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Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?

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ARTICLES

APPLICATION OF THE UNITED NATIONS
CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (CISG)
TO ARAB ISLAMIC COUNTRIES: IS THE
CISG COMPATIBLE WITH ISLAMIC
LAW PRINCIPLES?

Fatima Akaddaf†

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I. INTRODUCTION

The United Nations Convention on Contracts for International Sale of Good (CISG) and the Shari'a (Islamic Law) are areas that unfortunately remain enigmatic to the average American lawyer. This is true even though Islamic law, with civil law and common law, is one of the three major legal systems governing the world and the CISG is one of the most revolutionary treaties in the history of international trade.

Before World War I the study of Islamic law was mainly pursued in the universities of Western Europe. In the United States interest in Islamic law first arose when economic relations with the Middle East became increasingly important, and it was not until 1948 that lawyers in the United States began serious study of the *Shari'a*. Under the auspices of the Arabian American Oil Company, a group of lawyers met in Lenox Massachusetts in September 1948 to discuss Islamic law. This was the first time a Conference on Islamic Law was held in the United States.¹

Islamic Law is usually addressed in American legal education only in the context of what is known as comparative law with an international aspect. At the present time, the state of internationalization of the American legal education is promising, but unfortunately the vast majority of law students continue to graduate from law school without any solid background in comparative or international law.² Professor John Barrett recently addressed two critical questions:

¹ JAMES NORMAN ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* xvi (The Athlone Press ed., 1976).

² John A. Barrett, Jr., *Recent Development: International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U.J. INT'L L. & POL'Y 975, 976 (1997).

[Can] today's students afford to graduate without learning about international law in such a global society?

If international law is imperative, "how do we ensure that students receive it?"³

If these two questions were part of a simplistic quiz, from an internationalist standpoint, my answer to the first question would be "No" and the answer to the second question would be "Start by including international and comparative law on the American bar examinations." Although these responses seem both simple and self-evident, at present it sadly is still utopia.

This unfamiliarity⁴ with international and comparative law can have alarming consequences in the real world when an American lawyer tries to deal with different legal systems and cultures about which he or she knows little or nothing. As an example, the World Bank once sent a delegation including women to negotiate with the Central Bank of Korea. The Koreans were surprised and offended.⁵ For them, the presence of women meant that Koreans were not being taken seriously.⁶ I am also reminded of a personal experience shortly after I came to the United States and met a group of American lawyers dealing with countries around the world. When I asked them to what extent they work with the (CISG) for their clients' transactions, they stated that they were not familiar with such a treaty; they generally work with the Uniform Commercial Code.⁷

As the above discussion suggests, Islamic law and the CISG share some important characteristics, as they both carry an important international component and are both still ignored by

³ *Id.*

⁴ See Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources*, in *REVIEW OF THE CISG* 147 (Cornell Int'l L. J. eds., 1995).

⁵ See FRANK B. CROSS & ROGER LEROY MILLER, *WEST'S LEGAL ENVIRONMENT OF BUSINESS* 138 (2d ed. 1994).

⁶ See *id.*

⁷ [T]o avoid application of the CISG, it is not enough for the contract to designate the law of a specific state. Because the CISG is the law of the land under the supremacy clause, the state law is preempted. Instead, the following language might be used, "this contract shall be governed by and construed under the laws of the state of New York [as an example], not including the 1980 United Nations Convention on Contracts for the International Sale of Goods." HENRY GABRIEL, *PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (U.C.C.)* 11 (Oceana Publications, Inc. 1994).

many practitioners. More than that, both the CISG and Islamic law contain legal principles that are compatible in many ways, as we shall see in the following article. Before addressing these legal principles, it is necessary to introduce the CISG and to introduce Islam, including the cultural and economic environments of Islamic Arab countries parties and non-parties to the CISG.

Understanding Islam as a culture and civilization is imperative for everyone who intends to enter business relationships with Islamic countries. Accordingly, after introducing the CISG, the first part of this paper will focus on the cultural aspects of the Islamic world.

II. THE CISG

The United Nations Convention on Contracts for International Sale of Goods (CISG) applies to international transactions involving the sale of goods and aims to promote international trade by removing legal barriers in transactions between international traders. The importance of the growing body of jurisprudence under the CISG⁸ also demonstrates the need to promote international uniformity.⁹ The CISG does not apply to purchases for personal, family or household use; goods to be manufactured where materials necessary for such manufacture are a substantial part; most matters related to the "validity of the contract;" nor does it apply to claims for personal injury or death.¹⁰ Some scholars¹¹ have characterized the CISG as a "U.C.C. of international sales" for the United States, which means that the United States has now two separate bodies of sales law: Article 2 of the Uniform Commercial Code, which applies to transactions between parties domiciled in the United States,¹² and the CISG which governs sale contracts between

⁸ See *infra* text at note 122.

⁹ See CLAUDE WITZ., *LES PREMIERES APPLICATIONS JURISPRUDENTIELLES DU DROIT UNIFORME DE LA VENTE INTERNATIONALE* (Paris: Librairie Générale de Droit et de Jurisprudence 1995).

¹⁰ Articles 2, 3, 4 and 5 of the CISG. The United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668 (1980) [hereinafter CISG].

¹¹ JOSEPH LOOKOFKY, *UNDERSTANDING THE CISG IN THE USA* 1 (Kluwer Law International 1995).

¹² *Id.*

traders residing in different CISG "Contracting States."¹³ The provisions of the Convention are in many instances similar to those of the U.C.C., but there are variations between the CISG and the U.C.C., which can make an important difference in the rights and duties of the parties to contracts for the sale of goods.¹⁴

The CISG was signed in Vienna in 1980 and became effective on January 1, 1988. Countries like the United States adopted it as the "law of the land" in accordance with the "Supremacy Clause" of the United States Constitution.¹⁵ To date, fifty-eight countries¹⁶ have ratified the CISG, among them four Arab Islamic countries including Egypt on 1 January 1988, Iraq on 1 April 1991, Syria on 1 January 1988, and the new-comer Mauritania on September 1, 2000.¹⁷ This treaty is gaining acceptance on a worldwide level.

¹³ Art. 1 (1) (b) CISG "This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

"(b) when the rules of private international law lead to the application of the law of a Contracting State."

"Pursuant to article 95, the United States will not be bound by subparagraph 1(b) of article 1"

The CISG can also apply in some instances when contracting parties do not have their place of business in different Contracting States if the contracting parties so elect.

¹⁴ See *id.*

¹⁵ Article VI of the US Constitution "All debts contracted and engagements entered into, before the adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding. The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

¹⁶ Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Saint Vincent & Grenadines, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, Zambia.

¹⁷ See *The Institute for International Commercial Law at Pace University School of Law*, at <http://www.cisg.law.pace.edu>

III. CULTURAL ENVIRONMENT IN ARAB ISLAMIC COUNTRIES

A. *The Arab World*

The term "Arabs" is often mistakenly understood as encompassing all Muslims omitting the fact that many Muslim communities are non-Arabs, such as those populations living in Asia, the Pacific regions, and other parts of the world.¹⁸ Therefore, Muslims are not to be confused with Arabs. Statistics reveal that there are nearly one billion Muslims in the world; there are about 200 million Arabs. Among them, approximately ten percent are not Muslims. Thus Arab Muslims constitute only about twenty percent of the Muslim population of the world.¹⁹

Furthermore, the term "Middle East" sometimes includes "North Africa" and refers to the region going from Morocco to Iran. North Africa refers to the area west of Egypt. When North Africa is differentiated from the Middle East, the latter term includes Iran, Turkey, Iraq, Syria, Lebanon, Israel (which is not an Arab country), Jordan, Saudi Arabia, Kuwait, Bahrain, the United Arab Emirates, Qatar, Oman, North Yemen, South Yemen, Egypt, and Sudan.²⁰ Those countries are all part of what is known as the Arab world. This paper refers specifically to those Arab countries, which are Muslim.

B. *Islam - Myths and Realities*

The word Islam literally means "submission" to Allah (God), or submission to the will of God. For members of the Islamic faith, it is improper to call Muslims "Mohammedans," as the Prophet Muhammed does not have a divine status in the Muslim faith in the way that Jesus has in the Christian faith.²¹ The Prophet Muhammed appeared in the seventh century A.D. with the message of Islam. His Arab followers soon expanded

¹⁸ See generally T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG Be Enforced When the Forum is an Islamic State?* 9 INT'L LEGAL PERSP. 25 (1997).

¹⁹ <http://www.ummah.org.uk/what-is-islam/index.html>

²⁰ EUGENE FISHER & CHIEF BASSIOUNI, *STORM OVER THE ARAB WORLD* 1 (Follett Publishing Company 1972).

²¹ See The Arab Information Center, *Arab Civilization, An Introduction to the Arab World*, at <http://www.alhewar.com/ArabCivilization>

the new faith in the West, across North Africa into Spain and France, and in the East, to the borders of China.²² The Qur'an treats Moses, Jesus, and Mohammad as prophets of God as they are His messengers. Also the word Islam derives its root from the word "*Silm*" and "*Salam*" which means peace. *Salam* may also mean greeting one another with peace.²³ In the past three decades, however, many in the Western world have associated Islam with terrorism, violence, violations of human rights, oppression of women,²⁴ and backwardness. These stereotypes are largely the result of misunderstandings surrounding the religion of Islam.

This negative portrayal in the West is not without reason. In the past three decades, the religion of Islam has been often used for the sake of political powers imposed by some interested groups²⁵ under the banner of Islam and justice.²⁶ Women, men, and children are killed every day as a result of political expansionism goals. These goals have nothing to do with the religion of Islam which proclaims peace, justice, integrity, and equality between men and women. In the post cold war era, the American film industry has often portrayed Muslims as terrorists, the "bad guys," "fanatics who recite the Qur'an and perform ablution before blowing up innocent civilians."²⁷ The latest film of this category is *The Siege*²⁸ where Arabs and Muslims are again depicted as the devil that threatens America. As a result, an entire community has been punished because of the reprehensible actions of a minority. Although terrorism exists all over the world, it became for many Westerners associated with the religion of Islam and with Muslims as a whole.

²² *Id.*

²³ See generally *The Islamic Gateway*, at <http://www.ummah.org.uk/> (Providing access to many cites on Islam).

²⁴ See generally FATIMA MERNISSI, *THE FUNDAMENTALIST OBSESSION WITH WOMEN* (Simorgh, 1987).

²⁵ Marjon E. Ghasemi, *Islam, International Human Rights and Women's Equality: Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445.

²⁶ See Marjon E. Ghasemi, *Islam, International Human Rights and Women's Equality: Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445 (1999).

²⁷ Katayoun Beglari, *Hollywood/ Islam* (Voice of America Broadcast, Nov. 11, 1998), available at <http://www.fas.org/irp/news/1998/11/981111-terror.htm>.

²⁸ *Id.*

Understanding Islam would perhaps help in eradicating these negative images. For example, on the matter of women, Islam has brought revolutionary remedies to secure their rights and identity.²⁹ In the pre-Islamic era, women were slaves of their fathers, brothers, or husbands.³⁰ They were bought and sold as any merchandise. The birth of a female child was regarded as a shame and humiliation for her family. Therefore, the female child was buried alive at her birth.³¹ At its inception, Islam vigorously reacted against such cruel and primal practices and elevated the position of women in society by giving them equal rights with men and independent identity.³² In the 19th century, after long controversies the French religious authorities finally reached the conclusion that "a woman is a human being, but made to serve man."³³ In England it was not until 1882 that, for the first time, a British law gave women the right to make decisions on their own earnings, instead of handing them over to their husbands immediately.³⁴ Fourteen centuries ago Islam had given women total financial independence, their right to own and dispose of property without control of any man and to conduct business transactions without having to account to their husbands.³⁵

If today the rights of Muslim women are violated,³⁶ this is a result of "political and economic interests of a male elite, not the dictates of the religion."³⁷ A male elite is responsible for the

²⁹ *The Status of Women in Islam*, Islamic Circle of North America (on-line brochures).

³⁰ *See id.*

³¹ On the Day of Judgment "the female (infant) buried alive, will be asked for what crime she was killed." (Qur'an: 81: 8-9).

³² *See The Status of Women in Islam*, Islamic Circle of North America (on-line brochures).

³³ Sayyid Mujtaba Musavi Lari, *Islam and the Position of Women*, at <http://home.swipnet.se/islam/articles/women.htm>

³⁴ *See id.*

³⁵ Qur'an [4:32, 4:33]

³⁶ *See generally* SHAHEEN SARDAR ALI, GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW- EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? (Kluwer Law International 2000); *see also* Amir Shah, *Taliban Shuttters Widows' Bakeries-Leaders Forbid Women From Working*, HARRISBURG PATRIOT, Aug. 17, 2000, at 4.

³⁷ *See generally* FATIMA MERNISSI, *Beyond THE VEIL: MALE-FEMALE DYNAMICS IN A MODERN MUSLIM SOCIETY* (Albin Michel, S.A., trans. 1987). Mernissi (sociology, U. of Mohammed V, Rabat, Morocco) examines whether Islam is opposed to women's rights by focusing on the early years of Islam and Mohammed's intention of creating an egalitarian society without slaves or sexual discrimination.

denial of rights to women. Islam advocates peace, justice, and equality between human beings, both men and women.³⁸ In Islam, the only criterion for distinguishing among people is righteousness and faith. The Holy Qur'an addressed the issue of equality among mankind in "*Surat 13 -Al Hujurat*" (Verse 13 - The Walls).³⁹ The religion of Islam has certainly nothing to do with disturbing images and violations such as this one that was reported:

A fifty-five-year old woman is walking home, her arms full of groceries. It is hot, and the woman is clearly struggling to hold the groceries and maintain her veil, or *chador*, at the same time. Before she can put it back into place, the *chador* slips back and a single lock of hair appears on the woman's forehead. Immediately, she is arrested and imprisoned. For her "crime" she receives eighty lashes with a whip.⁴⁰

A male-elite created such violations. Unfortunately, these are the images that the Western world sees of Islam everyday.

IV. ECONOMIC ENVIRONMENT OF ARAB COUNTRIES

A. Overview

The writer Fouad Ajami asserts that "the matter of Israel is bound up with the matter of Arab modernity. For modernity to have a chance, the Arab political imagination will have to go

Her work stands as a manifesto for Muslim women who strive for full human rights on the one hand and access to an inspirational religious tradition on the other; she asserts that it is the political and economic interests of a male elite—not the dictates of the religion—that are responsible for the denial of rights to women. See also generally DREAMS OF TRESPASS: TALES OF A HAREM GIRLHOOD (1995); THE FORGOTTEN QUEENS OF ISLAM (1993).

³⁸ The Qur'an 3: 195 states: "Never will I waste the work of a worker among you, whether male or female, the one of you being from the other."

³⁹ Qur'an, 49:13 "O people, we created you from the same male and female, and rendered you distinct peoples and tribes, that you may recognize one another. The best among you in the sight of GOD is the most righteous. GOD is Omniscient, Cognizant." (Translated by Dr. Khalifa Rashad, 1935-1990, who is an Egyptian scientist and scholar who translated the Holy Qur'an and discovered the "Mathematical Miracle" found in the Qur'an. His translation of the Holy Qur'an is considered as one of the best available to us today. See Dr. Rashad's biography at <http://www.submission.org/khalifa.html>.)

⁴⁰ Alison E. Graves, *Women in Iran: Obstacles to Human Rights And Possible Solutions*, 5 AM. U. J. GENDER & L. 57, 57-8 (1996).

beyond the old enmity.”⁴¹ He thinks that Egypt characterizes this move toward modernity because of the country’s deep attachment to culture and reason.⁴² The author refers not only to social and political modernity, but also economic modernity.

It is true that science and technology owe a great debt to the Arabs as George Sarton, the Harvard historian of science, wrote in his *Introduction to the History of Science*:⁴³

From the second half of the eighth to the end of the eleventh century, Arabic was the scientific, the progressive language of mankind . . . When the West was sufficiently mature to feel the need of deeper knowledge, it turned its attention, first of all, not to the Greek sources, but to the Arabic ones.⁴⁴

Unfortunately, today the Arab world carries the heavy burden of a perception of economic backwardness and unfamiliarity with technological progress. Norvell Deatkine described the Arab world, and particularly the Middle East, in these words:

[O]ther than oil and talented people, [the Arabs] produce carpets and pistachio nuts. Their overall economy (minus oil and Israel) equals that of Finland and, with Israel added in it equals that of Belgium . . . Other than in making weapons and ammunition, most of the [Arab] countries are less self-supporting than 25 years ago. But even among the world’s top ten arms importers, seven are Arab nations. In terms of being able to feed their own populations, there has been an increasing reliance on outside food imports - a result of doubling populations and misguided government socialist policies in the last 30 years. While Asia has surged ahead in economic power and Latin America has moved to democracy, nothing similar has occurred in the Middle East.⁴⁵

⁴¹ FOUAD AJAMI, *THE DREAM PALACE OF THE ARABS* xvi (Pantheon Books New York, 1998).

⁴² See *id.*

⁴³ See *Arab Civilization: An Introduction to the Arab World*, at <http://www.alhewar.com/ArabCivilization.htm>

⁴⁴ *Id.* See also GEORGE SARTON, *INTRODUCTION TO THE HISTORY OF SCIENCE* 1-4 (Carnegie Institute of Washington 1931) (1927).

⁴⁵ Norvell B. Deatkine, *The Question Is Not Why We Care But Rather Should We?*, Summer 1999 *PARAMETERS* 141, available at <http://carlisle-www.army.mil/usawc/Parameters/99summer/deatkine.htm>.

Authors like Fouad Ajami link modernity with the process of peace with Israel, but others, such as Deatkine wonder if this relative backwardness is a function of Western imperialism.⁴⁶

B. *Application of Articles 38, 39, and 40 of the CISG to Developing Arab Countries*

If Arab countries are struggling with economic backwardness, what would be the impact on the legal environment? Did the drafters of a treaty like the CISG take into consideration the economic situation in developing countries or the Third World as a whole?⁴⁷ How, for example, would CISG Articles 38⁴⁸ dealing with examination of the goods, 39⁴⁹ dealing with timely notice of lack of conformity of goods, and 40⁵⁰ relating to seller's knowledge of non-conformity, apply to developing countries when dealing with advanced and sophisticated equipment

⁴⁶ See *id.*

⁴⁷ "The Third World consists of a disparate and amorphous group of over 120 African, Asian, and Latin American countries that together account for about seventy percent of the world's population." MIKE MASON, *DEVELOPMENT AND DISORDER: A HISTORY OF THE THIRD WORLD SINCE 1945* 1 (1997) cited in Jeswald W. Salacuse, *From Developing Countries To Emerging Markets: A Changing Role For Law In The Third World*, 33 INT'L LAW 875, 875 (1999).

⁴⁸ Art. 38 CISG:

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

⁴⁹ Art. 39 CISG:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

⁵⁰ Art. 40 CISG "The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."

or products delivered by industrialized partners?⁵¹ In Article 39(2), the Convention reached a compromise by accommodating⁵² third-world buyers and protecting the interests of sellers by imposing a two-year maximum period for notification of lack of conformity of goods, starting from the time of delivery of the goods.⁵³ What happens, however, when a defect of the goods is “hidden?”⁵⁴ In France, remedies for such defects are accommodated by the theory of “*vices caches*” (hidden defects) where the protection of the buyer starts from the time where the defect is discovered, instead of from the time of delivery of the goods.⁵⁵ The theory of “hidden defects” inspired many legal systems of former French colonies or protectorates, such as Morocco.⁵⁶ In developing countries, inspecting and discovering defects in sophisticated goods generally involves the difficult and often expensive quest for qualified experts, sometimes from industrialized countries, especially when dealing with “hidden defects.” It may take more than two years before a defect in sophisticated machinery can be discovered. In this particular instance, does the two-year maximum period mandated by Article 39(2) give enough protection to third-world buyers? The following CISG case may perhaps give an idea about how economic backwardness can affect the application of the rule of law.

In one recent case,⁵⁷ a Moroccan⁵⁸ buyer bought a chemical substance to be used for the production of plastic tubes from a German seller. One month later, the buyer tried to produce the plastic tubes using an old machine (30 years old) bought for this purpose. When the production failed, the buyer sued the seller invoking lack of conformity of the goods. The German court ruled that the buyer was not entitled to rely on lack of conform-

⁵¹ See GABRIEL, *supra* note 7, at 117.

⁵² See *id.*; see also JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* (2nd ed. 1991).

⁵³ See CISG, *supra* note 10, art. 39(2).

⁵⁴ Fatima Akaddaf, *Le principe de la garantie en droit marocain (The Principle of Warranty in Moroccan Law)*, 30 LE JOURNAL DU CONSOMMATEUR 27 (1993).

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ Oberlandesgericht Koblenz (F.R.G.), No. 2U580196, UNILEX (Sept. 11, 1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980911g1.html>.

⁵⁸ Morocco is not party to the CISG.

ity of the goods because it did not examine the goods as soon as practicable under the circumstances and did not give notice of the defects within a reasonable period after delivery (Arts. 38 and 39 CISG).⁵⁹ The court stated that examination of the goods should occur within a week after delivery, and notice of non-conformity of the goods should be given in another week at the most. Invoking Art. 40 of the CISG,⁶⁰ the court also argued that the burden was on the buyer to disclose to the seller that the machinery which it intended to use to manufacture the plastic tubes, was "unusually old" and that seller had no duty to warn the buyer with respect to the type of machinery which should have been used for treatment of the chemical substance delivered by the seller.⁶¹

The German court appears to have shifted the burden to disclose facts related to non-conformity to the buyer by holding that the Moroccan buyer should have disclosed to the German seller that the machinery it intended to use in connection with the chemical substance delivered by the seller was "unusually old" and the seller had no duty to warn buyer about the use of "standard machinery" to process the chemical substance. Accordingly, the German court appears to have erred in interpreting Art. 40, which clearly impose on the seller, not the buyer, the duty to disclose facts related to non-conformity "of which he knew or could not have been unaware."⁶² In another recent case,⁶³ the Stockholm Chamber of Commerce has defined "seller's awareness" of Art. 40 as encompassing "not only conduct amounting to fraud, bad faith or gross negligence, but also cases when the seller consciously disregards facts that meet the eye and are of evident relevance to the non-conformity."⁶⁴

If we apply the terms of Art. 40 to the Moroccan case, we may probably argue that the German seller was not unaware

⁵⁹ See Oberlandesgericht Koblenz (F.R.G.), No. 2U580196, UNILEX (Sept. 11, 1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980911g1.html>.

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² CISG, *supra* note 10, art. 40.

⁶³ Beijing Light Automobile Co. Ltd. v. Conell Limited Partnership (Arbitral award, Arbitration Institute of the Stockholm Chamber of Commerce) (Stockholm, Swed. June 5, 1998) CLOUT case no. 237, UNILEX (1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980605s5.html>.

⁶⁴ *Id.*

that if the Moroccan buyer were to use an “outdated” machine to process the chemical substance, the production would fail. Furthermore, the German seller was a sophisticated trader who should have known that it was dealing with a buyer from a developing country, Morocco, where the economic infrastructure is still undeveloped.⁶⁵ In Morocco, the private sector is mainly formed by small or medium-sized, family-owned businesses that have limited access to human and material resources.⁶⁶ Their management and industrial means are still rudimentary.⁶⁷ It is not surprising under these circumstances that the majority of these private entities rely on “used machinery” for their manufacturing needs. The German seller arguably should have known about the economic environment of the country it was dealing with. Therefore, it should have warned the buyer about the necessity of using “standard machinery” to process the chemical substance. The German court seems to have disregarded the practical realities of the economic environment in Morocco.⁶⁸

V. LEGAL ENVIRONMENT IN THE ARAB ISLAMIC COUNTRIES PARTIES TO THE CISG

Muslim and Western jurists have long recognized the importance accorded to law in Islam.⁶⁹ The internationally renowned Islamic Law scholar Joseph Schacht stated, “Islamic Law is the epitome of Islamic thought the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.”⁷⁰ This importance given to law in the life of Muslims has also been repeatedly emphasized by Muslim jurists such as Abderrahman Ibn Khaldun, the Tunisian historian/philosopher, who said that: “[m]an is by nature a domineering being; and his desire to overcome . . . others, and subdue and coerce them is

⁶⁵ Bachir Hamdouch, *Development and the Problems of the Moroccan Private Sector*, 4 FORUM 2 (Sept. 1997).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ PAULETTE BRISEPIERRE, Sénateur, ACCORD EURO-MÉDITERRANÉEN ÉTABLIS-SANT UNE ASSOCIATION ENTRE LES COMMUNAUTÉS EUROPÉENNES ET LE MAROC (Commission des affaires étrangères - rapport no. 321 - 1996/1997).

⁶⁹ See DAISY HILSE DWYER, *LAW AND ISLAM IN THE MIDDLE EAST: AN INTRODUCTION* 1 (Daisy Hilse Dwyer ed., 1981).

⁷⁰ JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 1 (The Clarendon Press 1964).

the source of wars and trespassing . . . Responding to this force, the law . . . is designed to preserve and protect human society."⁷¹ To fully examine the issues above and to better understand the legal systems applied in Arab Islamic countries, it is necessary to consider the Shari'a (Islamic Law), its sources, and the various schools of Islam to which these countries adhere.

A. *The Shari'a*

The word Shari'a appears in the Qur'an first to mean "path" or "way."⁷² The verb *shar'a* means, "to show, to recommend." The term *Shari'a* has also been used to mean legal prescription.⁷³ In Islam, law and religion are inseparable; both are considered the expressions of God's will and Justice.⁷⁴ The Shari'a deals with Moslem life according to a set of revelations transmitted to the Prophet Mohammed by Allah (God). Islamic law, with its traditions, provides the believers with the right Shari'a ("path"); the Shari'a governs relations between men and between man and God.⁷⁵ It is therefore a divine law made and transmitted by Qur'an scholars or "*Ulama*" or "*Fuqaha*."⁷⁶ Its four principal sources are the Qur'an and the *Sunna*, which are primary, and the *Ijma* (Consensus), and *Qiyas* (reasoning by analogy), which are secondary. There are other sources of less importance such as *istihsan*, equity or juristic preference, *istishab*, presumption of continuity (in juristic reasoning), *istislah* or *maslaha* (opinion based on public interest), *darura* (necessity), and *urf* (custom).⁷⁷

⁷¹ See *id.*

⁷² "Then we put thee on the right way of religion" Qur'an 14:18; see generally FAROOQ HASSAN, *THE CONCEPT OF STATE AND LAW IN ISLAM* (University Press of America 1981).

⁷³ See JACQUES BERQUE, *LE CORAN, ESSAI DE TRADUCTION* (Albin Michel ed., Paris 1995).

⁷⁴ See Majid KADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 3 (The Johns Hopkins University Press 1984).

⁷⁵ See 2 CURRENT LEGAL ASPECTS OF DOING BUSINESS IN MIDDLE EAST- SAUDI ARABIA, EGYPT, AND IRAN (Warren G. Wickersham & Benjamin P. Fishburne eds., Am. Bar Assoc. 1977).

⁷⁶ See ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION- CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* 25, 31 (Syracuse University Press 1990).

⁷⁷ See *id.* 23-6.

1. *The Qur'an, the Holy Book or the Book of Allah*

The Qur'an is a compilation of revelations received by the Prophet Muhammed from God (Allah).⁷⁸ The Qur'an includes 114 chapters or "*sourates*."⁷⁹ Each chapter is divided into different numbers of verses and deals with a variety of subject matters. Even though the Qur'an covers certain fundamental legal rules, it does not deal itself with all the various legal prescriptions. In fact, only about 80 verses, out of a total 6,000 odd *Qur'anic* verses are related to law.⁸⁰ Therefore other sources of law are necessary to supplement the *Qur'anic* rules. To render their judgments, Moslem scholars⁸¹ would first look at the Qur'an, which is the "Islamic Code." When nothing is found there, they would turn to the *Sunna*.

2. *The Sunna or Hadith*

The Arabic verb "*sanna*" means to fashion a thing and produce it as a model. The verb is also applied to model behavior.⁸² *Sunna* is the practice, conduct, and tradition of the Prophet Muhammed. At the beginning of Islam, after the Prophet Muhammed, when any litigation arose, the litigants would refer to the *Qur'anic* verses; but when there was no express provision in the Qur'an, they resorted to the *Sunna*, which was originally taken as the prevailing Arabian customary law.⁸³ As time passed, the *Sunna* became more restricted and was finally taken as the *Tradition*,⁸⁴ speeches, and actions of the Prophet of God, Muhammed, as opposed to being solely tradition in general. The *Sunna* supplements, clarifies, and explains the provisions of the Qur'an. For example, the *Sunna* provides that "Moslems are bound by their stipulations."⁸⁵

⁷⁸ See Mark Cammack, *Islam, Nationalism, and the State in Suharto's Indonesia*, 17 WIS. INT'L L.J. 27 (1999).

⁷⁹ S. H. AMIN, MIDDLE EAST LEGAL SYSTEMS 26 (Royston Limited 1985).

⁸⁰ See *id.* at 26.

⁸¹ See *id.* at 27.

⁸² FAZHIR RAHMAN, CONCEPTS OF SUNNAH, IJTIHAD, AND IJMA IN THE EARLY PERIOD, ISLAMIC STUDIES 1 (1962).

⁸³ See AMIN, *supra* note 79, at 26-27.

⁸⁴ *Id.* at 27.

⁸⁵ *Id.*

3. *Ijma or Consensus of Opinion*

If the *Sunna* also fails to provide guidance for the matter at hand, the judge can turn then to the third source of the Shari'a which is the consensus or *Ijma*. It is an agreement among Islamic scholars of a particular age about the appropriate rule of law applicable to a particular situation.⁸⁶ The *Ijma* is the result of *Ijtihad* or interpretation. *Ijtihad* literally means "hard striving or strenuousness but technically it means exercising independent legal reasoning to give answers when the *Qur'an* and *Sunna* are silent."⁸⁷ *Ijtihad* is generally only permitted in matters not covered by clear and definite text or "*nass*" of *Qur'an* or *Sunna*.⁸⁸ The jurists or "*Mujtahidin*" represent the community at large and reach an agreement on a particular legal matter. The rule agreed upon by those jurists becomes a definite and permanent element of Islamic jurisprudence. The Prophet Mohammed once said, "My nation will not agree unanimously in error."⁸⁹ The *Ijma* will apply when the *Qur'an* and *Sunna* are silent but should not conflict with them.⁹⁰

4. *Qyas or Reasoning by Analogy*

If the *Ijma* also fails to guide the Muslim judge, he would then seek guidance from a more objective standard of the science of analogy, which is the *Qyas*. When there is no appropriate legal authority, or the texts are not clear enough, the Muslim judge is then authorized to apply an accepted principle or an assumption that in his opinion would fit best the issue at hand.⁹¹

B. *Schools of Interpretation in Islam*

There are two major groups of adepts in Islam — the "*Sunnis*" and the "*Shiites*." The *Sunnis* are those who follow the

⁸⁶ *Id.*

⁸⁷ DUNCAN B. McDONALD, DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE & CONSTITUTIONAL THEORY (Premier Book House 1972) cited by AN-NA'IM, *supra* note 76, at 27.

⁸⁸ *Id.* at 28.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Qur'an and the *Sunna*⁹² or *Hadith*. The *Shiites* are those who believe that the best way to understand the truth as proclaimed by the Prophet⁹³ is through the religious leaders or Imams.⁹⁴ There are four Sunnis schools, the *Hanafi*, the *Maliki*, the *Shafi'i*, and the *Hanbali*. These schools were named after their founders Abu Hanifa, Malik Ibnou Anas, Al Shafi'i, and Ahmed Ben Hanbal.⁹⁵ There is also a *Shi'ite* school called the *Jaafari* School.⁹⁶ All of these scholar founders accept the Qur'an as a basic source of law as it presents the Word of God as revealed to the Prophet.⁹⁷ But they disagree as to the supplementary sources of law; hence the creation of four separate schools.⁹⁸

The *Maliki* School requires strict application of the *Sunna* of the Prophet and minimizes the role of opinion.⁹⁹ Mauritania and Morocco are two of the Islamic countries that adhere to the *Maliki* School. The *Hanafi* followers rely on reason and opinion, using analogy and equity as sources of law.¹⁰⁰ The *Shafi'i* tradition tried to reconcile the *Maliki* and *Hanafi* principles; its founder Al Shafi'i has been known as the founder of Islamic jurisprudence.¹⁰¹ He was the first jurist to compile and systematize Muslim sources of law.¹⁰² *Hanafi* and *Shafi'i* traditions are predominant in Egypt.¹⁰³ The fourth is the *Hanbali* School that is well known for its strict adherence to the text of the Qur'an,

⁹² C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE- AN INTERNATIONAL PERSPECTIVE* 48 (St. Martin's Press 1988).

⁹³ *Id.*

⁹⁴ Imam is a leader in prayer; head of the Islamic state; religious leader.

⁹⁵ RODOLPHE J.A. DE SEIFE, *THE SHARI'A- AN INTRODUCTION TO THE LAW OF ISLAM* 36 (Austin & Winfield 1994).

⁹⁶ The Jaafari school constitutes a small minority of Islam. The Shiites differs from the Sunnis over a dispute about the successor to Mohammed (pbuh). See *Islam: An Introduction*, at http://www.religioustolerance.org/isl_intr.htm. Their leaders promote a strict interpretation of the Qur'an and close adherents to its teachings. They believe in 12 heavenly Imams (perfect teachers) who led the Shi'ites in succession. Shi'ites believe that the 12th Imam, the Mahdi (guided one), never died but went into hiding waiting for the optimum time to reappear and guide humans towards justice and peace.

⁹⁷ See Wickersham, *supra* note 75, at 4.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See Wickersham, *supra* note 75, at 4.

and the *Sunna*.¹⁰⁴ Analogy is recognized as a source of *Hanbali* law.¹⁰⁵

C. *Influence of the Civil Law in the Arab Islamic Countries Signatories to the CISG*

The legal systems in Arab Islamic countries may be divided into six main categories which include the pure Islamic legal patterns, civil law, common-law, mixed legal systems, where the law is based on both civil-law and common law rules, socialist legal systems,¹⁰⁶ and Roman Dutch/Portuguese systems.¹⁰⁷ The four Islamic countries that have adopted the CISG belong to the second category called "Civil Law" systems. Legal systems in these Muslim countries are a blend of Western and Islamic influences. Their systems have vividly evolved¹⁰⁸ to suit the needs of their communities with substantial commercial and financial links with the rest of the world.

Egypt, Mauritania, Syria, and Iraq are examples of those Muslim countries that have adopted the continental European pattern, especially the French system based on the Roman law. In these legal systems, the Shari'a embraces only specific areas such as family law and personal status. Therefore, commercial law remains based on modern practices derived from the Napoleonic Code.¹⁰⁹ As an example, in the 19th century, the Egyptian legal system underwent a process of "Westernization" including the adoption in 1883 of modern civil and commercial codes based on the French Code Napoleon.¹¹⁰ In 1948, a new Civil Code was enacted. It attempted to broaden the scope of the Egyptian legal system by including principles imported from Islamic law, Egyptian court decisions under the old Civil Code, and other modern Western codes. Until May 1999, the Civil Code of 1948, the Commercial Code of 1883, and the Code of

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ Lybia opted for a unique socialist pattern called the "Islamic scientific socialism."

¹⁰⁷ S.H. Amin, *Classification of Legal Systems in the Muslim Countries*, 7 ISLAMIC & COMP. L. Q. 93 (1987).

¹⁰⁸ See generally ANDERSON, *supra* note 1.

¹⁰⁹ See generally Chibli Mallat, *Middle East Between Classical Transaction and Modern Law*, 48 AM. J. COMP. L. 81 (2000).

¹¹⁰ *Id.*

Civil and Commercial Procedure of 1968 constituted part of the general framework for commercial transactions within the country.¹¹¹ In May 1999, however, Egypt passed a new commercial law abrogating the law of 1883. The new commercial law entered into force on October 1, 1999 and provided for commercial sales in Articles 88 through 103.¹¹² The new Egyptian commercial law strongly reflects the influence of the CISG provisions.¹¹³ These developments have given Egypt one of the most sophisticated legal structures in the Arab world. The Egyptian legal system like the Syrian, Iraqi, and Mauritanian legal systems has been receptive to both foreign and customary legal principles.¹¹⁴ The legal systems of these countries have followed a movement of modernization that has occurred in most Islamic countries through the influence of European law and has gradually separated commercial law from the Shari'a (Islamic law).

In countries such as Mauritania and other North African countries, particularly Morocco and Algeria,¹¹⁵ this separation has occurred by application of two separate bodies of law referred to as "*droit moderne*" and "*droit musulman*" (modern law and Islamic law). The "*droit moderne*" is based on the French civil law codes and practices. It covers civil and commercial areas in general. The "*droit musulman*" (Islamic law) is dispensed in *Shari'a* Courts presided over by "*Kadis*."¹¹⁶ It governs personal status, family law, and some areas of property law and

¹¹¹ See Wickersham, *supra* note 75, at 5.

¹¹² See Law no.17/1999, O.J. 19 *bis*, (May 17, 1999).

¹¹³ Comment provided in Arabic by Dr. Hossam Abdel Ghany El Saghir, Associate Dean of Menoufia University Faculty of Law for Higher Studies [Egypt], Associate Professor of Law, and visiting Professor at Pace University School of Law during the academic year 1996 - 1997 and the fall semester 1999-2000. Dr. El Saghir is also the founder of the Middle East Center for International Commercial Law, which is linked to the CISG Pace University School of Law website [hereinafter Dr. Hossam Abdel Ghany El Saghir].

¹¹⁴ See Mar S W Hoyle, *Arab Republic of Egypt, Notes on the Legal System*, at <http://www.smlawpub.co.uk/kimes/countries/egypt.cfm>.

¹¹⁵ Tunisia adopted a uniformed legal system abolishing the Islamic courts governing the law of personal status. See James Norman Anderson, *The Tunisian Law of Personal Status*, 7 INT'L & COMP. L. Q. 262 (1958).

¹¹⁶ In Arabic generally the word "Kadi" means "judge." In some countries like Morocco, "Koran scholars" are referred to as "Oulemas" or "Fuquha," and a judge sitting in either modern or Islamic courts is referred to as a "Kadi."

criminal law. The Supreme Court can sit as a Shari'a Court and dispenses Islamic judgments.

Commercial law is the area where the European pattern is most prevalent because of the need to communicate with the rest of the world. Commercial and financial transactions by their nature require flexibility, rapidity, and evolution, which probably cannot be met in the rigidity of some Islamic rules. Those Muslim countries that have opted for application of the Shari'a (Islamic law) in all areas of law, including business law, have rejected non-Islamic legal systems. Among these nations are Saudi Arabia and Iran. The latter adheres to a literal application of Islam as the supreme source of the country's legal structure.¹¹⁷

The advocates of Islam referred to in Western society as "fundamentalists" are moving towards a revival of Islamic law based on the Word of God as it was revealed to His Prophet Mohammad in all aspects of life. The fundamentalists' goal is to apply a unified legal code based on the Shari'a. These movements advocate a return to the Islamic foundations of Muslim society in its seventh-century "Golden Age."¹¹⁸ According to their view, uniformity of the law based on the Shari'a would encompass all areas, including commercial law.

D. *Arbitration in the CISG and Islamic Forums*

Arbitration is a mechanism used only with the consent of the parties but renders binding decisions.¹¹⁹ The expansion and liberalization of international commerce have forced national court systems to modernize their legal processes.¹²⁰ Commercial transactions are by their nature in need of flexibility and rapidity. Therefore arbitration seems to be a better approach for international traders. The success of arbitration is due to the inadequacy of the traditional legal system in handling commercial transactions. Preventing disputes from being litigated reduces delays in rendering decisions.¹²¹

¹¹⁷ See NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURT IN EGYPT AND THE GULF* 258 (Cambridge University Press 1997).

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ See Hiram Chodosh et al., *Egyptian Civil Justice Process Modernization - A Functional and Systemic Approach*, 17 MICH. J. INT'L L. 865, 866 (1996).

¹²¹ *Id.*

In more than ten years of existence, the CISG has realized a growing success in resolving commercial disputes through arbitration. Thirteen countries along with the International Chamber of Commerce and the Iran-U.S. Claims Tribunal have rendered more than 130 arbitral decisions since the entry into force of the Convention.¹²² The CISG case law now exceeds 800 decisions rendered since 1988.¹²³ The continuing development of arbitration in international sales litigation demonstrates the objective of the CISG to remove legal barriers in transactions between international traders and promote international commerce.

The same interest is awarded to arbitration in the Islamic dispute resolution system. Arbitration is deep-rooted in Islamic traditions and culture, where the ultimate arbitrator is Allah. In Islamic jurisprudence, mediation and arbitration are considered better means for dispute resolutions, than the traditional judicial litigation, particularly for commercial disputes.¹²⁴ In the section dealing with the establishment of justice through arbitration, the Qur'an stresses the importance of reconciliation between believers and also the enforcement of judgments rendered by Muslim arbitrators.¹²⁵ If arbitration is deep-rooted in Islamic customs, the next issue would be to what extent Islamic countries enforce foreign judgments and arbitral awards.

The benefits of arbitration over traditional litigation in national courts for parties to international contracts wishing to settle their disputes are well known.¹²⁶ One of these benefits is the existence of multilateral and bilateral international conventions on the recognition and enforcement of foreign arbitral

¹²² These statistics are based on the CISG database, CISGW3, at Pace University School of Law, at <http://www.cisg.law.pace.edu/cisg/text/database.html> (last visited February 2000).

¹²³ *Id.*

¹²⁴ See Salah Al-Hejailan, *Mediation as a Means for Amicable Settlement of Disputes in Arab Countries*, Conference on Mediation (March 29, 1996) at <http://www.arbiter.wipo.int/events/conferences/1996/hejailan.html> (The author, Salah Al-Hejailan, is Chairman, Higher Board, Euro-Arab Arbitration System, and works at the Law Firm of Salah Al-Hejailan (Riyadh & Jeddah, Saudi Arabia)).

¹²⁵ See Qur'an 49: 9-10; Tahir Mahmood, *Law in the Qur'an - A Draft Code*, 7 ISLAMIC & COMP. L. Q. 1 (1987).

¹²⁶ Pierre-Yves Gunter, *Enforcing Arbitral Awards, Injunctions and Orders*, 1998 A.B.A. SEC. INT'L L. & PRAC., Annual Meeting, International Practitioners' Workshop Series, *Enforcement of Arbitration Agreements, Awards and Orders Worldwide*.

awards. The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, which succeeded the 1927 Geneva Convention and the 1923 Geneva Protocol,¹²⁷ is one of the most important multilateral treaties. To date, more than a hundred countries have ratified the New York Convention of 1958.¹²⁸ Among them, eight Arab countries: Djibouti, Egypt, Jordan, Kuwait, Morocco, Saudi Arabia, Syria, and Tunisia. Like the CISG, the New York Convention has achieved great success since its inception.

Although dispute resolution using amicable means is encouraged and protected by the Qur'an, Arab Islamic countries seem to be reluctant towards international arbitration. For example, in Saudi Arabia, the judicial system generally applies Saudi law only, even if the parties have consented to some other law. Also, although Saudi Arabia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on April 19, 1994, the Saudi legal system does not recognize or enforce agreements of foreign jurisdictions.¹²⁹ Iraq and Iran are not signatories of the New York Convention. The Iranian Civil Code and the Execution of Civil Judgments Act of 1977 includes some conditional possibilities for the enforcement of foreign awards.¹³⁰ Iraqi law does not enforce foreign arbitral awards, either under the ICC rules or foreign municipal laws, although there are some exceptions.¹³¹ Syria has adopted a more flexible approach towards enforcement of international arbitration where awards may be enforced if they were final, conclusive and enforceable in the country where given.¹³² In the same way, Egyptian law enforces foreign awards provided that they are not against public policy or morals, or in conflict with Egyptian judgments or awards.¹³³ In some of these countries,

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See Williams, Mullen, *Dispute Resolution In Saudi Arabia Is Base On Islamic Law*, 2 MIDEAST UPDATE 1 (1997).

¹³⁰ JAHANBAKHSH NOURAEI, *GUIDE TO THE IRANIAN MARKET: COMMERCIAL ARBITRATION* (3^d ed. 2000).

¹³¹ See Sabah Al Mukhtar, *Enforcement of Foreign Judgments, Iraq: Notes on the legal system*, Kime's Directory, available at <http://www.smlawpub.co.uk>.

¹³² See *id.*

¹³³ See *id.*

enforcement of foreign judgments and awards encounters delays resulting from procedural difficulties.¹³⁴

VI. INTERPRETATION OF THE CISG IN LIGHT OF ISLAMIC LAW PRINCIPLES

A. *Contract Formation Under the CISG and Islamic Law*

1. *Article 11 of the CISG and Islamic Law of Contracts: Is a Writing Required?*

CISG Article 11 provides that a contract between the parties can be concluded without any writing.¹³⁵ This provision is consistent with the law of contracts as prescribed by Islamic precepts. The Shari'a strongly protects non-Muslims, in most situations, to the same extent as Muslims, especially when dealing with contractual obligations.¹³⁶ The contract is the law of the parties. This illustrates the Arabic expression "*Al 'aqd Shari'at al muta'aqqidin*" (the contract is the Shari'a or sacred law of the contracting parties).¹³⁷ The discussion that follows describes how the law of contracts in Islam, and particularly the contract of sale is relevant to the requirements of Article 11 of the CISG.

Under the Shari'a, two fundamental principles must be observed when dealing with contract formation — the principle of freedom to contract, within the limits of the *Qur'anic* precepts, and sanctity¹³⁸ of the contract. The Muslim jurist Ibn Taimiya

¹³⁴ Wickersham, *supra* note 76, at 2 – 14.

¹³⁵ CISG Article 11: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

¹³⁶ T.S. Twibell, *supra* note 18, at 25.

¹³⁷ See *id.* at 27 fn. 13 (quoting Article 1134 of the French Civil Code "Les conventions légalement formées tiennent loi entre les parties contractantes;" and Sanhoury, *Al Wasit, A Commentary on the New Egyptian Civil Code*, THE SOURCES OF OBLIGATIONS 624 (Masadir Al Iltizam, ed. Cairo)).

¹³⁸ [The] late King Abdul Aziz Ibn Saud, the founder of modern Saudi Arabia, on one occasion gave an audience to F.A. Davies, chairman of the Board of Directors of the Arabian American Oil Company (Aramco), in December 1950. 'Give me your hand, Mr. Davies,' the King said to him: 'You can have confidence in us because our religion and our law make it our bounden duty to keep our pact with you, I have given you my pledge and my peace ('ahdi wa amani). You walk in the length and breadth of my land and enjoy the same security and protection as my own subjects.' The teaching of Muslim law, to which the King referred, expressed in the

referred to these principles by stating that "men shall be permitted to make all the transactions they need, unless these transactions are forbidden by the Book or by the *Sunna*."¹³⁹ Freedom to contract and respect for contractual obligations are therefore basic rules of the law of contracts in Islam. In addition, a contract is complete when there is offer (*ijab*) and acceptance (*qubul*).¹⁴⁰ Unlike in common law tradition, consideration is generally not essential, although in Saudi Arabia, for example, contract law requires an offer, acceptance and consideration.¹⁴¹ Fairness to both parties and reciprocity are also important elements in a contractual obligation; so that, for example, a contract that involves risk or uncertainty even to a party willing to accept it, can be invalidated.¹⁴² Contracts involving uncertainty are called *Gharar* contracts. The objective of *Gharar* is the risk and deception which flow from the lack of consent of the contracting parties when the thing is unknown and uncertain.¹⁴³ *Gharar* technically means "a transaction in which the object of contract or the commodity is not determined for both or either contracting party and thus the contract involves an element of risk and uncertainty."¹⁴⁴ Transactions involving *Gharar* are unlawful in Islam.¹⁴⁵

Islamic Law does not differentiate between a treaty and a contract of civil or commercial law.¹⁴⁶ Muslim scholars consider all these types as agreements, and therefore, they must be respected since God (Allah) is a witness to any contract concluded between contracting parties, either individuals or public

strongest language the two basic principles of freedom and sanctity of contract.

Excerpted from ANDERSON, *supra* note 1, at xi, xii.

¹³⁹ HENRI LAOUST, *LE TRAITÉ DE DROIT PUBLIC D'IBN TAIMIYA*, TRADUCTION ANNOTÉE DE LA SIYASA SHARIAH 167 (1948).

¹⁴⁰ See Weeramantry, *supra* note 92, at 66.

¹⁴¹ See *id.* at 66.

¹⁴² See *id.* at 66.

¹⁴³ See Yusuf Kassim, *Ataamoul Attijari fi Miizan Ashari'a (Commercial Dealings in Light of the Shari'a)* 252, 253, (Dar Annahda Al Arabia 1986), (in Arabic.); see also IMAM MALIK, *AL MUWATA* 412 (Ashaa'b Publishing) (Citations provided in Arabic by Dr. Hossam Abdel Ghany El Saghir, *supra* note 113). English translations of many of Malik's writings are available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muwatta/>.

¹⁴⁴ *Islamic Glossary*, at <http://www.ummah.org.uk/science/dictionary.htm>

¹⁴⁵ See *id.*

¹⁴⁶ See ANDERSON, *supra* note 1, at xv.

entities.¹⁴⁷ The Qur'an repeatedly refers to the respect of contractual obligations in a peremptory language such as "Be faithful to your pledge to God when you enter into a pact"¹⁴⁸ or "O you who attained to faith! Fulfill your bonds"¹⁴⁹ The "bonds" (in Arabic "*aqd*"; pl. "*uqud*") which the Qur'an orders followers to observe and fulfill include all types of contracts whether bilateral, multilateral, or any unilateral obligation to which one binds him or herself.¹⁵⁰ The term also covers any commitment towards God or any commitment in areas of private law, especially the civil and commercial branches.¹⁵¹ This also applies to various areas of constitutional, administrative, financial, and international law.¹⁵²

Of all types of contracts, the contract of sale is the most important in Islamic law.¹⁵³ All other contracts are patterned after it.¹⁵⁴ Islamic law texts on the book of sale state that the basis of sale is the exchange of a desired commodity against another commodity. This exchange can be done by word or by deed. The Qur'an has expressed a strong recommendation that a contract be in writing as stated in the following verses: "Do not avoid preparation of an agreement whether the stipulated period is short or long, it will be just in sight of God, stronger in evidence and better to rule out doubts."¹⁵⁵ "No scribe whom God has taught to write shall refuse to write the agreement."¹⁵⁶ In some circumstances the Qur'an is even more explicit about written documents. It states: "When you contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you . . . Be not averse to writing down whether [the amount] be small or great, with its term."¹⁵⁷

¹⁴⁷ See *id.*

¹⁴⁸ See LAOUST, *supra* note 138, at 445, cited by ANDERSON, *supra* note 1, at xv.

¹⁴⁹ Qur'an 5:1.

¹⁵⁰ See FATHI OSMAN, CONCEPTS OF THE QUR'AN- A TOPICAL READING 886 (MVI Publications 1997).

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81 (2000) [hereinafter *Commercial Law in the Middle East*].

¹⁵⁴ See AMIN, *supra* note 79, at 181.

¹⁵⁵ Qur'an II:282.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Muslim jurists, however, interpreted the above *Qur'anic* injunction as a simple recommendation and considered that written documents are not enjoined as a duty, nor are they forbidden.¹⁵⁸ For example, Shari'a countries like Saudi Arabia do not absolutely require that contracts be in writing, although it is strongly encouraged by the law. When a writing is involved, it should be formally witnessed by two males or a male and a female. The majority view among contemporary scholars in Islamic countries is to adhere to the doctrine that formally enforces all private contracts regardless of their formal specifications.¹⁵⁹

Therefore an oral agreement seems to be admissible and enforceable according to the Shari'a. In this respect, the Qur'an provides: "In the case of imminent transaction, there is no harm if it [the contract] is not entered through a written agreement . . . But in the case of a commercial transaction there must be witnesses."¹⁶⁰

Testimonial evidence is fundamental in Islamic Law and in a commercial transaction it is a strong proof of the existence of the transaction between the parties. Likewise Article 11 of the CISG states that the contract "may be proved by any means, including witnesses." The majority view amongst Muslim scholars inferred from the above verse (Qur'an 2:282 -*The Heifer*) is, however, that witnesses in commercial transactions are not required.¹⁶¹ According to this view, reference to witnesses in the said verse is only provided as guidance for the parties about what is most appropriate for their relations.¹⁶² The minority view asserts that the *Qur'anic* verse makes it mandatory to have witnesses in commercial transactions.¹⁶³

2. "Parol Evidence" Rule Under the CISG and Islamic Law

Article 8(3) of the CISG provides:

¹⁵⁸ See AHMED IBN MOHAMMAD AL TAHAWI, *THE FUNCTION OF DOCUMENTS IN ISLAMIC LAW* 6 (1972).

¹⁵⁹ See AMIN, *supra* note 79, at 181.

¹⁶⁰ Qur'an 2:282; see also Tahir Mahmood, *supra* note 124, at 1.

¹⁶¹ AL JASSASS, *AHKAM AL QUR'AN* (Citation and comments provided in Arabic by Dr. Hossam Abdel Ghany El Saghir, *supra* note 113).

¹⁶² See *id.*

¹⁶³ See *id.*

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The CISG and the Shari'a give particular importance to testimonial evidence, usages, and conduct of the parties between themselves in order to prove the existence of a contractual relationship. Again the Qur'an uses peremptory language to prohibit interference with evidence. "Do not suppress evidence; one who suppresses it is a sinner at his heart; and God knows all that you do."¹⁶⁴

As discussed above, formalism of contracts is helpful in commercial transactions but not mandatory in Islamic Law. Muslim jurists agree with one another that written documents are useful support for oral testimonies because they help keep the debtor and creditor from forgetting the terms of their agreement.¹⁶⁵ This approach gives supremacy to the oral agreement, which becomes the primary form of proof in the Shari'a. This fully contradicts the provisions of the American Uniform Commercial Code Section 2-202 dealing with the "Parol Evidence" Rule¹⁶⁶ but fits the requirements of Article 8 of the CISG reproduced above.

As noted above, the witness system is very strong in the law of Islam. If the Qur'an commands written evidence, it also strongly recommends the evidence of witnesses who would confirm the existence of written documents. The witness system has its roots in the pre-Islamic era where witnesses were of common use in civil, commercial and criminal matters.

¹⁶⁴ Qur'an 2:283.

¹⁶⁵ 1-4 THE ENCYCLOPEDIA OF ISLAM 1913-38 (Leiden ed., 1978).

¹⁶⁶ Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) course of dealing or usage of trade [Section 1-205] or by course of performance [Section 2-208]; and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.C.C. § 2-202.

3. *Lex Mercatoria: Trade Customs in Islamic Law and the CISG*

When dealing with international trade usage or practice, Article 9 of the CISG provides that:

- (1) The parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

In the same manner, Islamic Law stresses the importance of usage in commercial transactions, which is one of the minor sources of the Shari'a. The role of commerce is central and deep-rooted in the Muslim civilization. The requirements provided by the Qur'an regarding commerce include contracts, the necessity of their certainty, ethics, the necessity of honoring one's obligations and putting them in writing,¹⁶⁷ and the strict prohibition against usury (*riba*).¹⁶⁸ The free movement of goods is a key element for national and international commerce. Nowadays, to encourage foreign investments and international trade between themselves¹⁶⁹ and the rest of the world, Arab countries have established various treaties and regulations.¹⁷⁰ The importance of centrality of commerce can be illustrated by the fact that the Prophet Muhammed himself started his career as a caravan

¹⁶⁷ *Commercial Law in the Middle East*, *supra* note 152, at 81.

¹⁶⁸ "God has allowed commerce and prohibited *riba*," Qur'an 2:275.

¹⁶⁹ On February 1989, the Arab Maghreb Union (A.M.U) was founded in Marrakech, Morocco. This organization brought together the five countries of North Africa: Algeria, Libya, Mauritania, Morocco, and Tunisia. Although the Maghribi countries had long sought union, the expansion of the European Community to include Greece, Spain and Portugal threatened Maghribi markets in Europe and was the cause for the formation of the Union. Currently, the A.M.U.'s effects are primarily economic. It seeks free movement of individuals, goods, services and capital among the member nations, and it sponsors joint planning of strategy for trade with the European Community. In addition, the A.M.U. seeks joint development of the region and educational and cultural cooperation. See LIEUTENANT COLONEL CHEDLY KHEDIMI, INTERNATIONAL FELLOW, TUNISIA - THE ECONOMY OF THE ARAB MAGHREB UNION, US ARMY WAR COLLEGE, CARLISLE BARRACKS (1991).

¹⁷⁰ See generally 1-4 ISLAMIC ENCYCLOPEDIA, *supra* note 164.

merchant and had a commercial partnership with his wife.¹⁷¹ The sanctity of the contract of sale is the corollary of commerce along with the security of long-distance trade and market respect in Islamic Law.¹⁷² To facilitate commercial transactions between merchants, custom and trade practices played an important role in business relations in early Islam, and jurists have described it as a decisive source in the law of merchant. Muslim scholars like Sarakhsi stated that the law ultimately chooses what will facilitate people's lives.¹⁷³ He described how the custom and trade practices help merchants better deal with their transactions by saying "What matters is the *urf* (custom)."¹⁷⁴

4. *Good Faith in Islamic Law and the CISG*

The notion of good faith provided by article 7(1)¹⁷⁵ of the CISG complies in many ways with the Qur'anic provisions. The Qur'an stresses honesty and intention of the parties bound by pacts including commercial agreements. As an example, the following verse commands people to be honest in their transactions and lives. Human beings will be judged according to their intentions whether right or wrong. The verse addresses people as follows:

And do not allow your oaths in the name of God [frequently and hastily pronounced to thus] become an obstacle to acts of virtue and righteousness and reconciliation of people; surely God is All-hearing, All-knowing. God will not hold against you a slip in your oaths, but He will hold you responsible [only] for what your hearts have earned [intentionally] and God is All-forgiving, Forbearing.¹⁷⁶ God will not hold against you [an unintentional] slip in your oaths; but He will [only] hold you responsible for such oaths, which you have earnestly. . .¹⁷⁷

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ *Id.*

¹⁷⁵ Article 7 (1) CISG "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

¹⁷⁶ Qur'an 2:224-25.

¹⁷⁷ Qur'an 5:89.

In the chapter dealing with the law of commerce and trade, the Qur'an strictly prohibits fraud and fraudulent dealings. From this prohibition flows an obligation of good faith in commerce in general. The Qur'an provides: "Woe to the fraudulent dealers, who exact full measure from others, but give less than due to others in weight and measure, do they not know that they will be called to account, on a mighty day."¹⁷⁸

According to the Shari'a, good faith in commercial dealings is a primary obligation; and those merchants who resort to dishonesty and falsehood shall be punished.¹⁷⁹ In this respect the Prophet Mohammed said: "The merchants will be gathered on the Resurrection day as transgressors except those who were fearful of Allah, pious and truthful."¹⁸⁰

Imam Malik stated in his book *Al Muwatta* that once a man mentioned to the Prophet Mohammed that he was always being cheated in commercial transactions.¹⁸¹ The Prophet said to him "When you enter a transaction, say, 'no trickery.' So whenever that man entered a transaction, he would say, 'No trickery.'"¹⁸² Accordingly, Islam encourages commercial activities provided they comply with the Shari'a principles. It is a primary duty for mankind to strictly respect good faith in all aspect of their commercial transactions.¹⁸³

As Dr. Koneru stated, "good faith" under the CISG is a broad concept, and it applies to all aspects of the interpretation and application of the provisions of the Convention.¹⁸⁴ The principle of good faith includes not only concepts such as "reasonableness" or "fair dealing"¹⁸⁵ but also the "duty to disclose defects" relating to non-conformity by the seller as mandated by

¹⁷⁸ Qur'an LXXXIII:1-5; see also generally Mahmood, *supra* note 124

¹⁷⁹ Mohd. Ma'sum Billah, *Doctrine of 'Utmost Good Faith' In Takaful (Islamic Insurance): A Regulatory Framework*, at <http://www.islamic-finance.net/islamic-insurance/articles/t/goodfaith.html>

¹⁸⁰ See *id.*

¹⁸¹ See Imam Malik, *Al Muwatta*, *supra* note 142.

¹⁸² See *id.* at Book 31, Number 31.45.99: Section dealing with Business Transactions In General.

¹⁸³ See Billah, *supra* note 179.

¹⁸⁴ Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105 (1997), available at <http://www.cisg.law.pace.edu>. VIII.

¹⁸⁵ *Id.*

Article 40.¹⁸⁶ Such a suggestion is also relevant to Islamic precepts where observance of good faith includes disclosure of defects relating to goods sold and also refraining from misrepresentation, concealment, and fraud in commercial transactions.¹⁸⁷ This is illustrated by the following *hadith*, which states: "Uqba bin Amir said: It is illegal for one to sell a thing if one knows that it has a defect, unless one inform the buyer of that defect."¹⁸⁸

It appears that the obligation of good faith is "presumed"¹⁸⁹ throughout the text of the CISG.¹⁹⁰ Furthermore, "good faith" sometimes acts as a safeguard preventing buyer's speculation at seller's expense by requiring buyer to mitigate losses or by limiting the right to specific performance.¹⁹¹ Similarly, in the Shari'a, there is a presumption of good faith in all transactions. The same principle inspired the Moroccan Code of Obligations and Contracts, which states that: "good faith is always presumed as long as the contrary is not proven,"¹⁹² and every undertaking shall be executed in good faith.¹⁹³ An obligation performed in good faith is binding not only as to its nature but also as to its consequences resulting from law, usage or equity.¹⁹⁴

¹⁸⁶ See *Beijing Light Automobile Co. Ltd. v. Conell Limited Partnership*, (Arb. Inst. Stockholm Ch. Comm. (Swed.)), CLOUT case no. 237, UNILEX (5 June 1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980605s5.html>.

¹⁸⁷ See *id.*; see also Billah, *supra* note 179.

¹⁸⁸ *Id.*

¹⁸⁹ The Moroccan Code of Obligations and Contracts uses the word "presumed" by stating that good faith is presumed in all obligations.

¹⁹⁰ Koneru, *supra* note 184.

¹⁹¹ John Fitzgerald, *Recent Development Relating To CISG: CISG, Specific Performance, And The Civil Law of Louisiana and Quebec*, 16 J.L. & COM. 291, (1997) (citing JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 276 (2d. ed. 1991)).

¹⁹² CODE DES OBLIGATIONS ET CONTRATS (Morocco), art. 477.

¹⁹³ *Id.* art. 431.

¹⁹⁴ See *id.*

B. *Specific Performance in Islamic Law v. Civil Law, the CISG, and Common Law*

1. *Definitions and Terminology in Civil Law and Common Law Systems*

Specific performance requires highlighting some differences in terminology between civil law and common law systems. In civil law codes, the term "creditor" is used as equivalent of "non-breaching party" or "obligee." In the American common law system, the term "debtor" refers to the "breaching party" or "obligor."¹⁹⁵ Civil law countries do not view the theory of specific performance the same way the common law systems do. As an example of civil law systems, French law departs from the idea that an obligation must be performed in kind (*exécution en nature*) and that the law will, if necessary, enforce that performance (*exécution forcée*).¹⁹⁶ The expressions *exécution en nature* (performance in kind) and *exécution forcée* (enforced performance) are sometimes used interchangeably by some civil law scholars to refer to the notion of specific performance as viewed by common law practitioners.¹⁹⁷ According to this principle, Article 1144¹⁹⁸ of the French civil code permits the creditor to perform the obligation himself when the debtor defaults.¹⁹⁹ Such a performance by the creditor is done at the debtor's expenses.²⁰⁰ Under Article 1144, the creditor may also be permitted to request performance by a third party. On the other hand, if the promise under the contract involves an obligation of *ne pas faire* (not to do), and if the debtor performs such an obligation, which contravenes the promise under the contract, the creditor is entitled to have what has been done in breach of the obligation destroyed at the ex-

¹⁹⁵ See Fitzgerald, *supra* note 191.

¹⁹⁶ BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 216 (2d ed., Clarendon Press Oxford 1992).

¹⁹⁷ See WITZ, *supra* note 9, at 84; FRANCOIS-PAUL BLANC & RABHA ZEIDGUY, *CODE DES OBLIGATIONS ET CONTRATS* 523 (Socheppress-Université 1994).

¹⁹⁸ Article 1144 of the French Civil Code involves obligations to do something. It may also be applicable to obligations to give something. See NICHOLAS, *supra* note 199, at 217.

¹⁹⁹ CODE CIVILE (Fr.), art. 1144: "Le créancier peut aussi, en cas d'inexécution être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur."

²⁰⁰ *Id.*

pense of the debtor.²⁰¹ Such a possibility does not exist in common law where the breaching party must perform the obligation himself.

At Common law, specific performance is an equitable relief, which is awarded whenever the subject matter of the contract is unique and money damages are inadequate to compensate the non-breaching party. The equity court forces the breaching party to specifically perform himself according to his promise under the contract. Failure to perform is a contempt of court and may result in fines or imprisonment.²⁰² The American Uniform Commercial Code addresses the issue of specific performance in § 2-716. According to this section, specific performance is awarded to the buyer when the goods are unique or in other circumstances.²⁰³ An order for specific performance may include the payment of the price, damages or anything the court sees appropriate. The buyer has also the right of replevin against the goods.²⁰⁴

2. *Specific performance in Islamic Law*

According to the Shari'a, all contractual obligations must be specifically performed. This idea is deep-rooted in the concept of sanctity of contracts in Islam.²⁰⁵ The same principle is applied by civil law countries, which regard the sanctity of con-

²⁰¹ *Id.* art. 1143: "Néanmoins, le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérêts, s'il y a lieu."

²⁰² *Nayiri Boghossian, A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods, in REVIEW OF THE CISG 1999-2000* (Pace International Law Review eds., 2000).

²⁰³ U.C.C. § 2-716: (1) Specific performance may be decreed where the goods are unique or in other proper circumstances. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just. (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

²⁰⁴ *See id.*

²⁰⁵ *See* SAYED HASSAN AMIN, *COMMERCIAL LAW OF IRAN* 64 (Vahid Publications 1986) [hereinafter *COMMERCIAL LAW OF IRAN*].

tracts "as . . . implying the claim for performance."²⁰⁶ The injunctive language of the Qur'an illustrates the authoritative power of the sanctity underlying the fulfillment of obligations. It provides, among other things, ". . . you must fulfill your agreement; for every agreement you are accountable."²⁰⁷ This is also the basis of the cardinal principle of Islamic contract law "ufu bil ukud" (fulfill your contracts).²⁰⁸ The Traditions (Sunna) of the Prophet Mohammed were also based on such a principle where all agreements shall be specifically performed unless performance contravenes the Islamic code of conduct or is against public policy of the law.²⁰⁹

In resolving the issue of specific performance in Islamic law, there is a split of authority. Some Muslim jurists state that breaching an obligation is, by itself, contrary to the Islamic code of conduct.²¹⁰ Therefore, the Muslim judge shall force the breaching party to perform.²¹¹ On the other hand, other Muslim scholars assert that breaching a private contract violates only the personal rights of the creditor in the contract; it does not violate duties owed by men to God or the Muslim society as a whole.²¹² These scholars conclude that specific performance would be imposed only when the breach of contract involves not only the personal rights of the debtor but also duties owed to Allah (God) or the Muslim community as a whole.²¹³ This trend asserts, however, that if the breach of contract involves no more than some financial losses, the non-breaching party does not have an absolute right to specific performance.²¹⁴

These scholars also argue that if imposing specific performance on the breaching party is unreasonable, or if it results in hardship because his/her loss would be greater than the harm suffered by the non-breaching party, then the right to specific performance should be limited by the principle of *la darar* (no

²⁰⁶ John M. Catalano, Comment, *More Fiction Than Fact: The United Nations Convention On Contracts For The International Sale of Goods*, 71 TUL. L. REV. 1807 (1997).

²⁰⁷ Qur'an XVII:34; see also COMMERCIAL LAW OF IRAN, *supra* note 205, at 64.

²⁰⁸ COMMERCIAL LAW OF IRAN, *supra* note 205, at 64.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See COMMERCIAL LAW OF IRAN, *supra* note 205, at 64.

harm).²¹⁵ In Islamic contract law, the principle of *la darar* is based on equity and equal bargaining power of the contracting parties. The principle of *la darar* conveys the ideas that no one shall be harmed and that there will be no abuse of rights in a contractual relationship.²¹⁶ The same principle is reflected in the civil law of Louisiana where granting specific performance is discretionary to the court.²¹⁷ The Supreme Court of Louisiana held that even where specific performance may be an available remedy, in cases where granting such a relief would be more harmful to the breaching party than the damages to the non-breaching party, specific performance would be denied.²¹⁸ Using its discretionary power, the court held that specific performance is denied if "it is impossible, greatly disproportionate in cost to the actual damages caused, no longer in the creditor's interests, or of substantial negative effect upon the interests of those third parties."²¹⁹ This concept also reflects the approach taken by the German law where specific performance is not enforced when performance would require "unreasonable effort or expenses."²²⁰

Statutory laws of many Islamic Countries, especially those inspired by the Napoleon Code, handled the issue of specific performance in different ways. The Iranian Civil Code, for example, views specific performance as a secondary remedy.²²¹ Therefore, the judge is authorized to order the breaching party to do or not to do something.²²² Article 268 of the Iranian Code provides that "the performance of an act, when it has been stipulated that it should be done by a party to the contract, cannot be effectuated by another person except by consent of the obligee." The Iranian Code joins to some extent the Moroccan Code of Obligations and Contracts in that another person cannot replace a party who is obligated to perform an act unless the obligee consents to such a substitute. The issue of specific

²¹⁵ See *id.* at 65.

²¹⁶ See *id.* at 68.

²¹⁷ See William Jaynes, Note, *Obligations—Specific Performance of Obligations To Do Or Not To Do In Louisiana*, 57 TUL. L. REV. 1577 (1983).

²¹⁸ See *id.*

²¹⁹ *Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So.2d 896 (LA 1981).

²²⁰ Fitzgerald, *supra* note 191.

²²¹ See COMMERCIAL LAW OF IRAN, *supra* note 205, at 65.

²²² See *id.*

performance is addressed in the Moroccan Code of Obligations and Contracts (referred to as the D.O.C., Dahir des obligations et contrats) in articles 236, 259, and 261. The Moroccan Code recognizes specific performance as a primary remedy. It refers to it as "*exécution forcée*" (enforced performance). Article 236 states that the debtor shall perform the obligation either personally or by means of another person.²²³ He must execute it personally when: a) the contract expressly states so.²²⁴ In this case another person cannot replace the debtor b) the nature of the contract or the circumstances surrounding the obligation impliedly call for a personal performance.²²⁵ Article 236 gives the example of a personal services contract requiring special skills.²²⁶ Article 259 also stresses the fact that "the creditor has the right to force the debtor to perform his obligation."²²⁷ This idea of forcing the debtor derives from the traditional Islamic view of *Ijbar*, or constraint imposed by the judge, on the debtor in case of breach.²²⁸ An exception is, however, expressed in Article 261 of the D.O.C., which states that every obligation to do or not to do resolves itself into damages in case of non-performance by the debtor.²²⁹ This means by implication that there is no compulsion against the person of the debtor in contrast to the contempt of court or imprisonment available in the English system.²³⁰ The French and Moroccan civil codes, however, created a device by which the defaulting party may be compelled to perform his obligation under the contract. Such a device is called *astreinte*.²³¹ It is a monetary penalty for delayed performance determined by the court and paid for each day of delay in performance by the defaulting party.²³² In Moroccan law, the *astreinte* is particularly applied to personal services con-

²²³ See DAHIR DES OBLIGATIONS ET CONTRATS (Morocco), at art. 236.

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ DAHIR DES OBLIGATIONS ET CONTRATS (Morocco), at art. 259.

²²⁸ See COMMERCIAL LAW OF IRAN, *supra* note 205, at 64.

²²⁹ Article 261 of the MOROCCAN CODE OF OBLIGATIONS AND CONTRACTS is similar to Article 1142 of the French Civil Code, which states "Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur."

²³⁰ See NICHOLAS, *supra* note 196, at 216.

²³¹ See *id.*

²³² See DIDIER MARTIN, DROIT CIVIL ET COMMERCIAL MAROCAIN 122 (Al Madaris, 6ème ed., 1990).

tracts.²³³ As to compulsion against the person of the debtor in Islamic law, the Sunni school allows civil imprisonment as a means to force the breaching party to pay his debt.²³⁴ Article 490 of the Moroccan Code of Civil Procedure expresses this view by stating that imprisonment for civil debts is available only after an injunction for enforced performance (*exécution forcée*) has been ordered by the judge and not honored by the defaulting party.²³⁵ By contrast, the Shiite School does not recognize civil imprisonment as a remedy for breach of contract.²³⁶ After we have reviewed the various concepts involved in specific performance from civil law, common law, and Islamic law perspectives, it would be relevant to see how the drafters of the CISG accommodated these legal systems on the matter of specific performance.

3. *Specific Performance under the CISG*

Specific performance is addressed in Articles 46,²³⁷ 62,²³⁸ and 28²³⁹ of the CISG. Article 46 and 62 deal respectively with

²³³ See *id.*

²³⁴ See COMMERCIAL LAW OF IRAN, *supra* note 205 at 66.

²³⁵ See ABDELLAH BOUDAHRAIN, MANUEL DE PROCEDURE CIVILE 181 (Casa-blanca 1986).

²³⁶ See COMMERCIAL LAW OF IRAN, *supra* note 205, at 67.

²³⁷ (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy, which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

CISG, *supra* note 10, art. 46

²³⁸ "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement." CISG, *supra* note 10, art. 62.

²³⁹ "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." CISG *supra* note 10, art. 28.

buyer's and seller's right to compel performance. Article 28 restricts granting specific performance. It states that the court is not required to grant specific performance unless it would do so under its own law in respect to similar contracts not governed by the Convention.²⁴⁰ As in civil law and Islamic law, the CISG requires that the contracting parties specifically perform their obligations. Article 46 and 62 express this principle. Therefore, in contrast to the common law, specific performance is a primary remedy under the CISG.

In the drafting process of the CISG, it was a difficult task to create a uniform law that could be accepted by a large number of countries with different legal systems and diverse political and economic policies.²⁴¹ As to the concept of specific performance, the drafters of the CISG finally reached a compromise through article 28, which was meant to satisfy common law countries.²⁴² Many scholars view the sentence "judgment of specific performance" as vague.²⁴³ These scholars argue that the meaning given to specific performance may vary depending on whether a civil law practitioner or a common law practitioner is reading it.²⁴⁴ The purpose of the CISG is, however, to promote uniformity by creation of a uniform law that applies to all countries regardless of what specific concepts mean under their domestic legal systems.²⁴⁵ Therefore, specific performance should be understood according to the CISG meaning. The convention should be interpreted as an international treaty, and domestic laws should not influence lawyers when dealing with concepts such as specific performance. Through the negotiating process, the drafters of the CISG tried to satisfy different blocks by reaching compromises in various concepts. Therefore, the CISG should be read according to the meaning intended by its drafters not under domestic law perspectives. As an interna-

²⁴⁰ See *id.*

²⁴¹ See Alejandro Garro, *Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, cited by Boghossian, *supra* note 202, at 8.

²⁴² See *id.*

²⁴³ See Fitzgerald, *supra* note 191.

²⁴⁴ See *id.*

²⁴⁵ See generally Amy H. Kastely, *The Right to Require Performance In International Sales: Towards An International Interpretation of the Vienna Convention*, 63 WA. L. REV. 607 (1988).

tional convention, the CISG should be segregated from domestic laws and interpreted independently.²⁴⁶

Specific performance as interpreted in light of Islamic law appears to be compatible with the principles set forth by the Convention. For example, regardless of the broad scope of Article 46, which provides for the buyer's right to compel performance, Article 28 is a direct restriction of buyer's rights by which the court is not required to grant specific performance.²⁴⁷ On the other hand, the buyer's right to require performance is also indirectly limited by Article 7, which requires that all remedies be effectuated in good faith.²⁴⁸ The requirement of good faith indirectly prevents the buyer from forcing the seller to perform when it would be onerous or unreasonable to do so.²⁴⁹ On the one hand, the second sentence of Article 77²⁵⁰ seems to limit its scope to claims for damages. This view finds support in the legislative history of Article 77.²⁵¹ On the other hand, when one seeks specific performance, domestic law considerations can come into play via Article 28. Under various domestic doctrines, if a party fails to mitigate, this can prejudice a claim for specific performance.²⁵² Although some scholars disagreed about this point, mitigation of loss may also be regarded as a limitation to specific performance.²⁵³ The idea of restriction of specific performance in the CISG generously joins the famous Islamic principle of *la darar* discussed above, which dictates that specific performance should not apply when forcing the breaching party to perform would be more harmful than the loss suffered by the aggrieved party.

²⁴⁶ See *id.*

²⁴⁷ Fitzgerald, *supra* note 191.

²⁴⁸ CISG, *supra* note 10, art. 7.

²⁴⁹ Fitzgerald, *supra* note 191.

²⁵⁰ Article 77 CISG:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

²⁵¹ Comment provided by Professor Albert Kritzer, Executive Secretary, Institute of International Commercial Law Pace University School of Law.

²⁵² See *id.*

²⁵³ See *id.*

C. *Statute of Limitations*

1. *The U.N. Convention on Limitation Period and the CISG*

The United Nations Convention on the Limitation Period in the International Sale of Goods of 1974, as amended by Protocol in 1980 (the "Limitation Convention"), entered into force in August 1988.²⁵⁴ As of November 2000, there were 17 States party to the amended Limitation Convention of 1974.²⁵⁵ The Convention is published in Chinese, English, French, Russian, and Spanish, but not Arabic, while the CISG is published in the six official languages including Arabic.²⁵⁶ So far Egypt is the only Islamic Arab country party to the Limitation Convention.

The purpose of the Limitation Convention was to eliminate disparities in the national laws governing limitations on legal proceedings arising from contracts for international sale of goods.²⁵⁷ It was intended to operate concurrently with the CISG in order to provide uniformity in the area of international sale of goods.²⁵⁸ The Convention on the Limitation Period in the International Sale of Goods set forth uniform provisions relating to the time within which legal proceedings arising from international sales must be commenced.²⁵⁹ The Convention also operates as a supplement to the CISG, which does not address the issue of statute of limitations. The CISG and the Limitation Convention replace national laws relating to international contracts for the sale of goods. Therefore, it is important for the drafters of international contracts to consider the crucial impact of both the CISG and the Limitation Convention on commercial transactions with other countries.²⁶⁰ Both conventions will be binding on the international contracting parties unless they choose to opt out according to Article 6 for the CISG and Article 3(b)(2) for the Limitation Convention.

²⁵⁴ Anita Esslinger, *Contracting in the Global Marketplace: The U.N. Conventions on Contracts for the International Sale of Goods and the Limitation Period in the International Sale of Goods*, SF 24 ALI-ABA 61 (2000).

²⁵⁵ See <http://www.jus.uio.no/lm/un.conventions.membership.status>.

²⁵⁶ See <http://www.uncitral.org/english/texts/sales>.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See Qur'an 5:89.

The duration of the limitation period relating to commercial litigation under the Limitation Convention is four years.²⁶¹ This period cannot be modified by agreement of the contracting parties as in the U.C.C. Section 2-725(1).²⁶² But it can be extended by a written declaration of the debtor during the running of the period.²⁶³ The next issue is how the *Shari'a* treats the Limitation Convention.

2. *Interpretation of the Convention on Limitation in light of the Shari'a*

Islamic Law does not recognize the notion of a "statute of limitations." The rejection of such a notion is based on a *hadith* from the Prophet Muhammed stating that "[a] Muslim's right cannot be abolished even if it is remote in the past."²⁶⁴ Some schools of Islam such as the *Maliki* and the *Hanafi*, however, permit a claim to be barred if a certain period of time has passed.

Islamic countries approached the idea of statute of limitations in different ways. For example, the Ottoman Civil Code of 1877 provided for statutes of limitations in its Articles 1660 through 1075.²⁶⁵ Article 1660 states that claims regarding

a debt, or property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution of a property dedicated to pious purposes leased for a single or double rent, or to pious foundations with the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of

²⁶¹ Limitation Convention on the International Sale of Goods (1974) as amended by The 1980 Protocol, art. 8, U.N. Doc. A/Conf. 63/15 1974, available at <http://www.uncitral.org/english/texts/sales/limit-conv.htm> [hereinafter Limitation Convention].

²⁶² U.C.C. § 2-725 (1) "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."

²⁶³ Convention on the Limitation Period in the International Sale of Goods (1980) art. 22(2), reprinted in 19 I.L.M. 696 (1980).

²⁶⁴ S. H. AMIN, ISLAMIC LAW IN THE CONTEMPORARY WORLD 86 (Royston Limited 1985) [hereinafter ISLAMIC LAW IN THE CONTEMPORARY WORLD].

²⁶⁵ *Id.*

fifteen years since action was last taken in connection therewith.²⁶⁶

In the same sequence, Article 1661 states that "actions brought by a trustee of a pious foundation . . . may be heard up to a period of thirty-six years. In any event these actions shall not be heard after the thirty-six years has elapsed."²⁶⁷

Even though some schools of *Sunni* jurisprudence allow actions to be extinguished by lapse of time, some countries like Morocco, which adhere to the *Maliki* school, follow, in some instances, the Islamic traditional view under which no right shall be affected by lapse of time. For example, the Moroccan *Moudouana* (Code of Personal Status) provides, among other things, in Article 121 that "the right of a wife to seek support from her husband is not extinguished by prescription." To supplement the *Moudouana* enacted in 1957, the *Code of Obligations and Contracts* of 1913 states in Article 378 that no prescription shall exist: (1) between spouses during the marriage; (2) between parents and children; or (3) between the incapacitated and the guardian or executor.²⁶⁸ As general rule, Article 387 states that all actions arising from an obligation are extinguished after fifteen years has elapsed. Articles 388 to 392 illustrate the exception to the fifteen-year rule. They provide for statutes of limitation with shorter periods of time in some specific instances where an action will be time-barred after anywhere from one to five years.²⁶⁹

The Iraqi Civil Code of 1951 in Articles 429-443 also recognizes the lapse of time as one way to bar an action to be brought. It is almost the mirror image of the Moroccan Code with fifteen years as time limit except in specific actions where the time for prescription is shorter, from one to five years.²⁷⁰ The concept of time limitation has also been accepted in the Commercial and Industrial Law of Saudi Arabia.²⁷¹ The Saudi Arabian Companies Regulations of 1965 include the relevant

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ CODE DES OBLIGATIONS ET DES CONTRATS (Morocco 1913), art. 378.

²⁶⁹ FRANCOIS BLANC & RABHA ZEIDGUY, CODE DES OBLIGATIONS ET DES CONTRATS 133 (Sochepress-Université 1994).

²⁷⁰ ISLAMIC LAW IN THE CONTEMPORARY WORLD, *supra* note 264, at 89.

²⁷¹ *See id.*

provisions dealing with Commercial Law. The limitation period regarding industrial disputes is provided for in the Labor and Workmen Regulations of 1969. Article 13 of these regulations states that all actions arising from employment contracts that are within the jurisdiction of the Commission for the Settlement of Labor Disputes are time-barred after twelve months.²⁷²

The situation of Iran is unique. Iranian law has addressed the issue of statutes of limitation in three stages, pre-Revolution law, post-Revolution law, and the rights to contracting parties under post-Revolution. Under the pre-Revolution Code, the standard period of limitation was ten years.²⁷³ The post-Revolution law reversed this situation and adopted the traditional Islamic view that a right cannot be affected by lapse of time.²⁷⁴ Accordingly, Article 440 of the revised (but not yet formally approved) Iranian Civil Procedure Code of 1983 provides that "From the date of enforcement of this Law, the Statute of Limitation shall not be accepted as an objection to a lawsuit."²⁷⁵ Despite these statutory provisions, the contracting parties may change or limit these statutory provisions if they choose to do so under the contract. Contractual arrangements of the parties will be binding according the Islamic rule of "*Alaqdu shari'atul mutaaqidun*" (the contract is the law of the contracting parties).²⁷⁶

Islamic legal systems are theoretically divided as to the application of a time limit within which a legal action must be brought. Some Muslim authorities claim that it is the interest of society to bar claims from being tried after a certain period of time has passed, others adopt the traditional Islamic view under which no right shall be lost by lapse of time. Such views remain only theoretical, however, and have no impact on the existing codified laws of each country.²⁷⁷

The Convention on the Limitation Period appears to be in compliance with the Law of Islam although it limits the freedom of contracting parties by not allowing them to modify the

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ *Id.*

²⁷⁶ See ISLAMIC LAW IN THE CONTEMPORARY WORLD, *supra* note 264, at 89.

²⁷⁷ See *id.*

four-year statute of limitation set out by its terms.²⁷⁸ Iran, like other Islamic countries, accepted the incorporation of any convention containing a time bar as being valid as long as it is identified²⁷⁹ and does not interfere with the country's public policy.²⁸⁰ Furthermore, as with Article 6 of the CISG, the parties may always opt out of the Convention on the Limitation Period if they expressly so decide.²⁸¹

D. *Interest in Islam, the Forbidden Fruit: Is Article 78 of the CISG Compatible With the Shari'a?*

1. *The CISG and Islamic Law Definitions of Interest*

Under CISG Article 78,²⁸² it is clear that interest must be paid to the aggrieved party, although the Convention is silent as to the calculation of interest rate and the time of accrual of interest.²⁸³

Under the Shari'a, interest is considered to be usury or *riba*. In conventional terms, *riba* and "interest" are used interchangeably. The term *riba* literally means "an excess" and is interpreted as "any unjustifiable increase of capital whether in loans or sales."²⁸⁴ *Riba* or interest in its Shari'a context can also be defined as an unlawful gain as opposed to legitimate profit.²⁸⁵ *Riba* is divided into two categories: usury in debts, and usury in sales. The usury in debts was prevailing in pre-Islamic Arabia. The Qur'an, *Sunna*, and Muslim scholars unanimously prohibited it. In this type of usury when a party borrowed money for a specific term and that loan became due, the creditor would ask the debtor to pay his debt or to increase

²⁷⁸ See <http://www.uncitral.org/english/texts/sales>

²⁷⁹ See ISLAMIC LAW IN THE CONTEMPORARY WORLD, *supra* note 264, at 89.

²⁸⁰ See Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?* 18 FORDHAM INT'L L.J. 920 (1995).

²⁸¹ See CISG, *supra* note 10, art. 3.

²⁸² Article 78 CISG states: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."

²⁸³ See Koneru, *supra* note 190, at 105.

²⁸⁴ Zamir Iqbal, *Islamic Financial Systems*, World Bank Publications (June 1997), available at <http://www.worldbank.org/fandd/english/0697/articles/0140697.htm#author>.

²⁸⁵ NABIL SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW-*Riba*, *Gharar* and Islamic Banking 13 (Cambridge University Press 1986).

the sum of the debt, such increase is added to the principal sum. The usury in sales traditionally applies to seven known commodities, i.e., wheat, barley, date, silver, gold, and salt.²⁸⁶

From a comparative standpoint, Judaism and Christianity have prohibited usury or *riba* as well. In the Old Testament, prohibitions against interest taking are stated in passages such as in *Exodus* 22:25 and *Leviticus* 25:35-38, which provides that the poor among the Israelites must receive loans without interest charging.²⁸⁷ According to the Old Testament, Jews do not oppose applying usury to non-Jews as it is provided in verse 23:20 of *Deuteronomy* “[y]ou shall not charge interest to your countrymen: interest on money, food, or anything that may be loaned at interest. You may charge interest to a foreigner. . .”²⁸⁸ The New Testament also fully negated usury. This prohibition is referred to in *Luke* 6: 34-35 “ve ye your enemies, and do good and lend, hoping for nothing again.”²⁸⁹ Based on these texts, Christianity strictly prohibited usury.²⁹⁰ The Roman Catholic Church had by the fourth century A.D. prohibited the taking of interest by the clergy.²⁹¹

International arbitration addressed the issue of *riba* as well. In one case, a Saudi defendant argued that pursuant to the doctrine of *riba* embodied in Saudi law, a plaintiff was not entitled to interest on any arbitration award.²⁹² The arbitral tribunal held that the doctrine of *riba* did not bar all awards of compensation for financial loss due to a party not having had the use of a sum of money to which it would have otherwise been entitled.²⁹³ It is clear that the claimant has in fact suffered financial damage as the result of defendant’s breach of contract; the doctrine of *riba* does not preclude an award for the

²⁸⁶ S.H. Amin, *Banking and Finance based on Islamic Principles- Law and Practice in Modern Iran*, 9 ISLAMIC & COMP. L.Q 1 (1989).

²⁸⁷ Dr. Hossam Abdel Ghany El Saghir, *supra* note 113.

²⁸⁸ *Id.*

²⁸⁹ *The Evil of Usury*, at <http://www.biblebelievers.org.au/usury.htm#Usury>

²⁹⁰ Dr. Hossam Abdel Ghany El Saghir, *supra* note 113.

²⁹¹ Wayne A.M. Visser & Alastair McIntosh, *A Short Review of the Historical Critique of Usury*, 8:2 Accounting, Business & Financial History, July 1998, at 175, available at www.AlastairMcIntosh.com

²⁹² Final Award No. 7063 (1993) *reprinted in* 22 Y.B. COM. ARB. 87 (1997), IADR Ref. No. 112.**

²⁹³ *Id.*

reasonable compensation of this loss.²⁹⁴ The Tribunal, however, did not award a commercial rate of interest, but rather based the award on a rate that reflected the incidence of annual inflation over the period at issue.²⁹⁵

2. *Why Charging Interest is Prohibited in Islam*

The Qur'an is clear on the prohibition of usury (*riba*) or interest and considers the charging of interest an injustice.²⁹⁶ It says: "O believers! Do not devour usury, howsoever beneficial it may appear; and fear God so that you prosper."²⁹⁷ It stresses the prohibition of usury or interest²⁹⁸ as a means to preserve equity and fairness in commercial transactions. God has allowed commerce but prohibited *riba* because it is a source of unconscionability between the contracting parties, and enables the stronger party to make an unfair contract out of the weakness of the other. The *Qur'anic* notion of unfairness of contract dealing with usury is similar in some extent to the American approach of unconscionability provided by the Uniform Commercial Code in its Section 2-302(1).²⁹⁹ In Islam, usury is the "rotten apple" which vitiates the contract by making it unconscionable and unjust. The rationale behind the abolition of interest in Islam is that it is a source of oppression leading to the exploitation of the poor.³⁰⁰ The Qur'an eliminates application of interest from all commercial transactions and takes the position that usury has nothing to do with commerce.³⁰¹

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ ZUBAIR IQBAL & ABBAS MIKHADOR, *ISLAMIC BANKING* 1 (International Monetary Fund 1987).

²⁹⁷ Qur'an III:130.

²⁹⁸ "O you who believe! Observe your duty to Allah and give up what remains due to you from *riba*, if you are in truth believers. And if you do not, then be warned of war against you from Allah and His messenger. And if you repent then you shall have your principal (without interest). And if you repent then you shall not be wronged." Qur'an II:278-279.

²⁹⁹ U.C.C. § 2-302(1) "If the court as a matter of law finds the abstract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . ." *Id.*

³⁰⁰ M.N. SIDDIQI, *MUSLIM ECONOMIC THINKING: SURVEY OF CONTEMPORARY LITERATURE* 63 (Islamic Foundation UK. 1981); see also WEERAMANTRY, *supra* note 92, at 67.

³⁰¹ Qur'an II:278-279: "Those who devour usury are devilishly driven mad; they claim that usury is like trade; but God has permitted trade and forbidden usury; one who after knowing this Divine law desists, will be forgiven for the past,

This prohibition is based on arguments of social justice as well as equality and property rights.³⁰² Islam encourages the earning of profits but prohibits the charging of interest. This prohibition is justified because the lender who advances money for trade and production can receive a share of the profit because he becomes a partner in the partnership.³⁰³ He is therefore liable for gains and losses. When the lender lends money with the expectancy to receive interest on transactions regardless of the profit or losses of the partnership, however, the lender becomes a mere creditor with no liability in the losses incurred by the partnership.³⁰⁴ The only risk that the creditor carries is the insolvency of the borrower.³⁰⁵ According to Islam, money is not capital; it is only "potential capital" and requires the service of the entrepreneur to transform it into actual productive use. The lender has nothing to do with this conversion of money into capital, nor with using it productively.³⁰⁶ This is because Islam considers the accumulation of wealth through interest as selfish compared with accumulation through hard work and personal activity.³⁰⁷ Islamic social justice requires that borrowers and lenders share gains and losses.³⁰⁸

Furthermore, loans may be granted to the poor but profit should not be made out of their financial disadvantage.³⁰⁹ The notion of justice cherished by Islamic precepts requires that when a borrower finds it difficult to pay back his debt, the lender must give him more time until his financial conditions improve, and if the borrower cannot because he is bankrupt, he

so is God's wish, and those who go on with it are sinners; and will always so remain. . ."

³⁰² See WEERAMANTRY, *supra* note 92, at 67.

³⁰³ ZUBAIR IQBAL & ABBAS MIKHADOR, *supra* note 296.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Zamir Iqbal, *Islamic Financial Systems*, in FINANCE & DEVELOPMENT 2 (June 1997), available at <http://www.worldbank.org/fandd/english/0697/articles/0140697.htm>.

³⁰⁷ Talib Siraj Abdus-Shahid, *Interest, Usury and the Islamic Development Bank: Alternative, Non-Interest Financing*, 16 L. & POL'Y INT'L BUS. 1095 (1984) cited by John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40 (1996).

³⁰⁸ See DAHIR DES OBLIGATIONS ET CONTRATS (Morocco) art. 236.

³⁰⁹ See *id.*

should be relieved from the debt which should be regarded as a charity.³¹⁰

3. *Islamic Banking*

Islamic banking is a new phenomenon or a "growing niche,"³¹¹ as some American newspapers refer to it. Today, Islamic banking is estimated to be managing funds in excess of US \$100 billion. Its clientele are not confined to Muslim countries but are spread over Europe, the United States, and the Far East.³¹² The Islamic countries that are party to the CISG have also opened their financial markets to Islamic banking in the past thirty years.³¹³ Countries such as Iran and Pakistan Islamized their entire banking structure since the Western economic system of banking and interest is anathema to the *Shari'a*.³¹⁴ The notion of Islamic banking first appeared in Egypt in 1963. It was created "under cover, without projecting an Islamic image for fear of being seen as a manifestation of Islamic fundamentalism, which was against the political regime."³¹⁵ The first Islamic banks in Egypt neither charged nor paid interest and invested mostly by engaging in trade and industry, directly or in partnership with others, and shared profit with their depositors.³¹⁶ In the 1970's, changes occurred in the political structures of many Islamic countries, which opened their economic systems to Islamic financial institutions. These institutions were no longer established under cover.³¹⁷

³¹⁰ Qur'an II: 280-281: "If the debtor is indigent, Give him respite until his condition improves; and if you remit the principal that will be better for you, provided you could believe it. And fear the day when you shall return to God, then shall each soul be paid back what it has earned, and none shall be treated unjustly."

³¹¹ See Ritchanya A. Shepherd, *Islamic Finance is a Growing Niche*, NAT'L L. J., July 3, 2000 at A2.

³¹² Institute of Islamic Banking and Insurance (London, U.K), available at <http://www.islamic-banking.com/>.

³¹³ "Egypt, Iraq, Syria were among the first to engage in Islamic banking." T.S Twibell, *supra* note 18, at 72; see also TRAUTE WOHLERS-SCHARF, ARAB AND ISLAMIC BANKS: NEW BUSINESS PARTNERS FOR DEVELOPING COUNTRIES 13 (1983). Mauritania also engaged in Islamic Banking through Albaraka Islamic Bank. See Mohamed Ariff, ISLAMIC BANKING, 2 ASIAN-PACIFIC ECONOMIC LITERATURE, available at <http://cwis.usc.edu.80/dept/MSA/economics/islamic-banking.html>.

³¹⁴ See Institute of Islamic Banking and Insurance, *supra* note 312.

³¹⁵ See Ariff, *supra* note 313.

³¹⁶ *Id.*

³¹⁷ *Id.*

The issue of interest in Islamic banking raised important controversies among Islamic countries. Some Muslim scholars have, in the past, asserted that the prohibition of *riba al-qarud* (*riba* of loans) relates only to high interest charges and not to all forms of interest.³¹⁸ Others such as Dr. Mohamed Sayed Tantawi, the Sheikh of al-Azhar in Cairo, argue that bank interest is a sharing of the bank's profit and is therefore permissible.³¹⁹ He also states that most bank transactions such as loans, debts, deposits, investments, etc. are *halal* (permissible).³²⁰ Dr. Tantawi also discussed the *Fatwa* (religious decree) issued by the Egyptian House of Fatwas (*Dar Al Iftaa Al Masria*) involving investment bonds, transactions of real estate banks (mortgages), and US Dollar bonds.³²¹ This *Fatwa* affirms that all of these transactions and income deriving from them are *halal* (permissible) according to the Shari'a, as they do not involve any kind of *riba* (usury).³²² With respect to mortgage institutions, this *Fatwa* reached the conclusion that the Egyptian House of Fatwas (*Dar Al Iftaa Al Masria*) is unable to command all transactions of mortgage institutions because each transaction has its particular method and circumstances.³²³ Dar Al Iftaa Al Masria reviews these transactions on a case-by-case basis.³²⁴ The *Fatwas* (religious decrees) issued by *Dar Al Iftaa Al Masria* with respect to investment bonds and U.S. Dollar bonds have been criticized by the majority of Muslim scholars, however, particularly the former Head of Al Azhar, Sheikh Jad Al Hak Ali Jad and scholars of most Arab Islamic countries.³²⁵

The main characteristic of Islamic banking is that it is free of interest. From the Western standpoint, one could ask: How can financial systems survive without charging interest? The

³¹⁸ <http://www.islamic-finance.net/journal/derivative.html>

³¹⁹ *Id.*

³²⁰ SHEIKH MOHAMED SAYAD TANTAWI, *MUAAMALAT AL BUNUK WA AHKAMUHA ASHARI'A (Banks' Transactions and Regulations)* (7th ed. 1991); see also YUSUF KASSIM, *ATTAAMOUL ATTIJARI FI MIZAN ASHARI'A AL ISLAMIA (Commercial Dealings in Light of the Shari'a)*, citations and comment provided in Arabic by Dr. Hossam Abdel Ghany El Saghir, *supra* note 113.

³²¹ *See id.*

³²² *See id.*

³²³ *See id.*

³²⁴ *See id.*

³²⁵ *See id.*

answer, provided by the Shari'a, consists in the creation of permissible forms of business transactions forbidding interest and permitting profits. Among these forms of business creations are the *mudarabah* or trust financing and *musharakah* or partnership financing. These forms of business arrangements permit one to earn profits without charging interest.³²⁶ Islamic banking is based on four principal rules: (1) avoidance of interest or unlawful gain (called *riba*); (2) avoidance of excessive risk taking, called "*gharar*;" (3) recognition of the fact that money is not a commodity; (4) recognition of the fact that money has no time value, which means that money does not change in value as time passes.³²⁷

The *mudarabah*³²⁸ (trust financing) is defined as an agreement between two parties in which one provides 100% of the capital for a business and the other, called the *mudarib*, manages the partnership using personal skills. Profits from the work are distributed according to an agreement of the parties. Only the provider of the capital carries losses while the *mudarib* does not share the loss.³²⁹

The *musharakah* (partnership financing) is a partnership agreement. All parties involved contribute to the financing of a venture. The parties share profits according to a ratio agreed upon while losses are shared according to each party's equity contribution. All, some, or just one party member carries out management of the venture.³³⁰

The *mudarabah* and *musharakah* may be regarded as the twin pillars of Islamic banking.³³¹ Based on these principles, an Islamic bank acts as a *mudarib*, which manages the funds of the depositors to produce profits according to the rules of *mudarabah* as exposed above. On the other hand, "the bank may in turn use the depositors' funds on a *mudarabah* basis. Accordingly the bank operates a two-tier *mudarabah* mecha-

³²⁶ See ZUBAIR IQBAL & ABBAS MIKHADOR, *supra* note 296.

³²⁷ Gohar Bilal, *Islamic Finance: Alternatives to the Western Model*, 23 SPG FLETCHER F. WORLD AFF. 145 (1999).

³²⁸ Md. Abdul Awwal Sarker, *Islamic Business Contracts, Agency Problem and the Theory of the Islamic Firm*, 2 INT'L J. ISLAMIC FIN. SERV. 2 (1999).

³²⁹ Failaka International, Inc., *Glossary of Islamic Financial Terms*, at <http://www.failaka.com/Glossary>.

³³⁰ *Id.*

³³¹ Ariff, *supra* note 313, at 48.

nism where [i]t acts both as the *mudarib* on the saving side of the equation and as the *rabbulmal* (owner of capital) on the portfolio side. The bank may also enter into *musharakah* contracts with the users of the funds, sharing profits and losses.”³³² Islamic banks also extend loans for consumption called *qard hasan*³³³ which are interest-free loans given for fulfilling short-term funding requirements. The borrower is only obligated to repay the principal.

In Islamic finance systems, there is another financial device called *murabaha* (cost-plus financing), which is a contract of sale between the bank and its customer for the sale of goods at a price plus an agreed profit margin for the bank. The contract involves the purchase of goods by the bank, which then sells them to the customer at an agreed mark-up. Repayment is usually in installments.³³⁴ The following scenarios³³⁵ illustrate the difference between a conventional banking transaction and an Islamic banking transaction based on a *murabaha* contract

Example 1: Conventional bank transaction

To buy a car for U.S. \$10,000.00 Salma requests a loan from Bank for \$10,000.00. Bank may agree to give a ten-month loan provided Salma pays, for instance, \$50.00 per month in addition to the principal amount. In other words, the bank is charging \$50.00 each month for providing the U.S. \$10,000.00.

In the above scenario this is a lending transaction. In the case of conventional financing as stated above, the bank is charging money for making the loan. This is interest.

Example 2: Islamic bank transaction

Considering the above scenario, assume that Salma requests funding through an Islamic bank based on a *murabaha* instrument. In this case the bank will make Salma its agent. She will buy the car on behalf of the bank for \$10,000.00. Bank then sells this car to Salma for a total price of U.S. \$10,500.00. Even though the end result in both cases is the same, i.e., \$10,500.00, the approach is totally different.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ Scenarios excerpted from Bilal, *supra* note 327, at 145.

In Example 2, this is a sale transaction. In the case of Islamic financing as stated in Example 2, the transaction is a trade, whereby the bank initially buys the asset and then sells the asset to the client for a profit. The bank is making profit.

Although Islamic banking has gained a worldwide interest, Islamic countries when dealing with commercial transactions either nationally or internationally have adopted to some extent a more liberal approach when dealing with charging interest.

4. *Exception to the Qur'anic Prohibition of Interest: The Modern Trend*

The general rule of prohibition of interest, as we shall see, has been circumvented to some extent by juristic interpretations. Different Islamic countries have dealt with prohibition of interest in different ways. In Egypt, awards of interest are governed by Article 226 of the Civil Code, which states that "[w]hen the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the claimant, as damages for the delay, interest . . ."³³⁶

Although this provision contradicts the principles of the Shari'a, which prohibit application of *riba*, some Arab Islamic countries such as Iraq almost literally copied it and applied it to their law.³³⁷ Article 226 of the Egyptian Civil Code also conflicts Article 2 of the Egyptian Constitution, which states, as amended in 1980, that "Islam is the religion of the State, Arabic is its official language, and the Shari'a is the principal source of the law."³³⁸ In this respect, it is important to state that in 1985 an action has been brought against Article 226 before the Egyptian Supreme Constitutional Court for unconstitutionality as it contradicts the Shari'a.³³⁹ The Supreme Constitutional Court, however, dismissed the case.³⁴⁰ It held that Article 226 prevails because it was enacted before the Constitution.³⁴¹ The principle established by this decision was that the Constitution could

³³⁶ EGYPT CIVIL CODE art. 226 cited by John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40 (1996).

³³⁷ Dr. Hossam Abdel Ghany El Saghir, *supra* note 113.

³³⁸ *See id.*

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *See id.*

not apply to laws enacted prior to its promulgation.³⁴² Because of its legal unsoundness, this ruling faced vigorous criticism from the *Fiqh* (Islamic jurisprudence).³⁴³

For its part, the Moroccan legislator has created a sophisticated legal fiction leading to an application of interest. To circumvent the *Qur'anic* prohibition of interest, the Moroccan law used the distinction between individuals and artificial entities ("*personnes physiques*" and "*personnes morales*") to reach the conclusion that charging interest is prohibited in transactions between Muslim individuals "*personnes physiques*" who abide by the Islamic faith whereas artificial entities such as banks, corporations, public agencies or the like may freely charge interest in commercial transactions since they have no religion. Therefore they are not bound by the *Qur'anic* prohibition. This argument applies not only to transactions between artificial entities but also to transactions between an individual and an artificial entity.³⁴⁴ In accordance with this theory, a Muslim individual can freely receive or pay interest when dealing with his bank or any corporation, or public entity.

In one case, Dubai's Court of Cassation ruled that a "creditor may collect a fifteen percent interest on a delayed payment pursuant to a contract for the sale of goods."³⁴⁵ In Iran, if a request for charging interest on a loan is brought in the courts of Iran the Islamic prohibition of interest (*riba*) is applied even if the governing law is external, unless the court is prepared to hold that the usury statute does not apply to non-Muslims.³⁴⁶ When an action is brought outside Iran, however, Iranian authorities request interest in their dealings and litigation arbitration proceedings with foreign corporations.³⁴⁷ The above countries followed the modern trend to some extent. They apparently adopted a liberal approach on interest when needed in order to meet the requirements of a capitalistic economy and

³⁴² See *id.*

³⁴³ Dr. Hossam Abdel Ghany El Saghir, *supra* note 113.

³⁴⁴ Mohamed Mernissi, *Commercial Law Course Materials - Hassan II University School of Law, Casablanca (Morocco)*.

³⁴⁵ H.S. Shaaban, Note, *Commercial Transactions in the Middle East: What Governs?* 31 LAW & POL'Y INT'L BUS. 157, 170 (1999).

³⁴⁶ See Sayed Hassan Amin, *Banking and Finance Based On Islamic Principles- Law and Practice in Modern Iran*, 9 ISLAMIC & COMP. L.Q. 1 (1989).

³⁴⁷ See *id.*

avoid the prohibitive provisions of the Shari'a relating to interest.

As indicated above, the CISG is silent on the determination of the rate of interest. This silence is the result of the fact that the drafters of the CISG could not agree on the applicable interest rate due to the conflicting views on the economic function of interest and prohibitive provisions regarding interest in Islamic Law.³⁴⁸ To overcome these conflicts, according to the drafting history, the majority urged judges and arbitrators to fill the gap regarding the determination of interest rate in accordance with the terms of Article 7(2) of the CISG which states that, "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

Using the interpretative function stemming from the terms of Article 7(2), international arbitrators and the Iran-U.S. Claims Tribunal, for example, agreed to consider interest claims as part of general claims for damages. When dealing with disputes involving Islamic law, arbitrators have routinely awarded interest regardless of the prohibition on interest provided by the Shari'a.³⁴⁹ They justified their position by characterizing interest as "compensatory indemnity instead of interest."³⁵⁰

As some noted scholars³⁵¹ pointed out, even though the Qur'an definitely prohibits charging interest, the Islamic countries that are party to the CISG did not make reservations about Article 78 dealing with interest.³⁵² Apparently, these

³⁴⁸ Cf Ferrari, *Interpretation Uniforme de la Convention de Vienne de 1980 sur la Vente Internationale*, REVUE INTERNATIONALE DE DROIT COMPARE 26, 36 et seq. (1996) cited by Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129 (1998).

³⁴⁹ Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic, Ad Hoc Award of April 12, 1977, reprinted in 20 I.L.M. 1, 87 (1981).

³⁵⁰ Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129 (1998).

³⁵¹ T.S. Twibell, *supra* note 18, at 25.

³⁵² Egypt, Iraq, Syria and the new comer Mauritania, effective date: September 1, 2000.

countries adopted the modern trend on the applicability of interest because their legal systems are deeply influenced by the Western legal structure, and they do not want to be isolated from the Western world³⁵³ by applying rigidly the *Qur'anic* prohibition of interest. Furthermore, Article 6³⁵⁴ of the CISG constitutes a safe harbor for Islamic countries that decide to avoid application of Article 78 of the CISG relating to interest.³⁵⁵ Article 6 of the CISG illustrates the fundamental principle of freedom of contracts given to the parties. This idea complies with the *Qur'anic* rules "*alaqdu shari'atul mutaaqidain*" (the contract is the law of the parties) and "fulfill your undertakings" (*Ufu bil uhud*) which means that the parties must perform their obligations. The same principles also inspire the French Civil Code.³⁵⁶ If private Islamic agreements are expressly against the law or public policy, however, they will not be binding against the contracting parties. Islamic private agreements involving *riba* (interest/usury) or *gharar* (uncertainty) are regarded by traditional Islamic law as "*haram*," i.e., against the law and public policy and will not be protected by either the "*alaqdu shari'atul mutaaqidain*" or the "*Ufu bil uhud*" rule. This position was adopted by Article 6 of the Iranian Civil Procedure of 1936 which states that "no note will be taken by the courts of any agreement which is either detrimental to the public policy or is contrary to good moral principles."³⁵⁷

VII. CONCLUSION

Western scholars have described Islamic law as an "essentially defective and backward legal system."³⁵⁸ This evaluation is unfair as it disregards the ability of the Shari'a to adapt³⁵⁹ to specific circumstances in the Muslim's life and because it also disregards the basic principles of Islamic law which protect

³⁵³ See ISLAMIC LAW IN THE CONTEMPORARY WORLD, *supra* note 264.

³⁵⁴ Article 6 of the CISG provides that "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

³⁵⁵ See ISLAMIC LAW IN THE CONTEMPORARY WORLD, *supra* note 264.

³⁵⁶ "Les conventions légalement formées tiennent loi entre le parties contractantes"

³⁵⁷ COMMERCIAL LAW OF IRAN, *supra* note 205, at 53.

³⁵⁸ John Strawson, *Encountering Islamic Law*, in CRITICAL LEGAL CONFERENCE 9 - 12 (New College eds., 1993).

³⁵⁹ See ISLAMIC LAW IN THE CONTEMPORARY WORLD, *supra* note 264.

human and property rights. To illustrate this power of adaptability of the Shari'a, different Islamic entities dealing with family issues of Muslims living in the United States are now suggesting the creation of Islamic Arbitration Committees led by Muslim practitioners and scholars to deal with divorce issues and the like.³⁶⁰ The decisions of these Committees would be binding on the parties.³⁶¹ In divorce cases, if the husband refuses to abide by the decision rendered by these Commissions, the wife is entitled to file a petition for a civil divorce through an American court.³⁶² In this situation, the sin of not abiding by Islamic rulings will be on the non-complying husband. The Shari'a will recognize and accept the American civil judge's decision to dissolve the Islamic. After the court's decision, the wife can forward the paperwork to any local Islamic center and confirm the divorce from the Islamic center as well.³⁶³ The question of interest remains controversial and subject to interpretative discussions; and "Islamic banking," which aims at an interest-free economy, has been criticized by many scholars as being a usurious institution contrary to Islam.³⁶⁴ Interpretation plays an important role in Islamic law, however, and business law can probably benefit from the Shari'a's power of adaptability, that will make treaties like the CISG fully compatible with Islamic law principles.

³⁶⁰ See *Issues on Worrying More About Daughters Than Sons; Way Out of a Marriage; Wudu Near a Toilet; Sex During Travel in Ramadan*, at <http://www.pakistanlink.com/religion/98/re-12-03.html>.

³⁶¹ See *id.*

³⁶² See *id.*

³⁶³ See *id.*

³⁶⁴ Umar Ibrahim Vadillo, *The Fallacy of the Islamic Bank*, at <http://www.geocities.com/Athens/Delphi>.