

FACTORS TO BE CONSIDERED BEFORE ARBITRATING IN THE ARAB MIDDLE EAST: EXAMPLES OF RELIGIOUS AND LEGISLATIVE CONSTRAINTS

RADWA S. ELSAMAN¹

I. Introduction

The Arab Middle Eastern countries represent some of the leading business market participants in the world.² Moreover, many Arab countries own the lion's share of the planet's crude oil resources, and by 2012, nine of the world's ten largest oil refineries will exist in the Middle East.³ In addition, the Middle East presents "many dynamic trade and investment opportunities,"⁴ particularly because of its favorable geographical position, availability of natural resources, and competitively-priced labor. Also, its growing population — an increasingly young population integrated with Western pop culture through technology — has increased demand for American and Western products in general.⁵ Furthermore, there has been a strong inclination by American and European investors towards investing in the Arab Middle East.⁶

There is no doubt that arbitration has become increasingly accepted as a form of alternative dispute resolution in the Middle East.⁷ Arbitration clauses are becoming very common in different types of contracts — especially in commercial contracts.⁸ It is the preferred method for its speediness, professionalism of specialized decision-makers, confidentiality, and freedom of choice regarding both substantive and procedural applicable laws as well as place of arbitration, among other factors.⁹ However, efficiency in the arbitral process demands a clear understanding of the different legal, social, religious, cultural and other factors that may affect the enforceability of arbitral awards. These factors differ from one legal system to another,

especially within the Arab Middle Eastern countries. For instance, national courts of some Islamic nations have declined to enforce certain foreign arbitral awards on domestic public policy grounds including precepts of Islamic law.¹⁰ Accordingly, to guarantee the enforceability of arbitration awards, foreign investors and practitioners must be aware of the different issues that may affect the enforceability of the arbitration award before resorting to arbitration.

Part II of this article discusses religion as one of the factors that may affect arbitration laws and needs to be considered before arbitrating in a country whose legal system is influenced by religious rules, discussing Saudi Arabia as an example of an Arab Middle Eastern country based on Islamic Law (*Shari'a*) system. Part III then discusses legislative constraints that should be considered before arbitrating to guarantee the enforceability of the arbitral award, analyzing Egypt as an example of an Arab Middle Eastern country with exacting arbitration rules concerning technology licensing agreements.

II. The *Shari'a* and Its Influence On Arbitration Laws In The Arab Middle East, The Example Of Saudi Arabia.

A. The *Shari'a* in Brief

Islam, formally *Al-Islam*, is the religion of Muslims whose rules and principles are provided by the Muslims' holy book, the *Qur'an*,¹¹ which was dictated word for word by *Allah*¹²

¹ Commercial Law Assistant Professor, Cairo University Law School; Associate with Ibrachy-Dermakar Law Firm, Cairo; S.J.D. Candidate 09, LL.M. 08, The American University Washington College of Law, Washington DC; LL.M. 05, The International Maritime Organization International Maritime Law Institute, Malta; Postgraduate Diploma in Civil Law 03, B.A. 02, Cairo University Law School.

² For instance, Saudi Arabian foreign direct investment increased from \$12,106,749,694 in 2005 to \$39,455,863,929 in 2008. See The World Bank Group, *World Development Indicators*, available at <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

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

⁴ John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 *CORNELL INT'L L.J.* 414 (2005).

⁵ *Id.*

⁶ One example is the Industrial & Commercial Bank of China Ltd., the largest Chinese bank, which is expanding widely in the Middle East and is considering acquisitions there to take advantage of China's booming investment in the region. *Id.*

⁷ SAMIR SALEH, *COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST, SHARI'A, LEBANON, SYRIA, AND EGYPT* xxvi (2006).

⁸ *Id.*

⁹ *Id.* at xxvii.

¹⁰ See Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 *LOY. L.A. INT'L & COMP. L. REV.* 565, 602-03 (2006).

¹¹ The *Qur'an* is the Islamic holy book revealed to Prophet Muhammad (PB). *Glossary of Islamic Legal Terms*, *Glossary of Islamic Legal Terms*, 1 *J. ISLAMIC L.* 89, 99 (1996). See also Irshad Abdal-Haqq, *Islamic Law An Overview of Its Origin and Elements*, 7 *J. ISLAMIC L. & CULTURE* 27, 45 (2002) (defining the Islamic law, explaining the main elements of the *Shari'a*, and discussing the methodologies and schools of the Islamic jurisprudence).

¹² *Allah* means "God" in Arabic and refers to the Islamic name of the creator, the one and only deity. *Glossary of Islamic Legal Terms*, *supra* note 11, at 90. 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].

to his Prophet *Muhammad* (PB).¹³ The *Shari'a* refers to the body of rules derived from the main sources of Islamic law.¹⁴ These sources are divided into two categories: primary and secondary sources.¹⁵ While primary sources include both the rules incorporated in the *Qur'an* and the *Sunna*,¹⁶ secondary or supplementary sources include most importantly the *Ijma'* and the *Qiyas*.¹⁷ The *Shari'a* must be distinct from *Fiqh*,¹⁸ the technical process of applying the rules of the *Shari'a*, driven from its different sources, on real or hypothetical situations.¹⁹

The *Qur'an* is the main source of the *Shari'a*. More than a spiritual text, it is a legal code and a reference for everyday behavior.²⁰ The *Qur'an* is divided into *Suras*²¹ (chapters), each divided into verses.²² Since, the *Qur'an* is the highest source of the *Shari'a*, its revealed rules are not arguable and cannot be modified by rules derived from any of the other sources of the *Shari'a*.²³

The *Sunna*²⁴ refers to the practices of Prophet *Muhammad* (PB), including actions, oral statements, or consensus in action by others.²⁵ Through the *Sunna*, Prophet *Muhammad* (PB) interpreted, explained and completed principles first revealed in the *Qur'an*.²⁶ Hence, the *Sunna*, if it is to be trusted and

considered, cannot contradict the *Qur'an*.²⁷ Generally speaking, a trusted *Sunna* is usually narrated and recorded in one of the most famous books called the *Sahih*.²⁸

Where the *Qur'an* and the *Sunna* do not guide on certain issues, the supplementary sources of the *Shari'a* apply.²⁹ These sources include *Ijma'* and *Qiyas*. *Ijma'* means the convergence of opinion on a particular issue that is not provided by the *Qur'an* or the *Sunna* or that requires further interpretation.³⁰ The question is the convergence of whose opinion constitutes *Ijma'*. After Prophet *Muhammad* (PB) passed away, his knowledgeable supporters' unanimous opinions constituted *Ijma'*.³¹ Later, *Ijma'* was established through the unanimous opinions of the Muslim jurists of each era.³² In the end, any conclusion reached through *Ijma'* must be in conformity with the *Qur'an* and the *Sunna*.³³

Finally, *Qiyas* is a method of analogical reasoning that aims to govern a new situation with an old rule, as long as the new situation is similar to that governed by the old rule.³⁴ *Qiyas* derives its reliability as a source of the *Shari'a* from the *Qur'an* and the *Sunna*.³⁵ For example, through *Qiyas*, jurists forbid the use of drugs as they have the same effect on the body as liquor, which the *Qur'an* prohibits.³⁶

¹³ Prophet *Muhammad* (PB) is the Prophet of Islam. When the name of Prophet *Muhammad* (PB) is mentioned it is followed by the sentence Peace Be Upon Him ("PB") as a mark of respect and veneration.

¹⁴ MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 34 (2003).

¹⁵ M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 139-152 (2002) (defining the *Shari'a* 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).

¹⁶ The word *Sunna* is an Arabic word that refers to the sayings and deeds of Prophet *Muhammad* (PB) and it is referred to sometimes as *Hadit*. Abdal-Haqq, *supra* note 11, at 33.

¹⁷ *Ijma'* is an Arabic word that refers to the consensus of opinion of the learned Muslims scholars. Also, *Qiyas* is an Arabic word that literally means "analogy" and refers to the process of interpreting legal decisions on the basis of analogy by reference to the *Qur'an* and the *Sunna*. Glossary of Islamic Legal Terms, *supra* note 11, at 99. See also Adnan A. Zulfiqar, *Religious Sanctification of Labor Law: Islamic Labor Principles And Model Provisions*, 9 U. PA. J. LAB. & EMP. L. 421, 433-434 (2007) (discussing employees' rights in Islam by introducing the different sources of the *Shari'a* rules, explaining the role of Islam in shaping Muslim states, discussing the importance of having labor codes, elaborating on the presence of codes in the Muslim world, and developing a labor code from the sources of the *Shari'a*).

¹⁸ *Fiqh* is an Arabic word that 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 11, at 92. According to Abdal-Haqq, some authors use the words Islamic law, the *Shari'a* and *Fiqh* as simultaneous interchangeable words terms, which may confuse readers. Abdal-Haqq, *supra* note 11, at 32.

¹⁹ Abdal-Haqq, *supra* note 11, at 36.

²⁰ Bassiouni & Badr, *supra* note 15, at 149.

²¹ *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 11, at 94.

²² Bassiouni & Badr, *supra* note 15, at 149.

²³ Bassiouni & Badr, *supra* note 15, at 150. 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*).

²⁴ *Sunna* is an Arabic word which literally means method and it refers to the second source of the *Shari'a* which is the sayings of Prophet *Muhammad* (PB). Glossary of Islamic Legal Terms, *supra* note 8, at 100; see also Bassiouni & Badr, *supra* note 15, at 151.

²⁵ Bassiouni & Badr, *supra* note 15, at 152; see also Freamon, *supra* note 23, at 19.

²⁶ Bassiouni & Badr, *supra* note 15, at 152.

²⁷ *Id.* at 148.

²⁸ The *Sahih* books are: (1) *Sahih Al-Bukhari*, (2) *Sahih Muslim*, (3) *Sunan An-Nasa'I*, (4) *Sunan Abi Dawud*, (5) *Sunan At-Tirmidhi*, (6) *Sunan Ibn Majah*. See Abdal-Haqq, *supra* note 11, at 48.

²⁹ *Id.* at 54.

³⁰ *Id.*; see also Bassiouni & Badr, *supra* note 15, at 154; Freamon, *supra* note 23, at 21-29. *Ijma'* derives its reliability from Prophet *Muhammad* (PB) saying: "My community will never agree on a mistake." Recorded in *At-Tirmidhi*, 258/41, No. 44830, http://islamport.com/d/1/mtn/1/37/1116.html?zoom_highlightsub=%22%C3%E3%CA%EC+%DA%E1%EC+%D6%E1%C7%E1%C9%22 (last visited 4 Oct. 2010) (Author translation from Arabic to English).

³¹ Abdal-Haqq, *supra* note 11, at 54.

³² *Id.* at 55.

³³ *Id.*

³⁴ *Id.* at 56; see also Bassiouni & Badr, *supra* note 15, at 156; Freamon, *supra* note 23, at 29-30.

³⁵ Abdal-Haqq, *supra* note 11, at 56.

³⁶ Bassiouni & Badr, *supra* note 15, at 155.

B. The Extent of Muslim Countries Adoption of the *Shari'a* as a Source of National Law

Not all Muslim countries have the same reaction towards the *Shari'a* as a source of national law. Muslim countries can be divided into three categories according to their reaction to the *Shari'a*.³⁷ The first category includes countries such as Lebanon and Turkey, which do not consider the *Shari'a* as the main source of their national laws and therefore its effect on their laws and regulations is not clear.³⁸ 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.³⁹

The second category includes countries such as Algeria, Tunisia, Egypt, Jordan and Yemen, which consider the *Shari'a* as the main source of their national laws, but do not apply it to different aspects of their legal system.⁴⁰ For example, Chapter 1 of the Tunisian Constitution provides that “Tunisia is a free, independent, sovereign nation, its religion is Islam, Arabic language, and its Republic.”⁴¹ Chapter 38 provides that “[t]he President is the head of state and religion of Islam.”⁴² In the same context, Article 2 of the Egyptian Constitution declares Islam as the religion of the State and the main source of the law.⁴³ The same applies to Malaysia where Article 3-1 of the Federal Constitution provides that “Islam is the religion of the Federation but other religions may be practiced in peace and harmony in any part of the Federation.”⁴⁴ Similarly, Article 1 of the Yemeni Constitution provides that “[t]he Yemen Republic is an Arab Muslim and independent country”; Article 2 provides that “Islam is the religion of the country and Arabic is its official language”; Article 3 provides that “[t]he *Shari'a* is the main

source of legislation”; and Article 23 provides that “[t]he right of inheritance is guaranteed in accordance with *Shari'ah*.”⁴⁵

The effect of the *Shari'a* on the legal systems of states in this category differs from one country to the other.⁴⁶ For example, the Egyptian Supreme Constitutional Court held that:

The principles of the Islamic *Shari'a* are the major source of legislation. This imposes a limitation curtailing both the legislative and executive power, through which they are obliged that whatever laws or decrees they enact, no provision contained in them 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.⁴⁷

However, in Malaysia, the application of Islamic law is restricted to Muslims with regard to specific issues mentioned in the States List of the Federal Constitution of the country.⁴⁸

Finally, the third category is comprised by Muslim countries such as Iran, Bahrain and Saudi Arabia, which recognize the *Shari'a* as the main source of their national laws, to the extent that they consider the *Qur'an* the constitution of their countries.⁴⁹ Article 1 of the Bahraini Constitution provides that “[t]he Kingdom of Bahrain is Arab, Islamic, independent, and fully sovereign.”⁵⁰ Similarly, 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, and its language is Arabic, and its capital city is Riyadh.”⁵¹ Also, Article 1 of the Qatari Constitution provides that “Islam is the State’s religion and the Islamic *Shari'a* is the main source of its legislations.”⁵² The same rule is provided by the Constitution of the United Arab Emirates, “Islam is the formal religion of the country; the *Shari'a* is the main source of its legislations and Arabic is its formal language of the Union.”⁵³ Pakistan established the Islamic Council to confirm that the bills

³⁷ NISRINE ABIAD, *SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY* 51 (2008).

³⁸ *Id.*

³⁹ Turkey [Constitution] 1961, art. 2. See also Kemal Gözler, *Turkish Constitutional Law Material in English*, <http://anayasa.gen.tr/english.htm> (last visited Oct. 6, 2010).

⁴⁰ ABIAD, *supra* note 37, at 51.).

⁴¹ Tunisia [Constitution] June 1, 1959, No. 57, ch. 2. See also The Republic of Tunisia, Representatives Council, *The Constitution*, <http://www.chambre-dep.tn/> (last visited Oct. 6, 2010) (Author translation from Arabic to English).

⁴² *Id.* at ch. 38.

⁴³ Constitution of The Arab Republic of Egypt, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007. See also <http://www.egypt.gov.eg/english/laws/Constitution> (last visited Oct. 4, 2010).

⁴⁴ Malaysia [Constitution] 1957, art. 3.1. See also Constitution of Malaysia, *Part I- The States, Religion, And The Law Of The Federation*, <http://confinder.richmond.edu/admin/docs/malaysia.pdf> (last visited Oct. 6, 2010).

⁴⁵ Yemen [Constitution] 1994, art. 1-3 & art. 23. See also Republic of Yemen Supreme Commission for Elections and Referendum, *The Constitution of the Republic of Yemen*, <http://www.scer.org.ye/> (last visited Oct. 8, 2010).

⁴⁶ ABIAD, *supra* note 37, at 47.

⁴⁷ Case No. 5257/43/Dec. 28, 1997/Constitutional Court (Egypt).

⁴⁸ ABIAD, *supra* note 37, at 49.

⁴⁹ ABIAD, *supra* note 37, at 51.

⁵⁰ Bahrain [Constitution] 2002, no. 17, art. 1. See also Department of Legal Affairs, *Bahrain Kingdom Constitution*, <http://www.legalaffairs.gov.bh/> (last visited Oct. 6, 2010).

⁵¹ Saudi Arabia [Constitution] 1992, art. 1. See also Kingdom of Saudi Arabia Ministry of Foreign Affairs, *The Basic Law of Government*, <http://www.mofa.gov.sa/> (last visited Oct. 6, 2010).

⁵² Qatar [Constitution] 2003, art. 1. See also Embassy of the State of Qatar in Washington DC, *Constitution of Qatar*, <http://www.qatarembassy.net/constitution.asp> (last visited Oct. 8, 2010).

⁵³ United Arab Emirates [Constitution] 1971, art. 7. See also <http://www.gcc-legal.org/mojportalpublic/BrowseLawOption.aspx?LawID=2766&country=2> (last visited Oct. 8, 2010).

are in conformity with the *Shari'a* before issuance and it also established the Federal *Shari'a* Court to examine the conformity of the application of the national laws with the *Shari'a*.⁵⁴

C. Arbitration in *Shari'a*

Arbitration, or *tahkim*, is well known by *Shari'a* through its different sources. The *Qur'an* refers generally to arbitration in six general areas. For instance, the *Qur'an* provides: "... and when you judge between a man and man that you judge with justice..."⁵⁵ The *Qur'an* even approved arbitration in a matrimonial context "If you fear a breach between them (husband and wife), then appoint two arbiters, one from his family and the other from her family..."⁵⁶

The *Sunnah* also confirmed arbitration and Prophet *Muhammad* is reported to have appointed an arbitrator and adhered to his decision.⁵⁷ Also, he is reported to have counseled a tribe to have a dispute arbitrated.⁵⁸ Even his Companions unanimously acknowledged the validity of arbitration.⁵⁹

However, a discussion took place between Islamic scholars regarding the exact meaning of arbitration in Islam and its scope.⁶⁰ The question is whether, under Islam, arbitration is a mere attempt to conciliate and therefore constitutes amiable composition. *Sulh*, or Islam recognizes a similar understanding of arbitration to that of the Western concept.⁶¹ That is particularly relevant knowing that amiable composition or *Sulh* is not binding.⁶² 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 *Qur'an*, *Sunnah*, *Ijma* and *Qiyas* (analogy).⁶³

i. Saudi Arabia as an example of the influence of *Shari'a* on arbitration in the Arab Middle East

Moving from the theological rules of Islamic law to the practice of arbitration and local arbitration laws of the Arab Middle East, an important development is the enactment of modern national legislation related to international arbitration.⁶⁴ For instance, Bahrain, Jordan, Oman, Tunisia and Turkey arbitration laws are drafted in accordance with the United Nations Commission on International Trade Law Model Law of 1985 "Model Law".⁶⁵ Some other states drafted their arbitration laws on the basis of some European laws; for example, Lebanon and Qatar arbitration rules are based on the French Law.⁶⁶ However, *Shari'a* still has its clear effect on arbitration laws in the Arab Middle East.⁶⁷

Saudi Arabian law is an excellent model of the application of classical Islamic law.⁶⁸ Some argue that Saudi Arabia is one of the emerging markets with a promising future in global investment and trade as it has the largest economy in the Gulf region, possessing over twenty five percent of the world's conventional petroleum reserves.⁶⁹ Additionally, Saudi Arabia utilizes a dual legal system, characterized by both a presence of religious principles that conform to *Shari'a* and a legal system that resolves disputes and legal issues.⁷⁰

Since *Saudi Arabia v. Arab Am Oil Co. (ARAMCO)*,⁷¹ Saudis have become more open to international arbitration.⁷² As a result, Saudi Arabia adopted the Arbitration Law of 1983 (Arbitration Act).⁷³ However, Arbitration Act is not insulated from *Shari'a* rules, which underscores the importance of having a basic understanding of Islam and application of *Shari'a* before arbitrating in the Middle East.⁷⁴

Examples of the effect of *Shari'a* on Saudi Arbitration Act include the fact that arbitration is forbidden in areas where conciliation is not allowed; such as criminal offenses, public

⁵⁴ ABIAD, *supra* note 37, at 46.

⁵⁵ THE QURAN, *supra* note 12, at 228 (quoting the meaning of the *Qur'an* 4:58).

⁵⁶ THE QURAN, *supra* note 12, at 220 (quoting the meaning of the *Qur'an* 4:35).

⁵⁷ ABDUL HAMID EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 13 (1999).

⁵⁸ *Id.*

⁵⁹ *Id.* In the same context, "The *Ijma* (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." *Id.*

⁶⁰ EL-AHDAB, *supra* Note 57, at 13-18.

⁶¹ *Id.*

⁶² EL-AHDAB, *supra* Note 57, at 16.

⁶³ EL-AHDAB, *supra* Note 57, at 19.

⁶⁴ See generally SALEH, *supra* note 7, at xxviii- xxxiii.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *supra* Section II.B.

⁶⁸ *Id.*

⁶⁹ 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, 188.

⁷⁰ Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 629 (2006) (discussing arbitration in contracts of Islamic nature).

⁷¹ *Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO)*, 27 ILR 117, 169 (1963) (ruling against Saudi Arabia and deciding that its laws are not comprehensive enough and do not conform to the practice in the oil business and that ARAMCO's rights could not be protected by the law in force in Saudi Arabia).

⁷² Thomas, *supra* note 69, at 229.

⁷³ The Royal Decree M.46 of 12.07.1403 (H) 25.04.1983 (G) and its Implementation Rules.

⁷⁴ Trumbull, *supra* note 70, at 629.

order and other areas reserved for the state.⁷⁵ Moreover, Article 3 of the Saudi Arabian Implementation Rules states that:

The arbitrator must be a Saudi national or a Muslim 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 *Sahri'a*, commercial law and the customs in force in the Kingdom.⁷⁶

In addition, when the Arbitration Act is silent on certain issues, such as the question of whether foreign lawyers are allowed to appear in arbitration, the matter is referred to *Shari'a* rules as the general source of Saudi laws and regulations.⁷⁷ Furthermore, it is argued that Saudi's accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["the New York Convention"] as well as the International Convention for the Settlement of Investment Disputes ["ICSID"] shall not affect the fact that Saudi courts will continue to review arbitral decisions to ensure that they are in consistent with Saudi's public order influenced by *Shari'a*.⁷⁸

Finally, an agreement that provides for the application of a foreign law may be accused of breaching the Saudi public order of *Shari'a*.⁷⁹ In an arbitration held in London between a Saudi party and a non-Saudi party where the Saudi Arabian Law was chosen by the parties in a contract that was performed in Saudi Arabia, the three European arbitrators refused to implement the Saudi law.⁸⁰ In commercial transactions, *Shari'a* prohibits *riba* (the making of profit via interest) which means that agreements dealing with such a kind of issues would be void under the Saudi law.⁸¹ The concept of *ghara* (gambling), which means that any contract containing risky or hazardous dealings, where details concerning the transaction are unknown or uncertain particularly those concerning the subject matter of the transaction, are void under *Shari'a*, e.g., insurance contracts would be subject to this rule, it depends on the clauses of the contract.⁸²

D. Legislative Constraints on Arbitration in Technology Licensing Agreements in the Arab Middle East, the Example of Egypt

i. Brief on the importance of arbitration in technology licensing agreements

Licensing agreements are the only available method for adapting technology originated by others.⁸³ Licenses to use technology usually result in serious responsibilities for licensees. Specifically, licensees are typically responsible for any manufacturing defects or inadequate quality control.⁸⁴ Moreover, sometimes there is a general obligation on the licensee to use all reasonable efforts if the license is exclusive to achieve the objectives of the license agreement.⁸⁵ As a result, complex disputes arise in connection with technology licensing agreements.⁸⁶

Arbitration is an attractive method for solving disputes — especially those arising out of technology licensing agreements. First, it guarantees confidentiality to the parties, which fits the special nature of commercial reputation and trade secrets.⁸⁷ Second, it avoids the expense and complexity of multi jurisdictional litigation.⁸⁸ Third, it provides the expediency required by licensing. Fourth, it allows more flexibility to the parties in choosing the applicable law, place and language of the proceedings as well as the procedural rules and the appropriate decision-makers to resolve their disputes.⁸⁹

Examining arbitration and particularly arbitration in technology licensing agreements in is of extreme importance for political considerations 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

⁷⁵ Article 1 of Section 1 of the Implementation Rules for the Arbitration Act issued by the Royal Decree M/46 OF 12.07.1403 (h) 25.04.1983 (G); see also, Thomas, *supra* Note 69, at 229; El-AHDAB, *supra* note 57, at 573-74; Kutty, *supra* note 10, at 599.

⁷⁶ Article 3 of the Implementation Rules for the Arbitration Act issued by the Royal Decree M/46 OF 12.07.1403 (h) 25.04.1983 (G); see also, Kutty, *supra* note 10, at 606.

⁷⁷ Thomas, *supra* note 69, at 226. With regard to the issue whether foreign lawyers are allowed to appear in arbitration, the *Qur'an*, the *Sunna* has 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. Thomas, *supra* note 69, at 226.

⁷⁸ Kutty, *supra* note 10, at 602, 618.

⁷⁹ El-Ahdab, *supra* note 58, at 601.

⁸⁰ *Id.*

⁸¹ Thomas, *supra* note 69, at 237; see also, Kutty, *supra* note 10, at 605.

⁸² Kutty, *supra* note 10, at 605-606.

⁸³ THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, EXCHANGING VALUE NEGOTIATING TECHNOLOGY LICENSING AGREEMENTS: A TRAINING MANUAL 16 (2005).

⁸⁴ *Id.* at 67.

⁸⁵ *Id.* at 71.

⁸⁶ Examples to such kinds of disputes include concerning cross-licensing arrangements, disputes on international trademark or patent infringements, disputes related to the rights and obligations arising under joint research and development initiatives, disputes over agreements to settle prior litigation in several jurisdictions, copyright disputes, domain name issues and disputes of a more generic commercial nature like construction, business acquisition and others. See Sophie Lamb & Alejandro Garcia, *Arbitration of Intellectual Property Disputes*, INT'L J. OF PUBLIC AND PRIV. ARB. 1 (May–July 2008).

⁸⁷ EXCHANGING VALUE NEGOTIATING TECHNOLOGY LICENSING AGREEMENTS, *supra* note 83, at 75.

⁸⁸ *Id.* at 74.

⁸⁹ *Id.* at 75.

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.⁹⁰

Hence, arbitration in the Arab Middle East as a means to resolve disputes arising from important and complicated agreements like the technology transfer agreements and franchise agreements is often the best recourse.⁹¹ In such a case, investors should be aware of any constraints that may influence an arbitral award.

ii The Example of Egypt

Egypt is a prime example of how legislative constraints influence arbitration. It was the first Arab Middle East country to voluntarily adopt Western style Codes in the late nineteenth century.⁹² Egyptian law is influenced by European legal models — especially the French “Code Civil” and “Code de Commerce”.⁹³ Also, arbitration in this country is governed by the Egyptian Arbitration Law No. 27 of 1994 (Law No. 27), which is inspired by the UNCITRAL Model Law.⁹⁴

For the purpose of this article, Law No. 27 is characterized by three main areas. First, it distinguishes national from international arbitration,⁹⁵ which is interesting for many reasons including:

- (a) In case of national arbitration, the controlling authority over this arbitration can review the case of national arbitration, the controlling authority over this arbitration can review the subject matter of the dispute in several countries, which is not true in matters of international arbitration... (d) Public order is the limit of party autonomy and is different in national and international arbitrations. In national arbitration, one applies national public order whereas in international arbitration, one applies international public order...⁹⁶

Second, it grants the parties absolute freedom to choose the applicable procedural and substantive law.⁹⁷ Third, Law No. 27 is of a dual nature and is applicable to both domestic and international arbitration, affording parties the flexibility to agree on an arbitral site, which could be in or outside Egypt.⁹⁸

The law organizing technological licensing agreements in the Egyptian law is Chapter One of the Commercial Law No. 17 of 1999 (Chapter One).⁹⁹ The rules of this chapter define the technology transfer agreement as the agreement whose subject matter is the transfer of technology to be used inside Egypt.¹⁰⁰ Hence, the rules of Chapter One are very protective of licensees.¹⁰¹ Some believe that the reason behind protecting licensees in technology licensing agreements in Egypt is that licensees in developing countries are usually in a weak position compared to licensors.¹⁰² The outcome of such a conservative attitude is a set of protective arbitration rules concerning arbitration in technology licensing agreements that are different from the general flexible rules governing arbitration of the Law No. 27.

On one hand, unlike Article 25 of Law No. 27, which gave the arbitration parties absolute freedom to choose procedural and substantive law applicable on arbitration, Article 87 of Chapter One provides that if the parties to a technology transfer agreement agree to arbitrate, such arbitration shall take place according to Egyptian substantive and procedural law and any agreement between the parties to submit their disputes to any law other than the Egyptian law shall be null and void.¹⁰³ On the other hand, unlike Article 28 of Law No. 27, which gives the parties to an arbitration absolute freedom to choose the place of arbitration, Article 87 of Chapter One provides that if the parties to a technology transfer agreement agree to arbitrate, arbitration shall take place within Egypt.¹⁰⁴ Finally, unlike Article 1 of the Law No. 27, which distinguishes between national and international arbitration, Article 72 of Chapter One provides no distinction between national or international arbitration, as long as it refers to a technology licensing agreement.¹⁰⁵

⁹⁰ MICHAEL K. LINDSEY, INTRODUCTION TO FRANCHISING IN THE MIDDLE EAST: NAVIGATING THE RISKS AND REWARDS OF THE WORLD'S MOST INTERESTED MARKET 13 (ABA Forum on Franchising and the ABA Center for Continuing Legal Education) (2010).

⁹¹ *Id.*

⁹² SALEH, *supra* note 7, at 335.

⁹³ ARBITRATION AND MEDIATION IN THE SOUTHERN MEDITERRANEAN COUNTRIES 18 (Giuseppe De Palo and Mary B. Trevor eds., 2007).

⁹⁴ EL-AHDAB, *supra* note 58, at 155.

⁹⁵ The Egyptian Arbitration Law No. 27 of 1994, Official Journal, April 21, 1994, Article 1 (providing that “[t]his law applies to any arbitration ***should the arbitration be held in Egypt or be an international commercial arbitration.”).

⁹⁶ EL-AHDAB, *supra* note 58, at 158-159.

⁹⁷ SALEH, *supra* note 7, at 386. As Article 25 of the Law No. 27 provides that “the 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 of Law No. 27 provides that: “the Arbitral Panel shall apply the rules agreed by the parties to the subject matter of the dispute...” The Egyptian Arbitration Law No. 27 of 1994, Official Journal, April 21, 1994, Article 25, 39.

⁹⁸ SALEH, *supra* note 7, at 388; *see also* Article 28 of the Egyptian Arbitration Act that provides “the parties to the arbitration are entitled to agree on a site of arbitration in Egypt or abroad...”

⁹⁹ The Egyptian Commercial Law No. 17 of 1999, the Official Journal, May 17, 1999.

¹⁰⁰ *Id.* at Article 72.

¹⁰¹ For instance, Article 72 of Chapter One grants the licensee permission to invalidate any clause in the agreement that restricts his rights in using, developing, producing or advertising the transferred technology. *Id.*

¹⁰² DR. SAMEHA EL-KALOUBY, THE EXPLANATION OF THE EGYPTIAN COMMERCIAL LAW PART TWO 105 (2005) (available in Arabic).

¹⁰³ The Egyptian Commercial Law No. 17 of 1999, the Official Journal, May 17, 1999, Article 87.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

As long as the licensed technology is to be transferred within Egypt, foreign investors arbitrating disputes arising from a technology transfer agreement will be obligated to conclude the arbitration in Egypt and to abide by Egyptian substantive and procedural law. Some Egyptian scholars criticize such protective technology transfer arbitration rules.¹⁰⁶ Specifically, because Egypt does not have an independent body of law regulating franchising, franchising may be subject to the same rules controlling technology transfer agreements.¹⁰⁷

III. Conclusion

This piece highlights the issues that foreign investors in the Arab Middle East must consider before choosing to resolve their disputes through arbitration to avoid arbitral awards that cannot be enforced. While it does not assess arbitration laws or introduce an exhaustive list of the factors that affect arbitration in the Arab Middle East, it underscores the importance of considering different issues that may affect arbitration in this region.

Although most Arab Middle Eastern arbitration laws are enacted in Western legislation, *Shari'a* still influences domestic law, and therefore arbitration, in many countries in the Arab Middle East. Saudi Arabia is a clear example of the effect of *Shari'a* on arbitration laws. Hence, before arbitrating in a country such as Saudi Arabia, foreign investors must be aware of *Shari'a* rules related to arbitration, for example, the requirement of the Saudi law that arbitrator be a Saudi national or a Muslim foreigner.¹⁰⁸

Imposed by certain legal systems to protect their own national interest, legislative constraints are another factor that should be taken into account before choosing to arbitrate in the Arab Middle East. The clear example is the Egyptian law regulating arbitration of disputes arising from technology transfer agreements. This law requires that the parties abide by Egyptian substantive and procedural law, and for the arbitration to take place in Egypt. A clear understanding of these issues can be useful to investors and practitioners before deciding to arbitrate in the Arab Middle East.

¹⁰⁶ See generally EL-KALOUBY, *supra* note 103.

¹⁰⁷ EL-KALOUBY, *supra* note 103, at 106.

¹⁰⁸ Article 3 of the Royal Decree M/46 OF 12.07.1403 (h) 25.04.1983 (G).