International Commercial Arbitration Award
Enforcement at the Crossroads of Sharia\textsuperscript{1} Law and
Ordre Public\textsuperscript{2} in the MENA:\textsuperscript{3} Paving the Golden Path
towards Harmonisation\textsuperscript{4}

Mary B. Ayad\textsuperscript{*}

INTRODUCTION

This article clarifies to foreign investors and western jurists the complexity of the
legal systems of the MENA, which are a hybrid\textsuperscript{5} of civil law and sharia law, as well as the

\textsuperscript{1} In, Schacht, Joseph, An Introduction to Islamic law (1964) Oxford: Oxford University Press, at p. 1: Sharia
law is essentially Islamic law. Joseph Schacht defines sharia as the sacred law and fiqh as the science of sharia, or Islamic
jurisprudence, and maintains they are distinct from one another.

Nijhoff Brill Publishers, at pp. 3-4: Ordre public refers to public policy, state interests or public order as defined by
a state. The author submits that the concept of ordre public finds its origins in the Roman res publica. Indeed, the field
of public law, as pointed out by Elisabeth Zoller, is based on the foundation of the doctrine of res publica: ”The
concept of res publica is the raison d’
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\textsuperscript{3} In, Saleh, S., The Settlement of Disputes in the Arab World, Arbitration and Other Methods, Trends in
Legislation and Case Law, Arab Law Quarterly, Vol. 1, No. 2 (Feb., 1986), pp. 198-204: MENA stands for Middle
East and North Africa. The countries selected for this article: Bahrain, Egypt, Jordan, the United Arab Emirates
(UAE), and Qatar, together with Lebanon, Iraq, Libya, Kuwait, Saudi Arabia, Syria, Oman and the Republic of
North Yemen comprising the countries of the Arab Middle East. This definition of the Arab Middle East includes
Libya, which is one of the North African countries along with Morocco, Tunisia, Algeria, Egypt and Sudan. In
some instances these categories overlap.

\textsuperscript{4} El-Kosheri, Ahmed S. Islamic Law. ICCA Congress Series No. 7 (1996), pp. 494-500, at p. 494: ”The study
of a juridical concept, such as arbitration, reveals the impact of such cultural differences in legal, cultural heritage
on the understanding of the unified applicable rules and their implementation in practice. In more concrete terms,
the quasi-universal adherence to the United Nations New York Convention of 1958 on the Recognition and
Enforcement of Foreign Arbitral Awards, the positive reception of the UNCITRAL Arbitration Rules for the conduct
of arbitration procedures, as well as the increasing number of domestic legislative reforms inspired by the UNCITRAL
Model Law on International Commercial Arbitration, could have been considered sufficient grounds capable of
realizing a uniformity of solutions among all national legal systems prevailing throughout the world. In spite of the
above-stated logical assertion, we are witnessing on many occasions that the same texts containing codified uniform
rules, lead in practice to applications which differ from one country to another due to the continuity of certain
preconceived ideas and the influence of deeply rooted traditions within the domestic forum. This is particularly the
case in the countries where the Islamic legal system prevailed during a period of over twelve centuries and which
still strongly dominates the intellectual and spiritual way of life even in the presence of modern codes following
western patterns.”

\textsuperscript{5} In, Saleh, Nabil. Civil Codes of Arab Countries: The Sanhuri Codes. Arab Law Quarterly, Vol. 8, No. 2
(1983), pp. 161-167, at p. 162: For example, in regards to Egypt’s modern civil code, the following applies: ”The
function that the draftsmen of the Egyptian Civil Code of 1948 intended for the Sharia was to blend a certain
(footnote continued on next page)
order of preference given by each of the selected cases for the use of sharia in place of custom or civil codes, and the instances when ordre public may be privileged. Further discussion of the hybrid nature of the MENA legal systems will follow. A basic understanding of the history of these countries' legal system evolution and reform will be given based on the ensuing comparative legal analysis of Islamic law and ordre public, setting out recommendations that represent a synthesis of the complex interactions between sharia and ordre public in the MENA.

HISTORICAL BACKGROUND

The author argues that legal reform of International Commercial Law in the MENA is marked by four distinct phases which occurred in the form of codification. The first, marked by the codification of sharia into the Ottoman majalla, begins the hybridity process between the French legacy and sharia in which even the majalla was based on French Civil law. Greater French influence characterises the second phase leaving in place a rich legacy of a marked imprint on all the commercial laws of the entire region's countries because of both colonial influences and the implementation of French codes.

number of Sharia principles with the Western legal concepts forming the bulk of the Code. While it cannot be denied that the new law Civil Code contains a number of principles and concepts taken from Sharia law or chosen because they conform to the Sharia, the originality and success of the blending operation, although claimed as being total by some architects of the Civil Code, were not fully conceded."

In, Forte, David F. Studies in Islamic Law. (1999) Classical and Contemporary Application, Maryland, USA: Austin and Winfield, publishers, at p. 195: An excellent analysis of hybridity in the MENA set forth here: "Before the twentieth century, there had already developed an interrelationship between Islamic law and European legal systems. A vital amalgam of Anglo-Muhammadan law has long been in place in the Indian subcontinent, and the French attempted a similar molding in northwest Africa. In the twentieth century, Islamic states themselves absorbed the legal norms and legal codes of Europe. Today, most Islamic states possess a legal system that remains chiefly European in its form."

In, Brown, N. J. (1997) The Rule of Law in the Arab World. Courts in Egypt and the Gulf, Cambridge: Cambridge University Press: "Most countries in the Arab world share comprehensive legal codes, on the Continental Model, that combine elements of French and Islamic law. Court systems are similarly based on centralized and hierarchical civil law models. The culmination of the Ottoman codification effort, the majalla, issued between 1869 and 1877, was intended to be Islamic in content but was based on the code Napoleon."

In, Russel, Brian (ed) (1975) An introduction to business law in the Middle East, London: Oyez publishing, at p. 8: In Tunisia, secular tribunals applied codes enacted by the French and based on Islamic jurisprudence. The basis of the 1906 Tunisian Code of Obligations and Contracts was the 1899 Civil and Commercial legislation, drafted by the jurist David Santilana, and comprised of Islamic and Civil law principles.

Ibid: An example of the French influence in Egypt predates Sanhuri's code, "In Egypt, the Khedive Ismael enacted two civil codes, one to be applied to the mixed courts created in 1875 and the other to the local Egyptian courts, created in 1883. Although the codes contained some principles of Sharia, they were otherwise French codes."

Ibid, at p. 9: In both the case of the Khedive Ismael and the Jurist Sanhuri, "procedure and commercial law were, in most cases, borrowed almost entirely from the West and in most cases from France."

Ibid, pp. 11-12: The Majalla most certainly may have been an inspiration for Sanhuri's code which followed it, given that it was in a sense a harmonisation of a secular civil code with sharia. Indeed, Sanhuri based his reforms on the two codes enacted by the Khedive, as well as the codification of case law from Egyptian courts, and principles from sharia and commercial law.


In, Al Qurashi, Zeyad A. Renegotiation of International Petroleum Agreements (2005) Journal of International Arbitration 22(4); 261-300, at p. 274, "In all Arab states (including Saudi Arabia) the public and administrative law French legal traditions became an integral part of the various domestic legal systems."