International arbitration contract principles: analysis of Middle East perceptions

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Abstract

Purpose – The purpose of this paper is to examine the main contract principles which govern the international arbitration contract with special emphasis to examine contract principle found of the Middle East, how international principles of contract are perceived in the region, and whether there are any dominant contract principles.

Design/methodology/approach – A general exploratory research procedure used to give a better grasp of various aspects of socio-legal approaches. The paper seeks to create knowledge that can be used to retrieve some pressing social and organisational understanding in the said region. The first part of the paper examines the role of ethics and tradition in understanding Middle Eastern contract principles. The second part examines the impact of Islamic Law on commercial contract principles. The third section analyses the regional perception of international contract principles. Finally, the paper addresses some contemporary issues of international contracts in the Middle East.

Findings – The paper showed that the legal perceptions of international contract principles reflect regional legal thinking which has been influenced by a mixed understanding of regional traditions, Islamic contract law principles as well as Western contract principles when these principles match regional legal culture. Overall, it showed that still under such mixed understanding, there are strong regional legal traditions and these are found in Islamic contract principles and affects commercial contract experiences. In general, a significant difference still exists between modern international contract principles and those in the Middle East.

Practical implications – The paper generates a knowledge that mixed understanding in regard to international contract arbitration principles due historical and cultural reasoning. Arab States does not share common understanding of international contract principles. Thus, it is very superfluous to propose the argument that there is sole Middle Eastern regional perception which dominates every Arab State. Therefore, special understandings and considerations should be given to every international arbitration contract from certain Arab State entity to another.

Originality/value – The paper provides a clear understanding of the guidelines for international commercial arbitration contract in the Middle East. Legal culture should be taken into consideration if a successful contract implementation has to be achieved.

Keywords Middle East, Islam, International trade, Arbitration, Contract law, Legal principles

Paper type Research paper

1. Introduction

The paper will examine contract principles found in the Middle East, how international principles of contract are perceived in the region, and whether there are any dominant contract principles. As the international community during the decades following Second World War struggled to provide a transnational regulatory and adjudicatory infrastructure for international commerce so, developing nations, including Middle Eastern countries, are today struggling to devise legal institutions that:

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- transcend methods of interaction within known communities and facilitate economic exchange among strangers;
- accommodate in some culturally neutral way transactions including parties from completely different legal systems or traditions;
- operate independently of government, and if possible, with the government's promise not to interfere with the operations and decisions of these institutions;
- require little public investment, but are somehow capable of providing in the near term some of the functions of a public legal infrastructure that typically take decades to fully mature; and that
- despite all these features, somehow leave each nation's sovereignty intact. They are trying to solve this dilemma by turning to the principle institutions of autonomy in international contracts: private arbitration and contractual choice of applicable law (McConnaughay, 2001b).

The first part of the paper will examine the role of ethics and tradition in understanding Middle Eastern contract principles. The second part will examine the impact of Islamic Law on commercial contract principles. The third section will analyse the regional perception of international contract principles. Finally, the paper will address some contemporary issues of international contracts in the Middle East.

2. The role of tradition and ethics in Middle Eastern commercial contracts

Like other Asian countries, the Middle Eastern traditional supposition is that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodation – that may control far more than the written contract itself and how a commercial relationship adjusts to future contingencies (McConnaughay, 2001a). In the following part, how the Middle Eastern tradition of commercial contracts differs from the west will be examined.

2.1 The role of tradition in forming international contract principles

2.1.1 "Friendly negotiations" clause. A core term in many Middle Eastern commercial contracts is the "friendly negotiations" or "confer in good faith" clause. It captures the essence of contractual obligation in Middle Eastern as well as Asian tradition. Such clauses typically recite that, if differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably. The Western view of such clauses is that they impose no real obligation at all; at most, they represent a mechanism for making unenforceable requests for novation, or perhaps an initial formality in a multiple-step dispute resolution process culminating eventually in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in the Middle East. From a traditional Middle Eastern perspective, a "confer in good faith" or "friendly negotiation" clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. Characterising a "confer in good faith" or "friendly negotiation" clause as a "dispute resolution" clause tempts a misapprehension of its essential nature, for no "dispute exists if all of the parties to the contract share such understanding of its evolving and responsive (through good faith conference and friendly negotiations) nature[1].

This understanding of the "friendly negotiation" and "confer in good faith" clause, however, does not mean that real disputes do not arise in Middle Eastern commercial relationships. Just as the written contract defines the parameters of reasonable behaviour in a Western commercial relationship, so too does the contract, together with the other traditional values to be discussed, define the boundaries of reasonable commercial behaviour in Middle Eastern commercial relationships. The non-performance of obligations, or performance outside of these values, or refusal to adjust to reasonable demands due to changing circumstances, or unreasonable demands for adjustment, can all give rise to disputes in Middle Eastern commercial relationships no less serious and potentially destructive of the mutual enterprise than those that arise in the west. Both the process by which the dispute is resolved, and the values that inform its resolution, however, once again fundamentally differ in Middle Eastern traditions from those that we know in the west. Just as contracts are relational in Middle Eastern traditions, so too is commercial justice[2].

2.1.2 The importance of relations. The second traditional aspect of commercial contracts in the Middle Eastern region is relational values. The primacy of relational values in the Middle East has contributed traditionally to a significant aversion to seeking outside assistance for the resolution of private disputes. Great shame accompanied resort to third-party adjudication, and the source of the shame was twofold. First, the pursuit of compulsory adjudication involved an unseemly emphasis on private interests in societies where individual interests always were subordinate to those of the group; it was as if participating in adjudication involved a public display of selfishness. Second, the resort to adjudication was humiliating and involved a significant "loss of face", for it was attended by an implicit admission that an opponent lacked respect to "yield" or "give way" and settle the dispute privately. Even if the parties to a dispute overcame their aversion to outside assistance, relational values still defined both the substantive justice they sought to achieve, and the dispute resolution techniques and procedures used to deliver that particular conception of justice (Chen, 1973)[3].

2.1.3 Subordination of written contract. Consistent with the subordination of written law and contracts in the ordering of commercial affairs, and with the commensurate elevation of relational considerations such as status, harmony, reciprocal adjustment, and actual circumstances, the objective of dispute resolution in the traditional Middle East was not the ascertainment of legal rights and allocation of blame and entitlement, as it is in the west, it was a peaceful resolution, reconciliation, whatever the result. The merits of the outcome were not irrelevant, but in the Middle Eastern tradition had far more to do with relative status, actual circumstances, reciprocal adjustment, and maintaining the relationship than with the terms of any contract or law antecedent to the dispute. One might describe the parallel between Western and Middle Eastern and other Asian commercial dispute resolutions as the objective of each to achieve the "expectation interests" of the parties, but the comparison would convey falsehood if the completely different contents of the expectations were not noted as well. Middle Eastern commerce is as dependent as Western commerce on the "predictable" resolution of disputes; but "predictability" in the Middle Eastern tradition drives not from "legal predictability", as conceived in the west, but from the fact that there will be a conclusion to the dispute, and in most cases, the conclusion will provide a basis on which the commercial relationship may continue (Chen, 1973, p. 8).

2.1.4 Commercial justice. This version of commercial justice requires dispute resolution techniques and procedures different from those best suited to yield the "legally correct" outcomes favoured by the Western legal tradition. Mediation and conciliation, for example, traditionally have been strongly preferred over arbitration or other compulsory adjudications for the resolution of commercial disputes precisely because they are more likely, if successful, to provide a basis on which to continue the commercial relationship. Even judges and arbitrators charged with the adjudication of disputes in the Middle East routinely make intermittent efforts to mediate the disputes, meeting privately with each party and engaging in *ex parte* (on behalf of only one party, without notice to any other party) communications, and they see no particular problem with resuming their adjudicative role – and perhaps even imposing an outcome based on information they have learned during mediation – if their efforts to mediate fail. This conduct, of course, is alien to conventional Western notions of judicial impartiality, but perfectly consistent with Middle Eastern notions of the values and objectives that should govern the resolution of commercial disputes (Chen, 1973, p. 8).

Relational considerations also make privacy an essential aspect of Middle Eastern commercial dispute resolution traditions, at least in a judicial context. Privacy is an aspect of international commercial arbitration in the Western tradition as well, but it clearly is valued more highly in the Middle East. For example, the privacy of commercial arbitration offers a reduction in the humiliation and loss of face traditionally associated with seeking outside assistance for the resolution of disputes. Privacy also promotes intermittent mediation and conciliation, the preferred mechanisms of dispute resolution in Middle Eastern and other Asian countries. And whether in the context of mediation and conciliation or arbitral adjudication, private proceedings are far more conducive than public proceedings to all sorts of wide-ranging and often proprietary discussions that might lead to the preservation of an imperilled commercial relationship. Similar considerations also explain the importance in Middle Eastern dispute resolution traditions of arbitral discretion not to issue written opinions explaining decisions and awards; explanatory attributions of blame and blamelessness more appropriately attend "legally correct" outcomes, not relational ones, and the failure of commercial relationships, not their resurrection[4].

In sum, traditional Middle Eastern beliefs and practices with respect to the role of law and contracts in the ordering of the governance of private commercial affairs are fundamentally different from those of the Western legal tradition. The primacy of law and its moral force in the "deal closing" written contract terms in the west becomes seemingly elastic, "relationship beginning" predictions in the east. The procedural regularity and judicial impartiality essential to legally correct commercial justice in the west become the procedural irregularity and *ex parte* mediation essential to relational commercial justice in the east[4].

2.2 The role of Islamic law in the international commercial contract

Until the second half of the nineteenth century, Islamic law applied in nearly all Muslim countries with regard to the law of obligations and contracts. Islamic law must in this context be understood to comprise the law that is revealed, the teachings of the different schools and sects, customary practice, as well as an inevitable measure of foreign influence and alterations impelled by performance and passage of time. In practice, Islamic law is instanced by old decisions of Cairo *Shari'a* courts, by official

registers and private appearances in places like Riyadh, Jeddah, Oman, the Yemen, Damascus and Baghdad, and by the much heralded manuscripts of the Cairo Geniza (Saleh, 1988).

From the second half of the nineteenth century onwards, the Islamic law of contracts was affected by Western law, as a result, a composite legal system emerged which was not always systematic, and still in the process of adaptation. Until the nineteenth century, there is little doubt that Islamic ethics, directives and prohibitions pervaded the field of contracts and obligations. However, according to life's exigencies and contact with other cultures, countries in the Middle East have rapidly created a more lenient legal system parallel to the theoretical legal structure. The *Shari'a* is never purely idealistic and speculative, but in the mean time, there are no other coherent systems of law which can compete with its position in Islamic countries (Saleh, 1988, p. 14).

It also has been mentioned, that since the nineteenth century, the *Shari'a* has lost its exclusivity to govern financial transactions in Middle Eastern countries to a combination of sacred and secular laws. In countries such as Saudi Arabia, Oman or Yemen, where Islamic law remains dominant, a substantial number of mundane statutes curtail the *Shari'a's* ascendancy significantly. Conversely, where in other countries secular laws seem to take precedence, the *Shari'a* has not been completely supplanted. Government stances can be divided into several categories those that:

- have transformed their entire internal commercial and mainly, financial systems to an Islamic form, for example, Sudan;
- embrace Islamic Law as a national policy while supporting dual commercial tracks (Bahrain, Kuwait, UAE, Qatar);
- neither support nor oppose Islamic law within their jurisdictions (Egypt, Jordan, Palestine, Iraq and North African countries); and
- actively discourage a separate Islamic Law presence (Saudi Arabia, Yemen and Oman) (Vogel and Hayes, 1998).

The legal currents which exist side by side, the *Shari'a* and secular statutes or their combination, have ill-defined and ever shifting spheres of application. Practice, which also includes rulers' unpredictable dictates, adds another uncertainty to the principles of international commercial contract by creating or superseding the law as a matter of fact. To identify the legal rules governing a given problem is therefore an arduous task (Vogel and Hayes, 1998, p. 15). The difficulties are compounded by the actual interpretation and practical implementation of the rule as will be discussed.

2.3 Principles of Islamic contract law

*2.3.1 Non-binding (*Ja'iz*) versus binding (*Lazim*) contract principles*. All of the nominate contracts are either *Ja'iz,* meaning non-binding or revocable at will, or *Lazim*, meaning binding and irrevocable. A contract may be *Ja'iz* to one or both of the parties. If a contract is *Ja'iz* to a party, that party may terminate the contract prospectively at any time, even if the contract declares it irrevocable or fixes its duration. Termination does not affect acts already taken under the aegis of the contract. Indeed, a *Ja'iz* contract is so by its very nature (i.e. this trait is an "essential term" or *muqtada*). Examples of the

Ja'iz contract are agency and partnership contracts. The *Lazim* contract, on the other hand, binds a party both retrospectively and prospectively.

The paired concepts of *Ja'iz* and *Lazim* afford another way to organise the nominate contracts. Contracts that are *Ja'iz* to both parties include partnership (all forms), agency, deposit, loan *('ariya)*, and reward. Others are *Ja'iz* for both parties until delivery, including gift, loan *(qard)*, and pledge. Still others can be terminated by one of the parties, such as pledge by the pledgee (after delivery), or guarantee by the obligee. *Lazim* contracts include sale, lease, compromise, assignment, and rescission (Vogel and Hayes, 1998, Chapter 5 (Islamic Law of Contract), p. 111).

That so many basic contracts are treated as *Ja'iz*, and that this trait in a contract cannot be amended, shows once again how in Islamic law the parties consent is the basic for legitimacy. *Ja'iz* contracts require more than agreement at the moment of contracting; they demand the parties' continued satisfaction. Otherwise, the scholars tell us these contracts will be void, usually for reasons of *gharar* (Vogel and Hayes, 1998, p. 112).

What aspects of the above analysis affect modern international arbitration contracts? First, generically defined goods are vastly more common in modern commercial societies than they were in Medieval times. Outside of real estate and sales between private individuals, few items sold are unique. Most goods are to some degree standardised and fungible (meaning goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit) and are purchased by description, not identification. This means that Islamic law's degree of tolerance for delay, largely confined to sales of *ayn*, may prove inadequate in today's society (Vogel and Hayes, 1998, p. 121).

Second, the bilateral execution of the contract is fundamental to the operation of modern economics. Through contracts, parties expect to be able to gain security for a future performance without paying fully for that performance in advance. Even with no advance payment or performance, modern laws build a reciprocally secure arrangement; the parties mutually undertake either to perform or to respond in damages for all attendant losses. Modern law would see an advance payment requirement as unfair in denying the paying party the ability to refuse performance if the other party should default. But Islamic law, as summed up in the *al-kali'* maxim (forbidding sale of "delay for delay"), systematically opposes this logic (Vogel and Hayes, 1998, p. 122).

2.3.2 Contract on future things. Reference to contract on future things (in which the Islamic law literatures usually gives an example of a sales contract as selling fruit before being well grown) is made because contracting on the dispute resolutions mechanism in international commercial contracts falls within this category.

In reality not all Muslim scholars have been unappreciative of practical pressures and practical needs; thus the teaching of the *Maliki* author *Ibn Rushd*, who said that in case of necessity (*darura)* and when the future inception of the subject-matter is certain, such as when during one harvest fruits are produced in connected succession, a sale contract of the whole harvest would be valid (Ibn Rushd, 1981, Vol. 2, p. 156).

Although many other authors have shared Ibn Rushd's views, Ibn Qayyim al-Jawziyya especially addressed the problem. Ibn Qayyim al-Jawziyya (1970, Vol. 1, pp. 357-61, supra note 10. p. 20) denounced the confusion between a non-existent subject-matter and uncertainties which cast doubt on the future existence of the

subject-matter. What the *Shari'a* condemns, he concludes, is not non-existence but uncertainty.

Contemporary Arab authors and legislators have been only too happy to rely on this approach. They have focused their attention on *gharar* and disregarded the question of the thing's non-existence. And it is most probably in the wake of Ibn Qayyim al-Jawziyya (1970) precedent that the provisions of Article 129.1 are to be found in Iraq's Civil Code of 1951. These provisions read in translation: "The subject-matter of an obligation may be non-existent at the time of contracting, provided its future existence is possible and provided it is determined in a way which dispels want of knowledge (*jahl*) and risk (*gharar)*". Qatar followed suit (see Article 33 of the 1971 civil and commercial Law).

Even the more traditionalist Jordan's Civil Code of 1976 contains provisions to the effect that "the subject-matter of a contract may be a thing in future provided risk *(gharar)* is averted" (Article. 160.1). In the following Article 161, risk (*gharar*) is equated to an exorbitant want of knowledge. The Explanatory Memorandum of the Jordanian Civil Code (p. 155) tells us that the Hanafi School of law deems as a requisite that the subject-matter of a contract be in existence at the time the contract is concluded. But it considers that it may not be necessary in contracts such as hire (*ijara*), *Salam* (a sale with an advance payment for future delivery) and manufacture (*istisna*') (Ibn Qayyim al-Jawziyya, 1970).

Kuwait's modern legislators share that view. Not only does Article 168 of the 1980 Civil Code stipulate that "the subject-matter of a contract may be a thing in the future unless its existence is dependent upon pure chance", but also the accompanying Explanatory Memorandum (p. 138) emphasises that exceptions and qualification to the *Shari'a* principle (i.e. nothing in the future can be the subject-matter of a contract) are so numerous that it can be said that the principle does not receive application except when material *(gharar)* cannot be averted (Ibn Qayyim al-Jawziyya, 1970).

Consequently, it can be said that in contemporary Arab codification, averting material *(gharar)* has replaced the *Shari'a* requisite for the existence of the subject-matter at the time the contract is concluded. Material (*gharar* – uncertainty) and not the absence of the subject-matter cause voidance of contracts in the eyes of Arab legislators.

In practical terms, after Ibn Qayyim, Sanhuri and other scholars in the Arab world, contracts on future things are deemed valid provided they do not include a material element of uncertainty, risk or speculation (Ibn Qayyim al-Jawziyya, 1970).

2.3.3 Choice of special condition. Arbitration clauses fall within this definition. Choice of special condition (*shurt*) is restricted under the *Shari'a* but not under contemporary statutes. The question of "special condition" (*shur*t) has been posed as follows: "(In Islamic law) each nominate contract is strictly, and usually simply, defined in terms of its purposes and effect, and the question is how far, if at all, may the parties vary this rigid scheme by introducing agreed special terms and appendages to the particular contract they are purporting to conclude" (Ibn Qayyim al-Jawziyya, 1970, p. 23).

The answer offered by the different schools of law is that a special condition can be added to the pre-fixed terms and conditions of a nominated contract only if some specific requirements are met. These requirements vary from one school to the other. Hanafi teaching as an example, provides that a special condition is readily and validly

accepted as an appendage to a contract if it is necessary to the contract (*min muqtadayat al-'aqd*), for example, the vendor retaining possession of the object of a sale until the time he receives payment; or if it is appropriate to the contract (*mula'm lil-'aqd*), such as the vendor asking for a pledge to secure payment of a sale price; or if the condition is customary to the inhabitants of the place where the contract is concluded (Ibn Qayyim al-Jawziyya, 1970).

The remaining schools have adopted different criteria. The Hanbali School is considered the most lenient of those schools with regard to the problem. Under its teaching the validation of a special condition is the rule unless it falls within one of the two following categories:

(1) If it conflicts with the objective or the essence of the transaction, such as when the vendor requires that the buyer shall not sell or otherwise dispose of what he has acquired.

(2) If the special condition is contrary to a specific prohibition in the *Shari'a,* such as when the Prophet Muhammad disallowed the presence of two conditions in one contract.

The two conditions which are proscribed, according to the Hanbali interpretation, are those which bring an advantage to one of the contracting parties without being necessitated by or appropriate to the contract itself (Ibn Qayyim al-Jawziyya, 1970). The classic example of the combination of two such conditions in one contract is when the buyer of grain requires that the vendor mills it and carries it to him. But when the conditions, whether two or more, are necessary or appropriate to the contract itself, such as a sale made contingent upon the presentation of a pledge together with another security, then the conditions are valid (Ibn Qayyim al-Jawziyya, 1970).

2.4 The impact of choice of condition on region legislation

2.4.1 Divergences in the region. Contemporary Civil Codes in the region evidence two contradictory positions. Kuwait's Civil Code, for example, has not adopted any of the *fiqh* teachings with regard to special conditions, which in the circumstances would have been *Maliki'* teaching; what has been chosen is not too different from what is expected to be seen in any Western-inspired secular statute, namely, that "a contract may contain any condition agreed by the contracting parties provided it is not prohibited by law, public policy or good morals" (Para. 1 of Article. 175) (Ibn Qayyim al-Jawziyya, 1970, p. 24).

By contrast, Para.1 of Article164 of Jordan's Civil Code (which is identical to Article 34 of Qatar's Civil and Commercial Law) sums up Hanafi teaching with respect to special conditions. It states in translation: "A contract may contain a condition which confirms its content or is appropriate to the content or is found in customs and habits". On the other hand, Para. 2 of the same article, is contrary to Hanafi teaching and reads as follows:

> A contract may also contain a condition which is to the advantage of one of the contracting parties or to a third party provided it is not prohibited by the legislator or is not contrary to public policy or morals, otherwise the condition is cancelled but the contract remains valid unless the cancelled condition was its motivation, in which case the contract is also cancelled (Ibn Qayyim al-Jawziyya, 1970).

*2.5 Investigating the legality of the contractual cause (*sabab*)*

In relation to contracts, cause (*sabab)* means the motive (*ba'ith*) which actually induces the parties to enter a given contract, but it also means the purpose of contracting (*gharad*). Both meanings relate to the intent of the contracting parties (Ibn Qayyim al-Jawziyya, 1970). Broadly speaking, the various Islamic schools of law have approached the matter of legality of the cause in two different ways: the first approach relies on the opinion that respect due to legal acts leads to taking into account the ostensible intention and disregarding the inner or real intention, even if the latter contradicts the former (Ibn Qayyim al-Jawziyya, 1970). This means motives are not given a great value. The second approach is based on the belief that motive should be scrutinised in the light of moral and religious principles.

This means that a transaction is to be measured against the degree of purity of the contracting parties' intention.

For the Hanafi*s* and *Shafi'is,* the ostensible meaning conveyed by the apparent terms of a contract is taken into account when the real inner intention is not easy to detect; the real intention, however, prevails when recognisable (Ibn Qayyim al-Jawziyya, 1970, p. 25).

Malikis and *Hanbalis* take a different stand and give great significance to real motives behind the apparent legal act (and indeed all acts) provided they are known to both parties.

Consequently, motives for the *Malikis* and *Hanbalis* determine the validity or invalidity of a contract whether or not they are identified in such a contract. Two examples of void contracts (cannot be legally enforced and no longer of any effect) under *Hanbali fiqh* as a consequences of this illegality are the sale of grapes intended to be transformed into wine and the sale of arms intended to stir up trouble.

The basic rule taught by the schools of law that puts emphasis on real motives even when unapparent, is that a contract which in itself fulfils all the criteria of validity and in all appearances contains no element of illegality, may yet be a nullity on the grounds that it is inspired by improper motives. On the other hand, the Hanafi and, to a lesser extent, the *Shafi'i* school of law consider that it is not the function of the courts to investigate what stands behind apparently genuine transactions or to unveil their real inspiration. In addition, the law of contract is being increasingly affected by the resurgence of legal *moralism* based on the dicta of the *Qur'an* and the *Sunnah*. That is to say, the real purposes of contracts will be increasingly investigated and taken into account especially in the Gulf area where *fiqh* spurns legal stratagems *(hiyal)* and requires disclosure of the real *(sabab)* (Ibn Qayyim al-Jawziyya, 1970).

Here, again the example of the 1980 Kuwaiti Civil Code and 1976 Jordanian Civil Code will help to show how they have dealt with the concept of cause *(sabab)*. It is no accident that Article 165 Para. 1 of Jordan's Civil Code defines (*sabab)* as being the immediate intended purpose *(gharad)* of the contract; whereas Article 176. Para. 2 of Kuwait's Civil Code defines *(sabab)* as being the motive *(ba'ith)* which induces a contracting party to conclude a contract provided that such a motive is known to the other contracting party (Ibn Qayyim al-Jawziyya, 1970, p. 26).

The explanation for this difference is simple: the Hanafi School prevails in Jordan whereas the *Maliki* School holds authority in Kuwait. However, both legal systems stress that *(sabab)* should be in existence as well as lawful (Article 176. Para. 1, Kuwait; Article 165, Para. 2, Jordan) and both legal systems make room for establishing the real

cause *(sabab)* when there is doubt on the veracity of the apparent one (Article 178, Kuwait; Article 166, Para. 2, Jordan) (Ibn Qayyim al-Jawziyya, 1970).

2.6 Implications of Islamic contract law

2.6.1 Absence of formalism. The most fundamental difference between Western international contract principles and those in the Middle Eastern region is that, in the past, a written contract and a contract not committed to writing had exactly the same value with regard to legal enforceability. For both forms of contracts it was only the testimony of those who witnessed them which established their existence (Ibn Qayyim al-Jawziyya, 1970, p. 15).

Because writing was not convenient or possible during the first century of Islam (because many Muslims at that time were unable to read and write), contracts were often concluded by a witnessed exchange of words and that was deemed sufficient to tie the contracting parties together (*'aqda*, the verbal root of *'aqd* – contract or transaction – means to tie up, to make a knot) (Ibn Qayyim al-Jawziyya, 1970).

For more complex contracts or more orderly contracting parties, when writing was resorted to, it had be witnessed as well. Contracts of trivial importance could even be concluded by mere conduct (*mu'atat*) with few words exchanged and with no need for witnesses[5].

Other contracts could only be perfected by the subject-matter passing from hands of one contracting party to the other such as the loan of a non-fungible article, pledge or gift. The point to be emphasised here is that, as a general rule, contracts under Islamic law grew without formalism if we accept the requisite for uttering explicit words, in the past or present tense,[6]. which are indicative of the contracting parties' intentions[7]. Contracting parties might clap or shake hands in order to close the bargain, but these were local customs which, technically speaking, had no part in the conclusion of the transaction[7].

This lack of formalism found in the *Shari'a* Contract Law was remarkable compared to the existing formalistic laws of neighbouring Byzantian[8]. and Sassanian[9]. Empires. One likely reason for the Islamic informality in the contracting technique is the *Qur'an's* concern to spare the Islamic community from any undue hardship (*Qur'an* XXII, 78), that concern being a distinctive feature of the teaching of Islam. A better guarantee for the respect of contracts and transactions was not deemed ceremonial but observation of the divine injunction 'O ye who believe fulfil [your] contracts' (*Qur'an* V,1)[9].

Nowadays, written evidence is deemed essential with respect to a growing number of transactions and contracts, often as a requirement and a response to international trade and investments and not necessarily as the expressed wish of the contracting parties. Accordingly, international contracts are requested to be in writing and must be properly registered; otherwise they have no value. Thus, the advantage that the *Shari'a* offered to Muslims in their dealings has faded away. But, equally, the disadvantages that accompanied a strict interpretation and implementation of the *Shari'a* law or contract have also considerably diminished as the constraining factors have lost ground[9].

2.6.2 Freedom of contract. The second most important implication of Islamic contract principles for the harmonisation process of international commercial arbitration contracts is the freedom of contract concept.

Despite the general obligation to uphold contracts, not all contractual arrangements are condoned by the texts. The *Hadiths* raise a number of specific obstacles to freedom of contract. The most important *hadith* involves a transaction of the Prophet's Muhammad wife *'Aisha*, who desired to buy and then free a certain slave, *Barira*[10]. This *hadith* has highly troubling implications for freedom of contract. It suggests that the very terms of contracts, not to mention contracts themselves, must be prescribed by God's writ. Unless a term is positively allowed by revelation (in the *Book of God*), it is nugatory (of no real value), the parties' agreement notwithstanding. Contractual terms are treated here as if they were part of fundamental morality, conclusively and exclusively fixed by revelation, like the *Qur'an's* prescriptions as to the types and degrees of relationship within which persons may marry (Vogel and Hayes, 1998, pp. 67-8).

Moreover, as with all legal systems prior to the nineteenth century, "Islamic contract law is expressed not as a general theory but as rules for various specific contracts – laws of sale, lease, pledge, and so forth" (Bakar, n.d.) The closest thing to a general law of contract is the contract of sale (*bay'*), used by Muslim jurists as a prototype and analogy for all other contracts (Vogel and Hayes, 1998, see Islamic Law of Contract, p. 97).

From the perspective of modern contract law which honours virtually any genuine commercial contract having lawful purpose, this characteristic of Islamic contract law instantly raises questions. May one create new contracts? How exclusive and binding are the rules of the standard contracts? May one add to or vary from the terms prescribed by the *Shari'a?* In other words, to what extent does Islamic law admit freedom of contract?

The *Qur'an* emphasises fulfilling one's pacts or undertakings. The *Sunnah* is more resistant to free contracting imposing narrow limits on "stipulations", i.e. terms of contracts other than those dictated by *fiqh*. Recall particularly the "*Barrira" hadith* which condemned any term "not" in the *Book of God*. What position does classical law take on the issue of freedom of contract? (Vogel and Hayes, 1998, see Islamic Law of Contract, p. 98).

2.7 New contracts

In general, classical *fiqh* rarely discuses the idea of contractual freedom outside the standard contract types. The most relevant controversy is whether, in the absence of a specifically applicable revealed divine ruling, contracts and stipulations are presumed to be lawful or unlawful. Ibn Taymiyya takes a strong position:

> The underlying principle in contracts and stipulations is permissibility (*ibaha*) and validity. Any (contract or stipulation) is prohibited and void only if there is an explicit text (from the *Qur'an*, the *Sunnah* or the consensus) or a *qiyas* (analogy) (for those who accept *qiyas*) proving its prohibition and voiding[11].

At the other extreme from Ibn Taymiyya is the now-extinct "Literalist" or *Zahiri* school. This school argues that contracts, as private lawmaking, seek to alter the divine legal status of things, which can be done only with affirmative divine authority. The other *Sunni* Schools reject this narrow view, yet, as Ibn Taymiyya asserts, their position is not that different since, although they profess the principle of permissibility (*ibaha*) as he does, in practice they confine themselves to elaborating contract rules by analogy to revealed precedents[12].

2.8 Stipulations

In classical law, "debates concerning freedom of contract did not concern new contracts, but rather when standard contracts could be altered or combined. Stipulations were divided into three types:

(1) condition (*ta'liq*, literally "suspending") – the conditioning of a contract on a future event;

(2) extension (*idafa*) – delaying the beginning of the contract until a future time; and

(3) concomitance (*iqtiran*) – varying the terms of the contract. In all cases, if the law finds the stipulation void, the contract may or may not be void also: the results vary casuistically" (see footnote [12], p. 100).

3. Regional perceptions of international contract principles

This part of the paper will critically examine Middle East regional perceptions of international contract principles. It will argue that such perceptions reflect regional legal thinking which has been influenced by a mixed understanding of regional traditions, Islamic contract law principles as well as Western contract principles when these principles match regional legal culture. Overall, it will argue that still under such mixed understanding, there are strong regional legal traditions and these are found in Islamic contract principles and affects commercial contract experiences. In general, a significant difference still exists between modern international contract principles and those in the Middle East. In the following pages, such differences will be examined.

3.1 Flexibility over sanctity of international contract principle

As has been discussed in the previously, unlike in the west, in legal traditions as well as in Islamic contract principles, contracts do not have stability or sanctity characteristics. There has been no formality in contract theory either in tradition or in Islamic contract law. Referring to legal arguments used to deny the theory of contract stability and sanctity, the theory of administrative contract has been one of several used. Thus, the adoption of administrative contract theory in most Middle East countries became justifiable.

The concept of droit administratif was adopted by many Middle East countries, whether they were under the influence of the French legal system such as Morocco, Tunisia, Lebanon and Algeria, or were never French colonies. In particular, Arab-Islamic legal traditions facilitated the reception of French public law characterisation in all of the 22 member countries of the Arab League, as well as non-Arab Islamic countries in both Asia and Africa. When many Arab Islamic countries gained independence after the Second World War, the Egyptian model, which was based on French traditions, was introduced and formally adopted by many Arab states such as Syria, Libya, Kuwait, Qatar, United Arab Emirates, as well as Iraq and Sudan (Al-Saeed, 2002; Cattan, 1967; El-Kosheri and Raid, 1986). The question thus arises as to whether administrative law applies to international contracts?

Despite the fact that many have argued that administrative contract law does not apply to international contracts, this perception has been emphasised more frequently in Middle Eastern commercial arbitration cases.

It has been argued that Arab countries which adopted the French model recognise two categories of contracts. First, the categories of private contracts exclusively subject to the rules contained in the civil and commercial codes, and second, the category of public contracts, which are called administrative contracts, and which are, to a certain extent, governed by a special set of public law rules (administrative law). Only particular types of contracts which are concluded by the state or public authorities are regarded as administrative contracts (Al-Saeed, 2002; Cattan, 1967; El-Kosheri and Raid, 1986; Al-Tammawi, 1991).

An answer to the question whether administrative law applies to international contracts will depend upon the nature of the contract itself. Contrats administratifs have been defined as:

> [...] Contracts which the administration (the government or its representative), concluded with private persons, corporations, or other departments to regulate and facilitate public utility, and which include provisions unparalleled in private law contracts. Where administrative contracts are concerned, the governmental has exclusive power to place restrictions on these contracts which the other party to the contract has to observe. Any disputes arising from such contracts have to be resolved within the legal system according to the administrative law (Al-Fayad, 1981; Al-Tammawi, 1981, see footnote [11], p. 156).

Oil industrial contracts have considerable weight among other international contracts; thus how such contracts have been treated is very important for highlighting regional perceptions. According to Cattan: "an oil concession in the Middle East has always been treated as a contract between the State and the concessionaire which is governed by ordinary rules of contract" (Al-Saeed, 2002). It has been noted that some contracts administratifs provide provisions which regulate a multiplicity of legal relationships:, e.g. the State, the contractor, and the users. The concessionaire assumes the duty to perform on behalf of the state or public authority a service for the public. Such service may, for example, be the supply of gas, water, electricity or transportation. In contrast, no such relationships arise in the case of an oil concession which is restricted to the contracting parties and does not undertake the performance or management of a public service (Al-Saeed, 2002).

Also, it has been previously asserted by the French Consiel Etat that a mining concession is not a public service concession. For example, in its opinion of 19 December 1907, it said:

> [...] if the term concession is used in administrative law to designate numerous acts of a different nature, the identity in designation involves no necessary assimilation whatsoever between these various acts; in particular, no analogy can be established between the concession of public works by which an authority entrusts to a private corporation the management of a public service under conditions determined specially in each case and for a limited duration, and the concession of mines by which the public authority institutes a perpetual ownership under the regime fixed by the law of 21 April 1810-27 July 1880[13].

In the Aramco case, the public service concession was distinguished from the oil concession in arbitration between the Arabian American Oil company (Aramco) and the Government of Saudi Arabia when the Government of Saudi Arabia argued for the application of droit administratif to the concession agreement. The Arbitration Tribunal ruled:

> Aramco's concession could not be viewed as a public services concession, because it does not involve any users, nor any dues to be paid by the public, which does not have recourse to the concessionaire's service. To turn a concession into a public service, it is not enough that the exploitation of some national resources is of extreme importance to the economy of the conceding State, or even that the State's financial stability is dependent on such exploitation. The company has no duty to manage continuous and permanent services to the benefit of third parties (users). Its prosperity and its solvency depend on economic and political circumstances. This situation explains why no *cahier des charges'*, containing the law of the service, has been annexed to the concession contract. The status governing the company does not involve, therefore, any "act-condition" in the sense of French law; the State cannot intervene in order to modify the clauses of the concession[14].

The Tribunal also observed that:

> Mining and oil concessions are not public services concessions because they do not include any provision in favour of users. To use the words of Planiol: "The mine is not destined to public use and is exploited by the concessionaire in his own private interest". The concessionaire enjoys a nearly total freedom and is neither bound by clauses concerning maximum tariffs for sales nor by prohibitions of preferential tariffs which are the usual features of the *cahiers des charges* in public services concessions. Mining concessions are not public works concessions either, because the mineral deposits become the property of the concessionaire who, at the end of his concession, will have to return them to the state with their exploitable substance and sometimes even exhausted (see footnote [14], p. 161).

Finally, it should be said that the term "contract administratif" is usually restricted to three classical types of contracts, i.e. concessions of public utilities, public works and public procurements, and case-law established by the French *Conseil d'Etat*. Thus, international contracts concluded by a public authority, which are of prime importance, particularly in the modern world, are not classified within the enumerated categories of a contract administratif (see footnote [14], p. 158).

Although it has been noted that an international contract does not constitute a *contract administratif* and thus cannot be subject to the application of administrative law, such arguments do not prevent the parties in the region which possess the concept of administrative law to subject their contracts to *droit administratif* (see footnote [14], p. 159).

According to *droit administratif*, Middle Eastern states are required to compensate the contractor for both direct losses and lost profits, should the government unilaterally terminate the contract. Thus, the financial equilibrium of the contract is preserved upon payment of full compensation of any loss suffered as a direct consequence of government action[15] taken upon justification of regional perception of the principle of flexibility of contract.

3.2 Public over private international contract principles

The public law character can be seen basically in the increasing role of government interference in economic life: e.g. unilateral drafting in advance of the conditions of a transaction by public authorities, the legislative approval of which is ordinarily prescribed for the grant of an oil concession, and state-owned resources whose alienation is regulated by statute.

Modern Arab writers are agreed on emphasising the predominant public character of the oil contract. As Elwan noted:

> Do not forget that a country does not exist in oil contracts as a private law person, but in the capacity of a sovereign. Thus, the private characterisation of these contracts is reduced, at the same time their public characterisation is doubled, especially under the growing interference of the government. Although the parties to the contract freely negotiate in order to conclude agreements, the situation is changing at present, because of the increasing organising power of the government side. As a result of establishing investment legislations in these countries, the freedom of the parties has become restricted re this legislation. Even for the countries that do not adopt investment legislation and do not possess oil legislation, there are many legal restrictions on the freedom of contractual parties. This means that despite the existing relationship between the host country and the foreign contractor, the contract contents are not determined in free negotiation of the parties (Mughraby, 1966)[16].

The public law character has received a constitutional basis in the various Arab countries which include in their constitutions a provision emphasising that natural resources are the property of the state whose task it is to ensure the proper exploitation thereof in the best interests of the national economy.

For example, in the case of Kuwait, Article 21 of the Kuwaiti Constitution provides that: "Natural resources and all revenues are the property of the state. It shall ensure their preservation and proper exploitation, due regard being given to the requirements of state security and the national economy"[17].

3.3 Dualism preferred over monism international contract principles

In international contracts it is important that the contracting parties choose a dispute settlement mechanism (mainly international arbitration) whether institutionalised or *ad hoc,* without expressing the applicable law governing their contractual relationship. This issue is considered controversial in the area of international law. Different laws and principles have been suggested as being applicable to contracts between states and foreign investors. However, there is no general consensus. Some proclaim the application of the *lex contractus*, while others restrict the application of the law of the contracting state or transnational law or general principle of law or international law[18].

In other words, the arbitrator is not under any obligation to follow a national private international law system, whether one pertaining to the state in which the arbitration takes place, or of any other national system. This section will argue that Middle East countries adopt the Dualism principle over the Monism principle.

3.3.1 The application of the general principles of law. The idea that economic development agreements can be governed by general principles of law was presented by McNair (1961) Quoted that Rasulov, 2003). He argued that:

> [. . .] the system of law applied to these agreements cannot be public international law *stricto sensu*, because these agreements are not inter-state agreements and do not deal with inter-state relations. He suggested that the legal system of law most likely suitable for the regulation of these agreements and the adjudication of disputes arising out of them is the general principles of law recognised by civilised nations (McNair, 1961; Quoted by Rasulov, 2003).

A number of international contracts include provisions which stipulate the application of one of the general principles, such as "good will" and "good faith", or the application of the principles of law common to the contracting parties and, in the absence of such

common principles, then by and in accordance with the principles of law recognised by civilised nations in general.

A good illustration of this trend can be seen in Article 35(1) of the concession between the Government of Kuwait and the Kuwait Shell Petroleum Development Company Ltd of 1961 which states:

> The parties base their relation with regard to these agreements on the principle of goodwill and good faith. Taking account of their different nationalities this agreement shall be given effect and must be interrelated and applied in conformity with the principles of law common of Kuwait and England and, in the absence of such common principles, then in conformity with the principles of law normally recognised by civilised states in general, including those which have been applied by international tribunals (Al-Saeed, 2002, p. 159).

Similarly, Article 39 of the Agreement concluded between the Sheik of Kuwait and the Arabian Oil Company of Japan of 1958 first refers to the "principles of goodwill and good faith". Then it provides for the application of the "principles of law common to Kuwait and Japan and, in the absence of such common principles, then in conformity with the principles of law normally recognised by civilised states in general, including those which have been applied by international tribunals (Al-Saeed, 2002, p. 165)[19].

The general principle of law has been confirmed by international arbitration cases. Most of these cases deal with oil concessions. In the arbitration between the Arabian American Oil Company (Aramco) and the Government of Saudi Arabia, the Arbitration Tribunal held that:

> Matters pertaining to private law are, in principle, governed by the law of Saudi Arabia, but with one important reservation. That law must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence, in particular whenever certain private rights – which must inevitably be recognised to the concessionaire if the concession is not to be deprived of its substance – would not be secured in an unquestionable manner by the law in force in Saudi Arabia (Al-Saeed, 2002)[20].

> In the arbitration between the International Marine Oil Company v. Ruler of Qatar (1953), the arbitrator found that the parties intended the agreement to be governed by the principles of justice, equity and good conscience. In the Abu Dhabi case (1951), the arbitrator, Lord Asquith of Bishopstone, held that he had to resort to the general principles of law, as a form of the modern law of nature. (Al-Saeed, 2002, p. 166; International Marine Oil Company v. Ruler of Qatar, 1953).

Nevertheless, it has been argued that it is not for international legislations in different countries to agree on an applicable ruling in one specific matter. Thus, some jurists hold the view that these principles are just general suggestions which consider the basis of different legal systems. If so, it will be difficult for the contracting parties to predict clearly their rights and duties if their agreement is subject to such principles (Al-Saeed, 2002, p. 166; International Marine Oil Company v. Ruler of Qatar, 1953).

3.3.2 Denial of the application of international law. It had been suggested by Mann that contracts between states and aliens can be governed by international law if that law is chosen by the parties to be the proper law of the contract. He observed:

> [. . .] it is possible, however, for contracts between parties, only one of whom is an international person, to be subject to public international law [. . .] 9a) According to the theory referred to, a contract could be "internationalised" in the sense that it would be subject to

> public international law *stricto sensu*, therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly that same manner as in the case of a treaty between two international persons; but that, on the other hand, it would be caught by such rules of *jus cogens* as are embodied in public international law (Mann, n.d., 1944)[21].

In the arbitration between Aramco and the Government of Saudi Arabia, the Arbitration Tribunal rejected the contention that an oil concession should be "assimilated to an international treaty governed by the Law of Nations" and held that as the agreement had not been concluded between two States, but between a State and a private American corporation, it was not governed by public international law[22].

For these reasons, a number of developing countries, including many in the Middle East, stipulate in their internal legislations and international contracts the application of their own municipal law to these agreements. This view was adopted by the Organisation of Petroleum Exporting Countries Resolution XVI (1968)[23], regarding the declaratory statement of petroleum policy in member countries.

The resolution recommended to member countries that "all disputes arising between the Government and operators shall fall exclusively within the jurisdiction of the competent national courts or the specialised regional courts, as and when established"[23].

Hence, the local law of these contracting states is applied to disputes arising from these contracts. The Libyan Petroleum Law of 1995 as amended in 1965 provides that the contract "shall be governed by and interpreted in accordance with, the principles of law in Libya which are consistent with principles of international law [. . .]"[24]. Thus, the Libyan legislation does not adopt the notion of internationalisation of the state's contracts; however, it adopts the notion of subordination of the local law to international law. In other words, the Libyan law applies in all cases unless it differs from international law.

In the dispute between Petroleum Development Ltd and Abu Dhabi (1951), Lord Asquith decided that:

> This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi[25].

Sir Alfred Bucknill, the arbitrator in the arbitration case between the Ruler of Qatar and the International Marine Oil Company Ltd of (1953) decided that:

> If one considers the subject matter of the contract, it is oil to be taken out of the ground within the jurisdiction of the ruler. That fact, together with the fact that the ruler is a party to the contract and had, in effect, the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, and the fact that the agreement was written in Arabic as well as English, points to Islamic law, that being the law administered at Qatar, as the appropriate law (International Marine Oil Company v. Ruler of Qatar, 1953; Al-Jumah, 2002).

This award was confirmed by the *Aramco* case in which the Arbitration Tribunal found:

> [. . .] the concession of 4 Safar 1352, corresponding to 29 May 1933, derives therefore its judicial force from the legal system of Saudi Arabia, the *Shari'a*, the divine Law of Islam, supplemented by royal Decree No. 1135, of *Rabie al Awal* 1352, corresponding to 17 July 1933[26].

The Tribunal also found that:

> [. . .] matters of private law are, in principle, governed by the law of Saudi Arabia but with one important reservation. That law must, in case of need, be interpreted or supplemented by the

> general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence, in particular whenever certain private rights – which must investable by deprived of its substance – would not be secured in an unquestionable manner by the law in force in Saudi Arabia (Paul, 1994).

The application of municipal law has been adopted by a number of Middle Eastern governments contracts concluded with foreign investors. The choice of law clause was prescribed in the mining contract between the Democratic Republic of the Sudan and the Japanese Group of 1976, which explicitly states in Article 12:

> This Agreement shall be governed by and constructed in all respects in accordance with the law of the Sudan. Sudanese courts shall have jurisdiction to determine any matter arising from the Agreement (International Law Report, 1964)[27].

National legislation of some host countries also provides such provisions. For example, Article 3 of the Saudi Arabian Council of Ministers' Resolution No. 58, dated 25 June 1963, provides that:

> The law applicable to disputes to which the state is a party shall be determined in accordance with the established general principles of private international law, the most important of which is the principle of the application of the law pertaining to the place of execution. Government agencies may not choose any foreign law to govern their relationship with such individuals, companies, or private organisations (International Law Report, 1964).

In Kuwait, there is a systematic policy which, recently, has been adopted by the government, that in all contracts between foreign investors and government ministries or institutions, Kuwaiti law shall be the law of the contract.

A number of writers argue against application of the municipal law of the contracting host state in the contract in question. Most of their arguments are based on what has been stated in previous arbitration awards. For example, in the Aramco case, the Tribunal stated:

> The regime of mining concessions, and consequently, also of oil concessions, has remained embryonic in Muslim law and is not the same in the different schools [. . .] *Hanbali* law contains no precise rule about mining concessions and is silent a fortiori about oil concessions[28].

In the Abu Dhabi case, Lord Asquith asserted: "But no such Law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the *Qur'an*; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments [. . .]"[29].

In the Qatar case, Sir Alfred Bucknill declared: " [. . .] I have no reason to suppose that Islamic Law is not administered there strictly, but I am satisfied that the law (sic) does not contain any principles which would be sufficient to interpret these particular contracts" (International Marine Oil Company v. Ruler of Qatar, 1953)[30]. This argument has been invalidated in recent times since most of the developing countries, including Middle East countries, have developed advanced legal systems obtained from Western laws, which is no justification for not applying the national laws of these countries in these contracts[31].

From the above discussion, it seems there are two clear regional perceptions of international contract principles, the first, the application of the municipal law of the

contracting state, and the second, the flexibility of the international contract affording the right to modify the contract. Therefore, in practice, regional legal culture in respect of international contracts is always there and plays a significant role in any harmonisation process.

3.4 Contemporary Issues in the adjudication of international contracts in the Middle East

Previous sections of this paper have focused upon the impact of regionalism in relation to Middle East perceptions of International Contract Principles; this section will focus on a very prominent aspect of international commercial contract principles, that is, the nature of the contract between the arbitral parties and arbitrators. What is vitally important to analyse here is the precise difference between modern international contract law and the Middle East with regard to the arbitrator's legal status according to international arbitration contracts.

Arbitrators are free to create their own express contract with the parties setting out their rights, responsibilities, and liabilities regarding the arbitration. Unfortunately, as arbitrators do not regularly enter into a separate contract with the parties for the provision of arbitral services, a different method is necessary to determine the terms and conditions of the *receptum arbitri* (This term is used in Roman law to express the agreement to submit to arbitration and to have an informal assumption of a guarantee for a specific effect or specific result) (Franck, 2000a).

3.4.1 Immunity versus liability. Before discussing the immunity and liability of arbitrators under these two different legal cultures and the impact of regionalism in respect of this issue, it is worth discussing arbitrators' relationship to the arbitration contract. In general, arbitrators must accept their appointment in writing, but it is unclear whether this "acceptance" creates a distinct contract between the parties and the arbitrators.

Under modern law, as well as in Middle East countries, arbitrators are part of the arbitration agreement with differences. In Norjarl v. Hyundai (1990), for example, the court explained that the "arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to the arbitration agreement which becomes a trilateral contract."[32] English court pointed out that arbitrators become parties to the arbitration agreement by accepting appointments under it[33].

This perspective is also accepted in some Arab Middle Eastern countries. For example, in Lebanon and Yemen, an arbitrator becomes a party to the agreement to arbitrate and has a contractual relationship with the parties that may result in contractual liability. In these countries, arbitrators may also be bound by the terms of the parties' arbitration agreement[34] particularly because of the influence of the civil law tradition and Islamic law[35], it is likely that such liability can be based upon the contract. However, because of religious tradition it is also necessary to consider Islamic Law sources, mostly the *Qur'an* and *Shar'ia* to determine liability. As has been discussed in this chapter, the *Qur'an* emphasises "fulfilling one's obligation" as the fundamental principle that governs contracts (Peter, 1998a)[36] and which can create a basis for arbitrator liability[37]. At the same time, "service contracts [are] of a dubious nature, [and] are also outlawed on the basis of illegal *Mahall* [subject matter] and *(sabab)* [motivating cause]"[38]. Ultimately, however, it is necessary to consult the

Qur'an, the *Shari'a*, and the Code of the relevant country before making a final determination[39].

3.4.2 Express immunity of the arbitrator. When originally proposed, the UNCITRAL Model Law did not contain an express provision making arbitrators liable or immune from their acts or omissions. The Model Law's legislative history indicates that the issue of arbitrator liability was specifically ignored because "the liability problem is not widely regulated and remains highly controversial"(Holtzman and Neuhaus, 1989)[40]. However, some countries addressed this issue when adopting the Law.

The UK's Arbitration Act 1996 provides arbitrators with a statutory basis for immunity in tort, contract, or otherwise (Peter, 1998b)[41]. Section 29 provides an arbitrator with general immunity for anything done or omitted in the discharge or purported discharge of his functions as arbitrator. There are only two specific situations justifying liability if:

(1) an arbitral act or omission is done "in bad faith", (Thomas, 1997)[42]; and

(2) a court determines withdrawal is unreasonable[43].

Although immunity under the Arbitration Act is fairly broad, unlike the US approach, it is qualified to give parties a remedy for an arbitrator's international misconduct[44].

The immunity of arbitrators from suit is partly based upon the doctrine of judicial immunity and often on whether an arbitrator's responsibilities are functionally comparable to those of a judge. In essence, although some countries evaluate arbitral immunity on the basis of contractual obligation, others determine the scope of arbitral immunity by evaluating an arbitrator's similarity in status to that of a judge.

3.4.3 Form of liability of the arbitrator. Unlike most Western countries, many Arab countries create express liability for improper resignation. In these countries there is a tendency to base liability on faults such as inappropriate withdrawal, failure to render an award, and general failure to abide by the terms of appointment. As there is no indication in these countries of immunity, however, liability probably extends to all negligent acts and breaches of duty.

3.4.4 Express liability. In Qatar, an arbitrator is liable to the parties if he withdraws without serious grounds. Similarly, in Tunisia, the 1993 Arbitration Code does not provide any immunity for arbitrators and, instead, expressly subjects an arbitrator to damages if he "withdraws without good reason" (Peter, 1998c)[45]. Libya also has a law that does not create immunity but instead provides for an arbitrator's liability for withdrawal without good reason (Peter, 1998d)[46]. Under the Lebanese Code of Civil Procedure (1985), the law expressly provides that an arbitrator "will become liable" if he withdraws without sufficient reason[47]. However, in international arbitration, parties may opt out of this provision through agreement.

Other Arab countries create liability for resignation but add additional bases of liability. In Syria, if arbitrators resign except for a serious reason they may be required to compensate the parties[48]. Moreover, since arbitrators are not subject to the same procedure for judicial liability, arbitrators are liable for any negligence or fault committed during the arbitration.

Under the Kuwait. Arbitration Law of 1980, there is only one stated ground for an arbitrator's liability. Specifically, "if the arbitrator, without serious grounds, refrains from acting after having accepted his mission, he may be liable in damages to

the parties"[49]. But, because arbitrators are also required to accept their appointment in writing, failure to abide by duties enumerated in the arbitration law is likely to lead to liability. Morocco has a similar scope of arbitrator liability. Under the Arbitration Act of 1974, "arbitrators cannot refuse to act once they have started, else they shall have to pay compensation to the parties for the damage thus caused"[50].

Saudi Arabia applies traditional Islamic law principles to the issue of arbitrator immunity. Although there is one primary basis for liability, its potential is quite broad. The *Qur'an* contains the basic principle that, "he that mediates in a good cause shall gain by his mediation; but he that mediates in a bad cause shall be held accountable for its evil"[51]. Under this general principle, an arbitrator can be liable for negligence in "failing to take note of important documents made by one of the [parties]" (Al-Hejailan, 1979)[52]. Essentially, an arbitrator is liable for nearly any fault he commits which results in damage to any party. Although there was a regulation proposed to hold arbitrators liable for inappropriate withdrawal, this was never enacted. Instead, Article 11 of the 1983 Arbitration Regulation of Saudi Arabia provides that if the parties remove an arbitrator who was "not the cause of such removal", the arbitrator may "claim compensation" against the parties[53]. It is not clear, however, that the failure to enact a legislative provision will provide immunisation against the otherwise broad potential for arbitrator liability in Saudi Arabia.

3.4.5 Implied liability. In several Arab countries, the potential liability of an arbitrator is quite broad. In Iraq (no evidence of change post-Sadaam), after accepting appointment, "an arbitrator may not decline to act without a just cause"[54]. Although this does not expressly create liability, at least one commentator asserts this becomes a part of the *receptum arbitri* and is an implied basis of liability. The potential scope of immunity, however, is never discussed.

Although the Egyptian Code of Civil and Commercial Procedure of 1968 provided for arbitrator liability for resignation without comprehensively adopting the UNCITRAL Model Law, there is no express provision for arbitrator liability or immunity[55]. Although some have asserted that the duties implied by the 1994 Act create the basis for liability, this is not necessarily certain.

Jordan's Arbitration Act (1952) does not contain an express provision for liability, under the current law an arbitrator is generally not liable if he refuses to perform his mission; but if a party can prove a link between the damage and the refusal of an arbitrator to act, the general rules of liability apply[56].

Yemen has a similar standard of liability. Although arbitrators are not required to accept in writing, the arbitrator is a party to the agreement to arbitrate and is contractually bound to perform according to the agreement and is potentially liable for any breaches[57]. Overall, the potential for liability in these countries is quite extreme in comparison to that prevailing in common law countries (Franck, 2000b).

3.4.6 Implications of regional variations. The application of different laws to the same contractual relationship between the parties and the arbitrators will contravene the idea of uniform treatment of these contracts. This can result in unjustifiable discrimination against arbitrators where they live in countries with higher standards of liability. If the domicile is the applicable law, however, there is a greater probability that the arbitrator will be familiar with the proper standard of liability and act accordingly. Ultimately, this slight increase in certainty does not justify the significant variations in arbitrator liability. Particularly as it can result in variations

among the behaviour of arbitrators, there can be unacceptable varying levels of arbitrator performance. For example, within the same panel, US arbitrators could covertly engage in fraud without fear of repercussions while Saudi Arabian arbitrators adhered to the strictest letter of the law. Although not all arbitrators behave in the same way, this startling inconsistency in behaviour significantly undermines the respect for and integrity of the international arbitration process (Franck, 2000b, p. 18), or the prospect for evolution of a coherent, harmonised set of international rules.

In summary, first, in the West as well in the Middle East, arbitrators become a party to the agreement to arbitrate and have a contractual relationship with the parties; second, Arbitrator personal liability varies between states mainly between Western and Middle Eastern countries; third, occasionally, there is uncertainty as to whether municipal or international rules govern arbitral contracts; fourth, while Western legal culture provides arbitrators with a basis for immunity, that of the Middle East provides liability of arbitrators; fifth, the UNCITRAL Model Law's legislative history ignored the issue of arbitrator liability because it is highly controversial; and sixth, the contractual status of arbitrators *vis-a-vis* the original contracting parties who are in dispute varies.

Notes

1. See also Gidon Gottlieb, supra note 81, at 568 ("(The character) of juridical activities in relational societies" includes "the negotiation and renegotiation of juridical instruments accepted (in the west) as binding."); Macneil, supra note 77, at 396 ("The Chinese see the institution of contract, resolution of contractual disputes, and contract law as different parts of one integrated whole [. . .]. This has not been the case in the United States."). As in supra note 2. See Henderson, supra note 12, at 174 (noting that in Confucian philosophy, "justice (is) relational"). Op. cit. supra note 2, p. 7. See supra note 93, p. 27.
2. See Henderson, supra note 12, at 174 (noting that in Confucian philosophy, "justice (is) relational"). Op. cit. supra note 2, p. 7. See supra note 93, p. 27.
3. Chen (1973) at 4 ("If you are aggrieved, going to court is an admission that the other person does not have sufficient respect for you to settle properly outside of court. It is, therefore, an admission of lost face."); Cohen, supra note 87, at 1208 ("A lawsuit caused one to lose "face" since it implied either some falling from virtue on one's own part [. . .] or, what was also embarrassing, the failure to elicit an appropriate concession from another as a matter of respect for one's own "face.") See infra note 115 for citations to scholars whose work suggests that traditional aversions to public litigation may have resulted more from structural than cultural factors. See footnote [1], Op. cit. 3. p. 7. See also supra note 96, p. 28.
4. McConnaughay emphasised in his supra note 107, at p. 29 that: He do not intend his depiction of this contrast to suggest a preference for Asian over Western outcomes, for without the "equalising" effects of law, relational outcomes clearly will tend to preserve, rather than address, any social and/or economic inequities that might be present in any given relationship. However, such outcome determinative disparities are less likely to occur in the world of cross-border commerce, and the deep Asian preference for relational justice and dispute resolution mechanisms exists in that context as well.
5. *Mu'atat* is when the offer and acceptance are expressed by an act with no need for any formula. For example, when a shopper tenders five dirhams to a trader and takes two melons from the stall, and the trader takes the money and remains silent. See Saleh (1988, supra note 4, p. 15).

6. A promise to contract is not, as a matter of principle, valid by Shari'a standards. Thus, the contracting parties are urged to make use of the past tense or, less satisfactorily, the present tense, which indicates there is no separation in time between their intention to transact and the transaction they pass. See Saleh (1988, supra note 5, p. 16).
7. Expressing the intent means other than words, such as nodding, is not valid except for the mute. Contracts by mere conduct were first tolerated with respect to trivial subject-matters only. See Saleh (1988, supra note 6, p. 16).
8. *Byzantine Empire* is the term conventionally used since the nineteenth century to describe the Greek-speaking Roman Empire during the Middle Ages, centred at its capital in Constantinople. In certain specific contexts, usually referring to the time before the fall of the Western Roman Empire, it is also often referred to as the Eastern Roman Empire. See Wikipedia.
9. The Sassanid Empire or Sassanian Empire (in Persian: Sassanian) was the name given to the kings of Persia (Iran), during the era of the third Persian Empire, from 224 AD to 651 AD. The dynasty ended when the last Sassanid Shah, Yazdegerd III, lost a 14-year struggle to drive out the early Caliphate, the first of the Islamic empires. The empire's terrority encompassed parts of today's Iran, Iraq, Armenia, Afghanistan, eastern parts of Turkey (during Khosrau II's rule of Egypt, Jordan, Israel, Lebanon), eastern parts of Syria, North West India, Pakistan, Caucasia, Central Asia and Arabia. See Wikipedia.
10. It is related that 'A'isha said, "Barira came and said, "I have a freedom-contract with my owners for nine *awqiyas*, with one *awqiya* every year. Help me." 'A'isha said, "If your people like, I will give it to them all at once and then I will set you free. but your *wala'* will be with me" a Barira went to her owners and they refused to let her do that. She said, "I offered that to them and they refused until they kept the *wala'*." The Prophet Muhammad heard about that and asked me about it and I told him. He said, "Take her and set her free and give them the condition of the *wala'*. The *wala'* is with the one who sets free." 'A'isha said, "The Prophet Muhammad stood up among the people and praised and glorified Allah. Then he said, "Following on from that: why is it that some men among you make conditions which are not in the Book of Allah? Any condition which is not in the Book of Allah is invalid even if it is stipulated a hundred times. The decision of Allah is truer and firmer. What is wrong with some men among you who say, "Set free, so-and-so, and I will have the w*ala'*. The *wala'* is for the one who sets free." Chapter 53. Chapter on the Mukatab Sahih Collection of Al-Bukhari.
11. Ibn Taymiyya, al-Fatawa, 3:474. See also idem, Qawa'id, 112; idem, Nazariyyat, 226, etc. See (Vogel and Hayes (1998), supra note 3, p. 98).
12. Ibn Taymiyya, al-Fatawa, 4:47 off.
13. Cattan (1967), p. 81. Ibn Taymiyya, al-Fatawa, 3:474. See also idem, Qawa'id, 112; idem, Nazariyyat, 226; etc. See Vogel and Hayes (1998, supra note 3, p. 98), p. 157.
14. Saudi Arabia v. Arabian Oil Company (Aramco), 27 International Law Report, p. 215 (see footnote [11], p. 158).
15. Curtis Christopher, p. 335 (see footnote [11], p. 159).
16. Elwan Mohammed, p. 310; Rabah Khasan, p. 188; Mughraby (1966). See footnote [11], p. 161.
17. See footnote [11], p. 161.
18. See footnote [11], p. 163.
19. Al-Saeed (2002, p. 159). Basic Oil Concession Contracts (Middle East), Supplement No. 1.
20. Saudi Arabia v. Arabian American Oil Company (Aramco). See Al-Saeed (2002).
21. See footnote [11], p. 167.

22. Saudi Arabia v. Arabian American Oil Company (Aramco), Footnote 22, p. 165. See footnote [11], p. 169.
23. See Basic Oil Laws and Concession Contracts (Middle East), Supplement No. XXXI, p. c-1. See footnote [11], p. 169.
24. See footnote 23. See also Kronfol Zouhair, p. 76.
25. See Petroleum Development Ltd v. Sheikh of Abu Dhabi, p. 534. See footnote [11], p. 170.
26. Al-Saeed (2002, p. 166) and International Marine Oil Company v. Ruler of Qatar (1953). See also Saudi Arabia v. Arabian American Oil Company, Op. cit., p. 167.
27. El-Sheikh Fathi El-Rahman, Op. cit., p. 241. Also, see Article 21, 22 of the contract between Yacimientos Petroliferos Fiscales (a national Argentinian oil company) and Pan American International Oil Company of 1957. International Law Report (1964, supra note 3).
28. Saudi Arabia v. Arabian Oil company (Aramco), see footnote [11], pp. 163, 172.
29. Petroleum Development Ltd v. Sheikh of Abu Dhabi, Op.cit., p. 534.
30. International Marine Oil Company v. Ruler of Qatar (1953), see footnote [11], p. 172.
31. See footnote [30], p. 173.
32. Norjarl v. Hyundai (1991) 1 Lloyd's Rep. at 536.
33. Franck (2000a, p. 3).
34. Traditional Shari'a scholars suggest that an arbitrator should expressly accept his appointment. But modern jurists tend to assert that the agreement of the parties alone to execute an arbitration agreement is not sufficient, and instead, the consent of the arbitrator must be obtained. The *Shari'a* does not specifically indicate, however, whether this arbitration agreement must be in writing. See Saleh, supra note 22, at 39-40. See footnote [27], International Law Report (1964, supra note 47, p. 27).
35. Various Islamic codes have imported the Western concept of an irrevocable mandate and can prevent an arbitrator from being removed, except through established court procedures. In contrast, under tradition established in the *Shari'a*, the parties' appointment of an arbitrator is revocable at any time prior to the delivery of the award. See Saleh, supra note 22, at 24, 39-44. See footnote [27], International Law Report (1964, supra note 48, p. 27).
36. See Rayner, supra note 46, at 87. The *Qur'an* also states that, "O ye who believe, respect your contractual undertakings" and "He authorised what he did not forbid" Peter (1998a).
37. Under the *Qur'an*, arbitrators are required to judge according to the provisions of the *Qur'an* and arbitrate with observance of the rules of fairness and justice. See Saleh, supra note 22, at 15-16. International Law Report (1964), see footnote [27], supra note 51, p. 27.
38. See Rayner, supra note 46, at 156. International Law Report (1964), see footnote [27], supra note 52. p. 27.
39. International Law Report (1964, p. 27), see footnote [27].
40. Holtzman and Neuhaus (1989) citing First Secretariat Note, A/CN.9/207, Para. 70. See also id. at 1443, 1148-50 (providing the legislative history of the rejected provision regarding arbitrator liability). See footnote [27], International Law Report (1964, p. 27), see supra note 213. p. 42.
41. See Peter (1998b). This broad statutory immunity, however, does not protect an arbitrator from liability incurred by reason of resigning. Sections 29 (3) and 25 do provide for the potential liability of an arbitrator for his withdrawal from the arbitration. The parties are free to agree with an arbitrator of the consequences of resignation regarding entitlement to fees or expenses and any liability. See arbitration Act 25 (1). Otherwise, a resigning

arbitrator must apply to a court for: (1) relief from liability or (2) an order regarding fees and expenses. See Arbitration Act 25 (3). In making the determination about liability, the court will consider whether the resignation was reasonable. See arbitration Act 25 (4). This provision is unique because it allows an arbitrator to go to court prospectively to obtain a "grant (of) relief from liability" incurred by reason of resignation. See Arbitration Act 25 (3) (a). International Law Report (1964), see footnote [27], supra note 220, p. 42.

42. One important critique of the 1996 UK Arbitration Act is that it does not expressly define "bad faith", but rather leaves the judiciary to interpret this term. See Thomas (1997). Currently, under English law, "bad faith" means actual malice or actual knowledge of the absence of any power to discharge the function at issue. Peter (1998b, supra note 220, at 31-2); see also Melton Medes v. Securities and Inv. Bd., (1995) 3 All. E.R. 880, 890 (defining "bad faith" in a narrow sense that "a moral element is an essential ingredient. Lack of good faith connotes either (a) malice in the sense of personal spite or desire to injure for improper reasons, or (b) knowledge of absence of power to make the decision in question."
43. See English Arbitration Act of 1996, 25.
44. See footnote [43], supra note 84, p. 11.
45. Peter (1998c) (citing 1993 Tunisia Arbitration Code, Article. 11). In Bahrain, under domestic arbitration law, if an arbitrator withdraws without good cause, he may be liable in damages. See El-Ahdab, supra note 13, at 108 (citing Bahrain code of Procedure, Article. 234. Although there is a Bahraini International Arbitration Act, no provision within this statute expressly addresses the issue of arbitrator liability).
46. Peter (1998d) (citing Libyan Code of Civil and Commercial Procedure of 1953, Article. 748).
47. See Lebanon New Code of Civil Procedure, Article. 769 in El-Ahdab, supra note 13, at 864.
48. See Syrian Code of Civil Procedure, Article. 514 in El-Ahdab, supra note 13, at 928 and Saleh, supra note 22, at 100. See footnote [27], International Law Report (1964, supra note 268, p. 46).
49. Kuwait Law No. 38, Article. 178 in El-Ahdab, supra 13, at 885.
50. Act of 28 September 1974, Article. 313.
51. Sanders, supra note 276, at 17 (citing Koran, Al-Nisa (Women) 4:85).
52. Al-Hejailan (1979), See footnote [27], International Law Report (1964, supra note 289, p. 47).
53. Al-Hejailan (1979), see footnote [52], El-Ahdab, at 27-8 (citing Arbitration Regulation of Saudi Arabia, Article. 11).
54. Al-Hejailan (1979), see footnote [52], also 1969 Iraq Code of Civil Procedure, Article. 260, in El-Ahdab supra note 13, at 837.
55. Al-Hejailan (1979), see footnote [52], El-Ahdab. Law Concerning Arbitration in Civil and Commercial Matters, supra note 13, at 821-35.
56. However, in the new Jordanian Arbitration Act (2001), there are no express provisions for arbitrator liability, instead, there are uniform standards allowing for dismissal of an arbitrator and the setting aside of the award.
57. See Yemen Presidential Decree No. 22-1992 Issuing the Arbitration Act, Article. 4 at 755.

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