. *Id.* at 21.
117. *Id.* at 22.
118. *Id.*
119. Wakim, *supra* note 96, at.22.
120. *Id.* at 22-3.
121. *Id.* at 23.

Therefore, the creation of the proposed institution will serve two complementary purposes. On the one hand, the center will address the legal aspect of transnational arbitration by working on harmonizing and bringing together the different *sharia*-based interpretations of arbitration. In this sense, the center's function is to compare and contrast the *Sunni and Shiite* Islamic schools' different understandings of arbitration, and come up with a Model Law-like recommendation which could be adopted by all *sharia*-based countries. Once this first step is completed, the center shall then address the political hostilities within the Islamic World by serving as a neutral go-in-between institution where competing Islamic parties can solve their commercial disputes.

The suggestion above is based on a new "commercial peacemaking" role of international (or regional) commercial arbitration. This proposed new role is based on two inter-related rationales. The first rationale is that the lack of effective dispute resolution mechanisms between two clashing states creates an informal trade barrier between the private entities of both countries.[122] Inversely, developing an efficient dispute resolution system which considers both parties' interests is helpful in facilitating trade by removing the legal barriers between the rival states.[123] The second rationale is that the increased commercial exchange between the two states would encourage cooperation and reduces the risk—or the willingness—of confrontation.[124] In fact, empirical studies have shown that traders who were previously avoiding a particular international market for lack of appropriate legal protection will engage in that market when recourse to an effective dispute resolution mechanism—such as arbitration—is introduced.[125] Obviously, parties are likely to fall in a circle-like effect with the above-proposed plan. The absence of initial cooperation between the two states will virtually hinder any prospect for establishing effective dispute resolution systems which serve the very same goal of encouraging further cooperation and dialogue.

The suggestion above is not coming from a void, but rather relies on a recent, successful, Middle-Eastern experience. In 2013, The Jerusalem Arbitration Center (JAC) was launched.[126] A number of Palestinian and Israeli business people realized that the absence of effective cross-border dispute resolution mechanisms hinders trade between the two sides.[127] The "commercial peacemaking" role of ADR was therefore considered during the initiation of the JAC[128]: it has been suggested that "an increase in the scope of trade between Israel and Palestine can decrease political tensions by reducing the growing economic gap between the two economies."[129] The JAC was the viable solution for the development of an accessible, neutral, and

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122. Tamar Meshel, *"Commercial Peacemaking" - The New Role of the International Commercial Arbitration Legal Order*, 16 CARDOZO J. CONFLICT RESOL. 395, 396 (2015).

123*. Id.*

124*. Id.*

125. Alessandra Casella, *Arbitration in International*, 16 CARDOZO J. CON. RESOL. 395, 395 (NBER, Working Paper Np. 4136, 1992), http://www.nber.org/papers/w4136 (last visited July 6, 2014).

126*. About Us*, JERUSALEM ARB. CTR., http://www.jac-adr.com/about-us.html (last visited Mar. 15, 2017).

127*. Id.*

128. Meshel, *supra* note 122, at 411.

129. Miki Malul et al., *An Economic Development Road Map for Promoting Israeli-Palestinian Cooperation*, 14 PEACE ECON., PEACE SCI. & PUB POL'Y 1, 5 (2008).

effective cross-border dispute resolution mechanism which would be helpful to encourage dialogue and cooperation rather than hostility.[130]

In terms of Rules of Arbitration, the JAC reflects ICC values and adopts its Arbitration Rules in noteworthy manners.[131] In this sense, the JAC provides universal, well-known and well-tested procedural rules and methods while taking into consideration the local concerns for impartiality and neutrality, cost effectiveness, geographic accessibility to the institution, and enforcement.[132] To put it in different terms, from a legal perspective, the JAC is a reflection of ICA values and legal procedures which, over the short term, provides both Palestinians and Israelis the possibility of effectively resolving their commercial disputes; while at the same time it provides a hope for the building of mutual trust in each other that could be translated into future political cooperation in a region where violence rather than peace has been the norm for the past few decades. The author's proposal in this Comment is to adopt a JAC-like center for dispute resolution with a different scope of attention. This center shall, as mentioned above, address Intra-Islamic commercial disputes while taking into consideration the underlying political and sectarian divisions; and aim to both develop a more coherent Islamic system—which would make it easier to later incorporate it into the international one—and to provide a medium for dialogue between the conflicting States at issue, with the hope of fostering cooperation.

There obviously is a circular reasoning in the proposal above because the establishment of this center will require cooperative efforts by the different Islamic countries in the Middle-East. It is likely that these countries are unwilling to put diplomatic efforts and money into such a center. Islamic private entities, on the other hand, are likely to be more interested in an Islamic-friendly commercial arbitration center simply because it will serve their commercial interests by providing a stable, predictable, system. Therefore, this author assumes that the private sector is currently the sole viable actor to put this proposal in motion. Such an assumption is a reasonable and feasible one: the JAC, for example, was primarily launched by business leaders in the private sector.[133] While the exact structure of the center is hard to conceptualize at this point, it should reflect both the ICC and JAC in the sense where members will have to cover for the expenses of the arbitration proceedings and maintain the center through their membership fees.

V.   CONCLUSION

Transnational commercial arbitration gained an increasingly important role during the past few decades, and international actors put significant efforts to create guidelines and recommendations to harmonize the enforceability of arbitral awards. Local factors—such as religious and political considerations—however, makes it virtually impossible for the ICA system to fulfill the concerns of every community. Policymakers are aware of such a reality, and provide broad and inclusive recommendations, giving an opportunity for each country to apply the laws in a manner compatible with its own local considerations.

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130. Meshel, *supra* note 122, at 411.
131. *Id.*
132. *Id.*
133. *About Us*, supra note 126.

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Unfortunately, the system in place has not always successfully incorporated some groups' concerns, and this Comment highlights the difficulties faced by *sharia*-based countries in international commercial arbitration. This Comment first addressed the "conflict" between the system in place and *sharia*'s understanding of arbitration; section IV (B) shed light on the inconsistencies within Islamic laws, while section IV (D) covered a proposal to bridge the existing gaps. This Comment aims to trigger a movement in a direction which will help bring the currently competing and antagonistic states closer one to another. By fostering a more predictable, coherent, regional system which addresses the local concerns and differences, the proposed concept would hopefully translate into a solid and vigorous institution that will ultimately serve the needs of the commercial arbitration world.