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# The Possibility of Transplanting Western Bankruptcy Principles to Oman

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## Abstract

This article investigates the extent of possible transplantation of some western bankruptcy principles to Oman. Such principles include the concept of rescue culture, the notion of ‘cram-down’, imposition of stay on secured creditors’ claims and the concept of ‘debtor-in-possession’. It demonstrates the fact that since the start of the legislation path in Oman in 1973, Oman tends to transplant some legal western concepts and such transplantation is accepted. However, the author supports the view that before transplanting foreign principles it is crucial to assess their workability and functionality to avoid the risk of rejection.

**Keywords:** bankruptcy principles, legal transplant, Oman

## 1. Introduction

Many governments, particularly in developing countries, are aware of the need for more forgiving bankruptcy regimes. As a result of such awareness, many countries have reformed, and some are in process of reforming, their bankruptcy laws. However, in most cases, these new reforms or proposed reforms do not arise from existing cultural conditions; instead, the rules of such laws are transplanted from elsewhere and the cultural views are expected to change with such reforms. The aim of this article is to investigate the extent of possible transplantation of some western bankruptcy principles to Oman. Such principles include the concept of rescue culture, the notion of ‘cram-down’, imposition of stay on secured creditors’ claims and the notion of ‘debtor-in-possession’. As a matter of classification, this article is divided into three main parts. The first part deals with the concept of legal transplantation by highlighting various approaches underpinning such concept and the effects of legal transplantation. The second part will discuss the occurrence of legal transplantation within the area of bankruptcy laws. The third part will explore the experience of Oman in acting as an importing country by demonstrating the fact the Oman usually does not start from scratch, but rather learning from the experience of others has been the main source of legal development in Oman.

## 2. The Concept of Legal Transplant

There is a spectrum of different possibilities as to what is meant by ‘transplant’. Watson, for instance, states that a legal transplant is “the moving of a rule or a system of law from one country to another or from one people to another”.<sup>1</sup> However, in criticising such a definition, it is argued that Watson’s definition of a legal transplant is both narrow and loose from a number of perspectives. It is narrow because it is only concerned with legal history and the examples provided in his book are mainly inspired by the various influences exercised by Roman law on different peoples.<sup>2</sup> Also, Watson concerns himself only with the area of private law.<sup>3</sup> Further, it is argued that in defining the concept of a legal transplant Watson overlooked the necessity of acknowledging the strong determining role of the cultures of the ‘sending’ or ‘receiving’ countries when assessing the fate of such transplantation.<sup>4</sup> It is asserted that “legal transplants have now become a generic phrase to refer broadly to the influence of foreign law on the drafting of new legislation and to the movement of law beyond national borders”.<sup>5</sup> Thus, currently the term ‘legal transplant’ is used as a generic term for all transnational or cross-border spread of law.<sup>6</sup>

### 2.1 Theoretical Debates

Whether legal transplants are possible or not is subject to intense debate.<sup>7</sup> The debates have centred on the following issue: is it possible to transplant laws and legal institutions from one legal system to another? In

answering such a question, various approaches have been developed since legal scholars approach law in many ways. As Orucu stated, legal scholars “are dedicated to various trends such as ‘law as rules’, ‘law as system’, ‘law as culture’, ‘law as tradition’, ‘law as social fact’, ‘law in context’, ‘law and history’, ‘law and economics’, and ‘law and legal theory’”.<sup>8</sup> However, based on various conflicting views, the aim of this part is to explore the possibility of legal transplantations.

On one side of the debate, there are some scholars who oppose the idea of legal transplants. For instance, in his book, *“The Spirit of Laws”*, Montesquieu argues that “the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adopted in such a manner to the people whom they are framed, as to render it very unlikely for those of one nation to be proper for another”.<sup>9</sup> Thus, according to Montesquieu, legal rules cannot cross cultural boundaries since they express the spirit of nations and are, as a result, “deeply embedded in, and inseparable from their geographic, customary and political context”.<sup>10</sup> In line with Montesquieu, Pierre Legrand also opposes the possibility of legal transplantation. He stated that “anyone who takes the view that ‘the law’ or ‘the rule of the law’ can travel across jurisdictions must envisage that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage”.<sup>11</sup> However, he believes that such a view is mistaken. Legrand views legal rules as “an incorporative cultural form, as an accretion of cultural elements, it is buttressed by important historical and ideological formation”<sup>12</sup> and, as a consequence, “rules cannot travel” and legal transplants are impossible.<sup>13</sup> Since legal rules mirror the society in which they have evolved, their meaning does not survive the journey from one jurisdiction to another.<sup>14</sup> Accordingly, he argues that “at best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words” and “in any meaningful sense of the term, ‘legal transplants’, therefore, cannot happen”.<sup>15</sup> However, in response to such allegations, it is rightly argued that the spread of Roman law throughout the continent of Europe, or international or transnational commercial law<sup>16</sup> of today, demonstrates the possibilities of legal transplants.<sup>17</sup> The movement of legal rules, practices, and institutions has been a normal occurrence all around the world and it is hard to find a legal system in the developed world that has not imitated or borrowed from another country’s law.<sup>18</sup> This leads Miller to state that “the economic development, democratization, and globalization have today so sharply increased the number of legal transplants that at least in developing countries, most major legislation now has a foreign component”.<sup>19</sup> In this regard, despite the difference in culture, transplanting foreign rules or doctrines might help in filling a gap or meet a particular need in the importing countries.<sup>20</sup> As will be demonstrated below,<sup>21</sup> in order to promote the concept of rescue culture, many countries have reformed their bankruptcy laws through transplanting the experience of other jurisdictions.

On the other side of the debate, a number of scholars recognised the importance of legal transplants in developing national laws. Watson, through a number of books and articles, views direct transplants of whole legal systems as constituting the most important fertile source for legal development.<sup>22</sup> He argues that legal transplants are “socially easy” and, indeed, they are as alive and well as they were in the age of Hammurabi.<sup>23</sup> This is due to the fact that “legal rules are not particularly formulated for the society in which they operate;<sup>24</sup> rather they are the intellectual creation of clever lawyers, easily adaptable to local use by other clever lawyers elsewhere on the globe”.<sup>25</sup> According to this approach, despite the historical origin of legal rules, they “can survive without any close connection to any particular people, any particular period of time or any particular place”.<sup>26</sup> Hence, to him, legal borrowing is, in fact, the key to how law is changed and developed.<sup>27</sup> In supporting his arguments, Watson provides a number of examples of the reception of Roman law and the spread of English common law. In one of his arguments, Watson contends that successful transplantation could be achieved even when nothing was known by the importing country of the political, social or economic situations of the foreign law.<sup>28</sup> However, in criticising Watson’s approach it is stated that “free transplant theory’ loses sight of the law’s unavoidable susceptibility to some external pressures from culture and society”.<sup>29</sup> Nevertheless, Watson acknowledges the fact that a tomato plant that moves from X to Y is still a tomato plant. Nevertheless, its subsequent development depends on Y’s soil, temperature, wildlife and so on.<sup>30</sup>

As stated above, whereas Watson opposes the idea that legal rules mirror the society in which they have developed, Legrand supports such an idea and, as a consequence, he argues that legal transplantations are impossible. However, it is stated that there are many scholars who tend to fall between these two positions, seeing legal rules both as embedded in a legal system and a culture and subject to be transplanted from one jurisdiction to another.<sup>31</sup> In this regard, even though Kahn-Freund, for instance, recognises the possibility of legal transplants, he asserts that to avoid serious risk of rejection, sometimes having knowledge of the political and social conditions in the donor system is necessary.<sup>32</sup> Thus, even though he acknowledges the possibility of legal transplantations, the chances of survival or risk of rejection of the transplanted legal rules or institutions

depend on political factors.<sup>33</sup> In his article, Kahn-Freund refers to Montesquieu's opinion that it was only in the most exceptional circumstances that the institutions of one country could serve those of another at all.<sup>34</sup> Based on Montesquieu's view, a range of factors militate against transplantation, such as geography (for example the size and geographic position of a country), social and economic (for instance occupation, destiny, wealth of the population, trade), cultural (for example religion, traditions, customs) and political factors (such as the nature of the government).<sup>35</sup> However, Kahn-Freund affirms that the geographical, the economic and social, and the cultural elements have greatly lost their importance over time, but that the political factors have equally greatly gained in importance.<sup>36</sup> Then, he differentiates between two types of institutional transfer.<sup>37</sup> In this regard, he suggests a continuum of legal rules, the terminal points of which are, on one side, a rule which can easily be 'transferred' by mechanical insertion and, on the other side, a rule analogous to the transplant of a kidney from one person to another, with the attendant risk of rejection by the home environment.<sup>38</sup> He argues that any given rule or institution may be placed at an appropriate point of this continuum.<sup>39</sup> In supporting his argument, Kahn-Freund offers a number of examples.<sup>40</sup> For instance, within the area of family law, there are significant variations in the conditions and the consequences of a divorce, mainly as regards alimony.<sup>41</sup> In this case, even though fundamental rules of divorce laws have been transplanted successfully from Australia and New Zealand to England, radical changes in the same direction have occurred in Canada and in New York.<sup>42</sup> Hence, the law of divorce and alimony would *prima facie* appear to be most closely linked to local environmental factors, such as moral and religious beliefs.<sup>43</sup> Also, he provides an example involving rules of an institutional nature where the power factors appear much more strongly than in divorce law.<sup>44</sup> Examples of these rules are those which organise constitutional, legislative, administrative or judicial institutions and procedures, and above all, policy-making power.<sup>45</sup> According to him, all these rules are closest to the second side of the continuum and "they are the ones most resistant to transplantation".<sup>46</sup> For instance, he states that the failed attempt to transplant the English jury system to the Continent in the Nineteenth Century and the unsuccessful attempt to export the British parliamentary institutions into countries which do not share a particular feature in history, or a social structure, and of political consensus characteristic of the UK, demonstrates how such rules and institutions are resistant to transplantation.<sup>47</sup>

In addition, scholars such as Orucu and Sacco highlight the importance of legal transplantation. In his article, Orucu asserts that the movement of legal rules and institutions is a natural stage in legal development. According to Orucu, the future development of laws and institutions is closely tied to the movement of ideas and institutions from one place to another.<sup>48</sup> Moreover, both Orucu<sup>49</sup> and Sacco<sup>50</sup> argue that borrowing and imitating others' legal systems is of crucial importance in understanding the course of legal change. However, Orucu argues that many problems may arise for recipient legal systems as a result of the transmigration of law.<sup>51</sup> The scope of these problems depends on factors such as the size of the transmigration, the characteristics of legal movement, the success or otherwise of transpositions and 'tuning', the element of force or choice inherent in the move and the social culture of the new environment.<sup>52</sup> Thus, particular consideration should be paid to legal-cultural convergence and non-convergence which may come about as a consequence of import.<sup>53</sup>

To sum up, according to many scholars legal transplants are possible. However, those scholars who recognise the importance of legal transplants disagree on the method of such transfers. While Watson acknowledges the possibility of legal transplantations despite cultural differences between the exporting and importing jurisdictions,<sup>54</sup> Kahn-Freund is of the view that for such a transplant to be successful, knowledge of the political and social conditions of the exported legal rules is crucial.<sup>55</sup> However, in this regard, Xanthaki<sup>56</sup> makes the statement that:

*What matters when selecting a legal system for comparative examination in the process of legal transplantation is not the similarity of its characteristics with that of the receiving legal order, but the functionality of the proposal. If the policy, concept or legislation of a foreign legal system can serve the receiving system well, then the origin of the transplant is irrelevant to its success. As long as the transplant can serve the social need to be addressed, the transplant can work well in the new legal ground.*

This paper supports Xanthaki's assertion by arguing that despite the origin of transplanted rules or principles, they can be adopted in order to overcome the deficiencies of the legal system in the importing country. In this regard, the appropriateness of foreign rules and principles can be judged by trying to assess their workability and functionality before adopting them. This can be done by consulting a number of national and foreign experts and organising government symposiums in order to predict the workability and functionality of the proposed rules and principles. However, in assessing the functionality of such rules or principles, recourse should be made to a number of factors. For instance, in proposing foreign rules or principles, it is important to take into account cultural factors in the importing country (people's attitudes towards the proposed principles, religious

convictions). It is true that sometimes transferring the institutional context of foreign countries is not appropriate. This is due to social, cultural and political factors in the importing country. For example, Kahn-Freund provided examples of the attempted failures to transplant the English jury system to the Continent and the transplant of British parliamentary institutions to other countries.<sup>57</sup> Also, it is necessary to take into consideration the difference between the infrastructure in the importing and exporting countries. This includes, for example, the competence of courts in dealing with proposed principles and the qualifications of persons administering the law.

## 2.2 *The Effect of Legal Transplants*

It was argued above that transplanting the experience of other countries is important in legal development, as long as foreign rules or principles serve the needs<sup>58</sup> of the importing country. However, when an importing country applies a rule that has been transplanted from another country, it is effectively applying a rule to its own local circumstances and, as a result, the interpretation of a legal rule may vary more in the importing country than in its origin.<sup>59</sup> As Watson states, a tomato plant that moves from X to Y is still a tomato plant. Nevertheless, its subsequent development depends on Y's soil, temperature, wildlife and so on.<sup>60</sup> Transplant countries, as a consequence, are likely to suffer from what is called 'the transplant effect', that is, the mismatch between pre-existing conditions and institutions and the transplanted law, which might weaken the efficiency of the imported legal order.<sup>61</sup> Also, as is empirically demonstrated,<sup>62</sup> it can be argued that the differences of infrastructure between the importing and exporting countries might have an impact on increasing the effects of the transplant. For instance, in their study, Daniel Berkowitz, Katharina Pistor and Jean Richard analysed the consequences of legal borrowing by comparing the 'level of legality'<sup>63</sup> achieved over the last two hundred years in forty- nine different countries.<sup>64</sup> Their study develops and tests the proposition that "the way in which a country received its formal law is a much more important determinant of the current effectiveness of its legal institutions than the particular legal family that it adopted".<sup>65</sup> They based their argument on two key perceptions.<sup>66</sup> First, for the law to be efficient, it must be meaningful in the context in which it is applied so society has an incentive to use the law and to demand the establishment of institutions that work to enforce and develop the law.<sup>67</sup> Second, the judges, practitioners and other legal elites that are responsible for developing the law must be able to increase the quality of law in a way that is responsive to demand for legality.<sup>68</sup> Thus, for law to be functioning, a demand for law should exist so the law on the books will be used in practice and legal persons responsible for developing and administering the law will be responsive to this demand. Also, they assumed that if the transplanted law matches local conditions in the importing country, the law will be used and function as in an origin country,<sup>69</sup> and as a result, strong public demand for institutions to enforce this law would follow.<sup>70</sup> However, if the transplanted laws do not match local circumstances, or they were imposed via colonization and the population within the transplant was not familiar with the law, then the demand for using these laws would be weak.<sup>71</sup> They assumed that countries that received the law in this fashion were subject to the 'transplant effect'.<sup>72</sup> Hence, their main argument was that "legality is largely a function of demand for law. Only if demand for law is high, will there be a high voluntary compliance and will a society invest in the legal institutions necessary for upholding the legal order".<sup>73</sup> Therefore, based on their view, voluntary reforms initiated by the receiving countries (receptive transplants) are more likely to achieve better results than reforms imposed by outside forces (unreceptive transplants).<sup>74</sup> Even though they recognised the possibility of legal borrowing from other countries, they argued that "a good fit of foreign with domestic law may not be only a lucky coincidence, but could be enhanced by meaningful adaptation of imported laws to local conditions".<sup>75</sup> Furthermore, in his article 'the codification of law and the transplant effect', Pistor argues that over the past two hundred years of legal transplant, countries that transplanted a legal system wholesale have less efficient legal institutions<sup>76</sup> today than countries that developed their own rules.<sup>77</sup> This is, in her view, attributed to: initial economic conditions in the importing country, the political regime, cultural divergences, and inconsistency with pre-existing legal institutions.<sup>78</sup>

Hence, both of the above-mentioned studies acknowledged the existence of legal transplantations. However, such transplantations have an impact on the receiving countries in a way that might affect the implementation of such rules. It is argued that the effect of legal rules depends mainly on its "context-institutions, social and political forces and legal culture".<sup>79</sup> Thus, while it is normally an easy task to copy the text of foreign law, it is extremely difficult to transfer this context.<sup>80</sup> However, this does not undermine the importance of taking lessons from the experience of other jurisdictions. Thus, the author stresses that in the course of drafting or revising laws, it is desirable to adopt foreign rules or principles if these are appropriate in filling the gap in the importing country. As will be demonstrated by examples,<sup>81</sup> during its legislation path, Oman has tended to adopt some foreign legal principles. However, since Oman might be subject to 'transplant effect', it can be argued that minimising the effect of transplantations can be planned for by assessing in advance the workability and

functionality of the proposed foreign rules. In assessing the impact of the imported legal principles on the importing country, it is important to continually review the effects of such transplantation.

### 3. Transplanting Bankruptcy Laws

It has been already noted that the movement of legal rules, practices and institutions has been a normal occurrence all around the world and globalisation has increased the number of legal transplants.<sup>82</sup> As will be demonstrated below, many countries have reformed their bankruptcy laws through transplanting, imitating and borrowing other countries' laws. In this regard, there are a number of drivers for reforming bankruptcy laws.<sup>83</sup> First, some countries reform their laws, in particular corporate and bankruptcy laws, in order to attract foreign investment and to show foreign investors from various countries that they comply with the best recognised standards.<sup>84</sup> Secondly, because of globalisation, many countries believe that building a viable bankruptcy system "will help fuel a market economy".<sup>85</sup> As a consequence, many countries<sup>86</sup> have attempted to establish a reorganisation regime for failing traders like Chapter 11 of the US Bankruptcy Code.<sup>87</sup> Further, several international organisations, such as funding agencies like the International Monetary Fund (IMF) and the World Bank, normally make loan agreements to developing countries conditional upon adopting a specific model, generally the Anglo-American model.<sup>88</sup> This type of conditionality was also an essential feature of efforts made by the IMF to rescue banks and other financial institutions during the Asian Financial Crisis.<sup>89</sup> However, it is stated that countries in financial crisis, as a result, are significantly dependent on infusions of funds from multilateral institutions, and are likely to be much more susceptible to lawmaking influence by these institutions than countries in stable financial circumstances.<sup>90</sup> Also, it is argued that since insolvency laws are integral to the development and growth of markets, many countries have recognised the importance of introducing bankruptcy reforms.<sup>91</sup>

Based on the above-mentioned factors and in recognition of the importance of rescue culture, many countries have reformed, and some are in process of reforming, their bankruptcy laws.<sup>92</sup> However, in most cases, these new reforms or proposed reforms do not arise from existing cultural conditions;<sup>93</sup> instead, the rules of such laws are transplanted from elsewhere and the cultural views are expected to change with such reforms.<sup>94</sup> It is stated that in many areas of commercial law, national law reforms can no longer be purely national.<sup>95</sup> To one degree or another, the force for reform, the content of reform, and the 'trajectory' of reform proceeds from or responds to transnational and global context.<sup>96</sup> The great majority of the national bankruptcy reforms of the past 15 years are influenced by transnational or international developments.<sup>97</sup> It is stated that such reforms are not, normally, derived from the traditional cultural values of these countries; however, it is attributed to the influence of ideas drawn from the notion of rescue culture.<sup>98</sup> Thus, in recognition of the importance of rescue culture, many new bankruptcy laws have been transplanted from the United States.<sup>99</sup>

Despite the increase in transplantations of the US bankruptcy system, it is argued that the new reforms or proposed reforms have little impact, in reality, on the transplanted countries, if cultural views<sup>100</sup> or attitudes are not changed.<sup>101</sup> In her study, Martin examined the role of history and culture in developing bankruptcy and insolvency systems in a number of developed and developing countries.<sup>102</sup> In this regard, she argued that importing countries should avoid the wholesale transplantation of bankruptcy laws; rather, these countries should take into account the economic needs of their societies and their unique cultural components.<sup>103</sup> This is due to that fact that regardless of what bankruptcy law says, the reality may be quite different.<sup>104</sup> For instance, in Germany, the enacted Insolvency Code of 1999 adopted the concept of a debtor-in-possession.<sup>105</sup> However, the adaptation of this concept has been criticised and mistrusted by most of German society for a considerable time regardless of what the law says.<sup>106</sup> Also, despite the technical requirement that an appointed administrator shall be independent, in reality the lead bank chooses an administrator who is friendly to its interests.<sup>107</sup> As a result, Martin states that "long-held and strong cultural values may stand in the way, despite the best intentions of lawmakers".<sup>108</sup>

Furthermore, an empirical and a legal study in six Asian legal systems (China, Hong Kong, Indonesia, Malaysia, Singapore and Taiwan) was conducted to examine how local legal cultures shape national approaches to corporate insolvency law and practice.<sup>109</sup> That study suggested that law reforms which can mesh with pre-existing traditional attitudes, even if the source of the reform is a foreign one, are more likely to be successfully implemented.<sup>110</sup> Also, this study demonstrated that despite the different cultures between these Asian systems and the exported legal systems, "the extent to which traditional cultural values and attitudes to debt have been changing in the face of introduction of modernisation through the market".<sup>111</sup> As a consequence, this empirical study concluded that while the cultural attitudes in these Asian countries might continue to operate to some degree, particularly amongst the smaller and family companies, their impact on the imported bankruptcy laws seems to be declining.<sup>112</sup> However, this is not to claim that cultural attitudes are not expected to change

with such reforms. For instance, in China cultural views toward insolvency have changed over time as people have become more accustomed to the concept of insolvency.<sup>113</sup> In their empirical study, one of the interviewees noted that “[i]n the beginning, people regarded bankruptcy as a loss of face; now they see they are given other opportunities as a result of bankruptcy. Employees see it as fortunate and only reasonable that their enterprise go bankrupt”.<sup>114</sup> Also, in Japan there is a call to change cultural attitudes toward bankruptcy. For example, Japan’s Economy Minister has called for a change in both the laws and the attitudes towards debt repayment.<sup>115</sup> In promoting the use of the Corporate Reorganisation Act, the Japanese Government broadcasted on prime-time television the merits of using this Act.<sup>116</sup> In addition, within the area of business law, another empirical study examined the viability of transplanted foreign investment code in Kazakhstan.<sup>117</sup> This study also reached the conclusion that even though the transplanted law in question did not emerge from the culture of Kazakhstan and does not comport with Kazakhstan’s culture, the law has been accepted.<sup>118</sup>

These studies contradict the view of the supporters of the conventional theories that a specific culture requires a specific legal system and the view of both Montesquieu and Legrand that legal rules cannot cross cultural boundaries since they mirror the culture of the home country. Hence, it is argued that transplanted laws that grow outside the land of the importing countries can be accepted, even though this might occur after the passage of a period of time. The examples stated above demonstrate how cultural attitudes have changed as a result of such reform. However, cultural views can be changed by raising awareness amongst all stakeholders and communities about the advantages of using rescue proceedings. It was emphasised in a recent EU study that even though domestic policymakers adopt laws that promote the philosophy of a fresh start, there is a need to introduce a European cultural campaign promoting rescue culture.<sup>119</sup>

#### 4. Oman as an Importing Country

Although Oman is an Islamic country, most of its laws have western characteristics.<sup>120</sup> In this regard, laws were enacted, even though some of their features contradict the principles of Sharia law. For example, one of the earliest laws that was enacted in 1973 was the Law Relating to the Interpretation of Certain Terms and General Provisions (3/73). This law introduced a number of technical provisions normally encountered in western jurisdictions, such as rules governing the effect on private rights caused by the repeal of an existing law and its replacement by a new law.<sup>121</sup> Furthermore, as is the case in most Arab States, the Omani Penal Law of 1974 abandoned the penal principles of Sharia and transplanted instead western notions of criminality and punishment.<sup>122</sup> This is especially significant because the Islamic rules of crime and punishment, particularly what are called the *hudud* crimes, were abandoned.<sup>123</sup> These include the most forbidden crimes, such as adultery, false accusation of adultery, drinking alcohol, theft, brigandage (a group of corrupt people joining together to use arms, cut off highways, steal property, kill people and prevent the free passage of persons, called highway robbers and brigands)<sup>124</sup> and apostasy (the partial or complete abandonment or rejection of the beliefs and practice of a religion by a person who is a follower of that religion).<sup>125</sup> However, this does not mean that the role of Sharia has totally been discarded;<sup>126</sup> rather, it is limited to the laws of family, including marriage, divorce, wills and inheritance.<sup>127</sup> This leads a commentator to classify Oman as having a hybrid Islamic- Napoleonic system.<sup>128</sup> Thus, the laws of Oman and the laws of some Arab countries, as described by Sfeir, are a composite of:<sup>129</sup>

*(1) a residual of Islamic law rules, whether in modern statutory form, as is the case with laws of domestic relations, or in its classical form applicable in Saudi Arabia as the common law of land where no statutory legislation exists, (2) the European-based codes, which constitute the backbone of the law in the private and public law fields, some of which succeeded in incorporating certain Islamic law rules of contracts and obligations considered viable under today’s conditions, and (3) a growing number of major, topical legislation, in the form of comprehensive statutes in such fields as arbitration, banking, copyright, environment, maritime, social security, taxation and so forth.*

It is true that Oman’s Penal Law, Company law, Civil and Criminal Procedures, Law of Evidence and Maritime Law are designed to imitate, repeat and copy Western laws.<sup>130</sup> Except when dealing with some cases, Sharia courts have been replaced by modern civil courts. Currently, Sharia principles appear only rarely in the *Official Gazette*, and, when they do, it is usually only for the purpose of measuring a traditional Sharia obligation, such as a bloodwite (compensation paid by a murderer to the family of the victim) or dower (paid by the groom to the bride under Islamic law).<sup>131</sup>

In addition, the Commercial Code was enacted in 1990 and includes a number of general principles of contracts and tort contained in the Napoleonic Code.<sup>132</sup> It is worth noting that before the enactment of this law, reliance was on the principles of Sharia law.<sup>133</sup> However, after the issuance of the Commercial Code, the role of Sharia in

determining commercial acts has been narrowed considerably from its original position as the sole source of law. In this regard, Article 5 of this Code clearly states that Sharia law applies only in the absence of specific legislative provisions and in the absence of local or general customs. Hence, in the event of bankruptcy, if the court is unable to resolve an issue because of lack of a statutory provision, in this case the recourse will not be to Sharia rules, but rather the court should, firstly, look at local or general bankruptcy usages.<sup>134</sup> In the absence of such usages, the principles of Sharia will be utilised. This is despite the fact that Oman's Basic Statute (known also as a Constitutional law) of 1996 clearly states that "Islamic Sharia is the basis for legislation".<sup>135</sup> However, this Basic Statute also contains provisions that point in another direction: the duty of obedience of the Basic Law, the principle of democracy and the legislation authority of the constitutional councils, the enactment of human rights such as the principle of equality, freedom of religion and others which might be against the principles of Sharia. This led a commentator to argue, rightly, that constitutional laws in most Muslim countries normally have one foundation basic norm that seems to say: the basic idea of this state is the compatibility of Sharia and Rule of Law; however, it appears that working out the details does not necessary reflect this norm.<sup>136</sup>

The specific question to be asked is what are the reasons for the lack of interest in Islamic principles in regard to bankruptcy. Why is Oman's Commercial Code transplanted from other jurisdictions while, in dealing with bankruptcy, Sharia has a number of principles?<sup>137</sup> It seems that this is due to a number of factors. First, Oman is a modern<sup>138</sup> country and the enactment of written laws started in 1973. The enactment of the Commercial Companies Law was in 1974. Unlike the case in Sharia where the concept of corporation does not exist, the Commercial Companies Law of 1974 followed the modern trend in granting a company a separate legal entity.<sup>139</sup> Thus, in designing the Commercial Code the same approach was followed and, as a result, the rules governing the bankruptcy of companies in particular and the individual trader in general were transplanted.<sup>140</sup> Secondly, since the Commercial Code was enacted in 1990, it had to meet modern business needs in order to attract foreign investment.<sup>141</sup> It had to establish rules and procedures that conformed remarkably well not only in Oman but also across national boundaries. Such needs were acknowledged even before the enactment of the Commercial Code. For instance, in 1972, a special Committee for the Settlement of Commercial Disputes was established to deal with commercial matters.<sup>142</sup> Thus, even before the enactment of the Commercial Code in 1990, Sharia rules were abandoned and this Committee was established merely to handle commercial cases according to modern principles, to the local and general customs and to Sharia principles as a last resort.<sup>143</sup> Finally, as Hamoudi has argued,<sup>144</sup> such a departure might be due to the fact that the Sharia bankruptcy principles are not useful<sup>145</sup> or relevant to the order of modern commercial life and, as a consequence, the tendency has been to transplant other laws and ignore the rules of Sharia. For instance, the concept of cram-down is not recognised under Sharia law and, as a consequence, the debtor will be discharged from his debts in only two ways: full repayment of all unforgiven debts or death.<sup>146</sup> In his regard, Qatar has begun a process of Islamisation of its banking sector through issuing bank directives designed to expand Islamic banking within the country, and initiated a bankruptcy regime in a 2006 law that bears all of the hallmarks of a Western transplant.<sup>147</sup> However, it is worth mentioning that this does not mean Islamic law does not encourage the settlement of debts through partial or entire forgiveness or through granting respite. Rather, the Holy Quran encourages the creditors to forgive and grant debtors respite, even though such a demand constitutes purely a moral and not a mandatory obligation. In this regard, verse 2:280 of the Holy Quran says that "if a person is in difficulties, let there be respite until a time of ease. And if you give freely [i.e. if you forgive the debts voluntarily] it would be better for you, if only you knew". This Quranic verse makes it certain that the concepts of social responsibility and charity are at the heart of the Sharia's teaching.<sup>148</sup> Even though the obedience of these concepts is not mandatory, it is argued that "this forceful divine recommendation to be kind to one's debtor, is balanced by the Quranic verse that compels a Muslim to repay their debts- making it a sin and not just a legal obligation not to pay off all of the debts that you have the capacity to repay: "O you who believe, you shall fulfill your covenants".<sup>149</sup> While Sharia encourages creditors to forgive their debtors or grant them respite, it urges the debtor to fulfill his obligation under the contract. Hence, it can be argued that Hamoudi's argument that Sharia bankruptcy principles are not relevant to the order of modern commercial life is far from the truth.

From the above discussion, it is obvious that during the past forty years of the legislation path in Oman, the Omani law-making elites chose to import most laws from other jurisdictions. Hence, transplanting others countries' laws is not a new phenomenon in Oman. This leads to the question: in improving the bankruptcy regime in Oman, to what extent is it possible to learn from the experience of other jurisdictions? To put it differently, what is the impact of proposing modern concepts to be adopted by the Omani legislator, such as the concept of rescue culture, the notion of 'cram-down', imposition of stay on secured creditors' claims and the notion of 'debtor-in-possession'. This papers argues that such concepts, if proposed, might be accepted by the Omani legislator. This view is supported by a number of rationales. First, the current bankruptcy regime in Oman



fails to deal with the needs of today's business. The law, as it stands today, is outdated and inconsistent with modern business requirements since it focus merely on the complete dissolution of the distressed debtors. However, the modern trend is the introduction of a rescue culture into bankruptcy frameworks, thereby rehabilitating viable firms instead of liquidating them. Hence, such concepts are unlikely to be rejected by the Omani legislator since they have the intention to follow the modern trend in the area of bankruptcy law. In this regard, in 2013, for instance, one of the issues discussed in the 'Government Symposium for the Development of Small and Medium Enterprises in Oman' was bankruptcy of small and medium enterprises and how reform of bankruptcy law is appealing in order to encourage the concept of rescuing these enterprises instead of liquidating them. It is worth pointing out that, based on a royal order issued by His Majesty the Ruler of Oman, all recommendations stated in the final report of this symposium shall be considered as decisions that need to be implemented by the government and various institutions, not recommendations that have to be considered.<sup>150</sup> Thus, the importance of establishing a modern bankruptcy regime is fully acknowledged. Secondly, Oman's accession to the World Trade Organization in 2000 and Oman's Free trade Agreement with the United States, which came into force on January 1, 2009, fosters the government's desire to bring Omani commercial laws into conformity with internationally accepted standards.<sup>151</sup> In this regard, in 2011 the U.S. Department of Commerce started providing training and capacity building to encourage Omani policy-maker to update the current bankruptcy regimes to allow for appropriate restructuring of the distressed enterprises.<sup>152</sup> Also, in support of Oman's interest in increasing international trade and entrepreneurship, the Commercial Law Development Program (CLDP)<sup>153</sup> is providing technical assistance to Omani law-maker in order to develop a bankruptcy law that supports the restructuring of struggling businesses.<sup>154</sup> Finally, it is argued that such reforms will be accepted, even though some of the notions that might be transplanted are not recognised under Sharia law, such as the notion of cram-down. This is due to the fact that the Commercial Code of 1990 has already incorporated provisions that are inconsistent with the strict rules of Sharia. Nevertheless, such rules<sup>155</sup> were accepted and have been in force since the enactment of this Code. For instance, one of the fundamental principles of commercial transactions under Sharia is the prohibition of *riba*, which is translated as interest or usury, undue profits or excessive gain from a transaction.<sup>156</sup> However, such usury is not prohibited under the Commercial Code. In this regard, Article 80 of the Commercial Code states that "a creditor shall have the right to exact interest in exchange of the procurement by the debtor of a loan or commercial debt... [W]here the debtor fails to make the repayment on the due date, the creditor shall be entitled to exact the agreed interest for the period of delay". The acceptance of usury, although strictly forbidden under Sharia, indicates that the introduction of bankruptcy principles that are not recognised under Sharia law may not be rejected, since such principles are not strictly prohibited. This is manifested by the desire of the Omani legislator to bring commercial laws into conformity with the needs of today's business.

Hence, as it is stated by Markovits "starting from scratch means one must look for models" and "working from scratch also means that legislatures can provide their new laws with equally new supportive institutions".<sup>157</sup> Reforming Oman's bankruptcy regime is important to avoid what is called 'jurisdiction shopping'.<sup>158</sup> It is stated that many Middle-eastern based institutions are electing to make use of debtor-friendly bankruptcy regimes, e.g. US Chapter 11, to escape the deficiencies of their home jurisdictions.<sup>159</sup> This can be done by a change of a company's Centre of Main Interest (COMI) to the jurisdiction having a competitive bankruptcy framework.<sup>160</sup> It is argued that bankruptcy laws vary widely with respect to the complexity of the proceedings and the possible outcome and, because of these potentially huge distinctions, it can be advantageous for companies in difficulty to choose a jurisdiction which provides procedures that allow them to reach their aims in the easiest, cheapest and most effective way.<sup>161</sup> In this regard, Hellas Telecommunication, for instance, considered the insolvency procedures in England to offer a 'more flexible environment' for rescuing the business of the company than Luxembourg.<sup>162</sup> Thus, in order to avoid this kind of jurisdiction shopping and in order to follow the modern trend, the Omani legislator should learn from the experience of other jurisdictions. If we acknowledge the fact that 'business is business' all over the world,<sup>163</sup> then the best bankruptcy law practices can be the best everywhere as long as they serve the importing country.

## 5. Conclusion

This paper started by highlighting various approaches underpinning legal transplantations. As discussed above, these approaches can be divided into two groups. The first group took the view that legal transplantations are impossible. This is due to the fact that, according to this group, legal rules are normally encumbered by historical and cultural aspects and these rules mirror the needs of the societies in which they have developed. Thus, legal rules cannot travel from one society to another and, as a result, legal transplantation cannot happen. The view of the second group was that legal transplants are not merely possible; but actually quite essential in the path of

legal development. However, the supporters of this group disagreed on the scope of such transplantations. While some of them support the idea that legal transplantation is possible without the need for knowledge of the political and social conditions in the donor jurisdictions, others argued that to avoid the risk of rejection, it is necessary to have enough knowledge of such conditions. As mentioned above, notwithstanding the dissimilarity of social, political and legal systems, the author favoured the view that legal transplantation is possible and it is applicable as long as it serves the needs of the importing country. Then, this paper dealt with the issue of transplant effects and how these effects can have an impact on the receiving systems.

In addition, this paper explored the experience of Oman in acting as an importing country. Since the start of the legislation path in 1973, Oman relied heavily on the experience of other jurisdictions, mainly western laws. As explained above, the Omani Commercial Code of 1990, Oman's Penal Law of 1974, and Commercial Companies Law of 1974 all abandoned a number of Sharia laws and incorporated, instead, western principles. For instance, even though one of the fundamental principles of Sharia is the prohibition of *riba*, this principle is allowed under both Oman's Commercial Code and Commercial Companies Law. Hence, in reforming laws, Oman usually does not start from the very beginning, but rather learning from the experience of others has been the main source of legal development.

## Notes

<sup>1</sup> Watson, A. (1974). *Legal Transplants*. Edinburgh, Scottish Academic Press: at 21.

<sup>2</sup> See Dupré, C. (2003). *Importing the Law in Post-Communist Transition: The Hungarian Constitutional Court and the Right to Human Dignity*. Hart Publishing: at 40.

<sup>3</sup> *Ibid*, at 41.

<sup>4</sup> Shah, P. (2005). Globalisation and the Challenge of Asian Legal Transplants in Europe. *S.J.L.S.* 348: at 348.

<sup>5</sup> Dupré, above 2, at 42.

<sup>6</sup> Orucu, E. (2002). Law as Transposition. *51 I.C.L.Q.* 205: at 205.

<sup>7</sup> *Ibid*; Mousourakis, G. (2010). Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective. *57 O.U.L.R.* 87.

<sup>8</sup> Orucu, above 6, at 205.

<sup>9</sup> Montesquieu, C. (1793). *The Spirit of Laws*. J. & M. Roberson: at 7.

<sup>10</sup> see *Ibid*; Gillespie, J. (2002). Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam. *I.C.L.Q.*, 51(3), 641: at 644.

<sup>11</sup> Legrand, P. (2001). What 'Legal Transplants'? In D. Nelken, & J. Feest (Eds.), *Adopting Legal Culture*. Hart Publisher: at 57.

<sup>12</sup> *Ibid*, at 59.

<sup>13</sup> *Ibid*, at 57.

<sup>14</sup> *Ibid*, at 60.

<sup>15</sup> *Ibid*, at 63.

<sup>16</sup> Transnational commercial law can be referred to as a set of private law principles and rules, from whatever sources, which governs international commercial transactions and is common to legal systems generally or to a significant number of legal systems: see Goode R., Kronke H. & Mckendrick E. (2007). *Transnational Commercial Law: Text, Cases and Materials*. Oxford University Press: at 4; Goode defines "transnational commercial law" "as law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely national and have their force by virtue of international usage and its observance by the merchant community": see Goode R. (1997). Usage and its Reception in Transnational Commercial Law. *46 (1) I.C.L.Q.* 1: at 2.

<sup>17</sup> see Richard, S. (2010). Cut-and-Paste? Rule of Law Promotion and Legal Transplants in War or Peace Transition. In A. Engelbrekt, & J. Nergelius, *New Direction in Comparative Law*. Edward Elgar: at 56; However, it is argued that there are a number of factors affecting the ability of a country to borrow the laws of another jurisdiction. These include the development of legal institutions in the importing country, problems of languages

and the lack of a developed infrastructure.: see Kahn- Freund. (1974). One Uses and Misuses of Comparative Law. *37(1) M.L.R.* 1: at 12; see also Goode et al., above 16, at 185.

<sup>18</sup> Markovits, I. (2004). Exporting Law Reform- but Will it Travel. *37 C.I.L.J.* 95: at 95.

<sup>19</sup> Miller, J. (2003). A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process. *51 A.J.C.L.* 839: at 839-840.

<sup>20</sup> Mousourakis, above 7, at 93.

<sup>21</sup> See below section 2.

<sup>22</sup> Watson, A. (1977). *Society & Legal Change*. Scottish Academic Press: at 95.

<sup>23</sup> Watson, A. (2000). Legal Transplants and European Private Law. *E.J.C.P.L.*, 4(4). Retrieved July 20, 2015, from <http://www.ejcl.org/44/art44-2.html>

<sup>24</sup> Watson, A. (1985). *The Evolution of Law*. Johns Hopkins U. Press: at 8.

<sup>25</sup> See Markovits, above 18, at 95.

<sup>26</sup> Watson, A. (1976). Legal Transplants and Law Reform. *92 L.Q.R.* 79: at 80.

<sup>27</sup> Watson, A. (1978). Comparative Law and Legal Change. *37 C.L.J.* 313: at 321.

<sup>28</sup> Watson, above 26, at 79.

<sup>29</sup> Chen-Wishart, M. (2013). Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?. *I.C.L.Q.*, 62(1), 1: at 2.

<sup>30</sup> Watson, above 26, at 80.

<sup>31</sup> Elis, J. (2011). General Principles and Comparative Law. *E.J.I.L.*, 22(4), 949-964.

<sup>32</sup> Kahn-Freund, above 17, at 3-4; see Stein E. (1977-78). Uses, Misuses-and- Nonuses of Comparative Law. *72 N.U.L.R.* 198.

<sup>33</sup> Kahn-Freund, above 17, at 7.

<sup>34</sup> *Ibid*, at 6.

<sup>35</sup> *Ibid*, at 7; see also Stein, above 32, at 199; Forsyth A. (2006). The ‘Transplantability’ Debate in Comparative Law: Implications for Australian Borrowing from European Labour Law. Centre for Employment and Labour Relations Law, the University of Melbourne, Working Paper No. 8. Retrieved July 21, 2015 from <http://www.law.unimelb.edu.au/files/dmfile/wp381.pdf>

<sup>36</sup> In supporting his argument, Kahn-Freund provided a number examples; for in-depth discussion see Kahn-Freund, above 17, at 8-17.

<sup>37</sup> *Ibid*, at 6; for a summary of Kahn-Freund: see Stein, above 32; see also Teubner G. (1998). Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences. *61 (1) M.L.R.* 11: at 17.

<sup>38</sup> Kahn-Freund, above 17, at 6.

<sup>39</sup> Kahn-Freund states that “in the metaphorical language I am using, the kidney and the carburetor are the terminal points of a continuum, and any given legal rule or institution may be found at a different point of it”: *Ibid*

<sup>40</sup> see *Ibid*, at 13-27.

<sup>41</sup> *Ibid*, at 13.

<sup>42</sup> *Ibid*, at 14; see also Deech R. (1972). Comparative Approaches to Divorce: Canada and England. *35 (2) M.L.R.* 113.

<sup>43</sup> Stein, above 32, at 200.

<sup>44</sup> *Ibid*, at 201; Kahn-Freund, above 17, at 17.

<sup>45</sup> Kahn- Freund, above 17, at 17.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*, at 17 & 18.

<sup>48</sup> Orucu, above 6, at 205.

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<sup>49</sup> *Ibid.*

<sup>50</sup> Sacco, R. (1991). Legal Formats: A Dynamic Approach to Comparative Law. *A.J.C.L.* 39, 1.

<sup>51</sup> Orucu, above 6, at 212.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Watson, above 26, at 79.

<sup>55</sup> Kahn-Freund, above 17, at 3-4.

<sup>56</sup> Xanthaki, H. (2008). Legal Transplants in Legislation: Defusing the Trap. *57 (3) I.C.L.Q.* 659: at 662.

<sup>57</sup> Khan-Freund, above 17, at 17-18.

<sup>58</sup> The needs of an importing country can be judged by identifying the drawbacks of its legal system and seeing how such drawbacks are dealt with under other jurisdictions.

<sup>59</sup> Berkowitz, D., Pistor, K., & Richard, J. (2003). The Transplant Effect. *A.J.C.L.* 163: at 177; also see Berkowitz D., Pistor K. & Richard J. (2003). Economic Development, Legality, and the Transplant Effect. *47 E.E.R* 165.

<sup>60</sup> Watson, above 26, at 80.

<sup>61</sup> Berkowitz et al., above 59, at 171.

<sup>62</sup> *Ibid.*

<sup>63</sup> In measuring the level of legality they used survey data measuring the effectiveness of the judiciary, rule of law, the absence of corruption, low risk of contract repudiation and low risk of government expropriation observed during 1980-1995: *Ibid*, at 183.

<sup>64</sup> *Ibid.*

<sup>65</sup> They argued that the way in which the law is transplanted is a more important determinant of legality than the supply of a particular family: *Ibid*, at 167 & 183.

<sup>66</sup> *Ibid*, at 167.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> They argued that “there may be cases where the transplanted law is more or less compatible with the initial order and this could offset the fact that law was transplanted. This possibility is reflected in our classification of different transplants”: *Ibid*, at 179.

<sup>70</sup> *Ibid*, at 168.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid*, at 189.

<sup>74</sup> In their study, they classified countries into those that developed their formal legal order internally (origins) and those that received their formal legal order from other countries (transplants), see Berkowitz et al., above 59, at 167 & 179-180; see Markovits, above 18, at 97.

<sup>75</sup> Berkowitz, et al., above 59, at 190.

<sup>76</sup> This means the workability of the legal institution in the importing country is less than that in the country of origin.

<sup>77</sup> Pistor, K. (2008). The Codification of Law and the Transplant Effect. *Sesquicentennial Essays of the Faculty of Columbia Law School, Columbia Law School*: at 182.

<sup>78</sup> *Ibid.*

<sup>79</sup> Gunderson, J., & Waelde, T. (1994). Legislative Reform in Transition Economies: Western Transplants- a Short-Cut to Social Market Economy Status. *43 (2) I.C.L.Q.* 347: at 372.

<sup>80</sup> *Ibid.*

- <sup>81</sup> see below section 3.
- <sup>82</sup> Markovits, above 18, at 95; Miller, above 19, at 839-840.
- <sup>83</sup> Berkowitz, D. et al., above 59, at 163; Costa J., Jorge O. & Cardinal P. (2009). *One Country, Two System, Three Legal Orders- Perspective of Evolution*. Springer: at 84; Gillespie, above 10, at 641.
- <sup>84</sup> *Ibid*.
- <sup>85</sup> Martin, N. (2005). The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation. *28 B.C.I.C.L.R.* 1: at 4.
- <sup>86</sup> China, Indonesia, Hong Kong and Malaysia: see Tomasic, R., Little, P., Francis, A., Kamarul, K., & Wang, K. (1996). Insolvency Law Administration and Culture in Six Asian Legal Systems. *6 A.J.C.L.* 248: at 248; Martin, above 85, at 4.
- <sup>87</sup> Martin, above 85, at 4.
- <sup>88</sup> Gillespie, above 10, at 643. It is stated that the US leads the world in its experience with reorganisation of corporations through bankruptcy law and its philosophy of corporate rehabilitation has been incorporated in the global standards by International Financial Institutions: see Haliday T. & Bruce C. (2007). The Recursivity of Law: Global Norm Making and National Law-making in the Globalization of Corporate Insolvency Regimes. *112 (4) A.J.S.* 1135: at 1187.
- <sup>89</sup> See Tomasic R. (2009). Raising Corporate Governance Standards in Response to Corporate Rescue and Insolvency. *2 (1) C.R.I.* 5: at 5.
- <sup>90</sup> see Haliday & Bruce, above 88, at 1153.
- <sup>91</sup> Tomasic et al., above 86, at 248.
- <sup>92</sup> China, Indonesia, Hong Kong and Malaysia have already reformed their bankruptcy Laws. UAE is in the process of reforming its bankruptcy law: see *Ibid*; see also: [http://www.zawya.com/story/Hopes\\_renewed\\_for\\_UAE\\_bankruptcy\\_law\\_by\\_quarter\\_s\\_end-GN\\_20012013\\_210112/](http://www.zawya.com/story/Hopes_renewed_for_UAE_bankruptcy_law_by_quarter_s_end-GN_20012013_210112/). Last access on 27 July 2015.
- <sup>93</sup> As argued by Khan-Freund, in order to avoid the risk of rejection, it is necessary to have knowledge of the political and social conditions in the exporting jurisdictions: see Khan-Freund, above 17, at 3-4.
- <sup>94</sup> Martin, above 85, at 76.
- <sup>95</sup> Haliday & Bruce, above 88, at 1173.
- <sup>96</sup> *Ibid*.
- <sup>97</sup> *Ibid*.
- <sup>98</sup> Tomasic et al., above 86, at 485.
- <sup>99</sup> It is stated that “the US model of law and development introduced ‘ideal’ legal models to the newly independent states”: Cisse, H., Muller, S., Thomas, C., & Chenguang, W. The World Bank Legal Review: Legal Innovation and Empowerment for Development: at 162. Available at: [http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000356161\\_20121220072334](http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000356161_20121220072334); Martin, above 85, at 2.
- <sup>100</sup> It is argued that cultural views can be changed by raising awareness amongst all stakeholders and communities about the advantages of using rescue proceedings: *Ibid*.
- <sup>101</sup> *Ibid*, at 6.
- <sup>102</sup> *Ibid*.
- <sup>103</sup> *Ibid*, at 76.
- <sup>104</sup> *Ibid*, at 48.
- <sup>105</sup> *Ibid*, at 49.
- <sup>106</sup> *Ibid*, at 49.
- <sup>107</sup> *Ibid*, at 49.
- <sup>108</sup> *Ibid*, at 52.

<sup>109</sup> Tomasic et al., above 86, at 248-280.

<sup>110</sup> *Ibid*, at 285.

<sup>111</sup> *Ibid*.

<sup>112</sup> It is stated that sometimes there is an overlap between the extent to which corporate rescue and reconstruction philosophies operate in tandem with traditional attitudes which encourage settlement and accommodation of commercial dealings: *Ibid*.

<sup>113</sup> *Ibid*.

<sup>114</sup> However, this is not to suggest that the process of change attitudes to insolvency is uniform through China since in some areas of southern China the application of bankruptcy laws has proved far more difficult: see *Ibid*, 280.

<sup>115</sup> Martin argues that it is far easier to change law than attitudes: above 85, at 75.

<sup>116</sup> *Ibid*, at 63.

<sup>117</sup> Nicholas P. (1997). Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code. *18 (4) U.P.A.J.I.E.L.* 1235.

<sup>118</sup> *Ibid*, at 1236.

<sup>119</sup> Martin, above 85, at 51-52.

<sup>120</sup> Hirst, A. (1992-93). Contemporary Mercantile Jurisdiction in Oman. *7 A.L.Q.* 3: at 4.

<sup>121</sup> Article 9 & 10 of the Law Relating to the Interpretation of Certain Terms and General Provisions (3/73); see Hirst, above 120, at 4.

<sup>122</sup> It is argued that “the emergence of Western hegemony in the nineteenth century greatly affected the legal system in the Islamic world. In most Islamic countries that came under European colonial rule, Sharia criminal law was immediately substituted by Western-type penal code”. In some other countries, however, the departure was a result of the intervention of international organisations: see Peters R. (2005). *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*. Cambridge University Press: at 3-4.

<sup>123</sup> It is worth noting that Saudi Arabia has consistently maintained Sharia criminal law and the law of 2001 includes elements of classical Sharia criminal law, particularly in regard to the so-called *hudud* crimes. Also, as it was noted in the previous chapter, Oman’s Penal Code of 1974 plays a role in bankruptcy cases. In this regard, the company’s directors may incur criminal liability in the case where the company’s bankruptcy has been caused by fraudulent actions on their part: see Article 301 of the Penal Code 1974.

<sup>124</sup> Shah, N. (2011). *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*. Taylor & Francis: at 63.

<sup>125</sup> Campo, J. (2009). *Encyclopedia of Islam*. Infobase Publishing: at 48.

<sup>126</sup> Sfeir, G. (2000). The Place of Islamic Law in Modern Arab Legal Systems: A Brief for Researcher and Reference Librarians. *28 I.J.L.I.* 117.

<sup>127</sup> It is stated that the share of Islamic law today in the Arab legal systems (roughly speaking 25% to 30%) is bound to diminish as a distinct factor with new statutory enactments continuously generated by changing social and economic conditions and global developments: see Sfeir, above 126, at 120.

<sup>128</sup> Wood, P. (2007). *Principles of International Insolvency*. London, Sweet & Maxwell: at 64.

<sup>129</sup> Sfeir, above 126, at 121.

<sup>130</sup> see Abu-Odeh, L. (2004). The Politics of (Mis) Recognition: Islamic Law Pedagogy in American Academia. *52 A.J.C.L.* 789: at 789-790.

<sup>131</sup> Hirst, above 120, at 8; Buchler A. (2012). Islamic Family Law in Europe? From Dichotomies to Discourse or: Beyond Cultural and Religious Identity in Family Law. *8 (2) I.J.L.C.* 196: at 201.

<sup>132</sup> Hirst, above 120, at 6; also Wood states that Oman has Napoleonic Commercial Law: above 128, at 64.

<sup>133</sup> Nabil, S. (1981), *The General Principles of Saudi Arabian and Oman Company Laws: Statutes and Sharia*. Namara Publications: at 108.

<sup>134</sup> It is stated that trade usage, like custom in public international law, may vary widely both in its sphere of influence and its degree of specificity. For instance, an international trader usage might be confined to a particular type of business activity (e.g. bank documentary payment undertakings) but may be near-universal in geographical scope, whilst on the other hand there may be usages which apply to business activities generally but only within a defined geographical area or a particular legal family: see Goode et al, above 16, at 11.

<sup>135</sup> Article 2 of Oman's Basic Statute of 1996.

<sup>136</sup> see Otto, J. (2008). *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*. Amsterdam University Press: at 18-19.

<sup>137</sup> Examples of Sharia bankruptcy principles are the prohibition of *riba*, obligation of socially responsible and the principle of discharge from debt (by death); for an in-depth discussion of Sharia bankruptcy principles: see Awad A. & Michael R. (2010). *Iflas and Chapter 11: Classical Islamic Law and Modern Bankruptcy*. 44 *I.L.J* 975: at 980.

<sup>138</sup> It is a modern country because legal, economic and cultural developments began with the accession to power of Sultan Qaboos in 1970. Also, it is a modern country because the legislation path started after 1973.

<sup>139</sup> The reason for taking this decision might be that not granting a company a separate legal entity may play a role in discouraging domestic and foreign investment since partners would be severally and jointly liable for their business's debts to the full extent of their property: see Article 3 of the Oman's Commercial Companies Law of 1974.

<sup>140</sup> This appears from a number of provisions, such as the allowance of *riba* (interests) and considering a company a separate legal entity.

<sup>141</sup> Because the enactment of the Commercial Code was after the enactment of Foreign Business and Investment law of 1974 and after the enactment of the Commercial Agency Law of 1977.

<sup>142</sup> Also, in 1981 a Royal Decree has been issued whereby an Authority for the Settlement of Commercial Dispute is established. However, this Authority did not in practice supersede the former Committee for the Settlement of Commercial Disputes until the issuance of 1984 of detailed Rules governing the procedures before the Authority: see Haberbeck A. & Price R. (1986). *The Maritime Laws of the Arabian Gulf Cooperation Council States*. BRILL: at 29.

<sup>143</sup> See a report called 'Oman Mineral & Mining Sector Investment and Business Guide', prepared by USA International and Ibus.com, (Int'l Business Publications, 2007), at 129.

<sup>144</sup> Hamoudi, H. (2011). *The Surprising Irrelevance of Islamic Bankruptcy*. 19 *A.B.I.L.R.* 505: at 510.

<sup>145</sup> However, it is not clear what Hamoudi means by the word 'useful'?

<sup>146</sup> Awad & Michael, above 137, at 980.

<sup>147</sup> Hamoudi, above 144, at 509.

<sup>148</sup> Awad & Michael, above 137, at 980.

<sup>149</sup> *Ibid*; see The Holy Quran verse 5:1.

<sup>150</sup> This was an exception. Usually, all government symposiums result in a number of recommendations that need to be taken into account by various governmental institutions if they opt for them. However, the recommendations made by this symposium are considered to be decisions that require implementation.

<sup>151</sup> For example, providing minimum protection to intellectual property rights, easing market access for WTO members, recognising arbitral awards.

<sup>152</sup> See <http://www.state.gov/e/eb/rls/othr/ics/2012/191213.htm>

<sup>153</sup> Established in 1992, CLDP is a division of the U.S. Department of Commerce that helps achieve U.S. foreign goals in developing and post-conflict countries through commercial legal reforms; for further discussion see <http://cldp.doc.gov/about-cldp>.

<sup>154</sup> See <http://cldp.doc.gov/countries-regions/middle-east-north-africa>.

<sup>155</sup> The allowance of *riba* (interest) and granting a company a separate legal entity.

<sup>156</sup> Under Islamic law, the payment and receipt of usury is strictly prohibited as the application of interest is regarded as an act of exploitation and injustice and therefore inconsistent with Islamic concepts of fairness and

justice; see Fisho-Oridedi A. (2010), 'The Prohibition of *Riba* Under Islamic Law: What are the Implications for International Contracts?'. University of Dundee. Retrieved July 28, 2015, from <http://www.dundee.ac.uk/cepmlp/gateway/?news=30851>

<sup>157</sup> Markovits, above 18, at 100.

<sup>158</sup> Jurisdiction shopping or forum shopping may involve the transfer of judicial proceedings from one country to another, seeking to obtain a more favourable position. Also, such shopping takes place where those responsible for the formation of the company engineer its finances so that it becomes subject to the law of another country whose regulatory regime is more indulgent towards those who control and manage it: see Kastrinou A. (2013). Forum Shopping under the EC Regulation on Insolvency Proceedings. *24 (1) I.C.C.L.R.* 20: at 22; Belohlavek A. (2008). Center of Mani Interest (COMI) and Jurisdiction of National Courts in Insolvency Matters (Insolvency Status). *50 (2) I.J.L.M.* 53; It is worth noting that it is beyond the scope of this paper to discuss the treatment of corporate groups. However, the treatment of such groups is one of the issues in international insolvency that has been approached by many scholars: see for examples Tollenaar N. (2010). Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation. *23 (5) Insolvency Intelligence* 65; Mevorach I. (2009). *Insolvency within Multinational Enterprise Groups*. Oxford University Press; Dearborn M. (2009). Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups. *97 Cal. L. Rev.* 195; The treatment of corporate groups is also discussed in great detail in 'UNCITRAL Legislative Guide on Insolvency Law: Treatment of Enterprise Groups in Insolvency (Part Three)', (43<sup>rd</sup> session, A/C.9/686, July 2010); see Goode R. (2011). *Principles of Corporate Insolvency Law*. London, Sweet & Maxwell: at 788-790.

<sup>159</sup> see McCormack G. (2009). Jurisdictional Competition and Forum Shopping in Insolvency Proceedings. *68 (1) C.L.J.* 169: at 179; Elshurafa D. (2012). Insolvency Laws in Saudi Arabia: Time for Change?. *9 (5) I.C.R.* 300: at 302.

<sup>160</sup> For instance, Arcapita Bank, a USD 7.4 billion Bahraini investment firm that owns the clothier J. Jill filed for bankruptcy protection in New York in March 2012 after it was unable to extend a USD 1.1 billion credit Line. Arcapita was able to access the US bankruptcy jurisdiction by the establishment of a bank account in the US: see Elshurafa, *Ibid*, p. 302; also, in the case of *Sparkasse Hilden Ratingen Vilbert v Horst Konrad Benk* [2012] (EWHC 2432), Judge Purle QC emphasised in this case that the motive for changing one's COMI is unimportant; it is acceptable for a debtor to do so in order to take advantage of the more lenient English insolvency regime. However, what is important is that the COMI must genuinely have moved: see Rule O. & Murphy N. (2012). Bankruptcy Tourism and Forum Shopping. Retrieved July 29, 2015 from <http://www.allenoverly.com/publications/en-gb/Pages/BankruptcyTourismAndForumShopping.aspx>

<sup>161</sup> Klein, J. (2012). Pre-Packed Administration: A Comparison between Germany and the United Kingdom (Part 1). *33 (9) C.L.* 261: at 261.

<sup>162</sup> *Ibid*.

<sup>163</sup> Paquin, J. (2010). Business Law Transplants and Economic Development: An Empirical Study of Contract Enforcement in Dakar, Senegal. McGill University, UMI Dissertations Publishing.

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