International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award

by

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Abstract

Arbitration is one of the oldest legal systems of solving disputes, albeit, it was simple and without any power to enforce the outcome of the tribunal. In modern ages, arbitration has transformed to a more complicated and sophisticated system of solving international commercial disputes.

In recent decades, enforcement of tribunal award benefited from various conventions like New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). However the enforcement still has few difficulties. One problem is related to the enforcement of the award in different countries. Based on Article V (2(b)) of New York Convention, countries can prohibit enforcement of award if it is against public policy of that country. This broad definition has created many problems especially in some Islamic countries in Middle East due to frequent use of this defense.

Islamic countries in Middle East have tried to implement new arbitration legislations from western countries in order to acclimate themselves with modern International commercial and political relations. However facing biased actions from western countries toward their cultures, have made these adaptations more challenging.

Considering the claim of both parties, one should not forget the strong influence of culture in International relations as it defines many actions and concerns of society. Ignoring this issue can create many problems and hostile atmosphere between nations that even affect International commercial arbitration enforcements.

Knowing the significance of effect of culture, it is essential for many lawyers, scholars and practitioners to study and learn more about culture and norms of other countries. Multi-cultural
countries like Canada and commercial hubs like Dubai can facilitate understanding different cultures by creating cultural and legal centers.
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>AAA</td>
<td>American Association of Arbitration</td>
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<td>ICDR</td>
<td>The International Centre for Dispute Resolution</td>
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<td>SIAC</td>
<td>Singapore International Arbitration Centre</td>
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<td>HKIAC</td>
<td>Hong Kong International Arbitration Centre</td>
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<td>NAI</td>
<td>Netherlands Arbitration Institute</td>
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<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission</td>
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<td>ICAC or MKAS</td>
<td>The International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation</td>
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<td>LMAA</td>
<td>The London Maritime Arbitration Association</td>
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<td>WIOP</td>
<td>World Intellectual Property Organization</td>
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<td>Die Deutsche Institution Für Schiedsgerichtsbarkeit or DIS</td>
<td>German Institution of Arbitration</td>
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<td>BCICAC</td>
<td>The British Columbia International Commercial Arbitration Centre</td>
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<td>USAID</td>
<td>US Agency for International Development</td>
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<td>GCC</td>
<td>Gulf Cooperation Council</td>
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<td>BIT</td>
<td>Bilateral Investments Treaty</td>
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<td>CSCD</td>
<td>Committee for Settlement of Commercial Disputes</td>
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<td>AALCO</td>
<td>Asian-African Legal Consultative Organization</td>
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<td>TRAC</td>
<td>Tehran Regional Arbitration Centre</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>GAFTA</td>
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Chapter 1 - Introduction:

Since the beginning of the civilized world when human beings first gathered in small communities, arbitration was a method employed to solve disputes. In ancient societies, the elders acted as arbitrators commonly settled disputes. The simple procedure of arbitration, in which one person acted as the judge, has evolved over time to become a far more complicated system with various advanced rules. Arbitration is one of the oldest legal systems in the world as it was the simpler, more self-regulated and effective way of solving disputes working alongside – or instead of – official courts:

The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense than is involved in a recourse to the court.¹

Although arbitration lost the simplicity of its early age as its rules and procedures became more refined and methodical, it also grew to become more comprehensive.² One of the reasons

² There are different reasons explaining why arbitration grew as an alternative way of resolving disputes against the national court systems. One reason is the political relationship between countries. International law recognizes the sovereignty and independence of each state. At the same time, as a result of political changes around the world, relations between countries have become increasingly complicated. Given the complexity of international relations, coupled with the idea of sovereignty under international law, international disputes cannot always be resolved by national legal systems alone. Conceptually, because the idea of sovereignty is sacrosanct under international law,
arbitration has become an alternative to the court system even in modern world is its ability to resolve international commercial disputes. In the commercial world, national legislation could act as an obstacle to business development. Many extraneous factors affect the quick resolution of commercial disputes under national legislation, such as regulatory compliance issues and related expenses, time-consuming court procedures as well as countless other idiosyncrasies stemming from different legal systems. Some commentators believe that the interference of courts in international disputes acts as an obstacle for international business. For example, a report by a Business Week poll mentions that, “two-thirds of top U.S. corporate executives believe that the American civil justice system significantly hampers the ability of American companies to compete with Asian and European rivals.”

One of the universal features of international commercial arbitration, in contrast with national courts, is the flexibility it provides to the parties in dispute. As a result, the parties would be at an immediate advantage –irrespective of the differences in legal cultures and languages –were the inclusion of international commercial arbitration to be adopted within a national legal system. However, as arbitration continues to develop, complex problems have arisen whilst easy questions have remained unanswered. Practical problems, such as how to

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4 However, this supposed advantage does not seem to work all the time. The difference in cultures among lawyers and parties in arbitration sometimes act as a challenge to fairness of the system.
enforce arbitral awards in different jurisdictions, are one of the main concerns of the arbitration system.

Enforcement of arbitration awards have benefited from some international conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). These conventions act as international rules prohibiting any signatory country from rejecting enforcement of an award or interpreting it as being a foreign judgment. These rules are recognized by many countries; however, they are not always internationally followed. In some countries, including Islamic countries, enforcement of arbitration domestically faces different hurdles. In the majority of these countries, an international arbitration award is challenged due to its being interpreted as a foreign judgment. The challenges in enforcing arbitral awards can be indirectly attributed to the cultural perception of the arbitration process in these countries.

The Middle East is a very important region for international commerce, primarily due to the major deposits of oil and gas that are located in this region as well as the fact that its large population cannot be ignored by investors who would intelligently view this as a valuable market to invest in. However, political, legal, and religious limitations arising from Islamic values can create difficulties in commercial relations. Such circumstances necessitate an acceptable


6 The phrase Arab arbitration and Islamic arbitration are very similar in nature. The birthplace of Islam was an Arab country and in its initial stages Islam flourished in Arab states, now widely known as Muslim countries. These countries are mainly located in the Middle East. For this reason, in this thesis, the term Arab countries and Islamic countries are used interchangeably. However, one country in the region that is not an Arab country, the Islamic Republic of Iran, still has Islamic law (Shari’a) as its main source of law.
alternative dispute resolution system—such as arbitration—that enjoys many advantages: the most important of which may very well be its most evident: flexibility.

It appears that Arab countries were trying for many years to adapt their national laws with international arbitration, but after many futile efforts, they are now starting to close their doors to international arbitration. Two explanations have been put forth in the literature for this phenomenon; it is argued by western nations that Arab countries have primitive laws and lack advanced knowledge about arbitration. On the other hand, Arab countries claim that one of the reasons behind their attitude toward arbitration is that Western countries show biased behavior against Arab lawyers, arbitrators, and even Islamic laws. Unfortunately, there is little information and only limited statistics available with respect to analyzing the effect of culture in arbitration relationships. To this end, more study and research is required before a conclusive analysis can be established.

In the first part of this thesis, we will look at the international arbitration award, the advantages and disadvantages of arbitration and following that the enforcement of arbitral awards. Cultural and legal differences have been the two significant factors of conflict in the relations between the West and the Middle East. My thesis explores these cultural variations and their skewed understanding by both the West and the Middle East. This lack of appreciation for each other’s culture has accounted for various disputes in the arbitration system, creating an undesirable atmosphere between West and Islamic countries and thus leaving Islamic countries

7 See section 3.2.3, page 64.
8 The phrase Western countries in this context refers to developed countries, which have their roots into Roman civilization and Roman law and are located in the West and central of Europe and North America.
to view the arbitration system as a hegemonic Western creation built to not only subjugate, but to also gain control over their commercial relations and their natural resources.

For understanding the culture of Islam it is necessary to look at its history and its sources (Shari ‘a), thus in the third chapter we briefly study the background of Islamic culture. Also examined, is the enforcement of arbitration award in Muslim countries in the Middle East and the affect of culture in enforcement of awards, with reference to the arbitration systems of two Muslim countries, Iran and Saudi Arabia.

Chapter 2 - Arbitration:

Arbitration is generally described as, “a mechanism for the resolution of disputes in private, pursuant to an agreement under which two or more parties agree to be bound by the decision of one or more independent and impartial arbitrators, who, after a fair hearing and according to rules of law, render an enforceable award.”

Today, the cost of litigation seriously threatens the viability and productiveness of companies, and the individuals involved in the litigation process – for example, civil litigation in the U.S. costs $200-$300 billion annually.

These costs reflect not only the expenses of lawyers and courts but also damage to the goodwill of businesses and the time that a company or an individual has to spend in order to prepare for


and participate in legal actions. Some cases may take from four to five years to get before the courts, and during those years, the time that the staff of a company spends on preparing the evidence and documents for the company’s lawyers is deducted from the company’s operations. Moreover, the judgment of the court will most certainly affect the business relationship of the parties, because many of judgments are not confidential which in turn may jeopardize future business relationships with other companies who become aware of the decision. On the other hand, arbitration processes are confidential and seldom published in law journals, therefore the outcome of the tribunal will not affect the goodwill of the losing company.

Other options are available to parties for resolving their disputes in order to avoid the difficulties and costs of going to trial, called Alternative Disputes Resolutions (ADRs) include as mediation, expert determination, neutral evaluation, med-arbitration and arbitration. These

11 Todd B. Carver, supra note 3.
12 Another widely used ADR method is mediation, in which a trained neutral third party is chosen by the parties to assist them to resolve their disputes, (Ruth D. Raisfeld, “How Mediation Works: A Guide to Effective Use of ADR” (2007) 33(2) Employee Relations Law Journal 30 at 31). or in which “a neutral third party, the mediator, facilitates negotiation between the parties in order to assist them to reach a settlement.” (Andrew Tweeddale & Karen Tweeddale, Arbitration Commercial Disputes: International and English Law and Practice (Oxford, Oxford University Press, 2005 at 18) at 6). Mediation is very similar to arbitration; an impartial third person is chosen by the parties, to help them resolve their disputes inexpensively and quickly. But, like expert opinion, the mediator's decision is not binding and has no legal consequence given that it is not enforceable. Even if the parties agree to submit their dispute to mediation, they are not obligated to continue the process after the first meeting. (Tibor Varady, John J. Parcelo III & Arthur T. Von Mehren, International Commercial Arbitration - A Transnational Perspective, 2nd ed. (US, Thomson West, 2003) at 9). The mediation’s purpose, like other dispute resolutions, is to resolve the referred dispute faster, cheaper and in a cooperative manner. Mediation has many different forms, which cover many diverse fields of activity each with its own special characteristics and conditions. (Babak Barin, Andrew D. Little & Randy A. Pepper, The Osler Guide to Commercial Arbitration in Canada: A practical introduction to domestic and international commercial arbitration , (The Netherlands, Kluwer law international, 2006) at 5).

In many complicated cases involving particular technologies, judges will seek expert opinion on the dispute in question, and these expert opinions often affect the rendering of final judgment. In an ADR system, the parties themselves may ask for an expert opinion on the dispute under consideration, a process that many favor because it is fast and inexpensive. (Todd B. Carver, supra note 3) It is usually used for resolving valuation disputes like rent review, accountancy, and intellectual property disputes. (Andrew Tweeddale & Karen Tweeddale, Arbitration Commercial Disputes: International and English Law and Practice (Oxford, Oxford University Press, 2005 at 18).
alternatives are both characteristically and procedurally different from national courts, but all have a common purpose: solving the legal problems between the parties in a fast, inexpensive and often more private manner.

The Industrial Revolution significantly influenced international commercial relations between businesses, resulting in a paradigm shift in the way business relationships were forged, nurtured and executed, and therefore, in how disputes were resolved. Entrepreneurs and their business partners are constantly thinking and looking outside the box as well as beyond usual litigation and court procedures to resolve their business disputes. As a result, arbitration started to grow and develop at a tremendous pace. International arbitration offers the opportunity to

There are differences between the expert system and arbitration; like arbitrators, experts are decision-makers, but their decisions are not binding. Difficulties arise when it is not clarified in the agreement whether the person is acting as an arbitrator or an expert: If the person “has a mandate to resolve a dispute between the parties and does so in a manner that has the inherent characteristics of an arbitrator, the person is more likely to be considered an arbitrator than an expert.” (Babak Barin, Andrew D. Little & Randy A. Pepper, The Osler Guide to Commercial Arbitration in Canada: A practical introduction to domestic and international commercial arbitration, (The Netherlands, Kluwer law international, 2006) at 5). On the other hand, if the parties ask the person to give his or her own independent opinion without the need to reach any conclusion, then the person is most likely considered an expert. However, sometimes an expert may even be given the power to decide, but this option is exceptional: “Except when there is an agreement to the contrary, the findings and the recommendations of the expert will not be final nor binding for the parties.” (Mauro Rubino-Sammartano, International Arbitration - Law and practice, 2nd ed. (The Netherlands, Kluwer Law International, 2001) at 17). The parties rarely grant such authority to the expert. Another difference between an expert system and arbitration is the possibility of having a court review the award of arbitration, while an expert opinion is not reviewed. As John Kendall observes: “An arbitration award may be set aside because the procedure fails to conform to the statutory standard of fairness which is closely derived from the principles of natural justice: no such remedy is generally available to invalidate an expert’s decision.” (John Kendall, Expert Determination, 3rd ed. (London: Sweet & Maxwell, 2001) at 2). However, whenever the expert decides a legal issue, he or she acts as an arbitrator. In the Montaldo case (Montaldo v. G.A.N. Vie, Court of Appeal, Paris, June 13, 1989, Rev. Arb. 1990) 3, 717), the court stated, “[w]hen the parties have expressed the intention that the issue in dispute (the percentage of permanent injury due to an accident) be finally decided by a medical doctor, his decision, however framed, is an award and may be attacked as such.” The opinion or report of an expert can be challenged if the report was made wrongly because of fraud or bias. (V. v. W et al., Swiss Federal Court, September 30, 1993, ASA Bull 1994, I, 46).

14 “In neutral evaluation, an experienced evaluator will assess the issues in dispute and give a non-binding opinion about the likely outcome of the case if it goes to arbitration or to court.” Financial services commission of Ontario: <http://www.fsco.gov.on.ca/en/drs/Pages/neutralevaluation.aspx>

15 “In this process, the parties agree that if mediation does not produce a negotiated agreement, the mediator will change identity and act as an arbitrator to decide the dispute” (AlenRedfern, Supra note 1 at 37).
resolve disputes (commercial or political) quickly through practical solutions rather than relying on the inflexible and lengthy processes of national litigation that the existing systems had to offer.

Interestingly due to the nature of international arbitration, there is no internationally accepted definition for arbitration;\(^\text{16}\) each country – or more accurately, each legislation – may apply its own definition or its own description for arbitration. A staggering majority of the definitions, however, commit to the common principles of arbitration: “the need for an arbitration agreement, a dispute, and a reference to a third party for its determination and an award by the third party.”\(^\text{17}\)

Many theories have been developed to explain why arbitration is gradually becoming more useful and important in the new internationally oriented world; these theories share some common reasoning. One of the main reasons is the increased complexity of international contracts and the disputes which they give rise to. These kinds of contracts are a result of the technical, economic and social development of the last one hundred years,\(^\text{18}\) with advanced technologies forcing many companies to become specialized in one specific area. Companies possessing propriety rights to such critical and advanced technologies often engage in a transnational business. It is highly unlikely that one small company or even groups of individuals would carry out a complicated project in other parts of the world, given that some of


\(^\text{17}\) Ibid.

the projects and their financing may be bigger than the capacity of a state’s economy and the state’s gross domestic product. Since these kinds of transnational contracts are commonly made for developing fundamental and basic infrastructure of a country or for big projects to help the economy of a nation, they often have longer terms than standard business contracts. These types of contracts are deemed “international” because the parties are located in different national jurisdictions. These international contracts become more complicated when political issues, international transportation, and international marketing are involved. Therefore, it is customary to insert a standard arbitration clause within international contracts as a means to resolve future contractual disputes and claims. In one study, 62 percent of in-house counsels declared that they insist on the insertion of an international arbitration clause in their contracts. Since arbitrations do not have specific rules borrowed from tradition and/or the legal culture of a country, the rules are flexible and adjustable with the needs of the parties to resolve their disputes. Moreover, arbitration offers other useful features such as privacy, enforceability, simplicity and speed well beyond that of national jurisdictional courts – features that make arbitration a much sought after arrangement for resolving complex contractual disputes. It is noteworthy that the relationship between international commercial arbitration and international contracts or other international disputes is reciprocal. Arbitration aims to resolve disputes in a

19 Ibid.
20 Ibid. at 5.
21 The most common types of international contracts are as follows: Construction and civil works contracts, turnkey agreements (delivery of the whole factory), technology transfer and project financing contracts, primary sector (mining) concession or work contracts, joint venture, management, cooperation, franchising agreements. Simple output or requirement contracts (delivery of goods or services). Ibid. at 4.
more effective, satisfying manner and, international disputes in turn lead to further development and adaptability of the arbitration process to address different problems and concerns in such disputes as they become apparent.

In Canada, none of the arbitration statutes have a comprehensive definition of arbitration; only the province of British Columbia has in its legislation a definition for international or domestic arbitration. The Commercial Arbitration Act defines arbitration as, “A reference before an arbitrator to resolve a dispute under the Act or an arbitration agreement.” In addition, the International Commercial Arbitration Act defines it as, “Any arbitration whether or not administered by the B.C. Arbitration Centre or any other permanent arbitral institution.”

Other provinces governed by common law use the UNCITRAL Model Law (1985) as their source for defining both arbitration as, “any arbitration whether or not administered by a permanent arbitral institution,” and arbitration agreement as, “an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them.”

Before considering the arguments retaining to the effect of culture on international arbitration, it will be useful to explain the advantages and disadvantages of arbitration, in order to appreciate the kinds of problems that arise in arbitration because of cultural differences.

23 Ibid.
24 Ibid.
25 Commercial Arbitration Act, R.S.B.C. 1996, c.55
26 International commercial Arbitration Act, R.S.B.C. 1996, c.233
27 It is a Model Law which is “designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.” Official website of United Nation Commission on International Trade Law. <http://www.uncitral.org/uncitral/en/uncitral_texts/ arbitration/1985Model_arbitration.html>
2.1. Advantages of Arbitration:

Time shows that international arbitration, albeit at a few disadvantages, is still the preferable way of solving disputes,\(^\text{29}\) as it has many advantages for international commerce compared to national court procedure.

It is widely believed that one of the most notable advantages of arbitration over the court system is that it is flexible, more cost effective and less time consuming. However, in some cases arbitration is in fact more expensive and takes more time than regular courts; especially when the case is further complicated by the dynamics of international commercial and political issues.\(^\text{30}\) Still, many of the characteristics of arbitration are useful and important to the commercial world. These (in order of importance) are flexibility, enforceability of award, confidentiality,\(^\text{31}\) and finality.

There are a few other important advantages in the international commercial arbitration system: parties can choose the seat of their arbitral tribunal and solve their disputes in a chosen country instead of going to national courts of two or more countries. This option is useful for commercial parties as each country has its own jurisdiction, language, and legal system. Instead of incurring duplicate legal expenses for multiple proceedings in different jurisdictions, the parties could agree on one arbitral tribunal in a country of their choice. This creates another

\(^{29}\) In 2008 survey, 73% of respondent chose International arbitration mechanism for solving disputes. PWC, supra note 22.

\(^{30}\) This will be argued in the next part: Disadvantages of Arbitration.

\(^{31}\) PWC, supra note 22 at 6.
advantage over national courts, as it gives parties the peace of mind that arbitration will take place in a country in which it is neutral “in the sense that none of the parties to the arbitration has a place or business or residence there.”32 However, there are different views toward the weight of the seat of international arbitration: “One view holds that the seat is important as it determines the support or intervention that may be received from local courts in the courts of arbitration. An alternative view is that the choice of seat is less important because it is often a matter of convenience or governed by the desire or neutrality.”33

The next advantage of arbitration is the use of experts in arbitral tribunals. It is very important for the parties that experts or arbitrators who have specific knowledge and expertise in the subject of the dispute examine their case. This feature of arbitration gains special significance in certain commercial cases such as intellectual property disputes, since many different and complicated technical issues are involved in this type of dispute. There is the possibility that the judge of a national non-specialized court does not have the specific expertise needed whereas an expert arbitrator can understand the question and the way the business works in that area.

It can be argued that finality of tribunal decisions and ease of enforcement of international arbitration awards are fundamental advantages of arbitration over national judicial systems. Any effort in an arbitral tribunal to get a conclusion (an award) will be useless without the ability to enforce it. Moreover, enforcement of arbitration can become paralyzed if it is not final. This means the relation between these two is reciprocal. Unlike national court wherein each party can go to a higher level for an appeal, in arbitration there is not any appeal mechanism

32 Alen Redfern, supra note 1 at 92.
33 PWC, supra note 22 at 13.
in existence. This important factor attracts many lawyers, practitioners, corporations and businesses toward arbitrations. Although applications to challenging awards have increased, the majority of practitioners (91 percent) reject the possibility of having an appeal mechanism in arbitration.\(^{34}\) However, these two characteristics of arbitration are heavily dependent on the legislation and culture of each country and on how developed their legal systems are.\(^{35}\) As the main problems of arbitration arise when it comes to enforce the arbitral award, we will look at enforcement and the way western countries will practice.

### 2.2.1. Enforcement of Arbitral Award:

International arbitration awards are generally easier to enforce than foreign court judgments. In general, countries prefer to keep their legal independence; therefore, a national court usually resists accepting or enforcing foreign-court judgments. It is a general rule that nations are not subject to the jurisdiction of any foreign court;\(^{36}\) but arbitration awards do not suffer the same limitation of foreign court judgments. A foreign court judgment follows the political and legislative system of that foreign country whereas arbitration has separate rules,

\(^{34}\) PWC, supra note 22 at 15.

\(^{35}\) Economic and technological developments are factors that allow us to divide countries into two distinctive categories: developed or industrialized countries, and developing or undeveloped countries. Similarly, categorization can be made with respect to the legal systems of these countries. In comparing legal systems of different countries, some jurisdictions are considered more developed than others based on the complexity and effectiveness of the country’s legislation as well as the amount and variety of case law available to address different situations.

seats and independent arbitrators. In addition, foreign judgments are not protected by international treaties as arbitration awards are.\textsuperscript{38} For these reasons, enforcement of foreign judgments is not as widespread as arbitral awards.

However, the strict theory of sovereign immunity has changed, to some extent, with time. The argument most commonly accepted now is that there is a distinction “between acts of a state in its sovereign capacity and acts of a state in its commercial capacity.”\textsuperscript{39} This not only allows the national courts to have a broader view towards enforcement of foreign judgment, but also helps them to contain their public policy interpretation when it comes to enforcement of arbitration award.\textsuperscript{40}

Although the majority of corporations fulfill the awards rendered by international arbitration tribunals, some of the losing parties are reluctant to comply.\textsuperscript{41} Therefore, it is understandable that, after the arbitration tribunal renders the award, the winning party wants to carry out the award in the shortest possible time. This can be executed in a variety of ways. First, the winning party can push the other party to comply with the order by using commercial pressures. The winning party will have more power in this respect if the losing party wishes to continue its relationship or if there is a more commercial benefit such as being involved in a business in a certain region or in a technical industry in which the players are limited.\textsuperscript{42} In such situations, regional associations like the Grain and Feed Trade Association (GAFTA) can publicize the

\textsuperscript{37} That is, the seat of the Arbitral Tribunal.
\textsuperscript{38} W. Michael Reisman, \textit{supra} note 36.
\textsuperscript{39} \textit{Ibid}.
\textsuperscript{40} This matter is discussed in the third chapter.
\textsuperscript{41} Pricewaterhousecoopers, \textit{International arbitration: Corporate attitudes and practices} (May 2006), online: PWC <http://www.pwc.co.uk/eng/publications/International_arbitration.html> at 8.
\textsuperscript{42} Alen Redfern, \textit{supra} note 1 at 512.
behaviour of the losing party in order to pressure other members. For example, GAFTA rules expressly mention that:

In the event of any party to an arbitration or an appeal held under these Rules neglecting or refusing to carry out or abide by a final award of the tribunal or Board of appeal made under these Rules, the Council of the Association may post on the Association’s Notice Board and/or circulate amongst Members in anyway thought fit notification to the effect. The parties to any such arbitration or appeal shall be deemed to have consented to the Council taking such action as aforesaid.

Second, if the losing party is reluctant to perform the award, then the winner has to enforce the award by taking the case to the national court and get the court order for enforcing the award. This means that the winner has to go through the national court process for recognition and afterward enforcement of the award.

The finality of arbitral awards is helpful in commercial relations, and indeed the international arbitration tribunals consider the finality of the awards as the most important factor for the enforcement of awards. It is a general requirement that arbitration awards must be final.

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43 GAFTA Form 125, Arbitration Rules, Art.22.1.
44 The process is different in each country but usually there are four ways of doing this: “The first is where the award is deposited, or registered, with a court or authority. The second is where the laws of the country of enforcement provide that the award may be enforced directly without any need for deposit or registration. The third is where it is necessary to apply to the court for some form of registration as a preliminary step to enforcement. The fourth is to sue on the award as evidence of a debt, on the basis that the arbitration agreement constitutes a contractual obligation to perform the award.” Alen Redfern, supra note 1 at 514.
45 Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co. 415 F2d 403, 412-413 (1969). As noted previously, one of the distinctive advantages of arbitration is that it is perceived as a one-shot dispute settlement mechanism, ( Alexis Mourre & Luca G. Radicati Di Brozolo, “Toward Finality of Arbitral Awards: Two Step Forward and One step Back” (2006) 23 J.Int'l Arb 171 at 171) meaning that unlike the national courts, there is no appeal or retrial in arbitration. In international business and trade, parties usually prefer to settle their disputes once and for all. Arguably, appealing a case in the national court system would require spending considerable time and money. Even then, the dispute may not be solved accurately because the mistakes made by the first court might be repeated by the Court of Appeal. In arbitration, there will be one irrevocable decision.
and, therefore, binding in the place of arbitration. New conventions, such as the Washington Convention (1965)\textsuperscript{47} and the New York Convention (1958), absolutely abandon any recognition of the arbitration award if the award is not final. This means when the award is final, it is binding and enforceable. The New York Convention addresses the rejection of the awards that are not final and provides that there should not be an enforcement of the award when “the award has not yet become binding for the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made.”\textsuperscript{48} The Washington Convention (1965)\textsuperscript{49} provides that:

\begin{quote}
[\textit{t}]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
\end{quote}

In addition, the UNCITRAL Model Law (1985)\textsuperscript{50} in article 36(1)(a)(v) – a model for countries – provides that the foreign awards must not be recognized if the awards are not final.\textsuperscript{51}

\begin{footnotesize}
\begin{enumerate}
\item Lex Mercatoria website(www.lexmercatoria.org):
\item Art. V (e) , New York Convention (1958)
\item Art. 53 (1), Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
\item UNCITRAL Model Law on International Commercial Arbitration (1985),
\item “the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.” The UNCITRAL Model Law (1985) in article 36(1)(a)(v).
\end{enumerate}
\end{footnotesize}
The enforcement of arbitral awards is protected by various international conventions, most importantly the New York Convention. Before the New York Convention, parties generally had to proceed through the domestic courts and request the courts to confirm the awards “in order to have the award deemed final” and then request enforcement of the award—a problematic, if not deceitful, procedure given that the losing party could take advantage of any delay in enforcement of the award or could bring it to the national court to be reviewed. Nevertheless, under the New York Convention, all the signatory countries have to enforce arbitration awards; in fact, the main purpose of the Convention was to make it easier for the parties to enforce the award in other signatory countries. To understand the importance of this convention in the international arbitration world, it is helpful to review its history and its effect.

Because an arbitral award does not implement itself, there was early recognition that there should be a method to ensure the enforcement of foreign arbitral awards. The first international convention that dealt with the problem of international arbitral award enforcement was the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, which created enforcement methods for ‘all arbitral awards made pursuant to the Geneva Protocol on Arbitration Clause of 1923.’ However, the Geneva Convention did not have a process for enforcing awards made pursuant to legislation or treaties other than the Geneva Protocol, therefore, the Geneva Convention did not satisfy the need for a uniform system at the

52 W. Michael Reisman, supra note 36.
54 Ibid.
55 Ibid.
international level to enforce the international arbitration awards effectively. As international
commercial business and transactions increased, the need for universal enforcement of the award
also increased, resulting in the adoption of the New York Convention. In 1953, the International
Chamber of Commerce requested that the United Nations Economic and Social Council organize
a meeting on the subject of international arbitration. 56 Following that meeting, the New York
convention was adopted in 1958 and enforced on June 7, 1959. However, when the convention
was officially announced, many countries, including the United States, were hesitant to join the
convention, as they were worried about conflicts between the convention and their national law;
eventually only twenty four countries signed the convention. 57 The New York Convention
moved the burden of proof to the defending party; an important change from the Geneva
Convention. This means that under the New York Convention, the defendant has to prove that
the award is void and invalid under at least one of the seven provided grounds. 58

L. 747 at 749.
57 Ibid.
58 New York Convention (1958), Article V of the Treaty:
1- Article V of New York Convention:
Recognition and enforcement of the award may be refused, at the request of the party against whom it is
invoked, only if that party furnishes to the competent authority where the recognition and enforcement is
sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under
some incapacity, or the said agreement is not valid under the law to which the parties have subjected it
or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the
arbiter or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the
submission to arbitration, or it contains decisions on matters beyond the scope of the submission to
arbitration, provided that, if the decision on matters submitted to arbitration can be separated from
those not so submitted, that part of the award which contains decision on matters submitted to
arbitration may be recognized and enforced; or
Among these grounds, one substantive defense a party may invoke is public policy, (Art. 2(b)) which is a controversial subject in international commercial arbitration, (especially between Western countries and Islamic countries) and can be easily considered the Achilles heel of the international arbitration system. The main problems with the public policy provision relates to the use of domestic public policy because, it can be a ‘safety valve’ or ‘escape clause’ for the defendant. Although the argument about whether public policy should be a defense or not is a very important normative question in international arbitration, it is beyond the scope of this thesis. My thesis will instead focus on the effect different cultures many have on the use of the public policy defense in the international arbitration system.

There are a few important differences in the interpretation of public policy amongst western countries and Islamic countries. While empirical data is needed, preliminary review of arbitration cases suggests that Islamic countries use this defense more than Western countries, thus creating a complicated situation since Western countries claim it to be against the main feature of international arbitration; that is, straightforwardness and certainty of enforcement of international arbitration award in all countries.

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2- Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

59 Mary Lu, supra note 56 at 770.
Unlike the five procedural defenses that are provided for in Article V of the New York Convention, either party or the enforcing court can invoke the public policy defense. 60 Public policy may be delivered at three distinct levels: domestic, international, and transnational. 61 Domestic public policy is “when only one country is associated with the arbitration, then the laws and standards that form the domestic public policy of that country apply.” 62 In contrast with domestic public policy, “international public policy consists of the rules of a country’s domestic public policy applied in an international context.” 63 Therefore, when one or both of the parties come from different countries, courts will look at international public policy and assess domestic public policy with the “public policy of interested nations and the need of international commerce.” 64 Finally, in contrast with domestic public policy which is based on the laws of a country, transnational public policy “represents the international consensus on accepted norms of conducts.” 65 However, transnational public policy is more embracive than domestic and international public policy; therefore, it is not a good defense. 66

Many courts in developed countries try to avoid any intervention in arbitral awards. In general, one of the ways that they try to expand and develop arbitration is by respecting the pro-enforcement bias of the New York Convention, and therefore, the courts in these countries give

60 Ibid.
61 Ibid. at 771.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid. at 772.
66 Ibid.
great respect to the arbitrator’s decision.\textsuperscript{67} By classifying the public policy into two categories – international public policy and national public policy- and then by advocating a focus on the international public policy, courts try to streamline the process and move away from the specific measures of national policy choices.

In many developed countries, courts have realized the value of having arbitration as a new legal tool, because it provides flexibility: a critical element in the settlement of commercial disputes. Recently, courts in Western countries have come to understand that economic development is closely associated with the need for arbitration, and this is a strong reason for them to ensure full enforcement of awards.\textsuperscript{68} For example in Germany, the High Court of Bavaria stated that an arbitral award can be set aside in only extreme cases:

Only in extreme cases, when the enforcement of the arbitral award leads to evident abuse and grave harm to public order, an arbitral award can be set aside on the basis of section 1059 ZPO. Such is, in particular, the case when an award enforces an agreement contrary to \textit{bonos mores}, or breaches a rule which is part of the very basis of the social or economic order of a country, or in case the award was obtained by fraud. In the case at hand, the court believes that it is not the case, as the enforcement of the award - which is affected by no formal error - would not entail such consequences. The fact that a debtor be condemned to repay an assigned debt is not of such nature as to frontally hurt the social order.\textsuperscript{69}

\textsuperscript{67} Troy L. Harris, “The public policy exception to enforcement of international arbitration awards under the New York Convention” (2007) 24(1) J.Int'l ARB 9 at 11.
\textsuperscript{68} See \textit{M/S Bermen v. Zapata Off- Shore Co.} at 91.
In *Lesotho*, the House of Lords, reversing the Court of Appeal’s decision, stated, “even assuming that the arbitrators committed an error of law in their ruling on the issues of currency and interest, this is not reason enough for a review of the award by the court.” In a French case, *Thales*, the court also emphasized this policy of being nonjudgmental, thus demonstrating a commitment to the idea that the finality of arbitration should be top priority and is not to be undermined by a review of the merits of the arbitrator’s decision by a national court.

The leading case for U.S. domestic public policy is *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier* (RAKTA). Briefly, Parsons, an American company, made a contract with an Egyptian manufacturer, RAKTA, to construct a paperboard mill in Egypt. In addition to the contract, the U.S. Agency for International Development (USAID), a branch of the U.S. State Department, would finance the project. The two parties also included two terms in their contact: an arbitration clause, which provided a means to settle any disputes arising in the course of performance by arbitration, and a 'force majeure' clause, which excused any delay in performance due to causes which are beyond *Parsons Co.* reasonable control. Parsons started construction and the work proceeded as planned, but because of the Arab-Israel Six Day War (1967), many of Parsons’ workers left Egypt. The situation became more complicated when the Egyptian government deported all Americans and broke diplomatic communications with the U.S. However, the Egyptians stated that if any Americans needed to stay they could get special visas. In this situation, a dispute arose due to Parsons abandoning the

72 508 F. 2d 969 (2d Cir. 1974), see also Mary Lu, *supra* note 56 at 773.
project using the force majeure clause. The arbitration tribunal ruled against Parsons, expressing that Parsons had not made a good-faith effort to get special visas and that RAKTA would have been able to finance the project even if the American agency for International Development (USAID) could not.

When RAKTA wanted to enforce the arbitration award in the U.S., Parsons challenged the award based on a public policy defense, claiming that enforcing the award would breach the domestic public policy of the U.S:

Parsons argues that various actions by United States officials subsequent to the severance of American-Egyptian relations—most particularly, AID’s withdrawal of financial support for the Overseas-RAKTA contract—required Overseas [Parson], as a loyal American citizen, to abandon the project. Enforcement of an award predicated on the feasibility of Overseas’ returning to work in defiance of these expressions of national policy would therefore allegedly contravene United States public policy.  

However, the U.S. Court of Appeals for the Second Circuit rejected the arguments and confirmed the award. According to the court, “enforcement of foreign arbitral awards may be denied only where enforcement would violate the forum state’s most basic notion of morality and justice.” Nevertheless, the court did not explain what exactly the state’s most basic notion of morality and justice meant and provided no guidance on who should define these terms. However, many courts in the U.S. when referring to Parsons articulate some parameters for the

74 Mary Lu, supra note 56 at 774.
public policy defense.\textsuperscript{75} The court in \textit{Parsons} clearly explained the difference between national and international public policy:

\begin{quote}
Reading the public policy defense to protect national political interests would undermine the value of the New York Convention. An action that violates American public policy does not necessarily violate international public policy. Second, the public policy must be well defined and dominant. Lastly, the public policy defense must be construed in light of the overriding purpose of the New York Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.\textsuperscript{76}
\end{quote}

In another case, the U.S. jurisdiction looks at these matters from the international trade point of view. In \textit{M/S Bremen v. Zapata Off-Shore Co.},\textsuperscript{77} the Supreme Court stated, “We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”\textsuperscript{78} The Supreme Court extended the principle of \textit{M/S Bremen} to an international arbitration case, \textit{Scherk v. Alberto-Culver Co.}\textsuperscript{79} In \textit{Scherk}, the Supreme Court for the purpose of encouraging international free trade held that:

\begin{quote}
\[ \text{a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to the achievement of orderliness and predictability essential to any international business transaction. So, the court rejected the claim that because of domestic public policy, the dispute was not available to arbitration.} \textsuperscript{80}\]
\end{quote}

\begin{footnotes}
\item[75] \textit{Ibid.}
\item[76] \textit{Ibid.}
\item[77] \textit{M/S Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1 (1972)
\item[78] \textit{Ibid.} at 9.
\item[80] \textit{Ibid.} at 516.
\end{footnotes}
In the *Parsons & Whitmorne Overseas Co. v. Société Générale de L’ Industrie du Papier*\(^{81}\) case discussed above, the Second Circuit Court affirmed the idea of narrow interpretation clearly: “To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy.”\(^{82}\) Finally, in a very important case, the U.S. Supreme Court completely approved the policy of its national courts toward enforcement of arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,\(^{83}\) the Supreme Court held as follows:

> We conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that contrary result would be forthcoming in a domestic context.\(^{84}\)

Many other jurisdictions have adopted the same approach as the U.S. For instance, the leading case for English standards with respect to the public policy defense is *Deutsche Schachtbau-und Tiefbohrgesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat’l Oil Co. (Rakoil).*\(^{85}\) In this case, disputes arose over an oil exploration agreement. Since the agreement contained an International Chamber of Commerce arbitration clause, D.S.T. submitted its claim

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81 *Parson, supra* note 72.
to the ICC arbitration panel, centered in Geneva, Switzerland. Instead, Rakoil, submitted its
claim to the Court of Ras Al Khaimah, arguing that D.S.T. had not only made misrepresentations
in the agreement, but also requested the annulment of said agreement. As neither of the parties
participated in the proceeding initiated by the other, both succeeded in receiving the arbitration
award and securing the court’s judgment. D.S.T. then asked the English court to enforce the
arbitration award. In the English court, Rakoil argued that it was against English public policy
for the arbitration panel to use some unspecified, and possibly ill-defined, internationally
accepted principles of law rather than a particular country’s law. However, the court rejected this
argument and held that it was not contrary to English public policy “for an arbitration panel to
use a common denominator of principles underlying the laws of various nations governing
contractual relations.”

Therefore, in order for an English court to void an arbitral award on the
basis of the public policy defense, the advocating party (Rakoil in this case) must show that there
is, “some element of illegality or that the enforcement of the award would be clearly injurious to
the public good or, possibly, that enforcement would be wholly offensive to the ordinary,
reasonable and fully informed member of the public on whose behalf the powers of the State are
exercised.”

In Germany, the courts have held that: “The recognition of foreign arbitral awards thus is
governed normally by a less stringent regime than domestic awards.” Another court stated the
following: “From the view point of German procedural public policy, the recognition of a

86 Mary Lu, supra note 56, at 775.
88 See discussion of European jurisprudence in Troy L. Harris, supra note 67 at 15.
foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic function.”

A court in Luxembourg stated, “The case here concerns the effect in Luxembourg of rights acquired abroad; hence, public policy intervenes only in its attenuated form and is less stringent than if the case concerned the acquisition of the same rights in Luxembourg.”

A Russian court observed the following: “Enforcement of the present award would not contradict the sovereignty of the Russian Federation and would not contradict the basic principles of Russian Legislation,” implying that if these requirements are met, the award is enforceable. In addition, an Italian court remarked: “We must say that, where this consistency between the arbitral award and public policy is to be examined, reference must be made to the so-called international public policy, being a ‘body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.”

However, not all of these efforts mean that the pro-enforcement bias of the New York Convention is completely followed. For example, one case demonstrates just how fragile this implied rule of independency of the arbitral awards is. In Marketing Displays International v. Van Raalte Reclame BV (VR), the Hague Court of Appeal surprisingly acted as an appellate

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89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid.
judge in the name of an ill-grounded and superseded conception of public policy.\textsuperscript{94} A licensing agreement was entered into by Marketing Displays International ("MDI") and Van Raalte Reclame ("VR") in relation to interchangeable aluminum frames for billboards. Based on the agreement, an exclusive license was given to VR for the territory consisting of Belgium, The Netherlands, and Luxembourg ("Benelux"). A dispute arose over VR’s obligations to pay royalties to MDI for which arbitration proceedings were initiated in the United States. The arbitration tribunal led to three awards: the first Partial and Interim Arbitral Award,\textsuperscript{95} in 2001, found VR in breach of contract. The second award which was First Amended Partial Final Arbitral Award held in 2002,\textsuperscript{96} confirmed the previous ruling and ordered VR to pay EUR 5,000 per day for non-compliance. Also, in 2003,\textsuperscript{97} the Second Amended Partial Final Arbitral Award confirmed the previous award and ordered VR to pay $160,216 to MDI in damages. MDI requested a Dutch lower court to enforce the three U.S. arbitral awards pursuant to Article 1075 of the Netherlands Code of Civil Procedure and to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. However, VR defended against the enforcement of the arbitral awards based on public policy. According to VR, the Agreement upheld by the awards was contrary to Article 81(1) of the European Community Treaty (ECT), which prohibits anti-competitive agreements. Surprisingly, the Dutch court accepted this position and refused to

\textsuperscript{94} Alexis Mourre & Luca G. Radicati Di Brozolo, supra note 69 at 181.
\textsuperscript{95} Mark A. Luz, “Recent Development in International dispute resolution around the world” (2006) 19(2) International dispute resolution at 5. Online: White & Case <http://www.whitecase.com/files/Publication/18da94b4-2115-4981-a191-6b5cddb8a071/Presentation/PublicationAttachment/1b4d0e9c-a54e-413e-a48a-6f52b97f5558/International_Dispute_Resolution_Newsletter_October_06.pdf>
\textsuperscript{96} Ibid.
\textsuperscript{97} Ibid.
enforce the arbitral award because the Agreement was found to be in breach of Article 81(1) ECT due to its market-sharing elements. The principal purpose of Article 81(1) was to prohibit agreements between entities the object of which was to “effect the prevention, restriction or distortion of competition within the common market”. The exclusive license to VR by MDI over the territories of Belgium, Netherlands and Luxembourg stifled competition in the common markets, thus conflicting with the concept of market-sharing as contemplated in Article 81(1). Moreover, the Agreement was found void for an “exemption” under Article 81(3) ECT, which provides that anti-competitive agreements cannot be saved if they result in pro-competitive benefits. MDI appealed but the Dutch Court of Appeal referred to the *Eco Swiss* judgment of the European Court of Justice, which had held that Article 81 of the EC Treaty pertains to EU public policy and that EU Member States courts are under obligation to refuse to enforce arbitral awards that violate that provision.

While the pro-enforcement bias does not completely solve the problem of enforcement of arbitral awards, other grounds prohibit the complete enforcement of awards. Many countries have very strict rules to prohibit enforcement, even amongst the developed countries. These

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98 Article 81.1 provides: The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.


100 Mark A. Luz, *supra* note 95 at 6.
policies could be legal – usually legal rules that directly or indirectly relate to the economy of the enforcing country, or rules applied when the arbitration proceedings are procedurally deficient in very fundamental aspects. From the economics point of view, countries always have their own special rules related to the public policy, political situation, and culture of that country. For example, in Germany, the German exchange laws are so restrictive that courts will not accept to enforce the award that violates that policy.

Interestingly, the difficulties in the methodology of enforcing an award do not make the whole system weak. In fact, in a 2008 survey, the majority of respondents’ chose enforceability of awards as the single most important advantage.

2.2. Disadvantages of Arbitration:

It is perceivable that the international arbitration system also has some negative points as there are many disputes over the disadvantages of the system. Issues like costs, time, and lack of a third party mechanism, including national court intervention as well as consequential difficulties of enforcement of award, become the centre of debates among scholars and lawyers. In addition, there are other issues which are related to structure of the arbitration system: in arbitration, a panel must be selected in advance, so it is impossible to expect speed in relief;

101 Ibid. at 16.
102 Ibid.
103 PWC, supra note 22 at 6.
second, “[n]ot all courts will provide provisional remedies in aid of arbitration”\textsuperscript{104} In arbitration it is not possible, “to bring multi-party disputes together before the same arbitral tribunal.”\textsuperscript{105}

We will now look briefly at some of the disadvantages of international arbitration.

**Cost:** One of the reasons for development of arbitration in recent decades was to cut the costs of litigation in national courts. However, international arbitration can become more expensive at times. A party who wants to go through arbitration should consider the cost of arbitrators, lawyers, experts that in international commercial or transactional cases can be high. In addition, they should consider the expenses made on hotels or seminar rooms in ad hoc arbitration and if parties decide to go for institutional arbitration, then they should consider expenses of the institution. In contrast, in the national court system, parties use public facilities and the courts free of charge. All of these costs can become considerable. In a survey in 2003,\textsuperscript{106} out of fifty-two (52) respondents, only eight-percent (8\%) cited the procedure as less expensive and fifty-one percent (51\%) believed that this is not an advantage. Interestingly, in another survey in 2008\textsuperscript{107} the majority of respondents (70 out 80) were concerned about expenses of international arbitration process. This clearly means international arbitration “is unlikely to be cheaper than proceedings in court, unless there is a conscious effort to make it so.”\textsuperscript{108}

**Time:** Another concern of arbitration is the time it takes for filing a request for arbitration until rendering an award. A Comparison of two surveys (2003 and 2008) shows the discomfort

\textsuperscript{105} Alen Refern, *supra* note 1 at 29.
\textsuperscript{107} PWC, *supra* note 22 at 6.
\textsuperscript{108} Alen Refern, *supra* note 1 at 28.
of lawyers and practitioners: out of fifty-four (54) respondents, only eleven percent (11%) thought arbitration was less time consuming and twenty-four percent (24%) believed that this was a significant factor, whereas twenty percent (20%) did not consider it an advantage.\(^\text{109}\) In 2008 survey, fourteen respondents chose it as their first choice for disadvantages and eighteen chose it as their second.\(^\text{110}\)

Arbitration also suffers from lack of a mechanism to bring a third party to the tribunal. Unlike national court, arbitrators do not have the power to order other entities to the tribunal. Normally, parties are involved in the procedure because of the arbitration agreement: it is a matter of personal choice to be involved; but, there is no law to force a third party to get involved or attend arbitration tribunals. Moreover, award of the tribunal has no enforcement effect on the third party. In a 2008 survey, this was the last concern for respondents; however, in international contracts this can be a very important issue.\(^\text{111}\)

There is another disadvantage, which was not a concern amongst practitioners, but it is an undoubtedly important matter in international arbitration: conflicting awards. Unlike national court systems, the arbitration process is confidential, there is not any system in place to make a binding award therefore each award stands on its own\(^\text{112}\) and there are no precedent cases.

Although these arguments have been raised regarding the disadvantages of arbitration, one should be careful when studying these results, as they are based on the experiences of

\(^\text{109}\) Ibid. at 26. The same survey found that seventy-two percent (72%) of respondents thought the arbitration forum was neutral, sixty-four percent (64%) believed in the power of treaties for enforcement of the award, and sixty-four percent (64%) thought that confidentiality in an arbitration procedure was an advantage.

\(^\text{110}\) PWC, supra note 22 at 7.

\(^\text{111}\) Alen Redfern, supra note 1 at 29.

\(^\text{112}\) Alen Redfern, supra note 1 at 30.
various specialists in different situations and a limited pool of participants. Thus, they may not reflect a balanced analysis of the arbitration procedure. And the fact remains that parties have different views on cost and speed and the ‘amicable character’ of arbitration.\textsuperscript{113}

Chapter 3 - Arbitration in Islamic Countries:

One legal system that is in apparent conflict with the international arbitration system, and more specifically with the enforcement of arbitral awards, is the Islamic legal system. For many years, few Islamic countries had joined the New York Convention; many of them still had not developed a legal system implementing arbitrations, and the courts in the Islamic countries, it has been argued, ‘too often have impermissibly interfered with international arbitration cases.’\textsuperscript{114} It is true that Bahrain (to provide an Islamic country as an example) constituted an international commercial center long before Paris or London did; but the modern era of international arbitration has been a “roller coaster” experience for Bahrain and the Islamic world.\textsuperscript{115} The Islamic legal system was founded on many different cultural, political and geographical factors. Considering the different aspects of Islamic jurisdiction, pure knowledge of “the law” is not

\textsuperscript{113} \textit{Ibid}. at 27.
\textsuperscript{115} \textit{Ibid}. 

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sufficient\textsuperscript{116} in order to understand an Islamic jurisdictional system. It is difficult to discuss Islamic jurisdiction in a meaningful way without first looking at the historical background of arbitration and then Shari’a: the source of Islamic laws.

Many of the problems that exist between the secular Western and religious Islamic countries concerning arbitration are based on different views towards business, human rights and arbitration. Islam is considered by the Islamist believer as a complete way of life, and \textit{din} (religion), “encompasses theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of men.”\textsuperscript{117}

Historically speaking, arbitration in the Islamic world is not a new phenomenon; indeed, the first important arbitral treaty\textsuperscript{118} was made by Prophet Mohammad in 622 A.D. for arbitration of disputes between Muslims, non-Muslim Arabs and Jews. At that time, arbitration was based on a completely different legal system than today, and was widely practiced. Before reviewing the history of Shari’a as a main source of law in Muslim counties, one should first study the difference between the concept of arbitration in the West and that in the Islamic world.

Arbitration in the West follows different procedures and concepts. Unlike arbitration in Islam, arbitration in the West has always been a separate system working beside the national court system and has had a separate operating procedure. The history of arbitration in the West

\begin{itemize}
  \item \textsuperscript{117} Ibid. at 170.
  \item \textsuperscript{118} Abdul Hamid El-Ahdab, “Arbitration with the Arab Countries” 2d ed. (The Netherland, Kluwer Land and Taxation Publishers, 1990) at 13.
\end{itemize}
can be traced back to ancient Greek mythology.\textsuperscript{119} Arbitration between gods aside, the international arbitration is observable between ancient city-states in Greece.\textsuperscript{120} In addition, there are few records remaining that show us arbitration was used “in a wide range of commercial and family matters” in Rome.\textsuperscript{121} Based on Roman law, Western arbitration was protected from any court interference by limiting it to the field of contract law and prohibiting any court review.\textsuperscript{122} In Roman law, there was a clear distinction between equity and law, but Islamic law did not have any such distinction. Based on the old Roman law, judges could overturn an arbitrator’s decision only if it was contrary to equity.\textsuperscript{123} Aristotle mentioned this very basic aspect: “Parties may prefer arbitration rather than judicial action, for an arbitrator will look at equity, whilst a court has to consider the law.”\textsuperscript{124} In addition to this, Roman law “treated arbitration clauses as separate agreements, to which the parties could attach penalty mechanisms to enforce compliance.”\textsuperscript{125} These facts help the use of arbitration more than national court because “of deficiencies in state court system, which were characterized as unreliable, cumbersome and costly, and which faced particular difficulties in inter-state matters.”\textsuperscript{126}

\textsuperscript{120} \textit{Ibid}, at 9.
\textsuperscript{121} \textit{Ibid}, at 23.
\textsuperscript{123} \textit{Ibid}.
\textsuperscript{124} \textit{Ibid} at 918.
\textsuperscript{125} Gary B. Born, supra note 119 at 25.
\textsuperscript{126} \textit{Ibid}, at 26.
The differences in both ancient legal systems could be related to culture and the geographical environment of each society.\textsuperscript{127} Unlike Roman-law countries, arbitration in ancient pre-Islam Arab societies was not an alternative to court systems; it was simply the only way of solving disputes before going to war if direct negotiation and mediation failed,\textsuperscript{128} since a court system was nonexistent.

The arbitration (Tahkim) system had been used by Arab society to resolve daily disputes. George Sayen\textsuperscript{129} believes that when Prophet Mohammad came to power, arbitration was considered a threat to the Prophet at two different levels. First, Prophet Mohammad needed to control the legal system, therefore he wanted to reorganize and regularize the Tahkim in accordance with his new religion, but not all hakams (arbitrators) were in favor of Prophet Mohammad. The second problem was that hakams claimed religious authority as well, which was contrary to Mohammad’s new religion, which claimed there is only one God, Allah. However, the Prophet Mohammad did not try to obstruct Tahkim; rather he wanted to unify the arbitration system under one legal (religious) authority.\textsuperscript{130}

Another difference between the Western and Islamic systems relates to the ancient belief of Muslim people that “it would be sinful for a Muslim to accept a judgment issued by another

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{127} Based on the theory of Jared Diamond which was well explained in his book “Guns, Germs, and Steel: The Fates of Human Societies (1997)” culture and conduct of people in each region are highly affected by the geographical location of that area. In accordance with his theory the environmental differences are among the main reasons that Eurasian civilizations grew and developed faster than the other civilization. However, in this thesis, the main argument is not whether the Eurasian civilizations became more powerful because of the advantages of geographical factors. It is centered on the important issue that the geography, to some extent, has had a controlling effect on the culture and, as a result, on the religion of the people in each region. Consequently, it is foreseeable that cultures and pursuant to that laws in the Middle East became completely different from the laws and cultures of Europe.
\item\textsuperscript{128} George Sayen, supra note 122 at 923.
\item\textsuperscript{129} Ibid.
\item\textsuperscript{130} Ibid.
\end{itemize}
\end{footnotesize}
that he believed to be contrary to law.”

In contrast, in Roman law, it was accepted that an arbitral award could be contrary to law. The third difference is related to a distinct view toward referring future disputes to arbitration: a practice never developed in early Islam.

3.1. The History of Shari’a:

Before the advent of Islam, Arab communities had no unified legal system; the idea and role of qadi (judge) was taken from the judicial institutions, which had already existed in the conquered Byzantine and Persian empires. The arbitration system in old pre-Islamic Arab society was different from what it is today – it was optional and the parties agreed to go to arbitration by choice. Moreover, the arbitration awards were not legally binding because there was no legal system to enforce the award; enforcement depended solely on the moral authority of each party. The conditions under which arbitration came into existence in an Arab community were different from what they are now; arbitration was the only alternative to going to war against others and was the only legal system to solve disputes. For solving international disputes today, however, arbitration is an alternative system to the national legal system.

131 “Judges were not permitted to overturn an arbitrator’s decision merely because it was contrary to law (injusta) but only if it was contrary to equity (iniqua), that is, unacceptable to an honest, reasonable person, such that it would be contrary to good faith to accept it”. George Sayen, supra note 122 at 924.

132 Ibid.

133 Ibid. at 926.


135 Abdul Hamid El-Ahdab, supra note 118 at 11. Also the only power behind enforcement of arbitration (Tahkim) in that society was the general belief that hakams (arbitrators) were divinely inspired.
Many countries in the Middle East, such as Syria, Egypt, Kuwait, Yemen, Bahrain, Qatar and United Arab Emirates, use Shari’a as their primary source of law in their constitutions. Saudi Arabia and Oman do not even have formal constitutions and apply Shari’a as the only Islamic law. Since Shari’a is the main source of law in these countries, a concise review of the history of Islam is crucial for a proficient understanding of the complications of arbitration in Islamic countries and the differences between Western countries’ including Arab countries’ views on arbitration.

The word Islam means "submission" to God, or the total surrender of oneself to the Islamic concept of God. Based on this belief, God has absolute authority over every spiritual and material aspect of a Muslim’s life. Islam states that God created human beings, the earth, and everything that exists in the world. This indicates His supremacy; and based on Islamic beliefs, He is the sole sovereign lawgiver.

During the life of the Prophet, all major problems were referred to him for resolution; therefore, he used his inspired interpretation of the Qur’an to solve the economic and spiritual problems of tribes and individuals. After his death, al-sahabah (his Companions) tried to interpret Prophet Mohammad’s life, actions and deeds, called the Sunnah, as the second source of law, for solving their disputes. After the death of Prophet Mohammad, an argument arose between his followers as to who should succeed the Prophet and lead the ummah (community):

\[\text{\footnotesize[136]}\]
“[T]he Kingdom of Saudi Arabia is a sovereign Arab Islamic State with Islam as its Religion; God’s book and the Sunnah of His Prophet, God’s prayers and peace be upon him are its constitution…” Chapter 1, Article 1 of Basic Law of Government (Saudi Arabia).

\[\text{\footnotesize[137]}\]
Arthur G. Gemmell, supra note 116 at 171.

\[\text{\footnotesize[138]}\]
The Qur’an 12:40 and 7:54.
an elected or appointed representative? A group of followers believed that the community should choose its leader; and in the first election, Abu Bakr (Mohammad’s father-in-law) was chosen as the leader. However, another group of followers believed that Ali ibn Abu Talib (Mohammad’s son-in-law) had already been appointed by Mohammad and God to be the leader of the Islamic community. This argument between those two differing schools of thought gave rise to two major sects in Islam: The first group, which believed in the election of Abu Bakr as the first Caliph, is called the Sunni and the second group, which believed in the succession of Ali ibn abu Talib as the first Imam, is called the Shi’a.\footnote{Arthur G. Gemmell, supra note 116 at 171.}

The Sunni sect follows the first four Companions of the Prophet, better known as Caliphs, elected by the Muslim community as its leader one after the other successively: Abu Bakr al Siddiq, Umar ibn al Khattab, Othman ibn Affan, and Ali ibn Abu Talib. The second Caliph, Umar, was the first to start extending the territorial borders of the Islamic nation. The growing Islamic community also gave rise to various social and legal problems that needed to be addressed. In order to solve those problems, Umar resorted to the legal opinions of the Companions of the Prophet. This body is called the Hadith (narrations), and constitutes the third source of law in Islam, which is frequently consulted by the Muslim fuqaha or jurists.\footnote{Fuqaha is plural word for fagih, and a faqih is an expert in Islamic Law; as such the word faqih can literally be generally translated as a jurist. Faqih.} Twenty-seven interpreters have distinguished themselves as the prominent interpreters of the hadith, or the Prophet’s sayings.\footnote{Fiasal Kutty, “The Shari’a Factor in International Commercial Arbitration” (2006) 28(3) Loyola of Los Angeles International and Comparative Law Review 565 at 578.}
In the Sunni sect, four schools of thought have gained prominence – the Hanafi, Maliki, Shafi’i and Hanbali schools. The Hanafi School, founded in Kufa (Iraq) by Abu Hanifa Ma’man Ibn Thabil (699-767AD), believed in the close relation between arbitration and conciliation. Therefore, for Hanafis, an arbitration award is closer to conciliation than a court judgment, meaning arbitration awards have less force than a court judgment.142

The Maliki School,143 founded in Medina by Malik ibn Anas, accepts arbitration by permitting one of the disputants to be chosen as an arbitrator by the other disputing party. Unlike the other three schools, a Maliki school arbitrator cannot be removed after the commencement of the arbitration proceeding.144 The third school, Shaf’i, was founded by Abdullah Muhammad ibn Idris al-Shafi’i, who was born in Ghazzah, Egypt. Many of Shafi’i school ideas were extracted from Hanafis and Malikis thoughts.145 In this school, arbitration is of less force than judgment as it is possible to remove the arbitrator by the parties before the time of issuance of the award.146 The last major school, Hanbali, was founded by Ahmad ibn Muhammad ibn Hanbal. This school is the most religiously strict and most conservative of the four schools. On the other hands, it is also more tolerant of commercial transactions.147 A decision made by a Hanbali School arbitrator has the same binding nature as a court’s judgment.148

142 Arthur G. Gemmell, supra note 116 at 175.
143 Founder was Malik ibn Anas ibn Malik ibn ‘Amr al-Asbahi (c. 715 - 796) (93 AH - 179 AH ) is known as “Imam Malik”
144 Arthur G. Gemmell, supra note 116.
145 Samir Saleh, supra note 134 at 8.
146 Arthur G. Gemmell, supra note 116 at 176.
147 Samir Saleh, supra note 134 at 9.
The Shi’a sect, which believes in Imams descending directly from the Prophet rather than the Prophet’s Companions or the four senior Caliphs, regards Ali ibn abu Talib as the first Imam and rightful successor of the Prophet, and the other Imams as subsequent successors to him. The Shi’a sect itself is subdivided into three distinct schools of thought: (1) The Jafari Athna Ashari, or the believers in twelve Imams, is the largest and best-known school, is predominant in Iran, almost half of Iraq as well as among groups in Syria and Lebanon;¹⁴⁹ (2) the Ismailis, who believe in seven Imams, are the second-largest part of the Shi’a community after the Twelvers, are spread across Syria, South Arabia, parts of India and Eastern Africa;¹⁵⁰ and (3) the Zaidis, who believe in eight Imams, are spread in the western province of Saudi Arabia, Yemen and north of Iran. Each of these Islamic communities developed its own jurisprudence based on different geographical, social and cultural factors.

3.1.1. Sources of Islamic Rules:

The main source of law in the Islamic legal system is the Qur’an,¹⁵¹ which is considered the word of God revealed through Prophet Mohammad. It is composed of 114 surah (chapters), 6,236 ayah (verses), and 77,934 words. Muslims believe that the Qur’an is the last revelation sent by God to humanity, and contains certain guidelines and principles for human beings.

¹⁴⁹ Samir Saleh, supra note 134.
¹⁵⁰ Ibid.
¹⁵¹ “The primary purpose of the Qur’an is to lay down in broad terms a way of life regulating the relationship of man with man and his relationship with God. The Qur’an is not an exhaustive book of law”. However, many Islamic rules are extracted from Qur’an.
Six different references in the Qur’an are general expressions about arbitration.\textsuperscript{152} However, only one verse, related to family disputes, has the word arbitration clearly mentioned: “and if you fear a breach between them [husband and wife], send an arbitrator out of his family and an arbitrator out of her family; if they shall desire a conciliation, God will cause them to agree.”\textsuperscript{153} The other verses use the word judge (qadi): “O true believers, obey God, and obey the Apostle and those who are in authority among you; and if you differ in anything, refer it unto God and the Apostle, if you believe in God and the last day: this is best and fairer determination.”\textsuperscript{154} These references clearly refer to arbitration, as Prophet Mohammad expressed his views on the subject at a time when there was no organized legal system. As a result, wherever the Qur’an points to a judicial activity of the Prophet, the term Hakama (to arbitrate) and its derivatives are used.\textsuperscript{155}

After the Qur’an, \textit{sunnah} is the most authentic source of the Islamic legal system. The term \textit{sunnah} means the behaviors, actions and decisions of Prophet Mohammed. In the Sunni school, \textit{sunnah} was validated by the consensus of \textit{sahaba} (Companions of Mohammad), was

\begin{footnotesize}
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\item Samir Saleh, \textit{supra} note 134 at 12.
\item Qur’an, IV, 35.
\item Qur’an, IV, 59.
\item Qur’an, IV 65. “And by the Lord they will not have real faith until they make you judge [arbitrate] their disputes and shall not afterwards find their own minds any resistance against what you shall determine, but shall acquiesce with submission” (Qur’an, IV 65).
\item Qur’an, IV, 105. “We have sent you down the Book [The Qur’an] in truth, that you may judge [arbitrate] between men as guided by God” (Qur’an, IV, 105).
\item Qur’an, V, 45. “But if they come to you, either judge [arbitrate] between them or decline; and if you decline, they shall not hurt you at all. But if you judge [arbitrate], judge between them with equity; for God loves those who judge with equity” (Qur’an, V, 45).
\item Qur’an, VI, 152. “And when you pronounce [judgment], pronounce with justice even if a near relation is concerned, and fulfill the covenant of God” (Qur’an, VI, 152).
\item Samir Saleh, \textit{supra} note 134 at 18.
\end{enumerate}
\end{footnotesize}
collected in the third century, and became known as the narrations or \textit{ahadith}.\footnote{Plural of Hadith.} Six of these collections are considered the most important and authoritative: al- Bukhari (810-870 CE), Muslim (865CE), Abu Daud al Sijistani (888CE), al-Tirmidhi (892CE), al-Nasa’i (915CE), Ibn Majjah al-Qazwini (886CE).\footnote{Fiasal Kutty, \textit{supra} note 141 at 585} Based on the Shi’a belief, \textit{Sunnah} is the way or deeds of Mohammad as well of the twelve Imams.

The third source of the Islamic legal system is \textit{qiya\textsc{s}} and \textit{ijma}. \textit{Qiya\textsc{s}} means reasoning by analogy to solve a new legal problem;\footnote{Ibid. at 565.} \textit{Ijma} refers to the consensus of Muslim Shari’a legal and religious scholars.\footnote{Samir Saleh, \textit{supra}, note 134 at 11. There are other source like \textit{istihsan, istislahm darura} and \textit{istishal al-hal} which Sunnis either reject or disregard.}

Some writers, however, believe that two more sources exist: \textit{Ijtihad} and \textit{urf}. Thus, the Qur’an “with the aid of the \textit{sunnah} (precedents set by Prophet Mohammad), \textit{ijma} (community consensus) \textit{qiya\textsc{s}} (analagical reasoning), \textit{ijtihad} (independent reasoning or intellectual effort), and \textit{urf} (custom) can be used as a basis upon which to build a body of law.”\footnote{Fiasal Kutty, \textit{supra} note 141 at 584.} According to Samir Saleh “[l]egal capacities to enter into arbitration agreement do not differ significantly in Shari’a from legal competence to enter into ordinary contracts.”\footnote{Samir Saleh, \textit{supra} note 134 at 20.} Based on Shari’a rules, a person who enters into arbitration agreement should not be infants (\textit{tifl}), insane (\textit{majnun}), intoxicated, prodigal (\textit{safih}), imbeciles (\textit{ma’tuh}), insolvent (\textit{iflas}), or terminally ill (\textit{marad al-mawt}). He or she also has to have reached the age of reason (\textit{mumayyiz}), the age of
puberty (bulugh), and adulthood (sin al-rushd).\textsuperscript{162} In common law, the capacity to enter into a contract is mostly the same as that under Shari’a; a person who is under 18 years old (minor), mentally ill, aged, infirm or drunk cannot make any contract.\textsuperscript{163}

3.2. Enforcement of Arbitration Award in Islamic countries:

Arbitration as a new legal system was introduced to the Islamic world during the 1970s, and most arbitration tribunals have dealt with oil disputes.\textsuperscript{164} During the 1970s and 1980s, many events in the world had a decisive effect on international geopolitics, such as “the end of colonialism, resurgence of nationalism, pan-Arabism, Arab-Israel wars, anti-capitalist ideology fueled by the Cold War divisions, the meteoric rise in the wealth of oil-producing Islamic Arab countries, and countries’ use of oil as an economic weapon.”\textsuperscript{165} Those events and the explosion in the growth of technology caused an unprecedented increase in the consumption of oil by the Western countries. A considerable number of Islamic countries are producers of oil, and they have become rich as a result of the high demand for oil and its related price increases. The Western countries’ heavy dependence on oil has given rise to many complex disputes; the main

\textsuperscript{162} Ibid. at 21-25.
\textsuperscript{163} Michael H. Whincup, \textit{Contract Law and Practice}, fifth ed. (The Netherland Kluwer law international, 2006) at 115
\textsuperscript{164} Charles N.Brower, Hermy K. Sharpe, \textit{supra} note 114 at 643.
\textsuperscript{165} Ibid. at 647.
areas being exploration, exploitation, transportation, distribution and, in some cases expropriations.166

Many Islamic countries in the Middle East are modeled on the Western legal system and developed legal principles informed by Western ideas. It is possible to divide Islamic countries into three different groups based on degree of influence: 1) countries that have adopted Western laws, including the civil law tradition (e.g., Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco, and Tunisia) and the common law tradition (e.g., Iraq, Jordan, Sudan and the UAE); 2) countries that have drawn more substantially – though not completely – from the Shari’a (e.g., Saudi Arabia, Qatar, Oman and Yemen); and 3) countries that have Westernized their commercial laws but are still strongly influenced by Shari’a principles, such as Iraq, Jordan, Iran, Libya, and even the United Arab Emirates.167

While Islam regards arbitration as a closed and religious process, Shari’a, as the main source of laws in all of the above countries, has specific considerations and classifications towards arbitration as well as the type of disputes that may be assigned to arbitration. These classifications are completely different from what is followed in Western countries. Samir Saleh, an eminent scholar in the field, explains different classifications in Muslim society based on the religion, which I will review in brief.168 One must keep in mind, as Samir Saleh describes in the preface of his book, these historical categorizations are not entirely enforced in the modern era. Most of the time, new legislations are not strictly compatible with Shari’a rules, even when the

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167 Fiasal Kutty, supra note 141 at 595.
168 Samir Saleh, supra note 134.
constitution law of a Muslim country claims that Shari’a is the main source of law. Nevertheless, it is necessary to know the rules of Shari’a if one wants to understand the religion-based cultural background of Arab arbitrators.

One classification is the types of disputes arbitrable under Shari’a. While the variety of disputes that could be referred to arbitration tribunals was much wider in the pre-Islamic period than post,\textsuperscript{169} the situation has changed during the development of Shari’a and with establishments of courts. Islamic rules identify two types of rights; 1) God’s rights (\textit{huquq Allah}), which have fixed punishment (\textit{Hadd}) and are non-negotiable (arbitrable); and 2) private rights (\textit{huquq alnas}), which have fewer restrictions. Different schools have different thoughts about the arbitrability of private rights, but none of them have annulled the beliefs of the other schools. In general, the Hanafi School is more amenable to solving disputes by arbitration than the other three schools.\textsuperscript{170}

The second classification with respect to referring a dispute to arbitration is whether the parties involved are Muslims (\textit{umma}) or non-Muslims.\textsuperscript{171} Based on Shari’a, “a foreign party to an agreement is not a foreign national but a party who does not belong to the umma.”\textsuperscript{172} Historically, Muslims called the geographic territory of Muslim people \textit{dar al-Islam}, or the Islamic territory. Under Muslim rules, there are three categories of citizens:\textsuperscript{173}

1- The Muslims (\textit{umma})

\textsuperscript{169} \textit{Ibid}, at 36. \textsuperscript{170} \textit{Ibid}. at 37. \textsuperscript{171} The Quran, II, 122, 124; III, 99, 100. \textsuperscript{172} \textit{Ibid}. \textsuperscript{173} \textit{Ibid}. 46
2- The *ahl* (people of) *al-dhimma* or the *dhimmis*. The *dhimmis* belong mainly to the Christian or Jewish faith. Their protection is contingent upon three conditions: “their permanent residence in dar al-Islam, their payment of a special tribute called jizya; and their respectful stance towards Islam.”

3- The *musta’minin* (plural of *musta’min*) are foreigners (mainly followers of religions other than Judaism and Christianity). They can live in dar al-Islam with the permission of the Ruler or any adult Muslim believer for a period of just one year. They have rights similar to those of *dhimmis*. After one year, they are treated as *dhimmi* and must pay the jizya.

Since most arbitration disputes relate to contracts, it is important to look at the Shari’a view towards different contracts based on territorial and citizenship classifications. Four kinds of contracts are identified in *dar al-Harb*: 1) contracts entered into foreign territory by two Muslim parties under Shari’a rules; 2) contracts entered into foreign territory by a Muslim and a foreign party under Shari’a rules; 3) contracts entered into foreign territory between a Muslim and a foreigner subject to foreign law; and 4) contracts made in *dar al-Harb* between foreign parties according to foreign law.\(^{174}\) All these classes of contracts are valid in the eyes of Shari’a, except the third one. The Hanafi School believes that the contract which is made in *dar al-Harb* will be void if the Muslim party goes back to a Muslim territory and the dispute is decided by Shari’a court. However, the other schools, Maliki, Shafi’i and Hanbali, recognize the binding effect of this kind of contract.\(^{175}\) Furthermore, under Shari’a, contracts made in *dar al-Islam* by *dhimmis* and *musta’minin* are protected, and it does not matter whether the contract was made between

\(^{174}\) Ibid. at 62.
\(^{175}\) Ibid.
non-Muslims or with Muslims so long as it was made in Muslim territory. Therefore, arbitration agreements between a Muslim and a foreigner do not qualify as forbidden contracts per se.\footnote{Ibid. at 63.}

The divisions Saleh refers to were useful for the growth of Muslim society especially after Muslims in the Middle East conquered a vast territory in 6 and 7 A.D. As mentioned above, it is important to note that these traditional classifications in Shari’a are no longer enforced in their purest form today. Considering the long history behind the laws and regulations of Islam, it may be argued that the Islamic rules are not primitive. In fact, to assume so, and proceed with such an argument, is anything but benign. Rather, it is patronizing and at best ethno-centric. Unfortunately, a majority of the western world has taken this view when dealing with Islamic cultures and their laws.\footnote{Samir Saleh, supra note 134 at 3. See section 3.2.3 page 66-67.} Western nations have dictated to their Islamic counterparts that their legal cultures and rules are better or superior than Muslim legal cultures. Undoubtedly, this has resulted in a deadlock, pitching one culture against the other; it has created a hostile atmosphere of ethnocentricity pushing both parties away from a constructive dialogue between themselves.

There are various factors that should be considered when dealing with arbitration in Islamic countries. One is the number of arbitrators. During the time of Prophet Mohammad, only one arbitrator was allowed to decide a dispute, but later, the Hanafi School accepted the appointment of more than one arbitrator.\footnote{Ibid. at 42.} However, the other three schools –Maliki, Shafi’i
and Hanbali – did not consent to the appointment of more than one arbitrator. Interestingly, the concept of appointing two or more arbitrators is considered a necessary evil by Shafi’i writers.

Another consideration is the rules of evidence in Shari’a. One complicated aspect of evidence in Shari’a is the issue of oral testimony and oath. In the Quran, testifying is considered a religious duty, and therefore has a very strong meaning. Hence, based on Shari’a, in financial disputes, the testimony of two trustworthy males is required and if getting that is not possible, the testimony of one man and two women is permitted. This rule arises out of a Quranic view towards women – that a woman’s testimony is worth half a man’s testimony, a practice that is against the (Western) views of gender equality. The Quran states: “And get two witnesses, Out of your own men, and if there are not two men, then a man and two women, Such as ye choose, for witnesses, So that if one of them errs, the other can remind her.”

The four schools (Hanbali, Shafi’i, Maliki and Hanafi) accept this rule; though arguably, if rules of Qiyas (reasoning by analogy) were applied (and if it were accepted that arbitration is equivalent to a witness’s statements in the eye of Shari’a), it is doubtful Muslim national courts would accept a woman as arbitrator when they do not recognize her testimony on its own. One commentator believes that “the source of the problem is not a kind of obscurantism of Islam, but is due to the fact that women, in certain societies and at certain times, had less practical

\[179\] Ibid.
\[180\] Ibid.
\[181\] Ibid, at 49.
\[182\] Quran, sura of the Al Bagharah (II) 282.
\[183\] Abdul Hamid El- Ahdab, supra note 118 at 618.
experience than men.” Further, Abdul Hamid El-Ahdab cites similar examples from other legal systems to demonstrate his point. For instance, Jewish law did not accept women as witnesses under any circumstance; until the beginning of the nineteenth century, the law of certain Swiss cantons held the testimony of two women equal to the testimony of one man; and the Napoleonic Code in France accepted testimony of women only in certain formalities regarding civil status. Most of these old legal or religious systems changed during the nineteenth and twentieth centuries and adapted themselves to the realities of societies (and their changing values), as well as the new technologies that drastically changed people’s lifestyles and how they interacted and traded. Nevertheless, this transformation has been much slower to occur in the Islamic world, and any changes that did occur were so narrow that their effects have yet to become noticeable.

3.2.1. The Perspective of Western Countries:

Western countries believe that the main problem when dealing with Islamic countries is the fact that the public policy of Islamic countries makes it difficult to enforce arbitral awards. This part of the thesis explores some of the difficulties Westerners face when they deal with arbitration in Islamic countries.

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184 Ibid. at 619.
185 Ibid.
Arguably, the political limitations are always a major problem for most international legal or commercial systems. Political problems between Islamic and Western countries depend upon the interpretation of Islam within each Islamic jurisdiction, creating a complex situation in dealing with arbitration within an Islamic country. A major problem related to the politics of Islamic countries is public policy. While the New York Convention permits rejection of an arbitration award on the basis of the public policy of the country in question, (considering that the power of courts in each country is final and superior), if the highest court of a country refuses to endorse the award of a foreign arbitration then the parties can do nothing to enforce the award.

An analysis of the New York Convention makes it clear that the Convention imposes two principal obligations on the member states: a) they must ensure that national courts, where appropriate, refer parties to arbitration and stay related judicial proceedings, and b) they must recognize, and enforce, foreign arbitral awards just as if they were domestic judgments.\(^\text{186}\)

Historically, these obligations were absent from the arbitration laws and culture of many Islamic states – Qatar and Oman, for example, had no legislation that enabled parties to compel arbitration or stay court actions pending arbitration, so the parties to arbitration were forced to rely on general principles of the Islamic laws. This option is unacceptable for practitioners who work in the Western legal system since they believe international arbitration “simply cannot function, however, absent national laws that enable parties, through national court, to enforce agreements to arbitrate by compelling arbitration and staying duplicative judicial

\(^\text{186}\) Charles N. Brown, Hermy K. Sharpe, \textit{supra} note 114 at 649.
proceedings."\(^{187}\) Therefore, public policy is a decisive tool for parties who want to prevent the enforcement of awards in Islamic countries. Consequently, under the pretext of public policy and for its own political or commercial reasons, a country can refuse or abandon the enforcement of arbitral award.

Scholars argue over whether *tahkim* (arbitration) is more than a simple conciliation in Islamic jurisprudence.\(^{188}\) Those who favor the view that arbitration is simply conciliation point to verse 35 of *surah* (chapter) 4,\(^{189}\) others refer to another *surah* to support their view that *tahkim* is binding:

> God doth command you to render back your trusts to those whom they are due; and when ye judge between people, that ye judge with justice; verily how excellent is the teaching which He giveth you, for God is he who heareth and seeth all things.\(^{190}\)

There is no clear position in Islamic traditions with respect to this issue; in fact, none of the four leading Sunni schools makes a clear statement about the binding effect of arbitral awards. However, some jurists believe that an arbitrator has the same function as a judge. Hanafi schools suggest that arbitration is closer to conciliation, while the Shafi’i school believes arbitrators have a lower status than judges do since their appointment can be revoked while a judges’ cannot. The Maliki school believes that an arbitrator’s decision is binding unless there is a ‘flagrant’ injustice,’ while the Hanbali jurists believe that an arbitral award has the same

\(^{188}\) Fiasal Kutty, *supra* note 141 at 596.
\(^{189}\) “If ye fear a breach between them (i.e. the man and his wife), appoint (two) arbiters, one from his family, and the other from hers; If they wish for peace (desire reconciliation), then God will cause their reconciliation (make them of one mind): for God has full knowledge, and is acquainted With all things.”
\(^{190}\) Qura’n 4:58.
binding force as a court judgment and that an arbitrator must have the same qualifications as a judge.\footnote{Fiasal Kutty, supra note 141 at 598.}

Another major difficulty is that many Islamic countries treat the international arbitral awards as though they were foreign judgments. A foreign award is simply an award made under a law other than Shari’a, so if the award fails to meet the main Shari’a requirements, like the qualification of the arbitrator and the application of Shari’a law, then the award is deemed foreign and therefore not enforced.\footnote{Ibid. at 65.} For example, a Saudi court denied enforcement of an arbitral award rendered in the United Kingdom because U.K. courts do not enforce Saudi judicial decisions.\footnote{Abdul Hamid El-Ahdab, “Enforcement of Arbitral Awards in the Arab countries”, 11 ARB, Int’L 169, 175 (1995) at 8.}

In some Islamic countries, domestic arbitration laws have not been developed enough to match global needs. For example, although Saudi Arabia’s reforms in 1983 and 1985 clarified and simplified some elements of the traditional arbitration system, many of the country’s restrictions remain, including religious and gender discrimination.\footnote{Fiasal Kutty, supra note 141 at 593.}\footnote{The same rule in Oman prohibits any woman from becoming an arbitrator.} For example, by Saudi Arabian law\footnote{Charles N. Brower, supra note 114 at 652.}, an arbitrator must be a Muslim\footnote{Ibid, at 608.}. The objection to a non-Muslim arbitrator is that, based on the classical view, only a Muslim can judge between two Muslims by applying the Shari’a law.\footnote{197}
3.2.2. Development of Arbitration in Islamic Countries:

Arbitration culture is today growing rapidly in many Islamic countries, a trend that helps international Islamic arbitration centers improve their process by employing certified arbitrators, encouraging parties to refer to arbitration, providing information about the process, and helping to formulate uniform laws.\textsuperscript{198} This growth is also due to economic developments in some Islamic countries. Due to the expansion of international trade and the role of oil, Islamic banks have recently grown at an annual rate of 5 to 15 percent.\textsuperscript{199} As of 2002, the investments of Islamic financial institutions have grown by $200 billion. These figures indicate the great influence Islamic financial institutions may have on international trade relations and flows of capital.\textsuperscript{200}

Islamic countries have tried to adapt themselves more to the international arbitration system in the following ways: a) they have become parties to international conventions; b) they have adopted new or revised arbitration-friendly national law, and c) they have established international and national arbitration centers in developing countries as alternatives to the existing centers in the developed countries.\textsuperscript{201} By joining the New York Convention, many Islamic countries have tried to become part of the international arbitration system. As of 2003, thirty-nine (39) of sixty (60) Islamic countries were party to the Convention. In 2005, Liberia, Pakistan, and in 2006 the United Arab Emirates (UAE), joined the New York Convention. In

\textsuperscript{198} Ibid, at 799.
\textsuperscript{200} Ibid.
addition, 14 members out of 22 members of the League of Arab States are now party to the New York Convention. In an effort to develop international arbitration further in their countries, all six members of the Gulf Cooperation Council (GCC) have agreed to enforce each other’s arbitral awards.

Many Arab Islamic countries try to use other legal sources to create an arbitration-friendly national legislative environment in order to adapt to their domestic needs with respect to international arbitration. One of these sources is the UNCITRAL Model Law (1985) used by many countries, such as Azerbaijan, Bahrain, Djibouti, Iran, Jordan, Oman, Tunisia, Turkey and Zambia since it represents worldwide legal cultures. Egypt also used this Model Law for enacting an arbitration-friendly statute in 1994. However, some countries use the arbitration law of other countries as their legal source: both Lebanon and Qatar use the French Arbitration Law of 1981 in their arbitration law enacted in 1986 and 1990 respectively. Algeria borrowed its 1993 Arbitration Law from both the French Arbitration Law and Swiss Private International Law of 1987.

For developing arbitration in Arabic countries, two conventions where adopted; the first convention was the Riyadh Convention for Judicial Cooperation in 1983, and the second was the Amman Arab Convention on Commercial Arbitration, which was created by thirteen Arab

202 Charles N. Brower, supra note 114 at 648.
203 Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates.
206 Ibid.
208 Charles N. Brower, supra note 114 at 11.
Ministers of Justice and enforced when eight Arab states signed it. The Riyadh Convention was based on the older Arab League Convention of 1953, which concerns the enforcement of foreign judgments and awards among members and does not relate to enforcement of arbitration. The Riyadh Convention is a mixture of modern provisions and Shari’a-based provisions. However, the Convention mostly concerns judicial cooperation, except one article which talks about arbitration.

3.2.3. Muslim Countries’ Beliefs and the Role of Culture:

Human beings draw close to one another by their common nature, but habits and customs keep them apart.

Confucius (551 BC – 479 BC)

The attempt to develop the concept of international arbitration appears to have been a frustrating process for Islamic countries –especially Arabic countries. Many of these countries had opened their doors to international arbitration for many years and accepted the consequences of including arbitration terms in their international contracts. However, the supposedly advantageous arbitration system seems to have had considerable disadvantages for these countries: during the last decade, many Arab states found that in many arbitration tribunals, they

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209 Arthure G. Gemmell, supra note 116 at 188.
210 Samir Saleh, supra note 141 at 150.
211 Only Article 37 is about arbitration.
lost their case and the award of the tribunal went against them. Therefore, more recently, many Arabic countries have again closed their doors to international arbitration. Several scholars who study problems of arbitration in Islamic countries will, at first glance, attribute the source of these problems to the public policies of Islamic countries. A deeper analysis, however, demonstrates another obstacle: the behaviour and culture of the arbitrators and scholars from Western countries has engendered a feeling of bias and distrust.

One of the main reasons parties choose arbitration instead of a national court is the neutrality of the arbitration system thus ensuring a more fair and just result. But in order to get a fair and just result “it is also necessary for the parties to believe that they have been heard and understood in their cultural context.”

It is important to understand the affect of culture on behaviour and understanding of people in each region. The definition of culture can be found in numerous dictionaries and books; Webster’s dictionary defines culture as: “The integrated pattern of human knowledge, belief, and behavior that depends upon the capacity for learning and transmitting knowledge to succeeding generations.” In addition, two scholars, Philip Harris and Robert Moran, provide the following definition: “Culture gives people a sense of who there are, of belonging, of how they should behave, and what they should be doing.” Also, Ms. Truyol in her speech

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213 Ibid.
214 Webster dictionary: <http://www.merriam-webster.com/dictionary/culture>
216 Berta Esperanza Hernández-Truyol, Levin Mabie & Levin Professor of Law, University of Florida Levin College of Law.
defines culture as: “a complex of information that provides meaning for an individual or
community in particular circumstances.” 217 Culture, much like the captain of a ship, guides or
directs behaviour, thought and the core beliefs of a society. As previously mentioned, religion
has an important role in Arab Countries. Shari’a has shaped the culture of people in the Middle
East for centuries. For a practitioner who wants to work with Arab countries in the region, it is
vital to know the history and culture of the people. However, it is arguable that some
practitioners, arbitrators and lawyers consciously or unconsciously avoid learning anything about
Islamic culture. This behaviour is called ethnocentricity which can be defined as: “the tendency
to value what is familiar and predictable and to view one’s cultural norms as correct and natural
and, therefore, better than those that differ.” 218 This will have a negative impact on the arbitration
process: “when a participant in arbitration or mediation has a negative view of the religion of
another participant, whether due to political, historical or other factors, the dispute resolution
process will be negatively affected.” 219 For example, some days in Islam are holy days and are
normally, in Muslim countries, holidays. Perhaps in the view of people from Western countries,
this is simply a nonobligatory holiday and can be ignored. In contrast, for a Muslim, it can be a
very important religious holiday which cannot be ignored lest it result in divine punishment or
retribution. Al Ahdab clearly expresses the dismissive behaviour and attitude of Western
arbitrators towards Arab lawyers based on their lack of knowledge:

217 Berta Esperanza Hernández-Truyol, “Globalizing law and culture: towards a cross-constitutive paradigm 67.2
(Winter 2003) 617 at 619.
218 Amanda Stallard, “Joining the Culture Club: Examining Cultural Context when Implementing International
Dispute Resolution [2002] 17 Ohio St. J. on Disp. Resol. 463 at 473
219 William K. Slate II, supra note 212 at 3.
A dispute related to a construction project by a European country in an Arab country, which was referred to arbitration. The President of the tribunal was French and one arbitrator was Italian. The witness sessions were scheduled from February 15 to March 15, 2001. However, the *Al Adha* feast - the most important Islamic feast - happened to fall during that period. The lawyers representing the Arab country requested, in writing, a one day suspension during *Al Adha* to allow the witness and lawyers to celebrate with their families. The president replied: “I refer you to the procedural Order number… with the Schedule of the Hearing.” With disdain, the president refuses to discuss the request and denied it. During the hearing one Arab lawyer remarked that if the proceedings had been held in Cairo over Christmas and New Year, and if the arbitrator had been French nationals and the President an Arab Muslim, the hearing would have been suspended for one day. The President then replied: “this is our decision, do what you want.” The Lawyer stated: “This is an insult and non-recognition of the customs and traditions of our country.” The Italian arbitrator intervenes and threatened the Arab lawyer with a defamation suit.

This unfortunate pattern in the conduct of Western arbitrators shows that discrimination is present, albeit in a different form and ignores the possible disparate impact of a normative process based on western cultural values. It has arguably changed the face of the international arbitration system from a neutral and flexible system to a partial and unjust system that grants awards in favour of Western parties in a majority of cases. These factors force Islamic countries to abandon or discourage the use of the arbitration system and to limit the enforcement of arbitral awards in their countries. Lord Mustill commented on this problem:

> Is international arbitration serving the Arab world? The answer, I believe, is no, not in the fullest degree. But particularly why is the world of international arbitration not serving the Arab world as it should? We

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can from the Arab world, get an infusion, a transfusion, of ideas which are different from those which underpin international arbitration as it is known today. Which is, after all, essentially, a European world. The ideas are ultimately drawn from those of Europe. And I believe that arbitration needs a new source of moral values. 221

In order to ensure and encourage proper communication,222 one should put aside that the Western pattern of thought or belief and try to understand the culture of other people. For understanding of other cultures, Robert Brown, Co-chair of the American Bar Association International Communications Committee suggested:

Do some reading on the country- at least you’ll know where it is. Know something of history. Talk to someone who’s done business there, an American business man or someone from the department of Commerce- find out who the trade specialist is in that country and talk to that person. And once you get there, don’t hop off the place and set up meetings... Don’t do the trilogy of hotels, restaurants, and office buildings. Instead of staying in your hotel room answering e-mails, get up in the morning and walk around.223

Furthermore, analyzing the problems arbitration experiences in different cultures, and especially among Muslim cultures, will be imperfect if one does not look at the relation between arbitration and culture or at the important rhetorical and psychological role language plays in the arbitration process in different geopolitical contexts. In this regard, one commentator mentioned that “[i]t would clearly be useful to launch a psychological and socio-psychological study of the relationship of international arbitrations with arbitration tribunals, and to entrust such a study to

221 Ibid. at 313.
222 Deborah Enix-Ross, legal officer of the World Intellectual Property Organization refers to her own experience and mentioned that” awareness of someone’s cultural background yields a greater degree of comfort and trust in relationship.” Amanda Stallard, supra note 218 at 466.
223 Amanda Stallard, supra note 218 at 466.
the psychological centers of several countries.”\textsuperscript{224} Another analyst, Attorney Matthieu de Boisseson, comments on the importance of language for understanding these issues:

One should add the fact that language has power, or rather is a power, during the proceedings of an international arbitration. This power is often underestimated and wrongly so. A language is the vehicle of a legal tradition, of concepts which should not be rendered mechanically by simple translation.\textsuperscript{225}

Unfortunately, the International arbitration communities close their eyes to the role of culture in international arbitration. Most of the time, the noted differences in culture were limited to civil and common law differences in the arbitration process.\textsuperscript{226} Arguably, this could be the direct effect of a lack of meaningful presence of Arab or Muslim arbitrators in the international scene. Mr. Ahmed El- Kosheri mentioned this problem during the ICCA conference in Seoul in 1996:

In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration... the continuing attitude of certain western arbitrators being characterized by a lack of sensitivity towards the national laws of developing countries and their mandatory application, either due to the ignorance, carelessness, or to unjustified psychological superiority complexes, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationship.\textsuperscript{227}

\textsuperscript{225} The International Bureau of the Permanent Court of Arbitration, \textit{supra} note 220 at 316.
\textsuperscript{226} William K. Slate II, \textit{supra} note, 212 at 3.
\textsuperscript{227} \textit{Ibid.} at 1.
To analyze and solve cultural problems present in the International arbitration process, more data and statistics are needed. However, since one of the features of arbitration is confidentiality of the parties involved, it is difficult to find and gather enough information or statistics on the subject. Unfortunately, ICC is the only institution that publishes vital information in its annual report which is somehow considered “biased as ICC seeks to publish particularly interesting or unusual awards.” Other institutions like the AAA (American Arbitration Association) undoubtedly have important information that would be very helpful in analyzing the relations and problems between Western and Muslim arbitrators; however the AAA does not publish numerous reports—even though they have reliable information on this issue. In any case, an ICC report shows that the number of Arab arbitrators is far less than what Arab countries need.

In 1992, the International Chamber of Commerce Bulletin reported that 549 arbitrators from forty-seven countries worked in this area, of which only thirty-four of them were from Africa and the Middle East. This means that only six percent of the arbitrators were from the Middle East and Africa. The same source provides the following:

Although the overall figure of arbitrator appointments increases significantly during the following decade, the increase in African and Arab appointment did not. In 2002 the number of African or Middle Eastern appointments had risen to only fifty arbitrators as opposed to an increase to a total of 964 arbitrators who had performed arbitral functions that year. Further in 2005, while there were 1422 parties involved in ICC arbitration, and while seven percent of the parties considered themselves to be Arab, the percentage decreases to five percent.

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229 Jalal El Ahdab & Ruth Stackpool-Moore, supra note 224 at 279.
230 It decreases to five percent.
only a mere three percent of appointed arbitrators identifies themselves as African or Middle Eastern. By contrast, a non-comprehensive and unofficial study undertaken in 2005 showed that at the time there were fifty-nine bilateral investments treaty (BIT) disputes, with an amount stake of more than U.S. $100 million, being conducted. Of these fifty-nine disputes, five involved in Arab party and four of these five were conducted by a tribunal with at least one Arab arbitrator. Therefore, eighty percent of the BIT disputes involving an Arab party had an Arab arbitrator.\(^{231}\)

The Islamic countries’ disbelief in or distrust of the international arbitration system as an Alternative Dispute Resolution arises out of the behaviour of Western arbitrators who are perceived as continually granting awards deemed unfavourable to the Islamic countries. In this regard, Advocate Mauro Rubino Sammartano\(^{232}\) stated the following:

However, the arbitration that developing countries need is not always the arbitration they get. Frequently, developing countries\(^{233}\) end up losing arbitral proceedings or attacks against the award or enforcement proceedings. In fact, the sympathy which is frequently expressed to developing countries would not be consistent with behavior that keeps them in a weak position and benefits from this, or takes no cares of the problem. It would be interesting to conduct an in depth analysis of the reasons behind such a lack of success and to try to identify some needs if any…. Arbitration is not a tool designed to favor developed countries. … Frequently, it is not arbitration itself but the arbitrator who gives rise to dissatisfaction.\(^{234}\)

The miscommunication and distrust is not merely affecting the commercial relation between the Islamic and Western countries, it is also shaping the political behaviour of both

\(^{231}\) Jalal El Ahdab & Ruth Stackpool-Moore, supra note 224 at 275.
\(^{232}\) Chairman of International Association of Lawyers.
\(^{233}\) International Monetary fund report of April 2010 shows that all of Islamic countries in Middle East are categorizing as developing countries. <http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/groups.htm#oem>
\(^{234}\) The International Bureau of the Permanent Court of Arbitration, supra note 220 at 313.
parties towards each other. Therefore, the other difficulty that the Islamic world has with international arbitration relates to the political attitudes dominant in these countries, for example regarding the historical behaviour of Western countries toward Islamic countries. In some cases, Western arbitrators simply ignore rulings from Islamic jurisdictions based on the false belief that Islamic jurisdictions were not developed enough to handle special situations. In the case of *Petroleum Development Ltd. V. Sheikh of Abu Dhabi*,\(^{235}\) Lord Asquith undermined the ability of Abu Dhabi laws (which were grounded in Islamic Law) simply 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.”\(^{236}\) The main reason for the rejection was that there was no general law of contract in Shari’a, an argument that may be unacceptable. The mere fact that Shari’a rules about contracts are different from those in common law does not mean that there is no law of contract in Shari’a. In another case, *Ruler of Qatar v. International Marine Oil Co. Ltd.*,\(^ {237}\) the arbitrator first held that Qatar Law was the proper law to apply, but then said: “I am satisfied that the [Islamic] law does not contain any principles which would be sufficient to interpret this particular contract.” In yet another case, that of *Saudi Arabia v. Arab American Oil Co. (ARAMCO)*,\(^ {238}\) the panel held that Saudi laws had to be “interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence,” and it ignored Saudi Arabia’s Islamic traditional

\(^{235}\) *Petroleum Dev.(Trucial Coast) Ltd. V. Sheikh of Abu Dhabi*, 1 Int’l & Comp. L. Q. 247, 250-51(1952)
\(^{236}\) *Ibid*. Although this case relates to 60 years ago, however, it simply shows us why the Middle Eastern countries start to distrust the arbitration as a method made by foreigners to use their resources.
\(^{237}\) *Ruler of Qatar v. International Marine Oil Co. Ltd.*, 20 ILR 534 (1953).
jurisprudence. The dispute arose when ARAMCO refused to comply with the agreement that Saudi Arabia had in 1954 with Greek Shipping magnate Aristotle Onassis. In the agreement, Onassis was granted the right to incorporate a private company with the name of Saudi Arabia Maritime Tankers Company (SATCO), to transport oil from Saudi Arabia ports in the Persian Gulf to any other Saudi port on the Red Sea.\textsuperscript{239} ARAMCO claimed that it had a right to choose the means for transportation of oil by a 1933 agreement. Then Saudi Arabia offered to solve their dispute by arbitration, which resulted in an arbitration agreement on February 1955. Under Article 4 of the agreement, the tribunal had to settle the dispute:

a) In compliance with Saudi law indicated in the agreement (namely the Shari’a according to the Hanbali doctrine) if the disputed questions were of the jurisdiction of Saudi Arabia;

and

b) In compliance with any law the arbitral tribunal would deem applicable if the disputed questions were not of such jurisdiction.\textsuperscript{240}

The arbitral tribunal (whose seat was in Geneva) held in favour of ARAMCO. The tribunal applied both Saudi Arabian and international law; however, the Saudi government was dissatisfied with the award, as they were mostly concerned about the loss of control over their country’s natural resources.

The biased behaviour of practitioners, arbitrators and lawyers who work in the Western legal system also contributes to reciprocal anti-arbitration culture among Arab legal communities. Mr. Al- Ahdab, an eminent scholar in this field, offers four theories to explain the

\textsuperscript{239} Abdul Hamid El- Ahdab, \textit{supra} note 118 at 599.
\textsuperscript{240} \textit{Ibid.} at 600.
anti-arbitration culture in Arab (Muslim) countries. The first theory is conspiracy,\textsuperscript{241} based on the idea that arbitration is not a natural alternative dispute resolution (ADR). Rather, proponent of this view see it as a powerful tool in the hands of Western investors against Arab parties. It is also important to note that many Islamic countries see the foreign arbitration award as an instrument to impose Western needs. Judge Keba Mbaye of Senegal, a judge of the International Court of Justice in The Hague, said this:

\begin{quote}
The notion that there is a system of international justice will not be shared by some countries, notably, those of Africa, Asia and Latin America, who still see arbitration as a foreign judicial institution which is imposed upon them. The fact must, therefore, be taken into account if we wish to approach certain areas of developing countries, that are rarely used as the place of arbitration, and which even more rarely produced arbitrators. In addition, as everybody knows, in fact arbitration is seldom freely agreed to by developing countries. It is often agreed to in contracts of adhesion, the signature of which is essential to the survival of these countries.\textsuperscript{242}
\end{quote}

The second theory concerns market forces. This theory is based on “the premise that arbitration is a form of commercial justice which, like any other market, operates in accordance with market force. This theory assumes that genuine entry barriers, arising out of the operation of the free market, have led to the exclusion of Arab lawyers.”\textsuperscript{243}

The third theory refers to lack of international practice, arbitral culture, and recognition of Arab arbitrators. It seems that many people and companies who need an arbitrator for their disputes prefer to use a non-Arab arbitrator, as many of the parties (even Arab parties

\begin{footnotes}
\item[241] Jalal El Ahdab & Ruth Stackpool-Moore, supra note 224 at 282.
\item[242] The International Bureau of the Permanent Court of Arbitration, supra note 220 at 312.
\item[243] Jalal El Ahdab & Ruth Stackpool-Moore, supra note 224 at 282.
\end{footnotes}
themselves) believe that Arab lawyers and arbitrators do not qualify in terms of knowledge, recognition, and connections. The reason for the disqualification of Arab arbitrators could be dismissed as flawed logic, particularly since arbitration culture has always existed in Arab communities and, even before Islam, Arabs used this system instead of instituting courts. In addition, many Muslim law students study in Western universities and have knowledge of how Western countries’ legislation works; and some of them become familiar with the international arbitration system. However, the last issue, which is the lack of connections in the arbitration world, has two reasons: internal and external. The internal reasons probably relate to lack of access to academic and jurisprudential material, and the external reasons relate to lack of trust and misunderstanding – even between Arab practitioners – since “very few are appointed either as arbitrators in “non-Arab” arbitrations, or, which is more telling, by neutral individual appointing authorities.”

The fourth theory concerns hostility of national court judges. Since a new law cannot be fully enforced without the support of judges, judges should be aware of arbitration advantages for a country’s economy. Without understanding the purpose of arbitration, judges will seldom choose to enforce and sign “a piece of paper signed by an arbitrator, howsoever eminent in some far away part of the world, or whose name or reputation the judge in the court of enforcement has not even heard.”

244 Ibid. at 284.
245 Ibid. at 286.
246 Ibid.
Aside from political reasons, since commercial rules in Shari’a are significantly different from those in common law countries, it can be the source of other difficulties. Islamic culture has its own rules governing trade; a tenet carried over from the religion.\(^{247}\) Many of these rules are not acceptable by Western commercial systems—a disparity that has created a complicated situation for international arbitration. There are many trade rules in western countries which are considered basic rules for a commercial relationship, and many of them are protected by international conventions, such as the concept of "interest". For example, the United Nations Convention on Contracts for the International Sale of Goods (CISG) states: “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.”\(^{248}\) In contrast, interest (\textit{riba}) is prohibited by Islam. The reason behind this is that exploitation of a borrower by a lender is considered immoral.\(^{249}\) As interest could be an instrument of exploitation and ruin in a financial situation, it is considered an unjustified increase in capital.\(^{250}\) Historically, Prophet Mohammad himself never prohibited profit from a sale or from a partnership, but he did prohibit the charging of interest on a loan.\(^{251}\) The prohibition of interest varies in each Islamic country. Countries that are primarily Hanafi followers, like Syria, Jordan and Egypt, have for a long time eased the laws of prohibition by regulating interest rates,\(^{252}\) and they use \textit{Hiyal} or “legal

\(^{247}\) Arthur G. Gemmell, \textit{supra} note 116 at 173.
\(^{248}\) Abdul Hamid El- Ahdab, \textit{supra} note 118 at 605.
\(^{249}\) Samir Saleh, \textit{supra} note 134 at7.
\(^{250}\) \textit{Ibid}.
\(^{251}\) \textit{Ibid}.
\(^{252}\) \textit{Ibid}.

\textit{Hiyal} or “legal
tricks” which cover the concept of *riba* with the impression of responsibility. Other counties like Saudi Arabia, Qatar and Yemen, who are followers of Hanbali doctrine, strictly prohibit interest.254

This rule complicates banking operations in Islamic countries. Since money has to work to receive a return, banks in Islamic countries tried to find alternative ways of bringing in money instead of asking for interest: a practice against Shari’a rules. They now try to bend the rules by using other ways of investment. Some institutes, like the Shamil Bank in Bahrain, use a legal manipulation to solve this problem: “They invest deposits directly in different financial instruments, like real estate, and then they pay back profit shares rather than interest. Alternatively, they buy a car through a complex arrangement in which the bank takes temporary ownership and then sell the car to an individual at a profit.”255

The fact that charging interest meets with strong opposition in many Islamic jurisdictions is borne out of the negotiations leading up to the drafting of the United Nations Convention on Contracts for the International Sale of Goods (CISG). There, Islamic nations rejected proposals to set an interest rate, saying that charging interest was banned by their domestic laws. Although this situation is not dominant in all Islamic countries, each country has its own interpretation of Islamic sources. Some countries, like Morocco, legalized interest charges after a few years of

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254 According to Hanbali followers (Saudi Arabia, Qatar), the prohibition extended beyond the geographical boundaries of Islam.
dispute and argument, while others, like Saudi Arabia, did not.\textsuperscript{256} In Egypt, the constitutionality of charging interest was challenged, but the Supreme Court upheld the interest idea because the interest law predated the constitution, which made the Shari’a the principal source of law. Some countries try to interpret the Qur’an as saying that the Book prohibits charging interest only in “transactions between Muslim individuals… whereas artificial entities such as banks, corporations, public agencies or the like may freely charge interest in commercial transactions since they have no religion.”\textsuperscript{257} Some other countries try to accept interest in a different manner as a useful way for maintaining commercial relations with the West; for example, in UAE, a court authorized the collection of interest in a case of delayed payment.\textsuperscript{258}

Another issue that is prohibited in Shari’a, but is a normal business consideration in the West, is uncertainty or risk (\textit{Gharar}),\textsuperscript{259} in particular in contracts and with respect to the terms of contracts.\textsuperscript{260} This basic rule in Islam is another example of showing that there are differences between western legal rules and cultures and Muslim legal rules. Again, the Hanbali School has very restricted rules about risk (\textit{Gharar}) and so there is no way to circumvent this problem. The idea behind this issue in Shari’a is that the element of risk is equal to gambling - an activity prohibited in the Qur’an as being immoral gain;\textsuperscript{261} based on Shari’a. Therefore the parties to a contract must be completely aware of their obligations at the time they enter into contracts.\textsuperscript{262}

\textsuperscript{256} Abdul Hamid El- Ahdab, \textit{supra} note 118 at 605.
\textsuperscript{257} \textit{Ibid}.
\textsuperscript{258} \textit{Ibid}.
\textsuperscript{259} This prohibition also originated in the Quran.
\textsuperscript{260} Samir Saleh, \textit{supra} note 134 at 7.
\textsuperscript{261} \textit{Ibid}.
\textsuperscript{262} \textit{Ibid}.
Although there are ways to handle some issues forbidden in Shari’a, other issues that arise out of the trading of certain goods cannot be resolved: mostly because in Islam there are strict rules about trading such goods. For instance, all actions related to the production, sale, purchase, distribution and consumption of alcoholic drinks are forbidden.

3.3. Islamic Republic of Iran and Saudi Arabia:

In this chapter, the legal and arbitration systems of two Islamic countries, Iran and Saudi Arabia, will be examined; and a brief comparison with the Western arbitration system will be made. Both Iran and Saudi Arabia share some common sources for their law, the main one being Shari’a. Saudi Arabia is a very religious country and Shari’a rules and culture are applied heavily in the legal system. Iran was chosen for two reasons: first, as in Arabic countries, the source of much of Iranian law is Shari’a, but Iranians are Shi’a followers (a minority sect in the Islamic world), unlike other Muslim countries, that are Sunni. Therefore, a brief study will reveal how some of the difficulties are not directly related to Islam itself, but rather to a specifically interpreted application of religion in regulatory governance. Second, Iran played a vital role in international arbitration because many developments in this system came about during the U.S. – Iran arbitration disputes of the 1980’s.
3.3.1. Islamic Republic of Iran:

It is possible to classify the history of the legal jurisdiction in Iran into three phases: The first was before the Constitutional Revolution in 1906, during which the jurisdiction in Iran was a combination of Shari’a and the Kings' commands and wishes. The second was after the Constitutional Revolution (Enghelab Mashroutiat) in 1906, but before the Islamic revolution in 1979. The Constitutional Revolution in 1906 led to the creation of parliament in Iran for the first time. Still, in this period, Shari’a played an important role in the country’s laws, but Western concepts and legal structure were incorporated into the legal system in many areas of the law.

The third and last phase started with the success of the Islamic revolution in Iran in February 1979 and continues to be present. In this period, Islamic jurisprudence became the abstract source of law. Article 4 of the Constitutional Law enacted on November 15, 1979, which replaced the previous constitution, reads as follows:

All laws and regulations, civil, criminal, financial, economic, administrative, cultural, military, political or otherwise must be based on Islamic principles. This article applies generally to all articles of the Constitution and other laws and regulations. It will be decided by the religious jurists of the Guardian Council whether or not such laws and regulations conform to this article.

263 First Parliament in Iran: October 7th, 1906.
264 Article 2 of the Supplementary Constitutional Law enacted in 1907 reads as follows: "It is hereby declared that it is for the learned scholars of theology to determine whether such laws as may be proposed are or are not in conformity with the principles of Islam; and it is therefore officially enacted that there shall at all times exist a Committee composed of no less than five devout theologians who shall supervise conformity of the pertinent enactments with Shari’a."
According to Article 4, as in Arab countries, Shari’a is the main source of law in Iran, though Iran is a non-Arab country. After the Islamic Revolution in 1979, nearly 10,000 claims were filed against Iran internationally. Among these, 5,000 cases were filed by the U.S. government, companies or individuals; between 3,000 and 4,000 were filed by various European Union countries; and a few hundred cases were instituted by Japan and other countries and companies.\(^{266}\) For the purpose of resolving disputes between Iran and the U.S., according to the Algiers Accords signed on 19 January, 1981, all the disputes were referred to the Iran-U.S. Claims Tribunal at The Hague. It was the largest and the most significant arbitral body in the history of arbitration and the Tribunal’s jurisprudence is considered one of the first-hand sources in the matter of international law, especially international arbitration.\(^{267}\) The extent of arbitration there helped improve and develop the international arbitration system: These cases opened a new world to arbitration and created many different and new areas of discussions, such as:

- conditions for a lawful expropriation, standards of compensation, dual nationality, multiparty arbitration, security for costs before arbitrators, independence of first-demand bank guarantees and conditions of their proper call, immunity of State-owned entities from jurisdiction and execution and capacity of public entities to enter into arbitration agreement.\(^{268}\)


Iran lost a large number of the cases referred to the Iran-U.S. Claims Tribunal, which took nearly 15 years to process. During the tribunal and after all disputes settled, the government of Iran realized the utility of and the need for commercial arbitration laws, and in 1997 the *International Commercial Arbitration Act*\(^\text{269}\) was enacted. As in many other countries in the region, arbitration rules in Iran used during the last 40 years in different commercial and political disputes have been adapted from well-known foreign arbitration institutions,\(^\text{270}\) like ICC,\(^\text{271}\) whose rules are still used in many commercial cases.

One of the first important international arbitration disputes that took place in Iran in 1962 was between the Moratab Co. and Rover Company.\(^\text{272}\) Another early arbitration case was the arbitration between Iran and Iraq on the *Shat-Al-Arab* river dispute; the governments of both countries in the Baghdad Treaty in 1975 chose the Permanent Court of Arbitration rules for arbitration.\(^\text{273}\) The next important arbitration was in 1981 between Iran and the U.S., during which they used the UNCITRAL Rules for arbitration. These cases predated the 1997 law but demonstrate that the Iranian legal system is very familiar with international arbitration systems.

However, international arbitration in Iran follows the same path as it does in other Muslim-Arab countries. Unfortunately, the same problem exists for analyzing arbitration in Iran: there is lack of information and necessary statistics. The biased behaviour and hostile culture of the Iranian government and courts towards international arbitration is an important consideration


\(^{270}\) *Ibid*, at 217.

\(^{271}\) International Chamber of Commerce rules which came into effect on January 1, 1998.

\(^{272}\) *Ibid*.

\(^{273}\) S.H. Amin, *supra* note 266 at 216.
that prevails. In Iran, as in many other Islamic states, international commercial arbitration seems to have been monopolized by Western legal standards and Western personnel.\textsuperscript{274} History has shown the reasoning behind this perception. Since 1949, sentiment for nationalization of the oil industry grew in Iran. By 1951, under the leadership of Dr. Mohammad Mosaddiq, then-Prime Minister of Iran, the oil industry was nationalized, thus curtailing the interests of the British Oil Company, which took the case to the International Court of Justice (ICJ). However, the Court’s finding was in Iran's favor, and Dr. Mosaddiq won his case.\textsuperscript{275} Nevertheless, with the help of the United States of America, the British overthrew the nationalist Prime Minister Mosaddiq in a coup d’état and reinstated the protégé King (Shah), Mohammad Reza Pahlavi. This act of the U.K. and the U.S. and later their interference in Iran's internal affairs, disgraced them in the eyes of the Iranian population. These events prompted some religious leaders to make anti-West speeches and ask citizens to demonstrate against Western meddling in the affairs of the country, creating antagonistic atmosphere against the U.K. and USA in Iran. The second wave of public disapproval against the United States in Iran occurred during the Islamic Revolution of 1979, led by Ayatollah Khomeini, which was a major hit against relations between Iran and the Western countries, especially the U.S. and the U.K. Unfortunately, after 30 years, the relations between Iran and Western countries still remains unstable.

\textsuperscript{274} \textit{Ibid.} at 205.

After the collapse of the Soviet Union and the formation of the independent states in Eurasia, a significant degree of trade commenced between the newly independent states and the countries in the Middle East. The development of commercial relationships led to many disputes that could be resolved by arbitration. The countries of the region soon realized that they would benefit from an independent international *regional* arbitration institute.

In 1997, the Iranian government and the Asian-African Legal Consultative Organization (AALCO) entered into an agreement to establish the Tehran Regional Arbitration Centre (TRAC). This arbitration centre was created to provide a friendlier environment for arbitration across the region. Its purpose is indicated in Article I of the Agreement, which reads as follows:

> The aim of the Centre is to promote international commercial arbitration in the region, to coordinate activities and to assist the existing arbitration institutes in the region, to assist ad hoc arbitration, especially in case where they take place in accordance with the United Nations Commission on International Trade Law Arbitration Rules.

Presumably, the focus on a regional centre was to alleviate some of the impact of the perceived cultural biases and growing distrust towards established Arab cultures, as much as facilitating access and representation specific to the peoples of the region. The Agreement came into force in July 2004, and TRAC commenced its activities a year later, in July 2005. TRAC was to serve as a main arbitration center in its territory and could facilitate investment and trade relations between the countries in the region. Little information and statistics about TRAC’s

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276 Tehran Regional Arbitration Centre: <http://www.trac.ir/>
277 Ali Sahrian, supra 267 at 465.
operations have been available to date, and since TRAC has started its activities only recently, many of its problems and difficulties are still unknown. However, it is apparent that the law in Iran is a significant challenge for this kind of organization. The long gap between entering into the Agreement (1997) and commencement of the TRAC activities (2005) suggests the extent of problems confronting this organization. In addition, TRAC’s structure may pose a potential obstacle to its optimum operation. Under the Agreement, TRAC shall be administered by a director who shall be an Iranian national and appointed by the Government in consultation with the Secretary General of the Committee. \(^{278}\) It is notable that the entire political system of Iran is based on the ideas and thoughts of velayate faqih (a guardian cleric), who has absolute power under the Constitutional Law and who therefore has the ability to appoint or expel anyone he wishes. \(^{279}\) The basic requirement of TRAC is inconsistent with this authority and may create potential conflicts. The Agreement states that the Islamic Republic of Iran shall respect the independent functioning of TRAC and that the foreign staff of TRAC shall be immune from legal prosecution in respect of words spoken or written and all acts performed by them in their official capacity. \(^{280}\) However, velayate faghig of the country has the power and authority to intervene and change any staff or members of TRAC. Moreover, the independency and

\(^{278}\) Ibid.


\(^{280}\) Moshkan Mashkour, supra note 268 at 80.
immunity of TRAC could prove unstable, given that the Iranian government’s policies can vary drastically from one period of presidency to the next.  

Another difficulty related to the laws of arbitration in Iran concerns problems inherent in the arbitration law itself. As discussed in the first chapter, a major advantage of arbitration over national courts is the flexibility of arbitration. However, according to the Iran Constitution Law 1979, in cases where a dispute arises from a contract concluded between the governments or a state company and a foreign party, the approval of the Council of Ministers and the Parliament is required for referring the case to arbitration. Moreover, Article 139 of the Constitution explicitly stipulates that in cases where the other party is a foreign national, and when important domestic cases like construction of dams, highways, strategic factories, etc., are involved, Parliament's approval is required for referring the disputes to arbitration or making a settlement agreement. This is a frequent defense for either party and maybe used to delay the procedure. S.H. Amin argues that in accordance with the laws in Iran, arbitrators cannot be of the same nationality as the foreign party: “The umpire may not hold the same nationality as that of either party to the contract, in the case of European companies he may not be a citizen of a member State of the

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281 For example, during the presidency of the reformist Mohammad Khatami (1997-2005), NGO’s could work with more freedom than during the next ultra-conservative presidency, that of his successor Mahmud Ahmadinejad. Furthermore, many conservatives in the Government of Iran take the view that independent individuals or organizations are against them only by virtue of having connections with other countries. See Bill Samii, “Times Get Tougher For NGOs in Iran” Peyvand Iran News (11 August 2006), Online: <http://www.payvand.com/news/06/aug/1128.html>

282 Iran Constitution Law, supra note 288, article 139: “The settlement, of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here”.

283 S.H. Amin, supra note 266 at 212.
European Union, neither of the United States of America.\textsuperscript{284} This requirement also means limiting the choice of arbitrator: an idea completely contrary to the main concept of arbitration which advocates that the parties should enjoy freedom of choosing the arbitrators (by agreement) who are experts in the disputed case, in contrast to the national court system in which the parties do not have an option of choosing their judge. Before arbitration centres like TRAC can gain legitimacy in the international arbitration community, they need to operate for some time and prove their institutional independence from the political will of the government of the country in which they are located.

\textit{3.3.2. Saudi Arabia:}

In Saudi Arabia, like Iran, there are many challenges to enforcing an arbitration award. The origin of these difficulties lies in the ruling system of that country. All the power again rests in the hands of one person, except in this case it is the King. Saudi Arabia presents a complicated legal system based on the Saudi King’s power and on the authority of Shari’a\textsuperscript{285} as well as religious scholars (\textit{ulama}).\textsuperscript{286} Saudi Arabia does not have constitutional law in the same meaning or structure as that in most developed legal systems. In contrast, the country’s regulatory issues are divided into six parts: “religious matters (Shari’a), national matters, foreign affairs, cultural

\textsuperscript{284} \textit{Ibid}, at 213.
\textsuperscript{285} Chapter 1, Article 1 of Saudi Basic Law: “ The Kingdom of Audi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s book and the Sunnah of his Prophet, God’s prayers and peace be upon him, are its constitution.”
\textsuperscript{286} George Sayen, \textit{supra} note 122 at 907.
matters and military matters. An administrative body that has a direct link to the Saudi King governs each of those categories. Administration of Justice in Saudi Arabia is divided between two organizations: Governmental Board and Shari’a courts. The Government Board contains two important administrative bodies: Board of Grievances (Diwan Al-Mazalim) and the Committee for Settlement of Commercial Disputes (CSCD), which are particularly significant for litigation involving foreign business disputes.

International arbitration in Saudi Arabia changed after a famous case (ARAMCO) in 1958. Since the Saudi government was dissatisfied with the result of the dispute, it forbade in 1963 all government agencies from referring to arbitration without approval of the council of Ministers. However, this did not mean that arbitration became an abandoned system in the country. Arguably, Saudi Arabia is the most important trading partner of the West in the Middle East, and there has always been a great demand for foreigners to invest in many different sectors there, such as the oil industry. This development translates into a need to settle disputes by arbitration, which forces the Saudi government to provide exception to the prohibition that was made after ARAMCO case. The first exception is related to disputes that arise out of contracts of vital interest, and the second exception is related to technical disputes.

287 Abdul Hamid El- Ahdab, supra note 118 at 580.
288 Ibid.
289 George Sayen, supra note 122 at 908.
290 Discussed in text above at 67.
291 George Sayen, supra note 122 at 910.
292 Ibid. at 906.
293 Abdul Hamid El- Ahdab, supra note 118 at 587.
294 Ibid. at 603.
In 1983, a new arbitration law was enacted to cope with the growing number of arbitration disputes. The new law remained faithful to the basic principle of Shari’a and incorporated some general principles of modern arbitral legislation. This law was enacted for two important purposes:

First, it provides a comprehensive, uniform set of rules which are accessible to foreign business persons and their legal counsel. The regulation is designed to allay their fears over the previous lack of judicial and legislative support for commercial arbitration. Second, it establishes governmental control not only over arbitration procedure in general, but over the actual arbitration proceedings by providing for supervision by governmental agencies courts, or perhaps the Chambers of Commerce and Industry.

The arbitration law in Saudi Arabia has many ambiguities that give rise to the delay in the proceedings and, consequently, enforcement of the award. Moreover, some provisions give additional power to government to control arbitration proceedings, while other provisions simply incorporate Shari’a’s strict view of arbitration – for example, that arbitrators should be only Muslim men and that only a Muslim can judge between two Muslims by applying the Shari’a law. Furthermore, there is no provision in the act to limit the extent of review by the governmental authority. These inherent restrictions and ambiguities curtail the arbitration system.

However, the government decided to join the New York Convention to ease the historical resistance of the country towards international arbitration as well as to give foreign investors

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295 Ibid. at 587.
296 George Sayen, supra note 122 at 912.
297 Ibid. at 915.
298 Fiasal Kutty, supra note 141 at 608.
299 George Sayen, supra note 122 at 917.
more confidence for investing in the country. In April of 1994, Saudi Arabia signed the New York Convention and become the ninety-fourth party to the Convention.\textsuperscript{300} In spite of this, adoption of the Convention did not really change the historical resistance of Saudi Arabia’s legal culture and arbitral system towards international arbitration.\textsuperscript{301} The Saudi government simply uses public policy defense (Article V (2) (b)) of the New York Convention for refusing to enforce any arbitration award which it deems contrary to Shari’a and the country’s benefit.

The country’s attempt to enact new arbitration law and join the New York Convention did not improve the procedure of international arbitration inside the country. Furthermore, Saudis continue to exclude arbitration not only in areas in which no compromise is possible,\textsuperscript{302} but also in those areas which arbitration would be contrary to public order: an extra option that allows Saudis to exclude many more matters from arbitration. In addition to these limitations, Saudi law also provides for the following provisions: 1) It prohibits the Services of the commercial registrar from registering (without special authorization) any company which refers any disputes between the company and the Registrar to arbitration outside of Saudi Arabia; 2) it requires that all disputes dealing with commercial agency contracts be brought before the \textit{Diwan Al-Mazalem}\textsuperscript{303} (administrative court) and not be resolved through arbitration; and 3) it stipulates that the \textit{Diwan Al-Mazalem} has exclusive jurisdiction over disputes among foreign contractors or companies and

\textsuperscript{300} \textit{Ibid.} at 920.
\textsuperscript{301} \textit{Ibid.} at 953.
\textsuperscript{302} The areas that are against law and policy of the country.
\textsuperscript{303} “These courts exist in Riyadh, Dammam and Jeddah and have jurisdiction over disputes between government agencies and private individuals as well as disputes relating to forgery, corruption and trademark.” Abdul Hamid El-Ahdab, \textit{supra} note 126 at 586.
Moreover, any non-Saudi party who seeks to enforce an arbitration award against assets inside the country should submit the award to a Saudi Arabian court for approval. This creates a loophole that a losing party can use to challenge the arbitral award. Although this runs against the NY Convention Article IV and V, it is still in use.

It seems international arbitration in Saudi Arabia confronts obstacles which are not merely related to Shari’a; many of the problems relate to the behaviour and policy of the government of Saudi Arabia towards arbitration. The government itself is under the direct power and influence of the Saudi King and any changes in law should be done subject to his approval and control. Nevertheless, in order to change the negative approach toward arbitration and solve many difficulties that enforcement of arbitration award faces in Saudi Arabia, arbitration law was introduced in that country. While this is a start, it is a commitment in form, and not yet in substance; to date, it has not solved the enforcement problem of arbitral awards issued by foreign arbitrators for that jurisdiction.

Chapter 4 - Conclusion:

There is wide consensus among different stakeholders that one of the advantages of international arbitration for resolving commercial disputes is that arbitration is faster and more

304 Fiasal Kutty, supra note 141 at 600.
305 Ibid. supra note 141 at 645.
306 George Sayen, supra note 122 at 911.
cost effective than national courts. It is more flexible in terms of the practical resolutions it offers to the parties involved and transcends language and cultural barriers between parties. In spite of its advantages, arbitration is sometimes more expensive and time consuming than national court proceedings. Moreover, many disputes such as those related to financial crimes or registration of intellectual property cannot be resolved simply by arbitration. Only the national courts have exclusive jurisdiction to resolve such disputes. However, scholars and lawyers involved in this field are not just piqued by the expense and duration of arbitration tribunal determinations, but also by the particular difficulties faced by arbitration in countries where cultures and legal traditions vary largely from the West.

Unfortunately, many countries from Africa, Latin America, Asia, including the Middle East, have a rather cynical and hesitant view of international arbitration, often believing that this new legal system was created exclusively by Western nations to use against the developing countries. This view, of course, completely counters the main purpose of international arbitration. Therefore, while Islamic (mainly Arab) countries may not be seen hostile toward arbitration, they create unnecessary impediments, often suspicious of Westerners, and try to limit the international arbitration system in their countries.

While Islam, the dominant religion in the Middle East, has traditionally respected business and business practices, it also has incorporated restrictive rules towards commerce and business transactions. These rules were created to protect the commercial relations amongst the people of the region over the centuries, primarily to protect the vested interests of the people in the region. These rules developed to become an important part of Islamic culture and its people.
However, many of these rules and social mores are highly archaic and antiquated and therefore impractical in today’s commercial world. Nevertheless, it has become increasingly difficult to change these rules and values, as they are deeply rooted in the religion and culture of the region. Consequently, the commercial culture of the region also continues to resist the changes and new trends in the international commercial community, such as the full absorption of international arbitration.

Nevertheless, commercial relationships and business activities continue to grow. Therefore, many Islamic countries have gradually felt the need to observe new international commercial rules and adopt provisions in line with developed laws of international commerce. Economic relations make it necessary for Islamic countries to pursue serious changes in their legal systems and to do so with more effort.

Among the different ways of resolving commercial disputes in Islamic countries, arbitration still appears to be one of the best options, if not the best. Since arbitration draws infinite attraction due to its flexibility in resolving complex commercial disputes, one can assume that this feature of arbitration would be very helpful in dealing with the strict rules of Shari’a laws.

Each Islamic country has developed its own set of rules based on its own interpretation of Islamic sources; therefore, most Islamic countries have very different laws on international business matters and commercial arbitration. Hence, the issue of enforcement of arbitration award in these countries varies slightly from one country to the next. Many of these countries rely on the New York Convention, which states that a national court can refuse enforcement of
an international arbitration award if the award is against public policy. Generally, this rule should be interpreted narrowly and take into account international public policy as opposed to domestic public policy as it already has in some Western jurisdictions. However, this course is not followed by some Muslim countries and, as a consequence, the different views toward public policy in Islamic countries creates confusion and misunderstanding for Western lawyers, arbitrators and practitioners. 307

These different interpretations toward public policy can also be the result of a lack of Islamic countries’ knowledge of international arbitration, lack of arbitration tribunal reports in these countries,308 and shortage of reports from various regional institutes responsible for gathering articles and information about arbitration and co-operating with international institutes. This deficiency, in turn, leads to a shortage of reliable information for Western practitioners who deal with Islamic countries’ jurisdictions.

Today, unfortunately, the Western world connects Shari’a with fundamentalism and terrorism,309 and this perception affects the relationships in international arbitrations and relations between Western arbitrators with the Muslim world. Limited statistics provided by ICC in 2005 revealed that “less than half of the disputes involving Arab parties had an Arab arbitrator as a member of the arbitration tribunal which in contrast, while only three percent of parties

307 See e.g. Petroleum Development Ltd. V. Sheikh of Abu Dhabi and Ruler of Qatar v. international Marine Oil Co. Ltd., in Chapter 4 (B.3).
308 Klewer Arbitration database offer a list of countries that does not have any case reports about interpretation of convention which most of them are Islamic countries. ( Appendix 1)
309 Samir Saleh, supra note 134 at 3.
involved in ICC arbitrations are Swiss, Swiss arbitrators represent fourteen percent of the total number of appointed arbitrators.**310

There are various reasons for the lack of Arab arbitrators’ representation in the international arbitration system, but one of the main reasons is the non-recognition of the legal system of the Islamic world and Arab lawyers by their Western colleagues. This negative attitude towards Islamic culture adversely affects both the process of arbitration and the views of parties and lawyers toward arbitration. This outcome in turn affects the perception of Muslim countries towards international arbitration. However, it is possible to claim that Arab countries and Muslim practitioners and scholars have a responsibility to provide advice and guidance to Western scholars and practitioners on Shari’a and change the prejudiced perception of Shari’a as a set of primitive rules. To attain this goal, Arab countries need to familiarize their lawyers and practitioners more with the concept of international arbitration. This can be done by more structured efforts towards providing a better education of international arbitration among Islamic countries through university programs or special seminars and workshops on international arbitration as well as creating an atmosphere for more substantive and continuous dialogue between Western arbitrators and their Muslim counterparts.

With respect to the difficulties of enforcement of international arbitral awards in the Islamic countries, several solutions are suggested: One is the attempt of the government and legislators in the Islamic countries to separate religion from commercial relations and commercial rules. This separation is not an easy task and is likely to be resisted: However, some

**310 Jalal El Ahdab & Ruth Stackpool-Moore, supra note 224 at 289.****
efforts are also required on the part of Western arbitrators: They should not view Shari’ā as an antediluvian, primitive system and treat its principles with bias simply because it is rooted in religion; instead, they should respect the cultural differences. If mutual pertinacity prevails, the misunderstandings will never be resolved. As international arbitration is still the most preferred method of resolving international commercial disputes, Western countries interested in keeping commercial relations with Arab countries need to gain a better understanding of Islam and Shari’ā rules. In this regard, Professor Lalive states:

... in his conduct of the arbitration and in his awards-and this is an essential aspect of his objectivity-the international arbitrator of today must show proof of a comparative or comparatist mind, open to legal pluralism, to various cultures and curious political and social systems. Arbitration will hardly be regarded by a party as a suitable way of solving the case, writes Rene David quite rightly, 'if it is to be administrated by an arbitrator who is imbued with the ways of thinking and the prejudices of another culture.'

Another possible solution is to establish an independent Islamic institute for adopting and developing a set of regional-international rules that both Western and Islamic countries could accept and use as their basic arbitration rules. This strategy would prevent different interpretations of Shari’ā, avoid confusion, and could be implemented by using experience and ability of multicultural countries like Canada. In Canada, two different legal jurisdictions (common law and civil law) co-exist and perform side by side; Canada’s Supreme Court hears cases which come from these two legal systems. Moreover, the country’s population is made up of people who have emigrated from different countries with different cultures and languages.

311 The International Bureau of the Permanent Court of Arbitration, supra note 220 at 314.
This means that “Canada could offer a large pool of potential arbitrators with a demonstrated ability to appreciate cultural diversity.” Therefore, it is a foreseeable solution to build an international multicultural arbitration institution in Canada with the following three main purposes:

1- By developing a set of culturally sensitive rules which facilitate international commercial arbitration, give the developing countries the confidence to use international arbitration and to enforce arbitration awards in their countries;

2- To train and introduce arbitrators who have knowledge about different cultures and religions;

3- To prepare a database of arbitrators from different countries for the purpose of making available to the parties to arbitration an opportunity to choose arbitrators who know their culture, law and language.

These steps do not constitute an easy task, and they require effort on behalf of all parties involved as well as existing international institutions. New international commercial relations demand change – and soon. However, until progress is made, the argument between the West and the East over international commercial arbitration will continue much in the manner that Rudyard Kipling described in his famous two verses of *Ballad of East and West*: “Oh, East is East, and West is West, and never the twain shall meet, till Earth and Sky stand presently at God’s Great Judgment Seat.”

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312 Errol P. Mendes, “Canada: a new forum to develop the cultural psychology of international commercial arbitration”, (1986) 3 Journal of International Arbitration 71 at 76.
313 “Oh, East is East and West is West, and never the twain shall meet,
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Till Earth and Sky stand presently at God's great Judgment Seat;
But there is neither East nor West, Border, nor Breed, nor Birth,
When two strong men stand face to face, though they come from the ends of the earth!”

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## Appendix 1:

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