

# ARBITRATION, CONCILIATION, AND THE ISLAMIC LEGAL TRADITION IN SAUDI ARABIA

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## 1. INTRODUCTION

The 1980s have seen the oil producing states of the Arabian Peninsula under conflicting economic and political pressures. On the one hand, declining oil revenues have ended an unprecedented economic boom and forced a painful adjustment toward more sustainable levels of growth. Business opportunities are less attractive than they were a few years ago, and thus the oil producing states must work harder to attract foreign expertise and investment. At the same time, however, Islamic reaction and general political unrest in the Middle East exert increasing pressure on these countries to adhere more closely to traditional values as expressed in their ancient religious law, the Shari'a. Islamic religious law is designed to regulate not only the religious and personal life of the devout Muslim but commercial and political activities as well.<sup>1</sup> The Shari'a is not well understood in Western business circles. The application of these ancient legal rules to complex commercial transactions presents elements of risk and uncertainty that must be weighed against the potential benefits of doing business in the area.

Nowhere are these conflicting pressures more evident than in Saudi Arabia, the West's most important trading partner in the Middle East and also the most conservative Arab state.<sup>2</sup> Saudi Arabia is now in the process of developing rules for the arbitration and conciliation of commercial disputes. The task facing the Saudi government is to give the Western business community confidence that claims can be settled (reasonably quickly and fairly, impartially and predictably) under rules at least somewhat familiar to this community, while not straying too far from the rules that historically governed arbitration, or *tahkim*, under

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<sup>1</sup> Shari'a means literally "a clear path to water." The definitions of all Arabic terms used in the text are based on the works on Islamic Law cited in the text and on my own reading in Arabic legal texts. Two Arabic-English dictionaries were used. E. LANE, *LANE'S ARABIC-ENGLISH LEXICON* (1893); H. WEHR & J. COWAN, *A DICTIONARY OF MODERN STANDARD ARABIC* (1976).

<sup>2</sup> See Saba, *Saudi Arabia Investment Climate: Its Risks and Returns*, MIDDLE E. EXECUTIVE REP., Oct. 1986, at 9, 16-19.

the Shari'a.

This article considers the question of how far the Saudis can safely go to provide arbitration rules that meet the requirements of the Western business community while still remaining faithful to the Saudis' own legal tradition. The article initially discusses the various ways that foreigners doing business in Saudi Arabia may settle disputes and focuses on the newly promulgated regulations and rules governing arbitration in Saudi Arabia. It then describes the historical and conceptual differences between arbitration as it developed in the West, and *tahkim* as it developed in the Muslim world. The article concludes by proposing an alternative approach to extrajudicial resolution of commercial disputes in Saudi Arabia.

## 2. THE SAUDI JUDICIAL SYSTEM AND ARBITRATION

### 2.1. *The Saudi Judicial System*

The judicial system in Saudi Arabia represents an accommodation between the political power<sup>3</sup> of the King and the religious authority of the Shari'a and the Shari'a scholars, or 'Ulamā'.<sup>4</sup> The King has the power to appoint judges, to resolve controversies over disputed points of law, and to promulgate regulations in the interest of the Muslim community dealing with areas not treated by the Shari'a.<sup>5</sup> The main check on the King's power is the Shari'a itself, to the extent that it provides clear answers to legal questions, and the consensus of the 'Ulamā', who advise the King as to the application of the Shari'a.<sup>6</sup>

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<sup>3</sup> See S. SOLAIM, CONSTITUTIONAL ORGANIZATION IN SAUDI ARABIA 80-132 (1970); Asherman, *Doing Business in Saudi Arabia*, 16 INT'L L. 321, 321-37 (1982); Comment, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 COLUM. J. TRANSNAT'L L. 413, 413-53 (1979).

<sup>4</sup> Governing law in Saudi Arabia is the Shari'a as interpreted by the school (MADHHAB) of Ahmad Ibn Hanbal (d. 855). The teachings of a later Hanbali scholar, Taqī Al-Dīn Abū Al-'Abbās Ibn Taymiyya (d. 1328), are especially influential in governing circles. The three other recognized schools of law in SUNNĪ Islam are: the Hanafi school founded by Abū Hanīfa Nu'mān Ibn Thābit (d. 767), prevalent today in countries formerly part of the Ottoman Empire, including Iraq, Jordan, Syria, Lebanon, Palestine, Egypt, and Turkey; the Mālikī school, founded by Mālik Ibn Anas Al-Asbahī (d. 795), influential in the Arabian Peninsula and Egypt, and prevalent elsewhere in North Africa; and the Shāfi'ī school, founded by Muhammad Ibn Idrīs Al-Shāfi'ī (d. 819), influential in Lebanon, Syria, Palestine, and Egypt, prevalent in Pakistan and Indonesia. See S. MAHMASSANI, *FALSAFAT AL-TASHRĪ FĪ AL-ISLAM* 19-39 (F. Ziadeh trans. 1961); (PHILOSOPHY OF JURISPRUDENCE IN ISLAM); S. SALEH, *COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST* 4-6 (1984).

<sup>5</sup> These powers were outlined by legal counsel representing Saudi Arabia against ARAMCO in the 1958 Arbitration. Asherman, *supra* note 3, at 327.

<sup>6</sup> Historically, the most successful Muslim governments have been those that were able to work most effectively with the religious establishment, thereby maintaining a sense among the populace that the state was being governed according to religious prin-

The administration of justice is divided between the Shari'a courts and governmental boards. The former are the only courts of original jurisdiction, but cases that turn primarily on the interpretation of supplemental regulatory statutes rather than Shari'a texts are usually referred to the appropriate governmental board for adjudication.<sup>7</sup> Cases headed by a governmental board include those where the Saudi government is a party as well as most commercial disputes between private parties where foreign parties are frequently involved. The governmental boards are bound to apply the Shari'a as well as the statutes, where appropriate. The statutes are intended to supplement rather than modify the Shari'a, and are at least theoretically subordinate to it in cases of conflict. The boards are made up of both Shari'a court judges and representatives of government ministries. The Board of Grievances (Diwan al-Mazalim) and the Committee for Settlement of Commercial Disputes (CSCD)<sup>8</sup> are the most important boards for litigation involving a

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principles. The Saudi ruling family has been very effective at integrating the 'Ulamā into the decisionmaking process in order to insure political stability while still maintaining a slow but steady pace of change.

<sup>7</sup> The statutes are intended to supplement rather than modify the Shari'a, and are at least theoretically subordinate to it in cases of conflict. However, there is no record of a statute being struck down by a court because of incompatibility with the Shari'a. Occasionally the government will seek a fatwa, or legal opinion, from the 'Ulamā regarding the conformity of a proposed statute to Shari'a principles. Where a statute is ambiguous, the law consulted by the courts is, of course, the Shari'a. As a practical matter, the proper application of medieval Shari'a doctrines to modern commercial transactions is often highly debatable, and this allows the government to claim considerable freedom of action with regard to commercial legislation.

Nevertheless, the influence of the Shari'a should not be underestimated by anyone doing business in Saudi Arabia. A recent example of increased Shari'a influence involves interest-bearing obligations to banks. Although agreements to pay interest are contrary to the Shari'a and thus unenforceable, Saudi courts and administrative bodies have in the past not looked too closely at transactions where an obligation to pay interest was not obviously apparent. A recent change of policy has led judicial authorities to place on plaintiffs the obligation of proving that promissory notes represent a repayment of principal, rather than interest, in whole or in part. Renton, *Saudi Arabia/The Settlement of Banking Disputes: Major Developments*, MIDDLE E. EXECUTIVE REP., Feb. 1986, at 9, 24-25.

Moreover, Shari'a court judges reportedly have some degree of discretion as to whether or not to refer a case to a governmental board, leaving some uncertainty as to what tribunal will decide a particular case. See Vogel, *Saudi Arabia/Decision No. 822 On Banking Deposits: An Analysis*, MIDDLE E. EXECUTIVE REP., Apr. 1986, at 9, 21.

<sup>8</sup> The Board of Grievances (Diwan al-Mazalim), established in 1955, has jurisdiction over all disputes in which the Saudi Government or a governmental agency is a party. The Committee for Settlement of Commercial Disputes (CSCD) has had jurisdiction since 1967 over disputes involving companies organized under the Saudi Companies Law. The CSCD consists of three judges, two of whom are Shari'a court judges, the third being a legal advisor to the Ministry of Commerce. Most commercial disputes between private parties are now decided either by the CSCD or some more specialized government board, such as the Commercial Papers Committee, which deals with disputes regarding negotiable instruments, or the legal committee established this year by

foreign business.

Judges of both the Sharī'a courts and the governmental boards have a reputation for fairness and impartiality.<sup>9</sup> However, there is a serious backlog of cases, aggravated by a lack of sophisticated administrative support, as well as a lack of experience with complicated international transactions.<sup>10</sup> In general, the legal system has not kept pace with the modernization process. As a result, foreigners complain that sophisticated financing is difficult if not impossible and that the security of funds, goods, or technology advanced to a Saudi entity is inadequate.<sup>11</sup> For example, there are no clear definitions of liability for or enforceability of insurance or maintenance obligations, patents or copyrights. Moreover, there is no clear right to repossess goods if a buyer or lessee defaults; in fact, enforcement is still partly dependent on who the debtor is.<sup>12</sup> These problems have galvanized the search for an alternative means of dispute resolution.

## 2.2. Arbitration and Saudi Arabia

From the early days of oil exploration until the 1950s arbitration was the primary means of resolving disputes between Saudi and foreign companies.<sup>13</sup> However, the Saudi government's attitude toward arbitration changed dramatically after the famous *ARAMCO* arbitration of 1958.<sup>14</sup> As a result of its dissatisfaction with the decision in that case,

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the Ministry of Commerce for settlement of disputes between banks and their customers. S. SOLAIM, *supra* note 3, at 133-41; Renton, *supra* note 7, at 25 n.1.

<sup>9</sup> Cf. S. SOLAIM, *supra* note 3, at 134-36, 140-41; Comment, *supra* note 3, at 441-42.

<sup>10</sup> Hejailan, *National Reports: Saudi Arabia*, IV Y.B. COM. ARB. 162, 169 (1979).

<sup>11</sup> Saba, *supra* note 2, at 18-19.

<sup>12</sup> See *id.*

<sup>13</sup> For commentary on the arbitration climate in Saudi Arabia prior to 1983, see generally A. LERRICK & Q. MIAN, *SAUDI BUSINESS AND LABOR LAW* (1982); S. SALEH, *supra* note 4, at 290-326; Hejailan, *supra* note 10, at 162-73.

<sup>14</sup> The dispute resulted from a 1954 agreement between Saudi Arabia and Greek shipping magnate Aristotle Onassis, under which Onassis was granted a quasi-monopoly to transport oil out of Saudi Arabia. ARAMCO refused to comply with the Onassis agreement, asserting that it had an absolute right under its 1933 concession agreement with Saudi Arabia to choose the means for transportation of oil. ARAMCO's position was upheld by an arbitral tribunal meeting in Geneva, which applied both Saudi and international law. The Saudi government's dissatisfaction with the award cannot be adequately explained merely by the fact that it lost, since the Onassis agreement was not really very advantageous for Saudi Arabia. The dissatisfaction can perhaps be better explained by more general Saudi concerns over the ability and willingness of foreign arbitrators to apply Saudi law to disputes involving Saudi Arabia's most important natural resource. In any event, Saudi law since the ARAMCO award has been hostile to arbitration outside of Saudi Arabia or under non-Saudi law. See *State of Saudi Arabia v. Arabian Am. Oil Co.*, *reprinted in* 27 I.L.R. 117; Van den Berg, *National*

the Saudi government in 1963 forbade all government agencies from resorting to arbitration without prior approval from the Council of Ministers.<sup>15</sup> This policy remains in effect today despite the 1980 Saudi ratification of the International Convention for Settlement of Investment Disputes between States and Citizens of Another State (ICSID), which provides for arbitration under the auspices of the World Bank.<sup>16</sup> An ICSID arbitration clause has never been approved by the Council of Ministers.<sup>17</sup>

Commercial arbitration was not governed by a comprehensive set of rules until 1983.<sup>18</sup> As a result of this lack of clear procedures and judicial support, arbitration between private parties has been sporadic. For example, arbitration rules agreed on by the parties in advance were not enforced and it was unclear how awards were to be enforced, espe-

*Reports: Saudi Arabia*, 9 Y.B. COM. ARB. 7, 15 (1984).

<sup>15</sup> A 1963 Council of Ministers resolution forbade government agencies from (1) designating any foreign law to govern their relations with contracting parties; (2) accepting arbitration (anywhere) as a method of settling disputes; or (3) accepting the jurisdiction of any foreign court or other judicial body to the exclusion of the Saudi Grievance Board. Council of Ministers Resolution No. 58 of June 25, 1963, *reprinted in* Van den Berg, *supra* note 14, at 15 [hereinafter Resolution]. For a discussion of Resolution No. 58, see Hejailan, *supra* note 10, at 163.

<sup>16</sup> The Saudi government ratified the ICSID Convention on June 7, 1980. Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature*, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6690, 575 U.N.T.S. 160; see Van den Berg, *supra* note 14, at 15; see also Chaudhri & Clodfelter, *Saudi Arabia: Commercial Arbitration in the Kingdom*, MIDDLE E. EXECUTIVE REP., July 1985, at 9.

<sup>17</sup> Saudi ratification of ICSID "reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty" for arbitration or conciliation under ICSID. See A. LERRICK & Q. MIAN, *supra* note 13, at 181-82. In recent contract negotiations, Saudi officials refused even to discuss including an ICSID arbitration clause. Saba, *supra* note 2, at 19; see also Chaudhri & Clodfelter, *supra* note 16, at 20.

Saudi Arabia is not a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, *acceded to with reservations by* United States, Sept. 1, 1970, 17 U.S.T. 1270, T.I.A.S. No. 6690, 575 U.N.T.S. 38. It is, however, party to the 1952 Inter-Arab Convention on Enforcement of Judgments and Awards. *Convention of the Arab League of Nations Concerning the Enforcement of Judgments*, Sept. 15, 1952, *English translation in* 1952 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 333-35. This latter convention has only six signatories and has not been utilized much in practice. See S. SALEH, *supra* note 4, at 418-21.

<sup>18</sup> The Saudi Arabia Commercial Court Regulation contained a few limited rules on arbitration, allowing the court to confirm the appointment of arbitrators (but not to appoint arbitrators should a party fail to do so) and requiring the court to review the award prior to enforcement. Saudi Arabia Commercial Court Regulation, *issued under* Royal Decree M/32 of 1/15/1350 A.H. (1931 A.D.). These rules did not recognize the validity of an agreement to submit future disputes arising from a specific contract to arbitration. *Id.* The rules were formally repealed in 1983, but had been seldom utilized for some time prior.

cially if they were rendered outside of Saudi Arabia.<sup>19</sup> These problems were counterbalanced to some degree by the strong support for arbitration in the Saudi business community, whose members voluntarily complied with most arbitration awards. Nonetheless, foreign companies and their legal counsel were unhappy with the uncertain legal status of arbitration. The Saudi government was dissatisfied also because arbitrations were frequently conducted under foreign rules both inside and outside of Saudi Arabia.<sup>20</sup>

### 3. THE ARBITRATION REGULATION OF 1983

The Arbitration Regulation of 1983 ("the Regulation") serves two important objectives of the Saudi government.<sup>21</sup> First, it provides a

<sup>19</sup> Awards rendered outside Saudi Arabia are still notoriously difficult to enforce in Saudi Arabia. Saba, *supra* note 2, at 19. Foreign awards must be embodied in a foreign judgment and even then are subjected to a *de novo* review procedure by the Saudi government and/or a Saudi court of competent jurisdiction, which will apply Saudi law to the substance of the dispute and perhaps review factual determinations as well before enforcement is possible. Naturally, such procedures negate many of the advantages of international arbitration.

Nonetheless, the arbitration facilities of the International Chamber of Commerce (ICC) have been utilized on more than 30 occasions since 1975 to settle business disputes involving Saudi parties. Disputes submitted to arbitration under the auspices of the ICC or other international bodies have usually been settled by the parties or resulted in awards that were enforced voluntarily or enforced in countries other than Saudi Arabia. See W. CRAIG, W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (1984); A. LERRICK & Q. MIAN, *supra* note 13, at 197-99.

Aside from the enforcement problem, other aspects of ICC arbitration are unsatisfactory to both Saudi and foreign businesspeople. ICC procedures have been criticized as procedurally cumbersome, time consuming, expensive, and overly confrontational. Saba, *supra* note 2, at 19. For an overview and "horror stories" regarding ICC and international arbitration, see Goekjian, *ICC Arbitration From a Practitioner's Perspective*, 14 J. INT'L L. & ECON. 407 (1980); Kerr, *International Arbitration Litigation*, 1980 J.BUS.L. 164, 172; Layton, *Commentary of International Arbitration as a Dispute Settlement Vehicle*, MIDDLE E. EXECUTIVE REP., Mar. 1984, at 26; Layton, *Is International Arbitration a Viable Option for Middle East Disputes*, MIDDLE E. EXECUTIVE REP., June 1983, at 14, 15; see also Flower, Killian, Northrup & Range, *A Survey of Arbitral Forums: Their Significance and Procedure*, 5 N.C.J. INT'L L. & COM. REG. 219 (1980) [hereinafter Flower & Killian]; Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 J. INT'L L. & ECON. 407 (1980).

From the Saudi perspective, the ICC is viewed as a Western-oriented institution insufficiently sensitive to Arab legal and business traditions. The Saudi government is disturbed by the fact that non-Saudi law is frequently applied in ICC arbitrations to resolve disputes arising in Saudi Arabia out of relationships created and regulated by Saudi law. See N. ANGELL, *PROCEEDINGS OF SYMPOSIUM ON U.S.-ARAB COMMERCIAL ARBITRATION AND CONCILIATION* 8-12 (1984); A. LERRICK & Q. MIAN, *supra* note 13, at 197-99.

<sup>20</sup> See N. ANGELL, *supra* note 19, at 8-12; A. LERRICK & Q. MIAN, *supra* note 13, at 197-99.

<sup>21</sup> Saudi Arabia Regulation on Arbitration, issued under Royal Decree M/46 of 7/12/1403 A.H. (Apr. 25, 1983 A.D.), reprinted in 9 Y.B. COM. ARB. 316-18 (1984)

comprehensive, uniform set of rules which are accessible to foreign businesspersons and their legal counsel. The Regulation is designed to allay their fears over the previous lack of judicial and legislative support for commercial arbitration.<sup>22</sup> Second, it establishes governmental control not only over arbitration procedure in general, but over the actual arbitration proceedings by providing for supervision by governmental agencies, courts, or perhaps the Chambers of Commerce and Industry<sup>23</sup> ("the Chambers").

The extensive supervisory role played by the "Authority originally competent to hear the dispute" ("the Authority") is perhaps the feature which differentiates the Regulation from arbitration laws in other countries.<sup>24</sup> The Authority would presumably be the CSCD in most commercial disputes;<sup>25</sup> the Grievance Board in disputes with a government agency that has received permission to arbitrate;<sup>26</sup> or the competent Shari'a court in a case involving real estate.<sup>27</sup> Representatives of the Chambers, which promulgated their own arbitration rules in 1980, argue that their organization also should be considered the Authority in appropriate cases.<sup>28</sup> The Saudi government has not officially commented on the legal status of arbitration under the auspices of the Chambers since issuing the Regulation.

Three aspects of the procedure established by the Regulation have

(implementing rules issued by Council of Ministers Resolution No. 7 of 8/9/1405 A.H. (May 27, 1985)) [hereinafter Royal Decree M/46]; see also S. SALEH, *supra* note 4, at 4-6; Allam, *Saudi Arabia/Arbitration in the Kingdom: The New Implementation Rules*, MIDDLE E. EXECUTIVE REP., Aug. 1985, at 9; Van den Berg, *supra* note 14, at 7-36. Translations of the Regulation and Rules are also appended to this article.

<sup>22</sup> See Allam, *supra* note 21, at 9; Chaudhri & Clodfelter, *supra* note 16, at 9.

<sup>23</sup> Royal Decree M/46, *supra* note 21, ch. 1, §§ 1-10; see also Allam, *supra* note 16, at 17.

<sup>24</sup> "It distinguishes the Saudi Regulations from the arbitration regulations of most other countries which seek to set up an entirely self-contained alternative to the usual recourse to the courts of a particular country." Allam, *supra* note 21, at 17. "Such ongoing involvement of a court is, of course, quite different from arbitral supervision in other countries such as France." Chaudhri & Clodfelter, *supra* note 16, at 21.

<sup>25</sup> The CSCD is the presumed authority in this case, although it can be argued that this is not the sole Authority. As a matter of legal theory, it can be argued that the Chambers of Commerce and Industry can be considered the Authority. Allam, *supra* note 21, at 17.

<sup>26</sup> *Id.*

<sup>27</sup> Articles 5 and 6 of the Arbitration Regulation require that an "arbitration instrument" be filed with the appropriate Saudi Court. Royal Decree M/46, *supra* note 21. Where a case is not covered by statutory or contractual provisions, Shari'a procedural and substantive laws apply to commercial contractual relationships. Chaudhri & Clodfelter, *supra* note 16, at 20-21.

<sup>28</sup> Royal Decree M/6 of 4/22/1400 A.H. (Mar. 9, 1980 A.D.); see S. SALEH, *supra* note 4, at 295-96; Allam, *supra* note 21, at 18-19.

caused particular concern among foreign commentators.<sup>29</sup> First, while the Regulation recognizes the validity of a contractual clause calling for arbitration of future disputes, it is not clear how such a clause is to be enforced if one party refuses to cooperate when a dispute arises. Second, commentators are unsure about the extent to which Saudi law must be applied to the substance of the dispute. Third, the Regulation does not specify the grounds on which the Authority may set aside or refuse to execute an award.

### 3.1. *Enforceability of Arbitration Clauses*

The Regulation provides for two types of arbitration agreements: parties may agree either “to arbitrate a specific existing dispute” or to make a “prior agreement to arbitrate . . . any dispute resulting from the performance of a specific contract.”<sup>30</sup> This recognition of the validity of an arbitration clause is confirmed in the Rules of Implementation (“the Rules”).<sup>31</sup> The binding effect of an arbitration clause is called into question, by the requirement that the parties file an arbitration “document” or “instrument” (*wathīqat al-tahkīm*) with the Authority for validation when a dispute arises.<sup>32</sup> This instrument must contain the names of the arbitrator(s) and their acceptance to hear the dispute and details of the dispute itself, and it must be signed by both parties.<sup>33</sup>

It is unclear, however, what happens if a party, having agreed in advance to arbitration of any disputes arising from a specific contract, refuses to cooperate in the preparation of an arbitration instrument when a dispute actually arises. Commentators on the Regulation and Rules conclude — from the requirement that disputes subject either to an arbitration clause (future disputes) or an arbitration instrument—dealing with a specific existing dispute “be heard only according to the provisions of this Regulation,” and from other Articles which link various time limits and other events, including the issuance of the award, to the arbitration instrument — that an arbitration instrument is obligatory in all cases.<sup>34</sup> The Rules appear to confirm the obligatory nature of an arbitration instrument, distinguishing between an agreement to arbitrate future disputes (arbitration clause) and the appointment of arbitrators, which “shall be completed by agreement between the disputing parties in an arbitration instrument which shall suffi-

<sup>29</sup> See *infra* notes 30-53 and accompanying text.

<sup>30</sup> Royal Decree M/46, *supra* note 21, art. 1.

<sup>31</sup> *Id.* rules of implementation § 6.

<sup>32</sup> *Id.* art. 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* arts. 7, 9, 11, 17, 22.



ciently outline the dispute and the names of the arbitrators.”<sup>35</sup> Commentators have reached different conclusions regarding the legal effect, by itself, of an agreement to arbitrate future disputes.<sup>36</sup>

Additional confusion is created by the Rules, which state that an arbitration panel may render a default judgment if one party does not appear at the first hearing, “as long as the respective parties have filed their statements of claim, defenses and documentation.”<sup>37</sup> If a party has not cooperated in any stage of the proceedings, including the filing of such statements, it is unclear whether a default judgment can still be issued.

This apparent confusion in drafting must be taken seriously by the Western business community in light of the unenforceability of arbitration clauses under prior Saudi law and the serious questions concerning the validity of agreements to arbitrate future disputes under the Shari‘a. At the very least, it is safe to conclude that there is enough ambiguity in the statute to create opportunities for a party to delay the proceedings. The Rules state that the Authority “shall issue a decision for approval of the arbitration instrument within fifteen days.”<sup>38</sup> However, the Rules do not state any consequences if the Authority fails to respect this time limit, which seems unreasonable (and probably inapplicable) if the arbitration instrument does not contain all the information required. Assuming the Authority would have power to appoint an

<sup>35</sup> *Id.* rules of implementation § 6.

<sup>36</sup> One commentator takes the view that there can be no arbitration on the basis of an arbitration law, where an arbitration clause is merely a promise to agree to submit any future dispute to arbitration, although it does have the effect of staying judicial proceedings. Courts in Lebanon can order a party to sign a submission agreement, and, if the party refuses, can render judgment on the merits in favor of the other party. No such sanctions are available in the Regulation, leading the commentator to term the recognition of arbitration clauses in Article 1 “rather platonic,” and to argue that it cannot be said with certainty to constitute more than a definition of an arbitration clause. S. SALEH, *supra* note 4, at 304-07.

Other commentators argue that provisions of Article 10 stating “[i]f the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s) . . . the Authority . . . shall appoint the required arbitrators upon request of the party who is interested in expediting the arbitration” would be meaningless except in the context of an enforceable arbitration clause, since an arbitration instrument would include the appointment of arbitrators and their acceptance to serve. Van den Berg, *supra* note 14, at 11-12.

Still another commentator suggests, on the basis of “informal conversations” with Saudi government officials, that the proper procedure when a party has signed an arbitration clause, but refuses to sign an arbitration instrument, would be for the other party to submit an arbitration instrument containing as much as possible of the information required in Article 5, coupled with a request that the Authority exercise its Article 10 power to appoint any missing arbitrators and that it validate the arbitration instrument at the same time. Allam, *supra* note 21, at 16, 18 n.10.

<sup>37</sup> Royal Decree M/46, *supra* note 21, rules of implementation § 18.

<sup>38</sup> *Id.* § 7.

arbitrator in such a case, the Authority would be required to provide notice and a hearing on the appointment of arbitrators.<sup>39</sup> The party seeking to avoid arbitration would then have a chance to present arguments regarding the validity of the arbitration clause and its applicability to the dispute in question, and possibly to haggle over various aspects of the arbitration instrument, such as the "details" of the dispute.<sup>40</sup>

### 3.2. *Applicable Law*

The Regulation and Rules contain numerous features apparently designed to insure that arbitrators comply with the Shari'a and applicable Saudi statutes in deciding the merits of a case. The Rules specify that arbitrators must be Muslim, though they need not be Saudi nationals.<sup>41</sup> The arbitrators are expected to issue an award that is valid and enforceable under "provisions of the Islamic Shari'a and applicable regulations."<sup>42</sup> The Authority acts as secretary to the arbitration panel, handling all "notifications and notices," and is thus in a position to monitor the proceedings.<sup>43</sup> Arbitrators' fees not paid by the parties to the arbitrators within five days of approval of the arbitration instrument are to be paid to the Authority and held in escrow. The fees are then payable to the arbitrators only after the Authority issues an order for execution of the award.<sup>44</sup> This arrangement in itself would seem to be a strong incentive for arbitrators to make sure that awards comply strictly with Saudi substantive law so that the Authority's review of the award will not be unduly prolonged.

One commentator suggests that foreign legal principles might be applied as long as they are not contrary to Saudi public policy as expressed in provisions of the Shari'a and the statutes.<sup>45</sup> In light of the aforementioned provisions of the Regulation and Rules and the diffi-

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<sup>39</sup> Royal Decree M/46, *supra* note 21, art. 10.

<sup>40</sup> Provided there is an arbitration clause that appears valid on its face, most arbitration rules in widespread use internationally leave more detailed inquiry into the arbitration clause's validity and applicability, as well as the drafting of terms of reference (details of the dispute), to the arbitrators, with possibility of review by a court or supervisory body after the award is rendered. *See generally* Flower & Killian, *supra* note 19 (comparison of arbitral forums).

<sup>41</sup> Royal Decree M/46, *supra* note 21, rules of implementation § 3; *see also* Allam, *supra* note 21, at 9, 18 n.3 (theorizing that the government employee need not be Muslim, though the need for knowledge of Shari'a would make such a situation unlikely to occur).

<sup>42</sup> Royal Decree M/46, *supra* note 21, rules of implementation § 39.

<sup>43</sup> *Id.* art. 8.

<sup>44</sup> *Id.* art. 22.

<sup>45</sup> Allam, *supra* note 21, at 9, 15-16.

culty of determining what does or does not constitute “public policy” in any legal system, it would seem risky for an arbitrator to disregard a provision of the Shari‘a or the statutes on the basis that such a provision does not rise to the level of public policy. Public policy is not a term used anywhere in the Regulation or Rules.

Possible intervention by the Authority after arbitration proceedings have begun could occur for the purpose of replacing arbitrators or hearing challenges to arbitrators.<sup>46</sup> Under the Rules, preliminary issues involving matters outside the jurisdiction of the arbitration panel, including, but apparently not limited to, allegations of forgery or other criminal wrongdoing, require that arbitration proceedings be suspended pending final decision on the issue by “the concerned authority.”<sup>47</sup>

### 3.3. *Enforceability of the Award*

Once an award is rendered, the Authority is required to hear any objection against it;<sup>48</sup> however, even if there is no objection to the award, the Regulation still prevents the Authority from issuing an enforcement order before confirming “that there is nothing to prevent [the award’s] execution legally.”<sup>49</sup> The word “legally” is a translation of the Arabic *shar‘an*, which means literally, “according to the Shari‘a.” There is nothing in the Regulation or Rules to limit the scope of review by the Authority. It is not clear whether any subsequent appeal to a higher authority could be made if an objection were dismissed by the authority with original jurisdiction. However, if the Authority is the CSCD, a judgment would normally be appealable to the Ministry of Commerce.<sup>50</sup> This procedure is in marked contrast to the arbitration laws of other countries that limit the grounds on which a court can deny execution of an arbitral award.<sup>51</sup> Such grounds normally include

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<sup>46</sup> Royal Decree M/46, *supra* note 21, arts. 10, 12.

<sup>47</sup> *Id.* rules of implementation § 37.

<sup>48</sup> *Id.* art. 19.

<sup>49</sup> *Id.* art. 20.

<sup>50</sup> See Allam, *supra* note 21, at 17 (discussing whether any organization other than CSCD could constitute the Authority). One can usually file an appeal of a CSCD decision with the Minister of Commerce, but it is unclear whether such a procedure is also available for one objecting to a decision by the Authority. See *id.* at 19 n.19 (“[T]he Regulations seek to establish a homogeneous and essentially independent set of Arbitration Regulations and the CSCD is acting itself in an appellate capacity. It may then be argued that such appeal to the Minister of Commerce is not available since it is not specifically mentioned in the Regulations.”); see also Van den Berg, *supra* note 14, at 32.

<sup>51</sup> See Van den Berg, *supra* note 14, at 33. For example, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, to which sixty-six nations (although not Saudi Arabia, see *supra* note 17) are contracting states, limits the grounds for refusal of enforcement of arbitral awards. New York Convention

lack of impartiality of the arbitrator; failure to give a party a fair hearing; an arbitrator exceeding his authority; a violation of some provision in a statute or in the parties' agreement concerning arbitration procedure or composition of the arbitral tribunal; or a violation of public policy.<sup>52</sup> Usually only one appeal is allowed from the award in other countries.<sup>53</sup>

#### 4. ARBITRATION AND TAHKĪM

As noted above, problems in the arbitration process include: the ambiguities in the Regulation and Rules regarding the binding effect of arbitration clauses, the law that may be applied to the substance of the dispute, and the difference in the scope of judicial review of arbitration between the West and the Muslim jurists' interpretation of what they called tahkīm. The following sections discuss why binding arbitration clauses, choice of law by the parties, and limited judicial review of awards are central to the Western concept of arbitration and to the usefulness of arbitration in resolving international business disputes. They then discuss why these three characteristics may be problematic for a Muslim jurist. Reference will be made first to the early history of Islam and the primary sources of the Sharī'a (the Qur'ān, or revealed word of God, and the Sunna, or practice of the Prophet Muhammad) and second to the derived sources of the Sharī'a (Qiyās, or analogy to the revealed sources, and Ijmā', or consensus of legal scholars of the past regarding points of law).

##### 4.1. *Arbitration in the Western Legal Tradition*

Arbitration in the West has always been a parallel system of justice operating outside of the existing court system and its rules of substantive and procedural law.<sup>54</sup> Aristotle emphasized this distinction very early: "Parties may prefer arbitration rather than a judicial action, for an arbitrator will look at equity, whilst a court has to consider the law."<sup>55</sup> To fill this equitable role effectively, arbitration had to be insulated from undue interference by the courts, even where court coopera-

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on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, para. 2, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

<sup>52</sup> Van den Berg, *supra* note 14, at 33.

<sup>53</sup> Cf. Van den Berg, *supra* note 14, at 33 (referring to the stated grounds of appeal of other countries, and remarking that these countries do not review the merits of an arbitral award).

<sup>54</sup> See R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 13 (1985). For historical data and general observations about national law in the West, see generally *id.*

<sup>55</sup> See *id.* at 19 (quoting Aristotle).

tion was needed to insure enforcement of arbitral decisions.<sup>56</sup>

Roman law insulated arbitration from court interference by confining it to the realm of contract law and prohibiting court review in most cases.<sup>57</sup> Late medieval jurists recognized that minimal court review of awards was necessary and they severely restricted its scope.<sup>58</sup> Judges were not permitted to overturn an arbitrator's decision merely because it was contrary to law (*injusta*) but only if it was contrary to equity (*iniqua*), that is, unacceptable to an honest, reasonable person, such that it would be contrary to good faith to accept it.<sup>59</sup>

Although the ancient distinctions between law and equity are no longer of much practical significance, there has been a continuing need for dispute resolution procedures that are more flexible and more closely attuned to business needs than those applied by national courts. The business community today uses arbitration for a variety of reasons

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<sup>56</sup> See Van den Berg, *supra* note 14, at 33 ("In the majority of other countries a court will not review the merits of an award as arbitration is conceived as a contractual substitute for litigation. Where parties have expressed the will that their dispute be solved by arbitration instead of the courts, such will should be honoured by the courts.").

<sup>57</sup> R. DAVID, *supra* note 54, at 85. Under Roman Law, a dispute could be submitted to arbitration by a separate agreement, not included in a larger contract. Such an agreement (arbitration *ex compromisso*) would not be specifically enforced by the courts because it was not one of the contractual forms recognized by law. Courts would, however, enforce an agreement stating that a party who refused to submit to arbitration or refused to comply with the *arbiter's* decision would pay the other party a penalty (*poena*). The enforcement of such a penalty did not entail any ruling as to whether or not the *arbiter's* decision was in compliance with the law. Another type of arbitration agreement could be included as a term in a contract. In this way, parties to certain "consensual" contracts in which a particularly strong duty of good faith (*bona fides*) was imposed, could agree to remit the determination of certain clauses in the contract to an *arbitrator*. Known as arbitration *boni viri*, this method could be used, for example, to determine the sum due a partner in a partnership. Decisions reached through this type of arbitration would be specifically enforced by a judge, even if contrary to law. Enforcement would be refused only if the decision was manifestly unjust, that is, if the arbitrator had not acted in good faith. See *id.* at 84-85.

<sup>58</sup> Both types of arbitration known to Roman law were revived in the Middle Ages. Arbitration *ex compromisso* in particular increasingly assumed the characteristics of judicial procedure. Certain towns, fairs, merchants' guilds, and corporations were granted charters that empowered them, among other things, to organize and administer their own justice. The tribunals thus established were called arbitral, even though they had compulsory jurisdiction over certain disputes, partly because parties had a limited ability to choose their own judges, but primarily because the tribunals did not apply the rules of local customary law; rather, they developed their own commercial law, the law merchant. *Id.* at 85-86. Arbitration *boni viri* attracted the interest of canon lawyers, who widened its scope of application by imposing a duty of "good faith" in all contractual relationships. The *arbitrator*, also known as an *amicabilis compositor*, was empowered at first only to propose a compromise solution acceptable to both parties. Later, however he was authorized to impose his decision. *Id.* at 86-87.

<sup>59</sup> *Id.* at 88.

that one author has recently summarized under four headings:<sup>60</sup>

(1) Arbitration is viewed as a means of improving the administration of justice by reducing the procedural formalism, delay, and cost inherent in litigation and allowing disputes to be decided by persons better informed than judges with regard both to commercial usages in general and to technical aspects of particular disputes.

(2) Arbitration is viewed as a means for developing rules of substantive law more appropriate to the needs of the business community than those applied by courts. The role of arbitration in developing an international law merchant is particularly stressed by some authors.<sup>61</sup>

(3) Arbitration may be an effective method of finding compromise solutions that take into account the interests of parties on both sides of a dispute, thus minimizing resentment and conflict and allowing business relationships to continue even in circumstances where the parties cannot agree to a solution of their dispute through conciliation, and where a court judgment might result in dissolution of the contractual relationship.

(4) Arbitration may be used to resolve disputes that do not fall within the jurisdiction of the courts. Arbitrators may be called upon to revise or modify long-term contracts or to fill gaps left intentionally or unintentionally by the parties, thus giving the contract more flexibility to adapt to changed circumstances that might otherwise result in rescission of the contract and an award of damages.

National legislation in countries influenced directly or indirectly by Roman law takes a variety of approaches in formulating rules that allow arbitration the flexibility to fulfill this wide range of roles while still permitting access to the courts for enforcement purposes. Civil law countries tend to maintain a distinction between two types of arbitration, allowing the parties to authorize their arbitrator to decide a dispute either in strict law or *ex aequo et bono*, in an equitable fashion.<sup>62</sup> Different standards of review may apply depending on which type of arbitration is chosen.<sup>63</sup> In common law countries, no such distinction is

<sup>60</sup> See *id.* at 10-27.

<sup>61</sup> See, e.g., Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526, 526-34 (1983). For an assessment of the impact of the international *lex mercatoria* doctrine, see Klein, *The Law to be Applied by the Arbitrators to the Substance of the Dispute*, in THE ART OF ARBITRATION 189-206 (J. Schultz & A. Van den Berg eds. 1982).

<sup>62</sup> This distinction in types of arbitration arises from Roman law. R. DAVID, *supra* note 54, at 87-88. For an explanation of how the distinction continues in French law, see *id.* at 84, 88-90. For a discussion of the distinction's function in Italian law, see *id.* at 92.

<sup>63</sup> See *id.* at 87 ("An amicable compositeur was not bound to decide in accordance with the law, since he was regarded, fundamentally, as a conciliator; but his decision

explicitly recognized.<sup>64</sup> However, courts will generally afford great deference to arbitral decisions, recognizing at least tacitly that businesspersons do not expect arbitrators to decide disputes in exactly the same way judges do. In the United States, for example:

arbitrators pay the greatest attention to the legal arguments developed before them, but they do not hesitate to depart from strict law if this is required by justice. In so doing they believe they are fulfilling the will of the parties: businessmen prefer the way in which facts are interpreted by arbitrators to the uncertainty which, in their opinion, is inherent in the methods of interpretation used by courts or juries who are ignorant of the problems and conventions of trade.<sup>65</sup>

When arbitration has been fettered by rules making it too similar to litigation, frequently an institutional change has taken place. In Italy, for example, "free" or "informal" arbitration (*arbitrato liberale*) has largely replaced arbitration in strict law which is governed by provisions of the Code of Civil Procedure.<sup>66</sup> In England, the Arbitration Act of 1979<sup>67</sup> severely limits the authority formerly possessed by the courts to review arbitration awards on their legal merits, at least where the dispute is of an international character. The Act was a response to the reluctance of many businessmen to choose England or English law for arbitration of complex international disputes.<sup>68</sup>

Judicial deference to the parties' choice of strict law or equity and deference to the decision of the arbitrator chosen by them, or at least

could be quashed if it were contrary to equity (*iniqua*). There was on the other hand a tendency to . . . consider . . . that an arbiter *ex compromisso* was bound to decide as a judge.")

<sup>64</sup> *Id.* at 107 ("whilst on the continent of Europe a distinction is made between the arbitrator at law and the amicable compositeur, such a distinction, regarding substantive law, is unknown in common law countries."). In socialist countries, as well as in England, only one type of arbitration exists. *Id.* at 124.

<sup>65</sup> *See id.* at 120. As one commentator has noted, "American businessmen believe that lawyers and judges are, after all, amateurs in the matter of commercial disputes. Lawyers and judges require evidence to be produced on matters which are regarded as self-evident by a tradesman, they search for a fictive intention and reason on the assumption that contracting parties have had principally in mind what would happen if the contract were not duly performed. It is probably better to have a judicial mind than to be a kleptomaniac or an habitual drunkard, but this probably brings more trouble to other people, even if such a turn of mind causes much joy to the man who has it." Tausch, *Extrajudicial Settlement of Controversies: The Business Man's Opinion*, 83 U. PA. L. REV. 147, 150 nn. 6-9 (1934).

<sup>66</sup> *See* R. DAVID, *supra* note 54, at 92-97, 106.

<sup>67</sup> Arbitration Act, 1979, 2 Eliz. ch. 2.

<sup>68</sup> *See* Klein, *supra* note 61, at 198; Clark & Lange, *Recent Changes in English Arbitration Practice Widen Opportunities For More Effective International Arbitrations*, 35 BUS. LAW. 1621 (1980).

according to the terms of their agreement, are thus hallmarks of arbitration in Western countries. A third aspect of arbitration, namely, the enforceability of agreements to submit *future* disputes regarding a specific contract to arbitration rather than simply specific *existing* disputes has also gained wide acceptance since the nineteenth century. It is these aspects of arbitration that allow the flexibility necessary to assure sufficient sensitivity to the varying needs of business and the expectations of the parties, while still insuring that arbitration can result in firm and swift decisions. Arbitration thus resembles both conciliation and litigation, while not being identical to either one.

#### 4.2. *Tahkīm in the Qur'ān and the Sunna*<sup>69</sup>

The history of tahkīm in Islam took a markedly different course from the history of arbitration in the West. In the fragmented, tribal society of pre-Islamic Arabia, tahkīm, unlike arbitration, was not an alternative to an established judicial system. Rather, it was the only means of dispute resolution short of war if direct negotiation and mediation failed to achieve a settlement.<sup>70</sup> Hakams, or arbitrators, were therefore persons of considerable importance, although they did not hold any political power as a rule.<sup>71</sup> Most hakams were kāhins, or soothsayers, whose opinions would invoke the appropriate deities and would be couched in terms indicating they were revelations from heaven.<sup>72</sup> The general belief that hakams were divinely inspired was extremely important in bringing pressure to bear on the parties to submit disputes to tahkīm and to abide by the awards rendered.<sup>73</sup>

The hakams, therefore, represented a threat to the prophet Muhammad on two levels. First, they were rival expositors of the Sunna, or customary law, which Muhammad hoped to reform and regularize in accordance with his new revelation.<sup>74</sup> Second, they claimed religious authority for themselves and their deities in competition with the one God, Allah, whom Muhammad preached.<sup>75</sup> Muhammad's task was to unify the Arabs both politically and religiously; to become

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<sup>69</sup> See N. COULSON, A HISTORY OF ISLAMIC LAW (1974); J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 6-22 (1964); E. TYAN, HISTOIRE DE L'ORGANISATION JUDICIAIRE EN PAYS DE L'ISLAM 27-82 (2d ed. 1960).

<sup>70</sup> See 1 LAW IN THE MIDDLE EAST 359, 367-70 (M. Khadduri & H. Liebesny eds. 1955) [hereinafter 1 LAW IN THE MIDDLE EAST].

<sup>71</sup> See *id.* at 29; see also J. SCHACHT, *supra* note 69, at 7.

<sup>72</sup> See 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 29; see also J. SCHACHT, *supra* note 69, at 7-8.

<sup>73</sup> See J. SCHACHT, *supra* note 69, at 8.

<sup>74</sup> See *id.* at 8; see also 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 30-31.

<sup>75</sup> See 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 30.



known, in a manner of speaking, as *the* hakam and *the* kāhin for a unified nation of Islam, the sole valid expositor of the Sunna and the sole recipient of divine revelation.

Thus, unlike the legal scholars of Rome and medieval Europe, Muhammad was not at all interested in developing a dispute resolution mechanism that was insulated from political control.<sup>76</sup> On the contrary, Muhammad needed to control the legal system and, through it, to control the development of the law itself.<sup>77</sup> The Qur'ān particularly stresses the importance of Muhammad being named hakam in disputes arising among the early Muslims and that the disputes would be decided in accordance with God's law as revealed to Muhammad.<sup>78</sup> The Qur'ānic injunction that believers should be judged "by what God has revealed" precluded the choice of any other law by the parties.<sup>79</sup>

Moreover, the very concept of a divinely-revealed law implied a large potential for error with respect to human judgments. Even the Prophet himself did not claim infallibility in this regard. A judgment was binding only insofar as it accorded with God's law.<sup>80</sup> It would be sinful for a Muslim to accept a judgment issued by another that he believed to be contrary to law.<sup>81</sup> Yet, as we have seen, the acceptance of judgments that may be contrary to law is a fundamental characteristic of what the Westerners call arbitration. Like choice of law, limited judicial review never became a part of the Muslim concept of tahkīm.<sup>82</sup>

It would be a mistake, however, to conclude that tahkīm lost all of its pre-Islamic characteristics after the rise of Islam, or that it took on all of the characteristics that a Western lawyer would associate with a regular court proceeding. Pre-Islamic tahkīm was a voluntary procedure that could be triggered only by the mutual consent of the parties to the dispute and by their agreement on a specific individual to act as

<sup>76</sup> See J. SCHACHT, *supra* note 69, at 10-12.

<sup>77</sup> See *id.*

<sup>78</sup> "Oh believers! Obey God and obey the Prophet and those among you who are in authority, and if you have a dispute over anything refer it to God and the Prophet if you believe in God and the last day. That is the best and fairest determination." QUR'ĀN IV:59.

"We have sent you down the Book with the truth that you [Muhammad] may judge between the people by what God has shown you." *Id.* IV:105.

"Judge between them by what God has revealed and follow not their vain desires." *Id.* V:49.

<sup>79</sup> The QUR'ĀN attacks the hakams precisely because they failed to apply the proper religious and legal principles: "Have you not seen that those who claim to believe what has been revealed to you and what has been revealed before you wish to go for judgment to false gods, having been ordered to abjure them?" *Id.* IV:60.

<sup>80</sup> See M. KHAN, ISLAMIC JURISPRUDENCE 6-9 (1978); see also J. SCHACHT, *supra* note 69, at 189.

<sup>81</sup> See M. KHAN, *supra* note 80.

<sup>82</sup> See 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 259-63.

hakam.<sup>83</sup> Muhammad did nothing to change this voluntary aspect of tahkīm.<sup>84</sup> He much preferred to resolve disputes by proposing an amicable settlement (sulh) rather than by imposing a judgment on an unwilling party.<sup>85</sup> A settlement was a far more likely result where the hakam was chosen by the parties than where he was imposed by some outside authority.<sup>86</sup> Early Islam, therefore, never developed a system for the outside appointment of arbitrators, which is essential to enforcement of any agreement to submit future disputes to arbitration.<sup>87</sup>

When the parties were unable to agree on a single person to act as

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<sup>83</sup> See, e.g., the account in SHAMS AL-DĪN AL-SARAKHSĪ (Hanafī school, d.1090 A.D.), 1 SHARH AL-SYAR AL-KABĪR 363-66 (Hyderabad 1335 A.H.), of a tahkīm between the early Muslims, led by Muhammad, and a Jewish tribe that the Muslims had besieged. This account is noteworthy because of the great stress placed on both parties' acceptance of the hakam. According to the account the Jews agreed to name Muhammad as hakam only on the condition that he refer the decision of the case to another Muslim named Sa'd Ibn Ma'adh who had once been an ally of the Jews. Despite initial agreement on this arrangement, the two parties nevertheless took solemn oaths, first appointing Muhammad as hakam, then appointing Sa'd in his place. Even after Sa'd rendered his decision, Muhammad formally ratified it, saying that it was in accordance with his own opinion. AL-SARAKHSĪ explains these procedures as follows:

This is evidence that if they submit to the judgment of a [certain] man and he refers judgment to a third person with their acceptance, then that is lawful. He should not refer judgment to a third person without their acceptance because Sa'd, between the arms of the Prophet (Peace be upon him), took from them the oath that they would accept [his judgment], and the Prophet (Peace be upon him) did not object to that. This is because people have differing opinions [regarding the law] and this is a judgment that requires an opinion. So their acceptance of the judgment of one person is not acceptance of the judgment of another, and if he refers judgment to some one else without their consent and he judges in a certain way, then that judgment should not be enforced unless the first *hakam* approves it after he learns of it. Then it should be enforced because his approval gives it the same status as if he made it [himself] and because the judgment was in accordance with his opinion and they had accepted that.

*Id.* at 366.

<sup>84</sup> See 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 30-31.

<sup>85</sup> Bukhārī's SAHĪH (an early collection of traditions) includes a report of a dispute between two landowners who used the same stream for irrigation. The plaintiff had the legal right to exclusive use of the stream. The Prophet nevertheless suggested a reconciliation whereby the defendant could have the use of any excess water not needed for irrigation of plaintiff's land. Only when the defendant refused this compromise solution did the prophet give judgment in accordance with plaintiff's legal right. 3 ABU 'ABDULLAH MUHAMMAD IBN ISMA'IL AL-BUKHĀRĪ, SAHĪH AL-BUKHĀRĪ bk. XLIX, no. 871 (M. Khan trans. 1979).

Sulh gets far more elaborate treatment than tahkīm both in the hadīth literature and in fiqh treatises that followed in later centuries. Bukhārī's SAHĪH devotes an entire chapter to sulh, which the Prophet apparently found a particularly appropriate method for resolving financial disputes. See *id.* no. 869, 873; see also *id.* no. 868.

<sup>86</sup> See 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 29.

<sup>87</sup> See generally M. KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 231-38 (1955) (discussing the rise and fall of arbitration in relation to the development of Islam).

hakam, the general practice in the early Islamic community was for each side to appoint one hakam.<sup>88</sup> The two appointed hakams had to agree on the final judgment. This was the practice used in the disastrous tahkīm that occurred twenty-seven years after Muhammad's death. The tahkīm was an attempt to end the civil war between 'Alī, the fourth Caliph, and his rival Mu'āwiya, the governor of Syria.<sup>89</sup> Accounts of this event also provide a good illustration of the other aspect of pre-Islamic tahkīm that has been discussed; the emphasis on strict law as contained in the Qur'ān and the Sunna which provide grounds to set aside a judgment.<sup>90</sup>

The dispute over the Caliphate was submitted to tahkīm by a written agreement appointing the two hakams. The agreement gave the hakams full power to settle the dispute, but it contained an important proviso; the decision had to be based on the Qur'ān and the Sunna.<sup>91</sup> The hakams agreed in private that both claimants be deposed and a new Caliph be chosen by popular election.<sup>92</sup> 'Alī's hakam announced the decision first, but when Mu'āwiya's hakam followed, he said he agreed that 'Alī should be deposed but affirmed Mu'āwiya's claim to the Caliphate.<sup>93</sup> 'Alī quickly condemned the decision, charging that the two hakams had "left the Qur'ān behind them . . . and that each one had followed his own opinion without [taking into consideration] a standard. Their decision [therefore] has no ground of evidence or precedent; and [moreover] they have disagreed on their decision."<sup>94</sup>

Thus, all of the principal aspects of early Islamic tahkim combined to make the decision unenforceable. The requirement that the parties agree on the choice of a hakam and the general emphasis on compromise resulted in the appointment of two arbitrators, thereby reducing the chance of reaching a firm decision on the dispute. It also created an opportunity for Mu'āwiya's hakam to outwit 'Alī's hakam. The decision was easily rejected on grounds that the arbitrators did not comply with Sharī'a. The failure of this tahkīm caused innumerable difficulties for the early Muslim community; it lead indirectly, after

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<sup>88</sup> The only passage in the QUR'ĀN that refers to tahkīm by anyone except the Prophet himself, which is also the only passage that talks about tahkīm procedures, shows the purpose of tahkīm to be that of reaching a reconciliation between husband and wife: "If you fear a breach between the two, send a hakam from his family and a hakam from her family. If they wish a reconciliation, God will make them agree." QUR'ĀN IV:35.

<sup>89</sup> See M. KHADDURI, *supra* note 87, at 234-38.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 235.

<sup>92</sup> *Id.* at 236.

<sup>93</sup> *Id.* at 237.

<sup>94</sup> *Id.*

'Alī's assassination, to the great split between the followers of the Sunna and the followers of the Shī'a, or party of 'Alī.

Mu'āwīya went on to become the first Caliph of the new Umayyad dynasty which established a new system of justice featuring judges, or qādīs, with mandatory jurisdiction to hear disputes and the authority to enforce and execute their judgments.<sup>95</sup> The importance of *tahkīm* greatly declined as a result. Furthermore, as discussed in the next section,<sup>96</sup> the voluntary character of *tahkīm* increased because there was now an alternative method of submitting a dispute to the judgment of God and his Prophet.<sup>97</sup> The enforcement of decisions made by hakams became even more difficult, since they had to be reviewed by qādīs before being enforced.<sup>98</sup> Therefore, *tahkīm* became a very different institution from arbitration as it is known in the West.

#### 4.3. *Tahkīm in the Fully-Developed Islamic Legal System*<sup>99</sup>

In discussing the rules developed by the medieval scholars of *fiqh* (jurisprudence) regarding *tahkīm*, reference will be made to the doctrines of all four schools of law recognized by Sunnī, or orthodox, Islam.<sup>100</sup> Although the Hanbalī school is of primary importance in Saudi Arabia, there is a tendency there, as in other Muslim countries that apply the Sharī'a in whole or in part, for legislators and judges to choose the legal principles from the doctrines of all four schools considered most appropriate to contemporary circumstances.<sup>101</sup> A doctrine recognized by one of the schools would never be considered heretical or sinful by the other schools, even if they disagreed with it. Furthermore, in discussing *tahkīm*, scholars in each of the four schools tend to emphasize different aspects of the procedure, and thus it is really not possible to discuss *tahkīm* fully by referring to the doctrine of only one school. This section is intended to give the reader some sense of the range of source material available to the Saudi government for formulating arbitration rules that are consistent with the Sharī'a, broadly defined.

*Tahkīm* is not discussed at all in many of the medieval Sharī'a treatises. Where it is discussed, it is usually allotted only a short section

<sup>95</sup> See *id.* at 242; see also J. SCHACHT, *supra* note 69, at 188-91.

<sup>96</sup> See *infra* notes 115-19 and accompanying text.

<sup>97</sup> See J. SCHACHT, *supra* note 69, at 10-11, 24-27.

<sup>98</sup> See *id.* at 189.

<sup>99</sup> For an excellent, detailed account of *tahkīm* in the fully developed Sharī'a system, see generally S. SALEH, *supra* note 4.

<sup>100</sup> See *supra* note 4.

<sup>101</sup> See *infra* notes 133-37 and accompanying text.

in the chapter on judicial procedure (Al-Qadā'). Although authors frequently drew analogies between tahkīm and contract law, especially the law of agency (wikāla), tahkīm was not classified as part of the law of contract.<sup>102</sup> Sharī'a scholars were very careful not to compromise or modify either contractual or procedural doctrines in their discussion of tahkīm. The agreement to submit a dispute to tahkīm had to follow the same rules as an agency contract. The decision of a hakam had to measure up to the same standards as a qādī's judgment. The result was a procedure which looks to a Western lawyer like conciliation up to a certain point, where it then begins to resemble litigation.

The process commenced with the appointment of an arbitrator (hakam or muhakkam) by the parties to an existing dispute. Agreements to arbitrate future disputes regarding a specified contract were unknown in the Middle Ages and thus are not discussed in the Sharī'a texts. In the Shāfi'i, Hanafī, and Hanbalī schools, the appointment of the hakam could be revoked by either party to the dispute or by the hakam himself at any time up until he announced his decision.<sup>103</sup> According to Mālikī texts, the hakam's appointment was irrevocable from the time he was appointed.<sup>104</sup> None of the schools recognized any power in a third party, not even a qādī, to appoint a hakam who was not accepted by both parties. Thus, even in the Mālikī school, a hakam who died or otherwise became unable or unfit to serve after being appointed could not be replaced except by mutual agreement of the

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<sup>102</sup> Agency, like other contracts recognized by the Sharī'a, was governed by its own specific rules that the parties had only a limited ability to modify. Agency and partnership contracts created a special type of relationship that was neither binding (lāzim) nor void (bātil) but merely permissible (jā'iz). This meant that both parties had a unilateral right to withdraw from the contract whenever they wished. In the Gulf states, this aspect of agency agreements has created difficulties for foreigners doing business in the area, who are often required to have a local agent (wakīl). If the agent withdraws, the foreign principal cannot legally continue to do business. Applied to tahkīm, the analogy with agency meant that the hakam, as agent of both parties, had jurisdiction only so long as the parties agreed that he did, and so long as he himself agreed to serve. Like any other agent, when he transacted the business that he was hired to transact, in this case the rendering of a judgment that settled the dispute between the parties, his action was binding on his principal(s) if they had not revoked the agency agreement. See N. COULSON, *COMMERCIAL LAW IN GULF STATES: THE ISLAMIC LEGAL TRADITION* 76-82 (1984). The analogy between tahkīm and agency is stressed in all of the medieval Arabic works cited in this section.

<sup>103</sup> See, e.g., 5 MUHAMMAD IBN 'UMAN IBN 'ABIDĪN (Hanafī school, d.1836), *HASHIYYAT RADD AL-MUHTAR 'ALA AL-DURR AL-MUKHTAR* 427-432 (1966) [hereinafter *IBN 'ABIDĪN*]; MUHĪ AL-DĪN ABŪ ZAKARIYYA NAWAWĪ (Shafī'i school, d.1277), *MINHĀJ AL-TĀLIBĪN* (E. Howard trans. 1914); 10 MUWAFFAQ AL-DĪN IBN QUDĀMA (Hanbalī school, d.1223), *AL-MUGHNĪ* (1969) [hereinafter *IBN QUDĀMA*].

<sup>104</sup> See, e.g., BURHĀN AL-DĪN IBRAHĪM IBN 'ALĪ IBN FARHŪN (Mālikī school, d.1397), *TABSIRAT AL-HUKKĀM FĪ USŪL AL-AQDIYYA* nos. 43-44 (Cairo 1301 A.H.) [hereinafter *IBN FARHŪN*].

parties.

The problem of revocability of the hakam could be resolved by having his appointment ratified by a qādī. The hakam would then become the nā'ib, or representative, of the qādī, who was himself a nā'ib serving at the pleasure of the supreme executive and judicial authority, the Sultān.<sup>105</sup> This rule appears to be universal among all of the four schools.<sup>106</sup> It is at the root of the requirement in Article 5 of the Arbitration Regulation of 1983<sup>107</sup> and in the old Commercial Court Rules on arbitration<sup>108</sup> that a judicial authority must ratify the appointment of arbitrators. What this doctrine did not provide was a way for a court or any other body to appoint a hakam not initially chosen by both parties, or any other way to make tahkīm compulsory prior to the appointment of a hakam.<sup>109</sup> This being the case, a clause in a contract refer-

<sup>105</sup> See the MAJALLA art. 1847 (C. Typer, D. Demetriades & I. Effendi trans. 1901). The Majalla is a nineteenth century Ottoman codification of commercial doctrines of the Hanafī School. For more information on the ability of the Qādī to delegate his powers, see Tyan, *Judicial Organization*, in 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 236-41.

<sup>106</sup> See S. SALEH, *supra* note 4, at 43.

<sup>107</sup> Royal Decree M/46, *supra* note 21, art. 5.

<sup>108</sup> Royal Decree M/11 of 1328 A.H. (1962), amended by Royal Decree M/5 of 1389 A.H. (1969) & Royal Decree M/8 of 1393 A.H. (1973).

<sup>109</sup> Shari'a sources do provide two exceptions to the rule that only the parties may choose arbitrators. The first and most important of these is found in accounts of the Mazālim, or grievances, procedure. This procedure was a direct application of the absolute authority of the sovereign to right all wrongs. Ideally, grievances were to be heard directly by the king, but the power was usually delegated to subordinates who could act as a sort of "super" appellate court having power not only to review and overturn judgments and other formal acts by qādīs and administrative officials, but also to look into all aspects of those officials' public and even private conduct, to determine their worthiness and competence for their position. Mazālim powers could also be used to enforce judgments against powerful persons that qādīs were unable or unwilling to enforce. Mazālim officials were never called qādīs, and were freed from nearly all Shari'a rules of procedure and evidence. Unlike a qādī, an official exercising mazālim powers could compel parties to submit to a procedure similar to tahkīm, though it is never called by that name in the sources. Rather, it is reported that a mazālim official, after conducting an investigation of the dispute, could refer parties to "mediation" (wasāta) by persons chosen by the official. Should mediation fail to result in an amicable settlement (sulh), the case would be decided by a qādī also chosen by the mazālim official. It is not clear whether the qādī could also be a mediator. ABŪ AL HASSAN AL-MAWARDĪ, *AL-AHKĀM AL-SULTĀNIYYA* 77 *passim* (1973); 1 LAW IN THE MIDDLE EAST, *supra* note 70, at 266; see also *id.* at 263-69 (discussing mazālim as a type of justice "superior" to the ordinary judiciary, whose authority emanated from the authority of the sovereign, and who is not bound by positive law).

The second exception stems from the comparative latitude afforded by jurists of the Hanbalī school to freedom of contract in general and freedom of contract in territory not under Muslim control (Dār al-Harb) in particular. Contracts made under a foreign law regulating transactions taking place substantially outside Muslim territory (Dār al-Islām) should be recognized as valid under Hanbalī doctrine. 9 IBN QUDĀMA, *supra* note 103, at 245, 273; S. SALEH, *supra* note 4, at 89; A. ZAYDAN, *AHKĀM AL-DHIMMIYYĪN WA'L MUSTA'MINĪN FĪ DĀR AL-ISLĀM* 560-63 (1963). This doctrine

ring future disputes to arbitration would seem to be unenforceable.<sup>110</sup> In all of the schools, the parties' acceptance of a specific person or persons to act as hakam appeared to be an essential aspect of takhīm, one of the characteristics that defined the term. It is this very requirement of submitting an agreement signed by both parties at the time the dispute arises that calls into question the enforceability of an agreement to arbitrate future disputes (arbitration clause) under the Regulation.<sup>111</sup>

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could perhaps cause a Hanbalī court to honor an arbitration clause in such a contract. The doctrine would probably not cause a court to enforce a foreign arbitral award based on legal principles not consistent with the Shari'a, since the award would be considered an act of judicial sovereignty in contrast with the contractual character of the arbitration clause. This identification of an arbitral award with the law of judgments and an arbitration agreement with the law of contract would be consistent with the Shari'a's basic approach to takhīm. S. SALEH, *supra* note 4, at 89 n.19, 91-92, 320-22.

<sup>110</sup> A Lebanese commentator has cited other reasons why an arbitration clause would be invalid under the Shari'a based on Shari'a general hostility to agreements dependent on unforeseeable, future events. This hostility stems from QUR'ANIC prohibitions of ribā' (usury) and maysir (gambling), which merged in the minds of the Shari'a scholars to create a strong presumption against undue risk (gharar) in transactions. Gharar was said to result from lack of knowledge of the subject matter of the contract, its quality or quantity, the amount due in exchange, or the time payment or performance is due, which could lead to an undue profit for one party at the expense of the other. This uncompensated profit was the evil thought to be at the root of the prohibitions of ribā' and maysir. The longer contractual obligations continue into the future, and the more conditional or indefinite they are, the greater the risk that one party will not receive the value that he expected at the time the contract was made. The Shari'a did not recognize an agreement *in futuro*, an agreement to agree, which is essentially what an arbitration clause amounts to. Furthermore, the Shari'a did not recognize the validity of contracts whose object or purpose was not in existence or at least capable of being accomplished at the time of contracting. If the object or purpose of an arbitration agreement is the settlement of a dispute, then the fact that there is no dispute would be grounds for annulment of the contract, or at the very least would make the contract revocable by either party. Finally, the Maliki and Hanbalī schools flatly refuse to recognize the validity of a contract that is "suspended" (*al 'aqd al-mawqūf fi haqqihi*), in other words, a contract that becomes enforceable only on the occurrence of some uncertain, future event. Arbitration contracts are among the few contracts that cannot be conditional, according to the Shafi'i and Hanafi schools. In other words, the terms of an arbitration agreement are defined by law. S. SALEH, *supra* note 4, at 48-50; *see also* N. COULSON, *supra* note 102, at 44; IBN 'ABIDIN, *supra* note 103, at 428; IBN QUDĀMA, *supra* note 102, at 95; S. MAHMASSANI, AL-NAZARIYYA AL-'AMMA LI'L-MUJIBĀT WA'L-'UQŪD FI'L-SHARĪ'A AL-ISLĀMIYYA 327-29 (1972).

The concern over uncertainty and lack of foreseeability also explains the revocability of the permissible (jā'iz) contracts of partnership and agency. Such contracts, though necessary elements of an effective commercial system, are inherently uncertain because they are especially dependent on continued personal contact and cooperation between the parties. Thus, they could neither be considered void nor unconditionally binding but as belonging in a special category. N. COULSON, *supra* note 102, at 76-82.

<sup>111</sup> Egyptian law on arbitration provides an ingenious, if problematic, solution. Parties are required to name specific persons as arbitrators in the arbitration clause, in advance of any dispute, and obtain their consent to serve. A court will then ratify the arbitration clause. The problem is that if an arbitrator is unable to serve at the time a dispute arises, or is disqualified, the arbitration collapses unless the parties can agree at

The analogy between *tahkīm* and agency is central to understanding how the medieval Hanafī, Shāfi'ī, and Hanbalī scholars viewed the *tahkīm* procedure. It seems clear that *tahkīm* was intended to begin with an attempt at conciliation (*sulh*), which due to its association with religious generosity and forgiveness, was the preferred method of dispute resolution. While attempting conciliation, it was apparently considered desirable for the *hakam* to be put on an equal or even inferior level to the parties in order to force him to persuade rather than coerce the parties and generally to maintain a cooperative and friendly atmosphere conducive to an amicable settlement, the same atmosphere that ought to be maintained between principal and agent.

Incentives to settle rather than litigate were built into the *tahkīm* system. Since an offense against the law was also an offense against religion, the very idea that a person might have to be dragged into court and forced to obey the law was shameful. Even a successful litigant could suffer damage to his reputation.<sup>112</sup> It was far preferable to settle, perhaps on the basis of a private legal opinion from a *muftī* (legal scholar), or to submit voluntarily to the judgment of a *hakam*.<sup>113</sup> It is a general rule in all schools of the Shari'ā as well as in the statute laws of most modern Arab states that disputes that cannot be conciliated cannot be arbitrated.<sup>114</sup> Thus, the possibility of conciliation must always remain open in *tahkīm*.

At some point during the *tahkīm* procedure the *hakam* changed from a conciliator whose actions were governed by the law of contract to a judge whose decision had to comply with the rules of procedure, evidence, and substantive law under the Shari'ā. The *hakam* therefore had to have the qualifications of a *qādī*.<sup>115</sup> There are seven such qualifications, the most important of which is that he be a Muslim, and

that time on the appointment of a replacement. S. SALEH, *supra* note 4, at 201 *passim*. Note that Article 10 of the Regulation, allowing the Authority to appoint arbitrators, is a clear departure from the Shari'ā. Royal Decree M/46, *supra* note 21, art. 10.

<sup>112</sup> See 4 IBN QUDĀMA, *supra* note 103, at 358.

<sup>113</sup> According to an Egyptian scholar, both *tahkīm* and *iftā'* (the practice of seeking legal opinions) were intended to give parties an opportunity "to know the judgment of the Shari'ā and adhere to its precepts obediently and voluntarily." M. MADKUR, *AL-QADĀ' FĪ AL-ISLĀM* 131 (1965).

<sup>114</sup> Royal Decree M/46, *supra* note 21, art. 2.

<sup>115</sup> This rule is universal, except among some very late Hanafī scholars. The MAJALLA, for example does not state anywhere that a *hakam* has to be a Muslim. See the MAJALLA, *supra* note 105. Hanbalī sources insist that a *hakam* be "qualified to give judgment [sālih l'il-qadā']". See MANSŪR IBN YŪNUS AL-BUHŪTĪ (Hanbalī school, d. 1641); AL-BUHŪTĪ, 6 KASHSHĀF AL-QINĀ' 'AN MATN AL-IQNA' 308-09 (1968) [hereinafter AL-BUHŪTĪ]; MUSTAFA IBN SA'D AL-SUYŪTĪ (Hanbalī school, d. circa 18th c.), 6 MATĀLIB ŪLĀ AL-NUHĀ FĪ SHARH GHĀYAT AL-MUNTAHĀ (1961) [hereinafter AL-SUYŪTĪ]; 10 IBN QUDĀMA, *supra* note 103, at 94.



knowledgeable in the science of fiqh, or Shari'a jurisprudence.<sup>116</sup> If all parties to the dispute were non-Muslims these rules did not apply. Non-Muslims residing permanently in Muslim territory (dhimmīs), or travelling under a grant of safe conduct were permitted to administer their own justice if the dispute was between parties of the same religion. If their religions differed, or if a Muslim party were involved, application of the Shari'a was mandatory.<sup>117</sup> Thus, if a Muslim was a party to the dispute, it was not possible to arbitrate except in strict law.<sup>118</sup> Choice of law between the Shari'a schools was possible by the parties' agreement to choose a hakam from that particular school.

The areas of most serious conflict between Western and Islamic concepts of arbitration concern the enforceability of a judgment reached through tahkīm and the standard of review applied. The differences stem from the fundamental nature of law in Islam. The Shari'a, for a devout Muslim, is something of a religious ideal, ultimately beyond the comprehension of mortals. The Prophet expressed this attitude in a well-known hadīth:

I am only a man, and when you come pleading before me it may happen that one of you might be more eloquent in his pleadings and that as a result I adjudicate in his favor according to this speech. If it so happens and I give an advantage to one of you by granting him a thing which belongs to his opponent, he had better not take it because I would be giving him a portion of Hell.<sup>119</sup>

This remarkable statement brings out two important aspects of Islamic Law. It underscores the fallibility of all human judgments when measured against a divinely revealed standard, while warning believers not to act against their own consciences. A judgment may put an end to litigation, but it does not change the essence of things. For a reviewing court to enforce what it believed to be a serious violation or misinterpretation of the law would itself be sinful, equivalent to a successful litigant taking advantage of a favorable judgment that he knows to be unjust.<sup>120</sup>

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<sup>116</sup> S. SALEH, *supra* note 4, at 35-38.

<sup>117</sup> A. FATTAL, *LE STATUT LÉGAL DES NONMUSULMANS EN PAYS D'ISLAM* 344-66 (1958); A. ZAYDAN, *supra* note 109, at 560; 1 *LAW IN THE MIDDLE EAST*, *supra* note 70, at 78-124.

<sup>118</sup> THE ENCYCLOPEDIA OF ISLAM, *Hakam* 72 (2d ed. 1960) [hereinafter ENCYCLOPEDIA].

<sup>119</sup> IMĀM MUSLIM, 3 SAHĪH MUSLIM no. 4721 (A. Siddiqi trans. 1976).

<sup>120</sup> Another well-known tradition warns against "making lawful what is unlawful" or "making unlawful what is lawful." (*Lā yuhill harāman wa-lā yuharrim halālān*). See Tyan *L'Autorité de la Chose Jugée en Droit Musulman*, 1962 *STUDIA*

The schools of law differed somewhat on the binding force of a judgment reached through *tahkīm*. A minority of Shāfi'ī scholars held that the final judgment had to be accepted by both parties before it became binding on them, thus reducing *tahkīm* to a purely conciliatory procedure from beginning to end.<sup>121</sup> Hanafī scholars held that a *qādī* should not enforce a *hakam*'s judgment unless he agreed with it.<sup>122</sup> The majority of the Shāfi'ī scholars as well as the Mālikī and Hanbalī schools were of the opinion that the decision of a *hakam* had the same legal status as a *qādī*'s judgment.<sup>123</sup> The Hanbalīs are particularly insistent on this point, stating that a *qādī* should not refuse enforcement merely because of a difference of opinion (*ikhtilāf al-rā'y*).<sup>124</sup>

This doctrine sounds rather encouraging from a Western standpoint. However, it did not mean that any legal opinion expressed in a *hakam*'s judgment was binding on a *qādī*. The deference afforded to a *hakam*'s opinion was no greater than would be afforded to the opinion of another *qādī*. Such deference did not extend to a violation or misinterpretation of any rule stemming directly or by clear analogy (*qiyās jalī*) from the primary sources of the Sharī'a, the Qur'ān, and the Sunna, or any rule on which there was a consensus (*Ijmā'*) among the four schools. Different views were expressed as to whether a judgment could be revoked or annulled if a *qādī* or *hakam* disregarded a rule of law on which there was a consensus within his own school, in favor of a rule recognized by another school. In all cases, a *qādī* or *hakam* was expected to be aware of any controversy, at least within his own school, regarding a rule on which he was basing his judgment. If he failed to cite an opinion contesting the rule he applied, the door would be left open for a reviewing court to revoke or annul the judgment based on such other opinion.<sup>125</sup>

These rules would seem to make these judgments of a *qādī* or *hakam* extremely precarious. As a practical matter, however, since there was no appellate court system as such in medieval Islamic society and since a *qādī* had the power to enforce his own judgments, most were relatively stable.<sup>126</sup> A *hakam*, however, had no power to enforce

ISLAMICA 81, 81-90.

<sup>121</sup> SHAMS AL-DĪN RAMLĪ (Shāfi'ī school, d. 1596 A.D.), 8 NIĤĀYAT AL-MUĤTĀJ 230-31 (Cairo 1356 A.H.) [hereinafter RAMLĪ]; S. SALEH, *supra* note 4, at 75; ENCYCLOPEDIA, *supra* note 118, at 72.

<sup>122</sup> IBN 'ABIDĪN, *supra* note 103, at 431.

<sup>123</sup> IBN FARHŪN, *supra* note 104, no. 44 (Mālikī school); RAMLĪ, *supra* note 121 (Shāfi'ī school).

<sup>124</sup> 6 AL-BUHŪTĪ, *supra* note 115, at 310; 6 AL-SUYŪTĪ, *supra* note 115, at 472;

10 IBN QUDĀMA, *supra* note 103, at 95.

<sup>125</sup> M. MADKUR, *supra* note 113, at 57-61; see S. SALEH, *supra* note 4, at 75-82.

<sup>126</sup> A *qādī*'s decision would only be reviewed in four circumstances: (1) it could be

his decision. The decision would therefore have to be reviewed by the local qāḍī if the parties did not comply with it voluntarily. As a general rule, judgments could not be revoked or annulled because of a mere error of fact.<sup>127</sup>

In conclusion, the basic conceptual differences between arbitration and takhīm may be summarized as follows. First, arbitration in the West, although it begins with a contract, takes on many of the procedural characteristics of a court proceeding in its earliest stages. In the name of expediency, control by the parties over arbitration is limited following their initial agreement to arbitrate.<sup>128</sup> From then on, the procedure itself takes over, insuring that arbitrators will be appointed, preferably but not necessarily by the parties, and that arbitration will in fact take place unless both parties agree that it will not.<sup>129</sup> Takhīm, on the other hand, maintains a voluntary, conciliatory, and contractual aspect. The continuing consent of the parties would ideally be maintained up to the last possible moment before the hakam renders his decision. Thus, although certain procedures developed out of necessity to insure that a hakam, once appointed, could have a chance to render a decision, the idea of binding the parties to arbitrate a future dispute is essentially foreign to the cooperative spirit takhīm was designed to foster.

Second, though she has many of the powers of a judge, an arbitrator is not bound by the same constraints as a judge. Because she neither

reviewed by the qāḍī who made it; (2) it could be reviewed by his successor in office; (3) if enforcement were sought in another qāḍī's jurisdiction it could be reviewed by that qāḍī; or (4) it could be appealed to the sovereign through the mazālim procedure. See S. SALEH, *supra* note 4, at 75-82.

<sup>127</sup> However, certain Mālikī authors held that a judgment was reversible for an error of fact leading to a flagrant injustice, especially if there was reason to suppose the qāḍī or hakam had been unduly biased in favor of one party. There was no limit to the grounds on which an official exercising mazālim powers might revoke or annul a judgment. This was in keeping with the extraordinary nature of the mazālim jurisdiction, which was considered a direct application of the authority of the sovereign, the source of all judicial power exercised by the qāḍis. *Id.*

<sup>128</sup> See, e.g., *Aerojet-Gen. Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973) (basic purpose of arbitration is speedy disposition of disputes without expense and delay of litigation); see also AMERICAN ARBITRATION ASSOCIATION, SUGGESTIONS FOR THE PRACTICE OF COMMERCIAL ARBITRATION IN THE UNITED STATES 9 (1928) ("The arbitrator is the judge of both fact and law. This means that the decision and means of arriving at it are not subject to review by courts . . .").

<sup>129</sup> Under the rules of the American Arbitration Association (AAA), if the parties are unable to agree upon an arbitrator and have agreed upon no other method of choosing one, the AAA will select one for them. See *Commercial Arbitration Rules of the American Arbitration Association* § 12 (1973), reprinted in G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 131 (1977); see also *Global Maritime Leasing Panama, Inc. v. M/S N. Breeze*, 349 F. Supp. 779 (D.R.I. 1972) (arbitration agreements are enforceable as any other contract).

derives her powers from the state nor adjudicates in the name of the state, she is less interested in furthering the policies underlying state laws than she is in the needs and expectations of the parties and of the business community in general. She is considered particularly well-qualified to determine those needs and expectations, and thus her decision is reviewable only on very narrow grounds.<sup>130</sup> In contrast, when the hakam makes a judgment he is establishing the rights and duties of one party as against another under law which is the embodiment of God's commands for the welfare and protection of His community. The hakam's primary duty is to the law itself and to the Muslim community, not to the individual disputing parties. His function is therefore essentially equivalent to that of a judge, and his decision is entitled to no more deference than that of a judge.

At the root of the conceptual conflict between the two procedures is the fact that Islamic Law never developed a distinction between law and equity.<sup>131</sup> If one believes that the law is divinely inspired, the very idea that an alternative kind of justice exists that is more "just" in certain cases than the law itself is untenable. Thus, disputes must be resolved either by agreement among the parties or according to the law. It is the end that determines the means used to achieve it. Therefore, unlike arbitration, *tahkīm* never developed an identity separate from conciliation and litigation.

#### 4.4. *Significance of the Distinction Between Arbitration and Tahkīm*

Of what concern is this history to a foreigner trying to do business in Saudi Arabia? The short answer is that the concerns of those who promulgate laws regulating business activities must also be the concerns of the businesspersons themselves. The role of the *Sharī'a* in Saudi law is defined in the Organic Instructions of the Kingdom of Hijāz, which have served as sort of an informal Saudi constitution since they were promulgated by King 'Abd al 'Azīz in 1926:

Article Five. The administration of the Hijāzī Kingdom is in the hands of His Majesty King 'Abd al 'Azīz the First Ibn

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<sup>130</sup> See, e.g., *Sterling Col. Beef Co. v. United Food and Commercial Workers Local Union No. 7*, 767 F.2d 718 (10th Cir. 1985) (review of arbitration award confined to narrow question of whether it draws its essence from the collective bargaining agreement).

<sup>131</sup> "Juristic speculation in classical times was not regarded as an independent process which created a field of man-made law alongside the divine ordinances. It was entirely subordinate to the divine will in the sense that its function was to seek the comprehension and the implementation of the purposes of Allah for Muslim society." N. COULSON, *supra* note 102, at 19.

'Abd al-Rahmān al-Faisal al-Sa'ūd and His Majesty is bound by the rules of the Sublime Sharī'a.

Article Six. The [legal] judgments shall always be in accordance with the Book of God, the Sunna of His Prophet and what the companions and pious predecessors agreed upon.<sup>132</sup>

Article Six is noteworthy because of its emphasis on the Qur'ān and the Sunna and its limitation of the scope of Ijmā' (consensus) to the "companions and the pious predecessors," the latter term referring to the earliest generations of Islam before the establishment of the schools of law. This term implies some flexibility with regard to the binding authority of the medieval legal texts, though the medieval texts have unquestionably exerted a great deal of influence on the development of law in Saudi Arabia.

Sheikh Yamani, the former Saudi minister of petroleum, drew a distinction between two definitions of the Sharī'a in his 1978 speech at New York University.<sup>133</sup> Broadly defined, the Sharī'a consists of "everything written by Muslim jurists throughout the centuries," but has no binding authority in and of itself because it operated under circumstances that are no longer in existence. Narrowly construed, "the Sharī'a is confined to the undoubted principles of the Qur'ān, what is true and valid of the Sunna, and the consensus of the community represented by its scholars and learned men during a certain period and regarding a particular problem, provided there was such a consensus. Viewed as such, the Sharī'a has a binding authority on every Muslim. . . ."<sup>134</sup> Based on this distinction, Yamani argues in favor of a broad legislative power for Muslim governments to "select principles from the various juristic schools without bias . . . . Such countries can then legislate new solutions for novel problems by deriving the solutions from the general principles of the Sharī'a and considerations of public interest and communal welfare."<sup>135</sup>

This attitude is reflected to a somewhat lesser degree in the rules governing Sharī'a courts in Saudi Arabia. Judges are bound to apply authoritative Hanbalī texts, but are authorized to consult opinions from the other schools and to apply them in circumstances where the

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<sup>132</sup> *The Organic Instructions of the Hijāz Kingdom* pt. II, arts. 5, 6, translated in S. SOLAIM, *supra* note 3, at 172.

<sup>133</sup> Yamani, *The Eternal Sharī'a*, 12 N.Y.U. J. INT'L L. & POL. 205 (1979) (Remarks delivered by Ahmed Zaki Yamani, Minister of Petroleum and Mineral Resources, Saudi Arabia, at the New York University School of Law, New York, Oct. 24, 1978).

<sup>134</sup> *Id.* at 206.

<sup>135</sup> *Id.*

Hanbalī opinion would “cause strain and incompatibility with the public interest [maslahat al-‘umūm].”<sup>136</sup> Any such determination by a judge would be appealable to a higher court and ultimately to the Judicial Council and the King.<sup>137</sup>

The existence of this legislative power to interpret the basic sources of Shari‘a afresh in light of modern circumstances explains a great deal about the Regulation and Rules. Although the Regulation and Rules are more comprehensive than anything in the Shari‘a manuals, the fundamental characteristics of tahkīm that distinguish it from arbitration are still present. Arbitration in Saudi Arabia is to be arbitration in strict law. Arbitrators are required to meet Shari‘a qualifications and to render awards that follow the substantive provisions of the Shari‘a and the applicable Saudi statutes. There are no express limitations on the scope of judicial review to assure that these requirements are met. As we have seen, these are requirements firmly grounded in the Qur‘ān and the Sunna, inherent in the very nature of a divinely revealed, religious law, which recognizes the authority of no human judgment. For a judge to ratify an award that he believes to contain a serious violation or misinterpretation of that law, would, therefore, be nothing less than sinful.

The provisions of the Regulation and Rules that seem most foreign to the Shari‘a are the recognition of the validity of an arbitration clause, and the Authority’s power to appoint arbitrators.<sup>138</sup> As we have seen, these foreign elements are counterbalanced to some undetermined degree by the requirement that the parties submit a signed submission agreement for validation by a judicial authority at the time a dispute arises.<sup>139</sup> This is clearly a vestige of the Shari‘a rule that a qādī had to approve the appointment of a hakam in order to make the appointment irrevocable.<sup>140</sup> However, colorable arguments based on Shari‘a sources can be made in favor of arbitration clauses and judicial appointment of arbitrators.<sup>141</sup> Provided that a hakam is competent and rules according

<sup>136</sup> S. SOLAIM, *supra* note 3, at 96.

<sup>137</sup> *See id.* at 94.

<sup>138</sup> *See* Royal Decree M/46, *supra* note 21, arts. 1, 10.

<sup>139</sup> *Id.* art. 5.

<sup>140</sup> *See supra* notes 105-07 and accompanying text.

<sup>141</sup> The mazālim procedure provided for judicial appointment of arbitrators without the approval of either of the disputing parties, even though that power was extraordinary not to mention discretionary, as opposed to the “shall appoint” language in art. 10. *See supra* note 69. Governmental boards such as the CSCD are descendants of the old mazālim tribunals. As for Shari‘a courts, Mālikī sources hold that qādīs should be able to exercise mazālim powers when political circumstances and the public interest require it. Tyan, *supra* note 105, at 260-61.

Taqī al-Dīn Abū al-‘Abbās Ibn Tamiyya (d.1328) was a leading Hanbalī advocate of the same doctrine of “political law” or “lawful public policy” (Al-Siyāsa Al-

to the Shari'a, it can be argued that the "risk" otherwise present in an arbitration clause can be largely eliminated by court supervision.<sup>142</sup> A court can insure at the beginning of the proceeding that a qualified hakam has been chosen and can review his decision to insure compliance with the Shari'a. The result should then be consistent with what a judge would decide if there had been no tahkīm. Even though such an argument is novel, it is nevertheless consistent with Sheikh Yamani's call for a fresh interpretation of the sources in light of modern political realities.

Although Sheikh Yamani provides justification for a legislative re-interpretation of the Shari'a, he does not provide a basis for allowing any significant degree of deference to either judges or arbitrators. If "considerations of public interest and communal welfare" are to be the basis for reform, such considerations must ultimately be the province of the central government, not of arbitrators who are primarily concerned with the interest and welfare of the business community rather than society as a whole and who may not even be Saudi citizens.<sup>143</sup>

It is a difficult and controversial task to set the boundary line where some current perception of the public interest becomes inconsistent with fundamental principles stemming from the primary sources of Islamic Law. This is one reason why Ibn Taymiyya's famous treatise on political law, written in the early fourteenth century, stresses the central role of consultation and consensus between religious and political authorities.<sup>144</sup> The rise of the House of Sa'ūd to dominance in what is now Saudi Arabia began when they became allies of the seventeenth century religious reformer 'Abd al-Wahhāb. Early in this century King 'Abd al-'Azīz exhibited considerable skill in taking disparate points of view into account and slowly building a consensus around the need for reform and modernization. Though the process may seem slow to foreigners, Saudi Arabia has come a long way since 1927, when 'Abd al-'Azīz and the 'Ulamā' clashed over the legality of the wireless transmitter under the Shari'a.<sup>145</sup>

Arbitration represents a potential threat to this slow process of consensus-building because it may lead to an uncontrolled and haphazard introduction of foreign business customs and legal principles that

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Shar'iyya) which the Mālikīs used to justify the exercise of such powers. AL-SIYĀSA AL-SHAR'IYYA 182-83 (A. Farrukh trans. 1966) (PUBLIC POLICY IN JURISPRUDENCE) [hereinafter PUBLIC POLICY].

<sup>142</sup> Regarding the concept of risk (gharar), see *supra* note 110.

<sup>143</sup> See *supra* note 133 and accompanying text.

<sup>144</sup> PUBLIC POLICY, *supra* note 141, at 182-83.

<sup>145</sup> S. SOLAIM, *supra* note 3, at 159-170.

could cause confusion and resentment among Saudis.<sup>146</sup> The Saudi reaction to the *ARAMCO* case<sup>147</sup> indicates that the Saudis have little confidence in the ability of foreigners, especially non-Muslims, to apply correctly the Shari'a and to identify the real differences between it and the general (mostly Western) principles of international commercial law. This view has been reinforced since then by the reluctance of arbitrators in ICC arbitrations to attempt to apply Saudi law even where the contract mandates its application and has been executed and performed in Saudi Arabia.<sup>148</sup>

Arbitration, as it is understood and practiced in the West, is thus a suspect and dangerous institution from the point of view of the Saudi government, because it threatens the government's control over the pace of change, a key factor in the country's political stability. Interestingly, there is a parallel between this concern of the Saudi government to maintain control over changes in their legal system and that of Muhammad during the earliest days of Islam, when he denounced the pagan hakams as a threat to the establishment of a new, unified legal and religious doctrine.

With all this in mind, the advantages and disadvantages of arbitration in Saudi Arabia can be grouped according to the rationales employed by businesspersons who resort to arbitration in other countries.<sup>149</sup>

(1) *Improving the administration of justice:* Arbitration may or may not be quicker and cheaper than litigation in Saudi Arabia. There has always been strong pressure in the business community in favor of voluntary compliance with arbitration awards, and that pressure can only increase now that the Saudi government has promulgated rules that give a new legitimacy to arbitration. The Saudis hope that arbitration can help reduce the caseload of the CSCD, thereby making both litigation and the review of arbitration awards faster.<sup>150</sup> If the CSCD

<sup>146</sup> An historical precedent may be found in the granting of judicial privileges to European and American nationals by the Ottoman Empire under the so-called "Capitulations." Although initially intended only to allow the application of foreign law in disputes among foreigners, the Capitulations eventually led to widespread abuse involving the application of foreign laws to disputes involving Muslim citizens of the Empire. These abuses caused considerable resentment, and were a factor in the weakening of the Empire. Liebesny, *The Development of Western Judicial Privileges*, 1 *LAW IN THE MIDDLE EAST*, *supra* note 69, at 309, 312-15, 327-28.

<sup>147</sup> 27 *I.L.R.* 117 (1963); *see supra* notes 14-16 and accompanying text.

<sup>148</sup> A. LERRICK & Q. MIAN, *supra* note 13, at 197-99.

<sup>149</sup> *See supra* text accompanying note 60.

<sup>150</sup> If the Chambers of Commerce and Industry ("the Chambers") can be an appointing authority under the new rules, this will further relieve the problems of the CSCD. There seems to be no reason why parties cannot "otherwise agree" to have the Chambers appoint arbitrators under the provisions of Article 10. *See* Royal Decree M/



remains overloaded, however, this cannot help but affect the speed at which requests for enforcement of, and objections against, arbitral awards can be decided. As noted earlier, a party that wishes to take advantage of as many opportunities for delay as possible would find ample opportunities in the numerous possible referrals to the Authority possible under the new rules. Finally, a degree of unpredictability is present because of the lack of any defined standards for judicial review of awards. There will frequently be no way of predicting whether a magistrate reviewing an award will decide that an arbitrator has violated and misinterpreted a rule of law stemming from the Qur'ān, the Sunna, or Ijmā', if that is indeed the standard, because the application of such rules to contemporary commercial problems is simply not clear.<sup>161</sup> Thus, parties will have to worry about being sent back to square one with nothing to show for going through an entire arbitration proceeding, especially if some unusual or novel form of contract is at issue.

(2) *The search for another justice*: Arbitrators chosen will no doubt frequently be Western-educated Muslims familiar with the concerns of foreign businesspersons. However, these arbitrators will have less discretion than arbitrators in other countries to decide according to their own notions of what is in the best interest of the business community. Arbitration in Saudi Arabia may have some marginal value in bringing areas of Islamic law, where differences may be found in the source material, into line with prevailing business practices. However, arbitrators will always have to keep in mind that their decisions must be acceptable to the Authority originally competent to hear the dispute and to the Authority's idea of what is best for the general welfare, which may be based as much on political as legal concerns.

Thus, to the extent a businessperson is satisfied with the way judicial authorities decide disputes in Saudi Arabia, he will be equally satisfied with the way arbitrators decide them. To the extent he is dissatisfied with the Saudi judiciary, arbitration is not likely to give him a great deal more satisfaction. The same inconsistencies between Western and Saudi law regarding creditor's rights, interest payments, insurance

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46, *supra* note 21, art. 10. However, it is hard to see how the Chambers, which is not a judicial body and has no enforcement powers of its own, can have any final authority to review arbitral awards. See *supra* note 26 and accompanying text.

<sup>161</sup> See N. COULSON, *supra* note 102, at 107. Because the scope and interaction of Islamic and Western commercial law principles have in no way as yet been fully elaborated or consistently defined in Saudi Arabia, it is futile to suppose that any certitude exists at the moment as to what exactly Islamic commercial law is. "There is no real law as such, but only law in the making: the state of flux and speculation must be frankly recognized." *Id.*

and maintenance agreements,<sup>152</sup> the same ambiguities with regard to copyrights and patents,<sup>153</sup> and the contemporary application of the traditional Islamic philosophy that a party whose legitimate expectations are frustrated by unforeseen events may withdraw from a contract,<sup>154</sup> will likely continue to exist whether Saudi law is applied by a judge or an arbitrator.

(3) *The search for conciliation*: Contract law in Islam does contain a number of doctrines that a Western lawyer would classify as "equitable," although Islamic law would not distinguish them from any other contract law doctrines. One of these is that losses due to unforeseen events be born equally by the contracting parties.<sup>155</sup> Other equitable doctrines are clearly not recognized. For example, damages could never include lost profits because these are inherently uncertain.<sup>156</sup> In general, parties should expect no more equity from an arbitrator than a court would be willing to provide.

(4) *Resolution of disputes not within the jurisdiction of the courts*: An arbitrator, like a judge, might have authority to modify a contract in response to unforeseen circumstances. However, a contract that insufficiently outlines the rights and duties of the parties in advance would run the risk of being declared void for vagueness and uncertainty either by an arbitrator or a reviewing court.

Arbitration in Saudi Arabia is therefore likely to suffer from the unpredictability and ambiguity that afflict Saudi law in general. As one commentator puts it: "it is futile to suppose that any certitude exists at the moment as to what exactly Islamic commercial law is. There is no

<sup>152</sup> See Saba, *supra* note 2, at 19. "There is no clear right to repossess if a buyer or lessee defaults and no clear definition of liability or enforceability of insurance and maintenance obligations [under Saudi law]." *Id.*; see also N. COULSON, *supra* note 102, at 94-99. Instead of earning interest on their money, lender in Saudi Arabia make, or intend to make, their profit from participation in commercial ventures. This practice is undertaken to avoid the QUR'ANIC injunction against *riba'* or "usury," and broad notions of illicit gain or unjustified profit.

<sup>153</sup> Saba, *supra* note 2, at 19. In Saudi Arabia, "[p]atent laws do not exist and copyrights are virtually unenforceable." *Id.*

<sup>154</sup> See N. COULSON, *supra* note 102, at 82-93. "A brief summary, therefore, of the traditional Shari'a doctrine of frustration is that virtually any supervening circumstances which were unforeseen by the contracting party at the time of agreement and which render performance more difficult and burdensome than contemplated allow that contracting party who established the fact of such 'damage' to rescind the contract. The emphasis is upon the maxim of 'no fair loss' in the performance of contractual obligations." *Id.* at 86.

<sup>155</sup> See *id.* at 90. Coulson observed that Iraq civil courts when applying their civil code to contracts frustrated by unforeseen events would "split the loss equally between contracting parties. 'Equity is equality' is a maxim deep-rooted in Islamic legal tradition." *Id.* This theme, as applied to partnerships, is explored at length in IBN TAYMIYYA, *AL-MAZALIM AL-MUSHTARAKA* (1972).

<sup>156</sup> N. COULSON, *supra* note 102, at 82.

real law as such, but only law in the making: the state of flux and speculation must be frankly recognized."<sup>157</sup>

## 5. AMICABLE COMPOSITION AND SULH

Article 16 of the Regulation<sup>158</sup> has attracted little attention either in the Rules or from commentators, but it provides an arbitration procedure that could avoid some of the unpredictability inherent in the application of Saudi commercial law. It could also result in awards that are easier to enforce than those reached through arbitration in strict law. It appears to be analagous to the *tahkīm* procedure described in the Qur'an for settlement of marriage disputes by two hakams, one appointed by the husband's family and one by the wife's, authorized to reach a compromise settlement.<sup>159</sup>

This same procedure is applied to commercial disputes in a code of Hanafī commercial law called the *Majalla*, published by the Ottoman Empire in the nineteenth century.<sup>160</sup> Each party appoints an agent (*Wakīl*) with power to settle the dispute. Any decision reached by the two agents is binding on their principals.<sup>161</sup> In contrast with the wide range of legal objections possible against an award reached through regular *tahkīm* procedures, authorized commentators on the *Majalla* cite only two grounds on which a reviewing court can overturn a settlement resulting from this *sulh* procedure: (1) when it appears subsequently that the money paid by a party to a *sulh* agreement was not due; and (2) when the settlement concerns a claim that goods subject to a contract of sale are defective, and the goods subsequently prove not to be defective.<sup>162</sup> It should be noted that these grounds are factual, rather than legal, in nature.

The Hanbalī school also recognizes that a party may appoint an agent to conclude a settlement with another party, and that the settlement agreed to by the agent is binding on his principal.<sup>163</sup> Therefore, there is no reason why the procedure outlined in the *Majalla* would not also be possible in the Hanbalī school. Article 16 of the Regulation appears expressly to adopt it, stating that arbitrators may be authorized to conciliate (*mufawwadīn bi'l-Sulh*), in which case their decision must

<sup>157</sup> *Id.* at 107.

<sup>158</sup> Royal Decree M/46, *supra* note 21, art. 16.

<sup>159</sup> *See supra* note 88.

<sup>160</sup> *See the MAJALLA, supra* note 105, art. 1847.

<sup>161</sup> *Id.* art. 1556.

<sup>162</sup> S. SALEH, *supra* note 4, at 81-82.

<sup>163</sup> '4 IBN QUDAMA, *supra* note 103, at 359-60.

be unanimous.<sup>164</sup> Apparently Article 4, mandating that an uneven number of arbitrators be appointed,<sup>165</sup> would still be applicable. The extra arbitrator would presumably act as a mediator to help the two party-appointed arbitrators reach an agreement. If he failed to do so, the panel could then proceed to decide the case in strict law by majority vote.<sup>166</sup> Since Article 16 consistently refers to arbitrators in the plural, it seems that the parties could not authorize a sole arbitrator to conciliate.<sup>167</sup>

Based on Hanbali statements regarding *sulh*,<sup>168</sup> a settlement reached through this procedure would be more difficult to attack on appeal than would an award reached through arbitration in strict law. The former would be treated as if it were a binding (*Lāzim*) contract agreed to by both parties, while the latter would be treated like a judgment.<sup>169</sup> While a judgment establishes the rights and duties of the parties under their original contract, and can be attacked on the basis that it misinterpreted that contract,<sup>170</sup> a settlement constitutes a new contract to be judged as valid or invalid on its own merits.<sup>171</sup> Thus, a settlement is valid as long as it does not require the parties to do something they could not have contracted to do themselves. There is thus no need to establish what the rights and duties of the parties in fact were under the contract they actually signed.<sup>172</sup>

This procedure, which appears to have much in common with the Roman law concept of amicable composition,<sup>173</sup> might prove very useful in long-term leasing, supply, maintenance, and service contracts, which

<sup>164</sup> See Royal Decree M/46, *supra* note 21, art. 16.

<sup>165</sup> *Id.* art. 4; see also Van den Berg, *supra* note 14, at 22. "The requirement of an uneven number of arbitrators [in Article 4] deviates from the method set forth in the Labor and Workman Law of 1969 which provides for two arbitrators and an umpire." *Id.*

<sup>166</sup> See Royal Decree M/46, *supra* note 21, arts. 4, 16; see also Van den Berg, *supra* note 14, at 28. The expression "authorized to reach a compromise solution" in Article 16 means that the arbitrators act as conciliators and give a binding decision with the concurrence of the parties. This is why there must be unanimity in this case. Without the authority to compromise or with an inability to be unanimous, arbitrators will reach a majority decision based upon strict law; ENCYCLOPEDIA, *supra* note 118, at 72 (appointment of odd number of arbitrators).

<sup>167</sup> See Royal Decree M/46, *supra* note 21, art. 16; see also Van den Berg, *supra* note 14, at 22. "Although the appointment of a sole arbitrator (usually a Saudi lawyer) by mutual agreement of the parties enjoys popularity, the most common method of appointing arbitrators is that each party appoints an arbitrator and that the two so nominated appoint a third arbitrator who is the presiding arbitrator." *Id.*

<sup>168</sup> See 4 IBN QUDĀMA, *supra* note 103, at 357 *passim*.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *supra* note 58 and accompanying text.

the Shari'a would classify under the general heading of hire (Ijāra), which includes disputes which arise out of unanticipated needs and costs, and disagreements over the quality of services or equipment supplied. In such disputes, some sort of modification of contractual terms to respond to changed circumstances may be preferable to finding default, which is likely to end the business relationship between the parties. It is these long-term contracts that are the most difficult to enforce under Saudi law because of their uncertainty and inherent risk. If the parties to these long-term contracts want to continue to do business with one another, sulh may be a far better method of repairing their relationship than either arbitration or litigation. An American businessman speaking at a recent symposium on arbitration and conciliation in the Middle East advocated just such a procedure:

My own feeling is that one should try to reach a settlement without arbitration or without litigation.

In order to do this, it is sometimes necessary to try to eliminate those people whose egos have been involved in the execution of the contract, bringing in some new people from both sides who might be a little more unbiased about reaching a settlement.

I have found that when you go to arbitration there are inflated claims and counterclaims and finally, if a settlement is reached before the tribunal rules, the settlement is about what could have been negotiated in the first place.<sup>174</sup>

Most important, sulh is an unquestionably Islamic institution, the Prophet's preferred method of dispute resolution.<sup>175</sup> There is considerable pressure today in Saudi Arabia to reach and abide by amicable settlements.<sup>176</sup> Indeed, the main value of tahkīm, in the minds of the medieval Shari'a scholars, was probably that it would likely produce a settlement of the dispute rather than a judgment.<sup>177</sup> That value, it is submitted, is why the procedure was supposed to remain voluntary until the hakam reached his decision, according to the doctrine of three of the four schools. The possibility of judgment, whether by the hakam or a qādī, or both, was left open mainly to spur the parties to reach an agreed settlement. It may have been considered desirable for a hakam's judgment to be difficult to enforce, because this would constitute added

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<sup>174</sup> M. BROOKS, PROCEEDINGS OF SYMPOSIUM ON U.S.-ARAB COMMERCIAL ARBITRATION 40 (1984).

<sup>175</sup> See *id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*; see also N. COULSON, *supra* note 102, at 87.

incentive for the parties to settle.

Sulh will certainly not be an appropriate procedure in all cases. Where there has been a complete failure to perform the contract, or where one party has not acted in good faith, there is no business relationship to maintain and proceedings aimed at reaching a settlement would constitute merely another opportunity for the defendant to delay the ultimate resolution of the dispute. Similarly, where the positions of the parties are very far apart, it will not likely be possible to find any solution on which all the arbitrators can agree.

The decision whether to authorize the arbitrators to conciliate under Article 16 should therefore not be made in the arbitration clause, but after the dispute arises, based on the parties' assessment of whether a compromise would be an appropriate or feasible solution to the dispute. Nonetheless, counsel for foreign companies should keep in mind that sulh is the most Islamic, least controversial means of dispute resolution in Saudi Arabia. Although it may preclude total victory, the result is likely to be agreeable to both parties. The procedure outlined in Article 16 of the Regulation should, therefore, attract more interest than it has thus far. The Saudi government should be urged to issue rules to define more completely the consequences of authorizing arbitrators to conciliate.

## 6. CONCLUSION

Increased use of procedures that are drawn from the rich legacy of Shari'a scholarship is likely to be a far more effective way of helping the Saudi legal system develop in ways acceptable to foreign business people than are continued attempts to pressure the Saudi government to adopt laws that are essentially foreign. Rather than pushing for rules that limit the scope of court review of arbitration awards, Western lawyers should be aware that a procedure already exists for doing so in appropriate cases.

In general, the Arbitration Regulation of 1983<sup>178</sup> will be a success if those who utilize its procedures do not try to make it into a vehicle for wholesale change. Awards that pay only lip service to the Shari'a will likely be overturned by judicial authorities, resulting in a great deal of frustration on all sides. Skillful arbitrators and parties perceptive enough to choose the appropriate procedure (and the appropriate arbitrator) for the case, can play an important role in the slow process of discovering a workable application of the Shari'a to the commercial realities of the twentieth century.

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<sup>178</sup> See Royal Decree M/46, *supra* note 21, art. 1.

**ARBITRATION REGULATION OF SAUDI ARABIA****Royal Decree M/46 of 12.07.1403H (25.04.1983G)****Article 1**

The parties may agree to arbitrate a specific existing dispute; a prior agreement may also be made in respect of any dispute resulting from the performance of a specific contract.

**Article 2**

Arbitration shall not be permitted in cases where a settlement (Arabic: *SULH*) is not allowed. An agreement to arbitrate (Arabic: *AL-ITTIFĀQ 'ALA AL-TAHKĪM*) may not be made except by those who have capacity to act.

**Article 3**

Government Agencies are not allowed to resort to arbitration for settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This ruling may be amended by resolution of the Council of Ministers.

**Article 4**

The arbitrator shall have expertise and be of good conduct and behavior, and shall have full legal capacity. If there are several arbitrators, their number shall be uneven.

**Article 5**

The parties to the dispute shall file the arbitration instrument (Arabic: *WATHĪQAT AL-TAHKĪM*) with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorized attorneys, and by the arbitrators, and it must state the details of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached.

**Article 6**

The Authority originally competent to hear the dispute shall record the applications for arbitration submitted to it, and take a decision approving the arbitration instrument (Arabic: *WATHĪQAT AL-TAHKĪM*).

**Article 7**

If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation.

**Article 8**

The clerk of the Authority originally competent to hear the dispute shall be in charge of all the notifications and notices provided for in this Regulation.

### Article 9

The arbitrator's decision shall be taken within the time limit specified in the arbitration instrument (Arabic: WATHIQAAT AL-TAHKIM), unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within ninety days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject matter or extending the time limit for another period.

### Article 10

If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s), or if one or more of the arbitrators refuses to assume his task or withdraws, or something prevents him from carrying out his tasks, or if he is dismissed, and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrators upon the request of the party who is interested in expediting the arbitration, in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final.

### Article 11

The arbitrator may not be removed except with the mutual consent of the parties, and the arbitrator so removed may claim compensation if he had already proceeded and if he had not been the cause of such removal. Furthermore, he cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument (Arabic: WATHIQAAT AL-TAHKIM).

### Article 12

The arbitrator may be challenged for the same reasons for which a judge may be challenged. The request for challenge shall be submitted to the Authority originally competent to hear the dispute within five days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred. The decision on the request for challenge shall be taken in a meeting to be held for this purpose and attended by the parties and the arbitrator whose challenge is requested.

### Article 13

The arbitration shall not terminate because of the death of one of the parties, but the time fixed for the award shall be extended by thirty



days unless the arbitrators decide on a further extension.

#### Article 14

If an arbitrator is appointed in place of the removed arbitrator or the one who has withdrawn, the date fixed for the award shall be extended by thirty days.

#### Article 15

The arbitrators, by the majority by which the award shall be made, may, through a justified decision, extend the periods fixed for the award on account of circumstances pertaining to the subject matter of the dispute.

#### Article 16

The decision of the arbitrators shall be taken by a majority vote and if they are authorized to reach a compromise solution (Arabic: *SULH*), their decision shall be by unanimity.

#### Article 17

The award document shall especially include the arbitration instrument (Arabic: *WATHĪQAT AL-TAHKĪM*), a resume of the depositions of the parties and their documents, reasons for the award and its text and date, and the signatures of the arbitrators. If one or more of them refuse to sign the award, such refusal shall be stated in the award document.

#### Article 18

All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them. The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final.

#### Article 19

If the parties or one of them submitted an objection against the award of the arbitrators within the period provided for in the preceding Article, the Authority originally competent to hear the dispute shall consider the dispute and shall either dismiss the objection and issue an order for execution of the award, or accept the objection and decide the case.

#### Article 20

The award of the arbitrators shall be due for execution, when it becomes final, by an order from the Authority originally competent to hear the dispute. This order shall be issued upon request of one of the concerned parties after confirming that there is nothing to prevent its

execution legally.

#### Article 21

The award made by the arbitrators shall be considered, after issuance of the order or execution in accordance with the previous Article, as effective as a judgment made by the Authority which issued the order of execution.

#### Article 22

Fees of the arbitrators shall be determined by agreement between the parties and unpaid sums of such fees shall be deposited with the Authority originally competent to hear the dispute within five days after approval of the arbitration instrument (Arabic: *WATHĪQAT AL-TAHKĪM*), and shall be paid within a week from the date on which the order for execution of award is issued.

#### Article 23

If there is no agreement of the fees of the arbitrators, and a dispute ensues, the matter shall be settled by the Authority originally competent to hear the dispute, which decision shall be final.

#### Article 24

The decisions required for the execution of this Regulation shall be issued by the President of the Council of Ministers, on the basis of a proposal made by the Minister of Justice after agreement with the Minister of Commerce and the President of the Board of Grievances.

#### Article 25

This Regulation shall be published in the Official Gazette; and shall be effective thirty days after the date of its publication.

## GLOSSARY OF ARABIC TERMS

**ALLAH:** God.

**BĀTIL:** null and void.

**DĀR AL-HARB:** Lit. "Territory of War." Territory under control of non-Muslims.

**DHIMMĪ:** A non-Muslim residing permanently in a Muslim country under the protection of the Muslim government.

**FATWA:** A legal opinion given by a legal advisor, or **MUFTI**.

**FIQH:** The science of **SHARĪ'A** jurisprudence.

**GHARAR:** Risk of uncompensated loss to one party to a contract and corresponding gain to the other due to uncertainty of contractual obligations or unforeseen circumstances.

**HADĪTH:** An anecdote recording an action or statement of the Prophet, his companions (**SAHĀBA**) or immediate successors (**TĀB'ŪN**). A **HADĪTH** consists of an account of the action or statement (**MATN**) and a list of names of the persons who transmitted orally up to the time it was first recorded in writing (**ISNĀD**), ending with the name of an eyewitness to the event or statement.

**HAKAM:** Arbitrator.

**IJĀRA:** Hire or lease. Generally, any contract transferring the use and benefit of an object or person for a limited period of time for consideration.

**IJMĀ':** Consensus of scholars and leading men of a certain past epoch regarding a point of law. One of the four main sources of Islamic jurisprudence (**USŪL AL-FIQH**).

**IKHTILĀF AL-RA'Y:** A difference of opinion regarding a point of law on which there is no consensus among the four schools.

**JĀ'IZ:** Permissible. An adjective applied to contracts of license such as agency or partnership that were revocable at any time by either party.

**KĀHIN:** A soothsayer.

**LĀZIM:** Binding, enforceable.

**MADHHAB:** Opinion or school of law.

**MAJALLA, the:** A code of commercial law published by the Ottoman Empire in the nineteenth century based on the teachings of the Hanafi

school.

**MASLAHAT AL-'UMŪM:** The public welfare.

**MAYSIR:** A game of chance played in pre-Islamic Arabia outlawed by the Prophet. Gambling in general.

**MAZĀLIM:** Pl. of MAZLAMA, a grievance or injustice. Refers to a special legal procedure invoking the direct authority of the sovereign to review all judgments and right all wrongs without being bound by SHARĪ'A rules of procedure or evidence.

**MUFAWWADĪN BI'L SULH:** Persons appointed by the parties to a dispute authorized to reach an amicable settlement of the dispute.

**MUFTĪ:** A legal advisor authorized to issue FATWAS.

**MUHAKKAM:** An arbitrator, synonymous with HAKAM.

**NĀ'IB:** A representative, delegate, or deputy.

**AL-QADĀ':** Judicial procedure, the administration of justice.

**QĀDĪ:** A judge, magistrate.

**QIYĀS:** Analogy, one of the four main sources of the SHARĪ'A.

**QUR'ĀN:** The Holy Book of Islam, believed to be authored by God Himself. The most important source of Islamic jurisprudence.

**RIBĀ':** Usury, interest.

**SHAR'AN:** According to SHARĪ'A.

**SHARĪ'A:** Literally, "a clear path to water." Islamic Law as derived from the QUR'ĀN and the SUNNA of the Prophet through IJMĀ', QIYĀS and the public interest considerations. It purports to regulate all aspects of the life of a devout Muslim.

**SHĪ'A:** Literally, a party, faction, or sect. Refers to the party of Ali, the fourth Khalif, to whom the SHĪ'Ī sect traces its origin, and to whose descendants SHĪ'Ī Muslims attach special importance.

**SULH:** Amicable settlement, conciliation.

**SULTĀN:** The sovereign of the Muslim state.

**SUNNA:** Practice. The SUNNA of the Prophet is one of the four main sources of Islamic Law. The SUNNA of his companions and immediate successors, where they agreed, constitutes the most binding form of IJMĀ'.

**SUNNĪ:** Pertaining to orthodox Islam, as opposed to, for example, the SHĪ'Ī sect. The schools of law discussed in this paper are those accepted by all orthodox, SUNNĪ Muslims, who consider that all four schools provide acceptable interpretations of the SHARĪ'A.

**TAHKĪM:** Arbitration.

**WAKĪL:** Agent.

**WASĀTA:** Mediation.

**WATHĪQAT AL-TAHKĪM:** Arbitration instrument or document. An agreement to submit a specific existing dispute to Arbitration under the 1983 Saudi Arbitration Regulation.

**WIKĀLA:** Agency.

**'ULAMĀ':** Pl. of 'ĀLIM, wise man, expert, scientist. Refers here to legal and religious scholars of the SHARĪ'A.