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Development of a Commercial Arbitration Hub in the Middle East: Case Study -- The State of Qatar

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GOLDEN GATE UNIVERSITY

THE DEVELOPMENT OF A COMMERCIAL
ARBITRATION HUB IN THE MIDDLE EAST: CASE STUDY—

THE STATE OF QATAR

A DISSERTATION SUBMITTED TO
THE COMMITTEE OF INTERNATIONAL LEGAL STUDIES

IN CANDIDACY FOR THE DEGREE

OF

SCIENTIAE JURIDICAE DOCTOR

DEPARTMENT OF INTERNATIONAL
LEGAL STUDIES

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TITLE

Development of a Commercial

Arbitration hub in the Middle East: Case Study – The State of Qatar

DEDICATION

To:

My loving parents: Jamil and Hayat.

EPIGRAPH

Great progress was made when arbitration treaties were concluded in which the contracting powers pledged in advance to submit all conflicts to an arbitration court, treaties which not only specified the composition of the court, but also its procedure.

--Ludwig Quidde

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PREFACE

Originally my proposal was to address the “effectiveness of International Arbitration as a dispute resolution mechanism.” As I began my research, I discovered that International Arbitration has evolved to become the dominant transnational system of justice for commercial disputes wherein the increased autonomy from national legal systems and the harmonization of arbitration practices have created a robust market for arbitration and has catapulted this area of practice into a golden age.

As one of the most interesting areas of practice in International Law, arbitration is developing into this new international commercial legal order as it is being referred to in many recent articles. Ultimately my attention was drawn to the practical aspects of the international arbitration process. One of these aspects that has been heavily discussed behind closed doors and that has avoided public deliberation, is the fierce competition between international cities to hold court within their home jurisdictions for the practice either as a seat, or as venue of arbitration, a subject of which a lot has been said, but very little written. These sites have become known as “arbitration hubs,” a moniker that captured my attention.

As a result, the subject of arbitration hubs began to stir in my mind. Realizing the limited the scope of the legal frame work for International Arbitration, I decided to put forth the effort to make the study more comprehensive by including non-legal, political and socio economic factors that come into play as investors select a place to arbitrate their disputes. As this study is limited to the Middle East, the discussion inevitably turned to Islamic Shari’a Law and the role it has, particularly with the emergence of Islamic Finance as a viable industry in the region and beyond,

in the current legal systems of the region. While the purpose of this Dissertation is to fulfill my academic requirement for the Doctor of Juridical Science (SJD) program of the Golden Gate University School of Law, it is hoped that it will also provide useful and practical guidance on various aspects of arbitration in the Middle East to a wider audience that includes investors, local officials, judiciary and arbitration institutions and professionals in and outside of the region. With respect to this broad and diverse audience, the contemporary nature of this research, which uses the most recent legislation, reports, articles data, and news sources, makes the content useful. In addition, to my knowledge such a comprehensive study for the region has not been broached before.

This work is divided into seven chapters. While the beginning chapter is a general outline, the core chapters, two through six, examine various semi-independent topics that as a whole provide adequate substance for my final conclusion and recommendations in Chapter VII. Each chapter has its own introduction and its own conclusion, a structuring that allow the independent study of each chapter, or taken collective, they comprise a cohesive work of paper.

* * *

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If you want happiness for an hour, take a nap. If you want happiness for a day, go fishing. If you want happiness for a year, inherit a fortune. If you want happiness for a lifetime, help somebody.

-- Chinese Proverb

Completing this work would have been impossible without the help and support of many individuals. First and foremost, I express the most profound gratitude to my primary advisor, Professor Dr. Christian N. Okeke, who supervised and assisted me in all aspects with his invaluable time, knowledge and expertise throughout this doctoral work. Without his support encouragement and guidance, this work may have never seen the light of the day. Further, I extend special thanks to my SJD committee members, Professors Dr. Benedetta Faedi Duramy and Dr. Zakia Afrin for joining my doctoral committee. My sincere gratitude also goes out to all the staff of the Golden Gate University School of Law who made completion of this Dissertation possible.

On a personal level, I will forever feel the greatest gratitude for my parents, to whom I dedicate this dissertation, for their unconditional love, encouragement and moral support, and who, in my early childhood, planted within me the seeds of success. I am also deeply grateful for their believing in me throughout the years; that unwavering belief has kept me focused as I worked toward achieving my educational goals and pursuing the *Doctor of Juridical Science Degree*. I wish my father were still around to see this day as I am sure he would be the proudest of my supporters. Finally, I sincerely thank my husband, brothers, sisters and many of my

extended family and friends, whose patience and understanding contributed significantly to this accomplishment.

* * *

EDITORIAL METHOD

Writing in a language that is not one's mother tongue is rife with challenges of adventure and unknowingness; nonetheless, as with a trek into the Australian Outback or a Safari across the endless plains of Africa, one finds moments of awe inspiring delights, as well as those of dire uncertainty as whether to set out upon this path or that, while being ever mindful of the occasion unwelcomed intrusion into the domain of a powerful beast who might be in no mood for visitors. Thankfully, committing oneself to a major work of scholarly endeavor, one's chief concern, aside from finding material to support and help elucidate a chosen thesis, is the appropriateness of a particular word, phrase or expression.

Another concern is that while we all have, by young adulthood, learned how when speaking, to stress select words so as to give them more significance, the same is more difficult to accomplish with the written word; nevertheless, we do attempt such a feat by using punctuation, and sometimes particular combinations of words. The German-speaking people, to stress the importance of nouns for example, capitalize all nouns. This seems appropriate because language revolves around nouns, or objects, and words of actions, verbs. Hence, taking a note from the Germans, I have emphasized the importance of certain nouns by providing capitalizations that would ordinarily be thought unorthodox in American, British, and other forms of English. Therefore, as one example, where "states" may be used to refer to political entities within a larger republic or federation, when speaking of nations, I have capitalized the term; *i.e.*, "States," as well as a few other terms that might not normally be capitalized, except in the German-speaking world.

ABSTRACT

Litigation can be a long, frustrating and expensive experience. Given the choice, most of us prefer to avoid litigation if at all possible.¹

International Commercial Arbitration is quickly becoming the method of choice for dispute resolution by States and corporations around the globe. This Dissertation analyzes and discusses the development of arbitration in the Middle East with the major focus on the State of Qatar (hereafter, also “Qatar”) as a case study. It will study the rise and development of International Commercial Arbitration as it is conducted in Qatar in relation to other regional jurisdictions such as Bahrain, Dubai in the United Arab Emirates (UAE), and Egypt. These States have been emerging as regional powers in attracting International Commercial Arbitration in the Middle East.

This Dissertation (or “work”) analyzes the effects that the legal systems of the respective States have on the dispute resolution procedures that have been adopted by parties seeking to conduct proceedings, or attempting to enforce awards in these States. Over the last twenty years, countries of the Middle East have made commendable progress in many areas with regard to international arbitration. In that regard, many Middle Eastern States have enacted arbitration laws, many have acceded to New York Convention, and arbitration centers are spreading throughout the region. However many legal and procedural issues continue to hamper the practice in terms of seating arbitrations in the region. In order to overcome these problems, some Arab countries have found a Panacea in creating a separate legal

¹ Darlene W. Janulis, Marketing Coordinator at Frank Rewold and Son Inc. Location Greater Detroit., “June 15, 2011 Mediation vs. Arbitration – Know the Difference. “

system with its own legal culture where resolution of international investment disputes could be facilitated a way from all the ills of the mixed civil-Shari'a legal structure found in most state jurisdictions of the region.

While Qatar has made a name for itself as a major player in arbitrating and negotiating settlements for political disputes around the world, its leaders have been striving to equal that success in the commercial arena. Qatar's newly established jurisdiction, Qatar Finance Center (QFC) and its modern arbitration framework, provide Qatar many advantages that greatly enhance the country's standing in the race to win the crown of arbitration in the region. However, for Qatar to develop as a true competitor to world-class arbitration hubs such as London, Paris, and Singapore, it should update its State jurisdiction legal framework, upgrade its court system and improve its standing in other areas including, corruption and rule of law.

* * *

CHAPTER I

OVERVIEW OF THIS WORK

Arbitration improves access to justice. It enhances the likelihood of recovery. It delivers speedier results. It keeps costs down. For many, it is a superior option to the expensive, slow, cumbersome ways that have come to typify our civil justice system.¹

I. INTRODUCTION

Casual observation of creatures such as birds, cats, dogs and primates suggests unequivocally that dispute and dispute resolution are far older than the human race. Where all creatures may settle disputes by resorting to physical conflict, humans—while often utilizing that option—have invented other methods, among them being *litigation*, a term which may connote not only immense expenditures of time measured in days, months, or even years, from which mounds of paperwork—or nowadays—billions of bytes of digital information result, but even more so, frustration, personal bashing, and tremendous costs! While those of a contentious nature may still favor litigation, there are many others who prefer, and seek out other dispute settlement strategies, such as, “Alternative Dispute Resolution” (ADR).

¹ Peter B. Rutledge. Catholic University of America, Columbus School of Law
Arbitration – A Good Deal for Consumers,
2008.<http://www.instituteforlegalreform.com/featuredtool/arbitration-quotes>.(Last assessed 6/23/13).

One such strategy, which is the center piece of this work, is known as “arbitration,” and the other, a close “cousin,” if you will, is called “mediation.” They share both similarities and differences. They are similar in that they both are used to avoid the lengthy, costly and contentious process of litigation; thus, parties may emerge from the process on amicable terms. They are both are conducted in greater confidentiality than is litigation, and the outcome doesn’t become part of the public record; *i.e.*, parties don’t run the risk of “airing soiled laundry,” and more importantly, perhaps, exposing business practices they may wish to keep confidential. Additionally, both involve a third party, or “go-between,” who acts in a disinterested manner. Lastly, they both may result in enforceable resolutions. The differences, however, are more profound than are the similarities.

One difference is that, unlike arbitration, the third-party sits and listens, ask questions where appropriate, make suggestions, and finally offers a resolution, which the two parties may either accept or reject. Further, if they wish, the parties may continue on to litigation. In contrast, and herein lies the chief difference between these two forms of ADR; in arbitration, the third party has greater control, enabling that party to make a binding, non-appealable decision for the parties. Thus, from the point of view of courts, which have an ever present backlog of cases, one probable advantage of arbitration over mediation is that because the neutral third party can make a binding and generally non-appealable decision, the matter can be resolved in arbitration and there is a lesser probability that the parties will seek litigation before a court. We may now commence our discussion by offering yet another set of definitions; *i.e.*, just what is a “hub,” a “seat,” an “arbitration hub”?

In computer “geek speak,” a “hub” is a networking device, or a focal point to which two or more computers are connected for the purpose of sharing information among themselves, or from a common source. Whenever a geographical location is described as a “hub,” we are referring to a center of activity or interest; a focal point if you will. In arbitration, a hub is a place where contracting entities gather to discuss and hopefully, settle disputes. Preference of a hub (or “seat”) for arbitration is generally influenced by the seat’s formal legal infrastructure and the law governing the contract in dispute. Ideally, that seat should also be conveniently located, and have the proper amenities for the parties involved. London, Paris, New York and Geneva have historically been the global hubs of arbitration. As arbitration has been rapidly gaining international favor, Singapore has been steadily emerging as a regional leader in Asia,² while elsewhere, Stockholm, Vienna, Hong Kong, Zurich, Tokyo, China and other States are becoming well known in their respective region for attracting international arbitration tribunals.

In the Middle East, three jurisdictions Bahrain, Egypt, and Dubai in the United Arab Emirates (UAE) are exemplary with respect to legislation and their proficiency at implementing arbitration. Bahrain is a popular venue for parties within the Gulf Cooperation Council (GCC) States, and Egypt is a sought-after venue whenever one of the contracting parties is from an Arab State. Dubai with its two jurisdiction format (UAE Federal Law and Dubai International Financial Center (DIFC)³ Law)⁴ is

² ‘2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process.’ *White & Case*.

³ The Dubai International Financial Center (DIFC) was established on 16/02/2002 by the Government of Dubai and provides a free zone for financial services. It has its own legal authority and judicial system. www.difc.ae.

currently considered the most popular forum in the region by international arbitration parties from outside the Middle East. Both Bahrain and Egypt have adopted the UNCITRAL Model Law on Arbitration. The former adopted it without any modification for international arbitration, while the latter incorporated it into its legal system, made a few modifications, and adopted it for both domestic and international arbitration. In Dubai, the focus of the federal UAE Civil Procedure Code is court litigation and articles relating to arbitration, all of which are somewhat sparse; however, the DIFC Arbitration Law 2008 is based on the UNCITRAL Model Law. The DIFC also has an arbitration center and rules established in conjunction with the LCIA (London Court of International Arbitration).

Qatar has emerged from rather humble origins of being a small, desert British protectorate, prior to independence in 1971, and on to become a major economic and political power house in the Middle East. Besides causing a stir in the media world with its Aljazeera TV coverage of the Afghan and Iraq wars, Qatar has also achieved recognition as a peaceful and neutral world power in the international arena. In its attempt to brand itself as a peace maker, it has successfully achieved that goal by acting as a mediator promoting harmony and political accord in the region and beyond. On January 2012, addressing a symposium on “Arbitration and Alternative Dispute Resolution in Banking and Finance,” Sheikh Khalifa,⁵ expressed the following sentiment:

⁴ UAE Civil Procedure Code, Federal Law No. (11) of 1992 and (DIFC) Arbitration Law 2008.

⁵ Sheikh Khalifa bin Jasim al Thani, Chairman of the Qatar Chamber of Commerce and Industry.

Arbitration as a dispute resolution process has tremendously boosted foreign investor's confidence in Qatar and the region. We have learned from history that conflict exists wherever humans exist. However, in Qatar we strongly believe in the power of sincere arbitration whether it is in the political domain or business and finance sectors. Qatar's efforts to arbitrate go beyond the finance and business sectors. We remain the biggest proponent that conflict can be resolved through dialogue and harmony. This constant struggle to be a just arbitrator has made Qatar a preferred mediator for conflicting parties from Lebanon to Darfur to the Philippines.⁶

As we have indicated, Qatar has become a major force in arbitrating and negotiating settlements to decade's long political disputes across the Middle East, and around the world; moreover, its leadership is striving to equal, or go beyond that success in the commercial arena. In an attempt to catch up with other investment magnets in the region such as Dubai, Qatar created the Qatar Financial Center (QFC) in 2005 as a separate jurisdiction with its own laws within the State. The QFC Law⁷ provides for the arbitration of commercial disputes in relation to contracts that have been concluded under QFC Law.

The QFC has set Arbitration Regulations which are based on the UNCITRAL Model Law.⁸ Qatar also established the Qatar International Court and Dispute Resolution Center (QICDRC).⁹ The QICDRC was established by Qatari law in 2009 as part of a strategy to attract international business and financial services into Qatar. The QICDRC was the final component of Qatar's plan to construct a world-class

⁶ The Gulf Times News April 1, 2012, http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=496316.

⁷ The QFC Law (Law No. 7 of 2005).

⁸ QFC Regulation No. 1 Financial Services Regulation.

⁹ Formerly, the Civil and Commercial Court of the Qatar Financial Center.

international financial center. Since its inception, the QICDRC's ambition has grown from resolving disputes within the QFC to wider disputes within the Qatari business community and now to be an international commercial dispute resolution center open to parties from all over the world. To enhance the QICDRC's credibility, distinguished judges with noteworthy experience were hired from around the globe.¹⁰

On the other hand, with no independent Arbitration Law in the State's jurisdiction, it is obvious to both practitioners and commentators that Arbitration Laws in Qatar continue to lag behind the international norm, and are, therefore, in urgent need of reform.¹¹ Arbitration in Qatar is currently regulated by Articles 190—210 of Law No 13 of 1990 The Civil and Commercial Code of Procedure (CCP).¹² Provisions of the CCP are outdated and do not reflect the UNCITRAL Model Law. Arbitration in Qatar has been widely criticized for being too similar to commercial litigation.¹³ This is inherently problematic as arbitration's awards could be appealed.¹⁴ This has led the State Jurisdiction to fall significantly behind international arbitration standards.

¹⁰ A perfect example of this was early 2010 when it was announced that the Right Honorable Lord Phillips of Worth Matravers had been appointed QICDRC's newest president. With a long and highly distinguished career already behind him, Lord Phillips was appointed Lord Chief Justice of England and Wales in 2005 and currently serves as president of the Supreme Court of the UK. *Arabian Business News*, October 7, 2012.

¹¹ "Is It Time to Amend the Articles Regulating Arbitration in Qatar?" Seem Maleh, *The Center for American and International Law* "June 30, 2011.

¹² Based on the old Egyptian Civil and Commercial Procedure of 1968 which was flawed in many respects. 'Commercial Transaction in the Middle East: What Law Govern' H. S. Shaaban, (1999)

¹³ For more information see Abdel Hamead al Ahdab, 'Arbitration in the Arab world' (1st ed., 1998) 535.

¹⁴ Civil and Commercial Procedure 1990 (QTR), Article 205.

It is widely acknowledged that Qatar must develop its commercial Arbitration Law with respect to the state jurisdiction. Rising to the challenge, therefore, it is working diligently to achieve effective reform of its legal framework regarding this issue.¹⁵ It is also understandable that changes to Qatar's legal framework need to move at the same pace as its social development. Specially, when its social values are deeply rooted in old culture and bound by the Shari'a doctrine. Legal systems are not known for keeping up with social changes, but Qatar is at a crossroads of contrasting economies, cultures and natural environments. Time is of the essence, and it is now imperative for Qatar to move ahead and reform its domestic and international arbitration legislation. It is recommended that Qatar update its State jurisdiction arbitration framework by adopting the UNCITRAL Model Law with relevant amendments as the case was with Egypt to suit the Qatari context.¹⁶ This will further signify Qatar's commitment to international benchmark standards and pave the way for Qatar to become a world-class Arbitration hub.

II. THE OBJECTIVE OF THIS STUDY

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.¹⁷

¹⁵ Qatar is leading the Gulf Cooperation Council (GCC) initiative to have in place a unified Arbitration Law. *The Gulf Times News*, April 1, 2012, http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=496316.

¹⁶ See, "Does Qatar Need to Reform its Arbitration Law and to Adopt the UNCITRAL Model Law for Arbitration? A Comparative Analysis" Dr. Zain Al Abdin Sharar, Director of Legal Affairs and Enforcement, Qatar Financial Markets Authority. Published in *The Legal and Judicial* magazine 2011, second edition, by Qatar Ministry of Justice, <http://www.moj.gov.qa>, a copy of the article could also be found here, <http://www.almeezan.qa/ReferenceFiles.aspx?id=52&type=doc&language=en>.

This Dissertation investigates the law and practice of Commercial Arbitration in Qatar, especially within the context of instituting a modern competent system of arbitration to promote the State as a hub for arbitration in the Middle East,¹⁸ and beyond. Due in part to close proximity, and to a large extent similarity of history and culture, we shall scrutinize lessons learned from emerging international arbitration hubs outside the region and other jurisdictions in the region, namely Egypt, Bahrain and Dubai in the UAE, all of which have been active in transforming their systems to achieve the goal of becoming sought after arbitration hubs. Making references to these jurisdictions has the supplementary advantage of providing a more panoramic picture of the State of arbitration in the Middle East and lends incomparable insight into prevailing tendencies. As far as we have been able to ascertain, no extensive study on this subject has ever materialized. This observation leads, therefore, to our presenting the significance of this work.

III. THE SIGNIFICANCE OF THIS STUDY

The Middle East has enjoyed a long and storied history. It is considered the origin of modern culture, technology, architecture, mathematics, science, and as if that were not enough, both science and theology point to the Middle-East as the probable origin of the modern human race.¹⁹ But with humans being sometimes a “rough and rowdy race,” the Middle East has also been an area of political and social unrest.

¹⁷ Rudolph von Jhering 1818–1892. Quoted in Xanthaki, Helen, “Comparative Research Methods,” The Institute for Advanced Legal Studies, London 2004, p. 12.

¹⁸ A map of the Middle East is found in Appendix II of this work.

¹⁹ Many Christians believe the Garden of Eden was somewhere in the Middle-East, possibly in – modern day Iraq, or Lebanon. Scientists using DNA markers place the earliest human origins farther south of the Sahara, into central Africa, and have found variations in these markers as their research extended north towards the Red Sea and the Great Rift Valley.

Unfortunately, to the perception of an outsider, these latter events often overshadow the resplendent and glorious history of that region. Nonetheless, despite the seemingly ever present specter of war and strife, the Middle East still retains a powerful semblance of its ageless wonder and creativity; for this reason, we are witnessing new and invigorating growth throughout the region as it enters a new age of sophistication, which no doubt will be partly rooted in its vast and glorious past.

Recorded history shows that the earliest trade routes ran across the Middle-East, into Asia, and westward to the kingdoms of West Africa and to the Atlantic. Therefore, we are not surprised to find such a flurry of business-related activity being re-awakened in the region. Invariably in the course of business transactions, disputes arise. Often they arise through inadvertent actions, or mis-understandings, such as when the parties to a contract believe they have a valid and enforceable agreement, but each is mistaken as to the nature of the subject matter, or time of performance. In such a case, rather than sue on the contract, parties may elect the less costly and far less contentious, arbitration. Therefore, one of the areas of commercial activity that has flourished in the region is that of Commercial Arbitration, which in fact, along with mediation, which for the very reasons given above, has grown in popularity over recent years.

This Dissertation will shed some light on the increasing competition between States in the region as they aggressively upgrade their Arbitration Laws and practices in an attempt to improve the functionality of arbitration within their jurisdictions. In the process we will look at characteristics of modern arbitration hub systems and trends around the world. Foreign entities engaging in business in the Middle East,

and agreeing to conduct arbitration in a local jurisdiction, such as Qatar, Egypt or Bahrain, will also find the issues discussed, and recommendations provided herein of significance. This work informs these entities of the local jurisdiction's level of infrastructure and support offered for the conduct of international arbitration, and highlights the risks involved in allowing local courts to exercise supervisory control of their arbitration. We shall now consider the factors that make Qatar an attractive point of interest for this dissertation.

IV. WHY THE STATE OF QATAR?

Qatar may only have existed as an independent State since 1971 and its total population²⁰ may only amount to less than the size of an average small city in the US; however, it has an avid desire to be recognized globally for more than just the wealth it has amassed from its lucrative oil and gas reserves. Consider for example that television news channel, Al Jazeera has become a globally respected broadcaster; additionally, the awarding by the FIFA²¹ of the 2022 World Cup has rubber-stamped the Emir's²² plans to fashion the small State into a global superpower. As was evident by its active and influential role during the Arab Spring, Qatar's leadership is now envied by the largest Arab nations in the region.

²⁰ Qatar has an "estimated population of 1.9 million. Of these, it is also estimated that about 80% (or more) are non-Qataris. . . . According to a 2010 Gulf News article, because of the high proportion of foreign male workers (particularly in the growing construction sector), women comprise only one-quarter of the population of Qatar. <http://www.hziegler.com/articles/population-of-qatar.html>. (Last assessed 6/20/13).

²¹ Fédération Internationale de Football Association; or "International Football Association."

²² Sheikh Hamad bin Khalifa Al Thani. He took control of the State in 1995 while his father was on vacation abroad while his father Khalifa bin Hamad Al Thani was in Geneva, Switzerland, Hamad bin Khalifa deposed him in a bloodless 1995 coup d'état. "Backstory: The royal couple that put Qatar on the map". Harman, Danna (5 March 2007). *Christian Science Monitor*

Part of Qatar's Emir global vision includes commitment to become a global hub for dispute resolution including international Commercial Arbitration. There are many reasons why Qatar could also emerge as the region's leading hub for international Commercial Arbitration; for example, consider the following features that entrepreneurs would find appealing:

- Central geographic location
- Political stability²³
- Modern, clean and efficient infrastructure
- world-class communications and Transportation systems
- One of the fastest growing economies in the world²⁴
- The highest per capita income in the world²⁵
- A progressive ambitious leadership
- Self-sufficient economy that is ranked on top of the region in terms of Business Environment Outlook²⁶

On the other hand, Qatar is a typical and traditional Arab State with values deeply rooted in old culture and the Islamic tradition. Qatar is also the newest player into the arbitration market with least research work done on this subject for its jurisdictions. All these factors provide the classic elements for Qatar to be a case

²³ Qatar is ranked low on the 2009/2010 Political Instability Index. The Economist Intelligence Unit.

²⁴ It is projected to remain high, averaging 5.7% in 2012-30. The Economist Intelligence Unit.

²⁵ Ranked No.1 by the International Monetary Fund for year 2010/2011.

²⁶ Forecast for the period (2012-16). The Economist Intelligence Unit.

study, while highlighting a number of potential issues with establishing a Middle Eastern State as a hub for international arbitration.

V. THE SCOPE AND LIMITS OF THIS STUDY

For our purposes here, the Middle East region is defined to include the States of Syria, Lebanon, Jordan, Iraq, Egypt, Libya, Kuwait, Bahrain, Saudi Arabia, Qatar, the United Arab Emirates, Oman and Yemen. The subject of arbitration in the Middle East is an enormous one that is deeply steeped in history, tradition and legal systems having points of conflict. Considering the vastness of the region itself, and with all the multi-cultural aspects, all the foregoing could easily yield a volume of work too massive to complete within a single lifetime; therefore, on account of limited space and time constraints,²⁷ this Dissertation focuses primarily on the State of Qatar as a case study, but will highlight lessons gleaned from the experiences of Egypt, Bahrain and Dubai in the UAE; jurisdictions outside the region are only used to provide insight into characteristics and trends of modern arbitration hub systems. It analyzes and critically discusses how a number of Middle Eastern jurisdictions, particularly Qatar, are competing to attract international arbitrations to be held in their respective States. Therefore, this research mainly focuses on procedural rather than substantive issues. Recognition and enforcement of foreign arbitral judgments are only discussed within their historical contexts.

To promote a jurisdiction becoming a hub for arbitration, it is important to understand the general needs of potential clients, and to further determine the types of dispute resolution they require based on that understanding. With Islamic

²⁷ Professor Emeritus Sompong Sucharitkhul once (smiling), remarked that “No matter how interesting the topic, all dissertations must come to an end.”

Finance expanding in the region and throughout the Muslim world, demand for Islamic Arbitration of Shari'a-based products²⁸ is on the rise.²⁹ Therefore, this Dissertation examines the legal framework that caters to Islamic financial matters and the development of Shari'a based arbitration tribunals. Among other topics, the scope of this work could be summarized in the following:

- Brief history of arbitration in the Middle East
- Importance and characteristics of modern arbitration hubs
- Recent arbitration developments in Egypt, Bahrain, and the UAE
- Qatar's legal systems, Arbitration Law and the effect of Shari'a Law
- Enforcement and scope of review of the arbitral award
- Modern arbitration framework
- Court systems that have supervisory jurisdiction over arbitration
- Importance of the seat in international Commercial Arbitration
- The rise of new Jurisdictions in the Middle East: The free Trade zones
- The Rise of Shari'a based Financial Investment.³⁰

This Work does not discuss in detail much of the history of arbitration in the Middle East, or sources and variation of Shari'a Law³¹ in the Middle East; instead, it

²⁸ Including Islamic Banking, Islamic Insurance (Takaful) and Islamic Bond (Sukuk).

²⁹ Global Islamic banking assets under management are currently estimated at just over \$1 trillion and are expected to reach \$4 trillion by 2020. See 'The Rise And Rise Of Islamic Finance' African business Magazine Monday, November 19. 2012. Also see 'Financing on faith: The rise of Islamic finance' Article by Arabian Business. March 25. 2012

³⁰ Including Islamic Banking, Islamic Insurance (Takaful) and Islamic Bond (Sukuk).

³¹ This subject has been studied extensively in books and other dissertation. See 'Commercial Arbitration in Islamic Jurisprudence: A study of its role in the Saudi Arabia Context.' By Mohammed A.

focuses on legal, political, religious and economic variables that may play a part in the enhancement of international arbitration bodies, policies and legislation in Qatar and the region in general to attract arbitration tribunals.

VI. THE METHODOLOGY

In order to deal with any foreseeable question pertaining to the fruit of this research, this work proposes an in-depth study of legislation and practice of arbitration under the current Qatar Financial Center and Qatar State jurisdictions in light of lessons learned from other jurisdictions in the region—namely, Bahrain, Egypt, and Dubai in the UAE. Therefore, this research uses a combination of legal research methods. It utilizes the case-study methodology³² with an in-depth analysis of Qatar Arbitration Laws and practice, and focuses on procedural issues and a limited resort to the comparative study approach for the purpose of comparing how other jurisdictions and their major institutions have fared in their attempt to become a major hub of arbitration in the Middle East.

This Work adopts two methods of documentary presentation: the first is the analytical method, which depends on book reviews, the reviews of laws, regulations, resolutions, conventions, studies, research, reports and relevant websites. The second is the survey method, which gathers the definitive opinions of people who use arbitration such as investors, companies and government agencies, or those who practice arbitration by virtue of their profession, or those who are authorities *per se*

H. AL Jabra. 'Commercial Arbitration in the Islamic Middle East' by Arthur J. Gemmell. 'The Shari'a Factor in International Commercial Arbitration' by Faisal Kutty.

³² The Case Study Method is defined as "an in-depth study of just one person, group or event." See HELPSHEET 9, Published by Rhodes University accessible online.

on the subject and the review, selection, and analysis of the arbitration cases presented to arbitration centers' reports or papers by other researchers. It should be noted here that due to the very contemporary nature of the subject we have made every effort to use the latest legislations, reports, articles data, and news sources. Use of Library books was limited to historical backgrounds or analysis of old cases.

The confidential nature of arbitration, lack of transparency and to a larger extent, inaccessibility to most courts³³ and private institutions (whether court decisions, arbitral awards or official reports) in the Middle East make relevant data for this Work rare. Thus, this study relies heavily on published news and major institutions' reports for court decisions and arbitral award cases. Also in order to carry out this research using the survey method, we have used major global survey publications and published expert opinions and assessments to extract the relevant conclusions from the subject matter.

* * *

³³ Courts decisions in Qatar are not published. The legal system is unfamiliar with the system of law reviews. T. Al-Emadi; "Decisions of Qatari Courts Involving Questions of Private International Law" TDM 2 (2006), www.transnational-dispute-management.com.

CHAPTER II

OVERVIEW OF ARBITRATION IN THE MIDDLE EAST

Arbitration improves access to justice. It enhances the likelihood of recovery. It delivers speedier results. It keeps costs down. For many, it is a superior option to the expensive, slow, cumbersome ways that have come to typify our civil justice system.¹

I. INTRODUCTION

Arbitration, as a method to resolve commercial disputes, has been growing worldwide, but especially in the Middle East. This growth is going hand in hand with the fast growing economy of oil producing states particularly in the gulf region (Saudi Arabia, Kuwait, Qatar, Bahrain, UAE and Oman) where increased exploitation of oil combined with high prices has generated substantial revenues that have fueled rapid economic growth in the last two decades. These States have embarked upon extensive infrastructure development with many mega projects that are attracting international investors from all over the world. The region has also been influenced

¹ Peter B. Rutledge, Catholic University of America, Columbus School of Law "Arbitration – A Good Deal for Consumers," 2008. <http://www.instituteforlegalreform.com/featuredtool/arbitration-quotes>.(Last assessed 7/3/13).

by various forces of globalization² that swept the world following the fall of the Eastern Bloc.³ Less fortunate States such as Egypt, Yemen, Jordan and Lebanon with limited natural resources and those that operate under a socialist government model, such as Libya, Syria and Iraq have had to adapt and engage free market policies that provide more privatization and less government control. These policies were mainly adopted to encourage foreign investment and to a greater extent, to conform to the rules and requirements of influential international organizations such as the World Trade Organization (WTO)⁴ and the World Bank.⁵

In addition, flexibility, speed and confidentiality of arbitration have made it the most attractive Alternative Dispute Resolution method (ADR)⁶ to investors and parties in contracts of an international nature. Consequently, since the 1990s most States of the region have changed their laws and regulations governing arbitration, either by following the Model Law of the UNCITRAL or by incorporating principles and rules from French law or the law of England and Wales. Adoption of worldwide arbitration conventions, such as the New York Convention and the ICSID Convention

² Globalization promotes cross-border transactions with minimal interference from the State. See, Gunther Teubner, *Global Law Without a State* (Dartmouth, Aldershot, 1997); Michael Likosky, *Transnational Legal Process: Globalisation and Power Disparities* (Butterworths/LexisNexis, 2002).

³ Formerly the communist States of central and eastern Europe.

⁴ The World Trade Organization (WTO) is the global international organization dealing with the rules of trade between nations. Membership to WTO represents one of the key steps for a State to integrate into modern international economic relations. All States of the region are either full members or observers of the WTO. http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

⁵ The World Bank Group consists of five organizations that are vital source of financial and technical assistance to developing States around the world. <http://web.worldbank.org/WBSITE>.

⁶ United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, (New York and Geneva: United Nations, 2005), at 36.

has been solidified, most recently, with the UAE's adoption of the New York Convention in 2006 and Qatar's adoption of the ICSID convention in 2011. This trend continues to build momentum in the region with various states, including Iraq,⁷ doing a complete overhaul of their arbitration regulations.

This development in international arbitration is not only in response to the realities of modern politics and commerce, but also, arbitration is deeply rooted in the region's history and culture, while also conforming to the Islamic tradition.⁸ The Middle East has a long-standing history of embracing arbitration as a means of dispute resolution in the traditional sense. Further, it is commonly used for all sorts of disputes, including those of a commercial nature. In the twentieth century, however, from the end of the Second World War until the 1970s, the Arab world has been suspicious of the modern usage of international Commercial Arbitration because many Arabs perceive the practice to be biased in favor of Western interests.

This perception is mainly because of the arbitration decisions of some Arab oil concession disputes in the early 1950s where arbitration tribunals failed to apply local law to the disputes.⁹ Since that time, much of that perception has vanished and various States in the region have begun not only to embrace the institution and infrastructure of international arbitration, but have also embarked upon competing

⁷ As of this date, Iraq is about to pass a new bill on arbitration.

⁸ Abdul Hamid el-Ahdab, *Arbitration with the Arab States* 11 (2d ed., 1999) at 13; *Qur'an* 4:35 "If ye fear a breach between them twain (i.e. husband and wife), then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliation; for God hath full knowledge, and is acquainted with all things."

⁹ Charles N. Brower and Jeremy K. Sharpe, "International Arbitration and the Islamic world: The Third Phase," 97 *A.J.I.L.* at 643.

amongst themselves to attract international arbitration to hold court in their respective jurisdictions.

On the other hand, the international legal community does not consider the Middle East as Commercial Arbitration friendly; therefore, most foreign investors have been hesitant to seat their arbitrations in the Middle East.¹⁰ This is largely because of complicated enforcement procedures in some States and the influence of Shari'a-based local laws in others. While the hard work and high aspirations of particular local jurisdictions in the region are well recognized, the general perception by most foreign investors and practitioners is that the practice of Commercial Arbitration in the Middle East is still in its infancy and that arbitration experience of local practitioners, judges as well as arbitrators, lags behind the rest of the world.¹¹ Before further exploring the modern development of arbitration in the Middle East, and so that we may have a better appreciation of modern day arbitration, we should briefly consider the historical underpinnings of the practice of arbitration.

II. HISTORICAL BACKGROUND

Not only does the easily observable tendencies of people to engage in various forms of diplomacy to preclude conflict in business intercourse, there is evidence that arbitration, a strategy to avoid conflict, has been known since the dawn of

¹⁰ Jerome Martin, Senior Associate at law firm Clyde & Co to Dubai Eye's Business show about Dispute Resolution in Saudi Arabia noted. "There appears to have been a complete lack of consideration as to how a dispute would be handled, what their rights and entitlements would be and what sort of protections could have been built in at the contract negotiation stage." <http://kluwerarbitrationblog.com/blog/2011/08/22/radio-interview-dispute-resolution-in-saudi-arabia/>.

¹¹ See article "TalkingPoint: Dispute Resolution In The Middle East," November 2010. <http://www.financierworldwide.com/article.php?id=7468&page=1>.

civilization. It has developed throughout urban development of mankind wherever it existed. The Middle East has been called the “Cradle of Civilization,” which suggests a well-developed business intercourse, and therefore, the region could easily be called the “Cradle of Arbitration.” The first hard evidence of arbitration in the region appears in the form of inscriptions etched onto a stone slate sometime during the thirty-first century B. C. E. The inscriptions done in the Sumari language¹² refer to using arbitration to settle any disputes emerging from border problems between two kingdoms in what is now southern Iraq.¹³ There is also much evidence that the ancient Egyptians as well as Greece and Rome used arbitration to settle commercial, financial and individual disputes.¹⁴

With the arrival of Islam, arbitration continued to be considered a proper method of dealing with disputes, the difference being that, in rendering their judgments, arbitrators had to abide by the principles and teachings of the Qur’an and the Sunna, texts that constitute the main two pillars of the Islamic Shari’a Law. Muslims grew accustomed to having recourse to arbitration to settle disputes that involved financial or commercial disputes. This practice continued without any type

¹² A language of ancient Babylon, or a dialect of Akkadian, an ancient language of the Semitic language family.

¹³ Taha Baqer, *logademah Fi Tarikh al Hadarat al Oadima*. (Introduction to History of Ancient Civilization). 2nd ed., Sharkat al Tabh Almahdouda, Baghdad, (1370 H, 1949 A. D.) Vol. 1, p. 107. See also Nariman Abdelgader, *Itifag al Tahkim Wafgan Liqanoun al-Tahkim Limmawad Atijaria Wal Madania al Misri*. (Arbitration Agreement Compliant with Commercial Arbitration Law in Egypt) Edn., 1996, Dar al Nahdah al Arabiah, p. 33. Also noted in thesis by M.A. Jabra 2001, University of Wales, Aberystwyth. “Commercial Arbitration in Islamic Jurisprudence: A study of its role in the Saudi Arabia Context.”

¹⁴ John F Philips *Arbitration Law. Practice and Precedent* ICSA Publishing, Cambridge, England 1988, pp. 8-10. Also noted in thesis by M.A. Jabra 2001, University of Wales, Aberystwyth. “Commercial Arbitration in Islamic Jurisprudence: A study of its role in the Saudi Arabia Context.”

of codification until the publication of the *Majallat*¹⁵ of *Legal Provisions* under the Ottoman Empire. The *Majallat* of *Legal Provisions* was the first codification of the Shari'a and had an entire section devoted to arbitration. A number of States in the Middle East relied on the *Majallat* provisions long after the fall of the Ottoman Empire in 1918 until they developed their own Civil Law.

In the modern era a number of arbitration cases have been instrumental in shaping the recent history of, and developing contemporary procedural guidelines for arbitration in the Middle East. These landmark tribunals and the consequent precedents deriving therefrom are discussed here to give a more complete assessment of and comprehension of their significant effect on the development of international Commercial Arbitration legislation in the region, and to demonstrate how the Arab attitude towards international arbitration has evolved from disfavoring it, to widely embracing the practice for commercial dispute resolution.

A. The Oil Concession Cases of the 1950s

A number of oil concession arbitration cases in the 1950s have had a significant effect on the development of international Commercial Arbitration in the region.

¹⁵ See, Ali Haidar, *Durer al Hukkam Fi Sharh Madjallat Al-Ahkam*, Art. 1848. The *Majallat* recognized the validity of arbitration agreements subject to four conditions:

- The dispute must already have arisen and be clearly defined;
- The parties must have agreed to arbitration by offer and acceptance and made that decision known to the arbitrator;
- The arbitrator must be appointed by name, and
- The arbitrator must have the capacity under Islamic law to be a witness.

1. *The Case of Sheikh of Abu Dhabi v. Petroleum Development*¹⁶

In analyzing what was to be the law governing the concession, Umpire Lord Asquith expressed an opinion that is considered insensitive and remains infamous to many Arab jurists when he noted as follows:

This is a contract made in Abu Dhabi and wholly to be performed in that State. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Qur'an; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.¹⁷

Therefore, disqualifying Abu Dhabi law as the proper law governing the concession, Lord Asquith determined that the terms of the concession called for the application of principles rooted in the good sense and common practice of civilized nations. Although Lord Asquith determined that English law should not be inapplicable as such, he explained that, "some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence." Consequently, he applied English law principles to resolve the dispute.¹⁸

¹⁶ *Petroleum Dev. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. 18 International Law Report 149 (1952).

¹⁷ Peter, S. (1998c), International Handbook on Commercial Arbitration, National report on Tunisia.

¹⁸ See "Arbitration and the Arab Middle East" Paper by Howard L. Stovall, September 2009, http://www.stovall-law.com/images/Arbitration_in_the_Arab_Middle_East.pdf.

2. *The Case of Ruler of Qatar v. International Marine Oil Co. Ltd.*¹⁹

A similar argument was used in this case where the arbitrator dismissed the Qatari law by stating, "I am satisfied that Qatari law does not contain any principles which would be sufficient to interpret this particular contract."²⁰

3. *The Case of Saudi Arabia v. Arab American Oil Co. (ARAMCO)*²¹

The arbitrators in this case also dismissed the Saudi Arabian law as inadequate and subjected the law of Saudi Arabia to the general principles of jurisprudence and that the Saudi Law must be "interpreted or supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence."²²

One common outcome of the above arbitration cases was the arbitrators' dismissal of domestic law as being insufficient, after which they relied on "general principles of law," rooted in the laws of Western jurisdictions.²³ Predictably, this dismissal outraged the Arab legal community.²⁴ As a result, therefore, during the 1960s and early 1970s, many Arab States were deeply suspicious of international arbitration as biased in favor of Western interests.²⁵ In 1963, for example, following

¹⁹ *Ruler of Qatar v. Int'l Marine Oil Co.* 20 International Law Report 534 (1953).

²⁰ *Ibid.*

²¹ *Saudi Arabia v. Arabian Am. Oil Co.* 27 International Law Report 117 (1958).

²² *Ibid.*

²³ See *supra* note 18 of this chapter

²⁴ Brower and Sharpe, "International Arbitration and the Islamic world: The Third Phase," 97 American Journal of International Law 643, at 645.

²⁵ This sentiment is best expressed by Professor Ahmed el-Kosheri who declared: 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

its loss in the Aramco arbitration, Saudi Arabia issued Decree No. 58/1963²⁶

forbidding State agencies from resorting to arbitration without the consent of the Council of Ministers. The next several cases involve Libya.

B. The Libyan Arbitration Cases

Beginning in 1970, the Libyan government nationalized foreign oil concessions of three foreign oil companies, and did not participate in the subsequent arbitral proceedings that were initiated by these companies because the concession agreements contained arbitration clauses. The agreements included choice of law provisions under which the Libyan law and International Law (as relevant) would govern. The outcome of the Libyan arbitrations is a tale of three arbitrations:²⁷ each with identical factual backgrounds; each with identical legal documents; and each to be resolved in accordance with three identical “choice of law” clauses. But what was noteworthy to scholars of international Commercial Arbitration was that each

towards the national laws of developing States and their mandatory application, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationships. ICCA Conference, Seoul 1996. Adde Jalal el Ahdab and Ruth Stackpool-Moore: Arab Arbitration v. International Arbitration? The Case for a Reconciliation, *Journal of International Arbitration*, 25 - No. 2 (2008), pp. 275 – 288.

²⁶ Decree No. 58/1963 on June 25, 1963.

²⁷ See. *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of Libya* (1979) 53 ILR 389 (Texaco) and *Libyan American Oil Company v Libyan Arab Republic Award of 12 April 1977* (1982) 62 ILR 140 (Liamco) the tribunals chose public international law to govern the arbitration in *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic Award of 10 October 1973* (1979) 53 ILR 297 (BP Exploration) the arbitrator chose the law of the seat of the arbitration On the debated possibilities for delocalisation of arbitration procedure in general; e.g. SJ Tope *Mixed International Arbitrations* (Cambridge Grotius 1990) 17 *et seq.*, On the Libyan oil arbitrations see RB von Mermen and PN Koundes “International Arbitration Between States and Foreign Private Parties The Libyan Oil Nationalization Cases” (1981) 75 AJIL 476 C Greenwood *State Contracts in International Law - The Libyan Oil Arbitrations* (1982) 53 BYBIL 27.

arbitrator based decisions on a different legal analysis. The Libyan government lost all three cases and eventually reached settlements with the oil companies.. With respect to the international arbitration process, the Libyan cases contributed further to the Arab suspension of fairness. The Libyan action was disfavored among a number of Middle East nations, and their national laws reflected this attitude.

C. The Kuwaiti Arbitration Cases

The two following cases were significant in swaying the Arab attitude towards international arbitration from hostility to acceptance:

1. *The Case of Kuwait v. Sir Frederick Snow & Partners*²⁸

This is a case Kuwait gained an arbitral award against the British firm Sir Frederick Snow & Partners in 1973, at a time when neither the State of Kuwait nor the UK were a party to the New York Convention. Kuwait was not able to enforce the award in the UK till it acceded to the New York Convention in 1978 to meet the reciprocity requirement by the UK which acceded to Convention earlier in 1975 but retained the Convention's reservation of reciprocity.²⁹ This case had a positive effect in the development of arbitration in the region as it prove the effectiveness of international arbitration and the New York Convention as a mechanism to resolve international disputes. The next case involves Kuwait and Aminoil, a United States oil company.

²⁸ Kuwait v. Snow (1984) A.C. 426 (H.L.) (U.K).

²⁹ Charles N. Brower and Jeremy K. Sharpe, "International Arbitration and the Islamic world: The Third Phase," 97 *A.J.I.L* at 649 (noting that Kuwait was able to enforce the arbitral award in the United Kingdom once both states acceded to the New York Convention).

2. *The Case of Aminoil v. Kuwait*³⁰

The parties went to an *ad hoc* arbitration shortly after Kuwait nationalized its oil sector and terminated the Aminoil oil concession agreement in 1977. The Kuwaiti government fully participated in the proceedings of this oil concession arbitration appointing an international team of legal counsel.³¹ The arbitral tribunal seemed to be more sensitive to local law. It chose to apply Kuwaiti law to the substantive issue and decided that Kuwait had the right to terminate its contract with Aminoil due to changed circumstances, although Kuwait had to pay fair compensation to Aminoil for its long-term interests to the concession. The result of this arbitration helped to further increase acceptance of international arbitration as a viable method to resolve international disputes in the Middle East. Governments, like Kuwait's, for example, for many years, included a clause calling for arbitration of commercial disputes at the ICC in Paris in its standard contracts. The Kuwaiti cases helped to pave the way for a new outlook on arbitration in the Middle East.

D. Modern Changes in Middle East Arbitration

Arab reluctance towards arbitration began subsiding in the late 1970s. Thereafter, it quickly became apparent that arbitration in accord with internationally acceptable norms was the only acceptable method of dispute resolution in international commerce. Not only that, but with the emergence of increased commerce between states in the region and the West, and more recently the Far East, interest in international arbitration as a means to resolve disputes has increased among Middle

³⁰ Kuwait v. Aminoil, 21 I.L.M.976 (1982), 9Y.B. Com. Arb. 71 (1984).

³¹ See "Aminoil Revisited Reflections on a Story of Changing Circumstances" by Martin Hunter and Anthony C Sinclair. Professor Martin Hunter served as a member of Kuwait's team of counsel in the arbitration,

Eastern nations; moreover, this attentiveness is reflected in the current increase in the number of laws and institutions in the region that handle arbitration. This change of attitude could also be contributed to the work done by the United Nations Committee on International Trade Law (UNCITRAL) which had significant contributions from members of the developing States.³⁵

The UNCITRAL, first issued its 'UNCITRA Arbitration Rules', in 1976, which provided a comprehensive set of procedural rules that could easily be used for *ad hoc* arbitrations in many States with different legal, social and economic systems.³⁶ These rules opened the door for domestic *ad hoc* arbitration and eventually led to establishment of local institutions.³⁷ Thus, the 1976 rules provided an alternative and greater Independence from the typical international arbitration institutions of that time such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA) which used their own Arbitration Rules. Later the UNCITRAL issued its 'UNCITRAL Model Law' which provided a model text on international arbitration legislation that law-makers in national governments can

³⁵ Para. 9 of General Assembly resolution 2205 (XXI) of 17 December 1966, UNCITRAL takes into account in its work "the interests of all peoples, and particularly those of the developing States, in the extensive development of international trade." Members of the Commission represent different geographic areas, and are elected by the General Assembly "having due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing States." FAQ, www.uncitral.org

³⁶ The scope of the document states " Being convinced; that the establishment of rules for *ad hoc* arbitration that are acceptable in States with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations." http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

³⁷ These include the Cairo Regional Center for International Commercial Arbitration jointly set up by Egypt and the African-Asian Legal Consultative Committee; the Arbitration Center at the Chamber of Commerce and Industry of Beirut, Lebanon; The Bahrain Center for International Commercial Arbitration; the Kuwait Center for Commercial Arbitration; the Abu Dhabi Center for Conciliation and Arbitration; and the Dubai Center for Arbitration and Conciliation. Brower and Sharpe, "International Arbitration and the Islamic world: The Third Phase," 97 American Journal of International Law, at 653-54.

incorporate into their own legal systems. The Model Law was proposed as a vehicle for harmonization of international arbitration legislation with the flexibility to suit all legal systems of the world.³⁸ Contributions by Third World experts, including Arab members from Egypt, Iraq and Algeria,³⁹ were instrumental in changing the Arab attitude to international arbitration because the UNICITRAL Model Law was viewed as a reflection of worldwide consensus that contained key aspects of international arbitration practice, and not a creation of Western imperialism.

At the beginning of 1990 and throughout the last two decades, international business presence in the region has increased sharply and Middle Eastern States have increasingly embraced international Commercial Arbitration to encourage further investment. In this regard, many Middle Eastern States have adopted, or modernized national arbitration Laws, several have acceded to the New York and ICSID Conventions, and many international arbitration centers have been established throughout the region. It should be noted that of all the states that passed new

State	UNCITRAL Model Law
Bahrain	1994
Egypt	1994
Iraq	X
Jordan	2001
Kuwait	X
Lebanon	X
Libya	X
Oman	1997
Qatar	X
Qatar (QFC)	2005
Saudi Arabia	2012
Syria	2007
UAE	X
Dubai (DIFC)	2009
Yemen	X

³⁸ Commentary on the 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

³⁹ *Ibid*, the UNCITRAL commenced its eighteenth session on 3 June 1985. There were then 36 State members. They were Algeria, Australia, Austria, Brazil, Central African Republic, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Germany (Federal Republic of), Guatemala, Hungary, India, Iraq, Japan, Kenya, Mexico, Nigeria, Peru, Philippines, Senegal, Sierra Leone, Singapore, Spain, Sweden, Trinidad and Tobago, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

arbitral legislation, only Lebanon, which updated its law in 2002, continues to base its law on the French law rather than the Model Law (*supra* Table 2.1).

Despite the significant progress regarding arbitration legislation in the region, local courts continue to hamper the practice with old, lengthy procedures and unpredictable rulings regarding enforcement. Many local courts have used public policy grounds⁴² liberally to reject enforcing foreign awards based on the New York Convention. Saudi Arabia, for example, has traditionally been hostile to the recognition and enforcement of non-domestic arbitral awards, finding these awards contrary to Saudi Arabian law and public policy, and most lawyers assume that any arbitral award made abroad must not conflict with Islamic law or the general “public policy” prevailing in the Kingdom.⁴⁵ This could include awards requiring the payment of interest or insurance (prohibited under Islamic Law); other courts in the region have been also accused of using public policy in its wide sense to refuse enforcement. This observation about the courts leads us to a closer analysis of the legal systems in the region.

⁴² Article V (2) of the New York Convention states that “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the State where recognition and enforcement is sought finds that: . . . The recognition or enforcement of the award would be contrary to the public policy of that State.”

⁴⁵ Abdul Hamid el-Ahdab, *Arbitration with the Arab States* 11 (2d ed., 1999) at 612–13 (providing examples of inarbitrable disputes under Saudi Arabian law); Kutty, Faisal, “The Shari’a Factor in International Commercial Arbitration,” 2006, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 28:565, at 602–03 (explaining how public order in Saudi Arabia is determined); Michael J.T. McMillen, *Islamic Shari’ah-Complaint Project Finance: Collateral Security and Financing Structure Case Studies*, 24 *FORDHAM INT’L L.J.* 1184, 1201–02 (2001) (noting the uncertainty of reviewing an award to ensure compliance with the *Shari’a*).

III. MIDDLE EAST LEGAL SYSTEMS

The legal systems in the Middle East region have a complicated and rich shared history. States in the region have generally inherited several features of different legislative system from various periods of history. One of the major influences as noted above, was the Ottoman system since most of the Middle East nations were under the Ottoman dominance for almost 700 years; in this respect, one may say that the Middle East has been influenced not only by Islamic law, which was the law of the Ottoman Empire, but also by features of unique Ottoman law⁴⁶ that coexisted in line with Islamic law during the Ottoman rule.

Another big influence was the introduction of the Napoleonic Code from Europe into Egypt in the nineteenth century. The current Egyptian Civil Code is an amalgamation of the French Civil Code and principles of Shari'a Law. It was drafted by Al Sanhuri, a leading Egyptian scholar, and came into force in October 1949.⁴⁷ This code is considered the starting point for modern legal reform in the Arab States which up until then had mainly relied on the Ottoman codification of the *Majallat*. In the same year, Syria adopted a new civil code which was very much in line with the Egyptian Civil Code. Syria was soon followed by Iraq (1953), Lebanon (1961), Jordan (1976), Kuwait (1980), the UAE (1987), and, most recently, Qatar (2005). Yemen also

⁴⁶ See, Ottoman Sources of Law – Shari'a and Kanun, "Legal Systems Very Different From Our Own". Prof. David Friedman May 18, 2006.

⁴⁷ Sources of Law in Muslim Jurisprudence, Vol. 1-6, Cairo (1956-1967). Journal of Islamic Studies. 6:2 (1995) pp. 153-172 at pp. 153-154, "The jurist, Abd al-Razzaq Ahmad al-Sanhuri (1895-1971), is a leading Egyptian authority in modern Arab legislation and the principle architect of the present Civil Codes of Egypt, Iraq and Syria. As a major figure of the intersection of traditional Islamic culture with modernity, al-Sanhuri has left an indelible mark on contemporary Arab societies. Besides his pioneering work in lawmaking and codification and its far-reaching consequences, al-Sanhuri's colossal efforts extended to the critical explication and justification of legal precepts, resulting in decisive contributions to Modern Arab and Islamic Jurisprudence."

adopted a civil code in 1992, but its provisions are not modern and are, with minor variations, almost entirely derived from the Shari'a. Bahrain and Oman adopted various aspects of the Egyptian Code at various times via royal decrees.⁴⁸

In contrast, Saudi Arabia is the only State that continues to operate without a constitution or a civil code. Shortly after the formation of the kingdom, it reverted to a strict version of the *Shari'a* and made it the supreme law.⁴⁹ However, with the advent of modernization, many civil regulations have been enacted by the Kingdom in areas such as agency, employment, investment and the judiciary. The courts of Saudi Arabia will only apply these regulations to the extent that they do not violate Shari'a Law even when controlling regulations are present.

Accordingly, to varying degrees, Shari'a Law is embedded in the law of every Arab State of the Middle East.⁵⁰ This influence makes the legal system in each Arab State, while somewhat different from each other, clearly distinct from the legal systems of other States in the world, particularly in Saudi Arabia where Shari'a is of

⁴⁸ Information for each State was acquired from *GlobaLex* International and Foreign Law Research. Published by the Hauser Global Law School Program at NYU School of Law, <http://www.nyuawglobal.com/globalex/index.html?open=FLR>.

⁴⁹ The need for the codification of the *Shari'a* has recently been raised by some religious scholars (see, for instance, Sheikh Abdul Mohsen al Obeikan (a member of Saudi Arabia's Shura Council and a judiciary consultant for the Saudi Ministry of Justice), "The Codification of Islamic Shari'a," in *Al-Sharq Al-Awsat* (28/04/2006); and Paul Robinson, Adnan Zulfiqar *et al*, "Codifying Shari'a: International Norms, Legality & the Freedom to Invent New Forms," *University of Pennsylvania Law School, NELLCO* (2006); and Aminu Adamu Bello, "Between Allan Christelow, Paul H. Robinson and Adnan Zulfiqar; Abdullahi A. An Na'Im, Sanusi L. Sanusi and Asifa Quraishi: Rationalizing the Concept of Inventing New Forms in Islamic (*Shari'a*) Law in Nigeria," *Islamic Law and Law of the Muslim world Paper*, no. 08-38 (June 29, 2008)).

There have been many attempts at national levels to codify the *Shari'a* into modern law, beginning with the Ottoman Empire in the early 19th century. The issue is yet, however, far from being completed or accepted by all or even most Muslim schools and scholars. The most important difficulty with lack of a standard and codified version of the *Shari'a* is that it can be interpreted and applied in different ways.

⁵⁰ Kutty, Faisal, "The Shari'a Factor in International Commercial Arbitration," 2006, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 28:565, at 566.

primary importance. Therefore, it is imperative for any investor or entity doing business in the Middle East to have a reasonable grasp of the general principles of Shari'a Law and its role in commerce and arbitration in each State. Shari'a Law as a source of law constitutes one of the three major legal systems prevailing in the world today and is not limited to nations in the Middle East.⁵¹ In the following section, we shall examine this very important legal system.

* * *

IV. SHARI'A (ISLAMIC LAW)

Shari'a⁵² is the Islamic divine law. It governs not only spiritual matters; it is meant to govern all human activities as it makes no distinction between political and religious issues. As a body of law, official Islamic scholars declare that Islamic jurisprudence⁵³ (Fiqh) functions according to four sources of law,⁵⁴ which are as follows:

⁵¹ Badr, Gamal Moursi (Spring, 1978), "Islamic Law: Its Relation to Other Legal Systems," *The American Journal of Comparative Law* 26 (2 –Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, 24–25 February 1977): 187–198.

⁵² Shari'a and Islamic law will be used interchangeable throughout this Dissertation though the two may not exactly have the same meaning. Muhammad Asad, the prominent Islamic thinker, narrows down the Shari'a to the nusus, the definitive ordinances of the Qur'an which are expounded in positive legal terms, see M. H. Kamali, "Source, Nature and Objectives of Shari'ah" 33 *Islamic Quarterly* 211 at 233. Islamic law is far broader and includes those rules and laws that have been derived using the sources and methodologies for deriving laws sanctioned by Islamic jurisprudence as well as all the quasi-Islamic laws in existence in Muslim States as a result of colonization and secularization. *Journal of Arab Arbitration*. No. (4) 2009.

⁵³ There are two major branches in Islam, "Sunnis" and the "Shiites." The Sunnis are those who follow the Qur'an and the Sunna or Hadith. The Shiites are those who believe that the best way to understand the truth as proclaimed by the Prophet is through the religious leaders or Imams. The Shiites also have many schools with the largest being the Jaafari school that is most dominant in Iraq and Iran. All of these schools accept the Qur'an as a basic source of law as it presents the Word of God as revealed to the Prophet, but disagree as to the supplementary sources of law. The Islamic jurisprudence presented herein represents the Sunni sect as it is the most dominant in the region and represent 85% of Muslims in the world. "Shari'a," *Encyclopedia Britannica Online*.

- The Qur'an, which is the primary source for the Shari'a, is considered by Muslims to be the actual word of God revealed through the Prophet Muhammad (570-632 AD).
- The Sunna—the sayings and traditions of the Prophet Muhammad, having been recorded into what is known as the *Hadith*.
- Ijma—usually translated as “consensus,” becomes a valid source of Islamic law only after there has been widespread consultation by Islamic scholars and the use of juristic reasoning (Itjihad).
- Qiyas—the legal principle arrived at by analogy or analogical deduction. However, the logic utilized must be based on the Qur'an, Sunna or Ijma. Qiyas is often used to apply Islamic principles to the modern era issues.

Although the main principles and the essential doctrines of Islamic jurisprudence are identical, Islamic scholars have, for centuries, debated the proper understanding and application of religious injunctions (Fatwa)⁵⁵ regarding the

⁵⁴ In the light of the scope of this paper it is not possible to dwell on this matter in the detail it deserves and requires. The sources discussed are not finite, for example the renowned Islamic scholar M. Hamidullah sets out the sources as follows:

1. The Qur'an.
2. The Sunna, or Tradition of the Prophet.
3. The orthodox practice of the early Caliphs.
4. The practice of other Muslim rulers not repudiated by the jurisconsults.
5. The opinions of celebrated Muslim jurists:
 - a. consensus of opinion, or Ijma; or
 - b. individual opinions, or Qiyas.
6. The arbitral awards.
7. The treaties, pacts and other conventions.
8. The official instructions to commanders, admirals, ambassadors and other State officials.
9. The internal legislation for conduct regarding foreign relations and foreigners.
10. The customs and usage.

In Muslim Conduct of State, 4th ed., (1961) at 18. See also T.J. al Alwani, Usul Al Fiqh Al Islami: Source Methodology in Islamic Jurisprudence (Herndon, Virginia: International Institute of Islamic Thought, 1991). Journal of Arab Arbitration. No. (4) 2009

⁵⁵ Hallaq, Wael B. 2004, The Formation of Islamic Law. Edited by Ashgate Publishing. Great Britain., p. 205. Hallaq cites, Abramski-Bligh, Irit. The Judiciary (Qadis) as a governmental-administrative tool in early Islam. “. . . many regulations do not derive from the Qur'an or the Sunna but rather from the

secondary issues on which the religious scripture has remained silent. This has resulted in the formation of many different interpretations, even in the same schools of thought (Madhab). However, only four major schools⁵⁶ have remained and developed in the Islamic world up until today. Nevertheless, as there is no infallibility for a Shari'a scholar in Islam, all of the scholars' constructions concerning the secondary issues are regarded as equally applicable.

A. General Principles of Shari'a Law Relevant to Commerce

Islamic beliefs, as well as those of many other religions, basically advocates being honest, charitable, treating others well and being equitable to others. There are, however, also specific provisions in the Qur'an and the Sunna, advising how to conduct commercial transactions, among these are provisions regarding how carefully merchants have to weigh items before selling them. Set forth below are principles of Shari'a Law that are particularly relevance to Commercial Law:⁵⁷

- Sanctity of contract: it is a fundamental principle of Shari'a that contracting parties should abide [by] and comply with their contractual obligations. This is, however, subject to the prohibitions contained in Shari'a (referred to below) which are designed to establish equality of benefits between the parties.

qadi's independent judgment (ijtihad/fatwa), thus the importance of appointing a man with piety, shrewdness and religious knowledge in that order of importance.

⁵⁶ These schools are the "Hanafi School," which is named after its founder, the scholar Abu Hanifah (d. 767); the "Maliki School," which is named after its founder< Malik ibn Anas (d. 795); the "Shafi'i School," which is named after the scholar M. Al Shafi'i (d. 819); and finally the "Hanbali School," named after the scholar Ahmad ibn Hanbali (d. 855).

⁵⁷ See "Middle East Projects: Background and historical perspective" Raid Abu-Manneh, Mayer Brown International LLP London, England, American Bar Association Forum on the Construction Industry 2012. Also see Kutty, Faisal, "The Shari'a Factor in International Commercial Arbitration," 2006, Loyola of Los Angeles International and Comparative Law Review, Vol. 28:565, VI. Comparative analysis at 596.

- Acting in good faith: Acting in good faith in commercial transactions is an important element of Shari'a Law as it is clearly reflected in statements in the Qur'an: *"Give full measure when you measure, and weigh with even scales. That is fair and better in the end."*
- The prohibition of Interest (Riba usually translated as usury): At the time of the rise of Islam, the practice of lending money was being exploited so as to reap excessive gains from the interest charged on loans. If borrowers could not meet the due date by which to return the capital borrowed, the lenders would double and redouble the interest rates. The prohibition on Riba is part of the general abhorrence by Shari'a Law of unjustified enrichment and is designed to ensure equality of benefit between the parties.
- The prohibition of Insurance (Gharar usually translated as uncertainty): The prohibition of unjust enrichment in Shari'a Law precludes any element of uncertainty (Gharar) which could allow one party to a contract to take advantage of the other. Accordingly, gambling contracts, for example, are considered immoral and are prohibited.

So that they may avoid Gharar, the parties should endeavor to be aware of their obligations at the time they enter into a contract. Any element of uncertainty in the price or subject matter of a contract of sale could lead to the contract being prohibited.

B. The Role of Shari'a Law in Commercial Arbitration

Islamic law cannot be compared with common or civil legal systems. While modern legal systems embrace all areas of law, Islamic Law mostly deals with private law, leaving aside public law.⁵⁸ Therefore, the notion of some Islamic States that Shari'a is

⁵⁸ Redden, Kenneth R.; Brock, William Emerson, "Jordan" in *The Modern Legal Systems Cyclopedia*, volume 5, Buffalo NY U.S.A.: W.S. Hein 1990; "Reliance of the Traveller," a reference on the Shafi'i School of Fiqh written by Ahmad ibn Naqib al-Misri, organizes Shari'a Law into the following topics:

the only source of law for their legislation is not correct.⁵⁹ Shari'a mostly applies to matters of private law in these States and the public law has been largely imported from Western models, but with some changes to reflect the inclusion of Shari'a principles. Even in States such as Saudi Arabia, Oman or Yemen, where Islamic Law remains dominant, a substantial number of mundane statutes have been enacted to curtail the Shari'a's ascendancy significantly,⁶⁰ particularly, in areas that involve financial transactions.⁶¹ The matters which are related to arbitration are mainly based on secular European models; therefore, and for all practical purposes, Islamic jurisprudence in general has been relegated to the task of examining whether these models comply with Shari'a Law or not. For that reason one will see Shari'a courts existing side by side with civil courts in all Arab States. In practice, the Shari'a courts and the body of Shari'a Law are increasingly restricted to family matters, succession and property. To a limited extent, Tort and Criminal Law matters, pertaining to Commercial or Administrative Law, are decided in secular courts.

Purification, Prayer, Funeral prayer, Taxes, Fasting, Pilgrimage, Trade, Inheritance, Marriage' Divorce and Justice.

⁵⁹ For outsiders, Saudi Arabia might be seen as a place in which Shari'a is the law of the State, which is partly true. Nonetheless, the missing fact is that the term Saudi law is more comprehensive than Islamic law or Shari'a, in the sense that the Saudi law encompasses the Islamic law and the Codes and Regulations adapted from other laws within the sphere of the Shari'a principles. See, "Saudi Law and Judicial Practice in Commercial and Banking Arbitration", a thesis submitted for the degree of Doctor of Philosophy by A. Y. Baamir School of Law, Brunel University October 2008.

⁶⁰ See, "International arbitration contract principles: analysis of Middle East perceptions," Muhammad Abu Sadah. *Journal of International Trade Law & Policy* 9. 2 (2010): 148-174.

⁶¹ Contemporary banks dealing in interest have always existed in these States. For instance, the Banking Control Law of 1966 is an example showing the way in which the Saudi regulators deal with prohibited activities under Shari'a. The Law is totally silent about banking interest as legalising it clearly in the Act is a violation of the Constitution of the State; however, the law left room for the practice to regulate such activities, as will be seen in the last chapter. *Saudi Law and Judicial Practice in Commercial and Banking Arbitration* A thesis submitted for the degree of Doctor of Philosophy By A. Y. Baamir School of Law, Brunel University October 2008.

Commercial Arbitration procedures throughout the region follow international models with minor variations and fall under the civil court system. In practice, there have been instances where parties specifically asked the arbitrator to adhere not only to the law of a specific State but also to Islamic behavior and use principles of Shari'a as one of the equitable laws that the arbitrator should consider. This is common when enforcement is expected to be in a State that uses Shari'a Law as public policy, such as Saudi Arabia. In such a case it may be that when the arbitrator considers interest, he cannot award it because Shari'a prohibits it.⁶² With the revival of Islam and emergence of Islamic Finance and Shari'a based investments as viable alternatives, Shari'a is exerting a fresh impact and could have a much larger role as the law of choice for such investments. This probability will be discussed to a greater depth in Chapter IV.

V. THE LEGAL FRAMEWORK FOR ARBITRATION IN THE MIDDLE EAST

The existing regulatory framework of the Middle East States in the field of arbitration is generally considered suitable to a varying degree for international Commercial Arbitration. All States of the region, including Saudi Arabia, have codified rules of arbitration following the Model Law or other European models; these are usually controlled either in the relevant Code of Civil Procedure or in a separate law (*Infra* Table 2.2).⁶³

⁶² Essam Al Tamimi "Shari'a Law and its application to International Arbitration." LAW UPDATE. April 2012 Issue 248. <http://altamimi.newsweaver.ie/Newsletter/10id18fdhni>

⁶³ Data collected from International Council for Commercial Arbitration (ICCA) website. <http://www.arbitration-icca.org/related-links.html>.

Table 2.2	
State	Arbitration Legislation
Bahrain	Domestic: Articles 233-243 of the Civil and Commercial Procedures Law, 1971. International: The 1994 International Commercial Law and Decree No 30 of 2009.
Egypt	Law No. 27 of 1994
Iraq	Book III, Section 2, Articles 251-276 of Code of Procedures, 1969
Jordan	Law No. 31 of 2001
Kuwait	Articles 173-188 of Civil and Commercial Procedures Law, 1980
Lebanon	Domestic Arbitration: Articles 762-808 - International Arbitration: Articles 809-821 of Civil Procedures Code, 1983 amended by Law No. 440/2002
Libya	Code of Civil Procedure, 1953
Oman	Law No. 47 of 1997; Law 36/1998, Article 353 of the Civil and Commercial Procedures Law, 2002
Qatar	Articles 190-210 of Civil and Commercial Procedures Law, 1990
Saudi Arabia	New Arbitration Law issued under the Royal Decree No. M/34, 2012
Syria	Law No. 4 of 2008
UAE	Articles 203-218 of Civil Procedures Law, 1992
Yemen	Law No. 22 of 1992 amended by Law No. 32 of 1997

The laws of most States clearly distinguish between domestic and international arbitration procedures. While international arbitration procedures are usually subject to more liberal legal provisions to protect international business relations, arbitration unfriendly provisions continue to be present in some laws. Arbitration is also hindered in some jurisdictions by governmental and judicial attitudes that vary from uncooperative in some States to intrusive in others.⁶⁴ The judiciary in many States of the region continues to view arbitration as an exception to litigation. In

⁶⁴ See S. D. el-Falahi, *An Introduction to Business Law in the Middle East: The Legal Environment for Negotiating Commercial Agreements in the Middle*, 81–82 (Brian Russell ed., Oyez Publishing 1975) (showing that foreign arbitral clauses were not fully recognized by all courts in the Middle East); Kutty, Faisal, “The Shari’a Factor in International Commercial Arbitration,” 2006, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 28:565, at 592, 618 (citing “the end of colonialism, rise in nationalism, challenge to capitalism, and increasing oil wealth” as reasons for the change in attitude toward arbitration among Middle Eastern states and discussing the view that Saudi Arabia’s hostility to the recognition and enforcement of foreign arbitral awards gave way to the State’s interest in attracting foreign investors).

See also Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a State Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 *FORDHAM INT’L L.J.* 920, 936–37 (1995) at 953 (declaring that although foreign investors recognize the advantages of investing in Saudi Arabia, they may hesitate because of favoritism to domestic companies). Noted in “Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East,” by Mark Wakim, *Enforcement of Arbitral Awards in the Middle East*, 2008.

addition, although most States have acceded to the New York Convention, as shown in Table 2-1, recognition and enforcement in accordance with this agreement are not yet routine practice in the region because a few States frequently use their domestic public policy to refuse enforcement, which with a lack of local court track records showing an understanding of international arbitration, discourages many of those seeking arbitration—at least from outside the region—from seating their arbitration in the Middle East.

Bahrain and Egypt are the historic leaders in the region as they continue to pioneer arbitration friendly legal framework, and are continuously updating it to stay in line with international standards. Dubai in the UAE, and more recently Qatar, are the new players in that field. They have realized the importance of arbitration, and since the early 2000s, have embarked aggressively upon establishing a modern legal framework to attract and facilitate international arbitration. These States are exemplary because of their progress in becoming arbitration friendly, and for the popularity of their legal framework and arbitration institutions. They all have ambitions to become arbitration hubs, not only on the regional level, but also on the international level. In the following section we shall provide a brief description and commentary on the legal framework of these States.

A. Bahrain

Bahrain was the first State in the Gulf area to adopt statutory laws on arbitration. In 1971, the State took a major step towards arbitration by the enactment of *Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures*, a law that governed

enforcement of arbitral awards, whether domestic or foreign.⁶⁵ In 1994, Bahrain adopted the UNCITRAL Model Law of 1985 by reference, as its law for regulating international Commercial Arbitration,⁶⁶ and, unless the parties have agreed otherwise, applies it as the default choice of governing law in international arbitration. On July 2, 2009 Bahrain enacted a new arbitration legislation through legislative Decree No. 30. That legislation established a new Bahrain Chamber for Dispute Resolution to run in partnership with the American Arbitration Association (BCDR-AAA). As long as they are seeking to enforce the award in another State, the decree⁶⁷ gives parties, calling for international arbitration, the option of holding the arbitration in Bahrain without concern that the courts of Bahrain might interfere with, or set aside, the resulting award,. The result is the creation of what is called the “Bahrain Free Arbitration Zone.” the equivalent of a free trade zone for arbitration. The BCDR-AAA also provides mandatory semi-arbitration dispute resolution tribunals (statutory arbitration) for both regional and international parties when dispute claims exceed US\$1.3 million.

For domestic arbitration, or for international arbitration disputes heard before the BCDR—AAA, and to be enforced in Bahrain, the Higher Court of Appeal in Bahrain may only intervene in arbitral proceedings in limited circumstances. In particular, the Court of Appeal may intervene to assist in the appointment of

⁶⁵ Articles 252 and 253, Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures.

⁶⁶ Bahraini Legislative Decree No. 9 of 1994 Promulgating the International Commercial Arbitration Law.

⁶⁷ The relation between and potential coexistence of the Legislative Decree and the enactment by which Bahrain adopted the 1985 UNCITRAL Model Law in 1994 (Legislative Decree No. (9) for the year 1994 with respect to promulgating international commercial law) has not been specified in any detail. Statutory arbitration under the Legislative Decree is at all events unaffected by the 1985 Model Law enacted in Bahrain, since the latter deals only with international Commercial Arbitration by agreement. Commentary by Charles Russell LLP, Bahrain. <http://www.charlesrussell.co.uk>

arbitrators where there is a failure by any of the parties or the other arbitrators to do so, to issue interim orders if requested by any of the parties and/or the tribunal, and support the gathering of evidence, such as compelling witnesses to attend the hearing. Furthermore, foreign arbitral awards may not be appealed under Bahraini law, but the parties may apply to court to have an award nullified on certain grounds, which include the following: lack of a valid arbitration agreement; procedural irregularities (for example, the parties did not receive notice of the arbitral proceedings, or the tribunal was not constituted as required under the arbitration agreement or Bahraini law); an allegation that the arbitral tribunal exceeded its authority (in which case, only the parts of the award that exceed the tribunal's scope are rendered void); and the subject matter of the dispute cannot be handled by arbitration, or the award contradicts Bahraini morality or public policy.⁶⁸

Bahrain ratified the New York Convention in 1988, based on reciprocity, and the ICSID Convention in 1996. Bahrain has been a pioneer in Commercial Arbitration and has long established itself as a major site for arbitrations in the Gulf region. Bahrain status as an arbitration center is particularly beneficial for the GCC States because Bahrain hosts the Gulf Cooperation Council Arbitration Center, which is specifically designed to hear cases in which at least one party is a GCC member; it is particularly useful when both parties are GCC members. The next case study takes us to Egypt.

⁶⁸ Article 243 of the Civil and Commercial Procedures Law.

B. The Egyptian Arbitration Law

Arbitration in Egypt is governed by Law No. 27 of 1994, the Egyptian Arbitration Act,⁶⁹ and which is modeled on the UNCITRAL Model Law with some deviations. The Egyptian Arbitration Act adopts many of the modern arbitration friendly concepts and principles such as the following provisions:

- Parties are free to choose procedural and substantive law applicable to the Arbitration.⁷⁰
- Parties are free to choose seat of arbitration⁷¹ that is applicable to domestic and international arbitration.
- Adopts the principle of Kompetenz-Kompetenz, whereby the arbitrators have jurisdiction to rule on their own jurisdiction.
- Adopts the principle of the separability of the arbitration agreement, which means the agreement to arbitrate can be held valid regardless of the invalidity of the underlying contract in which it is contained.

The Egyptian Arbitration Act, however, deviates from the Model Law in some areas.

Many of these differences were listed in an article in the Global Arbitration Review 2012 report on Egypt.⁷² Some of the most notable deviations are:

⁶⁹ Law No. 27 of April 18, 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters.

⁷⁰ Egyptian Arbitration Act, art. 25, which provides that “[t]he parties to the arbitration have the right to agree on the procedures to be followed by the arbitral tribunal, including the right to subject such procedures to the provisions in force in any arbitral organization or center in Egypt or aboard...” Moreover, Article 39 provides that “The Arbitral Tribunal shall apply the rules agreed by the parties to the subject matter of the dispute. . .”

⁷¹ Egyptian Arbitration Act, art. 28, which provides that “[t]he parties to arbitration may agree on a place of arbitration in Egypt or abroad. . .”

⁷² See Global Arbitration Review, on Egypt, by Mohamed S Abdel Wahab, Zulficar & Partners

- 1) the Arbitration Act does not explicitly refer to the conclusion of an arbitration agreement through electronic means, but does not expressly exclude such possibility, which remains governed by the applicable Egyptian laws;
- 2) in case of an arbitration agreement that is incorporated by reference, the Arbitration Act requires the reference to be unequivocally explicit to incorporate the arbitration agreement itself;
- 3) the Arbitration Act requires an odd number of arbitrators;
- 4) a preliminary arbitral award on jurisdiction may not, according to the Arbitration Act, be challenged before the competent Egyptian court until a final award is rendered;
- 5) under the Arbitration Act, an arbitral tribunal does not have a default power to order interim relief unless such power is conferred thereon by the parties' agreement;
- 6) according to the Arbitration Act if the parties have not agreed the language of the proceedings the language shall be Arabic;
- 7) failing any designation by the parties, the arbitral tribunal shall, according to the Arbitration Act, apply the law that it considers to have the closest connection to the dispute;
- 8) the possibility of vacating an arbitral award if the arbitral tribunal has excluded the *lex causae* chosen by the parties; and

- 9) the Arbitration Act, whilst acknowledging the prevalence of any international treaties ratified by Egypt, provides for only three conditions on which an exequatur may be refused. These are:
- a. Inconsistency with a prior judgment rendered on the merits by the competent Egyptian court;
 - b. Contravention of Egyptian public policy; and
 - c. Failure to validly notify the award to a losing party.

One important aspect in which the Egyptian law contravenes the dictates of the Model Law is with respect to the definition of “public policy” as a criterion for the rejection of an award. Unlike the UNCITRAL Model Law, which states that to refuse the recognition and enforcement of an international arbitral award on public policy grounds, it must be a rule of international public policy, the Egyptian law refers to domestic public policy. However, recent enforcement decisions have shown that Egyptian courts appear to be enforcement friendly with respect to international arbitration, and the public policy ground is normally narrowly construed.⁷³

Egypt ratified the New York Convention in 1959 and since that time has historically accounted for the majority of cases from the Middle East that have been handled by major institutions, such as the ICC. In 1972 Egypt ratified the ICSID Convention and has recently been involved in several major cases brought under the ICSID rules.⁷⁴ The main arbitration institution in Egypt is the Cairo Regional Center for International Commercial Arbitration (CRCICA) which is most popular in the Middle

⁷³ Global Arbitration Review. Egypt, Mohamed S Abdel Wahab, Zulficar & Partners.

East, particularly if one of the contracting parties is from an Arab State. It reported 859 arbitration cases as of October 2012.⁷⁵ The next study is the law of Qatar.

C. The Law of Qatar

Qatar has two legal jurisdictions with laws containing specific provisions related to arbitration; State Law Jurisdiction, and QFC Jurisdiction:

1. The State Law Jurisdiction: the State of Qatar Law which regulates arbitration is set forth in the 1990 Code of Civil and Commercial Procedure (CCP).⁷⁶ Arbitration rules under the Qatar CCP are not based on the Model Law and are considered outdated by modern standards; for example, article 193 of the Law provides that arbitrators must be appointed in the arbitration agreement. It does not refer to the competence of an arbitral tribunal to rule on its jurisdiction.

Pursuant to article 198 of the Law, if the parties fail to agree on the law applicable to the elements of the dispute in relation to arbitration taking place in Qatar, the laws of Qatar will apply. Qatari Arbitration Law, also, gives domestic courts considerable latitude to review an award on the grounds that the arbitrators made a mistake of law or a mistake of fact which make all arbitral awards appealable. Furthermore, although the

⁷⁵ See report at the following:
http://www.crcica.org.eg/publication/annual/pdf/English/12/CRCICA_ANNUAL_REPORT_2011_2012.pdf.

⁷⁶ Articles 190 to 210 of the Procedural Code set the rules relating to arbitration; articles 379 to 381 apply to the enforcement of foreign awards.

Qatari courts have a reputation for fairness and impartiality, the court system is seen as slow and bureaucratic.

2. QFC Jurisdiction: Qatar created the Qatar Financial Center (QFC) in 2005⁷⁷ as a separate jurisdiction with its own laws within the State. The QFC has set Arbitration Regulations which are based on the Model Law. Qatar also established Qatar International Court and Dispute Resolution Center (QICDRC). The court was to be the final piece of Qatar's plan to build a world-class international financial center. Since its inception, the court's ambition has grown from resolving disputes within the QFC to wider disputes within the Qatari business community and now it is open to parties in dispute from all over the world.

In March 2003, Qatar became a signatory to the New York Convention of 1958 and in November 2010, Qatar ratified its membership to the International Center for the Settlement of Investment Disputes (ICSID). As the focus of this study, we will further discuss Qatar's legal framework and present arbitration rules, procedures and enforcement issues in more detail for both jurisdictions in Chapter III. For the moment, however, we turn our attention to the United Arab Emirates.

D. United Arab Emirates (UAE)/Dubai

Similar to the United States of America, UAE has both Federal and State (Emirate) laws. The UAE Civil Procedure Code, Federal Law No (11) of 1992 is the Federal Law that provides the legal framework under which arbitrations are governed in Dubai,

⁷⁷ Qatar Financial Center (QFC) Law of 2005.

Abu Dhabi, or any of the other five Emirates.⁷⁸ However, within Dubai there is another legal jurisdiction called Dubai International Financial Center (DIFC)⁷⁹ which has its own Arbitration Law. Therefore arbitration in Dubai works under dual jurisdictions:

1. Federal Law Jurisdiction: Arbitration under the Federal UAE law is currently dealt with in Articles 203 to 218 of the Civil Procedure Code (Law No. 11 of 1992 as amended by Law No. 30 of 2005). The focus of the Civil Procedure Code is court litigation and the articles relating to arbitration are somewhat brief and often difficult to interpret which proved to be inadequate in the context of modern international Commercial Arbitration and currently is aimed principally at domestic arbitration not international arbitration. Provisions of the Federal Law are not based on the UNCITRAL Model Law; the differences between the two are too many to list them all here.

The Code, for example, provides for frequent court intervention during the course of arbitration⁸⁰ and essentially a de facto review of the arbitral award,⁸¹ it requires the names of the arbitrators to be stipulated in a written document issued by the parties if the tribunal is to be authorized

⁷⁸ The other Emirates are, Fujairah, Ras al-Khaimah, Sharjah, and Umm al-Quwain.

⁷⁹ The DIFC Arbitration Law 2008.

⁸⁰ See Articles 207 & 209.

⁸¹ See Articles 214 & 215.

to act as amiable compositor,⁸² so pursuant to the Code the courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures and make evidentiary decisions on commission to approve, correct, enforce or even nullify an award.⁸³

Arbitration under the outdated Federal Law is still popular for dispute resolution of commercial transactions in the UAE particularly, in Dubai where foreigners constitute the majority of the population. Local arbitration is much more preferred by these expats over litigating their disputes in local courts, which suffers from lengthy procedures and all proceedings have to be in Arabic. All English documents must be translated if they are to be entered into evidence and all non-Arabic speaking witnesses must give oral evidence through a translator.

This makes the local courts a particularly difficult environment. That is why the Dubai International Arbitration Center (DIAC), which is the main arbitration center in Dubai, and operates under the Federal Law jurisdiction, has been popular for running domestic arbitrations with an increasing caseload. It commenced 182 new arbitrations in the first half of 2010, with a value in dispute of around \$626 Million. A key reason for this popularity is the ability to use English in the proceedings and choosing foreign arbitrators. As a result, UAE Federal Arbitration Law is well-tried, tested, reasonably robust and internationally recognized. Also,

⁸² See Article 205.

⁸³ See Articles 207, 208, 209, 214, 215, 216, 217.

there are a number of judgments from the highest court in the UAE, the Court of Cassation, which while having no precedent value, do provide useful guiding principles for practitioners.

2. DIFC Law Jurisdiction: The DIFC is one of a number of "offshore"⁸⁴ free zones established to encourage international investment and trade in the State (Emirates). The DIFC has its own distinct legal system that is based on Common Law principles. Moreover, it has its own court system in which proceedings are conducted in the English language, and many of its own laws are drafted in English. The DIFC's own, Arbitration Law 2008, governs arbitration. This is a comprehensive law based on the UNCITRAL Model Law.

The Dubai International Financial Center Institute (DIFC), which was established in conjunction with the LCIA (the London Center of International Arbitration) functions under the DIFC jurisdiction and is emerging as a favored dispute resolution forum for international contracts that involve companies operating within and outside the Middle East. The DIFC provides Dubai with a significant building block to show the international community that it has the required infrastructure and laws in place to facilitate world class arbitrations alongside major arbitration hubs such as London, Paris, and Singapore.

⁸⁴ While the DIFC refers to itself as "on shore" jurisdiction, see <http://www.difc.ae/discover-difc>, it is in reality mostly used by off shore companies that are looking to take advantage of the low taxes in these zones.

The UAE acceded to the New York Convention on November 19, 2006 and signed into a number of bilateral treaties relating to arbitration, the UAE is also a party of the Riyadh Convention, the GCC Convention and the ICSID Convention. Recognition and enforcement of domestic awards is governed by Article 215 of the Federal Law, whereas the recognition and enforcement of foreign awards is guided by Articles 235 to 237 of the Federal Law. In the past, enforcement of foreign arbitral awards in the UAE courts has been difficult.⁸⁵ To ensure recognition and enforcement, domestic awards have to undergo a validation (ratification) process before the UAE courts. This process is based on an ordinary court action, resulting in an order of recognition and enforcement by the competent court of first instance, which in turn is subject to the ordinary channels of appeal before the UAE courts. However, the UAE courts have become increasingly arbitration-friendly and look favorably upon the recognition and enforcement of arbitration awards.

DIFC awards are recognized and enforced in the UAE through a DIFC court order. Recognition and enforcement of DIFC awards before the Dubai courts is facilitated by reference to the 2009 Memorandum of Understanding Between Dubai courts and DIFC courts (which entered into force as from 16 June 2009) and the related Protocol of Enforcement between Dubai courts and the DIFC courts, provided the awards are final and appropriate for enforcement before DIFC courts. The UAE courts may refuse enforcement of a foreign award on grounds such as the following:

- The lack of proper jurisdiction of the tribunal at the place of arbitration;

⁸⁵ Chibli Mallat, "A Comparative Critique of the Arbitration Process in the Arab world," *Lebanese Review of Arab Arbitration* (Vol. 1 issue 3, 1996).

- The deficient issuance of the arbitration award at the place of arbitration;
- The improper summoning or representation of one of the parties in the foreign arbitration proceedings; or
- The contradiction of the foreign award with a previous UAE judgment or its violation of public policy or *bonus mores* as understood in the UAE (article 235).

Importantly, recognition and enforcement is based on the principle of mutual recognition, whereby the UAE courts will only apply the provisions under Article 235 in relation to awards issued in States that, in turn, recognize and enforce UAE awards (Article 235(1)).

With Dubai eager for becoming a prominent domestic and international arbitration hub in the region, and its arbitral centers reflecting a standard of international best practice, the legal community has been waiting patiently for the enactment of a new Federal Arbitration Law to complete the arbitration wheel.⁸⁶ A new separate comprehensive Arbitration Law has been on the table in the UAE for a number of years but has yet to be agreed upon. Once enacted, the new Federal Arbitration Law, which is based on the UNCITRAL Model Law, as well as on the Egyptian Arbitration Act, will replace the existing provisions of the Federal code and provide another push in support of the growing popularity of arbitral proceedings in the State.

⁸⁶ See, "All About Arbitration The Draft Federal Arbitration Law," by Christina Tsogas. July, 2010. <http://www.tamimi.com/en/publication/publications/section-1/july/all-about-arbitration-the-draft-federal-arbitration-law.html>.

VI. RECOGNIZING AND ENFORCING FOREIGN AWARDS IN THE MIDDLE EAST

Enforcement of international arbitration awards in the Middle East has been problematic, particularly in Libya and Iraq, neither of which has signed onto the New York Convention. Even where the New York Convention is in place, some Arab States have used the broad interpretation of public policy exemption to decline enforcement of foreign awards. Saudi Arabia for example is notorious in that regard where enforcement of foreign awards is routinely denied if it is determined that they conflict with the local Shari'a Law.⁸⁷

In recent years, however, Middle Eastern States have increasingly realized the value of foreign confidence in their domestic judicial systems. As a result, and to attract more competitive investments, many States in the region have signed onto several existing and new multilateral conventions that address enforcement of foreign arbitral awards which are relevant to international Commercial Arbitration. In addition to those conventions, Middle Eastern states have also enacted many Bilateral Investments Agreements (BIT) including agreements to recognize and mutually enforce court judgments and arbitral decisions⁸⁸(*Infra* Table 2.3). The following discussion pertains to the most important multilateral conventions that affect arbitration in the region.

⁸⁷ Lack of Shari'a Law codification in Saudi Arabia makes it particularly hard to measure what is acceptable in Shari'a and what's not prior to going to court. There are no formal statistics, however very few awards have actually been enforced in Saudi Arabia solely on the basis of the New York Convention.

⁸⁸ For example, The China–Egypt Treaty signed on 21 April 1994 and issued by virtue of Presidential Decree No. 361 (1994); the Egypt-UAE Agreement on Legal and Judicial Cooperation (2000); The Syria-UAE Agreement on Legal and Judicial Cooperation (2002); The UAE-Morocco Treaty on Judicial Cooperation in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters (2006).

Table 2.3					
State	Number of BIT*	New York Convention	ICSID	Riyadh Convention	GCC Convention
Bahrain	18	1988	1996	√	√
Egypt	91	1959	1972		
Iraq	2**	X	X	√	
Jordan	42	1980	1972	√	
Kuwait	40	1978	1979	√	√
Lebanon	48	1998	2003	√	
Libya	14	X	X	√	
Oman	20	1999	1995	√	√
Qatar	51	2002	2011	√	√
Saudi Arabia	11	1994	1980	√	√
Syria	20	1959	2006	√	
UAE	46**	2006	1982	√	√
Yemen	20	X	2004	√	

*<https://icsid.worldbank.org/ICSID/FrontServlet>

**<http://www.unctadxi.org/templates/DocSearch.aspx?id=779>

A. The New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) is by far the most prominent and widely accepted conventions governing international commerce in the world. As of September 2012, 146 of the 193 United Nations Member States had adopted the New York Convention.⁸⁹ All Middle East States, except Iraq, Yemen and Libya, have signed onto this Convention. The New York Convention contains an optional reciprocity reservation that allows a State to limit the application of awards to only those States that are parties to this convention.⁹⁰ Bahrain, Saudi Arabia, Lebanon and Kuwait use that option and apply the Convention only to awards made in the territory of another contracting State, while Oman, Egypt Syria, Qatar Jordan and UAE will apply the convention to all foreign awards from all countries including those

⁸⁹ Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConventionstatus.html.

⁹⁰ See Convention on the Recognition and Enforcement of Arbitral Awards, article I. http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

that have not acceded to the New York Convention.⁹¹ Thus, to improve one's chances of securing recognition and enforcement of an award in other convention States, when selecting a seat of arbitration, it is important for a party to select a State that has adopted the New York Convention.⁹²

The New York Convention applies to awards rendered in foreign States, as well as those not deemed as domestic in the State where enforcement is sought.⁹³ The New York Convention imposes two principal obligations on State parties; (1) to ensure that national courts, where appropriate, refer parties to arbitration and stay related judicial proceedings; and (2) to recognize and enforce foreign arbitral awards essentially as if they are domestic judgments.⁹⁴ By virtue of these obligations, enforcement of arbitral awards has been made much easier, and jurisdictional problems have been largely eliminated. Article V of The New York Convention restricts the grounds upon which national courts may refuse to enforce foreign arbitral awards to the following:

- 1) The parties to the agreement were under some incapacity or the agreement was not valid, under either the applicable law or the law of the State where the award was made.
- 2) Proper notice of the appointment of the arbitrator or of the arbitration proceedings was not given to the party against whom the award is invoked, or that party was otherwise unable to present his case.

⁹¹ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards status. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁹² It is possible to enforce the award in a State where the losing party has assets and which is also a member of the New York Convention.

⁹³ See Convention on the Recognition and Enforcement of Arbitral Awards, article I.

⁹⁴ *Id.* art. II.

- 3) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration.
- 4) Either the composition of the arbitration authority or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place.
- 5) The award has not yet become binding on the parties or has been set aside or suspended by competent authority.
- 6) The subject matter of the difference is not capable of settlement by arbitration under the law of the State.
- 7) If the award is contrary the public policy of the State.

In the Middle East while there are cases reported to have been denied enforcement under the New York Convention based on procedural issues such as the Bechtel case in 1994,⁹⁵ it is the public policy defense that has been problematic and widely used by national courts to refuse enforcement of foreign awards. The New York Convention does not define public policy in terms of whether it refers to the narrow international public policy or the broader domestic public policy; however, the UNCITRAL Model Law states that to refuse the recognition and enforcement of an international arbitral award on public policy grounds, it must be a rule of International Law.⁹⁶ Such a distinction is made by the Municipal Law of some Arab

⁹⁵ Case of Bechtel v. the Department of Civil Aviation of the Government of Dubai in 1994, in which the Dubai Court of Cassation refused to enforce a US\$ 25 million award in favour of the Claimant on the grounds that the arbitrator had failed to require the witnesses to swear an oath in the manner prescribed by the UAE Civil Procedure Code. Article by Mark Beswetherick and Keith Hutchison "United Arab Emirates: Enforcement of Arbitration Awards: Moving In the Right Direction" 16 May 2012.

⁹⁶ In the context of enforcement of arbitral awards, the legislatures and courts of a number of countries have sought to qualify or restrict the scope of public policy by applying a test of

States, including Lebanon, Algeria and Tunisia, with the effect of non-enforcement of those foreign awards that are against international public policy.⁹⁷

The laws of most Middle Eastern States, with the exception of Bahrain, Lebanon, Syria and Kuwait, do not refer to their international public policy in applying the New York Convention. Therefore, the challenge remains with regards to ensuring that the exceptions to refuse the enforcement of an arbitral award in local courts is applied in a strict and narrow manner; however, there have been positive signs from many jurisdictions in limiting the use of this exception and applying it only in clear cases of contravention of the State's moral or public policies.

B. The ICSID (Washington) Convention

The ICSID Convention of 1965 provides for the settlement of disputes between host States and foreign investors through arbitration or conciliation.⁹⁸ All States of the Middle East with the exception of Libya and Iraq are party to the ICSID Convention which currently has 158 signatory States. In Washington, D.C., the ICSID Convention established the *International Center for Settlement of Investment Disputes*, which provides a comprehensive set of rules for settling investment disputes, including several provisions that are clearly favorable to foreign investors.

"international public policy". Leading commentators have also approved the narrowing of the public policy exception and the application of "international public policy". The Committee endorses the application of a test of "international public policy." See, Final Report of the Committee on the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards. New Delhi Conference, 2002.

⁹⁷ Abdul Hamid El-Ahdab, *Arbitration with the Arab States* 11 (2d ed., 1999).

⁹⁸ ICSID CONVENTION, REGULATIONS AND RULES.
https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

The ICSID is considered the main force behind the rapid development in State investor arbitration, as well as arbitrations for more than 300 Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) around the world,⁹⁹ most of which have originated in the last twenty years. The ICSID doesn't refer to public policy and typically public policy (international or otherwise) is not an issue that a judge should consider when handling enforcement of ICSID awards. This development has led to far greater certainty for foreign investors in dealing with their host States and has incentivized growth in international trade and commerce. Through this type of arbitration, investors who have been negatively affected by the acts of a host State, such as, for example, the expropriation of property, now have a fair means of redress. Investor-State Arbitration analyzes the rights of private parties under these treaties to arbitrate disputes with States.

One major benefit of using the ICSID is that it limits the use of State immunity against foreign awards which is not addressed by the New York Convention. The ICSID's connection with the World Bank is another attraction of the process because investors recognize that this encourages States to comply with awards voluntarily and more readily than they might otherwise. Failure to comply with an ICSID award may draw the unfavorable attention of the World Bank in relation to other financing activities.

A notable trend developing in the region with regard to investment treaties is that Arab parties are initiating ICSID arbitrations against other Arab States. This

⁹⁹ Antonio R. Parra, Development of the Regulations and Rules of the International Center for Settlement of Investment Disputes, 41 INT'L LAW. 47, 53 (2007) (explaining that the traditional manner of consenting to ICSID was a provision in an investment contract).

demonstrates that actions pursuant to BITs are no longer dominated by investors from Western States.¹⁰⁰ It also shows that Arab investors have realized that they too can take advantage of these treaties to protect their investments and depend less on the existing pan-Arab treaties. As of December 31, 2012, the ICSID had registered 419 cases under the ICSID Convention, 10% of which covered the Middle East and North Africa.¹⁰¹

These arbitrations are generally high value and politically sensitive.¹⁰² Analysis of recent investor-State arbitral jurisprudence, the arbitration rules most commonly employed in investor-State disputes, the important elements of substantive law and procedure, the enforcement of awards (including annulment proceedings under ICSID), and finally, the emergence of an international investment jurisprudence, is a vast type of arbitration that makes interesting subject matter for separate research and another dissertation. The next convention, adopted at Riyadh, is one of the most popular in the Middle East.

C. The Riyadh Convention

The Inter Arab Convention on Judicial Co-operation was signed in Riyadh, Kingdom of Saudi Arabia in 1983 (Riyadh Convention). It is one of the most commonly used

¹⁰⁰ The case, Desert Line Projects LLC v. Republic of Yemen, CSID Case No. ARB/05/17. Involved an Omani company, Desert Line, which relied on the BIT between itself and Yemen. Also MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen. CSID Case No. ARB/09/7.

¹⁰¹ THE ICSID CASE LOAD – STATISTICS (ISSUE 2013-1). <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41>.

¹⁰² Recently, Dow Chemical of the US has been awarded \$2.16bn in damages from the Petrochemical Industries Co of Kuwait by an arbitration court over the breakdown of a planned joint venture between the two companies in 2008. This is one of the largest arbitration awards ever made that almost toppled the Kuwaiti government. <http://www.ft.com/cms/s/0/cc79eaca-a5a8-11e1-a3b4-00144feabdc0.html#ixzz2JxO2vGOa>.

treaties in the Middle East for the recognition and enforcement of both court judgments and arbitral awards between Arab nations.¹⁰³ The Riyadh Convention, Article 37, provides that arbitral awards from originating States will be recognized and enforced in recipient States, and shall be subject to the following exceptions:

- the judgment or award is contrary to Shari'a or the constitution, public policy or good morals of the State in which enforcement is sought;
- if there were certain procedural irregularities in the case, such as the losing party not being properly notified of the hearing so that it could not defend itself;
- if the parties were not properly represented at the hearing in accordance with the laws of the State in which enforcement is sought; or
- if the dispute has already been the subject of a judgment or award between the same parties on the same facts in the State in which enforcement is sought (or another State if that judgment has been recognized), or if proceedings are ongoing.

This convention reaffirms the enforcement character of arbitral awards made in a contracting State without consideration of the nationality of the party in favor of whom it was made. For instance, if an arbitral award is issued in Jordan in favor of a Brazilian national, the award would be enforceable in Iraq. The Riyadh Convention distinguishes between public policy and morality on the one hand, and the Shari'a

¹⁰³ Article 25 of the Riyadh Convention states that subject to certain provisions: "each contracting party shall recognize the judgments made by the courts of any other contracting party in civil cases including judgments related to civil rights made by penal courts and in commercial, administrative and personal statute judgments having the force of res judicata and shall implement them in its territory in accordance with the procedures stipulated in this Part. . ."

rules on the other probably because the mandatory principles of Shari'a rules are not regarded as part of public policy in most Arab States.¹⁰⁴ The Riyadh Convention is particularly useful for those Arab States that have not signed the New York Convention; *e.g.*, as Iraq and Libya, but it is also a step backwards for those who signed the New York Convention because it requires that permission to enforce be obtained in the State where the award was made.¹⁰⁵ Thus, leave to enforce from the originating State is required, which is not the case in the New York Convention. All States of the Middle East, except for Egypt, which has similar bilateral treaties with most States in the region, are signatories to the Riyadh Convention (*supra* Table 2.3, p.61).

D. The Amman Convention

The Amman Arab Convention on Commercial Arbitration (Amman Convention) modeled after the ICSID Convention was concluded by fourteen Arab states in 1987. The Amman Convention became effective in 1992 when eight States ratified it; however, no other State has ratified it since then.¹⁰⁶ The Amman Convention provided a set of modern unified Arab rules for arbitration. It is considered among the most important conventions in the field of arbitration in the region because it is the only convention that has organized arbitration in a specific way for commercial

¹⁰⁴ Al-Shubaiki, Torki, *The Saudi Arabian Arbitration Law in the International Business Community, a Saudi Perspective*, London School of Economic, London (2003), page 197.

¹⁰⁵ Article 34 of the Riyadh Convention.

¹⁰⁶ Jordanian Law and Arbitration Center, *Arbitration Under the 1987 Amman Convention* www.lac.com.jo/news1-8.htm.

relations on the basis of institutional arbitration starting with a unified Arab Arbitration Center and ending with issuing an arbitral award.¹⁰⁷

The Amman Convention established “The Arab Center for Commercial Arbitration” (ACCA) in Morocco. Enforcement must be granted by the Supreme Court of each Member State, and may be refused only for reasons of public policy.¹⁰⁸ This convention is of limited international interest in that it restricts submissions and pleadings to the Arabic language,¹⁰⁹ and the proceedings it contemplates are thus not accessible to most parties in international commercial agreements. The ACCA, however, was never actually set up, and consequently, the Cairo Regional Center for International Commercial Arbitration (CRCICA) in Egypt was designated as a temporary replacement; however, to date, it is not clear if any Middle Eastern State has utilized the Amman Convention¹¹⁰ and we could not trace a single arbitration case that has referred to this treaty. The next treaty under discussion is a product of the GCC Convention.

¹⁰⁷ H. Hadad, “Arbitration Award in Accordance with the Amman Convention,” *Arab Magazine*. May 1999.

¹⁰⁸ Article 35 of the Amman Convention.

¹⁰⁹ Article 23 of the Amman Convention (announcing that the language of the Arab Center proceedings is Arabic); Charles N. Brower and Jeremy K. Sharpe, “International Arbitration and the Islamic world: The Third Phase,” 97 A.J.I.L at 654 (noting that the Arab Center’s appeal outside of the Arab states is limited by the requirement that all proceedings be conducted in Arabic).

¹¹⁰ Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 136 (2000) (noting that the Amman Convention of 1987 made a genuine attempt to establish Rabat as a major center of arbitration); *Arbitration under the 1987 Amman Convention*, LAW AND ARBITRATION CENTER (2001), <http://www.lac.com.jo/news1-8.htm>. (highlighting as the most important provision of the Convention the establishment of the Arab Center for Commercial Arbitration in Rabat, Morocco).

E. The GCC Convention

The six-member Gulf Cooperation Council (GCC) nations, which include Bahrain, Oman, Saudi Arabia, Qatar, the United Arab Emirates and Kuwait, entered into the “Agreement on the Execution of Judgments, Delegations and Judicial Notifications” (the GCC Convention) in Oman in 1995. Similar to the Riyadh Convention, it covers the recognition and enforcement of both court judgments and arbitral awards between the GCC nations. Without re-examination of the merits,¹¹⁴ the execution of a judgment may be rejected in full or in part in the following events:¹¹⁵

- 1) If the judgment is in violation of the provisions of the Islamic Shari’a, the provisions of the Constitution or the public order in the State where the judgment is required to be executed;
- 2) If the judgment is issued in absence and the judgment debtor is not notified of the suit or the judgment properly;
- 3) If the dispute in respect of which the judgment is issued was the subject matter of a former judgment issued on the merit of the dispute as between the same litigants, is related to the same right in terms of its subject matter and grounds.

¹¹⁴ Article 1.A. states as follows:

Each of the GCC States shall execute the final judgments issued by the courts of any Member State in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under this agreement, provided that the court that issued the judgment has the jurisdiction in accordance with the international jurisdiction as applicable in the Member State where the judgment is required to be executed or has the jurisdiction in accordance with the provisions of this agreement.

¹¹⁵ See Article 2 of the GCC.

4) If the dispute in respect of which the judgment required to be executed is issued is the subject matter of a suit currently heard by one of the courts of the states where the judgment is required to be executed between the same litigants?

5) If the judgment is issued against the government of the State where the judgment is required to be executed or against one of its officials for acts done by such officials during or only due to the performance of the duties of their job.

6) If the execution of the judgment is in conflict with the international conventions and protocols applicable in the State where such execution is required.

Having concluded the discussion about the relevant multilateral conventions having a significant role in regulating conventions, we shall now take a look at major centers of arbitration in the Middle East.

VII. THE MAJOR ARBITRATION CENTERS

Traditionally arbitration centers all across the Middle East have been part of local chambers of commerce. Their expertise have varied considerably, but on the whole, they have not yet built a track record for dealing with the large and complex disputes, particularly on the international level. In recent years however, there has been a movement across the Middle East to form private arbitration and other ADR

centers¹¹⁶ to handle the great influx of investment disputes that have swept over the region due to rapid changing economies. The following centers are noteworthy; however, a more in depth presentation of rules and procedure of those centers with more international appeal will be covered in Chapter VI.¹¹⁷

A. Cairo Regional Center for Int'l Commercial Arbitration (CRCICA)

The CRCICA, (or "CRCICA") which is widely considered one of the leading arbitral institutions in the Arab world, is an independent non-profit international organization based in Cairo, Egypt. CIRCICA, established in 1979 under the auspices of the Asian African Legal Consultative Organization, is one of the most reputable arbitration centers in the Middle East, and boasts over thirty years of arbitration experience. It attracts many arbitration cases, mainly those connected with North Africa and the Middle East. The present CRCICA Arbitration Rules¹¹⁹ are based on the new UNCITRAL Arbitration Rules as revised in 2010, with minor modifications emanating mainly from the center's role as an arbitral institution and an appointing authority.

The latest CRCICA annual report¹²⁰ confirms CRCICA's position as a leading regional arbitration institution, and as a major administrator of international

¹¹⁶ See a list of these centers at, <http://www.arabarbitrators.com/a.guide%20.m.html>. Many of these centers may not be in existence or inactive any more, but the sheer number reflect the rising interest in the process in the region.

¹¹⁷ Prospects of a Modern Arbitration Hub in the Middle East.

¹¹⁹ CRCICA Arbitration Rules, 2011, http://www.crcica.org.eg/publication/arbitration_rules/pdf/English/CRCICA_arbitration_rules_en.pdf

¹²⁰ CRCICA annual report, 2011/2012. http://www.crcica.org.eg/publication/annual/pdf/English/12/CRCICA_ANNUAL_REPORT_2011_2012.pdf.

arbitration. The number of arbitration cases filed before CRCICA by the end of May 2012 reached 834. In 2011, sixty-six new arbitration cases were filed before CRCICA. Among the sixty-six new cases filed in 2011, nineteen were international cases, compared to sixteen brought in 2010. In the first half of 2012, forty-two new arbitration cases were filed, compared to thirty in the first half of 2011.

B. The Dubai Int'l Arbitration Center (DIAC)

The Dubai International Arbitration Center (DIAC) was established in 1994 to supply facilities for Commercial Arbitration, promote the settlement of disputes by arbitration, and develop a pool of international arbitrators. The DIAC has its own rules,¹²¹ which were revised in 2007. The rules are customized to fit local conditions with modern elements taken from the UNCITRAL, LCIA, ICC, WIPO and Stockholm arbitration rules. The number of cases heard by the DIAC has increased significantly in recent years to the point where it presently hears more cases than any other regional institution. Recent reports indicate a progressive increase in workload; as an example, in 2007, seventy-seven cases were registered at the DIAC and in 2008, there were 100. However, by 2010, the number of registered claims had increased to 429; in 2011 there were 440 registered cases in the DIAC.¹²² The DIAC's goal is to become a major arbitral institution in the Middle East, though it is likely to face stiff competition both in Dubai and regionally from the DIFC-LCIA (to be discussed next) and other upcoming centers.

¹²¹ <http://www.diac.ae/idias/rules/>.

¹²² As of 10 September 2012, there have been 256 arbitrations in the DIAC during 2012. <http://www.diac.ae/idias/>.

C. Dubai Int'l Financial Center and the London Court of Int'l Arbitration (DIFC-LCIA)

The Dubai government conceived the Dubai International Financial Center (DIFC) as a regional capital market complete with its own onshore¹²³ jurisdiction and Common Law-based Civil and Commercial Law. Shortly thereafter, the DIFC established the DIFC courts.¹²⁴ Originally the DIFC courts were established to hear cases relating to the DIFC only. However, in light of their success, the DIFC courts' jurisdiction was extended in October 2011. Decree No.16/2011 opened the courts' remit to hear: any civil or commercial case in which both parties select the DIFC courts' jurisdiction, either in their original contracts/agreements or post-dispute as well as any civil or commercial case related to the DIFC. In February 2008, the DIFC and the LCIA announced the launch of the DIFC-LCIA Arbitration Center in Dubai. This joint venture allows DIFC access to LCIA's international network of arbitrators. A DIFC award, once ratified by a DIFC court, is theoretically enforceable without any opportunity for challenge in the Dubai courts. This is unlike an arbitral award obtained outside the DIFC.

The DIFC-LCIA has its own arbitration and mediation rules that are based on the current LCIA Rules, but with minor amendments to account for local requirements. The DIFC-LCIA rules are universally applicable and are compatible with both Civil and Common Law systems, offering the international business community, international lawyers and arbitrators, a comprehensive and modern set of rules and

¹²³ See *supra* note 84 this chapter.

¹²⁴ The DIFC Courts were established by Dubai Law No. 12 of 2004, amended by Dubai Law No.16 of 2011.

procedures. As with the rules of other international centers, the DIFC-LCIA rules may also be adopted by parties in arbitrations that are to be conducted outside the DIFC.

There are no official surveys of caseload yet; however, according to one source, the DIFC-LCIA already has “dozens of cases” and will get many more “once users realize the ease of enforcing an award in the DIFC courts.”¹²⁵ The Registrar Department of the DIFC-LCIA has confirmed that the number of arbitration cases increased by 30 percent in 2012. In addition, the DIFC-LCIA has been appointed as the Registrar of the Financial Markets Tribunal created by DIFC Law No. 1 of 2004. These are considerable achievements that have consolidated the status of the DIFC-LCIA as a primary center for dispute resolution and a convincing alternative to other centers. The next center, located in Bahrain, which was established just several years ago, has enjoyed fairly good success under a unique set of rules.

D. Bahrain Chamber for Dispute Resolution (BCDR-AAA)

The Bahrain Chamber of Dispute Resolution (BCDR, or Chamber) was launched in January 2010 as an initiative between the Bahrain Ministry of Justice and American Arbitration Association (AAA). It is known formally as BCDR-AAA or the BCDR jurisdiction. Disputes will be heard by BCDR-AAA in the following two circumstances:

- The BCDR will have automatic and mandatory jurisdiction¹²⁶ for any claim within the jurisdiction of Bahraini courts that exceeds BD500,000

¹²⁵ See, “Institutions worth a closer look: Middle East and North Africa,” April 2013. <http://globalarbitrationreview.com/regional-arbitration/directory/4/article/31491>.

¹²⁶ See BCDR-AAA Resolution No. (65) Issuing the Regulation of Dispute Resolution Procedures for Statutory ADR Tribunal (English). <http://www.bcdr-aaa.org/en/rules-regulations/procedural-rules-for-section-1arabic.html>.

(approximately USD\$1.3 million) which involves an international party or a party licensed by the Central Bank of Bahrain¹²⁷ or

- If the parties have agreed in writing to settle the dispute in the BCDR¹²⁸

The BCDR Arbitration Rules¹²⁹ very closely follow those of the International Centre for Dispute Resolution (ICDR), and provide that the arbitral tribunal shall conduct the arbitration in whatever manner it considers appropriate. The ICDR is the international division of the AAA. Arbitrations before the BCDR must take place in accordance with the BCDR arbitration rules where the parties agree, or where they have provided for arbitration of a dispute by the BCDR and no particular rules have been designated that are subject to any modifications that the parties may agree to in writing.

The BCDR-AAA arbitration rules have unique elements that allow for arbitrations to be conducted under "Free Arbitration Zone" format away from the control of local courts, provided the enforcement is to take place outside Bahrain and the governing law is non-Bahraini law. The BCDS is relatively new and there are no official reports of caseload yet. However, James McPherson, Chief Executive BCDR-AAA told a select media briefing that the "BCDR-AAA is a one-stop-shop for alternative dispute resolution and is a major pillar to Bahrain's status as a world-class business and investment environment." Since its launch on January 2010, the

¹²⁷ See Article 9 of the Legislative Decree No. (30) for the year 2009. http://www.bcdr-aaa.org/media/document/En_Legislative_Decree_no_30.pdf.

¹²⁸ *Ibid*, Article 19 "Rules and procedure."

¹²⁹ A copy can be downloaded from, http://www.bcdr-aaa.org/media/document/BCDR_AAA_Arbitration_Rules.pdf.

Chamber has looked into 66 cases with a value of over \$1.7 billion. The Qatar center is our next topic of discussion.

E. Qatar International Court and Dispute Resolution Center (QICDRC)

The Qatar International Court and Dispute Resolution Center (QICDRC)¹⁴⁵ of the Qatar Financial Center (QFC) offers a full range of dispute resolution services including:

- 1) A world-class civil and commercial court referred to as the Qatar International Court (QIC), which hears disputes between parties from anywhere around the world if they have referred their dispute to its jurisdiction, and has mandatory jurisdiction to hear disputes between QFC entities. The judges of the QIC have considerable experience of resolving complex disputes and are renowned internationally for being totally impartial and independent. The QIC is a national court of Qatar, a Civil Law State, but applies procedures that are similar to those found in Common Law jurisdictions.

- 2) A Dispute Resolution Center (DRC) which operates in partnership with The Center for Effective Dispute Resolution (CEDR) which is a non-profit organization providing alternative dispute resolution services based in the United Kingdom and the leading independent commercial ADR provider in Europe.¹⁴⁶

¹⁴⁵ <http://qicdrc.com.qa>.

¹⁴⁶ <http://www.cedr.com/>.

Users of the QICDRC are free to choose their arbitration rules and procedures. Parties may also choose their own law and jurisdiction. The QIC is a national court of Qatar, which is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The QICDRC opened its door on December 14, 2010. There are no official reports on its caseload; however, Robert Musgrove, CEO of the QICDRC, in an interview with Arabian Business magazine indicated that the court had nine cases in 2011, and twelve in 2012.¹⁴⁷ These cases are usually high profile and high value and require world-class judges, arbitrators and counsels. With increased investment in the region and as the World Cup contracts come into force around 2013, the QICDRC will likely see its caseload increasing in the near future as economies grow and new arbitration developments take hold.

VIII. RECENT ARBITRATION DEVELOPMENTS

It is well recognized that Middle East States are increasingly embracing international Commercial Arbitration as the region has become one of the most attractive investment destinations in the world. Many in the region have advanced and harmonized their national Arbitration Law with those of other nations. As part of this continuing effort we shall discuss next the most recent laws adopted or drafted by Middle East States.

¹⁴⁷ <http://m.arabianbusiness.com/robert-musgrove-interview-rule-of-law-475243.html?page=0>.

A. The New Saudi Arabia Arbitration Law

On June 8, 2012, Saudi Arabia published its new arbitration regulation (Royal Decree Number M/34),¹⁴⁸ (New Law) replacing its old Arbitration Regulation of 1983. The New Law (which became effective July 7, 2012) institutes a variety of reforms to Saudi Arabia's arbitration system. The New Law is based on the 1985 UNCITRAL Model Law, as amended in 2006 and reflects many modern features that bring arbitration in Saudi Arabia closer to international standards. In analyzing the New Law, Mohammed al-Ghamdi and John C. Boehm noted the following improvements that the new law provide in comparison to the old regulation:¹⁴⁹

- The New Law provides written guidelines for determining whether an agreement to arbitrate may be enforced. Previously, there were no written guidelines for arbitration agreements (except the requirement that the arbitration agreement be made by a person with full legal capacity) and it was the responsibility of the Saudi court to approve the parties' agreement to arbitrate before the arbitration process could begin.¹⁵⁰

¹⁴⁸ Royal Decree No. M/34. <http://masar-sa.com/sites/default/files/KSA%20Law%20of%20Arbitration.pdf>.

¹⁴⁹ See "New Saudi Arbitration Law: A Positive Step, but Practical Questions Remain." September 4, 2012. Authors: Mohammed al-Ghamdi, John C. Boehm. <http://www.nortonrosefulbright.com/us/knowledge/publications/94353>.

¹⁵⁰ Article 3 of the Old Arbitration Regulations required that arbitrators had to be either Saudi citizens or non-Saudi Muslims with a professional designation. They had to be experienced, of good conduct and reputation, and be of full legal capacity. The Implementing Regulations then required arbitrators to have the same qualifications as Saudi judges which, in practice, meant that arbitrators had to be male and Muslim. For more background on the subject see "5.5. Position of Women as Arbitrator, Witness or Party in Conciliation in the Shari'a" E.A. Alsheikh / Arab Law Quarterly 25 (2011) 367-400 p. 386.

- The New Law provides clear and detailed procedures for the appointment and/or refusal of arbitrators. Under the Old Law there were no detailed guidelines and in practice courts required arbitrators to be male Muslims with knowledge of Shari'a.
- The New Law allows arbitrations to be conducted in a language other than Arabic if ordered by the arbitration panel or the parties agree (although awards must be translated to Arabic prior to enforcement). Under the Old Law, arbitrations were required to be conducted in Arabic.¹⁵²
- The New Law increases the length of time to complete the arbitration process. Under the Old Law, the arbitrator was required to issue an award within 90 days (unless the parties otherwise agreed), although this requirement was not typically observed in practice. Under the New Law, the arbitration process is allowed to take at least 12 months and can be extended by 6 months or more if the parties agree.¹⁵³
- The New Law allows parties the freedom to choose which law will apply.¹⁵⁴ The Old Law was silent in this regard (other than requiring that

¹⁵² See art. 29 of the New Law, *Supra* note 145 this chapter.

¹⁵³ *Id.* art. 48.

¹⁵⁴ *Id.* art. 25.

arbitral awards must be pursuant to the provisions of Islamic Shari'a and the "laws in force," *i.e.* applicable Saudi law).

The New Law is a significant step forward in the development in the law in the Kingdom and has wide-ranging implications for investment in the local market; however, there is still room for improvement. Attention is particularly drawn to two shortcomings: first, government authorities continue to be exempted from the scope of application of the Arbitration Law, and may be subject to arbitration only with the approval of the Prime Minister; second, the New Law affirms that Shari'a Law is paramount and that arbitration awards may be enforced only if they are Shari'a compliant. This could mean that parties would face similar issues that hindered enforcement in the past where the award was vulnerable to unpredictable interpretations by various Shari'a judges.

B. Draft of the UAE Federal Arbitration Law

On 31 January 2008, the government of the UAE issued a *Draft Federal Law on Arbitration and Enforcement of Arbitral Awards*.¹⁵⁵ The most recent draft was released on 16 February 2012, although the law has been in draft form for such a long time, this latest release demonstrates a positive step towards such a law coming into force, and its contents should be considered when drafting arbitration clauses where the dispute could involve the UAE.¹⁵⁶ The Draft Law is based loosely

¹⁵⁵ A full transcript of the Arbitration Law can be found on the website of the UAE's Ministry of Economy.

¹⁵⁶ See, "Latest Draft of UAE Federal Arbitration Law Released" By: Patrick Bourke, Adam Vause. Norton Rose Canada LLP, March 2012. <http://www.nortonrose.com/knowledge/publications/63923/latest-draft-of-uae-federal-arbitration-law-released>.

on the UNCIRAL Model Law, but it also takes guidance from a number of principles from the Egyptian Arbitration Law. It covers all stages of the arbitral process from the drafting of the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention including interaction with the laws of the DIFC, to the recognition and enforcement of the arbitral award. It reflects all key aspects of modern international arbitration practice of party autonomy, Kompetenz-Kompetenz and the separability principles that have been accepted as standards in the international community. Patrick Bourke and Adam Vause, in their commentary of this draft,¹⁵⁷ highlighted many of the key provisions of the Draft Law that are of considerable consequence:

The Draft Law provides that the parties are free to agree to a requirement that an arbitrator be of a certain nationality (Article 17), but otherwise there is no nationality requirement. On the other hand, Article 18.3 provides that in international arbitrations, none of the arbitrators can be the same nationality as any of the parties. It is, however, unclear whether this only applies where the parties are unable to agree on the selection of arbitrators.

Filing a suit to annul the award shall not suspend enforcement of the award, unless a party can persuade the court that there are “serious reasons” for suspension (Article 57). In any event, if enforcement is suspended, the Draft Law provides that the court must resolve the annulment suit within 3 months of suspending enforcement.

No order may be issued to enforce an award without verifying that it is not “in conflict with a ruling on subject of dispute passed by any UAE court of law.” Construed narrowly; *e.g.*, there isn’t a conflicting decision on the same dispute between the same parties on the same facts - this may not be of concern. Construed broadly, such a provision could hamper enforcement efforts.

¹⁵⁷ *Ibid.*

The DIFC has a jurisdiction which is separate and distinct from the wider UAE. One feature of the DIFC is that the federal and commercial laws of the UAE are not applied within its jurisdiction. As such it is not anticipated that the Draft Law will affect arbitration within the DIFC, which already has its own Arbitration Law (DIFC Law No. 8 of 2004), which applies to the arbitration of disputes connected with the DIFC or where the parties have agreed that they shall be subject to the DIFC Arbitration Law.

While observers of arbitration in the region have been predicting the passage of the Federal Arbitration Law for a number of years, the publication of the latest Draft Law is considered a positive development as it provides guidance to those involved in contractual negotiations with fair warning as to the issues that should be given due consideration when drafting arbitration clauses in agreements where the UAE is the seat of arbitration, or where UAE courts could be a forum for enforcement.

C. The Draft Iraq Arbitration Law

The current Iraqi provisions on arbitration appeared in the twenty-six articles set out in the Iraqi Code of Civil Procedure, law No. 83 of 1969. They pertain to arbitration in general terms and were therefore applicable to both local and international arbitrations; they are, however, outdated and meant for commercial and civil cases. The cumulative Iraqi governments have drawn attention to this matter and formed a Higher Committee to revise and update the Arbitration Code taking into account the terms of other modern arbitration rules. In this respect, the Committee has reviewed a variety of Arab Arbitration Laws and has prepared a preliminary draft which accords with the provisions of the UNCITRAL Model Law. Furthermore, the Committee has examined a set of arbitral awards that apply the UNCITRAL provisions. The Committee finalized the Draft Bill in 2010 and it is still pending

approval by the parliament. Judge Ridgway, former chairwoman of the U.S. Foreign Claims Settlement Commission, noted that, "this new Arbitration Law that Iraq is considering will be a surprise to the rest of the world—of how modern it is, while enacting the New York Convention after that will be the most important single step Iraq could take to welcome international trade and investment."¹⁵⁸

To settle trade disputes involving non-Iraqi business partners, Iraq established its first international Commercial Arbitration center in 2011¹⁵⁹ and expected to join the 1958 New York Convention on international arbitration in the near future. Further, Iraq has been active in regional and international conferences concerning arbitration and cooperation with major institutions in the region in an effort to provide training and expertise to local professionals and judges.¹⁶⁰

D. The Draft GCC Unified Arbitration Law

There has been reports since 2009 that the GCC is planning to create a unified arbitration system to tackle persistent cross-border business disputes that are blocking the flow of trade and investment in the region, a spokesman for the Federation of the GCC Chambers of Commerce and Industry¹⁶¹ said it had drafted a

¹⁵⁸ Citation omitted because actual site not found.

¹⁵⁹ See, KNews.2011. <http://www.zawya.com...ent%20in%20Iraq>. Najaf International Arbitration Center, website, <http://www.najafchamber.net/en/centers/icacn/index.1.html>,

¹⁶⁰ Judge Delissa Ridgway of the U.S Department of Commerce held a three-day workshop in Baghdad this week to explain international Commercial Arbitration to Iraqi judges. The workshop was attended by twenty judges from different parts of Iraq and various courts, including appeals courts, courts of appeal. http://www.rferl.org/content/iraq_arbitration/2320391.html. Also see, UNDP Iraq launches a comprehensive legal training program for over 400 Iraqi judges and legal officials. <http://www.undp.org/content/rbas/en/home/presscenter/pressreleases/2011/01/13/>.

¹⁶¹ Gulf States plan single Arbitration Law. By Nadim Kawach Published Saturday, August 22, 2009 <http://www.emirates247.com/eb247/economy/uae-economy/gulf-states-plan-single-arbitration-law-2009-08-22-1.30548>.

new law on a unified arbitration mechanism in the six States and presented it to the GCC Secretariat for approval. Further discussion of this law will be presented in detail in Chapter III, because it is expected to replace the current Qatari State law concerning arbitration once it is enacted.

IX. CONCLUSION

This chapter has provided an overview of international arbitration in The Middle East region. Considering the region's deep cultural and religious roots favoring arbitration, it is hardly revelatory that international Commercial Arbitration has been reemerging over the last twenty years as the favored method of dispute resolution. It is increasingly clear that the Middle East has overcome its hostility and mistrust towards international Commercial Arbitration that had previously existed in many Arab States as a result of insensitive awards issued in several oil concession arbitrations during the fifties and sixties of the last century. Arab attitudes towards international arbitration have normalized since, and uncertainties in the process are gradually disappearing. Now, in the Middle East, the options available for parties in dispute are no different from the conventional options in the rest of the world.

This transformation has been evident as many Arab States made significant strides towards establishing arbitration user-friendly environments. In the last twenty years, many States, including Saudi Arabia, Bahrain, UAE (DIFC), Qatar (QFC), Egypt, Oman, Jordan and Syria amended their Arbitration Laws by closely following the UNCITRAL Model Law. Iraq, Qatar and UAE (Federal government) are also presently considering draft Arbitration Laws that reportedly will be based on the

UNCITRAL Model Law. Most States of the region have joined both ICSID and the New York Convention and signed into many bilateral and multilateral investment treaties which refer to arbitration for disputes.

There is also a discernible trend towards limiting the use of public policy exceptions in denying enforcement of foreign awards by applying this exception narrowly to foreign public policy or only in clear cases of contravention of the State's moral or public policies. Arbitration centers are increasingly being established in the area, some of which are collaborating with well renowned arbitration bodies, such as the BCDR-AAA and DIFC-LCIA. Some of these centers are reporting impressive growth in the number of cases they are handling; for example, the DIAC registered 206 new arbitration cases in the first half of 2011, compared to 186 in the first half of 2012.

These important developments indicate that the Middle East is now particularly involved in arbitration because it is considered the law governing future investment. The international arbitration community also recognizes that the Middle East States have taken big steps towards providing the infrastructure necessary to build regional arbitration hubs that support international commercial contracts emanating from the region, and that are further having very positive effects on investment and business growth in the region. However Commercial Arbitration in the Middle East is still considered to be in its infancy; thus, it remains to be seen if these jurisdiction could break into the international arena alongside powerhouses such as Paris, London, New York, Singapore and others.

In summation, with respect to international arbitration, Arab States have moved from the acceptance phase and on to the promotion, and participation

phases. All are encouraging the use of international arbitration as a commercial dispute resolution method. A few such as Bahrain, Egypt, Dubai and Qatar are actively engaged in promoting their respective jurisdictions as a viable option for international parties to hold proceedings within their borders, and are therefore, implementing the required infrastructure. In the following section we shall examine the structure that has been established in Qatar.

* * *

Chapter III

QATAR'S LEGAL ARBITRATION FRAMEWORK

Negotiating in the classic diplomatic sense assumes parties more anxious to agree than to disagree.

Dean Acheson

I. INTRODUCTION

Because it depends on various pieces of legislation for its proper functioning, Arbitration Law, in general, is an integrated part of the legal system of any jurisdiction.¹ Therefore, a full understanding of Arbitration Law will not be complete, complete, unless the legal context within which it has developed is examined. Chapter II presented an overview of the development of the national legal systems of the Middle Eastern States, and with specific reference to their accommodation for modern International Commercial Arbitration. This chapter focuses on the State of Qatar; it discusses the background and development of arbitration within the context of the Qatari legal system; further, regarding the Qatar Financial Center (QFC), it reviews the modernization process of the Qatari legal system.

An analysis of the adjudicative bodies in Qatar follows, and finally, a section is allocated to the unified GCC Arbitration Law, which when enacted will replace the

¹ Sachs, Klaus. "CMS Guide to Arbitration: The importance of national arbitration legislation, at 7. http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_OVERVIEW.pdf

current arbitration provisions of the State of Qatar. This chapter investigates the practice of arbitration in Qatar, especially within the context of its use for resolving commercial conflicts, and then presents a realistic and contemporary appraisal of Qatar's progress in fashioning an arbitration system that is suited to its current state of investment activity.

II. GEOGRAPHY AND DEMOGRAPHICS

Qatar is a small peninsula located halfway down the west coast of the Persian Gulf. It has maritime and land borders with Saudi Arabia, and maritime boundaries with Bahrain, UAE and Iran. Islam is its official religion and Arabic is the official language; English, however, is widely spoken. Doha is the capital city, the seat of government, and the location of the leading commercial and financial institutions. Qatar has a population of close to two million inhabitants, of which only 20% are Qatari nationals, and the remaining 80% are expatriates, of which the majority comes from other Arab States, Iran, Pakistan or India.² Qatar is one of the world's most dynamic and fastest growing economies, almost tripling in size from 2005 to achieve a nominal GDP of approximately US\$173.3bn in 2011.³ The nation has one of the highest per capita GDPs in the world,⁴ as well as a modern legal system.

² See, <https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html>.

³ Source: Qatar Statistics Authority or QSA, www.qsa.gov.qa/.

⁴ Source: IMF world Economic Outlook Database April 2012.

III. QATAR'S LEGAL SYSTEM

Modern Qatar enjoys a highly evolved and organized legal system. The origins of the Qatari legal system are to be found in both ancient and classical sources shared by many states of the Middle East. On the one hand, it is founded on Islamic jurisprudence,⁵ and on the other, has adopted many principles of the Civil Law and more recently the Common Law legal systems. The Egyptian Code has also profoundly influenced the legal and judicial system of Qatar. In order to describe the legal system in Qatar effectively, it would be worthwhile to provide a brief overview of the historical development of Qatar's legal system. This historical overview is a useful foundation upon which a greater understanding of the current legal system in Qatar can be based. We shall go back some years to one of the oldest forms of legal systems on Earth: Tribal Law.

A. Tribal Law: Prior to 1871

The citizens of Qatar in this period can be divided into two groups: the Badu (nomads), and the Hadar (settlers). Qatar was formerly comprised of various territories, each with its own tribe and "sheikh" (chief). The chief was the political leader of the tribe and the supreme judge of tribal disputes,⁶ which were settled according to tribal customs.⁷ These customs were, in the absence of any centralized government during that time, enforced by the chief who had to settle

⁵ Qatar is the only State other than Saudi Arabia to espouse Wahhabism as its official State religion. The American Foreign Policy Council's *world Almanac of Islamism*, <http://almanac.afpc.org/Qatar>.

⁶ Rosemarie Said Zahlan, *The Creation of Qatar* (London, 1979), pp. 16-18.

⁷ The reader's attention is directed to the ancient code of Hammurabi, c. 1760 BCE; for example, in paragraph 196, the code provided, "If a man put out the eye of another man, his eye shall be put out." Yale Law School; Lillian Goldman Library; The Avalon Project; Documents in Law, History, and Diplomacy. <http://avalon.law.yale.edu/ancient/hamframe.asp>. (Last assessed 3/12/13).

disputes in his territory. Tribal Law, however, lacked procedures of forgiveness and reconciliation;⁸ to illustrate, in the case of homicide, it was the tribal custom for the victim's tribe to seek revenge by killing a member of the killer's tribe. If the killer's tribe was weaker than the victim's tribe, the former could request protection from the chief of that territory. The chief could then seek a form of compensation that was acceptable to the victim's tribe. If the victim's tribe did not accept the compensation offered by the killer's tribe, the law required that the killer be executed; another legal system that is older than many, but not as ancient as the tribal system is the Shari'a.

B. Shari'a Law: 1871–1916

During the late 1800s until post-World War One, the Ottomans dominated the area and it was administered from the province of Baghdad.⁹ Shari'a Law, based on teachings of the Hanafi school¹⁰ of Islamic Law, became the dominant method of law enforcement. Judges sat in Shari'a courts that had full jurisdiction on all civil and criminal matters; thus, Shari'a Law imposed limits on Tribal Law. The most noticeable limitation was that the sheikh, or chief of the tribe, no longer enjoyed sweeping authority under Shari'a Law. However, certain aspects of Tribal Law were still applied by Shari'a judges on those matters on which Shari'a Law was silent. It is important to

⁹ Note: The Ottoman Empire was extinguished at the end of World War One via the League of Nations Treaty that carved up the empire, creating a number of smaller political entities, many of which lay in Eastern Europe, Western Asia, and North Africa.

¹⁰ Named after the Persian scholar Abu Hanifa Ann-uman (AD: 699 – 767) and considered the most liberal school of Islamic law, <http://www.oxfordislamicstudies.com/article/opr/t125/e798>.

emphasize that with the ascendance of Jassim bin Muhammad Al Thani¹¹ to power as the first Emir of Qatar in 1878, the Hanbali school of Islamic Law, which insists upon strict adherence to the Qur'an and Sunna as the major sources of the Shari'a, started to take hold in Qatar.

C. Dual Common and Shari'a Law: 1916-1971

In 1916, Qatar became a British protectorate and remained so until 1971. With the intrusion of British political influence, and the discovery of oil in 1940, Western laws and British legal institutions were introduced into Qatar's legal system. It is important to emphasize, however, that British jurisdiction¹² did not replace Shari'a Law; the two systems existed in tandem. This coupling essentially created a dual legal system in which the Shari'a courts governed all nationals and Muslims in Qatar by applying Shari'a Law; while British courts governed Non-Muslim expats and British citizens who were in Qatar (usually working in the oil industry). The British court was located inside the British consulate. Its judges administered justice by applying the principles of the English Common Law, including the right to be represented by a lawyer in disputes. Final appeal against a decision of the British court was to the

¹¹ The Al-Thani family were adherents of Wahhabism and used the movement to legitimize their power. Wahhabism as an Islamic movement was founded by Sheikh Ibn Abdul Wahhab in Saudi Arabia who was influenced by the Hanbali School of Islamic jurisprudence which is the most fundamentalist. It rejects individual reasoning or interpretation as a source of Shari'a Law. Following the Hanbali rite, Ibn Abdul Wahhab rejected innovations running counter to pure Islamic faith. He sought to return Muslims to the 'Right Path' and eliminate negative practices of customs and tribal distinction, binding the Arabian Peninsula into a unity based on purity and true religion. The Wahhabi movement was responsible for the emergence of the Al-Thani family as rulers of Qatar since 1878. Michael Curtis (ed.), *Religion and Politics in the Middle East* (Boulder, Colorado, 1981), p.277.

¹² Under the British Foreign Acts, British legislation was given extraterritorial validity in the principalities of the Gulf. John A. Sanwick, *Gulf Cooperation Council* (Boulder, Colorado, 1987), pp. 107-12.

Privy Council in London;¹³ however, after gaining independence from the British, as is shown in the following section, the Qatari legal system began a rapid maturation.

D. Dual Civil and Shari'a Law: 1971-2005

In 1971, Qatar established its independence, and British jurisdiction was no longer applicable, meaning that the British courts and English Common Law no longer applied to non-Muslims. The Shari'a court regained full jurisdiction in all civil and criminal matters over all foreigners in Qatar. Thus, the status of non-Muslims became incompatible with the law applied by the Shari'a court. In response to the new situation, Qatar created the Adlia (Arabic for Justice) Court¹⁴ as a distinct court from the Shari'a Court, the Adlia Court applied the Civil Law that was originally developed and used in Egypt.

With the increase in oil revenue, the Qatari government began achieving modernization in various fields. Modernization took place in the areas of education, medical services, housing, social welfare programs, state administration, transportation and communication. Thus, new laws and new judicial techniques were urgently required to deal with consequences and problems of modernization that were unknown not only to Shari'a Law but to the Shari'a Court as well. Over the years, the Adlia Court started eclipsing the Shari'a Court by taking more and more of the jurisdiction and incorporating Shari'a elements within the Civil Law. The amended Provisional Constitution of 1972 apparently marked the beginning of an

¹³ John A. Sanwick, *The Gulf Cooperation Council* (Boulder, Colorado, 1987), p. 118.

¹⁴ The Adlia Court was established in 1971 by royal decree No. 13. The court was supplemented by Qatar criminal laws (Decree No. 14).

attempt to organize the judiciary. This organization had resulted in a division of Qatar's judicial system; while the Shari'a Court applied Shari'a Law, the Adlia Court applied Western Civil Law.¹⁵

E. The Current Legal System of Qatar

The current Qatari Constitution was passed in 2004 and came into force in 2005. The Constitution invests executive authority in the Emir.¹⁶ In Article 67, the Qatari Constitution lists the Emir's functions as follows:¹⁷ first, drawing up the general policy of the State with the assistance of the Council of Ministers and secondly, ratification and promulgation of laws; thus no law may be issued unless it is ratified by the Emir, as well as others.

Article 1 of the Qatari Constitution proclaims that Qatar's religion is Islam and Shari'a Law shall be a main source of its legislation.¹⁸ Its political system is

¹⁵ Much of the early history presented is attributed to an article by A. Nizar Hamzeh, "Qatar: The Duality of the Legal System" that first appeared in *Middle Eastern Studies*, Vol. 30, No.1, January 1994, pp.79-90, Published by Frank Cass, London.

¹⁶ "Emir" generally refers to a high-ranking official; a general officer, a prince, etc.

¹⁷ Article 67

1. The Emir shall have the following powers:
 2. Formulating the general policy of the State with the assistance of the Cabinet.
 3. Endorsing and issuing laws. No law shall be issued unless endorsed by the Emir.
 4. Convening meetings of the Council of Ministers, whenever public interest so requires. He shall chair all sessions he attends.
 5. Appointing civil and military personnel and terminating their services according to the law.
 6. Accepting the credentials of diplomatic and consular missions.
 7. Pardoning convicts or reducing punishments in accordance with the law.
 8. Bestowing civil and military honours in accordance with the law.
 9. Establishing and organising ministries and other government agencies and defining their authorities.
 10. Establishing and organising agencies to give him opinions and consultation to guide the policies of the State, to supervise these agencies and to define their authority.
 11. Any other powers in accordance with this Constitution and the law.
- Welcome to Qatar. Embassy of the State of Qatar, Washington, D.C.
<http://www.qatarembassy.net/constitution.asp>.(Last assessed 7/4/13).

democratic. Article 59 states that “the system of government is based on the separation of powers; the legislative authority is vested in the ‘Al-Shoura Council;’ the executive authority is vested in the ‘Emir and shall be assisted by the Council of Ministers;’ and the judicial authority is vested in the Qatari courts of Law.” The Al-Shoura Council was originally established in 1972 as an advisory council; however, after the constitution was enforced in 2005, the Al-Shoura Council assumed legislative authority, and now approves the general policy and budget of the government. It can also exercise control over the executive authority, every member of the Al-Shoura Council may address an interpellation to the minister on any matters within the minister’s jurisdiction. Every minister is therefore responsible before the Al-Shoura Council for the performance of his ministry. The Al-Shoura Council consists of a total of forty-five members, thirty of whom are to be elected by “direct, general secret ballot.”¹⁹

The Prime Minister, who serves as head of the Council of Ministers, is responsible for the implementation of the Council of Ministers' decisions and for coordination between the various ministries. The responsibilities of the Council of Ministers include proposing draft laws and decrees, which are then discussed by the Advisory Council before being submitted to the Emir for ratification and issuance.

¹⁸ Article 1

Qatar is an independent Arab state. Islam is the State’s religion and the Islamic Shari’ah is the main source of its legislations. It has a democratic political system. It’s official language is Arabic. People of Qatar are part of the Arab nation (Ummah). *Id.*

¹⁹ Al-Shoura Council’s elections for the 30 members have not been made to date (February, 2013) but it is anticipated that this will be done by end of 2013. The Al-Shoura Council does not have the powers mentioned above until the elections are made, and 30 of its members are elected by the general public. Political parties are not permitted. Qatar Chamber of Commerce and Industry (2004).

Law No. 10 of 2003 was intended to make Qatar's judicial system more independent; it established the Supreme Judicial Council,²⁰ unified all the Adlia and Shari'a courts into one judicial body, and determined the jurisdictions of each type of court. Shari'a Courts fall under the jurisdiction of the Presidency of Shari'a courts and Religious Affairs. The Shari'a courts deal primarily with personal matters relating to Muslims (such as marriage, divorce, and inheritance). Cases involving non-Muslims and Common Law, including civil and commercial law, are handled by civil courts. The hierarchy of the Qatari courts is as follows:

- The Supreme Constitutional Court (only deals with constitutional matters that are referred to it by the other courts)
- The Court of Cassation (Final and highest appeal level)
- The Court of Appeal (Second Level)
- The Court of First Instance (First Level)

Another court system that is parallel to the Qatari courts, but distinct from them, are the QFC courts that relate to financial matters. Among other tasks, the QFC courts regulate licenses and monitors the banking industry. Our discussion turns now to this new legal jurisdictional court.

F. The Qatar Financial Center (QFC) Regulations

Following the establishment of the QFC in March, 2005 as a center for business and financial services in Doha, Qatar, QFC Law Number (7) of 2005, was enacted to set

²⁰ The Supreme Judiciary Council has in its membership the two heads of the Shari'a Appeal Court and Justice Appeal Court, alongside a number of advisors and judges (Ministry of Finance, undated, *Judiciary*).

forth a legal and regulatory regime that is intended to be parallel to, and separate from, the Qatari legal system (except with respect to matters not governed by QFC laws, such as criminal law). The QFC has its own rules and regulations applicable to, among others, financial services companies, and which cover such topics as anti-money laundering, contracts and insolvency.

Despite the existence of these QFC laws and regulations, Qatari Civil Law continues to apply in the QFC—except when it is explicitly excluded, conflicts with, or relates to matters not dealt with under QFC laws and regulations. In accordance with the rules and regulations of the QFC, the Qatar Financial Center Regulatory Authority (QFCRA) regulates licenses and supervises banking, financial and insurance related businesses carried on, in or from the QFC in accordance with legislative principles of an international standard that is modeled closely on those used in London and other major financial centers.²¹

The QFC Law also introduced the QFC Civil and Commercial Court²² and the QFC Authority Tribunal; both bodies were later combined to form what is now called the Qatar International Court (QIC).²³ This essentially created a separate court system, distinct from the Qatari courts mentioned above. The QFC Court originally was intended to provide both litigation and alternative dispute resolution to civil or commercial disputes in relation to contracts that have been concluded under QFC

²¹Latham & Watkins: Doing Business in Qatar, p 2.
http://www.lw.com/upload/pubContent/_pdf/pub2782_1.pdf.

²² The Civil and Commercial Court of The Qatar Financial Center, which includes The First Instance Circuit and The Appellate Circuit, as established by virtue of Article (8) of The QFC Law.

²³ The Qatar Cabinet on May, 2012 agreed to use the new official name “Qatar International Court.” (Gulf Times / 03 July 2012), <http://www.islamic-finance-conference.net/2012/07/qatar-international-court-and-dispute.html>.

Law, however, this was extended later to outside disputes within the Qatari business community and currently, provide commercial disputes resolution in conjunction with the Center for Effective Dispute Resolution (CEDR) for parties from all over the globe. Thus, Qatar currently has dual jurisdictions, the State of Qatar jurisdiction which operates under a mix of Shari'a Law and Civil Law legal system, and the Qatar Financial Center (the QFC) jurisdiction that uses the Common Law legal system.

IV. ARBITRATION LAW IN QATAR

Qatar has been a contracting State to the New York Convention since March 2003. It recognizes and enforces foreign arbitral awards based on reciprocity. Qatar is also a party of the Riyadh Convention, the GCC Convention, and finally ratified its membership to the ICSID Convention in November 2010. Qatar has signed no bilateral treaties specific to arbitration; however, it is a party to at least fifty-one general Bilateral Investment Treaties (BITs)²⁴ that include provisions on arbitration and most allow for recourse to arbitration on the basis of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States.

As indicated in the previous section, there are two legal jurisdictions in Qatar with laws containing specific provisions related to arbitration in each of them: the State of Qatar jurisdiction and the Qatar Financial Center (the QFC) jurisdiction. The latter is a separate free-zone type jurisdiction with its own laws and courts within Qatar. Consequently, arbitration in Qatar may be governed by these two different Arbitration Laws, which we shall now examine in some detail.

²⁴ Total number of Bilateral Investment Agreements concluded by June 1, 2012, http://unctad.org/Sections/dite_pccb/docs/bits_qatar.pdf.

A. Arbitration Under State Jurisdiction

Arbitration under the State of Qatar law is currently regulated by Articles 190-210 of Law No 13 of 1990 Civil and Commercial Code of Procedure (CCP). The CCP is based on the old Egyptian Civil and Commercial Procedure of 1968 which was flawed in many respects.²⁵ The CCP does not reflect modern arbitration standards that are necessary to meet the needs of increased investment and construction developments that Qatar is heavily undertaking. In a recent publication by Dr. Zain Al Abdin Sharar²⁶ that is entitled, "Does Qatar Need to Reform its Arbitration Law and Adopting the UNCITRAL Model Law for Arbitration? A Comparative Analysis,"²⁷ Dr. Sharar examines the existing provisions of the CCP arbitration and determines the major deficiencies in those provisions. Some of the potential problems Dr. Sharar presents in his research are listed below:

- 1. Arbitration clause and arbitration agreement:** Article 190 of the CCP Law draws four conditions to have a valid arbitration agreement.
 - The agreement must be in writing;
 - The agreement must articulate the subject matter of the dispute;

²⁵ H. S. Shaaban, 'Commercial Transaction in the Middle East: What Law Govern' (1999) Fall Law and Policy in International Business.

²⁶ An Associate Professor of Commercial Law at Qatar University and Director of Legal Affairs and Enforcement at Qatar Financial Markets Authority (QFMA).

²⁷ Published in The Legal and Judicial magazine 2011, second edition, by Qatar Ministry of Justice, <http://www.moj.gov.qa>, a copy of the article could also be found here. <http://www.almeezan.qa/ReferenceFiles.aspx?id=52&type=doc&language=en>.

- All participating parties must have full legal capacity (thus preventing minors, mentally incapacitated persons and bankrupt persons from entering into arbitration); and
- The settlement must be amicable.

Failure to meet any one of these conditions will render an arbitration agreement null and void. Dr. Sharar recommends expanding the scope of “an agreement in writing” to encompass the situation in which a formal agreement has not yet been printed and signed by the parties. The proposed amendment should broaden the interpretation of the ‘writing requirement,’²⁸ consistent with international best-practice as reflected in the Model Law on interpreting the writing requirement.

* * *

2. Scope of the Arbitration Clause: There is no reference to arbitrability under Qatari law. Article 190 of the CCP mentions only the matters that can be settled amicably with no further elaboration which demonstrates the incompleteness and ambiguity of article 190. In that respect, Dr. Sharar recommends that the new Arbitration Law in Qatar lays down directly the requirements for arbitrability by clearly identifying the types of disputes that cannot be arbitrated with clear guidelines for matters that can be arbitrated to avoid the unnecessary setting aside of the award or rejecting its recognition or enforcement on public policy grounds.

²⁸ For more information see UNICITRAL Model Law on International Commercial Arbitration, Annotation to Article 2.

3. Legal Capacity: The New York Convention establishes that the parties' legal capacity is governed by the "the law applicable to them."²⁹ In Qatar, Article 190 of the CCP provides that arbitration is only valid if participating parties have the 'capacity to dispose of their rights' without a clear definition particularly, for government bodies entering into a contract. Dr. Sharar recommends that the Qatari jurisdictions should further clarify and define a party's "capacity" in more detail in relation to arbitration.
4. The Kompetenz-Kompetenz Principle and autonomy of the arbitration agreement: These two important principles which are adopted by Article 16(1) of the Model Law are completely missing from the CCP provisions regulating arbitration.
5. Finality of the arbitral award: The CCP permits three types of recourse against an arbitral award: the appeal; the petition for reconsideration; and the request for the award to be set aside; Articles 202-209 set out vague and ambiguous conditions and time restraints with respect to appeals. Dr. Sharar explains that there are no pre-established grounds for appeal and that an award can be appealed on question of fact and law. However, with regard to setting aside an award, the grounds provided for in article 207 of the CCP are very much similar to those mentioned in Article V of the 1958 New York Convention. As a result, Dr. Sharar recommends that the Qatari authorities amend its Arbitration

²⁹ Article V.I.a of the New York Convention.

Laws to abolish the provision in respect of appeals against awards and leave only the grounds of setting aside arbitral award.

In general, all the CCP articles relative to arbitration should be updated. There have been many calls urging the Qatari legislature to review the CCP, especially the arbitration provisions.³⁰ Arbitration in Qatar has been criticized for being too similar to commercial litigation.³¹ This is inherently problematic as arbitration's tendency to imitate traditional court procedure means that the advantages of arbitration are diminished.

With regard to enforcement, foreign awards will be enforceable in the State of Qatar if there is reciprocity of enforcement of Qatari judgments in the foreign jurisdiction that desires enforcement of its nationals' awards. Any request for enforcement of a foreign award must be submitted to the Superior Civil Court, along with a summons for the other party to appear at the hearing.³² Leave to enforce will be granted subject to the court's verification of the tribunal's jurisdiction and compliance with the relevant procedures, and provided that the award does not contradict any prior judgment of the Qatari court, or the rules of public order or good morals of Qatar.³³ The legal system in Qatar is regarded as fair and impartial; it

³⁰ Habib al Mulla 'International Commercial Arbitration' (2004) 6 DIAC Journal 29.

³¹ For more information see Abdel Hamead al Ahdab, *Arbitration in the Arab world* (1st ed., (1998) 535.

³² Article 379 of the CCP.

³³ Article 380 of the CCP. Note that there is no mention of Shari'a in this article.

is trusted by local and international corporations alike.³⁴ But the process is rather slow and bureaucratic. It is also important to be ever mindful that the Qatari courts do not rely on a formal system of precedent and has no formal reporting of court decisions.^{35 36} This peculiar protocol, or lack thereof, opens the door for occasional surprises; for example, in a recent ruling by the Qatari Supreme Court, it set aside an arbitral award because the arbitrator did not render the award in the name of H.H.

³⁴ A testament to Qatar's impartial legal system is the recent case *International Trading and Industrial Investment Company v. DynCorp Aerospace Technology et al.*, Civil Action No. 09-791 (RBW), (Jan. 21, 2011). DynCorp Aerospace Technology is a U.S. military contractor with operations in Qatar. It developed a dispute with its Qatari business partner, International Trading and Industrial Investment Co., regarding the minimum contract term and the right to terminate the contract.

Pursuant to their arbitration agreement, they submitted their dispute to an International Chamber of Commerce ("ICC") arbitration in Paris and DynCorp lost. DynCorp then petitioned the Qatari courts to review de novo the arbitrator's application of Qatari contract law because the Arabic language version of the arbitration agreement failed to provide that the arbitration would be final and binding. The lower courts rejected DynCorp's claims, but DynCorp ultimately prevailed in the Court of Cassation, where the Qatari court set aside the award due to the arbitral clause's non-binding language. However the award was later upheld by a district of Colombia court.

³⁵ This explains the lack of literature on actual Qatari judicial and arbitral proceedings. We found that most assessments and case literature with regard to courts interference with arbitration proceedings conducted in Qatar State jurisdiction are word of mouth or news articles by involved practitioners in the State.

³⁶ There have been news by Qatari News Agency on May 28, 2013 that *The Ministry of Justice will launch the (West Law Qatar) legal website in cooperation with "Thomson Reuters" Company*. The website is intended to provide legal information for local and international researchers as it contains more than 2,500 laws in English language and to publish legal principles of the Court of Cassation decisions in English language besides full texts of decisions in Arabic language.
http://www.qnaol.net/QNAEn/Local_News/Miscellaneous1/Pages/Justice-Ministry-to-Launch-Westlaw-Qatar-Legal-Web=site-on-Wednesday.aspx.

the Emir of Qatar.³⁷ This decision came as disappointing surprise to experts inside and outside the State. In 2006, the Qatari government realized that the benefits of arbitration that included circumventing court litigation, speeding up dispute resolution and offering more viable prospects to businesses.³⁸ As a result Qatar's primary business regulatory authority, the Qatar Chamber of Commerce and

³⁷ This case was presented in a group discussion on arbitration in Qatar on LinkedIn website. This commentary is based on the ruling rendered by the Supreme Court of Qatar on 12 June 2012 in the case n. 64/2012. Please notice that the word "award" has been replaced by "judgment" because the Arabic text of law does not make any distinction. Hence, confusion happened. In order to justify the necessity of rendering any arbitral award in the name of H.H. the Emir of Qatar, the Supreme Court provided the following reasoning: Whereas, by virtue of the Permanent Constitution of Qatar. Article 63 states that "Judicial Authority shall be vested in the Courts in the manner prescribed in this Constitution and Judgments shall be issued in the name of the Emir." Whereas, by virtue of the Qatari Civil Procedural Code, Article 69, "Judgments are issued and executed in the name of H.H., the Emir of the State of Qatar."

Article 198 stipulates that "Arbitrators render their judgment ... provided they do not violate the rules of public order and morality." Article 202 states that "the judgment of the arbitrators is rendered after deliberations . . ." Article 203 specifies that "The original of arbitrators' judgments, even if made for investigation proceedings, must be filed with the clerk of the Court originally having jurisdiction over this dispute . . ." Article 204 provides that "Arbitrators judgments are not enforceable unless an order of execution is granted by the President of the Court with whose clerk the original judgment was registered, upon request of any of the concerned parties. This execution order is granted after consideration of the judgment and the arbitration agreement and after confirmation that there is no obstacle against its enforcement. The execution order shall be endorsed on the original judgment.

The enforcing judge has jurisdiction over all questions relating to enforcement." Finally, Article 207 provides "Parties may request setting aside the arbitrators' judgments in the following cases: 1. if the award was made without there being an agreement of arbitration.... or if it breaches one of the rules of public order or morality." In the light of the above mentioned articles, the legislator qualified the decision of the arbitrator as a "judgment" and considered its mandatory character. The Parties should adhere to its execution and the Judge issues an execution order to implement and enforce it. Therefore, by virtue of article 204, the arbitrator judgment should be issued in the name of H.H. the Emir of Qatar.

If such condition is not fulfilled, the arbitrator decision shall not be considered as a "judgment" as contrary to the Constitution and the Law. Furthermore, rendering the "judgment" in the name of H.H. the Emir confirms that it is supported by Public Force and is enforceable. Such rule is part of the Public Order. Any decision or judgment of the arbitral panel should be rendered in the name of H.H. the Emir otherwise, they shall be considered as null and void, contrary to public order and the Court may – *sua sponte* – (by its proper motion) declare them as such. When I asked if prior arbitral awards were rendered in such manner, a local arbitration expert noted that he is not aware of any previous awards that were rendered in the name of H.H. the Emir of Qatar.

³⁸ Chaddock, D. (2008) Qatar: the Business Traveler's Handbook, Interlink Pub Group.

Industry, established the Qatar International Center for Arbitration (QICA).³⁹ The QICA's task was to develop a mechanism for resolving disputes among national companies themselves or between national companies and other foreign companies. Because of its successes, the QICA quickly became a popular alternative to litigation in Qatari⁴⁰ courts and a large number of parties doing business in Qatar (both foreign and locally based) selected the QICA for binding arbitration as the method of dispute resolution in Qatar. The QICA handles between forty and fifty cases a year and is the arbitration forum specified in almost all contracts signed by Qatari government entities.⁴¹ The QICA applies the laws contained in the CCP and has adopted a new set of arbitration rules that became effective as of May 1, 2012. These new rules are modeled upon the UNCITRAL Arbitration Rules, as revised in 2010, with some adjustments to comply with the mandatory provisions of the CCP. However foreign entities doing business in Qatar are free to choose the QFC rules or a well-established body of arbitral rules such as the LCIA, ICC or the UNCITRAL rules.⁴²

³⁹Prior to that time, most arbitration tribunals were conducted by the GCC arbitration center in Bahrain. Decision of the Council of Ministers in its regular session No 29 of 2001 approved the procedures required to implement the regulation of the Commercial Arbitration Center of the GCC States in Qatar. *Journal of Arab Arbitration*, volume 2- No. (1) 2010.

⁴⁰Talking to the Peninsula News on July, 9 2009. Dr. Ahmed Mohamed Seta, Secretary General, QICA said arbitration is increasingly becoming a popular alternative to litigation in Qatar. Over 150 arbitration cases, involving a sum of about QR1.3bn, have come up before the Qatar Arbitration Center ever since it was launched in 2006. <https://www.menafn.com/menafn/1093255415/Qatar-Contractors-go-for-arbitration-avoid-litigation->.

⁴¹Comments by M. A. Raoul, *The European & Middle Eastern Arbitration Review 2012*, Introduction

⁴²Latham & Watkins: *Doing Business in Qatar*, June 2009, www.lw.com.

While the CCP is silent in respect to use of institutional rules, it is common that arbitration clauses in contracts in Qatar contain institutional rules and the agreement to use these rules would likely be upheld by the local courts.⁴³ However, whether parties have an *ad hoc* arbitration agreement or an agreement referring to the use of institutional rules, the provisions of the Civil Procedure Code should be considered and applied. The QICA rules somehow complement the CCP and considered to be effective for Qatari arbitrations as they fill many gaps that the CCP is silent on, such as Kompetenz-Kompetenz, party autonomy and independence of the arbitration agreement; the rules also provide a model arbitration clause to be included in contracts and agreements. The awards rendered by the arbitrators under the auspices of QICA are final and binding on the parties and not subject to an appeal on merits to a court of law in Qatar.

B. Arbitration Under the QFC Jurisdiction

QFC Law Number (7) of 2005 provides that the QFC may make regulations establishing an arbitral body within the QFC with jurisdiction over disputes relating to the QFC (the QFC Arbitration Regulations). The QFC Arbitration Regulations were enacted in November 2005. These regulations are based on the UNCITRAL Model Law with some additions; they apply where the QFC has been chosen as the seat of arbitration by the parties. Some of the more interesting elements of the QFC Arbitration Regulations⁴⁴ are listed below:

⁴³ Arbitration Under Qatar Law, article by Laura Warren and Glenn O'Brien, Published May 27, 2010. <http://www.clydeco.com/insight/articles/arbitration-under-qatar-law>.

⁴⁴ Available at http://www.complinet.com/net_file_store/new_rulebooks/q/f/QFCRA_4116_VER1.pdf.

- 1) The Arbitral Panel may rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement (Competenz-Competenz). (Article 21).
- 2) Unless otherwise agreed by the parties, the Arbitral Panel may, at the request of a party, grant interim measures of protection (Article 22).
- 3) Subject to the provisions of the Regulations, the parties are free to agree on the procedure to be followed by the Arbitral Panel in conducting the proceedings (Article 25).
- 4) The parties are free to agree on the Seat of Arbitration (Article 26).
- 5) The parties are free to agree on the language or languages to be used in the arbitral proceedings (Article 28).
- 6) The parties are free to choose Rules of law applicable to substance of the dispute. Failing any designation by the parties, the Arbitral Panel shall apply the law determined by the conflict of laws rules which it considers applicable (Article 34).
- 7) Article 41 provides An Award may be set aside by the QFC Tribunal only if the requesting party furnishes proof as follows:
 - A party to the Arbitration Agreement was under some incapacity;
 - Invalidity of the agreement;
 - Failure to give proper notice of proceedings or the appointment of an arbitrator;
 - Circumstances preventing a party from presenting its case during proceedings;
 - That the award itself goes beyond (or deals with a dispute that falls outside) the terms of the arbitration agreement – provided that, if possible, only the parts of the award which exceed (or deal with a dispute which falls outside) the terms of the agreement will be set aside;
 - That the tribunal was not properly composed or failed to follow the agreed procedure.

Equally, the QFC courts can vacate an award if they find that the subject matter should have not been settled by arbitration under the laws of the QFC or the award is not in the interest of the QFC.

8) With regard to Recognition and enforcement of non-QFC awards, Article 42 of the QFC regulations provides that the QFC courts have sole and exclusive jurisdiction to hear applications for the enforcement of an award in the QFC and the QFC courts may refuse enforcement if the party against whom the award is to be enforced proves that:

- a party to the arbitration agreement was under some incapacity or the agreement was otherwise invalid under the relevant law;
- the party against whom enforcement is sought was not given proper notice of the appointment of an arbitrator or of the proceedings, or was otherwise unable to present its case;
- the award itself goes beyond (or deals with a dispute that falls outside) the terms of the arbitration agreement, provided that, if possible, the parts of the award which do not exceed (or deal with a dispute which falls outside) the terms of the agreement will be enforceable;
- the composition of the tribunal or the arbitral procedure did not accord with the agreement between the parties or with the relevant law;
- The award has yet to become binding on the parties, or an application has been made to the court under the law of which the award was made to set aside or suspend the award.

The QFC courts can refuse enforcement if they find that the subject matter of the dispute is not capable of settlement by arbitration under the laws of the QFC or that recognition or enforcement of the award would be contrary to the public policy of the QFC.

In May, 2012, The Qatar Cabinet combined the civil and commercial court, and the regulatory tribunal of the QFC to form what is now called the Qatar International Court (QIC).⁴⁵ The QIC provides a mandatory jurisdiction for the resolution of QFC related disputes, and also a consensual jurisdiction where parties can agree in a dispute Resolution Clause or by mutual agreement to submit to the jurisdiction of the QFC. The Regulatory Tribunal provides for appeals from the decisions of the QFC regulatory Authority. The appeal circuit of the court is the final Court of Appeal.

The QIC also features an Alternative Dispute Resolution (ADR) center that operates in partnership with the CEDR. Together they form the Qatar International Court and Dispute Resolution Center (QICDRC). The declared vision of the QICDRC⁴⁶ is to develop a world-class International Court and Dispute Resolution Center and provide national and international civil and commercial dispute resolution services within Qatar and the Middle East region that are accessible, modern, expeditious, economical and responsive to the needs of global business markets. The following section examines the QICDRC, a resolution center for the Qatar International Court.

V. THE QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTER (QICDRC)

The QICDRC (Court) was conceived as the final piece of Qatar's plan to build a world-class international financial center providing cutting edge court and dispute resolution services that equals or exceeds the best international practice with the

⁴⁵ The Qatar Cabinet on May, 2012 agreed to use the new official name "Qatar International Court," <http://www.thepeninsulaqatar.com/qatar/199730-qatar-international-court-plans-expansion.html>.

⁴⁶ QICDRC website, <http://qicdrc.com.qa/Vision.aspx>.

flexibility to accommodate market needs.⁴⁷ The Court provides a modern specialist civil and commercial court to resolve disputes between institutions and other bodies in Qatar and between entities at the international level. A distinguishing feature of the Court is its judges, who have considerable experience of resolving complex disputes and, who are renowned internationally for being totally impartial and independent.⁴⁸ The procedures of the Court are similar to those found in Common Law jurisdictions.

The Court comprises, in accordance with the Law No (2) of 2009, two divisions, a First Instance and an Appellate division. Each judge is able to sit in either division. Proceedings are heard and determined at first instance and on appeal by three judges. Cases are conducted in accordance with the QFC Court Rules and Regulations⁴⁹ (CRR) that came into force in December 2010. The CRR provides a code code for the administration of justice by the Court. Article 4 of the CRR provides the overriding objective of the Court, which is namely to “deal with all cases justly,” which includes ensuring that litigation takes place expeditiously and effectively, and in a manner that is proportionate to the amount involved and the importance and complexity of the case.

Article 10 sets forth a number of steps which the Court may take without prejudice to its power (Article 10.1) “to take all steps that are necessary or expedient for the proper determination of a case.” It has the power to grant a number of

⁴⁸ QIC President the Rt. Hon. the Lord Phillips of Worth Matravers was president of the Supreme Court of the United Kingdom. In addition to well renowned judges from all over the world: eight judges from England, two Scottish, and one each from Qatar, Germany, Australia, New Zealand, and Singapore. <http://qicdrc.com.qa/Biographies.aspx>.

⁴⁹ QFC court rules, http://qicdrc.com.qa/Court_Rules.aspx.

remedies, without prejudice to its power (Article 10.3), to grant all such relief and make all such other orders as may be appropriate and just in accordance with the overriding objective set out in Article 4. The Court can conduct oral hearings in English or Arabic (or both);⁵⁰ however, English is the common language to all judges of the Court and parties are encouraged, whenever possible, to agree to use English throughout the conduct of proceedings. Detailed provisions of the governing law to be applied by the courts have been enacted as part of the QFC legislation. Unless it is inconsistent with Qatari public order law, the parties may agree to use other law to govern the dispute.⁵¹

The judgments and orders of the Court are enforceable as the judgments and orders of a court of the State of Qatar.⁵² The Enforcement Judge⁵³ is primarily responsible for enforcing the Court's judgments, decisions, and orders. An appeal to the Appellate Division is subject to the requirement for permission. The purpose of the requirement for permission is the efficient, economic and effective resolution of litigation, but without causing material injustice. If an appeal is permitted to proceed it takes the form of review and not a rehearing.⁵⁴

The QICDRC provides a range of dispute resolution services that have been designed in consultation with the world's leading law firms, corporations, and Qatari government leaders and officials. The QICDRC is keen on ensuring that its disputes

⁵⁰ The QFC Court Rules, Article 3.

⁵¹ See paragraph 8 of Schedule 6 of Law No (7) of 2005, as amended. Restated in the QFC court rules Article 10.

⁵² The QFC Court Rules, Article 34.

⁵³ Appointed in accordance with paragraph 17 of Schedule 6 to Law No (7) of 2005, as amended.

⁵⁴ The QFC Court Rules, Article 35.

resolution service is accessible, modern, expeditious, economic and responsive to the needs of global business markets. The Court's premises are designed to include a mediation/arbitration room and ample break-out rooms for the parties to conduct their proceedings. These rooms are designed to suit the particular type of dispute. Mediation services are available prior to and after the beginning of proceedings. The Court also supports and facilitates arbitration under the rules chosen by the parties. Parties seeking to use the Court's premises for the hearing of arbitration should make a request to one of the established institutes, stating what the seat of the arbitration should be; for example, in London, but that the venue⁵⁵ is to be in Doha, Qatar.

VI. THE DRAFT GCC UNIFIED LAW FOR COMMERCIAL ARBITRATION

On December 4, 2012 and during his opening remarks at the first Kuwaiti conference for Commercial Arbitration,⁵⁶ the Executive Director of the Abu Dhabi Conciliation and Arbitration Center, Dr. M. Kassim, revealed that the Draft GCC Unified Law for Commercial Arbitration (Draft Law) was complete and had been handed over to the General Secretariat of the GCC States for adoption in the near future. We were able to find an unofficial copy of the latest draft of this arbitration act that was published in Arabic by the Alanba Newspaper on December 9, 2012.⁵⁷ Previous drafts of this law have been on the table since late 2009; however, the GCC government's bureaucracy and red tape has been blamed for its delay as well as that of other GCC

⁵⁵ A seat determines the *lex arbitri* and the courts with supervisory jurisdiction over the arbitration; a venue determines the location where hearings are to take place.

⁵⁶ Kuwait Commercial Arbitration Conference, website, <http://spatialco.com/arbitration/>.

⁵⁷ See, <http://www.alanba.com.kw/ar/economy-news/345260/09-12-2012>.

agreements.⁵⁸ The Draft Law is to a large extent based on the UNCITRAL Model Law. It covers all stages of the arbitral process from the drafting of the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention, to the recognition and enforcement of the arbitral award; it reflects all key aspects of modern international arbitration practice that have been accepted by the international standards. Seven of the key provisions of the Draft Law are provided here below:

1. General Provisions

The Draft Law provides clarity in Article 1 by stating that,

Provisions of the Draft Law apply to any arbitration between parties of public law or private law persons if the dispute is happening in a Member State of the GCC, or any international arbitration agreement executed outside the region with the parties agreeing to subject it to provisions of this law.

Thus, it does allow government agencies to use arbitration and make these provisions applicable for domestic as well as international arbitrations. Article 2 defines what is considered "international." It follows the principles found in the Model Law and provides that arbitration is international if the following conditions are true:

1. The place of business of one the parties of the arbitration agreement at the time of concluding the agreement, is in one of the GCC States and the place of business of the other party located in another State other than the GCC States.
2. The subject of the dispute covered by the arbitration agreement is linked to one of the GCC States and another outside State.

⁵⁸ Bureaucratic disruption of economic activity in the Gulf, Published December 2012, <http://www.albawaba.com/ar/AC-459017>.

3. The place of arbitration or contractual obligations of the original agreements are mostly situated outside the GCC States.

Article 7 clarifies who has Jurisdiction over the tribunal by stating “. . . Jurisdiction to arbitration matters referred to by this law is vested in the judicial authority originally competent to hear the dispute in accordance with the judicial system in force in each State of the Council.” Article 9 prohibits arbitration for personal-related disputes and matters where reconciliation is not allowed.

2. Arbitration Agreement

Similar to the Model Law, Article 10 requires that the arbitration agreement must be in writing, (could be letters or telegrams or telexes, faxes, e-mails or other written communication), and Article 21 provides that the arbitration agreement is independent from the contract itself. This is supportive of the internationally accepted doctrine of separability, *i.e.*, an arbitration clause can be "separable" from the contract in which it is included. This allows the arbitration clause to continue to be valid, even if the contract is not, and allows an arbitration to proceed regardless whether any party argues that the contract is invalid.

3. Arbitral Tribunal

The Draft Law does not put any restriction on nationality, religion or education of the arbitrators. Article 14 requires that arbitrators be of full legal capacity, of good conduct and reputation. However, the arbitrator shall not be related to any one of the parties of the dispute to the fourth degree unless the parties agree knowing that this relationship with the other party exists. Parties are free to select their arbitral tribunal without the intervention of the courts (Article 13). The law provides a

detailed procedure similar to the Model Law for selecting an arbitral tribunal in the event the parties have not done so in their agreement (Article 15). It also provides procedures for challenging the appointment of arbitrators (Article 17). In addition, arbitral tribunals have the authority to rule on their own jurisdiction (the doctrine of Kompetenz-Kompetenz) and they do not have to turn to the courts to determine if they have the authority to proceed with arbitration (Article 52).

4. Arbitration Proceedings

The court must not intervene in a dispute that has an arbitration agreement without the start of the arbitration proceedings or issue of arbitration award (Article 11). Article 25 states, ". . . The arbitration procedures shall begin from the day on which the arbitration tribunal is formed, unless the arbitration parties agree otherwise." This procedure follows standard international practice where any party can start arbitration by serving notice to the other party without any involvement of the courts.

Article 23 allows the parties to use procedural rules of their choosing. It permits parties to use either international or local arbitration institutions, or their procedural rules. If parties do not agree as to rules, the tribunal can apply the procedural rules that it deems appropriate. The parties are also free to choose the seat of their arbitration to be inside or outside the GCC States; if the parties cannot agree, the tribunal is authorized to decide (Article 26). Article 27 provides for arbitration to be conducted in Arabic unless otherwise agreed by the parties or arbitral tribunal.

5. Interim Measures and Preliminary Orders

Article 22 follows the example of the 1985 Model Law with regard to interim measures. It simply provides that “. . . parties to the arbitration may agree that upon request of either party, the arbitral tribunal may take temporary or precautionary measures it deems necessary and required in relation to the nature of the dispute.” If the order is ignored, the party that requested the order can turn to the competent court for execution.

6. Arbitration Awards

Article 37 provides the parties the freedom to choose the law applicable to the substance of the dispute. Failing any designation by the parties, the Arbitral Panel may apply the substantive rules that it considers the most relevant or most convenient to the conflict; also, if the parties agree expressly to conciliation, the delegated tribunal may rule on the merits of the dispute in accordance with rules of justice and equity, taking into account the equal treatment provisions of Article 24 without being bound by the provisions of the Draft Law. The Draft Law also provides that the arbitral award is to be issued within twelve months from the date that the arbitration was commenced (Article 43).

7. Recognition and Enforcement of an Award

The Draft Law follows international arbitration practice where arbitration awards are accepted as valid from their issuance and courts are required to recognize and enforce them except for limited public policy reasons. Article 49 states that the “. . . arbitration awards issued in accordance with the provisions of this [Draft] Law are not to be challenged in the GCC States.” However, it is allowed to file a lawsuit to

nullify or set aside an arbitration award according to the provisions of this Law.

Article 50 (1) specifies those instances as follows:

- 1) If there is no arbitration agreement or the agreement is void.
- 2) If one of the parties to the arbitration agreement as concluded was incompetent according to the law governing eligibility.
- 3) If one of the parties is unable to present a defense because of incomplete procedures that affected the verdict.
- 4) If the arbitration tribunal ruled out the application of the law that the parties agreed to apply on the subject matter of the dispute.
- 5) If the formation of the arbitral tribunal or the appointment of arbitrators was contrary to the law or rules of the agreement by the parties.
- 6) If arbitration ruling was in matters not covered by the arbitration agreement or exceeded the limits of this agreement; however, whenever possible partial judgment could be applicable on other matters subject to arbitration.
- 7) If the arbitration award or proceedings was nullified after the ruling.

The Court may also nullify or set aside the award if it finds it contrary to public order, public morals, and the Shari'a (Article 50-2). A party desiring to invalidate an arbitration award must submit an application – the Arabic legal term is ta'an, which translates as "challenge" – to the competent court within thirty days of the issuance of the award. The Draft Law places the onus on the complaining party to raise any

objection about the award within the thirty-day period, rather than requiring the successful party to justify the award when it seeks to enforce it.

The GCC Unified Law of Arbitration shall replace the provisions of arbitration laws in force in all the Member States⁵⁹ including Qatar. The Draft Law provides a significant improvement over the existing Qatari CCP arbitration provisions. By using the Model Law as its framework, the Draft Law applies modern international practices to Qatar and all other GCC States. It limits court power to intervene and recognizes the principle of party autonomy by allowing the parties to determine how they want their commercial disputes resolved. It incorporates widely accepted international arbitration doctrines such as Kompetenz-Kompetenz and the separability of the arbitration agreement.

VII. CONCLUSION

Qatar has had a long history of operating dual, yet complimentary legal systems. In the 18th Century, Qatar integrated tribal tradition with Shari'a Law and during its time as a British Protectorate in the 20th Century, British legal institutions operated in parallel with Qatari Shari'a courts. In 1971 Qatar became an independent State and operated Adlia and Shari'a courts under the Qatari State jurisdiction which combined the Civil Law system with Shari'a Law. In 2005 the off-shore QFC jurisdiction was created by the Government of Qatar with an independent judiciary, which since 2009 has operated under the Common Law system, thus, creating a unique legal environment of dual jurisdictions where ideas drawn from Islamic law, Civil Law, and the Common Law co-exist.

⁵⁹ Article 56 of the Draft Law

With regard to Qatar's State jurisdiction, it is obvious to both practitioners and commentators in the field that Commercial Arbitration practice under the State's jurisdiction is lagging behind the international norm. Provisions of the CCP that control the arbitration process in the State are outdated compared to the UNCITRAL Model Law and other accepted international standards.⁶⁴ This is in addition to the courts' lack of a formal system of precedent for reporting court decisions with regard to arbitration which from a practical point of view, is sufficient to raise doubts, particularly from interested parties outside the region, as to Qatar's commitment and neutrality to function as an arbitration seat. Therefore, before Qatar can truly establish itself as a hub of international Commercial Arbitration in the Middle East, it is *recommended* that the following conditions are met:

- 1) Qatar should reform its State *jurisdiction* legislation with respect to arbitration by adopting the Draft GCC Unified Law for Commercial Arbitration without delay. This law applies modern international practices that will improve the functionality of arbitration in Qatar. It limits court intervention and recognizes the principle of party autonomy by allowing the parties to determine how they want their commercial disputes resolved and incorporates widely accepted international arbitration doctrines such as Kompetenz-Kompetenz and the separability of the arbitration agreement.

⁶⁴ See *supra* note 16 Chapter I.

- 2) Qatar should provide greater transparency with regard to its State jurisdiction court decisions, including the publication of more arbitral decisions which would enhance predictability of how these courts apply their public policy exception to the arbitration process.

With regard to the QFC jurisdiction, the (QICDRC) operating under the QFC jurisdiction was established as a multi-purpose court, and an ADR center that provides the world's best practice in litigation, arbitration and mediation. It has arbitration regulations that are modeled after the UNCETRAL Model Law and recognizes modern principle of party autonomy, Kompetenz-Kompetenz and separability. The QIC, which is recognized for its world renowned international judiciary,⁶⁵ has exhibited friendliness and flexibility toward dispute resolution mechanisms including arbitration. The QICDRC seems to be keen on responding to market needs by providing the necessary logistics for quick and economical dispute resolution process.⁶⁶ It provides businesses in Qatar and the larger Middle East region with another world-class English-language, Common Law specialized commercial court along with the DIFC Court in Dubai. It definitely propels Qatar towards becoming a contender in the race for becoming the preferred hub of arbitration in the region. One drawback of the QICDRC is that it is relatively young

⁶⁵ A perfect example of this was early 2010 when it was announced that the Right Honorable Lord Phillips of Worth Matravers had been appointed QICDRC's newest president. With a long and highly distinguished career already behind him, Lord Phillips was appointed Lord Chief Justice of England and Wales in 2005 and currently serves as president of the Supreme Court of the UK. Arabian Business News, October 7, 2012.

⁶⁶ Robert Musgrove, CEO of the QICDRC International noted in Newsletter published by LexisNexis on May 4, 2012 that the court has developed the virtual court, where parties, if they choose, can participate in proceedings through audio and video links; it also has an IT team to develop full e-court facilities. It is also developing an outline Construction Adjudication Scheme with leading international law firms.

and without much of a track record,⁶⁷ and with a lingering question in regards to its relationship with the national courts in Qatar that provide the ultimate judicial authority and access to enforcement conventions.⁶⁸

Upon the creation of the QFC jurisdiction and the Qatar International Center for Arbitration (QICA), Qatar has made noteworthy strides towards establishing itself as an arbitration user-friendly seat of arbitration; however, issues with its State jurisdiction's law and court documentation remain; therefore, if parties intend to pursue a seat in Qatar, it is recommended that they use the QFC Court—provided they have specified that facility in their arbitration agreement. If the arbitration is to take place under the State's jurisdiction, we highly recommended that they use local qualified and knowledgeable counsel in addition to a well drafted arbitration agreement similar to the one proposed by the QICA rules. The following chapter takes up the interesting topic of arbitrating Islamic financial disputes.

⁶⁷ The court opened in 2010 and only had nine court cases in the first year and twelve in the second year. ARABIAN BUSINESS, October 7, 2012, by Shane McGinley. <http://m.arabianbusiness.com/robert-musgrove-interview-rule-of-law-475243.html?page=1>.

⁶⁸ It is important to make clear that the QIC is a Qatari court that was created through Qatari legislation and is part of the State's judicial fabric. While Qatar's legal system may belong to the Latin school or Civil Law system, the differences between this approach and the Anglo-Saxon (Common Law) approach in some ways are only superficial. However, I feel that as the International Court is new – with no old practices or judicial precedent the code may be very important and it may have to revert to the fundamentals. Comments made by Justice Hassan Al Sayed of the QIC to LexisNexis on May 5, 2012.

CHAPTER IV

ARBITRATION OF ISLAMIC FINANCE DISPUTES

Arbitration results were 33% faster than litigation. The median time from filing to judgment was 16 1/2 months in arbitration, while lawsuits took 25 months to conclude.¹

I. INTRODUCTION

Using arbitration as a means of resolving Islamic Finance disputes is gaining popularity in the Middle East, and as well, in other Muslim States in South-East Asia and Africa. This is evident in the number of studies and articles that have been presented on this subject by Islamic Finance experts and the legal community at large.² Major arbitration institutions in the region are also positioning themselves to cater to this industry's growing demand for dispute resolutions as some of these

¹ Michael Delikat and Morris M. Kleine , "An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?" 2003 . <http://www.instituteforlegalreform.com/featuredtool/arbitration-quotes>. (Last assessed 7/30/13).

² For example; see "Dispute Resolution in Islamic Finance: A case analysis of Malaysia" by Umar A. Oseni presented in the 8th International Conference on Islamic Economics and Finance of 2011 in Qatar. Also the 3rd Annual *world Islamic Banking Conference* in summer of 2012 in *Singapore* had a full session on "Governance, Legal and Risk Management Priorities for the Global Islamic Finance Industry." Also see "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012," <http://www.klgates.com/files/Publication>.

disputes tend to be of high profile and value.³ While the industry historically has preferred litigation over adjudication, and non-Islamic venues and laws to govern the subject of the disputes,⁴ there have been calls by legal and financial experts to refer more disputes to ADR methods, particularly arbitration, and provide custom arbitration clauses, procedures and practices more in line with Shari'a Law; this highly specialized industry is similar to what has been established for arbitration of other industries such as Intellectual Property, construction and sports, and many others.

Building a successful arbitration hub in the Middle East depends to a large extent on understanding the needs and types of dispute resolutions required by potential clients. The Islamic Finance Industry (the "Industry"), which is one of the largest and fastest growing sectors⁵ in the region's economy, will constitute a large percentage of those clients; therefore, demand for specialized dispute resolutions of Shari'a based products will increase. This chapter presents arbitration-related aspects of Islamic financial transactions; it further provides a brief overview of Islamic Finance and discusses how current disputes and arbitration clauses are being handled; it further analyzes relevant court precedents and makes suggestions that

³ For example the Qatar International Court and Dispute Resolution Center (QICDRC) has plans to expand its commercial court jurisdiction by resolving Islamic Finance disputes through a model framework. The Peninsula News July 2, 2012, <http://www.thepeninsulaqatar.com/qatar/199730-qatar-international-court-plans-expansion.html>.

⁴ Most Islamic Finance disputes are currently governed by the Law of England and Wales or the State of New York, Business Islamica: by Camille Paldi - a UAE-based Legal expert, read more, <http://www.alfalahconsulting.com/2012/03/uae-dubai-as-dispute-resolution-center.html#ixzz2Mhc1f01o>.

⁵ Global Islamic banking assets under management are currently estimated at just over \$1 trillion and are expected to reach \$4 trillion by 2020. See "The Rise and Rise of Islamic Finance" African business Magazine Monday, November 19. 2012. Also see 'Financing on faith: The rise of Islamic finance' Article by Arabian Business. March 25. 2012.

encourage arbitrations that are more in agreement with Shari'a requirements; it also looks at existing centers that have published their own specialized arbitration rules that regulate Islamic finance, such as the Kuala Lumpur Regional Center for Arbitration (KLRC), the Islamic Banking and Financial Services Arbitration Rules, and the Dubai International Islamic Center for Reconciliation and Arbitration (IICRA) Arbitration and Reconciliation Procedures. This chapter also presents some of the challenges the Industry faces, particularly in regards to providing a standard legal framework across various jurisdictions regarding the governing law of Islamic financial transactions.

II. AN OVERVIEW OF ISLAMIC FINANCE

Islamic Finance in general, refers to financial activities that are consistent with the principles of Shari'a Law. The key feature of these principles is the prohibition of Riba (interest) and Gharar (uncertainties in contracts).⁶ These two features provide the foundations of the Industry while taking into consideration the general consensus among Islamic scholars that the prohibition of interest is not limited to usury but refers to interest on debt in any form.⁷ Over the years, these principles, among others, have evolved into particular Islamic banking rules that control the business strategy to replicate conventional services with Shari'a compliant models in an effort

⁶ The prohibition of Gharar is to discourage excessive uncertainty in contracts, enhance disclosure, and proscribe all forms of deception, El-Gamal, M. 2009. *Islamic Finance: Law, Economics and Practice*. Cambridge, UK: Cambridge University Press, pp. 58-60.

⁷ Iqbal, Z., and A. Mirakhor. 2011. *An Introduction to Islamic Finance: Theory and Practice*, 2nd ed. Singapore: John Wiley and Sons (Asia) p 10.

to compensate for disadvantages, and capitalize on advantages. These guiding principles in general are the following:⁸

- 1) Prohibit pure debt securities from the financial system, and replace interest by the rate of return earned after completion of the contract.
- 2) Require bank deposits to be collected on a profit or loss sharing basis rather than fixed predetermined liabilities.
- 3) All financial contracts should be backed by assets or transactions/activities in the real economic sector.
- 4) Mandate fulfillment and sanctity of contracts that deal with trade in goods and services, as well as transfer of ownership and honoring of debt obligations.
- 5) Emphasizes principles of morality and ethics in business conduct, and proscribe illicit activities according to Shari'a and mandate that all economic activities be governed by rules of fair dealing and justice.

Within these principles, Islamic financial institutions have developed a vast range of contracts to facilitate the flow of financial transactions and serve the growing financial market. These contracts now cater for housing, consumer finance, business loans, project funding, co-operative or mutual insurance (Takaful) and lately tradable Islamic bonds (Sukuk). In addition to these developments, Islamic banking and finance is emerging on the global scene as a new reality to be reckoned with. It

⁸ Ibrahim Warde, 2000. *Islamic Finance in the Global Economy*, Edinburgh University Press, p 55.

has grown from the small local bank of Mit Ghamr,⁹ in Egypt into a global industry that was valued at about \$1.4 trillion at the end of 2011, and is expected to reach over \$4.0 trillion by 2020.¹⁰ To modern Islamic jurisprudence credit, Islamic financial institutions exhibit significant innovation, flexibility and sophistication in providing the necessary religious juristic rulings by producing a broad range of investment products¹¹ that cover all aspects of modern day financial needs, and encompasses all services that modern conventional banks, insurance outfits and capital markets can offer.

In retrospect, the Islamic banking industry formally emerged in 1975 with the establishment of the Islamic Development Bank and the Dubai Islamic Bank; the first Takaful Company was also established in 1979.¹² In 1980s, Pakistan, Iran, Malaysia and Bahrain, implemented Islamic banking within the framework of their existing system.¹³ Through the 1990s, and after the establishment of the Accounting and

⁹ In 1963, in Mit Ghamr, in Egypt, the first Islamic interest-free bank came into being. Mt Ghamr was a rural area and the people were religious. They did not place their savings in any bank, knowing that interest was forbidden in Islam. The Bank operated on profit sharing bases and provided interest free savings accounts, investment accounts and zakat (an obligatory Islamic tax) accounts.

The Mit Ghamr project was successful, as deposits increased from 1963 to 1966. The bank was cautious, rejecting about 60% of loan applications and the default ratio was zero in economically good times. But project was eventually abandoned for political reasons. Nevertheless, it had shown that commercial banking could be organized on a non-interest basis. The Institute of Islamic Banking and Insurance, http://www.islamic-banking.com/what_is_ibanking.aspx.

¹⁰ Global Islamic Finance Report 2012, http://gifr.net/home_ifci.htm.

¹¹ These products include but not limited to: Mudraba: "Trust Financing," Igra wa-igtin: "Lease/hire-purchase," Murabaha: "Cost-plus Financing," Musharaka: "Venture Capital," Bai'salam: "Transaction," Manazile scheme: "Islamic mortgage housing," Bai' bi thamin ajil: "sale by deferred payment," al-Wadiah: "non-fund transaction." Further types include Commodity Murabaha: "Money Market Instruments," Sukuk: "Fixed income bonds" and Takaful which covers many types of insurance.

¹² The Fiqh Academy (Islamic Jurisprudence Academy) in 1975 set out objections to conventional insurance practice and provided the grounds for an alternative structure (Takaful).

¹³ Academic activities launched with the first international conference on Islamic Economics in Makah in 1976. The first specialized academic financial research institution, the King Abdul Aziz University

Auditing Organization for Islamic Financial Institutions (AAOIFI),¹⁴ the International Islamic Fiqh Academy (IIFA)¹⁵ and the Shari'a Supervisory Boards (SSB)¹⁶ of Islamic financial institutions began engaging in discussions and reviewing financial transactions that provided further development of financial services. As of early 1999, Islamic financial institutions were present in more than seventy States and their assets exceeded the \$200 billion mark.¹⁷ Since the turn of the century, global assets of Islamic financial institutions have increased significantly. State and

Jeddah, established the Center for Research in Islamic Economics in 1978. In the 1980s, Islamic banking received significant recognition and progressed in several States. Pakistan, Iran, and Sudan undertook initiatives to transform their overall financial systems to comply with Shari'a. Due to these transformations and breakthroughs in economies, in March 1981 the governors of the central banks and monetary authorities of the Organization of Islamic Cooperation States jointly called for further strengthening and proper implementation of the regulation, close supervision, and monitoring of Islamic financial institutions.

¹⁴ AAOIFI was established the Islamic Financial Institutions in 1990, it prepares accounting, auditing, governance, ethics and Shari'a standards for Islamic financial institutions and the industry. Professional qualification programs (notably CIPA, the Shari'a Adviser and Auditor "CSAA," and the corporate compliance program) are presented to enhance the industry's human resources base and governance. . . <<http://www.aaofi.com/aaofi/TheOrganization/Overview/tabid/62/language/en-US/Default.aspx>>.

¹⁵ An Academy for advanced study of Islam based in Jeddah, Saudi Arabia. It was created at the decision of the second summit of the Organization of the Islamic Conference (OIC) 1974.

¹⁶ This board may have different name in different States however, Islamic financial institutions that offer products and services conforming to Islamic principles usually have a religious board that act as an independent Shari'a Supervisory Board comprising of at least three Shari'a scholars with specialized knowledge of the Islamic laws for transacting (Fiqh al mu`amalat), in addition to knowledge of modern business, finance and economics. The SSBs study proposed financial transaction, and issue an opinion as to the compliance of the transaction to Islamic law in the form of a fatwa, which is a non-binding jurist's opinion, Institute of Islamic Banking and Insurance (IIBI).

¹⁷ Ibrahim Warde, 2000, Islamic Finance in the Global Economy, Edinburgh University Press, p 6.

corporate Sukuk bonds emerged around 2001-2002¹⁸ and quickly created a large market in several States, particularly in the GCC region.¹⁹

The Sukuk bonds have been issued by many Islamic nations and are tradable in secondary financial markets with both FTSE²⁰ and Dow Jones providing indices to monitor this market. To the Industry's credit, it has been profitable for investors. Islamic financial institutions were able to sail through the financial crises of 2008 with minimal damage,²¹ and its ability to stay competitive compared to conventional conventional finance is probably the overriding factor for its popularity with Muslims and Non-Muslims alike. This is evident in the consistently higher rate of return for Islamic funds in comparison to conventional mutual funds.²² On a final note, as interest in Islamic Finance has grown, more infrastructure institutions have been

¹⁸ world's first global corporate Sukuk was by Kumpulan Guthrie Bhd (USD150 million, 2001). world's first global sovereign Sukuk was by Government of Malaysia (USD600 million, 2002).http://www.mifc.com/index.php?ch=menu_foc_suk&pg=menu_foc_suk_iss.

¹⁹ Other factors that helped the industry could be attributed to the increase in oil prices and repatriation of Arab funds in the wake of the aftermath of the terrorist attacks on US on Sept 11, 2001 when many Arab investors withdrew their funds from the US and the West in general and reinvested their fortune in the region where they favored Islamic investment. See article "Challenges facing sector's growth; Global Islamic finance" By: El Waleed M. Ahmed, Legal Consultant, Foreign Affair Department, Kuwaiti Lawyer Law Firm, Al-Jabria-Kuwait.

²⁰ A British provider of stock market indices and associated data services, wholly owned by the London Stock Exchange.

²¹ No Islamic bank was bailed out.

²² See Exhibit 7: Average yields of Sukuk and GCC conventional bond spreads, Global Islamic Finance Report 2012, http://gifr.net/home_ifci.htm.

established.²³ Many States have introduced legislation to better facilitate the Islamic Finance Industry²⁴ in their jurisdictions.

III. AN OVERVIEW OF ISLAMIC FINANCE DISPUTE RESOLUTION

As the Industry becomes more complex and global, disputes among international entities arising out of Shari'a compliant agreements are becoming more common place. One of the challenges that still persist in the face of the Industry in terms of compliance with Shari'a has been lack of a regulatory framework that deals with disputes arising from Shari'a compliant contracts. As a result, these Shari'a compliant financial transactions are governed by the national laws that the parties agreed to in the contract. These laws are typically rooted in the Secular, Civil or Common Law systems²⁵ rather than in the Shari'a Law, which provides the guiding principles of the the subject matter of the agreement. The Industry so far, has not been able to replicate the conventional industry risk management practices²⁶ in time of crises, and does not have precise legal procedures for remedying disputes when law suits

²³ Such as the Islamic Financial Services Board (IFSB), International Islamic Financial Market (IIFM), International Islamic Rating Agency (IIRA), (General) Council of Islamic Banks and Financial Institutions (CIBAFI).

²⁴ For a complete list see "Regulatory bodies" chapter 13 of Global Islamic Finance Report 2011.

²⁵ English Common Law and the French Civil Law have been accepted as the most common legal systems in the world including most Middle Eastern States where Shari'a regulates limited aspects of the law. Islamic financial contracts are treated no different than any other commercial contracts which are not regulated by Shari'a in most Middle Eastern jurisdiction.

²⁶ For example Basel III which is a global regulatory standard on bank provide a comprehensive and relevant way to deal with stress events, like the subprime crisis, for conventional banks. But, unfortunately this reform has not taken into account the specificities of Islamic Banking. Aniss Boumediene, May 25 "Basel III: Relevance for Islamic Banks" Université Paris I Panthéon-Sorbonne - Institut d'Administration des Entreprises de Paris (IAE Paris) May 25, 2011.

arise.²⁷ Therefore, conventional remedies continue to be used for this non-conventional industry.

A. The Malaysian Experience

As the Industry was developing, many disputes with regard to Islamic Finance compliance to principles of Shari'a were heard in local jurisdictions. Particularly since many of these cases in Malaysia were litigated and published, Malaysia, was one of the first Muslim States to commit to Islamic banking, provides an interesting case study²⁸ of how these disputes in Muslim jurisdictions developed.²⁹

In the early phases³⁰ of Islamic banking, dispute cases were handled in a conventional manner. Malaysian courts generally decided in favor of the banks as they were more concerned with the application of the classic Common Law approach by emphasizing the civil and technical aspects and did not tackle the issue of Shari'a compliance. However, as the Industry diversified its products, questions were raised that questioned their compliance to Shari'a Law and courts were

²⁷ For example, a loan restructuring plan requires approval by the Shari'a board of the creditor and the Shari'a board of the obligator.

²⁸ Hasan, Zulkifli and Asutay, Mehmet (2011) 'An analysis of the Courts decisions on Islamic Finance disputes,' ISRA International journal of Islamic finance., 3 (2). pp. 41-71.

²⁹ Malaysia was one of the first Muslim States to commit to Islamic banking and is exceptional among other Muslim jurisdictions where Islamic banking cases have been published in various law reports such as the Malayan Law Journal and the Current Law Journal.

³⁰ Generally characterized as prior to 2002, see note 24, the cases referred to are as follows:

- 1) Tinta Press Sdn Berhad v BIMB (1987) 1 MLJ 474; 1 CLJ 474
- 2) Bank Islam Malaysia Berhad v Adnan Omar [1994] 3 CLJ 735; [1994] 3 AMR 44; [1994] 4 BLJ 372
- 3) Dato' Nik Mahmud Bin Daud v Bank Islam Malaysia Berhad [1996] 4 MLJ 295
- 4) Bank Islam Malaysia Bhd v. Shamsuddin Bin Haji Ahmad [1999] 1 LNS 275; [1999] MLJ 450
- 5) Bank Kerjasama Rakyat Malaysia Bhd v. Nesaretnam Samyveloo [2002] 8 CLJ 95; [2002] 7 MLJ 103.

dragged into further examination of the practices of Islamic banking to rule on whether they were compliant or contrary to principles of Shari'a.³¹ A particular case of interest is the case of *Arab-Malaysia v Taman Ihsan Jaya Sdn. Bhd. & Onor* [2008] 5 MLJ 631. Where the Appeals Court in 2009 revoked the decision made by the High Court that the contract of Bay Bithaman Ajil³² (deferred payment sale) was null and void on religious compliance bases. The Appeals Court held that matters of Shari'a principles are not to be decided by civil court judges, but by Shari'a judges who are more expert in Islamic law.³³ This land mark decision contributed to the passing of Central Bank of Malaysia Act No. 701 in 2009 which established a central bank Shari'a Advisory Council and provided that courts and arbitration tribunals shall refer to this council before giving any judgment concerning Shari'a matters.³⁴

³¹ See *supra* note 24, some of the cases referred to are as follows:

- 1) Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Berhad [2004] 6 CLJ 25; [2004] 6 MLJ 1
- 2) Arab Malaysian Merchant Bank Berhad v. Silver Concept Sdn Bhd [2005] 5 MLJ 210
- 3) Affin Bank Berhad v. Zulkifli Abdullah [2006] 3 MLJ 67
- 4) Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd [2008] 1 CLJ 784; [2007] MLJ 722
- 5) Arab Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631; [2009] 1 CLJ 419
- 6) Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22; [2009] 6 MLJ 839
- 7) Tan Sri Khalid Ibrahim v. Bank Islam Malaysia Berhad [2009] 6 MLJ 416
- 8) Bank Islam Malaysia Bhd v. Azhar Osman & Other Cases [2010] 5 CLJ 54 [2010] 1 LNS 251.

³² This concept refers to the sale of goods on a deferred payment basis at a price, which includes a profit margin agreed to by both parties. Like Bai' al 'inah, this concept is also used under an Islamic financing facility. Interest payment can be avoided as the customer is paying the sale price which is not the same as interest charged on a loan. The problem here is that this includes linking two transactions in one which is forbidden in Islam. The common perception is that this is simply straightforward charging of interest disguised as a sale.

³³ For further reading on this case and its ramification see "SHARI'AH AND LEGAL ISSUES IN AL-BAY' BITHAMAN AJIL FACILITY IN THE CASE OF ARAB-MALAYSIAN FINANCE BHD V TAMAN IHSAN JAYA SDN BHD & ORS [2008] 5 MLJ " by Zulkifli Hasan. <http://www.kantakji.com/fiqh/Files/Fatawa/ww6.pdf>.

³⁴ Section 56 of Central Bank 2009 Act give an important jurisdiction to Shari'a Advisory Council to refer to Shari'a Advisory Council for ruling from court or arbitrator:(1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a

B. International Dispute Litigations of Islamic Finance

In the Middle East, for a long time, the practice by most parties of Islamic Finance contracts has been to resort to English or New York law to govern their contracts.³⁵

In fact, this seems to continue to be the business strategy adopted by many Islamic Finance institution regarding cross-State transactions. This is mainly in line with how conventional finance have handled their disputes,³⁶ the fact notwithstanding that both systems provide a good measure of predictability and their respective jurisdictions are well respected for effective enforcement. Parties of Islamic Finance contracts have also preferred litigation to resolve their disputes over other alternative methods such as Arbitration. This could be due to lingering skepticism toward arbitration of Shari'a related matters as a result of the old oil concession arbitration cases described in Chapter II, or parties might believe that litigation will provide them with more certainty than ADR methods.³⁷

In an effort to subject the agreements to principles of Shari'a, Islamic Finance parties have resorted to inserting, within the contract, a reference to Islamic Law in

Shari'a matter, the court or the arbitrator, as the case may be, shall-(a) Take into consideration any published rulings of the SAC; or (b) Refer such question to the SAC for its ruling.

³⁵ The Global Islamic Finance Report 2011: p. 238.

³⁶ The International Swaps and Derivatives Association (ISDA) Master Agreement of 1992 and 2002 for for (Multicurrency – Cross Border) transactions allow the parties the option to elect either English law or New York. <http://www.isda.org/publications/isdamasteragrmnt.aspx>.

³⁷ At the Asia Pacific Regional Arbitration Group Conference 2011, Hakimah Yaakob, of the International Shari'a Research Academy for Islamic Finance in Kuala Lumpur, stated that, following a survey that she conducted of 10 Islamic banks and 12 takaful operators (Islamic insurance providers) in Malaysia, she found that there was a 'credit policy' in many of these institutions not to include alternative dispute resolution clauses in their contracts, but to opt for litigation instead. This was said by the financial institutions to have been done, in many cases, in order to avoid credit risks for legal uncertainty. The preference for litigation was further confirmed by enquiries made of arbitration centers in Malaysia for the purpose of this report. See "Dispute Resolution in Islamic Finance" the Global Islamic Finance Report 2012.

their choice of law agreement. For example, in the celebrated case of *Shamil Bank of Bahrain v. Beximco Pharmaceuticals (Shamil case)*³⁸ the Islamic murabahah³⁹ agreements contained the following governing law clause:

Subject to the principles of the Glorious Shari'a, this Agreement shall be governed by and construed in accordance with the laws of England.

For reasons discussed in the next section, this practice was proven fruitless. In this case, both the High Court and the Court of Appeals dismissed the defendant's arguments that the agreements were invalid and unenforceable due to Shari'a non-compliance. While the courts agreed with the defendant on the Shari'a non-compliance of the agreement, the court held that the principles of Shari'a could not be applied to the agreements. The approach followed in this case established the English courts precedent on Islamic Finance governing law, and it was upheld in subsequent cases, including most recently the decision of the London High Court in *Dar v. Blom*⁴⁰ which was rendered in 2009 and concerned a different type of Islamic

³⁸ *Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Others* [2004] 1 Lloyd's Rep 1 28. In this case the defendant Beximco Pharmaceuticals Ltd and the other borrowers entered into a *murabahah* agreement with the plaintiff in 1995. After the defendants defaulted and after a series of various termination events under the agreements, the plaintiff finally brought the case to court and made an application for summary judgment.

³⁹ This is an Islamic Finance concept that refers to the sale of goods at a price, which includes a profit margin agreed to by both parties. The purchase and selling price, other costs, and the profit margin must be clearly stated at the time of the sale agreement. The bank is compensated for the time value of its money in the form of the profit margin. This is a fixed-income loan for the purchase of a real asset (such as real estate or a vehicle), with a fixed rate of profit determined by the profit margin. The bank is not compensated for the time value of money outside of the contracted term (i.e., the bank cannot charge additional profit on late payments); however, the asset remains as a mortgage with the bank until the default is settled.

⁴⁰ The text of the High Court decision in *The Investment Dar Co KSSC v Bloom Developments Bank Sal* [2009] All ER (D) 145, can be downloaded from, <http://www.allenoverly.com/AOWeb/binaries/55080.PDF>.

Finance agreement. As a result of these rulings and others in cases that have been heard in Western courts, most banks in the Industry removed the Shari'a reference from their agreement clause and may now include a "waiver of Shari'a defense," meaning that in case of a dispute the parties agree to waive any argument that the agreement is invalid under Shari'a Law.⁴¹

C. Reference to Shari'a in the Governing Law Clause for Islamic Finance

From a domestic perspective, some Muslim jurisdictions have been able to create Shari'a compliance infrastructure to provide for Islamic Finance dispute resolution with Shari'a Law controlling certain aspects of the governing law of the agreement. Indonesia, for example, created a specialized tribunal known as "Basyarnas"⁴² or the the National Shari'a Arbitration Body which is qualified to hear Islamic Finance disputes within its jurisdiction. Malaysia, as noted earlier, created a special body, the central bank Shari'a Advisory Council,⁴³ to assist courts and arbitration tribunals in Malaysia concerning Shari'a matters.

According to the settled law, the transaction is governed by what is agreed in the contract, supplemented by the State law applicable to the transaction. The compliance with Islamic legal principles—the Shari'a promise—is not enforceable in court and any defense that a transaction is not compliant with Islamic legal principles will not be heard. However, the mere fact that a debtor defends in an English court by referring to Shari'a principles seriously troubled the industry. Talk of Shari'a risk spread—as did discussion of how to deal with it. See article "Islamic Finance Litigation," by Kilian Bälz.

⁴¹ See article "Islamic Finance Litigation," by Kilian Bälz, <http://www.qfinance.com/contentFiles/QF02/gpflqc6p/1b/0/islamic-finance-litigation.pdf>.

⁴² The Basyarnas was created to use "Islamic law . . . as the basic principle" in settling disputes arising from financial disagreements that also invoked the civic laws. Eventually, the competence of religious courts was increased to hear "any act or business activity which is undertaken in accordance with Islamic principles which include all Islamic Finance institutions. See ABDUL RASYID, SETTLEMENT OF ISLAMIC BANKING DISPUTES IN INDONESIA: OPPORTUNITIES AND CHALLENGES 1–2 (2008). <http://www.apmec.unisa.edu.au/apmf/2008/papers/25-abdul%20Rasyid.pdf>.

⁴³ Malaysia Central Bank Act No. 701 in 2009.

From an international prospective, however, the question that continues to surface in every dispute with a Shari'a element is the following: can Shari'a or Islamic Law be applied to govern a contract? Past experience from western arbitration and court tribunals have ruled that Shari'a is incapable of being the governing law. This was the case in the early oil concession arbitrations where use of Shari'a Law was refused mainly because it is not codified and is subject to varying interpretations.⁴⁴ As far as Islamic Finance is concerned, the *Shamil* case as noted in the previous section sets the precedent on for Western attitude toward inclusion of Shari'a Law in the governing law clause of a contract. The decision document⁴⁵ provided the following reasoning for dismissing Shari'a as the governing law:

- 1) The words "subject to the principles of Glorious Shari'a" in the governing law clause were no more than a reference to the fact that "the Bank purported to conduct all its affairs according to the principles of Shari'a. It was not meant to trump the application of English law as the governing law."⁴⁶
- 2) The judge concluded "It is improbable in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This is especially so when the bank has its own religious Board

⁴⁴ Within Shari'a, some laws are immutable while others are interpreted according to the particularities of the situation, including the relative good that a specific decision may bring to the community.⁵⁴ This grey area is the province of *Ijtihad*, which is the use of legal reasoning to arrive at a correct opinion when there is no clear text on the issue. I. A. Al-Marzouqi, HUMAN RIGHTS IN ISLAMIC LAW, (2d ed. 2001) p 44.

⁴⁵ A copy of the decision document can be downloaded from, [http://www.ipsufactoj.com/international/2004/Part12/int2004\(12\)-009.htm](http://www.ipsufactoj.com/international/2004/Part12/int2004(12)-009.htm).

⁴⁶ *Supra* note 37, para. 41.

to monitor the compliance of the bank with the Board's own perception of Islamic principles of law in an international banking context."⁴⁷

- 3) There cannot be two governing laws in respect of the contract as provided by the Rome Convention⁴⁸ [where it] is made clear that a contract shall be governed by a national law of a State chosen by the parties not by "a non-national system" of law such as Shari'a. . . . the court was perfectly open to the parties to a contract to incorporate some provisions of a foreign law into an English contract, but only where the parties had sufficiently identified specific provisions of a foreign law or an international code or set of rules. "The general reference to principles of Shari'a in the governing law clause did not identify those aspects of Shari'a which were intended to be incorporated into the contract. . . . Those basic rules were neither identified nor referred to in the contract."⁴⁹ Had there been clear and specific Shari'a provisions incorporated in this case, the borrowers might have succeeded in their application.
- 4) The court concluded that the relevant Shari'a principles are "controversial." ". . . it was the evidence of both parties' experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts

⁴⁷ *Supra* note 37, para. 41-54.

⁴⁸ The 1980 Rome Convention on the law applicable to contractual obligations, Art.1.1, Art.3.1. [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126(02):EN:NOT).

⁴⁹ *Supra* note 37, para. 52.

which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute.”⁵⁰

- 5) The Court also noted that there was no suggestion that the Borrowers had been in any way concerned about the principles of Shari’a either at the time the agreements were made or at any time before the proceedings were started. In the Court's opinion, the Shari’a defense was "a lawyer's construct."⁵¹ Therefore the Court leaned against a construction which would defeat the commercial purpose of the documents.

As a result of the foregoing reasoning, the Supreme Court confirmed the judgment of Morrison J. of the High Court and explicitly denied that Shari’a Law could be applied to settle an Islamic Finance transaction, even if so specified in the contract. The Court also emphasized that Shari’a Law is not a recognizable form of law that contains principles of law capable of governing a commercial dispute in the UK.

The *Shamil* case highlighted many of the problems that face the Industry with regard to using Shari’a as a governing law. These issues, which are also recognized by most Islamic Finance advocates, are summarized as follows:

- 1) Shari’a is not the law of a nation;⁵²

⁵⁰ *Supra* note 37, para. 55.

⁵¹ *Supra* note 37, para. 41—55.

⁵² Taking effect from 17th December 2009, the Rome Convention has been replaced by the EU Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations („Rome I“). In its

- 2) Shari'a Law is not codified in a universally accepted body of law;
- 3) Islamic jurisdiction is not bound by precedence and legal opinions may deviate from previous decisions made by other Shari'a scholars;
- 4) Existence of different school of thoughts leads to different interpretations of various Shari'a compliance-related matters;
- 5) There is lack of standard detailed Islamic Finance legal procedures and provisions particular to dispute resolution and the governing clause of the agreement;
- 6) The Shari'a defense is a risk where the credibility of Shari'a Advisory Boards (SAB) is always questioned when things go wrong.⁵³

This lack of Shari'a Law governance over cross-border disputes is considered the Achilles heel in the global acceptance and growth of Islamic finance. To some industry advocates, it is just inconceivable and unsustainable for the industry to have parties who seek to enter into a contract based on Shari'a principles and be

recitals (13), the Regulation seems to open the door to non-State law: „This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law....” However, considering the history of the legislative process, this is meant to involve incorporation into a contract governed by State law rather than to allow the choice of non-State law as the governing law of contract in general.¹⁰

The Commission had initially proposed to allow the choice of non-State law such as UNIDROIT or Shari'a (but excluding, e.g., the *lex mercatoria*, which, according to the Commission, „is not precise enough“), but failed to gather sufficient support. Art. 3 of the Regulation allow partial choice of law. However, according to prevailing legal view, dual choice of law can only be applied to specific and clearly defined parts of a contract, due to certainty requirements. “*Analysis: Shari'a Clauses in Financial Contracts*,” Dr. Jur. Klaus Peter Follak, January 15, 2010 © Thomson Reuters 2010.

⁵³ Shari'a risk meant that the opinion or fatwa of a Shari'a scholar or a Shari's board could be challenged successfully by another scholar or board so that the claim of Shari'a-compliance cannot be upheld. This was also evident in the case of Blom Development Bank vs. The Investment Dar (TID). TID argued at court that a wakala (Agency) agreement was not in compliance with Shari'a and therefore was void because it went beyond the corporate powers of TID. The company was bound by its constitutional documents to Shari'a-compliant transactions only. What is relevant here is the fact that the Shari'a-compliance of the wakala agreement was quite successfully disputed by the management of TID although it was initially approved by the company's own Shari'a board.

subjected to remedies that may be in contravention to Islamic jurisprudence, including for example, paying or receiving damages that include interest payments. What could make matters worse is that a judgment obtained from a foreign court that contravenes Shari'a principles may not be enforceable in a home jurisdiction, such as Saudi Arabia, where one of the parties may be registered or where enforcement may be sought. Therefore, calls were made for harmonization between Shari'a Law and Common Law in order for the industry to have a coherent and effective dispute resolution mechanism.⁵⁴ The *Shamil* Court mentioned the lack of codification within the Shari'a Law. The following section discusses this subject.

D. Shari'a Codification (Standardization)

The Muslim world does not have a central religious authority that can provide definitive religious rulings. This is largely a result of the varying interpretations of religious principles applied by different Islamic schools of thought in different States across the world. Additionally, religious rulings on secondary issues⁵⁵ are not definitive in nature; for example, even a fatwa by al-Azhar,⁵⁶ the most recognized and respected religious body in the Middle East, is subject to discussion as it is merely considered, at least from a religious point of view, an unbinding religious

⁵⁴ See, "HARMONISATION OF INTERNATIONAL COMMERCIAL ARBITRATION LAW AND SHARI'A," 2009 Mary B. Ayad, Ph.D. candidate Macquarie University.

⁵⁵ These are typically details that the Qur'an and Sunna are silent on.

⁵⁶ It is a religious university in Cairo, Egypt. Founded in 970 or 972 as a madrasa, or center of Islamic learning, its students studied the Qur'an and Islamic law in detail, along with logic, grammar and rhetoric.

opinion.⁵⁷ As a result, Islamic institutions employ their own Shari'a advisory boards for compliance justifications. These boards have great leeway in defining if a product or an agreement is Shari'a compliant or not, which in turn results in different transactions being interpreted differently and causes uncertainty about how to do business in the Islamic Finance system; this makes accurate risk assessments for both the financial institution and the customer extremely difficult.

Many authors in the industry argue there is an urgent need for standardization within the Islamic Finance industry.⁵⁸ This issue, however, has proven to present a conundrum and remains one of the major difficulties facing the industry; simply put, it is the number one topic in every conference, workshop or research study that attempts to address Islamic finance. Because the core business practice of the industry is based on the compliance to Shari'a principles, standardization of the industry is largely dependent on the establishment of a universally accepted interpretation and codification of Shari'a Law. The Industry has established many internationally recognized bodies that are tasked with developing such common regulatory standards such as the Islamic Financial Services Board (IFSB), the International Islamic Financial Market (IIFM), the International Islamic Rating Agency (IIRA) and the Accounting and Auditing Organization for Islamic

⁵⁷For example, Islamic-oriented Sukuk has drawn controversy between the government that struggles for it and Egypt's religious authority al-Azhar, the world's reference for Sunni Muslims, which deems it against Islamic Shari'a (law). See "Odds raised as Egypt cabinet approves Draft Law on Islamic bonds," Xinhua, 28-2-2013.

⁵⁸Shanmugam, B. and Zahari, Z. R. (2009). *A Primer on Islamic Finance*, (Charlottesville, VA: Research Foundation of CFA Institute), p. 93.

Financial Institutions (AAOIFI).⁵⁹ While these bodies have had relative success in developing quite a few standards and regulations in various aspects of the industry's business, it seems they are having much more difficulty in tackling core issues that pertain to Shari'a Law. As an example, the IFSB⁶⁰ in 2009 issued a report that contains a set of Guiding Principles on the Shari'a governance systems for the industry⁶¹ that the IFSB hopes will ensure compliance with Shari'a rules and principles.

In reviewing the IFSB report, we found that the focus of its guiding principles was more on the selection process of the Shari'a advisory boards, rather than providing guidelines as to how to reach a consistent ruling on the religious compliance of financial transactions under Shari'a Law. One must keep in mind that this inconsistency continues to be one of the major challenges for Islamic finance, and this inconsistency has resulted in lack of homogeneity in a number of Islamic products.

⁵⁹ Bahrain takes pride in hosting several infrastructure institutions such as AAOIFI, LMC, CIBAFI, the International Islamic Financial Market and the International Islamic Rating Agency (IIRA), which inject more robustness into the Islamic Finance market.

⁶⁰ The IFSB is an international standard-setting organization which was officially inaugurated on November 2002 and started operations on 10 March 2003. The organization promotes and enhances the soundness and stability of the Islamic financial services industry by issuing global prudential standards and guiding principles for the industry, broadly defined to include banking, capital markets and insurance sectors. For more information about the IFSB, please visit www.ifsb.org.

⁶¹ The IFSB report "GUIDING PRINCIPLES ON SHARĪ'AH GOVERNANCE SYSTEMS FOR INSTITUTIONS OFFERING ISLAMIC FINANCIAL SERVICES," SBN: 978-983-44579-5-2, <http://www.ifsb.org/standard/IFS-10%20Shari'ah%20Governance.pdf>.

The AAOIFI⁶² has been successful to a certain degree in providing codified Shari'a standards for numerous aspects of the industry's business transactions and practices.⁶³ As of today,⁶⁴ the AAOIFI has published forty-five Shari'a legal standards that could eventually be admitted by courts in Europe as a system of principles capable of governing parts of an Islamic Finance agreement; however, these standards are far from complete—and most importantly, as of now there is no standard for a governing law clause that can safely evade the scrutiny of the various review committees of the AAOIFI. Finally, adoption and implementation⁶⁵ of such standards have been very weak in most Muslim jurisdictions, particularly those in the Middle East⁶⁶ where most States lack separate Islamic Finance legislations, and therefore, Islamic Finance transactions fall under conventional commerce regulations. The following section discusses the arbitration of Islamic finance.

⁶² The AAOIFI is supported by 200 institutional members from 45 States including central banks, Islamic financial institutions, and other participants from the international Islamic banking and finance industry, worldwide. This information was taken from AAOIFI's website: <http://www.aaofii.com/>.

⁶³ For a complete list see the following:
<http://www.aaofii.com/aaofii/Publications/KeyPublications/tabid/88/language/en-US/Default.aspx>.
(Last assessed).

⁶⁴ July 6, 2013.

⁶⁵ The AAOIFI has gained assuring support for the implementation of its standards, which are now adopted in the Kingdom of Bahrain, Dubai International Financial Center, Jordan, Lebanon, Qatar, Sudan and Syria. The relevant authorities in Australia, Indonesia, Malaysia, Pakistan, Kingdom of Saudi Arabia and South Africa have issued guidelines that are based on AAOIFI's standards. Please note that such adoptions alone do not have a binding nature : <<http://www.aaofii.com/>>

⁶⁶ Only Bahrain, Oman and the DIFC jurisdiction of Dubai have specific regulation regarding Islamic finance.

IV. ARBITRATION OF ISLAMIC FINANCE

As the Islamic Finance industry grew to unprecedented levels, major arbitration institutions in different regions, expecting parallel growth in number of disputes coming out of Islamic finance, have been positioning and promoting themselves to cater to the this industry in every forum of the industry. This was of particular interest to the various arbitration centers since Islamic Finance disputes tend to be of high profile and value. Mr. Ahmed Husain, the Bahrain Chamber for Dispute Resolution (BCDR-AAA) CEO, speaking in the Third World Islamic Banking Conference (WIBC) Asia Summit in Singapore, and discussing the industry's growth and the benefits of arbitration for the industry in dispute resolution, offers the following observation:

With this growth comes the demand for alternative solutions to traditional means of settling legal disputes. As such, arbitration and mediation have an increasingly important role to play in the financial and legal sector . . . We have already seen a shift towards using alternative solutions for dispute resolution in the region due to the considerable advantages that these solutions offer . . . The process is simple, flexible and cost effective. Furthermore, parties are able to hand pick an arbitrator or mediator with the credentials and expertise that best suit their needs. This is particularly important when considering the complexities of the Islamic Finance industry.⁶⁷

While many of the well-known institutes in the Middle East region (DAIC, BCDR-AAA, CRCICA, DIFC-LCIA, QICCA) and in the South East Asia region (KRCLA, SIAC, HKIAC) have promoted themselves for Islamic Finance disputes using conventional rules and

⁶⁷ BCDR-AAA press release "Increase in demand for alternative dispute resolution mirrors growth of the \$1 Trillion Islamic Finance Industry," June 10, 2012. <http://www.bcdr-aaa.org/en/news/press-release-increase-in-demand-for-alternative-dispute-resolution-mirrors-growth-of-the-1-trillion-islamic-finance-industry.html>.

procedures, there were other institutions established for the sole purpose of performing arbitration in accordance with the provisions of Islamic Shari'a Law in order that they might cater primarily to Islamic finance. Before we present these institutes' experiences and the different approaches they use to handle Islamic Finance arbitration, it would be beneficial to provide insight on the special advantages that arbitration offers to Islamic Finance and the modern trends in Islamic arbitration rules.

A. The Arbitration Advantage

It is clear that the current practice of using litigation for dispute resolution in the Islamic Finance industry is not effectively serving the purpose for which the industry was established. Litigation under a foreign law of any jurisdiction entails various challenges to Islamic Finance parties, and might include lack of enforcement mechanisms, non-conformance with Shari'a principles and a questionable level of judicial competence with regards to the subject matter.⁶⁸ At the same time, religious constraints will likely continue to impede the Islamic financial development in relation to Shari'a codification, which means the Industry continues to struggle to harmonize the Shari'a Islamic Law and the Civil or Common Law systems that are used by most nations of the world.⁶⁹ Many people understand that Islamic Finance has its own unique features that require someone with the proper knowledge and

⁶⁸ Professor Andrew White, associate professor at the International Islamic Law and Finance Center in Singapore, recently stated at the Asia Pacific Regional Arbitration Group Conference 2011 that litigation is not geared towards solving Islamic Finance disputes as judges often lack the education in many industry principles "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012." <http://www.klgates.com/files/Publication>.

⁶⁹ See List of national legal systems, http://en.wikipedia.org/wiki/List_of_national_legal_systems.

background to adjudicate many of its delicate issues. Therefore, many authors and legal practitioners in the Industry have been recommending the use of alternative dispute resolutions to resolve international disputes emanating from Islamic Finance. Dr. Engku Rabiah Adawiah of the International Islamic University, Malaysia summarizes it best in the following manner:

A sure way out of this judicial imbalance is adoption of ADR which enables the parties to appoint persons with at least basic knowledge and understanding of the guiding laws and principles to settle their disputes. The adoption is not a substitute for having competent judges of Islamic law whose conferment of powers by the appropriate authority to adjudicate on the disputes is long overdue. It is rather a viable alternative for a better administration of justice.⁷⁰

As a result the industry of such sentiments and the need for ADR as perceived by scholars such as Dr. Rabiah and practitioners, there has been active promotion of arbitration as a forum that could prove more conducive to furthering, rather than defeating, the commercial purpose of Islamic finance. Experts suggest that even London, if selected, and which continues to be the favored place for Islamic Finance parties to adjudicate disputes, could offer ideal opportunities to resolve Islamic Finance disputes in accordance with Shari'a Law, if those disputes are submitted to arbitration, rather than litigation.⁷¹ A case on point is the *Sanghi Polyesters Ltd.*

⁷⁰ Engku Rabiah Adawiah, "Constraints and Opportunities in Harmonization of Civil Law and Shari'a in the Islamic Financial Services Industry," [2008] 4 MLJ i at p. iii. Also quoted by Umar A. Oseni "Dispute Resolution in Islamic Finance: A case analysis of Malaysia."

⁷¹ The English Arbitration Act 1996 (which applies to all arbitrations seated in England and Wales) expressly permits the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties or, "if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal" (s46(1)(b)). So in English-seated arbitrations the arbitral tribunal can decide the dispute in accordance with such other considerations as are agreed by the parties, and

*(India) v. The International Investor KCSC (Kuwait) [2001] C.L.C.*⁷² where a dispute arising from an Islamic financing agreement utilized arbitration as the dispute resolution mechanism of choice, and the terms of reference of the arbitration listed London as the place of arbitration. The applicable substantive law provided as follows:

This dispute shall be governed by the Laws of England except to the extent it may conflict with Islamic Shari'a, which shall prevail.

The decision of the arbitrator, who was chosen as an expert in Islamic Law, as expressed in an ICC Arbitration Award obtained in London, gave affect to the parties' will to be governed by English law, except where this would conflict with Shari'a Law, by awarding principal and the profit claims, but disallowing additional damages claims because, although compliant with English law, these would conflict with Shari'a Law. The losing party challenged the award in English court, and the judge recognized that there was no issue regarding the law of England and Wales and that the only issue was whether the contract was "invalidated in the manner claimed . . . under Shari's Law." The judge ruled that there had been no serious irregularity or injustice and that the award would stand. The judge's ruling in this case provides a clear contrast to the *Shamil* case that went to litigation.

There are certainly some advantages in resorting to arbitration over litigation that are peculiar to Islamic finance. Features that have enabled arbitration to become the preferred dispute resolution method over the past thirty years have

this could include Shari'a Law. "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012," <http://www.klgates.com/files/Publication>.

⁷² Sanghi Polyesters Ltd. (India) v. Int'l Investor KCFC (Kuwait), [2000] 1 LLOYD'S REP. 480, 480 (2000).

been its finality, confidentiality, speed, cost and flexibility. Additionally, the move towards arbitration offers the Islamic Finance industry parties these specific added advantages:

- 1) Parties can appoint the arbitrators who are proficient in the field of the subject matter such and the Shari'a Law, unlike litigation, where the dispute is determined by national judges who are experts in neither Shari'a nor finance.
- 2) Parties have considerable freedom to tailor their own arbitration rules and institutes in accordance with their needs and the particulars of their dispute.
- 3) Parties are free to incorporate Shari'a Law into the governing law clause in accordance with their needs and the particulars of their dispute. Therefore, parties of Islamic Finance will have more success in subjecting desired aspects of the dispute to Shari'a principles.
- 4) Awards are final and easier to enforceable in other jurisdictions than judicial judgments. The New York Convention, which is adopted by over 144 States, has established a world-wide harmonized mechanism for such enforcement.
- 5) Arbitration can be conducted in venues close to home while maintaining the seat or governing law of choice abroad. This is of particular interest for Islamic Finance where most parties are in

Muslim States while the seat is London or the governing law is that of England.

These additional features make the arbitration process more appealing as the natural dispute resolution mechanism arising from Islamic Finance transactions because they enable parties to selectively incorporate Shari'a principles into the governing clause if they choose. This selective incorporation further enhances the fulfillment of the intent of the contract, which is Shari'a compliance, and which is a primary objective of the arbitration tribunal. Recall that compliance with Shari'a Law was totally ignored during the course of the *Shamil* litigation.

Ever since the publication of the *Shamil* case in 2002, the subject of arbitration of Islamic Finance disputes has gathered mounting appreciation in the Middle East, as well as in other Muslim States of South East Asia and Africa. Numerous studies and articles have been presented on this subject by Islamic Finance experts and the legal community at large.⁷³ International Law students in academia have also produced many dissertations on the subject of Islamic Arbitration or Arbitrations in Islamic Finance.⁷⁴ This attention has led many experts

⁷³ For example; see "Dispute Resolution in Islamic Finance: A case analysis of Malaysia" by Umar A. Oseni presented in the 8th International Conference on Islamic Economics and Finance of 2011 in Qatar. Also the 3rd Annual *world Islamic Banking Conference* in summer of 2012 in *Singapore* had a full session on "Governance, Legal and Risk Management Priorities for the Global Islamic Finance Industry." Also see "Dispute Resolution in Islamic Finance" By Jonathan Lawrence, Peter Morton and Hussain Khan Gates LLP. Published first in the "Global Islamic Finance Report 2012," <http://www.klgates.com/files/Publication>.

⁷⁴ For example: "Saudi Law and Judicial Practice in Commercial and Banking Arbitration," 2008, By A. Y. Baamir School of Law, Brunel University. "COMMERCIAL ARBITRATION IN ISLAMIC JURISPRUDENCE: A study of its role in the Saudi Arabia Context," By M.A. Al Jabra. Thesis submitted for the Degree of Doctor of Philosophy in Law of the University of Wales, Aberystwyth. 2001. "Distinction between the Concepts Mediation, Conciliation, *Sulh* and Arbitration in Shari'a Law, Essam A. Alsheikh, *Portsmouth University, Portsmouth, United Kingdom*. "HARMONISATION OF INTERNATIONAL COMMERCIAL ARBITRATION LAW AND SHARI'A," 2009 Mary B. Ayad, Ph. D candidate Macquarie University. "Choice

in the Industry to consider arbitration a perfect fit for the Industry's problem of incorporating Shari'a Law into other non-Shari'a legal systems, whether they are the Civil Law, Common Law or the hybrid systems that are most common in the Arab and Muslim world. Arbitration after all is a deeply rooted in the Arab and Muslim traditions and has long been implemented in practice since the pre-Islamic period. In that respect, arbitration has been viewed as a gateway for the application of legal pluralism⁷⁵ where a State's legal system accepts and tolerates the application of Shari'a Law or a certain school of thought of Shari'a Law to dispute resolution.⁷⁶

B. Modern Trend in Islamic Arbitration

In reviewing many of the articles and research papers written on this subject it is clear that, at least from a doctrinal prospective, there is no consensus on specific Islamic rules regarding arbitration within the context of resolving modern international commercial disputes. Faisal Kutty in his research paper, "The Shari'a Factor in International Commercial Arbitration,"⁷⁷ published in 2006, provides an

of Law and Islamic Finance," by Julio C. Colon, J.D. candidate at The University of Texas School of Law (2011).

⁷⁵ Legal pluralism is the existence of multiple legal systems within one geographic area. Plural legal systems are particularly prevalent in former colonies, where the law of a former colonial authority may exist alongside more traditional legal systems, http://en.wikipedia.org/wiki/Legal_pluralism.

⁷⁶ The Global Islamic Finance Report 2011: p 237. Chapter 30.4 "Legal pluralism in the Shari's" also reflects on historical example in Islamic heritage where various Shari'a schools of thought coexisted and individuals had the opportunity to go to a judge who offered an opinion which would be aligned to their affiliation. This did not contravene the broad desire by the State and the judiciary as the chief judge retained overall responsibility for the proper functioning of the system as a whole that the schools of thought should retain uniformity in jurisprudence.

⁷⁷ Kutty, Faisal, "The Shari'a Factor in International Commercial Arbitration," 2006, Loyola of Los Angeles International and Comparative Law Review, Vol. 28:565, at 623. <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1609&context=ilr>.

excellent overview of the various classic and modern opinion of the Shari'a Law regarding many modern arbitration aspects such as choice of law, public policy, and capacity of the arbitrator. Mr. Kutty suggests the following:

There is a need to reform Islamic law from within to deal with contemporary norms, transactions and institutions, but there is an equal need to better accommodate and address the issues of concern from an Islamic perspective.

Despite the diverse views of the different Shari'a schools of thought, which continue to persist in the Islamic world, the current trend in Islamic jurisdictions and Islamic arbitration institutes is to harmonize with international standards, particularly, with the UNCITRAL rules and Model Law, both of which, provide great flexibility with regard to party autonomy. New draft arbitration legislation and rules limit the role of Shari'a Law only to ensure there is no clear violation of Islamic principles, both in the arbitration process, and the applicable law of the arbitration which could be any State law as agreed upon by the contracting parties.

The current trend in Muslim jurisdiction is to view Shari'a principles or Islamic law as a law of substance rather than a law of procedure because the main sources of Shari'a, the Qur'an and Sunna are silent on many of the issues that are debated in the halls of academia regarding the arbitration process, such the place of arbitration, the procedure, the time limit, the applicable rules, remuneration and appointment of arbitrators. Both the Qur'an and the Sunna have left these aspects within the discretionary power of the parties to decide. It is important to note that much of the past academic research work was done by adopting the Saudi Arbitration Law of 1983 as a model for Islamic arbitration.

The old Saudi Arbitration Law of 1983 practically required the arbitrator to be a male Muslim with knowledge of Shari'a Law⁷⁸ as well as the use of Arabic as the language of arbitration. However the Saudi Arbitration Law of 2012,⁷⁹ as described in Chapter II, is based on the UNCITRAL model and was much harmonized with international norms in line with the modern trend of many Muslim jurisdictions. The 2012 law is silent as to gender, nationality, religion of the arbitrator and only require the arbitrators to be adults, of good conduct, and hold a degree in law or Shari'a science. Actually the new Saudi law allows parties the freedom to choose both the procedural and substantive law to be applied by the tribunal, provided they do not conflict with Shari'a Law.⁸⁰ The new law only retains the public policy requirement that the award must not contravene Shari'a Law,⁸¹ which from now on should come to play in issues arising from the substance of the dispute and the applicable law that is used to resolve the dispute. This approach towards arbitration

⁷⁸ Saudi Arabia Arbitration Regulation of 1983 (Royal Decree No. M/46). Article 3 of the Regulations of the Old Arbitration Law required that arbitrators had to be either Saudi citizens or non-Saudi Muslims with a professional designation. They had to be experienced, of good conduct and reputation, and be of full legal capacity. The Implementing Regulations then required arbitrators to have the same qualifications as Saudi judges which, in practice, meant that arbitrators had to be male and Muslim. For more background on the subject see "5.5. Position of Women as Arbitrator, Witness or Party in Conciliation in the Shari'a" E.A. Alsheikh / Arab Law Quarterly 25 (2011) 367-400 p. 386.

⁷⁹ The new Saudi Arabia Arbitration Regulation (Royal Decree No. M/34) published in June 8, 2012.

⁸⁰ The new Saudi Arbitration Regulation expressly allows the parties to choose the applicable law (Article 38), procedural law (Article 25 and Article 4), venue (Article 28), their arbitrators (Article 15), the procedure for challenging arbitrators (Article 17), the commencement of arbitration (Article 26), and whether the tribunal will be able to issue temporary or precautionary measures (Article 23). In fact, Article 25 of permits parties to use either international arbitration institutions or their procedural rules or *ad hoc* international arbitration rules, as long as those procedures do not violate Shari'a.

⁸¹ The new Saudi Arabia Arbitration Regulation Article 55-b.

is becoming common in most Muslim jurisdictions where the mention of Shari'a is limited to the public policy articles to ensure non-contravention.⁸²

C. Arbitration Rules for Islamic Finance

Arbitration of Islamic Finance poses a unique situation where the parties of such contracts or agreements are freely willing to conduct their business in a manner that is in compliance with Shari'a Law and naturally they would like to see their disputes handled in harmony with their intentions; therefore, it is only reasonable that such disputes are adjudicated in accordance to Shari'a Law. For that reason specialized Islamic rules or institutes were established for the sole purpose of performing arbitration in accordance with the provisions of Islamic Shari'a Law. From a procedural prospective there have been different approaches that have been used to infuse Shari'a Law into the applicable law of the dispute arbitration; these are the next topic of discussion.

1. International Islamic Mediation & Arbitration Center (IMAC)

This center was established in Hong Kong as an independent international institution pursuant to a resolution by the Arab Chamber of Commerce & Industry in July 2008. The center does not provide a set of its own rules on its website;⁸³ however, the site provides that arbitration proceedings administered by IMAC are governed by the arbitration rules, which essentially follow the UNCITRAL rules of arbitration. Certain aspects of these rules, however, have been modified in order to take into consideration the institutional character of arbitrations that will be conducted under

⁸² See the new UAE Draft Law and unifies GCC Draft Law in Chapter II.

⁸³ See, http://www.arabcci.org/IMAC_aboutus.htm.

the Shari'a Rules of Arbitration of IMAC. The arbitrators need not be of a specific sex or nationality or religion unless otherwise provided by agreement between the parties or by provision of law. Finally the center's website provides a list of arbitrators who seem to be experienced in multi functions, including knowledge of finance and Shari'a Law. It is not clear how the center provides for Shari'a compliance in its proceedings. We could not find much material on this center's activity and it seems to be dormant except for organizing basic training courses and seminars in Islamic arbitration and finance.⁸⁴

2. Kuala Lumpur Regional Center of Arbitration "KLRCa:" Islamic Arbitration Rules (KLRCa i-Arbitration Rules)⁸⁵

This well established center recently launched and adopted this set of arbitration rules for Islamic arbitration at the 2012 Global Islamic Finance Forum in September, 2012. The rules are based on the 2010 version of the UNCITRAL arbitration rules and are considered an expansion of the previous KLRCa Islamic Banking and Financial Arbitration Rules of 2007 that were used for domestic purposes. The rules have many modern features of party autonomy where the parties have control over the arbitration process and are free to choose their own arbitrators and applicable law.

The KLRCa provides this model clause to use i-Arbitration Rules:

⁸⁴ See, International Islamic Mediation & Arbitration Center (IMAC) organizes basic training courses in Hong Kong announces its president Lord Edwin E. Hitti, <http://pr.syndacast.com/gb/press-releases/2826-release.html>.

⁸⁵ Rule N. 8 of the KLRCa i-Arbitration rules: "PROCEDURE FOR REFERENCE TO SHARI'AH ADVISORY COUNCIL OR SHARI'AH EXPERT" reads, subject to paragraph 2 below, whenever the arbitral tribunal has to a) Form an opinion on a point related to Shari'a principles; and b) decide on a dispute arising from the Shari'a aspect of any agreement which is based on Shari'a principles; The arbitral tribunal shall refer to the matter to the relevant Council for its decision.

Any dispute, controversy or claim arising out of a commercial agreement which is based on Shari'ah principles or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules.⁸⁶

The rules provide modifications to the conventional international arbitration rules of the center that permit the outsourcing of Shari'a related issues to a specialized Shari'a expert or advisory council as specified and agreed on by the parties. The Shari'a expert or advisory council is selected from the Malaysian national Shari'a advisory council which was established by the Central Bank Act of 2009 and currently consists of eleven prominent Shari'a scholars, jurists and market practitioners. Rule 8.2 of the i-Arbitration rules provides the following:

Whenever the arbitration relates to a dispute on a Shari'ah aspect of a commercial agreement which is based on Shari'ah principles that is beyond the purview of the relevant Council⁸⁷ and the arbitrator has to form an opinion on a point related to the Shari'ah principles and decide on a dispute arising from the Shari'ah aspect, the arbitrator shall refer the matter to a Shari'ah expert or council to be agreed between the parties, setting out relevant information as the Shari'ah expert may require to form its opinion including the question or issue so Kuala Lumpur Regional Center for Arbitration referred, the relevant facts, issues and the question to be answered by the Shari'ah expert.

At the request of any party, the Shari'a expert, after delivery of the report, may be heard at a hearing where the parties are allowed to be present and question the

⁸⁶ KLRCA website, <http://www.klrca.org.my/scripts/view-anchor.asp?cat=30#291>.

⁸⁷ 'Council': means the Shari'a Advisory Council so established by the Central Bank under Central Bank Act 2009 or the Shari'a Advisory Council established by the securities Commission under the securities Commission Act 1993. The KLRCA i-Arbitration rules p. 15. Current members have vast experience in banking, finance, economics, law and application of Shari'a, particularly in the areas of Islamic economics and finance.

expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue.⁸⁸ While the i-Arbitration rules were established primarily for Islamic Finance disputes, the KLRCA advocates their use for any dispute which arises out of an agreement that is premised on the principles of Shari'a. The publication of these i-Arbitration rules is intended to provide Malaysia an opportunity to become a hub for Islamic Finance dispute resolution. KLRCA director, Datuk Sundra Rajoo, stated in an article in the *Global Arbitration Review*⁸⁹ the following:

With the advent of globalization and increasing cross-border transactions, the center decided to come up with a set of rules that provide for international Commercial Arbitration that is suitable for commercial transactions premised on Islamic principles, and that would be recognized and enforceable internationally, . . . Many Asian arbitration centers have their niche—for example, Hong Kong is an obvious venue for China-related disputes, and as a plural society with a majority of Muslim citizens and a regional hub for Islamic finance, Malaysia could be an appealing neutral arbitration forum for parties who have issues with Shari'a contracts

While the KLRCA has had limited success applying these rules to domestic arbitrations since 2007, it remains to be seen how this approach will be received at the international level. The next arbitration center for discussion is the IICRA.

3. The International Islamic Center for Reconciliation and Arbitration (IICRA)

This center (IICRA) was established as part of an agreement between the UAE and the General Council of Islamic Banks and Financial Institutions as a representative of

⁸⁸ Article 29 of the i-Arbitration rules.

⁸⁹ See "KLRCA to unveil Islamic arbitration rules" by Clemmie Spalton , September 17, 2012. <http://www.globalarbitrationreview.com/news/article/30822/>.

the Islamic Finance industry in 2004. It became operational in January of 2007.⁹⁰ The IICRA makes arrangements to settle any kinds of financial or commercial disputes between financial or commercial institutions that have chosen to comply with the Shari'a to settle their disputes.⁹¹ It maintains a list of arbitrators, who are required to have knowledge and experience in trade, industry, finance, as well as the relevant principles of Shari'a Law.⁹² The IICRA provides this model arbitration clause for Islamic arbitration:

If any dispute arising between the parties out of the formation, performance, interpretation, nullification, termination or invalidation of this agreement (contract) or arising therefore or related thereto, the dispute shall be referred to an arbitration panel constituted from uneven of arbitrators for a final and binding decision in accordance with the rules and procedures specified in the statute of the International Islamic Center for Reconciliation and Arbitration in Dubai.⁹³

The IICRA has issued the *Arbitration and Reconciliation Procedures*⁹⁴ that are mostly derived from the UNCITRAL arbitration rules and has many of its modern features of party autonomy where the parties can select their own arbitrators and have control over the arbitration process. Parties are free to choose their own procedural law⁹⁵

⁹⁰ IICRA website, http://www.iicra.com/en/misc_pages/detail/4c855d3580.

⁹¹ Article 2 of the IICRA Chart.

⁹² Article 10 of the IICRA Chart.

⁹³ IICRA website, http://www.iicra.com/en/misc_pages/detail/4beeffac0c.

⁹⁴ http://www.iicra.com/en/misc_pages/detail/47025a8fda.

⁹⁵ Article 12 of the IICRA Chart.

and substantive law, provided such law is not incompatible with Shari'a Law. In this regard, the IICRA procedures provide the following:

The arbitrators must abide by the laws chosen by the parties in the dispute. . . . In all cases, the Panel shall exclude any provisions that contradict in the law that should be applied if such provisions are not in conformity with the rules of Islamic Shari'a. The Arbitration Panel may invoke for the disputed issue whatever it deems appropriate from among the viewpoints of various schools of Islamic thought, rulings of Islamic Fiqh academies, and opinions of Shari'a supervisory boards at Islamic financial institutions.⁹⁶

The arbitration panel may also refer the draft ruling to the Shari'a board of the IICRA for review and may introduce amendments in form on the ruling. It may also draw the attention of the arbitration panel to substantive issues related to Islamic Shari'a.⁹⁷

While this center is one of the supporting infrastructure organizations for the Islamic Finance industry in the world, and claims to be the only accredited body for obtaining Shari'a compliant provisions by the Islamic Finance industry, the IICRA does not have any published records for their case load. The only reference we could find on the use of this center and its rules was in its semi-annual publication of January 2012 where it referred to an obvious increase in the number of Islamic Finance cases submitted to the center.⁹⁸ Not knowing the center's caseload size and the parties involved in the disputes, it is difficult to assess the effectiveness of these rules; in fact, we could trace not a single case to this center from external resources.

⁹⁶ Article 28 of the IICRA Arbitration and Reconciliation Procedures.

⁹⁷ Article 37 of the IICRA Arbitration and Reconciliation Procedures.

⁹⁸ "TAHKEEM" an IICRA semi-annual publication of January 2012, issue No. 7

This could mean that most cases handled by this center are either local or insignificant.

3. Conventional Arbitration Rules

At the domestic level, arbitration is becoming standard practice, many local Islamic Finance contracts include standard arbitration clauses in their contracts,⁹⁹ and most disputes are resolved in the local chambers of commerce. Internationally, all established ADR institutes around the world settle financial disputes, regardless of whether they are conventional or Islamic; these institutes use their own rules and procedures that are typically modern and closely modeled after the UNCITRAL, which provides parties with a great deal of freedom in choosing their arbitrators and customizing the governing clause in the way they believe is most suitable for their dispute. Nonetheless, the well-known institutes in the Middle East region (DAIC, BCDR-AAA, CRCICA, DIFC-LCIA, QICCA) and KRCLA in the South East Asia region are considered better suited for the industry because they are located within the geographic jurisdictions of the industry, because they are more familiar with local laws, which helps for better enforcement, and because they are better staffed with legal scholars that are well experienced in the fields of Shari'a and Islamic finance.

It is believed that these characteristics provide these centers with leverage to arbitrate Islamic Finance disputes and should provide better functionality for Shari'a

⁹⁹ This model is from a contract by Al Baraka Bank of Sudan. *"In the case of a dispute over the interpretation of different clauses in the contract, the matter is referred to a three-member arbitration committee. Each party to the contract nominates one committee representative and both parties have to agree on a third arbitrator who becomes the chairman of the committee. The arbitration committee resolves the dispute in accordance with the injunctions of Islamic Shari'a."*

principles in the governing law clause.¹⁰⁰ Many Islamic Finance agreements concluded within the Middle East region continuing to provide for Shari'a adherence in the governing clause; however these principles have recently been better specified by associating them to particular standards, or Islamic affiliation; for example, an agreement between National Bonds Corporation PJSC and Taaleem PJSC and Deyaar Development PJSC¹⁰¹ contained this governing clause:

This Agreement is governed by the laws of Dubai, UAE to the extent these laws are not inconsistent with the principles of Shari'a (as set out in the Shari'a Standards published by Accounting and Auditing Organization of Islamic Financial Institutions and/or Islamic Fiqh Academy of Organization of Islamic Conference), in which case the principles of Shari'a will prevail.

This practice definitely facilitates the arbitrators and judges task in determining the relevant rules of Shari'a and provides better certainty on issues related to application of Shari'a. The AAOIFI, which continues to promulgate standards in Shari'a rulings to guide the growing industry, has published a *Shari'a standard ruling on arbitration* in July, 2010 that helped to reassert the binding character of arbitration and the use of international conventional arbitration centers with non-Muslim arbitrators¹⁰² for Islamic arbitrations. However, lack of international or even

¹⁰⁰ These jurisdictions are more likely to stipulate "the arbitration is governed under a national law subject to the principles of the Shari'a" as a statement of intent and binding choice of law.

¹⁰¹ See DIFC judgment, *CA 001/2011 National Bonds Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC*, Date of Issue: 22 January 2011, http://difccourts.complinet.com/en/display/display_viewall.html?rbid=2725&element_id=3464.

¹⁰² AAOIFI Shari'a standard No. 32: Arbitration, "Parties can agree to settle a dispute by agreeing on a binding arbitration. The parties may select one or more arbitrators themselves, or they can delegate this to an individual or an institution. For instance, they may agree to delegate the American Arbitration Association to appoint an arbitrator from its panel of arbitrators, who understands and has experience in dealing with the kind of issues that are the subject matter of the controversy. It is preferable to have a Muslim arbitrator. Under necessity, you can appoint a non-Muslim. Whether Muslim or non-Muslim, arbitrators must judge and should not violate the principles and rules of the

regional convention for Islamic finance,¹⁰³ means that these standards could be challenged by reluctant parties and may be rendered non-binding by some courts.

With the current specialized Islamic arbitration centers lacking recognition and track records, resorting to conventional arbitration rules in the region is probably the most often-used approach by Islamic Finance parties for inter-State arbitrations; however, there is a lack of published arbitral opinions and lack of official records¹⁰⁴ regarding the number of Islamic Finance cases handled by these centers as well as other well-known centers in Europe and the US. This is understandable given, that first, the use of arbitration in the industry is a new trend, and second, that the confidential character of the process makes the likelihood of a published opinion in arbitration minimal, unless an award is challenged in court.¹⁰⁵

One thing is certain, however: the major arbitration centers in Qatar, Dubai and Bahrain, and their off shore courts are expanding their arbitration infrastructure and competing to attract Islamic Finance arbitrations. The DIFC, for example, released an updated version of its 'Guide to Islamic Finance in or from the DIFC' in 2009.¹⁰⁶ The QICDRC in July, 2012, announced plans to expand its commercial court jurisdiction by resolving Islamic Finance disputes through dispute resolution

Shari'a." <http://www.aaofifi.com/aaofifi/Publications/KeyPublications/tabid/88/language/en-US/Default.aspx#Shari'a>.

¹⁰³ See ISRA research Paper NO. 29/2011. "INTERNATIONAL CONVENTION FOR ISLAMIC FINANCE: TOWARDS STANDARDISATION," Hakimah Yaacob, Marjan Mohammad & Edib Smolo.

¹⁰⁴ In reviewing these centers records, they do not itemize Islamic Finance cases separately, CRCICA reported one Islamic Finance case in its 2011 report.

¹⁰⁵ On the contrary, agreements call for litigation before national courts, as in the Dar v. Blom and Shamil Bank cases, the likelihood of a published opinion (particularly at the appellate stage) is high.

¹⁰⁶ See, <http://www.difc.ae/news/difc-authority-releases-updated-version-guide-islamic-finance>.

mechanisms.¹⁰⁷ The BCDR-AAA in Bahrain has long been regarded the leader in championing Islamic Finance needs and continually explores and responds to the dispute resolution needs of the business community; for instance, it proposes to build a world-class Islamic dispute resolution center¹⁰⁸ specifically for the industry.

V. A PROSPECTIVE ON ISLAMIC FINANCE

The *Shamil* case and the issue of Shari'a compliance have provided rich material for much scholarly research and expert commentary over the last decade or so. Many ideas and proposals have been debated regarding including Shari'a Law in the governing clause of Islamic Finance contracts; this is particularly so when the contracting parties would like to subject the dispute to its principles. Some scholars have considered ways to accommodate the combined law formula in western systems as proposed by the Paris Europlace Commission on Islamic Finance (PECIF)¹⁰⁹ where the PECIF was tasked with reflecting on means of receiving Islamic Finance in France.

The PECIF's efforts have led to a series of tax reliefs and legislative measures in France aimed at making the Paris financial market more attractive to Islamic capital. Additionally, many Muslim scholars have advocated for Islamic solutions by the establishment of specialized Islamic tribunals and a universal Shari'a board that encompass all Islamic affiliations. There have also been requests to establish an

¹⁰⁷ QICDRC Chief Executive Officer Robert Musgrove said: "We are currently looking at the possibility of resolving Islamic Finance disputes by setting up dispute resolution mechanism." <http://www.thepeninsulaqatar.com/qatar/199730-qatar-international-court-plans-expansion.html>.

¹⁰⁸ See, "Bahrain Champions Islamic Finance, BCDR-AAA CEO says" 20/03/2013, <http://www.bna.bh/portal/en/news/552353>.

¹⁰⁹ "Proposal – Group on Governing Law and Dispute Resolution in Islamic Finance," G. Affaki (Ed.), I. Fadlallah, D. Hascher, A. Pézard, F-X. Train, 21 September 2009, to be published.

international convention for Islamic Finance that provides a model legal framework for the adoption of Islamic Finance in participating States.¹¹⁰

In the midst of this debate, the industry has been performing a balancing act. On one hand, it has needed to retain its authenticity as a Shari'a compliant industry by adhering to Islamic law; on the other, however, for the industry to be successful, it must promote its business model so that it can compete with the conventional industry by providing working and competitive models that meet all market needs. This task was best described by El Waleed M. Ahmed, a legal consultant in Kuwait when he compared Islamic Finance to conventional finance:

Conventional finance bows to one master, 'profit'. Islamic Finance however, has two masters, 'profit' as well as 'Shari'a principles'. Obedience to two masters is no easy task.¹¹¹

Partly as a result of attempting to please two masters, the industry continues to face unique challenges in terms of compliance with Islamic law regarding various aspects of its business, particularly in the domain of dispute resolution.¹¹² Legal experts dealing with dispute resolutions in the industry summarize these obstacles as follows:

- 1) There is no comprehensive regulatory or supervisory framework for the industry.
- 2) There is no universal Shari'a board that encompasses all Islamic affiliations.

¹¹⁰ See ISRA research Paper NO. 29/2011. "INTERNATIONAL CONVENTION FOR ISLAMIC FINANCE: TOWARDS STANDARDISATION," Hakimah Yaacob, Marjan Mohammad & Edib Smolo. P. 36-37.

¹¹¹ See article, "Challenges facing sector's growth; Global Islamic finance," By: El Waleed M. Ahmed, Legal Consultant, Foreign Affair Department, Kuwaiti Lawyer Law Firm, Al-Jabria –Kuwait, <http://www.sudaneseconomist.com/?p=270>.

¹¹² Other challenges facing the industry in terms of compliance with Islamic law have been internationally recognized in relation to capital adequacy, risk management, corporate governance, transparency and disclosure.

- 3) There is no international convention or treaty for Islamic Finance that harmonizes its legal framework amongst Member States.
- 4) Shari'a supervisory boards of different institutes may have mixed opinions in interpreting Shari'a compliance issues which results in varied rulings.
- 5) There is no authoritative and specialist Islamic Finance ADR institution.
- 6) There is lack of harmonization of Shari'a interpretations with other legal regimes such as the common and Civil Law will play an extremely important role in this regard.
- 7) Inadequate universal standardization and codification of Shari'a Law that could be easily applied to govern Islamic financial dealing internationally.
- 8) There is lack of local legal expertise in both Islamic and conventional finance.

While the industry has worked hard over the past decade to tackle these challenges, which in some cases have stirred controversy,¹¹³ it is inconceivable that the industry, with its Shari'a advisors, can bridge all the rifts among Islamic Fiqh schools and meet the fundamental test of representativeness, both from a doctrinal as well as geographical standpoint; therefore, the debate over ethics and Shari'a compliance in Islamic Finance will likely continue. On one side of the debate, for example, stands Dr. Al Gamal¹¹⁴ mocking the industry for thriving on incoherent pietism when he states,

¹¹³ Although Sukuk represent Shari'a compliant alternatives to traditional bonds, they are widely regarded as controversial due to their perceived purpose of evading the restrictions on Riba. Conservative scholars do not believe that this is effective, citing the fact that a Sukuk effectively requires payment for the time-value of money and offer investors fixed return on their investments which is also similar in appearance to interest. <http://www.financialislam.com/controversy.html>.

¹¹⁴ Mahmoud El-Gamal is chair of Islamic economics, finance and management at Rice University, Houston. He served as scholar-in-residence on Islamic Finance at the US Department of Treasury in 2004. His book "Islamic Finance: Law, Economics and Practice" published by Cambridge University Press.

Vying for countless billions of Arab petrodollars, unexpected champions of “Islamic finance” have emerged in unlikely places. Most recently, the growing list has included Gordon Brown, the UK’s Chancellor of the Exchequer, and officers of the Monetary Authority of Singapore.¹¹⁵

On the other side, Kilian Bälz¹¹⁶ speaking at Harvard Law School, in May 2008, contends that Islamic Finance should not be viewed in the context of “Islamization of the law,” but as part of a revival of Islamic religious ethics in international business¹¹⁷ where Shari’a principles in Islamic Finance are applied as ethical principles and not as legal principles. Bälz also contends that Islamic Finance does not mean to apply Islamic law; it only employs Islamic law exclusively to ascertain the permissibility of a certain transaction: the decisive question is whether the transaction is “halal;” i.e., “permissible” (as opposed to “haram” or “prohibited”).¹¹⁸

Through all these debates and challenges the industry has continued growing, and evolving in services to respond to the rapidly changing regulatory requirements and operating environment brought about by globalization and

¹¹⁵ See, Opinion: Mahmoud El-Gamal: Incoherent pietism and Shari’a arbitrage, By Mahmoud El-Gamal, Published: May 23 2007, Dr. Al Gamal lists The primary beneficiaries of Islamic Finance as first, international law firms with rising interest in an exotic legal system. The second set of beneficiaries has been the premier multinational banks, who have driven Islamic financial innovation (re-engineering is a more apt description) in both investment and retail banking. The third set of beneficiaries has been self-styled religious “scholars” and “experts,” who are retained as consultants to certify the Islamicity of re-engineered financial products. <http://www.ft.com/cms/s/1/01ccc914-0553-11dc-b151-000b5df10621.html#axzz2PzmPFtDe>.

¹¹⁶ A well-known scholar of Islamic Finance and banking, he is a partner of Amereller Legal Consultants, a specialist law firm focusing on the MENA region, with offices in Cairo, Damascus, Dubai, Baghdad, and Erbil, in addition to Munich and Berlin.

¹¹⁷ See, “Shari’a Risk? How Islamic Finance Has Transformed Islamic Contract Law,” by Kilian Bälz, the paper is based on a public lecture delivered at the Islamic Legal Studies Program of Harvard Law School on May, 2008. He notes that Islamic Finance “thrives in jurisdictions where law and religion are separated (such as Dubai, London, Kuala Lumpur), whereas in those jurisdictions that pledge to abide by Islamic legal principles (such as Saudi Arabia, Sudan, Iran, Pakistan), Islamic Finance did not really take off.” <http://www.law.harvard.edu/programs/ilsp/publications/balz.pdf>.

¹¹⁸ *Ibid.*

competition. The industry, particularly after the introduction of Islamic Sukuk has become increasingly more internationalized to the point where it is not catering for Muslims only, and it is attracting customers of other faiths and other jurisdictions across the world,¹¹⁹ a phenomenon currently observed in many States. This globalization has necessitated some sort of harmonization and integration between the industry and the international conventional financial system¹²⁰ at large. Globalization has introduced a new element into the Shari'a compliance debate; an element that is more concerned with profitability, which attracts big businesses, than with the Shari'a compliance sought by the devout Muslims for which the industry was originally designed. With the lure of profit being such a motivating factor, it is no wonder that many industry experts have recommended recasting the industry's "brand;" one suggested name could be "Participation Banking" (used in secular Turkey). The hope is that re-branding would enhance the industry's international appeal—particularly in non-Muslim jurisdictions where the industry will retain the essence of Islamic Finance models, "participatory and risk-sharing partnership." The less than explicit motive here is that a more secular nomenclature could remove the controversies that arise with respect to the industry's close association with religion.¹²¹

¹¹⁹ See report "The Globalization of Islamic Finance: Connecting the GCC with Asia and Beyond" 2012 by Standard & Poor financial services LLC.

¹²⁰ For example, The International Islamic Financial Market (IIFM) and the International Swaps and Derivatives Association, Inc. (ISDA) today launched the ISDA/IIFM Tahawwut (Hedging) Master Agreement on March 2010. <http://www.isda.org/media/press/2010/press030110.html>.

¹²¹ See article, "Ramadan wish list for Islamic finance" JULY 17, 2012, by Rushdi Siddiqui, who is the global head of Islamic Finance at Thomson Reuters. Siddiqui believes that rebranding will take away:

- PROMOTING (one religion over another) religion argument;
- REBUTS BACKDOOR "Islamization" argument;

VI. FUTURE OF ARBITRATION IN ISLAMIC FINANCE

With regard to dispute resolution in Islamic finance, the industry has long encouraged the move toward arbitration of its disputes in lieu of litigation. Furthermore, the regional ADR institutes have geared up to receive an influx of Islamic Finance cases that are slowly becoming the trend amongst Islamic Finance parties. This trend is likely to be solidified after the publication of the PRIME Finance Arbitration Rules,¹²² making arbitration more attractive for dispute resolution in the conventional international finance industry, and particularly for cases with high monetary value. These rules have been inspired by the 2010 UNCITRAL Arbitration Rules and customized to accommodate the needs of world financial markets,¹²³ which could include the Islamic Finance market. In view of the fact that the Permanent Court of Arbitration (PCA) has authorized the conduct of PRIME arbitral hearings at the Peace Palace, The Hague and the Law of Holland are recommended as logical choices for the seat and the governing law of arbitration in PRIME arbitration clauses. PRIME Finance has also issued a number of model arbitration clauses for use with the

-
- ERODES its only-for-Muslim argument; and
 - REMOVES it from the political talking points (and fund raising) for those who want to divide.

¹²² PRIME Finance (Panel of Recognized International Market Experts In Finance), based in The Hague, has been established to assist judicial systems in the settlement of disputes on complex financial transactions, for a copy of the rule; <http://www.primefinancedisputes.org/images/pdf/arbitration%20rules%20-%20prime%20format%20-.pdf>.

¹²³ The Rules provide for an arbitration institute to administer the arbitral proceedings, whereas UNCITRAL Rules have been written for ad hoc arbitration. The Secretary-General of the Permanent Court of Arbitration ("PCA") in The Hague has accepted to serve as appointing authority, if so requested by a party. Article 6. Exclusively persons identified on the panel of experts will be eligible to be appointed as arbitrator, unless otherwise agreed by the parties. See Article 8. Another distinctive feature of the P.R.I.M.E. Finance Rules is that awards may in principle be made public with the consent of all parties. Also, P.R.I.M.E. Finance may publish an award or an order in its entirety, in anonymised form, under the condition that no party objects to such publication within one month after receipt of the award. Article 34.

International Swaps and Derivatives Association (ISDA) Master Agreements¹²⁴ which the Islamic Finance industry has been part of since 2010. In retrospect, it is significant to keep in mind that Islamic financial transactions historically have been litigated under agreements governed by English or New York law mainly in line with the 1992 and 2002 ISDA Master Agreements for the conventional industry¹²⁵ which provided those options; however, In more recent developments at the international level, the ISDA and experts in the conventional industry are now advocating the use of arbitration in lieu of litigation in these venues as a more viable alternative.¹²⁶ The PRIME Arbitration Rule and the reference to arbitration in recent ISDA master agreements could be understood as reflections to a decade-long trend in the conventional finance industry of using arbitration versus litigation as a superior legal

¹²⁴ ISDA is a global trade association for over the counter derivatives, and maintainer of the industry-standard ISDA documentations, it is expected to release a number of model form arbitration clauses of its own later this year for use in conjunction with the Master Agreements. ISDA has previously indicated that arbitration under the PRIME Finance arbitration rules is one of the options under consideration, but has stressed that it is neutral as to the various arbitral institutions on offer. It is therefore expected that ISDA's model clauses will cover a number of the major arbitral institutions and venues, including arbitration under the LCIA, ICC, HKIAC, SIAC and AAA/ICDR rules. See article by Nicholas Peacock and Dominic Kennelly. Herbert Smith Freehills LLP. <http://www.lexology.com/library/detail.aspx?g=7f3393d4-66f7-4adb-9ba0-98ab826f7a94>.

¹²⁵ The 2002 ISDA MASTER AGREEMENT 13.(b) "Governing Law and Jurisdiction" provides:

(b) *Jurisdiction*. With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:

(i) submits:—

- (1) if this Agreement is expressed to be governed by English law, to (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court; or
- (2) if this Agreement is expressed to be governed by the laws of the State of New York, to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City;

¹²⁶ See, "MEMORANDUM FOR MEMBERS OF THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. on The use of arbitration under an ISDA Master Agreement, Dated: 19 January 201.

remedy to resolve legal financial disputes.¹²⁷ With the demanding need for integration with the international finance industry, this trend toward arbitration is sure to spread into Islamic finance, and particularly in the Sukuk market, which has the biggest international appeal and is subjected to the ISDA master agreement.

In face of the current environment of globalization, and its continuous search for profitable opportunities in tandem with favorable regulatory developments at domestic and international levels, the industry is bound to exhibit more flexibility by which it is meeting expectations of all its customers whether he is a devout Muslim in Egypt, a Hindu in India, or a mutual fund in Catholic Argentina. Islamic Finance has evolved into a huge business; and Shari'a-compliant business and should be defined as such. It is no longer catering to only the devout Muslim, who wants to conduct himself in accordance with his religion; it also promotes itself to anyone who believes in the ethics of the "profit and risk sharing business model," which is compliant with the Islamic Shari'a principles.

In that context, we may propose that the Industry move away from the religious debates over issues of Shari'a compliance and its dispensing with the various Shari'a advisory boards that usually do more harm than good.¹²⁸ This could be done through developing and publishing clear and comprehensive industry standards rather than the incomplete and vague Shari'a standards that now exist. The Industry's standards could be based on profit and risk sharing as sanctioned by

¹²⁷ See article, "Why the Financial Service Industry's "Arbitration Boom" is Here to Stay," by Daniel A. Dufresne as featured in the July 2004 issue of *Independents Credit Operations* - a publication by the American Financial Services Association.
<http://www.adrforum.com/rcontrol/documents/articlesbyforumstaff/200407dufresneico.pdf>.

¹²⁸ Considering the various conflicting Shari'a rulings and the conflict of interest accusations that are rampant in the industry. See "Prominent Saudi scholar warns on agenda against Shari'a advisories," by: Mushtak Parker, ARAB NEWS, Sunday 16 January 2011, <http://www.arabnews.com/node/365617>.

Shari'a Law, but do not have to meet the deliberate intricate scrutiny of every Islamic Fiqh school on Earth. The leading regulatory body in the industry, the AAOIFI, would be the logical institute for this task because it only has to accelerate and complete its standardization effort by employing this approach in its review process. From a dispute resolution prospective doing so will be a big leap in the direction of easy settlement of disputes within the industry.

VII. CONCLUSION

The recent Islamic Finance boom with the wide international appeal for its Sukuk market is prompting the Industry to harmonize its practices with international standards, particularly with the international legal systems, for its dispute resolutions. While Islamic Finance has tested the application of Shari'a Law in modern legal systems over the past decade, the issue of Shari'a compliance in dispute resolution has been problematic as local and foreign court jurisdictions are mostly conventional in nature and the problem is compounded by unpredictable court decisions, non-codification of Islamic Law and varying interpretations by Shari'a boards. During this period, this Islamic Finance boom has coincided with various forces of globalization, which have led to harmonization of legal practices throughout the world, including the Middle East, particularly with regard to arbitration. This is evident in the draft arbitration laws that are based on the UNCITRAL Model Law, and which are being considered by many States of the Middle East.¹²⁹

¹²⁹ As presented in Chapter II.

With respect to Islamic Finance, modern arbitration rules have features that make the process attractive to parties who wish that their dispute be governed by Shari'a Law, by which these parties may customize the arbitration proceedings to their liking and choose skilled arbitrators that understand the Industry, as well as principles of the applicable Shari'a Law.

Globalization has introduced a new element into the Shari'a compliance business of Islamic finance; an element that is more concerned with profitability than the Shari'a compliance aspect of the transaction. Parties who fall under this category would likely prefer conventional arbitration rules to resolve their disputes in line with the current trend in the international finance industry which was culminated by publication of the PRIME finance arbitration rules and the use of arbitration under an ISDA Master Agreement.

In order to build a viable hub for dispute resolution in Islamic banking and finance, it is important to keep the interests of the disputing parties in mind. Whether these parties choose litigation or arbitration, Islamic arbitration where the governing clause has a reference to Shari'a or conventional arbitration with no reference to Shari'a, the off-shore jurisdictions of Bahrain (BCDR-AAA), Dubai (DIFC-LCIA) and Qatar (QICDRC), with their respective dispute resolution centers and Common Law court systems, are in the best position to serve parties of this industry. In addition to these jurisdiction central location, many international law firms have opened offices in the region¹³⁰ and have started to build up Islamic Finance expertise

¹³⁰ For example, mirroring the view of the UAE as a regional hub, and despite the general perception that Dubai (and, to a lesser extent, Abu Dhabi) is a saturated legal market, new entrants continue to establish a presence in order to support or exploit new opportunities. For example, Bird & Bird LLP opened its Abu Dhabi office in 2011. Cleary Gottlieb Steen & Hamilton LLP, which has been active in the market for some time, opened an Abu Dhabi office in 2012 and installed partner Gamal Abouali

across core practice areas of banking, project development and finance, capital markets, restructuring, mergers and acquisitions and investment funds. These law firms have developed extensive Islamic Finance experience by drafting contracts and providing consultations to governments, banks, sponsors, export credit agencies and investment funds on Shari'a compliant transactions in the Middle East, Europe, US and Asia.

On a final note, the Industry can provide exceptional assistance in terms of quick and cost effective dispute resolutions, if it provides clear and comprehensive industry standards rather than incomplete and vague Shari'a standards that exist now which should reduce Shari'a risk concerns. It would also be immensely beneficial if the industry adopts a modified version of the PRIME Finance Arbitration Rules to fit the unique features of Islamic Finance where the arbitration seat could be in one of the jurisdictions mentioned above because of their ability to provide best international expertise and legal infrastructure for the industry. The next chapter discusses the modern emergence of arbitration hubs.

and associate Chris Macbeth to handle a broad range of corporate work. Addleshaw Goddard (Middle East) LLP also opened an office in Dubai in 2012, recruiting Andrew Greaves from Trowers & Hamblins to head up the office.

In another noteworthy move, Natalie Boyd joined K&L Gates from Simmons & Simmons Middle East LLP. Of the established international firms, Allen & Overy LLP, Clifford Chance and Clyde & Co LLP have the longest track record in the region and enjoy reputations for top-quality work. Key local firms include Al Tamimi & Company, which has benefited from its expansion into the broader GCC region, as well as Hadeef & Partners and Habib Al Mulla & Company. <http://www.legal500.com/c/united-arab-emirates>.

CHAPTER V

THE EMERGENCE OF MODERN ARBITRATION HUBS

Gentlemen, I fervently trust that before long the principle of arbitration may win such confidence as to justify its extension to a wider field of international differences.

--Henry Campbell-Bannerman.¹

I. INTRODUCTION

In the international arbitration arena, there is a battle going on; it is called “The Battle of the Seats.”² This battle is no longer limited to the usual heavy weights; Paris, Paris, London, Geneva and New York, but is attracting a long list of contenders³ from from all corners of the world including unlikely places such as the tiny island of Mauritius,⁴ which is vying to become a hub of arbitration for Afro-Asian trade

¹ <http://www.brainyquote.com/quotes/keywords/arbitration.html#kxYOLiEQ15JwGOfX.99>.

² See article “The battle of the seats: Paris, London or New York” December 2011 Damien Nyer, Paul Brumpton, John Templeman, Lucas de Ferrari , <http://www.whitecase.com/articles-12142011/#.UXHJ8bWG18E>.

³ Our search netted a long list that includes Hong Kong, Tokyo, Singapore, Kuala Lumpur, Chile, Peru, Peru, Korea, Vietnam, Dubai, Australia, Nigeria, Stockholm, Miami, Bahamas and Ukraine among others.

⁴ A small island nation in the middle of the Indian Ocean, The Government and leading arbitral institutions in Mauritius are working to create a new platform in the region for international commercial and investment arbitration. As part of this project launched in 2010, Mauritius

parties. A global survey⁵ that was conducted in 2010 shows arbitration as a fast growing segment of the legal practice, where both local and international arbitration service providers are reporting brisk growth, both in number of cases and number of venues for arbitrations. In the beginning of his keynote speech at the 2012 Congress⁶ of the International Council for Commercial Arbitration (ICCA), Singapore Attorney-General. Mr. Sundaresh Menon said,

I venture to begin by suggesting that this new age of arbitration is in fact its golden age. Those among us who practice it are extraordinarily privileged to be able to do so at this time. Never before have so many controversies been left to the disposal of arbitrators; and never before has so much autonomy been afforded them. Arbitration practitioners today ply their craft in venues across the world on behalf of users from every conceivable jurisdiction.

There are many reasons behind this golden age of arbitration as a dispute resolution mechanism. However, its ability to transcend national boundaries with effective enforcement via the New York Convention is becoming more of a primary factor as local economies are increasingly influenced by globalization. To service the growing market of arbitration, many institutions have been established around the world, and they are competing strongly to attract arbitration parties, both at the regional and international level. Consequently, they are continuously seeking local

successfully won its bid to host the 2016 Congress of the International Council for Commercial Arbitration. <http://www.miac.mu/Default.aspx>.

⁵ Queen Mary, University of London, School of International Arbitration 'Choices in International Arbitration' (published by White & Case LLP). This survey was based on 136 questionnaire responses and 67 in-depth interviews. Questionnaire respondents and interviewees were mainly corporate counsels from corporations across a range of industries and geographical regions.

⁶ ICCA Congress 2012 Opening Plenary Session International Arbitration: The Coming of a New Age for Asia (and Elsewhere).

governmental and judicial support for a more user-friendly legal infrastructure in their jurisdiction.

Historically, international arbitration has enjoyed a growing popularity with venues like London, Paris, Geneva and New York using institutions like the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the American Arbitration Association's International Center for Dispute Resolution (AAA/ICDR). With the emergence, however, of regional economic hubs around the world, there has been a trend towards referring disputes to arbitral institutes closer to home. For example, it makes more sense for parties from Saudi Arabia and Kuwait to use a neutral venue close by, such as Dubai or Qatar, rather than travel half-way across the world to London or New York, provided of course these latter offer a similar quality of service. As a result, regional economic hubs cannot attain a respectable stature in the current business and investment circuit environment without an effective and trusted platform for dispute resolution including arbitration venues.

This chapter presents various aspects of modern Commercial Arbitration, particularly in relation with building a successful modern arbitration hub. We begin by overviewing arbitration and the role it plays in modern economies, and discussing why it is important for regional economic hubs to be arbitration friendly. We also touch upon the importance of the seat of arbitration and its interaction with the arbitration venue that facilitates the proceedings. We further examine the common characteristics of modern arbitration hubs, and provide an overview of some of the existing and aspiring hubs in different regions of the world. Finally, we shall present a

set of concepts and initiatives that different arbitration hubs have introduced in their effort to lure arbitration parties to their jurisdiction.

II. THE IMPORTANCE AND ASCENDANCE OF MODERN ARBITRATION

In the current environment of global economics,⁷ the free market economy system is the norm; States that formerly held the Soviet era protectionist-State-controlled economic system are diminishing in number and are largely considered rogue States, at least from economical point of view, where their development is considerably lagging behind other States with similar resources.⁸ That is why we see more and more States of the world striving to harmonize and upgrade their trade laws and policies to be in line with acceptable world trade standards. This is particularly clear where these States have to comply with influential world organizations such as the World Trade Organization (WTO), which in order to achieve its objectives,⁹ requires

⁷ Rao, D.N, the Head of Economic & Investment Research at the Consulting Center for Finance & Investment, Riyadh, Kingdom of Saudi Arabia, noted in introduction of his study "ANALYSING RISKS OF FOREIGN DIRECT INVESTMENT IN EMERGING ECONOMIES: A CASE-STUDY OF SAUDI ARABIA." Globalization is ushering the era of low trade barriers and global competition. Companies can no more entirely depend upon its domestic markets. Besides, many of the developing States have been opening up their economies to accelerate development and are striving hard to mobilize funds for developing infrastructure and industry through Foreign Direct Investment (FDI). A large number of Multinational companies and investment groups are seeking entry to seize the opportunities offered by the emerging economies offer immense opportunities in the areas of telecommunications, power, transport, roads, real estate, manufacturing, banking and insurance etc.

⁸ A clear example of this contrast is the development in South Korea v. North Korea.

⁹ The reasons for establishing the WTO and the policy objectives of this international organization are set out in the Preamble to the WTO Agreement. According to the Preamble, "Recognizing that their relations in the field of trade and economic Endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." <http://www.wto.org/>.

members to reduce trade barriers and eliminate discriminatory treatment in international trade relations.¹⁰

Commercial dispute resolution mechanisms have always been an indispensable part of any legal system. However, a modern effective mechanism is critical for an economy to be successful and competitive, particularly in times of crisis and change, which are seemingly witnessed on an ongoing basis around the world.¹¹ The non-judicial nature of arbitration in which the process is administered by a panel of arbitrators, who have specialized competence in the relevant field and are agreed upon by both parties, has made the process both attractive and effective. Also arbitration advantages, which include a consensual, confidential and quick dispute resolution method that leads to a final and binding enforceable determination, are well recognized by public and private parties throughout the world.¹² Finally, other dispute resolution mechanisms and practices differ from one party jurisdiction to another.

Commercial disputes with an international flavor tend to be the primary arena where arbitration prospers the most. As a result, many international investments are currently protected by international treaties¹³ that transcend the

¹⁰ The Preamble to the WTO also states that there are two main instruments, or means, to achieve the objectives of the WTO: the reduction of trade barriers and other barriers to trade; and the elimination of discriminatory treatment in international trade relations.

¹¹ To name a few: the current European sovereign debt crisis of 2012 (Eurozone crisis); the world financial crisis of 2007–2012; the Arab spring turmoil of 2011-2013; the Afghan and Iraq wars (2000 and 2003); and the stock market crisis of 2000.

¹² See, “BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES” by Edna Sussman and John Wilkinson, and Rand Institute for Civil Justice, *Business to Business Arbitration in the United States, Perceptions of Corporate Counsel (“Rand”)*, p. 1, 30 (2011).

¹³ During the past two decades, the number of investment treaties has tripled. Today, nearly 176 States have signed onto one or more Bilateral Investment Treaties (“BITs”). These treaties offer

different national laws and courts by stipulating that any associated dispute will be resolved by arbitration. These arbitrations typically employ internationally accepted rules and laws where they are conducted by neutral arbitrators in a neutral place, and the awards are enforced via international agreements, such as the New York Convention¹⁴ for disputes between private parties, or the ICSID Convention¹⁵ for disputes that involve a State entity as one of its parties.

In the current globalized investment markets, and in direct response to the needs of local and international business communities, national and international legal systems of leading business hubs around the world have become firmly pro-arbitration with modern legal framework to facilitate the process. The current trend for a modern legal framework to support arbitration world-wide is for more States adopting the 1958 New York Convention and more harmonization with the UNCITRAL Model Law. While the arbitration process does have drawbacks, the least of which is the lack of a formal appeal process,¹⁶ and costs—which have been

foreign investors a series of economic rights, including the right to arbitrate claims.
http://www.unctadxi.org/templates/Page____1007.aspx.

¹⁴ The New York Convention requires that the states that have ratified it to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states, subject to certain limited exceptions. These provisions of the New York Convention, together with the large number of contracting states, has created an international legal regime that significantly favors the enforcement of international arbitration agreements and awards.

¹⁵ The International Center for Settlement of Investment Disputes (ICSID) also known as the Washington convention has 159 Member States which have signed the center's convention. All ICSID contracting Member States, whether or not they are parties to a given dispute, are required by the ICSID Convention to recognize and enforce ICSID arbitral awards.

¹⁶ Arbitration is considered binding or mandatory; the involved parties waive their right to have any form of litigation on the matter, meaning that no judge or jury can consider the case. This means that once a decision is made, even if it ends up being erroneous, there is none to very limited avenues to appeal the arbitral award. Additionally, the arbitral award is more of an independent judgment on an issue in light of knowledge and details submitted. The award itself is not enforceable by the process, but requires a judicial process to be completed to have it auctioned, or what is normally referred to as

increasing steadily—¹⁷ the advantages of international arbitration outweigh the disadvantages. This is evident in recent statistics and opinion surveys which reassert the above benefits and prove the popularity of arbitration over transnational litigation. In a 2008 study regarding corporate attitudes and practices toward arbitration,¹⁸ the key conclusions were the following:¹⁹

- 1) Overall, businesses continue to show a preference for using arbitration over litigation for transnational disputes, although concerns remain about the costs of arbitration.
- 2) International arbitration is effective in practice. The enforceability of arbitral awards, the flexibility of the procedure and the depth of expertise of arbitrators are still seen as the major advantages of arbitration.
- 3) When International arbitration cases proceed to enforcement, the process usually works effectively. Most participating corporations revealed no major difficulties in achieving recognition and enforcement of their arbitral awards. Where difficulties were encountered, they usually related to the circumstances of an award debtor, typically lack of assets or inability to identify relevant assets.
- 4) There is a high degree of compliance with arbitral awards.

“confirmation.” Lew, J., Mistelis, L. & Kroll, S. (2003) *Comparative International Commercial Arbitration*, Kluwer Law International.

¹⁷ The cost of the adjudicators is borne by the parties involved in the arbitration. This can have prohibitive impact on the process, especially when small consumers are involved. Redfern, A. (2004) *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell. Also see, *What Can Be Done About Arbitration Costs?* by Winston & Strawn LLP. http://winston.com/siteFiles/publications/Arbitration_Costs.pdf.

¹⁸ Arbitration: Corporate attitudes and practices: 2008. The Survey has been issued by PwC and Queen Mary, University of London. See note above.

¹⁹ These conclusions were reconfirmed in a recent 2013 Survey, 'Corporate choices in International Arbitration', which investigates how corporations use international arbitration, with a particular emphasis on companies in three sectors of strategic importance to the world economy – Energy, Construction and Financial Services.” <http://www.pwc.com/arbitrationstudy>.

- 5) Corporations are the main users of international arbitration. 75% of the arbitration proceedings involved private corporations only.

Because of its widespread popularity,²⁰ arbitration has become the first choice for resolving disputes when private companies or State entities enter into cross-border contractual relationships. In response to this global trend toward international arbitration, the arbitration community has been preparing to meet the challenges presented by the growing demand. The major arbitration centers are reporting a brisk growth in case volume (*See infra* Table 5-1).

Table 5-1²¹
NUMBER OF INTERNATIONAL CASES BY ARBITRAL INSTITUTIONS

<i>Arbitral Institution</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>
<i>AAA-ICDR (USA)</i>	<i>580</i>	<i>586</i>	<i>621</i>	<i>703</i>	<i>836</i>	<i>888</i>
<i>ICC^</i>	<i>521</i>	<i>593</i>	<i>599</i>	<i>663</i>	<i>817</i>	<i>793</i>
<i>CIETAC (China)</i>	<i>427</i>	<i>442</i>	<i>429</i>	<i>548</i>	<i>560</i>	<i>418</i>
<i>LCIA (UK)</i>	<i>118</i>	<i>133</i>	<i>137</i>	<i>213</i>	<i>272</i>	<i>237</i>
<i>SIAC (Singapore)</i>	<i>29</i>	<i>47</i>	<i>55</i>	<i>71</i>	<i>114</i>	<i>140</i>
<i>SCC (Sweden)</i>	<i>53</i>	<i>64</i>	<i>81</i>	<i>74</i>	<i>96</i>	<i>91</i>
<i>KCAB (South Korea)</i>	<i>53</i>	<i>47</i>	<i>59</i>	<i>47</i>	<i>78</i>	<i>52</i>
<i>Total</i>	<i>1781</i>	<i>1912</i>	<i>1981</i>	<i>2319</i>	<i>2773</i>	<i>2619</i>

Notes: All statistics published here have been obtained from the respective institutions named. The ICC International Court of Arbitration does not maintain separate statistics for international and French domestic cases administered by them.

²⁰ Certain industries, such as insurance, energy, oil and gas and shipping, use International Arbitration Arbitration as a default resolution mechanism. PriceWaterhouseCoopers (“PWC”), International Arbitration, Corporate Attitudes and Practices, (2008). PriceWaterhouseCoopers website.

²¹ Source: Singapore International Arbitration Center
http://www.siac.org.sg/index.php?option=com_content&view=article&id=339&Itemid=73.

This general trend was also seen in the high profile State-investors arbitrations where the number of ICSID cases registered in 2012 (fifty cases) more than doubled the number in 2002 (nineteen cases).²²

III. OVERVIEW OF MODERN ARBITRATION SYSTEMS

The New York Convention and the UNCITRAL Model Law, along with arbitration centers that employ modern institutional rules, are the most important instruments in establishing modern and supportive infrastructure for international Commercial Arbitration.

A. The New York Convention

The 1958 New York Convention has long overshadowed "the Geneva Convention on the Execution of Foreign Arbitral Awards,"²³ and currently is the most successful private international law treaty that is the basis for the entire international arbitration system as it exists today. More than 148 nations²⁴ have ratified it since its creation. The New York Convention, which provides mechanisms for recognition and enforcement of cross-State arbitral awards, is vital to the

²² See, THE ICSID CASELOAD –STATISTICS (ISSUE 2013-1).
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41>.

²³ The New York Convention was established as a result of dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. The initiative to replace the Geneva treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953. The ICC's initiative was taken over by the United Nations Economic and Social Council, which produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the New York Convention. See New York Convention introduction By Albert Jan van den Berg in UN website, <http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html>.

²⁴ See status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

arbitration process because it imposes two principal obligations on the contracting states;

- 1) To ensure that national courts, where appropriate, refer parties to arbitration and stay related judicial proceedings; and
- 2) To recognize and enforce foreign arbitral awards essentially as if they were domestic judgments.²⁵

By virtue of these obligations, enforcement of cross-State arbitral awards has been made much easier, and jurisdictional problems have been largely eliminated. Despite the fact that the New York Convention reflects the realities of international arbitration of the 1950s, it is still, surprisingly, a modern instrument that has brought a tremendous degree of harmonization to the recognition and enforcement regime for international arbitral awards. Many concerns that persisted earlier with regards to the application of the public policy defense under its Article V (2) (b) in refusing recognition and enforcement of awards by some Member States have greatly subsided after the enactment of more arbitration friendly legislation in many of these States, mostly, following the UNCITRAL Model Law,²⁶ and the general trend in many nations' attitudes toward more support of the process.

B. The UNCITRAL Model Law

The UNCITRAL has been instrumental, playing an important role in improving the legal framework for international trade by preparing model international legislative texts for use by States looking to modernize their law of international trade. The

²⁵ See Convention on the Recognition and Enforcement of Arbitral Awards, article II.

²⁶ For example see the new Arbitration Law in Saudi Arabia enacted 2012, discussed in Chapter II.

1985 UNCITRAL Model Law²⁷ on International Commercial Arbitration, with its 2006 adopted amendments, provides such a text that law-makers in national governments can incorporate into their domestic arbitration legislation.²⁸ The UNCITRAL codifies the modern international consensus on the practice of international Commercial Arbitration, and incorporates into its provisions a liberal approach to the regulation of arbitration.²⁹ It recognizes many important and modern aspects of the arbitration process, such as for example, the Kompetenz-Kompetenz and the principle of separability (autonomy of the arbitration clause),³⁰ interim measures,³¹ and party autonomy, all of which allows parties to choose the substantive law, the procedural law, the seat and language of the arbitration amongst other things.³² Adoption of the the Model Law is considered one of the most important steps for any State desiring

²⁷ U.N. Doc. A/40/17/Annex 1 (1985). A copy of the text of the Model Law (amended in 2006). http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

²⁸ *Ibid*, For example, in providing a definition of international arbitration, Article 1(3)(c) of the Model Law states that an “arbitration is international if . . . the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one State.”

²⁹ *Ibid*.

³⁰ *Ibid*, Article 16, (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

³¹ *Ibid*, Article 17, (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

³² *Ibid*, Article 19, (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Article 28, (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.... Article 20. (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitralArticle 22, (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

to establish modern arbitration legislation. The Model Law has, so far, served as the basis for modern statutory enactments on arbitration in over 100 jurisdictions in seventy States around the world.³³ Consequently, more States are expected to enact similar legislation based on the Model Law's future provisions.³⁴

C. Modern Arbitration Rules

For a jurisdiction to have modern arbitration infrastructure, it must have a modern arbitration institution with modern arbitration rules.³⁵ The UNCITRAL Arbitration Rules³⁶ ("Rules") have been recognized for their success as a tool that has guided many *ad hoc* (private without the help of a third party)³⁷ arbitrations over the past three decades. Although originally prepared for use in *ad hoc* arbitrations, the Rules have been increasingly used by arbitral organizations as their institutional rules with suitable changes. As a result the UNCITRAL has issued its 'Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the

³³ For a list see, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

³⁴ This includes many States in the Middle East including Iraq, Qatar and the UAE.

³⁵ Redfern and Hunter identified four basic criteria for proper selection of an arbitration institution: (1) permanency, (2) modern rules of arbitration, (3) qualified staff and (4) reasonable charges. Quoted in "China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration," Kidane (ed.) (2011).

³⁶ A copy (as revised in 2010) can be downloaded from [uncitral.org](http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf) website. <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

³⁷ An "*ad hoc*" arbitration is non-institutional arbitration pursuant to an arbitration agreement between the parties which does not specify an arbitral institution to provide administrative services and/or the procedural rules pursuant to which arbitration shall be conducted. When agreeing to an *ad hoc* arbitration, the parties can either design their own arbitral procedure to suit their particular requirements, refer to "non-institutional" arbitration rules such as the UNCITRAL Arbitration Rules (2010), or simply rely on the Arbitration Law of the State where the arbitration has its seat to provide the procedural framework for their arbitral proceedings. See International Arbitration – An Overview 2.2.1. http://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_OVERVIEW.pdf.

UNCITRAL Arbitration Rules.’³⁸ This publication provides guidance to institutions on the changes that could be made in these Rules when adapting them for use in their institution.

The Rules, which were amended in 2010, reflect current and modern practices that enhance the efficiency of arbitration³⁹ and cover all aspects of the arbitral process. They also contain a model arbitration clause that sets out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings; furthermore, they lay out other rules that relate to the form, effect and interpretation of an award. As more arbitration institutions are being established, many are adopting the UNCITRAL Rules and are introducing modifications per those guidelines appropriate to the needs of the institution’s prospective clients.⁴⁰ While the UNCITRAL Arbitration Rules continue to be most popular for many existing and new independent and specialty arbitration centers around the world,⁴¹ the ICC, the AAA-ICDR and the LCIA are still the institutions most commonly used by parties of Commercial Arbitration (*Infra* Chart 17).⁴³

³⁸ These recommendations were first introduced in 1982 and the current updated version was adopted in July 2012.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2012Recommendations.html.

³⁹ See note above, General Assembly Resolution 61/33 (4 December 2006), p viii.

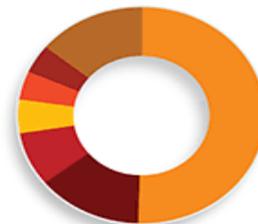
⁴⁰ This is demonstrated in the rules of major center of the Middle East such as CRCICA, DIAC and QICA QICA as presented in chapter 2 and 3.

⁴¹ Including prominent centers in the Middle East such as DIAC, QICA and CRCICA, also, PRIME finance finance arbitration rules are based on the UNCITRAL and the world Intellectual Property Organization(WIPO) centers uses the UNCITRAL rules for its institutional arbitrations.

⁴³ Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

These institutions, which pre-date the UNCITRAL, have developed their own distinct rules.⁴⁴ They have also been amending and, or updating their rules in an effort to harmonize with most current practices and solutions that meet business needs for quick and efficient arbitration process. As most of these and other arbitration rules converge with the UNCITRAL rules, they all are exhibiting more flexibility and party autonomy that

Chart 17: Preferred arbitration institutions



ICC	50%
LCIA	14%
AAA/ICDR	8%
SIAC	5%
JCAA	4%
HKIAC	4%
Other	14%

benefit international investment parties. While there are a number of distinctions between the various institutions, they “*have much more in common than one would expect taking into account their locations and the legal traditions of the host States.*”⁴⁵ Some of the main differences concern arbitration costs, level of institutional scrutiny, interim measures and the expedited process; for example, The ICC charges a percentage of the amount in dispute,⁴⁶ whereas the LCIA administers arbitrations on the basis of an hourly fee.⁴⁷ Moreover, the ICC Court of Arbitration exercises a quality control function over ICC awards by subjecting the draft ruling to scrutiny by the ICC,⁴⁸ which may require ICC arbitrators to reconsider any award or

⁴⁴ The ICC published new arbitration rules that were made effective January, 2012. AAA-ICDR Rules Amended there rules, effective June, 2009.

⁴⁵ Elena V. Helmer, “International Commercial Arbitration, Americanized, “Civilised,” or Harmonised?” Harmonised?” (2003) Ohio St. J on Disp, Resol 35 at 55.

⁴⁶ See “Appendix I: Arbitration Costs and Fees” of the ICC Arbitration Rules.

⁴⁷ Per LCIA Schedule of Arbitration Cost, http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.Costs.aspx.

⁴⁸ See Article 33 of the ICC rules, “Scrutiny of the Award by the Court Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal’s liberty of decision, may also draw

part of a ruling before it issues the final award. This is not the case with the LCIA where tribunal awards are considered final and binding without further review.⁴⁹ Closely associated with arbitration tribunals, disputes, and awards are the notions of “venue” and “seat.” While they both suggest location, that they are not the same is a crucial bit of information with which the disputants should be familiar. Let’s consider these vital terms.

IV. ARBITRATION SEAT VIS-À-VIS ARBITRATION VENUE

One of the most important elements of any international arbitration is the choice of seat, which is the legal place of arbitration as it is called in the LCIA rules.⁵⁰ While many modern national legislations and arbitration institutions rules refer to the seat as “the place of arbitration,” including the UNCITRAL Model Law where Article 20. “Place of arbitration” provides as follows:

its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.”

⁴⁹ See Article 26.9 of the LCIA rules, “All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any State court or other judicial authority, insofar as such waiver may be validly made.”

⁵⁰ See Article 16, “Seat of Arbitration and Place of Hearings.”” 16.1 The parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate. 16.2.

The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes. 16.3 The law applicable to the arbitration (if any) shall be the Arbitration Law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another Arbitration Law and such agreement is not prohibited by the law of the arbitral seat.

- (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. . . .

It is not necessarily the place where hearings and deliberations need to be conducted because paragraph (2), which is immediately below, of the same article allows these proceedings to be conducted in different physical locations or jurisdictions, sometimes called arbitration venues, as agreed upon by the parties in their agreement or determined by the tribunal after its formation.

- (2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

The ICC arbitration rules⁵¹ has similar language to the UNCITRAL; in fact it is very common for the ICC and AAA-ICDR arbitrations to be held in venues other than New York and Paris, even in absence of an agreement between the parties where generally determining a venue considers the convenience of both parties.⁵² In contrast, if the parties to LCIA arbitration have not agreed upon a seat of arbitration, by default the seat is fixed in London.

⁵¹ Article 18, Place of the Arbitration (1) the place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. 2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. (3) The arbitral tribunal may deliberate at any location it considers appropriate.

⁵² For example, in the *DynCorp* case, the parties who were from Qatar and the United States submitted their dispute to ICC arbitration in Paris as a place of arbitration, however the ICC court appointed an arbitrator from Lebanon where the arbitration took place, *International Trading and Industrial Investment Company v. DynCorp Aerospace Technology et al.*, Civil Action No. 09-791 (RBW), (Jan. 21, 2011).

A. Seat of Arbitration (Place of Arbitration)

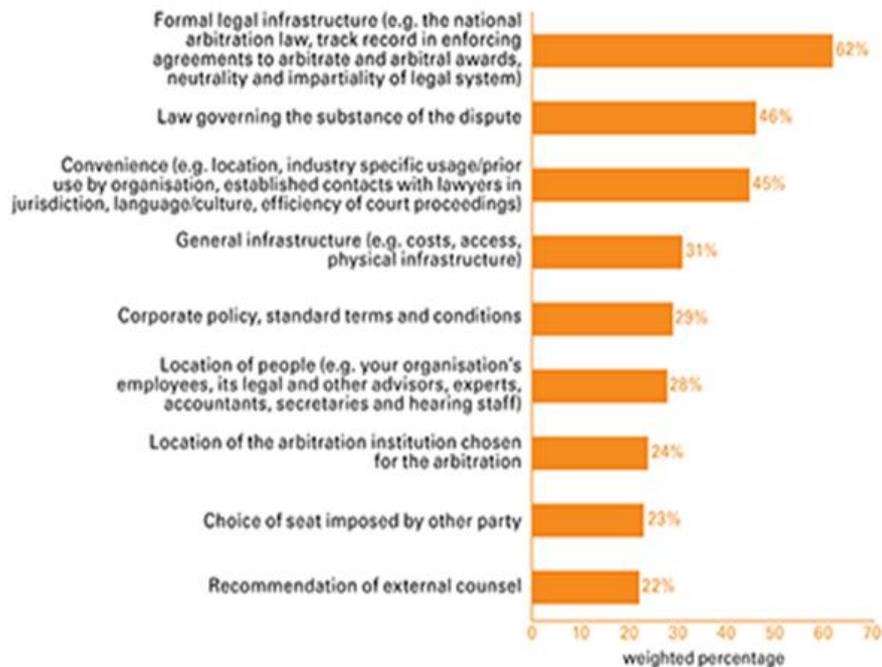
The concept of the seat is important within the context of international arbitration because it links up the arbitration activity with the legal system of a particular State which, in the absence of the agreement otherwise, prescribes the procedural law of the arbitration. Therefore, the seat usually determines the following:

- The courts that have supervisory power over the proceedings.
- The procedural law the proceedings must follow.
- The nationality of the award which is important for enforcement of the arbitral award.

That is why choice of seat, according to a survey conducted by Queen Mary University in 2010 (*Infra* Chart 14), is usually influenced by the formal legal infrastructure of the jurisdiction of the seat. In the survey, the top four influences on the choice of seat of arbitration are as follows:

- 1) The formal legal infrastructure at the seat, which includes the national Arbitration Law and also the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction and its neutrality and impartiality.
- 2) The Law governing the substance of the dispute.
- 3) Convenience including location, industry specific usage, prior use by the organization, established contacts with lawyers in the jurisdiction, language and culture and the efficiency of court proceedings.
- 4) General Infrastructure including cost, access and physical infrastructure.

Chart 14: Top influences on the choice of the seat of arbitration



While London, Geneva, Paris and New York continue to hold prominent positions as preferred seats (*See infra* Chart 15), this survey shows that compared to the survey conducted by the same school in 2006⁵⁵ where preference for the above traditional seats decreased from 72% in 2006 to 52%, in 2010 more arbitrations were migrating to other jurisdictions. This is largely because of the widespread proliferation and competence of other arbitration venues, and the increased harmonization of the process adopted by many jurisdictions around the world.

⁵⁵ In the 2006 School of International Arbitration/PricewaterhouseCoopers survey, 38% preferred England, 12% each preferred Switzerland and United States, 10% preferred France, 5% preferred Japan, and 3% preferred Sweden and 21% of respondents chose other seats as their first choice. In comparison to the 2010 survey, this clearly demonstrates the shift to other seats. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

Chart 15: Preferred seats of arbitration



London	30%
Geneva	9%
Paris	7%
Tokyo	7%
Singapore	7%
New York	6%
Other	34%

B. Arbitration Venues (Place of hearings and deliberation)

While many references define “arbitration venue” as the place the hearing and/or the deliberation is conducted, there are instances when it is confused with the “seat of arbitration.” This is because, in practice, they are often the same and approximately only 15% of all hearings are held outside the seat of arbitration.⁵⁶ The term “venue” is not often used in any of the major institutions arbitration rules or the Model Law; yet the terminology is very common in literature and arbitration guides and particularly those that derive from a Common Law background. For example there is a new book entitled “*Choice of Venue in International Arbitration*,”⁵⁷ which was published recently. The book is described as “Offering detailed analysis of a range of key venues, it addresses not only the practical reality

⁵⁶ Queen Mary, University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process. One of the survey findings is that only 15% of hearings are held outside the seat of arbitration. <http://arbitrationpractices.whitecase.com>.

⁵⁷ Michael Ostrove and Claudia Salomon, published by Oxford University Press, USA (September 15, 2013).

but also the history and development in these seats, making the book both an academic and a practical investment.” The book seems to use the two terms, “seat” and “venue” interchangeably.

This confusion has actually been the subject of an appeals court case regarding an ICC arbitration⁵⁸ that was constituted in London where the arbitration agreement provided for London as the ‘venue’ of the arbitration, but was silent as to the seat. After an interim award was made by the tribunal, the defendant appealed on the ground that, the seat of arbitration should have been in India because the law that govern the merits of the contract was Indian Law. Therefore, to eliminate such confusion, if they intend to use a different venue to hold hearing or deliberation, it is important for parties to specify the seat explicitly. For example, if parties from Saudi Arabia and Iraq want to use London as a seat and Qatar as a place for hearing, the arbitration clause could provide the following: *“The seat of arbitration shall be [London]. The venue for arbitration hearings (and/or deliberation) shall be [Doha, Qatar] or other location for convenience.”*⁵⁹

While the seat of arbitration is of prime importance from, a legal point of view, as discussed earlier, venues are chosen based on logistics and convenience to cut costs and improve the overall efficiency of the arbitration process. After all,

⁵⁸ *Shashoua v Sharma* [2009] EWHC 957 (Comm). In this case the English court’s judge concluded: “When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as seat, combined with a supranational body of rules [i.e. ICC] governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law..” For more details see article, November 25, 2009 *“When is the ‘Venue’ of an Arbitration its ‘Seat’?”* By Phillip Capper, White & Case LLP.

⁵⁹ For more examples See, *“International Arbitration and Forum Selection Agreements: Drafting and Enforcing,”* 3rd Edition by Gary Born (Mar 16, 2010), p 69.

convenience is one of the top four factors for choice of seat as shown *supra* in Chart 14, and could be of prime importance for small claims or parties with limited resources.⁶¹ As more venues improve and harmonize their legal system to international standards, parties have shown more of an inclination to elect them for the seat of their arbitrations and have migrated away from traditional seats, as was evident in the surveys discussed in the previous section.

V. THE RISE AND PROLIFERATION OF ARBITRATION INSTITUTIONS

As discussed earlier, the sharp rise in international transactions has led to a similar increase in the number of disputes. To resolve them, parties are increasingly favoring arbitration to litigation. These parties, in negotiating an arbitration clause, can decide whether to use an *ad hoc* arbitration or submit the have the arbitration conducted under the supervision of an established arbitral institution.

A. Ad Hoc Arbitration

An *ad hoc* arbitration is an arbitration done pursuant to an arbitration agreement between the parties, and one that does not specify an arbitral institution to provide administrative services. When agreeing to an *ad hoc* arbitration, and to provide the procedural framework for their arbitral proceedings, the parties can either design their own arbitral procedure to suit their particular requirements, or refer to “non-institutional” arbitration rules such as the UNCITRAL Arbitration Rules, or simply rely on the Arbitration Law of the State where the arbitration is seated. The *ad hoc* style of arbitration soared to prominence right after the introduction of the UNCITRAL

⁶¹ Travel cost and documentation could be prohibitive for some parties to go along with the arbitration.

Arbitration Rules in 1976 at a time when arbitration institutions were few and widely scattered. *Ad hoc* was preferred for its speed, low cost and informal procedures, and is still important for small disputes involving a limited amount of money, or when the parties are not able to agree on an institution. However, the prevalence of arbitration institutions that cater to all budgets, and the risks presented by the lack of formalities in *ad hoc* arbitrations,⁶² have led more parties, according to recent surveys, to prefer institutional arbitration over *ad hoc* arbitration.

B. Institutional Arbitration

An institutional arbitration is one in which a specialized institution, with its own professional administrative staff and lists of arbitrators, intervenes and assumes the role of administering the arbitration process in a setting similar to a privatized court. Each institution has its own set of rules, which provide a framework for the arbitration, and its own form of administration to assist in the process. In a study by Queen Mary, University of London, "International Arbitration: Corporate Attitudes and Practices 2008" one of the key findings was that *"86% of awards that were rendered over the last ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations."* The corporations surveyed in this study indicated that the main reason for using institutional arbitration was the reputation of the institutions and the convenience of having the case administered by a third party.

⁶² Lack of formality presents risks that a recalcitrant party may be able to engage in delaying tactics that cannot be easily overcome.

While resorting to institutions to administer arbitrations is considerably more expensive, and might take longer time, due to bureaucratic procedures in comparison with *ad hoc* arbitrations, institutional arbitration has obvious advantages over the ad hoc arbitrations because it provides:

- 1) Supervision of the arbitration proceedings using pre-established rules and procedures which ensure the arbitration proceedings begin and proceed in a timely manner.
- 2) Administrative assistance from the institution with a secretariat or a court of arbitration assisting with arbitrator removal, scrutinizing awards, fixing the remuneration of arbitrators and act as appointing authorities when the parties cannot agree on arbitrator appointments.
- 3) Lists of experienced arbitrators, often listed by fields of expertise.
- 4) Physical hearing and meeting facilities, and support services for arbitrations.
- 5) Help to avoid delaying tactics by a reluctant party who does not want to arbitrate the dispute.
- 6) A track record for an established format that has proven workable in prior disputes.

As International transactions become more complex, with multi contracts and parties, arbitration cases and procedures are becoming more extensive and financially significant, which is contributing to the increased predominance of institutional arbitration in detriment of *ad hoc* arbitration. Finally, whether use of institutional arbitration makes sense or not from a cost perspective is context-

specific, and should be decided on a case by case bases; however, as the surveyed corporations has indicated, having a qualified and reputable third party administer tasks that relate to the appointment of arbitrators, their fees, time frame for arbitration, while mitigating challenges to arbitrators, and the cost and quality of this service has contributed to more parties preferring to name an arbitration institution in their arbitration clause to administer their disputes. Thus, the demand for these institutions has increased.

C. The Arbitration Institution

A significant testimony of the success and rise of arbitration as a rules-based system for dispute resolution is the proliferation of arbitration centers all around the world where institutional arbitrations are being conducted in more places than ever before. Before 1940 only ten-percent of the institutions that are around today existed; seventy percent of the institutions have been created in the last thirty years; fifty percent in the last twenty, and twenty percent in the last ten years.⁶³ This historical trend has been quite evident in the Middle East, for example, which saw the number of private arbitration centers mushroom from one center⁶⁴ in the early 1990s to over ninety-two centers listed in the Arab arbitration institutes guide.⁶⁵

⁶³ See, "The Rise and Rise of the Arbitration Institution" by Guy Pendell, CMS Cameron McKenna LLP, November 30, 2011. <http://kluwerarbitrationblog.com/blog/2011/11/30/the-rise-and-rise-of-the-arbitration-institution/>.

⁶⁴ The Cairo Regional Center for International Commercial Arbitration CRCICA is an independent non-profit international organization established in 1979 under the auspices of the Asian African Legal Consultative Organization ("AALCO").

⁶⁵ See website in Arabic, <http://www.arabarbitrators.com/a.guide%20.m.html>. Many of these centers may not be in existence or inactive any more, but the sheer number reflect the rising interest in the process in the region.

Another example of this trend comes from Latin America where the 2011 ITA's *Inaugural Latin American Arbitral Institutions Guide* proudly highlights the following:⁶⁶

The era of Latin American arbitral institutions has arrived. Building on a strong legal framework, arbitral institutions have emerged throughout the region. Parties large and small, from Latin America and beyond, have increasingly turned to these institutions, as well as international institutions, to resolve their disputes.

Another testimony about the proliferation of arbitration institution comes from the more established institutions, which have expanded their presence in new markets by either opening satellite offices, or through joint ventures with local centers in other areas of the world. The ICC International Court of Arbitration, which has had a branch in Hong Kong since 2008, is currently opening a New York office to serve the Canadian and US market.⁶⁷ The LCIA opened a satellite branch in New Delhi, India in 2009, which followed its joint venture in February 2008 with the Dubai International Financial Center to form the DIFC-LCIA. The AAA also partnered with the Bahraini chamber of commerce and formed the BCDR-AAA in 2009.⁶⁸

Proliferation of arbitral institutions is considered a natural reflection in the face of the increased movement of international commercial trade into new business

⁶⁶ The comment is made by Jonathan C. Hamilton Partner, White & Case LLP. Who is also is editor of the ITA Survey of Latin American Arbitral Institutions. <http://www.cailaw.org/media/files/ITA/Publications/arbitral-institutions-guide-dec.pdf>.

⁶⁷ See, Arbitration goes global, <http://business.financialpost.com/2013/02/05/arbitration-goes-global/>.

⁶⁸ The AAA through its International Center for Dispute Resolution (ICDR) has similar partnership relation with The International Mediation Institute, the Singapore International Arbitration Center (SIAC), The ICDR & CANACO (Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce) and The ICDR & IACAC (The Inter-American Commercial Arbitration Commission). See, *The ICDR International Arbitration Reporter*, issue 1.

hubs, particularly in India, China, and the Middle East, with signs of growth for these institutions in East Europe (Ukraine and Russia) and South America (Brazil, Chile and Peru).⁶⁹ This is also an indication of the increased success of the process in meeting disputing parties' expectations. As a result, there exists a robust international market for arbitration institutions. The boom in the commercial dispute resolution is reflected in a press release in 2010 entitled, "*Sydney is set to share in the booming market in commercial dispute resolution*"⁷⁰ to announce the first dedicated international dispute resolution center in Sydney, Australia. Some of the comments made included the following:

Australia is well placed to capitalize on the booming global market for cross border dispute resolution, particularly in the Asia Pacific region," . . . "This will be a world-class seat in a prime CBD location close to existing legal services that will position Sydney as the new regional hub for international dispute resolution, . . .⁷¹

The increasing demand of this market, which is made up of demands from the international business community (corporations or individual merchants), is placing pressure on the international arbitration community consisting of arbitrators, law offices and arbitration centers to listen to what this market is saying and respond in a manner that is consistent with the evolving trends of globalization and technology in international trade and business. The next section highlights characteristics of emerging arbitration hubs.

⁶⁹ China, India, Brazil, Mexico and Russia are expected to become five of the top six economies in the world by year 2050. "BRIC" Wikipedia, http://en.wikipedia.org/wiki/BRIC#cite_note-21.

⁷⁰ To download the full text, <http://www.acica.org.au/downloads/adr.pdf>.

⁷¹ *Ibid.*

VI. CHARACTERISTICS OF NEW ARBITRATION HUBS

The boom in the market for international arbitration institutions has in one way or another created sort of undeclared competition or what was earlier called ‘battle of the seats’ between major international and regional institutions where each is vying for a larger share of this market. In this competition, success is measured by how successful these institutions are, in transforming their jurisdiction to be a hub for arbitration, where parties prefer to go to in case any dispute arises. Therefore, many arbitration centers, as they like to call themselves, have been aggressively promoting their services by keeping their facility and their institutional rules on the cutting edge of market changes and needs. At the same time, they are lobbying officials in their respective jurisdictions for similar responsiveness with regard to the legal framework. For example, in their review of arbitration in Malaysia, submitted to The Global Arbitration Review (GAR), the editors made the following observation:⁷²

Malaysia has been rigorously undertaking steps to develop into the preferred arbitration nation and is now fast becoming one of the key arbitration hubs in the Asia-Pacific region. The progress is further enhanced by a supportive government and arbitration-friendly courts in Malaysia, which, coupled with the aggressive marketing of the KLRCA as the preferred arbitral institution by engaging companies in Malaysia and abroad to explain the advantages of utilizing the KLRCA, will see the State soar to greater heights.

In the process, modern arbitration hubs, now, feature certain characteristics that play a major role for its success in attracting parties to their jurisdiction:

⁷² “The Asia-Pacific Arbitration Review 2013” Arbitration In Malaysia, by Chong Yee Leong and Choi Fuh Mann from Kamilah & Chong and Rajah & Tann LLP,

<http://www.globalarbitrationreview.com/reviews/44/sections/152/chapters/1704/malaysia/>

(1) Legal characteristics:

- Must be a party to the 1958 New York Convention;
- Must have updated modern Arbitration Law, preferably based on The UNCITRAL Model Law that provides maximum autonomy to arbitration parties and minimum intervention from local courts;
- The court system is transparent with public case records;
- The jurisdiction has a strong judiciary tradition that is supportive of arbitration, granting parties, full and consistent support in the conduct of international;
- The Jurisdiction must have a strong tradition of the Rule of Law, supported by a highly skilled well respected judiciary;
- The legal system has good reputation for being Independent, neutral and un-corrupt;

(2) Non-legal characteristics:

- Strong regional investment market, after all arbitration hubs are dependent on economical hubs
- Centralized location with easy access;
- Availability of reputable arbitral institutions with wide scope of services that include other ADR methods and administering arbitrations under different international institutional rules such as the UNCITRAL, ICC, AAA-ICDR, ICSID . . . etc. ;
- Modern infrastructure that include good transportation facilities, by rail or by air, good communications, by telephone, fax and telex,

audiovisual and video conferencing facilities, tribunal facilities and conference rooms, in terms of shorthand writers, interpreters and so on. and access to translation and transcription services;

- Availability of skilled local support-from lawyers competent to advice on matters relevant to the conduct of the arbitration, or from other professionals (engineers, economists... etc.) to provide expert witness assistance;
- Has free and open market economy with no restriction on transfer of funds which could be part of the arbitration process. After all, most if not all existing arbitration hubs serve as commercial or financial hubs as well;
- Availability of suitable accommodation for the parties, their advisers and witnesses. Some major cities experience an acute shortage of hotel accommodation at certain times of the year;
- Safety and political stability;
- Fluency in the English language;
- Cost effectiveness.

While traditional hubs such as Paris, London, Geneva and New York possess the majority of these features and are able to continue their roles, emerging hubs generally cite *cost and convenience* to differentiate themselves from these more established hubs. This tactic apparently resonates with prospective users of arbitration as shown earlier where corporations' preference to use the traditional hubs is decreasing. In order to have an edge and enhance their appeal, many

emerging hubs are adopting or looking into new concepts and interesting initiatives that they hope will improve the efficiency and speed of arbitration proceedings.

Some of these initiatives are as follows:

1) Provide Purpose-Built Facilities:

These include modern centers with hearing facilities and the ability to house, in one location, all the related Alternative Dispute Resolution (ADR) providers in the region. For example, to promoting Singapore as an arbitration hub, the government opened Maxwell Chambers⁷³ in 2010 as the world's first purpose-built and integrated physical venue for arbitration and dispute resolution. This is a purpose-built facility houses the offices of arbitration organizations, including the SIAC, Singapore Institute of Arbitrators, the Court of Arbitration of the ICC, the Permanent Court of Arbitration and the World Intellectual Property Organization. It also provides purpose built hearing rooms, and concierge and secretarial assistance. This emphasizes that the institution is going beyond just providing specified rules, administration and basic facilities.

2) Provide Emergency Arbitration:

This is designed to be an effective alternative to seeking pre-arbitration emergency relief in court, prior to and after the commencement of arbitration, but before the constitution of the arbitral tribunal. This issue has

⁷³ See website, www.maxwell-chambers.com.

been on the table for some time,⁷⁴ and international arbitration institutions have responded to this problem by enacting rules, procedures, and other textual guidelines to provide parties with various means of obtaining interim or other emergent relief within the arbitral process. Many institutions have now introduced provisions that provide for some form of emergency relief, either through the appointment of an emergency arbitrator or through the expedited formation of the tribunal.

3) Provide Expedited Arbitration:

This refers to a framework for a procedure that is only applicable if the amount in dispute does not exceed a certain cap, but only if all parties agree. For example, SIAC arbitration rules allow for such a procedure in Article 5⁷⁵ if the amount in dispute does not exceed five million US dollars. Under the expedited procedure,⁷⁶ the dispute is resolved by a sole arbitrator. The

⁷⁴ See, "INTERIM RELIEF UNDER INTERNATIONAL ARBITRATION RULES AND GUIDELINES: A COMPARATIVE ANALYSIS," Peter J.W. Sherwin and Douglas C. Rennie. *The American Review of International Arbitration (ARIA)*, v20/no 3, 317-366, copyright 2010 ©JurisNet LLC.

⁷⁵ Article 5.1.c. of the Singapore International Arbitration Center (SIAC) Rules, 2010 provides the same same procedure in cases of exceptional urgency (Emergency Arbitration). http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130#siac_rule_5.

⁷⁶ Provisions of the procedure are provided in Article 5.2. as follows:

1. The Registrar may shorten any time limits under these Rules;
2. The case shall be referred to a sole arbitrator, unless the Chairman determines otherwise;
3. Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the Tribunal shall hold a hearing for the examination of all witnesses and expert witnesses as well as for any argument;
4. The award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time; and
5. The Tribunal shall State the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

Registrar is empowered to shorten any applicable time limits, an award must be issued within six months, and reasons may be given in summary form.

4) Multi-door Court-ADR System:⁷⁷

This Market-driven court and ADR center concept was adopted by QICDRC⁷⁸ where the Registrar or a Judge can be made available at the request of the parties to discuss with the parties the best strategy for resolving their disputes before proceedings are commenced, or as part of the Court's case management process. Thus, the Court offers a customized service to parties, taking into account the needs of speed, cost, privacy, or a requirement for international judicial legal expertise.

5) Multi-Party and Multi-Contract Arbitration:

This has been a weakness of the process that continue to pose problems, however some major arbitral institutions are incorporating provisions where, under certain conditions, parties can consider "joining" other parties to an arbitration, allowing a third party to "intervene" in an existing arbitration, and "consolidating" two or more arbitrations together.⁷⁹

⁷⁷ This system is based on the *multi-door courthouse* concept pioneered by Frank Sander, a Harvard Law Professor; in 1976. The multi-door courthouse is an innovative institution that routes incoming court cases to the most appropriate methods of dispute resolution, which saves time and money for both the courts and the participants or litigants. See Article "THE EVOLUTION OF A MULTI-DOOR COURTHOUSE." Spring 1988, By Gladys Kessler and Linda J. Finkelstein, 37 Cath. U.L. Rev. 577.

⁷⁸ See QICDRC Services, <http://qicdrc.com.qa/Services.aspx>. Also see article "Qatar International Court Court plans expansion" Monday, 02 July 2012, <http://www.thepeninsulaqatar.com/qatar/199730-qatar-international-court-plans-expansion.html>.

⁷⁹ Examples for these techniques:

- (1) Joinder, which refers to the joining of parties (usually contracting parties, but potentially other third parties as well) to an arbitration by an existing party - Article 22 of the LCIA rules

VII. EMERGING ARBITRATION HUBS

As the market for international Commercial Arbitration grows, many cities and jurisdictions are positioning themselves to claim a share of this market. The traditional hubs such as London, Geneva, Paris and New York, which have long enjoyed this expansion exclusively, are now being challenged by emerging cities or jurisdictions (e.g., Vienna, Stockholm, Milan and Madrid in Europe, Hong Kong, Singapore, Tokyo, Shanghai, Kuala Lumpur and Seoul in Asia, Dubai, Bahrain, Cairo, in the Middle East Asia) where these emerging hubs are serving as a seat and/or venues for hearings and deliberations for many arbitrations. In addition, there are also another group of hopefuls that are looking to catch up with this market and serve as arbitration hubs; these include Qatar, Cypress, Mauritius, Nigeria, India, Sri Lanka, Chile, Bahamas and Russia. In this chapter we shall only present two of these hubs that have been quite successful over the last ten years gaining prominence and emerging as a leader in their respective region and becoming respectable competitors at the international level; they are Singapore and Hong Kong.

permits joinder of a third party to the arbitration upon the application of a party. Consent of the third party is required. There is no express requirement that the third party must be party to the arbitration agreement so this should permit joinder in multi-contract situations.

(2) Intervention, which refers to the voluntary intervention in an existing arbitration by a third party – Most institution have no express provisions for intervention, so parties who wish to allow for intervention should include custom clause drafting to that effect in the arbitration agreement.

(3) Consolidation, which refers to the merging of separate but related arbitrations, often where the related arbitration has been commenced pursuant to a different arbitration agreement and/or involves a different party - Article 10 of the ICC rules permits consolidation of two or more pending arbitrations at the request of a party, provided certain conditions.

For more details on this subject see article, "Dealing with Multi-Party and Multi-Contract Arbitration Issues." June, 2012. <http://www.herbertsmithfreehills.com/-/media/HS/T-060612-18.pdf>.

A. Singapore

Singapore's rise to arbitration prominence began about ten years ago after the government Legal Services Working Group of the Economic Review Committee recommended that the State do the following:

ADR centers in Singapore should form affiliations and alliances with foreign arbitration centers, and also periodically review the constitution of ADR panels, for example, to include experienced ADR practitioner from other jurisdiction, fees and costs (to ensure competitiveness), infrastructure and facilities. Demand factors have been identified by the LWG which would be influential and bear upon the selection of Singapore as the preferred forum or seat for ADR.⁸⁰

Since then "The Singapore Government has been extremely responsive to legal developments in its jurisdiction, with an enviable reputation throughout the arbitration community for its ability to update and improve arbitration legislation within a matter of months."⁸¹ Subsequently, Singapore has updated arbitration legislation, which came into force in January 2010 and which has effectively enhanced Singapore's competitiveness to attract international arbitration. The government of Singapore also funded the state-of-the-art, purpose-built Maxwell Chambers facility as a one-stop shop for dispute resolution where a number of dispute resolution institutions and many foreign arbitrators and councils have opened office. The Maxwell Chambers demonstrate Singapore's commitment for making its jurisdiction a leading venue for dispute resolution in the region and

⁸⁰ A copy can be downloaded from Ministry of Trade and Industry website, <http://www.mti.gov.sg/ResearchRoom/Pages/Reports-of-the-Economic-Review-Committee.aspx>.

⁸¹ See Nish Shetty response in "TalkingPoint: Arbitration In Singapore." June, 2011. http://www.financierworldwide.com/article_printable.php?id=8215.

beyond, and its success is making other jurisdictions consider building similar facilities, as is the case in Sidney, Australia.

Singapore has been successfully promoting itself as a venue for arbitration, which definitely has helped its jurisdiction to emerge as the leading hub in Asia. One of the conclusions of the 2010 International Arbitration Survey conducted by Queen Mary University of London was that “Singapore has emerged as a regional leader in Asia,”⁸² where Singapore, based upon factors such as perceived neutrality and impartiality and track record, was rated as highly as Paris as a preferred hub, and ahead of traditional destinations such as New York. This can be contrasted with the results of the previous survey conducted by the University in 2006, in which Singapore was not even rated. Some of the key advantages of using Singapore as promoted by its institutions⁸³ are the following:

- 1) The government is supportive of arbitration (sees it as a good business for Singapore);
- 2) Good courts and an emerging body of arbitration case law;
- 3) Arbitration friendly courts, which offer a high level of support for arbitration yet a minimal level of intervention; and
- 4) A central location in Southeast Asia with 5,400 scheduled flights a week to 200 cities;

⁸² Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

⁸³ For example see SIAC website, http://www.siac.org.sg/index.php?option=com_content&view=article&id=47&Itemid=65.

- 5) Singapore is currently rated at number 1 in world for neutrality in the Corruption Perceptions Index;
- 6) Maxwell Chambers which has the largest integrated dispute resolution complex, housing both modern hearing facilities and top international ADR institutions including SIAC, ICC, ICDR, ICSID, PCA, LCIA and WIPO;
- 7) SIAC, the national arbitration center, has been one of the most successful centers in the world more than tripling its case load in the last 10 years and as of 31 December 2012; SIAC received 235 new cases, a 25% increase in new filings on 2011 and a new record in SIAC history;⁸⁴
- 8) Parties have a freedom of choice of counsel in arbitration proceedings regardless of nationality;
- 9) There is no restriction on foreign law firms engaging in and advising on arbitration in Singapore;
- 10) Non-residents do not require work permits to carry out arbitration services in Singapore;
- 11) Lower costs than nearly any other major center of arbitration.

B. Hong Kong

As Asia's world city, Hong Kong is the most established venue for arbitration in Asia and is most popular in relation to China-related disputes. The Hong Kong International Arbitration Center (HKIAC) has been providing its services to the region since 1985. The ICC opened its Hong Kong office in 2008 and recently, the China International Economic and Trade Arbitration Commission (CIETAC) opened its office

⁸⁴ See SIAC Annual Report 2012, http://www.siac.org.sg/images/stories/documents/SIAC_Annual_Report_2012.pdf.

in Hong Kong in 2012, which should consolidate Hong Kong's leadership status as a leading venue for dispute resolution.

Hong Kong is traditionally known for having a robust legal system, independent judiciary, and a large base of legal professionals, which among other factors, enhance Hong Kong's reputation impartial jurisdiction for dispute settlement. Hong Kong also, has a modern Arbitration Law that was enacted in 2011, which is mostly based on the UNCITRAL Model Law. It has features that encompass the latest and best international practice, and provides a solid foundation for the future healthy development of arbitration in Hong Kong. While Hong Kong is not mentioned as one of the top seats in the 2010 survey,⁸⁵ it continues to have an edge edge in the number of cases handled by its institutions.

For example, the HKIAC handled 293 arbitration cases in 2012 compared to 235 cases by SIAC in Singapore. In light of the surge of economic activity, Hong Kong will likely remain the international arbitration hub in Asia for resolving commercial disputes, particularly due to its relationship with and proximity to Mainland China. Some of the Key advantages of using Hong Kong, as promoted by its institutions,⁸⁶ are the following:

- 1) Hong Kong preserves the Rule of Law and its Common Law legal System with judges who are independent, professional, and efficient;

⁸⁵ Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

⁸⁶ For example see HKIAC website, <http://www.hkiac.org/index.php/en/arbitration/why-hong-kong>.

- 2) it offers highly cost-effective arbitration services compared to most other major arbitration institutions in Asia and around the world;
- 3) Hong Kong's courts are considered pro-arbitration and take a "hands off" approach with respect to arbitration;
- 4) Hong Kong has an extraordinarily large pool of multilingual professionals;
- 5) for Mainland China Parties: Certain Restrictions on Arbitration outside Mainland China;
- 6) for Taiwanese Parties, Taiwan is not a member of the New York Convention but Taiwan enforces Hong Kong awards;
- 7) it is preferred by many Korean, Japanese and Vietnamese parties;
- 8) it has superb infrastructure with strong institutions, HKIAC, ICC, CIETAC;
- 9) It has strong legal profession (arbitrators, councils and other professionals);
- 10) parties are free to choose arbitrators from anywhere in the world, and are to choose lawyers either from Hong Kong or from other jurisdictions;
- 11) Hong Kong is conveniently located in Asia with direct flights to and from most major cities in the world.

The history and development of these two main hubs of arbitration in Asia, compared to other hubs such as Tokyo, Kuala Lumpur and Seoul, indicate that the strong tradition of the Common Law legal system and fluency in the English language have been among their strongest assets in becoming preferred hubs of international parties. Moreover, of the two jurisdictions, Singapore is perhaps doing the most to re-invent itself with innovative enhancements to its legal and non-legal

infrastructure; on the other hand, Hong Kong is also relying on its special relationship with mainland China and its historical position as a world financial and commercial center, which explains its slide from the lead position, and the concurrent ascendance of Singapore.

VIII. CONCLUSION

For governments and business, world-wide, globalization dynamics have made international arbitration the dispute resolution method of choice. As a result, recognition and development of the process have come far in an expanding list of States and jurisdictions. While many jurisdictions have harmonized their legal infrastructure to keep abreast of modern international arbitration standards (mainly to attract investments), many others have observed a market opportunity in the process itself, and they have embarked upon a program to establish themselves as arbitration hubs. This has introduced a new round of players into the arena of arbitration competition, who are enticing disputing parties to select their respective facilities. Traditionally, the leading venues of London, Paris, Geneva and New York have enjoyed the lion's share of this market for their robust legal structure and reputable court system.

While the 2010 survey⁸⁷ on choices in international arbitration indicates that legal considerations of the seat are on top of the list, for factors influence the choice of the seat of arbitration. As more States harmonize their arbitration legislation with modern standards, legal considerations are taking a back seat to non-legal

⁸⁷ Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

considerations in choosing a venue for arbitration. In modern-day arbitration, court interference in proceedings is minimal, and the use of public policy as a ground to refuse arbitral awards is being reduced to a very narrow scope by many nations, which are keen to project a friendly image of Commercial Arbitration.

Additionally, arbitration procedures have become highly standardized with arbitration rules of all major institutions becoming very similar with only minor differences in the scope of services. Thus, cost and convenience are becoming bigger factors in the choice of an arbitration venue, while the legal seat of arbitration could be anywhere in the world. The practical factors affecting choice of a venue for arbitration include location, accessibility, language, culture, and availability of reputable institutions, and law professionals who are familiar with substantive and procedural laws of the agreements. The increased importance of these factors explain the continuing migration of arbitration cases from traditional seats that hold the edge on the legal considerations⁸⁹ to other venues closer to parties' home for convenience or to reduce costs.

One observation of note is the significance of government support to building a successful arbitration hub. While many governments, such as those of Japan, Egypt, India and Chile, and others, such as Hong Kong, Singapore, Mauritius, Qatar and Australia, have expressed their appreciation of the process by revamping their legal framework, they have also taken extra measures to promote their respective jurisdictions as arbitration hubs. These governments and others are exhibiting a high

⁸⁹ See "World Bank, *Investing Across Borders 2010*" where average score for overall Strength of Framework for Arbitration had UK and France (94.0, 90.2 respectively) ahead of Singapore (89.9) based on strength of laws index, ease of process index and extent of judicial assistance index. <http://iab.worldbank.org/Data/Explore%20Topics/Arbitrating-disputes>.

level of support and collaboration with their local arbitration institutions and professionals. They are also responding to market needs and sometimes providing tangible facilities and infrastructure that make for an easy and cost effective process. Case in point is the Singapore government's role in the recent development of Maxwell Chambers and the Australian International Disputes Center in Sydney which was partially funded by the Commonwealth and NSW Governments.⁹⁰ This type of support goes a long way to guarantee a high level of commitment by these jurisdictions to the process, which will assuredly be observed by the professional community.

Another observation is that while States with Civil Law systems, such as those of China, South Korea, and Japan⁹¹ are major trade centers in Asia, their arbitration framework does not appeal to foreign parties, and they have remained largely limited to the local market because they rely mainly on the strength of their economies. This is in stark contrast to States with Common Law legal systems, such as Hong Kong, Singapore, Kuala Lumpur, Mauritius and Australia, all of which have been attracting parties from outside their jurisdictions, and thus, are emerging as more successful hubs of arbitration. This observation seems to support a preference of Common Law systems⁹² over Civil Law systems as legal frameworks for

⁹⁰ See press release in 2010 titled "*Sydney is set to share in the booming market in commercial dispute resolution*" <http://www.acica.org.au/downloads/adr.pdf>.

⁹¹ The legal system of these States Combines elements of continental European Civil Law systems, with English-American influence, and Chinese or Japanese classical thought. See CIA world Factbook website, <https://www.cia.gov/index.html>.

⁹² Some of the reasons that attribute to this preference are the following:

- English is the language of international business
- English law is transparent and predictable

arbitrations, at least from the commercial prospective in Asia and Africa. Additionally, and as a result of being former British colonies, English became a common language for many citizens and business in these jurisdictions. The pervasiveness of English has helped facilitate communications and has broken down cultural barriers for foreign parties because the language is currently the universal language of international business.

On a final note, the boom in the market for international Commercial Arbitration, which has ignited this quiet but real competition, is attracting new players who want to have a cut of this ballooning market. Not only are new jurisdictions involved in this competition, but emerging institutions, such as the SIAC are also expanding into new markets⁹³ following the lead of the established institutions such as the AAA-ICDR, LCIA and the ICC, who continue to look for opportunities to extend their services to other emerging business hubs. Finally, large multinational law firms are also racing to position themselves in these markets⁹⁴ where the name of the game for these firms is who has the highest caseload or the

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- English law offers more flexible arrangements where it is based on the principle of freedom of contract
 - English law supports the needs of modern commerce

See, Why choose English Law, publication, "England and Wales: The jurisdiction of choice," by The Law Society of England and Wales. https://www.haitz-rechtsanwaelte.de/de/newsarchiv/data/aktuelles_4_2.pdf.

⁹³ SIAC opened its first satellite office in Mumbai, India in April, 2013 and planning to open similar offices in Seoul and the Middle East. See article at, [http://www.law.com/jsp/article.jsp?id=1202598184650&Singapore Arbitration Center Opens Mumbai Office&slreturn=20130414155645](http://www.law.com/jsp/article.jsp?id=1202598184650&Singapore+Arbitration+Center+Opens+Mumbai+Office&slreturn=20130414155645).

⁹⁴ For example I could count at least 10 of the top 30 firms listed in GAR 30 International Law Firms that have office in Dubai, United Arab Emirates, for a complete list see, <http://www.hg.org/law-firms/page3/international-law/united-arab-emirates/dubai.html>.

largest disputed monetary amount⁹⁵ in this ‘Judge for hire’ or ‘privatized justice’⁹⁶ business.

Fifteen years ago, in their book, Yves Dezalay and Bryant G. Garth offered the following explanation:⁹⁷

it seems the community of arbitration specialists has moved a long way toward forming the nucleus of a sort of offshore justice. This expression, which alludes to fiscal paradises exploited by the operators of the great financial centers, is rather far from the unified international private system of justice-organized perhaps around one great *lex mercatoria*—that might have been imagined by some of the pioneering idealists of law. The current model can be understood much better as simply a delocalized and decentralized market for the administration of international Commercial Arbitration disputes, connected by more or less powerful institutions and individuals who are both competitive and complementary.

This characterization could not be more accurate in describing the status of arbitration at any time than today. However, perhaps one could concur with the conclusion made in an article entitled, “Global Trends in International Arbitration”⁹⁸ by Gary Born and Wendy Miles, where they expressed the following opinion:

[i]nternational arbitration is driven not by lawyers or the legislature but by parties. Arbitration remains a popular choice for parties because it is effective and, in the international context, capable of overcoming many of the

⁹⁵ See GAR-100, 2012 “guide to specialist arbitration firms,” which list top 30 legal firms in term of their number of cases and value of dispute. A copy can be downloaded from, <http://www.whitecase.com/files/Uploads/Documents/awards-GAR-100-2012-White-Case.pdf>.

⁹⁶ P. H. Lindblom, 1992. “The Privatization of Justice: Some Aspects of Recent Developments in American and Swedish Procedural Law.” *Netherlands International Law Review*, 39, pp. 199-214.

⁹⁷ Yves Dezalay and Bryant G. Garth, “Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order,” University Of Chicago Press (July 20, 1998), p 58.

⁹⁸ This article is published by Wilmer Cutler Pickering Hale and Dorr LLP, and can be downloaded from from this website http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/GlobalTrends_InternationalArbitration.pdf.

problems inherent in other dispute resolution alternatives. Provided those involved in international arbitration continue to be mindful of the objectives of the parties, and ensure that international arbitration continues to meet their needs, its growth in popularity is set to continue for many years to come.

In concurrence with the above sentiments, with respect to international arbitration, we can likewise proffer our thoughts for consideration. These include the often recognized fact that arbitration is less costly in the long run, but this is, in our estimation, not its best feature, which could be that it can defuse the hostility that can arise from litigation. After considering the many upsides of arbitration, it is now time to consider the feasibility of establishing a viable arbitration hub in the Middle East.

* * *

CHAPTER VI

PROSPECTS FOR MODERN ARBITRATION

HUBS IN THE MIDDLE EAST

It is not at all apparent to me that prohibiting arbitration will lead to a fairer, more equitable battlefield in the courtroom. Indeed, I believe the opposite to be true; the small, economically strapped litigant cannot afford to wage war in the courtroom. A war of attrition ensues in which the costs and uncertainty of litigation chill the individual from exercising the option of litigating. Arbitration is a preferable alternative, both in terms of efficiency and cost.¹

I. INTRODUCTION

In the past, foreign investors have been reluctant to seat their arbitrations, or hold their proceedings in Middle Eastern venues. Regarding the perception of the legal infrastructure, court systems, and professional support in most States of the Middle East, opinion has ranged from negative, to improving with a reservation that the practice is still in its infancy, and the experience and training of most lawyers and judges in the region falls below international standards. This is actually echoed by some Arab arbitration experts. Fahd Shamrani, for example, Vice President of the

¹ Kenneth Feinberg, Special Master for the September 11th Victim Compensation Fund Letter to U.S. Senate Committee on the Judiciary December 19, 2007. <http://www.instituteforlegalreform.com/featuredtool/arbitration-quotes>. (Last visited 7/30/13).

Arab Union of International Arbitration, declared in 2009² that Arab businesses incur losses and fines of up to \$20 billion annually to international arbitration. He stated that this loss is mainly due to lack of qualified personnel, as well as weak domestic legislation and conflict of investment policies.

As we discussed in previous chapters, several States in the Middle East, namely, Bahrain, Egypt and Dubai, and more recently, Qatar, are now demonstrating eagerness to change that perception. By introducing various elements of modern arbitration infrastructure, these States are currently considered the region leaders in terms of the race to attract international arbitrations. While Egypt is the historical leader and relies heavily on the strength of its legal framework, which is most familiar to the contracting parties in the Arab world, and Bahrain has been a center for many disputes related to GCC parties, Dubai and Qatar are relatively new players in the International market of Arbitration, who through their offshore common law jurisdictions have the potential to become popular venues for both regional and international arbitration parties.

The legal regimes of these jurisdictions were presented in Chapter II with more depth on Qatar and its dual jurisdictions in Chapter III. In summary, both Bahrain and Egypt have adopted the UNCITRAL Model Law on Arbitration. The former adopted it without any modification for international arbitrations only, while the latter made a few modifications and adopted it for both domestic and

² See article, "The absence of legal efficiency cost the Arab world 20 billion dollars a year" published in al-Asharq al-Awsat Newspaper. September 12, 2009, Issue 11246. He also pointed out that there are about 300 stalled projects in Saudi Arabia due to claims and disputes with lack of means to solve them, which is indicative of the chaotic State of dispute resolution in Saudi Arabia. <http://www.aawsat.com/details.asp?section=6&article=535638&issueno=11246#.UZZpELWG18G>.

international arbitrations. On the other hand, Dubai and Qatar, as of today, continue to use their outdated civil code provisions on arbitration in their respective State jurisdictions, while their off-shore jurisdiction, DIFC and QFC, use a modified modern version of UNCITRAL Model Law.

Although, many studies have been done, and numerous articles written on the subject of developing a Commercial Arbitration venue in the Middle East, much of the literature has focused on the legal frame work of these jurisdictions, in many cases, citing problematic issues associated with historical enforcement difficulties and their interaction with Shari'a Law, which provided an attractive subject matter that was heavily deliberated in most literature. However, in looking to the future, there are strong indications that both Qatar and UAE will soon adopt modern Arbitration Laws in line with the drafts being circulated for new UAE Federal Law on Arbitration or the GCC Unified Law on Arbitration. With this adoption, combined with the fact that all four States have signed onto the New York and the ICSID conventions,³ it is a sure bet that in the near future all four jurisdictions will have all the ingredients of a modern legal frame work.

The question that now arises is that, given that all four States have a similar legal frame work and many shared social and cultural values, what are the likely elements that will affect the selection of an arbitration venue amongst these jurisdictions, and which jurisdiction has the most potential to succeed in the race to become a much sought after hub of arbitration? Moreover, these jurisdictions are also facing fierce competition from other well-established international venues in

³ Including many regional and bilateral treaties such as the GCC and Riyadh conventions that make for easy recognition and enforcement of judicial and arbitral awards, see Chapter II.

Europe; namely, those of London and Paris, and those located in Asia where the arbitration market is currently dominated by Singapore and Hong Kong. To answer this inquiry, we will research published reports of major economic and legal indices, published by established world organizations, and analyze the various legal, social, economic and political aspects considered in these reports that could shed some light on the weakness and strengths of each jurisdiction. Hopefully, our research into this area should enable anyone, curious enough, to better assess each jurisdiction's prospects as a hub; further, we shall provide recommendations for improvements where we believe such are needed. This will be done by taking guidance from examples set by other successful hubs, such as Singapore and Hong Kong, which were discussed in Chapter V. The present chapter also discusses the rise and prospects of off-shore legal jurisdictions in Qatar, Dubai, and Bahrain and presents the prospects of their corresponding dispute resolution institutions, the QICDRC; the DIFC-LCIA; BCDR-AAA, of transforming these jurisdictions into world-class hubs for arbitrations.

II. THE USE OF PUBLISHED INDICES/INDICATORS

Governments, professionals, and investors rely on many published reports and surveys by government agencies, non-profit organizations and even private companies for more predictable planning and better informed decision making processes. The greatest benefit of these publications is that they provide indices or indicators that objectively measure or assess social, economic and legal characteristics of various states, which presumably, affect the overall health of investment and development in those economies. In this chapter we will make use

of some of these indicators (Appendix I) to help us make better assessments of the investment environment in the four States of the Middle East that are competing to emerge as the major arbitration hub of the region as the status of both business and arbitration activities go hand in hand.⁴ Also included in Appendix I, for comparison purposes, is the United Kingdom (UK) representing an established arbitration hub, and Singapore, representing an emerging arbitration hub. We are also including Saudi Arabia in the list to demonstrate the size of its economy, which is the largest in the Middle East by far, and its lack of efficient legal institutions, which means that Saudi Arabia could constitute the largest demand for the dispute resolution market in the above States. India and China are also included for comparison only.

A. Indicators as Performance Indicators

There are many legal and economic indicators that measure States' performance; however, for the sake of this study we will mainly use the most common and vital economic indicators listed below:

1. The 2012 Gross Domestic Product (GDP)

As a primary indicator of a State's economic health, the GDP is one such indicator used. The GDP represents the total dollar value of all goods and services produced within a State over a one-year period; it also provides a reliable measure of the size

⁴ This sentiment is echoed in a recent interview with Chester Cooper, chairman of the Bahamas Chamber of Commerce regarding their plans to emulate Panama in developing their nation as a hub for arbitration, He said, *"It's important for advancing the Bahamas as this global, or Western Hemisphere, business hub that we have all the infrastructure in place to make it happen. A key element in driving financial services and business generally for Panama is an arbitration center."* See Article in Tribune 242 "Chamber To Be 'More Involved' On Arbitration Plans" February 12, 2013 by N. Hartnell. <http://www.tribune242.com/news/2013/feb/05/chamber-to-be-more-involved-on-arbitration-plans/?news>.

of an economy of any particular State. GDP Growth is expressed as a comparison to the previous period, which provides a good measure as to whether an economy is growing or shrinking. For example, if the year-to-year GDP is up 3%, this is thought to mean that the economy has grown by 3% over the last year. The US Federal Reserve, for example, uses data such as the real GDP and other related economic indicators to adjust its monetary policy.⁵ GDP per capita is considered an indicator of a State's standard of living, or the wealth of a State. GDP data is compiled by many world organizations including the UN and the World Bank, but we shall use the 2012 estimates of the CIA World Fact Book.⁶

2. *The 2012 Corruption Perceptions Index*

This index is published in an annual report by Transparency International, and measures the degree to which public sector corruption is perceived to exist in 176 States and territories around the world. *“It is a composite index, a combination of surveys and assessments of corruption, collected by a variety of reputable institution.”*⁷ States are ranked from the least to the most corrupt where a high ranking number means more corruption.

⁵ See, “Monetary Policy and the Federal Reserve: Current Policy and Conditions”, by: Congressional Research Service. <http://www.fas.org/sgp/crs/misc/RL30354.pdf>.

⁶ See website, <https://www.cia.gov/library/publications/the-world-factbook/index.html>.

⁷ See, “WHAT IS THE CORRUPTION PERCEPTIONS INDEX” http://www.transparency.org/cpi2012/in_detail.

3. The 2013 Global Competitiveness Index (GCI)

The GCI is published in an annual report by the World Economic Forum,⁸ and assesses the competitiveness landscape of 144 economies in the world, while providing insight into the twelve pillars of competitiveness that drive their productivity and prosperity. The annual report defines competitiveness as follows:

set of institutions, policies, and factors that determine the level of productivity of a State. The level of productivity, in turn, sets the level of prosperity that can be earned by an economy. The productivity level also determines the rates of return obtained by investments in an economy, which in turn are the fundamental drivers of its growth rates. In other words, a more competitive economy is one that is likely to sustain growth.”⁹

Some of the basic pillars used in this index include the institutional environment of the legal and administrative framework and infrastructure of the respective State. Relative to development of our dissertation topic, we shall list and highlight these two pillars because we consider them the most relevant for the development of a jurisdiction into an arbitration hub.

4. The 2013 Doing Business Index (DBI)

This index is published annually by the International Finance Corporation (IFC) and the World Bank. The index tracks business-friendliness of government rules in 185 economies around the world by providing objective measures of business regulations and their enforcement. The DBI offers measurable benchmarks for

⁸ The world Economic Forum is an independent, not-for-profit foundation which is supported by membership, drawn from leading global companies. It is not tied to any political, partisan or national interest.

⁹ See 2012-2013 Global Competitiveness Index, p. 4.

reform, and serves as a resource for academics, journalists, private sector researchers and others interested in the business climate of each country.¹⁰ The index is based on the average of ten sub-indices¹¹ that include enforcing contracts that measure the efficiency of the judicial system in resolving a commercial dispute. We are listing and highlighting this sub index as it is very much relevant to purpose of our study.

5. The 2013 Economic Freedom Index (EFI) / the Rule of Law

This is an annual guide published by The Wall Street Journal and The Heritage Foundation. This index tracks economic freedom in 185 States by creating ten benchmarks in liberty, prosperity and economic freedom that gauge the economic success. These benchmarks are grouped into four key categories or pillars:

- 1) Rule of Law (property rights, freedom from corruption);
- 2) limited government (fiscal freedom, government spending);
- 3) regulatory efficiency (business freedom, labor freedom, monetary freedom); and
- 4) open markets (trade freedom, investment freedom, and financial freedom).¹²

¹⁰ See About Doing Business, <http://www.doingbusiness.org/about-us>.

¹¹ The 10 sub-indices are: Starting a business; Dealing with construction permits; Getting electricity; Registering property; Getting credit; Protecting investors; Paying taxes; Trading across borders; Enforcing contracts; Resolving insolvency. See Methodology. <http://www.doingbusiness.org/methodology>.

¹² See, 2013 Index of Economic Freedom, About the Index, <http://www.heritage.org/index/about>.

The EFI provides unambiguous confirmation of the importance of the Rule of Law to economic growth and prosperity. For its importance to our study, we will list the Rule of Law Index from this report separately as it is considered one of the most important characteristics of a successful arbitration hub, as presented in Chapter V. In general, “Rule of Law” is thought of as something that provides security to our societies, and ensures that disputes are resolved fairly and maintains stability. However, from the international business point of view, “Rule of Law,” as defined by the index, means elimination of legal and procedural advantages of local investors to create equitable treatment to all with no home field advantage.¹³ The Rule of Law has been determined to be a critically important factor in determining which States attract dynamic flows of global investment capital.

6. 2010 Investing Across Borders

The 2010 *Investing Across Borders* is a World Bank Group initiative that compared the regulation of foreign direct investment in eighty-seven States around the world. The indicators focus on four specific areas;¹⁴ most important for our study is the

¹³ See, Index Methodology for Rule of Law, <http://www.heritage.org/index/book/methodology>.

¹⁴ See “About Investing Across Borders,” <http://iab.worldbank.org/About-Us>, the four areas are:

1. Investing Across Sectors indicators measure the degree to which domestic laws allow foreign companies to establish or acquire local firms. The indicators track restrictions on foreign equity ownership in 33 sectors, aggregated into 11 sector groups, including primary sectors, manufacturing, and services.
2. Starting a Foreign Business indicators record the time, procedures, and regulations involved in establishing a local subsidiary of a foreign company (in the form of a limited liability company).
3. Accessing Industrial Land indicators evaluate legal options for foreign companies seeking to lease or buy land in a host State, the availability of information about land plots, and the steps involved in leasing industrial land.
4. Arbitrating Commercial Disputes indicators assess legal frameworks for alternative dispute resolution, rules for arbitration, and the extent to which the judiciary supports and facilitates

indicator for Arbitrating Commercial Disputes, which assesses the “legal frameworks for alternative dispute resolution, rules for arbitration, and the extent to which the judiciary supports and facilitates arbitration. The indicators analyze national regimes for domestic and international arbitration for local and foreign companies.”

Unfortunately, given that the report is a pilot program, it only covered eighty-seven States, did not include three of the four jurisdictions covered by our study, and it has not been repeated since 2010. We find it of great value to go through the list of survey questions as provided on the methodology¹⁵ and score the three missing jurisdictions; namely, Qatar and Bahrain, and Dubai that are represented by the UAE. The questionnaire covers three areas of arbitration in each State which are the following:

- 1) Strength of laws;
- 2) Ease of process;
- 3) Extent of judicial assistance.

Each index for each area is scored from 0 to 100 where the higher score indicates better reassurance and security to foreign companies as to the conduct of the process in that State. For comparison purposes, the scoring was done based on the current status of arbitration legislation as it exists now, rather than the new Draft Laws assumed to be adopted in the near future. We relied heavily on many

arbitration. The indicators analyze national regimes for domestic and international arbitration for local and foreign companies.

¹⁵ A copy of “Arbitrating Commercial Disputes Methodology” including the survey questionnaire can be downloaded from, <http://iab.worldbank.org/Methodology/Arbitrating-disputes>.

arbitration guides and reviews for each of these jurisdictions that we came across throughout the research, particularly the “*Global Arbitration Review*.”

III. WHAT THE INDICATORS TELL US

In reviewing the economic indicators (Appendix I), all successful arbitrations hubs such as London and Singapore, which are listed in the appendix, and Hong Kong and Paris, as well as others not listed, have consistently received high scores across the board, and have some of the highest rankings in economic, socio-economic and legal related considerations to do a business and resolve its disputes. It is easy to recognize that there is a direct correlation between the successes that a jurisdiction has in attracting arbitration parties, and its ability to draw businesses and investment. As a first conclusion, therefore, it could be argued that for an arbitration hub to succeed, there need to be an efficient and well recognized commercial center that is attractive to business.

On the other hand, many commercial hubs around the world including, giant and robust economies such as China and India, and to a lesser degree, Saudi Arabia, which have high growth and are ranked relatively high (29, 59, and 17 respectively) in the GCI, have been able to draw all kinds of international investors, whether for their cheap industry, cheap labor market, natural resource or construction; however, these States are failing miserably to attract international parties to arbitrate disputes their jurisdictions. On the contrary, even local parties prefer to arbitrate outside these jurisdictions, where the process is much easier and more efficient.

The failure of these jurisdictions to build on the success of their economies with similar success in the market of dispute resolution, could be attributed to their

failing in one of those areas covered by the indicators; for example, economic freedom is scored low in China (ranked 91 in the world) and India (ranked 132nd) the process itself is not perceived well and scored very low in Saudi Arabia where the average score for arbitrating disputes is one of the lowest at “43”¹⁶ in the 2010 Investing Across Borders. Thus, we see smaller economies with more efficient systems filling the gaps and serving as hubs or gateways for those nations. For example, Hong Kong is serving the Chinese market; Singapore is serving the Indian market, and Bahrain and Dubai are serving the Saudi Arabian market. A second conclusion is that strong economies with strong arbitration regimes will not be successful in attracting arbitration parties without economic freedom, rules of law, and well accepted regulations.

One final observation relates to living standards. All prominent seats and emerging hubs of arbitration, regardless of their population or economy size, share high or above average standards of living that could be reflected in their GDP per capita figures. This is understandable because poor nations seem to suffer from corruption and the general lack of rules of law. India and Egypt, for example, both have strong economies with free market democratic systems and strong arbitration regimes that provide attractive environment for investors; however, the poor living conditions in these two States feed corruption at all levels. The US State department,

¹⁶ Saudi Arabia has enacted new Arbitration Law since the publication of this report which should improve its score as far as Strength of Laws Index significantly, however I do not believe that the new law will have much effect on the Ease of the Process Index or the Judicial Assistance Index, Saudi Arabia bureaucracy and conflict of laws where all laws and regulations are subject to the courts’ interpretation of Shari’a will stand in the way of the new law effectiveness with regard to the judicial.

in its review of Egypt,¹⁷ finds that, “Corruption is still pervasive at all levels of Egyptian society, and U.S. investors continue to report requests for bribes from Egyptian government officials.” This kind of behavior is also expressed in the *Transparency International Report* that ranked India and Egypt high on corruption at 94 and 118, respectively. As a third conclusion of our review of the indicators, States with poor living standards have high levels of corruption, which, regardless of how strong their arbitration is, diminishes their attraction as viable arbitration centers.

IV. ANALYSES AND PROSPECTS FOR EGYPT

Boasting a GDP of approximately \$537.8 Billion (USD), Egypt is the second largest economy in the Middle East after Saudi Arabia; however, it is also the most populous State in the region with a population of 85 million. The lack of natural resources and prolonged periods of mismanagement and over population, have made living conditions for the average Egyptian, fairly wretched. These factors have contributed to frequent public discontent over the past ten years.¹⁸ In 2004, the Egyptian government pursued aggressive economic reforms¹⁹ with the intent to attract

¹⁷ See, “2012 Investment Climate Statement – Egypt.” U.S. Department of State. <http://www.State.gov/e/eb/rls/othr/ics/2012/191142.htm>.

¹⁸ As of today, July 11, 2013, Egypt is undergoing yet another change of regime as the democratically elected President, Mohammed Morsi, was forced from office a year to the day after his inauguration, which occurred on July 3, 2012. He was the first civilian and first Muslim to hold the office of President.

¹⁹ In 2004 the Ministry of Economy was eliminated and a powerful new Ministry of Investment took over broader range of functions. It issues law (no. 14/2004) which redefined the General Authority on Investment and Free Zones (GAFI) mandate to create a modern one-stop shop in Cairo and eliminate the complex registration and licensing procedures and render them simple for investors – turning hundreds of steps and dozens of agencies into a single stop. Also Income Tax Law No 91 of 2005 reduced the Corporate Tax rate from 42% to 20%. <https://www.wbginvestmentclimate.org/toolkits/investment-generation-toolkit/upload/Egypt-s-One-Stop-Shop.pdf>.

foreign investment and facilitate GDP growth. These reforms have helped the State to register relatively high levels of economic growth averaging about 5% a year from 2005 to 2010. However since the eruption of the so called Arab Spring, and the ouster of President Hosni Mubarak, in February 2011, the succeeding Egyptian government has backtracked on many of these economic reforms that were aimed at increasing social spending to address public dissatisfaction. In this process, government revenue has in fact decreased, and further, the continuing political instability has caused economic growth to slow significantly to less than 2% in 2012; consequently, foreign direct investment dropped from \$6.8 Billion in 2010 to \$3.5 Billion in 2012.²⁰ To make matters even more dire, overall economic growth is expected to remain slow for few more years.

As compared to the rest of the world, socio-economic indicators in Appendix I reflect below average status for Egypt across the board. More importantly the indicators also reflect a decline in its status as compared to 2010 figures, before the 2011 revolution. Below are some findings from the indicators listed in Appendix I on the status of Egypt.

- 1) Egypt's overall ranking in the 2013 Global Competitiveness Index is 94th out of 144 economies. This is a precipitous drop from its ranking in 2010²¹ when it was ranked 81st in the world.
- 2) Egypt's Economic Freedom score is 54.8, making its economy the 125th freest economy according to the 2013 Index. A significant drop from the

²⁰ See United Nations UNCTAD publication, "GLOBAL INVESTMENTS TREND MONITOR" http://unctad.org/en/PublicationsLibrary/webdiaeia2013d1_en.pdf.

²¹ http://www.webforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf.

2010 index when it scored 59 and ranked 94th in the world, reflecting declines in property rights, business freedom, and financial freedom.

- 3) Egypt is ranked 109th out of 185 economies in Doing Business 2013, recording a decline of 3 points compared to 2010.
- 4) Egypt has fallen 20 places in corruption Perception since 2010 from 98th²² to 118th out of 176 States, as levels of bribery, abuse of power and secret dealings remain at an all-time high.
- 5) According to the 2012 Global competitiveness report, the top five concerns investors have when doing business in Egypt are the following:²³ government instability/coups,²⁴ policy instability, crime and theft, restrictive labor regulations and Corruption.
- 6) One positive indicator, from the investors' prospective, is that Egypt is one of the most open economies to foreign equity ownership in the region. The State has opened up the majority of the sectors of its economy to foreign investors.²⁵
- 7) The low score of Rule of Law index reflect the unstable conditions across the State particularly after the revolution. The economic freedom report states that "the judicial system's independence is poorly institutionalized.

²² <http://www.transparency.org/cpi2010/results>.

²³ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf. P 158.

²⁴ Note: President Mohammed Morsi was ousted by the Egyptian military on July 2, 2013.

²⁵ Its score for investing across sectors is consistently higher than the regional and global average. See Investing Across Borders 2010. <http://iab.worldbank.org/Data/Explore%20Economies/Egypt#/Investing-across-sectors>.

Judicial procedures tend to be protracted, costly, and subject to political pressure. Property rights are not protected effectively, and prices for private political-risk insurance have skyrocketed. Corruption continues to erode trust in the economic system.”

Given the challenging political and economic transition, the Egyptian economy is still experiencing an extended period of instability and uncertainty. While political stability is of utmost importance to put a halt on the deteriorating conditions and reputation of the State, there are many lingering issues that will prove to be more difficult to handle and may take years, if not decades, to resolve. Just like in the past, without comprehensive reforms at all levels, high rates of poverty, unemployment, corruption, illiteracy and over population will undoubtedly undercut any improvements in the economy and reduce the effectiveness of the reforms that were designed to open Egypt’s markets to outside investors. According, however, to the Egyptian State Information Service,²⁶ Egypt still offers competitive advantages to investors as a business hub. Listed below are some of these advantages that may be significant as Egypt sets its sights on becoming an arbitration hub:

- 1) Egypt’s geographic location at the center of three continents has placed it within reach of international markets in European, Arab, African and south Asian States.
- 2) Egypt has a highly skilled labor force with experience in all sectors of the economy, such as information technology, communications,

²⁶ See website, http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=1346.

banking, construction and tourism, and English is spoken by most people as a second language.

- 3) Egypt offers the most cost effective base in the Middle East with regard to operating costs.
- 4) Egypt has a large economy with a large population, which makes it a major consumer market attracting many multinational retail corporations already operating in Egypt.
- 5) A relatively low corporate and per capita income taxes capped at 20%.
- 6) Egypt has concluded over 100 bi-lateral investment treaties that insure protection to investments by nationals of the counterparty State to the treaty.

On the legal and institutional front, Egypt has historically enjoyed a strong legal and institutional reputation as setting the standard for other Middle Eastern States; however, changes in economic policies, from the socialist welfare-oriented economy, which existed during the Jamal Abdel-Nasser era, and on to the capitalist less-State control system in early 1970s, which was in place during the Anwar Sadat era, and finally to the open-market system in the early 1990s, with the privatization of most government assets, and less subsidized services, which was extant during Hosni Mubarak period, all these approaches benefited only a small group of people, who amassed most of the wealth and contributed to worsening conditions for most Egyptians; one consequence, the middle class drifted closer to poverty, as the wealth has become concentrated in the hands of a few.²⁷

²⁷ Under Mubarak's rule, income poverty increased from 16.7% in 2000 to 25.2% in 2010, today, over 40% of the population lives under \$2 a day. Egyptian Center for economic and social rights ECESR

Concentration of wealth in the hands of the few,²⁸ in a State that has limited natural resources and high illiteracy, has negatively affected the population's social character, and corruption has become rampant. As a result the State's administrative institutions and Rule of Law has been weakened as is evident in the lowered ranking its institutions in the Global Competitiveness Index, and the low score on the Economic Freedom Index for Rule of Law. In another Rule of Law index issued by the World Justice Project²⁹ in 2013, Egypt also shows weakness in every category with low scores in fundamental rights and enforcement of regulation.³⁰

On a positive note, Egypt has maintained a modern Arbitration Law³¹ since 1994. It was the first Arab State to adopt the UNCITRAL Model Law, albeit with some deviations, and applied it for both domestic and International disputes. The 2010 Investing Across Borders reported an average score of 73.0 for arbitrating disputes in

website. <http://ecesr.com/en/2013/05/21/ecesr-presents-a-report-to-the-un-economic-social-council/>.

²⁸ *Ibid*, 2% of the population controls 98% of the economy.

²⁹ The world Justice Project, an independent, non-profit organization, develops communities of opportunity and equity by advancing the Rule of Law worldwide. <http://worldjusticeproject.org/who-we-are>.

³⁰ *Ibid*, the data for Egypt

Factors	Scores	Global Rank	Regional Rank	Income Group Rank
Ltd. Government Powers	0.58	40/97	1/7	3/23
Absence of Corruption	0.51	41/97	4/7	2/23
Order and Security	0.67	65/97	7/7	12/23
Fundamental Rights	0.43	89/97	6/7	19/23
Open Government	0.48	51/97	2/7	05/23
Regulatory Enforcement	0.42	77/97	6/7	14/23
Civil Justice	0.47	73/97	6/7	13/23
Criminal Justice	0.45	56/97	5/7	06/23

³¹ Arbitration Law No. 27/1994.

Egypt. This is slightly above the global average of 71.2³² and is considered the best in the Middle East. The Egyptian Arbitration Law adopts many of the modern arbitration-friendly concepts and principles, as noted in Chapter II, and allows parties to choose arbitrators of any nationality or professional qualifications; however, only lawyers who are licensed to practice in Egypt can represent parties in arbitrations. The Arbitration Law makes it clear that courts shall not accept a case if there is an agreement to arbitrate (unless the defendant waives his right to arbitration).³³ The courts in Egypt have emphasized a pro-arbitration policy in several leading decisions.³⁴

Courts are increasingly mitigating any form of hostility towards arbitration as an out-of-court dispute resolution system.³⁵ Judges have generally accepted and supported arbitration proceedings. Arbitral awards by virtue of the new Arbitration Law are never reviewed on the merits.³⁶ A specialized economic court circuit³⁷ is the only competent court circuit to rule on applications for enforcement of international arbitration awards made in Egypt, or other foreign arbitration awards. Finally, the

³² The average global indices for arbitrating commercial dispute are listed as follows:

- | | |
|---|------|
| • Strength of laws index - | 85.2 |
| • Ease of process index - | 70.6 |
| • Extent of judicial assistance index - | 57.9 |

³³ *Ibid*, Article 13(1).

³⁴ Source: “Investment Across Borders Report” by the World Bank.
<http://iab.worldbank.org/Data/Explore%20Economies/Egypt#/Arbitrating-disputes>.

³⁵ See, “An Overview of the Egyptian Legal System and Legal Research,” By Dr. Mohamed. Abdel Wahab. <http://www.nyulawglobal.org/globalex/egypt.htm>.

³⁶ *Ibid*.

³⁷ The enactment of Law No.120 of 2008 created specialized Economic Courts Circuit. These newly created Circuits are intended to provide a “one stop shop” of expedited commercial and investment justice for investors and disputants engaged in economic activities.

Ministry of Justice issued a decree in 2008 requiring a newly formed Ministry Arbitration Technical Office to scrutinize awards prior to their review by the courts. This new requirement has been unpopular with many practitioners because it adds another layer of review that may cause further delay.³⁸

While the 2013 Doing Business Index ranked Egypt 109th in the world for enforcing contracts, this is likely because of the daunting and lengthy procedures of the recognition and enforcement process. Recent enforcement decisions have shown that the trend with respect to international arbitration (in non-administrative contracts) is pro-enforcement and the public policy ground is normally narrowly construed.³⁹

Because it has pioneered the international arbitration in the region since 1913, Commercial Arbitration has been firmly established in Egypt.⁴⁰ Egypt has a substantial record of case law on arbitral awards⁴¹ utilizing the New York Convention and arbitral proceedings through the ICSID rules. An ICSID case search netted twenty-one cases against Egypt,⁴² eleven of these cases, which mostly were filed

³⁸ Decree of the Egyptian Minister of Justice No 8310/2008, 21 September 2008. The Arbitration Technical Office's decisions are not rendered public, and there is no right to appear before the Office. While this extra level of review most likely will delay and possibly impede the enforcement proceedings, several ongoing cases are challenging the decree's.
<http://www.kslaw.com/imageserver/KSPublic/library/publication/9-10ArbitrationCommitteeNewsletterChilds.pdf>.

³⁹ See Global Arbitration Review 2012, Egypt, by Mohamed S Abdel Wahab, Zulficar & Partners.
<http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/61/egypt/>.

⁴⁰ The first chamber of commerce was established in Egypt in 1913.
<http://cairochamber.org.eg/Page.aspx?Id=2>.

⁴¹ Many arbitral awards that have been challenge in Egyptian courts are published in various law periodicals such as Journal of Arab Arbitration.

⁴² See, ICSID website, <https://icsid.worldbank.org/ICSID/FrontServlet>.

after the 2011 revolution, are pending decision. The practice has had a huge improvement in the State as is evident in the number of ICSID decisions that went to Egypt's favor⁴³ after some well publicized loses earlier in the cases of Wena hotels and the Middle East Cement Shipping and Handling Co.⁴⁴ While many arbitration centers have been springing up recently around the State, the Cairo Regional Center for International Commercial Arbitration (CRCICA) continues to serve as the main center in Egypt and the region. The legal market in Egypt is dominated by the local full service law firms⁴⁵ and does not include any of the large multi-national law firms. The following section discusses the regional center in Cairo.

A. The Cairo Regional Center for International Commercial Arbitration (CRCICA)

When we speak of Egypt as an arbitration hub, we have to look beyond the political and economic gloom, and discuss this outstanding institution (CRCICA) and its success in shouldering the whole task in establishing its jurisdiction as a preferred hub in the Middle East. One of the major achievements of the Asian-African

⁴³ On May, 2011 Mohamed Abdel Raouf Secretary General of the CRCICA, noted that Egypt faces 11 arbitration cases since the end of 2010, where 6 cases were either resolved in Egypt favor, or ICSID rejected the cases for lack of jurisdiction. <http://www.youm7.com/News.asp?NewsID=419666>.

⁴⁴ Both of these cases resulted in decisions against the government. In *Wena Hotels Limited v. Egypt*, 41 ILM 896 (2002), a case involving the government and a UK investor owned by an Egyptian national, a tribunal held that the government had breached the obligation of fair and equitable treatment and constant protection and security under the terms of the UK-Egypt bilateral investment treaty, and in *Middle East Cement Shipping and Handling Co. v. Egypt*, Case No. ARB/99/6, the actions of the Egyptian government in rejecting the claimant's shipping rights were held to be an expropriation.

⁴⁵ The traditional, full-service firms remain dominant: Al Kamel Law Office, Shalakany Law Office, Helmy Hamza & Partners (Baker & McKenzie) and Zaki Hashem & Partners, Attorneys at Law. A number of younger, ambitious firms are challenging the status quo: these include Zulficar & Partners Law Firm, DLA Matouk Bassiouny and new IP boutique NAL & Partners. Ibrachy Law Firm was re-branded as Ibrachy & Partners in 2012. <http://www.legal500.com/c/egypt>.

Legal Consultative Organization (AALCO),⁴⁶ was launching its Integrated Scheme for Settlement of Disputes in the Economic and Commercial Transactions at the Doha session in 1978. As a result, regional arbitration centers, under the auspices of AALCO, were established. These centers were designed to be international institutions that would promote international Commercial Arbitration in the Asian-African regions, and that would provide services for conducting international arbitrations as viable alternatives to the traditional centers in the Western States.⁴⁷ Four such centers have been established so far. All are located at Cairo (Egypt), Kuala Lumpur (Malaysia), Lagos (Nigeria) and Tehran (Iran). The respective hosts Governments have recognized their independent status as international organization, and have accorded privileges and immunities to these centers.

The Cairo center was established in 1979 on an experimental basis. In 1983, an agreement was concluded between AALCO and the Egyptian government for granting the center permanent status as an independent center.⁴⁸ The Cairo center offers a wide range of specialized services to settle trade and investment disputes and promotes arbitration and other ADR techniques such as conciliation, mediation

⁴⁶ An organization made of 47 Afro-Asian States that serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern. See website, <http://www.aalco.int/scripts/view-posting.asp?recordid=1>.

⁴⁷ *Ibid*, AALCO stated objectives for the first two regional centers establishes were: Promoting international Commercial Arbitration in Asian and African regions;

- (a) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions;
- (b) Rendering assistance in the conduct of *ad hoc* arbitrations, particularly those held under the UNCITRAL Arbitration Rules;
- (c) Assisting in the enforcement of arbitral awards; and
- (d) Providing for arbitration under the auspices of the two centers where appropriate.

⁴⁸ See CRCICA website, <http://www.crcica.org.eg/history.html>.

and technical expert in the Afro-Asian region. The center's scope of service include the following:⁴⁹

- 1) Administering domestic and international arbitrations Under its own rules or any other rules agreed upon by the parties;
- 2) Conducting other Alternative Dispute Resolution techniques (ADR) such as conciliation, mediation and technical expertise services upon request;
- 3) Offering legal opinion during the drafting process of international commercial and investment contracts, and consultations regarding the avoidance of dispute during pre-contractual process;
- 4) Promoting arbitration and other ADR techniques in the Afro-Asian region through the organization of international conferences and seminars as well as the publication of researches serving both the business and legal communities;
- 5) Holding international investment and trade related conferences to create a trans-cultural central point that intersects the international with the regional with the ultimate purpose to attain conformity with international law and practice;
- 6) Providing capacity-building training courses in the field of international Commercial Arbitration (and other ADR Techniques) in order to qualify arbitrators-to-be in the Afro-Asian Region;
- 7) Providing technical and administrative assistance to newly-established arbitral institutions in the region.

⁴⁹ *Id.*

Apart from this, the Cairo center also established the *Institute of Arbitration and Investment* in 1990; the *Institute of Arab and African Arbitrators in Egypt* in 1991; the center's *Maritime Arbitration Branch in Alexandria*, which deals exclusively with maritime disputes, in 1992; the *Cairo Branch of the Chartered Institute of Arbitrators of London* in 1999; the *Alexandria Center for International Arbitration* in 2001; a *Mediation and ADR Center* as a branch of the Cairo center to administer Commercial Arbitration and other peaceful non-binding means of avoiding and settling trade and investment disputes, in 2001; and the *Port Said Center for Commercial and Maritime Arbitration* in 2004, which was established upon an agreement with the Suez Canal Authority.⁵⁰

The CRCICA arbitration rules were updated⁵¹ in 2011 to reflect the latest market trends in streamlining its procedures for more efficient and cost effective process. For example, the new rules use electronic e-mail for submission of evidence⁵² and telecommunications to examine witnesses.⁵³ The new rules solidify CRCICA's role as an appointing authority⁵⁴ that has a bigger role in appointing, challenging or replacing arbitrators.⁵⁵ Additionally, CRCICA maintains a list of international arbitrators and experts. Its website does not yet provide access to this

⁵⁰ See CRCICA, Branches, <http://www.crcica.org.eg/branches.html#three>.

⁵¹ The updated arbitration rules largely follow the revised UNCITRAL Arbitration Rules ("Model Rules"), which entered into force on 15 August 2010. http://crcica.org.eg/arbitration_rules.html.

⁵² *Ibid*, Article 2.

⁵³ *Ibid*, Article 28(4).

⁵⁴ *Ibid*, see "Appointment of arbitrators" (articles 8 to 10).

⁵⁵ *Ibid*, (articles 8 to 14).

list, but its 2011-2012 report indicates that in 2011, arbitrators acting under the auspices of CRCICA came from Egypt, Lebanon, France, Belgium, Canada, Colombia, Iraq, the Netherlands, Sweden, Switzerland and Syria. In the first half of 2012, arbitrators from Tunisia, Lebanon and the UK were appointed. The parties are not obliged to appoint their arbitrators or experts from amongst CRCICA's list. However, CRCICA is bound to appoint from its arbitrators' list when exercising its role as an appointing authority.

While CRCICA is considered the leading arbitration institution in the Middle East, particularly for Arab parties, the 2010 International Arbitration Survey: "Choices in International Arbitration"⁵⁶ concluded that CRCICA was one of the lowest rated centers, in terms of perception, where five respondents rated it as 'poor' and two as 'adequate.' Never mind the limited number and the nationality of the survey respondents; arguably this perception is largely due to relying mostly on local practitioners and arbitrators to keep the costs of arbitration low. This low cost could be one of the reasons for CRCICA's popularity among local and regional parties. However, this perception is sure to improve after the adoption of the new rules, and the increase in its arbitration charges, which will enable CRCICA to afford a more internationalized roster and more expensive arbitrators.

In addition to the wide scope of activity that CRCICA has at the Afro-Asian level, which provides the center with a high level of networking in the region, CRCICA has exhibited the most transparency with the publication of annual reports and quarterly newsletters detailing much of its caseload activity with regard to amount

⁵⁶ Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

of disputes, type of disputes, parties nationality and arbitrators nationality. While CRCICA still dominates the institutional arbitration scene⁵⁷ in the Middle East, these reports shall prove to be of great help for international parties from outside the region in making their choice of seat or venue in their agreements.

On a final note, because political instability, popular uprisings, deteriorating infrastructure, corruption and poverty that yet persist in Egypt, it is very difficult to be optimistic regarding its prospect in becoming an international arbitration hub. While CRCICA has helped, single handedly, to maintain the State's stature as a preferred destination for many Arab parties, it will be difficult to replicate the success of other emerging hubs, such as Singapore, and become a preferred hub at the international level. If Egypt does not find a way to settle down and quickly charter efficient plans that address all its lingering issues, it is likely to lose its current stature in the region, and the race in the arbitration market, to other emerging jurisdictions in the gulf region, such as Bahrain which is more stable.

V. ANALYSES AND PROSPECTS FOR BAHRAIN

Bahrain is the smallest economy in the Middle East with a GDP of \$32.4 billion; however, with its small population it ranks number 37th in the world in GDP per capital, which provides for an above average standard of living. Due to its limited oil reserves, as compared to its neighbors, Bahrain's government has long adopted liberal trade policies to lure foreign investors particularly, from the Gulf region.

⁵⁷ Elementary findings of a market research survey by the center show that CRCICA is dominating the institutional scene in most of the practice profiles of the participating firms. In 50% of them, CRCICA arbitrations represent more than two thirds of other international institutional arbitrations. CRCICA Newsletter 1/2012.

Since the early 1970s, Bahrain has been considered an ideal gateway to the Gulf markets and many financial institutions in insurance, Islamic finance, offshore banking and investment banking, all of which were established in Bahrain as early as 1973. Therefore, Bahrain has become the most mature and well-established business hub in the Gulf. It provides a relatively free, open, liberal and transparent environment for businesses, in addition to a well-developed infrastructure.

Bahrain is home to numerous multinational firms serving as a gateway to do business in other States of the Gulf, particularly in the Islamic Finance industry. The liberal policies of the Bahraini government have helped Bahrain to rank 12th in the world, and number one in the region in the 2012 Economic Freedom Index, and be classified as “mostly free.” In 2011 and continuing into 2012, Bahrain experienced some economic setbacks as a result of domestic sectarian strife. Bahrain's reputation as a financial hub of the Gulf has been damaged, and the State now risks losing some of its financial institutions to other regional centers in Dubai and Qatar. Also, Bahrain suffers from a moderate level of high-end corruption,⁵⁸ which according to the *Transparency International's Corruption Perception Index*, dropped Bahrain from being ranked 27th in the world on 2005⁵⁹ to 53rd in the world in 2012. However Bahrain still maintains its moderate ranking in the 2013 Doing Business report, which ranked Bahrain 42nd in the world, and the 2012 *Global Competitiveness Report* which ranked Bahrain 37th in the world with high marks for its legal and administrative

⁵⁸ According to U.S. firms, high-level corruption is sometimes an obstacle to foreign direct investment and contracting, particularly in the contract-bidding process and in operating notably successful investments, <http://www.State.gov/e/eb/rls/othr/ics/2012/191105.htm>.

⁵⁹ See, http://www.transparency.org/research/cpi/cpi_2005.

institutions and infrastructure. It is not clear how economic policies that were intended to jump start the economy and restore investors' confidence, such as the suspension of an expatriate labor tax,⁶⁰ will fare in the long run, as it may make other social and political challenges such as high unemployment and high national debt more difficult to address.

Bahrain has a moderate score of 53 on the Rule of Law Index; however, it offers other enticements for those seeking arbitration. For example, the judiciary is generally well regarded and unbiased, and private property is secure. On the other hand, official travel bans⁶¹ to prevent individuals from leaving the State until business or legal disputes are resolved, and occasional problems in obtaining required work permits and residence visas for expatriates, pose some concern to foreign investors.⁶²

While International Arbitration in Bahrain⁶³ is based on the UNCITRAL Model Law by reference, domestic arbitration is still governed by the old outdated Code of

⁶⁰ In August of 2006 the King ratified the Labor Reforms Law, establishing two entities: the Labor Market Regulatory Authority (LMRA), and the capacity-building organization now known as Tamkeen. The law imposed a monthly fee of BD10 (USD 26.60) on each expatriate employed by a company. The revenues collected under this program are earmarked to provide job training for Bahrainis. (The LMRA fee on expat workers has been suspended until April 1, 2012, as a means of jump starting the economy following the political and civil unrest of 2011.) In July 2009, the LMRA modified the sponsorship system, allowing greater mobility of foreign workers between employers. <http://www.State.gov/e/eb/rls/othr/ics/2012/191105.htm>.

⁶¹ In 2010 and 2011, the Embassy received several reports of travel bans imposed on Americans and other foreign citizens over business disputes. Under current law, any party can request a travel ban on another by filing a request in court and paying a nominal fee. It can take months or years to get a ban lifted. <http://www.State.gov/e/eb/rls/othr/ics/2012/191105.htm>.

⁶² Periodically, foreign firms experience difficulty obtaining required work permits and residence visas for expatriate employees due to the Bahraini government's efforts to promote greater numbers of Bahraini citizens in the workforce. However, this does not appear to be a matter of high-level policy, and often can be resolved on a case-by-case basis. <http://www.State.gov/e/eb/rls/othr/ics/2012/191105.htm>.

⁶³ Decree No 9 of 1994 on the International Commercial Arbitration Law.

Commercial and Civil Procedure⁶⁴ of 1971, which is similar to Qatar's code. This is why our assessment of the country's average index for arbitrating commercial disputes, following the methodology suggested by the 2010 Investing Across Borders report, was 70.2.⁶⁵ This assessment is close to the global average of 71.2,⁶⁶ and less than Egypt's average of 73.0. Once Bahrain adopts the draft GCC Arbitration Law as expected, there will be significant improvement in the Strength of Laws and Ease of the Process Indices; however, it is doubtful that this law will have much of an impact on the Judicial Assistance Index because court procedures, with respect to enforcing arbitration in Bahrain will not be effected; in fact, mainly due to these old and lengthy procedures, Bahrain ranks 113th in the world in contract enforcement.

The practice of Commercial Arbitration is well established in Bahrain. The GCC Commercial Arbitration Center, established in 1995, serves as the main center in the GCC region. It has a sizable caseload of arbitration disputes arising between and among GCC citizens. However, bureaucracy, lack of coordination, and outdated regulations, which are prevalent within the GCC States, are limiting the center's expansion;⁶⁷ for instance, the center has not been able to lure parties from outside

⁶⁴ Code of Commercial and Civil Procedure issued pursuant to decree No 12 of 1971 - articles 233-243 in chapter seven, Arbitration.

⁶⁵ The score was based on information provided in "Guide to dispute resolution in the Middle East" 2010/2011, by Al-Ghazzawi Professional Association, Herbert Smith LLP. www.herbertsmith.com

⁶⁶ The average global indices for arbitrating commercial dispute are listed as follows:

- strength of laws index - 85.2
- Ease of process index - 70.6
- Extent of judicial assistance index - 57.9

⁶⁷ See "Commercial Arbitration in the Gulf States An Overview" by Nasser al Zayed where he lists some obstacles that still hinder the development and growth of the Center:

- a. Obtaining the confidence of the parties requires hard work, persuasion and education.

the GCC or, even high profile cases from within the GCC itself. Bahrain also has many international law firms working in association with local partners that provide expert legal services for the region. As of April 2007, Bahrain has also allowed International Law Firms to establish offices in the State without local partners or sponsors.

The Bahrain Economic Development board,⁶⁸ on its website, highlights advantages that Bahrain, as a business hub, offers to investors. Some of these advantages, particularly within the context of its determination to become an arbitration hub are the following:

- 1) Bahrain is a favorable gateway to GCC markets. Its central location and well developed infrastructure make Bahrain a good access to GCC markets. That is why world-class companies like American Express, BNP Paribas, DHL and Kraft have selected Bahrain as their ideal base for regional operations from which to access the Middle East market, especially the Gulf's stable and growing markets.
- 2) Bahrain has a good track record and experience (maturity). Bahrain is first in the GCC region and only second to Egypt with regard to early adoption of the UNCITRAL Model Law, and its financial services sector

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- b. Delays in executing the Unified Economic Agreement, added to the obstacles of its enforcement at the State level has limited the efficiency of the Center in relation to disputes arising from the enforcement of the Agreement and the enforcement decisions rendered in this regard.
 - c. The necessity of renewing and developing legislation relating to Commercial Arbitration in the GCC States, in order to reflect the relevant international conventions, especially the New York Convention.
 - d. The poor coordination and cooperation between the Center and the Commercial Arbitration committees existing in the Chambers of Industry and Commerce of the Council states.
 - e. Journal of Arab Arbitration, Volume 2, N°1 – 2010, p 46.

⁶⁸ This is a public agency with an overall responsibility for formulating and overseeing the economic development strategy of Bahrain. See Why Bahrain, http://bahrain.bahrain.com/m_WhyBahrain.aspx.

has been thriving for over forty years, while, neighboring financial centers, such as Dubai's DIFC and Qatar's QFC are less than ten-years old.

- 3) Bahrain provides a cost competitive, value-oriented environment. Bahrain offers the best value for money, with lower taxes and operating costs for businesses. Bahrain facilities and services such as hotels, restaurants, rentals and transportation are most competitive in comparison to Qatar and Dubai.
- 4) Bahrain has the most educated, and skilled workforce in the GCC. The Bahraini business sector is supported by the most productive, highly-skilled national work force in the (GCC) States⁶⁹ with English widely spoken as a second language.

On the other hand there are factors that work against Bahrain as a favored jurisdiction for arbitration. The 2012 Global Competitiveness Report provides some of the troubling concerns that investors encounter when doing business in Bahrain. The top five concerns as listed in the report⁷⁰ in order of importance were as follows:

- 1) Policy instability
- 2) Inefficient government bureaucracy

⁶⁹ There are notable differences in productivity performance within the GCC, with the smaller, more diversified States (Bahrain 5.1 percent, Oman 4.1 percent) showing better performance than the more resource-dependent ones (United Arab Emirates -0.1 percent, Saudi Arabia 0.8 percent, Kuwait 1.3 percent and Qatar 1.8 percent). See report by The Conference Board, "Growing Beyond Oil: Productivity, Performance, and Progress in the States of the Gulf Cooperation Council" 2008. <http://www.conference-board.org/publications/publicationdetail.cfm?publicationid=1508>.

⁷⁰ See report, "The Global Competitiveness Report 2012–2013" P 100. http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf.

- 3) Insufficient capacity to innovate
- 4) Restrictive labor regulations
- 5) Access to financing

In addition to these concerns there are other nettlesome issues, particularly in the context of becoming an arbitration hub, that adversely affect Bahrain's drive to maintain its leadership in the gulf region, which include the following:

- Political stability. Despite the government's attempts to curtail public dissatisfaction by implementing some of the recommendations made by the Bahrain Independent Commission of Inquiry,⁷¹ occasional political and civil unrest continues.
- Court delay. The Bahraini justice system suffers from lengthy court delays due to understaffing, outdated procedures, and chronic lack of funding.⁷²
- Increased corruption. The trend for the last ten years has been a negative one. Corruption will affect party's perception of Bahrain's neutrality.
- Problematic enforcement. As reflected in its ranking for enforcing contracts, the judiciary tradition has not been supportive of arbitration.
- Lack of court records. The courts do not publish their cases; therefore, there is no adequate record of arbitration case law.

⁷¹ The Bahrain Independent Commission of Inquiry was established by the King of Bahrain on 29 June 2011 and tasked with looking into the incidents that occurred during the period of unrest in Bahrain in February and March 2011 and the consequences of these events. For more information see, https://en.wikipedia.org/wiki/Bahrain_Independent_Commission_of_Inquiry.

⁷² In July 2009, the government established a committee headed by Deputy Prime Minister Jawad al-Arrayed to oversee judicial reforms aimed at improving efficiency. <http://www.refworld.org/pdfid/4be3c8a20.pdf>.

A. Bahrain Chamber for Dispute Resolution (BCDR-AAA)

In effort to heighten its appeal as a venue for dispute resolution and bring relief to investors from lengthy court delays, Bahrain launched the BCDR-AAA in January 2010⁷³ as an initiative between the Bahrain Ministry of Justice and the American Arbitration Association (AAA). The BCDR-AAA has a unique ADR legislation where arbitration can be compulsory or by agreement as follows.

- **Compulsory Arbitration.** In these arbitrations, the BCDR has issued procedural rules for statutory ADR tribunals⁷⁴ (Statutory Arbitration) which provide for mandatory arbitration for any claim within the jurisdiction of Bahraini courts that exceeds BD500,000 (approximately USD\$1.3 million) and involves either an international commercial dispute or a party licensed by the Central Bank of Bahrain (CBB).⁷⁵ The tribunal's procedural rules use a unique blend of classic arbitration by agreement and ordinary court proceedings. For example, the tribunals are quasi-judicial in composition in which the panels are selected by the chamber or the parties from an approved list of judges, who according to the rules must comprise the majority of each panel.⁷⁶ In

⁷³ The BCDR-AAA was established by royal decree in 2009, Royal Decree No. (30).

⁷⁴ See BCDR-AAA Resolution No. (65) Issuing the Regulation of Dispute Resolution Procedures for Statutory ADR Tribunal (English). <http://www.bcdr-aaa.org/en/rules-regulations/procedural-rules-for-section-1arabic.html>.

⁷⁵ The BCDR will have automatic and mandatory jurisdiction over any claim exceeding BD500,000 (US\$1.3m) which involves an international party or a party licensed by the Central Bank of Bahrain (Article 9 of the Legislative Decree No. (30) for the year 2009 (the Decree)); or If the parties have agreed in writing to settle the dispute in the BCDR (Article 19 of the Decree).

⁷⁶ In accordance with Article 40 of the Legislative Decree No. (30), by default, the Tribunal must be made up of two judges from the Chamber's Roster of Judges and should include a Registrar appointed as a third member. The Registrar will be taken from the Chamber's Neutrals Roster or from that of an accredited BCDR-AAA institution. The Registrar will be appointed based on experience, qualifications

certain situations listed in Article 13 of the rules, parties to the dispute may bring a challenge before the Cassation Court requesting nullification of the award issued by the dispute resolution tribunal. Parties are free to choose the language and applicable law that govern the dispute; if there is no agreement, the default will be Arabic and Bahraini law.⁷⁷ Recognition outside of Bahrain of these awards has been a big concern because it is not clear if they should be viewed as arbitral awards, or court judgments; however, a recent New York court decision to uphold an award⁷⁸ issued by such a tribunal should foster some confidence in these tribunals and improve its global recognition.

and the nature of the case. Both parties may agree to each appoint one member to the Tribunal. In this instance, it must be agreed that each party will equally incur the fees and expenses of two of the appointed Tribunal members. In both cases, the Tribunal is to be chaired by the senior judge. The Chamber's Judge Roster is prepared by the CEO, taken from a list of judges delegated by the Supreme Judicial Council, being of High Court of Appeals level or higher.

⁷⁷ See Articles 11 and 12 of the Legislative Decree No. (30).

⁷⁸ In the decision in *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi and Brothers Company* (653506/2011, 2012 WL 6554881 (NY Sup Ct December 12 2012), the court enforced the award as a foreign money court judgment under New York's version of the Uniform Foreign Money Judgment Act and rejected the defendant argument that the proceedings were essentially compulsory arbitration as neither the parties nor the court addressed the applicability of the New York Convention to the award. Regarding this case, Richard F Hans, JP Duffy and E Job Seese at DLA Piper, commented,

The Standard Chartered decision is significant to international practitioners because it sheds light on how New York and US courts might approach the enforcement of awards from mandatory BCDR-AAA awards in the future, and provides authority for the position that such awards should be enforced as foreign money judgments under the Uniform Foreign Money Judgment Act regime, rather than as New York Convention awards. Notably, however, the decision does not appear to foreclose the possibility of such awards being enforced as international arbitral awards under the New York Convention. Moreover, it should not affect the ability to enforce awards issued by consensual international arbitral tribunals convened under the BCDR-AAA rules as New York Convention awards.

See Article, <http://www.internationallawoffice.com/newsletters/detail.aspx?g=7048c795-446d-4211-b553-9b01e2aa3f26>.

- Arbitration by Agreement. This is classical arbitration that is conducted under the BCDR-AAA Arbitration Rules,⁷⁹ which are virtually identical in substance to the AAA/ICDR rules, and reflect many important and modern aspects of the arbitration process such as Kompetenz-Kompetenz, principle of separability (autonomy of the arbitration clause),⁸⁰ interim measures,⁸¹ emergency arbitration⁸² and party autonomy which allows parties to choose the substantive law,⁸³ the seat⁸⁴ and language of the arbitration.⁸⁵ However, provided the parties are treated with equality, only the panel may choose the procedures by which the arbitration to be conducted.⁸⁶

One of the main unique features of these rules is that the rules allow arbitrations to be conducted on what is labeled as “free zone arbitration” basis where parties involved agree to be bound by the outcome of the arbitration process only. Awards will be final and binding and not subject to challenge in Bahrain. In these arbitrations the chamber has the jurisdiction to

⁷⁹ A copy can be downloaded from, http://www.bcdr-aaa.org/media/document/BCDR_AAA_Arbitration_Rules.pdf.

⁸⁰ *Ibid*, Article 15, (1) (2).

⁸¹ *Ibid*, Article 21, (1).

⁸² *Ibid*, Article 37.

⁸³ *Ibid*, Article 28.

⁸⁴ *Ibid*, Article 13.

⁸⁵ *Ibid*, Article 14.

⁸⁶ *Ibid*, Article 19, (1) Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

hear any dispute if the parties agree in writing to settle it through the Chamber. For free zone arbitration to work effectively, parties must agree that a non-Bahraini law will be applied and that the award should be enforced outside of Bahrain and in the State whose law has been selected to govern the dispute. The free zone arbitration provides parties with obvious advantages with jurisdictional and legal certainty regarding the recognition of arbitration awards, along with time and cost effective resolutions to disputes.

The BCDR-AAA does not maintain a list of arbitrators on its website, but parties do have access to the AAA's international roster of arbitrators or can choose their own arbitrators independently with the help of the chamber's case manager.⁸⁷

With the establishment of the BCDR-AAA, and its far reaching legislation, Bahrain has demonstrated that it is focused on maintaining its status as a world-class business and investment hub. Through its partnership with the world's leading provider, the AAA, and the enactment of cutting-edge ADR legislation, Bahrain has significantly enhanced its prospects as it competes to become an arbitration hub for international commercial business. However, the lack of transparency and published records will adversely affect its reputation with foreign parties and limit its appeal to local or regional parties who are in more direct contact with the chamber.

⁸⁷ Each case that appears before the BCDR-AAA is managed by an allocated a Case Manager'. The Case Manager is an independent, neutral administrator for the dispute and will remain with the case from the moment of filing to the closing of the case. Case Managers duties include: setting and managing deadlines; arranging meeting times for the exchange of all case documents and memoranda; filing of all submissions; requesting evidentiary procedures and overseeing the notification process. BCDR-AAA website.

VI. ANALYSIS AND PROSPECTS FOR DUBAI (UAE)

Dubai is one of the seven emirates (Abu Dhabi, Ajman, Dubai, Fujairah, Ras al-Khaimah, Sharjah, and Umm al-Qaiwain), all of which are equivalent to small monarchies that make up the Federation of the United Arab Emirates (UAE). While Abu Dhabi is the richest and largest of the seven Emirates, accounting for about 90 percent of their oil production, Dubai is the most important business center in the State and arguably, in the region. Since the formation of the UAE in 1971, Dubai has transformed from an oil and gas-dependent economy, to a broadly diversified economy based on international trade, banking, tourism, real estate and manufacturing. Dubai's open economic policy, minimal government control and liberal private sector regulation in free trade zones, such as the DIFC and Jabal Ali that permit 100 percent foreign ownership with zero taxation, have played an instrumental role in attracting significant foreign direct investment, which by 2008, had helped Dubai emerge as a global city and a business hub, and becoming a model for many cities and jurisdictions in the region and around the world.

In 2009, however, at the height of its unparalleled economic boom, the global financial crisis hit Dubai hard and the boon seemed to turn to bust. Property prices in Dubai tumbled in what is known as the "housing bubble crises," and the local financial markets went on a free fall before its oil rich neighbor, Abu Dhabi, come to its rescue and extended a multi-billion dollar bailout loan, which helped Dubai to get its house in order.

The major economic indices do not track Dubai separately from the UAE Federation; however, for all practical purposes, and keeping in mind that Dubai's

economy⁸⁸ makes up about 30% of the UAE economy, the indices of the UAE are considered representative of Dubai. While the effect from the collapse of the property market still affects Dubai, as evidenced by the many empty houses and business throughout the city,⁸⁹ indicators clearly show that confidence is slowly returning to its market. The economies of the UAE and Dubai, in particular, have grown by 4% in 2012 and are estimated to stabilize around 2.6 percent in the coming years according to the International Monetary Fund (IMF).⁹⁰ This is still a big improvement from the 2009 and 2010 figures that indicate a shrinking economy.⁹¹

Regarding other socio-economic indicators, in the 2013 Index of Economic Freedom, the UAE has a score of 71.1, which is “mostly free,” thus making its economy the 28th freest in the world. This score, reflecting substantial improvement, is 1.8 points higher than the year before when the UAE was ranked 35th in the world. According to the World Bank Doing Business 2013 Report, where it is ranked 26th in the world, the UAE has an above-average score for Ease of business; however, a closer examination of the data shows the UAE is more interested in attracting investments with high ratings for taxes, ease of permit qualification and ease of opening business, rather than protecting investments and enforcing contracts—

⁸⁸ Dubai’s GDP in 2011 was estimated \$83.4 billion by Dubai Statistics Office, UAE GDP for that year was estimated \$260.7 billion. <http://gulftoday.ae/portal/06845fe5-95d7-4226-823e-cb8de68919ba.aspx>.

⁸⁹ See article, “Dubai economic outlook 2013: Back to basics”, by: Massoud A. Derhally, Sunday, 3 March 2013. <http://www.arabianbusiness.com/dubai-economic-outlook-2013-back-basics-491694.html?page=0>.

⁹⁰ *Ibid.*

⁹¹ The United Arab Emirates’ economy shrank 1.6 percent in 2009, the first contraction since 1988, compared with a previous government estimate of 1.3 percent growth. <http://www.kippreport.com/news/gcc-2/uae-says-gdp-fell-in-2009-after-21-years-of-growth/>.

which are areas in which its scores are non-competitive.⁹² The Global Competitiveness Report 2012–2013 also ranked the UAE above average at 24th in the world with high marks for its administrative institutions and highly developed infrastructure. According to the report,⁹³ the most problematic factors for doing business are the following:

- 1) Restrictive labor regulations
- 2) Access to financing
- 3) Inadequately educated workforce

Though the following several factors do not enhance either the UAE, or Qatar's appeal as business centers, a redemptive feature common to both—according to the 2012 Corruption Perceptions Index—is their first-place tie as being the least corrupt States in the region and 27th in the world. The UAE, however, improved its ranking from 33rd place in 2008⁹⁴ by enjoying strong access to information systems and rules governing the behavior of those in public positions. The 2012 Economic Freedom index scores the UAE moderately at 61.5 for Rule of Law. The lower score is mainly because of lack of property rights for non-citizens. The report notes that the Rule of Law is generally well maintained, but that the ruling families exercise considerable influence on the judiciary. In another Rule of Law index issued by the World Justice

⁹² See, <http://www.doingbusiness.org/data/exploreeconomies/united-arab-emirates/>. The data shows that UAE is ranked No. 1 in taxes, but ranked No. 128 in protecting investments.

⁹³ See report, P 356, http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf.

⁹⁴ See, http://www.transparency.org/research/cpi/cpi_2008.

Project⁹⁵ in 2013, the UAE foremost weaknesses with regard to Rule of Law is in unlimited government powers, weakness in fundamental rights, and the lack of government transparency, where the UAE had below average scores for the 97 States covered by the index, and was dead last within the twenty-seven States that make up its income group.⁹⁶ The US State department website reports⁹⁷ that,

Small, medium, and some larger enterprises continue to fear being frozen out of the UAE market for escalating payment issues through civil or arbitral courts, particularly when politically influential local parties are involved. Some firms may feel compelled to exit the UAE market as they are unable to sustain pursuit of legal or dispute resolution mechanisms that can add months or years to the dispute resolution process.

In assessing the county's index for arbitrating commercial disputes (see Appendix I), following the methodology suggested by the 2010 *Investing Across Borders Report*. We have used the sovereign State jurisdiction courts and laws⁹⁸ wherein arbitration is ruled by the 1992 Federal UAE Law, which is inadequate in the context of modern international Commercial Arbitration, as noted in Chapter II. That

⁹⁵ The world Justice Project, an independent, non-profit organization, develops communities of opportunity and equity by advancing the Rule of Law worldwide. <http://worldjusticeproject.org/who-we-are>.

⁹⁶ *Ibid*, the data for United Arab Emirates:

Factors	Scores	Global Rank	Regional Rank	Income Group Rankings
Limited Government Powers	0.55	48/97	5/7	29/29
Absence of Corruption	0.74	23/97	1/7	20/29
Order and Security	0.91	5/97	1/7	05/29
Fundamental Rights	0.47	82/97	5/7	29/29
Open Government	0.44	63/97	6/7	29/29
Regulatory Enforcement	0.65	24/97	1/7	21/29
Civil Justice	0.60	33/97	3/7	25/29
Criminal Justice	0.75	12/97	1/7	12/29

⁹⁷ See, 2013 Investment Climate Statement - United Arab Emirates. <http://www.State.gov/e/eb/rls/othr/ics/2013/204755.htm>.

⁹⁸ While Arbitration under the DIFC jurisdiction is based on the UNCITRAL Model Law and has its own courts, they still function within the State jurisdiction courts.

is why the average score of 67.5⁹⁹ is significantly lower than the global average at 71.2¹⁰⁰ and less than Egypt's average of 73.0. Once the UAE adopts its own draft Arbitration Law or the *Draft GCC Arbitration Law* as expected, there should be significant improvements in the *Strength of Laws* and *Ease of the Process Indices*; however, it is not likely that any new law will significantly affect the Judicial Assistance Index, where the State courts in Dubai and other UAE jurisdictions continue to show inconsistent attitudes toward the practice and rank 113th in the world in contract enforcement.

The practice of Commercial Arbitration is, in fact, relatively recent in Dubai. In 2004, the Dubai International Arbitration Center (DIAC) was made independent of the Dubai Chamber. Since then the DIAC has been the busiest center in the Gulf region. The DIFC-LCIA is also a viable option that is currently being recommended by many practitioners in the region. The government and key sectors of industry recognize the vital role played by international law firms and are keen on ensuring that the legal market remains open to foreign firms,¹⁰¹ and towards that objective, requiring non-restrictive regulations for the practice. As a result the UAE is said to be

⁹⁹ Much of the scoring for in this survey was based on Habib Al Mulla and Gordon Blanke, Habib Al Mulla & Co review of United Arab Emirates arbitration, 2011. <http://www.mondaq.com/x/131338/Arbitration+Dispute+Resolution/Arbitration+In+the+UAE+2011>.

¹⁰⁰ The average global indices for arbitrating commercial dispute are listed as follows:

- Strength of laws index - 85.2
- Ease of process index - 70.6
- Extent of judicial assistance index - 57.9

¹⁰¹ See article "Lack of regulation leads to a free-for-all in legal practices" by Diana Hamade, Oct 16, 2011. Read more: <http://www.thenational.ae/thenationalconversation/comment/lack-of-regulation-leads-to-a-free-for-all-in-legal-practices#ixzz2VUI23uAK>.

"over-lawyered."¹⁰² Dubai by far has the most multi-national law firms in the region with many of these firms listed in the top 30¹⁰³ International Arbitration Law Firms in the world. Foreign lawyers can practice local law, and there are no restrictions on the participation of foreign lawyers in arbitration and mediation proceedings; however, only a UAE national can appear in court in Dubai; therefore, international firms must hire local lawyers to represent them in local courts.¹⁰⁴

As all economic indicators show that Dubai is on the road to recovery from its worst recession ever,¹⁰⁵ Dubai, with its State-of-the art infrastructure and world-class business environment, has reaffirmed itself as a leading regional commercial hub. It has many definite advantages that has long attracted investors and has made the UAE, by far, the largest destination for Foreign Direct Investment (FDI)¹⁰⁶ projects in the Middle East. Below are some of these advantages that relate to Dubai's potential to serve as an arbitration hub for business parties to resolve their disputes:

¹⁰² *Ibid*, there are now 436 local practitioners registered with Dubai's Legal Affairs Department, and about 600 with the federal Ministry of Justice. Just in Dubai's jurisdiction, there are 227 local law firms practicing, and 100 international law firms, in addition to about 80 international firms licensed by the DIFC and Jebel Ali Free Zone.

¹⁰³ One could count at least 10 of the top 30 firms listed in GAR 30 (The guide to specialist arbitration firms 2012) that have office in Dubai, United Arab Emirates, for a complete list see, <http://www.hg.org/law-firms/page3/international-law/united-arab-emirates/dubai.html>. For the GAR 30 report see <http://www.whitecase.com/files/Uploads/Documents/awards-GAR-100-2012-White-Case.pdf>.

¹⁰⁴ Federal Law no. 23 on the Regulation of the Legal Profession (16 December 1991) and Executive Council Resolution no.22 of 2011.

¹⁰⁵ See article "Six sure signs that show Dubai's economy is booming again" By Vicky Kapur, April 02, 2012. <http://www.emirates247.com/business/six-sure-signs-that-show-dubai-s-economy-is-booming-again-2012-04-02-1.451604>.

¹⁰⁶ See, "Dubai tops Arab region as FDI destination", the Financial Times, Published December 30, 2012. <http://www.emirates247.com/business/economy-finance/dubai-tops-arab-region-as-fdi-destination-2012-12-30-1.489235>.

- 1) Dubai has an enormous pool of experienced professionals from different backgrounds ready to support many kinds of dispute settlements; this includes a sweeping network of international law firms.
- 2) Dubai is centrally located with easy access to all major cities of the world.
- 3) Dubai has an established a reputation for being a low-crime State, and is politically stable.
- 4) Dubai has world-class transportation, telecommunications and service infrastructure which significantly enhance business performance.
- 5) Dubai is an international city where expatriates from over 150 nationalities comprise over 80 percent of the population, and English is the most widely spoken language.
- 6) Dubai has accumulated a good track record of legal case history. While the courts are not bound by law to case precedence, it does provide guidance on court attitudes toward the practice.

Aside from an outdated legal framework that continues to govern arbitration in Dubai, and even after the long-awaited adoption of either the draft UAE Federal Law on Arbitration or the draft GCC Unified Law, issues still linger that concern investors and legal practitioners. These unresolved concerns will surely adversely affect Dubai's ambition to claim the status of a highly coveted arbitration hub; these concerns include the following:

- Too much government control; *i.e.*, the government exercises many activities without recourse for checks and balances, thus, contributing to lower score in the Rule of Law index.
- Courts are unpredictable; *i.e.*, courts have been sending mixed messages with regard to application of the New York Convention regarding arbitration.¹⁰⁷
- Court delays; *i.e.*, the Justice system suffers from lengthy court delays that take years to resolve commercial cases.¹⁰⁸
- Lack of investment protection and contract enforcement; *i.e.*, these are the weakest scores for Dubai and the UAE in general for doing Business.

¹⁰⁷ Decisions of the Dubai Courts are not systematically reported. However, the existence of two enforcement actions under the Convention before the Dubai Courts is generally known amongst the local arbitration community. In the first, the Dubai Court of First Instance refused to enforce a Stockholm Chamber of Commerce award with no reasons. The decision is being appealed. The second enforcement action, in respect of an award in a dispute between a subsidiary of Macsteel International, incorporated in the Jebel Ali Free Zone, and a Dubai-incorporated company *Macsteel International v. Airmech (Dubai) LLC*, rendered under the Rules and seated in London, was upheld by the same court. As a contested action, the decision has been hailed as a key “step forward. Key Developments in Relation to Arbitration in Dubai, by Meryll Lawry-White. <http://kluwer.practicesource.com/blog/2012/key-developments-in-relation-to-arbitration-in-dubai/>.

In another recent ruling in September 2012 in *Baiti Real Estate Development v. Dynasty Zarooni Inc.* (Appeal No. 14/2012, Real Estate Cassation), the Dubai Court of Cassation has set aside an order for enforcement of a domestic arbitration award. The Court of Cassation gave an unprecedentedly wide interpretation to the concept of public policy as understood in the UAE, which may set a worrisome precedent for the interpretation of public policy as understood in the UAE for purposes of both domestic and international arbitration going forward. For more reading see, *Public Policy in the UAE: Has the Unruly Horse Turned into a Camel?* By Gordon Blanke, Habib Al Mulla & Co. OCT 2012. <http://kluwarbitrationblog.com/blog/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/>.

¹⁰⁸ The minister of Justice admitted delays were a problem, but said the ministry was trying to speed matters up to meet international standards. See “New moves to cut court delays in UAE vows Minister of Justice”, by Ola Salem and Awad Mustafa Apr 24, 2013. <http://www.thenational.ae/news/uae-news/politics/new-moves-to-cut-court-delays-in-uae-vows-minister-of-justice>.

- Lack of regulation for the legal practice; i.e., while not as restrictive as States such as Saudi Arabia or Egypt, Dubai regulations fall short of the global standard common in developed legal markets.¹⁰⁹

A. DIAC – Dubai International Arbitration Center

The DIAC, which was originally set up in 1994 as part of the Dubai Chamber of Commerce, did not achieve much recognition until it was made an independent non-profit institution in 2004 at which time its case load increased from fifteen cases in 2003 to over 400 in 2011.¹¹⁰ While originally the DIAC was tasked to supply facilities for Commercial Arbitration, promote the settlement of disputes by arbitration, and develop a pool of international arbitrators, it quickly became the leading center in the region in terms of caseload. This center became popular with many local dispute parties, which included expats in particular, who found it an ideal alternative to the lethargic local courts where they could conduct the proceedings in English, use foreign arbitrators¹¹¹ and get fast results that were enforceable within the State.

The DIAC's popularity was helped by issuance of its own arbitration rules, which were last updated in 2007, and that include many modern features filling many gaps that the federal law had been silent on such as Kompetenz-Kompetenz,¹¹²

¹⁰⁹ See article "Lack of regulation leads to a free-for-all in legal practices" by Diana Hamade, Oct 16, 2011. Read more: <http://www.thenational.ae/thenationalconversation/comment/lack-of-regulation-leads-to-a-free-for-all-in-legal-practices#ixzz2VUI23uAK>.

¹¹⁰ See Arbitration Guide, "UNITED ARAB EMIRATES" February 2013, Reza Mohtashami, Antonia Birt, Lee Rovinescu. IBA Arbitration Committee.

¹¹¹ According to DIAC 2010 Bi-Annual Statistics report, 14 of the 29 arbitrators used were from outside the GCC region. http://www.diac.ae/idias/resource/photo/diac_biannual.pdf.

¹¹² Under UAE law and relevant institutional rules (article 6, DIAC Rules); an arbitration tribunal is competent to decide upon its own jurisdiction.

interim measures,¹¹³ party autonomy, and independence of the arbitration agreement. While the DIAC has gained international attention with its high volume that has handled approximately 400 cases since 2010, most of these cases are predominantly local, low-value, construction or real estate disputes,¹¹⁴ including landlord–tenant matters. The center has generally failed to attract much interest from outside the Dubai business community.¹¹⁵ The DIAC was one of the lowest rated centers in terms of perception in the 2010 *International Arbitration Survey: Choices in International Arbitration*¹¹⁶ where four respondents rated it as ‘poor’ and two as ‘adequate.’ The gripe about the center amongst practitioners is that, similar to the CIETAC in China, most parties have to use the center as the best way to avoid the enforcement problems that are associated with foreign awards in local courts. In fact, the DIAC’s caseload may potentially suffer from the expected adoption of a new federal law on arbitration because the higher profile cases may elect to seat or conduct their arbitration outside Dubai as enforcement of foreign awards under the New York Convention could be easier and faster than submitting the process to the

¹¹³ There are no specific provisions on a tribunal’s power to make interim measures under UAE law. This said, some of the institutional arbitration rules are more specific, empowering the tribunal to adopt certain interim and conservatory measures once the arbitration tribunal has been constituted (article 31, DIAC Rules). Such measures may also include the ordering of measures relating to security of costs.

¹¹⁴ Real estate and construction case constitute about 80% of the center’s caseload. See, DIAC 2010 Bi-Annual Statistics report. http://www.diac.ae/idias/resource/photo/diac_biannual.pdf.

¹¹⁵ Professor Ziade, DIAC Director noted in November, 2011 noted “that DIAC plays a pivotal role in developing the business environment in Dubai as most of our cases involve Dubai interests. DIAC plans to continue attracting most of the disputes involving Dubai interests. In addition, DIAC wishes to increasingly attract cases that involve only foreign parties thus expanding its outreach beyond the boundaries of the Dubai business community, he concluded.” <http://www.dubaichamber.com/news/diac-promotes-arbitration-services-at-6th-open-arbitration-dialogue>.

¹¹⁶ Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

supervision and ratification of local courts, which are deemed inefficient and may look at the merits of the award in its ratification of domestic awards. An observation that is confirmed by the stiff competition the center is currently facing from the DIFC-LCIA, where awards issued by the DIFC-LCIA under the supervision of the DIFC courts are much easier to enforce in Dubai courts¹¹⁷ under a special protocol that will be discussed in the following section. On a final note, the center lacks transparency with regard to its caseload activity because it has stopped publication of its periodical reports since 2010. This action could affect its appeal to prospective international parties who are looking to do business in the region.

B. DIFC-LCIA – Dubai International Finance Center-London Court of International Arbitration

As explained in Chapter II, the Dubai International Finance Center (DIFC) is a separate jurisdiction based on Common Law, but with its own Arbitration Law based on the UNCITRAL Model Law. The DIFC has its own courts that have judicial panels consisting of internationally-renowned commercial and Civil Law judges,¹¹⁸ and its own arbitration center, the DIFC-LCIA. This center, which is located within the DIFC zone, was set up in 2008 through a joint venture between the DIFC and the LCIA, as a separate non-profit arbitration center. The DIFC-LCIA has its own boards of directors,

¹¹⁷ DIFC courts and their Dubai counterparts have agreed to recognize each other's judgments. So all you have to do to enforce in greater Dubai is have the DIFC courts ratify the award. There is then no need to undergo New York Convention enforcement, with the risk that the other side may raise public policy defenses.

¹¹⁸ DIFC Courts are led by the Chief Justice, Michael Hwang, SC, the President of the Law Society of Singapore, a Vice Chairman of the International Court of Arbitration of the International Chamber of Commerce (ICC), a Vice President of the International Council for Commercial Arbitration, a member of the London Court of International Arbitration, a member of the International Council of Arbitration for Sport, and is Singapore's non-resident Ambassador to Switzerland. DIFC courts website.

its own staff, and is headed by its own Registrar. However, The DIFC-LCIA mirrors the LCIA Court, with similar staff experience, training, case management procedures and arbitration rules; furthermore, it can draw arbitrators from the same list of well-trying world-class arbitrators (legal and non-legal), thus enabling parties to appoint tribunals of the highest caliber. In effect, this center offers all the services that are offered by the well-respected LCIA secretariat in London,¹¹⁹ and the only difference that is relevant in choosing between the two is convenience.

After a slow start, mainly due to a bad rap by a few DIAC officials regarding its jurisdiction and possible enforcement problems,¹²⁰ and after the DIFC Courts' jurisdiction was extended to hear disputes from outside the DIFC,¹²¹ in October 2011, the center is properly up and running with dozens of cases, some of which are impressively high valued.¹²² Parties involved in DIFC-LCIA's cases have come mostly from the UAE and the Gulf region, but the center has also had cases from States outside the region like Malaysia, Hong Kong, the Netherlands, Germany, Norway, the Cayman Islands and the British Virgin Islands.¹²³ As a result, the parties' legal representatives have included law firms based in the Middle East (meaning local

¹¹⁹ DIFC-LCIA website, <http://www.difcarbitration.com/base/faqs/index.html>.

¹²⁰ An individual on DIAC board of trustees wrote a highly technical article in a broadsheet paper, Gulf News, querying the legal infrastructure on which the DIFC-LCIA depends. *See supra* note 122 chapter II.

¹²¹ Decree No.16/2011 in October 2011 opened the Courts' remit to hear: Any civil or commercial case in which both parties select the DIFC Courts' jurisdiction, either in their original contracts/agreements or post-dispute.

¹²² *Ibid*, one case under way that is huge by local standards – a claim worth more than 1 billion Emirati dirham (\$272 million).

¹²³ *See*, "DIFC-LCIA & LCIA India: between universalism and regionalism," by Rémy Gerbay, Queen Mary, University of London, June 2012. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134124.

firms or local offices of foreign law firms), and firms headquartered in Western Europe and Asia. Likewise, the disputes at DIFC-LCIA concern both local and foreign industries with such subject matters as commodities, construction, engineering, and energy and consultant services.¹²⁴

The DIFC-LCIA awards, once ratified by the DIFC Court, are enforceable within the DIFC.¹²⁵ If the award is to be executed in the State jurisdiction of Dubai outside the DIFC, the award must first be ratified by the DIFC Court, and then, if enforcement proceedings are necessary, the award may be enforced through an execution order¹²⁶ by the Dubai Court in accordance with the 2009 enforcement “Protocol” between the Dubai and DIFC judiciary.¹²⁷ Despite early concerns, the application of the Protocol seems to have been successful. In March 2011 the Dubai Court approved the execution of a DIFC-LCIA arbitration award that was recognized and ratified by the Court.¹²⁸ Once an execution order of the Dubai Court is obtained, the award will be enforceable in Dubai or anywhere abroad under the New York Convention.

¹²⁴ *Ibid.*

¹²⁵ Pursuant to Article 42(1) of the DIFC Court Law. Article 42(1).

¹²⁶ Article 42(2) of the DIFC Court Law states that judgments, orders and awards issued or ratified by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law, Article 7.

¹²⁷ *See*, http://difccourts.complinet.com/net_file_store/new_rulebooks/d/i/DIFCC_enf_protocol_summary.pdf.

¹²⁸ *See*, DIFC Courts Press Release, “29 March 2011 — DIFC Courts and Dubai Courts achieve new arbitration enforcement landmark”. http://difccourts.complinet.com/en/display/display_main.html?rbid=2725&element_id=4492&record_id=4848.

Aside from the added delay due to the additional procedures required¹²⁹ by the “Protocol” between the Dubai and DIFC judiciary, and the less than informative website with no official reporting on its caseload, the DIFC-LCIA backed by the world-class LCIA, provide the DIFC jurisdiction, with its Common Law courts and its modern Arbitration Regulations, a unique standing among international arbitration parties and professionals in the international arbitration arena. As a result, the DIFC is quietly emerging as a preferred seat of choice in international contracts involving companies based in and out of the Middle East. Ultimately, the DIFC provides Dubai with a strong corner stone in its legal infrastructure that is necessary for creating a competitive world-class arbitration hub alongside key players such as London, Paris and Singapore. The next section takes our discussion to Qatar.

VII. ANALYSES AND PROSPECTS FOR QATAR

Qatar is relatively new to the world stage as a major player at the political and economic levels. It is probable that this progression all started with the 1995 ascendance to the throne of the prior Emir, Hamid bin Khalifa Al Thani.¹³⁰ Under his progressive leadership, Qatar has undertaken an impressive program of modernization at all levels. This includes a new constitution, not to say that Qatar is a democracy, but the Emir, under the new constitution, relinquished some of his

¹²⁹ *Ibid*, which include translation into Arabic by a legal translator and ratification by the DIFC Courts’ Registry before the Dubai Courts’ Execution Judge perform his review for application of the Civil Procedures Law without looking at the merits.

¹³⁰ The Emir came to power On 27 June 1995, after deposing his father in a peaceful coup and handed over power to his son Tamim on June 25, 2013 in a televised speech.
http://en.wikipedia.org/wiki/Hamad_bin_Khalifa.

powers¹³¹ when he was under no pressure to do so. Qatar also established Al-Jazeera News, the first uncensored media channel in the Middle East, which with Qatar financial clout, boosted Qatar's international stature and influence making it a preferred mediator in many political disputes.¹³² Qatar also implemented many economic and social policies that were prepared under the Emir's guidance when he led the State's Supreme Planning Council starting in 1992.

At the economic level, Qatar mainly prospered after 1997 when it started exporting liquefied natural gas¹³³ and huge investments were made in the following years in its energy infrastructure, such as the \$24 billion Pearl GTL plant that was completed in 2007.¹³⁴ Qatar now is considered one of the fastest growing economies in the world where it ranked first in the world with a real GDP growth rate average of 12% between 2008 and 2012, as compared to China, which was second with a growth average of 9% during the same period.¹³⁵ This is one of main reasons why Qatari residents are considered to be the wealthiest in the world with a GDP per capita at \$102,800.

¹³¹ Most notably, planning the election in 2013 of two-thirds of the members of the Advisory Council, see *supra* note 20 Chapter III.

¹³² Qatar, however is showing a change in its role from the mediator role it has played in the region with mixed results - Lebanon, Palestine, and in 2011 Yemen in liaison with the Gulf Cooperation Council with the Arab League - to that of active partner intervening in the framework of NATO military action in Libya in 2011, and supporting the revolution in Syria.

¹³³ In 1997, Qatar's first shipment reached the shores of Japan, Qatar's proven reserves of natural gas exceed 25 trillion cubic meters, more than 13% of the world total and third largest in the world "Qatar's economy: Past, present and Future", Ibrahim Ibrahim, Frank Harrigan, <http://www.qscience.com/doi/pdf/10.5339/connect.2012.9>.

¹³⁴ See, http://en.wikipedia.org/wiki/Pearl_GTL.

¹³⁵ See, www.gulf-times.com/business/191/details/354255/non-energy-sector-to-drive-qatar's-real-gdp-growth-to-6.5%25-in-2013.

Qatar economic policies focus on developing its non-associated natural gas reserves and increasing private and foreign investment in non-energy sectors; however, oil and gas still account for more than 50% of its GDP, and 70% of government revenues. Going forward, Qatar's GDP growth is expected to slow to more normal levels as Qatar's gas sector expansion moves toward completion; nonetheless, however, it is expected to remain the highest in the region. Higher government spending on infrastructure development is expected to stimulate economic activity in construction, financial and services sectors, all of which are expected to increase GDP growth to 6.5% in 2013 and 6.8% in 2014.¹³⁶ Qatar's successful 2022 World Cup bid will likely accelerate large-scale infrastructure projects that will have a lasting impact on Qatar's real estate, construction, and finance markets as companies scramble to obtain a portion of the more than USD 150 billion in infrastructure investments needed before 2022.

Regarding Qatar's socio-economic indicators, the 2013 Index of Economic Freedom, scored Qatar at 71.3, or "mostly free," which ranks its economy as the 27th freest economy in the world and second only to Bahrain in the region; this is a significant improvement from its 66th ranking¹³⁷ in 2008. Qatar has a moderate score for Ease of Business, according to the World Bank *Doing Business 2013 Report*, where it is ranked 40th in the world. The score mainly suffered from a bad rating for

¹³⁶ See article, "Non-energy sector to drive Qatar's real GDP growth to 6.5% in 2013," Pratap John/Chief Business Reporter, <http://www.gulf-times.com/business/191/details/354255/non-energy-sector-to-drive-qatar%E2%80%99s-real-gdp-growth-to-6.5%25-in-2013>.

¹³⁷ See, 2008 report at, http://thf_media.s3.amazonaws.com/index/pdf/2008/Index2008_ExecutiveSummary.pdf.

starting a business, protecting investments and enforcing contracts.¹³⁸ However, it has an outstanding ranking in the latest Global Competitiveness Report where it is ranked 11th in the world and 1st in the region with high marks for its administrative institutions; however, the report shows that the infrastructure in Qatar, while developed, is not up to the level seen in other jurisdictions, such as the UAE and Bahrain. According to the report,¹³⁹ the most problematic factors for doing business worth mentioning here are the following:

- 1) Access to financing
- 2) Inflation
- 3) Restrictive labor regulations
- 4) Inadequately educated workforce
- 5) Inadequate supply of infrastructure

The UAE and Qatar tie for first place as least corrupted States in the region, and the 27th in the world according to the 2012 Corruption Perceptions Index. However, while UAE has improved its standing, Qatar has experience a negative¹⁴⁰ trend. Over the last two years, the State has lost a total of eight points in global ranking since 2010 when it scored an impressive ranking of 19th in the world. Qatar is not covered

¹³⁸ See <http://www.doingbusiness.org/data/exploreeconomies/qatar/> . The data shows that Qatar is ranked No. 2 in taxes, but ranked No. 100 in protecting investments.

¹³⁹ See report, P 300, http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf.

¹⁴⁰ While Qatar has a very stringent anti-corruption law in place where anybody – with the exception of The Emir and the Heir Apparent– found embroiled in a case of alleged corruption can be prosecuted under the above law; however, there were cases of alleged corruption with the Public Prosecution and till date nobody, however, influential, had tried to pressure the Prosecution office to sweep a case under the carpet. <http://www.bqdoha.com/2013/03/subverting-corruption>.

by the extensive world Justice Project 142 index on Rule of Law; however, the 2012 Economic Freedom Index scores Qatar at 71 for Rule of Law based on property rights and freedom from corruption, which, while far from top scores in the world, it is by far best in the Middle East region. According to the report, the Rule of Law in Qatar has been solidly respected with a well-functioning legal framework in place, but the judiciary is susceptible to political influence and can be bureaucratic. The law imposes penalties for bribery of public officials and those who attempt to influence them illegally.

To assess the county's index for arbitrating commercial disputes (see Appendix I), following the methodology suggested by the 2010 Investing Across Borders Report, we have used the State jurisdiction courts and laws,¹⁴³ where arbitration is currently regulated by Articles 190—210 of Law No 13 of the 1990 Civil and Commercial Code of Procedure. These regulations are outdated in many respects, as explained in Chapter III. That is why the average score of 65.2¹⁴⁴ is significantly lower than the global average at 71.2,¹⁴⁵ and is lowest amongst the four

¹⁴² The world Justice Project, an independent, non-profit organization, develops communities of opportunity and equity by advancing the Rule of Law worldwide. <http://worldjusticeproject.org/who-we-are>.

¹⁴³ While Arbitration under the DIFC jurisdiction is based on the UNCITRAL Model Law and has its own courts, they still function within the State jurisdiction courts.

¹⁴⁴ Much of the scoring for in this survey was based on Dr. Zain Al Abdin Sharar study titled *“Does Qatar Need to Reform its Arbitration Law and Adopting the UNCITRAL Model Law for Arbitration? A Comparative Analysis. See supra note 16 chapter I.*

¹⁴⁵ The average global indices for arbitrating commercial dispute are listed as follows:

- Strength of Laws Index - 85.2
- Ease of Process Index - 70.6
- Extent of judicial assistance index - 57.9

Middle East States under study in this research. Once Qatar adopts a new arbitration law, such as the draft GCC Arbitration Law, there is likely to be significant improvement in the Strength of Laws and Ease of the Process Indices; however, like Bahrain and UAE, we doubt whether the new law will have much of an effect on the Judicial Assistance Index, where the State courts' procedures and attitude will not be affected, and enforcement issues will persist as is evident in Qatar's below average ranking of 95th in the world for contract enforcement.

Qatar is the most recent player of the four States in the practice of Commercial Arbitration in the region. The first arbitration center, Qatar International Center for Arbitration (QICA)¹⁴⁶ was created in 2006 and alternative dispute resolutions¹⁴⁷ in the QFC jurisdiction only started in 2010. There are around fifteen¹⁴⁸ International law firms (mostly UK and US firms) that have a presence in Qatar, most of whom are based in the Qatar Financial Center. However that number is expected to increase¹⁴⁹ as the government is increasing its investment in infrastructure over the next decade. Foreign lawyers who are working in registered international law firms in Qatar may practice international and Qatari law, but not to appear in court

¹⁴⁶ Prior to that, most arbitration tribunals were conducted by the GCC arbitration center in Bahrain.

¹⁴⁷ A Memorandum of Understanding ("MOU") was signed on January 10, 2010 by the QFC Court and the Center for Effective Dispute Resolution ("CEDR"). Whereby the CEDR will assist the court in providing both mediation services and training in the Gulf region.

¹⁴⁸ See , The International Bar Association website, http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Qatar.aspx.

¹⁴⁹ Various leading firms have an office locally, and this number is expected to rise. Following its decision to open an office in Doha, Allen & Overy LLP continues to go from strength to strength in the region, and Latham & Watkins LLP is another heavyweight presence. On the domestic side, the leading firms are Arab Law Bureau, Al Tamimi & Company in association with Al Marri, Hassan A Alkhater Law Office, and Law Offices of Gebran Majdalany. <http://www.legal500.com/c/qatar/legal-market-overview>.

except in the limited circumstances prescribed by the law.¹⁵⁰ There are no restrictions on the participation of foreign lawyers in arbitration and mediation proceedings in either jurisdiction.

Helped partially by the financial crisis between 2009 and 2011 in Dubai and the political instability in Bahrain since 2011, Qatar with its sound standing in most economic and socio economic indicators, has definitely emerged as a strong business hub in the Middle East. This was confirmed recently by the Morgan Stanley Capital International (MSCI), a global index compiler that upgraded Qatar along with UAE to Emerging Market status;¹⁵¹ this rating will further help the State's ability to access funds from around the globe.¹⁵² Qatar's fast ascendance to prominence as a commercial hub could be attributed to many reasons, but there are definite attractions that are drawing investors to Qatar that could also serve the State in its fight to become an arbitration hub for business parties as a seat or venue to solve their disputes; a few are the following:

- 1) Economic Stability: while many economies in the region suffered from low growth or shrinking GDP during the global financial crises, Qatar, relying on its own resources, enjoyed some of its highest growth rates of about 12% between 2008 and 2012.

¹⁵⁰ Article 8 of the Law on Lawyers. No. 23 of 2006.

¹⁵¹ See article, "MSCI Ups Qatar and UAE to Emerging Market Status", Published: Wednesday, 12 Jun 2013, by: Yousef Gamal El-Din, <http://www.cnbc.com/id/100809850>.

¹⁵² *Ibid.*

- 2) Big wealth and large expenditure: the Qatari government driven by its Vision 2030 plan has committed over \$140 billion for investment, infrastructure and expansion in a wide range of sectors,¹⁵³ which provide investors with security from future fiscal changes.
- 3) Security and political stability: Qatar is one of the most politically stable and secure States in the region with a strong respect for Rule of Law.
- 4) Qatar is developing a large base of experienced professionals from different backgrounds ready to support all kinds of dispute settlements including a wide network of international law firms.
- 5) Qatar population is mostly international where expatriates comprise over 85 percent of the population, and English is the most widely spoken language.
- 6) The legal system in Qatar is regarded as fair and impartial; it is trusted by local and international corporations alike.¹⁵⁴

However, aside from an outdated legal framework that continue to governs arbitration in Qatar, there still some lingering issues that will continue to be of concern to investors and legal practitioners. These matters will adversely affect its drive to become the an arbitration hub in the region, even after the long awaited adoption of either the draft UAE Federal Law on Arbitration or the draft GCC Unified Law on Arbitration. These concerns include the following:

¹⁵³ See more at: <http://www.arabfuturecities.com/why-qatar-.html>.

¹⁵⁴ See *supra* note 34 chapter III.

- 1) The negative trend in corruption perception which saw the State slide in standings from 19 in 2010 to 27 in 2012.
- 2) Despite constitutional guarantees, the judiciary is not independent. In practice, the majority of Qatar's judges are foreign nationals who are appointed and removed by the emir.
- 3) Courts are unpredictable with potential obstacles from the special emphasis sometimes placed by the courts on formalities and documentation.¹⁵⁵
- 4) Court delay: the Justice system suffers from lengthy court delays with a growing backlog of cases. The legal system has not been updated since 1990.¹⁵⁶
- 5) Lack of investment protection and contract enforcement: these are the weakest scores for Qatar in the 2013 doing Business index.
- 6) Qatari courts do not enforce judgments of other courts in disputes emanating from investment agreements made under the jurisdiction of other nations. The standard clauses in government contracts stipulate that disputes emanating from government contracts will be subject to arbitration in Qatar. This forces investors to seat their arbitration in Qatar

¹⁵⁵ Such as setting aside an arbitral award for the simple reason that the arbitrator did not render the award in the name of H.H. the Emir of Qatar, see Chapter III.

¹⁵⁶ See article, "Legal community pushes to revamp Qatar's court system as backlog grows" <http://dohanews.co/post/34096687069/legal-community-pushes-to-revamp-qatars-court-system>.

where it will be subject to the outdated State jurisdiction arbitration regulations.¹⁵⁷

While the Qatar International Center for Arbitration (QICA) is currently the most active center in Qatar with an average caseload of forty to fifty cases a year, it mostly caters to the local market or foreign parties in government contracts that are forced to use the QICA and seat their arbitration in Qatar. It is difficult to imagine that it could attract much business from outside the local market despite the valiant efforts by its new director, Minas Khatchadourian,¹⁵⁸ who is actively promoting the center, particularly to Qatari corporations to make QICA their default choice. Therefore, when we talk about the future of arbitration in Qatar, we should look at the QICDRC.

A. QICDRC—Qatar International Court and Dispute Resolution Center

While the QICDRC is not an arbitration center per se, it is a unique body that offers a full suite of dispute resolution options that include case managed trials, mediation, arbitration and other forms of Alternative Dispute Resolution (ADR). It is also a modern application of the multi-door court system where,

[t]he Registrar or a Judge may be made available at the request of the parties to discuss with the parties the best strategy for resolving their disputes before proceedings are commenced, or as part of the Court's case management process. Both clients and their lawyers may request this assistance. In this way the Court will offer a bespoke service to parties, taking

¹⁵⁷ See, publication by , U.S. & FOREIGN COMMERCIAL SERVICE AND U.S. DEPARTMENT OF STATE, "Doing Business in Qatar: 2012 State Commercial Guide for U.S. Companies", http://export.gov/qatar/static/2012%20CCG%20Qatar%20Final_Latest_eg_qa_050999.pdf.

¹⁵⁸ Minas Khatchadourian, an Egyptian professor and arbitrator, has been appointed as CEO and secretary general of the QICA. One of his top achievements is to publish a new set of rules in 2012 based on the new 2010 UNCITRAL Rules.

into account the needs of speed, cost, privacy, or a requirement for international judicial legal expertise.¹⁵⁹

In contrast, therefore, to the old-fashioned concept of a courtroom, which is viewed as removed from the real world, the QICDRC is designed to respond quickly and effectively in the fast moving economies of the region to provide “the most effective and efficient dispute resolution vehicles for resolving high-end commercial disputes that international businesses demand,”¹⁶⁰ which as Robert Musgrove¹⁶¹ puts it “explains how good law and good business go hand in hand.”

One of the main selling points for the QICDRC is that it has a world-renowned judiciary, currently led by former President of the Supreme Court of the United Kingdom, Lord Phillips of Worth Matravers. Their teams of experienced judges, who comprise the court, are specialists in their respective fields, some of them have served as arbitrators and others are certified mediators. They also come from different parts of the world, which highlights the international flavor of this court. While the QICDRC has a mandatory jurisdiction for any disputes relating to companies registered with the QFC as it was originally intended for, it is now truly a global court based upon the consent of the parties no matter where they are based.¹⁶²

¹⁵⁹ See QICDRC Introduction, <http://www.qicdrc.com.qa/PDF/QICDRC%20Introduction.pdf>.

¹⁶⁰ See, article, “Good law means good business” by Robert Musgrove is the CEO of the Qatar International Court and Dispute Resolution Center. June 11, 2013. <http://privatesectorqatar.com/english/2013/06/6918/>.

¹⁶¹ *Ibid.*

¹⁶² See QICDRC Introduction, <http://www.qicdrc.com.qa/PDF/QICDRC%20Introduction.pdf>, p 6.

The QICDRC does not have its own arbitration rules. Parties may bring their choice of rules and procedures such as the UNCITRAL, ICC or LCIA rules, and may use the QFC or State of Qatar as their seat, or choose to select their own seat. The QICDRC provides the facilities and administrative support for parties wishing to conduct arbitrations. The center does not maintain a list of arbitrators, however, a number of the Judges of the court are also internationally renowned commercial arbitrators, who are available to parties to act as arbitrators through the ADR Center, and, if required, the center is able to select arbitrators from a diverse pool of highly qualified and experienced individuals in consultation with internationally renowned providers. One huge advantage for using the QICDRC is that, as a government supported not-for-profit center, it does not currently charge any administrative fees or other costs to use its facility for neither local nor foreign parties. However, the parties will have to pay the professional costs of the arbitrators and for any extra services they require (such as printing documents, photocopying, and catering).¹⁶³

The QICDRC does not yet have an extensive history, nor does it have published reports of its caseload. Actually, it appears that it is off to a slow start as it only had four “large” arbitration cases in 2012.¹⁶⁴ However, it has been actively positioning itself as the preferred venue of the future for dispute resolution in the region. While arbitration has been by far the most favored dispute resolution

¹⁶³ See QICDRC Introduction, <http://www.qicdrc.com.qa/PDF/QICDRC%20Introduction.pdf>, p 12, 13.

¹⁶⁴ On the number of cases the court has heard and resolved, QICDRC CEO reported in July, 2012: “We have heard nine cases in the past year at first instance, two Regulatory Appeal Tribunal hearings, and the appeal circuit has sat under President Lord Woolf. We have heard our first mediation, and also four large Commercial Arbitrations. Arbitration cases in particular look likely to keep the court busy.” “Qatar International Court,” <http://www.thepeninsulaqatar.com/qatar/199730-qatar-international-court-plans-expansion.html>.

method by contracting parties in the region, the QICDRC, as well as many dispute parties, recognizes that its institutional nature and modern contracts complexities have stripped the process of some of the important characteristics that made it popular in the first place, most importantly, cost and speed. In an effort to re-emphasize these characteristics, the QICDRC, in cooperation with local businesses, law firms and other reputable dispute resolution centers, has been working on devising special schemes tailored to handle disputes arising from particular industries such as construction, insurance and Islamic finance, which constitute some of the major sectors of the economy in the region. The purpose of these schemes is to create customized processes or procedures for fast and effective dispute resolution using cutting-edge new technologies that produce binding judgments or awards. These procedures are expected to make full use of the existing center capabilities, such as the virtual court service and multi-channel video-conferencing rooms where the parties do can join in from anywhere in the world. This, in addition to use of fully automated electronic filing and documentation processes will definitely save significant time and travel costs.

As an example, the QICDRC is currently developing a fast track scheme for resolving construction disputes (Q-Construct) using specialist construction adjudicators or mediators.¹⁶⁵ This scheme, which requires the adjudicator to make a decision thirty days from the commencement of the process, is drafted to suit the accelerated pace of construction in Qatar in preparation for the 2022 World Cup, and make sure that construction disputes do not hinder the progress of the many

¹⁶⁵ See QICDRC website, <http://qicdrc.com.qa/ADRCenter.aspx>.

projects now underway. The scheme may be expanded to fit similar situations region.¹⁶⁶ The QICDRC has also established a feasibility study project with Pinsent Masons¹⁶⁷ to develop a plan for high-value insurance and reinsurance claims¹⁶⁸ in cooperation with insurers based in Qatar, Bahrain, Dubai and London. Finally the QICDRC in July, 2012 announced that it had begun another joint feasibility study to create such a scheme that caters to Islamic Finance disputes.¹⁶⁹

It is too early to judge the performance of the QICDRC because it has not completely developed its schemes and much of its current activity is dedicated to future construction. The center however, is not short of initiatives or resources in developing innovative and visionary techniques that are intended to achieve their vision for the future, which is,

[t]o develop a world-class International Court and Dispute Resolution Center and provide national and international civil and commercial dispute resolution services within Qatar and the Middle East region that are accessible, modern, expeditious, economical and responsive to the needs of global business markets.¹⁷⁰

¹⁶⁶ The adjudicator will make a decision 30 days from the commencement of the process. This includes 15 days from the time a complaint is first lodged with the court, a further 15 days for a response from the defendant and an additional two days given to the initial claimant. See, Qatar Construction Sites website, "Seminar updates on QConstruct," http://www.qc-sites.com/local_article.php?id=106.

¹⁶⁷ An international law firm.

¹⁶⁸ Preliminary proposals from Pinsent Masons and the QICDRC will be discussed by leading figures in the insurance and reinsurance industry at a series of roundtables in Dubai, Qatar, and London during September 2012. <http://www.ameinfo.com/pinsent-masons-qatar-international-court-dispute-310965>.

¹⁶⁹ QICDRC Chief Executive Officer Robert Musgrove said: "We are currently looking at the possibility of resolving Islamic Finance disputes by setting up dispute resolution mechanism." <http://www.thepeninsulaqatar.com/qatar/199730-qatar-international-court-plans-expansion.html>.

¹⁷⁰ See, QICDRC Vision, <http://qicdrc.com.qa/Vision.aspx>.

The QICDRC, operating under the QFC Common Law system and modern Arbitration Law with its internationally renowned judges, already provides parties many advantages that well-known international institutions, such as the LCIA, ICC, and SIAC offer; however the center has a keen eye on the future. It has shown willingness to reinvent itself by adopting the multi-door courthouse concept in order to offer the fastest, most cost-effective and responsive service for its clients. It is striving to be the best in the business. As a result the QFC has strong potential to emerge as a preferred seat of choice in many future contracts involving companies based in and out of Qatar. Ultimately, the QICDRC model could propel Qatar to win the race in the region and become a strong contender as a world-class arbitration hub alongside key players such as London, Paris and Singapore.

VIII. CONCLUSION

Egypt, Bahrain, Dubai (UAE) and most recently Qatar are actively promoting their respective jurisdictions as viable options for international parties to conduct their proceedings in the region. Aside from upgrading their arbitration laws and creating separate jurisdictions to facilitate the process away from local courts, they have well-established regional arbitration centers (CRCICA, DIAC) and new centers with international appeal that are steadily growing in significance (DIFC-LCIA, BCDR-AAA-QICDRC). In the research, carried out above, regarding the prospect of these jurisdictions to win the arbitration hub crown in the region, there have been several facts brought out before us on which we can build our conclusion.

Foremost, all four jurisdictions, in reality lag far behind other world leaders in terms of socio-economic and legal factors, and most importantly, the indicators for Rule of Law, corruption, arbitration disputes and enforcing contracts that particularly, appeal for foreign parties with no economic attachment to these jurisdictions. All four rely mainly on the strength of their economies, such as is the case for Qatar and the UAE, or on their appeal as a gateway for other regional economies, as is the case with Bahrain and Egypt.

Second, based on the indicators only, Qatar seems to be ahead in the race with regard to its appeal in socio-economic and legal status amongst the four jurisdictions, with Dubai (UAE), a close second. Qatar also has the most vibrant and sustainable economy, and expects to attract the most investments in the next decade as it prepares for the FIFA World Cup in 2022. Third, courts of State jurisdictions in all four States suffer from lack of efficiency with old and lengthy procedures; this inefficiency is reflected in their below average ranking for ease of enforcing contracts.

Fourth, despite all the gloom surrounding the future of Egypt, CRCICA with its vast, networked connections in the region will continue to serve in its traditional market, mainly for local and Arab parties outside the GCC, and with other cases coming from Saudi Arabia. Under current conditions, it is impossible for Egypt to replicate the success of other emerging hubs, such as Singapore, and become a preferred hub at the international level. Fifth, Bahrain has greatly improved its chances in the race with the establishment of the BCDR-AAA. Bahrain's introduction of the new concepts, "statutory arbitration" and "free zone" arbitration will help to resolve disputes more efficiently without having to depend on Bahrain's domestic

courts; however, these arrangements seem to be more intended for parties with trade attachments to Bahrain and its free zones. Whether use by outside parties materializes is still to be seen.

Finally, the real fight for the ultimate crown is between Qatar and Dubai with their respective offshore jurisdictions, the QFC and the DIFC. While the home-grown arbitration centers in Dubai and Qatar, namely the DIAC and the QCIA are currently enjoying busy caseloads, they are mainly catering to cases with economic attachments to their respective jurisdictions. They benefit from having somewhat of a captive audience where parties are driven to these centers by the legal or practical requirements existing within their jurisdictions. This means they do not face full competition from other international centers, and in fact, there is a strong possibility that these two centers will lose some of their workload if their respective jurisdictions adopt modern Arbitration Laws that permit fair competition.

However, the off shore jurisdictions of Qatar and Dubai with their respective institutions, QICDRC and DIFC-LCIA provide the cities of Dubai and Doha, Qatar with the means to develop into world-class contenders and compete with powerhouses such as Paris, London, New York, and Singapore in terms of servicing international parties with no trade attachment to their respective jurisdictions. From a legal and procedural point of view, there are several definite advantages for using these two centers and their off-shore jurisdictions as dispute resolution forums not only as venues of arbitration, but as seats of arbitration as well:

- Court proceedings are conducted in English.

- Courts are driven by a system of binding and recorded judicial precedent, which is not the case in the mostly Civil Law style courts which exist in all State jurisdictions of the region.
- They use English law, the most preferred choice to govern the substance of the disputes, which is also the base for the QFC and DIFC legislations.
- The two jurisdictions have staffed their courts with world-class judges known for their integrity and neutrality.
- Awards and court judgments are easier to enforce in their respective State jurisdictions where they are more easily converted to State court orders.

While the LCIA-DIFC provides Dubai with a ready-made well-tried recipe for its arbitration institutional needs by bringing in the (LCIA), one of the most respected arbitration institutions in the world, Qatar is taking a different approach by establishing its institution, the QICDRC, from the outset. Aided by some of the most renowned judges and experts, the QICDRC is building for the future by adopting new concepts and procedures, such as the multi-door courthouse and the industry-oriented ADR schemes, with one purpose in mind, to be the best in the business. Qatar's plans to have a place on the world's international arbitration map should not fall on deaf ears. In an article that discussed the QFC Court's future with the current QICDRC, CEO Robert Musgrove, published an article, "Qatar: A center for 'quality' international dispute resolution?"¹⁷¹ The editor concludes with the following:

¹⁷¹ Niel Ross, the Guardian.Co.UK. Tuesday 14 December 2010, <http://www.guardian.co.uk/law/2010/dec/14/qatar-international-dispute-resolution-law>.

It will take Musgrove time to build the court's reputation as a proper international center. "But like the 2022 World Cup bid," says Jeremy Kosky,¹⁷² "you can't rule the Qataris out of anything."

The next and final chapter submits a number of conclusions and recommendations for consideration and comment.

¹⁷²Jeremy Kosky, Partner, Clifford Chance LLP. Specialist in commercial and banking claims.

CHAPTER VII

SUMMARY

AND

RECOMMENDATIONS

One of the attractions of international arbitration as a means of resolving cross-border commercial disputes is the assumption that the tribunal will determine the case fairly and impartially, without regard to the nationality of the parties, and in accordance with generally [recognized] standards of due process. If either party has cause to believe that an arbitrator lacks the requisite degree of objectivity, or is for some reason incapable of performing his duties fairly and impartially, then it is right that such a party has an opportunity to object to that person sitting on the tribunal.¹

I. INTRODUCTION

In this concluding chapter, we discuss challenges and present recommendations with regard to the practice of arbitration in the Middle East. This effort commences with an outline of the general issues that modern arbitration is facing as it enjoys its golden age in the current international investment environment. Thereafter, our attention shifts to the challenges and obstacles, specifically those of a legal, cultural

¹ Foster, David, David Edwards. The European & Middle Eastern Arbitration Review 2008. Challenges to Arbitrators. http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators__impartiality_and_independence/challenges_to_arbitrators.pdf. (Last assessed 8/10/13).

and political perspective that affect arbitration in the Middle East. We shall afterwards proffer recommendations and suggestions that could improve the performance of local and regional practice of arbitration, which is generally criticized as being erratic and disorganized. Finally, follows a summary of chapter conclusions, and a review of the key findings as discussed over the course of this study.

II. CHALLENGES FACING MODERN ARBITRATION

This is an extensive topic that is worthy of a separate study; therefore, only a synopsis of the issues will be offered here. As globalization becomes ever more prevalent, with an increased international flow of trade and investment, arbitration has entered a golden age where it is the preferred process by which a party can attain enforceable results in another party's jurisdiction, in lieu of litigating the dispute in on its home court. Additionally, businesses continue to show a preference for arbitration over litigation or other ADR methods for transnational disputes.² However, as international agreements become more complex with multi-parties from various jurisdictions, and modern arbitration legislation allowing for increased party autonomy and different interim measures, international arbitration is now losing some of its luster. Besides time and cost, which have been a significant concern for some time, there are legal and procedural perceptions that are causing their share of apprehension. Coincidentally, as we are typing these very words, the

² Arbitration: Corporate attitudes and practices: 2008. The Survey has been issued by PwC and Queen Mary, University of London. See note above.

International Bar Association is conducting an international arbitration conference³ entitled, “*International Arbitration at a Crossroads: Is There a Coming Backlash?*” with the following program description:

International arbitration has grown exponentially. Has it become a victim of its own success? Even as arbitration has expanded into areas of greater value, prominence and sensitivity, there have at the same time been calls to cut it back, restrict its permissible scope, disregard awards or subordinate them to national court judgments and generally limit its effect.⁴

In the second half of Mr. Sundaresh Menon’s⁵ famous keynote speech, he proclaimed a “golden age” for arbitration at the 2012 Congress⁶ of (ICCA). Mr. Menon reflected on the question, “*The Beginning of the End?*” where he presented a list of issues and challenges that gave rise to that question. Some of the concerns he noted are the following:

1. Arbitrators have too much power where they “*grant final, binding and authoritative rulings on disputes, with little intervention*” or recourse for appeal.
2. The process is “*not charitable.*” It is a business that ultimately seeks profit for the arbitrators, councils and the institutions. Arbitrators are

³ The conference was conducted in St Petersburg, Russia on June 28, 2013, <http://www.int-bar.org/conferences/conf489/binary/St%20Petersburg%20Arbitration%202013%20programme.pdf>

⁴ *Ibid.*

⁵ Attorney-General, Singapore.

⁶ ICCA Congress 2012 Opening Plenary Session International Arbitration: The Coming of a New Age for Asia (and Elsewhere).

basically judges for hire, which gives many concerns regarding conflict of interest⁷ and the need for this business to be regulated.

3. The confidential nature of the process makes its proceeds and decision making ambiguous to its clients and other lawyers and arbitrators, which is increasingly “*creating a sense of disconnect.*”
4. There is a perception of “*pro-investor bias*” that exists on the part of commercial arbitrators⁸ as most of these arbitrators are drawn from the respective industries of those investors.
5. The process is not based on precedence or citations of authorities.⁹ Therefore, it lacks predictability.
6. There is evidence of growing hostility and tension between national courts and arbitration, “*suggesting a modest return to greater judicial oversight of arbitration.*”¹⁰

⁷ According to Mr. Sundaresh This problem is exacerbated by the practice of unilateral appointments. One particularly troubling statistic that emerges from one study is that practically all dissenting opinions in arbitrations had been written by arbitrators who had been nominated by the losing party. Just as damaging are the embarrassing cases of blatant leakage of confidential arbitral deliberations by an arbitrator to his nominating party and controversial inexplicable rulings subsequently explained by the undue pressure that had been exerted by the nominating party?

⁸ Mr. Sundaresh notes “The pro-investor attitude has even been cited as the reason arbitrators from the developing world often rule in favor of investors from traditionally capital-exporting countries, this being the “price” that has to be paid to gain credibility and access to the privileged club of elite International arbitrators.”

⁹ Catherine A Rogers, “The Vocation of the International Arbitrator” 20 (2005) Am. U. Int’l. Rev. 957.

¹⁰ Mr. Sundaresh noted many examples from around the world including Singapore where, in *Kempinski Hotels SA v PT Prima International Development*, 46 the High Court set aside three international arbitration awards, on the basis that the tribunal had decided on issues that were not pleaded by the parties, thereby acting in excess of its own jurisdiction in determining matters beyond the scope of submission to arbitration.

However, when all is said and done, despite all the aforementioned, and the added costs and time that are becoming associated with current international arbitration process, the consensus among all disputing parties and other professionals is that there is no viable alternative yet to arbitration for international disputes, because the results of other ADR methods such as negotiation, mediation or conciliation are not binding on the parties and not enforceable through any binding international rule; likewise, no party would willingly submit to an opposing party's jurisdiction court to resolve any dispute of significant value.

III. CHALLENGES FACING MIDDLE EAST ARBITRATION

Although most Middle Eastern countries have embraced international Commercial Arbitration as a preferred method for dispute resolution, there are yet challenges that lie ahead. In addition to the inherent issues described above, another area of challenge facing arbitration is specific to its application in different countries; these challenges are related to the variations between the international practice, on one hand; and on the other, domestic legal, social and political culture. This has been discussed in many articles and studies¹¹ where the need to resort, for whatever reason,¹² to another jurisdiction's legal system means that a party may inadvertently

¹¹ See, Ibrahim Fadlallah, Arbitration Facing Conflicts of Culture, in: Arbitration International, Kluwer Law.

International Volume 25 (2009), pp. 303-317. And "INTERNATIONAL COMMERCIAL ARBITRATION AND DOMESTIC LEGAL CULTURE", by The Hon. Michael Kirby at the ACICA conference, Melbourne. December 4, 2009. And, "Cultural sensitivity and International Arbitration" by: Khawar Qureshi, McNair Chambers. http://www.mcnairchambers.com/media/documents/200807/English-Cultural_sensitivity_and_International_Arbitration.pdf

¹² For example, In enforcement proceeding in case of a challenge, which is common in many Arab countries like , or a party may be forced to use the local jurisdiction law either as a requirement as the case in Qatari government contract for practicality as the case in many UAE agreements.

entangle itself in other issues and problems that are part of the local legal, cultural and political characteristics of that jurisdiction. In the Middle East, the ever-pervasive Shari'a Law, anachronistic judicial systems, bias and government influence are some of the major influences that shape the legal culture, and which continues to create difficulties in commercial relations and international arbitration.

A. The Role of Shari'a Law

Although Shari'a in most Middle Eastern countries is restricted to mostly family matters, Saudi Arabia, the largest economy and the largest recipient of direct foreign investment¹³ in the region, holds Shari'a Law as the supreme law of the land where any arbitral award, for example, is subject to Shari'a interpretation at the hands of Saudi Arabia's Shari'a judges. Thus, despite the enactment of a new modern Arbitration Law in Saudi Arabia since June, 2012,¹⁴ there is no guarantee that the Saudi courts wouldn't require, for example, the arbitrators to be male and Muslim per some mufti (judge) interpretation of Shari'a as these courts have done before.¹⁵ Keep in mind that Shari'a Law in Saudi Arabia is not codified, and its interpretation may vary from one judge to another, even within the country itself. Thus, the role of Shari'a in the Saudi legal system remains one of the main obstacles to attracting foreign investments, and is costing the country a high premium on its projects as

¹³ 18.8 Billion in 2012 according to the UNCTAD, http://unctad.org/en/PublicationsLibrary/webdiaeia2013d1_en.pdf.

¹⁴ See *supra* note 145 chapter II.

¹⁵ The Implementing Regulations (based on some interpretation of Shari'a) required arbitrators to have the same qualifications as Saudi judges which, in practice, meant that they must be male and Muslim. For more background on the subject see "5.5. Position of Women as Arbitrator, Witness or Party in Conciliation in the Shari'a" E.A. Alsheikh / Arab Law Quarterly 25 (2011) 367-400 p. 386.

many investors factor in additional costs to mitigate the higher risk of award enforcement in Saudi Arabia.

In October 2012, there were reports in the *Financial Times*¹⁶ of London that Saudi Arabia was seeking to establish a private court in London that would settle large commercial disputes arising from the kingdom, away from the influence of Shari'a courts, and thus boost foreign investment in the country. It is also interesting for the sake of our study that the London newspaper noted how this move may affect Qatar's plans to attract arbitration disputes by claiming that,

Saudi Arabia's move may derail the plans of other Middle Eastern and Asian countries, including Qatar and Singapore that have set up. . . arbitration centers, luring some of the UK's most renowned retired judges on to their panels, and marketing themselves as a forum to resolve regional disputes.

Aside from Saudi Arabia, since the start of the Arab Spring in 2011, religion has a bigger role in the regional politics as witnessed by the ascendancy of Islamic parties to seats of power in many Arab countries.¹⁷ It is too early to reflect on the role of Shari'a Law in future legislations of these countries; in Egypt, for example, certain extremists are already demanding Islamization of the law.¹⁸ Finally, with the emergence of the Islamic Finance Industry, which is having bigger role in financing

¹⁶ See article, "Saudis seek private court in London," by Caroline Binham and Helen Warrell in London, October 30, 2012. <http://www.ft.com/cms/s/0/47db481c-1f93-11e2-b273-00144feabdc0.html#axzz2WnTQ8unZ>.

¹⁷ The Muslim Brothers have gained power in Egypt in 2012, and Al-Nahda, an Islamic oriented Party, gained power in Tunisia in 2011.

¹⁸ The fundamentalist Salfi movement in Egypt, which has gained about 20% of the 2012 vote for parliament, has declared in many occasions that they would use the Quran as the only source of legislation. See "Salafists vow more protests for Shari'a-based constitution", <http://english.ahram.org.eg/NewsContent/1/64/57677/Egypt/Politics-/Salafists-vow-more-protests-for-Shari'abased-consti.aspx>.

many projects in the Middle East, Shari'a could also have a bigger role if the parties, as discussed in Chapter IV, agree to subject the governing law to its principles. If the wide influence of Shari'a can be thought an influence of some significance, then so are court decisions that are anachronistic and just as predictable as those decisions handed down under Shari'a. The following section considers these judicial decisions.

B. Outdated and Unpredictable Court Decisions

Courts in the Middle East continue to be stymied by the inefficiency of old procedures and lengthy processes.¹⁹ As one consequence, efforts to reduce delays in the judicial system in the Arab world have been slow to materialize. The World Bank's publication, *"Doing Business in the Arab world,"*²⁰ reports that it "has recorded 103 reforms to improve court efficiency over the past seven years. Few reformation attempts have been successful, and many have been slow to show any tangible results. Court reform generally takes time to show its impact."²¹ As a result all Arab countries of the Middle East, with the exception of Yemen (Ironically), the poorest countries of the Middle East, are ranked in the bottom half of the world with regard to enforcing contracts. The legal systems in the Middle East, the offshore jurisdictions excepted, have no system of recording and publishing court decisions, and judges are not bound by precedence from previous decisions; this could be the reason some courts are sending mixed messages, though inadvertently, with regard

¹⁹ For example, in the UAE, the overall recognition process may take in excess of 18 months, during which the enforcement of the award is suspended.

²⁰ See report at, <http://www.doingbusiness.org/reports/regional-reports/arab-world/>.

²¹ *Ibid.*

to application of the New York Convention regarding arbitration.²² In that respect, it is also noteworthy that, at this very moment, Qatar is taking steps to improve in this aspect by launching the “West Law Qatar” Legal Website²³ in cooperation with the Thomson Reuters Company, which will record and publish the Qatari Court Rulings in English. This should facilitate dissemination of legal information and contribute to enhancing the predictability and transparency of court decisions in Qatar.

C. The Perception of Bias

The old perception that International Commercial Arbitration tends to resolve disputes in favor of economic interests of the West yet persists in the Middle East. This perception, which has been shared by many Third World nations,²⁴ persists in the region. For example, in 2008, a distinguished Arab International Arbitration

²² In another recent ruling in September 2012 in *Baiti Real Estate Development v. Dynasty Zarooni Inc.* (Appeal No. 14/2012, Real Estate Cassation), the Dubai Court of Cassation has set aside an order for enforcement of a domestic arbitration award. The Court of Cassation gave an unprecedentedly wide interpretation to the concept of public policy as understood in the UAE, which may set a worrisome precedent for the interpretation of public policy as understood in the UAE for purposes of both domestic and international arbitration going forward. For more reading see, Public Policy in the UAE: Has the Unruly Horse Turned into a Camel? By Gordon Blanke, Habib Al Mulla & Co. OCT2012, <http://klowerarbitrationblog.com/blog/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/>.

²³ See announcement by Qatari News Agency on May 28, 2013. “The Ministry of Justice will launch on Wednesday the (West Law Qatar) legal website in cooperation with “Thomson Reuters” Company, in a ceremony to be held under the patronage of HE Minister of Justice Hassan bin Abdullah Al Ghanim, Minister of Justice, at Renaissance, West Bay, Doha.”

The website will provide legal information for local and international researchers as it contains more than 2,500 laws in English language. It also contains all issues of the Official Gazette. It also contains legal principles of the Court of Cassation decisions in English language besides full texts of decisions in Arabic language.

The Website also contains a collection of books, magazines and legal news in the state.

http://www.qnaol.net/QNAEn/Local_News/Miscellaneous1/Pages/Justice-Ministry-to-Launch-Westlaw-Qatar-Legal-Web=site-on-Wednesday.aspx.

²⁴ See, article “Arbitration and the Third world” by Amir A. Shalakany. Spring, 2000. 41 Harv. Int'l L.J. 419. <http://www.aucegypt.edu/fac/Profiles/Documents/Shalakany,%20.pdf>.

Specialist, Mr. Ahmed El-Kosheri, sounded a note of warning when he announced the following:

In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration . . . the continuing attitude of certain western arbitrators [is] characterized by a lack of sensitivity towards the national law 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 relationships.²⁵

More recently in a newspaper article²⁶ of July 2012, another Egyptian arbitrator, Ahmad Sharif, also declared that, “*International Arbitrators are biased to foreign investors at the expense of Arab States.*”²⁷ This perception may be solidified at the common level by widely publicized high valued arbitration cases, such as the *Wena Hotels* case²⁸ in Egypt, and the *Daw* case²⁹ in Kuwait where Arab states suffered

²⁵ See article, “Cultural sensitivity and International Arbitration” by Khawar Qureshi, McNair Chambers, June 2008, http://www.mcnairchambers.com/media/documents/200807/English-Cultural_sensitivity_and_International_Arbitration.pdf.

²⁶ See Article, “Experts: International Arbitration is biased to foreign investors at the expense of Arab States,” by Nagla Kamal, June 2012. <http://www.youm7.com/News.asp?NewsID=737115&>

²⁷ *Ibid.*

²⁸ *Wena Hotels Limited v. Egypt*, 41 ILM 896 (2002), a case involving the government and a UK investor owned by an Egyptian national, a tribunal held that the government had breached the obligation of fair and equitable treatment and constant protection and security under the terms of the UK-Egypt bilateral investment treaty.

²⁹ Recently, [Dow Chemical](#) of the US has been awarded \$2.16bn in damages from the Petrochemical Industries Co of Kuwait by an arbitration court over the breakdown of a planned joint venture between the two companies in 2008. This is one of the largest arbitration awards ever made that almost toppled the Kuwaiti government. <http://www.ft.com/cms/s/0/cc79eaca-a5a8-11e1-a3b4-00144feabdc0.html#ixzz2JxO2vGOa>.

heavy financial losses. While this perception is not largely unfounded³⁰ because every culture has its own preconceived judgments of others, it could be exaggerated by some local arbitration circuits hoping to justify their own lack of success. This perception could be a cause for alarm, particularly if it extends to the judiciary where it might affect the judges' neutrality when hearing issues involving Western interests, and as well, this influence may explain Western frustration with Middle Eastern courts for having special emphasis on formalities and documentation,³¹ while the culture of the region favors the promotion of substance over formality as rooted in one of the most commonly cited verses in the Qur'an, and translates as, "if you judge between people, judge with justice."³³

In addition to that perception, many Arab professionals believe that there is a bias toward appointment and use of Arab arbitrators and jurists in international

³⁰ Karen Mills, a chartered arbitrator, Karim Syah Law Firm, Jakarta, Indonesia, noted in his paper, "Cultural Differences & Ethnic Bias in International Dispute Resolution An Arbitrator/Mediator's Perspective."

"There is, unfortunately, still a widespread prejudice on the part of many westerners who perceive that third-world cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. A western arbitrator may pay greater credence to western witness than to an Asian one, even where the local witness may be a recognized expert in his or her field. The western witness not only speaks the same, or a similar language, as the western arbitrator, but also approaches his analysis from the western point of view, even though this may be completely irrelevant to the project or contract at hand. Our challenge is to guard against falling into this ethnocentric trap."
<http://translating-cultures-networking-development.com/img/upload/390/documents/Cultural%20differences%20and%20ethnic%20bias%20in%20international%20dispute%20resolution.pdf>.

³¹ Such as setting aside an arbitral award for the simple reason that the arbitrator did not render the award in the name of H.H. the Emir of Qatar, see chapter 3.

³³ See, Qur'an, chapter, an-nisa, verse No:58. <http://www.islamreligion.com/articles/376/>.

arbitration. The Arab Association for International Arbitration (AAIA)³⁴ provides on its website the following assessment:

There is an imbalance in the selection and the appointment of arbitrators. This is unfavorable to the Arabs. Indeed, to date, the arbitration organizations have not sufficiently opened the door for qualified Arab jurists to enable them to participate in international arbitration, even though an Arab law is applicable to the dispute; . . .³⁵

The next concern, which may involve bias, is unfair and unlimited government influence.

D. Unlimited Government Influence

Most governments in the Middle East, particularly the monarchy-type governments, exercise full authority and control of power in their respective countries. They do not tolerate any criticism or objection by their own citizens,³⁶ never mind that from a stranger, one deemed an outsider who knows very little of the system, he or she might be tempted to disparage in some manner. This sensitivity to criticism definitely places a lot of pressure on the parties involved in any business in these countries to watch and closely guard their actions, and exercise extreme care when dealing with government or influential entities. That is why some foreign companies feel pressured not to pursue disputes against government or influential entities in

³⁴ AAIA was founded in September 1991. It is composed of the most important and eminent Arab jurists belonging to different Arab countries to defend Arab interests before specialized institutions of international arbitrations: choice of Arab arbitrators, choice of Arab lawyers, a good implementation of Arab law. Its seat is in Paris (France). <http://www.ahdablawfirm.com/aaiarb/default.asp?MenuID=32>.

³⁵ *Ibid.*

³⁶ A Qatari poet has been sentenced to life in prison for an Arab-spring-inspired verse that officials claim insults [Qatar](#)'s emir and encourages the overthrow of the nation's ruling system, The Guardian, November 29, 2012. <http://www.guardian.co.uk/world/2012/nov/29/qatari-poet-jailed-arab-spring>.

these countries for fear of being blacklisted in future attempts to enter or enforce contracts.³⁷ In the case of professionals, arbitrators, councils and judges,³⁸ their ability to make impartial decisions may be affected, particularly if the case involves an influential entity that has power over their well-being in the country, which could mean being expelled from the country with no legal recourse to protect them. This is not to say that this scenario is happening because most deportations in these countries are usually politically motivated;³⁹ however, occasional stories of expulsions and deportations do find a way to enter and settle in many expat's psyches. That is why the Rule of Law is of utmost importance in these countries, particularly when dealing with such government entities. In that regard, Qatar has been most active in promoting the Rule of Law where it hosted two international Forums in 2009 and 2012⁴⁰ on the subject⁴¹ and according to the 2013 Economic Freedom Report, has the top rank in the region in the Rule of Law Index. While Rule of Law has some affect in mitigating the effects of government influence, it has had

³⁷ See, for example, 2013 Investment Climate Statement - United Arab Emirates. <http://www.state.gov/e/eb/rls/othr/ics/2013/204755.htm>.

³⁸ Remember, many judges in the gulf region come from other Arab countries such as Egypt, Jordan and Syria, and are appointed by royal decree.

³⁹ For example, hundreds of Lebanese Shiites were expelled from UAE in 2009 for their perceived support of Hizballah, <http://foreignpolicyblogs.com/2009/10/01/hundreds-of-lebanese-shiites-expelled-from-uae/>, in a more recent case; six Egyptians in Saudi Arabia were repatriated to Egypt following a disagreement with their employment sponsors.

<http://english.ahram.org.eg/NewsContent/1/64/72476/Egypt/Politics/-Egyptians-deported-from-Saudi-Arabia-as-sponsor-d.aspx>. Another example of use of deportation as a threat, Saudi Arabia in 2012 threatened to deport any foreigner caught eating or drinking food in public during Ramadan. <http://gulfnews.com/news/gulf/saudi-arabia/foreigners-breaking-ramadan-rules-in-saudi-to-be-expelled-1.1051760>.

⁴⁰ See, <http://www.qatarlawforum.com/welcome-aims/>.

⁴¹ *Ibid.*

less effect on another bogey man that often lurks in the shadows of government: corruption.

E. The Bane of Corruption

This could take different shapes and forms in the region. While bribes and kickbacks may be prevalent in most poor countries, such as Syria and Egypt, use of intermediaries (middle men) or “Wasta” (Arabic for “It’s who you know.”) and nepotism play much bigger roles in rich countries, such as Qatar and Dubai particularly, where tribal traditions, which puts high value to family affiliation, are strong. In *a discussion about dispute resolution in the Middle East*, and in response to the question, “*What arbitration-related challenges have you seen in your jurisdiction of focus?*,” Tim Portwood, an international arbitration specialist, replied, “One of the main difficulties, if not a true challenge, that we have faced [with] arbitration in the region is a belief that the process and the persons involved in the process will suffer from the same sort of weaknesses as civil servants and other state officials.”⁴²

These weaknesses to which Portwood is referring, imply the different forms of corruption that dominate government establishments in all countries of the Middle East as described above. Qatar and the UAE have been making every effort to reduce corruption and eliminate the Wasta culture from business dealings,⁴³ but being ranked at 27th in the world means there is more that has to be done in that

⁴² See, “Talking Point: Dispute Resolution in The Middle East,” November 2010. <http://www.financierworldwide.com/article.php?id=7468&page=1>.

⁴³ See article, “Qatar seeks to end 'Wasta' culture - court boss” by [Shane McGinley](#), October 2, 2012. <http://www.arabianbusiness.com/qatar-seeks-end-wasta-culture-court-boss-474912.html#.UctIDPnVB8E>. Also see, “UAE’s anti-corruption measures praised” The National Staff, Jan 10, 2013. <http://www.thenational.ae/news/uae-news/uaes-anti-corruption-measures-praised>.

regard. In the case of Qatar, a drop of eight ranks over the last two years underlines a case where political will alone sometimes is not adequate to overcome cultural shortcomings.

F. Political Instability

The Middle East has been characterized by political instability throughout the course of the last century. From the fall of the Ottoman Empire in 1917, and through the many wars, uprisings, coups, revolts, and revolutions that have swept the region ever since, the core issues that have fueled these conflicts still exist. Issues arising from artificial political boundaries, the Arab-Israeli conflict, autocratic regimes, religious extremism, ethnic friction and economic inequality continue to plague the region; unfortunately, no one can truly claim there is a real and lasting solution in sight. According to the World Bank, Arab countries with political and sectarian turmoil, such as Yemen, Iraq, Syria, Lebanon, Egypt and Libya have the lowest scores in the region in terms of political stability.⁴⁴ In this politically and religiously polarized region, Qatar and the UAE, which have the highest scores and other countries of the region, are not immune from outside influences, such as regional wars or the threat of terrorism.

Nevertheless, investors continue to be drawn to the region as it sits atop much of the world's oil and gas reserves,⁴⁵ and where the vast potential rewards of

⁴⁴ See Table 7-1 next two pages.

⁴⁵ The Arab world holds about 58% of proven international oil reserves and 30% of the proven global natural gas reserves. With such large reserves and a population equal to only about 5% of the global population, the region is a major exporter of oil and gas to the rest of the world. http://articles.economictimes.indiatimes.com/2010-05-10/news/28471378_1_bpd-global-oil-saudi-oil-minister-ali.

investments are thought to outweigh the risks. For example Iraq, which is one of the least stable and safe countries not only in the region, but in the whole world, with sectarian infighting on the rise, is enjoying huge outside investments in its oil and infrastructure, so much so that the IMF predicts that in the next two years, the Iraqi economy⁴⁶ should grow faster than that of any other Middle Eastern country. In such an unstable environment, it is important when drafting commercial contracts to keep in mind the effects of potential events, such as civil unrest (Arab Spring countries, such as Egypt, Libya, Syria, Yemen, Bahrain); war (Iraq in 2003, Lebanon in 2006), blockades (currently in Syria), or sanctions (Iraq from 1990-2003).

Such events may prevent contracting parties from performing their contractual obligations due to many reasons including lack of security, lack of payment, lack of access to material or cancellation of contracts as successive governments may charge misconduct and corruption in prior government's dealings.

Table 7-1⁴⁸
Political Stability/Absence of Violence

Country	Percentile Rank	Rank
Qatar	90.6	1
UAE	77.4	2
Oman	67.9	3
Kuwait	59	4
Saudi Arabia	36.8	5
Jordan	34	6
Bahrain	26.4	7
Libya	17	8
Egypt	11.8	9
Lebanon	6.6	10
Syria	4.7	11
Iraq	3.8	12
Yemen	1.9	13

⁴⁶ Iraq is exceptionally rich in oil, but sanctions and political instability led its economy to incur severe structural weaknesses. Nevertheless, partly thanks to the increase in oil production since 2003, Iraq has achieved a rise in GDP per capita from \$1,300 in 2004 to \$6,300 in 2012 in a very difficult security and political context. Economic growth has reached 8.4 percent in 2012 and is expected to rise to 9 percent in 2013 as oil production increases to 3.3 million barrels per day. <http://www.imf.org/external/np/sec/pn/2013/pn1358.htm>.

⁴⁸ Political Stability and Absence of Violence is one of the 6 dimensions of governance measured by the worldwide Governance Indicators by the World Bank. It captures perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism. Data from the 2011 World Bank report. http://info.worldbank.org/governance/wgi/mc_chart.asp

With arbitration being the principal means of settling such international commercial disputes, the latest turmoil caused by the Arab Spring continues to provide lessons that investors and professionals drafting arbitration clauses for Middle East investments should take heed of the following recommendations.

1. A Well-drafted *force majeure* clause: The *force majeure* clause⁴⁹ typically excuses a party's performance of a contract where an event has occurred, which is beyond that party's control, and has made performance of the contract impossible. An example of inability to perform could arise where war in the region could shut down oil rigs, close roads, railways and airspace.
2. BIT Treaties:⁵⁰ These treaties have added protections that guarantee the host State will provide fair and equitable treatment, full protection and security, and that the qualifying investments shall enjoy treatment no less favorable than that accorded to investments by its own nationals. Therefore, if investors cannot perform due to a lack of protection or political unrest, they may have claims that can be asserted for breach of the BIT between the host State and the investor.

⁴⁹ While provisions of *force majeure* are covered by the civil law regimes of the Arab world, there is no system of binding precedent and therefore interpretation of a force majeure clause governed by an Arab law can cause difficulties. Under English law, there is no general doctrine of force majeure and the ambit of the clause is purely a matter of contract. There is, however, a significant body of case law which considers the typical requirements of a force majeure clause; it is usually strictly interpreted against the party seeking to rely on it, the event must be beyond the party's control and the party claiming applicability of a force majeure clause has the burden of proving that it applies. See, "Commercial disputes after the Arab Spring" March, 2012. By Craig Tevendale, Herbert Smith Freehills LLP. <http://www.cdr-news.com/categories/litigation/commercial-disputes-after-the-arab-spring>.

⁵⁰ Experts have raised alarm over many court rulings that invalidated the sales contracts between the government and investors, stressing that the government may be obligated to pay large sums of penalty and interest once these cases are submitted to arbitration particularly under the ICSID arbitration rules. See "Economists: sanctions awaiting Egypt in international arbitration cases" by Mahmoud Al-Jamal 21/01/2013. <http://www.elwatannews.com/news/details/117162>.

3. Stabilization Clause: Used mainly in government contracts, these clauses are meant to “freeze⁵¹” the law at the time the contract is executed for that particular investor. Any future changes in legislation or regulation, for whatever reason, are not applied to the contract. This will protect the investors in case of dramatic government changes such as witnessed in Tunisia, Egypt and Libya where many contracts were canceled by new legislation and, or court decisions.⁵²

While the recent political and economic turmoil in the region may have given rise to many commercial and investment disputes of all types and dimensions that will take time to resolve, which, in the short run, will increase the arbitration caseload⁵³ for many arbitration centers in the region; political instability, on the other hand, threatens the development of the Rule of Law and judicial independence both of which, as discussed in Chapter VI, are crucial to the continued viability and growth of arbitration in the Middle East.

⁵¹ See, “Investments in the deep freeze? Stabilization clauses in investment contracts” November 9, 2011, by Annalise Nelson . <http://klowerarbitrationblog.com/blog/2011/11/09/investments-in-the-deep-freeze-stabilization-clauses-in-investment-contracts/>.

⁵² There have been some well-publicized project cancellations by the new regimes in Egypt and Tunisia. In May, 2011 the Egyptian judicial authorities annulled a contract to sell to a UAE developer large pieces of land located by the Red Sea that are believed to be rich with oil. The court not only annulled the contract, it fined Egypt’s Minister of Tourism and the developer significant sums, saying that the lands were sold at an undervalued price with no public bidding; this showed the transaction lacked the requisite integrity and transparency and was incompatible with free competition. For more reading see, “The Future of Arbitration and Dispute Resolution in the Current Middle Eastern Crisis”, by Essam Al Tamimi. Dispute Resolution Journal, Vol. 66, No. 3.

⁵³ Dr. Abdel Raouf, the Director of the Cairo Regional Center for International Commercial Arbitration (CRCICA) in his introduction of “[The European & Middle Eastern Arbitration Review 2012](http://globalarbitrationreview.com/reviews/40/sections/139/introduction/)” states “ In spite of the recent events in the region, the arbitration caseload in most Middle Eastern arbitral institutions has grown at a very high rate”. <http://globalarbitrationreview.com/reviews/40/sections/139/introduction/>.

IV. RECOMMENDATIONS FOR THE LOCAL PRACTICE OF ARBITRATION

Despite the wide-spread popularity of Commercial Arbitration in the Middle East with many centers being established at all levels, most international parties and some local parties still prefer to use international centers and arbitrators over local centers and arbitrators even when the law governing the contract is local law and the services of international centers and arbitrators come at a much higher price. Dr. Abdel Hamid El Ahdab, a leading Lebanese jurist, and chairman of the Arab Association for International Arbitration (AAIA), notes in his introductory letter⁵⁴ for AAIA, the following:

We noted that international Arab trade and investments in Arab countries have resorted to arbitration handled by European arbitrators and counsels, notwithstanding the governing Arab laws, which, consequently, are interpreted and applied to the disputes by persons who are not experienced thereto. Indeed, this has caused these laws to be applied only in the form, while remaining unapplied in substance, unless the concerned European arbitrators and counsels have in-depth knowledge of the legal and cultural domains of the Arab countries. However, those competent arbitrators are rarely invited to settle arbitrations where Arab laws apply.⁵⁵

In addition to the legal, cultural and political constraints noted in the prior section, the practice of arbitration in many of the home-grown arbitration centers that exist in the Middle East, excluding the main national centers mentioned in Chapter II, is characterized as being erratic, disorganized, lacking well established rules and

⁵⁴ See Letter of the Chairman, Arab Association for International Arbitration (A.A.I.A.). <http://www.ahdablawfirm.com/aaiarb/default.asp?MenuID=30>.

⁵⁵ *Ibid.*

procedures, and having arbitrators on board whose qualifications are not up to international standards.⁵⁶

While it is no easy task to resolve many of the political and cultural issues mentioned above, which for all practical purposes fall outside the scope of this dissertation, there are certain recommendations that are worthy of mentioning here, all of which local officials, the judiciary, arbitration institutions and professionals in the Middle East can address in order to make arbitration a more effective and reliable dispute resolution method in their respective jurisdictions. We shall now consider a fair number of them:

- 1) First of all, it is important that many of the Middle East States that have not reformed their arbitration regulation, do so, and adopt a modern form of the UNCITRAL Model Law for both domestic and international arbitration, as was the case in Egypt. The new arbitration laws should limit court interference and include modern aspects of the arbitration, such as Kompetenz-Kompetenz, autonomy of the arbitration clause and allow interim measures, choice of the substantive law, choice of the procedural law, choice of the seat and choice of language of the arbitration.

⁵⁶ See Article "Legal: Arab arbitration centers need to develop away from the improvisational and random" December 20, 2008, Alghad Newspaper.
<http://www.alghad.com/index.php/article/270256.html>.

- 2) The judiciary of each State should develop a deeper understanding of the jurisdiction and process of international arbitration within the context of the modern investment environment. The judiciary must reconsider arbitration as a primary means for the settlement of disputes rather than an exception to litigation; it should also develop a better understanding of the use of the public policy doctrine as intended by the New York Convention and the UNCITRAL regarding its application in modern practice.⁵⁷ In other words, the judiciary must develop an aggressive pro-arbitration policy.

- 3) For those States attempting to promote their own jurisdictions as arbitration hubs, they should designate more efficient and specialized commercial or arbitration courts with less procedures and formalities in supervising arbitration proceeding within their jurisdictions, or in cases of ratification, for recognition and enforcement of foreign awards. These countries should also remove restrictions on who may represent foreign parties in these courts and allow foreign lawyers to represent foreign parties in international arbitration cases.

- 4) Arbitration laws and rules should encourage the use of modern electronic communication (email, fax, e-filing, video conferencing, etc.) which will make the arbitration process proceed faster and more economical.

⁵⁷ In modern practice international public policy is narrowly construed. For more reading see, MAYER P./ SHEPPARD A., "Recommendations of the International Law Association on Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards: Presentation", *Yearbook Commercial Arbitration* 2004, 339.

- 5) Those professionals charged with providing arbitration services should cooperate with international arbitration organizations and centers through arbitration training, seminars and conferences to exchange knowledge, and experiences. This will improve the practice of arbitration in the region by creating qualified local arbitration centers and professionals who are familiar with international standards and meet international expectations. The target audience may include judges, lawyers, professionals, academics and government and private business representatives.
- 6) Professionals should provide guidance to local and foreign investors through specialized websites, brochures, seminars, etc., on the process of dispute resolution within their own jurisdictions, and to reduce occurrence of disputes, they must bring attention to areas of concerns that need to be addressed when drafting contracts.
- 7) These professionals should help train and promote local professionals, who are competent and have world-class professional experience, to become arbitrators and introduce them to the international arbitration community. This could be done through local or regional arbitration associations by training professionals, who are outstanding in their fields, on the various institutional Arbitration Laws and rules. This would ensure the success of the arbitral process and help expose them by publishing

their expertise on designated websites with detailed curriculum vitae (CV) that list their backgrounds, skills and experiences.

- 8) Local arbitration centers need to adopt uniform, convenient and modern arbitration rules and procedures; preferably, the rules should be based on the UNCITRAL arbitration rules, and the procedures on the International Bar Association (IBA) guidelines.⁵⁸ These rules and procedures should be published on a dedicated website for each center where the center should provide information on its caseload and maintain a list of arbitrators with detailed CVs.
- 9) One of the most repeated advices by ADR professionals to new practitioners is networking and staying connected.⁵⁹ As the Internet is becoming the best tool for marketing in the 21st century, it is advisable for local arbitration professionals, who want to break into the international market, to use the full power of the internet in promoting their services. First it is recommended to become proficient in the English

⁵⁸ The International Bar Association (IBA), founded 1947, is a voluntary bar association of international legal practitioners, bar associations and law societies. Its global headquarters are located in London, England, and it has regional offices in Seoul, Korea and Sao Paolo, Brazil. The IBA plays an important role in issuing codes and guidance on international legal practice.

The IBA Rules on the Taking of Evidence in International Arbitration, adopted in 1999 and revised in 2010, are commonly used by parties in international Commercial Arbitration. The IBA has also issued: IBA Guidelines on Conflicts of Interest in International Arbitration, IBA Guidelines for Drafting International Arbitration Clauses, and IBA Principles on Conduct for the Legal Profession (2011). http://en.wikipedia.org/wiki/International_Bar_Association.

⁵⁹ See, "Building and marketing an ADR practice," Dispute Resolution Magazine, winter 2011. http://www.revenue-resources.com/dispute_resolution_magazine_winter2011_reprint.pdf.

language,⁶⁰ and then join many of the legal and arbitration discussion groups and forums existing in cyberspace, such as LinkedIn and Facebook groups, and finally stay proactive in these discussions.

10) Those whose responsibility is to set educational standards, should make international arbitration a mandatory part of the law curriculum at local universities of the regions. These students can be introduced to arbitration and other dispute resolution mechanisms, and acquire legal understanding of the law supporting the process, the procedures that are required to be followed and the powers arbitrators can exercise. For a more effective education, the students can also be exposed to the practical aspects of conducting arbitration properly through conducting mock arbitrations with the assistance of practicing arbitrators and counsels.

V. CONCLUSION SUMMARY

This Dissertation has examined many of the legal and practical aspects of International Commercial Arbitration practice in the Middle East within the context of developing an arbitration hub in the region where parties in disputes would ultimately prefer to go in lieu of other well established places such as London, Paris, New York, and other emerging hubs such as Singapore. We have determined that four countries in the Middle East, Egypt, Bahrain, Dubai (UAE) and Qatar, have the

⁶⁰ See, "English-The Language of Global Business?"
<http://www.forbes.com/sites/dorieclark/2012/10/26/english-the-language-of-global-business/>

will and infrastructure that potentially could help their respective jurisdictions win the crown for the most attractive venue of arbitration in the region.

Chapter I outlined the purpose of this dissertation, and defined the scope of the study, and limited that study within the region to the States of Egypt, Bahrain, Dubai and the Qatar. The outline also provided an argument for the question: Why Qatar as a case study? Along with Qatar's wealth and progressive leadership, it is deeply rooted in religion and culture, and retains some potential issues with respect to being established a hub for international arbitration. Finally, this introductory chapter stressed the significance of this Dissertation as a guide to foreign parties doing business in the Middle East and agreeing to hold their arbitration in local jurisdictions.

Chapter II gave a brief history of arbitration in the Middle East, as well as the development of the legal systems and Arbitration Law in the region. It explained how Middle East States have overcome early hostility and mistrust caused by early oil concession arbitrations, towards the practice, and have re-embraced the practice over the last twenty years. The increased adoption of important international arbitration conventions, such as the ICSID and the New York Conventions, and modern Arbitration Laws such as the UNCITRAL Model Law, have provided many nations with the legal framework to provide parties in dispute conventional resolution options that is similar to the rest of the world.

Chapter II also presented to a greater extent the legal system and arbitration infrastructure of Egypt, Bahrain, Dubai and Qatar, which moved from accepting arbitration, to competing in the race for attracting arbitration parties. This chapter also touched upon the growth of their respective institutions and their caseloads.

Finally this chapter presented the latest arbitration development in the Middle East by discussing the new Arbitration Law of Saudi Arabia, a law which is based on the UNCITRAL Model Law, and the draft Arbitration Laws for Iraq, the UAE and the Unified GCC Arbitration Law, all of which are expected to be based on the UNCITRAL Model Law.

Chapter III focused on the State of Qatar. The chapter started with a brief history of the legal system of the country, which has had a long history of using dual legal systems, and set forth a cursory overview of the current legal system. The current Arbitration Law of the State jurisdiction was dissected to show that the Provisions of the CCP that control the arbitration process in the state jurisdiction is outdated and in dire need of an upgrade. The chapter also presented how Qatar introduced the QFC as a separate jurisdiction with its own common law legal system and Arbitration Law that is based on the UNCITRAL Model Law. It also presented the QICDRC as a modern multi-purpose court and ADR center that provides excellent practice in litigation, arbitration and mediation.

Chapter IV discussed Islamic Finance, which constitutes one of the fastest growing sectors in many Middle Eastern economies, and discussed arbitration of Islamic Finance disputes, as it will constitute a sizable portion of the dispute resolution market, which is unique due to the introduction of the Shari'a element into its agreements. The chapter started with a brief overview of Islamic Finance and how disputes and arbitration clauses are being handled within local Islamic jurisdictions particularly, in Malaysia where dispute resolution of Islamic Finance is most developed; it further discussed how many Islamic Finance disputes in the past have gone to litigation in Western jurisdictions, whereas in the case of *Shamil Bank*,

the courts held that the principles of Shari'a, as agreed in the governing law clause, "*Subject to the principles of the Glorious Shari'a, this Agreement shall be governed by and construed in accordance with the laws of England,*" could not be applied to the agreements because Shari'a is not a law of a country and is not codified in a universally accepted body of law.

In response to the *Shamil* ruling, the chapter presented some of Islamic Finance advocates' solutions, which gave rise to Islamic arbitration as it became offered in the IICRA center in Dubai and by the Islamic arbitration rules of the KLRCA in Kuala Lumpur. Finally Chapter IV discussed the difficulty involved in standardizing of Shari'a because of the existence of different schools of thought. Thus we conclude that such difficulty combined with the globalization and internationalization of the industry may limit the influence of Shari'a Law in future international disputes.

Chapter V looked at the modern practice of international arbitration worldwide with regard to development of a world-class arbitration hub. It began by laying out the required legal framework. In addition to adopting the New York Convention and a modern Arbitration Law, such as the UNCITRAL Model Law that provide maximum party autonomy and minimum interference by local courts, there needs to be a reputable arbitration institution with modern arbitration rules, such as the UNCITRAL, ICC, LCIA and the AAA/ACDR arbitration rules that provide more clarity and flexibility to the process, and cover all aspects of the arbitral process, while providing a model arbitration clause, and instituting procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

Chapter V also discussed the importance of the seat as a legal place of arbitration and pointed out top influences that come into play in choosing a seat. While the legal structure of the seat and the law governing the substance of the dispute are still top influences, it is believed that with greater harmonization of arbitration laws around the world, convenience of the seat will become the top influence. The chapter also discussed the rise of institutional arbitration at the cost of *ad hoc* arbitration as the process is becoming more complex. This in turn has caused a boom in the market for international arbitration institutions that has ignited competition amongst existing seats, and which has led to the emergence of new arbitration hubs. After the chapter presented two emerging arbitration hubs in South East Asia, namely, Singapore and Hong Kong, it laid out some of the common characteristics, which, in addition to the above legal frame work, that a modern arbitration hub has to have to be successful; these include an independent, neutral, and supportive judiciary with an unwavering respect for Rule of Law; the jurisdiction must have an accessible, and centralized location, a modern infrastructure, a strong economy, political stability, cost effectiveness, and English must be widely used.

Finally, in Chapter VI, we relied heavily on the published reports of major economic and legal indices by established world organizations, such as the United Nations and the World Bank to assess prospects for Egypt, Bahrain, Dubai and Qatar to become a modern arbitration hub in the Middle East. Each country was analyzed separately with regard to its economic growth, investment competitiveness, ease of doing business, economic freedom, Rule of Law, corruption, and ease of contract enforcement and arbitration of contract disputes. We concluded that while all four jurisdictions lagged behind other arbitration world leaders, such as London and

Singapore, Qatar seems to be ahead in the race with regard to its appeal in socio-economic and legal status amongst the four jurisdictions, with Dubai (UAE), a close second.

Chapter VI also emphasized that the main weaknesses of these countries was in the court system of their respective State jurisdictions, which suffer heavily from lack of efficiency with old procedures and lengthy processes. The chapter also presented the rise of the off-shore separate legal jurisdictions, the BCDR in Bahrain, the DIFC in Dubai, and the QFC in Qatar, with their respective dispute resolution centers, the BCDR-AAA, the DIFC-LCIA, and the QICDRC. We further concluded that the QICDRC, and the DIFC-LCIA with their English Common Law courts, and world-class judges provide the cities of Dubai and Doha, Qatar with the means to develop into world-class contenders along with the main seats of the world, such as Paris, London, New York, and Singapore, in terms of servicing international parties with and without trade attachment to their respective jurisdictions.

Finally, in the last twenty years, Middle East States have made impressive progress in many areas with regard to international arbitration. However many legal and procedural issues continue to hamper the practice in terms of seating arbitrations in the region. Notwithstanding the state jurisdiction of Egypt, which may continue to serve as a major regional hub for Arab arbitration parties, the legal culture in the Middle East, as influenced by various local factors including religion, politics and culture, is not supportive to the development of an international arbitration hub in any State jurisdiction of the region.

In order to overcome all these problems, Bahrain, Dubai and Qatar have found a panacea in creating a separate legal system with its own legal culture. The

off shore jurisdictions, BCDR, DIFC and QFC are good examples of the application of legal pluralism in the Arab and Muslim Middle East where resolution of international investment disputes could be facilitated away from all the ills of the mixed civil-Shari'a legal structure found in most state jurisdictions. The DIFC and QFC in particular, which are designated as common law jurisdictions with English law as main source of law, share similar legal heritage with major international arbitration hubs such as London, New York, and Singapore. The DIFC and the QFC, with their highly experienced judiciary, English language and their own arbitration institutions, the DIFC-LCIA and QICDRC, that have access to world best arbitrators, do provide Dubai and Qatar with the necessary means to compete with major international arbitration hubs such as London, New York, and Singapore.

The DIFC-LCIA and QICDRC provide regional and international investors with arbitrations similar in quality to major international arbitration centers, such as the LCIA, AAA, ICC and the SIAC, but with the added advantage of convenience for parties doing business in the region or for East-West and South-North parties looking for a convenient and intermediate neutral place for their arbitration. While the DIFC-LCIA in essence, currently provides the same high quality service that the LCIA in London provides, the QICDRC will in due time develop into a unique and efficient dispute resolution institution that will set a new example in the dispute resolution industry. This may propel Qatar to the forefront of the race to becoming the preferred hub for international arbitration in the Middle East. However, for Qatar to develop as a true competitor to world-class arbitration hubs such as London, Paris, and Singapore, it needs to update its state jurisdiction legal framework, upgrade its

court system and improve its standing in other areas including, corruption and rule of law.

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APPENDIX

SOCIO-ECONOMICAL AND LEGAL INDICATORS

Countries	2012 CIA Factbook ^①				2012-2013 Global Competitiveness Index ^②			2013 Doing Business Index ^③
	Population	GDP \$Billion	GDP Growth %	GDP per capita \$	Overall World: Rank	Institutions World: Rank	Infrastructure World: Rank	Ease of Doing Business: Rank
United Kingdom	63,395,574	2,323.00	0.10%	36,700	10	13	6	7
Singapore	5,460,302	325.10	1.30%	60,900	2	1	2	1
Egypt	85,294,388	537.80	2.00%	6,600	94	96	83	109
UAE	5,473,972	271.20	4.00%	49,000	24	12	8	26
Qatar	2,042,444	189.00	6.30%	102,800	11	4	31	40
Bahrain	1,281,332	32.44	2.00%	28,200	37	21	29	42
Saudi Arabia	26,939,583	740.50	6.00%	25,700	18	15	26	22
China	1,349,585,838	8,227.00	7.80%	9,300	29	50	48	91
India	1,220,800,359	4,761.00	6.50%	3,900	59	70	84	132

Countries	2013 Economic Freedom Index ^④		2010 Investing Across Borders, Arbitrating Commercial Disputes ^⑤				2012 Corruption Perception on world Rank ^⑥	2013 Doing Business Index
	Economic Freedom Index	Rule of Law Index	Strength of Laws Index	Ease of Process Index	Judicial Assistance Index	Average of Three Indices		Ease of Enforcing Contracts: Rank
United Kingdom	74.8	84	99.9	87.5	94.5	94.0	17	21
Singapore	88	91	94.9	81.8	93.5	90.1	5	12
Egypt	54.8	32	89.9	74.9	54.2	73.0	118	109
UAE	71.1	61.5	82.0	68.5	52.0	67.5	27	104
Qatar	71.3	71	79.0	66.0	50.5	65.2	27	95
Bahrain	75.5	53	86.7	71.5	52.5	70.2	51	113
Saudi Arabia	60.6	42	70.0	30.4	28.6	43.0	66	124
China	51.9	28	94.9	76.1	60.2	77.1	80	19
India	55.2	40.5	88.5	67.6	53.4	69.8	94	184

Note: A low Ranking Number indicates better conditions; a low Index number indicates worse conditions.

① <https://www.cia.gov/library/publications/the-world-factbook/index.html>

② <http://www.weforum.org/reports/global-competitiveness-report-2012-2013>

③ <http://www.doingbusiness.org/rankings>

④ <http://www.doingbusiness.org/r>

⑤ <http://www.doingbusiness>.

APPENDIX II

MAP OF THE MIDDLE EAST

