Historical normative traditions in Arab-Middle East region: an impediment to international arbitration universality and neutrality?

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The historical debate on mutual interaction between universality and cultural/regional specificities is not -and will never be- ready to reach a final and global understanding. It is not only a permanent process, closely linked to historical evolution of mankind, but also is at the origin of important positive developments as well as dangerous tensions and setbacks. This mutual interaction is present in all different aspects of international activities (science, trade, politics, peace, war etc.). The majority of wars and political tensions were, and still are results of nationalistic conflicts and adverse feelings among organised human groups (states, tribes, ethnics, religions etc.).

Failure to agree on common and mutually accepted legal norms and rules to ease tensions and solve conflicts is the main reason of use of force. Not less important is the equal failure to set up and put into action adequate mechanisms to implement those rules. At national level, these handicaps have been generally surmounted since human societies have been organized in statehood structures, exclusive owner of legislative executive and judicial powers. On the contrary, and in spite of very substantial progress during the two last centuries, the international order is still handicapped by the lack of international legislative, executive and judiciary bodies.

International arbitration is, indubitably an ingenious and great find alternative and complementary system to overcome these handicaps at the international (public and private) levels. In general, the two main universal pillars of arbitration system are agreement on the applicable law, and neutrality of the arbitrators. Are these two pillars totally agreed upon and culturally integrated in the Middle East countries?

Arab Middle East countries and the issue of normative universality: General principles of law and applicable law

1 Un Security Council, ICJ, specialized UN organizations and treaties, International Penal Court etc. are examples of this evolution.
The international order remains mainly based on the mutual consent of the international actors. Actually, international relations and inter-state conflicts are, in principle, submitted to international public law rules. The large majority of these rules are of conventional nature, i.e. only states which contributed or subscribed to their setting are legally bound by their respect. In international customary law - the other important source of Public international law - state consent to and the acceptance of any customary rule “as law”\(^2\) constitutes the main condition in the process of formation of international custom. Therefore, mutual, concomitant and general consent among states is the cornerstone in the creation of the international legal system. This general and mutual consent is the foundation of the international nature of any legal norm. Large wideness of this consent is at the basis of the universality of a legal norm and the guarantee of its respect.

General principles of law “recognized by civilized nations” as provided for in Article 38 d of Statute of the ICJ are also an expression of principles so general as to apply within all systems of law and originating from domestic laws\(^3\). These general principles are primarily principles of private law and procedure, “the oldest and technically the most highly developed branches of law in nearly all states”\(^4\). Due to their nature, these general principles are obviously applicable in arbitration, since they are at the basis of any settlement of disputes mechanism, judicial or arbitral because they guarantee the respect of main notions of justice, equality before law, rule of law etc\(^5\).

Middle East countries throughout their long history and cross-fertilization contacts with other cultures, contributed to the common development and adoption of these principles. Except some very accurate specificities, by the way obsolete and no more acceptable\(^6\), modern legislations in Middle Eastern countries adopt the same general principles accepted in the majority of the countries in the world.

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\(^2\) Article 38 of the Statute of the ICJ speaks of “international custom as evidence of a general practice accepted as law”.

\(^3\) Article 38 raised long discussions on its substance as well on its wording. However, this debate is now, rather of a historical and philosophical nature since there is a common understanding on its meaning. See Michel Virally: “The Sources of International Law” in Max Sorenson “Manual of Public International Law” pp: 118-170.

\(^4\) Ibid. p : 144.

\(^5\) Less relevant to arbitration are general principles of international law, basically derived from international conventions and international custom, such as “independence or equality of states”.

\(^6\) As an example, the Islamic inheritance rules, the need, in Islamic obsolete rules to produce concordant two female testimonies to equate one male testimony.
Therefore, and at least concerning general principles of law, there is no “legal objection” originating from any historical or cultural specificity as to the implementation of these principles in an arbitration involving an Arab or Muslim party, or performed by an Arab or Muslim arbitrator.

Similarly, and as long as the choice of applicable law is concerned, and unless there is a very specific and strong reservation on a particular rule, there is no absolute objection to chose as applicable law, a law of a Middle Eastern country. This is specifically true in the case of commercial arbitration because, modern legislations in Arab countries have been largely influenced by western laws, as consequence of colonization and due to the fact that a huge number of Arab lawyers made their studies and received their diplomas in Western universities and law schools. This a side effect of the globalization and thus, universality.

Furthermore, it is to be noted that the intensification and development of international financial and commercial relations between Arab-Middle East countries and other parts of the world since few decades is a new important element of rapprochement between this region and the other regions of the world. This rapprochement implied an unavoidable impact on the laws and practices of the countries in the Middle East. Actually, the concept of international commercial arbitration has “invaded” the international commercial relations of these countries as matter of necessity, since arbitration clauses have been introduced in almost all important commercial and financial international contracts. All commercial partners of these countries rightly, required to protect themselves and their interests by “introducing” these concepts, rules and mechanisms in these contracts.

In parallel, Arab-Middle East countries adopted many national new laws and regulations in order to facilitate commercial and financial regulations with actors from other countries. The aim of these news law and regulations is to modernize their domestic legislations and to reassure the foreign investors and commercial partners. Gradually, but surely, these domestic regulations are more and more adapted to international commercial and financial rules. Consequently international arbitration is more and more accepted in the “legal culture” of Arab–Middle Eastern countries as an effective settlement of disputes mechanism. In the same vein, many Arab counties
adopted laws and codes to regulate both, national and international arbitration as well as adequate international private law acts in order to have national legislations compatible with the general trend of domestic laws throughout the world, in particular in developed countries. This effort of adaptation, which became in fact inevitable, is due to the internationalization and interdependence in world economy.

As far as commercial and financial rules are concerned, fortunately, there is no real impediment of traditional or cultural origin and nature in the Middle East to this adaptation and even, adoption of international standards. The relative absence of impediment is basically due to the fact that these rules are rather new everywhere and were implied by the speedy evolution of science and intensification of international trade during the few last decades. Therefore this adaptation/adoption performed by Arab countries was neither that painful nor impossible to achieve. Related to this is equally the adherence to the main international commercial bodies and their arbitration mechanisms. This is another expression of universality reaching Middle East countries.

This was ineluctable and the Arab region, as all regions in the world, could not and cannot escape anymore legal and institutional consequences of this evolution. Therefore, we do not see any substantive and absolute reason to fear from cultural or traditional resistance against universality and “universalisation” of applicable norms in international arbitration. In this spirit, international arbitration is, definitely, a factor of international integration of norms, general principles and applicable law.

However, and when it comes to the implementation of the norms by arbitrators, the issue becomes much more complicated, since the *sine qua non* criteria of neutrality contains, in itself certain subjective and cultural elements that are not always easy to define nor to precisely verify.

**Arab Middle East approach of conflict resolution: does cultural concept of neutrality constitutes a real handicap to arbitration?:**

Although, Middle Eastern and North African countries have experienced very sophisticated socio-political structures (Pharaonic, Roman, etc.) in the Arab pre-Islamic era, the general socio-political structure of Arabic societies has been strongly influenced by
tribalism. Basically, the tribal system is founded on personal power enabled to solve conflicts by pronouncing decisions. Therefore, the conflict resolution approach was (and still is) much more of judicial than arbitral nature. Since the advent of Islam and during the Kahlifat, the system became theocratic and Koran the “applicable law”. Conflict resolution was naturally the prerogative of the Khalif or his representative.

**Just versus Neutral?**

As indicated in the topic, “there is no agreement in the literature on what it means for a dispute settlement process to be neutral”. This issue is even less agreed upon when cultural regional considerations are added to the general concept of neutrality. Historically, in Arab-Middle East, both tribal and theocratic structures are strongly tainted by the “judicial” approach to solve conflicts and, consequently, were not favourable to the development of the “arbitral” approach. Actually, arbitration pre-supposes a certain degree of freedom and democracy enabling parties to, legally, solve their conflict via arbitrators chosen by them, avoiding therefore the “vertical” resolution of the conflict via the judicial system and its possible uncertainties in non democratic systems. However and to be accurate, Islamic legislation devoted some place to arbitration, especially in family law. For example, in case of conjugal conflict, the Koran advises to constitute an arbitration mechanism composed of one relative of the husband and one relative of the wife to resolve the conflict. However and after careful analysis, this mechanism looks much more like a mediation/reconciliation than an arbitration, since these two “arbitrators” are not neutral, because each one them represents one party to the conflict. For this reason, the main issue in the Arabic conception, either in judicial system or in so the called “arbitration”, is and remains that judges and arbitrators must be “just” and not necessarily “neutral”! Against this cultural background the concept of “justice” supersedes the concept of “neutrality”. Therefore the concept of neutrality has a secondary role in Arab-Middle Eastern culture, and settlement of disputes mechanisms in these countries are rather of judicial nature, and to a lesser extent, of mediatory/ conciliatory nature. Arbitration in its modern conception is not profoundly rooted in Arab-Middle East culture, although some interesting arbitration practices took place during the pre-Islamic era.
Arbitration and neutrality in the pre-Islamic era:

As explained above, arbitration approach is rather exceptional, if not totally absent in conflict resolution among members of the same tribe because the conflict resolution, is in principle the attribute and the prerogative Sheikh of the tribe, or his representatives.

On the contrary, conflicts among tribes are “solved”, either by war, or by direct negotiation, which is in fact, a primitive form of diplomacy. Thus, inter-tribal resolution of disputes is of public character much more than private. Even if numerous inter-tribe conflicts had their origin in private conflicts, on the basis of revenge concept which consists in inflicting the same harm (sometimes more) suffered by a member(s) of a tribe (killing or other), to a member(s) of the other tribe. However and due to the high risk of escalation, some embryonic inter-tribe arbitration experiences took place\(^7\) using as arbitrator, in general, either a Sheikh of another tribe, or a religious dignitary (pagan or monotheistic) who is entrusted by the parties to resolve the conflict. The fact that the arbitrators are not members of the tribes in conflict or that their allegiance is religious and not tribal is considered as guarantee of their neutrality.

Interestingly enough, in many cases arbitrators request some guarantees of implementation of their award. Actually one of the most famous pre-Islamic arbitration took place between the two tribes of Bakr Ibn Wael on one hand and the tribe of Taghleb on the other. The conflict originated from the killing by one member of Taghleb tribe of some camels belonging to a lady from Wael tribe called Al Bassous. As consequence a long and deadly war took place during four decades. After the end of this war, another incident occurred when some members from Taghleb tribe, during pastoral move have been denied water by Wael tribe out of their old spite; seventy people from Bakr tribe died out of thirst. This tragic incident could have caused a new armed confrontation between Taghleb and Bakr tribes, but tired of warring some people from both tribes suggested to renounce to violence and proposed arbitration. Amr Ibn Hind, king of Al-Hira (south of Iraq) was designated as sole arbitrator. But, in order to show his neutrality and to guarantee that his award would be respected, Amr Ibn Hind requested from Bakr tribe to handover to

\(^7\) Many references and readings have been used to develop this part of the paper, in addition to those indicted by Professor Karim Hafez in the course, readings have been consulted. They are footnoted as and when required.
him 70 people so either they will be freed if he decides that Bakr is right, or to the contrary, he will give them to Taghleb tribe for revenge.

The febrile suspense reversals during the proceeding of this arbitration are famous in Arab poetry, since the “speeches for the defence” were in poems. According to unconfirmed historical reports the arbitrator appeared to be more inclined to Taghleb position, but their counsel, the famous poet Amr Ben Kalthoum was very arrogant and aggressive in his speech of the defence to the point that the arbitrator changed his mind in favour of Bakr!! The legend continues by telling that the arrogant counsel -a bad looser-finally assassinated the arbitrator!!

Apart from its hypothetical value from its historical authenticity point of view and its literary value, this “story” is interesting from under the angle of arbitration mechanism and arbitrators neutrality. Actually, exigency of neutrality of the arbitrator was very clear, but, equally the difficulty to be really neutral was illustrated by the tergiversations of the arbitrator’s feelings and opinion and the negative impact of the arrogance of the counsel.

These Arab-Middle Eastern cultural traditions are finally based on the concept that justice is administrated by an institution of power, and not rendered by a neutral non private body. Even when parties agree to resort to arbitration, the arbitrators are influenced by “power” considerations rather than by neutrality concept and criteria.

This fact has been strongly accentuated by a resounding historical failure of an arbitration precedent at the outset of the Islamic era which created, since the VIth century a traumatic aversion against arbitration: The Seffin arbitration.

**The trauma of Seffin arbitration case:**

The same pre-Islamic system of arbitration practices continued during the first two decades of the Islamic era. It is to be noted that recourse to arbitration has been encouraged by the Koran and even linked to Islamic faith.

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However, only 20 years after the death of the Prophet Mohammed, a serious issue regarding his succession, arose after the assassination of the Khalif Othman. After this assassination, Ali Ibn Abi Taleb (the Prophet’s cousin) was declared as Khalif by the Muslims of Medina. This appointment was not accepted by Moaouia Ibn Sofiane, a powerful Muslim dignitary, on the claim that Ali was involved in Othman’s assassination. This was strongly denied by Ali and his followers who went to combat the followers of Moaouia. The two armies met at a place called Seffin and Moaouia understood that the balance of force was not in favour of his army. He consulted his adviser Amr Ibn Al As who suggested a request for arbitration as mean to avoid a military defeat and create a scission among the followers of Ali. This suggestion was accepted by Moaouia and his combatants went out to face Ali’s army putting the Koran on their swords asking for arbitration. The arbitration proposal was accepted by Ali who appointed Abu Moussa Al Ashaari (a trustful and pious follower) as his arbitrator, whereas Moaouia designated his close friend and shrewd adviser, Amr Ibn Al As (in this case, the issue of neutrality of the arbitrator could have been raised!). A written “arbitration convention” was agreed upon by the parties. The consecutive steps of the proceedings in this arbitration are very instructive from the procedural point of view (public proceedings, multiple meetings, presence of the parties, etc.) One of these procedural rules was that the elder arbitrator takes the floor first.

This arbitration took long time and the arbitrators could not agree on whom, Ali or Moaouia should be declared as Khalif. In order to overcome this deadlock, Amr Ibn Al As suggested to Abussa Al Ashaari to dismiss both of them and to let the muslim community decide on the appointment of a third person as Khalif, using the “Shoora” system (a kind of consultation with main dignitaries). Abu-Mussa agreed to this suggestion and to publicly declare the arbitration outcome, and as usual he has been asked to speak first. In his declaration he dismissed both Ali and Moaouia. When Amr took the floor, he dismissed Ali and confirmed Moaouia as Khalif!!!
Needless to say, that this serious mischievousness created an extreme bitterness and resentment. It degenerated also in an intestine war among the Muslims and unfortunately created a strong aversion to arbitration.

Although some positive experiences can be found here and there in the Arab, middle-East historical background in arbitration, it is clear that tow main experiences (Bakr vs. Taghleb and Ali vs. Mouaouia) have dramatically failed and degenerated into armed conflicts. The main reason of this failure was the lack of neutrality of the arbitrators. Against this background, the Arabs lost trust in arbitration as a conflict resolution mechanism because, in their collective subconscious arbitration equates to dishonesty and disorder, while judicial system equates to justice and rule of law. Against this very background, it is understandable that external world feels uncomfortable with the Arab Middle-East regional specificity: “by [the] historical normative tradition…..[and] by [the] culturally constructed images of conflict resolution”. 12

In spite of all this heavy negative historical handicaps, it is important to note that during the few past decades, arbitration in Arab Middle –East countries is gaining importance in normative process and volume of recourse to arbitration as mode of settlement of disputes.

**Modern Arab-Middle East countries and modern arbitration:**

Since middle of last century, Arab countries started a historical process by being more structured in statehood and less in tribal society. It goes without saying that the tribal social structure will continue to impact the social relations, but the political and economical relations are, inevitably, organized in the framework of state machinery.

**Modern arbitration claim to universality: the impossible isolationism of Arab-Middle East countries**

Actually, in the aftermath of decolonization, geopolitical changes and scientific and communication developments, this region did not have any choice but to adopt modern

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12 Quotation from the topic of this paper as given by Professor Karim Hafez.
statehood as the model of collective organization. Modern states\textsuperscript{13} started to nurture, with its basic prerogative to legislate, to rule and to resolve conflict by rendering justice. In an interdependent world, such a process cannot be carried out in isolation. International legal norms invaded national legislations in Arab Middle East countries (law of treaties, law of the sea, international economical and commercial law etc.). Some areas of this normative “universalisation”, those linked to the dogma of state sovereignty (law of international organizations, international human rights law) are challenged by some of these states on the basis of their cultural traditions or religious faith. But international economical and commercial norms and their corollary, arbitration, as a settlement of disputes system cannot be challenged on the basis of historical and cultural considerations. Their universally shared conceptual vision, the need for a universal legal normative system and an adequate universal conflict resolution mechanism, in particular arbitration, are now universally needed. Actually, international economic and commercial activity is, by definition, not founded on cultural or historical premises but on universal grounds such as search of profit and earnings, investment, development of technology etc. These basics, common to all cultures and regions in the world, are not conditioned nor differentiated by cultural or regional considerations. This is a real criterion for universality.

International arbitration is closely linked to universal rules and practices of international trade. In view of the globalization of our current world and the interdependence of economic and financial activities, the evolution toward normative and institutional universality of international commercial relations is ineluctable. Arab-Middle East countries cannot escape this evolution.

**Modern arbitration claim to neutrality: Need for a new legal culture in Arab-Middle East countries:**

The multiplicity of actors belonging to different domestic legal regimes in international commercial relations implies, in case of conflict, the choice of applicable law and the decision on the mechanism of resolution of the conflict. The choice of applicable law is not very problematic since, in general, it is decided by the parties prior to the outbreak of the conflict. Furthermore, any chosen applicable law is pre-existent to the

\textsuperscript{13}\text{Not to be confused with democratic states.}
commercial relation and known to the parties and no surprise is to be expected and there is no possibility to change its provisions.

On the contrary, and even if the arbitration mechanism is pre-defined in the arbitration clause or by the arbitration convention, the issue of designation of respective arbitrators and the constitution of the arbitral tribunal are important and sensitive steps in the performance of the arbitration. The condition that arbitrators are neutral is of paramount importance. This neutrality should not only be a real fact, but also believed by the parties in the conflict in order to ensure reliable arbitral tribunal and credible award.

As developed above and taking some negative historical precedents, Arab-Middle East culture implied lack of trust in arbitration as system of dispute resolution due to suspicion on the neutrality of arbitrators. Actually, the notion of neutrality as a concept is not very developed in Arab culture. This is possibly due to the strong tribal sense of belonging. Individuals cannot be neutral because they are totally integrated in and protected by the tribe, the family, etc. So in case of conflict, they are socially and psychologically bound by an obligation to take position, under the risk to lose their integration and protection. Only structural decision makers can take position without risk of losing their power, belonging to the group, protection and power. These persons are judges and not arbitrators. Amazingly, the weakness of neutrality in this culture is due to lack of neutrality, which is due to weakness of individual’s independent will. Under these circumstances, arbitration as mode of conflict resolution appeared socially inadequate and was considered as an illegitimate defiance of the judicial system.

All this approach and this thinking is now, more and more abandoned, especially that modern arbitration relates rather to financial and commercial interests more than political interests or sovereignty issues. As indicated above, economic actors from these countries, in particular at the international level, are more and more inclined to accept arbitration as mode of conflict resolutions and they understand that arbitrators are and should be neutral, unless there is serious reason to challenge the neutrality, according to national or international norms. This is an important evolution in the Arab region, accelerated by the globalization and intensification of international business activities and rules and the exponential resort to arbitration, especially in Gulf countries. This new culture of Arab businessmen regarding arbitration and neutrality of arbitrators is also
echoed by an important evolution in the practice and vision of the new generation of Arab arbitrators themselves, whom, following their colleagues -arbitrators from non Arab countries- are more and scrupulous in their neutrality.\textsuperscript{14}

CONCLUSION

Neutrality and universality are two interrelated element in modern international arbitration. Neutrality is a guarantee and a condition of universality. But universality is also a criterion of trust in modern arbitration. Arab-Middle East history and culture, produced a widespread bias against arbitration because of two historically unfortunate and sensitive precedents where, lack of neutrality of the arbitrators, degenerated not only in collective frustration but also in armed conflicts.

Due to the recent evolution of the political, social and economical structures of these countries by becoming much organized as states than as tribes, arbitration reappeared, although timidly at the domestic level, as a useful mode of settlement of disputes, especially in conflicts where public order and sovereignty issues are not involved. The acceptance of international arbitration in Arab mentality, practice and legal culture was not strictly speaking, not an entirely conscious choice but one of the positive effects of globalization.

Middle East countries, as partner in international economic system, should equally become partner in the universality of international arbitration as mode of dispute settlement, by contributing to educating and training lawyers and businessmen on the technicalities, advantages and efficiency of international arbitration.

\textsuperscript{14} It is to be noted that, as reminiscence of the old approach, in some cases especially in arbitrations involving their own states, designated arbitrators by the state are sometimes not totally neutral because they consider themselves as “civil servant” who should defend the state at any rate.