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Freedom of Religion in Transnational Contract and Commercial Transactions

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Introduction

This chapter seeks to address religious freedom not through the typical public law or human rights lens, which is its natural domain, but rather from the perspective of contract and commercial law. It is not suggested that freedom of religion plays a large part in the construction of these legal disciplines. Nonetheless, it is exactly because little attention has been paid to the religious context of transnational commerce that an experimental, bottom-up approach examining the interface between commercial transactions and the role of religious freedom therein is a desirable component of this volume. It provides an opportunity for an audience largely accustomed to treating religious freedom in its wider public law context to sample a perspective that would ordinarily escape its attention. Indeed, the particular set of circumstances analysed in this chapter which give rise to a discussion of religious freedom have been approached by the respective stakeholders (judges, lawyers, litigants, and law-makers) from a purely commercial or otherwise private law angle. As a result, they tend to escape the notice of religious freedom scholars because terms closely associated with religion or rights are not have been designated as key words and the cases, where referenced, are classified as falling under the disciplines of commercial, contract, employment, or other laws. That the relevant stakeholders do not raise legal arguments encompassing religious freedom should provide food for thought for the readers of this volume. On the one hand, it is probably natural that black-letter commercial lawyers involved in the everyday practice of law do not as a rule venture into experimental forays but apply the law they know best. This, of course, means that the party which would have been favoured by a religious freedom argument remains either unaware of it or unsure if it might have any impact before a court, an arbitral institution, or a government body to which it may be submitted. Moreover, given the variety of contexts in which religious freedom arguments present themselves—for example, a) countries

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entertaining objective religious freedom (Europe); b) the Islamic world; c) countries hostile to the idea of religion, at least in the public sphere (eg China)—it is evident that the presentation of the relevant argument (essentially the communication[2] which involves the elements of information, utterance, and understanding) must be framed accordingly.[3]

The interface between religious freedom and contractual freedom, international trade and investment is not readily apparent. Private actors are considered as making rational choices in the private sphere, always subject to the ambit of applicable laws and on the basis of personal autonomy. Religion is typically kept out of commercial and trade transactions, at least in the west, but it is well known that countries adhering to Islamic law subject their entire legislation to the Qur'an and its secondary sources.[4] What this means in practice is that the applicable law is composed of religious texts and rulings. This position is quite antithetical to what western lawyers are used to in their daily practice, yet these types of religiously motivated transactions are making significant inroads in the globe's largest financial centres. Islamic financing, by way of illustration, is on the rise and numerous western banks already offer it to their clients, as is also the case with Islamic insurance (so-called *takaful*).[5] The contractual traits of both of these are not straightforward. The parties must necessarily commit to the jurisprudence and rulings of Muslim scholars and, depending on where the contract is concluded, must also adhere to particular choice of law clauses and other religiously motivated restrictions. Are these limitations a legitimate constraint on the parties' freedom of religion? This chapter discusses this issue by reference to public policy rules drafted on the basis of religious motivations. It is argued that unless absolutely necessary the state should not interfere arbitrarily in religious choices, whatever these are; including, in the case at hand, commercial and trade-related matters.

One of the key issues in this chapter concerns the freedom of private actors to impose self-restrictions upon their contractual relations and whether they possess the right to express their religious choices in such contractual relations. Subject

[2] See M Van Hoecke, *Law as Communication* (Hart 2002), which claims that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. This is so, argues Van Hoecke, because legal systems are open systems, thus allowing for this type of interaction between their various participants.

[3] Mounin argued that whereas communication involves the intention to convey a message through a sign (eg words or actions), the unintended conveyance of a message cannot by implication constitute communication, but something of an inferior character, which he termed 'signification'. See BS Jackson, *Semiotics and Legal Theory* (Routledge 1987) 21–3. It is perhaps possible that in sensitive socio-religious contexts, several stakeholders are consciously unwilling to push forward a religious freedom argument, even if wholly justified, because of fear of an unintended social or political backlash.

[4] See, for example, Article 1 of the 1992 Saudi Basic Law of Governance, which emphasizes that the country's constitution is 'Almighty God's Book, the holy Quran, and the *sunna* (traditions) of the Prophet'.

[5] Equally, intergovernmental organizations are making efforts to accommodate Islamic rules in their trade negotiations with Muslim nations. The WTO, for example, has given particular attention to the Islamic practice of *zakat* (a form of charity) in respect of Saudi accession to the WTO. See Working Party on the Accession of Saudi Arabia, Report of the Working Party, Doc WT/ACC/SAU/61 (1 November 2005) 9.

to limitations imposed by the executive on religious freedom (eg to avoid harm to oneself and others or to the state itself), there seems to be no other compelling reason to restrict contractual choices involving religious motivations. However, as will become evident in the course of this chapter, this matter is vexed and certainly not without some political dimensions. This chapter discusses the principle of party autonomy (*lex voluntatis*) and freedom of contract from the point of view of religiously motivated choices with a view to ascertaining some of the boundaries of the *lex voluntatis*. It then goes on to examine the freedom of parties to insert choice of law clauses in their contracts. The problems that have arisen in this regard concern Islamic law as the governing law of transnational contracts and the unwillingness of western judges and arbitrators to ultimately sustain this body of law as a valid governing law. This author is not in favour of this position, and considers that many awards and judgments adopted in the past encompass an element of western bias.

Freedom of Religion in the Private Sphere

The perspective of the Declaration

The fundamental premise underlying the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief[6] (the Declaration) is the protection of freedom of religion in the public sphere; that is, against the interference of the state, which is after all the very foundation of contemporary human rights itself. Indeed, even in the field of commerce and trade there are numerous instances in which the state inhibits private actors on the basis of their religious beliefs or conduct. This is particularly manifest in the imposition of public policy rules, which are otherwise legitimate, upon particular aspects of trade and commerce. Such restrictions become problematic when they are arbitrary, unforeseen, and discriminatory and in many cases local judgments discriminate on the basis of religion despite the existence of anti-discrimination laws.[7] In other instances—as in the case of the Bumiputra law in Malaysia, which discriminates in favour of Malays in all aspects of social and commercial life—discrimination is a prescribed policy of the state.[8] That some restrictions

[6] UNGA Res 36/55 (25 November 1981).

[7] See particularly *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation case no 503/2003, judgment (15 May 2004), which is discussed in more detail later in the chapter. However, Article XX(a) of the GATT allows the unilateral imposition of trade restrictions where this is 'necessary to protect public morals'. The WTO Panel has only once confronted the meaning of public morals, in the *US-Measures Affecting the Cross Border Supply of Gambling and Betting Services* case WT/DS285/R (10 November 2004), para 6.465, defining it as 'standards of right and wrong conduct maintained by or on behalf of a community or nation'. Given the unnecessarily broad nature of this definition, one can certainly justify the invocation of religious values with widespread social appeal. The US lost that case and recently China invoked the public morals clause to restrict the distribution of Hollywood movies.

[8] Art 153 Malaysian Constitution.

are afforded legitimacy is also justified by Article 1(3) of the Declaration, which clearly states 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.'

The express reference to the so-called *ordre public* (public order) was specifically meant as an exceptional intrusion of the state into private commercial affairs. This is consistent with treaty practice, particularly Article V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[9] Even so, nations cannot employ public policy rules in an arbitrary manner. Rather, domestic public policy rules must conform at all times to the duty of the forum to respect its obligations towards other states and international organizations; in fact, this obligation forms a concrete part of public policy.[10] This means that irrespective of any animosity between states, one's obligations under international law, whether treaty-based or custom, constitute an express bar to the imposition of arbitrary and conflicting public policy rules.[11] By extension, it is obvious that public policy rules predicated on the curtailment of religious freedom cannot constitute a bar to commercial or investment transactions the legality of which is based on treaty or customary international law. Going a step further, the individual freedom of religion, as this is enshrined in international instruments such as the ICCPR, trumps all public policy rules predicated on religious or other rules and imposed by a state; the reason being that the treaty-based freedom of religion is already part of the forum's domestic and international public policy and hence cannot be retracted by means of a new, conflicting, positive law. Quite clearly, the *lex posterior derogate legi priori* finds no application in such cases.[12]

AQ: Please expand this abbreviation.

[9] 330 UNTS 38 (1959).

[10] See R Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary* (CH Beck, Hart, Nomos 2012) 436.

[11] In *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, 268 and *National Oil Corp v Libyan Sun Oil Co* 733 F Supp 800, 819 (Delaware, 1990), the courts of England and the US held that the fact that the forum is at war or fails to recognize the government of a country from where an award is rendered (on which it has imposed unilateral sanctions) in no way implies that the duty to enforce awards from that country, subject to the dictates of the New York Convention, infringes the forum's public policy.

[12] The same is also true with respect to other mandatory rules that are not otherwise described as public policy. By way of illustration, in early 2013 an MP from the traditionally majority-atheist (or agnostic) political party SYRIZA suggested before the Greek Parliament that it was unfair for non-churchgoers to pay taxes that end up financing the salaries of Orthodox priests. He proposed that a special tax be imposed for those professing to be Christian Orthodox, from the revenues of which the priesthood would be paid. Although this proposition seemingly respects equality and non-discrimination (and is based on the German model of church tax, the so-called *Kirchensteuer*), in fact it flagrantly violates the individuality of religious freedom because its exercise is made dependent on financial considerations. Thus, the poor and destitute would be forced to deny their religion as a result of their inability to pay the requisite tax. Details on this debate and the reactions of other political parties are available in Greek at <www.tovima.gr/society/article/?aid=495205> accessed 5 November 2014. The ECtHR has never suggested that the levying of religious tax violates Art 9 ECHR and the German Federal Constitutional Court has tried to limit some of its effects. By way of illustration, in Case BVerfg, 1BvR 3006/07 [2 July 2008] it found that a levy ordinarily charged for abandoning the registers of a particular religion was unconstitutional.

Freedom of religion in the realm of private contractual transactions

Let us now turn to the application of religious freedom in the context of transactions emanating solely from private relationships. The text of the Declaration does not clarify whether its application extends to the private sphere as such, albeit that one can draw several inferences to this effect from the plain meaning of certain provisions. More specifically, Article 1(1) refers to the exercise of religious freedom 'in public or private', whereas Article 4(1) stipulates that states are to prevent discrimination on religious grounds in all fields of civil and economic rights among others. Although the Declaration is intended to emphasize the obligations of states, and hence does not impose obligations on other non-state actors, the nature of state obligations are two-fold in the field of human rights; namely, negative (in the sense of non-interference with people's rights and freedoms) as well as positive, which requires concrete action on the part of states. This positive dimension encompassing the obligations of states in the sphere of international human rights has been widely recognized by international courts and tribunals, and hence there is no need to dwell on it here at any length.[13] This observation has significant implications for human rights in the private sphere. It has long been undisputed that this body of law extends to private relationships,[14] but it is not entirely clear where the relevant obligations lie. The scholarly community supports the view, as indeed does this author, that non-state actors possess no human rights obligations. Their obligations, instead, are found in ordinary law, such as criminal law, tort, contract, etc.

So, the question that arises in this connection is how far private parties can go in curtailing or stifling each other's religious freedoms in the course of commercial transactions, especially of a transnational nature, and whether there are any appropriate state responses to such contractually imposed limitations to religious freedom. The following sections discuss a number of cases and incidents involving such restrictions. Yet in none of these cases did the parties invoke as a justification, one way or another, their freedom of religion as such. This is understandable to some degree, particularly since contractual freedom—and party autonomy

[13] This positive obligation is observed in respect of civil and political rights, as well as economic, social, and cultural rights. The European Court of Human Rights, in *Osman v UK* [1998] 29 EHRR 245, para 115, explained that the obligation arising from the right to life 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'. Equally, in *Finogenov and Chernetsova v Russia,* Eur Ct HR Admissibility Decision of 18 March 2010, the Court added that 'Article 2(1) [right to life] enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'. Equally, the constitutional courts of South Africa and Argentina have declared the governments' obligation to provide HIV treatment and medication to those who cannot afford it, despite the private nature of healthcare in the two countries. See *South African Minister of Health v Treatment Action Campaign* [2002] (5) SA 721 and *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco Drogas Neoplásicas*, Judgment of 24 October 2000.

[14] See especially A Clapham, *Human Rights in the Private Sphere* (Oxford University Press 1996), which provided the first theoretical bases for this connection.

thereto—provides the cornerstone for self-imposed limitations. The parties enter into a contract limiting their religious freedoms in exchange of trade and investment benefits, knowing full well the implications of their consenting to do so. It is, of course, a wholly different matter for religious freedom to be curtailed not by unilateral consent but through coercion, fraud, or deceit. In such cases the state is under an obligation, through the proper operation of its judicial system, to restore the aggrieved party's rights.

The most challenging aspect of the curtailment of religious freedom on the basis of contract concerns situations where the state refuses to enforce the terms of the parties' agreement. The fact that human rights law, particularly freedom of religion, has played no part in the parties' arguments in the context of business transactions, as opposed to employment contracts, is largely attributable to the commercial law expertise of the legal professionals involved. Law firms would not think of invoking religious freedom rules in international business transactions, not only because their personnel are commercial law experts, but also because they are confident that contract and general commercial law are sufficiently able to trump any contrary rules. The position of this author, as is explained in subsequent sections of this chapter, is that religious freedom encompasses the freedom of self-restriction, as opposed to externally imposed restriction, and that this should be honoured by the executive.[15] If this were not so then, by implication, the core freedom would be meaningless and the freedom to change one's religion equally without merit. This self-restriction may well manifest itself in the field of commercial or general contractual transactions. In the *Jivraj v Hashwani* case discussed in the next section, freedom of religion entailed the appointment of an arbitrator with specific religious qualities. In many Muslim states local legislation bans certain practices and transactions and subjects most others to Islamic law. It may be questioned whether such restrictions should have any application in the private sphere given that they restrict religious freedom, and from this perspective they should normally have no legal effect on the freedom of contract. Nonetheless, we know very well that this theoretical aspiration finds no application in practice, at least in these Muslim countries. Overall, the courts of liberal democracies should not interfere unduly, if at all, in the religiously motivated contractual choices of private parties,[16] especially where it is shown that the parties stand in relative parity towards each other and that no party was in any way coerced into the agreement in question. I am limiting this position to the field of commercial, investment, and trade contracts, subject to the qualifications already

[15] In fact, in *Sherbert v Verner* [1963] 374 US 398, 407, the US Supreme Court held that any restriction on religion (which is always exceptional) must not only serve a compelling interest, but must moreover be the least restrictive means at the disposal of the executive.

[16] The matter is not trouble-free and much of the jurisprudence does not necessarily favour my argument. More specifically, in *St Agnes Hospital v Riddick*, 748 F Supp 319 (D Md, 1990), a Roman Catholic hospital was opposed to its staff receiving abortion training. The court found this exemption to religious freedom justified because, *inter alia*, religious adherents 'who enter into commercial activity as a matter of choice' must observe the accompanying laws.

pointed out. Such a position would no doubt be consistent with the relevant provisions of the Declaration which were enumerated at the beginning of this section.

Party Autonomy as a Reflection of Religious Freedom

Contractual freedom is inextricably linked to the principle of party autonomy. This means that parties to a contract have the right to offer and accept anything permitted within the confines of law. Limitations upon this freedom are both substantive and procedural. By way of illustration, contracts with minors may be prohibited, and the same is true of agreements encompassing a criminal offence or in respect of speculative propositions.[17] Procedural limitations include, moreover, the concept of arbitrability; that is, that certain disputes are only susceptible to litigation because of the underlying public interest.[18] No doubt, the freedom to contract falls within the private sphere and ordinarily the incorporation of religion therein should not trigger the limitations imposed under the law. This has not always been the case.

In *Jivraj v Hashwani* the two litigants were Ismailis that had set up a property investment joint venture. Their agreement stipulated that in the event of a dispute they would have recourse to arbitration with each appointing an arbitrator, all of whom (including the umpire) would be drawn from the Ismaili community. Quite clearly there was a religious underpinning to the drafting and construction of the arbitration clause. Upon the subsequent termination of the joint venture a dispute arose as to the distribution of assets. Jivraj went on to appoint a non-Ismaili arbitrator on the basis that the aforementioned arbitration clause was contrary to rule 6(1) of the English Employment Equality (Religion or Belief) Regulations 2003 (EERBR). The purpose of the EERBR is to prevent religious discrimination in the workplace and allows exceptions only in cases of genuine occupational requirements under rule 7. Illustrative examples encompassing a genuine occupational requirement are those of a kosher butcher and the appointment of clergy. In any event, the list was certainly meant to be narrow in order to avoid abuses. When the case came before the Court of Appeals there was a rather peculiar outcome. It was held that the appointment of an arbitrator was a contract for the provision of services and that the parties appointing an arbitrator should be classified as employers under rule 6(1) EERBR.[19] As a result, no genuine occupational requirement was found to exist for the appointment of all-Ismaili arbitrators in the case at hand, given that any arbitrator could discharge the functions entrusted to him or her. The original arbitration clause was thus held to be void,[20] even though the

[17] Contracts entailing a significant degree of uncertainty and speculation are considered *gharar fahish* and are prohibited under Islamic law. This means that the typical Sharia-based contracts, such as profit-sharing (*mudharabah*), leasing (*ijarah*), and safekeeping (*wadiah*), as well as joint venture (*musharakah*), are permissible. See Bantekas and Alenezi, infra (n 32).

[18] I Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Aus YBIL 193.

[19] *Jivraj v Hashwani* [2010] EWCA Civ 712, para 29.

[20] *Jivraj v Hashwani* (n 19) paras 29–30.

Court accepted that a significant characteristic in the history and development of the Ismaili community is its 'enthusiasm for dispute resolution contained within the Ismaili community'.[21]

The judgment gave rise to two important questions: namely, whether arbitrators should indeed be considered as contracts of service, or are otherwise independent from their appointees; and whether party autonomy to appoint arbitrators is limited by religious discrimination laws. Given that arbitration is quintessentially transnational, it is evident that any limitations imposed by English law will have an impact on those choosing England as their *lex arbitri* (seat of the arbitration), as a place for enforcement of foreign arbitral awards, or where English law is the governing law of a transnational business contract.

Although it is beyond the scope of this chapter, the dominant trend in international arbitration is to consider arbitrators as independent from their appointees in order to emphasize their judicial character and ensure their independence.[22] At the same time, party autonomy to appoint arbitrators has never been curtailed in liberal democracies, save where they were closely affiliated with the parties. Freedom of religion has never been openly discussed but it is assumed that party autonomy is a much broader concept that implicitly permitted the parties to appoint arbitrators on religious grounds: indeed, this freedom was recently manifested by a decision before the English High Court which agreed to a request by the parties to refer all issues (including those relating to the financial settlement, the status of the parties' marriage, and the care and parenting of their children) to arbitration (although this may not be strictly considered arbitration in all countries) by a Jewish religious court, in this case the Beth Din of New York.[23] As a result, religiously motivated appointments, and indeed religiously motivated conduct, are considered acceptable in international business transactions. It was no wonder, therefore, that the UK Supreme Court overturned the *Jivraj* judgment of the Court of Appeals. However, the Supreme Court did not go as far as claiming that the autonomy of parties to designate their arbitrators was now beyond any doubt part of *lex mercatoria* and a general principle of commercial law. Lord Clarke simply held that arbitrators were not subordinate to their appointees and were not under contract to provide a service.[24] As a result, their status was not susceptible to the operation of the EERBR 2003, subsequently replaced by the Equality Act 2010.

It is perhaps probable that the Supreme Court was disinclined to justify its position by reference to the *lex mercatoria* or the rules of international commercial arbitration because the underlying issue concerned the application of labour relations.

[21] *Jivraj v Hashwani* (n 19) para 28.

[22] There are two schools of thinking on this matter: the so-called 'contractual', which renders arbitrators contractually bound to the appointing parties, and the 'status' school, which assimilates arbitrators to judges. The latter has prevailed because it does not restrict the independence of arbitrators. See MJ Mustill and SC Boyd, *Commercial Arbitration* (Butterworths, 1989) 222–3.

[23] *A.I and M.T* [2013] EWHC 100 (Fam), paras 31–3. See also LJ Thorpe, 'Statutory Arbitration and Ancillary Relief' (2008) 38 Family Law 26, 28.

[24] *Jivraj v Hashwani* [2011] UKSC 40.

Hence, there was no reason to infuse the desired outcome with the conflict between freedom of religion and party autonomy. The predecessor to the Supreme Court, the House of Lords, has already clarified the distinction between purely spiritual matters and matters with a spiritual undertone governed by contract. Whereas the courts do not enjoy jurisdiction over the former, 'a sex discrimination claim would not be regarded as a spiritual matter even though it is based on the way the church authorities are alleged to have exercised their disciplinary action … [on the basis that the claim is based on a contract which] the parties intended should create a legally-binding relationship'.[25] It is, therefore, the position of this author—which largely conforms to the spirit of the relevant judgments of the Supreme Court and international commercial practice—that freedom of religion clauses underlying party autonomy in commercial transactions should not be construed as entailing public law limitations, whereas direct employment clauses and contracts, even if these are found in general commercial contracts, are subject to such limitations.

Freedom of Religion and Choice of Law Clauses

Parties to transnational contracts routinely include a choice of law clause in order to ensure that the preferred law governs their relationship and provides the basis on which their contract will be construed. This freedom to determine the law governing a particular relationship is known as *lex voluntatis*. The *lex contractus* is quintessentially *lex voluntatis*.[26] Where the parties fail to insert a choice of law clause, the courts typically examine the contract itself in order to ascertain the implicit position of the parties in this regard. The courts, or arbitrators, may well discern a variety of governing laws, each operating in respect of discrete sections or clauses of the contract. A distinction should be made here between religion *as such* as the choice of law and rules *derived* from religious roots, including religious texts or oral tradition. Even if the former were permitted as valid choice of law clauses, in practice the court having to interpret them would be faced with a plethora of problems, particularly in respect of their vagueness and indeterminacy. By way of illustration, the prohibition against charging simple and compound interest (*riba*) in classical Islamic law,[27] which also constitutes a fundamental tenet of

[25] *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28.

[26] This was not always so, however. The idea that the governing law of a relationship may be governed by the *lex voluntatis* is attributed to the jurist Carolus Molinaeus (Charles Dumoulin, 1500–56). He broke ranks with the Catholic writers of his time, he himself being a Protestant, by formulating a theory that eliminated the feudal custom that subjected all disputes over property, contract, and matrimonial matters exclusively to territorial jurisdiction. This was an audacious theory at the time—considering that it was discussed again in the nineteenth century—and was to a large degree predicated on the perception that one of the means by which the Catholic Church constrained religious freedom was by strict limitations in matters pertaining to private life, as is the case with the *lex contractus*. For a brief discussion, see A Nussbaum, *A Concise History of the Law of Nations* (Macmillan 1947) 57.

[27] Qur'an 2:275, stating that 'those who devour usury will not stand excepts as stands one whom the Evil one with his touch hath driven to madness'.

modern Islamic law, is highly contentious. For one thing, Islamic law as such is divided among a number of schools, each with its own interpretation of primary and secondary sources and highly self-referential. This operational closure, characteristic of so-called autopoietic systems, means that jurisprudence generated by one school does not influence that generated by another.[28] Moreover, there seems to be a wide divergence between classical Islamic law and contemporary practice, which may or may not be reflected in the statutory law of Muslim-majority states. Furthermore, given that Islamic law generally disfavours, if not rejects outright, precedent because of man's inherent fallibility, it is impossible to know the precise position of Muslim legal systems on pertinent questions of Islamic law.[29] The problem is further compounded by the fact that, because of the indeterminacy of Islamic law, its application is necessarily cryptic and therefore discriminatory and, as a result, western courts are at times disinclined to enforce judgments predicated upon it.[30] This, of course, does not mean that it is not predictable or that a judge or arbitrator cannot render it predictable just like any other body of law.[31] Despite the complexity of Islamic law, sound commentaries from prominent Muslim scholars do exist, to which judges and arbitrators around the world can gain direct access by means of a certified translation provided by the parties.

This indeterminacy can be illustrated by the prohibition against usury and the charging of interest. The first inconsistency is that Islamic law requires all agreements to be honoured,[32] which immediately renders the status of usury contracts with non-Muslims unclear. It is equally unclear whether the uncertainty (*gharar*) inherent in a usury agreement is of minor importance (*gharar yasir*) or severe (*gharar fahish*), which effectively determines the agreement's survival. In some Muslim-majority states governments have introduced a two-tier track system whereby merchants and consumers are free to choose what best suits their religious views. In order to serve this model they have established parallel banking and insurance systems on the basis of either Islamic finance (and *takaful* in the

[28] See N Luhman, *Law as a Social System* (Oxford University Press 2004), at 6–8.

[29] Ironically, the use of precedent in liberal democracies, especially in common law jurisdictions, allows us to have a much better idea of Islamic law notions in cases where western courts are empowered to exercise jurisdiction. *Talaq* (Muslim divorce) judgments are issued by hundreds by English courts each year. See, for example, *A v L* [2010] EWHC 460 (Fam).

[30] In *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, the House of Lords held that a woman was justified in seeking asylum in the UK as a result of discriminatory family laws in Lebanon based on the Sharia.

[31] In *Libyan American Oil Company (LIAMCO) v Libya*, Award of 12 April 1977 (1981) 20 ILM 1, at 33, the contract was to be construed in accordance with the principles of law of Libya common to the principles of international law. After an exhaustive examination, Arbitrator Mahmassani concluded that 'Libyan law in general and Islamic law in particular have common rules and principles with international law' (at 37). He cited legal sources from the Maliki school in respect of unlawful nationalization whereby mines and underground resources are the property of the Sultan (ie the state) (at 48). In respect of contractual breaches and the sanctity of contract under Islamic law, he noted that 'no less than the Great Caliphs Omar Ibn Al-Khattab and Imam Ali accepted to abide by their agreements and to appear before the *kadis* (judges) as ordinary litigants without feeling that this conduct was against their sovereign dignity' (at 56–7).

[32] Qur'an 5:1.

case of insurance)[33] or regular conventional banking premised on the charging of interest in respect of ordinary lending transactions.[34] Even where the charging of interest has been allowed, it is not unregulated and is susceptible to several forms of limitation. By way of illustration, Articles 76 and 77 of the United Arab Emirates (UAE) Federal Commercial Transactions Law No 18 of 1993 allow lenders to charge their clients simple interest, the ceiling of which must not exceed a rate of 12 per cent. The Federal Supreme Court of Abu Dhabi has had a chance to review and assess the compatibility of this law with the UAE federal constitution and has come to the conclusion that economic necessity in a contemporary, complex, and largely internationalized business environment necessitates the charging of interest by financial institutions.[35] The same result was reached by the same Federal Supreme Court in a judgment[36] which demonstrates a clear trend towards legitimizing the charging of interest and confirming its compatibility with fundamental tenets of Islamic law—or at least reconciling it with the latter—which in turn gives rise to the arbitrability of disputes involving interest-based commercial and financial activities.[37]

Following this illustration, while one is clear as to the statutory status of usury in jurisdictions such as the UAE and Bahrain, one is completely in the dark as to the status of usury in Islamic law generally and Islamic law in the UAE and Bahrain, if different from the relevant statutory provisions.

This clear discrepancy between the injunctions of classical Islamic law (comprising principally the Qur'an and a largely consistent body of *hadith*), post-classical Islamic law (characterized mainly by the affluence of sects, schools, and their distinct interpretations), and the statutory law of Muslim states gives rise to a particular perception in western legal thinking. To a western lawyer, the very idea of freedom of religion is alien in his or her thinking regarding contract and choice of law clauses. This is because western lawyers take it for granted that the *lex contractus* places no religious limitation whatsoever. Even if religion enters into a contractual arrangement, such lawyers would construe it on the basis of ordinary law, rather than theological canons, moral theology, or other. In light of this, one is not surprised by the staunch hostility exhibited by Arab nations from the early

[33] Takaful is essentially co-operative risk-sharing by using charitable donations, as opposed to commercial capital, in order to eliminate *gharar* and *riba* that are intrinsic in the operation of conventional insurance. See Khaled Kassar and others, *What's Takaful: A Guide to Islamic Insurance* (BISC Group 2008). It should be stressed that the majority of insurance licence applications in the Gulf are *takaful*-based. AIG Takaful, for example, was set up in Bahrain in 2006 and is licensed by the Central Bank of Bahrain.

[34] As a result, the parties have a choice of arbitral institution on the basis of the legal tier upon they wish to base their business. Hence, those opting for Islamic finance or Sharia law more generally in the UAE may resort to the International Islamic Centre for Reconciliation and Commercial Arbitration (IICRCA). The Centre is based in Dubai.

[35] Federal Supreme Court of Abu Dhabi, Interpretative Decision No 14/9 (28 June 1981).

[36] Federal Supreme Court of Abu Dhabi, case no 245/2000, judgment (7 May 2000).

[37] See H Tamimi, Interest under the UAE Law and as Applied by the Courts of Abu Dhabi (2002) 17 Arab LQ 50. See M Al-Nasair and I Bantekas, 'The Effect of Public Policy on the Enforcement of Foreign Arbitral Awards in Bahrain and the UAE' (2013) 30 J Int Arbitration 281.

1950s until the close of the twentieth century to arbitration, which effectively eliminated Islamic law as a valid choice of law clause in transnational commercial contracts. To Arabs, this was viewed not only as an assault on Islam but also as a refutation of their religion by the western world.

The Perception of Islamic Law as a Legal System: Then and Now

In a string of cases concerning disputes between petroleum investors and the host states in the Arab world in which they operated, the parties had inserted choice of law clauses in their contracts. These clauses suggested that the governing law was Islamic law, albeit that this was to be construed in accordance with public international law. This was quite clearly an ill-conceived choice of law clause because it provided no alternative or authority in situations where Islamic law and international law were found to be in conflict. On the other hand, these clauses were silent on the type or school of Islamic law that the parties wished to be applied. So when the arbitrators where chosen, all of whom were prominent western scholars and practitioners of their time, they quickly decided that the applicable law was solely international law, on the basis that Islamic law was not sufficiently elaborate, was provincial and indeterminate, and was therefore unsuitable for the settlement of complex business disputes.[38] In the Sheikh of Abu Dhabi arbitration, the sole arbitrator, Lord Asquith, although finding that national law was applicable (ie Abu Dhabi law as grounded in Koranic law),[39] famously noted: 'No such law can reasonably be said to exist … [The Sheikh administers] a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.'[40]

AQ: Qur'anic?

Elsewhere it was claimed that Islamic law could not secure the interests of private parties.[41] The arbitrators clearly disregarded the *lex voluntatis* and exhibited a bias in favour of the investors. The fact that Islamic law was indeterminate or contrary to the interests of the parties was irrelevant, especially given that the parties were aware of this when drafting their choice of law clause.[42] An extension

[38] *Petroleum Development (Trucial Coasts) Ltd v Sheikh of Abu Dhabi* [1951] *18 ILR 144, per Lord Asquith at 149; Ruler of Qatar v Int'l Marine Oil Co. Ltd* [1953] 20 ILR 534, per Bucknill J at 545, who stated: 'I have no reason to suppose that Islamic law is not administered [in Qatar] strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract.'

[39] *Petroleum Development* (n 38) 149.

[40] *Petroleum Development* (n 38) 149.

[41] *Kingdom of Saudi Arabia v ARAMCO* (1963) 27 ILR 117 at 169.

[42] Contrast this early bias against Islamic law with *Alsing Trading Co & Svenska Tändsticks Aktiebolaget v Greece*, Award of 22 December 1954 [1956] 23 ILR 633, which was decided more or less the same time and where the sole arbitrator upheld the parties' applicable law—this, oddly enough, being Roman–Byzantine law as reintroduced into Greece by Decrees of 23rd February and 7th March 1835.

of the *lex voluntatis* suggests that the parties may decide to govern their contract under principles that are not necessarily law in the positivist sense, such as good faith, ethics, canon rules, reason, and certainly religious principles. Arbitrators and judges must make do with these, unless of course their application violates fundamental principles of justice or leads to a situation of *non liquet*, although this concept is itself shrouded in some degree by myth.[43] It is difficult to see in what way justice would have been hampered by the application of Islamic law, especially if the parties were in agreement as to the particular rules to be applied. A denial of religious freedom was therefore evident in all of these cases, although of course the outcome would not have been predicated on these grounds, for obvious reasons. Yet, for the first time in the contemporary era, western lawyers began to realize that Arab nations were intent on fostering Islamic law—with the Qur'an as its principal source—in their future business relations. This, of course, is not to suggest that Arabs are themselves advocates of freedom of religion in international business law.[44]

One of the tacit outcomes of these cases is the denial of the west to accept any religious rules in international business. This is aptly reflected in the principles underlying the growth of the international law of foreign investment from the late 1960s onwards, where arbitrators gave prominence to international law rather than the law determined by the parties,[45] even though in none of these cases was Islamic law the object of disagreement.[46] While this may seem like an objective, uniform, and dispassionate approach to international commercial law, it is in fact a denial of religious freedom for Muslims, for whom Islamic law is a corpus of

AQ: Refusal?

[43] In fact, *non liquet* is theoretically impossible, because if particular conduct is not regulated or prohibited it is therefore permissible. By extension, this is true also for so-called lacunae in the laws. In *Southern Pacific Properties (Middle East) Ltd (SPP) v Egypt*, ICSID Case No ARB/84/3, Award of 20 May 1992, para 80, the tribunal found lacunae in the applicable law at hand, namely Egyptian law. However, as the Dissenting Opinion of Arbitrator El Mahdi pointed out, the Egyptian Civil Code at the time provide for the application of *usage* in case of legislative gaps, failing which recourse was to be had to Islamic law. If this came to no avail, recourse could be made to natural law or natural justice: Dissenting Opinion, at section III(3)(iv).

[44] In disputes involving Saudi nationals or other Saudi elements, choice of law clauses are moot, given that under Hanbali teachings the governing law is by default Sharia or Saudi law. G Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (1987) 9 U Penn J Intl Business L 211, 220. Unlike other Gulf nations, Saudi Arabia has maintained the rule that arbitrators must be male Muslims. This is a natural extension of the limitation that the governing law is Sharia, therefore few non-Muslim arbitrators will possess in-depth knowledge of Islamic law. See I Bantekas and A Baamir, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 Arbitration International 239, at 253.

[45] Controversies have arisen with respect to the interpretation of Article 42(1) of the ICSID Convention, which stipulates that in the absence of a choice of law clause, an investment tribunal 'shall apply the law of the contracting State party to the dispute … and such rules of international law as may be applicable'. This rather straightforward provision has been interpreted by ICSID tribunals as granting supremacy and priority to international law over conflicting provisions of national law, even in violation of party autonomy. See *Compañia del Desarrollo de Santa Elena v Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000), (2000) 15 *ICSID Review—FILJ* 169, 191; *Amco Asia Corporation v Indonesia*, ICSID Case No ARB/81/1, Award, (1993) 1 *ICSID Reports* 569, 580.

[46] See the discussion in *SPP v Egypt*, supra (n 43).

rules that governs both their secular as well as their spiritual life. To the extent that the choice of Islamic law is the result of personal autonomy it should not be discredited because it renders the *lex voluntatis* an arbitrary and indeterminate process. There seems to be some change of attitude, however, at least in the field of foreign investment law and investment arbitration, which is not constrained by conflict of laws conventions. Several commentators, such as Kjos, contend that in the contemporary business world tribunals should honour the parties' chosen applicable law because of the fundamental importance of the doctrine of party autonomy, and that therefore the supervening function of international law should only arise sparsely.[47]

The antagonism of the 1950s has not subsided in the present era of globalization. In *Beximco Pharmaceuticals v Shamil Bank of Bahrain EC* the parties had inserted a choice of law clause according to which the pertinent contract was to be construed in accordance with English law 'subject to the principles of *Sharia*'. The English Court of Appeals held that under the 1980 Rome Convention on the Law Applicable to Contractual Obligations[48] only national legal systems can be designated as laws governing a contract, a requirement which Sharia was held not to satisfy.[49] Of course, this time round the Rome Convention serves as ample justification for the exclusion of Islamic law, but such judgments fail to explain why the parties cannot furnish proof as to the precise provinces of the Islamic law they refer to, much in the same way that the law merchant and, particularly, its obscure usages in many professional fields are well recognized and respected by domestic courts and arbitral tribunals, even though such usages are much harder to substantiate than their Islamic law counterparts.

In any event, the law as it currently stands (at least in the western hemisphere) is that the governing law of a commercial contract cannot be based on religious rules that are not simultaneously statutory rules (or common law-based precedent) because of their perceived indeterminate character. As already stated, although this stance seems to make the work of judges and arbitrators easier, it is a clear restriction on the freedom of religion in the private sphere, especially where the parties have so chosen, and finds no justification in practice (eg as contrasted to the application of the *lex mercatoria*) or in the UN Declaration.[50]

Public Policy as a Restriction upon Religious Freedom

Public policy (*ordre public*) is understood as a set of restrictions imposed by law in order to curtail certain activities undertaken in the private sphere. Public policy is

[47] HE Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013) 196.

[48] OJ L 266 (9 October 1980). Article 1(1) of the Rome Convention clearly states that it is applicable to 'contractual obligations in any situation involving a choice between the laws of different countries'.

[49] *Beximco Pharmaceuticals v Shamil Bank of Bahrain EC*, [2004] 1 W L R 1784.

[50] Particularly Article 4(1) of the Declaration.

quintessentially driven by the dictates and mores of a particular time and is thus subject to fluctuations in the succession of generations. Although our discussion of public policy in this chapter is limited to its commercial dimension, it naturally finds expression in other fields of regulation.[51] Despite the fact that scholars often talk of a 'transnational public policy' in business transactions,[52] we shall limit ourselves here to the more mundane, but certainly more tangible, manifestation of public policy rules in national jurisdictions. This is because public policy is discussed by reference to the laws of a particular country.[53] Although public policy rules are chiefly associated with restrictions imposed under Islamic law, freedom of religion-based restrictions are not unknown in western liberal democracies.

In a case decided in 2013, the Mayor of London had prohibited a Christian charity, the Core Issues Trust, from advertising a slogan on London transport exhorting homosexuals to give up their 'lifestyle' and asserting that homosexuality was a curable condition. The Mayor, who is the chief of Transport for London (TfL), argued that the slogan was an invasion of the right to private life guaranteed under Article 8 of the European Convention on Human Rights (ECHR) and this justified curtailing of the freedom of expression guaranteed under Article 10 ECHR. This was clearly a public policy restriction upon the freedom of religion, and particularly the right to reject homosexuality on religious grounds. Although the case is not strictly commercial and turns on the activities of a charity, its implications for commerce are evident: a corporation may well choose to base its operations on religious principles, which in turn define its marketing, sales, advertising, labour, and other strategies. The High Court held that the Mayor's decision was predicated on electoral favouritism and that pro-gay groups had already gone ahead with an advertising campaign on TfL which promoted homosexuality. As a result, the restrictions imposed upon the Christian charity were arbitrary.[54] This decision is welcome insofar as it does not impede, through public policy rules, the expression necessary for the articulation and application of the freedom of religion—particularly where, as in the case at hand, it was clearly demonstrated that the charity had by no means engaged in a hate campaign against homosexuals.[55]

AQ: It might be better to used a different word, unless this was the one chosen by the Court (or change to promoted acceptance of homosexuality).

The principal impact of public policy rules is that any transaction that conflicts with them will be declared null and void by the courts and institutions of the

[51] In 2012 the District Court of Cologne held that the circumcision of a 4-year old Muslim boy constituted an unlawful offence of causing actual bodily harm and could not be justified by the consent of the boy's parents. Landgerich Cologne, Docket No 151, Ns 169/11, Judgment of 7 May 2012.

[52] CN Brower and JK Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 Am J Intl L 643 at 649.

[53] See JD Fry, 'Désordre Public International under the New York Convention: Whither Truly International Public Policy' (2009) 8 Chinese J Intl L 81.

[54] *Core Issues Trust v Transport for London*, [2013] EWHC 651 (Admin).

[55] Whether or not one agrees with the cornerstone argument of the Core Issues Trust, namely that homosexuality is a treatable condition, the charity clearly insists that it respects those espousing a gay lifestyle. Its mission is to offer counselling to those Christian gay men and women who desire, out of their free will, to abandon their homosexual tendencies: <http://www.core-issues.org/> accessed 5 November 2014.

country in question. Hence, it is important to know the origin and content of such rules. This seems a simple enough proposition, yet this is hardly the case. This author is not aware of any statute in any country that enumerates each and every possible public policy restriction. This is understandable to some degree because, given that mores continuously change, such an enumeration would make the law unnecessarily rigid and inflexible. As a result, public policy rules are scattered throughout national legislation and the courts usually have the authority to acknowledge whether particular conduct is, or is not, part of prevailing public policy. Whether a provision relates to public policy may sometimes be a matter of interpretation,[56] whereas in other cases it is abundantly clear.[57] It is therefore evident that public policy may turn out to be a tool of abuse or arbitrariness, particularly since its flexible character verges on the borderlines of legal uncertainty.

Religion plays a large part in the construction of public policy, particularly in the Muslim world. One of the more liberal Muslim jurisdictions, the UAE, defines public policy in Article 3 of its Civil Code in the following terms: 'Rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Sharia.'[58]

The definition clearly associates public policy with religion, and particularly the major tenets of Islam. In fact, Sharia is the only measure of compatibility with public policy. The definition subjects all commercial transactions to this rule. This is a significant observation which distinguishes all other implicit references to religion in commercial transactions, given that here the connection is not only explicit, but is also the one and only test. The UAE is not alone. Article 37(e) of the 1983 Riyadh Convention on Judicial Cooperation between States of the Arab League stipulates that arbitral awards are not to be recognized and enforced among signatory nations where any part of the award contradicts 'the provisions of the Islamic Sharia, the public order or the rules of conduct of the requested party'. Moreover, several commentators have emphasized that the origin of public policy in the Muslim world is inferred from the *surah al-nakhl*, therefore emphasizing its Qur'anic origin.[59]

Even so, Gulf nations are generally resistant to public policy claims, unless there is an obvious instance of *gharar* or other serious prohibitions.[60] However,

[56] Article 337 of the Greek Code of Civil Procedure (CCP) stipulates that the courts may take into consideration mercantile practices and local custom when deciding the merits of a case. Tacitly, this provides an invitation to examine prevailing public policy.

[57] Article 6 of the Greek CCP states that the courts may refuse to enforce a request for international judicial assistance if it is contrary to public policy.

[58] Article 27 of the Civil Code stipulates that 'the provisions of all the laws which would be against the Islamic Sharia, public policy or good morals of the State of the United Arab Emirates shall not be applied'. This test supplements that which is found in Article 3 of the Civil Code.

[59] S Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shariah and Statute Law* (Graham and Trottman 1984), 473.

[60] The Dubai Court of Cassation, in case no 146/2008, judgment (9 November 2008), held that domestic, as opposed to international, public policy is a fundamental criterion at the enforcement

the very existence of such a broad and open definition of public policy carries with it the risk of abuse. The *Bechtel* case no doubt highlights this risk. There, the Dubai Court of Cassation refused to enforce a foreign arbitral award rendered in favour of the claimant on the ground that the arbitrator had failed to swear in witnesses in the proceedings in the manner prescribed by UAE law for court hearings.[61] This procedural 'defect'[62] relates, among others, to UAE public policy but is not listed, even indirectly, among the reasons for non-enforcement in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In any event, given that none of the parties during the arbitral proceedings protested against the particular manner of swearing in witnesses, and given also that the procedure in arbitral proceedings is not limited by reference to any domestic civil procedure law but is rather delineated by the wishes of the parties—which usually reflect the procedure of the institutional arbitration of their choice—it is inconceivable that the Dubai Court of Cassation could have assumed that awards sought to be enforced in the UAE ought to comply with its civil procedure law. Such an outcome defeats the fundamental principle of party autonomy and reduces the credibility of that particular legal system.[63] More importantly, decisions such as this place an unrestricted number of religious rules at the forefront of all commercial and business transactions in a manner that is incompatible with fundamental rules of the *lex contractus*. It is not that public policy should not be based on rules of religious origin; rather, all public policy rules should be sufficiently clear from the outset, should avoid triviality, and must apply equitably to believers and non-believers. The effects of the *Bechtel* judgment demonstrate an inclination to use religion and public policy as convenient excuses to justify a given outcome.

Religious Freedom of Multinational Corporations?

Although this chapter has dealt with religious freedom in the context of transnational business transactions, it is not out of place to discuss the same freedom in relation to corporations, since they are the source of most (or at least many)

stage in respect of foreign arbitral awards and judgments. However, the Court went on to emphasize that public policy is not one of the grounds for setting aside an award, in conformity with Article 216 of the UAE Civil Procedure Code.

[61] *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, case no 503/2003, judgment (15 May 2004). This same result was later reaffirmed by the Court in case no 322/2004, judgment (11 April 2005).

[62] In fact, following the issuance of the award, the losing party—the Dubai government—filed a claim with the Court of First Instance (CFI) arguing that the arbitrator's warning to the witnesses that they were 'bound to tell the truth' and could 'face severe consequences' for failing to do so was contrary to Dubai law [specifically Article 211 of the Civil Procedure Code), which requires witnesses to swear 'by the Almighty to tell the truth and nothing but the truth'. Not surprisingly, both the CFI [Case No 288/2002] and the Court of Cassation agreed with this claim and vacated the award.

[63] See AS Rau, 'Fear of Freedom' (2006) 17 Am Rev Intl Arb 469.

such transactions. This discussion will take as its starting point the arguments and implications that have arisen in the *Hobby Lobby* case. The owners of Hobby Lobby Stores Inc, the Green family, were devout Evangelical Christians who shared the belief that life begins at fertilization, and hence were opposed to contraception that prevents a fertilized egg from implanting in the womb. This belief would have raised no legal issues had the Obama administration's Affordable Healthcare Act[64] not required that employers provide all types of contraceptives (including the morning-after pill) to their employees as part of their individual insurance plan. While the Green family were not opposed to contraception generally, only to specific forms, they refused to contravene their fundamental beliefs by complying with the aforementioned legislation.

The family claimed the paramountcy of its religious conviction in the present case, particularly as there were no other shareholders, and argued that they were prepared to shut down their business if ordered to provide the relevant contraceptives through the insurance plan. The Tenth Court of Appeals sided with the owners' argument in accordance with the principles laid down in the 1993 Religious Freedom Restoration Act (RFRA),[65] holding that there was no 'compelling governmental interest' (not even a public health risk) which would justify a burden on the Greens' exercise of religion,[66] a position which the Supreme Court subsequently endorsed.[67] This reflects both the RFRA and relevant US Supreme Court jurisprudence stipulating that religious freedom trumps all federal regulation, save where this is a compelling governmental interest and provided that the restriction imposed is the least restrictive.

The other key issue in this case was whether corporations possess human rights in the same manner as physical persons and, in particular, whether they can exercise religious rights at all. The US government argued that for-profit organizations entering the marketplace cannot seriously claim the exercise of religious rights (as opposed to non-profit organizations such as religious institutions). This claim was upheld by the Third Circuit at more or less the same time as *Hobby Lobby* under similar circumstances,[68] but this was flatly rejected by the Tenth Circuit and Supreme Court as regards 'closely held corporations'.[69] A legalistic argument, under US federal law, would be that since the RFRA protects a 'person's' exercise of religion (without defining 'person') the protection is afforded also to legal

AQ: This was also part of the Hobby Lobby case or part of another case? Or there were two Hobby Lobby cases at the same time? Please clarify/rewrite as necessary.

[64] Patient Protection and Affordable Care Act, Pub L No 111–148, 124 Stat 119 (2010).

[65] The RFRA was adopted in reaction to the US Supreme Court's judgment in *Employment Division v Smith*, which ruled that people must comply with 'neutral, generally applicable regulatory law' even if the law, directly or indirectly, burdens their exercise of religion.

[66] *Hobby Lobby Stores Inc v Sebelius*, 723 F 3d 1114 (10th Cir 2013).

[67] *Burwell v Hobby Lobby Stores Inc*, Judgment of the Supreme Court, 30 June 2014. The Hobby Lobby case is considered in detail by Durham and Clark in Chapter 14 of this volume.

[68] *Conestoga Wood Specialties Corp v Secy of US Dep't of Health & Human Services*, 724 F.3d 377, 381 (3d Cir 2013).

[69] This argument was rejected by the 10th Circuit, which held that 'We cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before.' *Hobby Lobby*, above, at 1135. See also Supreme Court at?

AQ: Please complete the fn 69.

persons because these are encompassed under the term 'persons' in the Dictionary Act. This line of argument was certainly supported by the Tenth Circuit and Supreme Court in *Hobby Lobby*, as well as the US Supreme Court's judgment in *Citizens United* where it held that 'corporations are people too' for the purposes of freedom of speech,[70] albeit that the Third Circuit distinguished free speech from religious freedom.[71]

While it is evident that, despite the many antithetical voices, some domestic laws can find some place for the religious freedom of corporations, the multinational character of many corporations will pose several problems. For one thing, if religious freedom is not afforded to domestic legal persons it will not cover multinational corporations (MNCs). However, if domestic corporations enjoy religious freedom then this may not be withheld, under similar circumstances, from foreign MNCs protected by relevant bilateral investment treaties (BITs) which recognize the principle of national treatment[72] of foreign corporations. This extension of national treatment to foreign corporations espousing religious freedom may have severe implications in several fields, particularly employment relations, if the religious convictions of the foreign corporation are out of tune with the prevailing religious sentiments of the host state (especially if such convictions are of a non-recognized religion in the host state). In such cases the host state cannot invoke its public policy or domestic laws in order to curb the foreign corporation's religious freedom because the relevant obligation under the BIT supersedes obligations under domestic law.[73] We have already seen in previous sections that national courts and legislatures across the globe are generally disinclined to accept unlimited religious freedom in transnational business transactions, and in fields such as arbitration the invocation of public policy is a significant restriction on a foreign party's religious freedom. As a result it is difficult, or at least unrealistic, to envisage an extension of religious freedom to the corporate activities of MNCs more generally. This result is further reinforced by the fact that MNC subsidiaries are typically incorporated in the host state and are therefore considered legal persons under the laws of that state—save for exceptional practices such as transfer pricing which are not regulated solely at national level, or which are otherwise accepted in practice. Moreover, there are no internationally binding instruments on MNCs, with the relevant instruments adopted thus far by the OECD and the UN possessing so-called soft-law status.[74]

Finally, if it is contended that corporations possess religious freedom rights, it must necessarily be accepted that they are also burdened with relevant obligations. By way of illustration, Hobby Lobby Stores must provide prayer facilities and time

[70] *Citizens United v FEC*, 558 US 310 (2010). [71] See *Conestoga* (n 68) at 383.

[72] For a discussion of national treatment, see R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 178ff. Depending on the host state's other agreements, the same effect may be generated by the existence of other investment guarantees, such as most favoured nation (MFN) clauses in BITs.

[73] Article 32, ILC Articles on State Responsibility.

[74] See JG Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton 2013).

off in order that its employees may fulfil their religious duties (including time off for missionary work), some of which may conflict with the company's own religious convictions. In such cases two problems arise, namely: a) a clash of religious freedoms between two private actors and b) the transmission of an otherwise public function (ie the protection of human rights) to a largely unaccountable private actor, which is generally anathema in international human rights law.[75] The latter issue is generally well settled, whereas the first is problematic because states need to establish an objective test by which to determine such clashes—although ultimately this will always be arbitrary because it will assume that an aspect of one's religious freedom is more significant, or at least more worthy of protection, than that of another.

Conclusion

In some of the cases discussed in this chapter the connection with religious freedom was abundantly clear; in the majority, however, this was not the case. What this perhaps demonstrates is that our biases, cultural perceptions, legal training, and access to research information (eg legal databases) is in many cases inadequate for the broader subject matter of our research. Anthropologists would term the combination of these biases—which are typically the traits of experts in their fields—as *homeblindeness*, which constitutes a methodological impediment.

AQ: home blindness?

If anything, this chapter has shown the need to infuse elements of religious freedom in a field which is largely thought of as neutral to religion. Hopefully, readers will no longer think this the case, although it is by no means suggested that religious elements are abundant in contractual or commercial transactions, particularly outside the Islamic world. Rather, what is essential is for it to be recognized that religious freedom may constitute a valid legal and moral argument in all commercial transactions, both domestic and transnational, so that it may be drawn on by relevant stakeholders without having to rely on other legislation. Racial discrimination should never have come into the frame in the *Jivraj* case and the parties should have been able to rely on their religious freedom, which was transformed into an arbitration clause in a contract. If this line of thinking prevails then perhaps we will see more commercial cases involving religious freedom arguments being brought before ordinary courts (including tax courts, as per the proposal cited for taxing those professing to be practising Christian Orthodox in Greece) or even international tribunals, especially the European Court of Human Rights. Of course, in practice it might require some effort on the part of commercial lawyers to think from a human rights angle, and hence it would not be a bad idea for larger law firms to hire human rights lawyers with a view to their assessing whether each case may potentially lend itself to a human rights (including

[75] See I Bantekas and L Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 619–20 and 657–70.

freedom of religion) approach. This may, in fact, turn out to be rather lucrative and demonstrate ingenuity and imagination.

At the wider policy level, freedom of religion cannot be imposed other than by international treaties, the work of monitoring bodies with pertinent jurisdiction, the gradual impact of soft law, and civil society. However, relevant stakeholders can help to push things forward even in the face of a hostile executive. For one thing, arbitrators can, and should, uphold freedom of religion in international business transactions and any award to this effect must be enforced in the country of enforcement. This duty is grounded on principles of justice and respect for fundamental human rights. Public policy should never serve as a bar enforcement of such awards because the freedom to determine private issues on the basis of one's religion is recognized in all major religions and, even where religion is excluded from the public sphere altogether, contracts entailing an element of religious freedom should be treated from the point of view of contractual freedom—to the degree of course that they do not violate fundamental tenets of law in the host country.

Law firms representing large corporate clients and the work of diplomatic representation by industrialized nations in favour of their corporations or their shareholders can also seek to further this end when religious issues impinging on contractual freedom arise.[76] Equally, industry-wide interest groups and organizations, such as those representing the construction industry,[77] should promote religious freedom in transnational business transactions by even broader use of their trade usages (*lex mercatoria*) through their institutional rules (such as the FIDIC Rules).[78]

AQ: Please expand this abbreviation.

[76] See B Juratowitch, Diplomatic Protection of Shareholders (2010) 81 BYIL 281.

[77] Available at <http://fidic.org> accessed 5 November 2014.

[78] FIDIC rules are distinguished three-fold as follows: construction contracts *per se* (Red Book); plant and design-build (Yellow Book); and EPC turnkey contracts (Silver Book).