Finality of Arbitral Awards:

Comparing Approaches in Sharia Law and International Law

Submitted by:

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Abstract

The progress that Saudi Arabia has made in international trade implies that inevitably, its national laws at times govern the activities of non-citizens, as much as its citizens are governed by international laws when they are travelling internationally. When differences arise in trade or business-related affairs, arbitration comes up as a favoured method of resolution. However, unlike in most foreign jurisdictions, Saudi Arabia (and some of her neighbours) practise law (including arbitration) guided by the teachings of the Quran. This brings in extra technicalities to the recognition of arbitral awards in the Kingdom, especially when such awards are made in foreign jurisdictions that bear no reference to Sharia law. This study investigates the effect of the application of Sharia law in Saudi Arabia on the finality of arbitral awards on the basis of questions of law and public policy. International arbitration laws tend to circumvent the two issues by limiting the scope of their applicability. Based on the need to retain a degree of authority over enforcement of arbitral awards and other internationally issued legal determinations, this study finds that the Saudi Arbitration Law 2012 Act has some positive features and moves closer to international law in comparison to the Old Saudi Law, specifically on the issue of finality. The study finds that although not on a par with international law, it is a step in the right direction for Saudi Law to work more flexibly in the international sphere with issues involving finality. Where in the past, issues would not have been resolved due to the refusal to enforce arbitral awards, a more facilitating scenario comes about and the scope of enforcement of finality is set to rise due to the New Saudi Law. In addition, this study finds that the Saudi 2012 Act demonstrates the willingness of the Kingdom to cooperate with international laws. Although this is a breakthrough in dealing with finality, a fundamental principle of Saudi law is that the new Saudi law Act conforms to Sharia and the Kingdom's public policy. However, with a lack of empirical cases specifically involving the New Saudi Law, it is yet to be established that it has achieved the positive impact intended. This study supports continued efforts and ultimately recommends the decision to work towards the amendment of Saudi law to better aid the achievement of finality without undue subjection to unnecessary scrutiny based on public policy requirements and also to realign Saudi public policy with international standards while maintaining fidelity to the values and principles of Sharia law.

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Chapter One:

Introduction

1.1 Overview

The increasing relevance and importance of Islamic-based commercial activity in the global economy is influencing the direction of international legislative and judicial processes towards a more integrated legal regime with regard to the settlement of commercial disputes. Integration in this case refers to a system where the disparities between the dispute resolution mechanisms are smoothed out to come up with an inclusive mechanism that recognises diversity. There are 1.6 billion Muslims worldwide, with Islamic funds amounting to US$1.8 trillion, and another US$2.5 trillion in non-interest bearing bank accounts growing at an annual rate of 15%.[1] The Islamic finance industry has experienced massive growth and expansion in the global economy during the last decade.[2] This expansion has coincided with increased participation in the alternative dispute channels to which multinational institutions are gravitating. For instance, a record 59 arbitration processes involving multinationals began in 2012, and 56 were started in 2013.[3]

Disputes among humans have a long history, which essentially created the platform to seek judicial and alternative ways to resolve them. Modern alternative dispute resolution, or ADR, is a range of processes by which an amicable resolution of disputes may be arrived at extra-judicially with the intercession of a neutral third party.[4] ADR involves 'amicable dispute resolution' implying volition on the parts of both parties to abide by the final settlement. In

[1] M. Raffa, 'Arbitration, Women Arbitrators and Sharia' (Selected Works 2013) http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=mohamedraffa accessed 13 February 2016
[2] U.A. Oseni and A. U. F. Ahmad, 'Dispute Resolution in Islamic Finance: A Case Analysis of Malaysia' *(8th International Conference on Islamic Economics and Finance*, Doha, 2011).
[3] The Economist, 'The Arbitration Game' (*The Economist*, 11 October 2014) <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> accessed 20th February 2016
[4] Ibid.

this sense, ADR differs from ordinary judicial dispute resolution in that when the courts decide a case, a win-lose situation is the outcome. In the normal court setting, the parties are more distant from each other as it does not offer much conciliation but mainly aims at compensating (or offering some other form of redress) when one party has harmed the other, which is somewhat contrary to the ADR where each party is seen to win something and give up something else in a conciliatory approach.[5]

1.2 Aims of the study

The aim of this study is to examine the extent to which Sharia law is compatible with international principles on the issue of finality; that is, examining the extent to which Sharia and international law can be reconciled. In addressing this, account is taken of the recent reforms to Saudi Arbitration law by the Act of 2012. Being an alternative judicial process, arbitration should accord the parties a more expeditious path to dispute resolution and the decision of the arbitrators should be binding for the parties to the dispute. In this sense, the decision of the arbitration committee should be final and enforceable. This constitutes finality of arbitral awards. The ideal outcome as espoused in international arbitration conventions, where the seat of arbitration is different from the country where the award is sought to be enforced, is for the decisions and awards made by foreign arbitration tribunals to be automatically accorded recognition and enforcement. This would imply finality of the arbitral process started in a foreign jurisdiction, and it has a binding effect on parties. However, refusal to enforce on grounds of public policy, judicial review of the merits of the dispute, and appeal on question of law, all influence the adoption of such international arbitration decisions. Integrating Sharia principles with the international arbitration principles would be

[5] U.A. Oseni and A.U.F. Ahmad, 'Dispute Resolution in Islamic Finance: A Case Analysis of Malaysia' *(8th International Conference on Islamic Economics and Finance*, Doha, 2011).

important for a smooth adoption of the arbiters' decisions. This is because as it is, the Saudi arbitration law allows much scope for non-arbitrators to interfere with the arbitral awards. This study is concerned with how will Saudi arbitration law is progressing to move closer to international law, and what more needs to be done. The research mainly aims to interrogate the role of public policy on finality of awards in Saudi Arabia. The ultimate conclusion from this research is that Saudi arbitration law – though progressively amended to enhance finality –still lacks the attitudinal aspects of finality emphasised by most international arbitration laws.

In addition, along with the above objectives, the research also aims to provide international law organisations and investors with an understanding of the legal landscape in Saudi Arabia so they can plan their approaches to matters of arbitral interest, and also to help academics in this part of the world to better understand Sharia, as it affects most laws, especially those dealing with international trade. They need to know whether specific clauses in agreements or any other binding documents are to be evaluated based on their adherence to Sharia. Despite the differences in presentation, Sharia law recognises sovereignty of states as much as international law does. Understanding of the Saudi system and Sharia law will go a long way towards encouraging further large-scale foreign investment in Saudi Arabia. To achieve the ultimate level of investor encouragement, Saudi arbitration laws must keep pace with international developments. Focusing on the comparison between Sharia law and international commercial arbitration brings out the differences between the concepts of "finality of awards" in both laws.

1.3 Research questions

The following questions are pursued in this study:

1) what is the general attitude of Sharia to arbitration, and what features does Sharia have that are potentially problematic to the adoption of international arbitration resolutions?

2) What are the broad similarities and differences between Sharia and international law on arbitration?

3) What are the specific aspects of finality under both Saudi Arabian and international law, and is finality a binding rule or non-compulsory?

4) How have the key enhancements to Saudi Arabia's law on arbitration (i.e. those brought about by the 2012 Act), affected enforcement of arbitral awards, and should the new Saudi law move closer to international law?

5) Should the public policy defence as applied in Saudi Arabia be allowed to deny recognition and enforcement of foreign or non-domestic arbitral awards? How does public policy affect enforcement of international arbitral awards in Saudi Arabia?

6) Pursuant to the general principle in international arbitration on the finality of awards, should the setting aside of the arbitral award (by question of law) given by an international arbitration be abolished in Saudi Arabia? How can Saudi Arabian law/practice get closer to international law while maintaining fidelity to Sharia values and principles?

7) What are the key differences between the Saudi Arabian approach and the international approach to appeals on a question of law?

1.4 Structure of the study

This thesis is structured as follows:

1.4.1 Chapter One: Introduction

The introduction presents the background of the study and the context in which the problem of the study is situated. This chapter states the aim of the study, articulates the research questions in support of the stated aim, and describes the structure and methodology of the study. A brief literature review is provided in order to situate the study among the body of

scholarly articles and academic studies currently existing in the available pool of literature on the topic.

1.4.2 Chapter Two: Examination and analysis of arbitration under International law and Sharia law

The second chapter lays the groundwork for the discussion of international arbitration, in preparation for the subsequent in-depth discussion of Sharia-based arbitration. It is setting out the general history of approaches to arbitration in Sharia and international law and the broad values involved in both systems. Therefore, this chapter delves into arbitration from the general perspective of Islamic law, the legality of arbitration from the different sources of Sharia, an introduction to the multilateral conventions and treaties on arbitration acceded to by Islamic countries, and a general examination of arbitration involving Islamic and international law. The chapter establishes arbitration as an important tenet of Sharia law, and displays the influence it has on Muslims. The chapter brings out important features of Islamic law and its sources along with teachings that support the drift towards arbitration as a recognised method of dispute resolution among adherents of Islam, which is a practice dating back to pre-Islam generations. It further establishes that Sharia essentially advises a cautious approach to laws that are not based on Islamic values, which is the main basis of the conflict affecting enforcement of arbitral awards awarded through international arbitration.

1.4.3 Chapter Three: Critical evaluation of differences between International Arbitration Law and Sharia Law with regard to finality

This chapter examines the fundamental similarities and differences between conventional international arbitration and the view of arbitration as seen from the perspective of Sharia-based arbitration. The schools of Islamic thought are introduced and discussed,

including the Hanafi, Hanbali, Maliki and Shafi'i. Moreover, this section is about how all of approaches to arbitration in Sharia and international law manifests itself in specific differences, especially in differences on key issues such as finality, followed by a comparative analysis between Islamic and international arbitration with regard to the nature and scope of arbitration, the choice of law, selection of arbitrators, the conduct of the arbitration procedure, and the scope of judicial review and enforcement. The chapter brings out the key aspects of the Saudi Arabian/Sharia approach that are relevant to the remainder of the thesis; particularly the type of key elements that later form the basis of the differences on the issues of finality and appeals. Through an examination of the various grounds for refusal of enforcement of arbitral awards emanating from international arbitration tribunals, the chapter brings out the major elements of Sharia-based arbitration that affect recognition and enforcement of international arbitral awards as the local mechanisms for award recognition, the enforceability of the award based on states' agreement to international conventions, and the existence of clauses allowing different interpretation of awards within such international conventions. Furthermore, the existence of treaties that override the obligation to recognise arbitral awards is established as an important factor in the enforcement of the arbitrators' decisions. These issues surround the place of the award, which is provided for under the Restatement of Foreign Relations Law of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Enforcement in Saudi Arabia is shown to be difficult because of the procedures a party has to follow in order for their award to be recognised. For instance, according to the old Saudi arbitration, the award must be subjected to review by the Board of Grievances, whose major role is to establish whether it is consistent with Sharia law. In this way, an award is mandatorily reviewed for merit, which is a major drawback on the path towards automatic finality once the arbitration tribunal renders a decision. A commonly cited reason for non-enforcement in Saudi Arabia, which is a

contradiction to international provisions for the same, is failure of the award to adhere to the principles of Sharia law (i.e. prohibition against interest and the requirement that arbitrators be male, among others). Furthermore, Article 19 of the SAC allows either party to a dispute to challenge an award or any other decision that is issued by the tribunal (e.g. interim measures) within 15 days from issuance, which runs counter to most modern arbitration rules as it allows for dilatory tactics by the party against whom the award is sought to be enforced, who may raise minor technical or superfluous issues to postpone the enforcement of the award.

1.4.4 Chapter Four: Finality of Arbitral Awards in Saudi Arabian Law

This chapter analyses the statutes, issues and case law pertaining to the finality of arbitral award, and the degree to which finality is advanced in the international arbitration treaties and conventions, and in the Arab Muslim countries that have ratified these treaties. This chapter will also explore the question of whether Saudi arbitration law should move closer to international law even after the new Saudi Arbitration Law 2012, which is more progressive compared to the old Saudi law, came into force. It further explores whether Saudi law allows more scope to upset finality based on Sharia-based public policy. Further issues connected to finality will be also presented, such as the immunity of arbitrators from suit (precluding extended litigation on their participation), the annulment of awards by ad hoc committees, and the finality of awards as 'res judicata.' The implications of setting aside or annulment of an arbitral award are examined in the context of the place where the annulment was made, alongside challenges to the finality of the arbitral award under international treaties. Several suggestive/indicative case laws are discussed, including Dallah Real Estate v Ministry of Religious Affairs of Pakistan and Westacre Investment v Jugoimport-SDRP. A comparison of the application of public policy in Egypt, the United Arab Emirates and Saudi Arabia is made. The chapter finishes with an account of the new Saudi Enforcement Law

2013 and how it has made progressive advances in ensuring finality of arbitral awards, and concludes that local arbitration mechanisms are focused on enforceability within the jurisdictional context. The study shows that various approaches are adopted by different jurisdictions in terms of the level of finality. The new Saudi Arbitration Law provides significant improvement to the old Arbitration Law. Finality is very important in both domestic and international commercial disputes. However, Saudi arbitration law generally allows significant scope to upset final awards; in particular it allows more scope to upset finality based on public policy, and also by appeal on question of law in some cases. This leads into chapter 5 which will examine how Saudi law compares to international law, showing essentially that the latter now gives very limited scope to upset finality by appeals on question of law (leading ultimately to the conclusion that Saudi Arbitration Law should move closer to international law, and needs to restrict the scope of upsetting finality to align itself more closely with international arbitration practice).

1.4.5 Chapter Five: Appeals on Questions of Law - Comparing International and Saudi Approaches

This chapter will explore whether the scope for appeal on questions of law in international law provides a greater level of certainty than what is available in Saudi law. The chapter revisits the Saudi Arbitration law of 2012 in light of how it has inspired convergence of Saudi arbitration laws with international laws on the same, but picks out deformities that express a rigidity that has been borrowed from the earlier 1985 version of arbitration laws in the country. Comparatively, the English system appears unique among the international examples derived since it allows a large margin for review of arbitral awards due to a conflict between commercial and civil law in the governing Rule 69. However, the Saudi system still comes out as the more rigid in this respect. Relating the case of Saudi Arabia to other jurisdictions such as Australia and France shows that these countries also provide a basis to appeal on the

basis of question of law. Implied judicial review of arbitral awards on the merits is scrutinised as practised in the US under the manifest disregard for the law doctrine. In some systems, such as the American system of arbitration, there is no provision that explicitly allows for appeal on question of law for arbitral awards. In practice, however, a judicial review on the merits appears to be a possibility, hinging on the concept of 'manifest disregard.' The controversy stems from the case of Wilko v Swan[6], which is presented in the chapter. The study illustrates that different jurisdictions have different interpretations and approaches on appeal on question of law. Based on the fact that the Saudi Arbitration Law of 2012 reduce scope for intervention on the basis of the question of law, the researcher recommends that the Saudi Arabian arbitration law should continuing their efforts to move closer to international law in order to bridge any gap with maintaining fidelity to the values and principles of Sharia law.

1.4.6 Chapter Six: Conclusion

This chapter brings together the information and analysis of the first five chapters to resolve the research questions, thus concluding the discussion on the finality of arbitral awards and how this may be applied in countries with Sharia-based law. The chapter comprehensively reviews the evidence adduced to indicate that countries with Sharia-based law have difficulty in enforcing international arbitration resolutions due to low integration between the two systems. It further proposes a review of the two systems to harmonise how they work and allow international arbitration to be more applicable in Islamic nations. For instance, the researcher argues for the review of specific provisions of Saudi law that violate basic rights and undermine finality in an unprecedented manner. Therefore, in conclusion it can be said that in the context of Saudi Arabian law, it is inappropriate to abolish refusal to enforce arbitral awards based on the grounds of public policy violation unless the final award is

[6] Wilko v. Swan et al. 201 F.2d 439 (1953). No. 96

contrary to Sharia law. In addition, the study lends support to the continued Saudi efforts to perform further modifications to respect finality, restrict the scope of upsetting it and to become more closely aligned with international arbitration practice.

1.5 Methodology

This thesis provides an analytical and comparative study on the finality of arbitral awards in both Sharia Law and international law. It is built along analysis of both primary and secondary sources, particularly in the comparative evaluation of the arbitration practices relative to the legal regimes in different countries. The research is primarily focused on library-based information, such as textbooks, journal articles, case law, and published PhDs and scholars' opinions. The majority of these sources can be accessed via libraries or online sources, such as Westlaw and Lexis/Nexis. The review of contents however goes beyond simply a review of secondary sources (books and other commentaries) to also interrogate case law and arbitral awards, statutes and decrees. Examination of the statutes, case laws, and practices in Western and Arab Muslim countries under Sharia law are compared, examining the history, rationale, and developments in the law and jurisprudence in the regimes. The study looks beyond the statements of law as codified, and compares the results of the various challenges to finality of the arbitral award to determine the actual acceptance of the finality and enforceability of international arbitral awards in these countries. Implications are then drawn on the situation in the countries of the Middle East, particularly Saudi Arabia.

It is worth mentioning that drafting the thesis was complicated by the inaccessibility of Saudi arbitration proceedings, as they are not made public, particularly those decided after the enactment of the Saudi Arbitration Law 2012. Furthermore, there is no electronic database for Saudi law or even official websites providing this information, which makes tracking the proceedings and outcomes impossible. To overcome this shortfall, the researcher resorted to

consulting Saudi-based experts known to him in order to continuously obtain information that shaped the unfolding analyses.

1.6 Literature review

This thesis examines the finality of arbitral awards made in international fora, where finality is broadly taken to mean that the dispute behind the award is considered resolved, and the award itself is recognised and, most importantly, enforceable. The ability to enforce an award is the primary reason disputants resort to arbitration rather than litigation, in the hope of attaining a final and expedient settlement according to the agreement between them.[7]

1.6.1 The concept behind the "finality of awards"

In a regular judicial process where the venue of litigation, the rendering of judgment, and its enforcement are all located in a single country, the finality of the judgment is clearly defined as taking place after all remedies have been exhausted or the periods for appeals and motions for reconsideration have expired, in which case the judgment lapses into finality. The same takes place in the case of local (national) arbitration processes where the seat of arbitration is also the country of enforcement.

The matter is different, however, in the case of international or non-domestic arbitration, where the decision is made in accordance with international arbitration laws. Theoretically, an arbitration is conceived of as a 'one-stop' dispute settlement system, with its main distinction from the multi-tiered court litigation being its appeals system.[8] "Finality brings with it the advantage of efficiency."[9] A judicial system is deemed efficient when it can be relied upon to competently and expeditiously make rulings. There are, however, risks

[7] G. Kaufmann-Kohler and A. Rigozzi *International Arbitration: Law and Practice in Switzerland*, Corby, Oxford University Press, 2015
[8] *Ibid.* 161.
[9] *Ibid.*

involved in seeking arbitral procedures, such as when arbitrators commit mistakes in carrying out the procedure, in which case the parties must abide by the arbitral award though it may be defective. In theory, a mistaken award cannot be corrected because arbitration has no further remedies. That is, arbitration is supposed to provide a final avenue for dispute resolution, and the decisions reached should be final and binding upon all parties. Some of the mistakes that could render an award unenforceable include failure to abide by the provisions of the agreement that founded the basis for the arbitral process and obvious failure to abide by specific provisions of the law, which may be in contravention of national constitutions[10].

There are, however, cases where serious mistakes are encountered in the arbitration process which defeat the purpose intended by the parties. A small 'safety net'[11] is provided in the form of limited remedies provided by the law of most countries which, if availed of, may result in the annulment or 'setting aside' of the arbitral award. The 'safety net' acts as a window for review of awards when one party feels there are substantive grounds in law to disqualify the award from being enforced. The remedy is concerned mainly with the procedural aspect, or the manner in which the arbitration was conducted, rather than the content or merits of the arbitral decision. These are the same grounds that are resorted to in a later stage in the life of the award, in the form of objections to the enforcement of the arbitral award.[12]

In many legal systems in developed countries, foreign judgments are enforced without examining their merits, either pursuant to an existing treaty or as a matter of discretionary comity[13]. The principles of discretionary comity include: the absence of fraud, public policy violations, and conflict with a prior judgment or forum selection agreement; the impartiality

[10] Mourre, Alexis, Luca G. Radicati. Towards Finality of Arbitration Awards: Two Steps Forward and One Step Back. Journal of International Arbitration, Vol. 23, Issue 2 (April 2006), pp. 171-188, also G. Kaufmann-Kohler and A. Rigozzi,

[11] G. Kaufmann-Kohler and A. Rigozzi *International Arbitration: Law and Practice in Switzerland*, Corby, Oxford University Press, 2015.

[12] *Ibid.*

[13] *Ibid.*

of the foreign court; jurisdiction; and the compliance with the requisite of due process and proper notice. If the award is validated on the basis of the foregoing conditions, then the normal recourse is to allow for recognition, provided that there are no serious procedural irregularities or violations of public policy as specified in NYC Article V. In the case of the FAA, a foreign award is confirmed if no treaty reason exists to deny it recognition. Upon confirmation, the award becomes final.

1.6.2 Distinguishing among domestic, foreign, and international arbitral awards

Arbitral awards, also known as arbitration awards, refer to the decisions rendered by an arbitration tribunal in an arbitration proceeding.[14] Arbitration is "a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding."[15] Ideally and within a single national jurisdiction, awards that result from binding arbitration proceedings are understood to have the force of the law between the parties who have agreed to the proceedings, and often allow little or no option for an appeal, and courts are bound to enforce these awards.[16] Moreover, arbitration proceedings are subject to two fundamental legal doctrines: *res judicata*, and *collateral estoppel*. Res judicata signifies that the final judgment rendered in the dispute is conclusive as to the rights of the parties, and acts as a bar on any subsequent action from being filed for the same cause of action, demand or claim. Collateral estoppel also prevents the future re-litigation of an issue of ultimate fact determined by a valid judgment.[17] Both doctrines have the effect of putting the matter of contention to rest and enforcing compliance among the parties with the arbitral judgment.

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[14] US Legal Inc., 'Arbitral Award Law and Legal Definition', 2015, http://definitions.uslegal.com/a/arbitral-award/ (accessed 10 September 2015).
[15] A.K. Bansal, *Arbitration and ADR.* Universal Law Series. Delhi, Universal Law Publishing Co. Pvt. Ltd, 2009.
[16] W.C. Burton, *Burton's Legal Thesaurus.* London, McGraw-Hill, 2007.
[17] *Ibid.*

Having grasped the nature of an arbitral award in general, it should be realised that there are different classifications of arbitral awards that may, in various jurisdictions, affect the award's recognition, enforcement and finality. Arbitral awards may be domestic, foreign, non-domestic, and international, depending upon the convention under which they are regarded. Domestic arbitral awards are those that arise out of an arbitration agreement between parties situated in the same state, where the dispute under arbitration has no connection with another state, and where the award is made within the same state.[18] This is the general definition, although each state or jurisdiction may have another definition depending upon its national laws. For instance, it was observed by Almutawa[19] that in India, a previous ruling by the Supreme Court stated that, based on the definition of 'domestic award' in Section 2(7) of the Indian Act, foreign awards "are those awards which have been made pursuant to arbitration in a convention[20] country, whereas an award made outside India in an international commercial arbitration in a non-convention country is to be considered a 'domestic award'."[21] This earlier interpretation allowed for the inclusion of awards rendered outside of India within the category of domestic awards, if the seat of arbitration is a country which is not a member of the New York Convention. In a subsequent ruling this interpretation was reversed by the same Supreme Court[22] which clarified that it was not the intention of the Indian Parliament to give extraterritorial application to the Indian Arbitration and Conciliation Act of 1996, thus arbitral awards decided in foreign jurisdictions cannot be challenged under Article 34 of the Act (i.e., application for setting aside an arbitral award)

[18] S. Greenberg, C. Kee and J.R. Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge, Cambridge University Press, 2011.
[19] A. Almutawa, 'Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council' (DPhil thesis, University of Portsmouth, 2014).
[20] Referring to the New York Convention.
[21] Supreme Court of India, Bhatia International v Bulk Trading SA & Anr, Case No App (Civil) 6527 (2002) par 23.
[22] Supreme Court of India, Bharat Aluminum Co v Kaiser Aluminum Technical Services, Civil Appeal No. 7019 of 2005 (2005).

which applies only to domestic awards.[23] This latter ruling brought India in line with the international arbitration standard.[24]

An arbitral award is classified as a foreign award if it has been made in a foreign state.[25] Under the New York Convention, a foreign arbitral award is one that is "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."[26] A fundamental construction of this definition appears to provide that foreign arbitral awards may originate from any State other than that where the award is being sought to be enforced. However, when a state seeks to apply the reciprocity exemption between states, then the provisions of the New York Convention will apply only to foreign arbitral awards that are made in another signatory state to that Convention.[27] Thus the definition of foreign arbitral award also depends upon the national law of the country where the award is sought to be enforced, leaving the terms of enforcement largely to the interpretation of the courts of that country[28].

Despite the existence of 'foreign arbitral award' as a class of arbitral awards, there is also what is known in some jurisdictions as a 'non-domestic arbitral award.' The distinction between 'foreign arbitral awards' and 'non-domestic arbitral awards' is made in countries such as the United States[29] and France.[30] A non-domestic arbitral award differs from a

[23] A. Kabra, P. Chatterjee and V. Desai, 'Enforcement of Foreign Awards Becomes Easier: 'Patent Illegality' Removed from the Scope of Public Policy' (Lexology, 19 July 2013) <http://www.lexology.com/library/detail.aspx?g=4d6c99ad-4ab6-43f8-83e4-2d5d7c0cb4bf> accessed 10 September 2015.
[24] Almutawa, *op. cit.*, 7.
[25] Greenberg, Kee and Weeramantry, *op. cit.*, 15.
[26] New York Convention, Article 1, Section 1.
[27] A.J. van den Berg, 'When is an Arbitral Award Nondomestic under the New York Convention of 1958?' (1985) Pace LR 25.
[28] Kronke, H. Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. Kluwer Law International, 2010
[29] Leagle Inc, Bergesen v Joseph Muller Corp, 710 F2d 928 (2nd Cir 1983).
[30] Société AKSA KINGDOM OF SAUDI ARABIA SA v Société NORSOLOR SA (9 December 1980, Cour d'appel de Paris),
20 ILM 887 (France); General National Maritime Transport Co v Societe Gotaverken Arendel AB (21 February 1980, Cour d'appel de Paris), 20 ILM 884 (France).

foreign arbitral award in that it is given in the same country as the enforcing court, but is not considered a domestic award by the State in which the enforcement and recognition are sought.[31] The New York Convention allows for the existence of non-domestic arbitral awards which are of a non-obligatory nature.[32] Beyond this, there are no statutes that precisely define a non-domestic arbitral award. For instance, according to the decision of a US federal district court[33] it is a definite and intentional omission of the Convention so that the greatest possible effectivity can be given to the enforcement of awards while allowing the enforcement country almost total discretion in construing the coverage of the 'non-domestic' classification consistent with its national law.[34]

The consequence is that the coverage of 'non-domestic' has become varied and country-specific, and at times even contradictory within the same country. The court in Bergesen held that awards between two foreign parties made in the USA may be enforced as a non-domestic arbitral award under the New York Convention.[35] In contrast to Bergesen, which apparently allowed for the presence of a foreign element to render an award non-domestic, a federal district court in Illinois[36] later held that although the contract provision that gave rise to the dispute required performance in a foreign country, an award made in the US between two US parties was deemed a domestic arbitral award.[37] In another jurisdiction, the Paris appellate court held that an arbitral award was non-domestic for the reason that, although it was held in Paris, the arbitral award was not connected in any way with the French legal system.[38] The effect of the provision in the New York Convention thus appears to be the disengagement of

[31] S. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons*, Cambridge, Cambridge University Press, 1990, p.126.
[32] A.J. van den Berg 25: The Second Criterion in Article I (1) of the Convention allows, but does not obligate a court to determine, under the national law, if an award is non-domestic.
[33] Bergesen v Joseph Muller Corporation 710 F2d 928 (2nd Cir 1983).
[34] S. Toope, *op. cit.*, 125-127.
[35] Bergesen v Joseph Muller Corporation (n 29).
[36] Federal District Court for the Northern District of Illinois.
[37] Lander Co. Inc. v MMP Investments Inc. 927 F Supp 1078 (ND Ill 1996).
[38] General National Maritime Transport Co v Société Gotaverken Arendal AB, Cour d'appel de Paris (21 February 1980), (1981) 20 ILM 884 (France).

the requirement of territoriality from the enforcement of the award – while domestic and foreign awards are compelled to meet the territoriality requirement for due enforcement, the non-domestic arbitral awards have no such requirement, and the arbitral award is rendered in the same state as the enforcing state.

The fourth category of arbitral awards is the international arbitral award, which refers to awards wherein the seat of arbitration is within a state from which the nationalities of the parties or the locus of the subject matter of the arbitration depart. 'International' as applied to arbitral awards depends on two factors – the nationality of the parties and the nature of the dispute.[39] According to the UNCITRAL Model Law,[40] an arbitral award is defined as an award wherein:

(1) "the contending parties to the arbitration have businesses located in different states;

(2) the place of business of one of the parties is in a foreign state;

(3) the country of business of at least one of the parties is different from the place where a substantial part of the obligations are performed pursuant to the commercial relationship; and

(4) The parties are in agreement that the subject matter of the arbitration agreement is related to more than one country."[41]

The UNCITRAL Model Law does not draw a distinction between domestic and non-domestic (or foreign and non-foreign)[42] as in the New York Convention, but rather it distinguishes among awards derived from domestic versus international commercial arbitrations.[43] The US Code[44] adopts an even broader scope, identifying the award as one that involves "property

[39] A. Redfern, M. Hunter, C. Partasides and N. Blackaby, *Redfern and Hunter on International Arbitration* (Oxford University Press 2015).
[40] UNCITRAL Model Law Article 1(3).
[41] Greenberg et al., 400; Shahid Jamil, 'The Pakistan Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance' (Jamil & Jamil 3 December 2005) <http://jamilandjamil.com/wp-content/uploads/2010/11/recognitionandenforcement_021606.pdf> accessed 10 September 2015.
[42] Almutawa, *op. cit.,* 6.
[43] M. Hwang and S. Lee, 'Survey of South East Asian Nations on the Application of the New York Convention, *JI Arb* (2008).
[44] US Code, Title 9 Arbitration, Chapter 2, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards'.

located abroad, envisages performance or enforcement abroad, or *has some other reasonable relation* with one or more foreign states."[45] By comparison, Indonesia adopted a narrower construction of an international arbitral award, when its Supreme Court held that the term 'international award' pertained exclusively to those arbitral awards made outside of Indonesia. It therefore refused to recognise as an international award one that resulted from an arbitration between a local party and a foreign party, the seat of which was in Indonesia.[46] Ultimately, the determination of which awards constitute international arbitral awards relies upon the national law of the enforcing state.

1.6.3 ADR in Islamic countries

Islamic countries show several similarities and differences in the recognition and enforcement of domestic and foreign awards as they share the same concepts of Shariah law, the teachings of the Quran and the principle of public policy, all of which influence the enforceability and finality of arbitral awards. The comparative analysis of these countries provides insights into the ratification of the New York Conventions and the UNCITRAL Model Law, both of which guide the domestic and foreign arbitration proceedings. A comparative understanding of the arbitration proceedings, applicable and substantive laws, public policy, recognition and enforcement of arbitral awards and well as the finality principle will provide a comprehensive understanding of these concepts in the context of Saudi Arabia.

In the trade world, Islamic finance helped in maintaining sustained economic growth in the Middle Ages. Abed and Davoodi state that the last three decades have seen its resurgence after the first oil price shock of 1973-74. With the surge in oil liquidity, there was

[45] 9 USC Sec 202.
[46] Greenberg, Kee and Weeramantry, *op. cit.*, 400.

an introduction of innovative Islamic financial products and also a demand by Muslim populations for financial services compatible with the religious beliefs of the people.[47]

There are a number of academic studies that have delved into the compatibility and conflict among various aspects of international law and Sharia law. Many of these studies deal with the arbitration of disputes between corporations governed by Muslim law and those which abide by international law, with a view to understanding the nature of the differences and how these arbitration regimes may be unified in their implementation. The thesis by Almutawa[48] provides an exhaustive survey of issues concerning arbitration in Sharia-based countries, particularly with regard to the enforcement of arbitral awards. It should be recognised that for an award to be regarded with true finality, the contracting states must agree to its enforcement. Despite accession to the New York Convention, if the state has ratified the Convention with reservations (e.g. Saudi Arabia has ratified the NYC with the reservation of reciprocity), then the enforcement of awards does not automatically follow, even among signatory states.[49] Even among states in the Middle East, the friendliness towards the enforcement of arbitral awards varies, depending to some extent on the national law of each state and their rules on challenges to the enforcement towards foreign arbitral awards.[50]

In a comparative study among the arbitration practices of countries in the Gulf Cooperation Council (GCC) states[51], a survey conducted among individuals engaged in the field of arbitration in these states revealed that the countries perceived as having the friendliest practices towards enforcement of arbitral awards are Bahrain and the UAE,

[47] G.T. Abed & H.R. Davoodi (2010), Challenges of Growth and Globalization in the Middle East and North Africa, International Monetary Fund, available at < http://www.relooney.info/SI_Governance/Governance-Economic-Growth_14.pdf> accessed on 24 July, 2013, p3.
[48] Almutawa *op. cit.*
[49] A. Magnusson, 'The Arbitration Award and Finality and Enforcement of the Award – an Introductory Overview' *Kazakhstan Business Magazine*, 2002, http://investkz.com/en/journals/30/284.html (accessed 20 February 2016).
[50] Almutawa, *op. cit.*, p. 162.
[51] A. Alenezi, An Analytical Study Of Recognition And Enforcement Of Foreign Arbitral Awards In The GCC States. 2010. University of Stirling.

followed by Oman, Kuwait and Qatar. Saudi Arabia was the least friendly towards enforcement of foreign arbitral awards, despite the implementation of the Saudi Arbitration Law of 2012. At this point, it is appropriate to undertake a cursory examination of the grounds for denying enforcement to arbitral awards among the GCC countries (of which the Saudi Arabia is part), which are all signatories to the NYC. The grounds for denying enforcement also comprise the challenges to the enforcement of arbitral awards in that country, which shall be compared with the grounds allowed by the NYC for the denial of enforcement.

A) United Arab Emirates

Under UAE arbitration rules, there are four grounds upon which a challenge can be made to the enforcement of a foreign arbitral award. These are:

i. The arbitral award is in contravention of a previous judgment;
ii. The arbitral award is in violation of the UAE's public policy;
iii. The parties against whom the arbitral award was made were not given due notice;
iv. The foreign arbitral award must not conflict with a currently standing judgment made in the UAE by a domestic court.

Similar to Oman, Qatar and Bahrain, the UAE attributes priority to the domestic court judgments that precede the foreign arbitral award, and therefore the award may not be given effect if it contravenes a standing UAE court judgment. Comparing the UAE and Oman, the UAE somewhat exceeds Oman's requirement for enforceability in the seat of arbitration before it can be enforced in its jurisdiction. The UAE's laws require that the foreign arbitral award must already have been granted leave to be enforced in its country of origin. There is some confusion in the case law concerning the requirement to abide by due process for the enforcement of an arbitral award. The UAE Civil Procedures Code[52] makes this requirement

[52] Article 235(2) (c), UAE Civil Procedures Code.

by statute, however the UAE Supreme Court of Cassation ruled that the procedural law of the country of origin must govern the court proceedings, except if the law goes against the public policy of the state where enforcement is sought. Even after the promulgation of this ruling, however, the UAE courts continued on occasion to require compliance with the UAE Civil Procedures Code for enforcement to become possible, perpetuating the vagueness of this issue. Generally, however, a federal arbitration law is speculated to clarify the various issues in the implementation of the NYC in the UAE to eliminate the conflicting decisions currently prevailing.[53]

B) Oman

The Sultani Decree 29/2002 limits the grounds for challenging enforcement of foreign arbitral awards as follows:

i. The arbitral award has not been issued by a competent body;
ii. The arbitral award does not comply with Omani law or court decisions;
iii. The award is marred by improper notice and legal representation;
iv. The subject matter of the dispute is non-arbitrable;
v. The award is non-enforceable in the country of origin;
vi. The arbitral award has not yet reached finality;
vii. The award is against public policy and rules of morality.[54]

Under the Omani law, some of the grounds under the NYC are not specifically mentioned as bases for refusing enforcement of a foreign arbitral award, such as the absence of validity in the arbitration agreement from which the dispute sprang, the lack of capacity of the parties to conclude the agreement in the first place, the tribunal being wrongly composed or acting

[53] Almutawa, *op. cit.*, 170.
[54] M. Al-Siyabi, *A Legal Analysis of the Development of Arbitration in Oman with Special Reference to the Enforcement of International Arbitral Awards* (DPhil thesis, University of Hull 2008); A.H. El-Ahdab and J. El-Ahdab, *Arbitration with the Arab Countries* (Wolters Kluwer 2011).

outside of its jurisdiction.. However, overall the Omani requirements for enforcement are stricter than the NYC because they mandate that a foreign arbitral must be issued by a competent arbitration tribunal according to the law of the country where it was made.[55] The condition that the award should not violate Omani laws and court decisions also suffers from overbreadth because there is no distinction as to which laws or decisions should not be breached. Such ambiguity goes against the provisions and aims of the NYC that exceptions to enforcement be limited to a narrow set of situations. Furthermore, Oman's arbitration rules require that for an arbitral award to be enforced in Oman, it should be enforceable also in the country of origin. The NYC does not impose such a stringent requirement, since it merely requires that the arbitral award be binding pursuant to the law of the seat of arbitration or the applicable law. It is only when the award has been set aside or vacated in the seat of arbitration that the NYC allows the refusal to enforce the award in all other countries. However, as long as the award is binding, though not necessarily enforceable, in the seat, it should be possible for the award to be enforceable in other countries where the subject matter of the award is arbitrable and not against the enforcing country's public policy.

C) Kuwait

The following are the grounds imposed by the State of Kuwait on the enforcement of foreign arbitral awards in its jurisdiction:[56]

i. There must be due notification and representation afforded to all parties concerned.
ii. The foreign arbitral award must have attained finality or become *res judicata* pursuant to the law of the arbitral seat.
iii. The foreign arbitral awards must not contravene any judgment or ruling made previously in Kuwait.

[55] Article 352(1) and Article 353, Sultani Decree 29/2002.
[56] A.H El-Ahdab and J. El-Ahdab, *Arbitration with the Arab Countries* (Wolters Kluwer 2011), 331.

iv. The foreign arbitral award must not be contrary to Kuwaiti public policy or good morals.
v. The subject matter of the dispute addressed by the arbitral award must be arbitrable under Kuwaiti law. The foreign arbitral award must be enforceable at the seat of arbitration.

Additionally, a similar reservation as that made by Saudi Arabia in acceding to the NYC was also made by Kuwait regarding reciprocity. Likewise, as with Oman, Kuwait shall not enforce an arbitrable award that is not enforceable in the country from which the award originated, which as previously mentioned goes beyond the provision of the NYC or grounds for refusing enforcement. Also mentioned in the list above are the grounds that the arbitral award should conform to public policy and good morals of Kuwait, as well as the decisions and rulings made by the Kuwaiti courts. These provisions constrain the enforceability grounds unduly, putting the finality of foreign arbitral awards in question when filed for enforcement in Kuwait. It also puts foreign arbitral awards at a subordinate level to domestic arbitral awards since the foreign arbitral awards are limited by the principles set forth in rulings and judgments in domestic awards.

One matter that may be raised concerning the appointment of arbitrators is the substance of the decision in Case No. 24.[57] The decision holds that the court can appoint the arbitrator in those cases where the parties cannot decide on an arbitrator, or if the arbitrator recused himself or abstained from the proceedings, or if the arbitrator was dismissed. Ordinarily, the arbitrators must be appointed by the parties as they hold themselves to be bound by their decision, and failing such appointment, the parties may challenge the resulting arbitral award. In the exceptional cases above, however, the Kuwaiti Judicial Arbitration Court of Appeals clarified that, pursuant to Article 175 of the Kuwait Pleading Law, the

[57] Kuwaiti Judicial Arbitration Court of Appeals, Commercial, Case No 24, issued 25 September 1999.

award shall not be subject to annulment on the grounds that the arbitrators were not chosen by the parties.[58]

D) Qatar

In other GCC countries, the action to enforce a foreign arbitral award is not suspended by the filing of a challenge to the enforcement of the award unless a separate motion to suspend proceedings is filed. In Qatar, however, the filing of a challenge to the enforcement of the award by a party to the dispute automatically stays the enforcement proceeding. There are different grounds upon which the enforcement of arbitral awards may be challenged for domestic awards on the one hand, and for foreign arbitral awards on the other. There are four grounds[59] upon which a challenge may be filed against enforcement of a foreign arbitral award:

i. The dispute settled by the foreign arbitral award is not under the exclusive jurisdiction of Qatari courts.
ii. There was some irregularity in the summoning and representation of the parties to the procedure.
iii. The foreign arbitral award has not yet become *res judicata*, or it has not yet reached finality according to the law of the seat of arbitration, or the law under which the parties have subjected their dispute.
iv. The foreign arbitral award is contrary to a prior judgment by a Qatari court, or it violates the principles of good morals and public policy in Qatar.

Qatari arbitral law is similar to that of Oman in that it also requires that the foreign arbitral award should be enforceable in the country of origin before it can be allowed for

[58] Almutawa, *op. cit.*, 175.
[59] Article 380 of the Code of Civil and Commercial Procedure of Qatar.

enforcement in Qatar. Also, the Qatari prohibition of enforcement if the foreign award contravenes a prior judgment of Qatari courts is evidence that like Oman, the UAE, Saudi Arabia and Kuwait, Qatar gives higher priority to the judgments of its local courts over foreign arbitral awards,[60] and it is in this aspect that Bahrain differs from the rest of the GCC.

E) Bahrain

Bahrain distinguishes between domestic and foreign arbitral awards in the ruling on applications for their enforcement. There are seven grounds for challenging the enforcement of foreign arbitral awards in Bahrain:[61]

i. The arbitration agreement was not valid by reason of incapacity of one of the parties, or for failure to comply with the requirements of the law to which the parties have agreed to subject it, or when no governing law was stipulated, the law of the seat of arbitration.
ii. The party against whom the arbitral award was made was not duly informed of the arbitration proceedings.
iii. The dispute which the arbitral award seeks to resolve was not contemplated by or does not fall within the terms of the submission to arbitration, or it contains decision on matters outside of the scope of the submission to arbitration.
iv. Either the composition of the arbitral tribunal, or the arbitral procedure itself, contravened the agreement of the parties or the law of the country where the arbitration procedure took place.
v. The arbitral award has not reached finality or has not yet become binding upon the parties, or has been set aside or temporarily suspended by the court at the seat of arbitration, or under the law to which the arbitral award is subjected.
vi. The arbitral award is against public policy.

[60] Al-Siyabi, *op. cit.*, 257.
[61] Article 252, Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures.

vii. The subject matter of the dispute to which the arbitral award pertains is not arbitrable under the law of Bahrain.

Compared to the laws of the GCC countries discussed thus far, it is noticeable that Bahraini grounds for disallowing enforcement of foreign arbitral awards do not include compliance with Sharia, or judgments and rulings by the local courts, or the precondition that the foreign arbitral award must be enforceable in the seat of arbitration. All the seven above-stated requirements are consistent with the grounds set out by the NYC.[62] Bahraini law is closer to the NYC and less restrictive than that of Oman, the UAE and Qatar in that it does not require the award to be enforceable in the seat of arbitration, but only that it be final and binding upon the parties. In that sense, Bahrain's arbitration system is more cooperative in allowing for the enforceability of the foreign arbitral award than the other three mentioned states.

F) Saudi Arabia

The grounds[63] for refusal of the enforcement of an arbitral award, upon court verification, are as follows:

i. The arbitral award contradicts an arbitral award or decision promulgated by a court, committee, or board empowered to settle disputes in Saudi Arabia;
ii. The arbitral award violates Sharia principles and/or Saudi Arabian public policy;
iii. The party against whom the arbitral award is rendered has not been duly notified.

The grounds articulated by the Saudi Arabia Arbitration Law differ from the corresponding laws in other GCC countries in that they explicitly mandate that the arbitral award must be compliant with Sharia to be enforced.[64] To date, Saudi Arabia remains the GCC country with the strictest implementation of Sharia law in its arbitration regulations and with the lowest

[62] El-Ahdab and El-Ahdab, *op. cit.,* 146-147.
[63] Set forth in Article 55, Saudi Arbitration Law of 2012.
[64] J.-P. Harb and A.G. Leventhal, 'The New Saudi Arbitration Law' (Jones Day, 12 September 2012) <http://www.jonesday.com/newsknowledge/publicationdetail.aspx> accessed 20 February 2016.

rate of enforced foreign arbitral awards, principally on the grounds that the award violated Saudi Arabia's public policy.[65] Although Sharia compliance is explicitly mentioned only in the Saudi Arabian arbitration regime, the courts in the other GCC states have been known to impose this same restriction on enforcement cases even without express mention, also under the public policy defence[66]. For instance, in the case of Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi, Lord Asquith acknowledged that since the arbitration was based on Abu Dhabi, an Islamic country, the Islamic law of Shariah should apply. He described the decision made from the law as "purely discretionary form of justice with some assistance from the Koran."[67]

. The fact that Saudi Arabia's commerce has tended to suffer as a result of its restrictive arbitral practices. However, the diminished prospects the country has in light of an overly restrictive arbitration enforcement regime. In 2012, the new Saudi Arbitration Law was issued,[68] apparently to bring Saudi arbitration practices closer to those implemented under International Arbitration regulations.

It must be kept in mind that Saudi Arabia's accession to the New York Convention is made with the reservation of reciprocity, which means that it shall grant enforcement to foreign arbitral awards only when the awards originate from those countries that also allow the enforcement of arbitral awards rendered by Saudi Arabia. This introduces another source of infirmity in the application of the NYC in the Kingdom; as the signatories to the NYC and other international arbitration treaties are deemed to relax restrictions to other member signatories or at least limit grounds for refusal of enforcement to those specified under the convention, the expansion of construction allowed by the 'public policy' defence makes it

[65] Almutawa, *op. cit.*, 171.

[66] A. J. Gemmell, (2006),Commercial Arbitration in the Islamic Middle East, 5 SANTA CLARA J. INT'L L. At 169, 179 see also A.M. Alenezi, (2010), An Analytical Study Of Recognition And Enforcement Of Foreign Arbitral Awards In The GCC States. 2010. University of Stirling. Also see Almutawa, *op. cit.*, 18174

[67] Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi, 1 INT'L & COMP. L. Q. 247, 250–51 (Sept. 1951)

[68] Royal Decree No. M/34, published 8 June 2012 in Saudi Arabia's Official Gazette.

possible for a country to deny enforcement on the contention that their public policy (in this case, Saudi Arabian law) is violated by an apparent violation of the reciprocity principle if other countries refuse the enforcement of some awards issued in Saudi Arabia. However, in the end it should be mentioned that disputes that emanate specifically from the Islamic finance industry are *sui generis*.[69]

Legal experts and scholars argue that harmonisation of international commercial arbitration and Sharia law would be ideal for the resolution of the commercial arbitration process.[70] The national laws on arbitral procedures are supposedly inadequate due to their focus on domestic arbitration. The modification of the UNCITRAL Model law was thought to have brought about uniform standards in the ICA (Investment Company Act, 1940) proceedings. However the model needs to be reformed on the grounds of sovereign uniformity, truncated arbitral tribunals, liability of the arbitrators, and power of an arbitral tribunal to award an interest and also the discretion to enforce awards that have been set aside in the state of origin.[71]

1.7 Finality of arbitral awards in International arbitration and its acceptance under the Sharia Approach

The present section considers the finality of international commercial arbitration, the irreversibility of the arbitral reward and briefly the commonality between international commercial arbitration and commercial arbitration under Sharia regarding finality. It forms the basis of a comparison between Sharia-based and international arbitration. However, before that at first, the general advantages and disadvantages of international commercial

[69] Unique, constituting a class on its own; Oseni and Ahmad, *op. cit.,* 4.
[70] E. Levi-Tawil, 'East Meets West: Introducing Sharia into the Rules Governing International Arbitrations at the BCDR-AAA' *Cardozo J of Conflict Resolution* (2011).
[71] M.B. Ayad, 'Harmonisation of International Arbitration Law and Sharia', vol. 6, 2009, p. 93-94. W. Grais and M. Pellegrini, Corporate Governance in Institutions Offering Islamic, 2006, pp 2-3.

arbitration over traditional court litigation have been considered to understand the reasons behind its growing popularity.

Over the years, international arbitration has become very popular in settling commercial disputes of an international nature. Commercial agents who usually get involved in cross-border commercial transactions mostly prefer to settle commercial disputes through international arbitration instead of general court procedures. Arbitration offers many benefits over traditional court procedures. Commercial agents are busy people to whom time is money; a quick settlement that is only promised in arbitration is more alluring to them than a time-consuming court settlement. Again commercial disputes often seek the verdict of experts and general court procedure does not permit the involved agents to opt for the judges of their choice, who might have the necessary expertise to address unbiasedly and knowingly the issue under discussion. Arbitration in sharp contrast permits the involved parties to choose their preferred judges[72]. In comparison to traditional litigation through courts, arbitration is cheaper as well. Arbitration usually proceeds through the chosen language of the involved parties that facilitates their understanding. Usual court procedure is carried out in the domestic language, which might be beyond the realm of the involved parties, who may be of foreign descent. Traditional court verdicts can easily be challenged and it often becomes a never ending process, moving from one court to another. The verdict coming through arbitration is hard to challenge and almost impossible to vacate, which also favours arbitration over court settlements for commercial disputes. This feature, known as finality of commercial arbitral awards under international arbitration, is one of the main reasons for the popularity of international arbitration awards[73].

[72] M.L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2012) 4-6.
[73] *Ibid*.

Arbitration, however, also has certain disadvantages. Arbitration is advised only in those cases where fewer discoveries are needed; however, in reality arbitration is opted for even where more discoveries are required, such as in anti-trust disputes. In such cases, access to vital documents that are generally under the possession of the offenders are required for a successful arbitral award, but as has become apparent, getting hold of those documents is almost impossible and arbitration fails to provide a satisfactory result to the aggrieved parties in such a situation. Again, arbitrators cannot force the parties involved to honour the arbitral reward in case they are reluctant to do so. In such cases, ultimately court involvement becomes necessary and court litigation takes the course of long proceedings, demeaning the efficiency component of arbitration. Multi-party involvement is also almost impossible under arbitration. Hence, an arbitration tribunal does not have the necessary power to consolidate all the parties involved and cannot declare an arbitral award for similar claims. Another disadvantage of international commercial arbitration is that the experts in nationally diversified arbitrators lack the necessary ethnic and gender diversity. Attempts have been made to address this problem, but nothing significant has been achieved so far[74]. Even after all these disadvantages, finality of the arbitral award seems to be most alluring to both parties, so that international commercial arbitration has been gaining the upper hand in popularity over the years compared to usual court litigation.

Arbitration results are strictly binding and final for both parties and cannot usually be appealed to a higher court. Though this does not mean that arbitral awards are absolute in all circumstances, it definitely points to the fact that the grounds of appeal against an arbitral award are extremely limited. The finality of the international commercial arbitration is strengthened by the fact that an appeal against an arbitral award might be launched in the court of the country where the original decision has taken place, but only regarding

[74] Moses, *op. cit.,* 3-5.

procedural lacuna or if the concerned arbitrators have overstepped their jurisdictional boundaries. Under most arbitration law, the award cannot be challenged on the basis of merit of the concerned award. The losing party might also initiate an appeal against an arbitral reward at the court of the country of enforcement, which might necessarily be the country where the arbitration procedure has originally taken place. However, again the basis of challenge is extremely narrow and similar to appealing at the court of the country of arbitration.[75]

1.8Chapter synthesis

It has been established in past academic literature, as well as being common knowledge in arbitration, that while accession to international arbitration treaties and conventions stresses that foreign arbitral awards are considered as final and must be accorded due course in member countries, this is seldom the case, particularly with Arab Muslim countries. 'Finality of arbitral awards' as espoused in the NYC, may be understood to mean that an arbitral award that is given in one signatory country and sought to be enforced in another signatory country should be immediately enforceable without the need for a judicial review. Such is hardly the case, however, and for good reason. There are grounds whereby the treaties and agreements on international arbitration allow for either the setting aside of the award, or the refusal of enforcement in the enforcing country. The only way by which it may be ascertained that the foreign or non-domestic arbitral award is not impaired under any of these grounds is to conduct a judicial review, albeit one that does not inquire too deeply into the merits of the case, or does not seek to modify the arbitral judgment or award given.

In determining the applicability of these grounds, it is often the case that various jurisdictions would distinguish among different types of arbitral award, i.e. the domestic,

[75] *Ibid*. 2-3.

foreign, international and non-domestic awards. In some countries, such as Saudi Arabia, there is no distinction among types of award, as foreign awards are given the same strict construction and scrutiny as domestic awards. This includes subjecting the foreign award to the test of Sharia principles, ensuring that the arbitration of the dispute and the award does not contravene the strict principles of Islamic law. Should the award violate Sharia, then it is construed to be contrary to public policy, and grounds for refusal of enforcement under international arbitration law.

Thus is the context set for the understanding of how the customary practice of Islamic arbitration law clashes with the spirit of international law, and how there is a need for the conciliation (and if possible unification) of the two if countries whose laws are based on Sharia are to be integrated into the international milieu. For sure, if the two arbitration regimes can bridge the gap between them, then it would facilitate a more robust participation by Arab Muslim nations in global trade and commerce – a mutually beneficial prospect for all parties concerned.

Examining the national sources of law side by side with the contemporary international and regional arbitration regimes provides an idea of where the ancient and modern may be similar and where they differ. Such an understanding informs the discussion in the subsequent chapter where the Islamic and Western systems are juxtaposed, in order to analyse whether they differ on the matter of finality of arbitral awards, and if so, where they differ.

Chapter Two:

Examination and Analysis of Arbitration under International law and Sharia law

2.1 Overview

This chapter lays the groundwork for the discussion of international arbitration, in preparation for the subsequent in-depth discussion of Sharia-based arbitration. In Islamic jurisprudence, the scope of commercial arbitration has both linguistic and legal connotations, which are differentiated from the connotations ascribed to judicial authority, deputation, reconciliation and experience. Before the arrival of Islam in the Arab region, the people living in this area were generally comprised of nomadic tribes that were further grouped into sub-tribes and then into families. This chapter delves into the foundation of arbitration as a Quranic principle and investigates the various components of international conventions in which the principle of international arbitration is rooted. The findings indicate that there is a general drift towards international trade when enacting international arbitration law as opposed to the religious outlook of Islamic arbitration upon which arbitration laws in Islamic countries are based. The chapter establishes arbitration as an important tenet of Sharia law, and displays the influence it has on Muslims. The chapter brings out important features of Islamic law and its sources along with teachings that support the drift towards arbitration as a recognised method of dispute resolution among adherents of Islam, which is a practice dating back to pre-Islam generations. The chapter concludes that Sharia essentially advises a cautious approach to laws that are not based on Islamic values, which is the main basis of the conflict affecting enforcement of arbitral awards awarded through international arbitration. Even in this early period in the region's history, there had already been some form of commercial transactions between tribes in the form of trade and barter of goods and services

in order for the tribes to survive and flourish. Therefore, there had already been some early means of resolving disputes between parties who may have disagreed on the conduct or outcome of certain commercial transactions.

2.2 Arbitration from the general perspective of Islamic Law

2.2.1 Legality of arbitration from the Quran

It is generally acknowledged by scholars that arbitration is recognised by the Quran, although it must be kept in mind that the Quran is not intended as a code of law, and thus does not provide specific instruction on arbitration as a legal process. There are fewer than 500 Quranic verses overall that refer to legal issues, and even in these verses, there are gaps and uncertainties as to the mandatory or permissive nature of its legal injunctions, or whether the commission or omission of such merits any public or private sanctions[76]. For these reasons, it is opined by scholars that the Quran is taken more as a source of guidance upon which people rely to guide their lives, even in those aspects where there are no explicit pronouncements on specific issues.[77] This observation is paradoxical in the sense that the Quran is regarded in some Islamic schools of thought as inviolable literal truth, and not susceptible to interpretation or paraphrasing, a topic will be discussed in this chapter on the development of the concept of arbitration in the Arab region. However, Baamir[78] notes that the existence of gaps in the Quranic injunctions can be considered an advantage in that they make these verses "flexible and suitable for every time and every situation," which this author considers is evidenced by the debate among scholars that takes place as a result of "the differences in the understanding of Sharia texts."[79]

[76] P. Hitti, History of the Arabs (10th edn., Macmillan, 2002), p. 95.
[77] A.Y. Baamir, *Sharia Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing 2013).
[78] *Ibid.*
[79] *Ibid.*

The treatment of arbitration in the Quran falls under two main contexts. Some of the verses in the Quran, according to scholars, regard arbitration as a form of conciliation or 'amiable composition' that is not binding upon the parties; in this sense, the arbitrator's decision does not have the status of a judicial decision, and is neither binding nor final unless both parties accept it. The second set of texts regards arbitration as a dispute settlement with a binding character, which is much more consistent with the modern concept of arbitration. This is traceable to the use of the word 'hokm' in the Quranic verses regarding arbitration; the word 'hokm' means 'judgment' or 'arbitral award,' in juxtaposition with the use of the word 'hakam' meaning 'arbitrator'. In the Quran it is written: "surely, we have revealed to you the Book with the truth, so that you may judge between people according to what Allah has shown you.'[80] In this sense, the use of the word 'hokm' or 'judge' implies that the decision of the 'hakam' or arbitrator is akin to the decision of the judge.[81]

A Quranic verse that instructs the use of arbitration in the matter of personal and family disputes is found in the following:

> *If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her family; if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is ever all-knower, well acquainted with all things.*[82]

Arbitration is resorted to as a recourse after the primary remedies have been attempted and shown to be ineffective. According to Islamic tradition, depending on the jurisdiction where the dispute is sought to be settled, it was the duty of the judge to appoint an arbiter as the usual procedure; however, the words 'eb a'tho' were used in the original Arabic version, indicating that the sense in which 'appoint' was used was more in line with 'order.' The instruction for the judge to 'appoint' the two arbitrators should be taken more as an 'order' by

[80] Quranic verse: an-Nisa 4:105.
[81] Baamir, *op. cit.*, 2013.
[82] Quranic verse: an-Nisa 4:35.

the judge for the arbitrators to be charged with their duties. This adds greater strength to the arbitral award that the arbitrators shall subsequently make.[83]

The foregoing verse has been analysed by Ibn Qudamah,[84] foremost Hanbali ascetic; in his work, the al-Mughni,[85] he cites two principal arguments concerning the mission of the arbitrators and how it may be characterised. The first is that the arbitrators act as agents of the parties involved in the dispute. This is supported by the Quranic verse, since each arbitrator represents one of the parties, and in order for them to assume the mantle of arbitrators they must be accorded the consent by the parties of the dispute, and exercise to some extent the will of the parties (i.e., 'if they both wish for peace'). The second nature of arbitrators is that they are judges, not mere conciliators, because the Quran conveys this in the following verses:

> *Surely, Allah commands you to deliver trust to those entitled to them, and that, when you judge between people, judge with justice. Surely, excellent in the exhortation Allah gives you. Surely, Allah is All-Hearing, All-Seeing.*[86]
>
> *If they come to you, judge between them or turn away from them. If you turn away from them, they can do you no harm. But if you judge, judge between them with justice. Surely, Allah loves those who do justice.*[87]

The aforementioned verses appear to be consistent with the dual nature ascribed by Islamic scholars to arbitration – i.e. it uses the word 'judge' which suggests the mandatory nature of the decision rendered ('Allah commands you to deliver trust to those entitled' and 'when you judge between people, judge with justice'), while at the same time necessitating a volition on

[83] Baamir, *op. cit.*, 2013.
[84] Also known as Imam Mawaffaq ad-Din Abdullah Ibn Ahmad Ibn Qudama al-Maqdisi, the respected Hanbali ascetic, juris-consult and traditional theologian whose writings influenced Islamic thought in the late twelfth to early thirteenth century. He was also called Sheikh al-Islam and is considered one of the greatest Hanbali scholars.
[85] The al-Mughni is the most widely renowned textbook of Hanbali fiqh.
[86] Quranic Verse: an-Nisa 4:58.
[87] Quranic Verse: Al Maeda, 5:42.

the part of the parties and arbitrators ('judge between them or turn away from them. If you turn away from them, they can do you no harm'). The verse allows arbitrators the choice of whether to accept or reject the position, which is consistent with modern arbitration. Judges are not accorded this choice and under Islamic law may not decline jurisdiction over a case assigned to them without a valid reason. Arbitrators, on the other hand, do not have to provide a reason for not accepting the task. Once they accept the position, however, arbitrators are duty-bound to strictly observe the rules of justice and equity; however, they have the right to resign at any time. Likewise, their appointment can be revoked by either party at any time without remuneration.[88]

The impartiality of arbitrators is also established in the Quran, which admonishes that fairness and justice prevail 'even if a near relation is concerned'.[89] The same is contained in the following verse:

> *O you who believe, do not kill game when you are in Ihram (state of consecration for Hajj or 'Umrah'). If someone from among you kills it deliberately, then compensation (will be required) from cattle equal to what one has killed, according to the judgment of two just men from among you.*[90]

Baamir[91] observes that the Quran empowers individuals acting as arbitrators to determine how much compensation may be awarded without the intervention of a judge or other higher authority. The verse thus proves the legality of ad hoc arbitration in the Quran, by entrusting the estimation of just compensation in the form of the arbitral award to the discretion of the arbitrators, without having to submit the same to the court for approval.

[88] Baamir, *op. cit.*, 2013; Mona Rafeeq, 'Rethinking Islamic Law Arbitration Tribunals' *Wisconsin ILJ* (2010).
[89] Quranic Verse: al-An'am, 6:152.
[90] Quranic Verse: Al-Maeda, 5:95.
[91] Baamir, *op. cit.*, 2013.

2.2.2 Legality of arbitration from the Sunna

The Sunna is a collection of the words and actions of the Prophet Muhammad "peace be upon him" – his sayings, the manner by which he conducted himself, the matters he approved or condemned. The Sunna contains the Hadith, which is a direct report of the sayings and teachings of the Prophet. Arbitration is referred to in the Sunna in its description of the administration of justice and in the ideal behaviour of the arbitrators. Saleh[92] enumerated the aspects of arbitration most frequently referenced in the Sunna as the following:

(1) The Prophet "peace be upon him" admonished against unending litigation,[93] particularly "litigation of an oral nature";[94]

(2) The continuing efforts of the Prophet towards conciliation between parties and his concept of an expeditious conciliation procedure was established by him between debtors and creditors. The Prophet was reported to discount the claim of creditors to facilitate a swift settlement, at one time reducing the debt by half in order for it to be repaid immediately;[95]

(3) Whilst the Prophet acted as conciliator, refusal of a party to abide by the ruling he made was met by strict sanctions;[96]

(4) Disputes must be reconciled according to the rules set for in the Quran, and no room is left for adjustment or modification;[97]

(5) It is required that resources should be provided to the Prophet as arbitrator, as a sign of good faith;[98]

(6) The remuneration provided to the arbitrator is permissible and authorised, provided it is not excessive;[99] and

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[92] S. Saleh, *Commercial Arbitration in the Arab Middle East* (Westlaw Lexgulf Thomson Reuters 1984) 4-6. This book was established as the first and most comprehensive authority of the law in this field.
[93] *Ibid.*
[94] Baamir, *op. cit.*, 2013.
[95] Saleh, *op. cit.*, 4-6.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*

(7) The Prophet's "realistic and transcendental view on litigation"[100] which extends by analogy to arbitration, is evident in the following Hadith:

Allah's Prophet "peace be upon him" said, "I am only a human being, and you people (opponents) come to me with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear. So if ever I judge (by error) and give the rights of a brother to his other (brother) then he (the latter) should not take it, for I am giving him only a piece of Fire.[101]

The foregoing Hadith emphasises in part that judges and arbitrators are only human and therefore are prone to committing errors in their appraisal of disputes and the granting of awards. More importantly, however, is the sense of justice present in Islam, and the ethics that transcend the legality in the judicial mechanism.[102]

2.2.3 Legality of arbitration from the Secondary Islamic Sources

After the two principal sources of Islamic teaching – the Quran and the Sunna – there are at least three secondary sources of Islamic teaching on arbitration that are of importance: the Ijma, Qiyas and Ijtihad. These sources are consulted when an issue of Islamic law, such as the subject of dispute and arbitration, is not able to be resolved by the principal sources. The Qiyas involves reasoning by analogy, the Ijtihad includes the intellectual discourses by the mujtahid (legal scholars or juris consults who are qualified for Ijtihad), and Ijma is "the consensus of the community".[103] These secondary sources are the repository of the differing opinions that have been articulated in the course of the development of the different doctrines of the various sects of Islam; they range from the most conservative to the most liberal views.

[100] Baamir *op. cit.*, 2013.
[101] Sahih Bukhari (Sunna), Vol. 9, Book 89; verse 281. See Hadith No. 638, Vol. 3.
[102] Baamir, *op. cit.*, 2013.
[103] A. Al-Rahmani, *Suhl: A Crucial Part of Islamic Arbitration* (Islamic Law and the Law of the Muslim World Research Paper Series, No 08-45. New York Law School) 8.

The sole consideration is that none of them could differ with or contradict the Quran and the Sunna. The secondary sources, together with the two primary sources, provide a rich collection of authoritative opinions upon which Muslims base not only their judicial decisions, but also the conduct of their everyday lives. As previously discussed, the areas of Islamic law that are characterised by strict and well-defined rules are relatively few, and concern mainly religious practices such as fasting and praying. There are hardly any explicit rules governing dispute resolution, and such rules, together with other aspects of social relationships, are guided by general principles that are informed by the secondary sources.[104] Ijma consists of the consensus of the unanimous opinions of the Companions, (i.e., the knowledgeable supporters of the Prophet Muhammad "peace be upon him") after the demise of the Prophet, and augmented periodically by the Ulama (i.e. Muslim jurists and religious scholars) of each era. It is particularly authoritative because it embodies the convergence of opinion of Sharia experts on contemporary issues that need further construction from the primary sources.[105] The Quranic authority for Ijma is identified by the Akaddaf in the following Hadith from the Prophet Muhammad "peace be upon him": "My nation will not agree unanimously in error."[106] The Ulama are consulted on various issues that are not explicitly provided for in the Quran or Sunna; when these scholars arrive at an agreement or consensus regarding the interpretation and resolution of the issue in a manner they believe consistent with the Quran and Sunna, then this consensus is recorded as *ijma* and thereafter forms an integral part of Sharia. The Ijma provides judges with another authority which they may consult to find solutions to problems that have been addressed previously.[107]

[104] *Ibid.*
[105] R.S. Elsaman, 'Factors to Be Considered before Arbitrating in the Arab Middle East: Examples of Religious and Legislative Constraints' *I Com Arb Brief* (2011) 9.
[106] f. Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' *Pace IL Rev* (2001) 18.
[107] T.M. Leonard, *Encyclopedia of the Developing World, Vol 2* (Taylor & Francis Group 2006) 955.

Qiyas, or analogical reasoning derived from the Quran and the Sunna, is developed by defining laws from a known rule and applying them to a new situation.[108] Established rulings may be derived from the Quran or Sunna, and are considered for application to a new problem. In order for analogy to apply, the new problem must share the same cause or *Allah* as the established ruling, or at least the same essential reason. Deductions concerning the new problem can be thereafter formulated, and fatwas (decisions of a religious nature) delivered. The problem may therefore be resolved by issuing the appropriate declaration, i.e. forbidden (haram), permissible (halal), obligatory or encouraged (harus), or not recommended (makruh).[109]

Ijtihad, or independent logical thinking, is resorted to when no other recourse is available under the Quran, Sunna, Ijma and Qiyas. The process of ijtihad is commenced with a consideration of the general purpose of the law, or *maqasid al-Sharia.* The Ijma proceeds from the Ijtihad (i.e., 'interpretation); literally, the Ijtihad signifies "hard striving or strenuousness, but technically it means exercising independent legal reasoning to give answers when the *Qur'an* and *Sunna* are silent."[110] Ijtihad is justified, because Sharia is "a legal system based on principles rather than a code of law, thus it can be developed further by subjecting it to interpretations."[111] From its rank in the hierarchy of Sharia sources, Ijtihad is only permitted when the matter being adjudicated is not within the clear and definitive text, or 'nass' of the Quran and the Sunnah. The Ijtihad, or interpretation, is rendered by the Mujtahidin or jurists who represent the broader community, by virtue of their arriving at an agreement concerning a particular matter. The rule that results from the agreement arrived at by the jurists attains a status of permanency and is included as a definite element in Islamic

[108] Elsaman, *op. cit.,* 9.
[109] G. Pfleiderer, G. Brahier and kK. Lindpaintner (eds.), *GenEthics and Religion* (Basel, S. Karger AG 2010) 130.
[110] D.B. McDonald, *Development of Muslim Theology, Jurisprudence & Constitutional Theory,* Premier Book House, Cited by AA An-Nai'im (1990), *Toward an Islamic Reformation – Civil Liberties, Human Rights, and International Law (*Syracuse University Press) 27.
[111] Elana, *op. cit.,* 617.

jurisprudence. Thus while Ijtihad may be carried out on a matter of law not covered by the Quran or Sunnah, it must not contradict either of them.[112] Though describe Ijtihad as 'independent logical thinking', the process to arrive at ijtihad is considered to be of such importance that Abu Ishaq Al-Shatibi, an Andalusian Sunni Islamic legal scholar who followed the Maliki school and died in 1388, was known to issue a warning that those who fail to consider *maqasid* (goals or purposes) are likely to err in their ijtihad. Three norms underlie the development of ijtihad:

(1) The norm of compelling necessity (*dharuriyyat*) – The norm of dharuriyyat instructs that the maqasid must be protected, such that "in times of conflict the prohibition on an old ruling may be lifted."[113] These are supported by the following Quranic verses: "He has explained to you what He has made haram for you except that to which you are compelled";[114] and "…but if one is compelled by necessity, neither craving [it] nor transgressing, there is no sin on him; indeed God is most Forgiving, Merciful."[115]

(2) The norm of needs or convenience (*hajiyyat*) – The norm of hajiyyat requires lawmakers to exercise flexibility in deriving interpretations from scriptural sources, so that unnecessary difficulty or hardships may be eliminated, and so that the maximum benefit may be realised.

(3) The norm of enhancement, improvements or refinements (*tahsiniyat*). – The third norm, tahsiniyat, encourages actions that individuals may take in order to achieve improvements, so that "humans may seek beauty and comfort in life.[116]

These three norms are subsidiary rules that are formulated to guide the individual's assessment of moral matters underlying the issues considered for judgment. Such norms provide a "practical scheme of Islamic moral philosophy."[117]

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[112] Akaddaf, *op. cit.*, 18.
[113] Pfleiderer, Brahier and Lindpaintner, *op. cit.*, 131.
[114] Quranic Verse: al-An'am 6:119.
[115] Quranic Verse: al-Baqarah 2:172-173.
[116] Pfleiderer, Brahier and Lindpaintner, *op. cit.*, 131.

2.3 Development of Arbitration in the Muslim Countries

2.3.1 The first phase of contemporary commercial arbitration in the Middle East

There are three phases that may be discerned in the development of commercial arbitration in the Muslim Countries at Middle East.[118] The first phase, which began at around the end of the Second World War and lasted until the 1970s, was characterised by Western states' viewpoint that the law of Arab Muslim states was largely undeveloped and inferior for application to international disputes. During that period, Western powers were in the process of consolidating their interests in the Middle East, particularly in negotiating long-term oil concessions with the Arab states. During this period, many of the Arab states were protected territories of the UK, and thus their status as sovereign states became a controversial issue in matters of treaties and concessions. One particular case that proved instructional on this matter is that of Petroleum Development Ltd vs Sheikh of Abu Dhabi.[119] The dispute involved a controversy as to which state controlled the rights to the seabed and subsoil of the submarine area, i.e. "beneath the high seas" in the Arabian Gulf that is contiguous to the territorial waters of Abu Dhabi. Abu Dhabi, a British Protected State, claimed that it had exclusive jurisdiction and control over the said area, while the company, because it was domiciled in the United Kingdom, relied upon "the responsibility and control of the protecting power" as being "operative."[120] A preliminary question that the case settled prior to the subject of dispute was how the concession agreement was to be construed, whether in accordance with Islamic or English law. The construction of the agreement conceded that it was inappropriate that the municipal law of England should be made to apply, because the agreement was made wholly and was to be performed entirely in Abu Dhabi; thus, *prima*

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[117] *Ibid. 130.*
[118] C.N. Brower and J.K. Sharpe, 'International Arbitration and the Islamic World: The Third Phase' *Am JIL* (2003) 643.
[119] The Matter of an Arbitration Between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheikh Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi and its Dependencies (1952), 1 International and Comparative Law Quarterly, 247.
[120] *Ibid.*

facie the law of Abu Dhabi should apply. However, the award penned by Lord Asquith stated that:

> *No body of settled legal principles for the construction of modern commercial instruments existed in the Sheikhdom. Justice was discretionary 'in this very primitive region' and was based on the Quran. Article 17 of the agreement prescribes the application of principles rooted in good sense and common practice of the generality of civilised nations.*[121]

It was subsequently deemed that some of the rules of English municipal law are applicable, given the specific circumstances. From this determination of the law to be applied, it is evident, and not too delicately put forward, that the law of Abu Dhabi was considered inappropriate, despite being the law applicable in the jurisdiction of the dispute and resulting award, because it was not considered to be a "body of settled legal principles" that could apply to modern commercial contracts; that the justice that it imposes is discretionary (i.e., implicitly 'whimsical' or not based on precepts of law), and that it is based on the Quran by a few 'primitive' people.[122] The viewpoint expressed is clearly prejudiced in dismissing a legal framework as primitive and discretionary (in the sense of being 'baseless') because its basis is something other than the Western legal philosophy. Another case that shows evidence of the same prejudice is Qatar v International Marine Oil Co. Ltd. Similar to Petroleum Development v Abu Dhabi, the arbitrator recognised Qatari law to be the proper law of application, but dismissed it saying that the Sharia-based law "does not contain any principles which would be sufficient to interpret this particular contract."[123]

The denigration of the Sharia-based legal systems in Arab countries came to a head with the arbitral decision in the case of Saudi Arabia v ARAMCO.[124] The subject of arbitration was

[121] E.J. Cosford Jr., 'The Continental Shelf and the Abu Dhabi Award.' *McGill LJ* (1953) 115.
[122] *Ibid.*
[123] Ruler of Qatar v International Marine Oil Company Ltd. (1953) 20 ILR 534.
[124] Saudi Arabia v Arabian American Oil Company (1963), 27 ILR 117.

the interpretation of a concession agreement between the Kingdom of Saudi Arabia and the Standard Oil Company of California (later named the Arabian American Oil Company or ARAMCO), made on May 29, 1933. In January 1954, Saudi Arabia struck an agreement with Saudi Arabian Maritime Tankers Ltd (SATCO), a firm owned by A.S. Onassis, wherein SATCO was given a 30-year 'right of priority' to transport Saudi oil. ARAMCO protested this agreement, claiming violation of the provisions in its own agreement with the Saudi Arabian government that purportedly gave the latter exclusive rights to transport the oil extracted from its concession area in Saudi Arabia, a right that Saudi Arabia said was never conferred in their agreement. The arbitration panel ruled against Saudi Arabia, holding that Saudi law needs to be supplemented by the general principles of international law, implying inadequacy, reasoning that ARAMCO's rights cannot be "secured in an unquestionable manner by the law in force in Saudi Arabia."[125]

In retaliation for the perceived arrogance in these arbitration decisions, the Saudi Council of Ministers promulgated Resolution No. 58, which prohibited any participation by any Saudi government agency in arbitration. Hostility and distrust in international arbitration procedures spread beyond Saudi Arabia to other Arab countries implementing Sharia, and to this day the sentiment continues to be shared among peoples in the region.[126]

2.3.2 The second and third phases

The second phase was a period that coincided with the end of colonialism in the Middle East, during which time the countries in the region began to develop a sense of nationalism and experience growing prosperity as a result of the greater benefit they obtained from the nationalisation of their oil exploration industries. The greater wealth that accrued to these countries enhanced their capitalist-based economies, and cultivated in them a greater

[125] *Ibid.*
[126] Kutty, *op. cit.,* 33.

sense of confidence in the legitimacy of their culture, values and legal traditions as bases for arbitration. There was a paradigm shift that allowed for a greater sense of acceptance and of recognition as states of equal standing with those in the West. Kutty[127] cites the Libyan nationalisation cases as being representative of the mood that characterised this phase, described by legal, ideological, and political clashes between developing and developed countries. The Libyan Nationalisation Cases pertain to the nationalisation by the Libyan government of the interests and properties of nine international oil companies that were located within its territory, following the military takeover by Muammar el-Qaddafi.[128] The second phase may be seen as a period where the Arab nations, as well as other developing countries, began to assert themselves on the world stage vis-à-vis the established Western powers.

Presently, the region is undergoing the third phase in the development of commercial arbitration, which is evidenced by a more robust participation by Islamic nations in the international arbitration process.[129] Because of the increasing importance of Arab countries in the global economy, they have evolved more tolerant domestic arbitration laws and become signatories to international arbitration conventions.[130] Progress in the local economies has also precipitated this development, since the region has had to rely on the procurement of its massive construction works from international contractors who insist on arbitration clauses in their contracts. Rather than agree to the alternative recourse to have disputes arbitrated in London or Paris under English or French law, Arab countries saw the wisdom in setting up their own international arbitration centres which comprises a middle ground between

[127] *Ibid.*
[128] R.B. von Mehren and N. Kourides, 'International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Case' *Am JIL* (1981) 476.
[129] C.N. Brower, C.H. Brower II and J.K. Sharpe, 'The Coming Crisis in the Global Adjudication System' *Arb I* (2003) 415.
[130] Kutty, *op. cit.,* 34.

arbitration rules under local law and those under foreign law.[131] As a result, countries in the Middle East have come to increasingly value foreign confidence in their domestic judicial systems.[132]

A major development in this third stage is the establishment of international arbitration centres in the region, the longest-standing and most experienced of which is the Cairo Regional Centre for International Commercial Arbitration, whose thirty-year history makes it a favoured arbitration venue for many cases connected with Egypt and North Africa. Dubai has also built a reputation in this area with the Dubai International Arbitration Centre (DIAC), which attracts the most cases in the Gulf as it is the most modern arbitration centre in the Middle East. Its rules were promulgated as recently as May 2007, and are aligned with other major arbitration centres worldwide. A more recent development is the opening of a joint venture of the Dubai International Financial Centre and the London Court of International Arbitration (DIFC-LCIA). The DIFC-LCIA combines the international expertise of the LCIA with the regional clout of the DIFC. In October 2008, the centre's reputation received a boost with the enactment of the DIFC Arbitration Law 2008, which enables parties from anywhere in the United Arab Emirates and beyond to select the DIFC as the seat of arbitration. The new law also strengthens the arbitration process in stipulating that, unlike other arbitral awards obtained outside of the DIFC, a DIFC award that is ratified by the DIFC Court becomes enforceable without the opportunity for challenge in the Dubai courts.[133]

Presently, despite the huge strides made towards international collaboration during the third phase, there are still challenges in the enforcement of international arbitral awards in the countries of the Middle East, foremost of which are Yemen and Libya since they have not yet

[131] Lexis Nexis, PSL & Mayer Brown Intl LLP (2013) 'Arbitration in the Middle East'.
[132] M. Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East.' *NYIL Rev* (2008) 1.
[133] Lexis Nexis, PSL and Mayer Brown Intl LLP.

acceded to the New York Convention. Even in countries that are already signatories to the convention, however, enforcement is still often declined on the basis of its public policy exemption, if the award contravenes domestic public policy which has a broad and lenient interpretation and allows for a judicial review on the merits. In Saudi Arabia particularly, enforcement of foreign awards on the basis of the New York Convention must also be proven to comply with Sharia law or risk being declined.[134] It is with respect to this challenge that this study seeks to establish the actual extent of dissimilarity between Saudi arbitration law and international arbitration law, which ultimately advises the decision to support amendment of Saudi law to better aid achievement of finality without undue subjection to unnecessary scrutiny based on public policy requirements.

2.4 Multilateral conventions and treaties on arbitration acceded to by Islamic countries

2.4.1 The Arab League Countries Convention (1952)

At the onset, the Arab nations were wary and generally unreceptive to efforts towards the institutionalisation of international arbitration, and instead focused on inter-Arab arbitration.[135] These efforts can be divided into three stages, the first of which is the pursuit of arbitration in the context of judicial co-operation, which paves the way for the enforcement in each member country of arbitral awards made by other member countries.[136] This first agreement is otherwise known as the Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards. It was signed on September 14, 1952, by the Kingdoms of Jordan, Iraq, Saudi Arabia, Egypt and Yemen, and the Republics of Syria and Lebanon.[137]

[134] *Ibid.*
[135] P. Fouchard, E. Gaillard, B. Goldman and J. Savage (1999) *Fouchard Gaillard Goldman on International Arbitration* (Kluwer Law International 1999) 148.
[136] *Ibid.*
[137] Arab International Arbitrators, '1952 – Arab League Convention' (2011) <http://www.aiarbitrators.com/#!blank/c10t5> accessed 19 February 2016.

The Charter of the Arab League mentions arbitration as a means to dispute settlement, but does not specify the conditions and procedure for such arbitration. It nevertheless mandates that the arbitral award be made by majority.[138]

The second stage was fuelled by the increasing interest in inter-Arab investment, which led to the strengthening of the arbitration process as a means by which investment-related disputes were resolved. The efforts in this direction culminated in the Convention of the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of Other Arab States, which was signed on June 10, 1974, and which came into force on August 20, 1976. This 1974 Convention was modelled after the Washington Convention of 1965, discussed later in this section, and was complemented by two other treaties that were signed in Kuwait City in 1971 and in Amman in 1980. The Convention and two treaties strengthened the arbitration system in a manner that promoted investments and provided for a more systematic resolution of disputes.[139]

2.4.2 The New York Convention (1958)

The New York Convention (hereafter NYC) is also referred to as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. This Convention became effective and enforceable on June 7, 1959.[140] The NYC plays a vital role in the recognition and enforcement of cross-border awards. It consists of 149 signatory states, which is an indication of the wide acceptability and application of its provisions.[141] Its goal is to provide a set of common legislative standards to facilitate the recognition of arbitration agreements and recognition and enforcement of foreign and non-domestic arbitral awards by the domestic court. The classification of an award as 'non-domestic' is borne by some foreign

[138] El-Ahdab and El-Ahdab, *op. cit.*, 890.
[139] Fouchard, Gaillard, Goldman and Savage, *op. cit.*, 148.
[140] Article XII, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
[141] A.M. Saleem, 'Finality of Awards: Is It the Key Feature of the New Saudi Arbitration Law That Will Put the Country in the Global Map of Arbitration?' *CEPMLP Annual Rev* (2013).

element in the proceedings, even if the award was made in the state where it was being enforced – for instance, the case where it was agreed by the parties that the procedural laws of another state should be applied in the course of arbitration.[142]

The primary purpose of the NYC is to prevent the non-recognition between foreign and non-domestic arbitral awards by obliging the parties to the arbitration to recognise and enable its enforcement in the jurisdiction of the enforcing country in a manner similar to domestic awards. It has a secondary purpose: that of requiring the courts of the parties involved to deny them recourse to litigation in contravention of their arbitration agreement (i.e. agreement that the dispute be settled by arbitration rather than bringing action in court).[143] The NYC, however, provides for certain limited defences that may preclude the enforcement of the award, provided that the party challenging the award provides proof of any of the following:

(1) The existence of some incapacity of either of the parties under the law applicable to them;

(2) Failure to give proper notice to the party against whom the award is sought, either of the appointment of the arbitrator or of the arbitration proceedings, or any reason for which said party was prevented from presenting his case;

(3) The award was based on differences that were not intended by or were not included within the scope of the submission to arbitration, for as long as such matters were separable from those intended, in which case the part of the award that contains the decisions on matters submitted to arbitration may be enforced;

(4) The composition of the arbitral authority or the arbitral procedure did not comply with or contravened the agreement of the parties, or, failing such agreement, did not comply with the law of the country that was the seat of arbitration;

[142] UNCITRAL: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")'
[143] *Ibid.*

(5) The award has not yet become binding upon the parties, or has been set aside or suspended by the competent authority wherein, or under the law of which, the award was made.

Aside from the foregoing, there are two grounds upon which the award may be refused by the competent authority if such authority deems *motu proprio* that such conditions exist. Enforcement of the award may be refused if:

(1) It is not possible to settle the subject matter of the difference by arbitration under the law of the country where recognition and enforcement are sought; and

(2) The recognition or enforcement of the award runs contrary to the public policy of the country where the award is sought to be enforced.[144]

The last limitation mentioned above has become the subject of much discussion since the most frequently cited reason for the non-recognition or non-enforcement of a foreign (or non-domestic) arbitral award is that it contravenes the public policy of the country where enforcement is sought. The difficulty in this situation is that often, public policy is interpreted quite loosely by the competent authority in the enforcing country, thus when a dim view of foreign arbitral awards is entertained by this authority, 'public policy' is given a broad and subjective construction.[145]

The interpretation of the New York Convention's provisions, as viewed by earlier research with regard to the enforcement of foreign arbitral awards, has been shaped largely by the views and analysis of Western scholars.[146] The same has been said of the ICSID arbitration,[147] which is discussed in the next section.

[144] New York Convention, Article 5.
[145] A.G. Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation and Application* (JurisNet, LLC 2013) 29; K.-Y. Kim and J.P. Bang, *Arbitration Law of Korea: Practice and Procedure* (JurisNet LLC 2012) 313.
[146] Almutawa, *op. cit.*, 2014.
[147] W. Shan, *The Legal Framework of EU-China Investment Relations: A Critical Appraisal* (Hart Publishing 2005).

2.4.3 The Washington Convention (1965)

The Washington Convention, otherwise known as "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States," was developed under the auspices of the International Bank for Reconstruction and Development (i.e. The World Bank). It opened for signing in Washington, D.C., on March 18, 1965. The principal achievement of the Washington convention was the creation of an institutional arbitration mechanism that specifically addressed foreign investment disputes; this institution became known as the International Centre for Settlement of Investment Disputes, or ICSID. The Convention effectively established a system of international arbitration that assured both host countries and foreign investors the expeditious settlement of disputes with "impressive guarantees of impartiality."[148] As of April 18, 2015, 159 states have signed the Convention, and out of this total, 151 have submitted their instruments of ratification, thereby attaining the status of contracting state, at which time the Convention became effective.[149] The specific countries in the Middle East and North Africa (MENA) region, and the date the Convention entered into force in their jurisdiction, are shown in the following table:

Table 1: MENA Countries and ICSID membership status[150]

Country	**ICSID member since**
Algeria	1996
Bahrain	1996
Djibouti	No
Egypt	1972
Iraq	No

[148] Fouchard et al., *op. cit.,* 150.
[149] ICSID 'List of contracting states and other signatories o the convention, as of April 18, 2015 (April 2015) <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>
[150] OECD, 'Policy Brief. Issue 3.' *MENA-OECD Investment Programme: International Investment Agreements Concluded by MENA Countries* (2006) http://www.oecd.org/mena/investment/39992736.pdf.

Country	ICSID member since
Jordan	1972
Kuwait	1979
Lebanon	2003
Libya	No
Morocco	1967
Oman	1995
Palestinian National Authority	No
Qatar	No
Saudi Arabia	1980
Syria	2006
Tunisia	1966
United Arab Emirates	1982
Yemen	2004

ICSID has continued to be perceived generally as a multilateral, autonomous and specialised institution that has been created to support the growth of investments and reduce the risk to foreign investors resulting from their investment exposure in other member countries.[151] This perception is not shared, however, by all countries who have participated in ICSID. A few of the original members, such as Bolivia, Ecuador and Venezuela, withdrew from ICSID – Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012. These developments are indicative of the hostility of an increasing number of Latin American countries towards international arbitration in general, but specifically ICSID arbitration. The hostility germinated out of the multiplication of ICSID claims against these countries, and the international arbitral awards resulting from these cases undertaken under the ICSID framework, ordering them (the Latin American countries) to indemnify foreign investors for

[151] ICSID, 'ICSID and the World Bank Group', *International Centre for Settlement of Investment Disputes* https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/ICSID%20And%20The%20World%20Bank%20Group.aspx> accessed 18 February 2016.

the losses suffered in their jurisdictions.[152] Renunciation results in the termination of all of the renouncing countries' bilateral international treaties (BITs) that contain an ICSID arbitration option.[153] However, exposure to ICSID proceedings will continue to remain while the terminated BITs retain their force due to 'survival clauses' that remain effective up to 20 years after termination. Pending cases at the time of denunciation remain active and are in no way affected by the country's denunciation of the Convention.[154] These repercussions raise many legal questions that complicate the settlement of disputes, but what is clear is that no new claims can be initiated by investors against the renouncing state, which may raise the perceived risk of investment in that country.[155]

The denunciation and withdrawal of Latin American countries mirrors a hostility towards international arbitration that at one point was likewise attributed to the Arab Muslim countries, and which may still exist today for some of them. Moving forward, it is likewise possible that some of the Middle East countries may also opt for this alternative, although this does not seem to be the case at present. Should they follow the same route as Bolivia, Ecuador and Venezuela, if ICSID were not named as the sole arbitral venue, (e.g. most BITs provide additional opportunities to arbitrate under UNCITRAL arbitration rules and ICSIDs additional facility rules), then even after the effectivity of the country's withdrawal from the ICSID, investors from other countries would continue to be able to bring suit against the country for arbitration outside of the jurisdiction of their domestic judicial system.[156]

[152] S. Manciaux, 'Bolivia's withdrawal from ICSID' (*TDM* 2007) <http://www.transnational-dispute-management.com/article.asp?key=1076> accessed 19 February 2016.
[153] H. Smith 'Venezuela follows Bolivia and Ecuador with plans to denounce ICSID Convention' (International Arbitration e-Bulletin 19 January 2012) http://www.herbertsmithfreehills.com/-/media/HS/L-190112-18.pdf>
[154] S. Ripinsky, 'Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve' (Investment Treaty News 13 April 2012) <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.
[155] UNCTAD 2010.
[156] Ripinsky, *op. cit.*, 2012.

2.4.4 The Riyadh Convention (1983)

The Riyadh Arab Agreement on Judicial Cooperation, also known as the Riyadh Convention, was signed into effect by some of the member states of the Arab League on April 6, 1983. The Riyadh Convention repeals the earlier Arab League Convention 1952, with regard to the enforcement of judgments and awards. This latter convention came into force and effect in October 1985, and in its preamble it provides:

The legislative unity between the Arab countries is a national objective that must be met in order to realise global Arab unity. The judicial cooperation between the Arab countries should be cooperation in all judicial fields in such a manner as to enable positive and efficient participation in consolidation of the efforts made in this respect.[157]

The scope of the convention was very broad concerning collaboration and exchanges among the member states, including: an information exchange between the ministries of justice of the Arab states, with regard to legislation, academic treatise and case law;[158] encouragement of visits, conferences and exchanges of judicial personnel;[159] guarantees that their nationals would accede to the courts of the other member states;[160] the possibility for a national of one member State to obtain State-supplied legal assistance in another member State;[161] access to criminal records;[162] publication and notification of judicial and non-judicial documents and papers;[163] rogatory commissions;[164] appearance of witnesses and experts in criminal cases;[165] recognition of judgments pronounced in civil, commercial, administration, and personal

[157] El-Ahdab and El-Ahdab, *op. cit.*, 2011.
[158] Article 1.
[159] Article 2.
[160] Article 3.
[161] Article 4.
[162] Article 5.
[163] Articles 6-13.
[164] Articles 14-21.
[165] Articles 22-24.

status actions;[166] extradition of accused or convicted persons;[167] and execution of sentences.[168]

With regard to arbitration, the judgment creditor may seek enforcement before a competent authority (in Saudi Arabia, the competent authority would be the Board of Grievances) under either of two treaties: the Riyadh Convention or the 1995 Protocol on the Enforcement of Judgments, Letters Rogatory, and Judicial Notices (otherwise referred to as the GCC Protocol). The latter was issued by the Courts of the member states of the Gulf Cooperation Council (GCC), and together with the Riyadh Convention, these treaties apply to judgments rendered in their respective member states.[169] The Riyadh Convention and the GCC Protocol stipulated that court judgment of a signatory state may be enforced in any other signatory state, with the provision that the court rendering the judgment had jurisdiction over the dispute, and that such dispute has reached finality. The mandate to enforce is not absolute, however, as the treaties likewise allow the court where enforcement is sought to refuse to enforce the award if the judgment contradicts Sharia law, the Constitution, or the public order of the jurisdiction where enforcement is being pursued.[170] However, both the Convention and the Protocol also provide that where the judgment is to be executed in the state where the court that rendered the judgment is located, then judgments issued by a court in a member state are enforceable in any of the member states.[171]

Furthermore, Articles 16 through 21 of the Riyadh Convention provide that assistance requested by judicial authorities in member states be extended, such as requests to obtain the testimony of witnesses located in the other member states' jurisdictions. The Convention limits the granting of requests for rogatory commission, allowing refusal of such a request

[166] Articles 25-37.
[167] Articles 38-57.
[168] Articles 58-63.
[169] The GCC members are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. The GCC states comprise the largest group of Riyadh Convention members.
[170] Riyadh Convention, Article 30, and GCC Protocol, Article 2.
[171] Riyadh Convention, Article 31, and GCC Protocol, Article 3.

when: the recipient court lacks competence to implement the request; the request concerns a crime that is considered to be of a 'political nature' by the other contracting party; or when fulfilling the request would prejudice the sovereignty of the other contracting party.[172]

2.4.5 The Amman Convention (1987)

The Amman Convention (1987) is a regional agreement that is modelled on the Washington Convention, and is open to membership by Arab states; it has been signed by Algeria, Djibouti, Iraq, Jordan, Lebanon, Libya, Mauritania, Morocco, Palestine, Sudan, Syria, Tunisia, North Yemen and South Yemen. The Convention, also known as the Arab Convention on Commercial Arbitration 1987, is itself of limited international application and interest because its submissions and pleadings are limited to the Arabic language, and the proceedings it endorses are inaccessible to most parties to international commercial agreements.[173] The Amman Convention created the Arab Centre of Commercial Arbitration, which was arrived at with the participation of its signatories, who have all contributed their respective recommendations during its formulation; the Centre is located in Rabat, Morocco.[174]

The Amman Convention broadly provides for the High Court of each contracting state to exercise jurisdiction to grant the enforcement of arbitral awards, and that such enforcement may only be refused by the courts of the contracting state where enforcement is sought if the award is deemed contrary to the public policy of that contracting state. In any case, an award made by the Centre in Rabat may not be appealed before the judicial authorities of the country where enforcement is sought. According to the provisions of the Convention, there are only three reasons for which awards may be set aside: (1) the arbitral tribunal clearly

[172] Riyadh Convention, Article 17.
[173] M. Jalili, 'Amman Arab Convention on Commercial Arbitration, *JI Arb* (2004) 139; A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell Ltd 2004) 462.
[174] J. Jenkins and S. Stebbings, *International Construction Arbitration Law* (Kluwer Law International 2006), 308.

acted *ultra vires* its powers (i.e., beyond its legal and intended authority); (2) it has been established by a court judgment that there exists a fact that, had it been known earlier, would have substantially altered the arbitral award, in which case the fact shall be construed *contra preferentem* or against the offeror; or (3) there was undue influence on at least one of the arbitrators that could have affected his/their decisions.[175]

2.4.6 The GCC Arbitration Centre

The Cooperation Council for the Arab States of the Gulf, also referred to as the Gulf Cooperation Council (GCC), is an intergovernmental union that unites Arab countries that lie adjacent to the Arabian Gulf. With the exception of Iraq, the other states in this region (namely Bahrain, UAE, Saudi Arabia, Qatar, Oman and Kuwait) are signatories to the GCC political and economic union. These countries have gone a step further in the harmonisation of their arbitration procedures, having enacted the GCC Convention.[176] The GCC Convention binds member states to abide by the judgments issued in courts in any of the Council's members, including execution of the judgments. This provision literally creates a 'judicial federation' that harmonises execution of judgments, overcoming the challenge of non-recognition of arbitration awards made within them. Article 1 of the Convention stipulates that all judgments shall be binding upon member states, without regard to the type of judicial resolution made. However, Article Two of the Convention highlights the circumstances under which such judicial resolutions could be voided. These include failure to properly notify a debtor, violation of provisions of Sharia law, or violation of the state in which enforcement is sought.[177] A judicial decision is also voidable if it violates international conventions and

[175] A.H. El-Ahdab, 'Enforcement of Arbitral Awards in the Arab Countries', Arbitration International 11(2) (1995), **169**–181. 95 VI; Jenkins and Stebbings, *op. cit.*, 308.
[176] A.M. Alenezi, (2010), An Analytical Study Of Recognition And Enforcement Of Foreign Arbitral Awards In The GCC States. 2010. University of Stirling.
[177] Article 2 of the GCC Convention.

protocols that bind a member state. In its current state, the GCC Convention promotes uniformity in implementation of the decisions of judicial bodies within member states; however, by providing member states with the autonomy to individually review soundness of judicial decisions, the Convention opens the issue of finality of arbitration to further scrutiny. Furthermore, finality of arbitration in this region is subject to other international conventions and protocols that bind individual states, partly relegating the GCC's authority to second place after other international conventions. While this approach is healthy for allowing individual states to authoritatively respond to international legal obligations, it does not help in reinforcing the GCC's position against other countries in the bloc or individual states against international conventions on arbitration.

2.4.7 Comparisons among International Conventions

The ICSID and UNCITRAL are both international arbitration conventions that seek to advance the recognition and enforcement of foreign and non-domestic arbitral awards; however, there are marked differences between them. The most important of these differences is with regard to the legal weight of the resulting arbitral award arrived at through each convention. Under ICSID, an award resulting from an arbitration procedure is tantamount to "a final judgment of a court"[178] in all ICSID contracting states, thus the enforcement of the award is self-enabling without the need for any internal judicial procedures. The award is therefore directly executable in the states that have ratified ICSID. On the other hand, under the UNCITRAL Arbitration Rules, arbitral awards do not have the status of a final judgment of court, and therefore their enforcement requires additional domestic court procedures, which makes enforcement under UNCITRAL more cumbersome than enforcement under ICSID. Such enforcement procedures, however, are greatly aided by

[178] ICSID Convention, Article 54(1).

the provisions of the New York Convention that specify only a very narrow range of grounds upon which arbitral awards may be refused recognition and enforcement, and they still enable enforcement in any party that is a member state of the NYC.[179] Not everyone accepts this construction of the ICSID Convention, however; Argentina maintains that claimants who have received ICSID awards against Argentina are still required to apply to an Argentine court for their award to be executed in that country.[180]

2.4.8 Fundamental values of arbitration

Arbitration is founded upon specific values which must be upheld in decision making. Firstly, it is confidential and not public. It acts within a legal framework, with the decision-making power remaining within the hands of the parties to an extent as long as they are not able to come to a joint amicable solution. Arbitration is also based upon voluntariness of the parties. However, once chosen, it will result in a binding outcome and the process cannot be hindered by the free will of the parties. No special qualification except some knowledge of procedural rules is necessary. The reasons and the possibilities for the challenges in arbitration are fixed by law. The result of the end procedure is associated with no dissenting opinion. In the arbitral processes, no appeal is possible with the prevention of any subsequent national court proceedings. The enforceability of arbitration is conducted by local law or by the New York Convention 1958.[181]

Moreover, in the field of international arbitration, there are various sources leading to international commercial arbitration. The practitioners are in the consultation of a diverse regulatory dimension for the purpose of answering questions related to the arbitration of the disputes. The module is highly interconnected with that of international sources such as the

[179] Ripinsky, *op. cit.*, 2012.
[180] *Ibid.*
[181] A. Albekova and R. Carrow, International Arbitration and Mediation. From the Professional's Perspective (Yorkhill Law Publishing 2007) 239-240.

New York Convention of 1958 or the several model laws of the United Nations Commission on International Trade Law (UNCITRAL), such as for example the Model Law on Electronic Commerce and the Model Law on Arbitration. There are also various private sources of arbitration guidelines. It is robustly required that when there any disputes emerge, the practitioner must resort to the adaptation of a careful study of rules associated with the respective institutions.[182]

2.5 Examination and analysis of arbitration in international trade

2.5.1 A general examination of arbitration involving Islamic and international law

The foregoing introduction to the various arbitration conventions and the principles of Sharia-based arbitration raises the question as to how the two may be combined in a manner that enhances the finality and enforceability of arbitral awards. What is clear is that the recognition and enforcement of arbitral awards originating from a foreign seat of arbitration will present no problem if they are seen to be consistent with the laws of the public policy in which such recognition and enforcement are sought. While it is true that the international conventions mandate such recognition and enforceability without requiring that the arbitral award passes through any form of judicial review, the substantive defence of public policy (to be more thoroughly discussed in the next chapter) provides an all-too-convenient loophole by which the country where the award is sought to be enforced may refuse to recognise and enforce the award. The key, therefore, is to explore the possibility of unifying the body of Sharia law and that of international arbitration law, so that both may work together within the same jurisdiction.

At this point, a more careful scrutiny of recent attempts at assimilating Sharia-based arbitration as a distinct legal framework within Western democratic societies shall be

[182] Dispute Settlement in International Trade, Investment <http://unctad.org/en/docs/edmmisc232add20_en.pdf> accessed 12th Sept. 2014.

examined. In Western democracies, ecclesiastical (also known as faith-based) law grounded in Christian principles has long been accepted as a form of civil arbitration, and decisions penned by the court in ecclesiastical trials have been legally binding and enforceable. By the turn of the millennium, Islamic groups, claiming equal rights as those enjoyed by the Judaeo-Christian population, began pushing for the recognition of Sharia as a doctrine of arbitration. These developments were evident in Canada and the United Kingdom, among other developed Western countries. Attempts at the recognition and incorporation of Sharia law on arbitration in the judicial systems of developed Western countries appeared to be gaining acceptance, such as the legal recognition given to Islamic arbitration in 2004 in the province of Ontario, Canada. This recognition was subsequently withdrawn the following year, however, when protests erupted in Canada among Muslim women groups, the liberal Democratic DNP party, and the Jewish and Catholic communities.

"That Canada is the first Western country which considered establishing Sharia-based arbitration as an integrated part of the national judicial system is not surprising, given the country's history of prioritising multiculturalism and racial diversity. Today, Canada is the most multicultural and multi-ethnic society worldwide, and such has exposed members of its society to a variety of cultures and modes of behaviour, enhancing tolerance and acceptance."[183]

In Canada in 2004, the Islamic Institute of Civil Justice publicly announced its use of Sharia in cases involving family arbitration and inheritance. Justification for this move was based on the Canadian Arbitration Act, which allowed for the operation of Beth Din courts for the past century, which ruled over private arbitration processes participated in by Canada's Jewish Orthodox population. The Beth Din courts heard and decided contractual and private cases under ecclesiastical law, the decisions of which were given force and effect by the Canadian

[183] H. Moghissi, *Muslim Diaspora: Gender, Culture and Identity* (Routledge 2007) 29.

justice system, as long as both parties expressed their consent to its terms prior to the resort to arbitration. In the same vein, Catholic canon law also operated in private courts in the resolution of disputes involving familial and private jurisdiction cases.

When the Islamic Institute of Civil Justice proposed the adoption of Sharia law in private arbitration, one of the first groups to express strong resistance were Muslim women. Counter groups of women from the Muslim communities protested against the adoption of Sharia even on matters of family law, claiming that they would be treated in ways that violated the Canadian Charter of Rights. In 2005, Premier Dalton McGuinty, cognisant of the misalignment between the Charter of Rights and the rights of women under Sharia, refused recognition of Sharia arbitration. The necessary consequences of doing so, however, involved the denial of the same right to arbitrate under ecclesiastical laws that Jews, Catholics, and Jehovah's Witnesses were then enjoying. The right was therefore withdrawn from all religious groups, a decision that was applauded by them, since they realised that their continued exercise of such rights would entitle Sharia courts to operate. As a result, although private religious courts were still allowed to operate, their decisions would not be allowed to be registered under the Arbitration Act, and their enforcement could not be backed by the state. Under such conditions, the losing party could not be compelled by the regular courts to abide by the decision of a private arbitration court operating under ecclesiastical law if such losing party disagreed with the decision.[184]

The Canadian episode was the first documented case study where proponents of Sharia law pushed for its recognition as an official framework for arbitration in a Western democratic state. A somewhat different situation has developed in efforts to establish Sharia arbitration courts in England, since the ongoing arbitration thereunder has not been granted the endorsement of the state.

[184] A. William, 'An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England,' *Stanford JI Rel* (2010) 40.

2.6 Chapter synthesis

The second chapter was a review and general examination of the instruments and institutions that comprise the framework for international and regional arbitration, particularly among the Arab Muslim countries. Arbitration from the perspective of Sharia is regarded as not only permissible or tolerable, but is commended as an important mechanism for settling disputes and restoring peace, in disputes involving family members and social relations, as well as disputes of a commercial nature between partners and business relations. The Holy Quran instructs the use of arbitration after the initial direct attempts at bringing about a settlement between the parties of disputes that arise. Aside from the Quran, other sources of Islamic teaching include the Sunna, and the Ijtihad, Ijma and Qyas, as well as the lesser scriptures, all of which uphold arbitration as a favoured form of restoring amicable relationships after a dispute.

The sources of Islamic law and teachings were examined here to obtain a fundamental understanding of the moral basis for the stance of the Muslim faithful with regard to arbitration. What is stressed in this chapter is that legal bases for arbitration existed even prior to the existence of the Western-style arbitration regimes. The general misconception, from the early case law that includes the Saudi-Aramco case,[185] is that arbitration was a modern concept introduced by the European colonisers; in truth, the literature review on the sources of Islamic law in this and the preceding chapter reveals that the concept of alternative dispute resolution by the will of the parties to a dispute has been in existence since before Islamic law.

The chapter also provided a brief scan of the international conventions on arbitration, among which are the New York Convention of 1958, the Washington Convention of 1965, and ICSID and UNCITRAL; the importance of these sources of arbitration law are underscored

[185] Saudi Arabia v Arabian American Oil Company (ARAMCO), ILR 1963

by the fact that most of the Arab Muslim countries are signatories to them, and are therefore bound to abide by them. The regional arbitration conventions, including the Riyadh Convention of 1983, the Amman Convention of 1987, and the GCC Convention of 1987, all represented efforts by countries from within the region to elevate the level of arbitration regulation to enhance the certainty that foreign arbitral awards would be enforced, and to set up transparent and clear guidelines that govern when they should not be enforced. Despite the indicated long history of arbitration in Muslim countries, and despite the commitment to the various conventions to which various Islamic countries are party, there is a broadly cautious approach based on the desire to ensure compliance with Islamic values. This cautious approach is driven by the fact that arbitration, as demonstrated in this chapter, is perceived quite differently in the two contexts (that is, in the Islamic and international spheres).

Chapter Three:

Critical evaluation of differences between International Arbitration Law and Sharia

3.1 Chapter Overview

In the preceding chapter, the matter of the legality of arbitration as it is embodied in Sharia has been discussed briefly, the purpose of which was to trace the development of arbitration law within the Islamic countries of the Middle East. The recognition of arbitration in the teachings of the Prophet Muhammad and the holy scriptures of Islam is part of a continuum in the evolution of alternative dispute resolution processes. At this point, however, it is vital to revisit the sources of Islamic law to gain an understanding of how the application of Islamic principles justifies, at least to its followers, a necessary departure from the practice of international arbitration through knowledge and discussions with other Islamic schools whose interpretations are consistent with international practices. The following discussion tackles the reason for Arab states to insist on Sharia's version of arbitration, particularly on the matter of public policy.

This chapter examines the fundamental similarities and differences between conventional international arbitration and the view of arbitration as seen from the perspective of Sharia-based arbitration. The schools of Islamic thought are introduced and discussed, including the Hanafi, Hanbali, Maliki and Shafi'I along with underpinnings in Islamic teaching. This section is about how all of approaches to arbitration in Sharia and international law manifests itself in specific differences, especially in differences on key issues such as finality, followed by a comparative analysis between Islamic and International Arbitration with regard to the nature and scope of arbitration, the choice of law, the selection of arbitrators, the conduct of the arbitration procedure, and the scope of judicial review and enforcement. The chapter

brings out the key aspects of the Saudi Arabian/Sharia approach that are relevant to the remainder of the thesis, particularly the key elements of the Saudi Arabian/Sharia approach that later form the basis of the differences on the issues of finality and appeals. Through an examination of the various grounds for refusal of enforcement of arbitral awards emanating from international arbitration tribunals, the chapter brings out the major elements of Sharia-based arbitration that affect finality, recognition and enforcement of international arbitral awards as the local mechanisms for award recognition, the enforceability of the award based on states' membership of international conventions, and the existence of clauses allowing different interpretation of awards within such international conventions. Furthermore, the existence of treaties that override the obligation to recognise arbitral awards is established as an important factor in the enforcement of the arbitrators' decisions. These issues surround the place of the award, which is provided for under the Restatement of Foreign Relations Law of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

3.2 Introduction

As mentioned previously, this chapter delves into the differences between international arbitration and Sharia-based arbitration, stretching to why reconciling the two systems remains an illusion. Generally, international covenants institutionalise a core body of principles that all nations are capable of abiding by without encountering serious conflicts with their cultural or religious persuasions, or constituting a threat to their autonomy. As much is enshrined in the following declaration by the International Covenant on Civil and Political Rights, or ICCPR:

> Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as

> race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[186]

The ICCPR also guarantees all individuals the freedom to open observance of their religion or beliefs, limited only by the law to the extent necessary for the protection of "public safety, order, health, or morals, or the fundamental rights and freedoms of others."[187] While the observance of this principle has been integrated into the legal systems of most progressive nations without encountering major clashes between local and international law, the situation has proven to be a greater challenge for countries that abide by a literal interpretation of the holy scriptures of Islam. Law and religion are inseparable in Islam because they are both considered the expression of God's will and justice.[188]

In order to understand why several jurisdictions governed by Sharia law accord a literal interpretation to the Quran, it is important to realise that Muslims do not perceive the Quran as a mere collection of writings. The Quran is believed by the faithful to be the literal words of God, dictated verbatim to the prophet Muhammad "peace be upon him" and kept "in its pristine purity"[189] for the past 1,400 years, from the era of Islam's founder.[190] During all this time "there has not been an iota of change"[191] in the Quran, which is taken to be a true historic record, and it is every Muslim's duty to preserve the Quran and guard it from corruption. To disrespect the Quran in any manner whatsoever is to insult all Muslims.[192]

The Quran is therefore viewed not as a mere theological manual, but carries the direct authority of God himself; as such it cannot therefore be interpreted or modified because such would corrupt the divine utterance entrusted to the Prophet. The significance conveyed by its

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[186] International Covenant on Civil and Political Rights (1966), art 2, 999 UN Treaty Ser 171, 173 (1976).
[187] ICCPR, art. 18(3).
[188] Akaddaf, *op. cit.*, 16.
[189] J. Harnischfeger, *Democratization and Islamic Law: The Sharia Conflict in Nigeria* (Campus Verlag GmbH 2008) 618.
[190] A. Khan, 'The Interaction between Sharia and International Law in Arbitration', *Chicago JIL* (2006) 791.
[191] K. Ahmad, quoted in J. Myers & D.A. Noebel (2015), p. 64.
[192] J. Myers and D.A. Noebel, *Understanding the Times: A Survey of Competing Worldviews* (Summit Ministries 2015) 64.

words thus carries the inviolable mandate as it was literally conveyed, and any deviation from these words is rebellion against God and punishable by the most severe penalty. People may agree or not with this, but in any event it will help to provide further understanding in order to evolve in the Sharia world, especially for those who are concerned with trade in Islamic countries.

Under its literal interpretation, the Quran classifies all people either as believers (Muslims) or non-believers. Those who are non-believers include protected persons called *dhimmis*; Christians and Jews are counted under this classification. There are also unprotected persons who, by definition, enjoy fewer rights than Muslims and *dhimmis* under an Islamic government; they are particularly vulnerable to coercive conversion and other oppressive actions by the state. Traditionally, the *dhimmis* are granted privileges that Muslims enjoy, but they are also likely to be targets of discriminatory practices in a manner that may contravene international law. One such practice is that they are compelled to subsidise the system of religious institutions including mosques and schools run by the state; another is that they are barred from occupying top executive positions in the government.[193]

Aside from these legal principles that distinguish between religious groups, there are also principles in Sharia law that affect only the Muslim community and which may also clash with international law. Islamic countries have taken divergent paths to resolve these contradictions; some have responded by adopting secular law in governing the state, while others have opted to take a purely religious or pluralist legal model. Those that have opted for full-fledged Sharia law are in the minority, while those that prefer the pluralist model are in the majority.[194] The pluralist model refers to the adoption of a dual system of secular and

[193] Khan, *op. cit.*, 795.
[194] A.L. Estin, Embracing Tradition: Pluralism in American Family Law, *Md L Rev* (2004) 549.

religious courts, with religious courts governing family relations and disputes and secular courts litigating business and commercial matters and other affairs.[195]

The place where an international award is given is shown to be a significant factor in the determination of enforceability of arbitral awards in Saudi Arabia. Furthermore, enforcement in Saudi Arabia is complicated by the procedures a party has to follow in order for their award to be recognised. It is mandatory that any award is reviewed by the Board of Grievances, whose major role is to establish whether it is consistent with Sharia law. This procedure automatically undermines the principle of finality since it becomes obvious that even after a final decision has been made by a tribunal, it cannot be implemented before it is reviewed and approved based on specific criteria that are admissible before Sharia law. This compulsory subjection to Sharia law is the major limitation to successful enforcement of internationally given arbitral awards. This chapter further points out that Article 19 of the SAC allows either party to a dispute to challenge an award or any other decision that is issued by the tribunal within 15 days of issuance, which unnecessarily subjects an award to further review or opens the process to manipulation by parties unwilling to commit to the enforcement. At this point, however, it is vital to revisit the thought of Islamic law to gain an understanding of how the application of Islamic principles justify, at least to its followers, a necessary departure from the practice of international arbitration. The following discussion tackles the reason for Arab states insisting on Sharia's version of arbitration, particularly on the matter of public policy. How all of approaches to arbitration in Sharia and international law manifests itself in specific differences, especially in differences on key issues such as finality.

[195] S.S. Faruqi, *The Constitution of a Muslim Majority State: The Example of Malaysia.* A paper presented at the Constitution-making Forum: A Government of Sudan Consultation. Advisory Council for Human Rights, Khartoum, Sudan, 2011.

3.3 Schools of Islamic Thought

While the Prophet Muhammad "peace be upon him" lived, all legal questions were settled without controversy since they were decided by divine revelations sent directly through him. After Muhammad's death, legal questions had to be settled by jurists whose varying opinions gave rise to several schools of thought regarding interpretation of Islamic law.[196] There are various juristic schools and at least four principal schools of interpretation, and their cultural norms and customs differ in each country.[197] The majority of Muslims belong to the juristic school known as Sunni and as such follow one of four legal schools (i.e. Hanafi, Hanbali, Maliki and Shafi'i).[198] In the literature, there are some differences as to the number of recognised Islamic schools of thought.[199]

Common to these taxonomies are the schools of Hanafi, Hanbali, Maliki and Shafi'i, under the Sunni discipline. Hanafi is the most widespread and widely applied school in modern Sharia-based legislation,[200] and is dominant among the Muslim populations of Turkey, Afghanistan, Pakistan, India, China, Bangladesh, Iraq, Albania, the Balkans and the Caucasus,[201] while the family laws of Syria, Egypt and Jordan are based on Hanafi jurisprudence.[202] The Hanafi School was established by Imam al-Nu'man ibn Thabit (Abu Hanifa) who lived from 80H to 150H. This school gained popularity during the Abbasid Empire when Abu Yusuf al-Qadi, a student of Imam Abu Hanifa, ascended as the highest judge and the head of the judiciary department; consequently, he spread his madhhab (school

[196] K. Uhlman, 'Overview of Sharia and Prevalent Customs in Islamic Societies – Divorce and Child Custody' (*ExpertLaw* 2004) <http://www.expertlaw.com/library/family_law/islamic_custody.html> accessed 28 September 2015.
[197] Khan, *op. cit.,* 795.
[198] Uhlman, *op. cit.,* 2004.
[199] M.J. Chirri, 'The Five Schools of Islamic Thought.' (*Shi'a Islam 2015)* <http://www.al-islam.org/inquiries-about-shia-islam-sayyid-moustafa-al-qazwini/five-schools-islamic-thought> accessed 10 September 2015.
[200] D.S. El Alami, *The Marriage Contract in Islamic Law in the Sharia and Personal Status Laws of Egypt and Morocco.* Arab and Islamic Laws Series, 6: BRILL (1992).
[201] J.J. Nasir, *The Islamic Law of Personal Status 2* (2nd Ed), (Graham & Trotman 1990) 6.
[202] Uhlman, *op. cit.,* 2004.

of thought), specifically during the caliphates of al-Mahdi, al-Hadi and al-Rashid.[203] The Hanafi followers are more reliant on reason and logic, and on the opinion of their scholars who apply analogy and equity as sources of law.[204] Much of Hanafi's wide popularity is due to its flexibility.[205]

The second school, the Maliki School, was founded by Imam Malik ibn Anas ibn al-Himayri (AH 93-179/AD 715-795), who lived his entire life in Medina. Malik modelled his theory on the legal practice and consensus of the people of Medina, which he considered to be more representative of the conduct of the Prophet Muhammad. The Maliki theory held that the agreement or consensus of the city-community was valid, and should be regarded with a higher priority than hadith collections. This notion of legal development in the form of agreement and legal practice was a working concept that underscored the importance of arbitration among later generations of jurists.[206]

The last school of Muslim law, the Hanbali, is the juristic school that is officially adhered to in Saudi Arabia and Qatar.[207] Like Hanafi, it is named after its founder, Ahmed Ben Hanbal,[208] also referred to in literature as Ahmad ibn Hanbal al-Shaibani (AH 164-241/AD 780-855) of Baghdad.[209] As a pupil of Imam al-Shafi, Hanbal believed that the only roots of law in Islam were the Quran and the Sunnah; he therefore rejected the idea that human reasoning has a role to play in divine law. For sixteen years he travelled in search of ahadith, memorising 100,000 of them as well as the entire Quran itself. He became known for his most important work, 'Musnad ibn Hanbal,'[210] an immense collection of lectures written by

[203] Chirri, *op. cit.*, 2015.
[204] W.G. Wickersham and B.J. Fishburne (Eds.), *The Current Legal Aspects of Doing Business in The Middle East – Saudi Arabia, Egypt, and Iran* (American Bar Association 1977) 2.
[205] I.M.N. Al-Jubouri, *Islamic Thought: From Mohammed to September 11, 2001* (Xlibris Corporation 2010) 117.
[206] A.I. Kahera, *Reading the Islamic City: Discursive Practices and Legal Judgment* (Lexington Books 2012) 31.
[207] A.-M. Hutchinson and H. Setright, *International Parental Child Abduction (*Family Law 1998) 14.
[208] R.J.A. de Seife, *The Sharia – An Introduction to the Law of Islam* (Austin & Winfield 1994) 36.
[209] Al-Jubouri, *op. cit.*, 122.
[210] 'Al-Musnad' signifies The Collection of Hadith.

his son. What came to be known as the theory of Hanbali is in actuality not a particular religious theory that Hanbal would have developed, but a systematised compilation of his lectures on legal problems. The compilation and systematisation was carried out by his followers of note.[211] The Hanbali School is highly conservative and critical of all unorthodox thinkers; it also rejects the official state dogma that the Quran had been created, and stands by the eternal nature of the Quran.[212]

3.4 *Arbitration in the Pre-Islamic Era*

The philosophical analysis of Muslim Law as embodied in Sharia is broad and complex, but for the purposes of this thesis, Sharia shall be discussed insofar as it influences the Islamic view of arbitration. In the Middle East, arbitration is known as 'takhim,' and is a tradition predating the coming of Islam.[213] During this time, there was not any formal legal system by which the pre-Islamic Arabs (specifically the Arabs of Jahiliya) abided, although an early form of justice system had been in place by which arbitration was used to settle disputes within the tribe. According to the account by Abdul Hamid El-Ahdab,[214] arbitration during this period was only upon the volition of the parties, and awards that resulted were not legally binding. Seemingly consistent with the subsequent position of the Hanafi and Shafi'i schools (see discussion in the next section), the enforceability of the arbitral award depended on the moral authority that the arbitrator was perceived to command. According to these two Islamic schools, since the judge has a superior moral authority to that of the arbitrator, then the enforceability of the decision of the latter cannot preclude a judicial determination. Takhim eventually came to be recognised in the two principal Islamic scriptures – the Quran

[211] Hanbal's more renowned followers who were responsible for creating the Musnad ibn Hanbal were Abu Daud ibn al-Ashath (AH 203-275/AD 817-888) and Abu Bakr al-Khallal (died AH 311/AD 933).
[212] Al-Jubouri, *op. cit.*, 122.
[213] El-Ahdab, *op. cit.*, 11.
[214] S. Mahmassani, 'The Legislative Situation in the Arab Countries: Its Past and Present' In Dal El-Elm Lil Malain (Ed.) 31-32.

and the Sunna – but it is also evident in the 'ijma' (i.e. consensus) as an instrument for the resolution of disputes.[215]

The Islamic view of arbitration is grounded in the pre-Islamic method of dispute resolution that is in turn grounded on self-help. The Arab world had a centuries' long tradition of commerce and world trade; even the wife of the Prophet Muhammad "peace be upon him" was herself a trader, and it was her earnings that enabled the Prophet to concentrate solely on his preaching.[216] In the course of conducting trade negotiations, commercial disputes are bound to arise, in which case the pre-Islamic community would resort to a system of resolving their differences that required the appointment of a 'hakam,' or arbitrator. Gemmell[217] points out that another term, 'qadi,' is also used to refer to an arbitrator, although this term is closer to 'judge,' who is a public official, while 'hakam' is more a private individual. The hakam settled not only trade disagreements, but also disputes involving property, succession or torts. The hakam is any male in the community who is highly reputed to possess virtuous personal qualities, and whose lineage is known for their competence in the settlement of disputes.[218] When a hakam agrees to preside over a dispute, the parties put up a form of security in terms of property or hostages, to signify their commitment to comply with the decision the hakam shall arrive at.[219]

While the decision of the hakam was considered final, it could not be enforced, however, which is the rationale behind putting up the security. The decision became an authoritative statement of what the law should be, pursuant to custom. During Islamic rule, the decisions arrived at by the hakam were entered into the Sunna, which succeeding hakam simultaneously applied and developed. The Sunna eventually became the repository of legal

[215] El-Ahdab, *op. cit.,* 13.
[216] l. Lim, 'Terrorism and Globalization: An International Perspective' *Vanderbilt J Trans L* (2002) 703.
[217] A.J. Gemmell, 'Commercial Arbitration in the Islamic Middle East,' *Santa Clara JIL* (2006) 172.
[218] J.Schacht, *An Introduction to Islamic Law* (Oxford University Press 1982) 7.
[219] *Ibid.* 8.

principles that was sustained by the force of public opinion, and which, to begin with had insisted on the process of arbitration and negotiation.[220]

3.5 Underpinnings in Islamic Teaching

Upon the advent of Islam, the practice of arbitration was continued, inasmuch as it is perceived to be sanctioned by the Quran, particularly with regard to marriage. Kutty[221] points out that in Quran 4:35, when a disagreement arises between a husband and wife, two arbiters shall be appointed, one from each side, who shall work out a conciliation between them according to God's wisdom. The Prophet Muhammad "peace be upon him" has also been known to advise resorting to dispute resolution and himself accepted the decision of arbitrators,[222] such as when he entered into Takhim to settle disagreements with the Banu Qurayza tribe.[223] History also records how disputes were resolved through arbitration among the Muslims, non-Muslims and Jews that resulted in the Treaty of Medina in 622 A.D., the first treaty entered into by a Muslim people.[224]

Another development in the practice of arbitration under Muslim rule is related to the first codification of Sharia, during the Ottoman Empire;[225] the Code became known as the Medjella of Legal Provisions, upon which many Islamic countries relied even after the Empire's collapse from 1908-1922.[226] In the Medjella, importance was given to arbitration to which one whole section was dedicated, but in this document 'arbitration' was treated more as conciliation and compromise.[227] Since its stature falls short of a judicial determination, the arbitration decision was considered as being outside the ambit of the doctrine of *res judicata*

[220] Gemmell, *op. cit.,* 173.
[221] f. Kutty, *The Sharia Law Factor in International Commercial Arbitration,* Berkeley Electronic Press Legal Series, Paper 875 (2006).
[222] F. Kutty, citing S. Mahmassani, 'The Legislative Situation in the Arab Countries: Its Past and Present.' In Dal El-Elm Lil Malain (Ed.) (2006).
[223] Libyan Am. Oil Co. (LIAMCO) v Libyan Arab Republic (1977), 20 ILM, 41 (1981).
[224] El-Ahdab, *op. cit.,* 12.
[225] *Ibid.* 21-22.
[226] *Ibid.*
[227] Gemmell, *op. cit.,* 176.

with sole regard to the arbitral award. That being said, the discussion of arbitration in Medjella is nevertheless an affirmation and recognition of the contractual nature of arbitration by Sharia law, even in the early history of the region.

Under the Medjella, arbitration decisions that were rendered by a panel of arbitrators would be required to be unanimous in order for the parties to adhere to the award resulting from this arbitration. Before the award was made, however, either party was allowed to dismiss an arbitrator. Also, a suit could be filed in court contesting the arbitration award, which the court could void on the grounds that the award was found to be contrary to a previously rendered court judgment. The scope of authority of an arbiter was less than that of a court, and was confined to matters directly related to the dispute before him.[228]

3.6 Comparative Analysis to Approaches of Saudi/Sharia Law and International Arbitration and their impacts on finality and appeal on question of law

3.6.1 Nature of Arbitration under international and Sharia law

Arbitration, as it is understood in the West and embodied in international treaties and conventions, results in a decision that is generally binding,[229] in effect ensuring the finality of arbitration awards. In Islamic law, there is no such presumption and no definite opinion on the issue. Two views are generally held that have a bearing on the schools of Islamic thought. The Hanafi and Shafi'i schools are of the view that arbitration is a mere conciliation, and the powers of the arbitrators are subject to withdrawal by the parties. This is different from a judicial exercise where the judge wields mandatory power over the parties and his pronouncement has the compulsory power of law.[230] This hesitation to accept the finality of the arbitration judgment, however, does not appear to be strictly espoused by the school of

[228] *Ibid.*
[229] G.B. Born, *International Commercial Arbitration: Commentary and Materials (2nd Ed.)* (Kluwer Law International 2001).
[230] A. Alkhamees, 'International Arbitration and Sharia Law: Context, Scope and Intersections' *JI Arb*, 18(3), (2011) 264.

thought, however, and the opinion appears to be just as attributable to concerns by the school's followers that the power of the arbitrators may supersede that of the judge. If arbitral decisions become mandatory and enforceable, this fact may dislodge the authority of the judge, and the arbitration process may assume greater power than the judicial system, giving way to the eventual destabilisation of the state.[231]

While the arbitration process is generally accepted by scholars as recognised by Arab states from pre-Islamic times and within the teachings of Islam, in some Arab countries (e.g. Qatar and the United Arab Emirates), arbitration to this day is still seen as "an exceptional mode of dispute resolution between the parties, based on a departure from the usual modes of litigation along with the guarantees they provide."[232] Its nature is that of "an exceptional mode of dispute resolution and should therefore be expressly agreed upon."[233] Such perceptions have implications when resorting to arbitration in the Middle East, that have a bearing on practical issues with respect to certain countries, where the courts may be sensitive towards the subsequent recognition and enforcement of an arbitral award.[234]

3.6.2 Scope of Arbitration under international and Sharia law

The scope of arbitration defines those subjects that are capable of being arbitrated, and those subjects that are explicitly excluded.[235] According to the New York Convention, the national law of the country determines which issues may be arbitrated and which may not, and that it is permissible for a state to refuse recognition or enforcement of a foreign arbitral award on

[231] Kutty, *op. cit.,*, 56.
[232] Qatar Court of Cassation 87/2010 (65).
[233] Dubai Court of Cassation, Petition No. 51/92.
[234] N. Comair-Obeid, 'Salient Issues in Arbitration from an Arab Middle Eastern Perspective', *The Arbitration Brief* (2014) 62.
[235] Wakim, *op. cit.*, 35.

the grounds that the subject is one that the country's laws do not allow for settlement through arbitration.[236]

The generally accepted notion of arbitration in all four schools of Islamic thought is that the arbitration procedure is valid only in commercial disputes. Other issues are deemed beyond the scope of an arbitration proceeding, such as those that pertain to the "Rights of God"[237] – i.e. criminal issues, guardianship of orphans or incapacitated persons, and similar matters. Such cases must be subject to the determination of an official judge. The exclusion of certain types of dispute is not unique to Sharia; all countries, even in the West, have excluded certain issues from the arbitration process.[238]

In some Muslim countries, the scope of arbitration is more narrowly construed than in others. In Saudi Arabia, for instance, Arbitration Regulation Article 1 declares "that all matters relating to the public order"[239] are not subject to arbitration, and 'public order' is liberally construed in favour of the Sharia interpretation and local custom. Public policy value judgments are made wherever and whenever a contract subject of dispute or the resulting arbitral award appears to transgress Islamic principles. For instance, if a clause in the contract provides for an award in the nature of an interest payment, then this may be construed by the Islamic court to violate the Sharia prohibition against *riba* (interest).[240] There is some room for alternative interpretations, however, depending on the country and the school of Islamic thought adopted. In the case of riba, the general rule is to void awards of commercial rates of interest, but it may allow for compensation for the loss a party incurs for the use of their money.[241] There have also been observations that Sharia is not diametrically opposed to

[236] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), Art. 5, par 2(a).
[237] A. Nashmi, *International Arbitration and Islamic Law*. The Ninth Regular Session of the European Council for Fatwa and Research (2002) 13-15.
[238] Z. Al-Qurashi, 'Arbitration under the Islamic Sharia.' *Oil, Gas & Energy Law Intelligence*, 1(2), http://www.gasandoil.com/.
[239] Saudi Arabian Arbitration Regulation (May 27, 1985 G), 11 Y.B. Com. Arb. 370 (1986), art. 1.
[240] N. Affolder, 'Awarding Compound Interest in International Arbitration.' *Am Rev of Int Arb* (2001) 86.
[241] Akaddaf, *op. cit.*, 1; Khan, *op. cit.*, 791.

international principles of law, particularly arbitration; there are some instances when recognition of Islamic legal theory can reinforce decisions rendered by the International Court of Justice while maintaining consistency with international law, through the use of modernist approaches of interpretation.[242]

3.6.3 Choice of Law: international arbitration and Sharia law

Under the international principles of contract law, the parties to a contract have the freedom to choose the governing law in the contract; this selection becomes the legal framework according to which the arbitration panel should make its decision, in the case that a dispute arises in the course of the fulfilment of the parties' obligations under the contract. This principle is articulated in UNCITRAL, [243] the ICC Arbitration Rules,[244] and the AAA Arbitration Rules.[245] Under Islamic law, the option to select the applicable law is not allowed, and Muslims are obliged to implement the principles of Sharia law in all dispute settlement procedures. There is one narrow exception, however, where Muslims are allowed to subject themselves to a non-Islamic legal system, and that is when the application of Sharia is not feasible (e.g., when one of the parties is non-Muslim, and the parties and the dispute are situated in a foreign country where the prevailing legal system is not Islamic).[246] All the same, Muslim scholars have urged that Muslims who reside in predominantly non-Islamic jurisdictions be allowed the freedom to select Sharia law as the applicable law in the settlement of disputes.[247]

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[242] C.B. Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis,' *Ch JIL* (2007) 85.
[243] United Nations Commission on International Trade Law (UNCITRAL) Model Law, June 21, 1985, Article 28, as amended in 2006.
[244] International Chamber of Commerce (ICC) Rules of Arbitration (1998), Article 17.
[245] American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures, as amended effective October 1, 2013, R-11, at 15.
[246] Alkhamees, *op. cit.*, 259.
[247] Khan, *op. cit.*, 791.

In those disputes, however, that are located in countries where Islamic law is applied, the freedom to choose the law that may apply in a contract does not exist, since Quranic teachings do not allow for the recognition of any law except for Sharia, according to *fiqh* rules.[248] In contemporary arbitration practices, there are two approaches generally employed with regard to the choice of law: either the State remains steadfast in its application of Sharia requirements with regard to arbitration, or applies a version of arbitration law that merges Sharia and secular principles. The choice is dependent on the Islamic school of thought by which the particular state abides in its legal system.[249] For the Hanafi and Maliki schools, for instance, Sharia is adhered to in both its procedural and substantive rules. Under the Maliki system, when both parties to arbitration are Maliki, the application of the Maliki doctrine becomes mandatory.[250] For the Shafi'i and Hanbali schools, there is hardly any teaching on the matter of applicable law or choice of law.[251]

There are several Islamic countries whose stance on the choice of law for arbitration mirrors that of the West. Jordan, Kuwait and Yemen, for instance, compel the arbitrators to apply the law that the parties have agreed on between themselves. This is because the civil law in these two countries are based on Ottoman law, the Arbitration Act[252] of which is patterned after English arbitration law.[253] Kuwaiti law, however, has also been influenced in part by Egyptian jurists after it acquired independence. Yemen, reputedly one of the more conservative Islamic countries, nevertheless has an arbitration act[254] that is closer to international law and allows arbitrators to use the law that the parties have agreed upon or contains a rule which helps selecting the applicable law.

[248] Wakim, *op. cit.,* 38.
[249] Gemmell, *op. cit.,* 181.
[250] Saleh, *op. cit.,* 55.
[251] *Ibid.* 56-57.
[252] Act No. 13/62 (Official Gazette No. 1603 of 1 March, 62).
[253] El-Ahdab and El-Ahdab, *op. cit.,* 249 (Jordan), 305 (Kuwait) and 831 (Yemen).
[254] Act No. 33/1981 (Official Gazette No. 12 of Dec. 1981).

3.6.4 Selection of Arbitrators under international arbitration law and Sharia law

In general, the classical interpretation of Sharia restricts the appointment of arbitrators to the same qualifications as those of judges, that is, arbitrators can only be Muslim and male: "A judge has to be the age of majority, wise, free, Muslim and capable of being a witness."[255] Such is observed by countries such as Saudi Arabia and Oman where Sharia is strictly interpreted. However, in other countries such as the UAE, although the arbitration laws give emphasis to Sharia principles, there are no requirements for arbitrators to be male or Muslim.[256]

Under international commercial arbitration conventions, the restrictions according to gender and religion are obviously untenable; they directly violate the norms on international human rights. The strict adherence of Islamic law to these restrictions therefore raises concerns about the possibility of unifying Sharia-based arbitration and international commercial arbitration. The imposition of the standards of international law from institutions external to Islamic countries would understandably be viewed as an intrusion into their Muslim way of life, thus initiatives for reform must emanate from within the countries themselves.[257]

In Saudi Arabia, arbitrators are required to be legally competent, of good reputation and model conduct, and must hold a university degree in Sharia law or legal sciences.[258] In practice, it is best for the chairman of the arbitration tribunal to be Muslim; or, if a sole arbitrator presides, then he must be a Muslim male.[259] He must have competent knowledge of Sharia law, as well as the laws, regulations, customs and traditions of the country (Saudi Arabia). Only Saudi nationals may represent the parties, including foreigners, in a court of law or before quasi-judicial committees; however, the same is not required in arbitration

[255] Kutty, *op. cit.,* 55.
[256] *Ibid.*
[257] *Ibid.* 56.
[258] J.-B. Zegers and O. Elzorkany, *Arbitration Guide, IBA Arbitration Committee: Saudi Arabia* (International Bar Association 2014) 10.
[259] El-Ahdab, *op. cit.,* 39.

procedures in Saudi Arabia, thus the arbitrator must be a Muslim, but he does not have to be Saudi. What is important is that arbitrators must be impartial and independent with respect to either of the parties.[260] Doctrine requires that the party in whose favour the arbitral award is rendered must not be the arbitrator's spouse, child or parent. If such is the situation, the arbitrator may not execute his arbitration duties if the award favours his relatives; however, if the award is in favour of the opposing party, then the arbitrator may execute his duties in this regard.[261]

Certain scholars in Sharia law assert that there is an exception to the requirement that the arbitrator must be Muslim. When the seat of arbitration is a non-Islamic country, parties to the arbitration who are Muslims residing therein may choose a non-Muslim arbitrator. This opinion is based on an analogy drawn from the Quran,[262] insofar as it authorises a dying person to have two Muslims as witnesses, or two non-Muslims if such person resides in a non-Muslim country. Such Quranic exception is based on urgency or necessity, and therefore this same principle may be extended to arbitration in a non-Islamic country under similar circumstances.[263]

The arbitrator has a lower position to that of a judge under Sharia, therefore, according to the Medjella, the authority of the arbitrator may be challenged at any time before the arbitral award is issued. However, all schools of Islamic doctrine are unanimous in instructing that an arbitrator may not be dismissed once his appointment is confirmed by the judge and granted a delegation power. The arbitrator is then deemed to be bestowed with the capacity of the judge's representative, acquiring thereby his (the judge's) power and position.[264]

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[260] Zegers and Elzorkany, *op. cit.,* 10-11.
[261] El-Ahdab, *op. cit.,* 39.
[262] O. El-Kadi, *L'Arbitrage International entre le Droit Musulman et le Droit Français et Égyptien,* Doctoral Thesis, Paris, cited in J. El-Ahdab (2011) *Arbitration with the Arab Countries* (Kluwer Law International 1984) 39.
[263] El-Ahdab, *op. cit.,* 39.
[264] *Ibid.*

3.6.5 Arbitration Procedure

There does not appear to be a specific procedure for arbitration in Islamic jurisprudence, although there are some general observations that may be made concerning the conduct of arbitration processes in Islamic forums. One tenet is that the arbitration panel is not allowed to declare its decision prior to hearing all the parties concerned, who in turn shall be given equal opportunity to present their evidence.[265]

Traditionally, an arbitration hearing under Islamic law involves three stages. The first involves the presentation of the case by the claimant, at which he/they lay the bases for their claim in detail. This is done through both oral and written representations. The second stage consists of the respondent providing his/their answer to the allegations made by the claimant in the first stage, which he may acknowledge (Iqrar) or reject (Nokoul). At this point, the claimant is mandated to present his/their evidence (Baiyenah) in support of his/their claim. After this comes the final stage, which takes place when the claimant cannot present sufficient evidence; the panel, may, upon the request of the parties, ask the defendant to swear an oath (Yameen). If the respondent swears that the allegations made by the claimant are ill-founded, then the case shall be discharged. If, on the other hand, the respondent refuses to take the oath, then the award will be made in favour of the claimant.[266] These practices are handed down by tradition, but are not mandatory as there is no rule in Islamic jurisprudence that prescribes a specific procedure. Islamic teaching does not forbid the adoption of international commercial arbitration procedures. It does require, however, that the procedures to be adopted must ensure that justice is obtained for all parties, and that the procedures do not conflict with the fundamental teachings of Islam.[267]

[265] A. Baamir and I. Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' *Arbitration International* (2009) 258.
[266] Baamir and Bantekas, *op. cit.,* 258; Alkhamees, *op. cit.,* 260.
[267] Alkhamees, *op. cit.,* 261.

There are specific exigencies particular to Arab countries regarding arbitral procedures,[268] and as a result there are particular implications pertaining to the practice of arbitration among the Islamic countries themselves. In some jurisdictions, authorities give cognisance to the principle of the separability of the arbitration clause; these jurisdictions include Bahrain,[269] Dubai,[270] Egypt,[271] Jordan,[272] Kuwait,[273] Lebanon,[274] Qatar,[275] and Syria.[276] In these jurisdictions, it is required that any potential signatory to an arbitration agreement must possess a Special Power of Attorney (SPA), duly notarised, that explicitly entitles him the right to consent to an arbitration clause.[277] The SPA explicitly conveys upon its holder the authority to "dispose of, settle, or renounce"[278] the right being disputed in the arbitration process.[279] Absence of compliance with this requirement is sufficient to subject the arbitral award to annulment.[280]

As part of these exigencies, the arbitration procedures may be specifically prescribed for Islamic states within their own jurisdiction. In Saudi Arabia, for instance, there is a mandatory procedure that the arbitration tribunal must observe. Firstly, the Saudi Arbitration Regulation[281] provides that the hearing should be conducted in public, unless otherwise deemed by the arbitral panel. If it chooses, the panel may accept a request from one or both parties to hold the hearing in private. Requiring a public hearing was contemplated to increase the independence and transparency of the arbitral tribunal, although doing so

[268] Comair-Obeid, *op. cit.*, 62.
[269] Bahraini Civil and Commercial Procedure Act, Article 43.
[270] Code of Civil Procedure, Law No. 11 of 1992, Article 203(4), United Arab Emirates.
[271] Civil Code, Law No. 131 of 1948, *Al Jarida Al-Rasmiyya*, 29 July 1948, Article 702, Egypt.
[272] Civil Code, Law No. 43 of 1975, 1 Jan. 1977, Article 838, Jordan.
[273] Civil Code Article 702, Kuwait.
[274] Code of Civil Procedure, Decree Law 90 of 16 Sept. 1983, Article 381, Lebanon.
[275] Code of Civil and Commercial Procedures, Law No. 13 of 1990, Article 721, Qatar.
[276] Civil Code, Law No. 84 of 1949, 18 May 1949, Article 668, Syria.
[277] Dubai Court of Cassation, Decision No. 191/2009 dated 13 Sept. 2009.
[278] Comair-Obeid, *op. cit.*, 64.
[279] Article 203(4) and Article 58(2) of the UAE Code of Civil Procedure; Article 190 of the Qatari Commercial and Civil Procedure Code.
[280] Comair-Obeid, *op. cit.*, 63-64.
[281] Saudi Arabian Arbitration Regulation (May 27, 1985 G) Year Book Commercial Arbitration, 370 1986 Article 20.

sacrifices the confidentiality of the arbitration process, which is the reason why some parties resort to arbitration in the first place. In practice, it is more likely that persons without any relation to the case will not be welcome to attend. Thus, while the regulations require public hearings as a general rule, it is more likely that arbitration hearings are in reality held in private. In fact, during the Fifth International Conference of the Arab Union for International Arbitration, confidentiality was identified as the main advantage for resorting to arbitration as the dispute settlement method of choice in Saudi Arabia.[282]

Another aspect relating to practice is the provision in the Regulation that Arabic is the only official language to be used in arbitration procedures. This means that all written and oral arguments must be couched in Arabic, and all parties who cannot speak Arabic will have to avail of the services of an interpreter. Moreover, contracts where one of the parties is Saudi and which are written in English will require an Arabic translation to be attached, and the Arabic translation shall be the basis relied upon by the court in the course of the arbitration procedure. It is incumbent upon foreign lawyers to examine the Arabic draft to make sure of the accuracy of the translation from the English version.[283]

Finally, according to the same Saudi Arbitration Regulation, before the arbitration can even take place, the agreement to submit to an arbitration procedure must first be submitted for approval to the competent authority. This authority must arrive at a decision within fifteen days after the application is received.[284] Failure to submit the arbitration agreement to the proper court for approval may be cause for the invalidation of the arbitral award.[285] A further requirement in the application for approval is a statement to the effect that the arbitration shall be performed pursuant to the arbitration regulations of Saudi Arabia. Without this, or

[282] Alkhamees, *op. cit.,* 261.
[283] Y. Al-Samaan, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia', *Arab Law Quarterly* (1994), 231.
[284] Saudi Arabian Arbitration Regulation (May 27, 1985 G) Year Book Commercial Arbitration, 370 1986 Article 7.
[285] Baamir and Bantekas, *op. cit.,* 243.

where it is stated to the contrary, the Saudi Ministry of Commerce shall decline to register the arbitration agreement. Such was true of a case involving a contract of joint companies established by foreign and Saudi parties, which stipulated that the arbitration would be held under other laws.[286]

3.7 Comparing Approaches to finality under Scope of judicial review and enforcement

On its own, an arbitral award does not have the force of law and therefore cannot be self-enforcing, in which case a method recognised under the national law is necessary to compel enforcement of the award.[287] Particularly in the case when the seat of arbitration is foreign and the award created by a foreign person or body, the principle of international private law would require a pronouncement by a local authority that the award is consistent with domestic laws. Prior to the existence of the New York Convention, the losing parties to an arbitration procedure for which an award had been given generally submitted the award for adjudication before the domestic courts, to confirm the award in order for it to be deemed final.[288] It was only after the declaration of finality of the award that its enforcement could be requested. This rather tedious procedure typically and unduly delayed the award's execution, to the extent that the losing party would tend to benefit from abuse of the process by indefinitely putting off compliance, to the detriment of the party seeking restitution. Resort to the domestic courts for a proclamation of finality and for enforcement defeats the purpose of the arbitration as a more expeditious form of dispute settlement. Thus, the main purpose of the New York Convention and one of the principal improvements that it sought to establish was the elimination of the need for a judicial review to declare finality and enforcement. The

[286] Al-Samaan, *op. cit.*, 225.
[287] K.T. Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non Domestic Arbitral Awards?' *Fordham ILJ* (1994) 928.
[288] W.M Reisman and W.L. Craig, *International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes* (The Foundation Press, Inc. 1997) 1286.

Convention mandated all signatory countries to consider final and enforceable all international arbitral awards from other signatory countries.[289]

While the New York Convention required member states to enforce arbitral awards without resort to judicial review, it had however allowed for certain defences against the recognition and enforcement of the award in the country where enforcement is sought.[290] It allowed for seven grounds, the first five being procedural defences, as follows:

(1) The parties to the agreement lack the legal capacity, or the agreement is invalid under the law in effect, or under the law of the country where the award was made;

(2) The party against whom the award is sought to be enforced was not properly notified that an arbitrator was appointed, or arbitration proceedings were held without notice to him, and he was not able to present his case;

(3) The award is in consideration of a matter that does not fall within the terms of the submission to arbitration, or the decision contained therein is outside of the scope of the submission to arbitration when such decision is separable;

(4) The composition of the arbitration panel or the arbitration procedure itself violated the agreement of the parties, or was not in accordance with the law of the country that is the seat of arbitration;

(5) The award has not yet become binding upon the parties, or has been set aside or suspended by the proper authority in the country or under the law in which the award was made.

Under the foregoing five defences, the basis for refusal of recognition and enforcement of the award is the lack of a fair opportunity for the aggrieved party to be heard.[291] Under these

[289] B. Hendizadeh, *International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award* (Masters Dissertation, Queen's University 2012) 17.
[290] New York Convention (1958), Article V.
[291] M. Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England.' *Arizona JI Comp L* (2005) 762.

defences, the recognition and enforcement of the award may be refused only at the request of the party against whom the award is made, and if that party provides proof to the competent authority of the existence of the above circumstances. On the other hand, either party may invoke the following two defences (i.e., the substantive defences), or the competent authority in the country where the award is sought to be enforced may *sua sponte* refuse to recognise and enforce the award if it finds that:

(6) The subject matter is not able to be settled by arbitration under the law of that country;

(7) The recognition or enforcement of the award would be contrary to the public policy of that country.[292]

By mandating the enforceability of arbitral awards in general but allowing for five procedural and two substantive defences, the New York Convention effectively shifted the burden of proof to the defending party – i.e., that the losing party should provide evidence that the arbitral award is not valid – while the presumption is for validity and enforceability.[293] It may also be said that, in determining the applicability of any of the preceding seven defences, it will be necessary for the arbitral award to be subjected to a limited judicial review, from the point of view of the international arbitration conventions. On the other hand, the opportunity for a limited judicial review for whatever reason also opens the door for such a review to determine whether the Award is consistent with the principles of Islamic law, in the situation where the award is sought to be enforced in a Sharia-based jurisdiction. Even then, the merits of the dispute cannot be reviewed, as it is in international arbitration. It is limited to the scrutiny of specific aspects, including ascertaining that the arbitration agreement is valid, and whether or not the judgment is within the scope of the agreement. There can be no determination of substantive matters (e.g. the specific view of jurisprudence applied by the

[292] New York Convention (1958), Article V.
[293] Lu, *op. cit.*, 770.

arbitrator) on which a ruling of non-enforcement can be justified, other than those covered by the two substantive defences mentioned above.[294]

An example of a case where the subject matter was found to be incapable of arbitration is that of Libyan American Oil.[295] In this instance, the U.S. court refused to enforce the award because the subject matter of the dispute – whether or not Libya's nationalisation of Libyan American Oil's petroleum rights was valid – is not a matter that was arbitrable, because under U.S. standards such a dispute was a violation of the Act of State Doctrine.[296] This case exemplified how the enforceability of an arbitral award may turn on the local standards of arbitrability of the enforcing state.[297] The remedy would therefore be for the winning party to forum shop to find a country where arbitration of such a dispute is allowed by law.[298]

The defence of public policy may be invoked by the losing party, the country where the award was given, or the country where the award is sought to be enforced. Public policy may apply at three levels – domestic, international, and transnational.[299] At the domestic level, only one country is involved in the arbitration, and the laws and standards that comprise the public policy of that lone country apply.[300]

The nature or classification of the arbitral award in the enforcing state affects its recognition and the degree to which it may be enforced. In a survey conducted by Almutawa,[301] participants from the six GCC states were polled concerning the degree of satisfaction they experienced with regard to the manner in which their countries distinguished among domestic, foreign and international arbitral awards in relation to their obligations under the

[294] Al-Qurashi, *op. cit.*, 3.
[295] Libyan American Oil Company v Socialist People's Libyan Arab Jamabirya, 482 F. Supp. 1175, 1179 (D.D.C. 1980), vacated without opinion, 684 F.2d 1032 (D.C. Cir. 1981).
[296] E.M. Senger-Weiss (2006) 'Enforcing Foreign Arbitration Awards, *Handbook on International Arbitration and ADR/ American Arbitration Association*, Thomas E. Carbonneau, (exec. ed.),, Huntington NY: JurisNet pp. 157-175.
[297] Leonard v. Quigley (1961) 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards.' *Yale LJ* (1961) 1070.
[298] *Ibid.*
[299] Lu, *op. cit.*, 749.
[300] M.A. Buchanan (1988) 'Public Policy and International Commercial Arbitration' *Am Bus LJ* (1988) 513.
[301] Almutawa, *op. cit.*, 18.

New York Convention and the ICSID convention as signatory states. The survey participants were most satisfied with how their respective states defined domestic arbitral awards (rated at 80.9% satisfaction); they were less satisfied with their countries' definition of foreign arbitral awards (70.6% satisfaction rating), and least satisfied with the definition of international arbitral awards by their country (61.6% satisfaction rating).[302] Presently the GCC states have different interpretations of these arbitral awards. The findings of the survey suggested that the GCC states would benefit greatly from a uniform set of definitions of these arbitral awards.

According to Almutawa,[303] there are indeed manifest weaknesses in the arbitral enforcement mechanisms within the GCC states, although contrary to the popular misconception among Western scholars, such does not spring from the countries' reliance on Sharia law. The same weaknesses are apparently evident among non-Islamic countries regarding the enforcement of foreign arbitral awards. Among these is the lack of an international consensus on the enforceability of a foreign arbitral award that has been earlier set aside, 'overt judicial activism,' and protectionist attitudes of the state against foreign arbitral awards that are seen to be interventionist.[304]

3.8 Finality of Arbitral Awards under Sharia Law Approach

3.8.1 Conceptual foundations of arbitration in Islam

The general premise is that Islam recognises arbitration as a valid alternative dispute resolution procedure.[305] The discrepancy in outlook, however, lies in the manner in which arbitration is practised, and the perspective of the particular interpretation of Islam that is adopted. The principles according by which some Islamic schools abide are incompatible with the practices of international arbitration; however, there are other Islamic schools whose

[302] *Ibid.* 28.
[303] *Ibid.*
[304] *Ibid.*
[305] Alkhamees, *op. cit.*, 255.

interpretations are consistent with international practices, which are permissible for Muslims to follow or adopt.[306] For instance, when applying Sharia to determine who qualifies as a jurist/arbitrator, the response is that the individual is essentially 'male'. Even without going further on this finding, it is clear that international law does not allow discrimination on grounds of sex among other factors.

Arbitration as a contemporary legal system for settling international disputes was introduced relatively recently in the Islamic world, and mostly dealt with oil disputes.[307] For many years and in some cases until today, countries in the Arab region that operate under Islamic rule have not fully developed a legal system implementing arbitration, leaving the general impression that the courts in Islamic countries 'too often have impermissibly interfered with international arbitration cases.'[308] Many different cultural, political, and geographical factors have constituted the foundation of the Islamic legal system, and pure knowledge of the law does not suffice to understand the Islamic jurisdictional system.[309]

While international arbitration as a contemporary legal system is relatively new to Arab nations, arbitration per se in the Islamic world dates back to 622 A.D. when the Prophet Mohammad "peace be upon him" created the first important arbitral treaty that applied to the settlement of disputes between Muslims, non-Muslim Arabs, and Jews.[310] Arbitration then was widely practised, but it was based on a completely different set of legal precepts that differs from that relied upon by Western arbitration processes.[311]

In contemporary international business, Arab countries governed by Sharia law have come to play an important role and interact more frequently in business dealings with the developed countries of the West as well as the rest of the world. Since banking institutions

[306] *Ibid.* 255.
[307] Brower and Sharpe, *op. cit.*, 643.
[308] *Ibid.* 643.
[309] Gemmell, *op. cit.,* 169.
[310] El-Ahdab, *op. cit.,* 13.
[311] Hendizadeh, *op. cit.,* 34.

are the principal conduit of payments and remittances in international transactions, a good number of disputes involve financial contracts. Jarrar[312] called the finality of arbitration arbitrary, and the principle that the results of arbitration are binding and final a myth. This is not to say, however, that the teachings of Sharia are directly contradictory to the recognition and enforcement of arbitral awards. It is actually to the greater interest of Islamic countries that issue Sukuk bonds to streamline arbitration proceedings to reduce the perceived risks investors assume when investing in these Sharia-based financial instruments. Arbitration is invaluable for the average investor to pursue claims in any dispute, including Islamic finance, because arbitration is usually less costly and therefore favourable to individual investors. Added to these is the absence of uniformity among remedies and the complexities of navigating conflicts of law issues makes litigation an unfavourable means of obtaining relief. Therefore, it is to the advantage of Islamic financial institutions, in particular, and Islamic business in general to enhance systematic procedures that affirm and enforce arbitral awards, both domestic and international.

3.8.2 Conventions influencing the enforcement of arbitral awards in Islamic member states

As of May, 2015, 153 out of a total of 193 UN member states, as well as 3 non-UN entities (Cook Islands, the Holy See, Palestine), had adopted the New York Convention of 1958, among whom are all the major players in the Sukuk bonds market, namely Malaysia (1985), Bahrain (1988), Qatar (2003) and the UAE (2006). This is because Sukuk issuances have come to be accepted globally, and its compliance with arbitration is most useful in the resolution of international disputes arising out of the terms of the Sukuk contracts. Increasingly, the Gulf states have over the years acceded to the Convention, including Kuwait

[312] K. Jarrar, *Enforcing Arbitral Awards in Islamic Finance Contracts* (Los Angeles County Bar Association).

(1978), Bahrain and Saudi Arabia (1994), Oman (1999), and Qatar (2003),[313] although in the national laws of these countries it is specified that the reciprocity reservation holds, that is, the country will only apply the New York Convention to arbitral awards involving other New York Convention member states.[314] There are instances, however, when states such as Saudi Arabia implement their reciprocity reservation in a manner different from that usually applied by other contracting states. In Saudi Arabia, the Board of Grievances is more likely to ratify a foreign arbitral award if Saudi court judgments are enforceable in that state.[315]

Aside from the New York Convention, there are several regional conventions in place in the MENA region that are instrumental in enhancing economic relations among regional players. The two most prominent are the Riyadh Convention for Judicial Co-operation and the Amman Arab Convention on Commercial Arbitration. It should be noted that the rules of both conventions include provisions for a 'public policy' or 'public order' exception, and the language of both conventions is couched in Arabic.[316] There are likewise a number of regional arbitration centres or bodies established to meet the particular needs in Arab and Islamic arbitration processes. These include:

(1) The Euro-Arab Chambers of Commerce (EACC) was established in 1983 by the nine members of the Paris-based European Chambers of Commerce (UK, France, Germany, Italy, Portugal, Greece, Switzerland, Belgium and Luxembourg). A system of rules of conciliation and arbitration were drawn up for use in international commercial relationships involving Arab countries. The arbitration bodies under the EACC were composed of an equal number of European and Arab members. The rules were designed for maximum flexibility in arbitration, but did not specifically provide for dispute settlement with Sharia components,

[313] Jarrar, *op. cit.*, 2.
[314] DLA Piper Middle East LLP, Arbitration *in the Saudi Arabia*, (2010) http://www.dlapiper.com.
[315] *Ibid.*
[316] S. Akhtar, 'Arbitration in the Islamic Middle East: Challenges and the Way Ahead.' *The International Comparative Legal Guide to International Arbitration* (SJ Berwin LLP and the Global Legal Group, Ltd 2008).

and the EACC did not have any power to enforce an award, relying purely on the volition of the respondent party to comply with the terms of the award.[317]

(2) The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was established by the Asian-African Legal Consultative Organisation (AALCO) for the purpose of enhancing arbitration facilities in the Afro-Asian region. The Cairo Centre was based on the UNCITRAL Model Law and has met with some measure of success, leading to expansions in Alexandria and Port Said which was specifically intended for maritime arbitration, and similar other centres being established in Iran and Nigeria. Its successes notwithstanding, the CRCICA has encountered similar problems to the EACC in addressing issues and matters specifically pertaining to Islamic Finance and ensuring that awards are complied with. The CRCICA's rules, however, are more developed and extend further than those of the Euro-Arab Chambers of Commerce in incorporating provisions that the parties comply with the arbitral judgment with minimum delay.[318]

(3) The GCC Commercial Arbitration Centre, based in Bahrain, provides for maximum flexibility. However, when an arbitration agreement is deemed null or an award is duly annulled on the grounds that an arbitrator has not been correctly appointed, the GCC-CAC has a mandatory provision for awards to be enforced by local judicial authorities, exposing the award to technical and substantive challenges based on local requirements. As with the CRCICA and the EACC, no provision is made in the GCC-CAC for the specific arbitration of disputes involving Sharia-compliant agreements; however, the flexible regulatory structure allows for disputes of this nature to be satisfactorily resolved by the arbitration body.[319]

(4) The Dubai International Arbitration Centre and the Abu Dhabi Commercial Conciliation and Arbitration Centre are the two arbitration bodies present in the UAE, the older being the Dubai International Arbitration Centre, established in 1994 by the Dubai

[317] *Ibid.* 11.
[318] *Ibid.*
[319] Akhtar, *op. cit.*

Chamber of Commerce. The two centres, like the Bahraini centre, require the ratification of awards by the local courts prior to their enforcement, enabling any party to challenge an award based on even minor technical irregularities. A further challenge is the absence of legal professional privilege or confidentiality in the arbitration proceedings in the UAE, compromising the very rationale of the parties resorting to arbitration. Western firms have dealt with these concerns by introducing such concepts as a matter of convention in their dealings with other parties.[320]

(5) The International Islamic Centre for Reconciliation and Arbitration (IICRA), based in Dubai, was established in 2005 by the Islamic Development Bank and the General Council for Islamic Banks and Financial Institutions. This facility specifically provides for Sharia-based arbitration, and while the tribunal at this centre applies the legal procedure and substantive law chosen by the parties, it will refuse to apply those rules that it deems incompatible with Sharia (which in this case is the conglomeration of Islamic schools of thought and the teachings or opinions of Fiqh academies and Sharia boards of Islamic financial institutions). The IICRA conducts its proceedings in Arabic, which makes it apparent that non-Islamic institutions with non-Sharia compliant agreements with Middle Eastern parties will avoid submitting to the IICRA for arbitration. The centre boasts a number of international Islamic Finance experts that comprise their lineup of arbitrators from whom the parties may choose. It is stated that the awards are binding upon the parties. The centre, however, does not adopt further measures to ensure arbitral award enforcement beyond declaring that the Secretary General will extend his assistance in 'the exequatur if required by the law of the country in which the award is rendered.' The result is that the

[320] Akhtar, *op. cit.*

awards are subject to the same public-order challenges as are present in the other current international conventions in the region.[321]

In international legal system, the principal feature of arbitration is that the decision of the arbitrators is considered final and binding. The same cannot be said of arbitration under the traditional Islamic law, which actually holds no single view. The perspective of the issue depends on the particular school of thought under which Islam is taught. There are four such schools: The Hanafi, the Shafi'i, the Maliki, and the Hanbali schools.[322] There are also two distinct views on the finality of arbitration decisions. The Hanafi and Shafi'i schools of thought espouse the same view: that the pronouncement of the arbitrators should be regarded as merely an act of conciliation. This view holds that the arbitrator occupies a lower status than that of a judge, due to the fact that the power given to an arbitrator depends upon the discretion of the parties, and may be withdrawn by the same, unlike the power of the judge which is permanent. On the other hand, the Maliki and Hanbali schools hold that the judgment of the arbitrator is binding, except when a gross injustice is discovered. The arbitrator in these proceedings is seen to have the same authority as a judge.[323]

3.8.3 Types of judicial review

There are two kinds of judicial review that have to be distinguished from each other for clarity of discussion. The first type of judicial review examines whether natural justice was observed (i.e., the presence of imputed bias, or violation of public policy) and whether the arbitration proceedings and agreement are valid under the law chosen by the parties. The second type of judicial review looks into the merits of the award being made. The issue in the latter case is the possibility that the arbitrator erred in the judgment of the award. A judicial

[321] *Ibid.*
[322] *Ibid.*
[323] A Nashmi,at-Thkym Walthakm ad-Dwlá Fá ash-Shryah al-Slamyh [International Arbitration and Islamic Law], in The ninth regular session of the European Council for Fatwa and Research 13–15 (2002).

review on the merits is tantamount to an appeal from the decision of the arbitrator. The question raised in this case is whether or not the party that lost in the arbitration proceedings is accorded a second chance in the judicial review; and if so, whether it is just for the appellate decision to extend to the other party who has not agreed to the second venue. Judicial review on the merits necessarily implies the subordination of arbitral proceedings to court proceedings and, therefore, an intrusion into the finality of the arbitration process.[324] This latter type is not countenanced under the UNCITRAL Model Law.

3.8.4 Judicial Review in Islamic Jurisprudence

Generally, in final awards and enforcing foreign arbitral awards, the attitude of Sharia depends on the bilateral and international conventions upon which the agreement is founded, or into which the party states have entered. Furthermore, upon a judicial review, the Muslim judge may set aside a foreign award, vacate it or refuse its enforcement if the award is seen to contravene the general principles of Sharia and its sources, the Quran and Sunna.[325]

In all the four schools of thought, there is agreement that judicial review is warranted to verify whether the arbitral award is consistent with Islamic principles; this is only consistent with any judicial review of arbitral awards undertaken by all countries, even those in Europe and North America, to ensure harmony with the natural law and validity under the system of laws chosen by the parties. There exists some modern legislation in the Western states that requires court approval in order for an arbitral award to take legal effect.[326] This is the same as the first type of judicial review described in the preceding paragraph, and it is necessary if the implementation of the arbitral awards process is to be valid.

[324] C.M. Schmitthoff, *Select Essays on International Law* (Graham & Trotman Ltd 1988) 654-656.
[325] Abdul Razzaq Abdullah & Partners, Law Firm. Enforcement of Foreign Judgments in Kuwait (2013) <http://www.arazzaqlaw.com/enforcement-of-foreign-judgments-in-kuwait/>.
[326] *Ibid.*; Alkhamees, *op. cit.,* 262.

In fact, when a final arbitral award and a binding award is made by a competent arbitration body against a debtor residing in a signatory to the 1958 NY Convention, it is almost always, if not always, irreversible. There are practically no grounds for any appeal process or judicial review of an arbitrator's award. Moreover, judges are actually forbidden to review an arbitrator's award with respect to case merits and they are compelled to uphold the final and binding nature of the award, with only certain narrowly-defined exceptions, including: lack of a signed arbitration agreement; failure of the arbitrator to hear relevant evidence; straying by the arbitrator from the issues given for consideration; involvement of issues of the civil rights of an individual; and lack of receipt by the respondent of the notice of arbitration, or issuance of a defective notice.

3.8.5 The ARAMCO Case

A complete understanding of the disjunction between the Islamic and the conventional contexts of arbitral award enforcement requires an understanding of the historical rift between them. The generally negative attitude of Islamic countries towards international arbitration finds its roots in the ARAMCO case.[327] While international jurisprudence holds arbitral awards as binding and enforceable as the final judgment of the court, Islamic law requires a limited judicial review to ensure that the basis of the award is consistent with Islamic legal principles. Limited judicial review implies that the merits of the dispute cannot be debated or reviewed, but only peripheral aspects may be reviewed such as the validation of the arbitration agreement, and an inquiry as to whether the judgment is within the scope of the agreement.[328] Focusing on international arbitration provisions for similar cases, there is no requirement for a review of an award unless a party submits an allowable notice for a request to review the same.

[327] Saudi Arabia v. Arabian American Oil Company, 27 Int'l Law Rep. 117 (1963).
[328] Alkhamees, *op. cit.*

In the Saudi ARAMCO case,[329] a comprehensive concession agreement was struck in the 1930s by the Arabian American Oil Company (ARAMCO) and Saudi Arabia which covered most of its territory, for a period of 60 years. In 1954, Saudi Arabia entered into a contract with Aristotle Socrates Onassis (the Onassis Contract), authorising Onassis to form and own the Saudi Arabian Maritime Tankers Company (SATCO), and compelling ARAMCO to export its oil from Saudi Arabia on SATCO tankers. ARAMCO refused to comply with the Onassis Contract, on the grounds that its implementation violated the ARAMCO Concession Agreement and compromised the long-standing business arrangements and practices that had been in place for two decades. Furthermore, ARAMCO frowned upon the fact that the Onassis Contract would put SATCO directly in control with the former's export lifeline. When negotiations proved futile, arbitration was resorted to.

The Tribunal rejected the Government's argument that state sovereignty was decisive in the determination of the nature of the Concession, because this argument had no support in Islamic law, which did not distinguish between treaties, public contracts or commercial contracts – under Islamic law, all these agreements are valid. Furthermore, *pacta sunt servanda* is fully recognised by Sharia law. The Tribunal noted that since the Concession Agreement specified ARAMCO's exclusive right to sell the oil it extracted outside and not within Saudi Arabia, both parties were on an equal footing from a contractual standpoint, and Saudi Arabia could not unilaterally alter the terms of agreement and materially change ARAMCO's acquired rights. This included the right of ARAMCO to transport its oil on the open sea according to its own discretion, because the high seas were not within the territory of Saudi Arabia and therefore did not fall within its sovereignty. The case highlights the magnitude of tension in enforcing arbitral awards in Sharia-governed jurisdictions, especially where the arbitrators appear to undermine the scope of Sharia as applied in these countries. It

[329] As discussed by Judge Stephen M. Schwebel, The Saudi Arabia and Aramco arbitrate the Onassis agreement, *Journal of World Energy Law & Business*, 2010, doi: 10.1093/jwelb/jwq012.

particularly brings out the basis for Sharia-based countries to feel the need to internally determine finality of awards, as was seen in the eventual setting up of an authority to review all foreign arbitral awards in Saudi Arabia. In a sense, finality of such awards is subject to further scrutiny for its conformity to Sharia law.

This case triggered a difference of opinion because of the implications on sovereignty and on the implementation of Islamic law. One side, which is consistent with the decision of the tribunal, is that the applicable law (i.e., the law of Saudi Arabia) was inadequate for application to transnational rules, and therefore the arbitral tribunal considered that Saudi Arabian law need not apply with respect to this gap, and resort was made to world-wide custom and practice in the oil and business industry, to world case law and doctrine, and international jurisprudence.[330] On the other hand, the dissenting view, but one which is widely held in Islamic nations, is that international arbitration was being used by Western countries to preserve their interests, in breach of the national sovereignty of the Saudis. In the beginning, the Saudi Arabian government welcomed international arbitration, evident in the Buraimi case in 1955[331]. However, the ARAMCO case convinced Saudis that international tribunals disrespected Saudi law, which is grounded in Islamic principle. Either the Westerners lacked basic knowledge of the principles of Islamic Sharia, or as is more widely believed, members of the arbitration panel took advantage of the naivety of the Saudi Arabian government[332]. The view that the tribunal unfairly judged Sharia and refused to

[330] Z. Alqurashi, 'Arbitration under the Islamic Shari'a', Oil, Gas and Energy Intelligence, 2003, pp. 30-44. See in general, N. Albejad, Arbitration in Saudi Arabia (1st edn, Institute of Public Administration, 1999). see also 1958 Award by G. Sauser-Hall, referee, and M. Hassan, arbitrators, 27 Int'l L. Rep 171 (1963), in Emmanuel Gaillard, Berthold Goldman, & John Savage, Fouchard, on International Commercial Arbitration, The Hague, Netherlands: Kluwer Law International, 1999, at p. 843.

[331] F. Sami, International Commercial Arbitration in Arab Countries (1st edn., Dar Althaqafa Li Nashr wa Altaouze', 2006), p. 419.

[332] A.Y. Baamir, *Sharia Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing 2013).

apply it profoundly changed the attitude of the Saudis (and other Islamic nations that identified with Saudi Arabia) towards arbitral awards.[333]

As a result, the Council of Ministers Resolution No. 85 of 1963 was passed prohibiting the Government and its agencies from accepting arbitration clauses and agreements without prior authorisation from the Council President.[334] This resolution was followed by the Ministry of Commerce Circulation that prohibited foreign arbitration clauses in the articles of association of joint ventures that are registered within Saudi Arabia. This strict interpretation was relaxed, however, during the oil boom that followed. While Saudi Arabia agreed to join the ICSID Convention, vestiges of the ARAMCO case were evident in all reservations Saudi Arabia made with regard to oil and acts of sovereignty. In 1982, the jurisdiction of *Diwan Almazalim* (the Law of the Board of Grievances) was expanded to include foreign judgments and arbitral awards. These are contained in the first comprehensive arbitration regulations in Saudi Arabia as embodied in the Arbitration Act of 1983 and the Implementing Regulation of 1985, which is still in force today.[335]

Upon analysing the ARAMCO case, it is evident that Saudi Arabia's arguments were based on sovereignty issues, and not on Islamic principles per se, except where Sharia principles were used to justify the same sovereignty argument. The Tribunal, on the other hand, preceded on the plain terms of the agreement in determining what rights had been granted. The arguments of Saudi Arabia turned on the restrictive interpretation of the rights of the private party where the other contracting party is a state. In this case, because the shipping of the crude oil, though drawn from Saudi soil, was destined for transport out of the country, its contention that the shipping be contracted solely with SATCO was evidently an overreach on its part because Saudi Arabia's sovereignty did not stretch to the open seas and therefore the two parties were dealing with each other as equals insofar as the contract for shipping was

[333] *Ibid.*
[334] Alkhamees, *op. cit.*, 263.
[335] Baamir, *op. cit.*, 116.

concerned, and the rights of both should have been interpreted broadly. Also, it was contrary to law to subject the Concession retroactively to the SATCO agreement, which was contracted much later. Finally, the subject of this arbitral proceeding has little to do with the principles of Sharia, and little to do with Saudi Arabia's laws, which had a gap as far as international agreements and the settlement of disputes were concerned.[336]

It is important to mention that ARAMCO was not the only case of its kind. Other awards based on early oil concessions that were resolved to the detriment of the different Arab oil-producing countries include the arbitration between Petroleum Development and the Sheikh of Abu Dhabi,[337] and the Ruler of Qatar v. International Marine Oil.[338] In Petroleum Development, umpire Lord Asquith, while agreeing that the proper law to be applied should be prima facie that of Abu Dhabi, ruled that the Sheikh 'administers a purely discretionary justice with the assistance of the Koran…it would be fanciful to suggest'[339] that Abu Dhabi had a properly applicable body of legal principles. He then proceeded to apply English law, although he earlier acquiesced that English Municipal Law had no basis for application[340]. As for International Marine Oil, the arbitrator in that case held that Qatari law was the proper law to apply. However, in the same dismissive tone as Lord Asquith's comment in Petroleum Development, the arbitrator stated that 'I am satisfied that Qatari law does not contain any principles which would be sufficient to interpret this particular contract.'[341] It is readily evident why such comments would be so stinging to Arab jurists[342] that they perceived Western tribunals as being arrogantly ignorant of their national laws as well as of Sharia law itself.

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[336] Schwebel, *op. cit.*, 8.
[337] In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, 1 Int'l & Comp. L.Q. 247 (April 1952); Int'l Law Rep. 144 (1951).
[338] Ruler of Qatar v. International Marine Oil Company, Ltd., 20 Int'l Law Rep. 534 (1953).
[339] H. Stovall, *Arbitration and the Arab Middle East: Some Thoughts from a Commercial Practitioner*, (Chicago International Dispute Resolution Association 2010) 3.
[340] *Ibid*
[341] *Ibid.*
[342] H. Stovall, *Arbitration and the Arab Middle East: Some Thoughts from a Commercial Practitioner*, (Chicago International Dispute Resolution Association 2010) 5.

3.8.6 Gradual shifts in Middle-Eastern arbitration

The early oil concessions bred deep Arab suspicion regarding Western-style arbitration. In more recent developments, Middle-Eastern nations have perceived the economic advantages in participating in international arbitration, while Western nations in return have gained a greater understanding of the importance of the Sharia precepts in the Arab legal systems. A gradual shift developed in the region; for instance, countries such as Libya which banned foreign arbitration rescinded their prohibitions, and provisions for arbitration lowered the risks, and prices, of foreign contractors in their bids for Libyan government contracts. In another case in 1973, the Kuwaiti government won a substantial arbitral award against British firm Sir Frederick Snow and Partners in their claim concerning the construction of a Kuwaiti airport. Neither were parties to the New York Convention, but shortly after the UK acceded in 1975, Kuwait did likewise in 1978, enabling the latter to comply with the reservation for reciprocity. The Snow arbitration[343] helped convince Kuwait and other Arab countries of the benefits of accession to the New York Convention in particular, and international arbitration in general.[344]

Another arbitration involving Aminoil vs. Kuwait was another breakthrough for the acceptance of international arbitration in the Middle East.[345] Aminoil and the state of Kuwait were parties to a concession agreement for Kuwait's portion of the 'neutral' zone close to Saudi Arabia. In 1977, Kuwait terminated the concession and the parties entered arbitration. The case set a new benchmark because of the full participation of the Kuwait government, which appointed a legal counsel that was aided by highly competent international arbitration experts. More remarkable is the fact that the arbitral tribunal applied Kuwaiti law in a sensitive manner, while giving recognition to both Aminoil's long-term interests to the

[343] Kuwait Minister of Public Works v. Sir Frederick Snow & Partners, [1984] All England Law Reports 733.
[344] Stovall, *op. cit.*
[345] H. Stovall, citing A. Redfern, "The Arbitration between the Government of Kuwait and Aminoil", 55 British Year Book of Int'l Law 65 (1984).

concession, and the right of the Kuwaiti government to introduce alterations to the terms of the concession in view of the changing situation. This contrasts starkly with Libya's disputes in three oil arbitrations in the early 1970s.[346]

For some states that have not yet updated their legislation to accommodate more modern arbitration laws, there are evidentiary and procedural discrepancies that could provide challenges for arbitrators and the parties entering into arbitration. The case of Bechtel[347] is an example. Bechtel Company entered into a construction contract with the Dubai Department of Civil Aviation (DDCA). A subsequent dispute with regard to the construction project prompted the two parties to seek arbitration in Dubai, from which judgment Bechtel was awarded UD$24.4 million by way of damages. The DDCA filed a petition in the courts of Dubai, from whence the Dubai court overturned the award on the grounds that the witnesses in the arbitration had not been sworn into oath in the manner prescribed by Dubai law. According to the Dubai court, the administration of the oath on witnesses is 'an imperative requirement under Article 211 of the Civil Procedure Law', and allegedly the arbitrators failed to comply with this requirement.[348]

In another arbitration proceeding in Dubai, the arbitral award was also overturned by the courts because the arbitrators were found to have failed to comply with another technical rule under the UAE Civil Procedure Law: that is, if the reasoning of the decision and the award of an award appear on separate pages, the arbitrators must affix their signatures on all pages, not only the last page containing the final decision as was done in this case.[349] At the time these arbitration proceedings took place, the UAE had not yet acceded to the New York Convention and therefore Dubai, as one of the emirates in the UAE, was not yet constrained by its provisions. Otherwise, the courts would have been compelled to abide by the

[346] Stovall, *op. cit.*
[347] In 'Arbitration between International Bechtel Company Ltd. and Dubai Department of Civil Aviation, 300 F. Supp 2d 112' (D.D.C. 2004).
[348] *Ibid.*; Stovall, *op. cit.*
[349] Stovall, *op. cit.*

limitations on the grounds for setting aside an arbitral award under Article V. The lack of minor formalities, such as the affixing of signatures or minor lapses in the administration of the oath pursuant to a certain form do not detract from the substance of the basis for the arbitral award. Such decisions will only serve to undermine the confidence of the parties on the country's dispute resolution system and discourage commercial activities secured by such contracts.

3.9 Finality of arbitral awards in Sharia-based national laws

3.9.1 Saudi Arabia

The ARAMCO case has been a defining event in the development of arbitration law in Saudi Arabia, but the intervening years and the rise of Saudi Arabia's global stature have significantly modified the outlook and attitude of Saudi nationals, particularly those who contract with outside parties. Some of these changes have made their way into Saudi legislation, although there remain contentious issues in the Saudi Arbitration Code (SAC), particularly in the matter of finality of arbitral awards.

Before a foreign arbitral award may be enforced in Saudi Arabia, it must be ratified by the Board of Grievances, the authority whose role is to enforce foreign judgments and foreign arbitral awards. A petition is submitted to the Board of Grievances for review, in order to ascertain that the mandatory principles of Sharia law have not been contravened. The parties may be invited to submit oral arguments before the Board if needed. In the manner in which it is conducted, the review process before the Board is virtually a review on the merits; in the end, enforcement becomes difficult. Furthermore, the most common grounds for the Board of Grievances to reject enforcement of foreign arbitral awards is that the award is contrary to public policy, not because of any of the grounds enumerated in Article V of the New York Convention, but because it does not adhere to the principles of

Sharia law (i.e. prohibition against interest, the boycott against the State of Israel, and the requirement that arbitrators be male, among others), making the results of the review a ruling on the merits.[350]

Article 19 of the SAC, for instance, allows either party to a dispute to challenge an award or any other decision that is issued by the tribunal (e.g. interim measures) within 15 days from issuance. This allocation runs counter to most modern arbitration rules as it allows for dilatory tactics by the party against whom the award is sought to be enforced, who may raise minor technical or superfluous issues to postpone the enforcement of the award. This provision and similar measures undermine the effectiveness and efficiency of the arbitration process, and work against the rules by the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL) which mandate that arbitral decisions are not appealable in relation to the substance of the case.[351] Since Article 19 does not specify upon which grounds the parties may challenge the award, this opens the door to either a procedural or substantive challenge. The uncertainty introduced by this article is not favoured by parties in international agreements, and may impede the smooth commercial transactions that Saudi companies may seek in negotiating with external parties.[352]

In the case of the UAE-based Emaar and Saudi-based Jadawel,[353] what began as an arbitration proceeding ended up in the secondary appeals court due to the rulings by the Saudi Board of Grievances. Jadawel's claim against Emaar was dismissed during arbitration proceedings, and Jadawel was ordered to pay legal costs. Upon review, The Board reversed the ICC award on the basis of public policy, and instead ordered Emaar to give 18.61 million shares to Jadawel, and pay US$228 million in damages for realty projects and the costs of

[350] DLA Piper Middle East LLP.
[351] A Barraclough and J Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration, *MELB.J.Int'l L* (2005) 210-211.
[352] Saleem, *op. cit.*.
[353] Jadawel Intl. v. Emaar Property PJSC (2009).

litigation. Emaar appealed the decision and lost.[354] Clearly, the award by the ICC in this case was not considered to be final by the Board of Grievances, which proceeded to review on the merits and even reversed the decision by supplanting it with its own. The case highlights the uncertainty in the enforcement of foreign awards in Saudi Arabia,[355] and to some highlights the apparently 'traditionally hostile' attitude of Saudi Arabia[356] to the recognition and enforcement of foreign awards. Although the Saudi Arabian response to the ARAMCO case could be exaggerated in practice, the need to reform is even greater. The procedures used to enforce an award[357] make it impractical to do so with as much certainty and openness as in foreign jurisdictions. The significance of the ARAMCO case only has historical significance to the current situation of strictness in enforcement of arbitral awards in Saudi Arabia. Besides this notion, it is imperative that the country seeks more acceptable and globally recognised approaches to safeguard against the insinuated manipulation that occasioned the case, unlike the current approach which is seen as a hindrance to the enforcement of awards, and a deterrent to investment.

3.9.2 Qatar

While the ARAMCO case involved a dispute that was circumscribed by Saudi Arabian jurisdiction, the impact of its outcome became evident in the arbitration procedures in the rest of the region involving international commercial disputes, particularly in the matter of finality of the award. There is a general perception among Sharia-based countries that the arbitration tribunals' essential knowledge of Islamic commercial jurisprudence and their approach to the interpretation of international arbitration are deficient, resulting in inaccurate

[354] T. Childs. Egypt, Syria and Saudi Arabia: Enforcement of foreign arbitral awards in Egypt, Syria and Saudi Arabia. Middle East Country Developments. King & Spalding International LLP.
[355] Association for International Arbitration, 'International Commercial Arbitration in the Deserts of Arabia,' *In Touch*, October 2009, http://www.arbitration-adr.org/documents/?i=62.
[356] H. Stovall, *op. cit.*,
[357] The procedure is much like ascertaining whether the award should be enforced in the initial stages.

judgments particularly where the decision involves the setting aside of Islamic law despite this being the applicable law between the parties. In Qatar vs. International Marine Oil Co., Ltd.,[358] the arbitrator stated that the Sharia-based Qatari law, though it was the applicable law, should be discounted because 'I am satisfied that the [Sharia] law does not contain any principles which would be sufficient to interpret this particular contract.'[359] Like the ARAMCO award, the Qatar vs. International Marine Oil case was seen as having unjustly ignored the profound precepts of Islamic jurisprudence applied to contract law. For this reason, international arbitration is to this day still viewed by Islamic countries as an unjust Western tool.[360]

There was an occasion, however, where the award, although against Qatar, was rendered incapable of execution due to international treaty. In the case of Creighton vs. Qatar,[361] the dispute was related to a 1982 contract between Creighton, a Cayman Islands company, and the State of Qatar, for the former to build a hospital in Doha, the capital of Qatar. According to the terms of the contract, Qatari law would govern the interpretation of the agreement and the venue for dispute settlement by arbitration would be the International Chamber of Commerce (ICC) in Paris. In 1986, Creighton was fired by Qatar due to inadequate performance, for which Creighton sought arbitration pursuant to the terms of the contract. The ICC decided in favour of Creighton and awarded the company $8 million in damages, attorneys' fees and interest. Qatar applied to the French courts to have the arbitral award declared invalid – a claim that the Supreme Court of France (*Cour de Cassation*) turned down.[362]

[358] Ruler of Qatar vs. International Marine Oil Company, Ltd., 20 Int'l Law Rep. 534 (1953).
[359] Kutty, *op. cit.*, 565.
[360] Alkhamees, *op. cit.*, 264.
[361] Creighton Ltd. vs Government of the State of Qatar, No. 98-7063 (D.C. Cir. July 2, 1999).
[362] J.R. Schmertz Jr., & M. Meier. Arbitration: In action to enforce ICC arbitral award against State of Qatar, D.C. Circuit finds FSIA exemption for arbitral awards applicable. International Law Update. 5, 93-94, 1999

Although the award was granted in favour of Creighton, the firm nevertheless failed to enforce it in France due to the Supreme Court ruling that the assets specified in the claim were immune from attachment. Creighton then sued to enforce the award in the District of Columbia federal court. Qatar responded that based on the Foreign Sovereign Immunities Act (FISA),[363] the court lacked subject matter jurisdiction. The court dismissed the claim, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision. The ruling state that while the district court did have subject matter jurisdiction under the FSIA, it notes however that whereas the U.S. and France were member signatories to the New York Convention,[364] Qatar was not at that time a party to the Convention.[365] With the rule under the Restatement of Foreign Relations Law,[366] the crucial determination is the place of the award. If the location is within the territory of a signatory to the Convention, all other parties to the Convention are mandated to recognise the award and enforce it, without regard to the citizenship or domicile of the contending parties in the arbitration. The Court ruled that if Qatar had the status of a private party, the U.S. district court would have subject matter jurisdiction; however, Qatar was a foreign state and not a member of the Convention, therefore the Court must consider the terms of the FSIA. To this, Creighton claimed that Qatar, by agreeing to arbitrate in France, had implicitly waived its immunity; in response, the D.C. Circuit court noted that the FSIA contained no definition of implied waiver, and case law consistently applied a strict construction of the implied waiver provision, which the case failed to hurdle[367]. Qatar was not a party to the New York Convention, and as such its agreement to arbitrate in France, which was a signatory country, did not manifest its intention to waive sovereign immunity in the US. Lacking this, Section

[363] 28 U.S.C., sections 1330 & 1602-1611.
[364] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
[365] 21 U.S.T. 2517, reprinted in 9 U.S.C.A. section 201.
[366] Restatement (Third) of Foreign Relations Law, Section 487, comment b (1987).
[367] J.R. Schmertz Jr., & M. Meier. Arbitration: In action to enforce ICC arbitral award against State of Qatar, D.C. Circuit finds FSIA exemption for arbitral awards applicable.

1605(a) (1) does not confer subject matter jurisdiction to the court.[368] Qatar remains one of the less strict enforcers of Islamic law[369] within the GCC, but still shows non-responsiveness to foreign arbitral awards. This case sets the principle of finality of foreign arbitral awards as wavering of the immunity from execution of the awards requires that Qatar, upon acceptance to comply with the ICC arbitration had to comply with the final award as set out in Article 24 of the ICC Rules.

3.9.3 Kuwait

Foreign arbitral awards are enforceable in Kuwait provided they meet the principal requirement of reciprocal relationship. Since Kuwait is one of the member states that ratified the New York Convention by enacting Law No. 10 of 1998, reciprocity can therefore be easily established in case of the enforcement of arbitral awards. Thus, as long as the other party State in the arbitrated dispute is a member of the Convention, then the award passed by the foreign arbitral tribunal will be enforceable in Kuwait.[370] It would even be relatively simpler to enforce the foreign arbitral award if the disputed matter were arbitrated according to Kuwaiti law (that is, Kuwaiti law as specified by the parties in an agreement in the case of a dispute resolution), as long as it does not contradict the mandatory provisions of Kuwaiti law, or does not constitute an act of criminal nature under the same law.

3.9.4 Pakistan

Pakistan does not form part of the Middle East region, but its law applies Sharia principles. The Pakistani legal system is generally patterned after British common law, which was extended to British India by statute, even though Pakistan is an Islamic Republic and its legal

[368] *Ibid.*; Schmertz Jr. and Meier, *op. cit.*, 94.
[369] Please see Chapter 4 section 4.14.
[370] Abdul Razzak Abdullah & Partners.

system is therefore influenced by Sharia law.[371] Originally, as part of British India, the Arbitration Act of 1899 was applied, although this law was repealed by the Arbitration Act 1940 which is still in effect even after the partition of British India into India and Pakistan, and up to the present. However, although the Arbitration Act 1940 is the main legislation on arbitration in Pakistan, it is silent on the matter of foreign arbitration, forcing the courts to arrive at their own interpretation in the recognition of foreign arbitration.[372] The legislative basis thus referred to by the courts for the enforcement of foreign awards is the Arbitration (Protocol and Convention) Act 1937, or the "APC". The APC Act was enacted to give effect to the Geneva Protocol and to render operative the Geneva Convention in British India. It decreed that awards rendered according to the Geneva Protocol and Convention shall be considered "foreign awards" for the purposes of the APC Act, and will therefore be deemed enforceable.

The preceding discussions point to the direction of arbitration laws in Islamic countries. The general picture is that they are steadily aligning their legal systems with international standards so as to make enforcement of awards easier. However, as can be seen in the difference between the GCC member states and Pakistan, the history of a country serves as a defining factor in the determination of how fast they adapt to international legal standards, and the extent of such an adaptation. In summary, the Middle East as a region, and countries whose laws are Sharia-based, have made great strides in the adoption of structures and conventions that work to enhance the acceptability of the arbitration process and the enforcement of international arbitral awards; however, there remain inconsistencies and limitations that continue to pose material challenges for parties from outside the region seeking to do business in the region. It was suggested that the hesitation in accepting the

[371] C. Mallat, Commercial Law in the Middle East: Between Classical Transactions and Modern Business, 48 Am. J. Comp. L. 81 (2000), 42.
[372] A. Jillani, Recognition and Enforcement of Foreign Arbitral Awards in Pakistan, International and Comparative Law Quarterly, Volume37, Issue 04, October 1988, pp 926-935.

finality of arbitral decisions is a concern due to the likelihood of degradation of the authority of judges and ultimately the state.[373] However, continued efforts are recommended to support amendment of Saudi law to better aid achievement of finality without undue subjection to unnecessary scrutiny based on public policy requirements and to realign Saudi public policy with international standards.

3.10 Chapter synthesis

Legal experts argue that problems remain between Sharia law and International Commercial Arbitration. The preceding discussion brings this fact out quite clearly. Courts in some of the Islamic states have not been supportive of arbitration related to finality, and for some of them, it is not yet clear how the courts will implement modernised laws. There is also ongoing uncertainty about the role of Sharia law regarding finality, which can affect all aspects of arbitrations, including the applicable law, the validity of the arbitration agreement, finality of arbitral award, and the choice and capacity of arbitrators. This uncertainty is often exacerbated by foreign parties' lack of familiarity with Sharia. Since 2012, the new Saudi arbitration law considers the importance of finality, which may bring Saudi law closer to international law. Nevertheless, it should be mentioned that Islam is a complete package – a complete message and way of life. To fraction it into its component parts, "then examine them individually, will yield little or no understanding of Islam's holistic whole. Inevitably aspects of Islam examined separately, without a wide-ranging grasp of its totality, will be taken in a fragmented context"[374], in which case aspects may take on the appearance of extremism, especially when we talk about the relationship between Sharia law and International Commercial Arbitration Approaches. Yet, if Muslim countries are to participate significantly in the global economy as major centres of commerce, their arbitration processes

[373] A. Alkhamees, citing F. Kutty, *The Sharia Law Factor in International Commercial Arbitration* (2006) 565.
[374] Kabbani, 'Understanding Islamic Law'.

should be harmonised with international arbitration standards. The eventual goal of international juridical institutions and the legislative authorities in Islamic states is to arrive at a harmonisation of the principles of Sharia law with those of international commercial arbitration standards while maintaining fidelity to the values and principles of Sharia law. Islamic states cannot be compelled by foreign institutions to adopt principles and practices that they perceive to be anathema to their religious beliefs. They must therefore seek common ground that may unify international and Sharia arbitration, and on that basis institute reform from within their countries. A process of evolution, typical of all developing social processes and philosophies, may be developed on the bases of certain tenets of Islamic teaching that have identified been identified by scholars; "the fundamental principle of equality in Islam, the historical evidence and the emphasis given to freedom to contract and contractual obligations provide sufficient justification to reassess the Islamic position when it comes to non-Muslims and women."[375]

Within the mind of an Arab party or arbitrator, there lies a rich layer of Sharia and the lawmakers have to incorporate the fact that in the commercial arbitration process, the religion must be viewed as a key. The Islamic law permeates the commercial world as well as the Muslim way of life. The cultural differences between the East and the West bring with them a feeling of inferiority, colonisation and victimisation on the part of the Eastern parties[376].

The rapid growth of Islamic finance will require the international legal system for the development and understanding of the foundations of the Sharia-complaint business transactions. The judges in different countries that lack a history of dealing with Islamic law must at the initial stage compare the case in compliance with the Islamic financial sector for

[375] Kutty, *op. cit.*,53. See A. AbuSulayman, *Dialogue: Al-Dhimmah and Related Concepts in Historical Perspective* (1988) 8-29. Also see N. Ghadbian, 'Islamists and Women in the Arab World: From Reaction to Reform?' *American Journal of Islamic Social Sciences* (1995) 27.

[376] A. Al-Ramahi, "Sulh: A Crucial Part of Islamic Arbitration," *Islamic Las and Law of the Muslim World Research Paper Series at New York Law School* (2008), in p. 12. Available at http://ssrn.com/abstract=[1153659].

the purpose of accurately judging the commercial purpose of the Sharia-complaint business[377].

Central to the ability of a business is the protection of the interests of its stakeholders. The interests extend far beyond the financial sphere and affect religious, ethical and other values. For example, in the case of an institution offering Islamic financial services, the stakeholders generally expect that the operations will be executed under the compliance of the principles of Sharia (Islamic Law). Good governance of Sharia law is absolutely necessary in the coordination of the processes[378]. In the study by Khan,[379] it was stated that international law is governed by international covenants, and international covenants abide by a set of principles that all nations may observe but which still provide all individuals the greatest degree of autonomy to practise their faith.

[377] M. Shaukat. "The Recent Financial Growth of Islamic Banks and Their Fulfilment of Maqashid al-Sharia Gap Analysis" (2008) 12-13.
[378] Grais and Pellegrini, *op. cit.*, 4.
[379] Khan, *op. cit.*, 791

Chapter Four:

Finality of Arbitral Awards in International and Saudi Law

4.1 Chapter Overview

This chapter compares the general approach of the Saudi Arabian arbitration law and international arbitration laws on finality of arbitral awards. It commences with a discussion of the regulatory basis that gives finality of arbitral awards its mandatory nature, as per the international conventions governing arbitration. Hand in hand with this discussion is a discourse on why absolute finality may not be expected or even possible when an application for the enforcement of the award is made in a country other than where the award has been given. This chapter also considers the importance of finality and discusses whether Saudi arbitration law has moved closer to international law, especially after the enactment of the new Saudi Arbitration Law 2012. Moreover, issues connected to finality are presented – such as the immunity of arbitrators from suit (precluding extended litigation on their participation), the annulment of awards by ad hoc committees, and the finality of award as 'res judicata.' The implications of setting aside or annulment of an arbitral award are examined in the context of the venue where annulment has been made, and challenges to the finality of the arbitral award under international treaties. The issue of public policy as a substantive defence against enforcement is examined, thereby suspending the finality of the award. Case law is discussed, including Dallah Real Estate v Ministry of Religious Affairs of Pakistan and Westacre Investment v Jugoimport-SDRP. Another section focuses on public policy defence as resorted to by MiddleEastern countries, specifically comparing the experiences in Egypt, the UAE and Saudi Arabia. The chapter concludes with an account of the new Saudi Enforcement Law 2013.

This study discusses whether there is a contrast between Sharia and international arbitration law approaches that may affect the stage for a deeper understanding of the differences between the two approaches, which makes arbitral awards given in the latter in some cases unenforceable in Saudi Arabia, based on the final award violating provisions of the Quran, and the allowance in international arbitration law for setting aside of awards based on violation of certain domestic laws providing the platform for the refusal of many awards in Saudi Arabia. However, since Saudi Arabia enacted the new Arbitration Law Act 2012, this demonstrates further blending of Saudi Arabia's arbitration law with international law on the same through adoption of a more moderate approach to Sharia (as has happened in several other Islamic nations, e.g. Egypt and Qatar) which would allow for greater admissibility of internationally determined awards, provided there is no violation of the main Islamic principles.

Based on what has been mentioned above, this chapter seeks also to discuss whether the setting aside of the arbitral award given by an international arbitration bench should be abolished in Saudi Arabia pursuant to the general principle in international arbitration on the finality of awards. In addition, should the public policy defence as applied in Saudi Arabia be allowed to deny recognition and enforcement of foreign or non-domestic arbitral awards? A major concept follows, which is the finality of an arbitral award as res judicata, and whether the first necessarily includes the other. Following this is the scrutiny of the implications of setting aside or annulment of the arbitral award and what this means under the conventions and in case law. Having appreciated what annulment entails, the challenges to finality under the conventions is thereafter examined to establish the grounds and mechanisms by which the presumption of the finality of an award may be overcome, to the effect that it may be set aside, or declared unenforceable. Finally, the chapter found that Saudi arbitration law in general allows more scope to upset finality by appeal on question of law based on the public

policy approach, while international law now gives very limited scope to upset finality by appeals on question of law. Therefore, the chapter concludes that in the context of Saudi Arabian law, it is inappropriate to abolish refusal to enforce arbitral awards based on the grounds of public policy violation, unless the final award is contrary to Sharia law. In addition, the study lends support to the continued Saudi efforts to perform further modifications to respect finality and restrict the scope of upsetting it, and to become more closely aligned with international arbitration practice.

4.2 Perspectives on approaches of international law on finality of arbitral awards

According to Gaillard, international arbitration and arbitral awards are almost final in all respects, which means the judgment needs to be balanced and unbiased so that justice can be upheld.[380] Unlike court litigation which is often long and enduring, and considering the flexibility that each party involved might challenge the decision of the court time and again through successive appeals, arbitral awards have very few avenues to even be questioned and at most they might be reviewed (subjected to another hearing) but not revoked (overturned).

Again, only the arbitrators and not the court or any third entity has the right to review an arbitral award.[381] An arbitral award is an outcome of previously understood and agreed clauses; if one or both parties are unsatisfied after the arbitral award has been delivered then a review has to take into consideration the existence of the initially drafted arbitration agreement and can only consider whether there is any deviance of the arbitral award from the pre-documented clauses or previously determined award.[382] Again the review process is almost identical in judging whether natural justice has been respected. The court interference

[380] E. Gaillard. (2010). The Review of International Arbitral Awards, NY: Juris Publishing at p.p 1-4.
[381] *Ibid.*
[382] Gaillard, *op. cit.*

is permitted if and only if an arbitral award somehow undermines any ongoing public policy. However, as Gaillard mentions, "the review of the arbitral award should not encroach on the merits of the dispute…annulment or enforcement proceedings should not amount to an appeal".[383]

The finality of international arbitral awards is reemphasised in the writing of Greenberg, Kee and Weeramantry, who have mentioned that international arbitral awards are final and binding for all the parties involved.[384] However, court interference might be needed to have the arbitral award enacted or appealed if unsatisfactory to either or both parties. Indeed, international arbitration is a classic example of the balance between an international autonomous arbitration entity and the national court's control. According to Greenberg et al., though finality is a very important feature of international arbitral awards, the losing or unsatisfied parties are left with three options if they wish to stop or change the arbitral award. If dissatisfied with the arbitral award, a party might appeal against it on the basis of the question of law or fact if permitted by the arbitration authority of the concerned arbitral award, if this is already permitted under the clauses documented in the concerned arbitration document. The question of law applies where there were possible fundamental omissions or errors; such that the award is not enforceable in law based on existing statutes. However, according to Greenberg et al., the chances of the latter occurring are really very slim.[385] The concerned party or parties can also appeal to the arbitrator of that particular international arbitration to vacate the arbitration and in extreme cases might wait until the court initiates a forced implementation of the award and then appeal against the enforcement. For instance, this happens where the decision of the tribunal has fundamentally overstepped its scope. However, owing to the immense importance vested in the finality of the international arbitral award, appealing on the basis of the question of law is really very rare in international arbitral

[383] E. Gaillard. (2010). The Review of International Arbitral Awards, NY: Juris Publishing at p. 2.
[384] Greenberg, Kee and Weeramantry, *op. cit.*, 410-412.
[385] *Ibid.*

awards[386]. The probability of a request for review on this basis is essentially negligible compared to the resolved disputes.

Kurkela and Turunen underscored that finality is perhaps the most important feature of international arbitral awards. They further mentioned that finality and fairness of arbitral awards are not in conflict; rather, one enhances the potential of the other and fairness of the arbitral award actually strengthens the finality of the same.[387] Fairness is partly contained in an arbitral process reaching a decision in a timely manner, and finality helps to ensure that the same is effected expeditiously.[388] However, the authors have also mentioned that it can be a strategic move by the involved parties to raise the question of procedural fairness of an arbitral award to lengthen the process of settlement, but that risk can easily be minimised if prior caution is taken in drafting the arbitration more accurately and also throughout the award delivery process. As a whole, fairness never undermines the finality of international arbitral awards.[389] Similar to Kurkela and Turunen, Varady also opines that though fairness and finality might be rival terms in effecting arbitral awards, they also have huge potential to boost one another if fairness-related precautions are taken from the very beginning of the arbitration process by the arbitration tribunal.[390]

In a slightly different note on the absoluteness of the finality of international arbitral awards, Rubino-Sammartano distinguishes between binding and finality of the same. Rubino-Sammartano opined that an arbitral award is binding for all the parties involved once the last arbitrator puts his signature to the arbitral award; finality of the international arbitral award, however does not follow the same pathway.[391] This suggests that in substance, finality and

[386] Greenberg, Kee and Weeramantry, *op. cit.,* 411-413
[387] M. Kurkela, M and S. Turunen. *Due Process in International Commercial Arbitration* (Oxford University Press 2010) 204-205.
[388] *Ibid.* p. 205
[389] *Ibid.*
[390] T. Varady, "Can Proceeding "Not in Accordance with the agreement of the parties" be condoned?", In, S. Kroll (ed),*International Arbitration and International Commercial Law,* (Kluwer Law International 2011) 467-488.
[391] M. Rubino-Sammartano, *International Arbitration Law and Practice* (3rd ed), (Juris Publishing) 65.

the quality of being binding are essentially different in legal consideration. Finality of an arbitral award might be considered absolute only when the entrusted arbitral tribunal has considered the procedure of the concerned arbitration in its totality; otherwise the related arbitral award might be challenged on these grounds. In other words, an arbitral award is final if the concerned arbitral authority has considered and dealt with the entire dispute that is presented to them. Different key contributors explore the principle of international law on finality of arbitral awards by addressing fundamental aspects of international arbitration rules including jurisdiction, distinction between appeal and annulment and the limiting factors of the arbitral awards.

Morkin mentions that the right to appeal against an arbitral award varies from jurisdiction to jurisdiction; a perspective that gives rise to appeal on the basis of the question of law. Such an appeal generally has to be placed in the court of the concerned arbitration. It is also possible that the involved parties in arbitration will specifically exclude the provision of appeal against an award under any circumstances. Morkin gives the example of Section 69 of the English Arbitration Act – which will be discussed further in the next chapter – that the Act allows the involved parties to challenge an arbitral award if there is a mistake in law; however, it also allows excluding the same from the provisions of the arbitration agreement. The ICC and LCIA rules state that if the involved parties reach a consensus that the right to appeal against an arbitral award should be waived, then that would be sufficient for the right to appeal against the award to be waived altogether. Other rules such as those of UNCITRAL and ICDR do not speak of waiving the rights to appeal; however, appeal under these laws might be excluded from arbitration clauses if the need for removal is allowed by consensus.[392] The finality component of the international arbitration award is so strong that

[392] M.L. Morkin, (2009) "Dispute Resolution Clauses II: How to Choose Arbitration", In G. Hanessian and L.W. Newman, *International Arbitration Checklists,* NY: Juris Publishing, pp. 227-237

most of the courts, including the US Supreme Court, prohibit the chance of broadening the right to appeal against an arbitral award[393].

Fraser moves a step further to provide a brief account on how to challenge the arbitral award and what the limiting factors are on the same. The author "Fraser " puts 30 days as the usually accepted time limit on receiving any complaint on arbitral award.[394] He moves on to list the usual grounds of challenging any arbitral award as: an error in drafting arbitration clauses or omission from the clauses, any kind of mistake in question of law while drafting the arbitration clauses or declaring the award, lack of jurisdiction of the arbitration tribunal to move forward with the arbitration process or giving the award and any kind of procedural integrity related lacuna in association to the arbitration process.[395]

Simmons distinguishes between appeal and annulment and opines that annulment is an extremely limited exception of the finality of international arbitral award.[396] Annulment attempts to keep the balance between corrections and finality of arbitral awards; however, it gives more importance to finality than corrections. Appeal and annulment are different in nature considering the fact that annulment is far more limited and does not really have a scope of application in the case of international arbitral awards. This reasoning is seen in the interpretation that even appealing against an award does not provide for annulment under any circumstances. At best, annulment is the final barricade against any illegitimate international arbitral award that actually never comes into operation.

The outlook of Saudi Arabia Arbitration law follows the approaches of international law on finality of arbitral awards. The arbitration law in Saudi Arabia has gone through tremendous changes dated from 1931. Baamir states that commercial arbitration has been a

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[393] *Ibid.see also* M. Rubino-Sammartano, *International Arbitration Law and Practice* (3rd ed), (Juris Publishing).
[394] D.L. Fraser, "Challenging the arbitration awards",In G. Hanessian and L.W. Newman, *International Arbitration Checklists,* (NY: Juris Publishing, 2009), pp. 181-194
[395] *Ibid.*
[396] J.B. Simmons, "Valuation in Investor-state Arbitration", In, J.N. Moore (ed), *International Arbitration*, (Leiden: Martinus Nijhoff) 76.

part of the Saudi legal system back to the time of the Code of Commercial Courts of 1931. However, under the old law, the Saudis did not always have a very friendly attitude towards international arbitration. Saudi Arabia enacted its new arbitration law in mid-2012 and provides significant improvement over to the old Arbitration Law. The new law considers the importance of finality in both domestic and international commercial disputes, which may bring Saudi law closer to international law. However, the eventual goal of international juridical institutions and the legislative authorities in Islamic states is to arrive at a unification of the principles of Sharia law with those of international commercial arbitration. However, Islamic states cannot be compelled by foreign institutions to adopt principles and practices that they perceive to be anathema to their religious beliefs. They must therefore seek common ground that may unify international and Sharia arbitration, and on that basis institute reform from within their countries. Although the new Arbitration Law is still largely untested, time will show the extent to which the New Law's changes of the international trade and national law and reform will be implemented in practice and remains to be assessed over time. Generally speaking, legal experts believe that the introduction of the new changes is a step towards achieving a friendlier, more regulated environment. "One major improvement from the 1983 law, relates to the enforcement of arbitral awards. Prior to the passing of the new law, any arbitral award had to be ratified by a supervising court in order to be enforceable; so the arbitral award only becomes "final" once the Saudi courts have settled any appeal against the award"[397]

Rubino-Sammartano mentions that if arbitration is taking place in a Muslim country, then irrespective of the nationality of the engaged parties, the arbitration would follow Sharia unless a secular judiciary parallel to Sharia exists in the concerned country[398]. Similarly, arbitration in foreign countries not following Sharia would be considered as foreign and

[397] The new Saudi arbitration law: a step towards international norms http://www.lexology.com/library/detail.aspx?g=eff5c2fd-dcdd-40e2-9592-c960b33b6458.
[398] Rubino-Sammartano, *op. cit.*, 74-75.

following Sharia would not be considered as foreign. Similar to Baamir, Rubino-Sammartano also mentions the mixed experience of Islamic countries considering international arbitration and their prolonged reluctance to the same following the ARAMCO award.

Finally, the finality of international commercial arbitration becomes apparent. However, it also shows some avenues through which arbitral award might be asked for a review, appealed or vacated. In summary, commercial arbitration under Sharia and the acceptance of international commercial arbitration under Sharia has been briefly discussed. The next chapter will then discuss the avenues available to the involved parties to challenge the arbitral award in various countries as well as the avenues available under Sharia for Saudi Arabia.

4.3 Effects of International Approaches on Finality of Arbitral Awards and Its Importance in Dispute Resolution

Both in Saudi Arabia and international arbitration approaches, the matter of the recognition of the finality of arbitral awards is generally considered to be the ideal and desirable outcome of arbitration procedures.[399] Finality is promoted through limitation of appeal avenues for both parties to a dispute.[400] This universal wisdom concerning the effectiveness of arbitral procedures has been articulated by the Court of Justice of the European Communities in the *Eco-Swiss v Benetton* case,[401] where the Court stated that:

> *"Control of arbitral awards should have a limited character and… annulment of an award or the refusal of its recognition, should only take place in exceptional cases."*

[399] Baamir and Bantekas, *op. cit.*, 2.
[400] P. Lalive (2008) 'Absolute Finality of Arbitral Awards?' *Revista Internacional de Arbitragem e Conciliação-Año 1-2008,* (Associaçäo Portuguesa de Arbitragem, Ed. Almedina, Coimbra, 2009) 110.
[401] Eco Swiss China Time Ltd v Benetton International NV, Case C-126/97, Judgment of the Court 1 June 1999.

Lalive cited a number of instances where the international arbitration laws deliberately sought to enhance finality of awards.[402] In the Code of Sports-related Arbitration, Rule 46 states: "The award [notified by the CAS Court Office] shall be final and binding upon the parties." Article 27(6) of the ICC Rules stateD that "Every Award shall be binding on the parties… [and]…by submitting to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made". In Iran/US Claims, Article IV of the Declaration of the Algerian Government, and Art. 32(2) of the Tribunal Rules of Procedure, state that "all decisions and awards of the Tribunal shall be final and binding.[403]

Under the Swiss Private International Law Statute, Article 192, an arbitral award "may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement." Article 190 of the same statute provides that "The award is final from the time it is communicated," but also specifies a limited set of grounds where a contest to the finality of the award may be initiated[404]. In the French statutes, Article 1476 of the NCPC states that an arbitral award regarding the dispute is automatically vested with the authority of a *res judicata* ("matter already adjudicated" and which may not be pursued further by the parties) from the moment it is delivered[405]. While English courts recognise and preserve confidentiality when awards are appealed and reviewed by the courts, there is no such principle applied in the US, opening both parties to damages brought by the loss of confidentiality, as US disclosure involves not

[402] Lalive, *op. cit.*, 114.
[402] Eco Swiss China Time Ltd v Benetton International NV, Case C-126/97, Judgment of the Court 1 June 1999.
[403] Lalive stresses, however, that although the award is final and binding, it is not immediately self-executing, per obiter by Zachary Douglas, BYBIL (2003), pp. 151-228.
[404] A Sayed,Corruption in International Trade and Commercial Arbitration (Kluwer Law International, 2004)
[405] J Delvolvé, JRouche, G Pointon, French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration (Kluwer Law International, 2009) 236, 237.

only the judgment award but the details of court proceedings. The question of enforcement and annulment or setting aside of awards exist as mirror actions of each other; setting aside exists on the same grounds as refusal to enforce an arbitral award. That is, the same reasons that could lead to an award being set aside could also lead to its annulment. In the course of development of the law, there have been complications that have been introduced by the New York Convention. The visualisation of the actions and their effects as a result of the application of the NYC, depending on the venues or sites of the actions. However, it should be recalled that the New York Convention applies to the enforcement of arbitral awards originating in similarly contracting states. This effectively excludes arbitral awards sought and settled within the same jurisdiction. When the arbitral award has been set aside in the country in which it was made, this constitutes an automatic annulment of the award, in which case it is rendered unenforceable because it no longer exists. However, if the arbitral award has not been set aside, but enforcement has instead been refused in the country of origin, such refusal of enforcement has no effect in other countries, and cannot be grounds for refusal of enforcement abroad under the New York Convention.[406] The setting aside of the award in the country of origin therefore acts as a barrier to enforcement in other countries because the award does not exist.

4.4 Public Policy as a Substantive Defence against Enforcement

The most controversial, and yet most often-used among the seven challenges to the recognition and enforcement of arbitral awards, is the public policy defence. The New York Convention as well as the UNCITRAL Model Law both state that the recognition or enforcement of the arbitral award may be refused by the competent authority if the award

[406] K. Mbaye, 'Arbitration Agreement: Conditions Governing Their Efficacy' in van den Berg, A.J. (ed) ICCA Congress Series no 9 Paris 1998 (Kluwer Law International, the Hague 1999).

runs counter to the public policy of the country where the award is sought to be enforced[407]. Much discussion has revolved in both legal theory and case law around the construction of the phrase 'public policy.' The presumption of finality of arbitral awards appears to suggest that public policy is a term that admits a broad scope, and therefore should be narrowly construed else the presumption of finality of the award would be rendered empty[408]. On the other hand, countries with strong cultural differences from the Western world have a different concept of public policy as pertaining to the cultural norms and principles within their society that may or may not be similar to those of the seat of arbitration, or the country of the other contending party. For many countries seeking to avoid enforcing an arbitral award perceived as questionable according to their cultural sensibilities, the public policy defence provides a good 'escape clause' for the contesting party.[409]

The initial five procedural[410] defences against the recognition and enforcement of the arbitral award may only be invoked by the respondent party, but the public policy defence may be invoked by either party to an arbitration.[411] Public policy may be conceived of at any one of three levels – domestic, international, and transnational.[412] Domestic public policy pertains to the laws and standards that comprise a country's own domestic values, belief system and cultures, where only one country is involved in the arbitration.[413]

When more than one country is involved, then what is under consideration is international public policy, which involves the rules of a country's domestic public policy, albeit applied in

[407] New York Convention, Article 5.
[408] Sattar S. ENFORCEMENT OF ARBITRAL AWARDS AND PUBLIC POLICY: SAME CONCEPT, DIFFERENT APPROACH?. Transnational Dispute Management (TDM). 2011 Dec 1;8(5). See also M. Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England.' *Arizona JI Comp L* (2005) 762.
[409] M. Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England.' Arizona JI Comp L (2005) 7 47.
[410] See section 3.7.6 in chapter 3.
[411] *Ibid.* 770.
[412] *Ibid.* 771.
[413] *Ibid.*

an international context.[414] Thus, when either or both of the disputants come from different countries, the court conducting the adjudication will be contextualised within international public policy, and assess domestic public policy in line with the "public policy of interested nations and the need of international commerce."[415] One final distinction is that of transnational public policy, which encompasses the accepted norms of conduct arrived at as a consensus of the international community. This is a continuing development that at present is still too vague to be used as a standard, and thus suffers as a standard when compared with the more defensible concepts of domestic and international public policy.[416]

The difficulty with trying to formulate a definition of what, specifically, constitutes public policy is that as a concept it is "adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral, and economic dimensions."[417] There is a distinction between domestic and international public policy on the basis of case law. Aside from the fact that domestic public policy comes into play in domestic arbitration cases and that international public policy is relevant in arbitration cases where more than one country is involved, the distinctions as to when 'public policy' becomes a condition for vacatur of an award become more intricate.

4.5 Public Policy defence by Middle-Eastern countries

The construction and adaptation of Sharia principles in international arbitration have been varied, depending upon the country practising them. This is the result of the workings of the various schools of Islamic teaching which influence the legal framework of each sovereign

[414] *Ibid.*
[415] *Ibid.*
[416] M. Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: p.772. See also Sattar S. ENFORCEMENT OF ARBITRAL AWARDS AND PUBLIC POLICY: SAME CONCEPT, DIFFERENT APPROACH?. Transnational Dispute Management . 2011
[417] V. Anusornsena "Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: the United States, Europe, Africa, Middle East and Asia" (2012). Theses and Dissertations. Paper 33. http://digitalcommons.law.ggu.edu/theses/33

Muslim State. Asian Muslim countries, for instance, generally adopt a more secular approach in their legislation while incorporating Sharia principles. The Arab Muslim states likewise represent divergent views in adopting Sharia, which also affects their international arbitration rules and matters considered arbitrable and part of public policy. Since public policy is the most commonly used defence in setting aside arbitral awards, the interpretation of public policy in Muslim countries becomes a vital consideration for investors and contractors who wish to do business in the Arab region.

In the section that follows, the application of the public policy defence will be examined in the context of two countries whose arbitration laws are based on Sharia as well as the international arbitration conventions. The two jurisdictions chosen for comparison are Egypt and Saudi Arabia. The context of public policy as an arbitration defence is expected to have differences in scope and application in Egypt compared to Saudi Arabia. Egypt is a Muslim country which, while reliant upon Sharia, is considered relatively secular in its approach to legal application as a result of the influence of European law, while Saudi Arabia, the seat of Muslim civilisation and the site of the holy city of Mecca, is considered one of the more conservative Muslim states in whose jurisdiction Sharia is expected to have a stronger influence. A comparison shall be made with regard to how public policy is used in the enforceability of foreign arbitral awards.

4.6 Public Policy in enforcement of arbitral awards in Egypt

The Arab Republic of Egypt, technically situated in Africa, is nevertheless Islamic in its culture and Sharia-based in its legal framework. However, it admits two more influences, those of English common law and French codal law, to which it had been exposed from the 19th century onwards. The Egyptian legal system is subject to judicial review by the Supreme Court while the Council of State oversees the validity of administrative rulings. Among the three influences, Sharia forms the fundamental basis, even of its arbitration system. The

Sharia element coexists with European law, old French law, and a socialist arbitration system.[418]

Before its accession to the New York Convention, The Egyptian Code of Civil and Commercial Procedure constituted the basis of the arbitration system in that country. Since 1959, when the country acceded to the New York Convention, its arbitration law was inspired and harmonised with the provisions of the NYC.[419] In practice, however, Egyptian courts continued to be guided by Article 501 of the Egyptian Code, particularly when ruling as to whether an arbitration proceeding was inadmissible. Article 502 also presented problems as it required the arbitrator to be appointed by name in the arbitration agreement between the two parties.[420] It happens that at times the parties elect to have their dispute settled in an arbitration centre, where the actual arbitrator is not named. Such a case creates a loophole for the party interested in vacating the arbitration proceeding or the subsequent award, by arguing that the arbitration agreement should be set aside for failure to comply with Article 502. Such a decision was arrived at by an Egyptian court in 1983,[421] where it ruled that by not appointing an arbitrator by name, the requirement of Article 502 was not complied with and the arbitration agreement was contrary to public order and should be set aside, and arbitral proceedings permanently suspended.

In a subsequent ruling, the Cour de Cassation decided on December 23, 1991 that the contentious Article 502/3 of the Code of Civil and Commercial Procedure was not related to public order and its implementation was not therefore mandatory. Mindful of the discrepancies between the Egyptian Code and international arbitration laws, a committee was constituted a few years thereafter to formulate an updated international arbitration act for

[418] Anusornsena, *op. cit.*, 111.
[419] *Ibid.*
[420] Article 502 par. 3 of the Code of Civil and Commercial Procedure provided that "failing provisions of special laws, the arbitrators must be appointed by name in the agreement to arbitrate or a separate deed."
[421] Case No. 11,477 (Franco-Egyptian), Cairo Court (14th Chamber), 31 December 1983; also, Westland v. Arab Council of Industrialisation (Case No. 8165/1980 – Cairo).

Egypt, based on the UNCITRAL Model Law. The new law, the Egyptian Arbitration Act. No. 27 of 1994, amended by Law No. 9 of 1997, does not differentiate between international and domestic arbitration. The Egyptian Arbitration Act recognises the autonomy of the parties, and restricts the grounds for setting aside to the seven grounds specified in UNCITRAL and NYC. Public policy constituted one of the grounds for vacating the arbitration award, which is consistent with the Model Law. In its application, however, Anusornsena[422] notes that the new law exhibits the decreasing influence of Sharia, although Islamic principles have been retained in the background due to commercial pressure.[423]

While the modified arbitration law incorporates most of the principles of the Model Law, there are some aspects in which the legislators apparently sought to harmonise the arbitration act with the existing Egyptian legal framework. For instance, the enforcement of arbitral awards as contemplated in the Model Law is provided for in the Egyptian Arbitration Law Articles 55-58, which stipulated that the enforcement of arbitral awards in Egypt will be executed, provided that such award did not contravene a precedent judgment of Egyptian courts, Egyptian public order, and that the defendant had been duly notified of the award. Furthermore, Article 53(2) allows for the judicial nullification of the arbitral award if the content of such award was deemed by the court to be contrary to public policy. As if to reinforce this provision, Article 58(2)(b) provides that the court may enforce the award only if it does not contradict public policy in the Arab Republic of Egypt. Additionally, Article 11 of the Egyptian Arbitration Law No. 27 of 1994 specifies that "arbitration is not permitted in matters where compromise is not allowed," but the law does not specifically provide which matters may not be compromised or are not arbitrable. In some other statutes, there are provisions that variously provide that certain matters may not be conciliated, such as Article

[422] V. Anusornsena "Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: the United States, Europe, Africa, Middle East and Asia" (2012). Theses and Dissertations. Paper 33. http://digitalcommons.law.ggu.edu/theses/. *cit.,* 114.

[423] Ibid.*cit.*, 342.

551 of the Code of Civil and Commercial Procedure which identifies matters pertaining to personal status and public policy.

There is more than one law that may be applied in Egypt concerning international arbitration. The principal provisions regarding the enforcement of a foreign arbitral award still rest in the Egyptian Procedural Law, in Articles 296 to 301. The Egyptian Procedural Law is considered to have been superseded by the New York Convention since 1959 in all those cases that are contemplated by this Convention. Thus, the NYC is made operable when both parties to the arbitration proceedings are member states in the New York Convention. However, where the other party to the arbitration comes from a country that is not a signatory to the NYC, then Articles 296 to 301 apply. The conditions specified in these provisions under the Egyptian Procedural Law are more restrictive than those included in the NYC.[424] In the Egyptian Procedural Law, the grounds to set aside are specified in Articles 298 and 299. Article 298(4) prohibits the enforcement of any order that conflicts with any other ruling previously issued by the court, and as such constitutes a *fait accompli* not capable of revision, and all the parties can do is accept the established ruling.

With regard to the topic of public policy, Egypt does not distinguish between domestic and international arbitration cases and applies Arbitration Law No. 27 to both. This may constitute a disadvantage to the recognition and enforcement of international awards, because Law No. 27 refers to domestic provisions that govern conciliation, the provisions of which are derived from Sharia and partly incorporate provisions from the Egyptian Code of Civil and Commercial Procedure. As such, they may tend to render more difficult "the process of internationalising the notion of public policy."[425] However, inasmuch as Arbitration Law No. 27 is closely patterned after the NYC, numerous case laws demonstrate that the interpretation of public order by Egyptian courts has been narrow and restrictive, and that there is a general

[424] *Ibid.* 115.
[425] Saleh, *op. cit.,* 372.

reluctance of these courts to reject arbitral awards on the grounds of public policy under Article V(2)(b) of the New York Convention.

A case before the Court of Cassation in December 1991 claimed that the arbitration agreement must specify the name of the arbitrators, failing which the agreement must be set aside for being in violation of Article 502(3) of the Procedural Law, and thus being in breach of public order. The Court rejected the claim, providing a strict construction of the defence of public order as specified both in the NYC and the Procedural Law in ruling that Article 502(3) is not deemed a matter included under public order. The Court held that "an arbitral award will not be recognised in Egypt if it is in breach of public order or on social, political and economic grounds in the State."[426] This statement of the court was relied upon as doctrinal ruling in other subsequent cases on public order.

Another case demonstrating the strict construction of the public policy defence was the Amal Tourism[427] case. In this dispute, the Ministry of Tourism petitioned the Cour de Cassation to set aside the award for the reason that a domestic award in favour of an investor violated public policy, on the grounds that the land that was the subject of the dispute belonged to the public domain and had been assigned to national defence purposes. The Cour de Cassation rejected the claim, and ruled that the award was not in violation of the public policy of Egypt.

There are rare cases where Egyptian courts have annulled the awards, providing examples of what constitutes public policy for which an arbitral award may be set aside. In Case No. 10635 (2007), the Court of Cassation was said to have uncharacteristically demonstrated "excessive formalism"[428] in annulling an award for the reason that it did not include the

[426] E. Al-Tamimi, *The Practitioner's Guide to Arbitration in the Middle East and North Africa* (JurisNet 2009), see also E. Al Tamimi (Sept 2014) 'Enforcement of Foreign Arbitration Awards in the Middle East: Identifying Where the Problem Is and How to Fix It.' *Enforcement of Foreign Arbitration Awards in the Middle East.* Al Tamimi & Co. at 1

[427] Egyptian Court of Cassation, 27 December 2007, discussed by Thomas Childs (2010) 'Egypt, Syria and Saudi Arabia: Enforcement of foreign arbitral awards in Egypt, Syria and Saudi Arabia,' *Arbitration Newsletter*, Sept.

[428] Childs, *op. cit.*, 71.

pertinent text of the arbitration agreement, even though a copy of the agreement was attached to the case file.[429] Another example of the court upholding the defence of public policy is that of the Chromalloy case[430] (1995). In this dispute, the Cairo Court of Appeal ruled in favour of the request of the Ministry of Defence for the annulment of an award to an American military contractor, for the reason that the tribunal had erred in applying civil law rather than administrative law in considering the merits of the dispute. The ruling ran counter to Egypt's usual stance of strict construction of public policy, and notwithstanding the decision of the Egyptian Court of Appeal, courts in the US and France eventually granted enforcement of the award.[431] Other examples are evident in recent cases, where the Cairo Court of Appeal granted a similar request for annulment on the grounds that the tribunal applied the wrong body of Egyptian law.[432] Two subsequent cases, however, appeared to reverse these rulings and declared that Section 91 of the Court held that such error did not comprise grounds for annulment.[433] The reversals in the ruling notwithstanding, it is likely that Case No. 10637 and the Chromalloy case shall be instructive in future petitions for annulment of arbitral awards on similar grounds, because they were based on provisions of the Egyptian Arbitration Law that have no direct counterpart in the New York Convention.[434]

More recent cases affirmed the typical stance upheld by Egyptian courts to give effect, as far as possible, to the enforcement of the arbitral award. In the John Brown Engineering Case (2005),[435] the Court of Cassation held that a party seeking to enforce a foreign award may avail of the expedited procedure for enforcing domestic awards outlined in Article 56 of the Egyptian Arbitration Law. The expedited procedure involves filing an *ex parte* application

[429] Egyptian Court of Cassation, 27 February 2007.
[430] Cairo Court of Appeal, 5 December 1995, XXIVa YBCA 265 (1999).
[431] United States District Court, District of Columbia, 31 July 1996, XXII YBCA 691 (1997).
[432] Cairo Court of Appeal, 7 September 1999 and 20 March 2003.
[433] Cairo Court of Appeal, 29 January 2003 & 26 February 2003; see Borham Atallah, (October 2003) 'The 1994 Egyptian Arbitration Law Ten Years On,' *ICC International Court of Arbitration Bulletin*, 14(2), at 16-17.
[434] Childs, *op. cit.*, 71.
[435] Egyptian Court of Cassation, 10 January 2005. See Borhan Amrallah, *Les tendances de la jurisprudence égyptienne concernant l'exécution des sentences arbitrales étrangères à la lumière de la Convention de New York*, at 11-14.

for enforcement with the President of the Cairo Court of Appeal. The reasoning of the Court in allowing this measure is to give effect to Article III of the New York Convention, which states: "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." The alternative recourse is for the party seeking enforcement to bring an ordinary action in the Court of First Instance, as prescribed by Article 297 of the Egyptian Code of Civil Procedure, in lieu of the *ex parte* application for enforcement. Requiring them to do so is seen by the Court to violate Article III of the NYC.[436] In a contrary development, however, a less welcome ruling is that of a 2008 decree issued by the Ministry of Justice, requiring its Arbitration Technical Office to scrutinise awards before such are reviewed by the courts.[437] This extra level of review is seen to delay and even impede enforcement proceedings, particularly since the decisions of the Arbitration Technical Office are not publicised, and there is no right of interested parties to appear before the Office. Because of its controversial nature, there are several challenges to the constitutionality of this decree.[438]

As mentioned previously, matters regarding personal status, guardianship, marriage and divorce are non-arbitrable as a rule, as they are under the exclusive jurisdiction of the Egyptian courts.[439] Criminal matters are also non-arbitrable, therefore any civil transaction related to criminal or other unlawful activities may not be the subject of arbitration.[440] On the other hand, administrative contracts may be the subject of arbitration. In the Silver Night case,[441] the Egyptian Antiquities Organisation filed an action in court to vacate an award on

[436] Childs, *op. cit.,* 71-72.
[437] Decree of the Egyptian Minister of Justice No. 8310/2008, 21 Sept 2008.
[438] Childs, *op. cit.,* 72.
[439] Article 11 of Egypt Arbitration Law No. 27 of 1994, in reference to Article 551 of the Code of Civil and Commercial Procedure 1994.
[440] Saleh, *op. cit.,* 373.
[441] Antiquities Organisation v Silver Night Company, Court of Appeals, Cairo, Commercial Circuit No. 63, 19 March 1997, No. 64/113(j), Yearbook XXIII 169-174, (1998).

the grounds that the award was based on the contract for construction work between an English contractor and the Antiquities Organisation. Since this was an administrative contract, the petitioner argued that such was not arbitrable. The Court of Appeal ruled to the contrary, stressing that under the Egyptian Arbitration Act of 1994, disputes that arise from administrative contracts may be settled by arbitration processes.

4.6.1 Case Law: Arbitrability and Public Policy in Egypt

In *National Cement Company v Andritz Company*,[442] the petitioner (National Cement Company or NCC) contracted with Deutsche Babcock, a consortium which included the respondent and others, for the purpose of transforming two cement production lines. The arbitration agreement stipulated that disputes would be resolved under ICC Arbitration Rules, and the law governing the contract would be that of Egyptian law. The consortium put up a performance bond amounting to 10% of the contract value, in the form of letters of guarantee. The dispute arose when the NCC alleged that the consortium failed to execute the contract within the stipulated time frame. However, it was the consortium that initiated arbitral proceedings, requesting for the cancellation of the letters of guarantee due to the lapse of its period of effectivity, which was 54 months from the date the contract entered into force. NCC counterclaimed for damages resulting from non-performance by the consortium. The arbitration tribunal, in its award, ordered NCC to compensate the values of the letter of guarantee, inclusive of interest equivalent to the London Interbank Offered Rate (LIBOR) plus 3% per annum, commencing from April 7, 1998 and lasting until the date of payment. NCC filed a request with the Egyptian courts for the award to be set aside, arguing that the interest rate granted by the award exceeded the legally mandated interest rate. According to

[442] National Cement Company petitioned for the annulment of International Chamber of Commerce (ICC) arbitral award CK/9928 rendered on December 21, 1999.

Article 227(1) of the Egyptian Code of Civil and Commercial Procedure 1994, the interest rate cannot exceed 7% per annum.[443]

On July 30, 2001, the Cairo Court of Appeal nullified the award on the grounds that it violated public policy. The order to pay the LIBOR interest rate plus 3% was adjudged in excess of the maximum interest rate prescribed by Egyptian law, and thus was in contravention of public policy. A challenge was elevated before the Egyptian Cour de Cassation; as a consequence, the Court of Appeal ruling was reversed in part. The excess interest rate not condoned by Egyptian law constituted a violation of public policy under Article 53 of the Egyptian Arbitration Act of 1994[444], but the part of the award that is consistent with public policy and within Egyptian law should be retained and awarded to the consortium[445].

It is not common or mandatory practice to revert to the Egyptian Code of Civil and Commercial Procedure in the case of international arbitral awards because the Egyptian Code is intended to apply to domestic matters. The reason for its application in this case, however, is due to the stipulation of the parties in the arbitration agreement that the contract shall be governed by Egyptian law – strictly speaking, then, the grounds for vacating the award are not public policy but non-compliance with the law in effect.

There may be a disadvantage in the fact that Egypt applied the law on domestic arbitration to a dispute resolved by international arbitration, since it may unduly restrict the enforcement of

[443] According to Article 227(1) of the Egypt Code of Civil and Commercial Procedure, "The parties may agree on a different rate of interest, whether it concerns delay in fulfillment of an obligation or in any other cases where interest is stipulated, provided that the rate does not exceed 7%. Agreements to a higher rate of interest shall result in the reduction of interest to the prescribed rate."

[444] Elattar A, Enforcement of International Arbitration Awards: A Comparative Study between Egypt, USA, and the Gulf Cooperation Council Countries (LAP Lambert Academic Publishing 2013). see M. Aboul-Enein Reflections on the New Egyptian Law on Arbitration Volume 11, Issue 1, 1 March 1995. Available at , http://dx.doi.org/10.1093/arbitration/11.1.75

[445] Alahidab , A., Arbitration with the Arab countries (Kluwer Law International, 1999), P115. See also Richard Kreindler, 'Particularities of International Financial Arbitration in the Context of Challenges to Arbitral Awards' (1997)

foreign awards to the stipulations intended for domestic awards. On the other hand, terms for domestic awards may be more liberal in certain aspects such as availing of the expedited procedure for the enforcement of domestic arbitral cases in the John Brown Engineering Case (2005).[446] These examples illustrate that the adoption of domestic arbitration procedures and construction of public policy requisites should be carried out with caution and discernment so as to preserve the advantages of international commercial arbitration for foreign investors, business partners and contractors in Egypt.

4.7 Saudi Law on Finality of Arbitral Awards.

Following the preceding discussions on different international perspectives on finality and appeal on question of law, the following section discusses the approach and attitude of Saudi Arabian arbitration law to finality. The following discussion and the landmark case will clarify the difference (from international perspectives) in the understanding of finality in Saudi Arabia. When arbitral awards are final, their enforcement comes as an interactive result. More generally, the concept of finality of arbitral awards is a core principle in international arbitration conventions and is the principal advantage accorded the member states. As described previously, awards given under these conventions are generally considered to bear finality, except for certain procedural errors and at most two substantive infirmities identified by the New York Convention. Much discussion has also revolved around the 'public policy.' The presumption of finality of arbitral awards appears to suggest that public policy is a term that admits a broad scope for review. Both the New York Convention and the UNCITRAL Model Law state that the recognition or enforcement of the arbitral awards may be refused by the competent authority if the award runs counter to the

[446] Egyptian Court of Cassation, 10 January 2005.

public policy of the country where the award is sought to be enforced[447]. Saudi Arabia was the least friendly towards enforcement of foreign arbitral awards, despite the implementation of the Saudi Arbitration Law of 2012.[448] At this point, a cursory examination of the grounds for denying enforcement of arbitral awards among the GCC countries (including Saudi Arabia), which are all signatories to the NYC, would be apt The grounds for denying enforcement comprise the challenges to the enforcement of arbitral awards in that country, and they are compared with the grounds allowed by the NYC for the denial of enforcement.

Saudi Arabia has recently made massive changes and reforms to the practice of arbitration law. The law was signed into effect through the Royal Decree No. M/34 dated 16/04/2012 and replaced the Arbitration Regulation of 1983 and the Rules for the Implementation of the Arbitration Regulation of 1985. Expressing optimism about the new law, a note in the article *The New Saudi Arbitration Law* reads: "One major improvement from the 1983 law relates to the enforcement of arbitral awards. Prior to passing the new law, any arbitral award had to be ratified by a supervising court in order to be enforceable; so the arbitral award only becomes "final" once the Saudi courts have settled any appeal against the award".[449]

Rubino-Sammartano mentions that if arbitration is taking place in a Muslim country, then irrespective of the nationality of the engaged parties, the arbitration would follow Sharia unless a secular judiciary parallel to Sharia exists in the concerned country.[450] Similarly, arbitration in foreign countries not following Sharia would be considered as foreign. Similar to Baamir, Rubino-Sammartano also mentions the mixed experience of Islamic countries considering international arbitration and their prolonged reluctance towards the same following the ARAMCO award.

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[447] [447] Article V, (1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958. see also TURNER, R., Arbitration awards: a practical approach (Blackwell Pub., 2005), p5.

[448] Almutawa, *op. cit.*, 7.

[449] The new Saudi arbitration law: a step towards international norms http://www.lexology.com/library/detail.aspx?g=eff5c2fd-dcdd-40e2-9592-c960b33b6458.

[450] Rubino-Sammartano, *op. cit.*, 74-75.

The New Saudi Arbitration Law has been lauded as one of the biggest steps towards achievement of greater autonomy for international arbitral awards.[451] Al-Ghamdi and Boehm Jr. enumerate the positives of this new law as follows:

- "The New Law provides written guidelines for determining whether an agreement to arbitrate may be enforced. Previously, there were no written guidelines for arbitration agreements (except the requirement that the arbitration agreement be made by a person with full legal capacity) and it was the responsibility of the Saudi court to approve the parties' agreement to arbitrate before the arbitration process could begin.
- The New Law provides clear and detailed procedures for the appointment and/or recusal of arbitrators. Under the Old Law there were no detailed guidelines.
- The New Law allows arbitrations to be conducted in a language other than Arabic if ordered by the arbitration panel or if the parties agree (although awards must be translated to Arabic prior to enforcement). Under the Old Law, it was required that arbitrations be conducted in Arabic.
- The New Law increases the length of time to complete the arbitration process. Under the Old Law, the arbitrator was required to issue an award within 90 days (unless the parties otherwise agreed), although this requirement was not typically observed in practice. Under the New Law, the arbitration process is allowed to take at least 12 months and can be extended by 6 months or more if the parties agree.
- The New Law allows parties the freedom to choose which law will apply. The Old Law was silent in this regard (other than requiring that arbitral awards must be

[451] Harb and Leventhal, *op. cit.*

pursuant to the provisions of Islamic Sharia and the "laws in force", i.e. applicable Saudi law)."[452]

The finality of arbitral awards is related to the recognition and enforcement of domestic and international arbitral awards through the application of the SAL 2012 as the applicable procedural law. SAL 2012 provides for the recognition, enforceability and finality of arbitral awards issued under it granted compliance with the pertinent requirements.[453] Unlike the old law where all the arbitral wards had to be approved by a compete court, SAL 2012 provides a more favourable approach that allows for resolution of domestic and international disputes. The Law states that, 'Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable'.[454] This provision is a fundamental improvement in the enforcement of arbitral awards in Saudi Arabia. This is because the New law takes into consideration the possibility of annulment proceedings as well as the enforcement proceedings and the implication of Article 52 of the New law is to ensure that the enforceability process is simplified in a way that allows for arbitral awards to be effectively enforced as opposed to making all arbitral awards enforceable *per see* and final regardless of whatever applicable law is applied to govern the arbitral proceedings.[455]

The finality of arbitral awards in Saudi Arabia is based on the foundation of Sharia law as well as international developments. According to the perspective of the Hanbali School, it is believed that when an arbitrator writes to the judge regarding his ruling, then the judge would find it necessary to accept and execute the ruling as it is the rule in authority and it binding on the parties since they had made an agreement on the choice of arbitrator.[456] According to a renown Hanbali Jurist Ibn

[452] M. Al-Ghamdi and J. C. Boehm, Jr., New Saudi Arbitration Law: A Positive Step, but Practical Questions Rema. available at http://www.nortonrosefulbright.com/knowledge/publications/94353/new-saudi-arbitration-law-a-positive-step-but-practical-questions-remain

[453] The Law of Arbitration, Article 52
[454] Ibid
[455] Al-Fadhel, "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law." *Company Law* 30, no. 8 (2009): at 255
[456] Ibn Kudama, *AL-Mughni*, vol. 10 Issue No. 822; at 137

Qudamah, the judiciary only selects the most qualified and reputable persons to be judges, and hence they do not have to follow the rulings of previous cases regardless of how genuine or authentic they appear to be.[457] By adopting this approach, arbitration in Saudi Arabia avoids duplication and contradictory verdicts and brings to an end the occurrence and recurrence of conflict.

Contrarily, the Sharia law also contains some provisions that contradict the principle of finality of arbitral awards. According to Article 1849 of the Ottoman Court Manual 'Majalla', an arbitrator's decision is accepted and confirmed when submitted to a properly constituted court and in accordance with the law. This modern Islamic view under the Hanafi School is respected in the Saudi Arabian courts. Furthermore, Article 2094 of the Codification of Legislative Rules likens the arbitrator's award and that of the judge. In effect, it implies that the judge is obligated to accept and execute an arbitral award to conclusion since the arbitrator's decision has the same weight as the judge's decision.[458] Worth observing is the fact that the issue of finality of arbitral awards under article 52 of the New law is subject to some differences of opinion. Nevertheless, the legislature was decisive with regards to the inclusion of Article 52 in the new law as a way of stabilising the orientation of Saudi Courts on the matters of domestic and international arbitration.

The adoption of the principle of finality in Saudi Arabia is subject to some doubts and uncertainty as exemplified by a recent query by the Supreme Judicial Council where the judge sought to obtain guidance on the issue of enforcement of arbitral awards where the execution judge felt uncertain about the issue of violation of the provisions of public policy or the Islamic Law. The Office for the Settlement of Negotiable Instrument Disputes, through a Royal Order issued the final decision and highlighted that the enforcement judge should execute the details in the 'executive bond' with no regard to the merits of the dispute unless there is evidence of violation

[457] Ibid
[458] Ibid

of the provisions of public policy. This means that the principle of finality cannot be executed based on the violation of public policy of provisions of the Islamic law.[459]

4.8 Analysis of finality Awards: Enforced or Rejected in international arbitration agreements

4.8.1 Discussion and Analysis study of case: Dallah Real Estate v Ministry of Religious Affairs, Government of Pakistan

Dallah's case is central to the analysis of the principle of finality as it presents the implications of challenges of recognition and enforcement of arbitral awards by drawing on the limitation provisions set in the Articles 5 of the New York Convention, Section 103 of the Arbitration Act 1996 (UK) and Article 18, 34 and 36 of the UNCITRAL Model Law. The premise of the case is that if the award has not been set aside in the country of origin, it may still be denied enforcement in other countries. In the 1996 case of *Dallah Real Estate v Ministry of Religious Affairs of Pakistan*, Dallah signed an agreement with the Awami Hajj Trust for the provision of housing to pilgrims making the *hajj* to Mecca [460]. Awami Hajj is a trust set up by ordinance of the Government of Pakistan. The arbitration agreement contained within the contract specified that any disputes arising from it shall be referred to ICC arbitration in Paris, however, no applicable governing law was specified. Shortly after the agreement was signed, the ordinances creating the Trust lapsed and the latter ceased to exist as a legal person. When a dispute arose concerning the project's scope, Dallah brought ICC arbitration proceedings in 1998 against the Government of Pakistan, with the claim that the government was a true party to the agreement underlying the dispute. The tribunal upheld Dallah's claim and awarded the company USD 20 million. When Dallah sought to enforce

[459] F. Nesheiwat and A. Al-Khasawneh, "2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia, The," *Santa Clara J. Int'l L.* 13 (2015). At 448

[460] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan (2010) UKSC 46.

the award in England, the Government of Pakistan objected to enforcement pursuant to Arbitration Act 1996, Section 103(2)(b), which states that "(2) Recognition or enforcement of the award may be refuse, if the person against whom it is invoked proves (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made." The Government contended that the arbitration agreement was not valid under the law of the country where the award was made, due to the reason that the Government was not a party to the agreement.

A principal issue in this case is whether or not the enforcing court may decide whether an arbitration agreement exists, and the nature of this exercise as undertaken by the court. Dallah contended that a mere enforcing court may only conduct a limited review of the tribunal's jurisdiction, and resolve the precedent question as to whether a valid arbitration agreement existed that binds the parties. The Supreme Court, however, did not accept the argument for a limited review, and ruled that the issue of jurisdiction of the tribunal deserved a full investigation by the court. Lord Collins agreed, explaining that while the trend was to limit intervention by the Court both in fact and in law, it was necessary for the court to conduct a full investigation on the precept that upon its determination lay a fundamental cornerstone of arbitration, which is its consensual nature. A full investigation under the court under Section 103(2) could only be conducted when the issue centred on the "fundamental structural integrity of the arbitration proceedings."[461] The structural integrity of the arbitration is an issue, for instance, when the petitioner alleges that they had not been a party to the alleged arbitration proceedings, which were conducted without their knowledge. Such a situation necessarily implies the lack of due process, of notice and hearing, and even the total absence of involvement of the party from what should have been a resolution of the dispute with the

[461] Kanoria & Others v Guinness (2006) EWCA Civ 222.

full consent of the parties. In this case, according to Lord Collins, it is entirely suitable for the competent court to conduct a full review of the case, the facts and the law, to ascertain the structural integrity of the arbitration proceedings.[462]

Based on a detailed study of the language of Section 103(2)(b) of the 1996 Act and Article V of the NYC, Lord Mance arrived at the conclusion that neither of these provisions indicated that only a limited review may be conducted by the court in the enforcing country. Furthermore, neither Article VI nor section 103(5) state even imply that parties resisting the recognition or enforcement of an arbitral award in one country are obligated to first seek to vacate the award in the seat of arbitration.[463] There are a number of wider implications of the Dallah case, outlined by Bamforth and Aglionby as follows:

The doctrine of 'Competence-competence' is falsely interpreted to mean that the tribunal's word on its own jurisdiction is the last word, which the court in this case has denied. Dallah avers that when a tribunal's competence or jurisdiction is under question, then the tribunal's decisions are likewise subject to a full investigation by the courts in the seat of arbitration as well as the enforcing country, with both having full investigatory rights. It should be noted that some authors dispute this opinion; Amokura Kawharu argues that "in the ordinary course, a court dealing with a challenge to a tribunal's decision on jurisdiction should adopt a review, and not a rehearing, approach."[464]

When the grounds for resisting enforcement are based on Sec 103(2)(b) of the 1996 Act, then the power of the English court to fully investigate the tribunal's jurisdiction is derived from Article V(1)(a) of the NYC. This statutory provision admits no other interpretation in that jurisdiction.

[462] R. Bamforth and A. Aglionby, 'Case Comment: Dallah Real Estate and Tourism Holding Company v the Ministry of Religious Affairs, Government of Pakistan [2010], USKC 46 (2010).
[463] *Ibid.*
[464] A. Kawharu, 'Arbitral Jurisdiction' *NZ Universities L Rev (2008)* 238-264.

When the challenge to an awards enforcement is founded on the lack of validity of the arbitration agreement, and the parties have failed to stipulate a governing law for their arbitration agreement, then the jurisdictional issue should be addressed under the law of the seat of arbitration.

The best alternative is still for the parties to expressly consider from the start who they wish to be bound by their arbitration agreement, and duly have this drafted in the agreement.[465] By having a well-laid-out agreement, the specifics can be used to expedite the arbitration process based on the commitments of each party. Where the terms are well laid out, the process takes a shorter path to conclusion and also guides the engagement among parties when a matter is undergoing hearing.

Dallah's case is highly relevant to the principle of finality of arbitral awards as it explores the issues against and enforcement of international arbitral awards. Binder examines the provisions of the Model Law in relation to the extent to which arbitral awards may be set aside and asserts that, "In order to minimise judicial intervention in international commercial arbitration, every occasion where such intervention is permitted has to be scrutinised closely."[466] The challenge in enforcing the finality awards in Dallah emanates from the obligation of the court to balance the need to preserve the integrity of the arbitration process and the preservation of the finality of arbitration. Finality of the arbitral awards is one of the greatest appeals that inspire parties to international commercial transactions to select arbitration as an alternative dispute resolution mechanism. Professor Doug Jones averts that "When the parties choose arbitration, they choose finality. They choose to have their dispute resolved once and for all by an arbitral tribunal, in preference to the interminable layers of appeal characteristic of the judicial process."[467] However, the possibility of appealing to the

[465] Bamforth and Aglionby, *op. cit.,* 46.
[466] P. Binder, (2010), *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,* 3rd ed, Sweet & Maxwell. at 376.
[467] D. Jones, (2011), *Commercial Arbitration in Australia,* Thomson Reuters, at [10.100].

courts in case parties are aggrieved with the arbitral proceedings and enforcement of the arbitral awards instils confidence that the arbitral process is adequately safeguarded and supervised by the courts of law.

Article 34 of the Model Law provides limited grounds under which the finality of arbitral awards may be exempted. It sets out the grounds for the setting aside of the arbitral awards. As such, the arbitral awards may be set aside upon satisfaction by the High court that one or more of the grounds provided therein exists. In Dallah case, Articles 34(2)(a)(i) protects the right of the party who had not agreed to arbitration as that leads to invalidity of an arbitration agreement. The Supreme Court also relied on Articles 36 and Section 103 of the Arbitration Act 1996 (UK) which provides the appropriate grounds for the refusal for the recognition and enforcement of arbitral awards. Since the government of Pakistan did not sign the arbitration agreement, the agreement did not satisfy the provisions in Article 18 of the UNCITRAL Model Law that requires the parties to an arbitration agreement to be treated with equality and be given full opportunity of presenting their side of the case. Moreover, Article 5(1)(b) of the New York Convention's exception for procedural unfairness sets out the same grounds for the refusal of enforcement of arbitral awards. In this case, the award had the implication of asserting to enforce an obligation of making a significant payment to a non-party to an arbitration agreement.

4.8.2 Other case studies on finality of arbitral awards

The finality of the arbitral award becomes evident through different case considerations around the world. In TCL Air Conditioner (Zhongshan) Co. Ltd. vs. The Judges of the Federal Court of Australia,[468] the court declared that unless some arbitration dispute came into conflict with public policy, the court would not interfere regarding with the enforcement

[468] TCL Air Conditioner (Zhongshan) Co. Ltd v The Judges of The Federal Court of Australia and ANOR [2013] HCA 5.

of the arbitration award. It is apparent that if an arbitration award is not respected and it has no conflict with existing public policy, then the court would not interfere to compel the involved parties to respect the arbitration award. The court stressed in cases where the involved parties have priorly agreed to settle their dispute through final binding arbitration, they should stick to their commitment. The federal court imposed the arbitration award and proceeded to conclude that this was not an act of enforcement of the legal and exact content of the concerned arbitration, but the priorly determined binding results of the arbitration agreement[469]. The verdict of the Federal Court of Australia in the concerned case bears interesting teachings. The merit of international arbitration cannot be challenged under any circumstances, however the finality of the binding results of the arbitration can definitely be ensured without stepping beyond the jurisdiction of the court. A brief discussion of the above case might help to understand this. TCL Air Conditioner is a company based in China (PRC) and Castel Electronics is a company based in Australia. TCL gave Castel the exclusive rights to sell its air conditioners in Australia; but a dispute erupted between the two companies regarding their mentioned contract. Castel approached the arbitration authorities in Australia claiming compensation and the authority gave their verdict in favour of Castel, asking TCL to give Castel a sum equivalent to US $3,369,351.[470] Moreover, the arbitration authorities asked TCL to provide Castel with the cost of arbitration procedures. However, TCL failed to comply with the instructions of the arbitration tribunal and that compelled Castel to approach the Federal Court of Australia. The International Arbitration Act of 1974 confers the safeguarding of an arbitration award in case the same has not been respected on the Australian Federal, State and Territory courts. This has been done in accordance with the

[469] L. Bento, Finality Confirmed, Constitutionality Upheld: Major Victory for International Arbitration Community in Australia, 2013 Available at: http://kluwerarbitrationblog.com/2013/03/19/finality-confirmed-constitutionality-upheld-major-victory-for-international-arbitration-community-in-australia.

[470] K. Oldfield, (2014). International Arbitration – Finality of Arbitral Awards, Blakes, retrieved 19 September 2014 <http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1693>

UNCITRAL model law, which states that arbitration awards should be binding and honoured by all the parties involved, and in case any deviance is observed and any party involved approaches the court with a complaint regarding the same, the court should take necessary actions to settle the issue and safeguard the arbitration award. Article 36 on the other hand also clearly states under which circumstances an arbitral award should be nullified or should not be enforced by the court.[471]

TCL's very first reaction was to claim that the Federal Court of Australia did not have any jurisdictional realm in this issue so that it could direct TCL to pay out that amount. Again the concerned company mentioned that even if the court had jurisdiction, it should not interfere in terms of public policy as the arbitration tribunal was already subject to a breach of natural justice. However, it was hard to convince the Federal Court on these grounds and they declared that following IAA, 1974 the Federal Court has all the necessary jurisdiction to interfere in this case and safeguard the arbitration award if it feels it is necessary.[472]

Having no other options left, TCL approached the High Court so that it could prevent the judges of the Federal Court from interfering in the arbitration award. They argued that such intervention on behalf of the Federal Court was against the Australian constitution, against the integrity of the Federal Court and vested unprecedented judicial power in the arbitration tribunal. TCL had also mentioned that the terms of arbitration agreements must be correct in law in order for them to be respected in all circumstances so that this may lead to the safeguarding of the arbitration award. However, all the objections and arguments of the concerned company in front of the High Court were rejected and the Federal Court's decision was withheld. The High Court mentioned that such intervention was neither against the Australian constitution nor did it undermine the integrity of the Federal Court. Further, it

[471] High Court of Australia, TCL AIR CONDITIONER (ZHONGSHAN) CO LTD v THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA & ANOR, 2013.
[472] Oldfield, *op. cit.*, (2014).

mentioned that arbitration agreements need not be correct in terms of law in order for an arbitration award to be respected.[473]

The decision given by the court implies that arbitration is considered as a consensual agreement among parties where an arbitrator plays the role of a judge and for the award of an arbitration to be respected, the arbitration itself need not be correct in legal terms. Since it had been already decided by the parties prior to the dispute that the arbitration award would be respected in case of any dispute, hence the same has to be followed courting a similar situation. "Enforceability of the award in Australia is not dependent on whether the award is factually or legally correct, and an error in law does not fall within the narrow exceptions of when the court can refuse to enforce the award."[474]

The verdict given by the Federal Court of Australia and eventually supported by the High Court in the TCL Electronics Vs Castel arbitration dispute proves that foreign courts are all committed to uphold the arbitration award and only have very small grounds for refusal. This once again portrays that commercial arbitration is an efficient means to settle commercial disputes and courts will not come in its way or undermine its effectiveness; rather they will safeguard the finality of the arbitration award in case the same is not ensured by the involved parties. In brief, the finality of the law as it is concerned with arbitration, which in another way stands for no further appeal once the award has been determined and delivered courting any dispute bound by that arbitration, is well illustrated through the above case study. The respect towards the arbitration award by the national courts is also emphasised by the Federal Court of Australia's verdict on the concerned case.

The status of arbitration in a country like Australia is well portrayed in the above discussed case scenario. In another way, this also refers to the international attitude to the finality of arbitration. However certain other considerations might help in understanding the universal

[473] *Ibid.*
[474] *Ibid.*

appeal of arbitration as betterment of court litigations and finality of arbitration awards as respected by national courts all over the world.

The restrictions to challenge an arbitral award are well documented under the Arbitration Act of 1996 of the legal system of England and Wales. It mentions that an arbitral award can only be challenged if the applicant has already exhausted all other sources of arbitral process of review or appealing the arbitration award. Another thing binding on appeal against arbitral award is that before appealing, the appellant has to make sure that he has no other option available under article 57, such as additional award or review of award. Again, the application or the appeal must be initiated within 28 days of the award date. Both of these restrictions clearly specify the inherent objective of finality related to arbitration. The repeated emphasis on available modes of settlement other than court intervention also illustrates the fact that court intervention has been attempted minimally and only when no other alternative remains.

However, the 28-day time limit has been relaxed under special circumstances and the stringent set of conditions that have to be met before an arbitration appeal may be extended beyond 28 days are well documented in cases like Kalmneft vs Glencore International AG, Nagusina Naviera vs Allied Maritime Inc, Thyssen Canada Ltd vs Mariana Maritime Ltd. and L Brown & Sons Ltd. Vs Crosby Homes (North West) Ltd[475] (Altaras, 2008). Such time binding may also be considered as a step towards making the arbitration award fast, efficient and final. Considering the fact that there is limited time available to file an application against an arbitral award, involved parties might be reluctant to issue one and even if they file a complaint, it will be resolved quickly.

Aeberli portrayed the finality of an arbitral award brilliantly in his article, as he mentioned that "unless otherwise agreed by the parties and subject to challenge by any available arbitral

[475] D. Altras, *Time Limits for Appealing Against or Challenging an Arbitral Award in England and Wales*, (CIArt, November, 2008), 360-368.

process of appeal or review or in accordance with the provision of Part I of the 1996 Act, an arbitral tribunal may rule on its own substantive jurisdiction".[476] This illustrates that any argument regarding arbitral award can only start from when the arbitration tribunal has been properly constructed and the arbitration has proceeded following the clauses documented in the arbitration contract. In England and Wales, if the arbitration tribunal determines that the award it has delivered successfully deals with the parties' dispute, but for some reason is not honoured, then it can compel the involved parties to abide by the pre-determined arbitral award[477]. In other words, there is no way to challenge the arbitral award if the disputes raised afterwards were successfully included into the clauses of the arbitration contract beforehand. However, in case the tribunal thinks that the disputes fall outside the realm of their jurisdiction, they may restrict their investigation to whether the parties agreed to enter the arbitration. In only remote possibilities and situations will the court intervene to review an arbitral award. In Peterson Farms Inc. vs. C&M Farming Ltd, the judge specifically mentioned that if the concerned parties wished to challenge an arbitral award at court, they would have to prove first that the arbitration tribunal that awarded the arbitral award was flimsy and not properly constituted. This discussion proves the finality of arbitration process and arbitral award in jurisdictions such as England and Wales.

The finality of the arbitral award becomes more prominent if considered in the scenario of the USA. Unlike many other countries, in the United States, arbitration and the associated award were subject to being vacated following manifest disregard back to the time of the Wilko vs Swan case[478]. Manifest disregard implies that any of the dissatisfied parties might approach the court to vacate an arbitral award if the arbitrator, even after knowing the rule of law, ignores incorporating it into the arbitration contract. This might initiate doubt considering

[476] P. Aeberli, Jurisdictional Disputes under the Arbitration Act 1996, *Arbitration International,* Vol 21, No. 3 (2005), p.253.
[477] Platt R. The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?. Journal of International Arbitration. 2013;30(5):531-60.
[478] M.H. LeRoy, Are Arbitrators above the law?, *Boston College Law Review*, Vol 52, No. 137 (2011), 140-187

what has been discussed so far related to the finality of the arbitral award, and may compel one to raise the question whether arbitral awards can easily be vacated by the involved parties.[479] However, in reality this is not as easy, as is reflected in the Hall Street Associates, L.L.C. vs. Mattel, Inc. case ruling by the court. Hall Street Associates leased a manufacturing site to Mattel and an arbitration contract was laid out that if Mattel or any of its predecessors failed to comply with the present environmental protection laws and left any environmental footprint, then Mattel would have to compensate Hall Street. When Mattel gave notice to Hall Street that it wished to terminate the lease contract, Mattel filed a compensation claim, as the level of trichloroethylene was higher than the permissible level of the local environmental council. The arbitrator gave his verdict in favour of Mattel, reasoning that the company need not comply with the local environmental act. Hall Street approached the district court on the grounds of manifest disregard and the court favoured them, sending back the arbitral award to the arbitrator for reconsideration. This time the arbitrator gave his verdict in favour of Hall Street. However, when the concerned case reached the Supreme Court, the Court stated that manifest disregard was not valid in this case, and no court had the jurisdiction to change the initially conferred arbitral award. Later on, the Supreme Court even refused to hear cases such as Improv West Associates v. Comedy Club, Inc. and Coffee Beanery, Ltd. v. WW, L.L.C on the grounds of manifest disregard[480]. This portrays that if a particular law is not included into the arbitration settlement, then the failure to comply with this law, does not alter anything once the award has been delivered.

After the consideration of status of arbitration in countries such as Australia, the United Kingdom and the United States of America, it is apparent that the finality of arbitration award

[479] J. Polenberg and Q. Smith (2009), Can Parties Play Games with Arbitration Awards? How Mattel May Put an End to Prolonged Gamesmanship,*The Florida Bar Journal*, Vol. 83, No. 5, retrieved September 19, 2014 < http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/0/61132bebd0c33740852575a90048399c!OpenDocument&Click=>

[480] A.C. Gronlund, (2011), The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in Hall Street Associates, L.L.C. v. Mattel, Inc.,*Iowa Law Review*, Vol. 96, pp.1351-75

is almost assured and there is only a narrow base for appeal that is mostly refuted if used to launch an appeal against arbitral award.

In Hulley Enterprises Limited (Cyprus) v. the Russian Federation (2013), the claimants claimed they had been aggrieved by the actions of the Russian government, and in particular had been subjected to higher tax and subsequent subjection to criminal proceedings, whereas the management at Hulley felt that these actions were unwarranted as they were protected under an earlier Presidential Decree (1993) which allowed the firm to remit reduced taxes. The claimants highlighted the 'Taxation Carve-out article' that stipulated these benefits for itself. The Russian government was found to have breached the initial contract terms, and was required to pay damages to Hulley corresponding to the requested damages.

4.8.3 Case studyon public policy:

Westacre Investment v Jugoimport-SDRP Holding Co.

The case of Westacre Investments v Jugoimport-SDRP Holding Company[481] is particularly instructive as to when public policy may be invoked as a defence to the enforcement of a foreign arbitral award. In this case, the arbitration tribunal awarded the sum of $50 million plus £1.02 million to Westacre. The award was challenged by the defendant on the grounds that it violated 'ordre public international' or 'bonos mores'. The defendant alleged that Westacre had bribed persons in Kuwait with the intention of persuading those persons to use their influence to support entering into a contract with them. The allegation of bribery was alleged as fact in a subsequent affidavit during the action for enforcement and not during the arbitration, however, so a question about its factuality existed. Other than this, Lord Justice Waller raised the Lemenda[482] decision, which states that while bribery essentially bears on a principle of morality of general application, "it is questionable whether

[481] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12.
[482] Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd (1988) 1 Q.B. 448.

the moral principles involved are so weighty as to lead an English court to refuse to enforce an agreement regardless of the country of performance and regardless of the attitude of that country to such a practice."[483] In the Lemenda case, the contract was not enforced by the English court because it was contrary to the public policy of the place of performance as well as that of the law in effect (i.e. Qatar). However, in the Westacre case, there was no finding on Kuwait public policy by the arbitrators, since the point was not raised by the appellants at the arbitration[484]. The defendants excused this lapse by stating that there would have been no reason to do so because under Swiss law (the effective law in the agreement and the seat of arbitration), "(a) a contract for the purchase of personal influence short of bribery would not be contrary to the public policy of Switzerland; and (b) because it would not be contrary to public policy in Switzerland to enforce a contract that involved the acts contrary to the public policy of Kuwait or any other foreign and friendly state as opposed to being 'illegal' by the law of that state."[485] Furthermore, Lord Justice Waller reasoned: "[D]ifferent courts and different tribunals may have different views as to the enforceability of contracts for the purchase of personal influence depending on the proper law of the contract and where they were to be performed…albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed."[486] Therefore, although this is a foreign award that is contrary to the domestic public policy of the enforcing country, the consideration is that enforcing the award is not contrary to the domestic public policy of the country whose law governs the arbitration.

The foregoing reasoning shows that the existence of facts that go against the public policy of the country where enforcement is sought may not be sufficient to refuse enforcement, if such

[483] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12.
[484] A.Tweeddale, Enforcing Arbitration Awards Contrary to Public Policy in England. INTERNATIONAL CONSTRUCTION LAW REVIEW, 17, no. 1 (2000): 159-174.
[485] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12.
[486] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12, at 6.

fact is not a violation of public policy in the seat of arbitration or the country where the contract has been executed. The reason is not grounded in the graphical location, but on the gravity of the public policy violation. That is, although bribery and corruption may have taken place, there is a lower level in the 'scale of opprobrium' (e.g. compared to drug trafficking), for which reason the award should be left intact.[487] It would also have been a different matter if the violation was that of a crime or felony, in which case the award should be vacated in any situation.[488]

4.8.4 A summary of the case laws

In Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan (2010) UKSC 46,[489] the applicable grounds for refusal of the award in the UK was basically non-compliance with Pakistani law. The case brings to the light the need for arbitral awards to confer to local law, failure of which may mean that they are not enforceable anywhere else. This law prevents parties from attempting to seek enforcement of awards in foreign jurisdictions when they are faced with legal challenges in the original country of arbitration determination. A similar position was held in Westacre Investments v Jugoimport-SDRP Holding Company,[490] where enforcement could not be effected due to the fact that the award contravened the award country's public policy. In TCL Air Conditioner (Zhongshan) Co. Ltd. vs. The Judges of the Federal Court of Australia,[491] the case involved determination of whether public policy was contravened. The court declared that unless some arbitration dispute became conflicting to public policy, the court would not interfere

[487] V. Pavić, Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy, Victoria University Wellington Law Review (2012) Vol. 43 pp. 661-686.
[488] *Ibid.* 685.
[489] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan (2010) UKSC 46.
[490] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12.
[491] TCL Air Conditioner (Zhongshan) Co. Ltd v The Judges of The Federal Court of Australia and ANOR [2013] HCA 5.

regarding the enactment of the arbitration award. In another instance, we learn that arbitration cannot always be expected to follow the legal provisions of the award country, appearing to waive the role of public policy as a deterrent to enforcement of an award. This is clear in Improv West Associates v. Comedy Club, Inc. and Coffee Beanery, Ltd. v. WW, L.L.C on the grounds of manifest disregard,[492] where the courts refused to annul the awards based on contravention of specific violations of law, as no provision in the arbitration agreement expressly provided for such refusal under such grounds. In this way, public policy was given substantial grounds to refuse an award. While many arbitration agreements stipulate a specific period for appeal, this limitation in time does not always contribute to determination of finality, as seen in Kalmneft vs Glencore International AG, Nagusina Naviera vs Allied Maritime Inc, Thyssen Canada Ltd vs Mariana Maritime Ltd. and L Brown & Sons Ltd. Vs Crosby Homes (North West) Ltd.[493] Special circumstances may be allowed to set aside the stipulation for time limits, as the above cases demonstrate.

The case laws establish various grounds for refusal of awards; essentially, they must comply with the public policy of the country of award. Failure to do this means they cannot be enforced elsewhere. Secondly, failure to insert a clause into the agreement may mean that in respect of the law, a certain legal provision will be exempted from consideration in the agreement if it is not expressly stated that it constitutes grounds for arbitration or appeal against an award. Finally, certain provisions of the arbitration agreement may be waived when the court deems that specific important matters have overtaken the purpose for adhering to such provisions.

[492] Gronlund, *op. cit.,* 1351-75.
[493] D. Altras, *op. cit.,* 360-368.

4.9 Annulment of awards by ad hoc committees

The ICSID system allows for annulment of awards, pursuant to Article 52 of the Washington Convention. Article 52 provides that upon the request of either party, an application may be made in writing to the Secretary General for the annulment of the award on any of five bases: (1) the Tribunal was not properly constituted; (2) the Tribunal has manifestly exceeded its power; (3) there was corruption on the part of a member of the Tribunal, (4) there has been a serious departure from a fundamental rule of procedure, or (5) the award has failed to state the reasons on which it is based.[494]

A literal interpretation of Article 52(1) states that the party may only request the annulment, but does not guarantee or vest a right to obtain annulment on such grounds. Article 52(3), on the other hand, provides that the authority to annul the award rests in the ad hoc committee to be appointed by the Chairman from the Panel of Arbitrators, provided none of the members of the Committee have been part of the Tribunal that gave the award.[495] The literal interpretation of Article 52, therefore, admits the possibility of two interpretations: First, that the request by the party triggers an automatic annulment that one of the five grounds under Article 52(1) is present and the Committee has no discretion or power to abstain from this annulment; or second, that a "sort of space or 'no man's land'"[496] exists between the finding that grounds for annulment exist under Article 52(1), but the declaration of annulment under Articles 52(3) and 52(6) depends upon the ad hoc committee which is endowed with some measure of discretion. Under this second interpretation, the Committee may have the power to abstain from annulling the award if it believes that despite the existence of one of the conditions for annulment, such does not significantly harm the applicant, or that it does not

[494] Article 52 (1), (a) to (e), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Centre for Settlement of Investment Disputes.
[495] Article 52 (3), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Centre for Settlement of Investment Disputes.
[496] R. Rayfuse (2004) *ICSID Reports: Volume 2: Reports of Cases Decided Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965*, University of Cambridge, at 61-62.

affect the arbitral award *in toto*, and that it would be in the interests of the parties for the award to be given effect. Of course a third alternative is possible, that the Claimant abused their rights in invoking the said grounds in the application, in which case the ad hoc committee would do right to abstain from annulling the award.[497]

4.10 The finality of an award and the concept of 'res judicata'

As discussed in the introduction of this thesis, the concept of 'finality of award' in its best and broadest interpretation means that a dispute has been resolved and an arbitral award made, with the understanding that the award is deemed valid and enforceable. In the field of international arbitration, the arbitration awards that have been given by a competent body in a country other than the place of enforcement are deemed final "in the sense that they are not subject to appeals or other usual remedies"[498] and are therefore executable. This was the original intention of the arbitration process, and it remains the goal of the international conventions dealing with international arbitration.

In truth, an arbitral award that has been deemed final under the applicable law and in the country where the award was made does not become immediately executable or enforceable under the laws of the country in which enforcement is sought, and this is a challenge to the award's status of finality. In most cases, the recourse is to file for the setting aside or annulment of the award, failing which the court judgment should be for enforcement where an action for enforcement has been filed. Alternatively, there are some cases where the law of the land (e.g. Section 69 in the case of English law) allows for a review of an arbitral award on a question of law. In municipal law, the maxim *res judicata pro veritate habetur* (a thing adjudged is regarded as truth) is adopted to best facilitate the "rapid and lasting restoration of

[497] *Ibid.* 62.
[498] Kaufmann-Kohler and Rigozzi, *op. cit.*, 420.

juridical peace."[499] The necessary consequence of adjudications expressed through the doctrine of res judicata is that when a judicial decision lapses into finality, it must remain unchanged and unaltered, and that it should be binding upon the parties in the case where a subsequent conflict arises. A judgment may be challenged and amended only on the conditions and in the time periods that the law on civil procedure provides. This same context should be applied to the case of arbitral awards, however with the fundamental consideration of three basic points, according to Lalive:[500] States cannot be expected to recognise and enforce awards without reserving their right of supervision and control; While an international commercial court (much as in the nature of the International Court of Justice) does not yet exist, then the supervision and control can only take place in the context and operation of the domestic arena; and in the domestic arena, control can only be exercised within the judicial organisation of the state (which, Lalive[501] notes, is characterised by a hierarchy, a trait that runs contrary to the domain of arbitral institutions).

These observations by Lalive underscore the importance attributed by some countries to the necessity of a judicial review of foreign arbitral awards, as is predominantly maintained in Muslim countries with Sharia-based legislations. It is precisely because the supervision and control required for the recognition and enforcement of the arbitral award is undertaken by the domestic juridical system that a review becomes a logical recourse. The concept of judicial review under Sharia law is different from that applied in the normal/international arbitration mechanisms in that the award is subjected to review without the consent or volition of the parties to the dispute – it is a mandatory process. In the context of the Saudi Arbitration Law 2012 (used as an example), the scope of review is much narrowed: it is essentially tied to verification for adherence to principles of Sharia and conformity to case

[499] Lalive, *op. cit.,* 117.
[500] *Ibid.* 117.
[501] *Ibid.*

law and not the merits of the case. According to Park,[502] judicial review of arbitral awards may be considered a form of risk management; there have been occasions in the past when there have been perverse arbitrators who have passed decisions while ignoring basic procedural fairness, as well as so-called arbitrators who sought to resolve matters that had never been properly submitted to their jurisdiction.[503] In such cases, the review by judicial authority had been the only redeeming factor that had saved the unfortunate disputant from having to comply with an unjust award. In some jurisdictions, judges are also empowered to correct legal error[504] or examine the degree to which an award is consistent with public policy.[505]

The wisdom of judicial review is evident when, at the time of the recognition of the award, public scrutiny is focused on the propriety of the arbitration award. "Judges can hardly ignore the basic fairness of an arbitral proceeding when asked to give an award *res judicata* effect by seizing assets or staying a court action."[506] For this reason, Park advocates judicial review of awards at the place of arbitration in the case of international arbitration, since scrutiny by the court ascertains the integrity of the arbitration and enhances the fidelity of the parties to the results, and promotes a more efficient arbitral process that reflects the true intention of the parties as embodied in the arbitration agreement. Often, well-conducted judicial reviews aid in the development of commercial norms that provide guidance to parties in undertaking future commercial transactions.[507] On the other hand, without some sort of judicial review process, victims of procedural irregularities in the faulty arbitration process that made the

[502] W.W. Park, 'Why Courts Review Arbitral Awards' in *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel*, in 595 (R. Briner, L. Y. Fortier, K.-P. Berger & J. Bredow, eds., 2001); reprinted 16 Int'l Arb. Rep. 27 (2001).
[503] Park, *op. cit.*, citing UNCITRAL Model Law, Article 34; French Nouveau code de procédure civile (NCPC), Article 1502; German Zivilprozessordnung (ZPO) Article 1059; Swiss Loi fédérale sur le droit international privé (LDIP) Article 190; U.S. Federal Arbitration Act, Sec.10.
[504] 1996 English Arbitration Act, Sec. 69.
[505] UNCITRAL Model Law, Article 34(2) (b)(ii); French NCPC Article 1502 (5); German ZPO, Article 1059 (2)2.b; Swiss LDIP, Article 190(2)(e).
[506] Park, *op. cit.*, 595.
[507] *Ibid.*

award will be constrained to run from one country to the next in the search for a way to oppose what should be an intrinsically invalid decision.[508]

4.11 The setting aside (annulment) of an arbitral award

Since the beginning of the adoption of arbitration proceedings as an alternative to court litigation, awards have mostly been subject to judicial review, particularly at the initiative or application of the losing party. Two developments led to the institution of annulment action (or action to set aside) on the arbitral award as a separate action. One is that the party that was dissatisfied with the award, in an effort to pre-empt the winning party from filing for enforcement of the award, would take the offensive and seek a declaration of the award as a nullity. The action to annul is therefore seen as a 'mirror' or counterpart of the action to enforce the award. The other alternative rests in the possibility, in the case of an international arbitration, that the same award may be enforced in a different country from the seat of the arbitration award. This opens up the possibility that the grounds concerning the enforcement of the award may differ depending on the country where enforcement was sought. Thus, the losing party had an interest in having the award declared null and void at the seat of arbitration, for which reason it could file for the setting aside of the award at its source country. Because of the likelihood of multiple actions (i.e. opposition to enforcement in the same procedure, or initiation of a separate action to annul the award in the country of origin), a double review may sometimes result. While avoidance of double review is manageable in the country of origin, it becomes more difficult when enforcement is sought in another country (e.g., where the losing party may have assets against which the winning party may claim). In this case, the grounds upon which enforcement may be reduced are contained in the multilateral or bilateral treaties to which the countries are signatories.

[508] *Ibid*. 601.

A principal ground for the refusal to enforce an arbitral award is if the award has been set aside in the country in which it was made. The Principle of Exclusive Jurisdiction over annulment of the award states that the court at the place of arbitration has exclusive jurisdiction to annul arbitral awards. This principle has been adopted by most national laws, and more especially by the UNCITRAL Model Law on international commercial arbitration.[509] There are nevertheless divergences, where some laws give courts jurisdiction to annul awards that have been given outside of their boundaries, while other laws have also been known to deprive courts of jurisdiction over annulment of even those awards rendered within their territory.[510] The failed enforcement of annulled awards appears to be caused by "the heterogeneity of the provisions of national laws on the annulment of awards…and the defective articulation of these provisions with those of multilateral conventions on the enforcement of awards."[511]

The principle of exclusive jurisdiction has been recognised since the Geneva Convention in 1927, which preceded the New York Convention. It is also grounds under the NYC, where it is stated in Article V(1)(e) that an award may not be enforced if the respondent party can prove that the award had been set aside by the court in the country where it was made. The generally accepted principle is that domestic courts in the seat of arbitration have exclusive competence to decide on the nullity of an award. In Karaha Bodas v Perusahaan Pertambangan,[512] the US Court of Appeals for the Fifth Circuit refused to accept that the award had been set aside by a competent authority when the award was set aside by a court in Indonesia while the award itself was made in Geneva, Switzerland.

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[509] P. Binder (2000) *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions,* Sweet & Maxwell, London; A. Broches (1990) *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer Law International, The Hague, Netherlands; H.G. Gharavi (2002) *The International Effectiveness of the Annulment of an Arbitral Award*, International Arbitration Law Library. Kluwer Law International, The Hague. Netherlands.

[510] UNCTAD (2005) *Dispute Settlement: International Commercial Arbitration.* http://unctad.org/en/Docs/edmmisc232add39_en.pdf.

[511] Gharavi, *op. cit.,* (2002).

[512] In Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT Pln (Perseo), 364 F3d 274, 308-310 (5th Cir 2004).

There are two important matters that spring from this interpretation of Article V(1)(e) of the NYC. First, if the award had been set aside in the country from which it originated, then it would cease to exist legally. If the award no longer existed in the country in which it was created, then it would be impossible to enforce a non-existing arbitral award. Second, the court in the country wherein enforcement of the arbitral award is sought may not question the grounds upon which the award was annulled in its country of origin. This was the case in TermoRio vs Electranta,[513] where the US Court of Appeals for the District of Columbia declined enforcement of an ICC arbitral award made in Bogotá, where the award was annulled by the *Consejo del Estado* (Council of State) in Colombia; Colombia's rationale for annulment was that the arbitration proceedings were conducted pursuant to the ICC Arbitration Rules, the rules of which were not permitted by the law of Colombia at the time. The USCA declared that the state in which the award was made shall be free to set aside or modify an award according to its domestic arbitral law.

The foregoing statutes and cases such as the TermoRio case underscore the importance of the seat of an arbitration and the crucial role it plays in "vesting an award with presumptive validity." The arbitral situs has the power to grant or deny awards in their "international currency" by the manner in which it exercises its annulment power.[514] Nevertheless, it is prudent to note that some cases that show domestic courts enforcing arbitral awards that had been set aside by the courts at the seat. The Hilmarton case is one example where the French court enforced an arbitral award that had been set aside by the courts at the seat (Switzerland).[515]

The Federal Arbitration Act (FAA) of the United State, which was enacted in 1925 to govern arbitration and sets out four grounds upon which a court may rely upon to overturn or vacate an award. These are:

[513] TermoRio SA ESP & LeaseCo Group, LLC v Electranta SP, 487 F3d 928 (DC Cir 2007).
[514] Park, *op. cit.*, 601.
[515] Decision of the Austrian Supreme Court of November 18, 1982, 1983 Rev. Arb

(1) Where the award was obtained by corruption, fraud, or undue means; this ground requires fraud to be proven through convincing and clear evidence. In *Pacific & Arctic Ry. and Nav. Co. v. United Transp. Union*, the arbitrator was accused of fraud after he made ex parte contacts with the representatives of one party and disregarded the other party when making the final decision.[516]

(2) Where partiality or corruption is evident in one or more of the arbitrators; in this case, proof of absolute bias is not required as evident partiality is ground enough for setting aside an award as in the case of *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi*.[517]

(3) Where misconduct tainted the actions of the arbitrators (e.g. refusing to postpone the hearing despite a showing of sufficient cause, or refusing to hear evidence that is material and pertinent to the issue being heard), which prejudiced the rights of any party; the sufficiency of this ground must amount to denial of basic fairness as in the case of *Roche v. Local 32B-32J Service Employees Intern. Union* where the arbitrator had misled one party from submitting evidence that would have influence the outcome of the arbitration decision.[518]

(4) Where the arbitrators either exceeded their powers or executed them imperfectly, so as to prevent the rendering of a mutual, final, and definite award upon the subject matter. In the case Dighello v. Busconi, the arbitrator was deemed to have exceeded his powers by ruling on issues that had not been presented by the parties.[519]

There are four issues arising out of an action for setting aside, as described by van den Berg: (1) The likelihood that double control may result by having a judicial review of the award on

[516] Pacific & Arctic Ry. and Nav. Co. v. United Transp. Union, 952 F.2d 1144, 1148 (9th Cir. 1991).
[517] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2nd Cir. 2007).
[518] Roche v. Local 32B-32J Service Employees Intern. Union, 755 F.Supp. 622 (S.D. N.Y. 1991).
[519] Dighello v. Busconi, 673 F.Supp. 85 (D.Conn. 1987).

the same or similar grounds in separate proceedings, one for enforcement and another for annulment of the award;

(2) The potential of arriving at conflicting decisions relative to the same grounds between the proceedings for enforcement and for setting aside;

(3) The issue as to whether universal effect should be accorded to setting aside by a judicial authority in the seat of arbitration on perceived parochial grounds; and

(4) The issue as to whether the judicial tribunals of one country should have the final say with universal effect concerning whether or not an international arbitral award is valid.

4.12 Challenge to finality under the New York Convention and UNCITRAL

The presumption of finality of the arbitral award may be reversed on five procedural and two substantive grounds.[520] These factors have been highlighted before but have not been covered in depth. Each shall be examined here with respect to their application in case law.

4.12.1 Bases for procedural challenges to the finality of the arbitral award

Validity of the Arbitration Agreement: An arbitration agreement requires consent, written form, content of agreement, and scope. Validity is compromised by the existence of a certain incapacity of either of the parties under the law applicable to them.

Due Process: Under this category are included equal treatment and competence of a party to present its case. Infirmities would be failure to give proper notice to the party against whom the award is sought, either of the appointment of the arbitrator or of the arbitration proceedings, or any reason for which said party has been prevented from presenting his case.

Excess of authority regarding the relief sought: this includes an award in excess of or different from what is claimed. The award was based on differences that were not intended by

[520] New York Convention, Article 5; UNCITRAL Model Law, Article 34(2).

or were not included within the scope of the submission to arbitration, for as long as such matters were separable from those intended, in which case the part of the award that contains the decisions on matters submitted to arbitration may be enforced.

Irregularity in the constitution of the arbitral tribunal: This includes constitution of the tribunal in violation of the applicable arbitration rules or arbitration law, and the lack of partiality and independence of the arbitrator. The composition of the arbitral authority or the arbitral procedure did not comply with or contravened the agreement of the parties, or, failing such agreement, did not comply with the law of the country that was the seat of arbitration.

Irregularity in the procedure: There occurred a violation of the applicable arbitration rules and/or arbitration law, or the award has not yet become binding on the parties, or has been set aside or suspended by the competent authority wherein, or under the law of which the award was made[521].

There are two issues comprising substantive challenges to enforceability of arbitral awards:

Arbitrability: This issue includes the situation where the dispute is not capable of settlement by arbitration. The subject matter of the difference is not capable of being settled by arbitration under the law of the country where recognition and enforcement are sought. The category comprises arbitrability *ratione materiae* and *ratione personae.*[522]

Public Policy: This relates to "the Forum State's most basic notions of morality and justice."[523] Under this category, the recognition or enforcement of the award shall be denied because the award runs contrary to the public policy of the country where the award is sought to be enforced.

It should be kept in mind, however, that in practice not all violations of the above procedural and substantive conditions will result in annulment or refusal of enforcement. The violation

[521] A.J. van den Berg, 'When is an Arbitral Award Nondomestic under the New York Convention of 1958?' (1985) Pace LR 25.
[522] *Ibid*
[523] Parsons & Whittemore Overseas Co. v Société Générale de l'Industrie du Papier, 508 F2d 969, 974 (2nd Cir 1974).

should be determined, in a judicial review, be material and not merely *de minimis,* for which reason certain courts have discretionary power to enforce an award despite the existence of grounds for setting aside. The grounds for review, however, no longer include a review on the merits of the award; a matter that has become a generally accepted principle in international arbitration.[524]

While the foregoing are the grounds stipulated for setting aside under the Model Law, their implementation has not been uniform in every jurisdiction, and some member states have exercised their discretion in deviating with regard to certain aspects. Van den Berg cites the case of Egypt which added to the grounds for setting aside enumerated above, to which it included "the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute."[525] Additionally, aside from the Model Law countries, two other groups of countries have differing opinions: those that abide by French arbitration law, and those that follow English arbitration law. The French law differs from the Model Law in its use of the omnibus notion of 'mandate' as grounds for annulment, while the English law is more focused on the concept of 'misconduct' on the part of the arbitrator as its primary grounds for setting aside.[526]

4.13 Public policy in finality and enforcement of arbitral awards in Saudi Arabia

The legal system in Saudi Arabia is unique; it is based on Sharia law, which as earlier described in this thesis is derived from the Quran, the Sunna, and the other sources of Islamic law including the ijma, the qiyas and the ijtihad. While other countries likewise base their national legal frameworks on Sharia, Saudi Arabia's Basic Law[527] explicitly states that Sharia

[524] van den Berg, *op. cit.,* 6.
[525] Law No. 27 Concerning Arbitration in Civil and Commercial Matters 1994 (Egypt) Art 52(1) (d).
[526] van den Berg, *op. cit.,* 6.
[527] Article 7 of the Saudi Basic Law, Royal Decree No. 90/A dated 28/06/`4`1 H. (1992).

law has "supremacy over all laws and man-made regulations or normative instruments."[528] This is considered inviolable, no matter the situation currently prevailing. Saudi law cannot be separated from religion,[529] more so than any other Muslim country, and it is this element of Saudi law that makes it nearly impossible to incorporate significantly with elements of secular law that would better harmonise it with international laws. Religion is so intertwined with the law that even the King himself does not have the power to legislate in any field already regulated by Sharia, and to which he is also bound, in the same manner as all his subjects, by a duty of obedience.[530]

Saudi Arabia's Arbitration Law[531] dates back to 1983, and the country's accession to the New York Convention took place in 1994. According to Thomas Childs,[532] prior to 2012, Saudi Arbitration Law was considered antiquated because of the numerous requirements it mandated of those who availed of this means of dispute settlement. For instance, unlike the arbitration rules in the West and even in certain Muslim countries, Saudi Arabia requires that the language used in the arbitration process be Arabic, and that the arbitrators presiding over the process be males.[533] During this time, it was necessary for parties to bring applications for the enforcement of foreign judgments and arbitration awards before the Board of Grievances. The Board of Grievances was then mandated to undertake a full review of the merits of each award; a lengthy and rigid but mandatory procedure to verify that the award was compliant with Sharia law. The Board required all relevant documents from the arbitration to be submitted to it in Arabic to enable the review to take place; without such translation to

[528] Anusornsena, *op. cit.*, 143.
[529] D.J. Karl (1992) 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' *George Washington Journal of International Law and Economics.* 25, 131, at 139-140.
[530] Schacht, *op. cit.*, 123-126.
[531] Royal Decree No. M/46 dated 12/7/1403 AH (25 April 1983) (Law of Arbitration; and Royal Decree No. M/7/2021 (Implementing Regulations to Law of Arbitration), Official Gazette, Issue No. 3069, dated 10/10/1405 AH (28 June 1985).
[532] Childs, *op. cit.*, 72. Childs is an international arbitration lawyer with King and Spalding LLP, London.
[533] Raffa, *op. cit.*, 2.

Arabic, the review would be foregone as would be the recognition and enforcement of the arbitral award.[534]

Difficulties in achieving recognition and enforcement of foreign arbitral awards in Saudi Arabia during this period have led some non-Saudi businessmen to think that by allowing for the arbitration of disputes within the Saudi system, there will be a better chance of obtaining a favourable judgment towards enforcement against their Saudi counterparty. The case of Jadawel vs Emaar[535] proves this to be untrue. Jadawel commenced arbitration in 2006 before a three-member tribunal seated in Saudi Arabia; the award sought amounted to USD 1.2 billion resulting from damages due to a breach of contract by Emaar on a construction project. The entire arbitration process lasted two years, after which it was finally dismissed with the complainant Jadawel being ordered to pay legal costs. The award was subsequently submitted to the Board of Grievances for enforcement. During the review, the Board acted as an appeal court; it re-examined the merits of the case based on the original arbitration conducted, in clear violation of the New York Convention. Not only was the award not enforced, but the judgment in the said case was reversed by the Board of Grievances, which then ordered Emaar to pay damages to Jadawel.[536] The award simply could not be admissible – in the view of the Board.

In any case, consideration of the law of the seat of arbitration is of significant importance to international arbitration as a whole, for two reasons: (1) the mandatory rules of the seat will still apply even if the law of the seat were to be expressly excluded by the arbitration agreement; and (2) international tribunals revert to the law of the seat when the law chosen by the agreement contains lapses and insufficiencies;[537] thus the importance of selecting the seat

[534] *Ibid.*
[535] Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE).
[536] Saleem, *op. cit.*, (2012).
[537] Barraclough and Waincymer, *op. cit.*, 210-211.

of arbitration and the degree to which the law of the seat corresponds to the multilateral conventions.

Compared to Egypt and other Muslim countries where secular law has been incorporated into their arbitration laws, there have been significantly more issues with regard to enforcing arbitration awards in Saudi Arabia, despite the fact that the Kingdom has been a signatory to the New York Convention since 1994, as well as other multilateral treaties providing for the recognition and enforcement of foreign arbitral awards.[538] As of November 2009, there has been only one known case wherein a foreign arbitral award has been enforced by Saudi courts. Judges have been known to advise parties to reach an agreement on enforcement in order for them (the judges) to have to pass judgment on the case;[539] the implication is that if judgment has to be rendered by the court, then the chance of the award being enforced would be nil.

The Finality of Awards is provided for in Articles 18 and 19 of the old Saudi Arbitration Code 1983. This provision allowed either of the parties to an arbitration procedure 15 days[540] in which to challenge an award or any decision issued by the tribunal, such as interim measures. This runs counter to many modern-day arbitration rules; both the ICC[541] and the UNCITRAL[542] rules stipulate that arbitral decisions are not subject to appeal with regard, at least, to the substance of the case.[543] However, without challenging the merits, it is quite permissible to bring challenges of a largely procedural nature, such as failure to observe due process or fair treatment. In reality, the common practice to oppose enforcement of the award is to argue on appeal that the award conflicts with Sharia law, and is therefore contrary to

[538] Allen & Overy (2009, November) 'Grievances: arbitration in Saudi Arabia.' *Allen & Overy Publications.* Retrieved from http://www.allenovery.com/publications/en-gb/Pages/Grievances--arbitration-in-Saudi-Arabia.aspx
[539] *Ibid.*
[540] Article 18, Saudi Arabia Law of Arbitration, Royal Decree No. M/46, 12 Rajab 1403 (25 April 1983).
[541] International Chamber of Commerce, ICC Rules, Art. 28(1).
[542] United Nations Commission on International Trade Law.
[543] Saleem, *op. cit.*

Saudi Arabia's public policy.[544] It is the prevalence of this practice that had rendered almost impossible the enforcement of a foreign award in Saudi Arabia.[545]

Prior to the effectivity of the New Enforcement Law 2013, there was no clear appeal process or the conditions that would preclude it in Saudi Arbitration Law. Moreover, the very text of Article 19, which provides for challenges to the award, does not specify whether the challenges allowed are procedural, substantive, or both. Article 19 states:

Where one or more of the parties submit an objection to the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall hear the objection and decide either to reject it or issue an order for the execution of the award, or accept the objection and decide thereon.[546]

It is this vagueness in the Saudi Arbitration Law that has allowed for the arbitration court in the Emaar case to act as an appeal court and to re-establish the merits of the dispute. The issue of public policy or any violation of Sharia law principles has not even been raised, rendering the challenge and its subsequent judgment outside the purview of the NYC or the Model Law.[547]

There are numerous other infirmities under the Saudi Arbitration Law that tended to compromise the finality of arbitral awards that were sought to be reinforced in Saudi Arabia. The old law excluded arbitration in areas that contradicted Sharia law under the defence on public policy; it also provided for the following: (1) prohibition of the services of the commercial registrar from registering (without special authorisation) any company that refers any disputes between the company and the registrar to arbitration outside Saudi Arabia; (2) a requirement that all disputes dealing with commercial agency contracts be submitted before

[544] M. Al-Ghamdi, J. Lonsberg, J. Sutcliffe and S. Eversman, 'Chapter 44: Saudi Arabia' In '*The Dispute Resolution Review',* Richard Clark (ed.), (Law Business Research Ltd 2012), 675.
[545] Childs, *op. cit.*.
[546] Article 19, Saudi Arabia Law of Arbitration, Royal Decree No. M/46, 12 Rajab 1403 (25 April 1983). Retrieved from https://www.saudiembassy.net/about/country-information/laws/Arbitration_Law.aspx
[547] Saleem, *op. cit.*

the *Diwan Al-Mazalem* or administrative court, and not be resolved through arbitration; and (3) a stipulation that the *Diwan Al-Mazalem* has exclusive jurisdiction over disputes among foreign contractors or companies and their Saudi sponsors.[548] Any one of these restrictions was sufficient, under the old law, for arbitral awards granted by foreign arbitrators, and at times even arbitrations held within Saudi Arabia, to be denied finality and enforcement.

4.14 Finality of International Arbitral Awards under Saudi/Sharia Approach

In brief, Sharia comes out as being more anti-finality in this section, when compared to international arbitration law. This factor is laid bare by the lack of consideration for awards given internationally; completely disregarding all factors governing them and resorting to their enforceability under Sharia as their only qualification for enforcement.

It is worth mentioning that in Islamic countries in case there is no parallel secular judiciary system, commercial arbitration is governed by Sharia. Furthermore according to Sharia, any arbitration irrespective of where it takes place is domestic if it follows Sharia and foreign if it follows any other legal system.[549] The experience of the Islamic countries regarding international commercial arbitration is mixed. As an example, Saudi Arabia started with good faith on international commercial arbitration but severely detested the same following the 1958 ARAMCO arbitral award against it. The grief for the Saudi authority was so much owing to this arbitral award that henceforth entering into any sort of international commercial arbitration by any Saudi government agency was prohibited. Resolution 58 and the Ministry of Commerce 1979 circulation confirmed this. The Ministry of Commerce 1979 circulation mentioned that if under any circumstances any arbitration-related clause is entered into the articles of domestic companies, then by all means that clause stands as prohibited and

[548] Hendizadeh, *op. cit.*, 82-83.
[549] Rubino-Sammartano, *op. cit.*, 74-75.

meaningless. Furthermore, such a clause may not be registered or approved at all[550]. From 1970, following the economic boom, the Saudi government realised that to welcome foreign investment into the country, the government must opt for an unbiased arbitration system that would not be possible without conforming with the international commercial arbitration system. To this end, the country joined the 1979-80 ICSID convention and four years later in 1983, it issued the arbitration act. Two years later, in 1985, the regulation was passed and soon after the New York convention regarding international arbitration was approved[551]. All these efforts led to the establishment of the GCC Commercial Arbitration Centre, which is almost in full conformity with international commercial arbitration and emphasises finality of the arbitral award. However, until recently arbitral awards could be challenged in Saudi Arabia based upon procedure and substance, but now with the new law having been enacted, the concerned arbitration body mentions that all arbitrations are binding regarding both the parties, and the award delivered through an arbitration process is final. Still, however, the King's signature is mandatory unless and otherwise specified under an arbitration contract in order for any government agency in Saudi Arabia to enter into any arbitration contract. It is often opined that it was not only the ARAMCO arbitral award, but any other arbitral award that might have gone against them or any other neighbouring Islamic countries, that turned the Saudis and other Islamic countries against international arbitration. The common issue that Islamic nations, mainly Saudi Arabia, have against international arbitration actually comes from immense suspicion of foreign investors regarding their greed towards the natural resources of these countries. They are considered as takers who have come only to drain their land of its precious natural resources. Again, it should be noted that if any arbitration award comes into conflict with existing Sharia law, then Sharia Law will still be maintained against the arbitral award. As an example, taking interest over loans is prohibited under Sharia Law

[550] Baamir, *op. cit.*, 108.
[551] *Ibid*. 110.

as it is believed that in this process, the poor become poorer and the rich become richer, thus resulting in a division of society into two classes. Hence, if a foreign commercial body entering arbitration in Saudi Arabia approaches the tribunal regarding a dispute over interest payment, its claims would be automatically turned down.[552] Such an award is enforceable by the judicial authorities or the respected states in case any party or both the parties refuse to honour the award.[553] The new arbitration law in Saudi Arabia addresses several of the previous lacunae. The arbitral award, in tune with international commercial arbitration, is now almost final in Saudi Arabia; proceedings in different languages can be sought and the arbitrator has to have Sharia law knowledge but does not necessarily need to be a Muslim if the decision is made in a foreign state. Arbitrators' knowledge of Sharia law would eventually help them to avoid any conflict with his arbitral award and existing Sharia law that might in the end lead to setting the arbitral award aside and demeaning the finality of the same. However, one major problem that remains unattended to is that the changed law does not provide any definite limit to the realm of Sharia law under the new Saudi arbitration law in some cases, and might in the long run give birth to many other doubts and questions in a wide interpretation of the new arbitration law if unnecessary encroachment of public policy within the arena of commercial arbitration is witnessed.[554]

Considering international commercial arbitration's finality, Islamic states display varied and conflicting results. In general, international commercial arbitration is expected to abide by the New York Convention that was adopted in 1958 and enforced in 1959. The New York Convention was meant for eradicating disparities in international commercial arbitration and to promote the universal acceptance of the international arbitration award. Scholars and policy makers were optimistic about setting aside the arbitration-related uncertainty of the past. Though this might become true following the concerned convention for most of the

[552] Saleem, *op. cit.,* 16.
[553] Baamir, *op. cit.,* 113. and Saleem, *op. cit.,* 1.
[554] *Ibid.* 22-23.

other countries, the reaction of the Islamic countries considering the finality of the award and acceptance of the international commercial arbitration award remained mixed and unpredictable.

Many of the Islamic countries such as "Egypt, Syria, Djibouti, Jordan, Kuwait, Morocco, Saudi Arabia, Syria, Tunisia, Bahrain, Algeria, Brunei, Lebanon, Oman, Iran, and Qatar"[555] have become signatories to the New York Convention. However, to date, Sharia is considered before any other consideration, and this explains why there is quite a difference between theory and reality as far as acceptance of international commercial arbitration and associated finality is concerned. Citing Mallet and Akaddaf, Gemmell explains "[w]hether rejected openly by legislation or hampered by administrative means, the uselessness in Lebanon of an arbitration clause . . . is true of Bahrain, of the UAE, of Kuwait, of Jordan, and Oman. The list is not comprehensive."[556] The author has opined that there are many examples where an international arbitration award has been rejected, or left open for appeal in Islamic countries. Oman, Algeria, Kuwait and UAE according to the author have been the prime places for such disregard for international arbitration award. The author has moved one step forward to comment that even after Saudi Arabia signed the New York Convention, it never considers an international arbitration award as final. Gemmell has also pointed out that acceptance of an international arbitration award in Iran is subject to conditionality, Iraq does not accept the award and Egypt accepts an international arbitration award if and only if the concerned award is not against the public policy or morals.[557]

However, Gemmell has also shown that scholars are divided in considering the acceptance of international arbitration awards in Islamic countries. He notes that in Kuwait, honouring an international arbitration award was a regular incidence before the country signed the New York Convention and in Syria, honouring international arbitration is also a regular incidence.

[555] Gemmell, *op. cit.,* 187.
[556] *Ibid.* 188.
[557] *Ibid.* 188-189.

However, for Saudi Arabia, the scenario indeed does not completely support the finality of international arbitration awards. However, the Saudi law is still trying to be more in respecting finality like what is in international standards. The successful international arbitration award against a Kuwaiti national and in favour of Meryl Lynch does in fact strengthen the faith in acceptance of international arbitration awards in Kuwait. The dubious state of international arbitration awards in Saudi Arabia is well portrayed from the fact that in case the award comes into conflict with Sharia doctrine, Sharia prevails over that award irrespective of any convention, requiring only that the award does not violate public policy or breach the sovereign law of the state. The concerned country also seeks appointment of an exequatur from the court of the country of the concerned award. It is worth noting that appointment of an exequatur has long been set aside under the New York Convention[558].

It is clear from the above discussion that finality of an international commercial arbitration award becomes doubtful in some countries following Sharia, including in Saudi Arabia. The enactment of the new arbitration law in the country has served to lighten the issue, but there has not been much success due to public policy as mentioned during this study. It should be mentioned that there is a need for further ratification in certainty spheres of dispute in order to develop the Arbitration Law in Muslim countries so as to encourage more foreign investment and achieve more efficiency and harmony within international commercial arbitration. Thus, in order to achieve certainty in resolution of disputes, no further proceedings may be permitted to disturb that resolution. Therefore, it can be argued that absence of finality reduces the importance of arbitration/finality and may lead to no certainty as to the meaning of the law, or the outcome of any legal process.

Similar to the Saudi arbitration regulations, there are a number of technicalities that pertain specifically to the UAE. These involve such requirements that for an arbitral award, to be

[558] *Ibid.* 189-192.

enforced within the UAE, it must be physically signed within the UAE. The legal representative of each party must possess a valid power of attorney for them to be allowed to act in the proceedings. Moreover, witnesses should not be present during the evidentiary hearing except when they are the ones giving their testimonies; this requirement, however, is often relaxed when the parties agree to do so.

It has been known in the past for seemingly insignificant errors to have breached technical requirements such as these, resulting in the overturning of awards; for instance, when the members of the arbitral tribunal had merely affixed their initials on each page, this was deemed a failure on their part to meet the requirement to sign each page of the award in full, and thus caused the award to be vacated. In the Bechtel case,[559] the Dubai Court of Cassation overturned an arbitral award because the oath that was used during the swearing in of the witnesses in the arbitration proceeding was different from that of the formula required for UAE court hearings.[560] From the UAE's treatment of arbitral awards where simple, or largely minor technicalities advise the refusal to honour the same, the petty nature of refusal within GCC is laid bare, which is necessary in reinforcing an understanding of the case of Saudi Arabia.

In the case of Qatar, two types of recourse against arbitral awards are allowed, i.e. request for appeal and request for setting aside. The request for appeal involves what amounts to a relitigation of the merits of the award, evaluation of the evidence and the law as it is applied and interpreted by the arbitrators who made the award, and the revision of the substance of the award itself. The request for setting aside is for the court to declare the award invalid on the grounds that it does not meet the requirements for legal validity. The

[559] Direction Générale de l'Aviation Civile de l'Émirat de Dubai v International Bechtel Co.

[560] N. Gould (Dec. 19, 2014) 'Enforcement in Saudi Arabia and the UAE' *Fenwick Elliott: The Construction and Energy Law Specialists.* Retrieved from <http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/enforcement-saudi-arabia-uae>. Mr. Nicholas Gould is a Partner in Fenwick Elliott LLP.

difference between the request for appeal and that for setting aside is that when an award is set aside or annulled, the judge does not evaluate the rightfulness, merits or substance of the award, as is done in an appeal; the judge merely determines the fulfilment of the legal requirements of the award based on the limited grounds for setting aside, as set forth in the Model Law. In the case of appeals, there are no established grounds.[561]

4.15 The Extent to Which 'Public Policy' Affects Finality

As an inhibitory factor to the enforcement of arbitral awards, public policy has been focused on by legal experts due to its varied nature, even for countries with relatively similar legal backgrounds. For instance, when comparing the effect of public policy in the UAE and Bahrain, Alenezi[562] noted that this aspect keeps 'mutating', which makes it difficult to harmonise law intended to counter the problem. This further implies that, as much as countries face dissimilar challenges and opportunities, the exact circumstances guiding the application of particular public policy frameworks are limited to their own internal or external situations. But using the examples of UAE and Bahrain, Alenezi provides a glimpse into the kind of 'modernisation' required for legal frameworks governing laws that fail to synchronise with those of the rest of the non-Muslim world. He notes that both countries have gone a long way in institutionalising aspects of banking that if considered under Sharia, would fail the test of adherence to public policy. An example in this respect is the requirement that banks do not collect interest from borrowers.[563] This approach would be a violation of public policy if evaluated against the Sharia-based public policy of either country. This attitude towards such issues as charging of interest is however not publicly endorsed, and still lacks basis in legal amendments. This is the approach that seems to be

[561] Z.A.A. Sharar (2011) 'Does Qatar Need to Reform its Arbitration Law and to Adopt the UNCITRAL Model Law for Arbitration? A Comparative Analysis.' Retrieved 8 November 2015 from http://www.almeezan.qa/ReferenceFiles.aspx?id=52&type=doc&language=en
[562] Alenezi, *op. cit.*, 123.
[563] Sharar, *op. cit.*

lacking in Saudi Arabia. In a nutshell, the UAE/Bahraini approach is anchored on goodwill to international arbitration laws as opposed to the Saudi approach, which consistently vets such awards on the basis of compliance with public policy. Despite the Board of Grievances losing its power to the Execution Judge, it remains mandatory that this judge evaluates the suitability of awards under Saudi law, not to mention that the award may be rejected simply on the basis of lack of reciprocity from the country where determination was made; in this way, the technical threshold for refusal increases, despite not being on the basis of legal or procedural grounds. Therefore, it can be seen that 'public policy' in Saudi Arabia plays an important role in influencing finality[564].

In addition to the foregoing above, the vagueness in Saudi Arbitration Law still exists in public policy issues. For example, in Old Saudi Arbitration Law, Article 4 stipulated that the arbitrator should be male, however, the New Saudi Law, chapter 3, Article 14, it is still unclear whether or not women can act as arbitrators. In fact, this considered as one of complications matters that makes experts reluctant to believe that issues that have been left unaddressed in the new law and will indeed experience the intended meaning when it comes to practical application.

However, it is worth to mention that the disagreement on the issue of appointing women as legal arbitrators has been discussed to a great extent recently. This disagreement is on-going and each debating side has their own point of view and evidence. The opinion of those opposing, like the previous Mufti of Saudi Arabia, Ibn Baz, and Sheikh Ahmad az-Zarqa, are

[564] Al-Shareef Najla, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958, University of Dundee. See also J.M. Gaitis, Esq.; "International and Domestic Arbitration Procedure: the Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards".

based on the opinion of the scholars and this opinion is adopted by The Permanent Committee for Islamic Research and Iftaa in Saudi Arabia.[565]

However, on the other hand, Mohammad al-Ghazali, Dr Yusuf al-Qaradawi[566] and Professor Abdulkareem Zaydan[567] are among those espousing appointing women as legal arbitrators provided that the woman allowed to be appointed as judge or arbitrator should meet additional conditions. These proponents' viewpoint is related to the expansion of trade relationships among countries and to the current situation of the Muslim Nation that is open now to the laws of the West. Their attitude also hinges upon the better position that women have acquired nowadays in terms of their access to formal education and higher education in addition to the jobs and vocations that women could not access previously to assert their professional efficiency.[568]

In 2007, the Assembly of Islamic Research at al-Azhar in Egypt issued a decision which allows women to occupy the position of judge in all matters except the ones related to crimes, punishment and penalties. In other words, a female arbitrator can pass orders in financial and civil cases but not in criminal cases.[569] After one of their sessions, the assembly added that it was Abu Hanifa's opinion which received the consensus of al-Azhar scholars, and that religiously there is no objection to the adoption of the opinion of Abu Hanifa's followers even if there are other opinions which absolutely reject women's undertaking of judgeship or arbitration. The proponents of allowing women to occupy such a position argue that they

[565] The Permanent Committee for Islamic Research and Fataawa (also The Standing Committee for Scholarly Research and Fatwa, or The Committee for Research and Religious Edicts, or The General Presidency of Scholarly Research and Iftaa' in Arabic, al-Lajnah ad-Daa'imah lil-Buhooth al-'Ilmiyyah wal-Iftaa. Available at: http://www.alifta.net.

[566] See Qaradawi. Y. appointing a woman as a judge. Available at : http://www.vb.zyzom.com/t17209.htm

[567] Zaydan, A. Detailed in the provisions of a Muslim woman in the House and Islamic law. Available at: http://www.eltwhed.com/vb/showthread.php?18858.

[568] Shamrookh, N. Ruling on appointing a woman as a judge in Islamic jurisprudence. Available at: http://fiqh.islammessage.com/NewsDetails.aspx

[569] The Assembly of Islamic Research at al-Azhar in Egypt Available at :http: //www.azhar eg / magma

espoused Abu Hanifa's opinion to serve the general interest as long as the woman is qualified and as long as this happens in accordance with the religious and moral laws of Islam.[570]

The researcher believes that allowing any person – whether a man or a woman – to be judge or arbitrator is conditioned on the abidance by Sharia and sticking to its penalties. Thus, if the judge contradicts the Quran, his/her judgements will be inacceptable.

4.16 A Comparison of Finality in Saudi Arabia and Non-Sharia Jurisdictions

Beginning with the GCC members with whom Saudi Arabia shares a binding legal contractual agreement, it is clear that the UAE comes closest to Saudi Arabia in refusing enforcement of awards on the basis of internationally unprecedented technicalities of law. For the UAE, it is increasingly important that the award is given by a person considered to have the power of an attorney; in Saudi Arabia, the Enforcement Judge must have requisite training in arbitration law, somehow evening out this requirement under the two jurisdictions. However, it is highly unlikely that awards given in any GCC member state will fail enforcement in Saudi Arabia on the basis of lack of reciprocity, since these counties are under a common agreement. Beyond the GCC, the challenges rise unprecedentedly, despite the Saudi Arabia Law on Arbitration 2012 attempting to harmonise local standards with international standards. Parties to an arbitration due for enforcement in Saudi Arabia are not obligated to seek to limit the intervention of courts in a normal situation as this is naturally taken over by the Enforcement Judge; in Australia, the parties must consent to limit the intervention of the normal judicial system. The law provides that (1) the parties must agree, whether in the arbitration agreement or at any time before the expiration of the appeal period

[570] *Ibid.*

of three months[571] that an appeal may be made, and (2) the parties must seek leave of the court.[572] The US system does not have pre-qualification provisions for enforcement of arbitral awards, unlike Saudi Arabia. Similarly, in the UK and France, the law does not provide for express limitation to enforcement of an award, particularly when made in a foreign jurisdiction unless on grounds of violation of public policy, and whose scope is significantly limited. Therefore, Saudi Arabia stands out as an exception in the limitation of enforcement of awards on unexpected grounds as reciprocity by the award country and compulsory intervention by the Enforcement Judge.

[571] Section 34A (6), Commercial Arbitration Act 1984 (NSW).
[572] Section 34A, Commercial Arbitration Act 1984 (NSW).

4.17 Chapter synthesis

The finality of arbitral awards is the presumed result of an arbitration proceeding. Effectively, this means that at the end of arbitration, the parties who agreed to dispute resolution out of court can expect to have a fair decision to which both would be amenable, and which would be immediately executable. This is the reason behind the stipulations in the New York Convention, ICSID and UNCITRAL that arbitral awards shall be final. In practice, other than the declaration of finality as a convention of law, it is also the case that arbitral awards are seldom immediately accepted and enforceable because of dissent by one of the parties with the outcome of the award. Therefore, an award is never truly final while a challenge to it exists and while it remains unenforceable.

The enforceability of an award made and enforced domestically presents less of a dilemma because the law under which the award was made is the same law under which enforcement is sought, and therefore the regulations governing enforceability have presumably been considered by the arbitrators during the course of the arbitration process. The situation becomes more complicated, however, in the case of international or non-domestic arbitral awards where the arbitration takes place in another state or under another national law, and the award is sought to be enforced in a different state. Enforceability is substantively governed by the law of the enforcing state, as regards the two defences provided by the NYC and supported by ICSID and UNCITRAL, which are arbitrability of the subject matter and contravention of public policy. The problem of course arises when the law and public policy of the enforcing state disagrees with the law and public policy of the seat of arbitration; then the law becomes unenforceable and, therefore, effectively not final.

While arbitrability is an objective issue because the subject matters that cannot be arbitrated are defined by law, the matter of public policy is often subjective and is based on matters other than the law – social norms and customs, cultural values, generally accepted principles

of conduct either locally or internationally, and religion, among others, for as long as such are construed by the enforcing state as being included in "basic notions of morality and justice."[573] There have been attempts at defining the acceptable standard of 'public policy' for the purpose of application in the pertinent provisions of the international arbitration rules. A distinction was sought to be drawn between 'international' public policy and 'domestic' public policy, based on the commonality of the moral standard among many countries. The test appears to fail, in the case of Westacre v Jugoimport, [574] it was held that since bribery may be contrary to 'public policy,' even illegal, in most countries, it is sufficient to justify denial of enforcement of the award. Furthermore, public policy shifts with the changing times and adaptation of local to international social norms, which adds to the difficulty of construing the 'public policy' standard.

Saudi Arabia had been notorious in the past for resisting the enforcement of foreign arbitral awards, mostly based on the justification that the award was made against the public policy of the Kingdom.[575] There is no exhaustive list defining what constitutes public policy. On the contrary, the most common grounds for refusal of enforcement are that the award contains an order for the payment of interest or damages for consequential losses, which are both prohibited by Islam and the Sharia law based thereon. Less frequently cited grounds are the alleged lack of capacity of the arbitrators appointed by the parties, or when the agreement upon which the dispute is based is for the provision of prohibited goods or services pursuant to Sharia. Thus, in case law, the grounds upon which arbitral awards may be refused enforcement are broad and often arbitrary from the international's perspective; "[a]s a result,

[573] Parsons & Whittemore Overseas Co. v Société Générale de l'Industrie du Papier, 508 F2d 969, 974 (2nd Cir 1974).
[574] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12
[575] J.-B. Zegers & O. Elzorkany (2014) Arbitration Guide, IBA Arbitration Committee, Saudi Arabia. The Law Firm of Salah Al-Hejailan in association with Freshfields Bruckhaus Deringer, Riyadh, Kingdom of Saudi Arabia, 7.

refusals to enforce foreign arbitral awards are the norm because public policy in Saudi Arabia covers a vast area of practice."[576]

As to whether or not Saudi Arabia construes too leniently the definition of public policy so as to constitute overbreadth in its interpretation is not easy to decide. The purpose of Article V(2)(e) of the NYC is apparently to allow the enforcing nation some exercise of its sovereignty and to refuse to undertake an action that is considered repugnant by members of its own society. A member nation should have the right to refuse to do something that is against its national conscience. It is important that Saudi Arabia's trade partners respect its religious autonomy, as much as each of these states has their own local perspective on religion. Interest and the payment of damages against consequential losses are forbidden in Muslim states, and although this means that the award cannot be enforced in its original form, other innovative means may be explored to bring the award within Sharia compliance, which is something that has not as yet been explored. It is possible that examples drawn from the growing field of Islamic banking and how this interfaces with conventional or westernised banking may provide a source of analogy, under the Islamic principle of Ijtihad. Some possible solutions shall be further explored in the following chapters.

This chapter has elucidated on the issues that make enforcement of arbitration awards difficult when transferred from an international context to Saudi Arabia's national context. While the question of law is partially touched on, the more important aspect of this is the fact that the religious approach to legal matters cannot be substituted based on any beliefs, as this would be tantamount to undermining the integrity of the process. However, the intensity of the use of public policy to set aside or annul awards in Saudi Arabia should be reviewed with the aim of improving the 2012 Saudi Arbitration Law even further. The discussion around the changes in the national laws as brought about by the 2012 law indicates a slight improvement

[576] *Ibid.* 9.

in theory; however, in practice, the compulsion to review all foreign arbitral awards does not improve the outlook significantly. Most countries, particularly signatories to the NYC, have declared that an arbitral award is final and may not be modified or set aside except on the grounds of five procedural and two substantive conditions provided by the NYC.

Going back to the importance of finality that comes from the fact that finality is about certainty which is also related to commercial parties, there are other potentially competing considerations as mentioned above, such as culture, religion and public policy. It is worth mentioning that when comparing the Old Saudi arbitration with the new Saudi 2012 Act in terms of the issue of finality, even the New Arbitration Law approaches but does not reach the level of international law. However, some legal experts considered this step as an important positive feature for Saudi law reforms in order to move closer to international arbitration law. The Saudi law also respects its own laws within Sharia and public policy, and it is willing to separate the violating from the non-violating aspect of an award with regard to Sharia law and its implementation. "The New Law is likely to be considered more familiar and approachable to international litigants than the Old Law, and also there is hope that the arbitration proceedings and awards instituted under the New Law will usher in a new era for the enforcement of arbitral awards in Saudi Arabia"[577]. Similarly, arbitrators who issue the final decisions of awards should respect the tenets of Sharia in numerous areas of procedure and attempt to avoid any refusal of award on the grounds of failure to adhere to unforeseen legal barriers.

In conclusion, as mentioned before, the issue of finality in arbitration is of overriding importance in preserving the conflicting parties' confidentiality and speeding up the process of dispute resolution. However, as discussed earlier, the application of foreign arbitral awards

[577] F. Nesheiwat and A. Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 Santa Clara J. Int'l L. 443 (2015). Available at: http://digitalcommons.law.scu.edu/scujil/vol13/iss2/5

may be hindered by the existence of certain obstacles, such as the customs, culture, law and public policy of the respective country. This has been one of the foci of this study in relation to the current status in Saudi Arabia. In particular, the study has examined the question of whether the new Saudi arbitration law should move closer to the international law standards with respect to the issue of finality. While the old Saudi arbitration law may be dismissed from the international arbitration hub in terms of the issue of respecting finality due to the implementation public policy and its vagueness, the new arbitration law remains a desirable step in bringing Saudi Arabia closer to the international arbitration standards and fuels the hope of more progression towards certainty in finality of arbitral awards. In order for Saudi Arabia to achieve the desired level of respect towards finality, it needs to minimise the scope for upsetting finality and appealing on questions of law.

The study also lends support to the efforts made in Saudi Arabia to amend the arbitration laws in order to improve the effectiveness of arbitral awards in order that they become final and binding. This can be fulfilled by reducing the scope for upsetting finality and appealing on questions of law. The progress in this direction will no doubt realign Saudi public policy with international standards and will contribute to economic development in the country.

The following chapter deals with one of the challenges to the finality of a foreign arbitration award concerning appeals on questions of law. Traditionally, national laws provide for challenges to arbitral awards in various forms that include a motion for reconsideration, a motion for judicial review, a motion to set aside, and an appeal on question of law. Further discussion on appeals on the question of law will be presented in the next chapter.

Chapter Five:

Appeals on Questions of Law - Comparing International and Saudi Approaches

5.1 Chapter Overview

This chapter will investigate whether the scope for appeal on question of law in international law (including, in particular, the US, UK and Australia), still provides a greater level of certainty than what is available in Saudi law. The chapter considers the Saudi Arbitration law of 2012, highlighting how it has brought greater convergence of Saudi arbitration laws with international laws, but picks out deformities that express a rigidity that has been borrowed from the earlier 1985 version of arbitration laws in the country. This debate on the permissibility of appeals on the substantive merits of arbitral awards builds on the more general discussion of finality of arbitral awards in the preceding chapter. There, the review was concentrated around the provisions in Sharia that make international arbitral awards unenforceable in Saudi Arabia, and how finality is affected by the Kingdom's requirement for compulsory review to ensure adherence to Sharia (and for internationally given awards, to ensure it abides by public policy).. In the current chapter, the grant for appeal in the question of law is interrogated with respect to Saudi Arabia, with close comparison with the provisions for the same in international and foreign jurisdictions. It interrogates this requirement in view of the study's proposed support abolition of appeal on the basis of the question of law in Saudi Arabia.

Saudi Arabia's Law of Arbitration allows appeal by a party against an arbitral award before a competent court within 15 days from the date of the award.[578] The Saudi Arbitration Law 2012 does not explicitly provide for reasons under which an appeal against an award

[578] The Law of Arbitration, Article 18

may be sought. One of the reasons consistent with refusal of an award is failure to abide by Sharia law when giving an award, and this reason is numerously cited as grounds of appeal. In the formulation of the arbitration agreement, the parties may not agree to exclude grounds for appeal, leaving appeal open on any of the grounds allowed for refusal of enforcement.

The general sentiment of jurists on the matter is that the right of appeal on questions of law should be abolished.[579] The problem of appeal was considered during the consultation phase of the draft Arbitration Bill of the UK, and it was articulated by Lord Justice Seville as follows:

> *A feature of our existing law which has caused disquiet abroad and which is regarded by many as detracting from arbitrating here is the ability to seek leave to appeal to the court from the substantive award of the arbitral tribunal. What is said is that to allow an appeal of this kind is to frustrate the agreement of the parties to resolve their disputes by arbitration, since the result of a successful appeal is to substitute a court resolution for an arbitral resolution. There is substance in this view. Indeed, we considered whether to recommend the abolition of any right of appeal on the substantive merits of the dispute. In the end we decided not to do so…*[580]

The right to appeal an arbitral award on question of law is couched in the same context as that expressed by the English jurist above. Most countries, particularly signatories to the NYC, have declared that an arbitral award is final and may not be modified or set aside except on the grounds of five procedural and two substantive conditions provided by the Convention. Only two countries surveyed – i.e. the UK and Qatar – have statutorily provided

[579] Department Advisory Committee Report, February 1996, Department of Trade and Industry, par. 284.
[580] Lord Justice Saville (1997) 'The Arbitration Act 1996 and its Effect on International Arbitration in England.' *Arbitration*, 63, 104, at 108.

for the right to appeal an arbitral award on substantive bases. Appeal of an arbitral award necessitates a review by the court of the merits of the award and, in some cases, the underlying dispute. Some jurisdictions, despite legislative provisions declaring to the contrary, end up allowing litigious processes on arbitral awards, whether in the form of appeal or by judicial review. This chapter examines the context in which such appeals or reviews may take place, whether as a matter of right or as a challenge to the validity of the award on the grounds specified by the NYC. The dilemma lies in the consistency in allowing appeals on substantive matters involving arbitral awards, and the intention behind arbitration proceedings being a substitute for lengthy and costly court proceedings. The general wisdom is that since arbitration is undertaken at the volition and pursuant to the agreement of the parties, and is conducted by arbitrators of their choosing, then the outcome of an arbitration should be honoured by them, without the need for an appeal. The study illustrates that different jurisdictions have different interpretations and approaches concerning appeals on question of law. With regard to this issue, Saudi Arabia should move in the international direction with the enactment and implementation of its New Arbitration Law in order to be closer to international law with respect to finality. Finally, it is important to mention that this part of the discussion is an integral part of the previous chapter and will cover certain issues that have not been covered in the previous chapter when discussing finality, and will also focus more on the issue of appeals on the question of law. Thus, this chapter builds and expands on the previous chapter.

5.2 Application of 'Question of Law' in Arbitration Proceedings in Saudi Arabia

Saudi Arabia acceded to the New York Convention in 1994, and in doing so made the reservation on the basis of reciprocity, limiting the recognition and enforcement of awards

under the NYC only to those awards rendered by other countries that are also signatories to it and which recognise and enforce Saudi arbitral awards. By Royal Decree, there would be no retroactive application of the provisions of the NYC to disputes that were initiated prior to ratification, even if the arbitration had not yet reached its conclusion.

Although Saudi Arabia acceded to the NYC more than 20 years ago, awards that originate from outside of Saudi Arabia continue to be difficult to enforce in the country, let alone be considered final. It is not unusual for foreign awards to be subjected to a *de novo* judicial review in Saudi Arabia, where the court will apply Saudi law to the substance of the dispute and even a review on the facts before enforcement can be considered. The court's decision on the enforcement of the foreign award is subject to appeal,[581] therefore what starts out as an alternative dispute resolution process ends up in the litigation and appeal system in the courts of Saudi Arabia.

While the old Arbitration law in Saudi Arabia covered only the domestic disputes, Article 3 of the new law covers both domestic and international commercial disputes following the widened scope of the SAL 2012. Under Article 49 of Saudi Arabia's new Arbitration Law, if arbitral awards are issued under the Saudi Arbitration Regulations 2012 (hereafter Regulations; domestic or international), appeal is not possible under any circumstances; what is possible is to apply for the award to be set aside, which is premised on limited grounds, enumerated under Article 50(1). These grounds are:

(1) That no arbitration agreement exists, or the agreement is void, or that it has expired due to lapse of the prescribed period;

(2) That one of the parties is incapacitated during the time of the signing of the arbitration;

(3) That the award was made under a lack of due process;

[581] Zegers & Elzorkany, *op. cit.*, 5.

(4) That the arbitration tribunal acted in contravention of the rules agreed on by the parties;

(5) That there were irregularities in the constitution of the arbitration tribunal;

(6) That the arbitration tribunal exceeded its mandate;

(7) That the arbitration tribunal failed to comply with the requirements for issuing the award, and such failure resulted in an adverse effect on the award.

To date, however, there has been no instance when a legal proceedings to challenge an arbitral award has been initiated under the Regulations.[582] Furthermore, with regard to the filing of appeals to arbitral awards, the Regulations are silent as to any distinction between domestic and foreign awards, thus in theory both are not open to appeal.[583] Neither is there any recourse to appeal against an order for the enforcement of the arbitral award. However, an appeal may be filed with the competent authority against an order dismissing the enforcement of an award, provided that the appeal is filed within 30 days from the date the order is issued.[584] Although the Arbitration Law and Regulations do not distinguish between foreign and domestic awards in the matter of challenges to the award, courts have historically been reluctant to enforce foreign awards, but have been comparatively more willing to enforce domestic awards. The enforcement of foreign arbitral awards in Saudi Arabia has remained an uncertainty up to this day. The Regulations affirm that the competent courts will act according to the obligations of Saudi Arabia under international agreements, however there are no specific rules to ensure the enforcement of foreign arbitral awards.[585]

Saudi Arabia's Law of Arbitration allows appeal by a party against an arbitral award before a competent court within 15 days of the date of the award.[586] After 15 days, the award lapses into finality and no appeals may be made thereafter. However, there are no grounds

[582] Zegers and Elzorkany, *op. cit.*, 21
[583] *Ibid.*
[584] Saudi Arbitration Regulations 2012, Article 55(3).
[585] Zegers and Elzorkany, *op. cit.*, 23
[586] The Law of Arbitration, Article 18

specified by the Law of Arbitration upon which an appropriate appeal against an arbitral award may be brought. In practice, however, the most common reason for appeal brought by a party is that the award is in contravention of Sharia law, which is grounds consistent with refusal of enforcement of the award. In the formulation of the arbitration agreement, the parties may not agree to exclude grounds for appeal, leaving appeal open on any of the grounds allowed for refusal of enforcement. An appeal made to the competent court within the prescription period will enable the court to review the objections, after which it may either reject the objections leading to the execution of the award, or sustain the objections leading to the denial of enforcement.[587]

In March 2013, Saudi Arabia's new Enforcement Law came into effect and consequently replaced the 1989 Rules of Civil Procedure before the Board of Grievances. As earlier described, the Enforcement Law takes the jurisdiction out of the hands of the Board of Grievances and expedites the process through the Enforcement Judge, whose sole purpose is to recognise and enforce domestic and foreign arbitral awards. The new law "represents a great step toward harmonisation of Saudi law with international standards"[588] and is seen to facilitate a faster and higher rate of enforcement of arbitral awards in future. The creation of an entity dedicated specifically to the enforcement of arbitral awards speeds up the process while at the same time ensures the necessary expertise and more objective determination of the award, leading to its finality.

Saudi Arabia's new Enforcement Law sets out the rules and procedures that should govern arbitrations under the law.[589] The law specifies the procedures and rules to govern the proceedings if parties have not designated any specific laws. The new law observes the autonomy of the parties by allowing them to use their preferred procedural rules in both domestic and international arbitrations provided such proceedings are contravened in

[587] Al-Ghamdi et al., *op. cit.,* 675-676.
[588] Harb and Leventhal, *op. cit.,* 2.
[589] The Law of Arbitration, Article 25-37.

accordance with the public policy of the Kingdom and the Shariah law.[590] In cases where parties do not designate the preferred applicable law or in the event that they do not agree on a particular choice, the arbitral tribunal is obligated to select the procedural rules to govern the arbitral proceedings.

The procedural rules detailed in the new law are more comprehensive than other provided in the old law. The provisions are closely founded on the provisions of the UNCITRAL Model Law especially in dealing with the selection of the applicable law where the parties do not designate any specific applicable law. In such cases, the new law sets out the procedure to be followed by parties by default. These rules has features that are commonly used in intentional commercial arbitration including expert reports, witness statements, hearings and pleadings. However, parties are advised to select applicable laws they are familiar and comfortable with as opposed to relying on the default provisions of international arbitration rules.

The new law is also related to the UNCITRAL Model Law in relation to the statements of claim and defence albeit some superficial distinctions.[591] The new law also follows the UNCITRAL Model Law with regard to the approach of holding hearings and written proceedings despite the fact that the new law has a requirement for a written record of the hearing. The new law requires that the new written record of the proceedings be signed by the tribunal and all those in attendance including the parties, their representatives, experts and witnesses as well as the records and copies that the parties are required to receive.[592] Moreover, the provisions of the new law with regards to the consequences for a default by either parties is consistent with the provisions of the UNCITRAL Model Law although the new law omits the provision of the UNCITRAL Model Law that addresses that a

[590] The Law of Arbitration, Article 5, 25, 38
[591] The Law of Arbitration, Article 30, 32; UNCITRAL Model Law, Article 23.
[592] The Law of Arbitration, Article 33

respondent's failure to file a statement of defence should not be considered as admission of the allegations made by the claimant.[593]

The New Arbitration Law further grants the parties the liberty to choose their own arbitration institutions and rules for domestic commercial arbitrations. According to Article 2,

> '*... the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom. . .* '.[594]

As such, Saudi companies doing business with Saudi parties in Saudi Arabia can utilize these arbitration institutions and rules of their own choice.

As discussed in previous chapter around the 'public policy. The presumption of finality of arbitral awards appears to suggest that public policy is a term that admits a broad scope for review. Both the New York Convention and the UNCITRAL Model Law state that the recognition or enforcement of the arbitral awards may be refused by the competent authority if the award runs counter to the public policy of the country where the award is sought to be enforced. However, Saudi Arbitration Law of 2012 has recently made massive changes and reforms to the practice of arbitration law. Expressing optimism about the new law, a note in the article The New Saudi Arbitration Law reads: "One major improvement from the 1983 law relates to the enforcement of arbitral awards. Prior to passing the new law, any arbitral award had to be ratified by a supervising court in order to be enforceable; so the arbitral award only becomes "final" once the Saudi courts have settled any appeal against the award".

Rubino-Sammartano mentions that if arbitration is taking place in a Muslim country then irrespective of the nationality of the engaged parties, the arbitration would follow Sharia unless a secular judiciary parallel to Sharia exists in the concerned country. Despite the

[593] UNCITRAL Model Law, Articled 25
[594] The Law of Arbitration, Article 2

numerous benefits and new changes that the new Saudi Arbitration Law 2012 brought to parties, there are still lingering questions, as some aspects of the law still allow considerable space for appeal on the question of law. Some of the major concerns include:

- "*The new arbitration law affirms that Sharia is paramount and that arbitration awards may be enforced only if they are Sharia compliant.*
- *As noted above, the appropriate Saudi tribunal (typically the Board of Grievances at least until the new Law of the Judiciary, Board of Grievances Law and related judiciary reorganization regulations are fully implemented) remains responsible for approving awards and ensuring that awards are Sharia compliant as a condition of enforcement.*
- *Although the New Law provides increased flexibility with respect to selecting the location of the arbitration, the choice of governing law, language, selection of arbitrators and other matters, this flexibility is still clearly subject to the Saudi courts' oversight and mandate to ensure Sharia compliance. For example, while the New Law expressly states that arbitrators need not be "competent" in Sharia, the impact on the court's review and enforcement of an arbitral award issued through an arbitrator who is not deemed "competent" in Sharia is not addressed other than to confirm the paramount requirement of Sharia compliance. The same observation and uncertainty arises in connection with venue, language of the arbitration, choice of law and other matters. In sum, while the New Law allows significant flexibility and control with respect to the procedures for conducting an arbitration, the parties will want to take the Sharia compliance requirement into consideration when making such decisions.*
- *The New Law requires the Saudi court to act within a certain amount of time when performing its supervisory functions during the arbitration process. These time limits should help to move the arbitration process along more quickly. However, in practice,*

it is unclear whether the courts will adhere to such time limits or other "mandatory" aspects of the law.

- *The New Law permits the arbitration panel to issue temporary or injunctive relief if the parties agree that the arbitration panel may do so. However, this appears to conflict with another provision in the New Law which reserves such action for the "competent court". It is unclear in practice whether the court or arbitration panel will issue or enforce such temporary or injunctive orders, which are extremely rare in practice in Saudi Arabia."*[595]

Another important argument here is the vagueness of the exact meaning of public policy in Saudi law, which might lead to giving more scope for appeal on question of law which may upset finality. The wide interpretation of public policy might cause concern for finality of arbitral awards. This wide interpretation could be widely abused since there is no clear definition of public policy in Saudi Arabia such as many of countries that have no clear definition. In addition, the individual interpretations of judges in Saudi Arabia for public policy as Sharia gives judges a right to independent reasoning and intellectual exertion (Ijtihad), which may affect finality and will allow much scope to upset finality by giving a lot of scope for appeal on question of law due to the public policy approach. Alassaf and Zeller confirm that the grounds for public policy and arbitrability in Saudi law "have not been identified." [596] This implies that public policy could well be interpreted narrowly or broadly depending on the personal analysis and understanding of each Saudi judge.[597] However, Saudi Arabia's new arbitration laws remain largely untested. In practice, it can be said that we are yet to see what effect these new laws will have in practice, and how the execution judge will approach issues of finality and enforcement and what effect these provisions will

[595] Al-Ghamdi and Boehm Jr., *op. cit.*
[596] A. Alassaf and B. Zeller, 'The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985' (2010) 7 MqJBL 170, 18
[597] Ibid., 186.

have in practice. Reduction of the involvement of the local courts and granting of greater discretion to parties suggests that Saudi Arabia is moving in the right direction, towards adopting a relatively modern legislative and structural framework that respects finality and the enforcement of arbitral awards.

5.3 Relevance of Saudi Arbitration Law (SAL) 2012 Act in Enforcement of Arbitral Awards with the issue of applicable law and public policy under the role of sharia law.

The concept of the applicable law poses major dilemmas due to the differences in the subject matter between the law in Saudi Arabia and other modern arbitration legislation. Despite the numerous benefits and new changes that the new SAL 2012 brought to parties, there are still lingering questions with the issue of applicable law and public policy under the role of sharia law. Legal experts around the world hold diverse opinions regarding the subject matter of the applicable law. However, it should be mentioned that the provisions of Sharia law was establish in the time of the prophet Muhammad many years ago. Nevertheless, the Saudi judges' convergent opinions which based on Islamic values and favours Hanbali doctrine along with other four Islamic schools which is based on the application of the law of Sharia that views the adoption of man- made laws as applicable law inadmissible. This view further posits that any dispute should be resolved using the Islamic law. The Saudi judicial system requires that the substantive and procedural laws governing arbitration proceedings in Saudi Arabia should be Saudi Law which is Sharia-based[598].

The provisions of Article 20 of the SAL 1983 91 and Article 39 of its Rules 92 require that the arbitration proceedings, decision and enforcement of arbitral award be

[598] A. H. El-Ahdab, Enforcement of Arbitral Awards in the Arab Countries. *Arbitration International*, *11*(2) *Arbitration with the Arab Countries*. At pp. 660-661

conducted in compliance with Islamic Law and the applicable regulations. The reliance on these articles have generated uncertainty and ambiguity in the areas of arbitration process as many legal writers have discussed these issues to explore the importance of discriminating between domestic and foreign disputes for purposes of determining the applicable law that will be applied in arbitration applied in Saudi Arabia with respect to procedural and substantive issues while upholding party's autonomy.[599] Moreover, the Islamic law does not differentiate between procedural and substantive laws[600].

As discussed in previous chapter around the 'public policy, the presumption of finality of arbitral awards appears to suggest that public policy is a term that admits a broad scope for review. There is no clear definition of public policy in Saudi Arabia such as many of countries that have no clear definition. This wide interpretation could be widely abused. The social, political and economic background of different states may lead to achievement of different outcomes even with the application of the same legal text. In the context of public policy, the provisions of many international texts expands the scope of the discrepancy even further as the practice depicts a greater extent of ambiguity due to lack of uniformity across states.[601] In the international context, the issue of public policy presents one of the most complex legal matters in arbitration practice due to its link with the legal rules of the state that governs and helps the community accomplish its interests. Its association with the state policy and the need to accomplish the interest of the state makes it a thorny issue. As such, public policy has an association with the fundamental position of the state and its interests in the achievement of its interests including the social, political and economic interest, hence affecting the application of the law that govern such interests.[602] In Saudi Arabia, the

[599] Ibid.
[600] Ibid.
[601] V. Belohlavek, J. Alexander, Arbitration, Ordre Public And Criminal Law. Bilingual Edition (English, Russian) *Interaction of Private and Public International and Domestic Law*. Vol. 2 (of 3 publ.), (2009)
[602] A. H. El-Ahdab, Enforcement of Arbitral Awards in the Arab Countries. *Arbitration International*, *11*(2)

interpretation of public policy is in the jurisdiction of the judiciary, which acts as a source of legislation.[603]

According to a study conducted by Sheppard, it is reported that the domestic and international arbitration principles of public policy have distinct differences. Nevertheless, Article V (2-b) of the New York Convention provides that an arbitral award may be refused for enforcement in a certain country due to the perception that its enforcement is contrary to the country's public policy.[604] The public policy in Saudi Arabia is governed by the Shariah law, thereby making transactions involving riba (usurious transactions), Ghabn (injustice), Jahaalah (uncertainty) and Garah (compromised ambiguity) unacceptable as they are prohibited in the Shariah law. In effect, enforcement of such transactions is considered to be against the public policy of the country.[605] Given that these transactions are acceptable in the rest of the world, their application in Saudi Arabian domestic policy has an effect of exemption.

The national and international legislation has similarities to the effect of the exemption of enforcement of arbitral awards of the grounds of public policy. Article 50 (2) of the SAL 2012 expresses that

> '*The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law'*.[606]

The SAL 2012 New Arbitration Law is consistent with Egyptian Arbitration Law which postulates that the annulment of arbitral awards shall take effect if they are in conflict with

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Arbitration with the Arab Countries. At pp. 169-182.

[603] Ibid

[604] A. Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?," *Transnational Dispute Management, ALTA. L. REV.* 34, no. 01 (2004). At p.137

[605] M. Wakim, (2008), "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East." *New York International Law Review*, *21*(1). At P.49

[606] The Law of Arbitration, Article 50 (2)

the country's public policy.[607] The English Arbitration system through the English Arbitration Act 1996 also stresses the requirement that enforcement of arbitral awards not be contrary to the public policy.[608]

The application of SAL 2012 follows the reservations that Saudi Arabia put forth as a condition for the signing of the New York Convention. The country reserved that the Islamic Shariah law is closely linked to public policy, the acceptance of which made the country adopt Article V (2-b) which saw the enforcement of foreign arbitral awards in the country problematic. SAL 2012 further exemplifies the provisions in Article 11 (3) of the implementation Rules of the SEL which has traditionally been perceived as hostile to the recognition and enforcement of foreign arbitral awards due to the principle of conflict with public policy.

SAL 2012 poses major legal issues associated with the concepts of Shariah and public policy. Saleh notes two concerns; the issues of riba (usurious transactions) and Garar (compromised ambiguity) as the most likely to occur in the course of arbitral proceedings and in effect compromise the enforcement of arbitral awards.[609] When both parties are from Saudi Arabia, the issue of applicable law could also be added as the new law allows such parties to choose even the laws of another country to govern their dispute. However, Article 38 of SAL 2012 requires that the substantive laws selected to govern arbitral proceedings should not conflict with Saudi Arabia domestic laws by emphasising that the selected rules should not be in contravention to the public policy in Saudi Arabia and the Shariah law.[610] In the attempt to resolve these issues, Al-Hoshan, a Saudi law expert posits that two Saudi nationals involved in a commercial arbitration case may apply the foreign procedural or substantive rules in

[607] Egyptian Arbitration Law, Article 53 (2)
[608] English Arbitration Act 1996, Section 68 (2-g)
[609] S. Saleh, (1987), "The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East." In *Contemporary Problems in International Arbitration,* At p. 27
[610] The Law of Arbitration, Article 38

accordance with the Article 5 and 38 of SAL 2012.[611] The law maker points out to the Decision in the Court of Appeal in Saudi Arabia in 1995 that upheld the decision made by the non-Muslim arbitrators since the parties had made an agreement to resolve their case through arbitration held in France, US and Australia.[612]

The enforcement of arbitral awards are subject to the Royal Order which has provided that the enforcement judge must enforce what is contained in the executive bond unless the enforcement of the agreement goes against provisions of the public policy. The interpretation of "public policy" in this context according to the Royal Oder means that "the overall rules in Sharia Law are based on the texts of the Quran and Sunnah".[613] This requirement for compliance with Sharia law in SAL 2012 could pose challenges in term of recognition and enforcement of foreign arbitral awards especially when awards are issued by arbitral tribunals or courts that may not have an understanding of Sharia law.

Shair'a law is the framework upon which the development of Saudi legislation is based, a trend that has existed for over 1,400 years. The provisions of Sharia law in SAL 1983 is one of the distinguishing features between Saudi Arabia arbitration process and those governed by modern arbitration legislation. However, the adoption of Sharia law in arbitration proceedings has led to many obstacle as its nature is that Shari's law has a strict and narrow interpretation. Consequently, this approach has a negative influence on the acceptance of finality of arbitral award as "final and binding" due to the difference in the provisions under Sharia law and international practice. The enactment of the New SAL in 2012 sought to rectify the challenges of recognition and enforcement of arbitral awards by enabling respect for the principle of finality of arbitral awards. The concept of public policy under the Islamic

[611] M. Al-Hoshan, (2012), "The New Saudi Law on Arbitration: Presentation and Commentary." *International Journal of Arab Arbiration* Volume 4 - No. (3) At p. 10
[612] The 4th Review Committee, Decision No 43/T/4 (Saudi Arabia 1995
[613] The Number of Royal Order is (44983), dated on 22/08/2012

law in Saudi Arabia has also attracted major criticism from the international legal experts.[614] Moreover, even the new SAL 2012 makes reference to the application of Sharia law within the scope of applicable law, arbitral proceedings and the provisions of public policy, distinguishing Saudi Arabia arbitration process based on international standards. This has an effect of upsetting finality of arbitral awards by appeals on questions of law.

5.4 Appeal on Question of Law in Arbitration Proceedings in Other Countries with Sharia-based Legal Systems

The issue of opening up the foreign arbitral award for judicial review based on merits or on question of law is of great concern, especially because the failure of recognition and enforcement of arbitral awards should be legally recognised as per international arbitration laws. A study by Al Tamimi[615] noted that despite the abundance of talent, resources and growth in the Middle East region, the countries in this area have a long way to go to improve their standing in the realm of international arbitration, particularly in foreign awards enforcement. There are instances when an Arab state adopts the New York Convention, but negates the effect of the NYC provisions by the issuance of a local law that obstructs the enforcement of arbitration awards, in "total contradiction to the country's obligations under the New York Convention."[616] One common issue is when the enforcing state requires the ratification of the foreign award in the state where its enforcement is sought, which under the NYC is a foregone requirement; another issue is the necessity of undertaking an enforcement process "riddled with appeals" that requires a lengthy duration and great expense.[617]

[614] Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East."
[615] Essam Al Tamimi (Sept 2014) 'Enforcement of Foreign Arbitration Awards in the Middle East: Identifying Where the Problem Is and How to Fix It.' *Enforcement of Foreign Arbitration Awards in the Middle East.* Al Tamimi & Co. at 1
[616] *Ibid.*
[617] *Ibid.*

In recent years, however, arbitration institutions have proliferated in the MENA region, particularly in the Gulf area. What is remarkable is that these recently established arbitration institutions do not appear to represent a rekindling or reinforcement of traditional practices or teachings characteristic of the region, which is known to be strongly influenced by Sharia principles. Instead, they reflect "a realisation by governments of an economic reality."[618] There is therefore an inconsistency in the application of domestic and international arbitration laws and treaties that reflects a clash of philosophies with regard to dealing with arbitral awards.

5.4.1 The United Arab Emirates

The application of the principle of finality of arbitral awards in Saudi Arabia and internationally has attracted different arbitration procedures and process due to the application of different laws. While the old arbitration law set a completely different procedure to govern the arbitration proceedings and recognition and enforcement of arbitral awards, the new law seems to be more liberal with many provisions converging with those provided in the UNCITRAL Model Law and other relevant laws.

According to the provisions of the Civil Procedure Code (CPC) or the Dubai International Financial Centre (DIFC) Law,[619] arbitral awards cannot be appealed on any substantive grounds. However, there are challenges on procedural grounds that are set forth in the CPC and DIFC Law. Notwithstanding these provisions, in the UAE both substantive and

[618] S. Bono (2015) "13 Middle East and North Africa Overview, International Arbitration 2015" *International Comparative and Legal Guides.* Global Legal Group. Retrieved from <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/13-middle-east-and-north-africa-overview>

[619] Arbitration proceedings seated within the UAE are governed by Part 3, Book II of the Federal Law No. 11 of 1992, known as the Civil Procedure Code., while arbitrations seated within the DIFC are governed by the DIFC Arbitration Law (No. 1 of 2008), otherwise known as the DIFC Law. The UAE is a civil law jurisdiction influenced by Sharia law and based extensively on Egyptian Law. In contrast, the DIFC is a common law jurisdiction that is based largely on the law of England and Wales. The DIFC Law provisions are based on the UNCITRAL Model Law, but not those of the arbitration provisions within the CFC.

procedural laws are covered by public policy and are required to strictly conform to UAE civil law (since no law specific to arbitration exists yet).[620]

There is the possibility that delays due to appeals may also be encountered when the parties seek enforcement of their arbitral awards before the courts.[621] Furthermore, the arbitrators may not decide on whether the award applied for falls within their own jurisdiction, as the CPC does not provide for the principle of competence-competence. The arbitration agreement drawn up by the parties typically provides that the tribunal can rule on the foundation of its own power and mandate, usually by reference to institutional rules. Otherwise, the parties have the option to apply to the UAE courts to decide on whether the arbitration agreement in fact covers a particular dispute referred to arbitration. In such a determination, it is allowed to appeal the decision that may be arrived at by the court.[622]

Consistent with the NYC, an award considered contrary to public policy may be challenged and refused enforcement in the enforcing country. Guidance with regard to the meaning of public policy in the case of the UAE is provided in the UAE Civil Code,[623] which in turn specifically requires "compliance with the fundamental principles of Islamic Sharia law."[624] This apparently necessary inclusion of Sharia principles in the scope of 'public policy' among Arab Muslim countries is the reason for the subjection of foreign arbitral awards to local judicial review or appeal, which places the merits of the dispute under the jurisdiction of the judge who is often not seasoned in the specialised practices and considerations of

[620] H. Arab & L. El Shentenawi (2015) 'The UAE Country Report' *IBA Sub-Committee on Recognition and Enforcement of Awards – Public Policy.* March. International Bar Association. Retrieved from www.ibanet.org/Document/Default.aspx?DocumentUid=87CADCC5
[621] R. Mohtashami, A. Birt and L. Rovinescu (February 2013) *Arbitration Guide, IBA Arbitration Committed: United Arab Emirates.* International Bar Association. DIFC, Dubai, UAE, at 1.
[622] Mohtashami, Birt and Rovinescu, *op. cit.,* 7.
[623] Article 3 of the UAE Civil Code
[624] Mohtashami, Birt and Rovinescu, *op. cit.,* 14.

international arbitration, and who thus subjects the arbitral award to the requirements of local law.[625]

There have been encouraging developments in the application of international arbitration principles in the UAE courts. Dubai particularly has been the centre of much transformation which, if continued, could raise it to the level of established world economic centres such as New York, London and Hong Kong. In 2004, the creation of the DIFC was a milestone in this direction. The DIFC fosters a modern regulatory environment, 100% ownership, and is supported by a common law-based court system that co-exists harmoniously with 'on shore' civil courts, which is the first such model of its kind. Progress continued in 2009 with the development of a protocol of enforcement with the Dubai courts that facilitates portability of its judgments and arbitral awards. In the case of Meydan v Banyan Tree,[626] the DIFC confirmed that it had the jurisdiction, as a Dubai court, to enforce awards seated in Dubai although the award may have no connection whatsoever to the DIFC, and although there were no assets in the DIFC against which the award could be enforced at that time. This ruling is significant because it may enable the parties to circumvent the possibly lengthy ratification process undertaken by the Dubai courts.

Following the lead shown by the DIFC, the UAE courts are gradually warming up to embracing the principles in the NYC ratified by the UAE in 2006. The Dubai International Arbitration Centre (DIAC) and the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) have been established and have since experienced a strong and thriving case load. Such initiatives appear to have promoted a growing attitude of acceptance as UAE courts enforce more arbitral awards pursuant to the UAE's treaty obligations under the NYC.

[625] Arab & El Shentenawi, *op. cit.*
[626] Maydan Group LLC v Banyan Tree Corporate Pte Ltd. Case CA-005-2014, DIFC Court of Appeal, ruling 3 November 2014.

The case of Al Reyami v BTI[627] is an instance when the Dubai Court of Cassation upheld a decision promulgated by the Dubai Court of Appeal in favour of enforcing an ICC award rendered in Stuttgart, Germany pursuant to the NYC.[628]

There have been challenges posed in the recognition of foreign arbitral awards based on procedural grounds. In relatively recent cases in the years 2013 to 2014, the UAE judicial system applied local law to foreign arbitration awards. The UAE Court of Cassation refused to enforce a foreign arbitral award for the reason that the defendant had no apparent assets in its jurisdiction. The decision was pursuant to a local law resorted to in litigation cases, wherein an enforcement of judgment against an attachment may only be enforced if the defendant is domiciled in the UAE.[629] In other words, it is not sufficient, unlike in international arbitral award enforcement, that the defendant owns assets that are available in the UAE, even if such a defendant is not domiciled there. This contravenes the NYC, as well as the DIFC Law of the UAE.[630]

In another case, Baiti Real Estate v Dynasty,[631] the courts applied a broad and liberal interpretation of 'public policy' with regard to the arbitrability of property disputes. The court refused the enforcement of the award on the grounds that "disputes relating to the non-registration of property on the off-plan real estate register in Dubai were matters of public policy concerning the 'rules of private ownership and the circulation of wealth'."[632] In addition to the grounds in these cases, the UAE civil law that still governs UAE courts'

[627] Al Reyami Group LLC v BTI Befestigungstechnik GmbH & Co KG, Case No. 434/2014.
[628] Bono, *op. cit.*
[629] Al Tamimi, *op. cit.*
[630] Articles 235-238 of the UAE Procedural Law
[631] Baiti Real Estate Development v Dynasty Zarooni Inc., Appeal No. 14/2012, Real Estate Cassation, ruling of 16 September 2012.
[632] Bono, *op. cit.*

onshore decisions provides additional bases for challenge by requiring the ratification of foreign awards in the courts before they may be enforced.[633]

Another instance when an appeal against an arbitral award prospered on the grounds of domestic procedural irregularities is the Bechtel case,[634] an award rendered in Dubai. In this instance, the Dubai Court of Cassation ruled against the enforcement of a $25 million arbitral award against the claimant, for the reason that the arbitrator failed to swear in witnesses in the manner that UAE law prescribed for court hearings.[635] The French Court of Cassation eventually confirmed the award in the Bechtel case, on the grounds that although it was annulled in the seat of arbitration (Dubai), the award was divorced from any national legal order including that of the seat, and therefore continued to exist even if it was annulled by the seat.[636]

There are also awards, however, that have been denied enforcement based on appeal on substantive matters and issues of public policy. An Abu Dhabi Court of Cassation case[637] in 2014 ruled that a law:

> *…enacted to regulate the circulation of wealth and individual ownership of a state in terms of possession and the acquisition of rights in rem and the nature and scope of such rights, the means by which they are acquired and extinguished, including rules pertaining to their registration on the property register, 'are all provisions relating to the monetary system of the state which are essentially public policy.'*[638]

[633] Bono, *op. cit.*
[634] International Bechtel Co. Ltd. v Department of Civil Aviation of the Government of Dubai, Dubai Court of Cassation, case no. 503/2003, dated May 15, 2004.
[635] Comair-Obeid, *op. cit.*
[636] Latham & Watkins (Sept. 4, 2013). 'Arbitral Award Enforced in the United States Although Annulled Abroad.' *Client Alert.* Latham & Watkins International Arbitration Practice.
[637] Abu Dhabi Court of Cassation Commercial Appeal No. 55 of 2014 dated April 3, 2014.
[638] Abu Dhabi Court of Cassation Commercial Appeal No. 55 of 2014 dated April 3, 2014, as quoted by Arab & El Shentenawi, *op. cit.*.

For the foregoing reason anchored on the Abu Dhabi court's interpretation of public policy, the subject of the award was adjudged a non-arbitrable subject matter, and any dispute relative to this would not fall within the jurisdiction of the local courts, even though a valid arbitration agreement may already exist.[639] This is one of a few exceptional cases wherein the arbitral award was affirmed and enforced in a foreign country even though it had been nullified in the seat of arbitration, thus running contrary to the general rule that an award set aside at the seat does not exist and is therefore not enforceable in any jurisdiction.

What may be concluded about the UAE's stance regarding appeal of arbitral awards on question of law is that it appears to abide by a two-tier system with regard not only to appeal but to arbitration practice in general. The first tier is the level of the DIFC, DIAC and ADCCAC which strive towards approximating international arbitration treaty principles. The second tier is quite unaffected by the first, continuing the traditional practice of implementing local laws and interpretations of public policy to international awards arbitrated abroad and applied to the UAE for enforcement. If allowed to continue, these inconsistencies will cause much uncertainty in the arbitration practice in the UAE which may deter foreign partners and contractors from entering into more commercial transactions within the UAE.

Since the enactment of Saudi Arabia's new Arbitration Law in 2012, substantial modifications of the provisions of law related to arbitral proceedings have changed the arbitration practice in Saudi Arabia, making the process make substantial steps towards international arbitration norms that are friendly to both local and international business regimes. SAL 2012 is a reflection of the international policies of UNCITRAL Model Law, which has reshaped the old law by making amendments in essential areas of the arbitration process including the arbitration proceedings, appointment of arbitrators and the

[639] Arab & El Shentenawi, *op. cit.*

recognition and enforcement of local and foreign arbitral awards.[640] For instance, the new law amended the provision in the old law that required the arbitrators of a Saudi arbitral tribunal to be male, Muslim, be experienced and reputable. One of the major changes that steered the Saudi arbitration law towards the international norms was the omission of the requirement that the arbitration proceedings be conducted in Arabic. The new law now gives the parties the liberty to choose their language of arbitration even if they choose a foreign language. The new law also gives the parties the freedom to designate a foreign law to govern their arbitration agreement. As such, arbitral agreement made in compliance with the new law and the UNCITRAL Model Law are binding on the parties and their recognized and enforcement in Saudi Arabia or any other chosen country of arbitration is final.

Despite these convergence between the Saudi Arabia and international law regarding arbitration proceedings, it is worth noting that the Saudi Arabia arbitration proceedings are still governed by the provisions of the Sharia Law.[641] All the arbitration stages are required to comply with the provisions of Sharia ad it is not possible to conduct the arbitration proceedings that conflict with the principles of Sharia. In this regard, parties must ensure that the applicable law they select to govern the arbitration proceedings not only upholds the principles set out in Sharia law, but also that such principles reinforce the adopted arbitral procedures. This provision sets apart the principle of recognition and enforcement of arbitral awards and affects finality of arbitral awards due to their far-reaching effects that could undermine finality. For instance, the provisions of Shari's law could undermine the enforcement of interim applications which could be deemed as a party's inability to present a case fully, thereby rendering such an award as unlawful. This may challenge the enforcement of arbitral awards claimed under such situations, thereby undermining the principle of finality. With the influx of more dramatic economic growth in Saudi Arabia, the new

[640] Anusornsena, *op. cit.,* 114.
[641] Mohtashami, Birt and Rovinescu, *op. cit.,* 14

Arbitration Law remains subject to changes that create a "friendly" regulatory environment for international business.

5.4.2 Qatar

In Qatar, appeal against arbitral awards on both questions of law and of fact is allowed, and the right to appeal must be availed of within 15 days of the date of the award, similar to appeal from a court judgment.[642] This is due to the fact that at present, domestic and international arbitration in Qatar are still governed by Articles 190 to 210 of the CCP Code,[643] while the enforcement of foreign arbitral awards is still governed by Articles 379 to 383 of the same Code.

There are two provisions in the CCP that provide for the challenges to domestic arbitral awards: Article 205 provides for the right to appeal the domestic arbitral award on the merits, while Article 207 provides for the application for annulment of the award on procedural grounds. These current statutes are very outdated, for which reason the country is in the process of formulating a new arbitration law patterned closely after the UNCITRAL Model Law.[644] With the forthcoming updated Qatari arbitration laws, there is hope that Qatar will be well on its way from transforming itself from a jurisdiction with traditionally Sharia-based arbitration legislation to a fully-fledged international arbitration centre.

Qatar has recently been evolving into an international arbitration hub with the pursuit of initiatives that are intended to improve local and international arbitration practices. Notably, the country ratified the NYC in 2002 without any declarations or reservations. In 2005, the Qatar Financial Centre (QFC) was established, which thereafter enacted the QFC Arbitration Regulations that govern a QFC-seated arbitration. In 2006, the Qatar International

[642] A.H. Al Ahdab (1998) *Arbitration in the Arab World.* Kluwer Law International
[643] Articles 190 to 210 of the Civil and Commercial Procedure Code (CCP), Law 13 of 1990.
[644] Bono, *op. cit.*

Centre for Conciliation and Arbitration (QICCA), Qatar's first arbitral institution, was established by the Qatar Chamber of Commerce and Industry.[645]

A distinction should be made, however, between the Qatar Financial Centre and the State of Qatar. The State is a civil law jurisdiction, and its Civil Code[646] is patterned after Egyptian law which, as described in the preceding chapter, is based on the French legal system. Under the State's Civil Code, where no specific provision addresses the issue under consideration, the court reverts to Islamic or Sharia law, applicable customs, or the rule of equity. On the other hand, the QFC is a separate legal jurisdiction that has its roots in common law and has adopted this framework, which is essentially different from a civil law framework. The QFC has its own court, the Qatar International Court and Dispute Resolution Centre, also referred to as the QIC-DRC.[647]

As with the UAE, conflicting developments have arisen in the enforcement of foreign arbitral awards in Qatar, despite the encouraging steps the country has taken towards achieving greater consistency with the principles of international arbitration. The State has recently declared the annulment of a local and foreign arbitral award because the award was not delivered in the name of His Highness, the Emir of Qatar. As with the UAE case described earlier, this decision involves the application of the local requisite of complying with a local formality to the enforcement of a foreign award.[648] In a prior case, International Trading v DynCorp,[649] the Qatari Court of Cassation set aside an ICC award the arbitral seat of which was in Paris. The court conducted a review on the merits of the case, and decided that the tribunal had improperly applied Qatari law. In effect, the courts in these cases

[645] Bono, *op. cit.*
[646] Law No. 22 of 2004
[647] H. Al Naddaf (2015) 'Qatar'. *Global Arbitration Review, World Edition*. Retrieved from http://globalarbitrationreview.com/know-how/topics/73/jurisdictions/77/qatar/
[648] Al Tamimi, *op. cit.*
[649] International trading and Industrial Investment v DynCorp Aerospace Technology, Appeal No. 33 of 2008, Civil Appeal (First Circuit), dated June 2008.

inexplicably required a private arbitration that was resolved in a foreign country to comply with the domestic procedural law of Qatar.[650] In any case, in Qatar parties are free to choose the governing law of their contract, the law of the arbitration agreement, the seat of arbitration, any arbitral rules, the persons who will act as arbitrator/s, and the choice of the language of the contract and the arbitration.[651]

5.4.3 Bahrain

Bahrain is one of the few Arab countries that has the benefit of a modern arbitration law which firmly prohibits appeals on arbitral awards. The International Commercial Arbitration Law of 1994 (ICAL) currently in force in Bahrain is based on the UNCITRAL Model Law and has recently been updated. Bahrain also provides for the primacy or arbitration over local court jurisdictions as the principal means of dispute resolution for banking and international commercial disputes. According to Article 9 Legislative Decree No. 3 of 2009, where an arbitration agreement does not exist, then automatic reference to arbitration of disputes is made, based on certain criteria. The disputes should have been originally within the jurisdiction of Bahraini courts or other entities that have judicial jurisdiction, and wherein the claim exceeds BD 500,000 or about US$1.3 million. The disputes must also be either international commercial disputes connected with Bahrain, or among financial institutions licensed in Bahrain, or between such institutions and other institutions, companies and individuals. Bahrain also benefits from well-run arbitration institutions, i.e. the Bahrain Chamber for Dispute Resolution (BCDR) as well as the Bahrain Chamber for Economic, Financial, and Investment Dispute Resolution.[652]

The key to availing of the full benefit of Bahrain's modern arbitration system is to refer the disputes to the BCDR, rather than have them heard by the regular Bahraini courts.

[650] Bono, *op. cit.*
[651] Al Naddaf, *op. cit.*
[652] Bono, *op. cit.*

The law allows for two types of dispute to be referred to the BCDR: The first consists of disputes brought by or against financial institutions licensed under the Law of the Central Bank of Bahrain, as explained earlier. The other type consists of international commercial disputes. According to the decree,[653] a dispute is commercial if it concerns relationships of a commercial nature, whether they are contractual or non-contractual. The provisions of the decree in effect created a specialised international commercial court in Bahrain, and although the Bahraini judges still control decision-making by a ratio of three to two, the judges adjudicating on financial and commercial disputes are trained to deal specifically with international commercial arbitration, equipping them with a special competence and expertise that are beyond the experience and knowledge of the regular Bahraini judges.[654] Under the BCDR and Bahrain's new international arbitration law, foreign arbitral awards are immediately enforceable, as appeals, whether on point of fact or law, are prohibited in the recognition of international commercial arbitration awards.

5.4.4 Egypt

In Egypt, a Ministerial Decree was adopted in 2008 that introduces serious conflicts with the Arbitration Law enacted in 1994. The provisions of Ministerial Decree 8310/2008 are perceived to render more cumbersome the process of enforcing arbitration awards, specifically in terms of substance and, more significantly, internal procedure. Regulations have been tightened that subject the initial deposit for the application for enforcement of an arbitral award to the approval of the Ministry of Justice. The Ministry has the power to withhold such approval when the arbitral case deals with title to real property, or where the award contradicts public policy, or where it concerns family or personal status, or other such

[653] Legislative Decree No. 30
[654] J.M. Townsend (2010) 'The New Bahrain Arbitration Law and the Bahrain Free Arbitration Zone." *Dispute Resolution Journal: International Arbitration and Bahrain.* Feb-April, 2010. American Arbitration Association, New York, NY.

considerations.[655] Such requirements expand the grounds upon which the finality or enforceability of the arbitral award may be questioned in this jurisdiction.

There had been a few rare cases when, despite having been annulled in Egypt as the seat of arbitration, the arbitral award had nevertheless been confirmed by a foreign court. In the Chromalloy Aeroservices v Egypt case,[656] the US Court of Appeals for the D.C. Circuit enforced the arbitral award that was annulled in Egypt, on the grounds that launching an appeal against the award in Egypt was a violation of the final and binding nature of the arbitral award, however failing to recognise the award amounts to a violation of US pro-arbitration policy. This broad ruling was subsequently modified to include the criterion that for an arbitral award to be affirmed despite being set aside at the seat, there must be a showing that the annulment "violated basic notions of justice."[657] The case has contributed to a growing body of case law wherein a national court of a signatory to the NYC could recognise and enforce a foreign arbitral award despite the fact that it had been set aside at the seat of arbitration.[658]

5.5 Right to Appeal On Question of Law in Non-Sharia Jurisdictions

5.4.1 UK Arbitration Act 1996, Section 69, Appeal on Question of Law

To paint a good picture of how arbitration is challengeable under the rule of law in the international arena, the review opens with a look at UK arbitration law and how it deals with the matter of question of law as a challenge to admissibility of awards. Under the UK

[655] Al Tamimi, *op. cit.*
[656] Chromalloy Aeroservices v Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996)
[657] TermoRio S.A., E.S.P. v Electranta S.P. 487 F. 3d 928, 939 (D.C. Cir. 2007).
[658] ICC International Court of Arbitration Bulletin 733: ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention, v.23/Special Supplement 2012.

Arbitration Act 1996, there are three grounds upon which an arbitration award may be challenged in the English courts. These are:

(1) Challenging the tribunal's substantive jurisdiction;[659]

(2) Challenging the award on the grounds of serious irregularity affecting the tribunal;[660] and

(3) An appeal on a point of law.[661]

Parties to arbitration have a right of appeal pertaining to the first two grounds above, because Sections 67 and 68 of the UK Arbitration Act 1996 are mandatory provisions that parties may not waive under the arbitration agreements or clauses attached to their contract. These two grounds usually cover extreme cases, such as alleged bias by one of the members of the arbitration panel, or a lack of consensus in choosing arbitration.[662] The case of Czarnikow v Roth brings out a contradiction to public policy that the provisions for arbitration presented in the UK.[663] The contract for the sale of sugar required that the rules of the Association be followed, which mandated that disputes and questions of law be submitted to arbitration of the Council of the Association. Rule 19 of the Council of the Association stated that "Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid shall …apply to the Court to require, any arbitrators, to state in the form of a special case for the opinion of the Court any question of law arising in the reference, but such question of law shall be determined in the arbitration in the manner herein directed."

A dispute did arise which was referred to the arbitration of the Council, at which stage the buyers had the opportunity of applying to the Court for an order directing them to state a

[659] Section 67, Arbitration Act 1996
[660] Section 68, Arbitration Act 1996
[661] Section 69, Arbitration Act 1996
[662] J. Miller (2015) 'The right to appeal arbitration awards in coverage disputes.' *DAC Beachcroft.* Retrieved from http://www.dacbeachcroft.com/documents/imports/resources/pdfs/articles/the-right-to-appeal-arbitration-awards-in-coverage-disputes
[663] Czarnikow v Roth, Schmidt & Co. [1922] K.B. 478, 491.

case upon certain points of law. The arbitrators refused to comply with that request on the basis of Rule 19, and made their award without giving the buyers an opportunity to apply to the Court for an order under the Arbitration Act 1889. The buyers moved to set aside the award on the grounds of misconduct of the arbitrators. It was held by the court, and affirmed on appeal, that Rule 19 and the arbitration agreement mandating it were contrary to public policy and therefore invalid, and that the award must be set aside. The Divisional Court opined that "To hold that under these circumstances the agreement not to apply for a special case is not to oust the jurisdiction of the Court within the meaning of the rule of law…is in effect to decide that the Appeal Tribunal is entitled to be a law unto itself, and free to administer any law, or no law, as it pleases."[664] For that reason, the court decided that Rule 19 was unenforceable and void when incorporated in an arbitration agreement.

The circumstances of this case, in the context of arbitration as it was practised in 1922, illustrates the perceived conflict between arbitration then and the integrity and ascendancy of the power of the court. This perception may not be realistic in the present setting but as seen through *Czarnikov v Roth*, there was a real threat posed by arbitrators in their misapplication of the law on arbitration, resulting in usurpation of the power of the courts and denial to the individual parties of their right to the proper recourse under the law. Arbitration was intended to be governed by the will of the parties, but in this case and similar cases like it, arbitration was used to subvert the will of the less powerful party. The so-called consent was not truly obtained on the part of the buyer in this case because the terms of the contract requiring agreement to arbitration reflected the will of the Association and were not freely given by the buyer. The Association in this case was imposed upon the buyer by the agreement, which they had no power to rectify. By signing the contract, the authority of the Council as the default arbitrator came into force; failure to sign the terms of the contract

[664] Czarnikow v. Roth, Schmidt & Co., [1922] 2 K.B. (C.A.), at 486.

meant that the buyer could not purchase their desired products and effectively locked them out in favour of others who freely consented to it. The fact that the buyer was not accorded the choice to decide their arbitrator and that the procedure further limited their right to appeal over a process they had very little control over amounts to subversion of justice. As the reasoning of Lord Justice Seville showed in the foregoing quote, there has been a reluctance to completely do away with an appeal to arbitral decisions on question of law. Lord Justice Seville is not alone in entertaining this sentiment. In a survey conducted in 2006 among individuals involved in arbitration procedures, more than three out of every five respondents preferred to retain the possibility of appeal of an arbitral award on a point of law.[665] On the other hand, in another study conducted in that same year[666] among in-house counsel at major international corporations, less than one out of every ten corporations welcome the ability to appeal an award on its merits in international arbitration.[667] Section 69 was developed to bring about coherence in the interpretation of arbitral awards in the UK, since as Pendell and Bridge noted, "Before the English Arbitration Act came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979. This legislation applied to different aspects of arbitration and was complemented by, interpreted by and built on a large body of case law."[668] Several factors made arbitration less attractive to members of the public and the business community, due to the following reasons highlighted by Pendell and Bridge: (1) arbitration was becoming untenable due to ever-rising fees and expenses; (2) the UK's arbitration law excluded foreigners and laypersons; and (3) the courts appeared needlessly ready to intervene in arbitration. Regarding this last point, it was necessary to make court

[665] M. O'Reilly (2006) 'Appeals from Arbitral Awards: The Section 69 Debate'. Retrieved from <http://www.biicl.org/files/2493_michael_o_reilly__appeals_from_arbitral_awards_the_section_69_debate_.pdf>. Michael O'Reilly is a professor of law at Kingston University and Partner in Adie O'Reilly LLP.
[666] A study on attitudes towards international arbitration, under the auspices of the Queen Mary School of International Arbitration, University of London.
[667] *Ibid.*
[668] G. Pendell and D. Bridge, 2012 "Arbitration in England & Wales" in Torsten Lorcher, Guy Pendell and Jeremy Wilson, (eds) CMS Guide to Arbitration (CMS Legal Service, 2012)

intervention less welcome in order to make the process less vulnerable to appeal on flimsy grounds.

The provision for appeal on point of law in English legislation is contained in Section 69 of the Arbitration Act 1996. It is of course preferable that the decision and award specified by the arbitrators be recognised and enforced by the parties as such is the intended outcome. However, a leave to appeal may be given when certain conditions are present, such as that: (1) the determination of the legal question will affect substantially the rights of one or both of the parties in the arbitration; (2) the legal question is one which the tribunal was asked to determine in the arbitration procedure; (3) based on the findings of fact in the award, the tribunal's appreciation of the matter and its subsequent decision is obviously wrong, or that the legal question is one of general public importance and the tribunal's decision is at least a doubtful one; and (4) although the parties agreed to resolve the dispute through arbitration, it is only appropriate and fair that based on the circumstances, the court (rather than the arbitrators) should render the decision[669].

The right of appeal granted by Section 69 in the English Arbitration Act 1996 is "a peculiarity of the English arbitration law not found in many other jurisdictions."[670] That is because most countries absolutely do not allow appeal on arbitral awards. That being said, there is a limit to the review on the merits that the English court allows itself to take, as is evident in the Westacre Investments case.[671] As discussed in the preceding chapter, the case concerns the bribery of Kuwaiti officials by the party in whose favour the award was given. In that case, the appellate court declared that the bribery and corruption of government

[669] J. Miller (2015) 'The right to appeal arbitration awards in coverage disputes.' *DAC Beachcroft.* Retrieved from http://www.dacbeachcroft.com/documents/imports/resources/pdfs/articles/the-right-to-appeal-arbitration-awards-in-coverage-disputes. See also Platt, R. (2013) 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' Journal of International Arbitration, 30 (5), 531-560

[670] M. Berard and K. Lewis 'Courts reluctant to grant appeal of arbitral award on point of law: Client briefing.' (*Clifford Chance* 2014) <http://www.cliffordchance.com/briefings/2014/02/courts_reluctanttograntappealofarbitra.html>. The authors are partner and senior associate, respectively, of Clifford Chance.

[671] Westacre Investments Inc. v Jugoimport-SDRP Holding Company Ltd (1999) APP.L.R. 05/12.

officials for the purpose of winning a contract was against the public policy of the UK, and in a domestic arbitration would have been unconditionally struck down. However, other than the act not being contrary to the public policy of the country under whose law the contract and arbitration is governed, Lord Justice Waller also noted that the infirmity existed in the underlying contract, and not the award or the arbitration process that made it. In fact, the matter of bribery was not even raised or proven during the arbitration procedure. Since neither the award nor the arbitration process were not tainted by the alleged bribery, it was decided in Westacre that the court in England may not review the merits of the underlying case to arrive at a decision other than the decision of the arbitration tribunal. Since the award was made in all fairness (taking into account the relative positions of all parties to the dispute), the court decided to uphold and enforce the award, relying on the tribunal's assessment of the dispute on its merits.

Until the Arbitration Act 1979, the predecessor of the Arbitration Act 1996, English courts were much involved in the supervision of commercial arbitration processes, and the right to appeal on a question of law was automatically brought under the jurisdiction of the court. The 1979 Act, however, began the basic shift from strict judicial supervision to commercial expediency, party autonomy, and finality in arbitral awards. By the time the 1996 Act repealed the 1979 Act, it was generally argued that the parties should be able to rely on the decision of their arbitrator rather than submitting to a judicial review as a matter of course. It was felt that in such a case, to allow an appeal was to subvert the purpose of the arbitration process. However, rather than adopt the position of the UNCITRAL that provided for no appeal on the merits, the Departmental Advisory Committee, which conducted the consultative process for the enactment of the 1996 Act, decided not to opt for the complete abolition of the right to appeal on the merits, but did limit the right by reducing the scope within which it may be applied. The limited right of appeal is the middle ground between

complete party autonomy and the need to maintain some mechanism by which English judges may decide when errors in the application of the law are made.[672] Section 69 does not make appeal on question of law a requirement; what it does is make appeal available upon the choice of the individual parties to the arbitration. The will of the parties concerning whether (1) they would wish to oust the jurisdiction of the courts, or (2) include it, relative to appeals on a question of law, has to be agreed upon at the earliest stage possible (during the stages preceding finalisation of the agreement) in the formulation of the agreement with respect to a contract of a commercial undertaking. These are contained in Section 69, (1) and (2) respectively.[673] The former option assures that the parties avail of the benefits of arbitration (finality, expediency, cost-saving, avoidance of multiple tiers of court proceedings) without the challenge of an appeal on a question of law that may threaten to delay the finality of the award. The latter option, on the other hand, provides the parties an option if they are concerned about the ability of the arbitrator to properly interpret and apply the law in the seat of arbitration.

It has earlier been mentioned that the availability of the recourse for appeal on question of law, as provided in Section 69, sets English arbitration law apart from most national arbitration laws that refuse to conduct appeals on arbitral awards, whether in law or in fact. Some authors have alleged that Section 69 tends to be counter-developmental for the country insofar as commercial law is concerned.[674] While Section 69 appears to have been contemplated for application in the field of civil law, the English legal system has never distinguished technically between civil law and commercial law. Thus applications in commercial law are governed by the same regime as that applied to civil law. Civil law in this case governs the conduct of individuals in a normal setting, while commercial law is

[672] R. Platt (2013) 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' *Journal of International Arbitration*, 30 (5), 531-560

[673] T. Dedezade (2006) 'Are you in? Or are you out? An analysis of section 69 of the English Arbitration Act 1996: Appeals on a Question of Law.' *International Arbitration Law Review*, 2, 56-67, at 56

[674] Pendell and Bridge, *op. cit.*

essentially concerned with decisions touching on trade among parties. It is more desirable to have recourse in civil law since matters under this class are not particularly resolved by arbitration. Such has ramifications for the English context that are not encountered in other jurisdictions, particularly where a different body of laws applies to the more specialised area of commercial law than to civil law.[675]

When Section 69 is applied to commercial law, it is in this branch of the law where its greatest disadvantage lies. Section 69 has been dubbed "the most controversial area dealing with the court's jurisdiction" since the 1996 Act came into force."[676] Commercial lawyers argue that the intrusion of the courts into the decisions arrived at by the arbitration tribunal through an appeal on a point of law is a major factor that contributes to the slowdown of the economic progress of the UK. The appeals process empowers the courts to analyse the correctness of the *ratio decidendi* applied by the arbitration tribunal, through value judgment. Others, however, see an opportunity in the application of Section 69 in the development of a code for commercial law in the UK. Since the courts are allowed, even required in some cases, to delve into the particulars of an arbitration award, the mass of case laws generated by more awards being investigated by the courts provides a substantial pool of situations and decisions that provide a basis upon which to build a body of commercial law[677]. Given the history of English arbitration law and the liberality with which arbitral awards were appealed prior to the 1996 Act, it is noticeable that the number of appeals allowed, and therefore judicially decided, have drastically diminished.[678] It is therefore the opinion of a growing

[675] P. Esposito (2008) 'The Development of Commercial Law through Case Law: Is Section 69 of the English Arbitration Act 1996 Stifling Progress?' *Arbitration*, 74(4):429-438, at 430.
[676] *Ibid.* 423-433.
[677] Esposito, *op. cit.*
[678] See citations enumerated in Paolo Esposito (2008) 'The Development of Commercial Law through Case Law: Is Section 69 of the English Arbitration Act 1996 Stifling Progress?' *Arbitration*, 74(4):429-438, at 433.

number of lawyers and authors that the appeal on point of law be retained as provided in Section 69, for the purpose of the development of case law for commercial applications.[679]

The debate surrounding Section 69 may not be as contentious as it is in practice; however, this is evident in light of the limitations imposed on the right to appeal. These constraints include the following:

1) The right to appeal a foreign arbitral award is available only if its waiver is not otherwise agreed by the parties. It is common practice for parties to waive the right of appeal, whether expressly stipulated in the arbitration agreement or arbitration clause, or by implication as construed with the incorporation of institutional rules excluding the right to appeal, such as the rules of the International Chamber of Commerce or the London Court of international Arbitration.

2) Where the right of appeal has not been excluded or waived, questions of fact cannot be appealed. The appeal against arbitral awards must be on a question of law, and only of English law since questions of foreign law raised before an English court are construed as matters of fact and not law. Furthermore, the question of English law to be raised should be of such importance as to substantially affect the rights of the parties; for instance, if the right to a fair hearing is undermined. Questions of law that are of a trivial nature do not justify an appeal against the arbitral award.

3) An appeal on question of law against the arbitral award may only be initiated with leave of the court and with the agreement of all parties. Leave is granted by the court only upon fulfilment of several conditions. One such condition is that the decision of the arbitral tribunal on the subject matter of the appeal is either obviously wrong or open to serious doubt, particularly where the question upon which the appeal is based is one of general

[679] *Ibid.*

importance to the public,[680] for instance, where the case needs reinforcement in law due to inadequacy in provisions.

4) The right of appeal on question of law is available to the parties only for a short period of time, after which the right prescribes permanently. Application to avail of the right to appeal must be made within 28 days of the date of the filing of the arbitral award or the notification to the applicant of the results of any arbitral review process conducted by the arbitral tribunal or arbitral institution.[681]

5.4.1.1 Special Case: Right to Appeal Arbitral Awards in Coverage of Disputes

In arbitration proceedings under English law, there may be special situations where the right to appeal arbitration awards may be allowed. A typical case is that of insurance and reinsurance contracts involving disputes over the coverage of a policy. The right to appeal in this case hinges on the greater risk of injustice resulting from the likelihood of inconsistent decisions by arbitral tribunals even when faced with the same issues. Insurance cases are usually attended with sensitive information that may not be divulged publicly even if proceedings have been concluded. As a consequence, people who participate in the industry have felt the need for appeals against arbitral awards to be allowed in the case of coverage disputes.[682]

The general law[683] enumerates the grounds for challenging arbitral awards which involve challenging the tribunal's substantive jurisdiction,[684] challenging the award based on serious irregularity affecting the tribunal,[685] and appeal on point of law.[686] Due to the exceptional circumstances surrounding the procedural and substantive requirements that

[680] Berard and Lewis, *op. cit.,* 1.
[681] *Ibid.*
[682] Miller, *op. cit.*
[683] Arbitration Act 1996
[684] Section 67
[685] Section 68
[686] Section 69

would enable an appeal on point of law to prosper, it is rare that such appeals are encountered. To illustrate the instance where appeal on point of law has been considered, the case of IRB Brasil v CX Reinsurance[687] will be examined.

The respondent settled several US liability claims and sought recovery on these claims from the appellant petitioner, who was its excess of loss insurer. The latter, however, refused to pay, and in the subsequent arbitration proceeding the arbitral tribunal judgment ruled in favour of CX Re. IRB Brasil appealed on the grounds that in rendering its judgment, the tribunal erred in three instances: (1) the tribunal referred to the settlements being "arguably" within the contract terms rather than "on the balance of probabilities" which is the correct standard of proof under English law; (2) the judgment did not refer to relevant case law or the period clause in the course of determining whether the losses to be recovered under the insurance contract were still within the coverage of the relevant period; and (3) the tribunal referred to the losses arising from a single "cause" rather than "event" when it described the matter from which the losses had arisen.

The court decided on appeal that the tribunal did not commit any error of law and upheld the award given by the tribunal in light of its findings that: (1) use by the arbitrators of 'infelicitous' wordings did not detract from the fact that their decision was arrived at on the balance of probabilities; (2) the period clause was not necessary for the arbitrators to explicitly state, nor was it necessary for them to expressly refer to case law, as long as the method they used was not inconsistent with it; and (3) although the arbitrators committed a mistake in using the word 'cause', they nevertheless intended to say that the loss stemmed from a single event.[688]

[687] IRB Brasil Resseguros SA v CX Reinsurance Company, Ltd (2010) EWHC 974 (Comm)
[688] Miller, *op. cit.*

A similar issue was the focus of adjudication in the case involving the insurance dispute of AIOI Nissay v Heralddlen.[689] The controversy involved whether aviation liability losses that arose out of the September 11, 2001 World Trade Center attack arose from one or two 'events' under the terms of the policies covering the loss. The tribunal considered that the losses arose from two 'events' and thereby made the award accordingly. The tribunal decision was appealed, resulting in the court upholding the arbitration award. The judge found that the tribunal, in arriving at their conclusion, did not make any error of law, and they were wholly within their jurisdiction to make such a determination.[690] In both cases, the grounds alleged for the appeal which was on point of law were not sufficiently proven, thus the appeal did not prosper and the arbitral award was upheld.

5.4.2 Application of the Question of Law in Australia

In the interest of comparing arbitration regimes in different states, there is likewise a provision in Australian law that provides for the right to appeal an arbitral award. While cognisant of the fundamental philosophy of arbitration that parties are bound, by their agreement to this alternative dispute resolution, to the certainty and finality of the decision of the arbitrator, most parties to arbitration proceedings usually expect to waive their right to appeal, optimistic that the extra cost and time it takes to contest the award will not be necessary. Since in practice these expectations appeared unrealistic when disputes arose in the course of the execution of the contract, the arbitration regime underwent a general overhaul in 2010 to factor in additional safety nets to address such disputes.

New South Wales became the first Australian state to adopt the Commercial Arbitration Bill 2010. The new regime adopted several reforms to bring Australian arbitration more in line

[689] AIOI Nissay Dowa Insurance Company Limited v Heraldglen Limited and Advent Capital (No. 3) Ltd (2013) EWHC 154.
[690] Miller, *op. cit.*

with international standards and practices. One of these reforms provided for a limited right to appeal. Under the old regime, the scope of judicial intervention with which the courts were empowered was broad, as the parties were able to challenge an award by either of two methods: (1) by seeking to have the award set aside for misconduct by the arbitrator,[691] or (2) seeking leave of the court or agreeing between themselves (the parties) to have access to a right of appeal on a question of law.[692]

Now, under the 2010 Amendments, the scope of judicial intervention available to the courts has been severely restricted. The Act contains an exhaustive and exclusive list of specific circumstances for which parties to an arbitration may seek recourse for setting aside an arbitral award.[693] More than this, the threshold to appeal an award on an error of law has been raised to a much higher level. Under the new regime, it has also become imperative for the parties to comply with two conditions: (1) the parties must agree, whether in the arbitration agreement or at any time before the expiration of the appeal period of three months[694] that an appeal may be made, and (2) the parties must seek leave of the court.[695] The effect of the new requirements for appeals on an award is to restrict those instances when appeals may be carried out, because in the absence of such an agreement and the necessary leave of court, the presumption is automatically on the finality and enforceability of the award in the absence of other challenges. The finality and authority of the arbitral award is thus strengthened, restricting the probability of the uncertainty, cost, and delay that are certain to attend the conduct of appeals.[696]

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[691] Section 42, Commercial Arbitration Act 1984 (NSW).
[692] Section 38, Commercial Arbitration Act 1984 (NSW).
[693] Section 34, Commercial Arbitration Act 1984 (NSW).
[694] Section 34A (6), Commercial Arbitration Act 1984 (NSW).
[695] Section 34A, Commercial Arbitration Act 1984 (NSW).
[696] J. Granger & Z. Shafruddin (2 July 2012) 'The right to appeal an arbitral award: Express may be best.' *Clayton Utz*. Retrieved from: http://www.claytonutz.com/publications/news/201207/02/the_right_to_appeal_an_arbitral_award_express_may_be_best.page#10

5.4.3 The Question of Law in France

France is historically noted to have the most advanced and liberal arbitration law in the world, and on 13 January, 2011, the country adopted a new law on arbitration. The law sought to address the perceived need to update the 30-year-old French arbitration law in order to allow for an even more flexible regime by broadening the scope of the freedom of the parties regarding all aspects of an arbitration.[697] Provisions that may have an impact on possible appeals on questions of law or judicial reviews on the merits would be those provisions in the new law that deal with recourse against an international award. These are contained in Articles 1518 to 1524 of the French Code of Civil Procedure and the reforms introduce by Decree No. 2011-48 of 13 January, 2011 (hereafter referred to as the "2011 Decree"). While the 1980 regime did not clearly distinguish between recourse against awards made abroad or made in France, the Code now provides for two different regimes in bringing about recourse against international awards made in France and those awards made abroad.

For recourse against awards made in France, the rationale upon which the recourse regime is based remains the same; namely that the only means of recourse that may be taken against international awards made in France is the action to set aside, or *recours en annulation*. There is no appeal process available against an international award made in France. Several procedural changes to international awards made in France were introduced by the 2011 Decree, all with the intention of increasing the flexibility and speeding up the process of availing of the action to set aside. The grounds for filing an action to set aside an award are similar to the NYC and the Model Law:

(1) The arbitral tribunal wrongly upheld or declined jurisdiction; or

(2) The arbitral tribunal was not properly constituted; or

(3) The arbitral tribunal ruled without complying with the mandate conferred upon it; or

[697] Gaillard, *op. cit.*

(4) Due process was violated; or

(5) Recognition or enforcement of the award was contrary to international public policy.[698]

The Code also now allows the parties to waive their right to bring an action to set aside an award, which must be done expressly by agreement of the parties. However, if the right has been waived, it shall be possible for the interested party to appeal against the order *granting the enforcement* of the award, which remains available on the same five grounds enumerated previously for setting aside an award.

5.4.4 Appeal on Question of Law in the U.S.A. Wilko v Swan (1953)

In the American system of arbitration, there is no provision that explicitly allows for appeal on question of law for arbitral awards. In practice, however, a judicial review on the merits appears to be a possibility, hinging on the concept of 'manifest disregard.' The controversy stems from the case of Wilko v Swan,[699] an action brought by a customer against a securities brokerage firm for alleged misrepresentation in the sale of securities. The action sought to recover damages under the civil liabilities provision of Section 12(2) of the Securities Act of 1933.

According to the complaint, the petitioner was induced by Hayden, Stone and Company to purchase 1,600 shares of common stock of Air Associates, Inc. The respondent company falsely represented to the petitioner that Air Associates' stock price would rise by $6.00 per share over the then current market price, and that it was currently being bought up for the speculative profit. The petitioner alleged that he was not told that Haven B Page, a director of Air Associates and likewise its counsel, was at that time selling his own Air Associates' stock, some of which was bought by the petitioner at the speculative price. Two weeks later,

[698] Article 1520 of the French Code of Civil Procedure.
[699] Anthony Wilko v Joseph E. Swan, et al. 346 US 427 (1953), Argued October 21, 1953, Decided December 7, 1952.

the petitioner disposed of his holdings in Air Associates at a loss. It was claimed that it appeared that the stockbrokerage had misrepresented the stock's true prospects in order for Page to exit his position at a profit but to his (the petitioner's) detriment, for which he sought damages.

Instead of answering the complaint, the respondent moved to stay the trial pending an arbitration under Section 3 of the Federal Arbitration Act (FAA), which requires that arbitration clauses in contracts should be given full effect by the federal courts. Such an arbitration clause was contained in the margin contract between Wilko and the brokerage firm. The Second Circuit Court of Appeals, in a divided decision, upheld the validity of the arbitration clause and ruled that Wilko's action should be stayed pending the result of the arbitration process. The Supreme Court, however, reversed that decision, ruling that the Securities Act of 1933, protecting the rights of the investor to his choice of venue wherein he would have a greater bargaining power, barred any waiver of rights on the part of the investor. The Supreme Court declared that said provisions of the Securities Act took precedence over the Federal Arbitration Act relied upon by the respondents.

The logic of the decision in Wilko v Swan was propagated in subsequent actions brought before the appeals court covering claims under the Securities and Exchange Act of 1934. In a 1985 case,[700] however, the Supreme Court itself expressed doubt on the soundness of its holding in Wilko v Swan. In Quijas v Shearson/American Express Inc.,[701] the Supreme Court overruled itself, thereafter expanding the role of arbitration in dispute resolution.

Although the Wilko v Swan case was overruled in Quijas v Shearson, the doctrine of 'manifest disregard' articulated by Justice Stanley Forman Reed in Wilko survived, as a court dictum justifying the overturning of an arbitral award. The 'manifest disregard' doctrine describes a legal principle wherein an arbitral award may be vacated if the arbitrator

[700] Shearson/American Express Inc., and Mary Ann McNulty v. Eugene McMahon & Julia McMahon, et al., 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d.185.
[701] Rodriguez de Quijas v Shearson/American Express Inc., 490 U.S. 477 (1989).

manifestly disregards the law. In order for this to take place, it is not sufficient that the arbitrator errs in interpreting or applying the law. Manifest disregard is appreciated in an arbitrator's actions if: (a) the legal principle that is applicable to a case is clearly defined and not the topic of contentious debate; and (b) the arbitrator/s refuse to abide or be guided by that legal principle. The Supreme Court ruling in Wilko that articulating the doctrine had created by implication a non-statutory ground for vacatur of arbitration awards, and a reason for judicial review to determine error in interpretation.[702] In a subsequent ruling,[703] however, the Supreme Court restricted the grounds for vacatur of an arbitration award to those grounds set forth in Section 10 of the FAA. As a result of the 2008 doctrinal ruling, 'manifest disregard' has consequently ceased to be independent grounds for vacating arbitration awards under the FAA.[704]

The significance of the 'manifest disregard of the law' doctrine is that it provided the courts with a basis, albeit unsupported by formal statute, to conduct a review of an arbitral award on its merits. The doctrine has been formulated in various terms and uncertain scope and has never been fully defined, as is evident in marked disagreements among several lower federal court decisions; there were confused debates in jurisprudence as to whether the manifest disregard doctrine was available in enforcement actions under the New York Convention.[705] In any case, while the doctrine was applied, the way it was generally understood and accepted was that a federal court may vacate an award where the arbitrator was aware of the applicable law but refused to apply it.[706]

Presuming that the manifest disregard doctrine were legitimate, then the speculation among jurists was whether the doctrine was intended to provide the FAA with a way out of possible

[702] Coffee Beanery, Ltd. v WW, LLC, 300 Fed. Appx. 415 (6th Cir. Mich. 2008).
[703] Hall Street Associates, LLC v Mattel, Inc., 128 S. Ct. 1396, 1403, 170 L. Ed. 2d 254 (2008).
[704] K.C. Bisceglie, H.C. Ross, & T.J. Fleming (2012) *New York Commercial Litigation Guide.* Matthew Bender & Company, Inc., Lexis Nexis; Peter B. Rutledge (2012) *Arbitration and the Constitution,* Cambridge University Press at 46.
[705] P.B. Rutledge (2013) *Arbitration and the Constitution.* Cambridge University Press, at 46.
[706] Born, *op. cit.*, 1238.

constitutional infirmities.[707] Many observers believed that the FAA posed a challenge to Article III Section 1 of the US Constitution which states: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." For this reason, it was stated in *Coalition for Fair Lumber Imports (2006)*, in the brief by the petitioner, that absolute preclusion of judicial review is not constitutional. [708] The FAA makes arbitration clauses 'valid, irrevocable and enforceable' subject only to traditional contract principles.[709] The view of jurisprudence that predates the twentieth century is that pre-dispute arbitration agreements are attempts at appropriating the jurisdiction of the courts and are therefore unconstitutional. It was therefore common practice among the courts to simply decline to enforce pre-dispute arbitration agreements as unenforceable.

The doctrine of non-arbitrability of public law claims, however, was relatively short-lived, as the Court eventually reconsidered its position in formulating this doctrine. It declared in a case decided in 2000 that arbitration did not necessarily affect substantive rights, for which reason the Court discarded the 'bright-line' non-arbitrability rule in favour of a fact-specific test that allows plaintiffs to go to court if they are able to prove that their federal statutory rights cannot be vindicated in arbitration. This fact-specific test is also known as the 'vindication of rights' rule, which is the remnant or 'ghost' of the non-arbitrability doctrine.[710] At this point, the Court is close to universal arbitrability, but it still makes a slight exception for certain cases.

There remain in US jurisprudence certain exceptions to universal arbitrability. There are instances when Congress can expressly give certain claims immunity from being brought under the operation of the FAA, e.g. a ban on pre-dispute arbitration clauses in contracts

[707] Rutledge, *op. cit.*, 46.
[708] Coalition for Fair Lumber Imports, Executive Committee, Petitioner v United States of America, et al., Respondents Canadian Lumber Trade Alliance, Inc., et al., Intervenors, 471F.3d 1329 (D.C. Cir. 2006).
[709] 9 U.S.C. Sec. 2 (2006).
[710] D. Horton (2012) 'Arbitration and Inalienability.' *Kansas Law Review.* 60, 723-766, at 723-724

between car manufacturers and dealers.[711] Courts should also decline to compel arbitration if an 'inherent conflict' exists between the FAA and another federal statute, thus suspending the effectivity of the FAA. An example of this is the case of 'core proceedings' which, under the Bankruptcy Code, are non-arbitrable as they inherently conflict with the intent of Congress to consolidate all matters relative to a debtor's insolvency into a single case in a bankruptcy court.[712] While the 'vindication of rights' rule is relied on in federal law, in state contract law, the doctrine of unconscionability has instead been resorted to in order to invalidate one-sided arbitration clauses.[713]

Referring back to the just laid out similarities and differences between the finality of arbitration among the UK, US, France, and Australia, it is imperative to note that in all jurisdictions, the question of appeal in law is fundamentally recognised, with more challenges to the case of the UK where some aspects of commercial interest are resolved via civil law, taking away the liberty and flexibility that come with the selection of arbitration as a more accommodative path to dispute resolution.

5.6 Case Law on Right to Appeal on Question of Law

By highlighting the application of a few case laws, the effect of the 'question of law' as barrier to the achievement of finality of arbitral awards will be evaluated under different contexts.

5.6.1 ED & F Man Sugar. v Unicargo

In *ED & F Man Sugar. v Unicargo*,[714] the petitioner, a sugar trader, chartered a vessel from the respondent to deliver a cargo of sugar from Brazil to Ukraine. One week before the vessel arrived at the loading port in Brazil, the parties were advised by the local agents that a fire

[711] 15 U.S.C. Sec. 1226 (a) (2) (2006).
[712] In Re: White Mountain Mining Co., LLC, 403 F.3d 164, 169-70 (4th Cir. 2005).
[713] Kristian v. Comcast Corp., 446 F.3d 25, 63 (1st Cir. 2006).
[714] ED&F Man Sugar Ltd. v Unicargo Transportgesellschaft GmbH (2013) EWCA Civ 1449.

had broken out at the terminal which was normally used by the charterer and where the vessel was initially scheduled to load. The conveyor belt that linked the terminal to the warehouse where the sugar was stored was destroyed in the fire, and the local agents informed the charterer that the sugar would have to be transferred to another loading terminal, which resulted in considerable delay, costing the owner a significant amount.

Consequently, the owner claimed demurrage due to the fact that the laytime for the loading in the charter party had lapsed before the loading had begun. However, an exclusion clause in the charter party provided that time lost due to 'mechanical breakdowns' would not count as laytime. On this basis, the parties commenced arbitral proceedings. The tribunal upheld the demurrage claimed by the owner, and the charterer appealed the award to the High Court, on key questions of law, one of which was whether the delay in loading due to a fire that destroyed the mechanical loading equipment counted as laytime. The High Court judge dismissed the charterer's appeal and upheld the tribunal's decision.

The charterer sought and was granted leave to appeal the findings of the High Court judge that the inoperability of the conveyor belt system did not amount to a mechanical breakdown under the exclusion clause. During the appeal process, the charterer adduced fresh evidence that the fire itself had been the cause of a mechanical breakdown. The Court of Appeal held that the fresh evidence introduced by the charterer during the appeals process was irrelevant and the charterer should not be permitted to reopen the arbitration on new evidence that it could have obtained for use at the arbitration, had it thought such evidence relevant at the time. The Court of Appeal upheld the decision of the arbitral tribunal and the High Court.

In a commentary, it appears that the Court of Appeal weighed its desire to correct errors in the award against the necessity of putting a stop to what was turning out to be an open-ended appeal system – the very protraction that the arbitration process was supposed to

prevent. The owner spent considerable time, finances and effort pursuing the appeal through the High Court to the Court of Appeal and, if they had persevered, through to the Supreme Court, only to have their petition denied and to suffer undue delay and impaired relationships with an otherwise good business partner. The parties in this case would have benefitted from an exclusion to the right to appeal on a point of law that could have been incorporated in the charter party.[715]

5.6.2 Saipem v Bangladesh

In the case of Saipem v Bangladesh,[716] the petitioner was an Italian company engaged in the engineering and construction industry. The company was contracted to construct a gas pipeline for a Bangladeshi State entity by the name of Petrobangla.[717] A dispute eventually arose and pursuant to the contract, Saipem initiated an ICC arbitration, the seat of which was Bangladesh.[718] Petrobangla challenged the ICC tribunal's jurisdiction, and after dismissal of its procedural requests, elevated the case to the Bangladeshi courts with the request to revoke the authority of the ICC tribunal. Despite an injunction issued by the courts and the subsequent revocation of the tribunal's authority, the ICC tribunal nevertheless proceeded with the arbitration and eventually issued an award in favour of Saipem. Petrobangla sought to annul the award; however, the courts did not annul the award but held that it was null and void *ab initio*, based on their earlier findings, and therefore could neither be set aside nor enforced.

Saipem then commenced ICSID arbitration under the Italy-Bangladesh bilateral investment treaty (BIT). The ICSID tribunal ruled that the ICC award itself was not an investment that

[715] *Ibid.* 3.
[716] Saipem SpA v The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, par. 6-7.
[717] Saipem SpA v The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, par. 10-18.
[718] Saipem SpA v The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, par. 22.

was protected under the ICSID Convention; however, it deemed that the entire or overall operation of Saipem in Bangladesh must be assessed, not just the ICC award considered as an isolated matter, as to whether it (the whole operation) constituted an ICSID-protected investment. The tribunal thus applied the Salini test to the transaction underlying the ICC award. The Salini test defines an investment as having four elements: (a) a contribution or money or assets; (b) a certain duration of time during which the money or assets is put to some productive use; (c) an element of risk in the manner the money or assets is productively employed; and (d) a contribution to the economic development of the host state as a result of such productive use.[719] The Salini test was applied to the underlying transaction, and the tribunal found that the ICC awards crystallised Saipem's rights under the construction contract and therefore formed part of the original investment. The requirement under Article 25(1) of the ICSID Convention that the dispute should arise directly out of an investment was satisfied, since the ICC award formed part of an overall investment operation.[720]

5.7 Comparative Analysis: Question of Law in Saudi Arabia and International Arbitration

It is clear from the previous discussions on finality and appeal on question of law that the way Sharia law is structured appears to be designed to enforce it as a final legal channel of reference. That is, the application of Sharia excludes consideration of, and recognition too of international law to the extent it is practised in a manner contrary to Sharia. Under the question of law, there is an expanded scope for refusal of arbitral awards. However, the question of law is not always uniformly applied in refusing an award. The appeal on question of law had a much expanded role in disallowance of arbitral awards before the enactment of

[719] A. Gabrowski, (2014) 'The Definition of Investment under the ICSID Convention: A Defense of Salini.' *Chicago Journal of International Law*, 15(1), Art. 13, 287-309
[720] Saipem SpA v The People's Republic of Bangladesh, ICSID Case No. ARB/05/07.

the Saudi Arbitration Law 2012, which essentially set the stage for a reformed approach to the acceptance of arbitral awards that have been awarded internationally for enforcement in the country. With the powers conferred to the enforcement judge, his authority rests in determining whether the award in question should essentially be enforced under local laws, making him the sole determiner of enforceability – unless such matters are brought before a judicial court of law. A good understanding of how the Sharia-based system treats specific aspects of business interest that are arbitrable can be seen in the doctrine of *masalih al mulrsalla*. As Ayad notes: "*Al masalih al mursalah* cannot protect an act which is classified as a crime under Islamic law, such as theft, and as such it is prohibited with no exception clauses."[721] However, the new Saudi law on arbitration has been successful in bridging the awkward loophole that seemed to automatically necessitate a review of an arbitral award under the old law. While the role of the enforcement judge has been removed in the new system, the system is not particularly aligned to the exact formats of international arbitration law standards. For instance, the question of law is more applicable within Rule 69 of English Law, but appeals on the question of law are far more limited under the Saudi Arbitration Law of 2012. How the question of law applies in several other non-Muslim jurisdictions is of great importance in demonstrating the difference between the Sharia-based Saudi Arabian arbitration system and international arbitration laws. In the US, the question of law is expressly waived if not stipulated in the arbitration agreement, as demonstrated in Improv West Associates v. Comedy Club, Inc. and Coffee Beanery, Ltd. v. WW, L.L.C on the grounds of manifest disregard,[722] both of which were dismissed on grounds of the obvious non-compliance with specific laws of the country, and which was not envisioned to stand as a hindrance to the enforcement of an award. More in line with the US, Australian law also requires that (1) the parties must agree, whether in the arbitration agreement or at any time

[721] Ayad, *op. cit.*, 273.
[722] Gronlund, *op. cit.*, 1351-75.

before the expiration of the appeal period of three months[723] that an appeal may be made, and (2) the parties must seek leave of the court.[724] In the UK, appeal on question of law is not a requisite; however, Section 69 makes appeal available upon the choice of the individual parties to the arbitration. Besides insurance and reinsurance contracts which generally attract a lower threshold to qualify for appeal following arbitration in the UK, the general law[725] provides the grounds for challenging arbitral awards that involve challenging the tribunal's substantive jurisdiction,[726] challenging the award based on serious irregularity affecting the tribunal,[727] and appeal on point of law.[728] When it comes to international arbitration laws, it becomes apparent that some Western arbitral laws have played a bigger role in their nurturing than has Sharia. In fact, the influence of Sharia in this respect is negligible or completely non-existent.[729] Therefore, when drafting international laws, there has not been a keenness to study the implications of Sharia-based laws on the enforcement of awards. Therefore, we can say that as much as Sharia tries to be the final law of reference and international arbitration law attempts to reinforce the concept of finality of arbitral awards, there arises a conflict that has been difficult and indeed thus far impossible to resolve. The conflict created by Sharia's intention to allow nullification of foreign laws and any determinations coming therefrom against the implied positioning of international arbitration law opens up foreign awards to unnecessary scrutiny once they are brought to Saudi Arabia. Therefore, a deadlock emerges principally in each set of laws' intent to be the final point of reference in deciding finality of an award. However, in a bold move by the Saudi law making bodies, the 2012 Arbitration Law takes a break from ordinary scrutiny based on conformity to Sharia, which then

[723] Section 34A (6), Commercial Arbitration Act 1984 (NSW).
[724] Section 34A, Commercial Arbitration Act 1984 (NSW).
[725] Arbitration Act 1996
[726] Section 67
[727] Section 68
[728] Section 69
[729] Western nations previously thought of Sharia as being inferior to their own laws, as earlier discussed in the ARAMCO case.

effectively leaves Sharia as a point of reference only when an appeal is sought as other provisions of an agreement may call for, and not on the question of law as was the norm under the old law. However, it is also important to note that any agreements brought to the scrutiny of the courts of law in the Kingdom 'lie in the penumbra of Sharia', which then implies that even when complications involving contradictions with Sharia have not been anticipated, there may still arise certain contradictions that may lead to annulment of the initial award and subsequently, the entire agreement constituting commencement of arbitration. However, the shortfall in the new enacted law (the Saudi Arbitration law of 2012) needs to be addressed through further amendment of the law to remove sections that remain contentious to its implementation and applicability.

Most remarkable of these obstacles is the requirement that whenever there is a dispute in arbitration that needs to be addressed, the courts have to ascertain the compliance of the particular award to Sharia. In fact, this puts an award in an extremely awkward position since applicability of Sharia is at times unconceived at the initial seat of arbitration. As mentioned earlier in the previous chapter, The New Arbitration Law requires that public policy is not violated in the arbitration process and the issued final award. Therefore, the requirements still present a challenge to international companies seeking to enforce their arbitral awards in Saudi Arabia. For example, as mentioned in earlier chapters, the arbitrator should be male and of Muslim faith and must hold a university degree in either Sharia or law. The requirements could be aimed at preventing the tribunal from reaching a decision or issuing an award that leads to a breach of Sharia law, which is considered public policy, and as a result the award would be annulled or at least be out of certainty. Therefore it could be a safeguard against having the award annulled by one of the parties on those grounds. Therefore, the researcher recommends that the Saudi Arabian arbitration law should reduce these obstacles

and also limit the scope to upset finality and the grounds of appeal should move closer to international law in order to bridge this gap.

At this juncture it becomes apparent that finality of arbitral award and the grounds of appeal against international arbitration are at a transitional stage under both international and Sharia law. However, Sharia law, owing to its vast scope and different interpretation often shows much more flexibility regarding the grounds of appeal and finality of an international commercial arbitration award. If the Islamic countries, including Saudi Arabia, are willing to come up to par with the larger international commercial community then they have to adjust any disparity between the two laws regarding international commercial arbitration, its finality and the grounds of appeal. However, the shortfall in the new enacted law (the Saudi Arbitration law Act 2012) needs to be addressed through further amendment of the law to remove sections that remain contentious to its implementation and applicability. Therefore, the researcher recommends that Saudi Arabian arbitration law should move closer to international law in order to bridge this gap. This, for example, should be done without making its subject to unnecessary scrutiny on the grounds of public policy requirements. Thus, Saudi arbitration law needs to be aligned with international standards by strictly limiting the requirement of public policy. However, international law would require Saudi arbitration law to provide maximum judicial support and minimum intervention in the arbitration process, while also having limited scope to upset finality. At this point, however, considering that the study recommends that the Saudi Arabian arbitration law should move closer to international law in order to bridge any gap, it is vital to international law to revisit concepts behind sharia law to gain an understanding of how the application of Islamic principles justifies, at least to its followers, and also to understand that any arbitral award is contradicted to Allah's law (sharia) will not be enforced. therefor In all the preceding matters of the legality of arbitration as it is embodied in Sharia that has been discussed briefly is is

mainly based on resources of Islamic law, Allah says in Surah Al-Ma'idah, what can be translated as "And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers. So do not fear the people but fear Me, and do not exchange My verses for a small price. And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers".[730] "And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation [united in religion], but [He intended] to test you in what He has given you; so race to [all that is] good. To Allah is your return all together and He will [then] inform you concerning that over which you used to differ"[731].

5.8 Chapter synthesis

This chapter dealt with the specialised exception of appeal against an arbitral award on question of law. This is one of the challenges that may be made against the finality and enforcement of an arbitral award – although as a matter of procedure, the filing of an appeal may not, in some cases, stay or suspend the application to enforce the award unless a motion is filed for such suspension. In any case, an appeal on point of law against an arbitral award filed in a court at the place of enforcement is a challenge to the finality of the award in the sense that it seeks to oppose the enforcement of the award. Compared to an action to vacate or set aside an award, or to a limited judicial review which is also conducted as a challenge to

[730] Surah Al-Ma'idah [5:44-] - Quran

[731] Surah Al-Ma'idah [5:48] - Quran

the award, the provision for an appeal on a question of law constitutes a more serious intervention by the courts in the arbitration process.

There are few countries in the world that have instituted in their laws the ability to appeal an award. Even the countries in the Middle East that base their laws on Sharia do not provide for the possibility of appeal against arbitral awards, whether domestic or foreign, although the old Saudi Arabian law expressly provided for a mandatory judicial review on the merits prior to confirming arbitral awards in order to ascertain compliance with Sharia law. As a statutory right, however, only the United Kingdom has introduced in its laws a provision that allows a party to avail of the right of appeal against an arbitral award on a question of law.

In Section 69, in the Arbitration Act 1996, the state allows for a judicial review of a foreign arbitral award even if such award was declared final in the seat of arbitration. The rationale of the provision rests on several basic points: first, that states cannot be expected to recognise and enforce awards without inquiring into their bases, for which it reserves the right of supervision and control; second, that in the absence of an international commercial court, supervision and control of the award can only be performed in the domestic setting; and third, the courts are the only institutions that are equipped to discharge this supervision and control. Some have even suggested that the power to regulate the enforcement of awards through a judicial review is in the nature of risk management, so harm that may potentially be done by a faulty award may be prevented prior to enforcement.

When an arbitration award is submitted to a judge for enforcement, the award having been deemed final and executory at the seat of arbitration, the judge is in effect being asked to give the award the effect of *res judicata*. The fact that a judicial action is required to first recognise the award and then to enforce it signifies that the judge, an agent of justice, must at least assure the fairness of the award, else his office serves no purpose. For this reason, a judicial review is warranted prior to confirmation, on the basis of the limited grounds

provided by Article V of the New York Convention that would constitute an exclusion to the enforcement of the award.

The argument for appeal on a point of law pursues this line of reasoning. If a judicial review is justified *motu proprio* to determine the fairness of the award prior to enforcement, it should be of greater interest to the judge to inquire into the fairness of an award if one of the parties alleges unfairness and files for an appeal on the grounds that the arbitration did not abide by the law upon which the parties agreed. The entire justification behind the finality of arbitral awards leading to its enforceability, ideally without the intervention of the court, is that the arbitration was conducted according to the agreement of the parties. Where a party alleges, however, that the arbitration did not abide by this agreement, and such was proven by an examination of the law that was applied, then it may be said that the award contravened the agreement of the parties and at least one party did not consent to this matter. The basis upon which finality rested is therefore rendered nugatory, and the award cannot be confirmed as final and enforceable.

The provision for recognising and giving effect to appeals on questions of law is not provided for in US law, however on the basis of case law, the doctrine of 'the manifest disregard of the law' was articulated, albeit in a most questionable and confusing matter. This doctrine has been seen, in practice at least, to justify judicial inquiry into foreign arbitration cases that supposedly had reached finality and were seeking enforcement. The doctrine provided the courts with a reason to conduct a review of the award on its merits, and to strike it down if it became evident that the arbitrators, knowing the applicable law, intentionally disregarded it and refused to apply it in the resolution of the dispute. Since its declaration in Wilko v Swan, the manifest disregard doctrine has been relied upon successfully in several cases, although there has been as much speculation that in other cases the doctrine appears to be put to rest (e.g. Hall Street v Mattel), although the court always falls short of categorically declaring this

doctrine to be no longer valid. This chapter therefore shows that in theory Saudi Arabia has a more restrictive system of appeal based on the question of law, since it lays out more grounds for appeal than observed in other comparative jurisdictions. However, international law aspires to see Saudi arbitration law offering maximum judicial support and minimum intervention in the arbitration process with limited scope to upset finality by appeals on question of law. Hence, Saudi Arabia should move in that direction with the implementation of its New Arbitration Law in order to be closer to international law, as suggested in the Recommendations section. In order to achieve this, it is important for the government to review certain parts of the law to cater for the shortfall. Finally, the researcher also believes that in order to bridge the gap, the Saudi Arabian arbitration law should move closer to international law while maintaining fidelity to the values and principles of Sharia law. This should be done without making its subject to unnecessary scrutiny on the grounds of public policy requirements. Thus, Saudi arbitration law needs to be aligned with international standards by strictly limiting the requirement of public policy. However, international law aspires to see the Saudi arbitration law offering maximum judicial support and minimum intervention in the arbitration process with limited scope to upset finality by appeals on question of law.

One might argue that the new Saudi Law Act 2012 is a positive step in the right direction. However, it is still important to know the pitfalls that can arise to upset finality. Along with the need for respecting finality, there have been some other points of contention. One of these, as has been mentioned, is whether women are allowed to be arbitrators or whether indeed they are permitted to play any part in arbitral proceedings. Another point of contention is whether a non-Muslim is allowed to be an arbitrator to claimants who are Muslim.

One of the biggest complications with Saudi law is the vagueness of the exact meaning of public policy, which might lead to giving considerable space for appeal on the question of law and might reverse or annul awards or allow the court to re-establish the facts of the case. The wide interpretation of public policy has caused concern for finality of arbitral awards. This legal uncertainty or unclear public policy should not exist as it is common for countries to change local legislations to align with international treaties and conventions that the state voluntarily joins. New Saudi law needs more detail about public policy and also detail concerning certain matters that arbitration parties were used to seeing and crucially, explicit limits on the scope of judicial review. Alassaf and Zeller confirm that the grounds for public policy and arbitrability in Saudi law "have not been identified." [732] This implies that public policy could well be interpreted narrowly or broadly depending on the personal analysis and understanding of each Saudi judge.[733] However, as Al-Jerafi stated, not every violation of Sharia would necessarily amount to a public policy violation in Saudi law as long as it was not a violation of a fundamental principle of Sharia.[734] Hence, it can be said that public policy could be widely abused since there is no clear definition of public policy, as there are four main schools in Islam along with no clear clarification or test to measure and identify public policy exceptions. Therefore, the suggested solutions that could be considered as public policy exceptions should be considered narrowly, in line with other countries; the public policy defence could be amended to allow an independent body to decide whether or not a public policy has been breached; removing the exception of public policy entirely from the convention and giving the objecting party a chance to remedy, and also the chance that the party may challenge the award in the country where it is rendered[735].

[732] A. Alassaf and B. Zeller, 'The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985' (2010) 7 MqJBL 170, 18
[733] Ibid., 186.
[734] W. Al-Jerafi, 'Yemen's Ratification of the New York Convention: An Analysis of Compatability and the Uniform Interpretation of Article V(1)(A) and V(2)(B)' (DPhil thesis, University of Leicester 2013).
[735] A.M. Saleem, A Critical Study on How the Saudi Arbitration Code Could Be Improved and on Overcoming

Moreover, as stated before, the new Arbitration Law with regard to appeal on question of law and appeal on the merits is still largely untested and remains to be assessed over time. Furthermore, it remains to be seen how the execution judge will approach issues of finality and enforcement and what effect these provisions will have in practice. In principle the enforcement law should guarantee that the merits of the dispute are not revisited or subject to harsh review by the local courts as mentioned in chapter four in the case of Emaar v Jadawel. One required test of the Saudi Law Act of 2012 is to see whether judges will correctly apply the new law or if they will follow the Fatwa, Ijtihad and apply the teaching of the Hanbali school more than what is set out in the new Saudi Law Act, or if they will take a principle of balance between them.

At this level, one could draw attention to the fact that a judge has the authority to use Ijtihad and to apply Fatwa regarding an incident or legal question. As scholars, they are able to look at the entire package of Islam and issue a ruling on the question at hand. The Centre of Rulings and the mufti build the information model while the judge applies it to a particular case. Each case studied by the judge is an attempt to comprise a particular verdict based on the legal precedent given by the mufti which can be applied in the specific judgment[736].

It should be mentioned that although the New Law provides increased flexibility in different issues, this flexibility, as has been mentioned above, is still clearly subject to judges' interpretations and the Saudi courts' oversight and mandate to ensure Sharia compliance. As previously mentioned, one major problem arising with uncertainty of finality comes from reviewing the underlying dispute on the merits. It should be guaranteed that the merit of the dispute is no longer revisited; however, it is yet to be determined what effect the provisions

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the Issues of Enforcing Foreign Awards

[736] See Understanding Islamic Law – ISCA http://www.islamicsupremecouncil.org/legal-rulings/-understanding-islamic-law

will have in practice. The Saudi Enforcement Law does not protect parties or foreign awards that are unfamiliar to Saudi law or Sharia law concepts. In other words, within the practice process and enforcement of arbitral awards obtained offshore, Saudi Arabian courts need to stop reviewing the underlying dispute on the merits, and also stop undue subjection of the dispute to unnecessary scrutiny based on public policy requirements. By this step, Saudi Arabia will move forward and be closer to international law standards.

From what has been mentioned above, legal researchers and experts have concerns with regard to individual interpretations of judges in Saudi Arabia for public policy as Sharia gives judges a right to independent reasoning and intellectual exertion (Ijtihad), which may affect finality and will allow much scope to upset finality by giving a lot of scope for appeal on question of law due to the public policy approach. As earlier mentioned, the Saudi Law Act 2012 needs to be tested in order to ascertain whether judges are able to apply the new Saudi law rules or follow the Fatwa and apply the teaching of the Hanbali school as it exists in Saudi courts.

Finally, the New Arbitration Law does require that Sharia is adhered to at all times in the arbitration agreement, throughout the arbitration process and in the final award issued. Those issues can be properly managed under the New Arbitration Law for an arbitration held in Saudi Arabia without unduly burdening the parties. Therefore, the study suggests that the Saudi Arbitration Law should apply the provisions and texts regarding the issue of appeal that arbitral awards are not subject to appeal as stated under Article 49 of the Arbitration Law. This study also supports continued efforts to avoid certain drawbacks, affecting finality of arbitral awards, stop reviewing the underlying dispute on the merits, and also stop undue subjection of the dispute to unnecessary scrutiny based on public policy requirements. Considering that by allowing an appeal, one could almost say that the most important feature of arbitration, which is rapidity, will be undermined, as the timescale for the procedure of an

appeal will be longer, and in fact will amount to the same timescale as litigation before a court. This is why the study suggests that Saudi Arabian law, in order to be more closely aligned with international arbitration practice, should not allow much scope to upset finality by appeal on question of law based on public policy and the right to appeal should only fall within a very limited period as adopted in international law.

Chapter Six

Conclusion

6.1 Summary and Conclusions

The Finality of arbitral awards is not the mere declaration that the award is final in the seat of arbitration; the full implication of finality is that it is also deemed recognised and enforceable; otherwise the benefits of arbitration cannot be said to have been realised. This chapter begins with a discussion of the various challenges to the finality of arbitral awards and how they are applied in various jurisdictions, thereby contrasting their application with the subject nation – Saudi Arabia. Thereafter, each research question is answered in light of the preceding analysis.

Although, as previously observed, most rules on arbitration stipulate that the results of an arbitration should be 'final,' it is almost always the case that the party against whom the arbitral award holds has some recourse by which they may challenge the award, regardless of whether the parties agree at the beginning to accept the results of the arbitration.[737] There are several challenges that may be made to the finality of an arbitral award. These include such judicial actions as appeal on question of law, judicial review of arbitral awards, and actions to set aside or vacate arbitral awards. These actions have differences in scope and meaning.

The UNCITRAL[738] states that when an award is successfully challenged, it shall be set aside, annulled or vacated, which results in the award ceasing to exist, at least within the jurisdiction of the court that set it aside. The annulment of an award may be done either in the country of origin of the award, or in the country where enforcement is sought. As shown in Table 2 in Chapter 4 of this thesis, when the award is annulled in the country of origin, it

[737] F. Leila, 'Setting Aside an Arbitration Award.' *Selected Works of Fernando Leila.* Retrieved from http://works.bepress.com/fernando_leila/2/.
[738] UNCITRAL Model Law, Article 34, Application for setting aside as exclusive recourse against arbitral award.

ceases to exist and cannot therefore be enforced anywhere in the world. If the award is annulled in any country other than where it originated, the award is unenforceable in that country without prejudice to having the same award recognised and enforced in another country. Of course, for an award to be set aside, the proper action should be taken within the period prescribed by the UNICTRAL Model Law or the law of the country in which the action is being taken.

The second action, a judicial review on the merits, means that the court may conduct a review of the substance (rather than just the procedure or conduct) of the arbitration award. The UNCITRAL and NYC do not provide for the judicial review of the arbitral award, only for its annulment or setting aside based on a narrow set of grounds. Under the national laws of the country of enforcement, however, judicial review is at times allowed. For instance, the Federal Arbitration Act of the United States allows an award to be not only vacated but also modified or corrected, pursuant to Sections 9, 10 and 11. Section 10 lays out the grounds for vacating or setting aside. Section 11, however, allows for the modification or correction of an award on the following grounds:

(1) Where there was an evident material miscalculation or mistake in the award;

(2) Where the arbitrators decided something outside of the scope of the agreement; or

(3) Where the award is imperfect in form but in a manner that does not impact on its merits.

In determining these latter three situations, it becomes necessary for the court to conduct a judicial review of the award. The grounds are not procedural, but substantial and their evaluation involves an assessment of the merits of the award. If none of the foregoing grounds are met, then it is incumbent upon the court to confirm the arbitration award leading to its enforcement. The grounds in Section 10 and 11 are exclusive in the judicial review of

the award. Even if the parties agree to expand the scope of judicial review, such expansion should not be allowed by the court.

In Hall Street Associates v Mattel,[739] the parties' agreement stipulated that the District Court could override the arbitrator's decisions if it found an error in the arbitrator's conclusions of law. In effect, the agreement provided that the federal court may exercise a broader discretion in supervising the arbitration than it was granted in the case of limited judicial review under the FAA. The result of the arbitration found in favour of Mattel, to which Hall Street sought a review from the District Court on the grounds that the arbitrator made conclusions that were legally erroneous. The award was therefore reversed in favour of Hall Street. Mattel appealed to the 9th Circuit of the US Court of Appeals. The latter ruled that the original award in favour of Mattel must stand, because although legal errors were committed by the arbitrator, based on the FAA it was not under the power of the court to make that determination. Modification of the award was allowed by the FAA when the arbitrator showed evidence of corruption, partiality or misbehaviour, but not when the arbitrator made errors of law. The judicial review thus expanded beyond the limited circumstances allowed by Sections 10 and 11, and therefore the original award must stand.[740] The decision in Hall Street v Mattel contradicts the "manifest disregard" doctrine discussed in a preceding section of this chapter; to recall, the 'manifest disregard' doctrine states that an arbitral award may be vacated if the arbitrator manifestly disregards the law. It is arguable that the fact the arbitrator merely committed an error of law and did not disregard it despite knowing the law is a matter beside the point: whether disregarded or erroneous, the law was not followed in Hall Street v Mattel as it was also not followed in Wilko v Swan, but the court disallowed the modification sought by Hall Street in the former. Jurists therefore argue whether or not the manifest disregard of the law

[739] Hall Street Associates, LLC v Mattel, Inc., 552 US 576 (2008) at 578.
[740] Cornell University Law School case brief <https://www.law.cornell.edu/supct/html/06-989.ZO.html>

doctrine had been put to rest by Hall Street v Mattel, but the Supreme Court fell short of decisively declaring this in subsequent rulings.[741]

The third action to challenge the finality of the arbitral award is the appeal on a question of law. Unlike a judicial review, the circumstances subject of this appeal is the proper application of the law, not the merits of the arbitration decision or award. At least this is the general concept, since the conventions governing international arbitration do not provide for judicial review or appeals to arbitral awards – these are challenges that are provided for by the national law in the enforcing state. The most notable of such states is the UK, which provides for the right to appeal an arbitral award on a point of law. Section 69 of the Arbitration Act 1996, discussed in the preceding chapter, does not allow for a review of findings of fact or procedural errors. It only allows for a review on questions of law, although not issues dealing with foreign law, as such are considered to be questions of fact in UK court proceedings. Thus, only awards in the case of arbitration proceedings governed by UK law may be appealed under Section 69. The right to appeal on question of law may be excluded by the arbitration agreement, however, and such a waiver is typical in most commercial arbitration agreements.

In IRB Brasil Resseguros v CX Reinsurance,[742] the respondent settled several US liability claims and sought to recover from its excess of loss reinsurer, who in this case was the claimant. IRB Brasil refused to pay, however, initiating arbitration proceedings during which the tribunal found in favour of CW Reinsurance. IRB Brasil appealed on the grounds that the tribunal committed several errors of law, which included: (1) reference to the settlements being 'arguably' within the terms of the insurance and reinsurance, not 'on the balance of probabilities' which is the standard of proof in England; (2) no reference was made to relevant case law or the period clause, when it determined that the losses sought for

[741] P.J. DeRosier, 'Judicial Review of Arbitration Awards Under Federal and Michigan.' *Michigan Bar – Journal* (2013) 35.
[742] IRB Brasil Resseguros SA v CX Reinsurance Company Ltd [2010] EWHC 974 (Comm).

recovery under the reinsurance contract were covered by the relevant period; and (3) reference to the losses from a single cause rather than an 'event when it alleged that the loss stemmed from a single event.'[743] The court decided that there was no error of law and upheld the award. The court cited the following grounds: (1) the arbitrators actually reached their decision based on the balance of probabilities although their wordings reflected otherwise; (2) it was not crucial for the arbitrators to specify the period clause or to expressly refer to case law, as this does not signify that they adopted an approach inconsistent with precedent or the period clause; and (3) the arbitrators may have wrongly referred to the loss having arisen out of a single cause, but it was clearly their intention to say that the loss stemmed from a single event. Such errors did not constitute a material error in the application of the law, and thus the original award is affirmed.[744]

The foregoing discussion summarises the mechanisms by which the finality of an arbitral award may be challenged, and the grounds upon which they may be challenged. Any limitations that may be placed upon the right to challenge contribute to the realisation of the finality of the arbitral award; however, undue limitation of the options to challenge may compromise the fairness of the award, if the award has material defects that need to be addressed. On the basis set forth in this research, the remainder of the discussion shall address the aim of the study to provide a framework by which Sharia-based arbitration law may be brought closer to international arbitration law on the matter of the finality of arbitral awards, leading to their enforceability.

[743] Miller, *op. cit.*
[744] *Ibid.*

6.2 Findings

Through analysis of the various content depicting how arbitration is conducted across various jurisdictions, the researcher was able to focus on a few factors that pertain to similarities and dissimilarities in administration of arbitration awards. Notably, there are irreconcilable differences between the Saudi Arabian Sharia-guided law and the international standards for arbitration, particularly because the Saudi law in some cases benchmarks enforceability based on merits, a practice that is inadmissible in the practice of international arbitration. Quite clearly, the Saudi system does not recognise international arbitral awards as final until a validation process has been undertaken within its judicial system. This creates an irreconcilable source of conflict as far as admissibility of foreign awards is concerned. Ultimately, the differences in various national clauses imply that various states lack harmony in their administration of international arbitration awards. The biggest contrast was observed in the enforcement of arbitration guided by religion (Islam) and international arbitration law, which essentially focuses on resolving disputes at the international level. Generally, the Arab world derives its version of arbitration from Quranic readings, in contrast to the international arbitration mechanisms which derive their legislation from several fragmented laws. In this sense, there is no agreement between the two sets of arbitration. In the Quranic version (which forms a large part of Saudi Arabia's arbitration law), the awards presented at a hearing are final if made within the country, with the exception of times when it has been proven that such processes were flawed. This implies that finality is determined at the point of award, and no recourse is possible unless such fundamental flaws are established. Awards given in neighbouring countries (GCC member states) are prioritised in Saudi Arabia, essentially because the GCC has an Islamic-based arbitration adherence, and the pact clearly reinforces this cohesiveness.

The conclusion replies to the research questions and provides a summary of the individual chapters, in accordance with the findings presented in each. A summary of the chapters is provided below.

Overall, the research sought to determine the finality of arbitration in Saudi Arabia, with in-depth comparisons between the Kingdom's law on arbitration (and how it provides for finality once an award has been given) relative to influences of Sharia and GCC convention; and international arbitration law. In particular, the research sought to reply to the questions of the extent to which it is possible to resolve fundamental conflicts between provisions of Sharia and international arbitration law on the question of finality; the development of arbitration in Muslim countries; analysis of the general attitude of Sharia to arbitration and the features of this religious law that prevent full adoption of international arbitration law; insights into the broad similarities and differences between Sharia and international law on arbitration and the broad challenges in finding a common ground; how both Saudi Arabia and international arbitration laws approach finality; a decision whether based on the general principle in international arbitration on the finality of awards, the setting aside of the arbitral award given by an international arbitration should be abolished in Saudi Arabia; whether the public policy defence as applied in Saudi Arabia should be allowed to deny recognition and enforcement of foreign or non-domestic arbitral awards; whether appeal on question of law should be allowed in Saudi Arabia when enforcement of the arbitral award is sought; and how finality of arbitral awards should be applied in the case of Arab countries (which base their law on Sharia).

The study addressed its research questions as following:

What is the general attitude of Sharia to arbitration, and what features does Sharia have that are potentially problematic to the adoption of international arbitration resolutions?

Sharia provides an alternative platform for resolving disputes through arbitration – disputes that would not necessarily require application of the normal court system. However, there is great emphasis on strict adherence (especially based on the country's conceived school of thought) to Sharia, which limits resolution and implementation when the parties are not in agreement. In Sharia, arbitration is a demanding approach to dispute resolution, and parties do not have much choice in adopting it as their method of resolving disputes. This implies that the law stipulates arbitration as a basic way for Muslims to resolve issues. The difficulty in implementing arbitration awards in Sharia-based countries borrows from its non-recognition of other laws except itself, which contrasts with reality in the largely globalised world of today in which religion does not influence the ability to trade among parties. Countries that strictly observe Sharia often find it difficult to accept international arbitration awards because their laws fail to recognise certain aspects of such awards, particularly from a religious perspective. For instance, bearing specific reference to the Saudi Arbitration Law of 2012, the requirement that the awards be scrutinised for adherence to specific elements of Sharia – such as the compulsory delivery of judgment by a male arbitrator. However, although Saudi Arabia respects its own laws within Sharia, it is willing to separate the violating from the non-violating aspect of an award with regard to Sharia law and its implementation.

What are the broad similarities and differences between Sharia and international law on arbitration and the broad challenges in finding a common ground?

Several similarities and differences between Sharia and international law that both reinforce the argument for conflict in approach and possibility for harmonisation have been explored in chapter three. The very nature of the two sets of laws defines their first significant difference. In a normal setting, Sharia does not envisage the contribution of arbitrators as binding, but rather views their roles as reconciliatory.[745] This grants parties the power to withdraw from proceedings at will and at any point, as well as not providing binding pronouncements to which those parties must adhere. On the other hand, the international arbitration law mandates parties to strictly adhere to the judgments rendered during arbitration hearings. In the latter case, the arbitrator wields the power of a judge. In this sense, Sharia fails to promote finality whereas the binding nature of awards by international arbitration seeks to make a final determination that has very few bases for being challenged in a court of law. Both Sharia and the national arbitration laws (including international arbitration laws) are similar in that they allow for arbitration only on certain matters, leaving other matters open for resolution through other judicial means. For instance, the four schools of thought in Islam concur that arbitration should be a preserve for deciding business matters, which is also largely the practice in international arbitration law. National arbitration laws exempt certain matters from being adjudicated through arbitration, which Al-Qurashi notes is a common norm even among Western nations.[746] Despite this similarity, the scope of both Sharia and international arbitration laws differs slightly in that Sharia governs persons within jurisdictions that observe strict adherence to Islamic laws; unlike others that have a different set of laws guided by other factors altogether. With the exception of instances where one or both parties to a dispute is not Muslim, Muslims must at all times seek resolution to disputes through arbitration.[747] This arises as a way to resolve disputes in situations where application of Sharia is not feasible. In the international arbitration system, parties to a dispute are

[745] A note in Born (2001), espoused through subsection 3.6.1.
[746] Al-Qurashi, *op. cit*.
[747] Alkhamees, *op. cit.,* 259.

allowed to settle on arbitration as their way to resolve it, which means it is not binding on them simply on the basis of the nature of conflict as stipulated in Sharia-based arbitration. Wakim notes that the Quran does not provide for recognition of other laws except Sharia, which leaves arbitrating parties in Islamic countries with a narrowed scope of choice with regard to the approach to be adopted whenever the existing laws do not provide an adequate dispute resolution mechanism.[748] This strictness is mainly exercised in countries that observe Shafi'i, Hanbali, and Maliki schools of thought; which is different from countries that adhere to the Hanafi school of thought.[749] The Sharia and international arbitration laws further differ in the selection of arbitrators. Sharia allows selection of arbitrators based on gender (they must be male), of a considerably mature age, and Muslim by faith. Such provisions (especially touching on adherence to religion and gender/age) are seen as violations of human rights in international law and thus do not apply at this stage. The international framework recognises competence and impartiality as the core requirements for arbitrators. Furthermore, the arbitration procedure differs based on whether parties employ a Sharia-based arbitration process or one guided by the international arbitration framework. Although Sharia does not provide expressly for the procedures to be adhered to when arbitrating, Baamir and Bantekas note that parties are given equal opportunity to present their cases and evidence – a requirement that must be strictly adhered to.[750] A traditional approach (one not provided for in the Sunna or Sharia) begins with the complainant presenting their case to the arbitrators, then the respondent answers to the allegations, and finally the defendant swears an oath to allow for their discharge or refuses to take it, in which case the award is made in favour of the claimant.[751] The international arbitration procedure broadly provides for the steps to be followed in reaching a resolution. The parties must have agreed to be subjected to arbitration

[748] Wakim, *op. cit.*, 38.
[749] Saleh, *op. cit.*, 55.
[750] Baamir and Bantekas, *op. cit.*, 238.
[751] *Ibid.* 260.

in the clauses defining their relationship, serve each other adequately with notices when arbitration is sought, and follow normal court procedures as provided for in the arbitration laws. Finally, finality of the awards comes into perspective as another point of deviation between Sharia and international arbitration law. Being a means to resolve issues much faster than the normal judicial system, the New York Convention sought to minimise the reasons why an award given internationally could not be enforced in a particular jurisdiction, which is another way to enforce its finality. It summarises the seven reasons why enforceability can be rejected as follows:

- "The parties to the agreement lack the legal capacity, or that the agreement is invalid under the law in effect, or under the law of the country where the award was made;
- The party against whom the award is sought to be enforced was not properly notified that an arbitrator was appointed, or that arbitration proceedings were held without notice to him, and he was not able to present his case;
- The award is in consideration of a matter that does not fall within the terms of the submission to arbitration, or the decision contained therein is outside of the scope of the submission to arbitration when such a decision is separable;
- The composition of the arbitration panel or the arbitration procedure itself violated the agreement of the parties, or was not in accordance with the law of the country that was the seat of arbitration;
- The award has not yet become binding upon the parties, or has been set aside or suspended by the proper authority in the country or under the law in which the award was made;
- The subject matter is not capable of settlement by arbitration under the law of that country;

- The recognition or enforcement of the award would be contrary to the public policy of that country."[752]

As already indicated, finality in Sharia law is not legally reinforced, but the same is emphasised through insertions into the arbitration laws of different countries. Undoubtedly there is the basis of the movement toward convergence of the various laws applied in the two sets of laws (with Sharia-based countries particularly drifting towards enhancing finality of awards in line with international arbitration law).

What are the specific aspects of finality both under Saudi Arabian and international law?

In clear terms, the basis for conflict between Saudi and international arbitration is generally the question of the place of religion when arbitrating. As indicated in the preceding section, international arbitration law (based on the NYC) greatly limits the scope of parties to appeal, which is the surest way to enhance finality of awards. Unless a party can prove that their hearing was affected by any or some of the seven indicated reasons above, the system assumes the award is final and binding on all parties. As such, finality is reached when a determination is made, unless it can be proven that the above reasons were in existence when handing judgment. "Article 50(4) expressly states that during any proceeding initiated to set aside the award of the tribunal, the competent court may not review the documents submitted in the proceedings, nor may it review the merits of the case."[753] This article greatly reduces the grounds for review of an award, which is determinative of a quick arrival to finality of the same. However, the same cannot be said of Sharia. Sharia allows review and nullification of any award whose proceedings were not conducted in a manner compliant with its

[752] New York Convention (1958), Article V.

[753] Harb and Leventhal, *op. cit.*

requirements – including the religion of the arbitrators. Therefore, the requirements (under public policy) is still present a challenge to international companies seeking to enforce their arbitral awards in Saudi Arabia. The requirements could be aimed at preventing the tribunal from reaching a decision or issuing an award that leads to a breach of Sharia law, which is considered public policy, and as a result the award would be annulled or at least be out of certainty. Therefore it could be a safeguard against having the award annulled by one of the parties on those grounds. Therefore, in this case Saudi law should reduce these obstacles and also limit the scope to upset finality and the grounds of challenge, moving toward closer to international law in order to bridge any gap. However, the two sets of laws international law and Saudi arbitration law would require providing maximum judicial support and minimum intervention in the arbitration process, while also having limited scope to upset finality.

Pursuant to the general principle in international arbitration on the finality of awards, should the setting aside of the arbitral award (by question of law) given by an international arbitration be abolished in Saudi Arabia?

Clearly, the NYC, which is the major foundation for determination of awards on the international arena, allows country-based evaluation of suitability of awards based on the question of law. Being an independent member of the community of nations, Saudi Arabia has a right to self-determination, as it has jurisdiction over its subjects and the courts. Therefore, it is prudent to expect that like any other country (note: every country has limitations to their enforcement of an internationally determined award; however, Saudi Arabia is seen to have one of the strictest sets of laws that greatly limit enforceability of the awards), the Kingdom will continue to effect a system that is consistent with its national laws, which strictly borrow from Sharia. Setting aside arbitral awards on the basis of laws that are not universally recognised may seem absurd; however, for the enforcing authority, it

is clear that such forms part of its basic law. The question that lingers hence is whether such significant jurisdictional differences are permissible, especially when the country is aware that the situation affects hundreds of international traders and investors who are not bound to always follow the stringent legal provisions that bring about the shortcoming. As an investment hub, Saudi Arabia needs to respond more responsibly to this obligation on international investors.

What are the key differences between the Saudi Arabia approach to the question of law and the international approach to the same?

The main discrepancy that arises in the implementation of arbitration awards between Islamic countries and those not governed by Sharia is essentially recognition of provisions based on the standpoint of an effecting authority. Apart from the Islamic states, the main guiding framework for other countries is the New York Convention. The Convention recognises matters of law that may hinder implementation of an award, which are listed as:

- "Lack of a signed arbitration agreement;
- Failure of the arbitrator to hear relevant evidence;
- Straying by the arbitrator from the issues given for consideration;
- Involvement of issues of the civil rights of an individual;
- Lack of receipt by the respondent of the Notice of Arbitration, or a defective Notice."[754]

Saudi law has been described as the most problematic in recognising international arbitration awards, falling behind other GCC member states in this respect. However, the law has

[754] Article XII, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

recently been fine-tuned to make it easier for such implementation and to enhance finality of arbitration awards.[755] Through this law, the reasons an award may not be enforceable include:

- "The arbitral award contradicts an arbitral award or decision promulgated by a court, committee, or board empowered to settle disputes in Saudi Arabia;
- The arbitral award violates Sharia principles and/or Saudi Arabian public policy;
- The party against whom the arbitral award is rendered has not been duly notified."[756]

These stipulations by Article 55 do not vary fundamentally from the provisions of other states, including non-Muslim states, apart from the express provision that they should be enforceable in light of Sharia law. However, what entails 'contradiction of arbitral awards or decisions promulgated by a court, committee, or board empowered to settle disputes in Saudi Arabia marks the departure in practice, as this marks the entrenchment of nationally recognised case laws, which are essentially anchored on the principles of Sharia. Thus, this prohibition in finality carries on to the second provision for non-enforceability of the awards in the Kingdom (that an award does not contradict Sharia principles). In order to resolve disputes between the Sharia-based approach to recognition of arbitral awards and the international conventions on the same, Islamic states would have to enter into special conventions with their trading partners such that their rights to enforce Sharia are recognised. On the other hand, they may decide to recognise such awards based on whether the parties involved are all either bound or not bound by Sharia law. For instance, where one or both parties are Muslims (mainly from countries that also base their recognition for arbitral awards on Sharia law), then enforceability (even when a ruling is made internationally) would have to be determined through Sharia-based principles. This requirement would be waived when both or all parties are not bound by this requirement. This ensures that the Islamic countries

[755] Through the Saudi Arabian Arbitration Law 2012.
[756] Based on Article 55 of the Saudi Arbitration Law 2012.

protect the integrity of their Sharia principles and only subject litigants to them when parties are bound by them.

Moreover, should appeal on question of law be allowed in Saudi Arabia when enforcement of the arbitral award is sought? It can be said that Saudi Arabia has progressively changed its arbitration laws to enhance finality of awards and bestow more powers on parties to exercise. Appeal on question of law is undeniably among the factors that affect finality of arbitral awards, in a negative sense in this case. While appeal on the question of law under Saudi Law is impermissible as it stated under Article 49 of the Arbitration Law that arbitral awards are not subject to appeal, except that a party can make an application to nullify the award in accordance with the Arbitration Law Articles 50 and 51. However, In fact, Saudi law needs to reduce the review of tribunal award, specifically on the grounds of public policy and be interpreted narrowly. This will enhance enforceability of the awards[757], which is important for arbitral recourse. This issue has already been discussed in Chapter Five. Generally, the entire system cannot be scrapped since there could arise legal challenges to the validity of an award – however, the scope for setting aside or refusing an award on the basis of question of law should be narrowed further, such that the religious influences of the law (which are not in line with the international community and international arbitration laws) can be exempted from awards that involve non-Muslim parties.

Finally, in theory, the 2012 Arbitration Law significantly improved the legal landscape for arbitration in Saudi Arabia, which had previously been governed by an Arbitration Law enacted in 1983. However, the effectiveness of the new arbitration law is still unclear. According to Majed Qaroub, a member of the consultant arbitration committee

[757] Article 50 of the Saudi Arbitration Law of 2012 sets out the criteria and grounds upon which an arbitral award may be set aside. Public policy in Saudi Arabia consists primarily of Sharia, although there are also additional Saudi Arabian public policies such as the prohibition on governmental entities to enter into an arbitration agreement. As such, the grounds for setting aside under Sharia ought to be the same grounds for setting aside in Saudi Arabia, including the prohibition on the riba [interest] and the gharar [uncertainty].

at the Saudi Justice Ministry, and head assistant of the Arab Chamber of Arbitration and Documentation. "Although the business community is now more aware of the importance of arbitration, and the need to have it in the Saudi market, it is still too early to judge the recent update on the commercial arbitration law in the Kingdom"[758], and also the Saudi government has promulgated the law, but there have not yet been any cases implemented or at least these are not accessible for research purposes due to reasons of confidentiality. Qaroub states that "I think the Kingdom needs between seven and 10 years to test the new arbitration law"[759]. Secondly, the commercial judicial system has not reacted to any commercial case either by implementing or opposing any case: "We need to see at least 10 implemented or opposed judicial statements, to test the efficacy of the new arbitration law."[760]

Should the public policy defence as applied in Saudi Arabia be allowed to deny recognition and enforcement of foreign or non-domestic arbitral awards?

The public policy defence has been used repeatedly in Saudi Arabia to deny the execution of awards by international arbitrators. While it is frustrating for obvious reasons, and promotes non-conformity in law, it is allowed for international arbitration laws, including the NYC. However, it is necessary that this limitation in enforcement is restricted to where instances where parties are Muslim and an international arbitration committee failed to envisage this fact in their judgment. The public policy defence should only be applied in accordance with the laws governing arbitration, including those borrowed from any international conventions to which Saudi Arabia subscribes. The question of finality of arbitral award at the place where the award was made always depends on the laws of that particular country. If it is not yet final in the seat of arbitration, then it cannot be enforced anywhere. Therefore, if the question is whether the award that was made in Saudi Arabia has

[758] See "Arbitration laws still considered weak, ineffective in Kingdom", available at : http://www.arabnews.com/news/454354
[759] *Ibid.*
[760] *Ibid.*

finality in Saudi Arabia, then the award is final as long as the procedural requirements are met, the award is final and enforcement may be sought in Saudi Arabia or any other country. There is no controversy in this. Finality depends entirely upon Saudi arbitration law if made in Saudi Arabia because it depends upon how Saudi arbitration sees the merit of the case arbitrated. Saudi and Sharia law govern the merit of arbitration cases in Saudi Arabia or any Muslim country, depending on their national laws. Therefore, if this is the problem, then it is at once solved.

The real problem in Saudi arbitration law is how it recognises the awards that should be enforced as final in other countries. Finality is what the NYC, UNCITRAL, ICSID and all these regional conventions are about. Let us suppose the USA arbitrated a case and declared it final. Would Saudi Arabia enforce it without an in-depth judicial review? Apparently not, because of the public policy interpretation. Now, Western countries restrict public policy interpretation, but under Sharia law the award must comply with Sharia principles as a matter of public policy. Take the case of interest, or riba. This is forbidden in Saudi Arabia but not in Western countries. Thus, an award that is final in the US but which requires the payment of interest will be struck down in Saudi Arabia as it is unenforceable based on Sharia. This is the dilemma in international arbitration because under the NYC and UNCITRAL, what has been declared final in a signatory country should also be declared final in Saudi Arabia. The problem of finality in Saudi Arabia, therefore, is not one of whether the case has achieved finality in the seat of arbitration, but whether it will be accepted as final in the country. Subjecting the award to scrutiny for compliance with public policy constitutes failure to recognise the finality of the award. This is the reason why public policy in Saudi Arabia is viewed as a barrier to finality. In essence, finality in the country of enforcement is devoid of scrutiny for merits. In this case, Saudi Arabian law has to adopt a public policy that does not restrict enforcement of arbitral awards merely on the basis of religious principles; some of

which are violations of the basic rights of the person (for instance, nullification of awards based on whether an arbitrator was female undermines the arbitrator's right to non-gender-based discrimination).

How have the key enhancements to Saudi Arabia's law on arbitration affected enforcement of arbitral awards?

The Saudi Arbitration Law of 2012 has tremendously narrowed the grounds for appeal on grounds that essentially fail to meet the threshold of international law. These enhancements can be summed up as follows:

"Article 21 welcomes separability of the arbitration clause, which protects the agreement to arbitrate from any defect affecting the underlying agreement. Article 40 provides the arbitration committee greater power to vary the deadline for enforcement. Article 50(4) abolishes review of documents submitted in the proceedings or the merits of the case. The new law allows the parties to choose the applicable law, procedure, venue, arbitrators procedure for challenging arbitrators, when to commence arbitration, and whether the tribunal could grant temporary or precautionary measures."[761]

While the above developments are welcome improvements signifying removal of barriers to finality, the following three grounds (as alleged by some countries with non-Sharia-based law) still make the Saudi Law on arbitration appear backward and partly retrogressive.

"An award should not contradict an award or decision rendered by a court, committee, or board having jurisdiction over the settlement of the dispute in Saudi Arabia; the award does not violate Sharia and public policy in the Kingdom (with the possibility of reserving a non-violating part for execution); and the party against whom the award has been rendered has

[761] Harb and Leventhal, *op. cit.*

been properly notified."[762] Clearly, the above reforms have enhanced finality; however, the manner in which this is gravitated towards does not fully address the challenges thereof. This is especially true for the case of awards given internationally, which are still partly susceptible to what is considered unnecessary scrutiny. Any further amendments, as recommended herein, must consider these factors.

6.3 Recommendations

Based on the above findings, the following recommendations were devised in line with the arguments and the observed enforceability of internationally given arbitral awards in Saudi Arabia.

There are fundamental differences between the way Sharia is founded and its flexibility to accommodate awards given internationally. For this reason, there is a need to recognise the ways that international law can enhance enforceability of such awards on Sharia law, such that when subjected to the laws of these countries, the awards cannot be turned down on the basis of conformity to Sharia. This recommendation is made with the realisation that apart from countries in the Muslim world, other countries vary in their adaptability to incoming laws, and a change in the law would not affect their performance (in terms of the percentage of arbitral awards enforced) significantly, yet it would promote their abilities to trade freely with their Sharia-guided counterparts.

The model used to assess compliance with public policy in Saudi Arabia as well as other strict enforcers of Sharia may need further amendment to remove some of the grounds for refusal of enforcement of awards as long as this removal does not affect the fundamental provisions of sharia. As shown in chapter four, this will be necessary to establish a middle ground between the burgeoning number of awards requiring review and the need to normalise

[762] *Ibid.*

arbitration (such that its enforcement is made simpler). By removing these barriers, the country will have set a working model to encourage further investment, with the enhanced assurance that the legal framework governing enforcement of arbitral awards is clear and workable for all parties to a dispute, even when such an award is made internationally.

The researcher believes that this thesis has contributed to shedding light on the concept behind the finality of awards and has shown the dissimilarities between Saudi and international arbitration laws with new ideas and legal perspectives, as well as providing a useful guide for the process of enforcement of foreign arbitral awards in those Arab countries with Sharia-based laws. The thesis has also highlighted unanticipated problems in the context of enforcement of foreign arbitral awards. As mentioned previously, this study also discusses the effect of the application of Sharia law in Saudi Arabia on the finality of arbitral awards on the basis of question of law and public policy. International arbitration laws tend to circumvent the two issues by limiting the scope of their applicability. The enactment of the Saudi Arbitration Law 2012, as seen through this analysis, places Saudi Arabia in a better position to execute international arbitral awards than most of her neighbours and makes it a leader in setting the standards for recognition of arbitral awards. Based on the need to retain a degree of authority over enforcement of arbitral awards and other internationally issued legal determinations, and as was concluded in chapter four, this study finds it inappropriate to abolish refusal to enforce arbitral awards based on the grounds of public policy violation as long as there is no significant effect on provisions of sharia. However, it recommends continued efforts to realign Saudi public policy with international standards. It further recommends the introduction of mechanisms to allow for the incorporation of Sharia-trained arbitrators in arbitration proceedings that could require enforcement in Saudi Arabia so as to avoid refusal on grounds of failure to adhere to unforeseen legal barriers. This can be done by

mutual declaration of interest when parties anticipate enforcement of foreign arbitral awards in Saudi Arabia. In brief, public policy should be defined and codified clearly and precisely to enable everyone to know the limitations imposed by the law, culture and religion. Such rules should be reviewed regularly in accordance with the changes in daily life while maintaining fidelity to the values and principles of Sharia law.

The study recommends that the Saudi Arbitration Law under public policy needs to be more flexible in respect to the appointed arbitrator especially when a disputes and award is made in a foreign state. In the Old Saudi Arbitration Law in Article 4 stipulated that the arbitrator should be male and Muslim. However, the New Saudi Law, chapter 3, Article 14, it is unclear whether or not women can act as arbitrators. In fact, there are many debates about this issue (as discussed in second part of section 4.18 chapter four). Therefore, the New Arbitration Law should be clearer and perhaps can be amended according to the prerogatives of arbitration as long as no contravenes the essential provisions of sharia. Internationally, only the disputing parties themselves should stipulate whether they require a male or female arbitrator. In some Arab arbitration laws in general do not require these conditions (that the arbitrator should be male) because the choice of the arbitrator owes its very objective to the disputing parties and their agreement with the appointed arbitrator whom they have chosen in their own right. This study recommends that Saudi law should rethink that females may be considered as arbitrators and acceptance their awards if the decision is made in a foreign state as there are different point of view among schools of Muslim law hold different views on this issues, and also if they are qualified and well-versed in the matter as long as they are competent. Ultimately, this study suggests that the correct decision, which should be in line with Sharia law and its enforcement, is more important than the issue of whether the arbitrator is male or female.

Arbitration is supposed to provide a final avenue for dispute resolution, and the decisions reached should be final and binding on all parties. “Finality brings with it the advantage of efficiency", and in so doing, promotes and upholds the rule of law globally. This reflects the fundamental importance of arbitration as a form of dispute resolution. However, in the new Saudi Act 2012, appeal on the question of law is impermissible, and this study suggests that continue appeals are not need to be reviewed and reduced on the grounds of question of law. As discussed in chapter five, appeal on question of law is undeniably among the factors that negatively affect finality of arbitral awards. By allowing an appeal, one could almost say that the most important feature of arbitration, which is rapidity, will be undermined, as the timescale for the procedure of an appeal will be longer, and in fact will amount to the same timescale as litigation before a court. Therefore, this study recommends that Saudi Law should keep this amended in line with International Law to offer maximum judicial support and minimum intervention in the arbitration process. This amendment will enhance finality and enforceability of the awards, which is important for arbitral recourse. As was concluded in chapter five, Saudi Arbitration law should reduce the scope to upset finality by stop appeals on questions of law. This is possible as well without making unnecessary scrutiny on the grounds of public policy requirements. Generally, the entire system cannot be scrapped, since there could arise legal challenges to the validity of an award – however, the scope for setting aside or refusing an award on the basis of public policy should be narrowed to avoid religious influences of the law (which are not in line with the international community and international arbitration laws) or can be exempted from awards that involve non-Muslim parties.

The study also recommend that Saudi Arabia has to amend its Arbitration Act 2012 by specifically inserting the words “binding awards” for the sake of dealing with the issue of jurisdiction. Furthermore, the researcher recommends that Saudi Arabia should revoke the

principle of "reciprocity reservation", as it complicates business transactions due to the fact that some countries may refuse awards granted in Saudi Arabia for the simple reason that they are against their public policy, and Saudi Arabia may reciprocate such an act.

The researcher believes that it is important to draw attention to the matter that preventing lower courts and judges from interpreting the law with regard to international arbitrations and limiting the scope to upset finality and the grounds of appeal will help significantly in developing Saudi arbitration in order that it is more in line with international standards. This approach has been used successfully in other jurisdictions, which have used specially designated appeal courts and trained judges who are supportive of the finality of arbitral awards. Therefore, the supervising court shall only have the authority to review the award (and not the merits of the case) to ensure compliance with Sharia law, public policy, and to ascertain that it does not contradict any previous judgments and has been properly served on the opposing party.

It is undeniable that the new Saudi Arbitration and enforcement laws are intended to introduce respect of finality and enforcement proceedings in Saudi Arabia that have a similar effect to those that apply in other international jurisdictions. However, again, it remains to be seen how the execution judge will approach issues of finality and enforcement and what effect these provisions will have in practice. In principle as mentioned earlier, the enforcement law should guarantee that the merits of the dispute are not revisited and are not subject to harsh review by the local courts, and should limit (reduce) the scope to upset finality by appeal on question of law or based on public policy. Commitment to curtail the previous interventionist powers exhibited by the Saudi courts will show that the Kingdom's arbitration laws are moving in a positive direction.

As discussed earlier in this chapter, it is still required that the courts exclude any element of an award that violates Sharia law or public policy. However, it appears that neither the requirement of Sharia compliance nor the reciprocity reservation remain high barriers to the issuing of an enforcement decision by the Enforcement Court, at least in the first instance. Observers should be careful to note, however, that a decision by the Enforcement Court is not necessarily the final step in the process, as the respondent may still initiate an enforcement dispute proceeding, followed by an appeals process, which can further lengthen the proceedings considerably and effectively lead to a review of the merits of the underlying dispute. Whether the standard of review will be similar to that employed in ordinary proceedings or take a more summary form remains to be seen as more cases are brought before the Enforcement Court and appellate divisions[763].

Generally speaking, Saudi Arabia's new arbitration laws remain largely untested and we are yet to see what effect these new laws will have in practice. Reduction of the involvement of the local courts and granting of greater discretion to parties suggests that Saudi Arabia is moving in the right direction, towards adopting a relatively modern legislative and structural framework that respects finality and the enforcement of arbitral awards.

This study does not find Sharia an obstacle towards achieving harmonisation with international arbitration norms. Instead, what the author has discovered is the revelation that Sharia is actually, as stated by many scholars before, a flexible legal system that can become harmonised with the needs of modern international arbitration. While there are a handful of issues where Sharia might be seen as strict, these limited issues should not affect the landscape of international arbitration in Saudi trade. In this regard, the researcher proposes that Saudi arbitration law should consider interpreting public policy narrowly and with the

[763] H. Ghaith, Saudi Enforcement Court confirms that it would enforce a London ICC Award July 13, 2016 available at http://kluwerarbitrationblog.com/2016/07/13/saudi-enforcement-court-confirms-that-it-would-enforce-a-london-icc-award/

pro-enforcement policy of the New York Convention while maintaining fidelity to the values and principles of Sharia law.

The researcher faced several difficulties while undertaking this study. Foremost among the difficulties was the inaccessibility of arbitral awards in Saudi Arabia (the country of reference). Such information is not available in government records or online databases. Therefore, the author sought to avoid cases that touched directly on the individual cases decided in Saudi Arabia, save for the few (sometimes quite old) cases that were available and the literal sentiments of other researchers and legal commentators. As a result of this lack of information, the researcher had to seek contact persons who were well positioned to provide guidance and offer remarkable contribution regarding the state of recognition of arbitral awards in Saudi Arabia. Therefore, the author recommends and suggests computerising the system as well as establishing an electronic database so that law students, researchers and arbitrators from Saudi Arabia and abroad can access this online resource. Moreover, this would help to a certain extent to show the importance of arbitration in Saudi Arabia.

This thesis attempted to provide links between Arab countries whose laws are Sharia-based and modern arbitration laws, on both local and international platforms, with the aim of bringing to light any similarities and differences they both may possess, and then to clear up any qualms about Islamic Commercial Arbitration and the limits tolerated by both international and local legislatures in relation to arbitration from the perspective of Islamic Jurisprudence. This focus on Sharia law will fill the lack of knowledge and understanding of Sharia by international investors, who have found Saudi Arabia a fertile ground for investment.

The issue of finality in Saudi Arabia and all related to it requires additional research. One principal area of concern which would require further research in the interest of developing legal concepts is the substantive concept of public policy, which is presently associated with the doctrine of state sovereignty and taken to be national in context. There is a need to define the concept of international public policy, in relation to finality of arbitral awards, and reconcile this with the principle of domestic public policy. These remain open to future research, the discourse of which may constitute academia's contribution to the formulation of philosophical principles on which the legal system may constitute future laws.

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