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The Quest for the Holy Grail: A Harmonised International Commercial Arbitration Law Code (HICALC) in Investor–State Arbitrations of Oil Concessions and Foreign Investment Treaties and Agreements *

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"April is the cruellest month, breeding lilacs out of the dead land, mixing memory and desire, stirring dull roots with spring rain. Winter kept us warm, covering earth in forgetful snow, feeding a little life with dried tubers…What are the roots that clutch, what branches grow out of this stony rubbish? Son of man, you cannot say, or guess, for you know only a heap of broken images, where the sun beats, and the dead tree gives no shelter, the cricket no relief, and the dry stone no sound of water" (T.S. Eliot, The Wasteland, *1922).*

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I. Introduction

1. The Wasteland

Our story begins with a desolate wasteland; bleak and grey where no new life can grow. A terrible oppressive sense of despair permeates the air. Stagnation, gloom and ruin have taken hold. The Fisher King suffers from a mysterious wound, whose origins have been obscured by the cruel passage of time and the destruction that has laid his kingdom to utter waste. Our young and innocent fool, Perceval the Knight, finds himself in the Fisher King's castle, witnessing a surreal apparition; a Lovely Maiden passes before him with a Chalice, from which there falls three droplets of blood. Marvelling at the sights before him, Perceval is rendered speechless, precisely at the time when it is the most urgent to speak[1].

The question that Perceval should have asked when faced with the Fisher king's wound, and would have revived the kingdom is, "What is the Holy Grail". For it would have been found that the Holy Grail is that which would restore everything to its rightful state. Herein, the question has been answered. Trust, built upon *res judicata* and the finality of an arbitral award, based on a sound structure of enforcement, is the Holy Grail that can restore life to the highly specialised legal area of International Commercial Arbitration (hereinafter, "ICA") law in Investor–State arbitrations between European investors and Middle Eastern governments. Whilst Western investors do not trust Middle Eastern governments, arbitration centres, or laws, especially Islamic Law, Arab governments conversely do not trust European arbitrators. One of the major problems today is this two–way lack of trust stemming from both sides. The following section will be devoted to establishing that this lack of trust has contributed substan-

[1] There are several versions of the Grail legend. In A. Lupack, *Oxford Guide to Arthurian Literature and Legend*, 2005, Oxford at p. "As he continues his journey to his mother, he meets a man fishing, the Fisher King, who offers him hospitality. In his castle, Perceval learns that the Fisher King suffers from a wound, and he witnesses the Grail procession: a young man carries a lance with a drop of blood falling from its tip; he is followed by two attendants carrying a candelabra; then a young lady passes by carrying a grail, which causes 'such brilliant illumination' that 'the candles lost their brightness just as the stars and the moon do with the appearance of the sun' (379); she, in turn, is followed by a woman carrying 'a silver carving platter' (379). Through all of this, Perceval, remembering Gornemant's advice, remains silent even though he is curious about what he sees. Perceval's childish insistence early in the romance on asking a series of questions 'constrasts strikingly with his failure to ask the single question which would have saved the Fisher King' (Lacy 111)".

tially to the major problems in ICA, and that therefore, trust is the Holy Grail.

A) Bias

In ICA, the perception of bias is as damaging as actual bias itself. A bad faith allegation of bias has the power to disrupt and undermine arbitral award proceedings and enforcement. Investor–State arbitrations raise a plethora of unique, challenging and thorny issues strongly related to mistrust, for example, "The entry of a state, either by itself or through its trading entity, into the picture creates many complications. The policy goals of the state become implicated in the dispute. If the state is a developing country, entrenched suspicions of international arbitration become accentuated. Such suspicions result from the fact that these states have seen international arbitration as a system that is weighted in favour of the capital exporting states"[2]. Indeed, it is arguably quite feasible that trust may ultimately be the *sole* distinguishing factor in Investor–State arbitrations compared to any other difficulty and compared with other types of arbitrations. This lack of trust has served as a red flag calling for deeper scrutiny of Investor–State arbitrations:

> "... because of the entrenched suspicion of international arbitration as a method of solving commercial disputes involving states or entities of states, problems quite different from those that arise in international arbitration of disputes between private parties arise in the field of disputes arising from state contracts, a field in which international arbitration cannot claim as much success as in other categories of commercial disputes. It is relevant to analyse the reason for this lack of success"[3].

The fact that it is still debatable as to whether or not such trust still exists is in itself proof that mistrust is a serious issue lurking about and undermining credibility in ICA practice[4]. Indeed, the problem of

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[2] M. Sornarajah, *International Commercial Arbitration: The problem of State Contracts*, Longman, Singapore Publishers, 1990, Singapore at p. 5.

[3] *Ibid.*, *supra*, No. 2 at p. 6.

[4] *Ibid.*, *supra*, No. 2 at p. 6: "The claim is sometimes made that Third World states are showing an increasing willingness to participate in international commercial arbitration. It is generally conceded that these states have been suspicious of international methods of settling commercial disputes but it is claimed that such suspicion is now receding. The claim that the suspicion is receding is a subjective one dependent on the selection of favourable evidence. In the area of export trade, it is generally true to say that international commercial arbitration has come of age and is here to stay. In this area, state entities which participate in export trade willingly abide by the rules of the game simply out of necessity. If they are to continue in the export of goods, they must follow the rules other traders follow. Loss of credibility will mean loss of trade".

mistrust has been brushed under the carpet, to the detriment of ICA in Investor–State arbitrations[5]. The depth of mistrust is actually inherent to the entire system of ICA's nature[6]. In fact, it has been argued that said inherent nature was deliberately crafted in favour of the investor to the detriment of the state:

> "Since it was conceived as a method of investment protection, its early rules were designed to achieve that result and favour the foreign investor. Even its ardent supporters do not deny that in its formation, the system of international commercial arbitration was biased against developing states. Thus, an advocate of arbitration concedes that, 'it may be true that in the beginning of this century, and until the 1950's, arbitrations conducted by various international tribunals or commissions evidenced bias against developing countries"[7].

Scholars argue that specifically, the genesis of the theory of internationalism underpinning the doctrines that made international arbitration inherently biased was born out of the Middle Eastern oil concessions[8]. The argument goes that the *raison d'être* for the bias was in the need for petroleum resources[9]. To this end, the rules were drafted

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[5] *Ibid., supra*, No. 2 at pp. 7–8: "In this area, several theoretical problems which result from the participation of state entities in international business remain unsolved. Opinion has become polarised. Writers who favour arbitration ignore the problems involved and are more concerned with proclaiming the virtues of arbitration in this area and magnifying the little success in the field. Writers who do not favour it set their minds against the possibility of international commercial arbitration as a means of settling disputes arising from state contracts. This situation of uncertainty itself works against the evolution of a credible system of international arbitration of disputes arising from state contracts. It is best to bring out the theoretical difficulties in the way of international arbitration so that they may be honestly discussed than have the subject befuddled by meaningless rhetoric on both sides".

[6] *Ibid., supra*, No. 2 at p. 8: "Much of the suspicion flows from the fact that publicists of capital exporting countries have sought to build a system of arbitration for the protection of foreign investment contracts and related business activity in the context of international law. There was no other system in which such rules, said to be binding on states, could have been based. That in itself generates suspicion for international law has been seen by African, Asian and Latin American states as an instrument of subjugation and as a product of Western dominance".

[7] *Ibid., supra*, No. 2 at p. 9.

[8] *Ibid., supra*, No. 2, at p. 17: "The genesis of the theory could be found in the disputes arising from petroleum concessions in the Middle Eastern states. These were concession agreements entered for absurdly long periods of time giving virtual control over exploitation of petroleum to the major oil companies by principalities which were still British protectorates. The unequal nature of these agreements has been discussed in many works. The arbitrations were charades, often presided over by British judges, to ensure that a legal cloak for the continued control over the oil riches of the region was maintained".

[9] *Ibid., supra*, No. 2 at p. 10: "From the standpoint of the developed states, there was a need for the rapid development of such rules. With the end of colonialism, ready sources of raw materials to fuel industries in Europe and the United States had disappeared. The-

in such a way, as inherently biased, as to ensure a positive outcome for investors[10]. However, other scholars have argued that these rules came about accidentally and have barely left their mark on the historical archives of the petroleum industry[11]. Clearly, the case for mistrust by Arab parties regarding Western arbitrations has long been established by the perception of historical fact and by the unsatisfactory outcome of many of the arbitrations of this time, particularly in the area of oil concessions. However, in the interest of the utmost fairness and ethics of equality, it is necessary at the outset to re–read the argument against Western arbitrators in a different light:

> "In these awards, there is an acceptance that the host country's laws should be applied to the disputes arising from the concessions. Thus, in the Abu Dhabi arbitration, the arbitrator, Lord Asquith of Bishopstone, gracefully conceded that, 'if any municipal legal system was applicable, it would prima facie be that of Abu Dhabi'. Such a conclusion was sound in principle but it did not further the objective of alien control over the resources of Abu Dhabi. The principle had to be circumvented. The law of Abu Dhabi was rejected on the ground that 'it was fanciful to suggest that in this very primitive re-

re was a need to assure continued supplied. The technique of doing this was found in ensuring that states which enter into contracts for the supply of such resources for a period of time cannot resile from those obligations too easily. The best evidence for such agreements is to be found in the petroleum sector where concessions tied up vast areas of petroleum producing land for long periods of time in return for which a small sum, vastly disproportionate in terms of the profits made, was paid as royalty. Doctrine was developed that breaches of such contracts were international wrongs and that damages may be ordered against such breaches in arbitration".

[10] *Ibid.*, *supra*, No. 2 at p. 10: "A whole set of rules was created to ensure this result. From the area of the resource sector, this notion of protection through arbitration was taken into other areas of state contracts. This attempt at tying up the resource sector by the series of unequal contracts like the early concession agreements and the role which international arbitration played in bolstering up this regime were the main causes for the suspicion of international arbitration of disputes relating to state contracts".

[11] Y. Dezalay and B. Garth, *Dealing in Virtue*, Chicago, The University of Chicago Press, 1996, at p. 75: "The petroleum disputes were founding acts. They made arbitration known and recognised. The importance of the financial, political (the redefinition of colonial relations), and the legal (the relationship between sovereignty and the respect of contractual obligations) stakes incited a certain number of important actors from the legal field (high judges, noted practitioners and academics, leading law firms) to become interested and to invest in this mode of dispute resolution. The efforts and intellectual activity that they deployed for resolving these new, exceptional conflicts in a legal manner served to construct the minimum base of knowledge necessary to build a field of practice. They furnished an occasion for a series of investments in knowledge, institutions, and political relations that permitted the basic 'equipping' of this new market. The basic equipment also required rules and the construction of institutions capable of handling the work of international arbitration. All this occurred as if, through the mechanism of great conflicts, a small portion of the profit of the petroleum industry was converted into symbolic capital in the form of a new legal order. At the same time, however, these great arbitration matters occupy only a marginal, if negligible, place in the history of the petroleum industry".

> gion, there was any settled body of legal principles applicable to the construction of modern commercial instruments'. Hence, a need arose for some other body of principles to be applied in the resolution of the dispute. A similar technique was adopted in the Qatar Arbitration. The referee, Sir Alfred Bucknill, held that Islamic law, which was the law of Qatar, was normally applicable to the concession agreement. But, he pointed out that, according to the expert evidence given to him, the concession agreement was invalid in Islamic law. As such a result could not have been intended by the parties, the referee ruled that the dispute should be settled 'according to the principles of justice, equity and good conscience'. Similar views were stated in the Aramoco Arbitration involving Saudi Arabia"[12].

Aside from the fact that one of the main strengths of arbitration is its choice of law to protect parties from any nation's domestic law, it is argued herein that for the sake of justice, fairness and equality, just as the position of developing countries has been taken into consideration, the concerns of the Western countries are also valid. It is conceivable that the source of Western bias against Middle Eastern countries and legal systems also lies in deep mistrust. This mistrust is founded upon ignorance and misinformation, particularly in regards to Islamic and *Sharia* law principles in common with Western legal principles[13]. Hence, it is argued that mistrust on both sides continues to contribute to bad faith allegations of bias. It can also be argued that negative perceptions of bias are occurring on both sides. Regardless of the degree of bias or the lack thereof or the consistency of frequency against one side rather than the other, the existence of allegations of any bias *at all* warrants examining the system more closely. Bias has been implicated in the past as a cause of mistrust. There is still mistrust and perceptions of bias on *both sides*. The developing states, particularly the Middle Eastern countries, have historical reasons to mistrust their Western trading partners and Western nations have ideological reasons to mistrust a legal system that appears to them obscure and arcane and to which they do not have access to, nor adequate knowledge of nor understanding of, due to many reasons outside of the scope of this paper. A harmonised international commercial arbitration law is the *only* remedy to bridge the abyss of mistrust and to create a sure and steady road for the fair and just conduct of ICA in Investor–State arbitrations with Middle Eastern governments.

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[12] *Ibid.*, *supra*, No. 2, at p. 18.

[13] Not only have scholars in the past demonstrated the existence of common principles of law within and amongst Islamic law and civil and common law, but beyond that, an American scholar has argued that the origins of the English common law can be attributed to Islam, in, J. Makdisi, "The Islamic Origins of the Common Law", 77 *N.C.L. Rev.* 1635. 1998–1999, pp. 1639–1640 at p. 1638, and that the legal doctrine of the English Jury was taken from Islamic law.

Clearly, if there did exist a genuinely uniform code of ICA law applicable to Middle Eastern States with foreign investors, and if the code referred to well known Islamic principles in common with Western civil and common law, there would have been neither the cause nor the opportunity for the aforementioned judicial statements on Islamic law, nor would it have been so easily discounted. Had the International Public Law that was applied been shown to be compatible to both legal systems, mistrust would not have occurred. Perhaps if that had been the case, the outcome of these awards would have been different[14].

B) Precedent

Inherent bias built into the system[15] is not the only cause for mistrust. The unpredictability of the outcomes of similar awards, such as *Sapphire*, created problems in trust as well, e.g.:

> "There is an obvious change of direction in this award. The previous awards had stated the lack of sophistication of the national laws as the reason to look elsewhere. The Sapphire Award, however, concentrated on the policy justifications for not applying the host state's laws thus seeking to universalise the proposition that, however adequate the host state's laws may be to deal with the problem, the foreign investment contract, by nature, is subject to 'general principles of law'. The need for the change of tack was simply that resource exporting states had begun enacting laws governing the exploitation of their resources and it was no longer possible to say that the host state's law was not applied because it lacked sophistication to deal with the problems raised by the contracts for the exploitation of natural resources. The Award dismisses the relevance of such local laws with the casual observation that they are 'often unknown or badly known' to the foreign investor– a strange proposition indeed for as a general principle of law, legal systems do not permit an alien who enters a state to plead ignorance of its laws. There seems to have been a great deal of selectivity in the use of general principles".

[14] *Ibid., supra*, No. 2 at p. 19. A case in point: 'The Sapphire Petroleum Arbitration was the first award to give complete support to the exclusion of the host state's law and the application of public international law. The agreement involved in the dispute was a concession agreement for the exploitation of oil in Iran. Judge Cavin, who was the arbitrator, excluded the application of Iranian law on the ground that it was unlikely, in the view of the enormous capital risks involved in the project, that Sapphire could have accepted Iranian law as the law applicable to the contract as such law could be changed at will by Iran. He held that the law applicable to the agreement was the 'general principles of law recognised by civilised nations" (1963) 35 *ILR* 136.

[15] *Ibid., supra*, No. 2 at p. 23: "If international commercial arbitration is to escape from the charge of bias, it should dismantle the existing structure which is based on doctrines associated with neo–colonialistic efforts at the preservation of economic dominance and move towards more acceptable standards which seek a balance between the interests of capital exporting states and those of capital importing states".

Indeed, though it is argued herein that domestic law, under any circumstances, should *not* be followed in ICA, and that instead a universal law that harmonises amongst the three legal traditions relevant to the Middle East, common, civil and Islamic law, should be the guide in order to remedy the situation of bias, mistrust and unfairness. Furthermore, it is called for that future scholars bring to light more and more of the principles of law which are common to these three traditions and can inform a harmonised ICA code. The argument that early ICA proceedings fostered mistrust and damaged credibility in the entire system has herein been established. The first reason given has to do with the inherent nature of the system. The second reason is due to the lack of consistency and precedent[16] in arbitral award decisions:

> "The ideas contained in the Sapphire Award are carried further in later arbitral awards. The three arbitral awards made in connection with the Libyan nationalisation of oil concessions are important landmarks in the theory of internationalisation of foreign investment agreements. Although the three arbitrators came to different conclusions about remedies and procedure, thus indicating the confusion that exists in the area on many points, they agreed that foreign investment agreements containing certain indicia like choice of law clauses, arbitration clauses and stabilisation clauses are international contracts and that disputes arising from such contracts should be settled according to public international law"[17].

This lack of predictability due to an absence of 'precedent' in arbitral awards together with the problem of bias further compounds the issue of mistrust. Not only were three landmark cases decided differently and on different grounds, but an important case after that also deviated[18] from an important case before it. This lack of consistence

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[16] Tai–Heng Cheng, "Precedent and Control in Investment Treaty Arbitration", pp. 149–182, at p. 151, in A. Bjorklund, I. Laird, y S. Ripinsky (eds.), *Investment Treaty Law, Current Issues III, Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law*, London, British Institute of International and Comparative Law, 2009: "The doctrine of precedent, or *stare decisis*, refers to the doctrine under which a court, when deciding a point of law, is generally required to defer to a holding of a prior court on that point if that prior court is hierarchally superior. The highest appellate court will also generally follow its prior decisions on a point of law, except in exceptional circumstances".

[17] *Ibid., supra*, No. 2 p. 20. *Texaco* v. *Libya* (1977) 53 *ILR* 389; *BP* v. *Libya* (1977) 53 *ILR* 296; *Liamco* v. *Libya* (1981) 20 *ILM* 1.

[18] *Ibid., supra*, No. 2, at p. 22: "The reaction to Texaco was not uniform. Though the arbitral tribunal in *Company Z* v. *State Organisation ABC followed Texaco, The Aminoil* Award, made by a distinguished tribunal which consisted of Professor Paul Reuter, Professor Hamed Sultan and Sir Gerald Fitzmaurice contained hardly any reference to Texaco. Aminoil, in presenting its arguments to the tribunal had relied heavily on principles and authorities that support the theory of internationalism. It had relied on the principle of *pacta sunt servanda* and on awards such as the one in Texaco. The tribunal rejected

and precedence continues to contribute to lack of predictability and mistrust in ICA. More than one scholar has raised the absence of precedent as a cause for mistrust:

> "In many investment treaty arbitrations, parties have either unilaterally published the wards or consented to the administering arbitral institution publishing the awards. With disclosure comes public scrutiny. Because international investment law, i.e. the international legal principles and rules relevant to foreign investments, is a rapidly developing field, it is inevitable that arbitrators occasionally render contradictory awards. These conflicts have raised urgent questions about the extent to which awards are bound by a system of precedent, and, more broadly, whether international investment law is stable and predictable. International arbitrators have acknowledged that these issues may influence both the actual legitimacy and the public's perceptions of legitimacy of investment treaty arbitral awards, and even international investment law itself. Academics, practitioners and arbitrators are now accordingly actively engaged in discussions to fill this *lacuna*"[19].

One of the benefits of precedent is that it contributes to enforcement[20]. However, precedent alone, in the context of Investor–State arbitrations is not sufficient given the distinguishing features of these types of arbitrations.

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these arguments, holding that while it may be possible that a state could agree to bind itself not to nationalise the investment 'during a limited period of time', it could not do so for a substantial period of time so as not to take into account the economic and social progress of the national community. It thus struck at the scope of the stabilisation clause which is one of the bases on which the theory of internationalisation rests. Existence of awards such as Aminoil show that there is no consistent authority supporting any uniform principles regarding the theory of internationalisation and that arbitral awards do not support a single coherent thesis in such a way that an argument as to the existence of supranational principles could be built up on the basis of these awards" *Company Z* v. *State Organisation ABC* can be found at (1983) 8 *Yearbook Comm. Arb'n* 94. *The Aminoil* Award can be found at (1982) 21 *ILM* 976. *Texaco* may be found at (1980) 74 *Am. J. Int'l L.*134.

[19] *Ibid., supra*, No. 16, at p. 150.

[20] *Ibid., supra*, No. 16 at p. 155: "Finally, precedent improves recognition. The rules of precedent provide criteria: (a) for judges to appraise whether a prior decision should be upheld, reversed or applied; (b) for scholars to evaluate judicial decisions and make recommendations to improve the law; (c) for practitioners to determine which decisions to rely on in their advocacy; and finally (d) for the public to appraise the propriety of each judicial decision and the operation of the entire judicial system itself. When a judicial decision has complied with the rules of precedent, that decision may have a constitutive and developmental effect on the law, because it binds future disputes and may cause citizens to adjust their actions in reliance with that decision. It may also have a legitimating effect on the law when the various actors in the system determine that the system is operating properly. Conversely, where a judge has deviated from the rule of precedent, actors may reject that judge's claim to constitute the law and anticipate future disputes concerning whether the incorrectly–decided point of law should be rectified".

Precedent is important for creating certainty, predictability and legitimacy. However, without a harmonised law guiding ICA, the creation of precedent will be impossible. Precedent requires consistency in interpreting the same law. Given the flexible nature of arbitration to combine one or many laws in any given proceeding, the possibility for the existence of a *corpus* of consistent and clear precedent guided by *rationis decendi* rather than *obiter dicta* is impossible. The lack of precedent contributes to a lack of trust. Without trust, the entire edifice of ICA crumbles. Trust is upheld by justice, fairness and effectiveness. Just as the Fisher King's near fatal wound that lead to the wasteland of the entire kingdom was symbolised by three drops of blood: the wounds of public policy, sovereign immunity and the broad category of bad faith, so also does the antidote of salvation to the wasteland that is the current state of ICA lies in three saving medicines: fairness, justice and effectiveness. The Grail Castle housing the Cup of Salvation for ICA is built upon these three pillars. It is said that the Grail Castle is built upon a holy mountain in front of a bottomless lake. A harmonised ICA law is the grand design the supports these pillars. It is a mountain of strength and support. The comparative legal analysis that can extract the general principles of law at Common, Civil and Sharia law is like the bottomless lake; there exist infinite legal principles in the areas of contracts and arbitration that can be called upon to form the basis of a harmonised International Commercial Arbitration Law. The HICALC is the missing strand:

> "But, unlike the theory of internationalisation and the set of norms associated with it, the principles drawn from the international law of development form the basis on which some accommodation could be reached between the developed countries which export capital and the developing countries which receive it. For this reason, the future of international arbitration lied in stressing this strand that is emerging so that international arbitration can escape from the shroud of suspicion of bias that now surrounds it. But, it must be recognised also that investment in the natural resources sector falls outside of the scope of international arbitration simply because of the existence of the peremptory norm of permanent sovereignty over natural resources which itself is a principle of the international law of development. Many countries put this proposition beyond issue by including it in their constitutions or in their investment codes. The scope for such arbitration through ad hoc tribunals as was the case in the early disputes will diminish because of the suspicions generated by the prejudicial nature of the early awards. Such suspicion will also attach to arbitral institutions constituted by organisations of international business"[21].

Without a foundation built on the common general principles of law found at Common, Civil and *Sharia* law (hereinafter, 'the three

[21] *Ibid.*, *supra*, No. 2 at p. 42.

traditions'), ICA shall continue to remain a wasteland[22] desolate of life, growth, and hope. But if a HICALC is implemented, even regionally or as the law of arbitration for MENA[23]–FI[24] investments, the wasteland of the global financial crisis, FDI and diplomatic relations can be born again and saved.

The lack of trust described above has been the reality of MENA–FI ICA since its inception. The history of ICA can be best described overall as a desolate and bleak wasteland of mistrust and appeals. The early oil concessions had unhappy endings for the MENA governments in terms of profits and for the investors in terms of expropriation, in some cases due to nationalisation. As time passed, the unhappy endings were caused by what has been referred to as 'the mafia' of arbitrators in which western arbitrators are perceived as biased and in cases where there is an arbitrator from a non–western country, usually representing the dissenting opinion, is seen as irrelevant or as relevant as a potted plant. In cases where the award was enforced against a MENA state successfully, unfair and excessive amounts of interest were attached to the award[25]. In cases where the state defended itself from enforcement by appeal, ridiculous loopholes and bad faith use by MENA governments of the pleas of public policy, sovereign immunity and allegations of bias were upheld by higher courts[26]. All of this has undermined trust. The Global Financial Crisis of 2008–2011 has proven to the global community the interconnectedness of the entire global financial community and the reality that what occurs in one part of the world, affects the rest. The same occurred with the fall of the Asian Tiger economies. Just as the Fisher King's entire kingdom is desolate due to his wound, so the entire global economy can benefit from the salvation of ICA. FDI and other large scale investments play a significant role in the individual economies involved and as such, they do have the power to affect the

[22] *Ibid.*, *supra*, No. 2 at p. 91: "...developing states have participated in international arbitration and sometimes, awards favourable to them, have been made. But, though such facts may go towards dispelling suspicion of international arbitration, the basic reasons for suspicion still remain. Progress in the area of international investment arbitration can be made only if the reasons for the suspicion of arbitration are understood and removed".

[23] In, S. Saleh, "The Settlement of Disputes in the Arab World, Arbitration and Other Methods, Trends in Legislation and Case Law", *Arab Law Quarterly*, Vol. 1, No.2. (Feb., 1986), pp. 198–204: MENA stands for Middle East and North Africa.

[24] The term MENA–FI was coined by the author and stands for Investor–State arbitrations between Middle Eastern Governments and Foreign Investors. MENA means Middle East and North Africa.

[25] Please refer to the *Wena* Case.

[26] Please refer to the *Pyramids* Case.

entire, interrelated global economy. Proceedings are not conducted fairly, or are perceived as conducted unfairly. Without trust, successful investments are undermined. Without trust, valid Awards are questioned and not enforced, or appealed and invalid Awards are enforced because of untrustworthiness. The nature of International Commercial Arbitration, given its proceedings and the legislation that regulates it, is based on trust. A court upholding a foreign judgment will respond differently to the enforcement of the award if it trusts[27] that the proceedings and the outcome were fair and just, and the converse is also true. Trust makes the world go around, quite literally in ICA and also as the Global Financial Crisis has demonstrated. The seriousness of such a wasteland in the area of disputes between investors and states in light of the GFC cannot be ignored any longer[28]. The deep and nearly fatal wounds of the Fisher King, left to fester and rot, led to decay and destruction throughout the Kingdom. The deep wounds to the global economy and the realm of ICA, if left uncleaned by the poisons of mistrust and bias, can never heal. Just as new wine cannot be poured into old wineskins, the entire edifice of ICA as it was built on mistrust and bias cannot bring about positive changes to ICA unless it itself is rebuilt.

The dangers of an unclear precedent are obvious, and the converse is important to highlight. In this case the Court sets a high example in following precedent:

> "Other Chapter 11 tribunals have also referred to decisions in non–NAFTA investment cases. For example, in *Metalclad Corporation v. Mexico*, the tribunal compared *Biloune v. Ghana Investment Centre*, which related to the expansion of a resort in Ghana and the need to comply with local permitting requirements, issues similar to those presented in *Metalclad*. 'Although the decision in Biloune does not bind this Tribunal, it is a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion'. Other tribunals have proceeded in a similar manner, and have compared, relied on, and distinguished decisions of other international tribunals, including decisions of the ICJ, and of other investor–State tribunals. Tribunals have also referred to decisions by WTO/GATT tribunals when those tribunals have been interpreting is-

[27] The law of the United Arab Emirates regarding foreign awards has a list of requirements. The law not only demonstrates the extreme distrust of foreign arbitrations but has also legislated mistrust. Just as mistrust can be legislated, so also can trust.

[28] P. Lalive, "Some Objections to Jurisdiction in Investor–State Arbitrations", Publié dans les Procès–verbaux de l'ICCA, mai 2002, at p. 1, in which is found a quote by Professor Siqueiros "'Disputes between investors and sovereign Governments are becoming increasingly frequent', having regard to 'the gradual economic interdependence among developed and emergent economies, the growth of regional and subregional trade agreements and the proliferation of bilateral investment treaties..., which explained that 'investor–state arbitration has had special significance throughout the world, particularly in Latin America'".

> sues similar to those found in Chapter 11. The *Methanex* tribunal made clear that it was not authorised to decide claims that the GATT had been violated under the auspices of a NAFTA Chapter 11 tribunal. Yet the tribunal indicated that it 'would be open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant'"[29].

The fact that tribunals are acknowledging prior legal reasoning and are willing to consider it speaks in favour of the argument that there can be a corpus of precedent found in arbitral tribunal decisions.

Indeed, this development is extremely prescient in light of the following:

> "Article 1136(1) makes clear that the rule of *stare decisis* does not apply to awards rendered under Chapter 11. It reads: '[a]n award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case'. This is generally true of decisions made by international tribunals– Article 59 of the Statute of the International Court of Justice provides that decisions of the ICJ are binding only with respect to the parties before the Court and only with respect to that particular case– and it is true in investor–State arbitrations as well. The principle that international tribunal decisions are not precedential stems in part from the role they play in the hierarchy of international law established by Article 38 of the Statute of the International Court of Justice, which assigns them a subsidiary role in the development of international law. In addition, investment treaty arbitration takes place under numerous treaties pursuant to which host states may have undertaken different obligations. Thus a legal standard from BIT is not necessarily instructive in the case of another BIT"[30].

A HICALC can create this very legal standard that is missing.

Tribunals in the past have been open to views from other tribunals and this is an important development[31].

2. Public Policy

"An English judge in 1824 described public policy as: a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail"[32]

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[29] M. Kinnear, A. Bjorklund and J. Hannaford, "Article 1136– Finality and Enforcement of an Award", *Investment Disputes under NAFTA, An Annotated Guide to NAFTA Chapter 11.1,* Kluwer Law International, 2006, pp. 1136–1– 1136–41, at p. 1136–7– 1136–8.

[30] *Ibid., supra,* No. 29, at p. 1136–4.

[31] *Ibid., supra,* No. 29at p. 1136–5. Please refer to *Mondev Int'l Ltd. (Can.)* v. *United States,* ICSID (W. Bank) ARB (AF)/ 1992 paragraph 35–36 (Award) (Oct. 22, 2002).

[32] A. Sheppard, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", *Arb. Int'l,* Vol. 19, No. 2, 2003, pp 217–248, at p. 247.

The New York Convention of 1958 is the reason that public policy is still given rein to undermine the *res judicata* of an Arbitral Award. The New York Convention does not distinguish between domestic public policy and international public policy[33]. Domestic public policy can also be viewed as *maslaha*[34] at *Sharia* Law, 'public interest' at Common Law, and '*order public*' at Civil Law.

> "This narrower concept is often referred to as international public policy (or ordre public international). This name suggests that it is in some way a supranational principle; however, in practice it is no more than public policy as applied to foreign awards and its content and application remains subjective to each State. It has been suggested, instead, that only if an award is contrary to 'truly international public policy' or 'transnational public policy', representing an international consensus as to universal standards and accepted norms of conduct that might always apply, should courts refuse recognition or enforcement"[35].

International public policy is an equally vague term. None of these domestic understandings are truly international and until a truly international concept of public policy is defined, drafted and ratified, this plea will continue to undermine arbitral award enforcement. Public policy, furthermore, is not to be confused with state necessity or national security. Clearly, state necessity and national security are critical to the very existence of a sovereign state, and should not be challenged lightly. But to hold something as ephemeral, vague and country–specific as public policy to the same consecrated standard as the security of a sovereign state is to conflate two separate and unequal concepts. One is a doctrine of international law, part of the fabric of *jus cogens* and the general principles of civilised nations. The other is a potentially fleeting idea that can be overturned from one day to the next with an act of parliament or the change of government, and is of relevance only to the individual country involved, of no merit or impact upon the rest of the civilised nations. An international concept is necessary; one that withstands the tests of time and the shifting sands of domestic legislation in the winds of electoral greed. Or one that speaks to that which is universal in the human ex-

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[33] A. Kosheri, "Enforceability of Awards– Some Additional Problems", *ICCA Congress Series*, No. 12 (2005), pp. 337–345, at p. 340: "Turning to the delicate issue pertaining to the concept of public policy as it has to be understood and applied under Art. V(2) of the New York Convention, it can be stated that regrettably the distinction between domestic and international public policy is not clearly understood in a similar manner by all the countries adhering to the New York Convention".

[34] *Al maslaha al murssalah* is a *carte blanche* in Islamic law if it does not contradict with the general spirit of *sharia*.

[35] *Ibid.*, *supra*, No. 32 at pp. 217–218.

perience and that which no civilised nation can deny. Herein is found the challenge. "The legislation of a number of countries refers simply to 'public policy'. Most countries, however, refer to public policy of 'Country X', which is the wording of the New York Convention and the UNCITRAL Model Law, or else they have simply adopted the New York Convention"[36]. This is yet one more reason, *inter alia,* that the New York Convention and the UNCITRAL require reform. The wording of the New York Convention and UNCITRAL, by making the point of reference the public policy of the country rather than that of the international community is a problem and it needs to be reworded. In the MENA, questions of public policy are also closely tied to religious and cultural values that are deeply ingrained. Products and services prohibited[37] by *sharia*, if they are part of a contract that was arbitrated, or if the Award itself is against public policy, will face scrutiny and possible rejection by MENA judges. However, by digging more deeply in Western laws[38] it is possible to find similar values that form a basis of a cohesive common denominator and that can be accepted by both sides. This foundation of similarities is the only way out of the quagmire of mistrust. In Latin America, the situation is similar to that of the MENA, in that, "At the far end of the spectrum (in terminology and application), the legislation in Brazil provides that enforcement will be denied if 'the decision is offensive to national public policy"[39]. This is not the attitude of every state. Conversely, the exemplary example of the United States' view of the restriction of the scope of public policy should be emulated:

> "There is also no doubt that the United States, which has given legislative effect to the New York Convention and the Panama Convention, applies a restrictive concept of public policy: for example, Judge Smith's famous dictum in *Parsons & Whittemore* that enforcement of the foreign award should only be denied 'where enforcement would violate the forum state's most basic notions of morality and justice'. The same year (1974), the Supreme Court, in *Scherk* v. *Alberto–Culver Co*., recognised the difference between international and domestic public policy. It enforced an agreement to arbitrate a claim arising in international trade although arbitration of a similar claim would have been barred had it arisen from a domestic transaction. Holtzman writes that the courts recognise that, particularly since accession by the United States to the New York Convention, the international public policy of the United States favours the enforcement of international arbitration as an essential element in promoting foreign trade and world peace; and that this international policy has been given precedence

[36] *Ibid., supra,* No. 32, at p. 225.
[37] Alcohol, gambling, pork products, interest, insurance, *inter alia*.
[38] *Ibid., supra,* No. 13.
[39] *Ibid., supra,* No. 32 at p. 226.

over national public policies expressed in domestic laws (and he cites the well known cases concerning arbitrability of securities and anti–trust disputes)"[40].

The United States' attitude is by far the most correct and the most in line with the higher aims of the goals of ICA as outlined in the ICSID preamble and in the Permanent Court of Arbitration Charter. The fact that the United States acknowledges the role of arbitration in the promotion of world peace is an example to be followed by every country. This spirit effectively addresses the issues at the heart of the problems within ICA which are manifestations of larger international disputes and it provides a practical remedy to the historical mistrust. It is indeed an exemplary model to be followed. The United States Supreme Court, in *National Oil Corp.* v. *Libyan Sun Oil Corp.* stated:

"To read the public policy defence as a parochial device protective of national political interests would seriously undermine the [New York] Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'"[41].

Other countries have taken a middle ground approach:

"In India, the Supreme Court, in *Renusagar Power Co. Ltd* v. *General Electric Co.* (1994), has interpreted public policy more restrictively than before. The Court held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. It held that the phrase 'public policy' must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; and (c) justice and morality"[42].

The Indian Supreme Court's deeper reading of the spirit of the law to look to the intention and policy of the law and to read it within the context of private international law is an improvement, but the fact that the judge still refers to Indian interests rather than to those of the international community or to international standards is not unique, however it is in contrast to the view of the Hong Kong Court of Final Appeal which: "in 1999 rejected the suggestion that public policy under the New York Convention meant some international public policy or 'standard common to all civilised nations'. Nevertheless, it construed public policy narrowly"[43]. The Hong Kong Court of Final Appeals judge in denying that the New York Convention clause means

[40] *Ibid., supra,* No. 32 at p. 227. 417 U.S. 506 (1974).
[41] *Ibid., supra,* No. 32 at p. 237.
[42] *Ibid., supra,* No. 32 at pp. 227–228.
[43] *Ibid., supra,* No. 32 at p. 228.

anything more than domestic public policy is correct. This is precisely why, if it is agreed that domestic public policy is the problem in arbitral award enforcement that it is, then the wording of the Convention must be rewritten to express an international public policy standard. Public policy, in order for its impact on ICA to be understood, especially in the MENA requires an analysis of the following: "sub–categories of rules and norms can be identified: (a) mandatory laws/lois de police; (2) fundamental principles of law; (3) public order/good morals; and (4) national interests/foreign relations. Some prohibitions (e.g. corruption, smuggling) may fall into more than one category"[44]. Because this list is not inclusive, unpredictable elements of public opinion may occur. Indeed, in the MENA, since religious and cultural values are not separable from the law or public policy in these nations, cultural and religious values may surprisingly make themselves known after an award has been decided and may obstruct the enforcement. This may or may not be done in bad faith, intention is not always quantifiable as legal practitioners are well aware. Additionally, in the MENA, these categories may overlap, e.g., what is national interest is good morals and vice versa, and mandatory laws and good morals may fall into the same category, public order may fall in the same category as national interest. Another important aspect of public policy is its relationship to arbitrability:

> "The public policy ground (in Article V.2(b) of the New York Convention and Article 36(1)(b)(ii) of the Model Law) is closely related to the arbitrability ground in Articles V.2(a) and 36(1)(b)(i), respectively, which provide that recognition and enforcement of a foreign arbitral award may be refused if: 'the subject matter of the difference is not capable of settlement by arbitration under the law of that country'. It has been said that arbitrability forms part of public policy and that therefore Article V.2(a) is superfluous"[45].

If a country agrees to arbitrate a dispute, it cannot turn around after that and claim that a legitimately arbitrable dispute is suddenly against its public policy when it agreed to arbitrate and since disputes that are not arbitrable are usually prohibited by legislation (e.g. in the case of Egypt), then the subject matter of the dispute does not fall under those prohibited and is arbitrable. Hence it cannot be said to be against public policy. An ideal scenario exists in the case of Singapore in which "a Singaporean judge has said (1969): 'the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circum-

[44] *Ibid., supra,* No. 32 at p. 228.
[45] *Ibid., supra,* No. 32 at p.229.

stances exist'". This *dictum* should be enshrined in a HICALC. The English courts follow a similar hopeful and inspiring policy: "The English courts have articulated a pro–enforcement policy"[46]. In regards to *Omnium de Traitment et de Valorisation SA* v. *Hilmarton Ltd* (1999), Timothy Walker J eloquently advocated for ICA thus: "If anything, this consideration dictates (as a *matter of policy of the upholding of international arbitral awards*) that the award should be enforced.(emphasis added)"[47]. Investor–State contracts and arbitrations will raise public policy questions that may have more serious ramifications than other types of arbitrations in terms of public policy precisely because one party is a state. However, the useful distinction of *acta jure imperii* and *acta jure gestionis* must be the standard test for determining the limits of the doctrine of public policy in Investor–State arbitrations. In this sense the public policy plea of a state acting *actus jure imperii* as such cannot be adjudicated against 'as a matter of public policy' and as such is rendered moot. Such a defence cannot succeed. In comparison to the MENA, in which if an award or the subject of the dispute is contrary to *sharia* law, it will be deemed to be contrary to that state's public policy: "The Swiss Federal Supreme Court has held (in 1995) that substantive public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of Swiss law. Likewise, the Indian Supreme Court has said (in 1994): 'In order to attract the bar of public policy, the enforcement of the award must involve something more than the violation of the law of India'"[48]

Furthermore, in the case of Switzerland, the ground of the public policy claim must be based in principle of law and the burden of proof rests on the party bring the charge: "For example, in Switzerland, the party wishing to invoke a violation of public policy when applying to set aside an award under the Swiss Private International Law Act has to establish concretely what fundamental principle of law as violated by the award. Among these principles are those of pacta sunt servanda, the prohibition of the misuse of the law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination, and the protection of those incapable to act"[49].

This standard has merit, however, the bar must be raised higher– as we have seen–unsubstantiated allegations of bad faith, of bias, of

[46] *Ibid., supra,* No. 32 at 229.
[47] *Ibid., supra,* No. 32 at p. 230.
[48] *Ibid., supra,* No. 32 at p. 232.
[49] *Ibid., supra,* No. 32 at p. 234.

discrimination, *inter alia*, have unfortunately succeeded in barring arbitral award enforcement. It is very difficult to prove intention, and bad faith, bias, and discrimination have an element of *mens rea* that may not exist with *actus rea* in some cases. In the event where there was *actus rea* of the aforementioned– unless the element of *mens rea* is also firmly established, it is questionable if indeed the *actus reus* can be construed as bad faith, bias or discrimination, *inter alia*. In light of the fact that, "Certain activities are regarded as *contra bonos mores* virtually the world over"[50], bad faith allegations of bias, discrimination and corruption and bribery, *inter alia* should be firmly placed in the category of *contra bonos mores* and the principle that the wrongdoer cannot benefit from the illegality of an act (a universal principle of law in the MENA as well as universally), should be upheld against those who make false claims of the aforementioned in order to thwart arbitral award enforcement. The importance of addressing alleged claims cannot be overstated:

> "There is undoubtedly an international consensus that enforcement of an award should be refused if its making was induced or affected by fraud or corruption. For example, the Report of the UNCITRAL Commission stated that: 'It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside'. Australia, New Zealand, India, and Zimbabwe have enacted modified versions of the UNCITRAL Model Law, which provide that, 'for the avoidance of doubt' and 'without limiting the generality' of Articles 34 and 36 (of the Model Law), an award is contrary to public policy if: 'the making of the award was induced or effected by fraud or corruption'. The ICSID Convention includes as one of the ground for annulment of the award: 'that there was corruption on the part of a member of the Tribunal' (Article 52 (c)). Fraud implies some act of deceit perpetuated on the Tribunal (e.g. falsified documents, perjured evidence) or on the other party. There are differences of opinion as to whether the fraud/corruption must be shown to have affected the outcome. We would submit that fraud involving the tribunal should make the award unenforceable without having to prove its effect but fraud by the successful party must have influenced the outcome before enforcement is refused".

There is a clear and present danger in allowing 'fraud involving the tribunal' to 'make the award unenforceable without having to prove its effect', in light of the increasing alleged claims of fraud on the part of losing parties and in light of the perception of historical bias. Higher standards of proof must be employed and the burden of proof must rest on the party attempting to establish a claim of fraud. Allowing the possibility of bad faith allegations of bias and fraud to con-

[50] *Ibid.*, *supra*, No. 32 at p. 236.

tinue damages the reputations of arbitrators and damages the credibility of ICA and contributes to the perception that ICA is biased against developing countries, furthermore, it reinforces the thesis that the early arbitrations were systematically biased and that they created a body of law to support aforementioned bias. The problem with this is that it undermines any legitimate attempts to create a harmonised law that would allow greater international economic cooperation and development. ICA is crucial to economic development in that it encourages more trade by providing a safety net for the enforcement of awards in the event of disputes, as well as a fair method for settling these disputes that contributes to international understanding. The wounds caused by public policy run deep and are in danger of infecting the entire edifice of ICA, if they have not already done so.

3. Sovereign Immunity

The signing of a contract by a State means that it has submitted itself to the rule of law, regardless of its sovereign status. The inclusion of an arbitration clause means that the state has further bound itself to the resolution of the contract, in the event of a dispute. Again, sovereign immunity is not to be equated with state necessity or national security. A State's sovereignty is not undermined by being held accountable for its financial and commercial profit–making actions. The fine distinction between *jure gestionis* and *jure imperii* has already dealt with this issue sufficiently in international public law. Implicit in the plea of sovereign immunity is the doctrine of state sovereignty. Although these two principles are not one and the same, the existence of sovereign immunity points to, or implicates the doctrine of state sovereignty. In essence, without the doctrine of state sovereignty, the plea of sovereign immunity would clearly have no basis and would fall flat, *per se*, *prima facie*. A major consequence of the doctrine of state sovereignty is the plea of sovereign immunity, or in other words, the non–acceptance of the binding nature of arbitration upon its sovereignty. Therefore, state sovereignty and sovereign immunity are directly related to the problem of enforcement based on *res judicata* because these two *Janus* twin doctrines undermine the binding authority of an arbitral tribunal against a State. The manifestation of state sovereignty and sovereign immunity is lack of enforcement[51].

[51] *Ibid.*, *supra*, No. 28 at p. 2: "But I would suggest that the overall picture is perhaps less 'rosy' than appears at first sight, and that a more realistic approach should also take into account the many and indeed traditional manifestations of State reluctance to accept binding adjudication by third parties. After all, this phenomenon has long been observed

4. Bad Faith

The ancient doctrines of *res judicata* and *ancient estoppel* cannot be applied in cases of fraud. The term fraud is legally defined; however, this section discusses bad faith and its illegitimate offspring: fraud, bribery, corruption, by employing a comparative legal analysis in the three traditions. All three traditions legislate against fraud and all three uphold the holy doctrine of *pacta sunt servanda*. Without a consistent approach to *pacta sunt servanda*, trust is undermined. Bad faith opens the door to appeal and to judicial review. It does so in the form of fraud as this is legislated clearly. In the event that the Tribunal did not follow the proceedings properly the Award is rendered invalid. However, bad faith works against an Arbitral Award in another way. When one party feels that the plea used by the other party was unfair and gave it an unfair advantage, this opens the door to an appeal and to judicial review. This happens in situations when a State pleas public policy or sovereign immunity. Worse still is the bad faith allegation of bias against an arbitrator in order to challenge the arbitrator, delay or stop the proceedings or render the award invalid, in fact, this type of bad faith allegation of bias is on the rise. Notable scholars have discussed this issue in greater detail than is permitted in the scope of this paper[52]. It is argued herein that the combined pleas of sovereign immunity, public policy and allegations of bias are three common examples of bad faith in the MENA context and which have significantly contributed to the wasteland of ICA in terms of limiting enforcement. Furthermore, the alleged history of bias in the foregoing paragraphs, whether real or imagined, has created mistrust due to the possibility that it might be so. The combination of previous mistrust and current bad faith dealings ensure a veritable wasteland of ICA. Even beyond that, it is precisely because of the negative perception of past arbitrations that arbitrators today are even more vulnerable to becoming victims of bad faith allegations of bias that are

in Public International Law, e.g., with regard to the acceptance by States of the 'optional clause' of the ICJ, and the number of objections to the jurisdiction of the International Court. Let me state at the outset that the deep and traditional reluctance of Governments to undertake binding arbitration commitments (in the broad sense of the term 'arbitration') is perfectly understandable and indeed sometimes quite justified, on the part of responsible State authorities. Be that as it may, in spite of the remarkable progress accomplished by some pioneers like the late Aron Broches, it is unlikely that the tendency of States or Governments to object to arbitral jurisdiction will diminish".

[52] S. Luttrell, *Bias Challenges in International Arbitration: The Need for a "Real Danger' Test*, The Hague, Kluwer Law International, 2009.

founded not in fact, but in perception, and in falsely created allegations. This is the real danger of ignoring the past historical perception of the landmark oil concession cases and their outcomes. By fostering a spirit of mistrust and a negative perception, that perception can continue to fuel false allegations of bias that are difficult to disprove, not because they are based on fact, but because the jury of public opinion is already against the accused at the outset without hearing any evidence to the contrary. The reason for the citations of allegations of past bias is not to prove that arbitrations have been unfair, but to establish that there is a negative perception of ICA and that negative perception creates dangers in self–perpetuating itself in the present even in cases where it is unfounded and unjustified; hence strengthening the unfortunate climate of mutual mistrust. The only remedy against bad faith allegations of bias against arbitrators in order to thwart arbitration proceedings is to legislate severe penalties for the fraudulent use of an alleged bias claim made in bad faith, together with articles of law that specify exact criteria to prove in fact if bias occurred, in a single HICALC instrument. Distinguished scholars[53] have offered tests to lower the incidents of false allegations of bias succeeding in undermining ICA proceedings.

II. The Holy Fool: The New York Convention of 1958

Scholars have been asking many questions in the past hoping to find a way to vivify the wasteland of un–enforced or oft unfairly appealed awards, but they have not asked the right question that could lead to the Grail. The reason for this is because the Grail's mysterious identity has not yet been revealed. It lies shrouded in a web of speculation, mystery, and even legend, but it has not yet been subjected to the rigours of deep analysis as to the actual material of its construction and the shape of its dimensions. The question is not, "What is wrong with International Commercial Arbitration", but "How can it be made right again?" And to answer that question, one must ask, "What is the thing that can do all this?" It is trust. And, "How can that thing be upheld?" Enforcement should be the penultimate goal. Trust should be the ultimate goal. Above all, only a HICALC can ensure that trust is legislated into the entire framework of ICA Law. Enforcement is only a means to an end. Even in cases of enforcement, if there was doubt as to the fairness or justice of the award; even when that doubt is not based in any fact whatsoever, the wasteland remains desolate

[53] *Ibid.*

still. Enforcement cannot occur without legislation that is respected by all involved parties. This means, investors, States, and Courts. Past attempts to harmonise laws have been applied throughout the EU in a number of areas as well as internationally. It has also been attempted with the UNCITRAL in terms of creating standard rules. However, harmonisation was seen as unification or standardisation. What is meant by harmonisation herein is the creation of a law that contains within it general principles of law common to the three traditions.[54]

Many scholars to date have commented on the New York Convention of 1958 in the past. Much discussion but little action has been devoted to the issue of public policy raised by the New York Convention. The problems of public policy are well established. However, what we need today is less discussion and more action. The call of the Hero demands that the Quest for salvation be taken seriously and only those who set out on the Quest asking the right questions and backing it up with the right action will find the way. Although the issue of public policy has been much talked of, very little has done to address the overarching framework which allows this unruly horse to remain untamed and wreck havoc on the outcomes of ICA, especially in investor–State arbitrations with MENA governments. Those familiar with the New York Convention of 1958 are aware that it contains only 16 articles of law[55]. Of these 16 Articles, only four deal with arbitration *per se*. Aside from the first Article which deals with definitions, and eleven articles which deal with the Convention itself, this leaves only four articles that actually address arbitration; those being

[54] Two notable historical attempts have been attempted before, but only partially, the first, the Ottoman Majalla was a codification of Sharia law based on the Code Napoléon and the second, Dr. Sanhuri's creation of an Arab Civil Code which harmonised Sharia law with Civil law and was exported throughout the MENA within the last 70 years. However, never before has such a research project such as has been suggested by the author, in which a comparative analysis of Common, Civil and Sharia law to create a harmonised ICA Law, has ever been attempted. The oldest known European attempt to harmonise law did not extend to Sharia Law. In A. Duncan, *GlobaLex, A guide on the harmonisation of international commercial law*, www.nyulawglobal.org/globalex/Unification_harmonization.htm, retrieved 9/08/2010: "Founded in 1893, the Hague Conference has as its purpose 'to work for the progressive unification of rules of private international law'. Statute of the Hague Conference, Article 1. The conference has drafted dozens of treaties dealing with family law, testamentary dispositions and commercial law, particularly the sale of goods and the recognition of foreign judgments".

[55] For the original text of the 1958 New York Convention please refer to the UNCITRAL (United Nations Commission on International Trade Law Web page: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York" convention at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, Retrieved on 20 September 2010.

Articles II, IV, V and VI. Of these four articles, Article V is the most important to ICA and as such is the most relevant to the discussion herein on several levels. Article V gives the exceptions to which an award may be refused. Only the subparagraphs relevant to the discussion will be mentioned. Article V (1) (a)[56] designates that the agreement may be rendered invalid under the chosen law, or under the *lex arbitri*. This leaves ICA at the mercy of domestic law, the very evil which it is ultimately intending to defend the arbitration from. Article V (1) (d)[57] allows for non–enforcement in the event that the composition of the arbitral tribunal or the procedures are not in accordance to the parties agreement or the *lex arbitri*. Again we have to two subparagraphs devoted to the same topic, that of the problem of the *lex arbitri*. Article V (1) (e)[58] allows for the setting aside of an award if the decision was made by the competent authority. Article V (2)[59] allows the competent authority to refuse enforcement and recognition if, in (a) the subject is not arbitrable by that country's law. Again, we have a third statement referring to domestic law, which is none other than the *lex arbitri*. Article V (2) (b)[60] allows for the setting aside if the award is against public policy. Regarding the second part of Article V (1) (a), which deals with the *lex arbitri*, has direct relevance to ICA in the MENA, given the discussion on the lex arbitri and the mistrust of MENA arbitration centres and Islamic law. If a HICALC instrument exists that is ratified by a country and has the same standing as domestic law, it would address this concern. The HICALC would have to designate what would be considered a valid agreement. In regards to Article V (1) (d)[61], of which the first section deals with the composition of the tribunals, in the MENA this has particular relevance. Although in the MENA the point of law of the composition follows the provisions set out in the UNCITRAL, for example, in most cases, this article could be expanded or amended to address the concerns of MENA arbitrators who feel they are a minority in a 'mafia' of Western arbitrators by designating specific rules to regulate the number of arbitrators from any given region or legal background in order to minimise potential bias or the perceptions of the possibilities of bias or actual bias. Article V (1) (e)[62] means that a MENA Court can set aside an

[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*

award. It is an extremely vague article that undermines ICA as a legally binding process. It undermines the *res judicata* of the arbitral tribunal and subjugates the legally binding process to the court. In legal principle, this is wrong. ICA awards, if they are indeed legally binding (which *prima facie* they are) should be treated as higher court judgements. As such – if properly conducted, as we all assume higher court judgments are, they should be held *res judicata* and not subject to appeal. Or, in the very best instance should not be subject to appeal to any domestic court, no matter how high it is, but to a supreme arbitral tribunal body that conducts 'judicial review' in extreme cases in which a tribunal was found to be acting in bad faith, or in cases of bias, procedural mistake, or misapplication of the law, and not for reasons of public policy, sovereign immunity or for the plaintiffs to escape a financial obligation. However, for such a high standard to occur (meaning the binding and *res judicata* status of awards) the standards by which they are derived must reflect justice, fairness, impartiality, correct application of the law, and correct procedures, as well as general good faith, so that causes for appeal are minimised. Article V(2)(a)[63] can be addressed by a HICALC that sets forth a uniform list of the types of subject matters that are not arbitrable, *inter alia*, to a certain degree, to minimise the occasions for invoking V(2)(a)[64]. Article V(2)(b)[65] can be remedied with a standard definition of international public policy, though impossible to draft, can at least be thought out in its bare skeletal structure and incorporated into a HICALC. Reforming or amending the New York Convention or UNCITRAL and obtaining the signatures and ratification of all the countries may be a difficult task indeed. But by drafting a HICALC as a supplement to existing laws, rules and instruments– the *lacunae* in the law can be filled and a higher standard for ICA, one built upon trust, can be incorporated into the existing legal framework.

III. The Grail Castle

The Holy Grail is not haphazardly and arbitrarily hidden somewhere random, but rather it is safely housed within its own Grail Castle. When one is close to the Grail Castle then the quest for the Holy Grail is nearly fulfilled. The Grail Castle is built of the three pillars of Justice, Fairness, and Effectiveness. The years 1958 and 1965 found

[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*

the commencement of the journey to more successful outcomes of ICA with the drafting of the New York Convention and the Washington ICSID Convention (The Convention on the Settlement of Investment disputes between States and Nationals of Other States)[66], respectively. Indeed, the year 1965 of the active engagement in the quest for the Holy Grail of ICA was under the auspices of such a guiding star as the ICSID Convention. However, a star can only illuminate the darkness so much; rather it is the bright light of the sun that can reveal the golden path of illumined intellect and analysis employed to solve the problems besetting ICA and only a HICALC with its comparative law approach and profound analysis can shine forth with such strength. The preamble of the Washington Convention[67] sets forth three critical and illumined principles of ICA (i) that there exists "the need for international cooperation for economic development, and the role of private international investment therein"[68], (ii) "international methods of settlement may be appropriate in certain cases"[69], (iii) such settlements should be construed as constituting "a binding agreement which requires in particular that due consideration be given"[70] and "that any arbitral award be complied with"[71]. Taken in light of the foregoing discussions of the framework of a political economy analysis of the evolution of public international law to favour European investors[72] together with historical perception the profound mistrust amongst European investors and Middle Eastern seats of arbitration, this preamble is prescient, prophetic and profound in its ideal aims. Setting aside momentarily how historically arbitral awards under the ICSID and prior have unfolded, a closer look at the actual legal text and its literal and intentional meaning are called for. The role of private international investment as a source of economic development may in theory be contested by scholars[73], but in regards to the Middle East and particularly in terms of a country such as Egypt[74] which has an economy that is undoubtedly largely

[66] The full text of the Convention may be found at *Yearbook Comm. Arb'n*, A.J., van den Berg (ed.), Vol. XVI, 1991, pp. 683–703.

[67] *Ibid., supra*, No. 66.

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*

[71] *Ibid.*

[72] *Ibid., supra*, No. 2.

[73] *Ibid.*

[74] M. Siddiqi, "Investors Position for an FDI rebound", *The Economist*, February, 2010, at pp. 55–58, at p. 55: "Egypt remains the largest recipient in North Africa, accounting for 40% of sub–region inflows of $24bn in 2008. Italy's Edison International paid $1.4bn for

dependent upon the tourist economy which is built significantly on outside foreign direct investment projects[75] that support the tourist infrastructure thereby supporting the entire economy, the goal of 'international cooperation for economic development' is precisely in the interests not just of Western investors but also for Middle Eastern economies. This applies not just to Egypt but to the other MENA[76] countries, which, though not as heavily dependent upon tourism are dependent upon other types of investment. Significant statistics, figures and research projects of MENA economies in terms of the benefits of foreign investment exist to support this well established economic reality. In that vein, any steps towards fostering international cooperation for economic development, by bringing together European foreign investors and MENA governments to the same table in a spirit of trust, goodwill and mutually beneficial projects is to be sanctified and glorified. A HICALC, because of its win–win outlook, comparative law principles and foundation of an international common denominator of accepted legal principles, can do just that. A HICALC integrating these general principles of law, as well as the draft articles presented herein regarding choice of arbitrators, *inter alia*, would precisely achieve the ultimate aim of the ICSID by removing the barriers that create the mistrust that obstructs the aims of ICSID. These draft articles proposed herein that aim to regulate the coming together of arbitrators from the same nationality or region may protect arbitrators from the potential of bad faith allegations of bias by lowering the possibility that any outside observer would have the opportunity to perceive bias. This is for the protection of arbitrators from false claims. The second aim of "international methods of settlement" also speaks to the perceived cause of the mistrust, which was bias built on the overuse and dominance of one region's laws, legal tradi-

a two–fifths stake in an Egyptian gas field, with a pledge to invest $1.7bn in new exploration/development work".

[75] The Middle East, May 2010, issue 411, Rhonda Wells, COMESA promotes safer investment networks, pp. 42–43, at p. 43: "Current investment opportunities in Egypt include, amongst others, infrastructure projects related to ports worth $4.95 billion, railways schemes estimated at $792 million, tourism development worth $4.36 billion, medical cities expected to run to $1.45 billion and water and sewage treatment worth $995 million".

[76] *Ibid.*, *supra*, No. 74, at p. 55: "The latest published figures (for 2008) from the Geneva–based United Nations Conference on Trade and Development (UNCTAD) show that FDI to the MENA economies rose by 11.3%, to a record level of $133.14bn over the year (compared with $53.47bn in 2005), resulting in an increase of FDI stock in the region to $540.74bn". Furthermore, "Consequently, 'their reliance on FDI has increased, not so much for its financial contribution, but for the technology, expertise and management it brings with it', noted the *World Investment Report* 2009".

tions, legal culture and political and economic agendas. In that vein, it is arguable that to date, prior arbitrations seen in this critical light were never perceived as international to begin with. Again, the inherent nature of a HICALC would address this unsettling vulnerability within ICA. The third aim of the ICSID outlined herein– of a binding nature would have been the natural outcome had the first two conditions been fulfilled. Because of a spirit of mistrust, there was no international cooperation and because of this the inherent nature of the settled awards was not seen as international, therefore credibility and trust in the outcome were undermined and as a result, the final outcome of such unfair awards was their lack of enforceability in the face of national courts who believed that 'their side' was not dealt with in a spirit of justice or fairness. Finality and enforcement based on a *res judicata* understanding of an arbitral award would be the natural outcome of truly international awards that were decided without the perception of bias. The arbitral tribunals that awarded them would have seen them as legitimate awards and as such credibility and legitimacy would have led to higher enforcement by upholding the *res judicata* of these awards. The pleas of public policy and state sovereignty would not have been necessary as defences or would have been significantly less frequent. Any bad faith use of unjustified pleas or of alleged claims of bias would have been vastly less frequent and enforcement would have been more frequent.

1. Justice and Fairness

The aforementioned discussions regarding the inherent bias in the system[77] focused mainly on the law and on the unpredictability of the outcome of the law when it was applied to specific cases. However, there is yet another element that contributes to mistrust. Bias, in all its forms; real or alleged, undermines the possibility of justice and fairness being served. Bias can also occur due to the particular choice of arbitrators or how arbitrators are chosen. Thus, bias can exist on multiple levels and as such, it must be tackled on multiple levels. Just as our hero Perceval must meet with many obstacles on the way to the Grail Castle, so we too must face the hidden obstacles blocking just and fair international commercial arbitration proceedings at every level of the ICA process. The standard of fair and equitable treatment is already legislated in investment law.[78] However, the reason that the

[77] *Ibid., supra,* No. 2.

[78] *Ibid., supra,* No. 16.at p. 164, "The fair and equitable standard undoubtedly forms part of customary investment law. It was first codified in the Havana Charter of 1948.

fair and equitable treatment standard is difficult to enforce or to build up a *corpus lex* of precedent pertaining to it, is because, *inter alia*, it is hard to define.[79]

A) The UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules of 1976

The UNCITRAL brings our hero Perceval ever closer to the coveted Holy Grail, guiding him even further than the 1958 New York Convention and the 1965 Washington Convention. The UNCITRAL[80] is another instrument that requires a closer study. Article V[81] reads: "If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed". Article V of the UNCITRAL allows for the appointing of arbitrators. Clearly, in the first instance, it is the parties' responsibility to appoint arbitrators. Given the prevalent concern of bias by Middle Eastern parties or arbitrators, this article allows them to select the number of arbitrators, however, whether it is one or three, that in and of itself does not address the issue of bias. Although it is understood that arbitrators (like judges) must be free of bias and impartial, no individual human being can be free of personal or cultural biases, whether an arbitrator or a judge and an amendment to this article, or an entirely new rule incorporated into a HICALC, to the effect that the sole arbitrator be from a third region of the world different than either that of the Euro-

Today, thousands of BITs and several important multilateral trade–related agreements have codified the fair and equitable treatment standard with remarkably uniform language".

[79] M. Kinnear, "The Continuing Development of the Fair and Equitable Treatment Standard", pp 209–240, at p. 209, in A. Bjorklund, I. Laird and S. Ripinsky (eds.), *Investment Treaty Law*, Current Issues III, Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law, 2009, London, British Institute of International and Comparative Law: "Virtually all modern BITs contain a 'fair and equitable treatment' ('FET') clause, and FET is the most frequently pleaded obligation in international investment arbitration. Arbitral awards since 1999 have made significant progress in clarifying the meaning of FET, and its elaboration continues at a rapid pace. However, notwithstanding its frequent invocation and the superficial simplicity of the phrase 'fair and equitable treatment', the FET standard continues to defy precise definition".

[80] The text of The UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules of 1976 may be found on the UNCITRAL web page at http://www.uncitral.org/uncitral_texts/arbitration/1976arbitration_rules.html. Retrieved on 20 Septemeber, 2010.

[81] *Ibid., supra*, No. 80

pean investor or MENA state, or that of the three arbitrators, and that no more than one can represent one region of the world, should be drafted. The reason being is that such an article would protect the arbitrator from the perception of bias and from bad faith allegations of bias. In the event of the appointment of one arbitrator Article VI (1) (a)[82] allows for the nomination of the names of one or more persons, of whom one would be selected to serve as an arbitrator. However, in practical cases, this is not always feasible due to the potential unavailability of a selected arbitrator. In the event that Article VI (1) (a)[83] is not fulfilled, Article VI (1) (b)[84] allows the submission of a person or institution to serve as an appointing authority. Article VI (2)[85] and Articles VI(3)(a)(b)(c)(d)[86] and Article VI(4)[87] of the UNCITRAL deal with the procedures for the appointment of the sole arbitrator, in the event of a non agreement (Article II)[88] and according to a list– procedure of names (Article VI(a)–(d))[89], however, if the procedure cannot be fulfilled for any reason, the appointment is at the sole discretion of the appointing authority (Article VI (3)(d)[90]– again leaving the door open to potential bias or to the perception of bias. This article effectively removes entirely the choice of arbitrators from out of the hands of the parties– or opens the door to one party exerting force or influence on another, or to the perception thereof. Article VII(1)[91] provides that the two appointed arbitrators, in a case in which there are to be three, shall chose the third as the presiding arbitrator of the tribunal. Again, Article VII (1)[92] removes the choice of the presiding arbitrator from the hands of the parties. Judicial review of arbitral awards should look more closely at the choice of arbitrators. Future scholarly work should analyse to see if there is a direct correlation between arbitrators thus chosen (by means remote from the direct appointment by the parties themselves) and the outcome of the case, and if the cases were decided fairly; if the arbitral tribunal arrived at a decision that weighted the merits of the case of each party equally, or if there was a correlation (direct) with cases in which arbitrators cho-

[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

sen indirectly were more in favour of the party where the names of one of the list were those left over after all other names were crossed off (Article VI (3)(b))[93] –in other words– since both parties can cross off names– this leaves names that are numbered differently by the different parties, thus the ones chosen will inherently reflect the bias (conscious, or otherwise) of the appointing authority, who, was appointed (Article VI (1)(b))[94] as a list of names, since the existence of an appointing authority means no sole arbitrator was selected–hence the reason for an appointing authority. Article VI(4)[95] 'advises' the appointing authority to "have regard to such considerations as are unlikely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing and arbitrator of a nationality other than the nationalities of the parties". [96] It should be a clear injunction and enshrined in the rules that the arbitrator must not only be of 'a nationality other than the nationalities of the parties', but further than that, that an arbitrator must not be from a region of the world as that of another arbitrator[97] and possibly must even be from a region of a distinct legal and

[93] *Ibid.*

[94] *Ibid.*

[95] *Ibid.*

[96] R. Garnett, H Gabriel, J. Waincymer and J. Epstien, *A Practical Guide to International Commercial Arbitration*, New York, Oceana Publications, Inc., 2000, at p. 167.

[97] S. Saleh, *Commercial Arbitration in the Arab Middle East. Sharia, Lebanon, Syria, and Egypt*, 2nd Edition, Oxford, Hart Publishing, 2006, at pp.120–122: "The recurring Western arbitral majority vote is seen as securing international awards in favour of the Western party. In this respect the problem has been freely expounded in a paper by a distinguished Syrian lawyer in front of an Arabic–speaking audience. In this paper, which purports to describe the common plight of Arab countries with regard to international arbitration, elaborates in fact specifically Syrian grievances. The basic ideas laid down in the paper may be summed up as follows: (i) The majority for making an international award is generally a Western majority: the chairman is appointed by international arbitral institutions and at least one arbitrator is appointed by a non–Arab party. Thus, both chairman and at least one co–arbitrator are non–Arab. (ii) Very few Arab arbitrators have been involved in international arbitration. (iii) The application of Arab laws is generally avoided. (iv) In view of (i), (ii), and (iii), a proposed remedy is submitted: in order to safeguard Arab interests affected by a recurring Western majority, the chairman of an international arbitral tribunal should not be authorized to determine a dispute according to a law in which he is not conversant, i.e. a law which does not belong to his own legal system. In other words, an adjustment between the nationality of the chairman of an arbitral tribunal and the applicable law would allow the chairman to competently deal with and apply his own law, thus securing, *inter alia*, the appointment of an Arab chairman when an Arab law is applicable. Whilst the observations made under (i), (ii), (iii) are correct, it is submitted that the proposed remedy under (iv) seems to be unrealistic, arguable for the following reasons: (i) The Western majority as described by the distinguished Syrian lawyer derives from a preconceived idea that there is a systematic Western solidarity of the same sustai-

cultural tradition from the other arbitrators, that differs vastly from and has no political agendas or public policy considerations closely tied with either of the other arbitrators[98] or parties. This one change alone would make considerable differences to the law, practice and outcomes of ICA, for the betterment of the entire global community. As long as there is a perception of a 'block of Western arbitrators' trust will be impossible but if this perception is resolved by preventing such congregations in the first place, credibility in ICA will be ensured. Article VII (1)[99] states, "If there arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator for the tribunal". But, Article VII (2)[100] states: "if within 30

ned virulence as the Arab regional solidarity. (ii) The proposed remedy would, in practice, replace a Western majority by an Arab minority, which in its growing current of political bitterness would lose the chance of being independent and impartial. (iii) Moreover, the independence and impartiality of arbitrators do not necessarily derive from a given language and a given legal culture and there is no reason to systematically trust or distrust an arbitrator on the grounds of his nationality. In addition, retaining the criteria of applicable law for selecting a chairman may face technical difficulties as in many instances, e.g. failing the choice of parties, the applicable law may not be determined at the outset of the arbitral process, at the stage of composition of the arbitral tribunal, but at the ultimate stage, the award making. A tentative remedy or rather a mitigating factor would possibly be found in a carefully selected human infrastructure by international bodies, neither recruited in the industrialised world which may hold a different legal perspective to that of developing countries, nor, systematically, in the Arab world, thus attempting to transcend the economic interest of the West and the regional solidarity of the Arab Middle East". Three basic facts emerge from this discourse (i) inherent bias due to regional affiliations, i.e., 'the Western majority' have created mistrust on the side of the Arab parties, (ii) nationality is implicated in that it is tied to one's overall regional affiliation and (iii) it is not feasible to impose any domestic law, whether Western or Arab on an ICA, because this is also a form of bias and defeats the purpose of ICA in transcending domestic laws, thus, the conclusion is that in order to form 'a carefully selected human infrastructure' with the purpose outlined in the aforementioned paragraph, clear rules as the ones recommended herein, in which no more than one arbitrator or member of an arbitral tribunal, including the chairman, the presiding arbitrator or the appointing authority, may originate from an single region. The tribunal must be thoroughly international and must not represent any single nationality, legal culture, developed or developing part of the world or any single region, and this requirement must be legislated.

[98] *Ibid., supra*, No. 97 at pp. 347–348: "The second issue is one also connected to the real or supposed majority and has to do with the independence of arbitrators. Independence is generally considered, *rationae personae*, as required for the relationship of an arbitrator to the parties and not *inter* arbitrators: the non–Western arbitrator sits with Western arbitrators whose fellowship is often woven around a complex web of cases, either as counsel or as arbitrators. This contributes to promoting closer understanding between the Western arbitrators".

[99] *Ibid., supra*, No. 80.

[100] *Ibid.*

days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed": then in Article VII(2)(a)[101] it is provided that, "the first party may request the appointing authority previously designated by the parties to appoint the second arbitrator"[102]. The issue of the 'club of arbitrators'[103] has been identified by many scholars[104]. Given this perception of a club, or a 'mafia', any legislative at-

[101] *Ibid.*

[102] *Ibid., supra*, No. 97, at pp. 347–348: "In mixed international arbitration involving Western parties and Asian, African or Middle–Eastern parties, the main criticism made by the 'exotic' parties relates to the process being conducive to a pre–constituted majority, inasmuch as one co–arbitrator is generally appointed by the 'exotic' party and two members of the tribunal, including the chairman, are appointed by the Western party. The later is often appointed by an arbitral institution based in the West. According to critics, despite judicious selection of arbitrators by, e.g., the ICC International Court of Arbitration from neutral European countries, the result in practice is one of a Western majority closely connected by cultural, economic and industrial solidarity. Hence, according to these same critics, political neutrality has no impact on the economic and legal mechanisms of commercial arbitrations. It is submitted that criticism of this inherently recurring majority finds as a counterpart, on the other side of the barrier, a regional solidarity arising from poverty, inferiority complexes and residual anti–colonial sentiments. Frequently, the minority arbitrator is treated as some kind of poor relation. His input remains furtive. If the minority opinion is one expressed with a certain degree of forcefulness, e.g. in ICC practice, the Court will not always act on this in accordance with art. 27 of the Rules ("The Court may also draw the attention of the arbitrator to points of substance"), but rather will often make use of the lever of the minority opinion to remedy the weaknesses in the draft majority decision. The dissident opinion is then considered as supportive padding and not as a springboard for new considerations and potential substantive improvement. The problem ultimately lies in the balance of composition of a tribunal, with the aim being to eliminate the stumbling block of the pre–constituted majority, whether real or imaginary".

[103] *Ibid., supra*, No. 16 at p. 180: "Historically, there has been remarkable uniformity in the community of arbitrators. Detlev Vagts has described the community of international arbitrators as 'an exclusive club in the international arena' whose members 'are automatically' brought into almost any major dispute... However, the developments in legal education and legal industries around the world in the latter half of the 20th Century has resulted in the emergence of skilled practitioners in many parts of the world eager to gain entry into the purported 'exclusivity club'. "

[104] *Ibid., supra*, No. 11 at p. 8: "Only a very select and elite group of individuals is able to serve as international arbitrators. They are purposely selected for their 'virtue' – judgement, neutrality, expertise– yet rewarded as if they are participants in international deal–making. In more sociological terms, the *symbolic capital* acquired through a career of public service or scholarship is translated into a substantial cash value in international arbitration. Not surprisingly, scholars are not the only persons interested in the somewhat mysterious world of international arbitration. Many lawyers would very much like to get into this line of work. A number of leading U.S. laywers, for example, especially those who have attained a formal retirement age, have reacted to the subject matter of our research by inquiring how they can enter the world of international commercial arbitration, a world that they often perceive as a rather closed and arcane European club". Furthermore, at p. 23: "There are individuals who, for example, teach at low–prestige schools, work in

tempts to demonstrate that this is not the case and to minimise this perception will result in lowered incidences of bad faith allegations of bias and higher award enforcement. Or according to Article VII (2) (b)[105] if that fails it can request the Secretary–General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. Article VII (3)[106] provides that if there is still no agreement regarding the presiding arbitrator, then the procedures in Article VI[107] are to be followed. This means that the same problems inherent in Articles VI (3) a–d[108] are invoked again in this scenario. The question of nationality and regionality must be legislated more narrowly. One of the most ironic aspects of ICA is that in both modern and traditional forms, both parties are to agree upon the arbitrator(s). This freedom of choice gives arbitration flexibility, and seems to lessen the adversarial nature of the process, making it different from litigation in which it is clear that it is one side against the other in instances that ideally, where both parties can agree to a sole impartial arbitrator, the non–adversarial nature of ICA is at its best. However, in the event that a three–arbitrator scenario is selected, clearly each side would, in the name of healthy self–interest choose the one arbitrator to be most inclined to its own side, almost as an 'advocate', so to speak, to defend the party before the other arbitrator and the presiding arbitrator. In this sense, bias can never be fully eradicated. Herein lies the paradox

unknown law firms, or produce scholarship that is deemed too marginal, who cannot gain access to this world no matter how much they write, attend conferences, or in general profess the faith. Others need not even profess the faith or write about arbitration to enter the field more or less at the top. One of those who fits the profiles of those just described stated simply, it is 'not that hard to get into the club'". Furthermore, at p.23: "A prominent London solicitor thus stated, ' I started roughly twenty years ago' with an ICC case in Geneva: 'The chairman of the tribunal was Claude Reymond, who has now become a firm friend. Michael Mustill... [now Lord Mustill of the House of Lords] was one of the other arbitrators. And it was quite a good introduction...to the mafia'". And finally at p. 50: "The potential problem confronted by outsiders and invoked by the ICC secretariat is evident in the words of a leading arbitrator of the new generation, 'This is a mafia. There are about, I suppose, forty to fifty people in Western Europe who could claim that they make their living doing this. I'm one of them. It took me, oh, probably close to fifteen years to get to the point that when I go as I do regularly to the Swiss Arbitration Association meeting twice a year, or I go to an ICC gathering, or an ICCA gathering that I will know and be recognised, and know and talk to a number, you know, the leading figures. And if you...that's how you just get into it. Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends– people, you know. It's a mafia because policymaking is done at these gatherings'. "

[105] *Ibid., supra*, No. 80.

[106] *Ibid.*

[107] *Ibid.*

[108] *Ibid.*

of arbitration as an alternative to litigation on one hand, as parallel to it on the other. There are many pitfalls on the quest to the Grail. However, there does exist a very real possibility for change and efforts to this effect have been made[109].

Just as Perceval's original flaw is his naiveté that leads to his folly and stumbling and bumbling about until he begins to grow wise and ask the right questions, Article VIIII reflects extreme naiveté: "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances"[110]. Clearly, in cases of obvious conflicts of interest it would be a simple matter to disclose, however, given that each party will attempt to choose the one arbitrator who is most inclined to its case, it is naive to expect that a prospective arbitrator will be one hundred percent impartial and in many cases may not even be consciously aware of any cultural or other biases that would predispose him to one side over another. An independent body should have the discretion to review the impartiality of an arbitrator beforehand to deal with potential bias and disqualify him before an arbitration commences, in the event of manifest bias. The existence of such an independent body can serve as a deterrent to bad faith allegations of bias in that if it cannot be proven that bias occurred and if there is a reasonable belief that such a claim was made in bad faith, a penalty may be incurred for attempts to thwart an arbitration proceeding.

In terms of fairness, much can be said regarding Article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case"[111]. Depending on the law governing the procedure itself, the only way fairness, justice and equality can be quantified is if each party is given an equal

[109] *Ibid.*, *supra*, No. 11, at p. 47: "The secretariat of the Court of Arbitration of the ICC makes no secret of its desire to open the market of arbitration beyond the narrow circle of the grand old men". Further, at p. 47: "As one key representative of the secretariat mentioned: 'There was an effort to broaden the pool'. And new nationalities were also brought in partly because 'it's important for the perception of the ICC as being international. And it's important in the perception of international arbitration as an institution, it's being universal'".

[110] *Ibid.*, *supra*, No. 96 at p. 168.

[111] *Ibid.*, *supra*, No. 80.

opportunity to raise at the appropriate time any information and defences having relevance to their claims or the merits of their case. However, there is no way to measure, guarantee, or legislate after that stage that each argument will be weighted and considered equally on its merits by each arbitrator(s) in any given arbitration. At that stage, at the stage of the decision, all that is left is trust, and hope. But if trust has not been previously legislated by way of all the recommendations provided herein, then doubt will remain as to the fairness of the outcome, and this doubt will weaken enforcement and undermine credibility in the entire system of ICA. Article 20 reads: "During the course of the arbitral proceedings either party may amend or supplement his claims or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside of the scope of the arbitration clause or separate arbitration agreement"[112]. The discretion of the appropriateness of amendments to the claim or defence, and its jurisdictional scope lies with the tribunal. If there is no trust in the tribunal's impartiality or fairness at this stage, an arbitration party may have cause to doubt the decision and the entire proceedings that it is based upon, and thereby appeal it. Article 22 reads: "The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements"[113]. Here the tribunal decides who to give a chance to provide further evidence in their favour. What if they are perceived as being biased and of not giving one side a further chance to adequately present evidence that would help its case? What if the time limit they chose is unfair to one party and the evidence cannot be obtained in the time they designate? What if certain evidence is not weighed with due consideration? Too many 'what ifs' undermine trust in ICA and open the door to the possibility of bad faith claims of bias. Article 24 (1) reads: "Each party shall have the burden of proving the facts relied on to support his claim or defence". [114] This Rule is *prima facie*, inherently biased, against, (usually), the state. It is a fundamental principle of law that it is the guilt of a party that must be proven beyond a reasonable doubt because it is possible

[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*

to demonstrate objectively by presenting evidence that supports a claim of guilt, whereas it is infinitely more difficult to provide concrete evidence beyond a reasonable doubt to prove one's innocence. This is a cornerstone principle in common law and the reason why a jury in criminal law proceedings is necessary. Anyone can accuse anyone of anything but to prove one's innocent is in fact against certain allegations is far more difficult than to prove with fact and evidence that one is guilty. The burden of proof mush lie with the claimant in establishing proof beyond a reasonable doubt with concrete evidence that the claims and allegations put forth against the accused party, or the defence, are indeed, based in fact and demonstrate beyond a reasonable doubt the guilt of the other party in breaching a contract in bad faith. To do otherwise, to maintain a burden of proof to prove innocence is wrong. A system based on a fundamentally unjust premise cannot, in its final outcome and decisions, be just. This article should be reworded, or a relevant article pursuant to the above discussion should be included in a HICALC and made as a supplementary law to the UNCITRAL Rules. Furthermore, this very logic is what puts arbitrators at risk for being unjustly accused of bias. If the accuser knows that just raising doubt as to the impartiality and the independence of the arbitrator is enough to shut down an arbitral proceeding or to obstruct an award, then such bad faith allegations can continue. But if the principle of innocent until proven guilty is standardised, and is applied equally, both to the arbitral proceedings and to any cases of allegations of bias against arbitrators, many of the problems besetting ICA would be resolved just with this one single change of shifting the burden of proof to the accusing party to substantiate their claim, whether they are in a proceeding or making allegations against an arbitrator. To insist otherwise leaves innocent people at risk of false allegations and this is in complete violation of all known standards of justice and fairness universally. The New York Convention deals mostly with exceptions to enforcement. The UNCITRAL in the main deals with rules on very basic procedures and in the selection of an arbitrator. Another set of rules –Article 33(1)[115]– deals with the law applicable to the substance of the dispute. Article 16 (2)[116] deals with the place of arbitration and this can invoke the *lex arbitri*. One HICALC addressing each of these can simplify matters. The near total confidentiality of ICA proceedings means that tremendous guesswork is involved in actually understanding how the New

[115] *Ibid.*
[116] *Ibid.*

York Convention and the UNCITRAL as well as other laws and regulations impact the outcomes of arbitral award decisions. Although decreasing confidentiality is not called for, legislating higher trust can supplement *lacunae* where confidentiality prevents transparency and analysis.

B) The Washington Convention of 1965[117]

In light of the foregoing analysis of the history of ICA, a closer analysis and different reading of the Washington Convention is in order. Of the seventy–five articles found in the Washington Convention, only six out of those seventy–five articles have any direct bearing on the very essential issues that Investor–State arbitrations, particularly in the context of the MENA, have raised, time and again. Those six articles are Articles 13, 14, 38, 39, 42, and 52. Article 13(1)[118] allows for the possibility of a composition of an arbitral Panel of four members who may be nationals of the contracting state. Given the aforementioned discussion on nationality, the dangers of this non–regulation of nationality in the ICSID should be clear. Article 13(2)[119] sets out the prohibition of having ten persons on a Panel of the same nationality. Just as with the UNCITRAL discussion, this should be extended from nationality to region. Article 14[120] requires that a person serving on the Panel is competent in the fields of law. Given that many Investor–State arbitrations are held with MENA governments in which the *lex arbitri* may be of an Islamic nature, it is doubtful that this condition in reality is always fulfilled. Article 14 also requires that an arbitrator exercise independent judgment. Given the aforementioned discussion of the negative perception of the nature of the pool of arbitrators as an exclusive club, or as a mafia, this clause is laughable. In this vein, independent judgement, as perceived, is impossible. Mafia aside, given the natural personal, cultural, and legal, *inter alia*, biases of any given arbitrator, the absence of other legislation to safeguard against such potential biases is a danger. It is a danger for the arbitrator as much as it is a danger for potential bias. This must be seen in light of the historical perception of biases and absence of legislation to prevent such types of bias. Article 38 makes provisions in the event that if after 90 days no tribunal has been constituted, the Chairman may appoint the arbitrators so long as they are not nation-

[117] *Ibid.*, *supra*, No. 66 at pp. 683–703.
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*

als of either party of the arbitration. This is the same problem with Article VI of the UNCITRAL. Furthermore, restricting nationality is insufficient given the perceived enormous historical and political regional biases. The scope of the restriction must be widened from nationality to region. Article 39 provides for a majority of non–nationals unless otherwise designated by agreement of the parties. Article 38 and 39 do not adequately address the issue of bias, on the same grounds and reasoning as was given regarding Article VI of the UNCITRAL in the foregoing paragraphs. Article 42 (1)[121] states that in the absence of an agreed upon law, "the Tribunal shall apply the law of the Contracting State" and "other such rules of international law as may be applicable". Indeed, this is precisely the problem with the early oil concessions. When Western arbitrators attempted to apply the law of the Contracting State, they found that it either 'did not exist', or was too 'primitive', *inter alia*, and international law was not seen as international law by the non–Western parties. A HICALC would instantly remedy this conundrum. Clearly this article has shown itself to be inadequate in all the history of Investor–State ICA in the MENA, particularly in regards to the early oil concessions. Article 42 (2)[122] prohibits the 'obscurity' of the law from being a source of non–decision. Given that in Investor–State arbitrations with MENA government seats the odds are highly likely that the law of the place will be Islamic law, and that Islamic law is still highly obscure not only to Westerners but to many Middle Eastern lawyers, arbitrators and judges alike, Article 42 is highly impractical, inadequate, and unrealistic[123]. It is naive and past experience requires that a rewriting of the law be considered. On that takes into consideration the realistic challenges and unfolding of ICA, based on experience. Just as Perceval grew transformed into a wiser man in his journey by successfully facing adversity and integrating the lessons learned on the path, a HICALC that takes into consideration practical realities would be a much more effective instrument in ensuring higher arbitral award

[121] *Ibid.*, *supra*, No. 66 at pp. 683–703.

[122] *Ibid.*

[123] A. Redfern, M. Hunter, N. Blackaby and C. Partisides, Constantine (fourth ed.) (2004) *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell: Any given ICA can make reference to four different domestic sets of laws. The first is the law that governs the clause in a contract designating an agreement to submit to arbitration. The second is the law of the actual arbitration proceedings. The third is the law of the arbitral tribunal that is applied to the substantive matters in dispute before it. The final law governs recognition and enforcement of the award of the arbitral tribunal. At any stage, any one of these laws may by default end up being Islamic law, and certainly in the case of a foreign arbitral award seeking enforcement in a MENA jurisdiction.

enforcement in the highly specialised area of Investor–State arbitrations in the MENA. Article 52(c)[124] provides for annulment of the award due to corruption. Given that bias can be construed as corruption and wilful bad faith, and conversely that bad faith allegations of corruption and bias can be used to annul an award, this clause should be enlarged in scope to encompass the historical lessons learned from the journey for the quest for higher ICA enforcement. Given the Global Financial Crisis, the inadequacy of the three existing instruments to protect ICA and arbitrators can no longer be ignored.

2. Effectiveness

Effectiveness means finality of the award and enforcement. This means that neither actual fraud nor the perception of fraud can exist in order for the doctrines of *res judicata* and *ancien estoppel* to be upheld. Finality and enforcement however, are two distinct but interrelated concepts. Clearly the aforementioned discussions on bias, precedent, public policy, state sovereignty and aspects of res judicata have established how interconnected and relevant all these doctrines are to ICA effectiveness. The question of effectiveness cannot be fully and properly addressed until these other questions of doctrines are decided in the context of universal standards. The existence of appeal and annulment undermine effectiveness of the entire ICA process and its credibility, but the fact that at the end an award may be annulled especially undermines effectiveness.

A) Finality, *res judicata* and *ancien estoppel*

These two longstanding principles, together with finality, imply the binding nature of the Arbitral Decision. The thread of public policy runs throughout the entire fabric of ICA and any related doctrines therein. It is impossible to discuss *res judicata* and any related doctrines thereof without further reference to public policy, particularly in light of the foregoing analysis of the ways in which public policy undermines arbitral award enforcement and credibility in ICA. The reason that public policy is a serious problem in ICA is because as it is construed broadly, it undermines the *res judicata* of arbitral awards: "In restricting the concept of public policy and applying an international public policy standard, the courts have recognised the importance of *finality*– which is itself an aspect of public policy. Since an overly broad interpretation of the concept of public policy defeats

[124] *Ibid.*, *supra*, No. 66 at pp. 683–703.

arbitral finality and the objectives of arbitration, the public policy exception is narrowly construed"[125]. Finality, or res judicata, as a doctrine, should be legislated in to the domestic public policy and legislation of nations as a consideration of public policy that should be upheld as equally as other public policy concerns. The doctrine of the finality or res judicata of awards should be as equally upheld as other public policy considerations. This forms the basis of justice and fairness for the arbitration process. Why should *res judicata* of arbitration decision be any less important to a country than other public policy or national interest considerations? Considering the importance of ICA in fostering world peace, *res judicata* of arbitral awards should be the foremost priority of any nation's public policy and national interests. Indeed:

> "It has been said that it would be contrary to public policy to enforce an award that was contrary to, and inconsistent with, the prior judgment of a local court on the same subject matter. This is expressly referred to in the legislation of some countries, for example Egypt. The English courts have also held that the principle of res judicata is a rule of public policy. An award that disregarded, or was in conflict with, an order of the Indian High Court relating to the same dispute was accepted by the Indian Supreme Court as potentially being contrary to pubic policy (but it found no conflict on the facts)"[126].

One approach to dealing with public policy in the event it undermines *res judicata* has to do with preventing judicial review:

> "As to whether the court should allow a re–opening of the facts, Colman J., at first instance, concluded that the public policy of giving effect as far as possible to the finality sustaining international arbitration awards and discouraging relitigation outweighed, on the facts of this case, the public policy of discouraging international corruption. The judge emphasised that the conclusion was not to be read as in any sense indicating that the Commercial Court was prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption was referred to high calibre ICC arbitrators and duly determined by them, it would be entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission. The majority of the Court of Appeal (Mantell L.J and Sir David Hirst, Waller LJ. Dissenting) agreed with Colman J. that, on the facts of that case, the attempt to re–open the facts should be rebuffed"[127].

The principle of *res judicata* in the face of increasing unjust and bad faith allegations of fraud, bribery, bias and impartiality can pro-

[125] *Ibid.*, *supra*, No. 32 at p. 228.
[126] *Ibid.*, *supra*, No. 32, at p. 241.
[127] *Ibid.*, *supra*, No. 32 at p. 245.

tect both ICA and arbitrators from the aforementioned. The view of the English court is sound, pragmatic and refreshing in light of the serious problems besetting ICA in regards to public policy and allegations of fraud. However, the French courts do not share the same enlightened view: "The Paris Court of Appeal appears more willing to carry out a full–scale review"[128]. This view undermines credibility in ICA as well as lowering enforcement. A landmark case[129] demonstrated precisely this when the Paris Court of Cassation 'overturned' an arbitral tribunal's legitimate decision without giving reasons. The judicial review denied the existence of a legitimate arbitration agreement as well as denying that the competent government authority whose signature bound the state to the arbitration agreement had the jurisdiction to act as a representative of the state. The court did not base the decision on public policy but it 'overturned' an arbitral tribunal's decision to not accept a plea of state sovereignty. This dealing by the court of arbitral tribunal decisions as if they were those of a 'lower court' and subject to appeal is another factor that greatly undermines the *res judicata* of an award. An arbitrator has the same status as a judge vis a vis an arbitral tribunal that a judge has vis a vis a court. To interfere with such judicial decision making of an arbitrator applying the law to the facts of a case renders *res judicata* of an arbitration moot and makes arbitration pointless. Only a properly legislated law that protects arbitral tribunals from unnecessary meddling by the courts in the outcomes of the tribunals or in the award, via a HICALC, can protect the credibility and enforceability of the decisions of arbitrators.

Clauses to the effect that arbitrations are final and binding are necessary but this is only the first step, as after the level of acceptance of the finally and binding nature of an award, problems with enforcement and effectiveness may still occur, and that fact is also based upon the wording of and provisions thereof, of the law. For example,

> "The first draft of NAFTA had a single article on investor–state dispute settlement, which was proposed by the United States. Paragraph 3 of that article provided that an arbitral award resulting from an arbitration under the UNCITRAL Arbitration Rules, the ICSID Additional Facility or any other Rules used for the matter would be 'final and binding on the parties to the dispute'. Each party undertook to carry out the award without delay and to provide for the enforcement in its territory. This provision was modified in the May 1st, 1992, text to delete the reference to arbitration being conducted pursuant to rules other than the ICSID and UNCITRAL Rules. The May 13, 1992, draft added a paragraph stipulating that

[128] *Ibid.*, *supra*, No. 32 at p. 245.
[129] Please refer to the *Pyramids Case*.

> an investment dispute would be considered to arise out of a commercial relationship for purposes of the New York and Inter–American Conventions. This version stated that an award would be final and binding, would be carried out without delay, and that the Parties would provide enforcement mechanisms for such awards, subject to the Inter–American, New York and ICSID Conventions. A provision was included stating that no Party would give diplomatic protection or bring a claim for damages or restitution of property unless the other Party had failed to abide by the award pursuant to the New York Convention"[130].

The provisions for 'finality' and 'binding' are all well and good, but the reference to the New York Convention once again gives priority to the public policy clause found therein and essentially works to undermine said 'finality' and 'binding' natures of arbitral awards, perhaps the fact that this still remains an issue points to the reality that in practice, states and investors are hesitant in giving finality its due place in ICA rather than:

> "States have traditionally preferred the finality of investor–state awards, in preference to 'consistency and correctness'. Following the decisions in SGS and Lauder, however, the commentators have argued that 'consistency and correctness' ought to outweigh finality. In this article, it is argued that, based on the available evidence, the 'tide has not turned': states and investors continue to prefer finality over consistency and correctness. It is further argued that, based on this position, reform ought to be considered to seek to protect the finality of investor–state arbitral awards"[131].

B) Enforcement

Enforcement cannot occur without finality and finality cannot occur in cases in which it is claimed the award was decided based on bias or bad faith, or in the face of public policy or sovereign immunity pleas, *inter alia*. Obviously, without the chance of enforcement, trust decreases even more and ICA Law loses credibility. A related aspect of enforcement is in the term 'binding'. What is even more disconcerting is that, "The percentage of cases in which enforcement is refused or if the award is subject to annulment seems, however, to be increasing. This is especially so if we take into consideration the non–reported cases, mainly in developing countries, such as my own country, Egypt, where the number of annulled arbitration awards and of the court decisions refusing to grant enforcement is practically impossible to ascertain with precision"[132].

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[130] *Ibid.*, *supra*, No. 29 at p. 1136–1.

[131] J. Clapham, "Finality of Investor–State Arbitral Awards: Has the Tide Turned and is There Need for Reform?", *J. Int'l Arb.*, Vol. 26, No. 3, 2009, pp. 437–466 at p. 437.

[132] *Ibid.*, *supra*, No. 33 at p. 337.

IV. The Holy Grail

Trust is the Holy Grail of International Commercial Arbitration. When Justice, Fairness and Effectiveness, the pillars of the Grail castle are discovered, then the quest for the Grail is nearly fulfilled. These three pillars lead to trust. Trust is the most important aspect of ICA. Without trust, investors would not invest and states would not be held accountable. Conversely, without trust, states can be taken advantage of, or arbitrators can be falsely accused of bias. History has shown us that both of these situations have prevailed and this is the real reason that ICA is a wasteland. However, trust cannot remain an elusive and poetic concept with a solely aesthetic and ideal value. Trust must be legislated and by being legislated, the legislation itself will lead to further trust. This will create a situation in which trust builds upon trust and the credibility of the edifice of ICA is maintained and re–enforced regularly.

V. Conclusion: The HICALC

In hindsight, it is a simple matter to apply the historical outcome of oil concession arbitral awards to the letter of the law and to see clearly where the law, or *lacunae* in the law, fell short in preventing the mishaps that lead to the creation of an ICA wasteland. However, to ignore the lessons of history would be folly indeed. Now it is necessary to gather the knowledge generated of almost 100 years of ICA proceedings from the early oil concessions to date and to apply that knowledge to an improved law. A HICALC may either be an entirely new law governing International Commercial Arbitration, or a set of amendments to one of the existing instruments. It may stand alone or as part of a reform process. As the UNCITRAL is already being revised and reformed, a HICALC may be implemented that reflects the wisdom gained from the quest for the Holy Grail in which the Holy Fool has slowly transformed into the Wise One. Given the wide spread ratification of the 1958 New York Convention, perhaps amendments to it may be more feasible than the implementation of an entirely new law. However, since this law is mainly addressing the problems that occur in MENA–FI arbitrations, it may also be implemented in the region as part of the Euro–Med reform and EU trends towards unification, standardisation and harmonisation of laws overall. The Euro–Med Dialogue can bring EU reforms to the MENA. Since the UNCITRAL is also either widely ratified in the MENA, or is the basis of many of the MENA countries' arbitration laws, either the addition of

amendments to existing instruments, or the creation of an entirely new set of rules can be drafted. It should be clear that a legal instrument supplementing, amending or reforming the three main instruments of ICA, those of the New York Convention, the Washington Convention and the UNCITRAL, i.e., a HICALC can be the saving grace of ICA in light of the historical wasteland.

Audrey Sheppard's ILA Report on Public Policy stated:

> "It is generally accepted that lack of impartiality on the part of the tribunal is a ground for refusing enforcement on grounds of public policy. But it is more usual for lack of impartiality to be raised before the arbitration institution administering the arbitration at the time of commencement of the arbitration (in the context of a challenge to a prospective arbitrator) or before the court with supervisory jurisdiction over the proceedings, rather than at the enforcement stage. However, it is beyond the scope of this Report to investigate bias and lack of impartiality"[133].

Given the seriousness of (i) the perception of bias, (ii) the reality of bias and (iii) the bad faith allegations of bias, and the negative impact that these factors have on ICA as well as the *lacunae* in the existing legal framework, it is intended that this paper will have addressed this problem and offered practical changes to the wording of the main relevant legal instruments to improve this situation.

One main area required for reform is in the definition of international public policy as a doctrine above and beyond domestic public policy. Another must be in distinguishing clearly, for the purposes of International Commercial Arbitration, what is *acta jure gestionis* and what is *acta jure imperii*, and the creation of a narrowly construed understanding of the plea of sovereign immunity. Another should be in the definition and limitation of the concept of usury or *riba*. Amendments concerning *res judicata* need to be included, stressing the finality of the Award. Amendments in regards to enforcement in regards to foreign awards must be included, in which the principles of *res judicata* and *pacta sunt servanda* are upheld. The actual issue of mistrust due to bias, perceptions/ allegations of bias, bad faith, lack of precedent and lack of enforcement needs to be more specifically addressed in legislation. For example, in cases where there are three arbitrators, it must be legislated that only one can be from a western country and only one from a developing country in the MENA and the third from an extremely neutral region, either in Latin America or an Asian country. The choice of an arbitrator's country obviously cannot be legislated but legislation can be created to the effect that no more

[133] *Ibid.*, *supra*, No. 32 at p. 240.

than one arbitrator may be from the same region, for all practical purposes. The way dissenting opinions are weighed need to also be taken into consideration. A higher litmus test for bad faith in its entire legion forms needs to be created and applied. The use of certain pleas, such as public policy and sovereign immunity must be subject to scrutiny and must be penalised if done in bad faith. These pleas fall into the category of fraud in the sense that they use an unfair disadvantage to defraud an unsuspecting party. Allegations of bias, if made in bad faith should also be dealt with as fraud. To be penalised for attempting to gain through fraud is a universally legislated standard and the same principle may be applied here, in the form of legislation that penalises parties using such pleas in bad faith. Legislation does create trust. A reliable framework governing ICA, one built upon justice, fairness and effectiveness, through a HICALC can bring salvation. If mistrust is the cause of the problem, then legislation can bring about a situation that facilitates trust. If Justice and Fairness can be legislated, then so can Trust, and in so doing, the Quest for the Holy Grail of ICA Law is fulfilled, and the Lovely Maiden bearing the Holy Grail is Lady Justice herself.

ABSTRAC: The Holy Grail of International Commercial Arbitration Law is trust. In order for ICA to succeed, credibility built upon trust in the justice, fairness, and effectiveness of the proceedings is necessary. This means that the pillars upon which ICA law rests: justice, fairness, and effectiveness, form a foundation that make it final and enforceable. Without these pillars it becomes a house of cards rather than the Grail Castle that holds the Holy Chalice of dispute resolution. A successful arbitration proceeding is a fair 'trial', presided over by impartial arbitrators who hold the Scales of Justice, blindly balancing the merits of the State on the one hand and the merits of the investor on the other, to reach a just, fair and final decision; a decision that is honoured and upheld as a sacred and holy trust by national judges. Contested awards would ideally never appear before a judge in the first instance due to the following reasons: public policy, sovereign immunity, and the collection of sins which may fall under bad faith inter alia: fraud, partiality, and bias, and especially false allegations of bias or corruption against arbitrators to sabotage proceedings, do not have space to exist in the harmonious architecture of the Grail Castle.

*KEYWORDS: CONVENTION OF NEW YORK 1958 –CONVENTION OF WASHINGTON 1965 – UNCITRAL RULES INTERNATIONAL COMMERCIAL ARBITRATION 1976 – INTERNATIONAL INVESTMENT ARBITRATION – AWARD ENFORCEMENT (*RES JUDICATA*) – PUBLIC POLICY – BIAS CHALLENGES – SOVEREIGN IMMUNITY – GOOD FAITH.*

RESUMEN: El Santo Grial de la Ley de Arbitraje Comercial Internacional es la confianza. Con el fin de que Arbitraje Comercial Internacional pueda tener éxito, la credibilidad basada en la confianza en la justicia, la equidad y la eficacia de las actuaciones es fundamental. Esto significa que los pilares sobre los que descansa el Derecho del Arbitraje

Comercial Internacional: la justicia, la equidad y la eficacia, son la base para convertir los laudos en firmes y ejecutables. Sin estos pilares se convierte en un castillo de naipes más que el Castillo del Grial que contiene el Santo Cáliz de la solución de controversias. Un procedimiento de arbitraje con éxito es un juicio justo, presidido por árbitros imparciales que posean la balanza de la justicia, que puedan equilibrar las ventajas del Estado, por un lado y los méritos de los inversores por el otro, para llegar a una solución justa, equitativa y final, una decisión que es honrada y consagrada como un deber sagrado y santo por los jueces nacionales. Los laudos impugnados no deberían aparecer ante un juez en primera instancia por las siguientes razones: orden público, la inmunidad soberana y la percepción de los pecados que puedan ser, entre otras cosas, mala fe: el fraude, la parcialidad y el sesgo, y en especial las denuncias falsas de parcialidad o corrupción en contra de los árbitros para sabotear los procedimientos, no tienen el espacio que existe en la arquitectura armoniosa del Castillo del Grial.

PALABRAS CLAVE: CONVENIO DE NUEVA YORK DE 1958 – CONVENIO DE WASHINGTON DE 1965 – REGLAMENTO UNCITRAL ARBITRAJE COMERCIAL INTERNACIONAL DE 1976 – ARBITRAJE DE INVERSIONES – COSA JUZGADA – ORDEN PÚBLICO – INMUNIDAD – BUENA FE.