Sulh[1]

international commercial arbitration model. Thus, if the foreign investor and counsel fail to comprehend the religious and cultural underpinnings supporting commercial arbitration in the Islamic Middle East, they may well find themselves in a dispute resolution system that is partially inaccessible, and laden with ambiguity and uncertainty.

Business relations in the Arab world are not matters only governed by the general principles of law and of contract in a world apart from home and family. They are a segment of the whole web of friendship, kinship obligations, and personal relations that support a particular way of life. Due process of law, sanctity of contract, and free enterprise based on purely individual rights never became the sacred trinities that they became in the West. Whereas, westerners know the primacy of law, the Arabs know the primacy of interpersonal relationships. Arab commercial relationships are "relational" in the same sense that western commercial relationships are "legal." Thus, leading to the paradox that the West has conceptions of discreet bounded notions of contract whereas the Arabs have fluid and multi layered notions of the same.

Dispute resolutions in the Middle East are guided with an overarching principle of collective interests of the family, the tribe, the community and the country. The Arab's Islamic3jN(931T2T5N)Fj3'n3(5N)Fj3*((*j61j6jj1e2T5N*565*(1ra2T5N63G1I235N5(

Sulh, or conciliation and peacemaking, is a practice that predated Islam. Within the framework of tribal Arab society, chieftains (sheikhs), soothsayers and healers (kuhhān), and influential noblemen played an indispensable role as arbiters in all disputes within the tribe or between rival tribes. The authority and stature of those men served as sanctions for their verdicts.[6] The decision of the hakam was final but not legally enforceable. It was an authoritative statement as to what the customary law was or should be and later of Islamic principles. In fact, Scha9G1 2T33*N e

arbitration. The process of arbitration relied upon the claimant proving his case and the respondent basing his defence on his oath.[15] If a claimant did not prove his case then he could ask the respondent to swear an oath denying the claim. If the respondent did so then the claim would fail. The tribes before Islam declared their oath before the statute of Hobel (an idol) that stood in the Kabeh in Mecca.

The Prophet Mohammad was chosen as an arbitrator before he became a prophet due to his honesty and trustworthiness and sometimes he was referred to as a kahin. One of the most famous disputes during that time was in relation to the black stone. This was a dispute between the sheikhs of Mecca over the placing of a holy black stone[16]. There was fierce disagreement between the tribes as to who will have the honour of choosing the position of the stone. They could not resolve this

THE ISLAMIC RELIGION

After the advent of Islam in the sixth century, the Arabian Peninsula became the geographical base for the Islamic state, ruled by the Prophet Mohammad and his successors, the Caliphates Rashdeen[21]. There are two main sources of Islamic law-Sharia: Koran that God revealed to Mohammad who is considered to be God's final Prophet and Sunna which is the words and deeds of Mohammad. There are also three secondary sources of Sharia; Ijma, Qiyas and Ijtihad which will be explained in detail below.

Islam is a religion originating from the teachings of Mohammad of the Koran and the Sunna. The Koran contains 114 suwar (chapters) and 6616 ayat (verses) and 77,934 words which cover virtually all aspects of lif

‘O you who believe! obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about anything, refer it to Allah and the

jurist consult) in deriving rules consistent with the first principles of Islam. Ijtihad could refer to the use of qiyas


Law

both public disputes, such as those between fighting clan members, and private ones, including those between his Companions and their creditors. Further, a well-known hadith of the Prophet warns:

> You bring me lawsuits to decide, and perhaps one of you is more skilled in presenting his plea than the other and so I judge in his favour according to what I hear. He to whom I give in judgment something that is his brother's right, let him not take it, for I but give him a piece of the Fire.[44]

Sulh was the method preferred by the Prophet, who made it plain that he was sceptical of judicial proceedings, which were devised by man and therefore fallible. Parties who won their cases by dent of eloquence at the expense of truth were threatened with direst sanctions.[45] Thus, the trial process is not regarded as an ultimate truth-finding mechanism that will lead to substantive justice. It can be tainted and subverted by the imperfect nature of man, therefore, it should be avoided when possible.

long it takes.[49] His follower al-Qasṣ (d. 335/946-947) claims that if there is an ijma that a judge can delay judging if he desires sulh, but this must be with the consent

sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.'[55] Arbitration continued as a dispute resolution practice in the Mohammad and post-Mohammad eras. In fact, for a Muslim, 'arbitration carries with it no better impri

HANAFI SCHOOL

The Hanafi School confirmed that according to the Koran, Sunna, Ijma and Qiyas, arbitration is a legitimate dispute resolution process because it serves an important social need and it simplifies disputes. It is also less complex than the courts.[62] The scholars in this school emphasised the contractual nature of arbitration and stated that it is binding like any other contract. Some scholars argued that an arbitrator has the same duties as a judge but others considered the arbitrator to be closer to an agent or conciliator.[63]

SHAFI SCHOOL

According to this school, it is permitted for the parties to choose an ordinary person that does not possess any of the judge's qualities to resolve the dispute, whether or not there is a judge available in the place where the dispute arose.[64] The scholars within this school confirmed the validity of arbitration by giving an example from history that shows Muslims referring disputes to the Caliphate Umar ibn al-Khaṭṭ'ab who acted as an arbitrator on many occasions. It is pointed out that an arbitrator is inferior to a judge as the arbitrator could be removed at any time by the parties before an award is rendered.[65]

MALIKI SCHOOL

This school placed arbitration as one of the highest forms of dispute resolution. It contended that an arbitrator decides a case based on his conscience therefore, it allowed one of the disputing parties to be appointed as an arbitrator if he was chosen by the other party.[66] Unlike the other three schools, this School stresses that an arbitrator cannot be revoked after the commencement of arbitration proceedings. An arbitration award is binding on the parties except if a judge declares it to be flagrantly unjust.

HANIBALI SCHOOL

The scholars of this doctrine hold that the decision of the arbitrator has the same binding nature as a court judgment. Therefore, an arbitrator must have the same qualification as a judge and must be chosen by the parties.[67]

THE MEDJELLA OF LEGAL PROVISIONS

The "Medjella" of the Legal Provisions' (the Medjella), the first codification of Sharia under the Ottoman Empire, confirmed the conciliatory nature of arbitration. Its articles were drafted and derived from the science of fiqh (academic writings and case law) relating to civil acts and the prevailing opinion of the Hanafi[68] doctrine. There was a whole section in the Medjella dedicated to arbitration. The main provisions reflected the contractual nature of arbitration which is closer to conciliation and compromise than to court judgements. Juries of the Medjella explained that an arbitral award is inferior to a court judgment, thus, a judge is authorised to invalidate an award if it is against his principles whereas he is obliged to enforce a judgment given by another judge.[69] However, this does not refrain the parties from enforcing sulh between them, thus making it binding between the parties just like a contract.

The duty of an arbitrator closely resembles an agent authorised by the parties to obtain a conciliation order. This principle was outlined by two provisions in the Medjella. According to the first provision[70], 'should the parties have authorised the arbitrators…to conciliate them, the agreement of the arbitrators is deemed to be a compromise…which the parties must accept' as if they had compromised themselves'. According to the second provision[71] 'if a third party settles a dispute without having been entrusted with this mission by the parties, and if the latter accept his settlement, the award shall be enforced by application of Article 1453' according to which 'ratification equivalent to agency'.[72] Consequently, unlike a judgement, an award requires the agreement of the parties and thus, a judge could annul an arbitration award if he saw fit but cannot annul a judgement.

According to the Medjella, the concept of arbitration could be used to settle disputes in a way that resembles conciliation. Article 1850 of the Medjella stated 'legally appointed arbitrators may validly reconcile the parties if the latter have conferred on them that power'. Therefore, if each of the parties has given powers to one of the arbitrators to reconcile them and the arbitrators terminate the case by a settlement, the parties may not reject the arrangement.[73] The technique

arbitration as similar to judgments, fair and binding on the parties. Either way, the validity of arbitration is unequivocal in Islam and the duty to reconcile the parties is imposed on anyone resolving disputes between Muslims.

A Muslim arbitrator has a duty of conciliation and a moral obligation to clarify the facts, establish the truth and find the appropriate principles of Sharia to be applied. Islamic law allows the parties to confer upon the arbitrators the power to settle their disputes by a binding decision according to rules agreed upon or what the arbitrators consider just and fair.

which until quite recently performed most of the social, economic, and political functions of communities in the absence of centralized state governments.[78]

Even today, the institutions of the state do not always penetrate deeply into society, and "private" justice is often administered through informal networks in which local political and/or religious leaders determine the outcome of feuds between clans or conflicts between individuals. Communal religious and ethnic identity remains strong forces in social life, as do patron-client relationships and patterns of patriarchal authority.[79] Group solidarity, traditional religious precepts, and norms concerning honour and shame retain their place in Middle Eastern society.

Antaki[80] distinguishes two models of dispute resolution mechanisms. The first is intuitive and informal and the second is cognitive and formal. He argues that East subscribes to the former and the West to the later model. Western approaches to reconciliation concentrates on the individual. The individual in the East is enmeshed within his own group or tribe. It is not just business relations that need to be maintained in the Arab world, family and society connections as a whole need to be promoted and protected which is more likely to occur through sulh rather than adjudication.

The penetration of this tribal heritage and religious underpinning into the commercial world within the Middle East has created a gap between the Arabs way of doing business and that in the West. It is quite clear that the co-existence of these two rationalities is potentially problematic. The differences are not just in the general landscape but in the detail and perceptions in relation to specific matters. For example, Irani argues that conflict from a western perspective is considered to have a positive dimension, 'acting as a catharsis to redefine relationships between individuals, groups and nations and makes it easier to find adequate settlement or possible solutions'.[81] Whereas conflict in the East is considered to be negative, threatening and destructive to the normative order and needs to be settled quickly or be avoided. These two views of conflict are sufficiently dissimilar to substantiate the argument that each side has a very different starting point when it comes to understanding conflict and consequently, conflict resolution.

Western societies today strongly privilege individualism, thus, social pressures and relationships do not operate as influential factors in dispute resolution. Parties are committed to the process as a result of legally binding procedures or because the process serves their individual interests. Conflict is not necessarily seen as a

[78] L.E. King-Irani, 'Kinship, Class and Ethnicity: Strategies for Survival in the Contemporary Middle East' in D. Grener, (ed.) Understanding the Contemporary Middles East (Boulder: Lynne Rienner, 1999).

[79] H. Sharabi, Neopatriarchy: A theory of bu:Qp3RgbJE.UjvUvRUN2j3,g JE2Uj30Q,goJEQU3pjQjgoJEQU3N,QNg JERUNNgEJE,U3pNhE.Uj

we

negative interaction that should be avoided. The western model calls for a direct method of interaction and communication. Also, in the western model any intrusion of emotions and values is perceived as an obstacle to reaching an agreement.

By contrast, conflict resolution in the Middle East aims to restore order. Even though a dispute might begin between two individuals or two families, it soon involves the entire community or clan. The initiation and implementation of any intervention is based on the social norms and customs of the society. These social codes operate as a pressuring tool to reach and implement an agreement between two parties. Bargaining moves are conducted on the basis of preserving the social values, norms and customs. Future relationships are very crucial elements in settling disputes in the Arab-Islamic context. Priority is given to people and

individuals; disputing families and lineage groups solicit the intervention of prominent individuals to prevent the escalation of the conflict and the disruption of communal symbiosis. The process is therefore completed with a powerful ritual that seals a settlement and reconciliation with handshakes and a collective meal.

INTERNATIONAL COMMERCIAL ARBITRATION IN THE MIDDLE EAST

> 'Arbitration will become the natural justice in business communities inside and outside the Arab world. Nowadays, complicated transactions take place and there is substantial inward and outward investment, which means that we need to find a good forum for resolving disputes'
>
> Professor A. S. El-Kosheri[82]

The Middle East is both a major area for foreign investment in the current economic environment and has become recently an investor in foreign markets. The US alone invests in the excess of 120 billion US Dollars in the region and at the end of 2007, Gulf Cooperation Council Sovereign Wealth Funds had over 1 trillion US Dollars to invest internationally.[83] Due to growing trade and an increase in international transactions, arbitration has become the chosen forum for dispute resolution for the world's trading nations as well as the Arab countries in international commerce. Ahdab agrees, '[a]rbitration...can serve, as well as possible, the economy of our world, which has become a small village'.[84]

It is noteworthy that arbitration in the Middle East is influenced by Islamic traditions. [85] Consequently, given the growing calls for a return to the Sharia[86] and increase in global interdependence, religious considerations, play a vital role in the acceptance and successful functioning of international commercial arbitration in this region. Sharia is not only a source of law in the Middle East but it also informs cultural, economic and political life there. As Professor Ballantyne notes, 'even where the shari'a is not applied in current practice, there could be a reversion to it in any particular case…Without doubt, a knowledge of the shari'a will become

[82] 'Arbitration in the Arab World' (2008) 25(2)

increasingly important for practitioners...'[87] as it an important part of the hearts and minds of the Arabs and the Muslims generally.

In the mind of an Arab party, counsel or arbitrator, lies a rich layer of Sharia.[88] Saleh argues that 'there is still a body of uncodified shari'a tenets that may remain influential, mainly with regard to behaviour of the parties and arbitrators, even though they are not embodied in a modern piece of legislation'[89]. The lawyer-scholar must accept and internalise the fact that history and religion are the keys to understanding commercial arbitration in this part of the world. Islamic law pervades the commercial world, as well as a Muslim's way of life.

Cultural difference and the long present hierarchies of the colonial world engender a generalised suspicion towards western contractors – who may appear to charge too much or to have done too little – on the part of Middle Eastern parties. Somehow, such conflict brings with it feelings of colonisation, victimisation and inferiority. There is sometimes a feeling of revenge. The negative feelings seem to be worst when the arbitration is conducted under International Chamber of Commerce (ICC) Arbitration Rules with its huge fees that may easily cripple some of the richest businesses in the Middle East.

Certain Arab economic operators advocate that renunciation of national courts cannot signify accepting a new allegiance to an arbitration board composed in the majority of foreigners. 'Although certain Arab parties consent, although unwillingly, to insert an arbitration clause in contracts binding them to foreign parties, it is in the conviction that arbitration cannot be terminated by sentences in terms they would not accept. When they discover that such is not the case, they are extremely disappointed'[90]. However, it is not difficult to see from the history of the region that the use of arbitration for settlement of disputes, particularly commercial disputes, are deeply rooted in Arab customs and traditions and have long been implemented in practice.[91] As it was outlined above, Islamic jurisprudence prefers conciliation and arbitration to adjudication.

Commercial arbitration was born from the wisdom of trading people in order to maximise efficiency and minimise risks and costs. Disputes are unavoidable in any human society. And dispute resolution is an instinctive function of the society itself. Eve cne ge f tratels, cion ang presan ss95N*569*3561 2T3(69)1H2T5N(G39(31 2T3F61n2T5N*((*j6

commercial arbitration is also under the influence of all these factors but some more than others.

Arbitration is a product of culture. All participants bring with them their own cultural understanding of many concepts such as party appointed arbitrator-neutrality, procedure – civil v common law. On one side are parties who, coming from areas of the world with different socio-cultural backgrounds, assisted often by counsel of diverse legal formation, have diverging views as to the conduct of the proceeding and the powers reserved to them as compared to those reserved to the arbitrator. On the other side, there is the presence of one or more personalities, the arbitrators, each having his or her own background and legal formation and who may not always be subsumed in the somewhat abui

Arbitration and other forms of alternative dispute resolutions is viewed by many in the East[93] as a false western panacea, a programme imposed from outside and thus insensitive to indigenous problems, needs and political processes of the region. George Irani contends,

> There is a need to fathom the deep cultural, social and religious roots that underlie the way Arabs behave when it comes to conflict reduction and reconciliation… Issues such as the importance of patrilineal families; the question of ethnicity; the relevance of identity; the nature of tribal and clan solidarity; the key role of patron-client relationships; and the salience of norms concerning honour and shame need to be explored in their geographical and socio-cultural context[94].

Antaki promotes a form of dispute resolution that he says is a hybrid system that combines the best of arbitration and conciliation, serving the international commercial community most effectively. He describes the person that is conducting the procedure as 'a neutral third party, acts sometimes as a mediator