

**TOWARDS A TRULY HARMONISED INTERNATIONAL COMMERCIAL AND
INVESTMENT ARBITRATION LAW CODE (HICIALC): ENFORCING MENA-
FOREIGN INVESTOR ARBITRATIONS VIA A SINGLE REGULATORY
FRAMEWORK: A NEW MAP FOR A NEW LANDSCAPE**

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The current regulatory framework governing International Commercial Arbitration¹ and International Investment Arbitration Law, hereinafter 'ICA/IIA' Law is problematic. A new harmonised ICA/IIA Law addressing current laws and trends in these two separate but interrelated areas of International Law applicable to both investor-investor commercial disputes and Investor-MENA States (particularly in regards to oil concession and foreign investment contract disputes) is required to form the foundation of a single regulatory framework. A HICIALC will ensure courts rule in favour of arbitral award enforcement. Reasons for the ever importance of Arbitral Award enforcement will be given. This new law, based on general principles of law found at Civil, Common and Sharia law traditions, hereinafter 'the three traditions', will allow for higher enforcement through addressing gaps in the New York Arbitration Convention of 1958, the United Nations Commission on International

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¹ This article is concerned solely with International Commercial Arbitrations occurring between a Middle Eastern Government and (a usually European) Foreign Investor, hereinafter, 'MENA-FI' Arbitrations.

Trade Law (UNCITRAL) Model Law, and the Washington Convention of 1966 of the International Centre for Settlement of Investment Disputes. This article makes use of a comparative law analysis, (in the traditional and scholarly meaning of the term), in the service of drafting a new HICIALC. Thus, the theoretical framework underpinning a harmonised law can be derived from existing legal principles in common at Civil, Common and Sharia Law, especially in the fields of ICA, IIA and the laws of MENA States, demonstrating that International Contract Law, and International Arbitration Law (whether it governs ICA or IIA Law) are thus all well-suited to harmonisation.

I INTRODUCTION

A harmonised HICIALC Law as the main pillar of a single regulatory framework governing International Commercial and Investment Arbitration² is urgently needed. Problems in conflicts of laws particularly in the MENA have demonstrated the need for harmonisation. Without harmonisation the plea of public policy in the MENA greatly undermines award enforcement. Many of the MENA States have ratified the 1958 New York Convention which contains particular clauses that give license to the overuse of the plea of public policy.³ These clauses are too broad particularly in the context of MENA-FI arbitrations. Without stability in Arbitral Award enforcement the entire edifice of large scale foreign investment contracts⁴ would collapse. This could have negative consequences on the economies of both developing and

² Newcombe, Andrew and Paradell, Lluís, *Law and Practice of Investment Treaties, Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, at p. 1: “The international legal framework governing foreign investment consists of a vast network of international investment agreements (IIAs) supplemented by the general rules of international law. Although other international treaties interact with this network in important ways, IIAs are the primary public international law instruments governing the promotion and protection of foreign investment. IIA texts differ in many important respects, but they are also remarkably similar in structure and content: most IIAs combine similar (sometimes identical) treaty-based standards of promotion and protection for foreign investment with an investor-state arbitration mechanism that allows foreign investors to enforce these standards against host states.” The mechanism referred to is the ICSID or Washington Convention.

³ Van Den Berg, Albert Jan (1981) *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Deventer /Netherlands: Kluwer Law and Taxation Publishers, at p. 359: The prominence of the New York Convention of 1958 amongst MENA governments increases the use of public policy as an acceptable plea because of the Conventions provision in Article V(2) that recognition and enforcement may be refused by the competent authority in the country of enforcement if it (a) decides the subject is not arbitrable or (b) if recognition would be against public policy.

⁴ An ‘investment’ is a legal term whose definition is widely debated both in international law and under the ICSID.

developed nations.⁵ A harmonised law as the foundation of a single regulatory framework, together with an International Court to enforce Arbitral Awards would resolve these problems.⁶ Higher Arbitral Award enforcement is linked to successful International Commercial and Investment Arbitrations. One of the major risks inherent in IIA under the New York Convention is the danger of non-enforceability of the arbitral award, due to contentions related to state sovereignty or *ordre public* (public policy), comparable to the Islamic doctrine of *maslaha*⁷ by MENA jurists. Without harmonisation of ICA and

⁵ The contribution of Foreign Direct Investment (FDI) to developing nations is a currently debated topic in the field. Sornarajah, M. The retreat of neo-liberalism in Investment Treaty Arbitration, pp. 273-296, at p. 274, in *The Future of Investment Arbitration*, Rogers, C. and Alford, R (Eds) (2009) Oxford, “The notions that foreign investment promotes economic development, and that investment treaties with the compliance mechanism of ICSID or other arbitration are essential to the promotion of foreign investment, took strong hold in the 1990s when neo-liberalism provided the policy objectives that drove an instrumental international law.” Also at p. 274, “This is a more fundamental question than the question whether investment treaties promote foreign investment. There is a revival of this question too, in the modern literature, though focus of attention is on questions relating to investment treaties. After the Asian economic crisis, states like Thailand stressed the need for development based on internal resources on the ground that the economy could be subverted by the sudden pull-out of foreign capital, which precipitated the Asian economic crisis.”

Additionally, it is noteworthy to mention that the more recent trend of developing economies to invest in developed nations is predominant. This trend has important economic and political implications for the future of investment treaties and investment law, as well as for international commercial arbitrations regarding these types of contracts and disputes.

⁶ This extensively researched article is divided into ten parts. The first five sections will carve out the foundations for the argument that a single regulatory framework in the form of harmonisation will solve serious problems in ICA and IIA Law by preparing the ground. These sections consist of the introduction, the current legal framework, the importance of arbitration award enforcement, and the dangers of public policy. Part V, covering public policy, is a synthesised analysis of the previous parts, which gives practical justification for harmonisation, which is the part VI. A new definition of harmonisation will be given. A harmonised ICA law can easily be drafted from the discussion in part VII. Part VIII is that of a comparative analysis of the general principles of law found at the three traditions, and is the pillar upon which the feasibility of harmonisation rests. This section gives concrete evidence and testimony to the existence of common principles of law. Part XI, regarding the creation of an international court, is the cornerstone of erecting an edifice that is both achievable and sustainable and is foundational to enforcement. Finally, recommendations will be given in order to allow for the construction of a truly harmonised law to begin. Therefore, a new law together with an International Commercial Arbitration Court will form the single regulatory framework. This will significantly contribute to Arbitral Award enforcement. The research and analysis of this article are derived from extensive research and a comparative law approach based on the author’s current doctoral dissertation.

⁷ *Maslaha* is the Arabic word for public interest. The doctrine of public policy or *maslaha* is central in ICA Law to arbitral award enforcement. Kamali, M. (1989) *Principles of*

IIA law, serious problems exist leading to a decrease in arbitral award enforcement for parties to contracts with arbitration clauses who fail to take into consideration national differences; the enforceability of an arbitral award in the form of a civil remedy is the *raison d'être* for arbitration, otherwise it is pointless. What gives legitimacy to the process of arbitration is the guarantee of a civil remedy enforced on the losing party.⁸ Any barriers to this end incur high risks for parties to a contract who believe in the event of an unfulfilled contract they will receive a just financial remedy compensating them for their losses. Thus, to reduce risk, potential barriers to enforceability must be addressed and removed. This will lower risk to foreign investors in oil concession, foreign investment, and large scale tourist contracts between Arab States and European corporations and ensure the smooth transaction of both ICA and IIA law. By way of introduction, it is necessary at the outset to place the need for harmonisation in the proper historical context. The question to be investigated in this article is: would harmonisation increase International Arbitral Award enforcement? The evidence thus far suggests that the answer is yes. Before delving into a discussion on harmonisation, it is important at the start to highlight the fact that just because a bilateral investment treaty (BIT)⁹ is in place, this does not necessarily guarantee protection to foreign

Islamic Jurisprudence. Pelanduk Publications, Malaysia, at p. 338, "Literally, *masalahah* means benefit or interest; when it is qualified as *maslaha murslah*, it refers to unrestricted public interest in the sense of not having been regulated by the Law-giver and no textual authority can be found on its validity or otherwise. It is synonymous with *istislah* and is occasionally referred to as *masalahah mutlaqah* on account of it being undefined by the established rules of the *shariah*. To al-Ghazali, *masalahah* consists of considerations which secure a benefit or prevent a harm but are, in the meantime, harmonious with the objectives (*maqasid*) of the *Shariah*. These objectives, the same author adds, consist of protecting the five essential values, namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of *masalahah*, and anything which violates them is *mafsadah* (evil), and preventing the latter is also *masalahah*." Thus, a considered understanding of how MENA judges interpret or consider an issue falling under public policy is important in demonstrating the validity of a harmonised ICA law.

⁸ Muller, Sam and Mijs, Wim (eds)(1994) *The Flame Rekindled. New Hopes for International Arbitration*, 1st Edition. The Netherlands: Martinus Nijhoff Publishers, at preface, pp. xiii-xiv, by Dr. Boutros Boutros-Ghali: arbitrations are binding and thus similar to courts.

⁹ In, *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11) ICSID Review, *Foreign Investment Law Journal* (2004) pp. 486-514, the existence of a Bilateral Investment Treaty between Egypt and the United Kingdom of February 24, 1976, did not allow the contract signed by Joy Mining Machinery Limited of the UK, in which Joy Mining was responsible for the replacement of phosphorus mining equipment, to be considered an investment according to the legal definition of the term although the claimant asserted, at p. 498, "that the bank guarantees constitute an asset which thus qualifies under the definition of investment of the Treaty. The Tribunal has examined this specific argument concerning the bank guarantees under the Contract

investors. Harmonisation, however, due to its inherent nature, would guarantee protection.

II INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration, as opposed to litigation, is an alternative dispute resolution method that allows for parties to appear before an arbitral tribunal rather than before a national judge of a national court. The arbitral tribunal is governed by its own specific rules and laws, which at many times may resemble those of a national court, such as those laws pertaining to the presentation of evidence by counsel from both sides,¹⁰ the use of documents,¹¹ expert witnesses,¹² fact finding and other procedures used in civil litigation. Arbitration, like litigation but differing from mediation, is legally binding. The technical definition of what constitutes international commercial arbitration has to do with the nature of the subject matter, but that is outside of the scope of this article. The technical definition of an investment dispute is also outside of the scope of this article. However, suffice to say that there are legislative guidelines as to what constitutes an investment and what is simply a commercial transaction in nature, although these guidelines are at times vague. In this case, an international arbitration proceeding would involve a dispute that had parties from different countries. The commercial nature of the dispute would put it outside the scope of criminal law making it a civil matter. The reason arbitration is chosen over litigation is because it has several important benefits, usually fairness and efficiency. The fact that the outcome is binding makes it as equally ‘legal’ as litigation.¹³ Investor-State arbitrations invoke

in order to establish whether this is an ordinary feature of a sales contract or an investment subject to the protection of the Treaty. The Tribunal is not persuaded by the Company’s argument that this is an investment, as a bank guarantee is simply a contingent liability...to conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do.”

¹⁰ Trittmann, R., Kasolowsky, B. Taking evidence in arbitration proceedings between common law and civil law traditions- the development of a European hybrid standard for arbitration proceedings, pp. 43-49, in (2008) 14 (1) UNSWLJ Forum, at pp. 44-45, “In our experience, a standard has evolved in the taking of witness evidence in international commercial arbitrations, and this standard follows very much the taking of witness evidence in ordinary English court proceedings.”

¹¹ *Ibid*, at p. 45, “In international arbitration proceedings, it is generally accepted that documentary evidence constitutes the best evidence.”

¹² *Ibid*, at p. 47, “Indeed, the IBA Rules do provide that an arbitral tribunal may order experts appointed by the parties to meet and record in writing the issues which they agree and issues upon which they differ in opinion in their respective reports.”

¹³ A hypothetical case regarding a dispute of an investment contract in which the investor is an Australian national and the second party is the Indian government would bring to life the complex legal problems that arbitration can solve, and would also demonstrate the

the tension of deciding in favour of one side over the other. The law must insure absolute balance, equality and fairness to both sides. A harmonised ICA law can provide this balance by ensuring fairness, equity and a win-win situation in which the financial needs of the investor are balanced justly with the economic and political needs of the state.

III CURRENT LEGAL FRAMEWORK

The scope of this article is limited to International Commercial Arbitrations and International Investment Arbitrations amongst MENA governments and European (or other) Foreign Investors in oil concession, Investment and large scale contract disputes with applications to Australasian trading partners in the Asia Pacific region are topical. Egypt and the United Arab Emirates (UAE) are taken as case studies. Under the regulatory frameworks, reference will be made to the 1958 New York Convention, hereinafter 'the Convention of 1958'¹⁴ and the UNCITRAL¹⁵ Model Law. In matters related to the

gaps in current laws that necessitate a harmonised ICA Law particularly in the MENA context, as will be demonstrated elsewhere. In this hypothetical case, the contract which provided for the importing into Australia Indian textiles was terminated by the Indian government. The contract has an arbitration clause in which both parties agree to settle the dispute with arbitration rather than in a national court. In this case, without this clause the Australian national would have had to face an Indian Judge in an Indian court governed by Indian national laws. Given the current events affecting diplomatic relations between these two nations, the risk of bias may be higher than usual. This may put the Australian investor in a situation where the outcome of the case would be biased. However, in an arbitral tribunal, both parties can select the internationally renowned arbitrators and the law governing the procedure as well as substantive issues. This allows for greater fairness and freedom from bias. For a legal system to maintain credibility it must be perceived as unbiased. The fact that there is always a possibility of bias, particularly when tensions arise to such a level that they affect diplomatic relations is a risk that arbitration minimises.

¹⁴ Baykitch, A, Hui, L., Celebrating 50 years of the New York Convention, pp. 65-69, in (2008) 14 (1) UNSWLJ Forum, at p. 65, "It is often said that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('Convention') is 'the single most important pillar on which the edifice of international arbitration rests' and is a convention which 'perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law'. The most significant function that the Convention serves in international trade and commerce is that it provides for the almost universal enforceability of awards. There are currently 142 parties to the Convention, including most of the major trading nations." Further, at p. 68, The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York), opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

¹⁵ Mantilla-Serrano, F., and Adam, J. UNCITRAL Model Law: missed opportunities for enhanced uniformity, pp. 29-35, in (2008) 14 (1) UNSWLJ Forum, at p. 29, "the Secretariat of the United Nations Commission on International Trade Law

Convention of 1958, reference will be made to court decisions from various jurisdictions. In matters related to the UNCITRAL, reference will be made to scholarly discussions.¹⁶ Reference will also be made to the Washington Convention of 1966, hereinafter, 'Washington Convention'.¹⁷ In matters related to the Washington Convention reference will be made to International Centre for the Settlement of Investment Disputes (ICSID) Arbitration

('UNCITRAL'), in consultation with other international 'interested parties', conceived the UNCITRAL Model Law ('Model Law')." Further, at p. 29, "At the time of writing, more than 60 states, territories and/or regions have adhered to the UNCITRAL-sponsored model. For the experienced arbitration practitioner, the prospect of participating in arbitration with its seat in a 'Model Law State' usually augurs a largely predictable journey in well-navigated waters."

¹⁶ Binder, P., (2000) (1st Edition), *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions. An International Comparison of the UNCITRAL Model Law on International Commercial Arbitration*, Sweet & Maxwell, London, at p. v., ". . . the Model Law States today cover approximately one quarter of the world's territory. . . Several countries are considering adopting the Model Law, which, together with the comments being made in different quarters about the need for modernizing legislation on international arbitration, promises that the number of enactments of the Model Law will continue to grow. . . the Model Law's broad applicability and the fact that it is widely known are increasingly influencing practitioner's decisions. Ample anecdotal evidence shows that when arbitration agreements are negotiated and agreements reached about where arbitration is to take place, the question whether the state has enacted the Model Law plays a significant role. One reason for this is that arbitrating in such a state gives the parties the confidence that they can count on a legislative climate that is friendly to international arbitration and that unpleasant surprises are unlikely to arise." This is real life evidence from the field that a harmonised law is effective in protecting foreign investors by insuring a higher rate of Arbitral Award enforcement.

¹⁷ In Reed, L., Paulsson, J., Blackaby, N., (2004), *Guide to ICSID Arbitration*, Kluwer Law International, The Hague, at preface ix, "One of the chief impediments to foreign investment in developing countries has been the investor's perception that, in the event of disputes with the host State, they would find themselves without an effective legal remedy. Investors may no longer realistically rely on their own governments to espouse their claims, at least promptly and successfully, under traditional avenues of diplomatic protection. If investors proceed alone against the host State, they fear discrimination in the local courts. To help resolve this quandary, the World Bank conceived a special forum for arbitrating investment disputes. Since its entry into force in 1966, the groundbreaking International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the *ICSID Convention* or the *Convention*) has offered eligible States and foreign investors the opportunity to bring their investment disputes to neutral ad hoc arbitration tribunals. These tribunals are administered by the World Bank's International Centre for Settlement of Investment Disputes (*ICSID* or the *Centre*) in Washington, D.C. These tribunals are entirely self-contained and delocalized, meaning that they function independently of local courts and local procedural law. Most important, ICSID awards- unlike any other international arbitration awards- are immune from any form of national court review, and yet are enforceable in the courts of more than 135 signatory States as if they were national court judgments." The Washington Convention is particularly relevant as it concerns State-Investor Arbitrations.

Awards.¹⁸ Under Egyptian Law, reference will be made to Egyptian Mixed Court¹⁹ Case Law, the Egyptian Civil Codes drafted by the eminent jurist Professor Sanhuri, Egyptian Law 1994, Egyptian Law 1997 Amendments, and Egyptian Court decisions. Reference will be made to the Libyan Civil Code, Article 1. Under the UAE, reference will be made to Dubai Court of Cassation Judgements, and the new DIFC Arbitration Law.²⁰ Reference will be made to Bilateral Investment Treaties (BIT). At Common law, reference will be made to English common law and precedent. At Civil law, reference will be made to Roman law. Under Islamic Law, reference will be made to *sharia*, *ijma*, *ijtihad* and *urf*.²¹ Reference will be made to the *sunna* of the Prophet which is considered as precedent within Islamic law, particularly the Banu Qurayza

¹⁸ Duprey, P., Do Arbitral Awards constitute precedents? Should commercial arbitration be distinguished in this regard from Arbitration based on Investment Treaties? IAI Series on International Arbitration No. 3, Towards a uniform international arbitration law (A.V. Schlaepfer, P. Pinsolle & L. Degos eds., 2005), pp. 251-291, "Since the 1980s, arbitration has become the most common form of dispute resolution as far as international investments are concerned. In fact, only arbitration can ensure the utmost equality between parties otherwise in unequal positions (a private investor and the host State of an investment). This particular form of arbitration has been developing due to the existence of numerous investment treaties. Most investment treaties are bilateral treaties for the protection and promotion of investments (hereinafter 'BIT'). BITs are in constant development and more than 2200 exist as of today. There are also multilateral treaties dealing with investments such as: the North Atlantic Free Trade Agreement (NAFTA) between Canada, the United States and Mexico, the Energy Charter Treaty; the Agreement for the Promotion and Protection of Investments concluded between the members of ASEAN on December 15th, 1987; the 1994 Colonia Protocol on the Reciprocal Promotion and Protection of Investments within the MERCOSUR; the Free Trade Agreement between Columbia, Mexico and Venezuela. The provisions of those treaties relating to the protection and promotion of investments are usually implemented by way of application of the Washington Convention of 1965, which created the International Centre for Settlement of Investment Disputes (ICSID). The Centre, which functions under the auspices of the World Bank, plays a decisive role in the development of investment law, as its purpose is to settle disputes arising from investments and involving a private person, the investor, and a public person, the State. It has two mechanisms for the settlement of disputes: the first for States that are a party to the ICSID Convention and the second for cases in which one of the Parties to arbitration is not a Party to the Convention."

¹⁹ The Mixed Courts of Egypt were founded in 1875 by the Khedive Ismail and designed by Nubar Pasha. They lasted until 1949 and were presided over by the most illustrious international judges. They were, however, Egyptian courts.

²⁰ Luttrell, S.R., International Journal of Private Law, Vol. 2, No. 1, 2009, pp. 31-45 at p. 42. DIFC (Dubai International Financial Centre) is a free trade zone enacted by the UAE, consisting of its own courts, judicial system and arbitration law.

²¹ *Sharia* is Islamic Jurisprudence. *Ijma*, *ijtihad* and *urf* can be understood as tools of jurisprudence and correspond to; consensus, reasoning or discovery and custom, respectively.

Arbitration. Reference will also be made to Institutional Centres,²² Arbitral Rules and Arbitral Awards.

IV ARBITRATION AWARD ENFORCEMENT

The importance of arbitral award enforcement is not a new priority.²³ In fact, “The origins of the International Court of Justice- the World Court- owe much to the Peace Movement, and its particular preoccupation with international arbitration and adjudication as the means of peaceful settlement of international disputes and indeed of the avoidance of war.”²⁴ Regarding the importance of the Permanent Court of Arbitration, Former United Nations Secretary General Kofi Annan has affirmed that it has a long and distinguished history in carrying out the mission of the United Nations

²² Particularly to the Cairo Regional Centre for International Commercial Arbitration, located in Egypt. Asouzu, A., (2001) *International Commercial Arbitration and African States, practice, participation and institutional development*. Cambridge University Press, at p. 67, “The Regional Centres at Cairo, Kuala Lumpur and Lagos function as international arbitral institutions under the auspices of the AALCC.” Further, at p. 65, “The AALCC Regional Centres are unique in that unlike most commercial arbitration institutions, which are private, national and mostly profit oriented, the AALCC Regional Centres are public, regional and non-profit oriented. They are creatures of an intergovernmental organisation composed only of developing states. Being intergovernmental, the Regional Centres may be compared to ICSID, an international tribunal institution based on a multilateral treaty sponsored by the World Bank, itself an international institution. Additionally, at p. 65, “In order to establish the Regional Centres, the AALCC concluded agreements by exchange of letters with respectively Malaysia (3 March 1978), Egypt (28 January 1979) and Nigeria (May 1980).” In regards to the Cairo centre, at p. 71, “The CRCICA, its property and assets in the territory of Egypt enjoys immunity from every legal process. However, the AALCC may waive this immunity in any particular case provided that no such waiver shall extend to any measure of execution (Article IV(A)). Also, the premises of the CRCICA, its property and assets as well as its archives in the territory of Egypt and all documents belonging to it shall be inviolable and be immune from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action (Article IV(B)).” Finally, at p. 77, “The Agreements between the AALCC and the host states of the Regional Centres have significant international legal implications. They are international agreements in the sense of a treaty.”

²³ Philip, J. A., *A Century of Internationalisation of International Arbitration: an Overview*, in, Hunter M., Marriot, A., Veeder, V.V., (Eds), *The Internationalisation of International Arbitration LCIA Centenary Conference*, Graham & Trotman Limited, at p.26: “It is remarkable in that at a very early stage, far in advance of any similar developments in respect of judgements, states accepted the desirability of recognition and enforcement of foreign arbitral awards. In 1923 and 1927 respectively, under the auspices of the League of Nations, the Protocol on Arbitration Clauses in Commercial Contracts and the Convention on Enforcement of Arbitral Awards were adopted.”

²⁴ Hunter M., Marriot, A., Veeder, V.V., (Eds), *The Internationalisation of International Arbitration LCIA Centenary Conference*, Graham & Trotman Limited, at p.8.

Charter as set out in Articles 1 and 33 by settling international disputes by peaceful means, in conformity with the principles of justice and international law because arbitration is among the methods of peaceful settlement.²⁵ Indeed, “The settlement of disputes between states by judicial action is only one facet of the enormous problem of the maintenance of international peace and security. In the period of the United Nations Charter the use of force by individual States as a means of settling disputes is impermissible. Peaceful settlement is the only available means.”²⁶ The negotiation of oil concessions²⁷ and foreign investment contract disputes are critical to diplomatic relations. Our increasingly interdependent global economy brings into contact transnational commercial disputes more frequently than ever before. Many of the new rules are an amalgamation of new international legislation and modern arbitration standards.²⁸ These rules need to be made more effective. Globalisation, as it has led to higher transnational commercial disputes, and to an interdependent economy necessitates a harmonised body of ICA/IIA law that is acceptable to the entire global community and not just only to western nations. The goal of harmonisation is a primary way to reduce the risk of unenforceable awards.

V PUBLIC POLICY

²⁵ Kofi A. Annan, Secretary-General United Nations, Forward, at p. vii. Permanent Court of Arbitration. Basic Documents, Conventions, Rules, Model Clauses and Guidelines, 1998, Peace Palace, The Hague.

²⁶ Brownlie, I., (1990), *Principles of Public International Law*, (Fourth Edition), Clarendon Press, Oxford, at p. 708. See also, at p. 708, the UN Charter, Arts 2(3), 2(4), and 33, and at p. 709, “Before conciliation appeared as an established technique, the process of arbitration had long been a part of the scene, having the same political provenance. However, the practice of arbitration evolved as a sophisticated procedure similar to judicial settlement. Modern arbitration begins with the Jay Treaty of 1794.”

²⁷ Araque, A.R., in Mommer, R. (2002). *Global Oil and the Nation State*. Oxford University Press, at p. 118: “The concession system in the Middle East was of colonial and imperial origin. When Persia granted the D’Arcy concession, in 1901, the country was divided into spheres of British and Russian influence. In Iraq the tug of war for oil concessions began under Turkish rule; then the country was under a British mandate when the most important concession was granted to the Turkish Petroleum Company (TPC) in 1925. The sheikhdoms of Bahrain (1930), Kuwait, (1934), and Qatar, (1935) granted concessions under British rule. Only Saudi Arabia, which granted its most famous concession in 1933, was an independent kingdom. Every single concession covered a large part, if not all, of the national territory of these countries. The concession term varied between 55 years (Bahrain) and 75 years (Iraq, Kuwait and Qatar), and there were only vague provisions for relinquishment. Hence, the history of Middle East oil is largely the history of a few concessions.”

²⁸ Conference on Aspects of International Arbitration in the law and practice of Arab countries. Session III. The reception of new legislation and international standards on Arbitration: The role of the legislator and state courts. Omar M.H. Aljazy, PhD MCIARB. June 13th, 2007. Cour de Cassation. Paris, France.

This article is concerned solely with arbitrations occurring between a state and a private party because of the question of public policy. Such a contract may be a straightforward commercial contract or an investment. Dispute resolution between governments and private parties by its nature raises the question of public policy.²⁹ It often times also allows the plea of sovereign immunity to be raised which can only be within the purview of a State to do so. Investment treaties and contracts, particularly Investor-State disputes also implicate public policy questions by their nature. Since the Washington Convention of the ICSID which deals with IIA does not have a public policy exception, the question of public policy in the New York Convention of 1958 gains even greater significance. Where there is a gap in one of the legal instruments, the other that addresses it gains more predominance. The public policy clause of the New York Convention then gains wider scope. This demonstrates the need for a single regulatory framework which in the form of a HICIALC addresses this *lacuna*. As a historical fact, the early oil concession disputes in previous arbitration cases had unsatisfactory results for many of the Arab States, thus the trend towards acceptance of arbitration by Arab participants is a positive step towards achieving diplomatic relations and global peace. A positive perception on the part of Arab participants in International Commercial

²⁹ Most foreign investment disputes and oil concessions fall within the framework of public international law; thus the author submits that the careful negotiation of oil concession disputes is an important regulator of peaceful international relations because of the delicate nature of the relationship between oil producing states and oil consuming states. This is especially so in light of the fact that the doctrines of public policy, both international and domestic, together with state sovereignty fall within the realm of public international law; equally so with negotiations of foreign investment contracts. Just and equitable arbitration awards as a feasible solution to large commercial disputes such as the outcomes of oil concession financial investment cases would certainly be a determining factor of interstate relations where cross-cultural misunderstandings can lead to disastrous consequences. Another reason for this fact, in, Newcombe, Andrew and Paradell, Lluís, *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, The Netherlands, 2009, at p. 2: “The uniqueness of the current IIA network is a product of an historical evolution going as far back as the Middle Ages. Prior to the twentieth century, international standards of foreign investment and investor protection developed primarily through the related processes of diplomatic protection and claims commissions. In the late nineteenth and early twentieth centuries, as the world economy became apparent, particularly as controversies arose between capital exporting and capital importing states regarding the customary international law minimum standard treatment to be accorded to foreign investors and investments.” Clearly the way foreign investors were treated by host states had international ramifications for relations between the host state and the country of the investor. BITs certainly reflect an element of diplomatic foreign relations that can be influenced by the outcome(s) of a dispute.

Arbitration disputes is a critical determinant of diplomatic interstate relations.³⁰

A substantive issue discussed in this article will show that the current rules that regulate ICA/IIA do not take into consideration domestic public policy, national judicial interpretations, political Islam or issues centering on the place of enforcement and jurisdiction of Arbitral Tribunals in the MENA region. In the MENA, because of the complex interrelationships between *Sharia* Law, domestic public policy and political Islam, the question of public policy³¹ as set forth in the New York Convention needs to be reformulated and arbitral tribunals must be given the scope and power to decide on questions related to international public policy because this Molotov cocktail combining religion with politics for mainly political ends necessitates reviewing the virtue of allowing an international and unbiased arbitral tribunal to decide on substantive legal questions pertaining to the specific dispute raised by the parties. This must occur in the overall context of consideration for a transnational public policy over a domestic one. The concept of public policy is open to interpretation and many times domestic public policy is confused with international public policy, in which a state hopes to impose its narrow understanding of public policy upon the international global community.³² Public policy may at times be a weak defence that does not necessarily have the best interests of the international community. Furthermore, it is a dangerous doctrine because it is complex and doctrinally undefined, yet legislators still give courts the right to reject enforcement because an award is contrary to public order in the field of arbitration. Further, domestic public order is confused with international public order.³³ The situation as it is thus described guarantees adjudicatory risk.

This is precisely the reason why a uniform code of law that takes into consideration a commonly understood general principle of public policy would resolve this dilemma.³⁴ In the United States, this understanding of the

³⁰ Ayad, Mary, International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region, *Vindobona Journal of Comparative Law and Arbitration* (2008) 12 VJ 2, pp. 169-176, at p. *Ibid*, at p. 171.

³¹ *Ibid, Supra*, No. 62, at pp. 723-751, for a more detailed synthesised critical literature review and ensuing arguments regarding public policy and *sharia*.

³² Van Den Berg, Albert Jan (1981) *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Deventer/Netherlands: Kluwer Law and Taxation Publishers, at p.360.

³³ Ouerfelli, Ahmed. Enforcement of Foreign Arbitral Awards in Maghreb Countries. *Journal of International Arbitration*, 25-No. 2 (2008), pp. 241-256, at pp. 254-255.

³⁴ For a discussion on the necessity of imposing checks on governments particularly in terms of public policy and the rule of law in order to maintain an independent judiciary,

overall global context in which arbitration operates has been honoured such that,

Pro-enforcement bias is further reflected in the numerous cases where courts have rejected arguments that enforcement should be denied on the basis that the award violates public policy. In a frequently quoted definition of public policy, Joseph Smith J in the United States Court of Appeals case of *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA*, held that the public policy defence should be construed narrowly and that enforcement of a foreign award may be denied only when enforcement would violate 'the forum state's most basic notions of morality and justice'. The case concerned a contract between an Egyptian company and a United States contractor for the construction and operation of a paperboard mill in Egypt.³⁵

In this case it was the investor and not the state who invoked the defence of public policy, a rather creative use of the defence, claiming that "a change in United States foreign policy towards Egypt as a result of the Six Day War between the Arab states and Israel required it to abandon the project. In rejecting the public policy argument, the court held that [t]o read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'."³⁶

However, in the MENA, this type of decision would not necessarily be given by a MENA Judge. Case law demonstrates the opposite. Given the political and religious considerations of certain interpretations of *sharia* law, this check against domestic public policy serves as protection for the sacred pillars of public international law; *jus cogens*, and 'general principles of law'³⁷ of

amongst other things please refer to, Ayad, Mary (2009) The Office of the Ombudsman: A vehicle for Human Rights Protection via Good Governance and Rule of Law in Democratic States, *Quis custodiet ipsos custodes?* Forthcoming issue (Volume 13) 2009 of Mediterranean Journal of Human Rights, Sicily: Università Degli Studi Kore Di Enna.

³⁵ *Ibid*, *Supra* No. 15, at p. 67.

³⁶ *Ibid*.

³⁷ Pryles, M., Application of the *Lex Mercatoria* in International Commercial Arbitration, pp.36-42, in (2008) 14 (1) UNSWLJ Forum, at pp. 36-37, "Sometimes, when contracting parties or arbitrators seek to subject a contract to or decide a dispute by reference to non-national rules, they refer to terms other than the *lex mercatoria*. Examples include 'general principles of international commercial law', 'generally-recognised legal principles' and 'principles common to several legal systems'. Proponents of the *lex mercatoria* recognise that general principles of law and common principles of law represent sources of the *lex mercatoria* and demonstrate an intention that the contract is

civilised nations'. It is a highly debated issue of whether principles from civil law, or private international law, like the *lex mercatoria* may inform public international law.³⁸ Since many of the principles of private international law are derived from public international law, the concept of harmonisation will be further demonstrated to already exist, in that both public and private international law have much in common. Furthermore, prior to proceeding to the section on general principles of law informing a HICIALC, it is important to draw the distinction between 'general principles of law of civilised nations', which are the foundation of public international law, and *general principles of law common to nations*.³⁹ A HICIALC, however, would not contradict either of these two distinct categories.

not to be governed by national laws. Nonetheless, arbitrators faced with such expressions must take care to exactly establish what the parties had in mind when they used a particular expression to describe the rules applicable to the dispute."

³⁸ Somarajah, M. The retreat of neo-liberalism in Investment Treaty Arbitration, pp. 273-296, at p. 276, in *The Future of Investment Arbitration*, Rogers, C. and Alford, R (Eds) (2009) Oxford, "The situation in investment arbitration also involved commercial arbitrators sitting in judgement over disputes involving heavy public law matters in which they had no experience. Arbitrators decided the disputes according to commercial principles, ignoring the issues of public law. The quality and background of the arbitrators deciding these disputes differed markedly. One can witness dissensions breaking out within the fold of arbitrators as a result of expansive changes that extended the law under the investment treaties too rapidly to conserve the tenants of neo-liberalism. States and some scholars were increasingly displeased with these expansionist trends. States indicated that they might not accept awards and that they would withdraw from the system of arbitration or from the investment treaty system. Scholars began to criticise the trends within investment arbitration as not taking the public law features of the disputes into account or as not evidencing sufficient legitimacy." Indeed, these are valid historical reasons for concern. These cases also support the value of a harmonised law, which would instead of leaving such a *carte blanche* to unqualified arbitrators to decide questions of public law, would set a clear parameter that arbitrators would be required to apply to the substantive issues at dispute.

³⁹ Guillaume, G. Can Arbitral Awards constitute a source of international law under Article 38 of the Statute of the International Court of Justice? Pp. 105- 112, in, *IAI Series on International Arbitration No. 5, Precedent in International Arbitration* (Y. Banifatemi ed., 2008), at p. 105, "I was asked to answer the question whether arbitral awards may be considered as a source of international law in accordance with Article 38 of the Statute of the International Court of Justice. Firstly we must remind ourselves of the text of the Statute, which provides that the International Court of Justice, 'whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the consenting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'" Additionally at p. 106, "Two preliminary comments should be made in light of this text: 1) The list provided by Article 38 is not exhaustive.

Even within a single country, contradictory multiple levels of ‘regulation’ governing arbitration are found. For example, there may be several different laws governing an arbitration proceeding together with a BIT, and with several *national* laws that contradict each other, such as those derived from the Constitution, and those gazetted. More specifically, the 1994 Egyptian arbitration law shows it was amended by Law No. 9/1997 which adds to Article 1 of the 1994 the following change to privilege public policy: “With regard to disputes relating to administrative contracts, agreements on arbitration shall be reached with the approval of the competent minister or the official assuming his powers with respect to public law entities. No delegation of powers shall be authorised in this respect.” This amendment adds another layer to the regulatory framework of an arbitration; that of an Egyptian government minister. One of the conditions of Egypt’s 1994 new law of arbitration is that the contract must not violate Egyptian public policy or ‘*ordre public*’ for the award to be enforceable.⁴⁰ If an aspect of a contract is deemed incompatible with public order then the award will not be enforced. Interpretations of the doctrine of public interest add another layer to the regulatory framework, making ICA more complicated than it should be.

Article 22 of the Constitution of the United Arab Emirates (UAE), makes indirect reference to public policy whereby it establishes social justice as the basis of the national economy.⁴¹ A highly distinguished scholar has recently highlighted the fact that in the context of the UAE, the question of public policy in regards to arbitral award enforcement is still unsettled due to

In fact, several sources of international law that are important today are not mentioned, such as unilateral acts of States and the acts of the international organizations, both of which are taken into consideration by the Court in its judgements and advisory opinions. 2) The general principles of law mentioned in Article 38 sub-paragraph (c) should not be confused with the general principles of Public International Law. While general principles of Public International Law are enshrined in international custom, and for advocates of *jus cogens*, may even be considered as ‘peremptory norms of international law’, general principles of law are common to national legal systems and transposable to Public International Law. It is difficult to draw up a list of general principles of law as it manifests in case law. However, the principle of good faith, the *nemo auditor* legal doctrine, as well as fundamental rules of tort law seem to belong to the latter category.” This article will give further examples of these principles. Finally, at p. 106, “Arbitral awards as such are not covered by the sub-paragraphs (a) to (c) of Article 38. Therefore, we should focus our attention on sub-paragraph (d), which deals with judicial decisions. The Statute of the International Court of Justice mentions principles of international custom, but not as Public International Law but as common amongst nations. This fact alone is worthy of further scholarly investigation beyond the scope of this article.

⁴⁰ See, Egypt: A new law on Arbitration by White & Case International Law Firm in 10 Arab Law Quarterly 31-33. 1995, at p. 32.

⁴¹ Article 22, Constitution of the United Arab Emirates.

ambiguity caused by a contradiction between Article 7(2) of the Judicial Authority Law and the new DIFC law.⁴² This analysis is consistent with rulings by the Dubai Court of Cassation. In, Dubai Court of Cassation Judgement No. 267/93, Dated 16 January 1994, the Court held that a foreign arbitration award, if compatible with certain conditions would be upheld in the UAE, but only for the principle amount of the award and not for the order for interests and costs.⁴³ The much disputed questions of interest or *riba*,⁴⁴ as well as 'excess profit' or other non-principle monies were not upheld; clearly public policy may be implicated here as an underlying obstacle. In response to the foreseeable appeal to this decision, the Court replied thus,

the Court of Cassation held that the UAE Courts had no jurisdiction to look into the merits of the case or to deliver a further judgement with regard to costs or otherwise. The Court's role would be limited to enforcing the principle amount of the award and not interest and costs thereon. The Court of Cassation further held that when ratifying the award, the UAE judge will not consider the merits of the case but only ensure that the arbitration was, according to UAE law, proper and executable. It must not contradict any previous judgement or public policy of the UAE and must be made pursuant to an agreement given due consideration. If these pre-conditions are satisfied, the Court will ratify the award without granting the Plaintiff any other request or remedies.⁴⁵

⁴² In, Luttrell, Sam R. International Journal of Private Law, Vol. 2, No 1, 2009, pp. 31-45, at p. 42, "Article 7(2) of the Judicial Authority Law states that DIFC judgements are enforceable in Dubai courts provided that they are 'final and appropriate for enforcement'. This drafting is somewhat vague because, whilst it seems to import public policy considerations, it does not use the expression 'public policy' (let alone a narrower phrase like 'Dubai public policy'). This creates adjudicatory uncertainty and, it follows, country risk. The 'appropriateness' of a DIFC judgement for enforcement in wider Dubai could, for example be determined by reference to the tenets of public order and policy of the Emirate of Dubai, the UAE, the GCC or the wider international community. The DIFCAL recognition and enforcement articles expressly refer to the 'public policy of the UAE and so it seems that a domestic reading of the expression would prevail in a situation where a Dubai court considered an application for execution of a DIFC award."

⁴³ United Arab Emirates Court of Cassation Judgements (1989-1997) Tamimi, E. And Price, R. (1998), Kluwer Law International, The Hague at p. 251. See also pp, 245, 247, 251, 253, 255, 263, 267, respectively for Abu Dhabi Court of Cassation Judgement No. 13/18, dated 15 December 1996. Abu Dhabi Court of Cassation No. 433/17, dated 26 February 1997. Dubai Court of Cassation Judgment No. 6/94, dated 13 November 1994. Dubai Court of Cassation Judgment No. 267/93, dated 9 March 1996. Dubai Court of Cassation Judgment No. 9/96, dated 13 July 1996. Dubai Court of Cassation Judgment No. 61/94, dated 13 November 1996. Dubai Court of Cassation Judgment No. 167/94, dated 13 November 1996.

⁴⁴ Interest or usury in Arabic.

⁴⁵ *Ibid*, *Supra* No. 43 at p. 252.

Clearly, *public policy* was the reason the Court set aside the award but it only alluded to public policy in the negative, rather than stating outright that it was the reason. This has its own implications regarding the slippery nature of the use of public policy in the MENA. The fact that it is not overtly referred to as the grounds for the Court's decision lends to the impression that it may be invoked at will. Furthermore, the reasoning of the Court makes it clear that an arbitration would be executable 'according to UAE; law and if it 'does not contradict any previous judgement or public policy'. The question to ask then is, 'what is public policy in the view of this Court'. This again demonstrates the inherent adjudicatory risk involved when public policy is defined broadly and given such free rein. Answers to this question, though beyond the scope of this article, would lower risks to MENA FI arbitrations and would be valuable in informing a truly harmonised ICA Law. It is also noteworthy to highlight the fact that the Court of Cassation upheld all Arbitration agreements that did not contradict public policy.⁴⁶ Although the vagueness does justify considerable concern, there is also hope. The Islamic concept of public policy necessitates the public good (*maslaha*), and given the impact of the Global Financial Crisis on the MENA States, it is certainly in their best interest to promote the smooth transactions of financial trade and investment without undue risks and complications. This important economic development factor, as cited in the Constitution may indeed influence future readings of the public good.

As previously noted in the case of Egypt, the amendment to the 1994 Arbitration law defines the competent authority as a public minister, clearly concerned with public policy. The definition of public policy is not defined. Laws in MENA countries that exist to prevent arbitration of certain subject matters usually refer to public policy, therefore the first clause of Article V(2) is thus reinforced. Holding an international standard over the domestic in the case of public policy is one solution to this problem.

VI JUSTIFICATION OF HARMONISATION

The main objective of this article is to demonstrate that the current legal framework of ICA/IIA Law reduces or limits Arbitral Award enforcement thereby calling for reform. There is a worldwide consensus amongst key figures in ICA Law that it is more ideal to resolve commercial disputes with

⁴⁶ For a treatise of the historical evolution of legal reform in the MENA, please refer to Ayad, Mary (2009) International Commercial Arbitration Award Enforcement at the Crossroads of *Sharia* Law and *Ordre Public* in the MENA: Paving the Golden Path towards Harmonisation, in the Journal of World Investment and Trade, October 2009, Vol. 10 No. 5, pp. 723-751 at p. 744.

arbitration rather than in a municipal court⁴⁷ because fair arbitrations resolve problems related to conflicts of national jurisdictions and domestic laws which may otherwise bar arbitral award enforcement.⁴⁸ Questions regarding better practices to ensure arbitral award enforcement, conflicts or gaps in choice of law in terms of substantive procedure in cases between parties of different legal traditions and procedural practical reforms to both the procedure and substance of UNCITRAL, the 1958 and the Washington Conventions must be posed. Questions addressing substantive matters in terms of public policy must be asked. National laws on arbitral procedure are inadequate due to their focus on domestic arbitration. This led to a discrepancy between arbitration rules and national laws especially on questions of public order, which is a serious problem in the fields of ICA/IIA law. The intention of the Model Law was to bring about uniform standards in ICA proceedings. However, the Model Law needs reform. The UNCITRAL Secretariat has identified areas in the Model for future work to achieve uniformity: questions of on the doctrines of arbitrability, sovereign immunity, decisions by ‘truncated’ arbitral tribunals, liability of arbitrators, the power of an arbitral tribunal to award interest, and the discretion to enforce awards that have been set aside in the state of origin.⁴⁹ A uniform law, however, could be designed to address the specific challenges posed by ICA and modern practice.⁵⁰ This article calls for reform that will fill an important gap in the Model Law by drafting articles that will strengthen the probability of higher award enforcement. UNCITRAL has been criticised for giving birth to rules

⁴⁷ Ayad, Mary, International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region, *Vindobona Journal of Comparative Law and Arbitration* (2008) 12 VJ 2, pp. 169-176, at p. 169.

⁴⁸ Ayad, Mary, Harmonisation of International Commercial Arbitration Law and *Sharia*. The Case of *Pacta Sunt Servanda Vs Ordre Public*. The Use of *Ijtihad* to Achieve Higher Award Enforcement. (2009) *Macquarie Journal of Business Law* (2009) Vol 6, pp. 93-118, at p. 93.

⁴⁹ Mantilla-Serrano, Fernando and Adam, John. *The University of New South Wales Law Journal*. Forum International Commercial Arbitration. Vol. 14. No. 1. May 2008, pp. 29-35, at p. 22, Further,; “If the arbitration process runs into difficulties – the party, the advocate, the arbitrator and (it is important to note) the judge, who may be concerned with finding a solution to the problems- we all want to know that whatever answer is thought to be in accordance with justice can be enforced by reliable and potent mechanisms. These are very little discussed at arbitration congresses, and are scarcely touched upon by the Model Law.”

⁵⁰ For a background discussion on the need for the United Nations to improve and maintain harmonisation or standardisation in all its proceedings please see, Ayad, Mary, (2009) United Nations Treaty Body Reform, Human Rights are Not Optional, in the *Mediterranean Journal of Human Rights*, Volume 14 (forthcoming issue) 2009, Malta: Faculty of Laws, University of Malta.

that do not have a specific common historical background.⁵¹ This is why a law informed by the three legal traditions, general principles of law and possibly oil concession law (*lex petrolea*) would fill this gap. The precedents of *lex petrolea* may inform setting forth precedents from which general principles of law contributing to a harmonised code may be employed.

The existing law on ICA, the Model Law is not capable of resolving many of these differences.⁵² In order to make more rapid progress in the drafting of a Model Law Plus instrument or Code which is truly harmonised, it is necessary to review the interaction of the current Model Law, as well as the 1958 and Washington Conventions with previously arbitrated cases in order to determine where there are gaps in the law and how those gaps have affected the efficiency and outcome of arbitration cases particularly in terms of award enforcement and public policy. This can allow for insights into cases where there exists a conflict of laws between the civil and common law traditions on one hand, and *sharia* law on the other. The purpose of this comparison is to identify areas where the current law is falling short in terms of resolving ‘conflicts of laws’ in order to draft a new and improved Model Law. Answers to these questions will provide for a qualitative analysis of the impact of the current Model Law with a view on current debates in the UNCITRAL Model Law reforms on MENA-FI IIAs and International Commercial Arbitrations. This will insure a higher probability of award enforcement.

Increasing Arbitral Award enforcement requires adopting an international convention that imposes a new ‘Model’ of ICA Law, or, an improvement to the current Model Law. The Model Law is still in its inception: “We are, however, at an early stage and it will only be possible to estimate the real influence of the Model Law later.”⁵³ This means no thorough studies have

⁵¹ In the introduction (the Editors), in De Zylva, M.O and Harrison, R. International Commercial Arbitration. Developing Rules for the New Millennium. (Eds). 2000. Jordan Publishing Limited. Bristol, UK at p. xxxiv.

⁵² *Ibid, Supra* No. 51, pp. 29-35, at p. 29, For example, “when drafting arbitration clauses and settling on the seat of arbitration, parties, rightly or wrongly, often omit to examine in detail the arbitration statute of the seat, but choose that seat principally for reasons of convenience (for example, physical proximity) or, more commonly, neutrality. In practice, this leads to difficulties. With astonishing frequency, parties to an arbitration agreement will find themselves hostage to a series of unanticipated national particularities which depart from conventional and usual arbitration practice, and were never envisaged at the time they entered into the agreement. Arbitrators, too, are occasionally caught off-guard by these national specificities, fail to take them into account, and find that their awards are subsequently set aside. ‘Uniform’ provisions such as those of the Model Law, go a long way to avoiding such situations.”

⁵³ *Ibid, Supra*, No. 25, at p. 29.

examined the full impact of Model Law influences, particularly on ICA/IIA arbitrations in the MENA context. The current legal framework governing ICA/IIA is beset with significant problems. This article sets forth recommendations towards the creation of a single regulatory framework. Indeed, an apt model for such a framework has already been alluded to in the words of the illustrious Judge Howard M. Holtzman, in which his Honour stated:

The system of International Commercial Arbitration works best within a framework that has five intertwined, yet separate elements. These are: (a) effective arbitration clauses, (b) efficient procedural rules, (c) experienced arbitration institutions, (d) national laws that facilitate arbitration and, (e) international treaties that assure the recognition of agreements to arbitrate and the enforcement of foreign arbitral awards.⁵⁴

Indeed, one single harmonised ICA/IIA Law is capable of achieving all five of these elements with one stroke of the pen. Creating a single regulatory framework, especially in the MENA context when dealing with Muslim judges means also engaging in efforts to promulgate the concepts enshrined by harmonisation, particularly regarding a transnational definition of public policy. The importance of ICA is based on the fact that it is the established method of determining international commercial disputes, especially as most states have modernised their arbitration laws to keep up with this reality as well as creating new arbitral centres. Further, the rapidly evolving practice and laws of arbitration have become important research topics in law schools and universities worldwide.⁵⁵ The global economy depends on the outcomes of both ICA and IIA because it is the most widely used form of international commercial dispute resolution involving significant sums of money and/or investments. Moreover, the MENA region is richly involved with ICA and IIA. To understand why harmonisation is absolutely crucial it is necessary to understand that a complex system of international treaties and national laws are the only reason why the complex natures of ICA/IIA work.⁵⁶ The central problem in ICA/IIA is the contradiction of laws. This is precisely why there is an extremely serious problem that can only be solved by a HICIALC. When

⁵⁴ Holtzman, H. J. (1995), A task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in Hunter M., Marriot, A., Veeder, V.V., (Eds), *The Internationalisation of International Arbitration* LCIA Centenary Conference, Graham & Trotman Limited, at p. 10.

⁵⁵ Redfern, Alan; Hunter, Martin; Blackaby, Nigel; Partisides, Constantine (fourth ed.) (2004) *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell, at p.1.

⁵⁶ Samir, Salah. *Commercial Arbitration in the Arab Middle East* 2nd Ed Hart Publishing. 2006. Portland, OR, USA at pp. 1-2.

these laws contradict in the nexus between arbitration and domestic laws, there is no *one single* legal jurisdiction to provide necessary infrastructure support.⁵⁷ Even a basic infrastructure is not enough. The seriousness of the problem needs to be further elucidated. Any given ICA can make reference to four different domestic sets of laws. The first is the law that governs the clause in a contract designating an agreement to submit to arbitration. The second is the law of the actual arbitration proceedings. The third is the law of the arbitral tribunal that is applied to the substantive matters in dispute before it. The final law governs recognition and enforcement of the award of the arbitral tribunal.⁵⁸ These laws within a single given arbitration may contradict with one another such that the substantive law may be an entirely different system of law from the ones governing proceedings, the clause or the enforcement.⁵⁹ Moreover, it is possible for a contract to contain clauses that make it contradict with the public policy of a country. In order for an arbitration to be enforced, these four sets of laws must be in harmony with each other.

Without enforcement the risks to foreign investors are high. The regulatory and legal framework governing ICA/IIA, especially MENA-FI arbitrations is increasingly complicated, contradictory, unpredictable, unsatisfactory, and lacking in credibility. The various institutional rules, together with the flexible nature of arbitration, with the three major arbitration law instruments, the 1958 and Washington Conventions and the Model Law, political Islam, judicial unpredictability, *sharia* interpretations and weak Arbitral Tribunal jurisdiction as well as national laws and domestic public policy interpretations create a regulatory framework that is at odds with itself. Indeed, the flexibility of arbitration may allow parties to a contract from India and the Netherlands to arbitrate a dispute in Cairo, Egypt according to French civil law and to the *Lex Arbitri* of the Cairo Regional Arbitration Centre. Drafting a strong ICA Law Code is a step towards the creation of a single regulatory framework that supports Arbitral Award enforcement. This code must integrate general principles of law common to and acceptable to the three legal traditions. This is something that has hitherto never been attempted before. However, “it is very relevant in this connection to point out that Islamic law treats international law (the law of *Siyar*) as an imperative compendium forming part of the general positive law, and that the principles of that part are very

⁵⁷ In, Garnett, R, Gabriel, H, Waincymer, J and Epstein, J (2000), A Practical Guide to International Commercial Arbitration, Dobbs Ferry, New York: Oceana Publications, Inc, at p. 4.

⁵⁸ *Ibid*, *Supra* No. 57 at p. 2.

⁵⁹ Samir, Salah. Commercial Arbitration in the Arab Middle East 2nd Ed Hart Publishing. 2006. Portland, OR, USA at p. 2.

similar to those adopted by modern international legal theory.”⁶⁰ In international law, acceptance of general principles of law is an ancient and revered custom that forms the basis of international public and private law in modern times:

. . . one development must be mentioned which certainly, if it gains general acceptance, will contribute to the internationalisation of arbitration. It is connected with the name of the late Berthold Goldman, although he himself in a posthumously published article contributes it to Schmitthoff. It is, of course, the idea of a *lex mercatoria*. The concept of applying general principles of law exists in international law in Article 38 of the Statute of the International Court of Justice. Similarly, Article 215 of the Rome Treaty talks about general principles common to the law of the member states, and the concept is often used in the case law of the Court of Justice. Even in national law, judges have to fall back on general principles of their own law, failing any other basis on which to decide a case. And arbitrators, who apply a particular legal system, must, of course, within that framework do the same thing. Application of *lex mercatoria* is a different matter. It amounts to the disregard of any existing legal system, national or international, in favour of principles or rules drawn from legal systems in general and having a certain more general acceptance in many or the more important to them. To the extent that that is accepted it is certainly possible to talk about internationalisation of arbitration in the area of the applicable law. It is certainly accepted in the case law of some countries, including the UK and France.⁶¹

VII HARMONISATION

Harmonisation may be viewed in two different ways. The first would require having as few documents, statutes, conventions and sets of rules as possible. This is inter-harmonisation, achieved by ratifying the Convention or the UNCITRAL. The second view would be the embodiment of the principle of harmonisation within the existing Convention or Rules, such that all general principles common to the three legal traditions are represented, thus intra-harmonisation. In line with the second understanding of harmonisation, harmonisation may be viewed as truly international when it integrates general or universal principles of law from the three traditions. This trend has already begun. Harmonisation of ICA Rules proceedings has been taking place as a result of employing commonly accepted practices that are universal but taken

⁶⁰ Mahmussani, S., (1997), *International Legal Materials*, Vol. 20, p. 1 (1981); *International Law Reports*, Vol. 62, p. 140 (1982), in, August, R. (2004) *International Business Law. Texts, Cases, and Readings*, (Fourth Edition) Pearson Education Ltd., Australia, at p.57.

⁶¹ *Ibid*, *Supra* No 25, at pp. 33-34.

from different juridical and commercial traditions.⁶² This same trend toward harmonisation is also occurring at the level of the use and interpretation of substantive law applied to ICA disputes.⁶³ Indeed, harmonisation of international commercial arbitration means the internationalisation of it in a truer sense, “Until the 1st World War, international arbitration, in the real sense, barely existed. Users came to drink at the great fountains of arbitral justice in the capitals of the great powers (where it existed); but these forms of arbitration were not ‘international’ in the sense we understand today. At best, it was domestic arbitration adapted for parties engaged in transnational trade. It was effectively the ‘nationalisation’ of arbitration for homogeneous business communities.”⁶⁴ Furthermore, “My thesis is that, in principle, international arbitration is just as national as it was 100 years ago. What has changed and what properly may be called internationalisation are the sources or origins of the applicable national law and the state of mind in which we approach it, and the surrounding atmosphere in which it exists.”⁶⁵ Hence, the need for a single regulatory framework based on a solely harmonised ICA Law. In International Commercial Arbitration, the history of internationalisation is also the history of harmonisation, such that:

From the First World War, however, the great historical events began which led to the international system we know today. At the state level, the League of Nations and the United Nations produced the 1923 Geneva Protocol, the 1927 Geneva Convention, the 1936 UNIDROIT “Rome” draft Model Law, followed by the 1958 New York Convention, the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law. At the user level, the great arbitral institutions were born: Stockholm (1917), the ICC (1922) the American Arbitration Association (1926)- and even eastward Moscow’s Maritime Arbitration Commission (1932) and its Foreign Trade Arbitration Commission (1934).⁶⁶

Since the aforementioned Conference, there have been further developments. These are the Middle Eastern Arbitration Centres and law reforms but as this article is focusing on those of Egypt and the United Arab Emirates any MENA trends beyond those two are outside of the scope of this article. A

⁶² Fortier, L.Y., at p. vi, *forward*, in Zylvia, M.O., Harrison, R. (Eds) International Commercial Arbitration. Developing Rules for the New Millennium, (2000), Jordan Publishing Ltd, Bristol, UK.

⁶³ *Ibid*, at p. vi, *forward*.

⁶⁴ *Ibid*, *Supra* No. 25, at p. at p. 1.

⁶⁵ *Ibid*, *Supra* No 23, at p.25

⁶⁶ *Ibid*, *Supra* No 25, at p. 2.

truly harmonised law would be a natural outcome of the ‘comparative approach’ or of true internationalisation.⁶⁷

In the context of the MENA a harmonised law will ensure award enforcement, particularly in its ability to uphold the doctrine of *pacta sunt servanda*.⁶⁸ This doctrine is at the heart of the common denominator running throughout the three traditions. Moreover, the main aspect that makes arbitration as acceptable to MENA governments as it is to Europeans is its legally binding nature. Even the early arbitrations in the history of Islam were legally binding, and this legally binding aspect, very similar to the sacredness of an agreed upon contract, is the central key of arbitration that must be supported by law articles.

It must be noted that:

International disputes suffer from the same sort of problems as those prevalent in national systems, and other problems as well; cultural barriers, different systems of law, custom and trade usage and so on. . The problems are two-fold. There are problems of substance- the system of law, the rules

⁶⁷ Lalive, P., The Internationalisation of International Arbitration: Some Observations, at p. 50-51 in, Hunter M., Marriot, A., Veeder, V.V., (Eds), The Internationalisation of International Arbitration LCIA Centenary Conference, Graham & Trotman Limited, “The fact remains that, as a rule, international arbitration as we understand it today has a distinct and specific nature, not only (or not mainly) on a juridical level (e.g. because it involves problems of private international law), but on a sociological and psychological level; it frequently involves much more than a mere conflict of interests, economic or legal. What has perhaps struck me more than anything, after many years of arbitral practice, either as advocate or as arbitrator, is the essential role played by what may best be called ‘conflicts of cultures’ between the parties (as well as between their respective counsel), with the many difficulties of communication they involve. Hence the usefulness, or even the necessity, for arbitrators and attorneys alike (and especially for the former), of what I like to call the ‘comparative approach’. If I may be forgiven a rather trite remark, the inevitable internationalisation of international arbitration requires also an increasing internationalisation of arbitrators and other practitioners. There should be little controversy on the need for a truly international arbitrator to adopt that ‘comparative approach’, not only in respect to the law applicable (to both procedure and substance) but, more generally, with regard to the parties’ attitudes and reactions. This is in fact an essential aspect of the requirement of arbitrators’ neutrality and objectivity, in the broad sense of those terms, and they require a large degree of international mindedness (i.e., the exact opposite of legal parochialism or intellectual imperialism in international commercial relations).”

⁶⁸ *Ibid*, *Supra* at No. 3, and further “The question of enforcement is generally one of the primary concerns in the decision to choose arbitration.” Thus, a harmonised code that takes a more universal understanding of the principle of *ordre public* without allowing it to serve as a bar against arbitral award enforcement would go a long way towards reducing the risks to foreign investors in MENA states.

of substance, and its expectations: are these rules the same as the expectations of the market place in which the product was bought? There are also problems of procedure- what are the steps to be taken to resolve the dispute? The line between the two is a fine one: the substantive rules are also the underlying rules that any dispute procedure has to use. Similarly, procedure rules will tend to affect the substance: a claim that is difficult and expensive to litigate will itself become discounted in value, and the underlying substantial law may wither or be seen as less significant.⁶⁹

A harmonised law can resolve questions related to procedural and substantive law that arise in arbitrations, and that simultaneously create complexity. The relationship between harmonisation, internationalisation and a *lex mercatoria*⁷⁰ or *lex petrolea* is made clear when the regulatory framework of ICA Law is seen as a holistic entity.⁷¹

VIII FEASIBILITY BASED ON GENERAL PRINCIPLES OF LAW DRAWN FROM THE THREE TRADITIONS

A critical thematic and wide reaching review of the literature has found four important threads informing this article. The first three have been discussed in Part I: (1) the need for greater harmonisation (2) the feasibility of higher

⁶⁹ Samir, Salah. *Commercial Arbitration in the Arab Middle East* 2nd Ed Hart Publishing. 2006. Portland, OR, USA at pp. xxvi-xxviii.

⁷⁰ Pryles, M. Application of the *Lex Mercatoria* in International Commercial Arbitration, pp. 36- 42, in (2008) 14 (1) UNSWLJ Forum, at p. 36, "Lord Mustill, who has written incisively and critically about the *lex mercatoria*, refers to the work of Professor Lando and states that the sources of the *lex mercatoria* include, public international law, uniform laws, general principles of law, the rules of international organizations, international custom and usages, standard form contracts and reporting of arbitral awards."

⁷¹ *Ibid*, Supra No. 25, at pp. 31-32: "(a) the many organisations that during the period have been created or developed for the functioning of arbitration, such as the LCIA, ICC, AAA and Stockholm just to mention some of the most important; (b) the international recruitment of arbitrators that this has lead to; (c) the organisations founded for the study and furtherance of internationalisations, such as the ICCA; (d) the journals and yearbooks that are published for the spread of information about arbitration and the books about the machinery of international arbitration; (e) the many new centres of arbitration in all corners of the world, and the enormous number of conferences, symposia, courses, etc, about arbitration that are being held each year. All of this works to promote arbitration as a means of settling disputes and it contributes towards the harmonisation of arbitration procedures and the spirit in which arbitration is conducted. But it has also contributed towards creating a social structure of its own, including an International Federation of Commercial Arbitration Institutions. That structure transcends boundaries, and tacitly or expressly, has set up its own rules of behaviour and acceptance which are truly international. For the practice of international arbitration at the bar or on the bench it is no longer nationality that counts, but rather the acceptance of a generally accepted standard of behaviour."

harmonisation (3) doctrines that are a bar to award enforcement, such as public policy and state sovereignty as well as certain interpretations of *sharia* by MENA jurists and (4) formerly substandard or incomplete harmonisation because the gap in previous scholarship on the subject of Islamic jurisprudence defines Islamic law in two contradictory ways: either lacking a common thread of unifying principles, or the other extreme, as rigidly inflexible and inadaptable to modern concerns, particularly in the areas of international business transactions and finance. The implications of this erroneous analysis led scholars and jurists to the false conclusion that Islamic law is inharmonious with civil and common law. Further, this mistaken analysis ignored the Egyptian Mixed Court case law as well as Professor Sanhuri's codes. However, the research undertaken herein will show that Islamic law does contain unifying principles which can indeed be included together with Civil and Common law to be set forth into a *corpus lex* and which are at the same time, possible to apply to modern contracts with complex financial transactions involved. Integrating general principles of law that also exist in Islamic jurisprudence will make ICA Law more acceptable to MENA governments and this must inform a reformed harmonised ICA Law. Achieving this requires viewing Islamic Law from an historical perspective. Islamic jurisprudence has historical tools that have been neglected and that allow jurists to both locate these principles and to interpret and apply them to the appropriate context. Further, due to this gap in understanding Islamic law, there is as a result a gap in the literature regarding harmonisation in the context of including Islamic law principles. However, a re-reading of *sharia* (prior to the closing of the gates of *ijtihad* by extremists) demonstrates that it contains principles that are compatible with Civil and Common law principles that are based on a deeper understanding of the spirit of the law as well as its proper context and intention,⁷² such that:

The closing of the door of *ijtihad* has produced a legal system that is often at odds with the modern world. Many important figures in the Islamic world (including Saudi Arabia's King Fahd [1922]) have recently advocated reopening the door of *ijtihad*, but this step has been vehemently opposed by traditionalists (including Iran's late Ayotallah Khomeini [1900-1989]). It is important to note that the Sharia is primarily a moral code, more concerned with ethics than with the promotion of

⁷² Ayad, Mary, Harmonisation of International Commercial Arbitration Law and *Sharia*. The Case of *Pacta Sunt Servanda Vs Ordre Public*. The Use of *Ijtihad* to Achieve Higher Award Enforcement. (2009) *Macquarie Journal of Business Law* (2009) Vol 6, pp. 93-118, for a more thorough treatise of the similarities of common and Islamic law, and an exposition of the precise jurisprudential tools that can and should be used to inform a harmonised law to fill this gap in the literature.

commerce or of international relations. Nonetheless, many principles of the Sharia are not unlike the principles found in the civil law and the common law.⁷³

Since it has been established that Islamic law ‘treats international law as an imperative compendium’, and since *pacta sunt servanda* is an established principle of international law⁷⁴, then by logical analysis one can infer that Islamic law upholds *pacta sunt servanda* equally.⁷⁵ This requires integrating tools found in Islamic jurisprudence or *sharia*⁷⁶ interpretations of discovery (*ijtihad*),⁷⁷ consensus (*ijma*)⁷⁸ and custom (*urf*)⁷⁹ into the code in order to increase arbitral award enforcement, bringing reform to the region. Analysis of these three tools demonstrates they are common to the three traditions and are capable of being employed to justify the expansion of arbitral competence and increasing arbitral award enforcement. In the light of the nature of ICA Law, the comparison amongst the three traditions is highly appropriate. In the Arabic language, as in Hebrew, the core word ‘hkm’ gives us the words: wisdom ‘hikma’, judgement ‘hokm’, the verb to judge, ‘yehkom’ and finally, arbitration, ‘tahkeem’, when the vowels and prefixes are changed. It is

⁷³ August, R. (2004) International Business Law. Texts, Cases, and Readings, (Fourth Edition) Pearson Education Ltd., Australia, at p.55.

⁷⁴ *Ibid*, *Supra* No. 62, at p.59: “International custom and case law had always sustained the proposition of *pacta sunt servanda*. It has been upheld in many arbitration awards, such as Aramco-Saudi Arabia Arbitration of 1958, and Sapphire International Petroleum, Ltd. v. National Iranian Oil of 1963.”

⁷⁵ This is one proof of the existence of *pacta sunt servanda* in Islam. Further proof has been cited by scholars who have located verses in the Quran that expressly state that contracts are to be upheld, implying *pacta sunt servanda*, see note 88.

⁷⁶ In, Coulson, Noel James, (1969) Conflicts and Tensions in Islamic Jurisprudence, Chicago: The University of Chicago Press, at p. 3, “The comprehensive system of personal and public behaviour which constitutes Islamic religious law is known as the *sharia*.”

⁷⁷ Independent reasoning in Islamic Jurisprudence. An arbitral tribunal that is empowered to exercise the full jurisprudential tools at its disposal found in *sharia* law, such as reasoning by analogy, independent judgment and interpretation (*qiyas, ijtihad*), while placing Islamic legal principles within the appropriate modern context, weighing carefully the current public interest of both the parties to the contract with that of the state itself would derive vastly different conclusions from extremists who argue along lines based solely on a 7th century context without which to reasonably draw an analogy.

⁷⁸ Consensus in Islamic Jurisprudence. Indeed, tracing the history of consensus shows it is remarkably similar to the idea of *ordre public* or *maslaha*, as that which is of benefit to the group as a whole is considered the greater good over that which applies to any particular case.

⁷⁹ *Urf* is the Arabic word for custom or practice. The reason a discussion on custom or ‘*urf*’ is important is because historically in the evolution of Islam custom has played an important role and continues to do so today. It is obvious that *urf* is also exists at common law, thus representing one of many specific principles found in all three traditions that can form the basis of improved ICA rules.

interesting to note that the faculty of judging and the concept of judgement cannot be divorced from the principle of wisdom. This linguistic understanding of the relationship of an arbitrator to an arbitral tribunal and to ICA Law is analogous to that of a judge in a court. This is also an argument for each tradition to take from its principles the best in order to craft a better harmonised law. It also supports the argument that Arbitration, in Islamic law, according to the etymology of the word, should, in theory, be similar to the English common law system, whereby:

As you are aware, the vital distinction between these two systems is as follows. An English Arbitrator, although chosen by the parties, is still a judge in the sense that he must administer the law. In disputes arising out of a contract (in practice, therefore, in most commercial arbitrations), his function is to give effect to the rights of the parties under the contract. He has no right to carve out a new contract for the parties, or to suggest 'reasonable' or 'equitable' courses. He is there to determine the dispute by deciding which party is right. The Latin system of 'conciliation' is based on a totally different conception. The referee thereunder undertakes the good offices of a friend, but his decision, being under the reference, has the binding force of law. He is not limited to decide the dispute according to the rights of the parties, or even to decide who is in the right at all. His object may be equally to effect a compulsory compromise, and he may therefore by his award direct the parties to do that to which they have never agreed, and which, apart from the award, they would never have been bound to do.⁸⁰

Another common denominator between Islamic law and the English common law system has to do with the acceptability of arbitration such that English judges are pro arbitration, and have "respect for the autonomy of the parties, by which I mean their right to have their dispute decided as they want. If the parties choose a foreign law, their choice should be respected. If they opt for a foreign or novel procedure, they should be free to do so. If they want to exclude intervention by the court, they should be free to do that too."⁸¹ The same respect for arbitration in the MENA stems from its indigenous origins from (then) Arabia, now Saudi Arabia.

Indeed, the very concept of arbitration began in the early history of Islam among the Yathrib tribe.⁸² ". . . Prophet Muhammad was appointed as an

⁸⁰ *Ibid, Supra* No. 25, at p. 21.

⁸¹ *Ibid, Supra* No. 25, at p. 5.

⁸² See Hamid Ahdab A., *Arbitration with the Arab countries* 13 (2d ed. 1999): "Arbitration, the principal form of international dispute resolution, has a long and often troubled history in the Islamic world. Shortly after the founding of Islam, the Treaty of Medina of 622 A.D. (A security pact among the city's Muslims, non-Muslim Arabs and Jews) called

arbitrator before Islam by the Meccans, and after Islam by the Treaty of Medina. He was confirmed by the Holy Koran as the natural arbitrator in all disputes relating to Muslims. He himself resorted to arbitration in his conflict with the Tribe of Banu Qurayza. Muslim rules followed this practice in many instances, the most famous of which was the arbitration agreement concluded in the year 659 A.D. (37 H.) between Caliph Ali Mu' awaiya after the battle of Siffin."⁸³ Arbitration is thus, as a doctrine and a process, indigenous to the MENA cultural and political context. Its acceptability is well grounded in its historical origins which have been exported by Islam from Arabia. Obstacles to arbitrations are not of indigenous origins. *Ijtihad* is a similar process as that of the civil law system of discovering what the law means. It is also similar to the common law system which employs a dual method; that of deriving law from precedent *and* general principles of law. Consensus (*ijma*) is similar to the common law tradition of following precedent and *urf* is similar to the civil law system of *lex mercatoria* as well as the common law system of customary usage or custom. The use of custom in Islam is time honoured and as legally binding as it is in customary English law."⁸⁴ In fact, not only is custom honoured in English law but it is has historically been desirous to harmonise it with international trading partners, creating a precedent for harmonisation: "Once, English law and in particular, English contract and trust law, was devised by people who also had the task of deciding the disputes- i.e., judges. One of the aims of the English judges who developed, for example, contract law principles, was to make our principles of trading law similar to that of the other nationals that we traded with."⁸⁵

Indeed, a single regulatory framework can give rise to a *lex arbitri*. It is relevant to note that the other subsidiary legal sources mentioned in said Article 1 of the Libyan Civil Code, namely custom and natural law and equity, are also in harmony with the Islamic legal system itself. As a matter of fact, in the absence of a contrary legal text based on the Holy Koran or the

for an arbitration of any disputes by the Prophet Muhammad." ; see also *Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic* (1997), 20 ILM 1, 41 (1981) [hereinafter LIAMCO award]. "Indeed, the Prophet himself resorted to arbitration in his conflict with the tribe of Banu Qurayza."

⁸³ *Ibid, Supra* No. 62, at p. 58.

⁸⁴ Fortier, C.Y., *Forward*, in Hunter M., Marriot, A., Veeder, V.V., (Eds), *The Internationalisation of International Arbitration LCIA Centenary Conference*, Graham & Trotman Limited, at p. vi., "In business, especially, people crave certainty. Certainty demands rules. Rules derive from principles. Practice, as well as reason, has a hand in shaping principles. And commercial practice in a global economy will increasingly tend to reflect conditions concerns and expectations that are common, that is, transnational rather than purely local. This is not to say that particular contexts do not require particular rules."

⁸⁵ *Ibid, Supra* No. 25, at p. xxxii.

Traditions of the Prophet [i.e., the Sunna], Islamic law considers custom as a source of law and as complementary to and explanatory of the contents of contracts, especially in commercial transactions. This is illustrated by many Islamic legal maxims, of which the following may be quoted: ‘custom is authoritative’, ‘public usage is conclusive and action may be taken in accordance therewith,’ ‘what is customary is deemed as if stipulated by agreement’, ‘what is customary amongst merchants is deemed as if agreed upon between them,’ ‘a matter established by custom is like a matter established by law’.⁸⁶ This means that since arbitration was established by custom, then it is legally binding.

The inherently binding nature of arbitration in the face of MENA-FI public policy injunctions can be further demonstrated thus:

Moreover, Islamic law, which as we have seen forms a complementary part of the law of Libya, (Article 1 of its Civil Code) underscores the binding nature of contractual relations and of all terms and conditions of a contract that are not contrary to a text of law. This is expressed in the legal maxim: a stipulation is to be complied with as far as possible. This maxim is corroborated by the various sources of Islamic law. For instance, a Koranic verse ordains: ‘Oh, you who believe, perform the contracts. In the same sense, a Tradition of the Prophet reads: ‘Muslims are bound by their stipulations.’ Muslim commentators and jurists expounded this binding force of contracts in detail. In particular, the learned Ibn Al-Kayyem elaborated this principle in his great treatise *I’lam Al-Muaq’een*.⁸⁷

Further support for this line of reasoning that an arbitral clause is legally binding comes from an Islamic doctrine called *alikalah*: “Consequently, one of the parties cannot unilaterally cancel or modify the contents of the agreement, unless it is so authorized by the law, by a special provision of the agreement, or by its nature which implies such presumed intention of the parties. Likewise, the same rule is recognized in Islamic law, in which cancellation of a contract is not valid except by mutual consent (*alikalah*).”⁸⁸ This is furthermore another reason to reword the 1958 Convention’s public policy clause which, allows public policy to invalidate a contract and is ‘authorised the law’ to allow this.

The implication of these similarities means that arguments used by Islamic judges to deny award enforcement can be counter-argued with principles from

⁸⁶ *Ibid, Supra* No. 62, at p. 57.

⁸⁷ *Ibid*, at p.58.

⁸⁸ *Ibid*, at p.59.

Islam itself. A codified harmonised ICA/IIA law would be the most organised way to achieve this.

Common principles of law found amongst the three traditions form the foundation of empirical⁸⁹ evidence making the call for a harmonised law feasible.⁹⁰ The Roman Empire lent many of its principles to *sharia*, and vice versa, especially in the area of customary law. Moreover, during the time of the Roman Empire, Mosaic Law, which forms the foundation of both Christianity and Islam, has influenced Civil Law⁹¹ which has in turn further influenced Common Law. Moreover, Christianity, through Mosaic Law and beyond, has itself influenced Civil and Common Law. Therefore, Islamic law and Civil Law have a common thread through Roman law which in turn was influenced by Mosaic Law and the larger Judaeo-Christian heritage which is foundational to Islamic law. Even more ancient still than the Roman

⁸⁹ Punch, Keith, F.C. (2nd ed) *Developing Effective Research Proposals*. London: Sage Publications at pp. 2-3, "Empiricism is a philosophical term to describe the epistemological theory that regards experience as the foundation or source of knowledge (Aspin, 1995:21)." This empirical approach will inform the research process, maintaining always an awareness of the reality of the affect of the law on arbitration and evidence based on experience, whether or practitioners familiar with the effect of the law, or of the law itself and how it is used, or misused in the case of enforcing arbitrations.

⁹⁰ Ayad, Mary, *International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region*, *Vindobona Journal of Comparative Law and Arbitration* (2008) 12 VJ 2, pp. 169-176. For an in depth treatise on the common foundations of the three traditions to in the context of the complex history of previous MENA arbitrations in order to reform a harmonised arbitration law.

⁹¹ Leon, H. (1960). *The Jews of Ancient Rome*. Updated Edition. Hendrickson Publishers. Peabody, Massachusetts, at p. 250-251, "It is perhaps surprising in our day to learn that the Jews of the Roman period were both active and successful in winning converts to Judaism. That the Jews in Rome itself were energetic proselytizers as early as the time of Augustus is clearly indicated by a well-known passage in the *Satires of Horace*..." Further, at p. 250 "It had become fashionable for the aristocratic members of Roman society to adopt certain Jewish religious practices, whether as a fad or through conviction, without however, becoming fully converted. Observance of the Sabbath and practice of the dietary laws are most commonly mentioned in that connection." Also, at p. 250, "In the time of Nero, the philosopher Seneca complained bitterly, as reported by Augustine (*De Civ.Dei* 6.11), about the widespread adoption of the Jewish Sabbath." At pp. 250-251, "Seneca's testimony to the spread of Jewish practices is confirmed by Josephus' statement (*Apion* 2.39.282) that such Jewish religious customs as the observance of the Sabbath, fasting, kindling of lamps, and abstinence from certain foods were followed in every part of the world and even in barbarian countries." At p. 251, Leon quotes Juvenal a generation later "Accustomed as they have become to scorning the laws of Rome, they study the Jewish law and observe it and fear it, that law which Moses handed down in a mysterious scroll, which instructs them not to point out the way except to the one who follows the same rite nor to guide to a spring of water any but the circumcised." At p. 251, "Juvenal's denunciation would have little meaning were it not directed against a situation prevalent in his day."

Empire, legal history provides archaeological evidence from the laws of Greek Egypt, pre-Hellenistic Greece, the Sumerians, Babylonians, Assyrians, Hittites and Ancient Egyptians. Jurists analysed Egyptian papyri, Greek inscriptions, cuneiform clay tablets, and Mesopotamian cylinders. They reviewed laws and codes, in their original languages such as those of the Babylonian King Hammurabi, the antique Greek city law of Gortyn in Crete, the city law of the Hellenistic metropolis of Alexandria, and laws from Further Asia.⁹² What these jurists concluded established the basis for international comparative law; they discovered undeniable parallels between these legal systems. These parallels could not be explained away as being derived from one another. The implication of this is that for any given economic and social situations there are a limited number of legal formulas, and these formulas occur in individual legal systems according to the cultural context and stage of cultural development.⁹³ It is submitted that this archaeological evidence points to the possibility of a universal 'code' that can be applied to similar cases across cultures. This principle is the same as that behind a harmonised ICA law; which is feasible and possible. Many principles of international law and jurisprudence are derived from the monotheistic traditions common to the MENA and Europe, with the common thread of Roman law running throughout, thus it is possible to harmonise between eastern and western legal systems.

A comparative literature review of international and Islamic law doctrines reveals that foundational doctrines in contract law such as "(1) good faith, (2) breach of contract, (3) *lex non scripta* (unwritten, common law, comparable to the idea of the Sunna or traditions in Islam) and (4) *omnia praesumuntur legitime facta donec probetur in contrarium* (presumed to be lawful unless shown otherwise, similar to concepts in *sharia* law), also exist in *sharia* law, for example, the principle of permissibility (*ibahah*)⁹⁴ in regards to commercial transactions and contracts is that they are permissible unless otherwise prohibited. Included amongst these international doctrines is that of the aforementioned arbitration. Additionally, (5) the principle of *pacta sunt servanda*, (Latin for agreements must be kept) is also found in Islamic jurisprudence as the Quranic injunction⁹⁵ upon believing people to fulfil their

⁹² Kunkel, Wolfgang (1996) *An Introduction to Roman Legal and Constitutional History*, Oxford: Clarendon Press, at p. 194.

⁹³ *Ibid.*

⁹⁴ Kamali, M.H. "*Islamic Commercial Law: An Analysis of Futures and Options*" 2000, Islamic Texts Society. Cambridge, UK. Chapter Seven, The *shariah* Perspective on Commercial Transactions (Mu'amalat), p 67.

⁹⁵ *Ibid*, p 76.

contracts.”⁹⁶ The sacred concept of *pacta sunt servanda* goes back even to the time of Hammurabi’s Code⁹⁷ and to ancient Hindu law at the time of King Ashoka. The contract is mentioned in seven known articles of Hammurabi’s Code.⁹⁸ A comparative analysis of the three monotheistic world religious traditions and how these common values have shaped legal principles in the three traditions that are the foundations of many of the laws therein⁹⁹ should inform a new ICA Law. As the learned V.V. Veeder, QC has noted,¹⁰⁰ the branches of these legal traditions are similar and their origins historically can be found in common soil. Critics of harmonisation of laws who claim legal systems belonging to vastly different cultures such as those of *sharia* or mixed jurisdiction states, and are different from European states, overlook the inherent universality of many of the common principles of UNIDROIT and international law principles.¹⁰¹

Indeed:

...much of English contract and trust law remains, as yet, precedent based. In these precedents, there are detectable lines of principle. However, as the number of precedents has increased enormously with the national progression of the years, so the principles that originally lay behind the precedents have become obscured. Styn LJ in the Court of Appeal in England has complained of the inadequacy of the practice on the part of Counsel of simply reading large numbers of cases to the court rather than elucidating for the court the ‘argument’ (or principle?) that lay behind the cases.¹⁰²

⁹⁶ Ayad, Mary, International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region, *Vindobona Journal of Comparative Law and Arbitration* (2008) 12 VJ 2, pp. 169-176, at p. 175.

⁹⁷ Amin, S.H., (1992) *Research Methods in Law*. Glasgow: Royston Publishers, at p. 54, “The Code of Hammurabi, the oldest code of laws in the world (discovered in Susa, Persia and now standing in the Louvre Museum, Paris) was enacted by King Hammurabi cd. 2250 B.C.) whose rule extended over the whole of Mesopotamia from the mouths of the River Tigris and Euphrates to the Mediterranean coast.”

⁹⁸ Articles 7, 37, 52, 122, 123, 151 and 152 of the Hammurabi Code. The extensive mention of the contract as well as enforcements of it clearly expresses the idea of *pacta sunt servanda*.

⁹⁹ Ayad, Mary, International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region, *Vindobona Journal of Comparative Law and Arbitration* (2008) 12 VJ 2, pp. 169-176, at p. 172.

¹⁰⁰ *Ibid*, *Supra* No. 61, *forward*, at p. xii, V.V. Veeder.

¹⁰¹ Ayad, Mary, International Commercial Arbitration and Harmonisation of Contract Law with a Focus on Reform in the Mena Region, *Vindobona Journal of Comparative Law and Arbitration* (2008) 12 VJ 2, pp. 169-176, at p.174.

¹⁰² *Ibid*, *Supra*, No. 25, at p. xxxiii.

The same process by which general principles of law have been extracted from cases by precedent in the common law tradition can be applied within *Sharia* to do the same. Indeed, this is exactly what Professor Sanhuri accomplished *via* his civil codes and what Judge Styn wished to see more of.

IX IMPLEMENTATION

A harmonised law is necessary but the penultimate step to effective Arbitration Award enforcement would be the institution of an ICA Court. For, without enforcement, even a harmonised law is weak. In the sage and prophetic words of Judge Howard M. Holtzman, “To dream the impossible dream. . . These are the words sung by Don Quixote in *The Man From La Mancha*. Perhaps they apply equally as I set out to tilt at the windmills of national sovereignty by suggesting that a valuable task for the 21st Century would be to create a new international Court that would take the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitration awards.”¹⁰³

Judge Holtzman describes the Court thus:

The new international Court for resolving disputes on the enforceability of arbitral awards that is proposed, is designed to remove the risks inherent in the present regime of the New York Convention which, as noted, requires recourse to municipal courts- most often in the loser’s country. The new Court would have exclusive jurisdiction over questions of whether recognition and enforcement of an international arbitration award may be refused for any of the reasons set forth in Article V of the New York Convention.¹⁰⁴

X CONCLUSION

Hybridity of laws exists in the MENA. It has been previously noted that the thread of Roman law runs throughout MENA laws. This is a result of both the influence of the Roman Empire and colonialism by France as well as the United Kingdom due to the revival of civil law in England prior to colonialism. Post-colonialism takes into account the unique history between the MENA region and Europe. Not only would a more universal and more harmonised law prove valuable, and not only do principles that contribute to

¹⁰³ Holtzman, H. J, A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in Hunter M., Marriot, A., Veeder, V.V., (Eds), *The Internationalisation of International Arbitration* LCIA Centenary Conference, Graham & Trotman Limited, at p. 109.

¹⁰⁴ *Ibid, Supra* No 23, at p. 112.

such a law already exist throughout legal and social history, but also there could very well be “only one best solution/best answer” in the form of harmonisation and universal standards to resolve the problems that inhibit the efficiency of ICA. This is already the stance of the United Nations in creating the UNCITRAL.

Precedents distilled from *lex petrolea* may inform setting forth precedents from which general principles of law contributing to a harmonised code may be employed.

The knowledge generated as a result of this research as well as the drafted articles would not only be valuable reforms as applied to the MENA but may also have applications to the Australasian trading climate of the Asia Pacific region. A Model Law that balances and takes into consideration the three legal systems (Civil, Common, and *Sharia*) of European and Middle Eastern States involved in disputes together, while integrating the common principles into a unified code of rules or best practices will go far in facilitating satisfactory arbitrations that lead not only to a higher incidence of award enforcement but also foster cross-cultural understanding and diplomatic state relations as well as on-going business relations between parties at dispute. UNCITRAL has been criticised for giving birth to rules that do not have a specific common historical background.¹⁰⁵ This is why a law informed by the three legal traditions, general principles of law and oil concession law (*lex petrolea*) would fill this gap.

In terms of setting a precedent of harmonisation and impartiality to foreign investors, Egypt is genuinely an exemplary model starting with the Egyptian Mixed Courts.¹⁰⁶ The internationality of the Mixed Courts is established.¹⁰⁷

¹⁰⁵ De Zylva, M.O and Harrison, R. International Commercial Arbitration. Developing Rules for the New Millennium. (Eds). 2000. Jordan Publishing Limited. Bristol, UK at p. xxxiv.

¹⁰⁶ Brinton, Jasper Yates (1930) *The Mixed Courts of Egypt*, New Haven: Yale University Press, at p. xxvii in preface: “The Mixed Courts of Egypt stand, above all, for the essential solidarity of justice the world over. They are a witness to the power of the science of law to bind her servants into a common loyalty strong enough to triumph over all considerations of national partisanship and international jealousies. Their example may well give courage to all who are labouring to advance the cause of justice among nations.”

¹⁰⁷ *Ibid*, at p. xxvi in preface. Indeed, the precedence of the Mixed Courts may well serve as a model for expanding the scope and powers of Arbitral Tribunals. National Courts do not have the international powers that the Mixed Courts have, which can be compared to International Courts of today, however, the Mixed Courts *were* national courts. The Mixed Courts can inform an expansion of Arbitral Tribunals. Since Arbitral Tribunals already follow court proceedings, but on an international, rather than national legal basis, these tribunals can look to the model of the Mixed Courts, particularly new International

With Egyptian courts being a source of precedential law, Egyptian national courts, and MENA and other arbitral tribunal centres should look to Mixed Court case law for precedent particularly for their impartiality under the most political of pressures, and their absolute fairness to ‘foreigners’ in terms of commercial and other legal matters.¹⁰⁸ Additionally, the Egyptian Mixed Courts were qualified to handle all legal questions, “scarcely any topic of law or judicial administration has not been discussed (and often very elaborately) at some period of the history of the courts.” The implication of these combined features is that the plea of the public policy defence was not overused; the Mixed Courts were impartial and independent from political pressures thus acting with absolute fairness to foreign investors. This precedence should guide the drafting of new articles. The Mixed Courts existed prior to the creation of the 1958 New York Convention’s provision for the legal defence of ‘public policy’ as a reason to set aside awards.¹⁰⁹ This comprehensive coverage of all questions pertaining to substantive legal doctrines before a national court with an international identity sets legal precedence for arbitral tribunals. Arbitral Tribunals are inherently international in nature and should therefore be qualified to handle the range of substantive issues raised by any foreign investment or oil concession contract dispute coming before a panel, including those pertaining to international public policy. Given the existence of the black and white interpretation of public interest or *maslaha* in *sharia* as explained by Kamali, any movement toward a relatively flexible but just understanding of international definition of transnational public policy accepted globally and enshrined in a harmonised ICA code would do no harm. There are clearly times when public policy is invoked by States as a valid defence and a transnational public policy definition that allows for this kind of flexibility while preventing inappropriate usage would lead to fairness and balance in Investor-State arbitrations.

Reform has never been more important than it is now as currently; “international Commercial Arbitration in its countries of origin lives in an atmosphere which is sharply different from that which has traditionally pervaded the Arab world. Failure to appreciate this may lead to disappointment when initiatives are taken to integrate the Arab world with

Commercial Arbitration Centres in the Middle East, since they have the precedence of the Mixed Courts to fall back on.

¹⁰⁸ *Ibid*, at p. xxiv in preface.

¹⁰⁹ Ayad, Mary (2009) International Commercial Arbitration Award Enforcement at the Crossroads of *Sharia* Law and *Ordre Public* in the MENA: Paving the Golden Path towards Harmonisation, in the Journal of World Investment and Trade, October 2009, Vol. 10 No. 5, pp. 723-751 at p. 732.

international arbitration as currently practiced.”¹¹⁰ An improved harmonised UNCITRAL Model law informed by cross cultural sensitivity¹¹¹ to elements in *sharia* law would return ICA law to its simple origins would make it acceptable to Arab Seats and lower risks to foreign investors based on pleas of public policy and state sovereignty, making it once again an effective method of dispute resolution that would lead to a higher rate of arbitral award enforcement. The recommendations set forth in this article would not only be valuable reforms as applied to the MENA but, as previously mentioned may also have applications to Australia’s trading partners as well as the Asia Pacific region and the Commonwealth Member States, in terms of setting a precedent for integrating cultural understanding in a codified arbitration law based on general and universal principles of law.

Thus, “From the past, we know that the present system of international commercial arbitration is the work of relatively few men who dreamt great dreams, which were adjudged impossible by many of their contemporaries. Can we not derive lessons and encouragement for the future from the great initiatives and successes in the past of the Cecils, Davids and Eisemanns, as the world economy develops and changes still further? Can the seeds of new ideas for that future not be sown now, in our time, by new dreamers of ‘impossible dreams’?”¹¹² The relevance of these wise words to the current global financial crisis is starkly obvious, and no matter how ambitious a project it is to implement a harmonised ICA Law Code, now is the time to

¹¹⁰ Keynote speech, Michael Mustill, Lord of Appeal in Ordinary, England, in Van Den Berg, Albert (ed) with the cooperation of the T.M.C. Asser Institute, Institute for private and public international law. *International Commercial Arbitration and European Law*. International Council for Commercial Arbitration Conference, Bahrain, 14-16 February 1993. *International Arbitration in a Changing World*. 1994. Kluwer Law International. The Netherlands, at p. 14,

¹¹¹ Please see, Levine, Judith. *Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules*. The University of New South Wales Law Journal Forum *International Commercial Arbitration*. Vol. 14 No. 1. May 2008, at pp. 4-6, as well as, Jean-Claude Najjar. *International Commercial Arbitration* yearly lecture sponsored by Clayton Utz Law Firm. Supreme Court, Sydney, Australia, Wednesday November 5th, 2008, and Mantilla-Serrano, Fernando and Adam, John. *The University of New South Wales Law Journal*. Forum *International Commercial Arbitration*. Vol. 14. No. 1. May 2008, pp. 29-35, at p. 29, together with, In, Keynote speech, Michael Mustill, Lord of Appeal in Ordinary, England, in Van Den Berg, Albert (ed) with the cooperation of the T.M.C. Asser Institute, Institute for private and public international law. *International Commercial Arbitration and European Law*. International Council for Commercial Arbitration Conference, Bahrain, 14-16 February 1993. *International Arbitration in a Changing World*. 1994. Kluwer Law International. The Netherlands, at p. 19.

¹¹² *Ibid*, *Supra* No. 25, at p.3.

plant the seeds for the impossible dream that will become tomorrow's deliverance, and to do so with wisdom.