

Factors to Consider Before Arbitrating in the Arab Middle East: Religious and Legislative Constraints

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Abstract

This article discusses two significant factors affecting arbitration in the Arab Middle East: the effect of religion on arbitration and the effect of legislative constraints on arbitration. By presenting foreign investors and practitioners with an overview of some of the unique social, legal and religious issues distinctive to arbitration in the Arab Middle East, this article will provide foreign investors and practitioners with examples of factors to consider that can affect arbitration decisions in the Middle East.

Introduction

The Arab Middle East's distinctive geographical position, the region's availability of natural resources, and the recent population increases and corresponding burgeoning demand for Western products¹ has primed Middle Eastern countries to be some of the largest participants in the global market. The Middle East is home to many dynamic trade and investment opportunities. For example, Saudi Arabia experienced an increase in foreign direct investment of \$27 billion from 2005 to 2008.² The Industrial & Commercial Bank of China Ltd., the largest Chinese commercial bank, is expanding widely in the Middle East and is considering acquisitions there to take advantage of China's booming

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1 See, e.g., John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 414, 415 (2005).

2 The World Bank, World Development Indicators (2008), <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD> (last visited June 19, 2011) (indicating an increase in foreign direct investment (net inflows) from \$12,106,749,694 in 2005 to \$39,455,863,929 in 2008, amounts in "current U.S. dollars").

investment in the region.³ In 2007, Egypt was poised for the expansion of approximately 40 international franchises, including 25 fast food franchises such as KFC, McDonald's and Pizza Hut.⁴ Finally, the Middle East countries possess the lion's share of the planet's crude oil resources, with Saudi Arabia, the largest exporter of petroleum, owning about twenty percent of world's proved oil reserves.⁵ In fact, analysts predict that nine of the world's ten largest oil refinery crackers will be located in the Middle East by 2012.⁶

Due to these unique trade and investment opportunities, potential methods to settle contract disputes in the Arab Middle East must be considered. Arbitration is an increasingly accepted form of alternative dispute resolution. Indeed, commercial contracts increasingly include arbitration clauses. Arbitration is often more efficient than other judicial remedies and has many attractions including: expediency, professionalism, specialized decision makers, confidentiality, and freedom of choice of substantive and procedural laws and place of arbitration. However, arbitration is most efficient when the parties involved understand the different legal, social, religious, cultural and other factors that may affect the arbitration and the enforceability of the arbitration award.

These factors differ between legal systems, especially in the Arab Middle East. In some Islamic nations, the courts decline to enforce foreign arbitral awards on domestic public policy grounds, including precepts of Islamic law.⁷ For instance, in Saudi Arabia and the United Arab Emirates, public order is constituted by the *Shari'a*, the body of rules derived from the main sources of Islamic law. Accordingly any foreign arbitral award that is

3 See Press Release, Industrial and Commercial Bank of China, ICBC Opens its Subsidiary in the Middle East (Oct. 10, 2008), http://www.icbc-ltd.com/icbcltd/about_us/news/icbc_opens_its_subsidiary_in_the_middle_east.htm (last visited July 6, 2011).

4 See Kendal Tyre, *Franchising Sector in Egypt Receives Financial Boost* (June 29, 2009), http://www.nixonpeabody.com/linked_media/publications/Franchise_Alert_06_29_09.pdf (last visited March 2, 2011).

5 Saudi Arabia possesses 19.9% of the world's proved oil reserves and the Middle East possesses 55.6%. U.S. ENERGY INFORMATION ADMINISTRATION, WORLD PROVED RESERVES OF OIL AND NATURAL GAS, MOST RECENT ESTIMATES (March 3, 2009), <http://www.eia.gov/emeu/international/reserves.html>.

6 Robert Westervelt, *Mideast Advance*, 171 *Chemical Week* 3 (2009).

7 See Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 *LOY. L.A. INT'L & COMP. L. REV.* 565, 602-03 (2006).

inconsistent with *Shari'a* rules is set aside.⁸ A common example of this is setting aside foreign arbitral awards concerning contracts involving *riba* (interest).⁹ Because arbitration with an unenforceable award is pointless, foreign investors and practitioners must be aware of the issues affecting the enforceability of an arbitration award before they agree to an arbitration clause or include one in a contract.

Part I of this article will discuss religion as one of the factors affecting arbitration, particularly in the context of contracts. This section will demonstrate why religious influence on the legal system of a country must be considered before arbitrating in countries where the legal system is influenced by religious rules. Arbitration in Saudi Arabia provides a useful example of this process in a Middle Eastern country with a legal system based on Islamic Law (*Shari'a*). Part II of this article will discuss legislative constraints that warrant consideration before arbitrating to guarantee the enforceability of the arbitration awards, especially for technology licensing agreements. Egyptian law is analyzed as an example of a Middle Eastern country with exacting arbitration rules concerning technology licensing agreements.

I. *Shari'a* and Its Influence on Arbitration Laws in the Arab Middle East

In order to understand the influence of *Shari'a* on Middle Eastern arbitration, it is essential to understand the fundamentals of *Shari'a* law and its impact on national law and arbitration in the region. An example of *Shari'a* influence in Saudi Arabia illustrates the importance of considering religious issues for foreign investors working with the Arab Middle East.

A. *Shari'a* in Brief

Islamic rules and principles are provided by the Muslims' holy book, the *Qur'an*.¹⁰ In the Islamic faith the *Qur'an* was dictated word for word by *Allah*¹¹ to his Prophet Muhammad.¹²

⁸ See ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 608-09 (1999).

⁹ See *id.* at 609. *Riba* is an Arabic word which means usury. *Glossary of Islamic Legal Terms*, 1 J. ISLAMIC L. 89, 99 (1996).

¹⁰ The *Qur'an* is the Islamic holy book revealed to Prophet *Muhammad* (PBUH). *Glossary of Islamic Legal Terms*, *supra* note 9, at 99; see generally, Irshad Abdal-Haqq, *Islamic Law An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, (2002) (defining

Shari'a refers to the body of rules derived from the main sources of Islamic law. *Shari'a* is the body of law and *Fiqh* is the process of applying the rules of *Shari'a* to real or hypothetical situations.¹³ *Shari'a* is divided into primary sources and secondary sources.¹⁴ Primary sources include the rules set forth in the *Qur'an* and the *Sunna*.¹⁵ Secondary sources include *Ijma'* and the *Qiyas*. *Ijma'* is an Arabic word that literally means the

the Islamic law, explaining the main elements of the *Shari'a*, and discussing the methodologies and schools of the Islamic jurisprudence).

11 *Glossary of Islamic Legal Terms*, *supra* note 10, at 90 (“Islamic name for the creator, the one and only deity; God.”); *see also* THE HOLY QURAN ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY, 1536 (The Presidency of Islamic Researchers, Ifta, Call and Guidance ed., 1994) [hereinafter THE QURAN]; *Id.* at 2028 (“Then we put thee on the right Way of Religion: so follow though that Way and follow not the desires of those who know not”); *and id.* at 2028 (“Say: He is Allah, the One; Allah, the Eternal, Absolute, He Begetteth not, nor is He begotten; And there is none like unto Him”) (quoting the meaning of the *Qur'an* 112).

12 Prophet *Muhammad* (PBUH) is the Prophet of Islam. When the name of Prophet *Muhammad* (PBUH) is mentioned, it is followed by the sentence Peace Be Upon Him (“PBUH”) as a mark of respect and veneration. Abdal-Haqq, *supra* note 10, at n. 58. According to Abdal-Haqq, *supra* note 10, at 40:

Muhammad had a very difficult time establishing Islam among the Arabs of his day. Ultimately he succeeded. Though born an orphan and unable to read or write, he was able to combine religious with the secular in one of the most backward corners of the earth, to establish a civilization that ushered in the Renaissance in Europe, among other things. For his accomplishment, he has been called *the most influential person* in the history of the world by a non-Muslim historian [Michael H. Hart].

13 *Fiqh* is an Arabic word which refers to the Islamic Jurisprudence and sometimes to the collection of decisions reached by specific individual or institution. *Glossary of Islamic Legal Terms*, *supra* note 9, at 92. According to Abdal-Haqq, some authors use the words Islamic law, the *Shari'a* and *Fiqh* as simultaneous words which may confuse readers. Abdal-Haqq, *supra* note 10, at 32.

14 *See generally* M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135 (2002) (defining the *Shari'ah* and introducing its sources and methods of interpretation and discussing the possibility of formulating new rules of law to meet the situations that were unknown during previous centuries and currently need to be both Islamic and modern).

15 The word *Sunna* is an Arabic word that refers to the sayings and deeds of Prophet *Muhammad* (PBUH) and it is referred to sometimes as *Hadit*. Abdal-Haqq, *supra* note 10, at 33.

unanimous agreement or consensus of opinion and refers to the consensus of opinion of the learned Muslim scholars. *Qiyas* is an Arabic word that literally means analogy and refers to the process of deducing legal decision on the basis of analogy by reference to the *Qur'an* and the *Sunna*.¹⁶

The *Qur'an* is the main source of the *Shari'a* and is a spiritual book and a guide for everyday behavior.¹⁷ The *Qur'an* consists of *Suras*¹⁸ (chapters) which are then divided into verses.¹⁹ Since the *Qur'an* is considered to be the highest source of *Shari'a*, its rules are not subject to challenge and cannot be modified by rules derived from any of the other sources of *Shari'a*.²⁰

The *Sunna* refers to the practices of Prophet Muhammad, which includes: "(1) Muhammad's own words; (2) Muhammad's actions (such as descriptions of how he prayed, conducted war, treated the poor, etc.); (3) Muhammad's tacit approval of actions performed in his presence, i.e. his silence on a matter was interpreted as consent; and (4) descriptions of his physical attributes, personality, demeanor, and disposition."²¹

Through the *Sunna*, Prophet Muhammad explained and completed principles stated in the *Qur'an*. The *Sunna* cannot contradict the *Qur'an*.²² An authentic *Sunna* that complies with the *Qur'an* is usually narrated and recorded in one of the *Sahih*, the best known and most trusted compilations of *Sunna*. These books are the *Sahih Al-Bukhari*, *Sahih Muslim*, *Sunan An-*

16 See *Glossary of Islamic Legal Terms*, *supra* note 9, at 94 (providing literal meanings); See also Bassiouni & Badr, *supra* note 14, at 152-57 (2002) (providing connotation of terms).

17 Bassiouni & Badr, *supra* note 14, at 148.

18 *Sura* is an Arabic word meaning chapter of the *Qur'an* and literally meaning a series of things. *Glossary of Islamic Legal Terms*, *supra* note 9, at 101.

19 Bassiouni & Badr, *supra* note 14, at 148-49.

20 Bassiouni & Badr, *supra* note 14, at 149; See also Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 3, 15 (1998) (discussing the Islamic law of slavery and the solutions provided thereof after giving a brief introduction about the current situation of Islam and the different sources of the *Shari'a*).

21 Abdal-Haqq, *supra* note 11, at 47.

22 See Bassiouni & Badr, *supra* note 14, at 152.

Nasa'I, *Sunan Abi Dawud*, *Sunan At-Tirmidhi*, and *Sunan Ibn Majah*.²³ If there is no guidance on an issue in the *Qur'an* or the *Sunna*, the secondary *Shari'a* sources (*Ijma'* and the *Qiyas*) apply.²⁴

B. *Shari'a* as a Source of National Laws in Muslim Countries

Different countries treat *Shari'a* differently as a source of national law. Islamic countries can be divided into three categories based on the degree of influence of *Shari'a* on their legal system.²⁵

The first category includes countries like Lebanon and Turkey that do not consider *Shari'a* to be a source of their national law.²⁶ In these countries, the influence of *Shari'a* on the actual practice of law and on legal decisions is limited or not formally clear. For instance, the Turkish Constitution provides that:

The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.²⁷

The second category includes countries like Algeria, Tunisia, Egypt, and Jordan.²⁸ The effect of *Shari'a* on the legal systems of the countries in

²³ See Abdal-Haqq, *supra* note 10, at 46-49.

²⁴ See Abdal-Haqq, *supra* note 10, at 54, 56-57.

²⁵ NISRINE ABIAD, *SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY*, 43-46 BRIT. Inst. of Int'l & COMP. L. 2008. Abiad places the countries into "a large and diverse spectrum" *Id.* at 43. On one end of the spectrum are secular countries like Turkey, and on the other end are countries such as Iran wherein Sharia is "the only source of legislation." *Id.* at 44. "Between these two extremes are...[various countries]... "which accord Sharia different degrees of status as a normative source of the law." *Id.* at 46.

²⁶ See *id.* at 35-36, 44 (using Lebanon and Turkey as examples of countries in which Islam is not constitutionally assigned a privileged status).

²⁷ TURKEY [Constitution] art. 2.

²⁸ See ABIAD, *supra* note 25, at 37-38, 46-51.

this category differs from one country to the next.²⁹ The Algerian, Tunisian, and Jordanian Constitutions only provide that Islam as the formal religion of the country without providing for *Shari'a* as the primary source of law.³⁰ Conversely, Article 2 of the Egyptian Constitution declares Islam as the religion of the State and the “principal” source its law.³¹ Therefore, according to the Egyptian Supreme Constitutional Court,

The principles of the Islamic *shari'a* are the major source of legislation (*tashri*). This imposes a limitation curtailing both the legislative and executive power, through which they are obliged, in whatever laws or decrees they enact, to avoid provisions that may contradict the provisions of Islamic law which are definite in terms of their immutability and their meaning...Whatever legislative enactment contravenes them must be declared null and void.³²

The third category of Islamic countries are countries like Iran, Qatar, the United Arab Emirates and Saudi Arabia which recognize *Shari'a* as the main source of their national laws to the extent that they consider the *Qur'an* to be the constitution of their countries.³³ Article 1 of the Basic Law of 1992 of Saudi Arabia provides that: “Saudi Arabia is an Arab Islamic country with full sovereignty whose religion is Islam and its Constitution, the Book of Allah and the *Sunna* of His Prophet, peace be upon him ”³⁴ Article 1 of the Qatari Constitution provides that “Qatar is an

²⁹ See *id.* at 47.

³⁰ See *id.* at 37-38, 51.

³¹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 2, available at <http://www.egypt.gov.eg/english/laws/Constitution> (last visited Oct. 4, 2010) (“the principal source of legislation is Islamic Jurisprudence (Sharia)”).

³² Case No. 5257/43/Dec. 28, 1997/Constitutional Court (Egypt), quoted in Kilian Bälz, Human rights, the rule of law, and the construction of tradition The Egyptian Supreme Administrative Court and Female Circumcision (appeal no. 5257/43, 28 Dec. 1997), 34 *Première série, Droits d'Égypte: histoire et sociologie* 141, available at <http://ema.revues.org/index1511.html>.

³³ ABIAD, *supra* note 25, at 39-46 (placing Iran, Pakistan, and Saudi Arabia at “one end of the spectrum” because they hold the Qur'an as their constitution/source of law).

³⁴ THE BASIC LAW OF GOVERNANCE, art. 1 (Saudi Arabia), available at Kingdom of Saudi Arabia Ministry of Foreign Affairs, *The Basic Law of Government*, <http://www.mofa.gov.sa/sites/mofaen/> (point to “About Kingdom”; then “Saudi Government” hyperlink) (last visited June 19, 2011).

independent Arab state. Islam is the State's religion and the Islamic Shariah is the main source of its legislations."³⁵ The same rule is provided by the Constitution of the United Arab Emirates: "Islam is the official religion of the Union. The Islamic Shari'ah shall be a main source of legislation in the Union."³⁶ Likewise, Pakistan established the Islamic Council to confirm that the bills are in conformity with the *Shari'a* before issuance, and established the Federal *Shari'a* Court to examine the conformity of the application of the national laws with the *Shari'a*.³⁷

C. Arbitration in *Shari'a*

Arbitration, or *tahkim*,³⁸ is well known in *Shari'a* through its different sources. The *Quran* refers loosely to arbitration in several of its verses. For instance, the theory of arbitration is presented in the *Quran* through the concept "...when ye judge between people that ye judge with justice..."³⁹ Jurists argue that this verse allows judgment and accordingly it allows arbitration to settle disputes as a general rule.⁴⁰ The *Qur'an* further provides for arbitration in the matrimonial context, "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..."⁴¹

The *Sunna* also confirms arbitration. The Prophet Muhammad reportedly appointed an arbitrator and adhered to his decisions.⁴² He also reportedly counseled a tribe to have a dispute arbitrated.⁴³ In addition, Arab arbitration expert Dr. Abdul Hamid El-Ahdab states, "The Idjma

35 QATAR [Constitution], art. 1, available at Embassy of the State of Qatar in Washington DC, *Constitution of Qatar*, <http://www.qatarembassy.net/constitution.asp> (last visited June 19, 2011).

36 UNITED ARAB EMIRATES [Constitution], art. 7, available at <http://www.unhcr.org/refworld/docid/48eca8132.html> (last visited June 28, 2011).

37 ABIAD, *supra* note 25, at 45-46.

38 *Glossary of Islamic Legal Terms*, *supra* note 9, at 101.

39 The *Qur'an* 4:58.

40 See EL-AHDAB, *supra* note 9, at 14-15.

41 The *Qur'an* 4:35.

42 EL-AHDAB, *supra* note 9, at 15.

43 *Id.*

(consensus) which is the third source of Moslem law, was even more explicit with respect to the definition and determination of the field of arbitration. Consequently, the validity of arbitration never was, and never could be, discussed in Islam.”⁴⁴

While arbitration as a dispute resolution tool may not be questioned, Abdul Hamid El-Ahdab points out that a discussion took place among Islamic scholars with regard to the exact meaning of arbitration in Islam and its scope.⁴⁵ The question is whether Islam understands arbitration as a mere attempt to conciliate, similar to the Islam concept of amiable composition or if Islam has an understanding of arbitration in line with the Western conception of arbitration, wherein arbitrators are empowered to decide upon disputes.⁴⁶ Abdel Hamid El-Ahdab concludes that:

The answers given by Moslem Law to the problems raised by arbitration have been given before the commercial and economic evolution had reached today's stage. However, they are not unalterable and do not constitute an exception to the universal rule that 'the laws must change over the times'. Indeed, Shari'a is not static and rigid and it is only bound by the Koran, the Sunna, the Idjma' and the Qiyas (analogy).⁴⁷

D. The Influence of *Shari'a* on Arbitration in Saudi Arabia

In practice, important developments in arbitration in the Arab Middle East began with the enactment of modern legislation regarding international arbitration.⁴⁸ In Bahrain, Jordan, Oman, and Tunisia, arbitration laws are drafted in accordance with the United Nations Commission on International Trade Law Model Law of 1985 (“Model

44 *Id.*

45 *Id.*

46 *Id.* at 13-18.

47 EL-AHDAB, *supra* note 940, at 19.

48. *See generally*, George Anthony Smith, Matthew A. Marrone. *Recent Developments in Arbitration Law in the Middle East*, WEINBERG WHEELER HUDGINS GUNN & DIAL (Sept. 15, 2010), <http://www.wwhgd.com/news-article-71.html>.

Law”).⁴⁹ In Lebanon and Qatar, arbitration legislation is drafted based on European law.⁵⁰

However, *Shari'a* still has a clear effect on arbitration in the Middle East. Saudi Arabia is a good example of the influence of *Shari'a* on arbitration in the Middle East because Saudi Arabian law is an excellent model of the application of classic Islamic law.⁵¹ Saudi Arabia considers the *Qur'an* to be its Constitution.⁵² Furthermore, Saudi Arabia is significant because it is one of the major emerging markets in the Middle East with a promising future in global investment and trade. Saudi Arabia has the largest economy in the Gulf region,⁵³ so the influence of *Shari'a* law on arbitration holds important implications for future trade and investment.

The Saudi legal system has a dual nature, with both religious principles that conform to *Shari'a* and a legal system that helps solve disputes and deal with different legal issues.⁵⁴ In this context, the *Arabia v. Arab Am Oil Co.* (ARAMCO) case represents a turning point in Saudi arbitration.

In the 1958 case, the ARAMCO Company and the Saudi government entered into a petroleum concession contract to research, exploit, and market petroleum and provided for arbitration to resolve disputes.⁵⁵ Later, Saudi Arabia effectuated the establishment of a private company, Saudi Arabia Maritime Tankers Company (“Tankers Company”) and gave it preferential rights to transfer petroleum from and to the Saudi

49 See William K. Slate, *UNCITRAL (United Nations Commission on International Trade Law): Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, n. 59 (2004).

50 Charles N. Brower, Jeremy K. Sharpe, Notes and Comments, International Arbitration and the Islamic World: The Third Phase, 97 AM. J. INT'L L. 643, 650 (1993).

51 Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 628 (2006) (discussing arbitration in contracts of Islamic nature).

52 EL-AHDAB, *supra* note 9, at 537.

53 S. Breckenridge Thomas, *International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT'L ARB. 183, 187-89.

54 Trumbull, *supra* note 51, at. 609, 629.

55 Thomas, *supra* note 53, at 233; EL-AHDAB, *supra* note 9, at 558-560.

terminals. ARAMCO argued that its concession contract allowed it to choose its own method to transfer petroleum, and refused to accept the Tankers Company's priority rights. The Saudi government brought the dispute to arbitration.⁵⁶

The arbitral tribunal ruled in favor of ARAMCO. The tribunal determined that ARAMCO's concession contract was subject to the Saudi legal system, whose main source of law is *Shari'a*. However, the tribunal also considered standard practices in the oil industry, international jurisprudence, and legal precedents. Ultimately, the tribunal found that Saudi law was not comprehensive enough and did not conform to standard industry practice.⁵⁷ ARAMCO's concession contract rights were upheld because "the (Saudi) government cannot abolish acquired rights in a concession contract by granting them, all or in part, to another person in a new concession contract."⁵⁸

Although the Saudi Council of Ministers initially forbade government agencies from arbitration following the case, Saudi Arabia's economic prominence and interaction with the West gradually made it more open to international arbitration,⁵⁹ as shown by its adoption of the Arbitration Law of 1983 ("Saudi Arbitration Act").⁶⁰ However, like the rest of Saudi law, the Saudi Arbitration Act is subject to *Shari'a*. This means that Western and Asian practitioners must have a basic understanding of Islam and the application of *Shari'a* if they wish to interact with Islamic countries like Saudi Arabia in the global market.⁶¹

Shari'a has multiple effects on the Saudi Arbitration Act. For instance, arbitration is not allowed in areas of law where conciliation is not allowed, such as criminal offenses, public order and other legal areas

56 EL-AHDAB, *supra* note 9, at 558-61 (quoting the arbitration tribunal).

57 See Thomas, *supra* note 68, at 233.

58 EL-AHDAB, *supra* note 9, at 561.

59 See Thomas, *supra* Note 53, at 233.

60 *Id.*; Arbitration Law, Royal Decree No. M.46, 12 *Rajab* 1403, A.H. (April 25, 1983) [hereinafter Saudi Arbitration Act], reprinted in EL-AHDAB, *supra* note 9, at 909-12.

61 See Charles P. Trumbull, Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts, 59 VAND. L. REV. 609 (2006).

reserved to the state.⁶² Moreover, Article 3 of the Saudi Arabian Implementation Rules states that:

The arbitrator must be a Saudi national or a moslem foreigner chosen amongst the members of the liberal professions or other persons. He may also be chosen amongst state officials after agreement of the authority on which he depends. Should there be several arbitrators, the Chairman must know the Sharia, commercial law and the customs in force in the Kingdom.⁶³

Finally, when the Saudi Arbitration Act is silent on certain issues, like whether foreign lawyers are allowed to appear in arbitration, the matter is referred to *Shari'a* rules as the source of Saudi laws and regulations.⁶⁴

Furthermore, Saudi Arabia's accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and the International Convention for the Settlement of Investment Disputes ("ICSID") does not affect the fact that Saudi courts review arbitral decisions to ensure that they are consistent with Saudi Arabia's public policy and *Shari'a*.⁶⁵ As a result, arbitration awards against a Saudi Company in favor of a foreign company are almost never enforced for "public policy" reasons. Contracts which provide for the application of foreign law are also often accused of violating the Saudi public order and *Shari'a* ipso facto, and thus considered void.⁶⁶

Examples of contracts that might violate *Shari'a* in Saudi Arabia include contracts for commercial transactions that include profit via interest

62 Thomas, *supra* Note 53, at 233; *see also* Implementation Rules for the Arbitration Act, Royal Decree No. 71 2021/11, 09/08/1405 H May 27, 1985 [hereinafter Implementation Rules], Art. 3, reprinted in El-Ahdab, *supra* 9, at 909-12; Kutty, *supra* Note 7, at 599; El-Ahdab, *supra* 9, at 573-74.

63 Implementation Rules, *supra* 62, art. 3; *see also* Kutty, *supra* note 7, at 606.

64 *See* Thomas, *supra* note 53, at 235. With regard to the issue of whether foreign lawyers are allowed to appear in arbitration, the *Qur'an* and the *Sunna* have construed this silence as not prohibiting foreign representation according to the implementation of a principle of the *Shari'a*, which authorizes anything not expressly forbidden. *Id.*

65 *See* Kutty, *supra* note 7, at 600-02, 618.

66 *See* EL-AHDAB, *supra* note 9, at 601.

or contracts that involve gambling.⁶⁷ Any contract containing risky or hazardous dealings, where details concerning the transaction are unknown or uncertain such as transaction insurance contracts, would be subject to this rule. A contract's validity under *Shari'a* depends on the clauses of the contract, and foreign investors should be aware of potential complications in arbitration based on this.⁶⁸

II. Legislative Constraints on Arbitration in Technology Licensing Agreements in the Arab Middle East

In addition to contemplating the religious impact of *Shari'a* on arbitration in the Arab Middle East, investors and practitioners need to consider the legislative constraints on arbitration, particularly when resolving disputes over technology licensing agreements. A brief overview of the complications related to technology licensing agreements and the important role of arbitration to resolve these disputes is followed by an example of legislative restraints on arbitration in Egypt.

A. Technology Licensing Agreements and Arbitration

One way to exploit technology owned by others is through a licensing agreement with the other.⁶⁹ Licenses to use technology usually result in serious responsibilities for licensees. For instance, licensees are typically responsible for any manufacturing defects or inadequate quality control.⁷⁰ Moreover, sometimes if the license is exclusive there is an overall obligation on the licensee to use all reasonable efforts to achieve the objectives of the license agreement.⁷¹

As a result, huge and complicated disputes arise in connection with technology licensing agreements. These disputes occur in the following contexts: cross-licensing arrangements; international trademark or patent infringements; rights and obligations arising under joint research and

⁶⁷ Kutty, *supra* note 7, at 605-06; Thomas, *supra* note 53, at 227.

⁶⁸ See Kutty, *supra* note 7, at 605-06.

⁶⁹ See generally, Exchanging Value Negotiating Technology Licensing Agreements (A Training Manual), 16 The World Intellectual Prop. Org. & Int'l Trade Ctr., Exchanging Value Negotiating Technology Licensing Agreements (A Training Manual) (2005).

⁷⁰ See *Id.* at 67.

⁷¹ *Id.* at 71.

development initiatives; agreements to settle prior litigation in several jurisdictions; copyrights; domain name issues; and generic commercial disputes like construction and business acquisitions.⁷²

Arbitration is an attractive method of solving disputes arising out of technology licensing agreements, particularly because it guarantees confidentiality to the parties and supports the special needs of commercial reputations and trade secrets related to technology licensing agreements. Arbitration also ensures expediency in resolving disputes and allows more flexibility to choose the place and language of proceedings. Finally, arbitration utilizes decision makers who understand the complex issues involved in these types of conflict.⁷³

In the Middle East, arbitration in technology licensing agreements is extremely important because:

Middle Eastern countries are generally characterized by weak judiciaries which are not independent from the executive branches of government. The Judges in the region are often government employees working under the executive through the minister of justice. This gives the executive branch the power to interfere in the judicial process. Egypt and Lebanon, for example, have highly developed judiciaries but are often under pressure from the executive branches of their governments. Further, the judiciary in Middle East countries is often characterized by a lack of binding precedent, lack of procedural transparency, sparsely developed doctrines, unavailability of remedies such as injunctive relief and lack of publicly available administrative or judicial decisions.⁷⁴

As a result, arbitration in the Middle East may be the most effective solution when there is conflict resulting from a complicated agreement like

72 Sophie Lamb & Alejandro Garcia, *Arbitration of Technology & Intellectual Property Disputes*, *Global Arbitration Review: The European & Middle Eastern Arbitration Review* 2008, *Int'l J. of Public and Priv. Arb.* 1, at 49-50.

73 See WORLD INTELLECTUAL PROP. ORG. & INT'L TRADE CTR., *supra* note 69, at 75.

74 MICHAEL K. LINDSEY, INTRODUCTION TO FRANCHISING IN THE MIDDLE EAST: NAVIGATING THE RISKS AND REWARDS OF THE WORLD'S MOST INTERESTED MARKET 13 (The American Bar Association ABA Forum on Franchising and the ABA Center for Continuing Legal Education 2010).

a technology licensing agreement.⁷⁵ However, although arbitration is a good choice as opposed to the traditional judicial systems of the Middle East, investors must take into account the constraints on arbitration in the Middle East and make sure they are completely aware of what they are signing up for.

B. Legislative Constraints on Arbitration in Egypt

The legislative constraints on arbitration in technology licensing agreements can be demonstrated through the situation in Egypt. In the late nineteenth century, Egypt became the first Arab country to adopt a Western influenced legal system.⁷⁶ Egyptian law is influenced by European legal models, particularly the French “Code Civil” and “Code de Commerce.”⁷⁷ Arbitration in Egypt is governed by Law No. 27 of 1994, known as the “Egyptian Arbitration Act,”⁷⁸ which is modeled on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law.⁷⁹

The Egyptian Arbitration Act has three primary functions. First, it distinguishes between national and international arbitration by providing in Article 1 that “the provisions of the present Law shall apply to all arbitration...when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this Law.”⁸⁰ Second, the Egyptian Arbitration Act gives the parties to an arbitration absolute freedom to choose procedural

⁷⁵ *See id.*

⁷⁶ SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST, SHARI'A, LEBANON, SYRIA, AND EGYPT, 335 Hart Publishing 2006; *see also* Herbert J. Liebesny, A *Symposium on Muslim Law (Part II): Impact of Western Law in the Countries of the Near East*, 22 GEO. WASH. L. REV. 127 (1953).

⁷⁷ ARBITRATION AND MEDIATION IN THE SOUTHERN MEDITERRANEAN COUNTRIES (Giuseppe De Palo & Mary B. Trevor eds., 2007).

⁷⁸ Law No. 27 of April 18, 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, *translated in* El-AHDAB, *supra* note 9, at 156, 820-35 [hereinafter Egyptian Arbitration Act].

⁷⁹ El-AHDAB, *supra* note 9, at 155-56. UNCITRAL is the principal legal entity in the United Nations established to modernize and harmonize international commerce laws. UNCITRAL drafts model laws, legislative guides, and legal recommendations. About UNCITRAL, http://www.uncitral.org/uncitral/en/about_us.html (last visited June 1, 2011).

⁸⁰ Egyptian Arbitration Act, *supra* note 78, art. 1.

and substantive law applicable to the Arbitration.⁸¹ Finally, the Egyptian Arbitration Act applies to domestic and international arbitration, so it does not take a rigid position with regard to the place of arbitration; parties are free to agree to hold the arbitration in Egypt or abroad.⁸²

Technology licensing agreements in Egypt are governed by Law No. 17 of 1999, known as the “Commercial Code,” particularly articles 72-87 of the Code, referred to here as the “Technology Transfer Provisions.”⁸³ In particular, the Technology Transfer Provisions concern agreements whose subject matter is the transfer of technology to be used in Egypt.⁸⁴ The Provisions are very protective of the licensees. For example, Article 75 gives the licensee the permission to invalidate any clause in the agreement that restricts his rights in using, developing, producing or advertising the transferred technology.⁸⁵ Some believe that the reason behind this cautious and protective approach to licensees in Egypt stems from the idea that licensees, as receivers of technology in developing countries, are often in a weak position compared to licensors.⁸⁶ The outcome of this conservative

81 See SALEH, *supra* note 76, at 386. See Egyptian Arbitration Act, *supra* note 78, 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 centre in Egypt or abroad...” Moreover, Article 39 provides that “The Arbitral Tribunal shall apply the rules agreed by the parties to the subject matter of the dispute...”

82 SALEH, *supra* note 76, at 388; see also Egyptian Arbitration Act, *supra* note 78, art. 28, which provides that “[t]he parties to arbitration may agree on a place of arbitration in Egypt or abroad...”

83 Law No. 17 of 1999, Promulgating the New Commercial Code, arts. 72-87, *translated in* Egypt: Technology Transfer Provisions in Law No. 17 of 1999, 15 Arab L. Q. 418 (2000) [hereinafter Egyptian Commercial Code No. 17 of 1999].

84 Egyptian Commercial Code No. 17 of 1999, *supra* note 83, art. 72. Article 72 states:

The provisions of this Chapter shall apply to each contract for the transfer of technology to be used in the Arab Republic of Egypt, whether such transfer is international lying across the regional borders of Egypt, or inland, without taking into consideration in both cases the nationality of the parties to the agreement or their places of residence.”

85 Egyptian Commercial Code No. 17 of 1999, *supra* note 83, art. 75 (“Any condition prescribed in the technology transfer contract, which restricts the freedom of the importer in its use, development, acquaintance of the product or its advertisement, may be invalidated”).

86 Sameha El-Kalouby, <Transliterated Arabic Title> [The Explanation of the Egyptian Commercial Code Part Two], 105 Dar-Alnahda Al-arabeya 2005 (available in Arabic).

attitude is protective arbitration rules regarding technology licensing agreements that differ from the general, more flexible rules governing the Egyptian Arbitration Act.

One example of the difference between arbitration law under the Egyptian Arbitration Act and the Technology Transfer Provisions involves choice of law and location in arbitrations. Unlike Article 25 of the Egyptian Arbitration Act, which gives parties to an arbitration freedom to choose the procedural and substantive law applicable to the arbitration, Article 87 of the Technology Transfer Provisions provides that if parties to a technology transfer agreement choose to arbitrate, the arbitration will be subject to Egyptian substantive and procedural law. Any agreement to arbitrate under a different foreign law is null and void.⁸⁷ As a corollary, while the Egyptian Arbitration Act Article 28 gives the arbitrating parties absolute freedom to choose the place of arbitration, Article 87 of the Technology Transfer Provisions provides that technology transfer agreement arbitrations must take place inside Egypt.⁸⁸ Lastly, Article 72 of the Technology Transfer Provisions applies to all contracts for the transfer of technology to be used in Egypt, regardless of locality, whereas the Egyptian Arbitration Act Article 1 applies to international commercial arbitration conducted abroad only if the parties have agreed to be subject to the Arbitration Law.⁸⁹

Resultantly, any foreign investor arbitrating a technology transfer agreement in Egypt is obliged to conduct the arbitration in Egypt and abide by Egyptian substantive and procedural law. Some critics argue that these protective technology transfer rules discourage foreign investors from transferring technology to Egypt.⁹⁰ Licensors arbitrating technology

87 See Egyptian Commercial Code No. 17 of 1999, *supra* note 83, art. 87 (“In all cases, decided on the subject of the dispute shall be according to the provisions of the Egyptian law, and any agreement to the contrary shall be null and void.”).

88 See *id.* (“The Egyptian courts shall have jurisdiction to decide on disputes... Agreement may be reached on settling the dispute amicably or via arbitration to be held in Egypt according to the provisions of Egyptian law”); Egyptian Arbitration Act, *supra* note 80, art. 28 (“The parties to arbitration may agree on a place of arbitration in Egypt or abroad”).

89 Egyptian Commercial Code No. 17 of 1999, art. 1, *supra*, note 84; Egyptian Arbitration Act, *supra* note 78, art. 1 (“the provisions of the present Law shall apply... when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this law”).

90 Sameha El-Kalouby, <Transliterated Arabic Title> [The Explanation of the Egyptian Commercial Code Part Two], 105 Dar-Alnahda Al-arabeya 2005 (available in Arabic).

transfer agreements in Egypt must be aware of legislative constraints they face when arbitrating a technology licensing agreement in Egypt.

Conclusion

Foreign investors in the Middle East must be aware of the constraints and legal frameworks that affect arbitration in the region before deciding to arbitrate their disputes in the Arab Middle East and avoid unenforceable arbitration awards. The importance of considering different legal, religious, social, and cultural issues that may affect arbitration is an essential part of doing business in the Middle East.

Though Middle Eastern arbitration laws are often based on Western arbitration law, *Shari'a* special rules and legislative constraints put into place to protect national interests have a significant influence on arbitration law in the Middle East.⁹¹ Arbitration in the Middle East is unique, and lack of a proper understanding of the situation can be costly. Foreign investors and practitioners who are looking at arbitrating in the Middle East must invest the time to become familiar with the special legal and religious context of the country in which they want to arbitrate. An understanding of different concerns and backgrounds and how they affect arbitration is essential for investors and practitioners before deciding to arbitrate in the Arab Middle East.

⁹¹ See, e.g., Saudi Arbitration Act, *supra* note 60, art. 3.