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Foreseeable Issues and Hard Questions: The Implications of U.S. Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law under the New York Convention

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NOTE

FORESEEABLE ISSUES AND HARD QUESTIONS: THE IMPLICATIONS OF U.S. COURTS RECOGNIZING AND ENFORCING FOREIGN ARBITRAL AWARDS APPLYING ISLAMIC LAW UNDER THE NEW YORK CONVENTION

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INTRODUCTION

International commercial arbitration's rising popularity as a mode of dispute resolution increasingly forces arbitral tribunals to reconcile the friction created when foreign parties bring divergent legal cultures to a single legal proceeding.[1] Ironically, international commercial arbitration's pervasiveness is partly due to the fact that foreign parties can agree to apply multiple legal codes to a single legal dispute.[2] When a party petitions a particular country's court to recognize and enforce an award rendered using another country's law, friction arises. As this Note will explain, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and several judicial decisions have helped guide U.S. courts when parties seek to recognize and enforce arbitral awards rendered using non-U.S. and contradictory law. No court decision or scholarly piece, however, has addressed the course of action a court should take if asked to recognize and enforce a foreign arbitral award rendered using Islamic law. Yet U.S. courts will have to develop a satisfactory response to such requests, as the rapid growth of Islamic finance will undoubtedly lead parties dealing in Islamic financial instruments to seek recognition and enforcement of foreign awards rendered using Islamic law (particularly Islamic financial law) in the United States.

This Note will examine how a U.S. court should approach recognition and enforcement of a foreign arbitral award under the New York Convention where the parties chose Islamic law as the governing law. A court's chosen course of action will necessarily implicate issues such as the state action doctrine, due process, equal protection, the political question doctrine, and the First Amendment's Establishment Clause. This Note aims to prescribe the most effective approach a court may take when dealing with an award rendered in the international commercial arbitration setting that uses Islamic and other religious law, advancing a three-step process. First the court should use the doctrine of separability to determine exactly which parts of the

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1 *See* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 6–12 (4th ed. Supp. 2009).

2 *See* INT'L CHAMBER OF COMMERCE, ARBITRATION AND ADR RULES art. 21 (2011) ("The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute."); VÁRADY ET AL., *supra* note 1.

arbitration applied religious law (e.g., the procedural law, the evidentiary law, the arbitral law, or the substantive law). Second, the court should institute a waiver rule at the recognition and enforcement stage regarding objections relating to procedural, evidentiary, or arbitral law issues. In limited cases, a U.S. court should undertake due process and equal protection analyses to determine if any constitutional violations occurred during the arbitral proceedings or if recognizing and enforcing the foreign arbitral award would contravene U.S. constitutional rights.

This Note is divided into seven parts. Part I describes the New York Convention. Part II explains certain aspects of Islamic law that would be relevant at the recognition and enforcement stage. Part III provides a brief overview of views toward Islamic law in the United States. Part IV describes the increasing popularity of Islamic finance as a mechanism for conducting financial transactions, which implicates the importance of Islamic commercial law. Part V outlines the particular facets of Islamic law that would create tensions and dilemmas at the recognition and enforcement stage in a U.S. court. Part VI explores three possible, but ultimately flawed, approaches a U.S. court could use when confronted with a foreign arbitral award rendered using Islamic law. Lastly, Part VII prescribes a three-step approach that could minimize many of the problems associated with recognizing and enforcing a foreign arbitral award rendered using Islamic or other religious law.

I
THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an international treaty that the vast majority of countries have signed.[3] Signatories to the treaty include the United States and most countries in the Muslim world.[4] The treaty allows parties seeking to enforce an arbitral award rendered in one member country to have that award recognized and enforced in another member country.[5] Arbitration is the preferred method for settling international disputes that involve parties from different nations

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3 *See* VÁRADY ET AL., *supra* note 1.

4 *See id.*; Charles N. Brower & Jeremy K. Sharpe, Note, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT'L L. 643, 647 (2003) (observing that as of 2003 roughly two-thirds of the Organization of Islamic Countries' nation-members are parties to the New York Convention).

5 *See generally* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention] (providing procedures, exceptions, and conditions under which signatories agree to enforce foreign arbitral awards).

because awards are easily recognized and enforced abroad, especially when compared to the more uncertain and cumbersome process of seeking recognition and enforcement of a judgment rendered in a foreign country's domestic courts.[6] If a party seeks recognition and enforcement of an arbitral award rendered by a New York Convention country in another New York Convention member-country tribunal, that party can be sure that the latter country will apply the New York Convention.[7] However, if the same party seeks recognition and enforcement of a foreign judgment, an agreement between the judgment-rendering country and the country where recognition and enforcement is sought will dictate whether the award will be recognized and enforced; if no such agreement exists, the domestic law of the country where the party seeks recognition and enforcement will dictate whether the award is recognized and enforced.[8] The latter approach is less streamlined and creates more uncertainty for parties seeking to resolve a dispute with an international dimension.[9]

Article V of the New York Convention includes a limited number of exceptions that allow a foreign court to vacate an award.[10] For example, Article V(1)(b) provides that a court can withhold recognition and enforcement of an award if a party was "unable to present his case" during the arbitral proceedings.[11] Courts interpret this provision to withhold recognition and enforcement when parties were denied the opportunity to present their case (e.g., material evidence was not allowed to be introduced).[12] Article V(1)(d) states that a court can vacate an award if the "arbitral procedure was not in accordance with the agreement of the parties."[13] This provision allows a court to

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6 *See* Elana Levi-Tawil, Note, *East Meets West: Introducing Sharia into the Rules Governing International Arbitrations at the BCDR-AAA*, 12 CARDOZO J. CONFLICT RESOL. 609, 612–16 (2011) (detailing the history of international commercial arbitration and the enforceability of foreign arbitral awards); Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L.J. 920, 926–28 (1995) (noting the advantages of international arbitration as compared to litigation in foreign domestic court).

7 New York Convention, *supra* note 5, art. I.

8 *See* J. Noelle Hicks, Note, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 165–66 (2002); Roy, *supra* note 6, at 926–28 (exploring the public policy exception to the recognition and enforcement of foreign judgments under the Brussels Convention).

9 *See* Charles Platto & William G. Horton, *Preface* to ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE, at xi, xi (Charles Platto & William G. Horton eds., 2d ed. 1993) ("[T]he enforcement of foreign judgments remains one of the few fields in which there is no international governing convention."). For example, in the United States, "state law governs the enforcement of foreign judgments, thus creating a sense of uncertainty for foreigners." Hicks, *supra* note 8, at 160.

10 *See* New York Convention, *supra* note 5, art. V.

11 *See id.* art. V(1)(b).

12 *See id.*

13 *See id.* art. V(1)(d).

vacate an award where the parties chose a specific law to govern the dispute but the arbitrator based his or her decision on another legal code.[14] Also under this provision, a court may refuse recognition and enforcement where the composition of the arbitral tribunal was inconsistent with the parties' agreement.[15]

Article V(2)(b) provides an additional exception that either the parties or the court can raise.[16] This exception allows the court to vacate an arbitral award when "recognition or enforcement of the award would be contrary to the public policy of [the forum] country."[17] U.S. courts have interpreted the public policy exception to apply when an award's recognition and enforcement would offend "the forum state's most basic notions of morality and justice."[18] The public policy exception is unavailable in situations where the award's recognition and enforcement is merely contrary to the forum state's "national political interests."[19]

Parties who raise the public policy exception are seldom successful because U.S. policy generally favors arbitration.[20] Several U.S. cases go so far as to suggest that it is contrary to U.S. public policy for a court to fail to recognize and enforce a valid foreign arbitral award.[21] In the context of international financial disputes, the Supreme Court, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, stated that there is an "emphatic federal policy in favor of arbitral dispute resolution."[22] Hence, U.S. courts' interpretation of the New York Convention calls for virtually automatic recognition and enforcement of foreign arbitral awards.

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14 *See id.*

15 *See id.*

16 *See id.* art. V(2)(b).

17 *Id.*

18 Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974); Hicks, *supra* note 8, at 166–67.

19 *Parsons & Whittemore*, 508 F.2d at 974.

20 *See* Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 176 (2007) (noting the "current policy . . . that courts should favor arbitration over litigation" (quoting Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 17 (1997)) (internal quotation marks omitted)).

21 *See, e.g.*, *In re* Chromalloy Aeroservices, 939 F. Supp. 907, 913 (D.D.C. 1996) (noting that a decision failing to enforce a foreign arbitral award "would violate . . . clear U.S. public policy").

22 473 U.S. 614, 631 (1985).

II
ISLAMIC LAW

A. Islamic Arbitral Law

Arbitration has been the preferred method of dispute resolution since the beginning of Islam.[23] Anyone qualified to be a *qadi* (Islamic judge) is also qualified to arbitrate a dispute involving Islamic law.[24] Conversely, an arbitrator must also qualify as a *qadi*, which means that in some schools of Islamic law, women and minorities cannot serve as arbitrators.[25] Additionally, Islamic arbitral law discourages parties from using attorneys or representatives to argue their cases.[26]

Particular aspects of Islamic arbitral law might force a U.S. court to confront uncomfortable issues. If the arbitral tribunal was composed in accordance with an interpretation of the *qadi* arbitrator rule that prohibits women and minorities from serving as arbitrators, a U.S. court may feel uncomfortable enforcing its award, despite the New York Convention's instruction that an arbitral tribunal must be composed in manner consistent with the parties' agreement.[27] A U.S. court may feel similarly uncomfortable enforcing an award where the tribunal discouraged the parties from retaining counsel.[28]

Although arbitration has been prevalent throughout Islamic history for settling legal disputes,[29] Muslim states and other entities have only recently embraced international arbitration as a means to settle commercial disputes.[30] Former President of the International Court of Justice Mohammed Bedjaoui explains the Arab world's recent acceptance of international arbitration as follows:

> [T]he Arab world does not merely submit passively to [international] arbitration, as imposed by its western partners in their con-

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23 *See* Brower & Sharpe, *supra* note 4, at 643; Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 589–96 (2006) (describing the Middle East's long history of arbitration, dating back to the pre-Islamic period).

24 *See* David S. Powers, Islamic Procedure Readings 55 (Sept. 21, 2009) (unpublished manuscript) (on file with author).

25 *See id.*

26 *See* Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 464 (2006).

27 *See* New York Convention, *supra* note 5, art. V.

28 *See* Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the* Beth Din *Precedent*, 25 J.L. & RELIGION 379, 394 n.69 (2009–2010) (describing state arbitration statutes that make the right to an attorney a nonwaivable statutory right).

29 *See* Mona Rafeeq, Note, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108, 113–14 (2010) (describing how arbitration has been preferred to litigation from the start of Islamic history).

30 *See* Brower & Sharpe, *supra* note 4, at 656.

> tracts, but is rather an active proponent of the system, freely adopting it in its intra-regional commercial relations. In such cases, there is no external economic power which has imposed its will and choice on Arab partners.[31]

Charles Brower and Jeremy Sharpe persuasively argue that Muslims are now eager to embrace international commercial arbitration when a financial dispute arises because it is a tool that provides the freedom to choose the procedural and substantive law.[32] In light of Islamic finance's increasing popularity as a means to conduct international business,[33] the international community must ensure that Muslim states and their nationals continue to embrace international commercial arbitration.

B. Islamic Evidentiary Law

Certain facets of Islamic evidentiary law will create issues in U.S. courts' enforcement of arbitral awards rendered using this law. For example, according to many Islamic interpretations, legal testimony is only acceptable from a witness who is classified as "religious."[34] An arbitral tribunal must determine whether a witness is an "upright" individual, whether that witness follows Sharia, and whether that witness "abstains from sin."[35] A witness's testimony is unacceptable if the witness stands to benefit from the outcome of the case or if the witness has an interest in the case.[36] Thus, a problem would arise at the recognition and enforcement stage if a U.S. court were asked to vacate a foreign award under Article V(1)(b) because the arbitrator did not allow the party to introduce material evidence and consequently denied the party an opportunity to present its case.[37]

Another issue emerges if the parties chose Islamic law as the applicable evidentiary law and adopted an interpretation that holds a woman's testimony to be equal to half of a man's testimony.[38] In cases involving financial disputes, Islamic law requires the testimony of two

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31 *See* Mohammed Bedjaoui, *The Arab World in ICC Arbitration*, *in* THE ICC INT'L COURT OF ARBITRATION BULLETIN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE ARAB COUNTRIES 7, 13 (Supp. May 1992). Although the Bedjaoui quotation refers to the Arab embrace of international commercial arbitration, the quotation is equally applicable to the rest of the Muslim world considering that the non-Arab Muslim world had a similar experience with external economic domination. *See* KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 141–55, 178–80 (2000); Brower & Sharpe, *supra* note 4, at 647.

32 *See* Brower & Sharpe, *supra* note 4, at 655.

33 *See infra* Part IV.

34 David S. Powers, Islamic Evidence Readings 2 (Sept. 21, 2009) (unpublished manuscript) (on file with author).

35 *Id.*

36 *See id.* at 3.

37 *See* New York Convention, *supra* note 5, art. V(1)(b).

38 *See* Powers, *supra* note 34, at 4–5.

men to establish a fact as proven.[39] Following the above-described interpretation of Islamic law would mean that four women would have to testify to establish a fact in a case involving an Islamic financial dispute. If an arbitrator accepts such an interpretation, then the arbitrator, by default, accepts the notion that the testimony of one person is inferior to others on the sole basis of sex. In the United States, this acceptance would constitute an equal protection violation,[40] meaning that a foreign tribunal's application of this interpretation would be contrary to U.S. public policy.[41] Various interpretations of the Quran, however, state that adjudicators should treat male and female testimony as equal.[42] But, as explained below, a court would violate the Establishment Clause by accepting one of these "liberal" interpretations.[43]

III

PUBLIC PERCEPTION OF ISLAMIC LAW IN THE UNITED STATES

Islamic law's apparent encroachment into the U.S. legal order is continually pushed to the forefront of American political discourse. In 2010, for example, those who opposed the proposed construction of two mosques, one in lower Manhattan and one in Murfreesboro, Tennessee, partially justified their opposition on the grounds that the mosques would further the prevalence of Islamic law in the United States.[44] In a suit seeking to block the mosque's construction, the residents of Murfreesboro stated that their community would be "irreparably harmed by the risk of terrorism generated by proselytising for Islam and inciting the practices of [S]haria law."[45] The residents claimed that such a mosque would establish "Constitution-free zones" where Islamic tribunals would exclusively apply Islamic law and impose Islamic law penalties.[46]

Any politician or religious leader who suggests that Islamic law has some role to play in resolving disputes between willing parties is quickly rebuked for facilitating Islamic law's intrusion into his or her country's secular legal order. For example, Archbishop Rowan Williams, leader of the Anglican Church, faced harsh criticism at home

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39 *See id.* at 5.

40 *See* Reed v. Reed, 404 U.S. 71, 77 (1971) (finding that discrimination on the basis of sex violates the Equal Protection Clause).

41 *See* New York Convention, *supra* note 5, art. V(2)(b).

42 *See* Powers, *supra* note 34, at 8.

43 *See infra* Part V.C.

44 *See Islam in Tennessee: An Uncivil Action*, ECONOMIST, Nov. 20, 2010, at 39, 39; *see also Muslims and McCarthyism*, ECONOMIST, Mar. 12, 2011, at 42, 42 (critiquing an "Islamophobi[c]" decision of a House committee to hold security hearings that would focus exclusively on Muslim Americans).

45 *Islam in Tennessee: An Uncivil Action*, *supra* note 44.

46 *Id.*

and abroad for implying that Islamic law has a place in Britain's faith-based dispute resolution system when parties voluntarily choose it.[47] Similarly, in Canada, Ontario's Premier rejected, after strong public outcry, a 2005 proposal to incorporate Islamic faith-based arbitrations into the already existing framework of faith-based arbitrations, which includes Jewish and Christian mediation centers.[48] Journalists and scholars suggest that the mere mention of Islamic law creates such knee-jerk reactions because Islamic law evokes images of beheadings and stonings and conjures notions of a legal code that is fundamentally incompatible with the rights of women and minorities.[49]

Such notions concerning Islamic law might help explain why Oklahoma voters passed State Question 755 (also known as the Sharia Amendment) by a vote of 70.08% to 29.9% in a November 2008 ballot measure.[50] Although the Sharia Amendment has not gone into effect, it forbids Oklahoma courts "from *considering or using* international law" and explicitly forbids the use of Islamic or Sharia law.[51] Lawmakers in six other states have proposed similar legislation.[52] In South Carolina, a legislator proposed a law that would prohibit courts from "consider[ing] Sharia Law . . . and [enforcing] decisions of courts or tribunals" using Sharia law.[53]

Although the probability that the Sharia Amendment or similar laws would pass constitutional muster is very small,[54] "the xenophobic spirit of th[ese] amendment[s] . . . is quite depressing."[55] The public's view of Islamic law in the American legal system is indeed "depressing," because the debate focuses almost exclusively on the invented threats posed by Islamic law overtaking the secular legal order and does not focus on the real issues posed by accommodating parties who voluntarily wish to apply Islamic law to their disputes. For example, instead of examining whether a court should enforce a foreign arbitral award where an arbitrator applying Islamic law denied a party the opportunity to present a witness because the witness had an

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47 *See Sharia in the West: Whose Law Counts Most?*, ECONOMIST, Oct. 16, 2010, at 71, 71.

48 *See* Wolfe, *supra* note 26, at 428.

49 *See Islamic Law and Democracy: Sense About Sharia*, ECONOMIST, Oct. 16, 2010, at 16, 16.

50 *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320 (2011).

51 *See id.*

52 *See id.*

53 *See id.* at 321.

54 *Cf.* Amanda Bronstad, *10th Circuit Blocks Enforcement of Sharia Ban*, NAT'L L.J., Jan. 10, 2012, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202538005267&10th_Circuit_blocks_enforcement_of_Sharia_ban (subscription required) (reporting that the U.S. Court of Appeals for the Tenth Circuit has maintained the injunction blocking the application of the Oklahoma amendment but that the district court has yet to reach a decision on the merits).

55 *See* Symeonides, *supra* note 50, at 323.

interest in the outcome, the public is concerned with whether enforcing a judgment that used Islamic law will lead to stoning for adultery and cutting off hands for theft.[56] The latter concern is purely imagined because it is impossible to fathom a U.S. court recognizing and enforcing a foreign arbitral award imposing the type of Islamic corporal penalties that only a few Muslim countries sanction.[57] This Note will focus on the real and foreseeable dilemmas posed when a party asks a U.S. court to recognize and enforce a foreign arbitral award rendered using Islamic law.

IV
THE GROWING IMPORTANCE OF ISLAMIC FINANCE AND BANKING IN INTERNATIONAL COMMERCE

Recent trends indicate that Islamic finance is becoming an increasingly popular alternative to traditional or "Western" forms of investment and financial trading.[58] Today, Sharia-compliant assets equal "almost one trillion U.S. dollars globally."[59] Financial experts estimate that "[t]he potential market for Islamic financial products could be as high as four trillion U.S. dollars."[60] This growth is not just limited to countries with overwhelmingly large Muslim populations, but it also extends to Western countries such as the United States.[61] Scholars suggest that Islamic finance's growing popularity may be due to its emphasis on "responsible management"[62] and "aversion to excessive risk."[63]

At its most basic, there are four principle rules that distinguish Islamic commercial law from Western commercial law.[64] Under Islamic law, financial deals must not involve interest (*riba*), the parties must not undertake "excessive risk-taking" (*gharar*), the parties must not treat money as a commodity (i.e., a commodity cannot be sold before it is delivered, and speculation is discouraged), and the value of money cannot change with the passage of time.[65]

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56 *See, e.g.*, Blake Farmer, *Fears About Shariah Law Take Hold in Tennessee*, NPR (Sept. 3, 2012), http://www.npr.org/2012/09/03/159378918/fears-about-shariah-law-take-hold-in-tennessee (recounting a recent incident of irrational fear of Sharia law in Tennessee).

57 *See Islamic Law and Democracy: Sense About Sharia*, *supra* note 49.

58 *See* Bashar H. Malkawi, *Financial Derivatives in the West and in Islamic Finance: A Comparative Approach*, 128 BANKING L.J. 50, 58 (2011); Julio C. Colón, Note, *Choice of Law and Islamic Finance*, 46 TEX. INT'L L.J. 411, 412–13 (2011).

59 *See* Colón, *supra* note 58, at 412.

60 *See id.*

61 *See id.*

62 *See id.*

63 *See* Holly E. Robbins, Note, *Soul Searching and Profit Seeking: Reconciling the Competing Goals of Islamic Finance*, 88 TEX. L. REV. 1125, 1149 (2010).

64 *See* Malkawi, *supra* note 58, at 61.

65 *See id.*

Islamic banking and financial transactions are often cross border.[66] As such, parties to these transactions often turn to international commercial arbitration as the principle means to resolve disputes, given that this is the easiest method to enforce awards across national borders.[67] Many of the assets related to these disputes will be in the United States, and parties will therefore undoubtedly seek recognition and enforcement of awards in the United States.[68] Accordingly, Islamic finance's expansion will inevitably force U.S. courts to grapple with the question of whether recognizing and enforcing awards where Islamic law provided the procedural and substantive law violates U.S. public policy or qualifies for any of the other relevant exceptions enumerated in the New York Convention.

V
DIFFICULTIES IN USING ISLAMIC LAW IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT

A. Determining Islamic Law

If an agreement calls for an arbitrator to simply apply Islamic law, the arbitrator will face certain challenges regardless of whether the arbitrator is an expert on Islamic law. Difficulties will inevitably arise during the arbitration because multiple schools of Islamic law exist and each of these schools has many interpretations.[69] Islamic law is essentially 1,400 years of jurisprudential analysis of Islam's sacred texts—mainly the Quran and Sunna (Prophet Muhammad's recorded actions and sayings).[70] Today, Islamic law is divided into two main categories: the Sunni and Shi'a schools of law.[71] Four Sunni schools also continue to interpret Islamic law: Maliki, Hanbali, Hanafi, and Shafi.[72]

Another problem arbitrators will confront when asked to apply Islamic law is that the concept of binding precedent does not exist in Islamic law.[73] Islamic scholars, whose writings make up Islamic law, constantly debate and change their opinions on the law.[74] Further-

66 *See* Colón, *supra* note 58, at 411 (suggesting that the emergence of international Islamic financial instruments may create conflict-of-law issues).

67 *See* Levi-Tawil, *supra* note 6.

68 *See* Colón, *supra* note 58, at 412 (referencing U.S. providers of Islamic financial products).

69 *See* Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 626–28 (2006).

70 *See id.*

71 *See* Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 172 (2006).

72 *See* Trumbull, *supra* note 69, at 627–28.

73 *See id.*

74 *See* Kutty, *supra* note 23.

more, Islamic law has no real choice-of-law concept.[75] Therefore, parties who choose Islamic law will face uncertainty during the arbitral proceedings, as Islamic law not only has many interpretations, but these varying interpretations are also in constant flux.

B. The "Laws of a Country" Versus "Rules of Law" and Proceedings "Not in Accordance with the Agreement of the Parties"

A British case, *Shamil Bank of Bahrain E.C. v. Beximco Pharmaceuticals Ltd.*, raises an interesting choice-of-law issue in commercial arbitral proceedings where the arbitrator applied Islamic law.[76] In *Shamil Bank*, the court held that an agreement calling for the application of Islamic law was invalid because Islamic law is not the law of any one country.[77] The court based its decision on the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the Rome Convention),[78] which requires parties to choose the law of a particular country.[79] The following question is raised: Should an arbitrator refuse to honor the parties' choice of Islamic law on the basis that Islamic law is a religious code and not the legal system of any one nation? Many nations have incorporated Islamic law into their legal systems, but it is difficult to single out any one of these countries and hold it as a true example of Islamic law.[80]

The Rules of Arbitration Article 17 of the International Chamber of Commerce (ICC) and Article 28 of the United Nations Commission on International Trade Law's Model Law on International Arbitration (Model Law) provide an alternative approach to the Rome Convention.[81] The ICC and Model Law take the "rules of law" approach, allowing parties to choose to apply a body of law that is not necessarily codified by any governing body or state.[82] Nevertheless, even if the parties to an arbitration adopt the ICC and Model Rules approach, the difficult problem of recognizing and enforcing an arbitral award

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75 *See id.*

76 [2004] EWCA (Civ) 19, [2004] 1 W.L.R. 1784 (appeal taken from Eng.).

77 *See* Colón, *supra* note 58, at 414.

78 June 19, 1980, 19 I.L.M. 1492.

79 *See* Colón, *supra* note 58, at 414–15.

80 For example, Iran and Saudi Arabia have applied Islamic law to "all areas of law." Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 22 (2001). Nevertheless, Iran and Saudia Arabia's national laws differ: the former adheres to Shi'a Islamic law and the latter to Sunni Islamic law. *See* Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT'L L. 375, 386 n.45 (2005) (stating that Sunni Islam influences the Saudi order).

81 *See* VÁRADY ET AL., *supra* note 1, at 652–54 (4th ed. 2009).

82 *See id.*

applying a religious law with contradictory and evolving interpretations still lies before the court.

The fact that Islamic law consists of many schools of thought creates another vulnerability for a foreign arbitral award using Islamic law at the recognition and enforcement stage. Article V(1)(d) of the New York Convention states that a court may refuse recognition and enforcement of an arbitral award where the law used during the proceedings "was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[83] Hence, if at the recognition and enforcement stage the losing party objected to recognition and enforcement on the basis that the version of Islamic law chosen was not the law the parties intended, then the U.S. court may hold the arbitral award invalid on Article V(1)(d) grounds under two justifications. First, the U.S. court might find that the law the arbitral authority applied was not the version of Islamic law chosen by the parties, such that the law applied "was not in accordance with the agreement of the parties."[84] Second, the U.S. court might decide that the parties' choice of Islamic law was too vague to constitute an agreement regarding the governing law. The court may instead choose to apply the law of the country where the arbitration occurred.

VI
THREE ALTERNATIVES A REVIEWING U.S. COURT MAY EMPLOY WHEN CONFRONTED WITH A FOREIGN ARBITRAL AWARD RENDERED USING ISLAMIC LAW

A. Per Se Ban on Recognition and Enforcement

Under a per se ban, U.S. courts would automatically refuse to recognize or enforce a foreign arbitral award rendered using Islamic law for the procedural, substantive, evidentiary, or arbitral law.[85] Proponents of a per se ban might justify such a rule on the basis that Article V(2)(b) of the New York Convention allows a court to set aside an award if "recognition or enforcement of the award would be contrary to the public policy of [the forum] country"[86] or, in other words, if the award offends the "forum state's most basic notions of morality and justice."[87] The proponents of such a ban would contend that a court's recognition and enforcement of such an award is against U.S. public policy and against the United States' "most basic notions of

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83 *See* New York Convention, *supra* note 5, art. V(1)(d).

84 *Id.*

85 *See* VÁRADY ET AL., *supra* note 1, at 654–55, 657 (4th ed. 2009).

86 *See* New York Convention, *supra* note 5, art. V(2)(b).

87 *See* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

morality and justice" because Islamic law is fundamentally inconsistent with American principles of secularism, due process, and equal protection.[88]

The argument that such an award is automatically contrary to U.S. public policy is unpersuasive. In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, the U.S. Court of Appeals for the Second Circuit read the New York Convention's public policy exception "narrowly" and held that it is not "a parochial device protective of national political interests."[89] The U.S. Court of Appeals for the D.C. Circuit further elaborated on the public policy standard by explaining that a foreign arbitral award is contrary to U.S. public policy when enforcement "tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."[90] According to these standards, a foreign arbitral award rendered using Islamic law will not contravene U.S. public policy by the mere choice of Islamic law. The fact that certain aspects of Islamic law might be wholly contrary to U.S. ideals concerning individual rights and the administration of law (e.g., a woman's testimony equaling half of a man's testimony) does not necessarily imply that any award applying Islamic law is automatically contrary to U.S. public policy. Indeed, substantive Islamic financial law seems entirely compatible with U.S. public policy.[91] Islamic substantive financial law emphasizes that parties to a commercial transaction should not charge interest (*riba*) nor undertake excessive risk (*gharar*).[92] Such pronouncements seem far

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88 *See, e.g.*, *Saudi Arabia Execution of "Sorcery" Woman Condemned*, TELEGRAPH (U.K.), Dec. 13, 2011, http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/8952641/Saudi-Arabia-execution-of-sorcery-woman-condemned.html (discussing international condemnation of Saudi Arabia's execution of a woman convicted of "sorcery" under Sharia law).

89 *See Parsons & Whittemore*, 508 F.2d at 974. In regards to foreign judgments rendered by foreign courts, Karen Minehan explains that U.S. courts have applied the public policy exception to only a few unique classifications of cases. *See* Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795, 804–08 (1996). These cases include: (i) a foreign judgment that awarded damages incurred as a result of wrongdoing by the party seeking enforcement from a U.S. court, where a wrongdoer or fugitive asks for enforcement, (ii) a foreign libel judgment that is inconsistent with the U.S. Constitution, and (iii) penal foreign judgments. *See id.*

90 TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007) (quoting Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986)) (internal quotation marks omitted).

91 *See generally* Akaddaf, *supra* note 80 (explaining how the United Nations Convention on Contracts for International Sale of Goods—to which the United States is a party—and Islamic commercial law are compatible).

92 *See* Robbins, *supra* note 63, at 1127 (discussing the basic principles of Sharia finance).

from offending any of the United States' "basic notions of morality and justice."[93] Hence, a per se ban would be extremely overbroad.

Christian and Jewish legal codes also contain certain laws contrary to U.S. public policy, but courts and politicians have recognized that despite some areas of tension,[94] arbitrations that employ religious law have a very important purpose: they provide willing participants a binding dispute resolution mechanism that employs a legal code consistent with the participants' religious beliefs.[95] The same logic applies to arbitrations rendered using Islamic law. Even though certain aspects of Islamic law are contrary to U.S. public policy, allowing willing parties to choose Islamic law as the applicable arbitration law encourages these parties to resolve their disputes civilly and in accordance with their beliefs.

Problematically, a per se ban would contravene the political question doctrine, the Free Exercise Clause, and the Equal Protection Clause. A state court would also violate the Supremacy Clause and the federal foreign affairs doctrine if it were to impose a per se ban on foreign arbitral awards rendered using Islamic law.[96]

If a court were to institute a per se enforcement ban on arbitral awards rendered using Islamic law, the court would violate the political question doctrine. Montré Carodine argues convincingly about the political question doctrine in regards to recognition and enforcement of foreign judgments (as opposed to foreign arbitral awards—the focus of this Note).[97] She asserts that when a U.S. court contemplates enforcing a foreign court's decision, the court engages in an "international due process analysis," which entails judging whether the foreign nation's judicial system is "fundamentally fair."[98] Using this analysis, the court decides whether the country's judicial system is

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93 *See Parsons & Whittemore*, 508 F.2d at 974.

94 *See* Grossman, *supra* note 20, at 178, 181 & n.111, 189 (providing examples of such tension, including the Institute for Christian Conciliation, which retains the power to deny parties their right to an attorney, and "strict Jewish law," which does not allow women, non-Jews, relatives of the parties, or the disabled to act as witnesses); *Sharia in the West: Whose Law Counts Most?*, *supra* note 47 (implying that the presence of arbitral centers applying Jewish law or Christian law in the United States is not as controversial as the prospect of Islamic arbitral centers in the United States).

95 *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1276–77 (2011); *Sharia in the West: Whose Law Counts Most?*, *supra* note 47.

96 *Cf.* Zschernig v. Miller, 389 U.S. 429, 440 (1968) (striking down an Oregon statute that limited foreign citizens' inheritance of U.S. citizens' property to those who could prove that their country provided reciprocal rights to U.S. citizens).

97 *See* Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1193–1207 (2007).

98 *See id.* at 1177, 1183–84 (explaining that the system under which the foreign decision was rendered need only be "'*compatible* with' American notions of due process" (quoting Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000))).

so "bad" that its judgments are per se unenforceable.[99] Carodine argues that a court undertaking this analysis violates the political question doctrine because such an analysis requires the judge to conduct foreign policy.[100] Foreign relations questions trigger the political question doctrine.[101] The Supreme Court, in *Baker v. Carr*, agreed with this position.[102] In *Baker*, the Court held that questions involving foreign relations are inherently political and beyond a court's province.[103] Similarly, if a court were to institute a per se rule disallowing enforcement of arbitral awards rendered using Islamic law, the court would violate the political question doctrine. Such a violation would occur because the court would have conducted foreign affairs by judging an entire foreign legal code's validity rather than the validity of the single proceeding in regards to a specific disputant.

One might argue that a court would not violate the political question doctrine if it declared that Islamic law is contrary to U.S. public policy because Islamic law is a religious code, not exclusively the law of any one country. This argument follows the British court's logic in *Shamil Bank*,[104] but it is misleading because Islamic law is still a foreign legal code and several countries use Islamic law as the foundation of their legal system.[105] As such, if a U.S. court imposed a per se ban on arbitral awards because the arbitrator applied Islamic law, the court would essentially declare that several countries' legal codes are fundamentally contrary to U.S. public policy. This declaration contravenes the political question doctrine.

A per se ban would also violate the Free Exercise Clause of the First Amendment. Any law similar to the one passed in Oklahoma, which forbids courts from enforcing judgments rendered using Islamic law, would violate the Free Exercise Clause.[106] Such a per se

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99 *See id.* at 1170–89 (comparing court decisions that find a country's judicial system to be "bad" without examining particular due process concerns of the case at hand with court decisions that find a country's judicial system to be "good").

100 *See id. But see* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a) (1962) (implying that it should not matter whether the individual process provided by a foreign court to a party in rendering a single foreign judgment was unfair but whether the foreign legal system, as a whole, is unfair).

101 *See* Carodine, *supra* note 97, at 1197–1203 (noting that the Supreme Court recognizes that questions involving foreign relations are inherently political).

102 *See* 369 U.S. 186, 217 (1962) (arguing that cases involving foreign relations provide traditional indicators of political questions).

103 *See id.*

104 *See supra* Part V.B.

105 *See generally* Akaddaf, *supra* note 80 (citing Saudi Arabia and Iran as countries that universally apply Sharia law).

106 *See* Symeonides, *supra* note 50, at 321–22 (citing Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012)).

ban "singl[es] out" Islamic law for disparate treatment in violation of the Free Exercise Clause.[107]

Similarly, a state court would violate the federal foreign affairs doctrine by imposing a per se ban on the enforcement of foreign awards rendered using Islamic law.[108] In *Zschernig v. Miller*, the Supreme Court held that a state court cannot apply state laws which have the effect of managing relations with another country because foreign relations is the exclusive province of the federal government—specifically the President and Congress.[109] Consequently, a state court's per se recognition and enforcement ban would amount to a state passing judgment on an entire foreign legal code.

A state court that applies a state law imposing a per se ban on recognition and enforcement of an arbitral law would violate the Supremacy Clause. Such a court would be refusing recognition and enforcement on a ground not listed as an exception under the New York Convention.[110] Under the Supremacy Clause, federal law controls when state law contradicts federal law.[111] The state court's declaration that the mere use of Islamic law is grounds for refusal would violate the Supremacy Clause because the New York Convention is federal law incorporated into the U.S. Federal Arbitration Act,[112] and a foreign arbitral award that merely uses Islamic law is not an enumerated ground for withholding recognition and enforcement.[113]

B. Per Se Enforcement or Minimal Review

Under a per se enforcement or minimal review approach, a court would simply enforce an arbitral award or conduct a very limited review of the award. In practice, courts take this approach when recognizing and enforcing a foreign award under the New York Convention.[114] When a party seeks to enforce a foreign arbitral award under the New York Convention, the court does not examine the merits of the dispute and can only refuse recognition and enforcement on a few grounds.[115]

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107 *See id.* The law is facially discriminatory because although it forbids courts from referencing any foreign law, it mentions only Sharia as an example.

108 *See* Carodine, *supra* note 97.

109 389 U.S. 429, 432 (1968).

110 *See* New York Convention, *supra* note 5, art. V.

111 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

112 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1970 (Federal Arbitration Act), Pub. L. No. 91-368, 84 Stat. 692 (codified as amended at 9 U.S.C. §§ 201–208 (2006)).

113 *See* New York Convention, *supra* note 5, art. V.

114 *See supra* Part I.

115 *See* Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 960 (S.D. Ohio 1981) (agreeing that the court, acting under narrow powers of judicial review, cannot substitute its judgment for that of the arbitrators); Mark Wakim, *Public Policy Concerns Regarding*

The per se enforcement or minimal review approach gives rise, however, to a number of issues. For example, many scholars argue that a court's recognition and enforcement of an arbitral award amounts to state action.[116] If state enforcement of an arbitral award is truly state action, then enforcing an arbitral proceeding that lacked due process protections would create constitutional violations under the Fifth or Fourteenth Amendments.[117] Thus, if parties chose Islamic procedural law to govern a dispute and if the arbitrator excluded several witnesses with material testimony because they had an interest in the outcome, then state enforcement of the award might be unconstitutional given that the parties did not have a full opportunity to present their case.[118] Similarly, if the parties agree that only Muslims can serve as arbitrators, then a simple per se enforcement of the award would violate constitutional protections such as the Equal Protection Clause.[119] Another problem would stem from some interpretations of Islamic law stating that the testimony of a woman is half that of a man's.[120] This interpretation creates issues under the Equal Protection Clause and Article V(1)(b) of the New York Convention, under which a state court would likely note that material evidence was disallowed and the arbitration failed to provide an adequate opportunity to present the case.[121]

A British court directly confronted the problem of enforcing a domestic arbitral award that resolved a financial dispute where the arbitration agreement stipulated that the arbitrator must be a member of a specific sect of Shi'a Islam.[122] In *Jivraj v. Hashwani*, the losing party objected to enforcement on the grounds that the award's recog-

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Enforcement of Foreign International Arbitral Awards in the Middle East, 21 N.Y. INT'L L. REV. 1, 24–25 (2008) (listing the grounds for refusal of an award under the New York Convention and noting that an exception based on the erroneous application of substantive law is not listed as a reason for withholding recognition and enforcement).

116 *See, e.g.*, Grossman, *supra* note 20, at 199–202; Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 579 (1997).

117 *See* Grossman, *supra* note 20, at 202–03.

118 The test for procedural due process examines whether a court deprived a party of his or her constitutionally guaranteed right to life, liberty, or property without due process. *See id.* To determine whether a due process right exists, the court must balance the party's interest affected by the procedure in question with the possibility of an "erroneous deprivation" of using the procedure in question against the government's interest in keeping the current procedure in place. *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

119 The state's discrimination on the basis of religion, without a compelling government interest, amounts to an equal protection violation. *See* Powers v. Ohio, 499 U.S. 400, 434–35 (1991).

120 *See supra* Part II.B.

121 *See* Reed v. Reed, 404 U.S. 71, 77 (1971) (finding that discrimination on the basis of sex is a violation of the Equal Protection Clause).

122 Jivraj v. Hashwani, [2011] UKSC 40, [1] (appeal taken from Eng.); Pierre M. Gaunaurd et al., *Islamic Finance*, 45 INT'L LAW. 271, 271–72 (2011).

nition and enforcement would violate the English Equality Regulation (EER), which prohibits private parties from discriminating on the basis of religion in the employment context.[123] The English Court of Appeals held that the award violated the EER and was invalid.[124] This case, however, should not be held up as a paradigmatic example of the incompatibility of an arbitral proceeding's incorporation of Islamic law and call for a Muslim arbitrator with Western notions of dispute resolution and equal protection.[125] The EER includes an exception permitting religious discrimination where "being of a particular religion or belief is a genuine occupational requirement."[126] Additionally, the *Jivraj* Court decided the dispute under English substantive financial law; the parties did not need a Muslim arbitrator proficient in Islamic law because the dispute did not involve issues relating to substantive Islamic financial law.[127] When an arbitral clause calls upon an arbitrator to apply Islamic commercial law, the issue remains open as to whether the arbitral award is invalid because the parties did not allow non-Muslims to act as arbitrators.

Nevertheless, the per se enforcement or limited review approach might be inconsistent with the state action doctrine. In *Shelley v. Kraemer*, the Supreme Court famously held that the enforcement of a racially discriminatory covenant amounted to state action and constituted a violation of the Fourteenth Amendment.[128] Although the Court's state action jurisprudence is not entirely clear or consistent, in *Georgia v. McCollum*, the Court attempted to enunciate a standard for determining when private acts constitute state action.[129] Under this *McCollum* standard, the right that a plaintiff claims the state infringed upon must be a right provided by the government,[130] and the alleged infringer must be "properly described as a state actor."[131] Richard Reuben argues that a court's enforcement of an arbitral award is state action because the government is highly involved in encouraging the growth and effectiveness of the dispute resolution process, of which arbitration is a part.[132] He also posits that arbitrators perform a traditional government function: they resolve disputes involving the application of law to facts.[133] Reuben analogizes a

123 *Jivraj*, [2011] UKSC 40, [1], [6]–[7].
124 *See* Gaunaurd et al., *supra* note 122, at 272.
125 *See id.*
126 *See id.*
127 *See id.* at 271–72.
128 334 U.S. 1, 20 (1948).
129 *See* 505 U.S. 42, 50 (1992) (questioning whether the defendant's use of a peremptory challenge constituted state action).
130 *Id.* at 51.
131 *See* Grossman, *supra* note 20, at 199.
132 *See* Reuben, *supra* note 116, at 579, 628–29.
133 *See id.* at 619–25.

court's enforcement of an arbitral award to a private attorney's use of preemptory challenges during voir dire.[134] In *Batson v. Kentucky*, the Supreme Court found that a private attorney's use of preemptory challenges to dismiss jurors on the basis of race amounted to state action and a violation of the Equal Protection Clause.[135] State recognition and enforcement of an arbitral award, however, involves at least just as much state action because an award rendered by a private arbitrator is in effect approved by the state, and the state will use its authority to recognize and enforce the award.[136]

If a court's recognition and enforcement of a foreign arbitral award is correctly classified as state action, then per se enforcement of foreign arbitral awards rendered using Islamic law becomes problematic.[137] For instance, if an arbitration excluded material evidence because a party's key witness has some interest in the outcome of the arbitration, a U.S. court's recognition and enforcement of the award would violate that party's due process rights. If the parties ask an arbitrator to apply Islamic law and the arbitrator then interprets Islamic law as denying the right to representation during the arbitral proceedings, a U.S. court's recognition and enforcement of such an award might violate the due process rights of the party who sought representation. Furthermore, if the parties ask the arbitrator to apply Islamic law and the arbitrator interprets Islamic law as dictating that a woman's testimony equals half of a man's testimony, then a U.S. court's recognition and enforcement of such an award might violate the Equal Protection Clause.[138] A similar equal protection problem would exist if the parties chose their arbitrator on the basis of religion and a U.S. court recognized and enforced such an award. In sum, a

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134 *See id.* at 626.

135 *See* 476 U.S. 79, 89 (1986).

136 *See* Reuben, *supra* note 116, at 627–29 (discussing the various roles a court plays in the arbitration process).

137 If recognition and enforcement of arbitral awards is correctly considered state action, then all faith-based arbitrations might be in jeopardy. In the education context, the Supreme Court stated that "a State may not delegate its civic authority to a group chosen according to a religious criterion" and that "[a]uthority over public schools belongs to the State . . . and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group." Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690–96, 698 (1994). An interesting question to ask is whether the same logic applies to binding arbitration where the dispute resolution function of the government is turned over to a religious institution.

138 The question of whether a losing party would have standing, on equal protection grounds, to challenge an award rendered where the losing party's female witness's testimony was given half the weight of a male's testimony is irrelevant at the recognition and enforcement stage. The losing party's standing to challenge on equal protection grounds would be irrelevant because the losing party would challenge the finding that a female witness's testimony given half the weight of a male witness's testimony violates the Equal Protection Clause, which is U.S. public policy. *See* New York Convention, *supra* note 5, art. V(2)(b).

U.S. court's per se ban on recognition and enforcement of an arbitral award, depending on the interpretation of Islamic law used, may lead to equal protection or due process violations.[139]

C. Intermediate Level of Reviewability

Another approach U.S. courts can take is an intermediate level of review for constitutional violations. If a court reviewed an arbitral award rendered using Islamic law for due process or equal protection violations, the court could easily violate the First Amendment's Establishment Clause. Some scholars argue that one advantage of using Islamic law is that it has many interpretations, meaning that a court could adopt an interpretation that would uphold an award without violating the forum country's public policy or fundamental notions of justice.[140] Yet, if a U.S. court employs this intermediate level of reviewability, it would effectively be choosing a specific interpretation of a religious legal code as correct, which U.S. courts are not permitted to do under the First Amendment.

In *Lemon v. Kurtzman*, the Supreme Court held that state action is permissible only if it "has a secular purpose," "does not have a primary effect of promoting or inhibiting religion," and "does not excessively entangle the government with religion."[141] Thirty-two years later, in *Jones v. Wolf*, the Court established the neutral principles test for the religious question doctrine.[142] In *Jones*, the Court stated that a court can make "no inquiry into religious doctrine" when confronted with a dispute involving religious issues;[143] a court can decide a dispute that involves religious elements, but if the court must examine religious issues to resolve the dispute, the court should not hear the case.[144] Thus, when a party asks a U.S. court to withhold recognition and enforcement because the arbitrator excluded material evidence by adopting a putatively wrongful interpretation of Islamic evidentiary law, the court should refuse to inquire into whether the interpretation was wrong under Islamic law. This approach avoids a First Amendment violation. Apparently, a court must either examine Islamic law

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139 A court attempting to find an interpretation of Islamic law that would avoid a due process or equal protection violation would be violating the First Amendment's Establishment Clause. *See infra* Part VI.C.

140 *See* Kutty, *supra* note 23, at 618–21 (explaining how certain aspects of Islamic law, which might be contrary to "modern institutions and customs," can be interpreted differently); Almas Khan, Note, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 794–97 (2006).

141 Trumbull, *supra* note 69, at 616 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), *aff'd*, 411 U.S. 192 (1973)).

142 *See* 443 U.S. 595, 602–05 (1979).

143 *Id.* at 603 (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (per curiam)).

144 *See id.* at 602–05.

to determine if a constitutional violation occurred during the arbitration stage and, in so doing, violate the First Amendment's Establishment Clause, or refuse to examine Islamic law and possibly violate the objecting party's constitutional rights.

VII
A THREE-STEP APPROACH FOR RECOGNIZING AND ENFORCING FOREIGN ARBITRAL AWARDS RENDERED USING RELIGIOUS LAW

The next Part of this Note suggests an approach that U.S. courts *ought* to take when asked to recognize and enforce a foreign arbitral award rendered using religious law, as distinguished from the approaches discussed above that they may be *authorized* to take. The suggested approach focuses on Islamic law but applies to all religious law, not just Islamic law, as a court's application of the suggested approach to only Islamic law would constitute a violation of the Equal Protection Clause.

A. Separability

Separability is a familiar arbitration doctrine that the Supreme Court adopted in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[145] Under the doctrine of separability, an arbitral clause is separate from the container contract in which it appears.[146] According to this doctrine, a contract as a whole may be invalid, but the arbitral provision in the same contract can still be valid and enforceable (and vice versa).[147] The separability doctrine allows an arbitrator to apply separate legal codes to the container contract and the arbitral clause.[148]

Although developed in the context of preserving the validity of arbitral clauses,[149] a court could also use the separability doctrine to confront the issues involved in enforcing an arbitral award rendered using Islamic law (or any other religious law). Arbitral proceedings may employ different laws for different aspects of the dispute. Theoretically, the parties can choose a different law for the merits of the dispute, the procedure and evidence, the arbitration clause, and the arbitral law.[150] Given this wide latitude, an enforcing court must first consider the part of the arbitration to which Islamic law applied. If the parties chose Islamic law to govern the merits of the dispute, the court should not review the arbitrator's application of Islamic law. Re-

145 388 U.S. 395, 403–04 (1967); *see* VÁRADY ET AL., *supra* note 1, at 95–96.
146 *See* VÁRADY ET AL., *supra* note 1, at 101.
147 *See id.*
148 *See id.*
149 *See Prima Paint Corp.*, 388 U.S. at 402–04; VÁRADY ET AL., *supra* note 1, at 95–96.
150 *See* VÁRADY ET AL., *supra* note 1, at 654–55, 657 (4th ed. 2009).

viewing courts generally do not review the merits of disputes (the facts and the application of law to facts),[151] and there is little in Islamic financial substantive law that would create due process or equal protection concerns.[152]

B. Waiver

If Islamic law was the law chosen to govern the procedure, evidentiary rules, or arbitral law, then the reviewing court should ask whether the party objecting to recognition and enforcement has waived its right to object.[153] If a party did not object to the arbitration's use of Islamic or any other religious law for evidentiary rules, arbitral rules, or procedural rules, then the enforcing court should not permit that party to raise these issues during the enforcement stage.

A possible counterargument to this waiver approach is that it ignores the state's interest in ensuring that enforcement of arbitral awards does not violate constitutional law or U.S. public policy. The New York Convention has seven exceptions under which a court can refuse recognition and enforcement of a foreign award.[154] A court, however, can only raise an exception on its own motion under two circumstances: the public policy exception and the nonarbitrability of subject matter exception.[155] Therefore, one can argue that a private party does not have the exclusive right to waive its constitutional protections because allowing a court to enforce an award that offends notions of due process and equal protection contravenes U.S. public policy.[156]

U.S. courts, however, have been comfortable allowing parties to waive constitutional rights in arbitral proceedings. In *Barnes v. Lo-*

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151 *See* Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 960 (S.D. Ohio 1981); Wakim, *supra* note 115, at 21–22, 24–25.

152 *See generally* Peter M. Hoffman & Lindsee Gendron, *Judicial Review of Arbitration Awards After* Cable Connection*: Towards a Due Process Model*, 17 UCLA ENT. L. REV. 1, 3–4 (2010) (noting that U.S. courts have upheld arbitration awards even when they violate American principles of due process); Laura Belkner, Note, *The Secular and Religious Legal Framework of Afghanistan as Compared to Western Notions of Equal Protection and Human Rights Treaties: Is Afghanistan's Legal Code Facially Consistent with Sex Equality?*, 20 CARDOZO J. INT'L & COMP. L. 501, 534–35 (2012) (arguing that provisions regarding the protection of women in Afghanistan's constitution, a legal document largely influenced by Islam, are facially consistent with U.S. notions of equal protection). Substantive Islamic law is distinguished from Islamic procedural, evidentiary, and arbitral law on the basis that the latter types are where the tension exists between Islamic law and Western notions of due process and equality. *See supra* Parts II, VI.A.

153 *See supra* Part V.B.

154 *See* New York Convention, *supra* note 5, art. V.

155 *See id.* art. V(2).

156 *See* Grossman, *supra* note 20, at 204.

gan,[157] the U.S. Court of Appeals for the Ninth Circuit took the view that "a party [can] waive[ ] any claims based on its right to due process of law under . . . the United States Constitution."[158] Additionally, in the international commercial arbitration context, parties are typically sophisticated entities.[159] Michael Grossman's duress argument—that parties might be coerced into accepting arbitration where religious law is applied because of community pressure—is inapplicable in the international commercial arbitration context where parties are generally state actors or other corporate entities familiar with the legal process.[160] Therefore, international commercial arbitration will likely not infringe upon the constitutional rights of a vulnerable or unknowing party.

C. Procedural Due Process and Equal Protection Analysis in Limited Cases

When an arbitration employs Islamic law (or any other religious law) for the procedural, evidentiary, or arbitral laws and the party fighting enforcement has objected during the arbitral proceedings, then the court should conduct a due process analysis to determine whether the arbitration provided the objecting party a full and fair opportunity to be heard and whether notions of equal protection rights were honored. This approach would require courts to closely examine the procedures applied during the arbitral proceedings. Peter Hoffman and Lindsee Gendron offer a list of criteria that an arbitral proceeding must satisfy in order for courts to recognize and enforce domestic arbitral awards consistent with due process.[161] Hoffman and Gendron posit that an arbitral tribunal must give adequate notice to the parties, must allow the parties to "defend and present" their cases, must let the parties confront opposing witnesses, and must ensure that the parties have the right to an arbitral proceeding that is "free of racial or other actionable prejudice."[162] Although Hoffman and Gendron's criteria concern domestic arbitral awards and not for-

157 122 F.3d 820 (9th Cir. 1997).

158 *See* Hoffman & Gendron, *supra* note 152, at 3.

159 *See* Khan, *supra* note 140, at 792. *See generally* Brower & Sharpe, *supra* note 4 (discussing nation-states and corporate entities as the participants in international commercial arbitration).

160 *See* Khan, *supra* note 140, at 798–99.

161 Hoffman & Gendron, *supra* note 152, at 36–37.

162 *See id.* Hoffman and Gendron also suggest that the defending party has the right to have the complaining party carry the burden of proof. *See id.* at 37. This requirement is inconsistent with Islamic procedural law. Under Islamic procedural law, the claimant is not always the party with the burden of proof. Instead, the party deemed to have the weaker case is the claimant and the party with the stronger claim is the defendant. *See* Helfand, *supra* note 95, at 1265–66. Whether Islamic procedural law's method of assigning the burden of proof is consistent with basic notions of due process in the United States is beyond the scope of this Note.

eign ones, a court can employ the same criteria when deciding whether a foreign arbitral award that uses religious law meets basic constitutional requirements.

One might argue that conducting a due process analysis of foreign arbitral awards is exactly the type of "international due process analysis" that violates the political question doctrine.[163] Yet, because a U.S. court engaging in a due process analysis would not examine Islamic law as a legal system to determine if it is consistent with notions of due process or equal protection, but would instead examine the individual arbitral proceeding to determine if due process and equal protection rights were met, this kind of analysis of foreign arbitral awards would not violate the political question doctrine.

Critics of this approach might argue that a U.S. court's due process analysis of a foreign arbitral award is contrary to the New York Convention. The critics might also argue that the New York Convention enumerates specific exceptions to recognition and enforcement, and inconsistency with a country's constitution is not one such exception. Furthermore, critics can challenge this approach by pointing out that conducting due process and equal protection analyses of foreign arbitral proceedings is absolutely contrary to the purpose of the New York Convention and will impose costs on international commercial transactions. The purpose of the New York Convention is to facilitate cross border transactions by allowing courts of member countries to recognize and enforce resolutions of commercial disputes of an international character regardless of national boundaries.[164] Furthermore, critics may contend that if U.S. courts take an approach that scrutinizes foreign arbitral awards rendered using Islamic law, they will discourage Muslim states and other Muslim entities from investing their Islamic financial assets in the United States. The critics will assert that a court's constitutional analysis is essentially relitigation of the case—the very outcome the New York Convention and arbitration mean to avoid.[165]

Critics of the due process and equal protection analysis approach are correct in pointing out that it is somewhat inconsistent with the New York Convention. These critics, however, ignore the Supreme Court's finding that the U.S. Constitution trumps international trea-

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163 *See* Carodine, *supra* note 97, at 1190–91.

164 *See* Levi-Tawil, *supra* note 6, at 612–14; *see also* Kutty, *supra* note 23, at 570 (discussing additional benefits of international commercial arbitration, including the parties' freedom and flexibility regarding choice of arbitrators, location of arbitration, procedural rules, and governing substantive law).

165 Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) ("Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.").

ties and international laws when these sources of law conflict.[166] Therefore, because enforcement of an arbitral award is state action,[167] if enforcement of a foreign arbitral award will infringe on constitutional due process or equal protection rights,[168] a U.S. court should not enforce the foreign arbitral award. Furthermore, if a U.S. court were to find that a foreign arbitral award rendered using Islamic procedural, evidentiary, or arbitral law violated U.S. notions of due process or equal protection, then, in most instances, this finding would qualify as contrary to U.S. public policy—an exception under New York Convention Article V(b)(2).

The criticism that the due process and equal protection analysis approach will impose costs on cross border transactions involving Islamic financial assets and discourage Muslim states and entities from investing these assets is unnecessarily alarmist. The constitutional analysis approach will not impose costs on international commercial transactions involving Islamic financial assets because two conditions must be satisfied before a court will even conduct the due process and equal protection analysis.[169] First, the U.S. court has to find that the arbitration employed Islamic law for the procedural, evidentiary, or arbitral law.[170] Second, the court must find that the party raising the objection to the use of Islamic law in regards to the procedural, evidentiary, or arbitral law at the recognition and enforcement stage raised the same objection during the arbitral proceedings.[171] Only after these two requirements are met will a court determine if the arbitral proceeding was consistent with due process and equal protection.

Still, an uncomfortable dilemma exists with this approach: How can a U.S. court decide whether Islamic law, as applied during a foreign arbitration, is consistent with due process and equal protection without implicating the First Amendment's Establishment Clause? Grossman implies that courts have two mutually exclusive options in regards to recognition and enforcement of domestic arbitral awards where religious law is applied. The court can choose to "examine some religious doctrine" for constitutional violations (and thereby contravene the Establishment Clause by interpreting religious doctrine) or recognize and enforce an award without examining it for constitutional violations (in order to avoid violating the Establishment Clause).[172] Grossman concludes that courts should pass judgment on

166 *See* Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality opinion) ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.").

167 *See supra* Part VI.B.

168 *See supra* Parts II, VI.A.

169 *See supra* Part VI.A.

170 *See supra* Part VI.A.

171 *See supra* Part V.B.

172 *See* Grossman, *supra* note 20, at 208–09.

the constitutionality of arbitral proceedings where religious law is applied in order to protect individual due process rights, and he accepts that in so doing, a court would technically violate the Establishment Clause.[173]

Grossman, however, creates a false dichotomy. It is unnecessary to concede that protecting individual due process rights at the recognition and enforcement stage of an arbitral proceeding where religious law is used and preserving the First Amendment's Establishment Clause are mutually exclusive. Under the neutral principles test established in *Jones v. Wolf*, a court cannot inquire into religious issues in order to resolve a dispute.[174] Under step three of my suggested approach, a court would not inquire into the workings of Islamic law to see if the arbitral proceeding was consistent with due process and equal protection; the court would merely ask whether the arbitral proceeding itself, which used Islamic law, was consistent with due process and equal protection. In other words, the court would not ask whether Islamic law is consistent with due process and equal protection or whether the arbitrator(s) applied Islamic law correctly; instead, the court would ask whether the actual procedure used was consistent with due process and equal protection.

For example, if an arbitrator interpreted Islamic evidentiary law to hold that a party's material witness could not testify because the witness had an interest in the outcome and at the recognition and enforcement stage a U.S. court found that denying a party the ability to present a material witness is a violation of the party's due process rights, then refusing to recognize and enforce the foreign arbitral award would not contravene the Establishment Clause. By contrast, in the same scenario, the court would contravene the Establishment Clause by holding that the arbitrator's interpretation of Islamic evidentiary law led to a due process violation. Similarly, the court would also contravene the Establishment Clause by holding that Islamic evidentiary law's principle concerning a witness's interest in the outcome of a dispute is contrary to due process. In the first example, the U.S. court examines the arbitral proceeding and the actions of the arbitrator for due process violations without inquiring into Islamic law. In the latter two examples, the court analyzes the arbitrator's interpretation of Islamic law and whether a certain aspect of Islamic law is contrary to due process, respectively. Both of these latter two examples violate the neutral principles test and consequently the Establishment Clause. In the first example, even though the arbitrator justifies his decision on the basis of religious law, the U.S. court does not examine the arbitrator's rationale for his decision or use of religious law, just

173 *See id.*

174 *See supra* Part VI.C.

the arbitrator's decision itself. In the latter examples, the U.S. court examines the arbitrator's rationale for his decision, which in this case is based on religious law, and analyzes whether the religious law used is consistent with the Constitution, respectively. As long as a court can distinguish between an arbitrator's decisions and the effects of those decisions (even if those decisions and effects resulted from an arbitrator's application of religious law) from the religious law that led an arbitrator to make those decisions, the court would not violate the neutral principles test. Under this application of the neutral principles test, it is possible to protect a party's due process rights while at the same time preserving the Establishment Clause's prohibition on courts' religious inquiry.

CONCLUSION

International commercial arbitration is not simply just another dispute resolution device. With the help of the New York Convention, international commercial arbitration is a cross border mechanism that connects people, nations, and business entities. It can facilitate trade between private entities from countries that have little or no formal relations with each other. A party from Israel and a party from the Islamic Republic of Iran can arbitrate in the United Kingdom, and a U.S. court can recognize and enforce the award rendered under the New York Convention's enforcement-friendly rules.[175]

Uniquely, not only does international commercial arbitration help increase the interconnectivity of parties from around the world with little concern for national boundaries, but it also allows parties to retain a sense of cultural, national, and religious identity by allowing the parties to choose the law applied to the arbitration. Thus, international commercial arbitration is a force that encourages globalization but still respects cultural, religious, and national attachments. If this duality is understood, international commercial arbitration can indirectly ease global tensions that stem from national, cultural, and religious misunderstandings by harnessing commercial relations between states and private entities from around the globe.

The issue of recognition and enforcement of foreign arbitral awards rendered using Islamic law in U.S. courts is sure to arise in the near future. The growth of Islamic finance as an alternative to more traditional forms of finance in the global marketplace will inevitably lead parties to seek U.S. recognition and enforcement of foreign arbitral awards rendered using Islamic law. When confronted with such

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175 *See* VÁRADY ET AL., *supra* note 1, at 6–12 (listing Israel, Iran, the United Kingdom, and the United States as countries belonging to the New York Convention).

questions, U.S. courts must take a meticulously nuanced approach in order to avoid a myriad of constitutional dilemmas.

In an attempt to avoid these constitutional dilemmas, this Note offers a three-step approach for U.S. courts with regards to recognition and enforcement of foreign arbitral awards rendered using religious law. First, courts should use the doctrine of separability to determine whether the arbitration applied religious law to the substantive law of the dispute or to the procedural, evidentiary, or arbitral law of the dispute. Second, if the arbitration employed Islamic or any other religious law for the procedural, evidentiary, or arbitral law, then the court should examine whether the objecting party at the recognition and enforcement stage also objected during the arbitral proceedings. Third, if the party did object during the arbitral proceedings, the court should conduct a due process and equal protection analysis of the arbitral proceedings. During the third step, the court should be mindful not to pass indictment on any aspect of Islamic or religious law or evaluate the arbitrator's interpretation of Islamic or religious law. Instead, the court must merely evaluate whether the arbitral proceedings violated due process or equal protection. This approach will allow a U.S. court to protect the due process and equal protection rights of the parties and simultaneously advance the dual advantages of international commercial arbitration: facilitating interconnectivity between private parties regardless of nationality and allowing parties to retain their national, cultural, and religious identities during the dispute resolution process.

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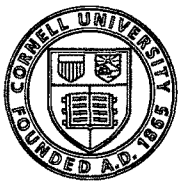

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