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Islamic Sharia and arbitration in GCC States: The way ahead

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Abstract

Irrespective of the existence of a legislative environment complying with the most recent international texts in the field of Arbitration in most GCC states; such as UNCITRAL Model Law of international Commercial Arbitration, 1985, Islamic sharia may not be sufficiently clear to foreign investors and western jurists who might consider it as an impediment jeopardizing recognition and enforcement of arbitral proceedings in Arab states especially in GCC.

This article clarifies the relationship between Arbitration and the real concepts of Islamic sharia, concluding that rules of Islamic sharia would not be an impediment to the enforcement of Arbitral Awards in GCC states. The article illustrates the real concept of Islamic sharia as a part of public policy and analyzes the attitudes of recent GCC legislations, and court decisions, concerning matters looking contradictory to Islamic sharia and might constitute a legal ground to challenge arbitral awards, such as religion and gender of Arbitrators, interest rates and aleatory contracts.

Keywords: Arbitration; Islamic sharia; Public policy; Challenge of arbitral award; Arbitrator's religion; Gender of arbitrators; Flexible interpretation of Islamic sharia

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الشريعة الإسلامية والتحكيم في دول الخليج العربي - الطريق مفتوح

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ملخص

بالرغم من وجود بيئة تشريعية متوافقة مع أحدث النصوص الدولية الصادرة في مجال التحكيم في أغلب دول الخليج العربي، مثل القانون النموذجي للجنة الأمم المتحدة للقانون التجاري الدولي 1985؛ إلا أن عدم وضوح المفهوم الحقيقي للشريعة الإسلامية، كجزء من النظام العام، وكذلك عدم وضوح موقفها من بعض الأمور المتعلقة بالتحكيم، يجعل منها، في نظر بعض المستثمرين والقانونيين الأجانب، عائقًا محتملًا أمام إمكانية تنفيذ أحكام التحكيم الوطنية والأجنبية في دول الخليج العربي، حيث يمكن الاستناد إلى قواعدها؛ للطعن بالبطلان في حكم التحكيم لمخالفته للنظام العام.

يهدف البحث إلى بيان خطأ الاعتقاد بكون الشريعة الإسلامية عائقًا أمام التحكيم في دول الخليج العربي، من خلال توضيح موقف التحكيم في المفهوم الحقيقي للشريعة الإسلامية، كجزء من النظام العام. كما يتناول الدور الفعلي للشريعة الإسلامية، كأساس للطعن ببطلان أحكام التحكيم، من خلال بيان موقفها، وموقف التشريعات الخليجية من بعض المسائل التي قد تبدو، لأول وهلة، مخالفة للشريعة، مثل؛ ديانة المحكم، وتحكيم المرأة، وفوائد الديون، وعقود الغرر.

الكلمات المفتاحية: التحكيم، الشريعة الإسلامية، النظام العام، بطلان حكم التحكيم، ديانة المحكم، جنس المحكم، التفسير المرن لقواعد الشريعة

للاقتباس: عبد الله، آمال. "توزيع مخاطر عقود صناعة البترول: "Knock-for-Knock" نموذجًا"، المجلة الدولية للقانون، المجلد التاسع، العدد المنتظم الثاني، 2020

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1. Introduction

Over recent decades, GCC states have accepted the principle of settling disputes through alternative dispute resolution (hereinafter ADR). They have regulated arbitration, as a particularly effective type of ADR, in national laws influenced by the Model Law on International Commercial Arbitration, drafted by United Nation Commission on International Trade Law (UNCITRAL Model Law in 1985, hereinafter UNCITRAL ML).[1] These arbitration laws[2] comply with the main principles of international arbitration, including; separability, competence -competence, finality …etc., and provide an exception to the principle of GCC states' civil and commercial procedure law under which disputes with nationals and residents of GCC states would normally be settled by state courts.[3]

The improvement in the legal environment of GCC countries has been accomplished by ratifying the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards of 1958[4] (hereinafter NY Convention)[5] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (hereinafter ICSID Convention)[6]. Arbitration centers have been established in many GCC states[7], to provide the involved parties with a professional dispute resolution body.[8] State courts in GCC jurisdictions deal with all types of ADR, especially arbitration matters. Courts in GCC countries, like the state courts in other Islamic countries that have adopted the UNCITRAL Model Law or ratified the NY Convention, are still entitled to refuse recognition or enforcement of foreign—or even domestic—arbitral awards when the award contradicts public policy and/or Islamic Sharia as a part of public policy.

Some foreign investors and jurists may consider Islamic Sharia as a potential impediment to enforcement and recognition of arbitral awards in GCC. However, Islamic Sharia may not constitute a real obstacle to arbitration in GCC states. This is due to many factors, including the historical background of arbitration in this area of the world, the development of GCC legal environments within the second half of the 20th

1 "The Model Law is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world." See: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration accessed 13 May 2020.

2 National arbitration laws adopted in many GCC states have been influenced by the UNCITRAL Model Law of International commercial Arbitration of 1985 (modified in 2006); Saudi Arabia, legislation adopted in 2012, Qatar in 2017, Oman in 1997, Bahrain in 2015, UAE in 2018.

3 Art (20) of UAE Civil Procedures Law No.11/1992, Art (1) of Civil & Commercial Procedures Law in Bahrain- No.12/1971, Art (4) of Civil & Commercial Procedures Law in Qatar- No.13/1992, Art (29) of Civil & Commercial Procedures Law in Oman- No.29/2002, Art (23) of Civil & Commercial Procedures Law in Kuwait- No.38/1980, Arts (24,25) law of procedures before Sharia Courts in Saudi Arabia issued by Royal decree No.1 in 22/1/1435 Hijri (25/11/ 2013).

4 Saudi Arabia ratified the NY Convention in 1994, Qatar in 2002, Oman in 1999, Kuwait in 1978, Bahrain in 1988, UAE in 2006. 2006, n.

5 Convention of the Recognition and Enforcement of Arbitral Awards (adopted on 10 June 1958, entered into force on 7 June 1959), United Nations Treaty Series 330, Registration No. 4739.

6 Convention of the settlement of Investment Disputes between States and Nationals of Other States (adopted on 18 March 1965, entered into force on 14 October 1966), United Nations Treaty Series 575, Registration no. 8359.

7 Sultan of Oman established the most recent arbitration center in GCC by the Royal Decree No. (26) of 2018, establishing the Commercial Arbitration Centre in Oman. Pursuant to the Royal Decree, a special center called a Commercial Arbitration Centre in Oman that shall sit within the Oman Chamber of Commerce and Industry and shall enjoy a legal personality, See: Omani Official Gazette Issue No. 1265 dated 28 October 2018.

8 See for example: Riad Tarik, Overview of the DIAC Arbitration Rules 2018, (2017) 2, International Journal of Arab Arbitration, 41.

century, and the flexible interpretation of some rules of Islamic Sharia, adopted by legislators and judges in GCC states.

This article provides an overview of Sharia principles as a potential impediment to the efficiency of arbitration in GCC states. It clarifies the real concept of Islamic Sharia as a part of public policy and explores how Islamic Sharia accommodates arbitration as a means of dispute resolution (2). Some points of conflicts between Islamic Sharia and western laws are highlighted (3), to demonestrate that Islamic Sharia does not pose an obstacle to arbitration in GCC states (4).

2. Arbitration approved in the real concept of Islamic Sharia

The real concept of Islamic Sharia should be clarified to avoid confusion between different terms in the field of Islamic religion and to clarify Islamic Sharia within public policy in GCC (2.1). The principle of arbitration is based on the disputants' choice of the means of resolution recognized historically in GCC states and is mentioned expressly in many resources in Islamic Sharia (2.2).

2.1. The real concept of Islamic Sharia & public policy

A distinction shall be made between the term Islamic Sharia and other related concepts in the field of the Islamic religion (2.1.1), to clarify the role of Islamic Sharia as a part of public policy (2.1.2).

2.1.1. *Clarification of concepts of Islamic Sharia*

Concept of Islamic Sharia as a part of public policy might be confused with other concepts related to the Islamic religion. To avoid terms being used synonymously by mistake, the concepts of Islamic Sharia, Islamic law, Islamic jurisprudence, and Islamic sects should be explained.

2.1.1.1. *Islamic Sharia and Islamic Law*

The term "Islamic Sharia" may be employed as an equivalent to "Islamic law". Islamic Sharia refers to the direct words of God *(Quran)* communicated to the Prophet Mohamed (peace be upon him) by the Archangel Gabriel and to the acts or sayings of the Prophet Mohamed (*Sunnah*). The *Quran* and the *Sunnah* constitute the principal sources of Islamic Sharia and contain the basic principles of a Muslim's life, mainly creed, worship and transactions. These rules of Islamic Sharia are fixed and unchangeable. [9] The term Islamic law is more general than Islamic Sharia; it comprises not only the concept of Islamic Sharia (rules of the *Quran* and *Sunnah*) but also the human efforts of scholars and judges to interpret, explain, and apply the rules of the *Quran* and *Sunnah* to different issues in different fields, called *fiqh* (Jurisprudence). *Fiqh* changes according to the circumstances under which it is applied.[10] "Islamic law is defined in Islamic legal theory as the law of God based on four main sources: the *Quran* (a collection of revelations made to the Prophet between 609-632 A.D.), the *Sunna* (decisions, words, actions, and tacit approvals of the Prophet, which are related in traditions called hadith), *Ijma* (consensus of the legal scholars), and *Qiyas* (reasoning by analogy). The law, based on these sources, is elaborated in treatises written by jurist-scholars."[11]

As stated, human efforts to understand the rules of Sharia are called *fiqh*, or Islamic jurisprudence, which is the science of ascertaining the precise terms of Islamic Sharia.[12] The rules of *fiqh* are derived from the rules of the *Quran* and the *Sunnah* in conformity with a body of principles and methods, which are collectively known as (*usul al-fiqh)*.[13]

The methodology of *usul al-fiqh* refers to methods of reasoning, such as analogical deduction (*qiyas*),

9 Abu Amina Bilal Philips, *The evaluation of Fiqh* (The international Islamic publishing House-1988) 13.

10 Ibid.

11 John Makdisi, 'Islamic Law bibliography' (1986) Law Library Journal, Vol. 78, 103.

12 www.britannica.com/topic/fiqh, accessed 13 May 2020.

13 M. H. Kamali, *Principles of Islamic jurisprudence* (Rev. ed. Cambridge: Islamic Texts Society 1991) 12.

juristic preference (*istihsan*), a presumption of continuity (*istishab*), and *Ijma`*, which is defined as the unanimous agreement of the *jurists/scholars* of the Muslim community from any period, on any matter, following the demise of the Prophet.[14] These methods are designed to serve as an aid to the correct understanding of the sources and to facilitate *ijtihad*.

Ijtihad is defined as the total expenditure of effort made by a jurist to infer, with a degree of probability, the rules of Islamic Sharia from the detailed evidence in the relevant sources.[15]

Further, *ijtihad* is defined as the intellectual effort of a *mujtahid* (or jurisconsult) in deriving rules consistent with the first principles of Islam.[16] These intellectual efforts to understand the texts of the *Quran* and the *Sunnah* are influenced by the cultural, political, and social circumstances of the scholars themselves. Political conditions played a special role in Islamic jurisprudence and led to the creation of Islamic sects after the death of Prophet Mohamed (PBUH).

2.1.1.2. *Islamic sects and schools of jurisprudence*

During the era of the Prophet Mohamed (PBUH), Muslims were a unified political and religious community. A few decades after his death, during the era of his fourth successor (Ali ben Abi Taleb – Prophet's cousin), a political conflict arose between Ali's followers (Shiaat Ali in Arabic, or Shia), and another group of the Muslim community called the Umayyads, led by Muawiyah Bin Abi Sofian, the governor of the "Al-Sham" region.[17] The power struggle[18] between the two groups—Ali's followers (who later became known as Shia) and Muawiyah's followers together with neutral people (who later became known as Sunni)—crystalized into the first division in the Muslim community. Nowadays, it is safe to say that Shi'ism and Sunnism are the main sects in the Islamic religion,[19] and for our purposes, it is important to bear in mind that each sect has its own schools of jurisprudence.

"There evolved many scholarships in this area and numerous schools of jurisprudence developed. They began along geographical lines, in Medinah (in Saudi Arabia) and Kufa (in Iraq), but later evolved around individual scholars or jurists."[20] The four schools of Sunni jurisprudence are named after their founders:

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14 Ibid.

15 Al-Amidi Abou Al-Hassan Said Al-Din, *Al Ehkam fi Usul Al Ahkam*, (Vol.4, the Islamic Office Publisher Beirut1981) 162. See: also, Kamali, M.H, *(n* 13) 315.

16 Esposito, John Louis, The Oxford Dictionary of Islam (OUP2003)114.

17 The area consisting of Syria, Lebanon, Palestine, and Jordan.

18 Shias started as a minority of Muslims, and insisted that the Caliphate had to remain in the family of the Prophet Mohamed (represented by his cousin Ali), [it] declared Ali as the rightful successor to Mohamed (PBUH), and gave him the title of "*Imam*," meaning the "leader of the community." The majority group, however, did not endorse Ali's candidacy, which was passed over in favor of another prominent follower of Prophet Mohamed, Abu Bakr. More than twenty years later, Ali came to power as the fourth Caliph of the Islamic nation. Nonetheless, Ali's rise faced some resistance and opposition by another group known as the Umayyads, who assassinated Ali in 661. Despite the tragic murder of Ali, the Shia did not give up their plan, and the Shia of Kufa convinced Husayn, Ali's son, to lead them against the Umayyads. None of the promised military support from Kufa (located in today's Iraq) materialized, and Husayn and his supporters were killed in Karbala (located in today's Iraq).
See: George Khoukaz, 'Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution'(2017) Journal of Dispute Resolution, University of Missouri,183.

19 The schism occurred after the arbitration between Ali ben Abi Taleb and Muawiyah ibn Abi Sufyan regarding the Caliphate. The Shia insisted that the Caliphate had to remain in the family of the Prophet (represented by his cousin Ali) while the Sunni did not insist on this. For more details, See: Fred, M. Donner, Muhammad and the Caliphate: *Political History of the Islamic Empire Up to the Mongol Conquest*, in Esposito, John Louis (ed) (The Oxford History of Islam OUP 1999) 14.

20 Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28, Loyola of Los Angeles International & Comparative Law Review, 582.

the Hanafi school,[21] the Maliki school,[22] the Shafi'i school,[23] and the Hanbali school.[24] The two main schools of Shia jurisprudence are the Ja'fari school[25] and Zaidi school.[26] Other Islamic sects have also developed, such as the Ibadi school, or Ibadism,[27] and the Zahiri school.[28]

By the 17th century (1869), the Ottoman Empire, influenced by civil law traditions, had codified the approach of the Hanafi school of jurisprudence (*Hanafi fiqh*), for civil and commercial dealings in "The Medjella of Legal Provisions", a code of provisions regulating civil matters.[29] The provisions of the Medjella have both directly[30] and indirectly[31] influenced many Arab civil codes.

Each religious sect/school has its own interpretation of the texts of the main sources of Islamic Sharia (*Quran* and *Sunnah*) as influenced by its cultural, political, and social background.[32] It is worth mentioning that when analyzing the legal system of any Islamic country, the sect/school of jurisprudence corresponding to the majority of the population of the state should be considered for a better understanding of Islamic Sharia as a part of the public policy of that state.[33] Public policy is separated, usually, into; domestic, international, and transnational categories. Classification of Islamic Sharia within one of these categories may help to clarify its role in the legal environment of GCC states.

2.1.2. *Classification of Islamic Sharia as a part of public policy*

The term public policy embodies the moral, political, and economic order of the state,[34] but its meaning may differ from state to state, and over time.[35] Many scholars[36] and professional associations[37]

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21 Founded by Iraqi jurist Abu Hanifa (699-767 A.D.). Vincent Cornell, *Fruit of the Tree of Knowledge: The Relationship Between Faith and Practice in Islam, in Esposito, John Louis (ed.)* (The Oxford History of Islam OUP 1999) 94.

22 Founded by Medinan scholar Malik ibn Anas (AD 715-795). Id. at 95.

23 Founded by Muhammad ibn Idris al-Shafii.Id.

24 Founded by Ahmad ibn Hanbal (AD 780-855). Id.

25 The Ja'fari school is derived from the name of Jafar Al-Sadiq, the 6th Shia Imam.

26 The Zaidi school is derived from the name of Zayd ben Ali, the grandson of Husayn ben Ali Ben Abi Taleb and the son of the 4th shia Imam.

27 Ibadism is a school of Islamic jurisprudence deriving its name from Abdullah Ibn Ibad (CE 650). This school is dominant in the Sultanate of Oman and in parts of Algeria and Tunisia.

28 The school of Islamic jurisprudence founded by Dawoud Al-Zahiri in the 9th century CE; See: Wael B. Hallaq, *The Origins and Evaluation of Islamic Law* (Cambridge University Press 2005) 124.

29 El-Ahdab, Abdul Hamid & Jalal El-Ahdab, *Arbitration with the Arab Countries* (Wolters Kluwer *2011*) 16.

30 Provisions of the Medjella are still applied in Palestine as a civil code, and the Tunisian civil code of 1906 adopted many articles of the Medjella.

31 The Egyptian, Iraqi, and Jordanian civil codes have been influenced by many articles of the Medjella.

32 An overwhelming majority of Muslims are Sunni, while 10-13% are Shias. The majority of the population in Iran, Iraq and Bahrain are Shias, while the majority of the other GCC states are Sunni and the majority of the population in Oman are Ibadis. See: www.pewforum.org, accessed 13 May 2020.

33 The legal system in many Islamic countries is influenced by religious principles, with the sect of the state's majority population playing a role in drafting the state's legal rules.

34 Loucas Mistelis, 'Keeping the unruly horse in control or Public Policy as a Bar to Enforcement of Foreign Arbitral Award' *International Law Association, Conference, Committee of international Commercial Arbitration, London* (2000) 252.

35 Wasiq Abass Dar, 'Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards -A South-Asian Perspective' (2015) 2, European Journal of Comparative Law and Governance, 317.

36 For more details on differences between international, transnational and domestic public policy and its effects on the recognition and enforcement of arbitral awards, See: Cole, Richard A., 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) 1/2, Ohio State Journal on Dispute Resolution, 374.

37 Adnrey Ryabinin, *Procedural Public Policy: in Regard to the Enforcement and Recognition of Foreign Arbitral Awards* ▸▸

have recognized the approach of classifying public policy into domestic, international, and transnational categories.

The concept of domestic public policy is a standard of justice and ethics that applies territorially to regulate the *internal* dealings in the state, and as such, national courts may apply such standards in purely national disputes.[38] Domestic public policy contains the national standard of justice and ethics that could be applied by national courts to protect the main moral, political, economic, or social order in the state against *any* violation occurring in the territory of that state. The standard set by domestic public policy should be applied by a state court to any relationship, even those where there is involvement of a foreign party. These standards could provide grounds to set aside any arbitral award as long as such relationship or award could potentially be enforced in the territory of the state—in other words when the state is directly concerned.[39]

The concept of international public policy has been defined by some scholars as those fundamental notions of morality and justice applied by the national courts of a state in cases where transactions and relationships involve a foreign element; it "refers to a particular country's subjective concept of what all civilized nations [have] conceived international policy to be".[40] Soft law means "quasi-legal instruments that have no legal force such as non-binding resolutions, declarations and guidelines created by international organizations.[41] The rules issued by the United Nations, such as the Universal Declaration of Human Rights[42] could be a good example of international public policy. Arbitral awards addressing matters such as; corruption, bribery, fraud, human trafficking, smuggling, or violations of human rights, could, depending on the ruling, be considered as violating international public policy, so as to entitle the state court to set aside the award, even if such award would not be enforced in the territory of the state.

The concept of international public policy as might be set out in different texts issued by international organizations is distinct from the concept of "transnational public policy", which constitutes "the fundamental rules of natural law, peremptory norms in public international law, and general principles of morality accepted by civilized nations".[43] Equality and respecting disputing parties' rights of defense may constitute clear examples of transnational public policy.

Principles of Islamic law constitute a part of the domestic public policy in any Islamic state. Irrespective of the legal, political, or economic system of the particular state, Islamic Sharia comprises a substantial component of the social and legal order in Islamic states, even for non-Muslims living in the territory of such

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▸▸ (LLM short thesis, Central European University, Budapest, 2009), published electronically at: <http://www.iurisprudentia.ru/files/proc.pdf> accessed 13 May 2020.

38 See also, Wasiq Abass, (n 34) 324.

39 The Malaysian High Court refused to enforce an arbitral award in *Harris Adacom Corp v. Perkom Sdn Bhd*, where the defendant had objected to the claimant's application to have an award confirmed on the ground that it would be contrary to the public policy of Malaysia since the claimant company was an Israeli company. The Malaysian court refused to enforce the award as its enforcement would have been against public policy given that trade with Israel was prohibited. See e.g., Pryles, Michael and Moser, Michael, Asian Leading Arbitrators Guide to International Arbitration, (Juris Net 2007) 436.

40 Wasiq Abass, *(n.*34) 324.

41 "The term Soft Law, first emerged in diplomatic language in 1980s and has since became a common term in international law circle", See: Bryan Druzin, 'Why does soft law have any power, anyway?' (2017) 7, Asian Journal of International Law. 361, See also; Guzman, Andrew and Mayer, Timothy, 'International Soft Law' (2010) 2/1, Journal of Legal Analyses 179; Gerson, Jacob E and Posner, Eric., 'Soft Law Lessons From Congressional Practice' (2008) 61/3, Stanford Law Review, 624.

42 Universal Declaration of Human Rights: Drafted by the UN Commission on Human Rights in 1947 and 1948, adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948 Text: UN Document A/810, p. 71 (1948).

43 Ma, Winnie Jo-Mei, 'Pubic Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia, (Ph.D. Thesis, Bond University, 2005). Published electronically at: http://epublications.bond.edu.au/. accessed 13 May 2020.

states.[44] However, the domestic public policy of GCC states and other Islamic states, does not necessarily contradict arbitration as a means of dispute resolution. In fact, it may have some place specifically, due to the historical background of this area of the world and the rules of the *Quran* & *Sunnah* and other sources of Islamic law.

2.2. Arbitration recognized historically in GCC states & Islamic law

An absence of judicial authority during the pre-Islam period had encouraged Arabian tribes to create various types of ADR, including arbitration, to settle their disputes.[45] The role and acceptance of arbitration after the advent of Islam is discussed below (2.2.1). Additionally, some texts, which constitute sources of Islamic law, do allow for an acceptance of the main principles of arbitration (2.2.2).

2.2.1. *Arbitration in the Arabian Peninsula before & after Islam*

Arbitration and conciliation were used broadly in the Arabian Peninsula, to settle intra- and inter-tribal disputes.[46] Recourse to ADR in the Arabian Peninsula relied on the disputants' choice of the means of resolution. Of no less importance was the tribal justice system as managed by the chief of the tribe[47] and the moral authority of the arbitrator. After the advent of Islamic religion, the Prophet Mohamed (PBUH) established and ruled the Islamic state,[48] and his successors ruled the state successfully after he passed away. Rules of Islamic Sharia replaced the customs of Arabian tribes on the peninsula. Many customs practiced before Islam continued to be honored after the rise of Islam, including customs relating to the means of dispute resolution.[49] The practice of arbitration was expressly approved in the main resources of Islamic Law; in the *Quran*, arbitration was recognized expressly, as a means of dispute resolution for matrimonial disputes.[50] Similarly, the principle of arbitration based on the disputants' choice of the means of resolution is also mentioned expressly in the *Quran*.[51] In the *Sunnah*, the Prophet Mohamed (PBUH) himself had recognized and practiced arbitration;[52] he advised others to arbitrate and his closest

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44 All residents in Islamic states have to respect public policy of such states, including principles of Islamic sharia. See for example Art (57) of Qatari constitution, (49) of Kuwaiti constitution, (44) of UAE constitution, (35) of Omani constitution and Art (41) of the Saudi constitution. The core matter of mentioned article is to make all residents bound by rules of public policy irrespective their nationalities or religions.

45 Aseel Al-Ramahi, Sulh, A Crucial Part of Islamic Arbitration, working paper, <www.lse.ac.uk/collections/law/wps/wps.htm> accessed 13 May 2020.

46 For more details about dispute resolution in the Arabian Peninsula during Pre-Islamic period, See: Al-Obaidli, Jassim Mohammed, Arbitration Law in Qatar, the way forward, (PhD thesis, Robert Gordon University 2016) 66.

47 Mohamed Al Jarbra, Commercial Arbitration In Islamic Jurisprudence, A study of its role in the Saudi Arabian Context, (PhD thesis, Aberystwyth University 2001) 33.

48 The first Islamic State was the political entity established by the Prophet Mohamed in Medina in 622 CE. It contained all Muslims irrespective of their ethnicity or language. It was subsequently transformed into the Caliphate by The Prophet's disciples, who were known as the Rightly Guided (*Rashidun*) Caliphs (632–661 CE). The Islamic State was expanded under the Umayyad Caliphate (661–750) and subsequently under the Abbasid Caliphate (750–1258). For more details about the early Islamic State, See: Ali Ashgar, *The State in Islam: Nature and the Scope* (Hope India Publications, 2006).

49 Al-Obaidli (n 46) 66.

50 "*[A]nd if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware*." See: The noble Quran, Surah: An-Nisa, 4:35.

51 But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission. See: The noble Quran, Surah: An-Nisa, 4:65.

52 "Prophet Mohamed (peace be upon him) recognized and practised arbitration. He appointed arbitrators and accepted their decisions. He also acted as arbitrator in several occasions to resolve disputes arising between individuals and tribes. He acted as an arbitrator in the dispute between several Arab tribes regarding which of them will have the honour ▸▸

companions often used an arbitration agreement to resolve disputes as well.[53] Arbitration is also recognized in a secondary source of Islamic law, *Ijma*[54] and recognized as a means of dispute resolution by four schools of Sunni jurisprudence.[55] Moreover different modern principles in arbitration and other types of ADR have already been adopted into many sources of Islamic law.

2.2.2. *Arbitration in sources of Islamic law*

As mentioned earlier, the settlement of disputes by a third party has not only been accepted by the *Quran* and the *Sunnah*, but is also recognized by texts in the *Quran* and the *Sunnah* as the most effective type of ADR. In the modern history of Islamic legislation, arbitration was mentioned in the Ottoman era codification "The Medjella of Legal Provisions" mentioned above,[56] in the era of the Ottoman Empire. Non-binding means of ADR, such as conciliation and mediation—and even dispute adjudication boards and technical experience—can be accepted through an interpretation of some texts comprising the main sources of Islamic Sharia (*Quran* and *Sunnah*) or through reference to Islamic jurisprudence *(fiqh*).

All schools of Islamic jurisprudence consider an arbitration agreement as the basis for authorizing arbitrators to settle a dispute and issue a binding decision; where that arbitration agreement is based on the valid consent of the disputants.[57] No Islamic school of jurisprudence has prescribed that an arbitration agreement must be in writing to be valid, but legal practice has established that a written agreement is a valid basis for an arbitration agreement.[58]

Concluding an arbitration agreement to resolve a potential dispute is likely to be acceptable in Islamic Sharia given that the principle of freedom of contract potentially includes any agreement, which does not contradict directives pronounced by the *Quran* or *Sunnah*. Moreover, there is a command of God in the *Quran* that obligates contracting parties to reduce to writing an agreement regarding a future debt.[59] This part of the *Quran* may be seen as Islamic Sharia supporting the acceptability of a clause agreeing on the use of arbitration for a future dispute.

▸▸ of lifting and placing the Black Stone after rebuilding the Kaaba. He put the Black Stone in his outer garment and judged that every tribe chooses a representative and that all the representatives carry the garment together to the place of the Stone." See: Al-Obaidli, (*n* 46) 67.

53 "The leading case where arbitration was used by the companions of the Prophet (PBUH) is the famous political case between the Caliph "Ali Ben Abi Taleb" (the fourth rightful successor after Prophet Mohamed) and "Muawya Bin Abi Sofian" (the governor of Assham which is Syria, Lebanon, Palestine and Jordan). Muawya had refused to recognize Ali ben Abi Taleb's right to the Caliphate. The dispute led to a civil war between the two parties. During the fighting, Muawya Bin Abi Sofian demanded the settlement of their dispute through arbitration. Ali ben Abi Taleb accepted that and each party appointed his arbitrator. The two arbitrators were to decide who would be the Caliph. The two arbitrators were nominated in the arbitration agreement document and drafted arbitration agreement specifying the dispute. The procedure, duration of the arbitration, place of arbitration and the applicable law were fixed in the arbitration document." See: Zayed Al-Qurashi, Arbitration under the Islamic Sharia (2004), Transnational Dispute Management, <http://www.nigerianlawguru.com> accessed 13 May 2020, and Al Jarbra, (n 47) 53.

54 Kutty, Faisal, (n 20)31.

55 Al Thabity, Mohammad Moltg, Enforceability of Arbitral Awards Containing Interest - A Comparative Study between Sharia Law and Positive Laws, (PhD thesis, University of Stirling 2016) 28.

56 Art (1790) of The Medjella of Legal Provisions defines Arbitration as "appointing an arbitrator upon consent of the disputant parties to solve their dispute. See also, El-Ahdab & El-Ahdab, (*n*. 29) 16.

57 Mohamed Abul-Enein, 'Liberal Trends in Islamic Law (Sharia) on Peaceful Settlement of Disputes' (2000) 1/2, Journal of Arab Arbitration.

58 In the dispute between the Caliph "Ali ben Abi Taleb" and "Muawya Ibin Abi Sofian", the two parties agreed to appoint two arbitrators in a written document. See: Walied El-Malik, *Mineral Investment Under the Sharia Law* (Graham & Tortman1993) 127.

59 "O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice", See: The noble Quran, Surah al-Baqarah, 2:282.

The principle of party autonomy and its effects on arbitration are acknowledged in various Islamic areas of jurisprudence under the Islamic perception of the principle of "*pacta sunt servanda*".[60] This principle asserts the discretionary power of the parties to draft an arbitration agreement. Freedom of contract in Islamic Sharia also protects the parties' right to specify the law applicable to the arbitration, the place of arbitration, the type of arbitration (ad-hoc or institutional), the number and qualifications of the arbitrator(s), etc. The principle of "separability" meaning the arbitration remains unaffected by any claim of invalidity of the underlying contract is also recognized by Islamic jurisprudence, under the doctrine of severance of contractual clauses,[61] thus maintaining the validity of the arbitration clause even where the underlying contract is challenged.

The following section considers the role of Islamic Sharia in GCC legal system and examines some factors that might constitute points of conflict between arbitration and Islamic Sharia, to clarify the true effect of Islamic Sharia as grounds of challenging the arbitral awards in GCC states.

3. Islamic Sharia as an obstacle to arbitration in GCC States?

The concept of Islamic Sharia may play a significant role in the legal system of the GCC states, as a part of domestic public policy (3.1), and it could potentially constitute a ground for challenging the recognition and enforcement of arbitral awards. Nevertheless, rules of Islamic Sharia may not present as great an obstacle in dispute resolution as imagined by many western jurists (3.2).

3.1. Nature of the legal system of the GCC States and the role of Islamic Sharia

The legal system of GCC states has developed into a scheme, which, while being influenced by rules of Islamic Sharia, can best be characterized as a civil law regime. Due to the historical and cultural relationships between GCC states and Egypt, Egyptian jurists played a special role in developing the legal system of GCC states. The Egyptian legal system had been influenced by civil law culture as a result of French colonization and the cultural relationship between France and Egypt during the 18th and 19th centuries.[62] The influence of the civil law system and Egyptian legal culture[63] was then transferred to many legislative acts in GCC states through the efforts of Egyptian jurists who participated in the drafting of many GCC-state national codes.

The role of Islamic Sharia as a third supplementary source of legal rules was set forth in the Egyptian Civil Code of 1948 and was later included in the civil codes of many GCC states, such as the UAE and Bahrain. To date, the influence of Egyptian legal culture can be observed in judgments issued by Egyptian judges in GCC-state courts or by GCC-state judges who studied either in Egypt or under Egyptian law professors in many of the law schools in GCC states. Hence, Egyptian legal culture, including scholarly opinions and judicial decisions, may be identified as one of the historical sources of legislation in GCC states, and is interpreted in accordance with the majority religious sect in each state.

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60 About "*pacta sunt servanda*" See: Zahid Anwar and Rohimi Shapiee, 'Pacta sunt Servanda: Islamic Perception' (2010) 3/2 Journal of East Asia and International Law.

61 Mutasim Al-Qudah, 'The Impact of Sharia on the acceptance of international commercial arbitration in the countries of the Gulf Cooperation Council' (2017) 20/1, Journal of legal Ethical & Regulatory Issues. <https://www.abacademies.org> accessed 13 May 2020.

62 In Middle Eastern countries, legislation has been influenced by former colonial legal culture, especially the civil law culture flowing from French colonization. The influence of French legal culture is most apparent in the North African states of the Middle East (Egypt, Tunisia, Algeria, and Morocco).

63 Several definitions of legal culture are found in the relevant literature, the present author adopts the definition of John Bell who defines Legal Culture as "specific way in which values, practices and concepts are integrated into the operation of legal institutions and the interpretation of legal texts." See: John Bell, 'English law & French Law- Not so Different' (1995), 48, Current Legal Problems, 70. For more definitions of legal culture, See: George Mousourakis, *Comparative Law and Legal Traditions* (Springer 2019) 139.

Almost all GCC states refer to Islamic Sharia as a main—or even the primary—source of legal rules in their constitutional laws.[64] Similarly, in many other codes in GCC states, Islamic Sharia constitutes a first / second/ third supplementary source of legal rules, usually coming after custom in the civil and commercial codes. Some GCC-state codes solely refer to principles/provisions of Islamic Sharia as a supplementary source of legal rules, such as the Omani Commercial Code[65], the Bahraini civil code,[66] and the Qatari Civil code[67], whereas other GCC-state codes refer to rules of Islamic jurisprudence *(fiqh*), such as the UAE,[68] Omani,[69] Kuwait[70] Civil Codes. Additionally, other Islamic states have referred to Islamic Sharia as a supplementary source of legal rules in their civil and commercial codes. In Egypt, Islamic Sharia comes as a third supplementary source of legal rules after legislation and custom.[71] In Syria, Islamic Sharia comes before custom in the civil code as a second supplementary source of legal rules directly after legislation.[72] In the Jordanian civil code, rules of Islamic jurisprudence followed by principles of Islamic Sharia come before custom.[73]

It is worth mentioning that the UAE, Oman & Kuwait civil codes adopt the term "principles/rules of Islamic jurisprudence" as a supplementary source of legal rules, similar to Jordanian civil code, whereas other GCC states, adopt the term "principles/provisions of Islamic Sharia" similar to the Egyptian and Syrian civil codes. The Kuwaiti and Bahraini civil code assert that principles of Islamic Sharia /Islamic jurisprudence

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64 See for example, Art. (2) of the Omani Constitution, Royal Decree No.101/1996: "Islamic Sharia is the basis of legislation", Art. (7) of the UAE Constitution of 1971: "Islamic Sharia is the main source of legislation," same as Art. (2) of the Kuwaiti Constitution of 1962, Art. (2) of the Bahraini Constitution of 2002, and Art. (1) of the Qatari Constitution of 2004, Art. (7) of the Saudi constitution of 1992 state that, "The regime derives its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws." It is worth mentioning that Islamic Sharia has been mentioned, as a source of laws in about (8) article in the Saudi constitution.

65 Art. (5) of Omani commercial code: "If there is no legislative provision, custom shall have effect, and special or local custom shall take precedence over general custom. If there is no custom, the provisions of the noble Islamic Sharia shall apply, then the principles of equity."

66 Art. 1(b) of Bahraini civil code – No.19/2001: "In the absence of a provision of a law that is applicable, the judge will decide according to custom and in the absence of custom in accordance with the principles of **Islamic Sharia** that suit the conditions and circumstances of the country. In the absence of such principles, the judge will apply the principles of natural justice and the rules of equity."

67 Art. (1/2) of Qatari Civil Code No.22/2004: "Where there is no statutory provision, the Judge shall rule according to the relevant provision of the **Islamic Sharia**, if any. Otherwise, the judge shall rule according to the customary practice. In the absence of such customary practices the judge shall rule in accordance with the rules of justice".

68 Art. (2) Of the UAE civil code-No.5/1985: "The third gateway is that when interpreting the law, the courts are to take notice of **Islamic jurisprudence** (*fiqh*)."

69 Art. (2) of the Omani civil code – No.29/2013: "The rules and principles of **Islamic jurisprudence (*fiqh*)** shall be relied upon in the interpretation of these provisions."

70 Art. (1/2) of Kuwaiti civil code No.67/1980: "In the absence of a provision of a law that is applicable, the judge will decide in accordance with the rules of **Islamic jurisprudence** (*fiqh*), most suitable to the country's reality and interests. In the absence of such rules, the judge will decide according to custom."

71 See: Art. 1(b) of the Egyptian civil code- No.131/1948: "In the absence of a provision of a law that is applicable, the judge will decide according to custom and in the absence of custom in accordance with the principles of **Islamic Sharia**. In the absence of such principles, the judge will apply the principles of natural justice and the rules of equity."

72 See: Art. 1(b) of the Syrian civil code- No. 84/1949: "In the absence of a provision of a law that is applicable the judge will decide according to the principles of **Islamic Sharia**. In the absence of such principles, the judge will decide according to custom and in the absence of custom, the judge will apply the principles of natural justice and the rules of equity."

73 Art. 2/2,3 of Jordanian civil code No.43/1976 "2- In the absence of a provision of a law that is applicable, the court will decide in accordance with the rules of **Islamic jurisprudence** (*fiqh*), the most suited to the rules of civil law. In the absence of such rules, the court will decide according to the principles of **Islamic Sharia.** 3- In the absence of principles of **Islamic Sharia**, the court will decide according to custom. In the absence of custom, the court will decide in accordance with the rules of justice …."

applied as a supplementary source of legal rules should comply with the reality and circumstances of the country. Irrespective of the term used by legislators to specify the concept of Islamic Sharia as a supplementary source of legal rules, almost all GCC states, and other Islamic states adopt the most flexible interpretation of rules of the *Quran,* and the *Sunnah* concerning transactions, to comply with the international legal environment.[74]

In the field of dispute resolution, the lack of a unified definition of public policy[75] has lead scholars to view public policy as an exception that paves the way to unpredictable outcomes[76] or as an exception, which may only be used if there is no ground to nullify the arbitral award. In GCC states, the concept of Islamic Sharia may play a significant role, as a part of domestic public policy,[77] and it could potentially be used as a ground to challenge the recognition and enforcement of arbitral awards. In fact, rules of Islamic Sharia may not present as great an obstacle in dispute resolution as imagined by many western jurists. Challenges to an arbitral award based on an alleged violation of principles of Islamic Sharia may be rejected by national courts for many reasons.

The following section considers the true effects of Islamic Sharia when it is used as a public policy challenge to an arbitral award.

3.2. The true effects of Islamic Sharia as grounds to challenge an arbitral award

Upon an examination of the current conditions of the legal systems of GCC states and the role of Islamic Sharia as a part of domestic public policy, Islamic Sharia might, in fact, be more compatible with international standards of dispute resolution and with international commercial dealings than considered by some scholars.[78] This section analyzes whether Islamic Sharia can be used as grounds to challenge arbitral awards before state courts in GCC countries. The following parts look particularly at how some factors might slow down the acceptance of arbitration in GCC states such as; the gender and religion of arbitrators (3.2.1), the subject matter of disputes (3.2.2), and the rules of Islamic Sharia on certain points, such as interest and aleatory contracts (3.2.3). The section concludes that the enforceability of arbitral awards will not necessarily be jeopardized in GCC states due to the flexible interpretation of Islamic Sharia as adopted by almost all GCC jurisdictions.

3.2.1. *Gender and religion of arbitrators*

The requirements and qualifications of arbitrators might be decided by agreement of the parties, or by the third party entitled to appoint the arbitrator. Arbitration laws contain certain minimum requirements concerning arbitrators. The freedom of disputants to agree on the qualifications of arbitrators has been asserted by most national courts in GCC states. By contrast, in the field of formal litigation, procedural rules prescribe more restrictions, qualifications, and requirements in respect of judges such as to generally deprive disputing parties of any power to choose the judge who will hear their dispute.

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74 See: Section 3.2.3: "Flexible interpretation of Islamic Sharia and the Enforceability of Arbitral Awards in the GCC States."

75 Interpretation of public policy is usually left to the courts, but few Arab legislations define the concept of public policy, e.g. Art (163) of Jordanian civil code -N.43/1976: "The following issues are to be considered matters of public order: rules regarding personal status such as capacity, inheritance, procedures necessary to the disposition of Waqf, real-estate, or state property, laws on mandatory pricing and laws that are adopted for the need of consumers in exceptional circumstances."

76 Born. G. *International Arbitration: Law and Practice* (The Netherlands 2012) 2621.

77 Islamic sharia has mentioned, expressly, within the concept of public policy stated in Art. (3) of UAE civil code- No.5/1985: 'Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership, and the other rules and foundations upon which society is based in such manner as not to conflict with the definitive provisions, and fundamental principles of the Islamic Sharia.'

78 For a different approach See: Khoukaz (n 18)190.

Certain qualifications for arbitrators might be grounds for challenging the arbitral award based on a violation of Islamic Sharia. Religion and gender could constitute grounds for challenging an arbitral award in a GCC jurisdiction—or any other Islamic state—based on a narrow interpretation of certain texts in the *Quran* or *Sunnah*. Legal practice shows that almost all GCC governments have broadly interpreted Islamic Sharia texts concerning the requirements for judges/arbitrators.

Some legislation regulating judicial authority in GCC states requires judges to be Muslim,[79] while other GCC-state legislation does not mention religion in connection with the requirements for acting as a judge;[80] only Saudi law requires a judge to have acquired the capacity according to principles of Islamic Sharia, without however a direct indication as to his religion.[81] Legal practice in GCC-state courts establishes that all judges in GCC-state courts are Muslims, whether nationals or foreigners. In other Islamic countries, judges can be non-Muslims based on a broad interpretation of Islamic Sharia rules as established by some schools of Islamic jurisprudence. Egyptian judicial rules do not mention any religious requirements for judges,[82] and practice shows that there are many non-Muslim judges in Egypt. Moreover, a judge's religion is unlikely to constitute an obstacle to recognizing a foreign judgment issued by a non-Muslim judge abroad given that the requirements for the recognition of a foreign judgment in the laws of GCC states are silent on the religion of the judges in the state where the decision has been issued.

In the field of arbitration, no law in any GCC state sets out a restriction concerning the religion of the arbitrator. Appointment of an arbitrator is subject to the mutual consent of the parties without any restrictions other than the minimum limits concerning the arbitrator having reached the age of majority and having legal capacity.[83]

Furthermore, the principle of freedom of contract entitles the disputants to draft an arbitral clause requiring the arbitrator to be of a certain religion. Such a clause will not be considered impermissible discrimination, as long as the religion of the arbitrator could be a part of his qualifications, given the nature of the dispute, e.g. where the disputant parties choose rules of Islamic Sharia as the law applicable to their contract and designate the appointment of Muslim arbitrator(s) to settle a dispute arising out of such a contract. In 2011, the Supreme Court in the UK upheld the validity of an arbitral clause requiring the arbitrator to be of a certain religion or community. In *Jivraj v Hashwani*, the UK court held that "stipulation that an arbitrator be of a particular religion or belief can be relevant to the manner in which disputes are resolved."[84]

It is worth mentioning that the religion of judges has been a matter of discussion between schools of Islamic jurisprudence; the majority of scholars refuse to permit non-Muslims to be judges, and some scholars have recently extended such rule to arbitrators.[85] The present author asserts the right of non-Muslims to serve as arbitrators based on the principle of freedom of contract given that the disputing parties appoint the arbitrator by agreement, this being contrary to a judge who is appointed in litigation without requiring the specific consent of the parties. Practice in GCC states shows that non-Muslims are

79 See: Art. 21(a) of the Omani Judicial Authority Act, Royal Decree No. 90/1999; Art.18 (a) of the Federal Judicial Authority Act of UAE No. 3/1983; Art. 19 of the Kuwaiti Judicial Authority Act No. 23/1990.

80 See: Art. 22 of the Bahraini Judicial Authority Act No. 22/2002; Art. 27 of the Qatari Judicial Authority Act No. 10/2003.

81 Art. 31 of the Saudi Judicial Authority Act, Royal Decree No. 78/ 2007.

82 Art. 38 of the Egyptian Judicial Authority Act No. 46/1972.

83 According to almost all GCC-state arbitration laws, it is not permissible for an arbitrator to be a minor, or a person under judicial restriction, or a person deprived of his civil rights by reason of his having been convicted of an offence involving a violation of honor or trust or by reason of his bankruptcy having been declared unless he has been rehabilitated.

84 Jivraj (Appellant) v Hashwani (Respondent) [2011] UKSC 40, published electronically at: https://www.supremecourt.uk/cases/docs/uksc-2010-0170-judgment.pdf. accessed 13 May 2020.

85 S. A & Oseni U.A, 'Appointing a non-Muslim Arbitrator in Tahkim Proceedings: Polemics, Perceptions and Possibilities' (2014) 5, Malayan Law Journal.

permitted to preside over arbitrations without restriction. Consequently, the religion of the arbitrator should not be a ground to challenge an arbitral award based on Islamic Sharia.

Concerning the gender of arbitrators, GCC-state arbitration laws (including the new Saudi Arbitration Law of 2012) do not stipulate any gender requirements for arbitrators, nor do they contain any language that prohibits a woman from serving as an arbitrator. Despite the disagreement between scholars on Islamic jurisprudence regarding the possibility of appointing a female ruler or a female judge,[86] the Saudi Administrative Court of Appeal in Dammam approved (or, more precisely, did not object to) the appointment of the first Saudi female arbitrator.[87] The gender of an arbitrator could potentially be used as grounds for challenging an arbitral award based on a narrow interpretation of a saying of the Prophet Mohamed (PBUH) about appointing a female as a ruler. A minority of Islamic scholars interpret such saying narrowly, reasoning, in their opinion, that it prevents the appointment of female judges. This particular interpretation of the Prophet's words has been rejected by many Islamic jurisdictions. Today, there are female judges in many Islamic states; there are about seventy female Iraqi judges, ten female judges in the UAE, and in Egypt, one finds twenty female judges as well as arbitrators. Nigeria recently appointed the first female chief justice in Africa and has one of the largest National Associations of Women Judges; and other Muslim countries also have female judges and arbitrators, including Indonesia and Malaysia.[88] This is reinforced by the fact that there is historical evidence indicating that women were appointed judges in the pre-modern era.[89]

In the field of litigation, most GCC-state legislation on judicial authority does not mention gender within the requirements for serving as a judge.[90] Only UAE federal legislation on judicial authority requires judges to be male,[91] whereas there is no indication as to a judge's gender in the judicial authority legislation of the Emirate of Abu Dhabi.[92] Female judges have already been appointed in Abu Dhabi courts. The Saudi Judicial Authority Act requires that judges have acquired capacity according to principles of Islamic Sharia, without reference to a judge's gender.[93] Legal practice in Saudi Arabia has thus far not produced any female judges, contrary to the practice in other GCC states. The wording of Art. 31(3) of the Saudi Judicial Authority Act could be interpreted broadly or narrowly so as to accept or reject female judges.

The effect of the difference between litigation and arbitration extends also to the scope of dispute settlement.

3.2.2. *Scope of litigation and arbitration in Islamic Sharia*

In Islamic Sharia, the scope of dispute settlement by litigation is wider than that of arbitration. Any type of dispute might be settled by litigation, including criminal matters and matrimonial disputes. By

86 Nasser Al Zaid, *Woman as arbitrator 'A commentary on the decision of the Saudi Administrative Court of Appeal, Case N0.3022/ 1436 Hijri'* <https://www.arbitrationkw.com> accessed 13 May 2020.

87 Decision of the Saudi Administrative Court of Appeal in Dammam on May 10, 2016. Available at: http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/. accessed 13 May 2020.

88 Mohamed Raffa, 'Arbitration, Women Arbitrators and Sharia' (2013) Law Journal of Nigeria, <http://works.bepress.com/mohamedraffa/1> accessed 13 May 2020.

89 Asifa Quraishi, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' (1997) Michigan Journal of International Law18, 287 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524245> accessed 13 May 2020.

90 See: Art. 21(a) of the Omani Judicial Authority Act, Royal Decree No. 90/1999; Art. 22 of the Bahraini Judicial Authority Act No. 22/2002; Art. 27 of the Qatari Judicial Authority Act No. 10/2003; and Art.19 of the Kuwaiti Judicial Authority Act No. 23/1990.

91 See: Art. 18(a) of the federal Judicial Authority Act of UAE No. 3/1983.

92 Art. 18 of the Abu Dhabi Judicial Authority Act No. 32/2006.

93 Art. 31(3) of the Saudi Judicial Authority Act.

contrast, the scope of arbitration is limited to disputes that can be settled by compromise (*sulh* in Arabic).[94]

According to the main schools of Islamic jurisprudence, *sulh*, and consequently arbitration, is not authorized for matters relating to the "rights of God". Matters relating to the rights of God have been extended to many subjects, including criminal matters (*Hudud*).[95] Also understood as a right of God and excluded from the scope of conventional arbitration is the unique form of dispute resolution for matrimonial matters as prescribed expressly in the Quran;[96] while termed "arbitration", it entails a special mechanism that is totally distinct from the arbitration mechanism employed in civil and commercial disputes.

Arbitration has been approved by many texts in the Quran as an acceptable dispute resolution mechanism in general.[97] As there is no express or even implied rule against settling commercial disputes by arbitration, the four main *Sunni* schools[98] and also the other schools[99] of Islamic jurisprudence accept arbitration as a means of dispute resolution for all commercial matters.

Moreover, each GCC jurisdiction has its own scope of arbitrability influenced by its political and economic interests irrespective of Islamic Sharia; for example, intellectual property disputes are excluded from the scope of arbitrability in Oman.[100] Similarly, disputes between partners of a limited liability company—in their personal capacity and without involving the company—is not considered arbitrable in the UAE.[101] It is worth mentioning that the national courts in GCC states have a wide discretionary power

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94 Surah: An-Nisa, 4: 65.

95 ***Hadd:*** (plural: *hudud*) signifies an unchangeable punishment prescribed by divine law which is considered as the right of Allah. In the penal context, prescribed punishment means that both the quantity and quality thereof is determined and that it does not admit of degree. What is meant by its being prescribed as the right of Allah is that it is prescribed in the public interest (*maslahah 'ammah*), and individuals as well as the community cannot annul it. It means that whenever a *hadd* crime is established as being committed, the judge has no choice other than punishing him with a *hadd* punishment as prescribed. According to the majority of jurists, *hudud* crimes are as follows:
1. *zina* (unlawful sexual intercourse),
2. theft, *qazaf* (false accusation of *zina*),
3. drinking intoxicants,
4. *hirabah* (highway robbery),
5. *baghy* (rebellion) and
6. *riddah* (apostasy).
For more details See: Abdul Qadir Awdah, '*al-Tashri' al-Jina'i al-Islami Muqaranan bi Qanun al-Wad'i.*' (Vol.1, 13th ed., Muassasah al-Risalah, Beirut 1994) 79.

96 *"[A]nd if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware."* Surah: An-Nisa, 4: 35.

97 See: Mohamed Al-Zohalili, 'Legal and Shari Arbitration in the Present' (2011) 27/3, Damascus Journal of Legal and Economic Sciences.

98 Shahadat Hossain, 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview' (2013) 1, Journal of Philosophy, Culture and Religion.

99 Al-Zohalili, (n. 98).

100 See: Amel Abdallah, *Arbitration in Oman*, in Gordon Blank *(ed.), Arbitration in MENA*, (Juris 2016).

101 See: Judgment of the UAE Court of Cassation, No. 150/2014: "The Court asserted that the provisions laid down in the UAE Companies Law in articles numbers (218, 222, and 322) are mandatory rules related to the public policy. These articles provide that (i) the company has an independent artificial capacity and owns all its shares and money (ii) the partners' liability in limited liability companies is limited to their shares in the company, unless there is evidence of a grave error or fraud. The Cassation Court pointed out that the claimant's claim was not addressed to the partners in their personal capacity, as the claim was directed to the Company, nevertheless the claimant did not involve the Company. The Cassation Court further highlighted that the partners' liability was limited to their shares in the Company, unless they committed a fraud or grave error, and these are mandatory rules connected to the public policy, and thus these provisions could not be the subject of an amicable settlement nor arbitrated. Consequently, the Cassation Court decided to ▸▸

to consider the arbitrability of certain disputes within the purview of Islamic Sharia, concerning matters related to the rights of God. The discretionary power of GCC state courts has been influenced by the flexible interpretation of the rules of Islamic Sharia in different matters, especially prohibiting the charging of interest and prohibiting aleatory contracts.

3.2.3. *Flexible interpretation of Islamic Sharia and the enforceability of arbitral awards in GCC States*

A state court may set aside an arbitral award if it contradicts Islamic Sharia as a part of public policy. However, that possibility is nowadays very limited due to statutory laws influenced by a flexible interpretation of the rules of Islamic Sharia (*Quran and Sunnah*) and the approaches of western legislators. Matters such as prohibiting the charging of interest (*riba* in Islamic Sharia)[102] or preventing speculation are unlikely to constitute grounds for challenging an arbitral award in many GCC jurisdictions due to the flexible interpretation of texts preventing *riba* or speculation in the *Quran* and the *Sunnah*.

Concerning *riba*, or charging interest, the national laws or judicial decisions of many Islamic countries (including almost all GCC states) have drawn on a range of legal grounds to recognize the validity of certain limited interest rates in civil and commercial dealings. Also, compound interest is permitted in banking loans in many Islamic countries. The Egyptian Court of Cassation supported the validity of charging interest as set out in the Civil Code: in 1980s, a challenge was made to Article 226 of the Egyptian Civil Code of 1948, stating the interest rate in civil dealings, due to its alleged contradiction of Art. 2 of the Egyptian Constitution of 1981, which make Islamic Sharia the main source of laws in Egypt. The Egyptian High Constitutional Court affirmed the validity of Art. 226 of the Civil Code, however, on the ground that the article preceded the Constitution of 1981.[103] Similarly, in Morocco interest has been recognized through some questionable legal distinctions regarding moral and natural persons, arguing the Quran only prohibits charging interest in "transactions between Muslims as natural persons ... whereas legal persons such as banks, corporations, public agencies or the like may freely charge interest in commercial transactions since they have no religion."[104] In the UAE, the Federal High Court allowed the imposition of interest rates in banking loans due to the necessity of banking operations in the state and on the grounds that there is no current mechanism complying with Islamic Sharia that may replace banking activity.[105]

Only Saudi Arabian law still prohibits interest as a type of *riba*.[106]

In Saudi Arabia, if the arbitral award contains an element which contradicts a national law legal rule influenced by Islamic Sharia, such as "interest", the state court may refuse to recognize or enforce

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▸▸ overturn the appeal judgment, and accordingly decided to nullify the arbitration award, as the arbitrators did not have the jurisdiction to review and decide on the dispute as it was governed by mandatory rules related to public policy." See more details at: https://www.tamimi.com/law-update-articles/commercial-civil-disputes-may-not-settled-arbitration-uae/. accessed 13 May 2020.

102 *Riba* is defined as "any unjustifiable increase of capital whether in loans or sales." Or "any unlawful or unjustified gain." See: Zamir Iqbal, Islamic Financial Systems, Finance and Development, (June 1997) <https://www.imf.org/external/pubs/ft/fandd/1997/06/pdf/iqbal.pdf> accessed 13 May 2020, and Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Cambridge University Press1986) 13.

103 Decision of Egyptian High Constitutional Court, case No. 47 issued on 21/12/1985.

104 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?' (2001) 13/1, Pace International Law Review,55.

105 Decisions of the UAE Federal Court issued on 6/9/1983 and 25/10/1983; for more decisions, See: Ahmed Mahmoud Shawky, "Report about the approach of the UAE Federal Court in the matter of banking interest rates",(14th Conference of College of Law and Sharia, Islamic Financial Institutions, UAE University, May 2005).

106 Art. 149, Saudi Order of the Commercial Court, Royal Decree No. 32/1931, published electronically at: http://www.wipo.int/edocs/lexdocs/laws/ar/sa/sa050ar.pdf. accessed 13 May 2020.

that part of the award, but the rest of the award could be recognized. Otherwise, the award could be challenged in its entirety for violating Islamic Sharia as a part of public policy, [107]where the subject of the award contradicts Islamic Sharia, e.g. a contract of sale of alcoholic beverages. However, Saudi Arabian judges are "partially" influenced by the flexible interpretation of texts preventing *riba* in other Islamic countries. Scholars in Saudi Arabia have discussed some legal solutions to re-imagining the principle of "interest" arising in foreign arbitral awards.[108] Legal grounds such as compensation for missed opportunities, compensation for the time value of money, compensation for a debtor's delay in repaying, can be used to create acceptable support for foreign arbitral awards containing interests. The mentioned legal solutions based on some court decisions issued in Saudi Arabia in the 1990s recognized foreign arbitral awards bearing interest on the basis of reasonable compensation for financial loss.[109] Nonetheless, the validity of any arbitral award based on agreement granting damages ascertained in advance cannot be guaranteed in the Saudi Arabian judicial system.[110]

In general, an arbitral award bearing interest could be enforced in almost all Islamic countries including states where interest is impliedly or expressly prohibited, by considering different factors including the actual practice of those commercial dealings in the state of enforcement.[111]

The prohibition of *gharar* in Islamic Sharia means that any agreement based on an uncertain event is void, even if the event was specified. The strict prohibition of *gharar* in Islamic Sharia leads to the prohibition of many types of aleatory contracts, such as insurance contracts, and any agreement containing an element of speculation, including all stock exchange dealings. Many Arab statutory laws have adopted less restrictive policies concerning aleatory contracts, realizing the important role of such contracts in the national economy. Abdel Razak El Sanhuri[112] and other scholars have tried to align rules on *gharar* in Islamic Sharia with the western concept of aleatory contracts.[113] El Sanhuri has examined the approaches of different schools of Islamic jurisprudence concerning *gharar*. These approaches make a distinction between severe *gharar*, reflecting a kind of exploitation prohibited in Islamic Sharia, and mild *gharar*, which is permitted in Islamic Sharia according to many schools of jurisprudence. As a result of these efforts, commercial and civil dealings embodying mild *gharar*, such as insurance contracts and speculation on stock exchanges, is unlikely to contradict Islamic Sharia.

Based on a flexible interpretation of Islamic Sharia and due to the efforts of Arab jurists like El Sanhuri,

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107 A Saudi Arabian national court might revise the merits of the arbitral award to ensure that decisions are consistent with Saudi public policy as determined in accordance with Islamic Sharia. See: Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1999) 18/3, Fordham International Law Journal, 923.

108 See: Mohamed Al-Issa, 'A critical Analyses with the legal problems associated with recognition and enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law' (2012) resolve the Main Legal Problems?, (PhD thesis, university of Essex, 2016)187.

109 For more details about these court decisions See: Ahmed Al-Mutawa, Challenges to the enforcement of arbitral awards in the states of Gulf Cooperation Counsel, (PhD Thesis, University of Portsoumth, 2014) 202.

110 See: Al-Shareef, N.S. Enforcement of foreign Arbitral Award in Saudi Arabia; Grounds for Refusal under Article (V) of the New York Convention 1958, (PhD Thesis, University of Dundee 2000)184.

111 For more details about these factors, See: Mohamed Saud Al-Enazi, Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in GCC States Law, (PhD thesis, Brunel University, 2013) 125.

112 Abd el-Razzak El-Sanhuri or 'Abd al-Razzāq al-Sanhūrī, (1895–1971) was an Egyptian, legal scholar and professor who drafted the revised Egyptian Civil Code of 1948. He wrote the draft of the Iraqi civil code with the help of many Iraqi jurists whom he supervised; he guided many jurists in different Arab countries in the drafting of national civil codes, such as in Syria, Libya, and Kuwait.
See: Nabil Saleh, 'Civil Codes of Arab Countries: The Sanhuri Codes' (1993) 8/2, Arab Law Quarterly, 161.

113 See: Abd el-Razzak El-Sanhuri, Sources of Obligations in Islamic Jurisprudence (fiqh), (Vol. 3, 2nd ed, Al Halabi Publisher, Beirut 1998) 51.

modern Arabic legislation can comply with the standards of modern civil and commercial transactions. Many Islamic states, including Saudi Arabia, have relaxed their restrictive policies regarding insurance[114] and other types of aleatory contracts.

Considering the recent condition of legislation in Islamic countries, including GCC jurisdictions and their approaches concerning interest and aleatory contracts, Islamic Sharia as a part of public policy in many Islamic states will not impede recognition or enforcement of domestic or foreign arbitral awards.

4. Conclusion

This article has explained that the legal environment in the majority of GCC states complies with the most recent principles in international commercial arbitration, and that Islamic Sharia might not impede the enforcement of arbitration in GCC states. As such, arbitration does not represent a contradiction to the real concept of Islamic Sharia.

1. The concept of Islamic Sharia and its role in GCC states as a part of public policy, was clarified as follows:
    a. Islamic Sharia should be understood as rules set out in the texts of both of the *Quran* and the *Sunnah*, but that concept should be distinguished from other related concepts, such as Islamic law, which reflects human efforts to interpret the texts of the *Quran* and *Sunnah*. These efforts, in turn, can then be classified under different schools of Islamic jurisprudence *(fiqh*).
    b. *Usul al-Fiqh* is a methodology used by Islamic scholars to interpret texts of the *Quran and Sunnah*, including different methods of reasoning, such as analogical deduction (*qiyas*), juristic preference (*istihsan*), presumptions of continuity (*istishab*), and *Ijma`*, which is defined as the unanimous agreement of the jurists/scholars.
    c. Muslims are a unified religious community, but they have divided into two main sects due to political circumstances. Sunnism and Shi'ism are the main sects in the Islamic faith, with each sect having its own schools of jurisprudence.
    d. The sect or the schools of jurisprudence of the majority population in a certain country may help in determining that country's approach when interpreting principles of Islamic Sharia as a part of public policy.
2. Arbitration, as a means of dispute resolution, does not contradict the real concept of Islamic Sharia:
    a. Arbitration was practiced in the Arabian Peninsula before & after Islam.
    b. Arbitration is recognized as a principle in the Quran, Sunnah and other sources of Islamic Law, including Ijma.
    c. Prophet Mohamed (PBUH) recognized and practiced arbitration.
3. Many principles of international arbitration have been recognized in Islamic Sharia/Islamic jurisprudence:
    a. All schools of Islamic jurisprudence consider an arbitration agreement as the basis for authorizing arbitrators to settle a dispute by a binding decision.
    b. An arbitration agreement in respect to future dispute is likely to be acceptable in Islamic Sharia on the basis of the command of God in the Quran that obligates contracting parties to reduce to writing an agreement regarding a future debt.

114 Roy, Kristin T. (n 208) 947.

c. The principle of party autonomy and its effects in arbitration are acknowledged across Islamic jurisprudence under the Islamic perception of the principle of "pacta sunt servanda".

d. The principle of "separability" is recognized by Islamic Jurisprudence under the doctrine of severance of contractual clauses.

4. The role of Islamic Sharia in the legal system of GCC states:

a. Islamic Sharia plays an important role as a main source of legislation in the constitutions of GCC states.

b. Islamic Sharia constitutes a second/third source of legal rules after legislation and custom in the commercial and civil codes of almost all GCC jurisdictions, these being influenced by the approach of the Egyptian civil code.

c. Few civil codes in GCC consider Islamic jurisprudence, expressly, as a supplementary source of law.

5. Potential points of conflict between Islamic Sharia and Arbitration do not necessarily constitute grounds for challenging the recognition and enforcement of arbitral awards in GCC states:

a. The religion of the arbitrator is not necessarily a ground to challenge an arbitral award based on Islamic Sharia. Non-Muslims may serve as arbitrators based on the principle of freedom of contract given the disputing parties appoint the arbitrator by agreement.

b. An arbitral clause requiring the arbitrator to be of a certain religion may not be considered impermissible discrimination as long as the religion of arbitrator could be considered part of his qualifications given the nature of the dispute.

c. The gender of the arbitrator may not be a ground to challenge an arbitral award based on Islamic Sharia. A female arbitrator may be appointed upon agreement of the disputants or by a court decision. Challenging the arbitral award on the basis of the gender of the arbitrator has been rejected by many courts in Islamic countries and GCC states including Saudi Arabia.

d. The main schools of Islamic jurisprudence, assert that arbitration is not authorized in matters relating to the "rights of God", including criminal matters and matrimonial disputes.

e. The main schools of Islamic jurisprudence recognize arbitration as a means of dispute settlement in civil & commercial disputes, but each GCC state has its own scope of arbitrability independent of the rules of Islamic Sharia.

f. The majority of GCC-state laws and courts adopt the most flexible interpretations in schools of Islamic jurisprudence as regards the prohibition of riba and gharar. Such rules may not constitute grounds to challenge an arbitral award based on Islamic Sharia in almost all GCC states.

Finally, Islamic Sharia is unlikely to constitute a threat to the recognition or enforcement of arbitral awards in the majority of GCC jurisdictions, in light of the compromise that has been reached between Islamic Sharia and the statutory laws in GCC states, and in other Islamic states. The author is of the view that unified GCC rules concerning the concept of Islamic Sharia, the role of Islamic Sharia as a supplementary source of civil codes, and a unified GCC rule concerning arbitrability, may help to illustrate the real attitudes of the GCC legal environment (legislation & courts) to foreign investors and foreign jurists. Moreover, scholars play a significant role analyzing the most recent attitudes of GCC legislators and courts concerning Islamic Sharia as grounds for challenging the recognition and enforcement of arbitral awards in GCC states, and to clarifying the compromise reached between Islamic Sharia and the statutory laws in GCC states, to the world at large.