

# INTERNATIONAL JOURNAL OF ARAB ARBITRATION



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# ARTICLES

## Moral Harm in the Middle East: Charting New Territory for Commercial Arbitration

Joseph Chedrawe and Karl Touma\*

### ABSTRACT

*Moral harm damages represent a mechanism by which a claimant is compensated for intangible harm, such as a loss of reputation. In Middle Eastern jurisdictions, the judicial imposition of moral harm damages is supported by legislation and relatively well-established in tortious claims; however, the availability of those damages in contractual claims has not been explored to the same extent. This, coupled with the recent increase in the number of investment treaty cases involving claims of moral harm, raises important questions about the legal limits on those claims and whether arbitral tribunals, in the context of disputes governed by the applicable law of a Middle Eastern jurisdiction, may award those damages in commercial arbitration.*

### INTRODUCTION:

In certain Middle Eastern jurisdictions, courts are empowered by legislation to award damages for intangible "moral harm" resulting from, for example, a loss of reputation suffered by the claimant as a result of the defendant's wrongful actions. Although these

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cases have arisen, by and large, in the tortious context (particularly for personal injury), legislative schemes in the region have allowed for such damages to be awarded in contract claims, as demonstrated in recent court decisions. In recent years, there has been a rise in the number of international investment arbitrations in which tribunals have addressed the issue of damages for moral harm. It is therefore important to understand the limits that apply to the awarding of moral harm damages in the Middle East.

This article is set out in five parts. Section 1 will review the purpose and meaning of moral harm damages. Section 2 will examine the rise of moral harm damages in international arbitration. Section 3 will consider France as a more well-established example of the availability of moral harm damages in contract cases. Section 4 will analyse the treatment of moral harm damages in four Middle East jurisdictions: Egypt, Lebanon, the United Arab Emirates and the Kingdom of Saudi Arabia. Section 5 offers brief concluding remarks.

## 1. PURPOSE AND MEANING OF MORAL HARM

Moral harm represents harm that does not directly affect a financial interest, but rather a non-financial interest.<sup>1</sup> There are several rights under the umbrella of moral harm. They fall into two general categories, depending on the rightsholder:

- (i) *Natural persons* (e.g. individuals): protection of intimacy and private life; the right to one's image; the right against any harm caused to one's name; the right to preserve one's reputation and honour; and the right against any harm to one's civil freedoms.<sup>2</sup>
- (ii) *Legal persons* (e.g. corporations): the right to protect brand image, name, reputation; and the right to protect trade secrets.<sup>3</sup>

Moral harm is founded broadly on the general principle that a claimant is entitled to full compensation for its loss. In civil law jurisdictions, that principle is legislative. For example, French legislation provides for compensation to put the injured party in the position in which it would have been had the act that gave rise to the damage not occurred.<sup>4</sup>

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1. Prof. Mohammad Hassan Kassem, *Civil Law, Obligations, Sources, the Contract*, part II, p. 225.

2. G. Viney, P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité*, LGDJ, 2nd Edition, para. 259.

3. G. Viney, P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité*, LGDJ, 2nd Edition, para. 260.

4. C. Connellan, E. Oger-Gross, A. André, *Compensatory Damages Principles in Civil and Common Law Jurisdictions: Requirements, Underlying Principles and Limits*, *Global Arbitration Review*, Chapter, 29 November 2018; H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Section

The extent to which moral harm may be compensated depends on the nature of the limits that are applied by the applicable jurisdiction. A review of the moral harm jurisprudence in the Middle East reveals two important limits:

- (i) *Cause of action*: First, whilst some jurisdictions will only compensate moral harm in the tort liability context, others will do so for both tort and contract. Therefore, the question becomes whether a claimant may recover moral damages in a claim for breach of contract.
- (ii) *Claimant status*: Second, whilst some jurisdictions will compensate moral harm for natural persons and legal persons, others are more reluctant to recognize such a right for legal persons. Accordingly, the question becomes whether a company may recover moral damages at all.

These two limits will be examined in Section 4 below, with reference to the position in four Middle Eastern jurisdictions.

## 2. MORAL HARM IN INVESTMENT ARBITRATION

In investment treaty arbitration, it is becoming more common for investors to claim - and thus for arbitral tribunals to address - moral harm.<sup>5</sup> Two broad approaches to compensation have emerged: the punitive approach and the prejudice approach.

- (i) *Punitive approach*. Certain arbitral tribunals have focused primarily on the behaviour of the State and awarded moral damages in a manner that is non-compensatory, but rather punitive.
  - a. In *Desert Line*, after noting that moral damages should be compensated in exceptional circumstances despite the view that "*investment treaties primarily aim at protecting property and economic values*", the arbitral tribunal went on to conclude that the State had been "malicious" in the manner in which it treated the claimant's executives and that its behaviour was "*therefore constitutive of a fault-based liability*".<sup>6</sup> The tribunal ultimately took into account the harm caused to the physical health of the claimant's executives

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2-002, citing *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas. 25 at 39.A. Bénabent, *Droit des obligations* (16th ed. LGDJ *Précis Domat*, 2017) 683.

5. P. Dumbery, *Why and How Arbitral Tribunals Award Compensation for Moral Damages*, Kluwer Arbitration Blog, 3 May 2010.

6. ICSID Case No. ARB/05/17, *Desert Line Projects LLC v. The Republic of Yemen*, Final Award, 6 February 2008, paras. 289-290.

and to the claimant's credit and reputation.<sup>7</sup> The tribunal awarded the claimant USD 1,000,000, a fraction of the OMR 40,000,000 (approximately USD 103,000,000) for which it had claimed, since the tribunal found the claimed amount to be exaggerated. The tribunal concluded by stating that the amount was "*symbolic yet modest in proportion to the vastness of the project*".<sup>8</sup>

- b. In slight contrast, the arbitral tribunal in *Inmaris* considered that the respondent's mere violation of the bilateral investment treaty would not entitle the claimant to compensation for moral harm.<sup>9</sup> The actions of the State, according to the tribunal, had to be "*malicious or driven by motives beyond the perceived need to change key components of the economic relationship*" between the parties.<sup>10</sup> The tribunal ruled that, in light of its damages award for the commercial harm suffered by the claimant, any emotional harm was not sufficiently serious so as to merit an award of additional compensation for moral damages.<sup>11</sup>
- (ii) *Prejudice approach*. Other arbitral tribunals have focused primarily on the prejudice suffered by the investor when awarding moral harm damages.
- a. In *Arif*, the tribunal noted that both the conduct of the State and the prejudice of the investor must be "*grave and substantial*" for the harm to be eligible for compensation.<sup>12</sup> In that case, the tribunal rejected the claim for moral damages, finding that the investor had been an experienced entrepreneur who took the conscious decision to invest in Moldova during a period of great instability as it transitioned from forming part of the Soviet Union to becoming a free market.<sup>13</sup> According to the tribunal, while this did not justify the State's breach of the bilateral investment treaty, it did exclude the presence of "*exceptional circumstances*" which would justify compensation for moral damages.<sup>14</sup> The tribunal considered that the governmental and police

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7. ICSID Case No. ARB/05/17, *Desert Line Projects LLC v. The Republic of Yemen*, Final Award, 6 February 2008, para. 290.

8. ICSID Case No. ARB/05/17, *Desert Line Projects LLC v. The Republic of Yemen*, Final Award, 6 February 2008, para. 290.

9. ICSID Case No. ARB/08/8, *Inmaris v. Ukraine*, Final Award, 1 March 2012, para. 428.

10. ICSID Case No. ARB/08/8, *Inmaris v. Ukraine*, Final Award, 1 March 2012, para. 428.

11. ICSID Case No. ARB/08/8, *Inmaris v. Ukraine*, Final Award, 1 March 2012, para. 428.

12. ICSID Case No. ARB/11/23, *Mr Franck Charles Arif v. Republic of Moldova*, Final Award, 8 April 2013, para. 592.

13. ICSID Case No. ARB/11/23, *Mr Franck Charles Arif v. Republic of Moldova*, Final Award, 8 April 2013, paras. 604-605.

14. ICSID Case No. ARB/11/23, *Mr Franck Charles Arif v. Republic of Moldova*, Final Award, 8 April 2013, para. 606.

interference, of which the claimant complained, was less shocking - and, to an extent, expected - given the transitional nature of the period.<sup>15</sup>

- b. In *Rompetrol Group*, the arbitral tribunal noted that awarding moral damages should be handled with a considerable degree of caution given that tribunals enjoy "*an almost absolute discretion in the matter of determining the amount of moral damages*".<sup>16</sup> The tribunal considered that there were two scenarios in which a *State entity* ought to be compensated for moral harm: (1) damage to the honour and dignity of the State; and (2) indirect compensation under the rubric of diplomatic protection for injuries of a personal kind suffered by the citizens of the claimant State.<sup>17</sup> As for moral harm, such as reputational damage *to an investor*, the tribunal found that such harm could conceivably have resulted from the unlawful conduct by the State, which is likely to manifest itself in increased financing costs as well as other transactional costs.<sup>18</sup> Nevertheless, the tribunal commented importantly that moral damages could not be "*admitted as a proxy for the inability to prove actual economic damage*" and, having found that the claimant had failed to prove its actual losses, the tribunal declined to award moral damages.<sup>19</sup>
- c. In *Lemire*, the tribunal took into account (1) whether the State's actions implied physical threat, illegal detention or other analogous situations, (2) whether such actions caused the investor to experience a deterioration of health, stress, anxiety or other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position, and (3) whether both cause and effect are grave or substantial.<sup>20</sup> In the case at hand, the tribunal found that the claimant was indeed mistreated by the respondent and mentioned that it had "*sympathy and understanding for the stress and anxiety which he must have felt*". However, the tribunal considered that the moral aspects of the claimant's injuries were covered through the award of a significant amount of economic compensation.<sup>21</sup> The tribunal also noted the claimant's occasionally rude and disrespectful attitude towards the

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15. ICSID Case No. ARB/11/23, *Mr Franck Charles Arif v. Republic of Moldova*, Final Award, 8 April 2013, para. 606.

16. ICSID Case No. ARB/06/3, *Rompetrol Group v. Romania*, Final Award, 6 May 2013, para.289, citing Ripsinky & Williams, Damages in International Investment Law.

17. ICSID Case No. ARB/06/3, *Rompetrol Group v. Romania*, Final Award, 6 May 2013, para. 289.

18. ICSID Case No. ARB/06/3, *Rompetrol Group v. Romania*, Final Award, 6 May 2013, para. 289.

19. ICSID Case No ARB/06/3, *Rompetrol Group v. Romania*, Final Award, 6 May 2013, para. 293.

20. ICSID no. ARB/06/18, *Joseph Charles Lemire v Ukraine*, Final Award, 28 March 2011, para. 333.

21. ICSID no. ARB/06/18, *Joseph Charles Lemire v Ukraine*, Final Award, 28 March 2011, para. 344.

respondent.<sup>22</sup> The tribunal ultimately considered that, while the claimant had suffered as a result of the respondent's recurring rejection of the former's applications for administrative licenses, which had a negative impact on the claimant's entrepreneurial image, the injury was not substantial. Indeed, the tribunal specifically commented that "*the injury suffered cannot be compared to that caused by armed threats, by the witnessing of deaths or by other similar situations in which [t]ribunals in the past have awarded moral damages.*"<sup>23</sup> As a result, the tribunal rejected the claimant's three million dollar claim for moral harm.<sup>24</sup>

- d. In *Bernard von Pezold and others*, the arbitral tribunal awarded moral damages, commenting that such a remedy served the dual function of repairing "*intangible harm*" to the investor and "*condemning the actions of the offending State*".<sup>25</sup> The tribunal took into account the criteria in *Lemire* and awarded the claimants (residents of Zimbabwe) USD 1,000,000 for moral damage suffered during the raids by the Zimbabwean authorities.<sup>26</sup>

While these tribunals approached the question of moral harm from different angles, in all cases, they examined both the State's behaviour, in line with a punitive approach, and the investor's harm, in line with a prejudice approach. Regardless of the approach, whether punitive or based on prejudice, there has been an increase in the number of cases in international arbitration that have addressed moral harm damages in a meaningful way.

### 3. MORAL HARM IN FRANCE

The availability and limits of moral harm damages with respect to companies in commercial cases under French law is now more fully established than under the laws of many Middle Eastern jurisdictions. Given the historical influence of the French Civil Code on the equivalent civil codes in the Middle East, it is important to examine the French position.<sup>27</sup>

22. ICSID no. ARB/06/18, *Joseph Charles Lemire v Ukraine*, Final Award, 28 March 2011, para. 345.

23. ICSID no. ARB/06/18, *Joseph Charles Lemire v Ukraine*, Final Award, 28 March 2011, paras. 338-339.

24. ICSID no. ARB/06/18, *Joseph Charles Lemire v Ukraine*, Final Award, 28 March 2011, para. 310.

25. ICSID Case No. ARB/10/15, *Bernhard von Pezold and others v. Republic of Zimbabwe*, Final Award, 28 July 2015, para. 916.

26. ICSID Case No. ARB/10/15, *Bernhard von Pezold and others v. Republic of Zimbabwe*, Final Award, 28 July 2015, paras 918-923.

27. See, for example, the Lebanese "*Code des Obligations et des Contrats*", enacted by virtue of Law No. 32 of 9 March 1920, as well as the Egyptian Civil Code, adopted on 16 July 1948, which in turn influenced the Civil Transaction Law of the United Arab Emirates, enacted by virtue of Law No. 5 of 15 December 1985.

New Article 1231-1 (Former Article 1147) of the French Civil Code provides as follows:

*"The debtor shall be ordered, if found liable, to pay damages following either the non-performance of the obligation or the delay in execution, if the latter fails to prove that the execution was made impossible by force majeure".*<sup>28</sup>

Although moral harm damages are not expressly cited, according to French legal scholars Viney and Jourdain, French jurisprudence has concluded that the non-material nature of the damage, meaning damage that is not tangible, be it physical harm to a person or economic harm to an entity, does not preclude compensation.<sup>29</sup> They also consider that, in this context, there is no distinction to be made between tortious and contractual liability.<sup>30</sup>

The possibility of awarding moral damages to natural persons (i.e. individuals) in France is accepted and uncontroversial. In contrast, there had been a decades-long debate, among French scholars, regarding the availability and limits of moral damages with respect to legal persons (e.g. companies).<sup>31</sup> This was perpetuated by conflicting case law in France's lower courts. In 2012, however, the French Court of Cassation settled the issue once and for all, ruling that moral harm compensation was available to corporations. In that case, an individual had transferred the shares he held in a company, which owned a restaurant.<sup>32</sup> The share transfer agreement contained a non-compete clause, which the former shareholder had violated by acquiring shares in a competing restaurant and hiring former employees of the first restaurant. The Court of Appeal found that the defendant had indeed breached the agreement and allocated the claimant company EUR 60,000 in compensation for material harm, but rejected the claims for moral harm on the basis that companies could not claim for moral harm.

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28. Before the amendment of Order no. 2016-131 dated 10 February 2016, the equivalent of Article 1231-1 was Article 1147, which had, to some extent, the same wording.

29. G. Viney, P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité*, LGDJ, 2nd Edition, para. 253. See also: H. L. Mazeaud, *Traité t. I*, 6th Edition, by A. Tunc, para. 307; F. Terré, P. Simler and Y. Lequette, *Droit civil Les obligations, Précis Dalloz*, 6th Edition, para. 537.

30. G. Viney, P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité*, LGDJ, 2nd Edition, para. 253. See also: H. L. Mazeaud, *Traité t. I*, 6th Edition, by A. Tunc, para. 307; F. Terré, P. Simler and Y. Lequette, *Droit civil Les obligations, Précis Dalloz*, 6th Edition, para. 537.

31. A. Dorville, *De l'intérêt moral dans les obligations, étude de droit comparé, Sur le principe de la réparation pécuniaire des dommages non économiques*, thèse, Paris, Rousseau, 1901m p. 639, cité par H. Marton, *Les droits de la personnalité des personnes morales de droit privé*, LGDJ, 2011, préf. J.-C. Hallouin, no. 33; Planiol and Ripert, T. VI, *Obligation*, 1st Part, LGDJ, 2nd ed., 1952, by P. Esmein, no. 552. P. Malaurie, L. Aynès and P. Stoffel-Munck, *Les obligations*, 5th ed. 2011, no. 248. See also: G. Viney, P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité*, LGDJ, 2nd Edition, para. 260.

32. *Cour de cassation, commerciale*, 15 May 2012, n° 11-10278 (n° F-PB), SAS La Pizzeria.

The Court of Cassation confirmed the breach of the agreement by the defendant and the amount allocated as compensation. The Court of Cassation also found, contrary to the Court of Appeal, that there was no legal basis to prevent moral damages from being awarded to companies.<sup>33</sup> Since then, there have been numerous French court decisions in which companies have been awarded compensation for moral harm for loss of reputation, honour and social standing.<sup>34</sup>

#### 4. MORAL DAMAGES IN THE MIDDLE EAST

In the sections that follow, the legislative and judicial approach to moral harm is examined across four Middle Eastern jurisdictions: Egypt, Lebanon, the United Arab Emirates and the Kingdom of Saudi Arabia.<sup>35</sup>

##### 4.1 MORAL DAMAGES IN EGYPT

Under Egyptian Law, the Civil Code provides for compensation for moral harm in both tort and contract. In the context of contractual liability, Article 222.1 of the Egyptian Civil Code provides as follows:

*"Compensation shall also include moral damages, but such damages may only be assigned to third parties either after executing an agreement for that purpose or after the creditor has filed a claim before the courts".*

Sanhoury (1895-1971), an Egyptian law professor, judge and politician who played a key role in the drafting of the Egyptian Civil Code, wrote that nothing excludes the idea that a party to a contract may have a moral interest in the execution of the contract and that, should the other party breach its contractual obligation, the former shall have the right to claim for moral damages.<sup>36</sup> Sanhoury gave the example of an employer's wrongful termination of a service agreement, the result of which that employer must compensate the contractor for any moral harm incurred by not finishing the works. According to Sanhoury, a contractor could have a moral interest in finishing the works, a principle which could also be applied, for example, to a sculptor creating a sculpture, an author writing a book or an

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33. Even though the case at hand was strictly related to contractual liability, the Court of Cassation also mentioned the provisions related to tort liability to generalize the position it had taken on moral harm.

34. *Cour de cassation*, civile, Chambre civile 3, 20 June 2019, 18-12.714; *Cour de cassation, civile, Chambre commerciale*, 10 July 2019, 18-12.213; *Cour d'appel de Versailles*, 16 April 2019, n°19/00212, etc.

35. While there is a wealth of case law on moral harm in the personal injury context, such a review is beyond the scope of this article, which focuses on compensation for moral harm in the contractual context.

36. Sanhoury; Anwar Talabat, *Commentary on the Article of the Civil Code*, part I, p. 294; Prof. Abed Al Meneem Faraj Al Sadah, *The Contract Theory in the laws of the Arab Countries*, 1974, p. 571.

engineer constructing a building.<sup>37</sup> This is because such works are the product of their skill, time and effort, the success of which could enhance their reputation.

In a similar vein, Kassem, Egyptian scholar, professor and dean, notes that there is now no denying, in either the case law or jurisprudence, that moral harm is recognized in the contractual context. It is accepted that a party to a contract may have a moral interest in the contractual relationship and that a breach there of may result in liability to remedy said breach, regardless of whether there has been physical harm.<sup>38</sup>

In addition, judges have the sole discretion to determine the amount to be paid for moral damages, which is typical in other Middle Eastern jurisdictions as well.<sup>39</sup>

#### 4.2 MORAL DAMAGES IN LEBANON

Article 263 of the Lebanon Code of Obligations and Contracts provides as follows:

*"Moral harm shall be taken into account as much as material [physical] harm, provided that its quantification is reasonably possible".*

There are three important observations in relation to the Lebanese position. First, the Code of Obligations and Contracts provides for compensation for moral harm in relation to tort liability (Article 134) and for breach of contract (Article 263).<sup>40</sup> Second, Article 263 clearly delineates between moral harm and material (or physical) harm, supporting the notion that moral harm may be compensated irrespective of the presence of physical harm. Third, the quantification of any moral harm must be *reasonably possible* for it to be compensated, which suggests an acknowledgment that moral harm is, in general, more difficult to quantify and therefore may offer some leeway to claimants in establishing their claims on quantum. In this respect, it is noteworthy that Article 134 of the Code of Obligations provides that only current and incurred damages by the victim may be compensated.

Al Aouji (1929-2012), Lebanese judge and professor, agreed that, in the contractual context, moral damages may be awarded. He provided, as an example, the termination of an air transport contract due to deception by the airline, which resulted in a loss of reputation to the travel agency that contracted with the airline for the transportation of its clients.<sup>41</sup> Similarly, Yakan (1907-1973), also a Lebanese judge and professor, noted that

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37. Abed Al Razzak Al Sanhoury, "The Reference in the Explanation of the Civil Code", Tome VII, p. 252.

38. Prof. Mohammad Hassan Kassem, Civil Law, Obligations, Sources, the Contract, part II, p. 225.

39. Prof. Mohammad Hassan Kassem, Civil Law, Obligations, Sources, the Contract, part II, p. 225.

40. Elias Abou Eid, The Code of Obligations and Contracts, Part 4, 2018, p. 77, Point 6.

41. Mustafa Al Aouji, The Civil Law, Part 1, The Contract, p. 507.

the presence of Article 263 leaves no doubt as to whether damages may be allocated for moral harm in the contractual context. He also noted that the presence of a financial interest in the contract does not exclude the possibility of having a moral interest in that same contract. Yakan gave multiple examples, such as the moral harm caused to a trader that has sold items to its clients but whose supplier fails, without justification, to deliver on time.<sup>42</sup>

The Lebanese Court of Cassation considered moral harm damages in a decision dated 11 June 2009 regarding the breach by a supplier of the supply contract in a construction case.<sup>43</sup> The question before the Court was whether cement delivered by the defendant to the claimant was in accordance with the agreed upon specifications. The Court of Appeal allocated moral damages to the claimant on the basis that the latter had suffered a moral loss due to the issues that had arisen with third parties, including the main contractor, as a result of the defective cement.<sup>44</sup> The respondent challenged the decision of the Court of Appeal on the basis that, first, moral harm damages are only available in tort, and second, as a company, the claimant could only sustain physical harm. The Court of Cassation upheld the decision of the Court of Appeal. In doing so, the Court of Cassation rejected the respondent's arguments, ruling that, first, compensation for moral harm is available in the contractual context, and second, a company could suffer moral harm. As for the quantification of the harm, the Court found that this was within the lower court's sole discretion. In this respect, the Court of Appeal awarded USD 22,000 to the claimant.

### 4.3 MORAL HARM IN THE UAE

Article 293.1 of the UAE Civil Transaction Law provides as follows:

*"The right to indemnity for harm shall include moral harm, and an infringement of the liberty, dignity, honour, reputation, social standing or financial credit of another shall be regarded as being moral harm".*

The fact that Article 293.1, above, appears in the tort liability section, together with prevailing case law, seems to suggest that it is applicable only in tort. Article 293.1 may be found in the "*General Provisions*" section of the third chapter of the UAE Civil Transaction Law entitled "*Tort*". Case law indicates that the quintessential moral harm case arises in the context of personal injury. In Civil Appeal no. 175/2014, the UAE Court of Cassation confirmed a Court of Appeal decision to increase the total compensation award from AED 400,000 to AED 500,000 to include the moral harm suffered by the parents, in

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42. Zouhdi Yakan, *An Explanation of the Obligations and Contracts Law*, Part 5, First Edition, p. 113.

43. Lebanese Court of Cassation, Fourth Chamber, 11 June 2009, *Al-Adl Magazine*, Year 2010, Part I, p. 159.

44. Lebanese Court of Appeal, 9th Chamber, 19 June 2008, Decision no. 939/2008, Case no. 934/2006.

addition to the physical and moral harm suffered by their child who had been physically assaulted at his school.<sup>45</sup> Similarly, in Civil Appeal no. 561/2018, the Court of Cassation allocated AED 210,000 to the family of an eighteen-year-old after a car accident resulted in his death on 8 June 2017 (AED 100,000 for his mother, AED 75,000 for his father and AED 35,000 for his sister).<sup>46</sup>

On the other hand, the broad wording of Article 293.1 does not restrict its applicability to the tort context. As such, it may also apply in contract cases. In Commercial Appeal no. 1129/2018, the UAE Court of Cassation confirmed an award of damages for moral harm to a company in a contract case. The claimant company's trademark had been used, without its consent, on fraudulent merchandise. The Court of Appeal ordered the defendant to pay AED 5,000 for moral harm. Before the Court of Cassation, the claimant applied for an increase of AED 5,000 in these moral harm damages. In relying on Article 293, the Court of Cassation did not award the increase, concluding that this was a factual finding over which the Court of Appeal had sole discretion.<sup>47</sup>

#### 4.4 MORAL HARM IN THE KSA

In Saudi Arabia, Shari'ah principles govern damages, including for moral harm. Nevertheless, the general requirements under Shari'ah principles are that loss be both direct and quantifiable. Accordingly, there is more limited case law in relation to moral harm in Saudi Arabia. In Decisions no. 4/519 of the year 1435 H. (2013) and 2/527 of the year 1436 H. (2014), the KSA Administrative Court of Appeal found that one of the main principles of Shari'ah is that "*damage must be eliminated*" and that one should not repair just one category of damage and not the other, such as repairing only physical harm and not psychological harm. In those cases, the Court of Appeal found that the claimants were entitled to compensation for psychological harm.

## 5. CONCLUSION

The increasing number of claims for moral damages being addressed in the investment treaty arbitration sphere suggests that tribunals in commercial arbitrations may see an increase in such claims, particularly in the Middle East where moral harm damages are often expressly provided for by legislation.

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45. UAE Court of Cassation, Civil Appeal no. 175/2014, Case no. 175/2014/440, Decision dated 29 January 2015.

46. UAE Court of Cassation, Civil Appeal no. 561/2018, Case no. 561/2018/440, Decision dated 21 April 2019.

47. UAE Court of Cassation, Commercial Appeal no. 1129/2018, Case no. 1129/2018/445, Decision dated 17 April 2019.

In bringing, or defending against, such claims, commercial parties will need to have careful regard to the two common legislative limits, as interpreted by the courts, being whether the applicable law permits moral harm for: (1) breach of contract (rather than tortious liability only); and (2) corporate parties.

Even where those two thresholds are surpassed, a party claiming moral harm will likely still be required to justify the imposition of those damages in consideration of the factual circumstances of the case. The investment treaty case law suggests that arbitral tribunals will generally consider both the prejudicial impact on the claimant, particularly with respect to its reputation, as well as consider whether punitive damages should be awarded to address any malicious behaviour on the part of the respondent.