COMMERCIAL LAW IN THE ARAB MIDDLE EAST:

The Gulf States

W. M. BALLANTYNE

LLOYD'S OF LONDON PRESS LTD.

COMMERCIAL LAW IN THE ARAB MIDDLE EAST:

The Gulf States

W. M. BALLANTYNE
M.A. (Cantab)
of the Inner Temple
and Gray's Inn
Barrister

|L|L|P|

LONDON NEW YORK HAMBURG HONG KONG

LLOYD'S OF LONDON PRESS LTD.

1986

Lloyd's of London Press Ltd.
Legal Publishing and Conferences Division
26–30 Artillery Lane, London E1 7LX
Great Britain

USA AND CANADA
Lloyd's of London Press Inc.
817 Broadway
New York, NY 10003 USA

GERMANY
Lloyd's of London Press
PO Box 11 23 47
Deichstrasse 41, 2000 Hamburg 11
West Germany

SOUTH EAST ASIA
Lloyd's of London Press (Far East) Ltd.
903 Chung Nam Building
1 Lockhart Road, Wanchai
Hong Kong

First published in Great Britain 1986

British Library Cataloguing in Publication Data
Ballantyne, W.M.
Commercial law in the Arab Middle East:
the Gulf States.
1. Commercial law—Persian Gulf States
I. Title
345.3'6067 [LAW]

ISBN 1–85044–056–5

Text set in 10/11pt Linotron 202 Baskerville by
Wessex Typesetters, Frome, Somerset
Printed and bound in Great Britain by
Paradigm Print
Gateshead, Tyne and Wear

COMMERCIAL LAW IN THE ARAB MIDDLE EAST: THE GULF STATES

PREFACE

In 1983 Noel Coulson, Professor of Oriental Law at SOAS, asked me to devise and deliver the lectures which now form the basis for this book. These lectures form the syllabus for the third term of the course entitled "Comparative Commercial Law of the Middle East". The plan of this course was to be: *Term One*: The Shari'a, delivered by Professor Coulson himself: *Term Two*: a historical "bridge" and introduction to the Codes of Egypt and North Africa delivered by Mr Ian Edge: *Term Three*: the modern commercial law with emphasis upon the laws of the States of the Arabian Gulf, at present constituting the Gulf Cooperation Council. This plan gave me the task of fitting a vast and complicated subject into ten hours of lectures: the result considerably expanded, is contained in this book, of whose shortcomings I am only too well aware. The problem has not been what to say, but what *not* to say. Yet, one is reminded of Pascale's aphorism: "If I had had more time, I could have been briefer". It is a hard world. In reading with some dissatisfaction the proofs of these lectures, I was almost minded to call them "Legal Rambles in the Arabian Gulf". Be that as it may, they were delivered as lectures and my object is to record them as far as possible in that form.

The plan which I adopted is set out in Chapter I. It was immediately obvious that in ten hours I could do no more than paint with a broad brush, give an overall introduction to the area and perhaps whet appetites for further study, while at the same time suggesting the basic method of approach to legal problems in the area. In so doing, I had to bear in mind that the postgraduate students for whom the lectures were and are intended, while all holding degrees in law, came from a broad spectrum: most are "common law" trained, only a few, normally, having "civil" backgrounds: most have done no comparative law, although all may be expected to have studied conflict: a few usually know Arabic, the majority do not.

If there was one message that I have tried to impart, it is the value of the comparative approach and its application in the practice of the law, an approach not only desirable, but often essential in the jurisdictions of the Gulf. Comparative lawyers will find some of the material, in particular in Chapter I, simplistic. The reason for that is that the training of the majority (not all) of my classes has stopped at the completion of a degree course in their own municipal law, with no vestige of comparative training.

My reasons for publishing these lectures are really twofold. First: the first year, which involved putting the course together and delivering it *de novo*, I found stimulating: the second year, which consisted of presenting the same material to a different class, substantially less so. It became obvious that it would be far better to publish the material, let the class study it in advance of each lecture, and devote the precious hours to discussion and debate. I was hoping to accomplish this in time for the 1985 term, but pressure of other work has defeated me in this. Also, as a "new boy" in the lecture field, I had no idea of the work involved in turning the spoken word into even the semblance of a balanced book.

My second reason is belief that this material may serve as an introduction to the legal history and jurisprudence of a very important area of the world about which very little has been written, certainly not in English. In my thirty-five years of practice in or in connection with the jurisdictions of the Arabian Gulf, I have compiled an indexed library of the laws of the area. I have decided that the time has come to publish those indexes in the form of a source book to be supplemented by a quarterly update service. It is hoped that this volume of lectures will be published contemporaneously and serve as a companion volume to the source book. I would also hope to publish subsequently textbooks which will again use the source book as a reference.

In this comparative study, it has been necessary to differentiate in the main between the Anglo/US system of law (as represented by the Contract Laws of Bahrain, and some of the Emirates of the UAE) and the "Continental" system (e.g. the Kuwaiti Civil and Commercial Codes). I have in general made this differentiation rather loosely by reference to "civil law" and "civilians"; and "common law and lawyers". This sometimes leads to inexactitudes which will be apparent to the comparative lawyer, but which I trust will be forgiven in the interests of brevity.

The basic purpose of this book being to give an overall view of the Gulf Area based upon a system of study, footnotes have been kept to a minimum; so has the Bibliography.

Arabic terms have been avoided as far as possible. Their use would have necessitated transliteration, serving no useful purpose. The Arabic-speaking lawyer will immediately know the Arabic equivalent; the non-Arabist would derive no benefit from assimilating a few Arabic terms which he could not pronounce.

My heartfelt thanks are due to my Arabic assistant, Kathryn Lydiatt, without whose assistance this book would assuredly not have been compiled; to Mark Hoyle for reading the manuscript and banning most of my colloquialisms; to Michael Crawford, now at the F.C.O., who did the research for the section on *riba* in Chapter VII; and to Philip Littler and Simon Gutteridge at Lloyd's for their enthusiasm in launching not only this book but the whole new Arab Law publishing concept.

5 Verulam Buildings,
Gray's Inn
January 1986

W. M. B.

NOTE CONCERNING RECENT LEGISLATION

The following legislation has a bearing on some of the material contained in this work, but became available too close to publication for comment in the text:

Qatar

Law 8/85 amending Law 13/71 regulating the Courts of Justice

Saudi Arabia

Ministerial Resolution 20/1406 issuing the Order governing the procedures to be followed when filing claims with the Civil Claims Directorates

Ministerial Resolution 0/86/1406 authorizing incorporation of the National Cooperative Insurance Company

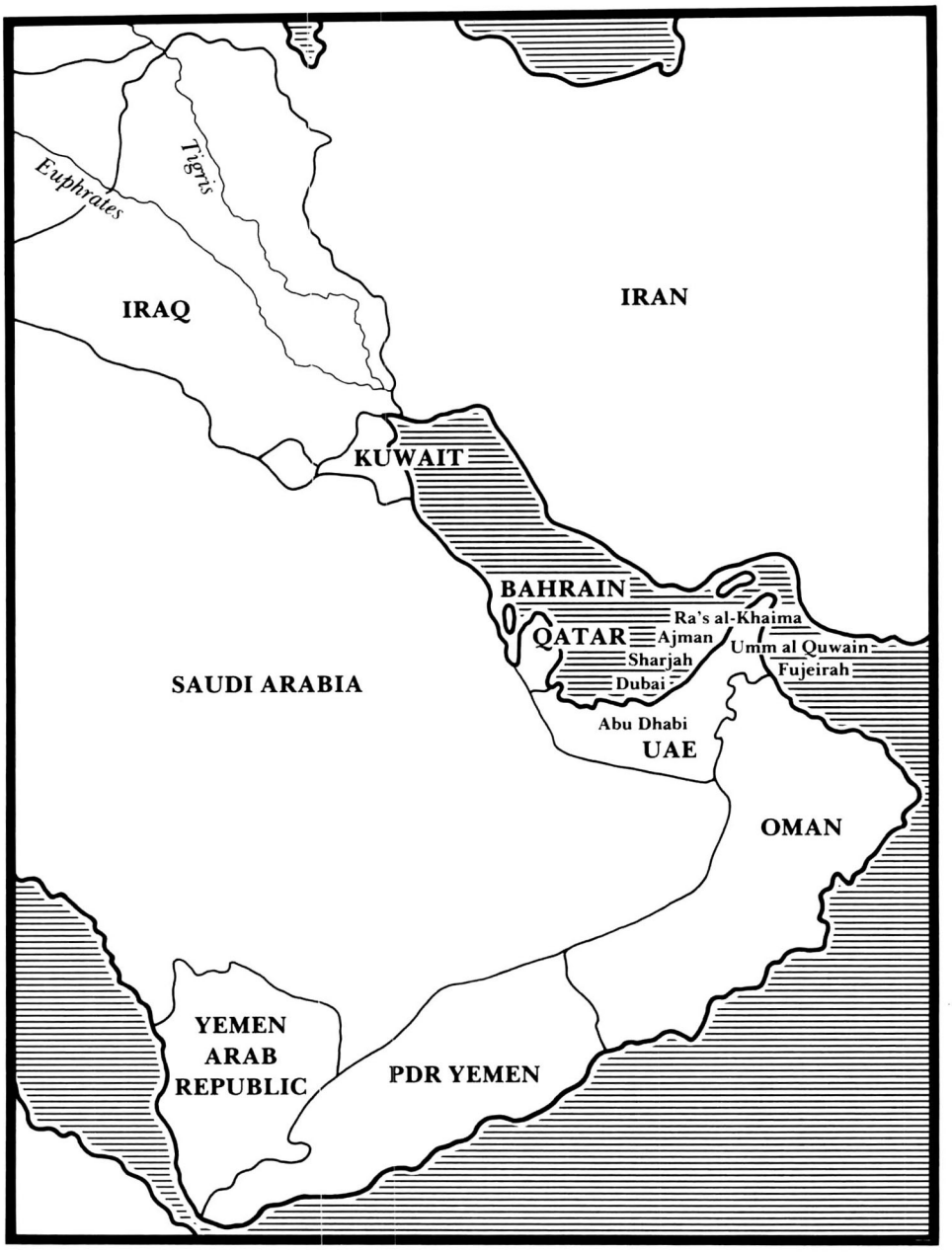
UAE

Law 5/85 issuing the UAE Law of Civil Transactions (Civil Code) (This is the long-awaited Law in the UAE which deals with obligations generally. It is scheduled to come into effect by the end of March 1986, and effectively replaces the Contracts Laws in the Emirates of Dubai, Sharjah and Ra's al-Khaima, and the Abu Dhabi Law of Civil Wrongs (see below, p. 81)

Law 6/85 concerning Islamic Banks, Financial Institutions and Investment Companies

Law 14/85 amending Law 10/73 concerning the Union Supreme Court

W. M. B.


Euphrates
Tigris
IRAQ
IRAN
KUWAIT
BAHRAIN
QATAR
Ra's al-Khaima
Ajman
Umm al Quwain
Sharjah
Fujeirah
Dubai
SAUDI ARABIA
Abu Dhabi
UAE
OMAN
YEMEN
ARAB
REPUBLIC
PDR YEMEN

CONTENTS

I

GENERAL INTRODUCTION

"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations".
Dr Samuel Johnson, in Boswell's *Life*.

"The different sources of law thus to be applied are not, at least in the present case, in contradiction with one another. Indeed if, as recalled above, international law constitutes an integral part of the law of Kuwait, the general principles of law correspondingly recognize the rights of the State in its capacity as supreme protector of the general interest. If the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of their resources and encouraging their trend towards unification that the future of a truly international economic order in the investment field will depend".
Aminoil Award, see p. 9 *infra*, fn. 6.

The overall scheme of this book is comparative commercial law in the Gulf. The comparative approach is often not merely appropriate but essential in the jurisdictions of the Middle east; *a fortiori* in the jurisdictions of the Arabian Gulf where we are lucky to find a virtual microcosm wherein the comparative lawyer can give full range to his propensities. I hope that the reasons for this will become apparent through the chapters of this book.

In the field of commercial law this comparative approach is of increasing validity, not only in the Arabian Gulf and the Middle East as a whole, but generally. By this, with reference to the Arab Middle East, I do not mean that there is some kind of *lex arabica*, or in other words a body of general principles of secular law, that is law other than the Shari'a peculiar to the Arab World—or even a sort of Arab *lex mercatoria*. The comparative approach involves, in greater or lesser degree dependent upon the jurisdiction under discussion, a study of not only civil law, but also common law principles. In some cases, an amalgam of those principles is relevant. This approach is validated in part by lacunae in the codified laws, but not exclusively so, and other factors, discussed below, contribute to its validity.

It is, however, essential to make immediately one overall and important qualification. Behind all the secular legislation stands the Shari'a law of Islam. We shall see that the extent to which the Shari'a is relevant in modern commerce varies from jurisdiction to jurisdiction; but it must never be

forgotten that the Shari'a runs like a golden thread through the legal systems of the Arab Middle East. This is dealt with in particular in Chapter IV. Nevertheless, it should also be said at the outset that in any legal problem that arises in these jurisdictions the question must be asked: "To what extent if at all, does the Shari'a apply?". The answer may be: "Not at all"—but anyone who does not ask the question, and satisfy himself as to the answer, acts at his peril and at the peril of his clients.

The book is divided into ten chapters, broadly set out as follows for the following nine chapters.

Chapter II: The history of the area, including the extra-territorial jurisdiction of the British Crown and the part this played in the development of the Arabian Gulf, together with an appreciation of the overall influence which that historic hand still exercises on legal theory in the area.

Chapter III: Deals with constitutional law. In most of the States of the Middle East there are written Constitutions. Unless we have an understanding of the constitutional background in each case we cannot have any real understanding of the jurisdiction in question.

Chapter IV: A comparative study of the jurisprudence of the area and the sources of law. Quintessentially important will be the extent to which the Shari'a applies in each jurisdiction and against that background we consider secular sources, notably of both civil and common law, in that order.

Chapter V: Considers the law courts and their infrastructure.

Chapters VI, VII and VIII: Deal with what codes there are and the lacunae. We shall consider in particular the law of obligations, contract and delict or tort; we shall also have to consider corporations, foreign capital investments, commercial agencies, banking, negotiable instruments and the like.

Chapter IX: Considers private international law and the conflict of laws.

Chapter X: Deals with the Gulf Cooperation Council.

There is a bibliography at p. 171 which should be referred to for extra reading, and various important documents are contained in the Appendix and referred to in the text below.

To define the immediate area which is the subject-matter of this book the map at p. x should be considered. This area runs from Kuwait in the North, in an anticlockwise direction, to Oman in the East. In general, we shall always deal with it in that order for the sake of uniformity.

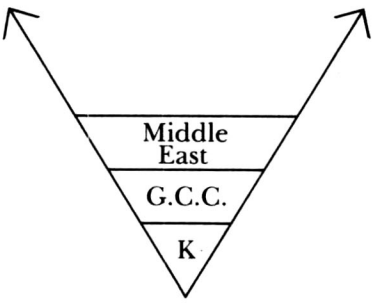
Kuwait is abutted on its southern boundary by an area which used to be called the Kuwait/Saudi Arabian Neutral Zone, and which is now called the Divided Zone. This area is in many ways an anomaly and presents jurisdictional problems and substantive law difficulties of a high order, but of rather too specialized a nature to concern us here. Next comes Saudi Arabia, geographically a vast area and of corresponding economic importance; then Bahrain, an archipelago; Qatar; The United Arab Emirates, which consists of seven separate Emirates, the sovereignty of each of which constituting an interesting study at international law; and Oman. All these six are independent sovereign States, and members of the United Nations Organization. They were all, with the exception of Saudi Arabia, at one time

within the ambit of British extraterritorial jurisdiction. Oman, however, was always on a different basis from the other Gulf States in this respect and the jurisdiction ceased long enough ago for us to disregard it for practical purposes. The extra-territorial jurisdiction was retroceded in Kuwait in 1961, and in the other Gulf States, with the exception of Oman, in 1971. These States constitute at the present time the members of the Gulf Cooperation Council: I shall refer to them in the aggregate as "the Gulf States".

In a comparative study such as this, there must be a focal point or pivot—a *mihwar*. For reasons which will increasingly become apparent, we shall take Kuwait as our base point. The main reason for this is that Kuwait has by far the most complete system of codes, and for that itself there is a historical reason. We have noted that the extraterritorial jurisdiction in Kuwait ended in 1961, that is to say, ten years before it ended in the southern Gulf. As will be seen in Chapter II, this historical fact, allied to the emancipated attitude of a far-sighted Ruler, gave Kuwait a head start in legislation.

It should be noted in passing that the word independence is not used in the context of the retrocession of extra-territorial jurisdiction. These Gulf States were Protected States: they were independent States in special relationships with the British Government, and the jurisdiction was exercised on that basis under a kind of quasi-capitulatory regime. The States were not even Protectorates. The Foreign Jurisdiction Acts of England were the statutory measures which permitted the exercise of that jurisdiction.[1]

Such is the immediate area of concern here; however, the principles that we shall discuss in this book will be found to be relevant in an ever-widening sphere, first, on a Middle East basis, and secondly on a global basis. It should be stressed that what we are looking for in this study are points of concordance, not differences. We will try to find the common principles that weld together not only this immediate area of the Arabian Gulf, but a much wider area in which they are also relevant. We may envisage a triangle standing on its apex:



At the apex we have Kuwait as the pivot; above that the States of the Arabian Gulf; then the Arab Middle East; and above that *ad infinitum*, with the principles becoming more or less relevant according to which area of the world is under consideration and which jurisdiction is involved. However—and here

[1] *Infra*, at Chap. II, p. 16.

again is our main qualification—when we step outside the Islamic countries, then we exclude, in the main, the Shari'a. I say in the main because, in whatever jurisdiction, the Shari'a may of course assume relevance by virtue of the municipal dictates of that jurisdiction itself. An obvious example is where the principles of private international law applicable designate the Shari'a as the substantive law to be applied. Another example is where, for example, in an international dispute the "general principles of law"[2] may be applied, and where, as one of those general principles, the Shari'a may be adduced.

We may make one more fundamental assumption in defining the shape of these studies. Commercial law is essentially largely a matter of contract. Although we have these days much blurring of edges and overlapping of principles, particularly between the bases of the jurisprudence that we shall be discussing, in contract the divisions appear fairly well defined. We shall be discussing what the civil lawyer would refer to as the law of obligations in considerable detail. In this context, it is relevant to make the particular division between those States having a civil law concept of contract generally, e.g. Kuwait and Egypt, and those still having a common law concept, e.g. Bahrain, Dubai and Sharjah.

Unfortunately, we shall be concerned with some jurisdictions where neither civil nor common law concepts are relevant, for example Saudi Arabia and perhaps Oman. Despite the foregoing generalizations, in most jurisdictions it may be appropriate where there are lacunae in the codes to adduce principles from both civil and common law systems, and the potential value of the comparative approach can thus be seen.

When we talk of commercial contract, the obvious initial comparison to make is Kuwait with Bahrain: that is, the civil law in Kuwait and the common law in Bahrain. Thus, one of our main studies will enable comparison of the Kuwait law of obligations with the Bahrain Contracts Code, and this will automatically provide a graduated comparison of Kuwait with Qatar, and Bahrain with the Emirates of the UAE. Even against this background, it must be stressed that the picture is contantly changing, and it is with some regret that, as basically a common lawyer, I have to record that in my view the principles of the common law are inevitably on the wane in the Arab Middle East. For example, Bahrain has for some time had a full Commercial Code in draft based on the civil system: the same obtains in the United Arab Emirates where a Law of Commercial Companies has been promulgated recently based on Egyptian and thus French principles. For emphasis, I must distinguish again Saudi Arabia and Oman. In Saudi Arabia the law is Shari'a with an admixture of qualifying Regulations; and basically the same position obtains in Oman.

Where discussing Comparative Commercial Law of the Middle East—what do we mean by comparative law? It is really a misnomer. There is in fact no such thing as comparative law, and this was put by Professor Gutteridge with his usual succinctness: "It is a method of study, not a distinct branch or

[2] See the Statute of the International Court of Justice, Art. 38.

department of law". Against that background we are searching for points of concordance and not difference and let us anticipate by a brief consideration of the main points of concordance.

First, the Shari'a. I have already referred to this. In the Arab Middle East we are dealing exclusively with Islamic States whose Consitutions all prescribe the Shari'a as the, or a, principal source of law. Second, where there are written Constitutions these are all more or less on the same model. In the practical consideration of a commercial problem, it will be found that direct reference to the Constitution is often more relevant in these jurisdictions than would be the case in, say, the United States of America. The reasons for this are manifold, but I think that perhaps the main one is that, certainly in the Gulf States, the system is more intimate. This is difficult to explain, but is certainly part and parcel of the overbearing influence of Islam. I hope to explain this as we progress. It must be rare that in a normal commercial case in the United States the constitutionality of a Law is called into question: that is not necessarily the case in the jurisdictions under consideration here. In this context, we shall need to note the essential nature of a written Constitution, more readily appreciable by those lawyers who come from the United States or Europe than by the common lawyers. The third point is that, the Shari'a apart, we have increasingly civil law principles obtaining in the secular field. As we proceed, it will be apparent that I am at the moment painting with a very broad brush. We shall consider many other similarities. However, the fourth point which I would stress is that of Arabic language and thought.

This list is not of course exhaustive, nor is it made in any order of precedence. Were priorities to be allotted, the Arabic language and the thought processes which it represents would certainly not come at the bottom of the list. Arabic is not, of course, *per se*, a source of law; but the language and the thought processes from which it derives are so important that this almost adds another element to the rules of construction and, indeed, to one's whole approach. If we think of the general progression of thought to language to thought, and add to such considerations the peculiarities evinced by the Arabic tongue, all this becomes apparent. Just as circumstances or thought or reaction or instinct, as the case may be, give rise to the necessity to express the thought or emotion in language, so a circular process develops which furthers itself. This is apparent quintessentially with the Arabic language, and the thoughts which are reflected in the language must be understood in construing a piece of Arabic. As I have said, this adds another element: too strong a warning cannot be given against the all-too-common practice of dealing with Arabic texts in translation. Let us not forget that Arabic is the official language of the area under discussion; it is the language of the courts, and in the courts of the area no other language is permitted, nor is documentation admitted unless it be in Arabic. It is my considered opinion that any lawyer who endeavours to advise on an Arab jurisdiction, without a sufficient knowledge of the language, is short-changing his client.

In the fourth chapter I shall deal on a comparative basis with the progression of research in a legal problem in these jurisdictions. We shall

appreciate that initially reference must be made to the Constitution, written where there is one, as the law paramount; and we shall find no concept approximating to that of an omnipotent parliament to the extent to which we find it in the United Kingdom. We shall find that in many of these jurisdictions there is the opportunity to take constitutional matters before constitutional courts. As the second step in research, reference is made to the sources of law and the jurisprudence prescribed in the Constitution. Then we go to subsidiary legislation, the codes made within that ambit. Once again, let us remind ourselves that usually, but not always, and in varying degree, we have the Shari'a. However, there are often lacunae: the sources are not fully or adequately prescribed. The codes may be non-existent or fragmentary, incomplete. They may need supplementing, and of course even in the case of complete codes, they need commentary, doctrine and jurisprudence. Here I use the word jurisprudence to denote guidance to be found in court decisions, that is to say in the civil law context. Reference is made to learned writers and commentators. Where common law principles are relevant, precedent may be called in aid, and I shall come to that later; but in general it may be stated that the rule of *stare decisis* is not endemic to the jurisdictions with which we are here concerned. I have already referred to the fact that the trend is towards the principles of the civil law. Where learned writers are referred to, they are not yet, in the main, writers originating from the Gulf States themselves: we go to great figures like Abd al-Rizzaq Al-Sanhuuri, the architect of many of the Arab codes, the great Egyptian jurist who wrote his monumental work *Al-Wasit*, the commentary on the Egyptian Civil Code, because he was at that time brought under house arrest. It may be that, but for that unhappy event, he would not have had time to do this, but he wrote his ten-volume commentary, which is of paramount importance, because we find that the codes of most of these jurisdictions owe much to the Egyptian codes, and, of course, behind Egypt we have the codes of France. Then again, we may find that some of the codes contain elements of both civil and common law drafting. I refer to the Omani codes as an example.

The importance of an approach which seeks for a concordance of principle is increasingly apparent. If common principles can be found to fill a gap in authority, or where there is conflict between various authorities, then the more support that can be found from general principles of law, the more formidable the argument that can be made.

We may add another important feature when dealing in these jurisdictions, namely, the personality of the judge or arbitrator. Is he civil or common law-trained? Because accordingly he may be swayed by civil or common law philosophy. It has to be borne in mind that in the Gulf area the vast majority of judges consists of lawyers imported from outside, and there is obviously and frequently a difference of approach to a problem, between a Jordanian or a Sudanese judge with a basic training of common law, and an Egyptian judge with an essentially French background.

The considerations to which I have briefly referred apply perhaps *a fortiori* in the Gulf area; throughout the Arab Middle East; but also in a wider spectrum.