SHARIA-DRIVEN POLICY CONSTRAINTS TO ENFORCEMENT OF ARBITRATION AWARDS IN THE KINGDOM OF SAUDI ARABIA

By

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Abstract

International arbitration is posited on the intention that its awards will be recognised, binding, and enforceable between different stakeholders. However, recognition and enforcement may vary in different jurisdictions. Courts may have to decide upon competing parties' rights when enforcing an award. This thesis investigates the key challenges and barriers in recognition and enforcement of arbitral awards in the Kingdom of Saudi Arabia (KSA), where applicable law is grounded in Sharia (traditional Islamic jurisprudence and local customs) and compatible international laws and conventions. Although current Saudi legislation is considered to meet international regulatory systems and standards, there are still many reservations about it from international legislators and legal communities. Arbitration awards should be registered in the KSA and validated by the Kingdom's courts, because current enforcement and recognition of foreign arbitral awards is subject to Islamic law, which can be problematic for the recognition and enforcement of foreign arbitration awards. This is related to Sharia implications of international arbitration conditions, and a lack of familiarity and knowledge of foreign arbitration among the Kingdom's judiciary, along with the general incoherence between domestic and foreign arbitration mechanisms. The findings of the analysis undertaken in this thesis support five key recommendations to overcome these challenges: (1) establishment of a quasi-judicial committee; (2) defining arbitration for domestic and foreign arbitral awards; (3) providing and clarifying conditions for enforcement; (4) limiting the judges' capacity to refusal of arbitral awards; and (5) clarifying the grounds for public policy and limiting automatic incorporation of sharia law. The implications of this research, its limitations, and directions for future studies are also outlined.

Keywords: Saudi Arabia; Enforcement of foreign arbitral award; NYC; UNCITRAL Model Law; Saudi SAL 2012; Public Policy; GCC States; Sharia Law; Saudi Vision 2030; Quasi-Judicial Committee.

Declaration

I declare that the research in this thesis is the author's work and submitted for the first time to the Post Graduate Research Office at Brunel University London. The study was originated, composed and reviewed by the mentioned author in the Brunel Law School, Brunel University London, UK. All information derived from other works has been referenced and acknowledged.

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Dedication

To my Loving Parents, Brothers, Sisters, and most especially to my Wife and Children!

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List of Abbreviations

Acronym	Description
ARAMCO	Arabian American Oil Company
BoG	Board of Grievances
CoM	Council of Ministers
CoSS	Council of Senior Scholars
COVID-19	Novel Coronavirus Disease 2019
CPSID	Convention for The Pacific Settlement of The International Dispute
DAA	Domestic Arbitral Award
FDI	Foreign Direct Investment
FAA	Foreign Arbitral Award
FMCS	Federal Mediation and Conciliation Services
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
HPC	Hague Peace Conference
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
KSA	Kingdom of Saudi Arabia
LCIA	London Court of International Arbitration
MoJ	Ministry of Justice
NYC	New York Convention
OPEC	Organisation of the Petroleum Exporting Countries
PCA	Permanent Court of Arbitration
SAL	Saudi Arbitration Law
SEL	Saudi Enforcement Law
SCCA	Saudi Centre for Commercial Arbitration
UAE	United Arab Emirates
UK	United Kingdom

UNCITRL	International Commercial Law Commission
USA	United States of America
USD	United States Dollars
WTO	World Trade Organisation

Chapter 1 : Introduction

1.1. Background and Context

The Kingdom of Saudi Arabia has its roots in the Arabian Peninsula, an area located in the western part of the Arabian Peninsula that is home to the largest deserts in the world. For centuries, the Arabian Peninsula was inhabited by nomadic tribes and a few scattered city-states and kingdoms.[1] The region was also an important centre of trade and commerce, with many important trade routes running through it. The modern-day Kingdom of Saudi Arabia was founded in 1932 by King Abdulaziz Al Saud.[2] King Abdulaziz was born in the central region of Najd and was part of a powerful tribal family known as the Al Saud. Throughout his life, King Abdulaziz sought to unite the various tribes and regions of the Arabian Peninsula under one banner. He accomplished this through a combination of military conquests and political manoeuvring, and by the early 1930s he had successfully established the Kingdom of Saudi Arabia.

King Abdulaziz ruled the country for nearly 40 years, during which time he worked to modernize and develop the country.[3] He established a strong central government, built infrastructure, and encouraged economic growth. After his death, the kingdom was passed down to his descendants, who have continued to rule the country as a monarchy to this day. In the decades that followed, Saudi Arabia became one of the world's largest oil producers, and the country's wealth grew exponentially.[4] The government invested heavily in education, healthcare, and infrastructure, and the country has become a major player on the global stage. Today, Saudi Arabia is a modern and rapidly developing country with a diverse economy and a rapidly growing population.

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[1] John E Peterson, *Historical Dictionary of Saudi Arabia* (Rowman & Littlefield Publishers, 2020) 303

[2] Ahmed Altawyan, 'The legal system of the Saudi judiciary and the possible effects on reinforcement and enforcement of commercial arbitration' (2017) 10 Canadian International Journal of Social Sciences & Education 269-288

[3] Frank E. Vogel, *Islamic Law and Legal System of Saudi Arabia* (Leiden: Brill, 2000) 173

[4] Haider Mahmood, 'Oil price and economic growth nexus in Saudi Arabia: Asymmetry analysis' (2021) International Journal of Energy Economics and Policy 29-33

The KSA has no formal constitution,[5] but it has fundamental constitutional principles that are embedded in the Basic Law adopted in 1992,[6] driven by the Holy Quran and Sunnah; hence, they create the framework for the jurisprudential principles as well as the main structures for governing[7] the country under the basis of Islamic law (Sharia).[8] Therefore, it is argued, that the unifying factor in the creation of the KSA was Islam; hence, Islamic jurisprudential principles[9] form the bedrock of Saudi Arabia's law and governance.

The principles of Sharia has been fundamental to legislative process in the Kingdom of Saudi Arabia. Islam (i.e., the Quran and Sunnah of the Prophet Mohammed (ﷺ)) forms the core of general jurisprudence for the KSA, although local customs are also taken into account in particular legal rulings (as per traditional Sharia norms).[10] This chapter examines the brief historical overview of the Kingdom's formation and its Islamic cultural influence, to sketch the background context of arbitration in international law, and the Sharia-driven policy constraints that pertain to the enforcement of arbitration awards in the KSA, followed by identification of the significance and scope of this research.

Arbitration under international law is used as a formal dispute settlement mechanism similar to common judicial procedures.[11] Arbitration is involved in the binding determination of third-party judges, who determine rulings based on applicable laws and statutes, in accordance with legal principles.[12] An arbitration tribunal may be either a permanent body or be convened on an ad hoc basis for particular cases, to resolve disputes among involved parties. The concept

[5] Awad Ali Alanzi, 'Development of the civil legal system in Saudi Arabia' (2020) 23 (4) Journal of Legal, Ethical and Regulatory Issues 1-7.

[6] Basic Law of Governance 1992, Royal Decree No. A/90 dated 27/08/1412 H. (01/03/1992); published in Unm Al – Qura Gazette No. 3397 on 5th March 1992, art 5.

[7] Shady Mohamed Arafa Hegazy, 'The regulating provisions of the formation and competencies of Sheikhs and Shura Councils in the Egyptian and Saudi systems: A comparative study' (2020) 23 (6) Journal of Legal, Ethical and Regulatory Issues 1-11.

[8] Basic Law of Governance 1992, art 1.

[9] Jean-Pierre Harb, and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 Journal of International Arbitration113, 130.

[10] Saudi Arabia's first commercial code dates to 1931, The Commercial Court Law 1350 H, correspondent 1931; one of the oldest and country's earliest law.

[11] ibid.

[12] Bakr A F Al-Serhan, 'Speedy Enforcement of Domestic Arbitral Awards: Analytical Study under the Emirate Civil Procedures Law' (2015) 29(4) Arab Law Quarterly 378, 378-96

of arbitration has become more important and prolifically used over recent decades due to the increasing volume of global trade (in the globalised economy) across borders (i.e., national jurisdictions).[13]

The United Nations Convention on the Recognition and Enforcement of Foreign Awards (commonly known as the New York Convention, or NYC), one of the most important developments in the arbitration field, is one of the international initiatives that Saudi Arabia has been vigilant in adopting and enforcing to regulate international trade. The NYC and other conventions aim to establish a legal platform for recognition and enforcement of foreign arbitral awards and agreement in member states.[14] Arbitration in Saudi Arabia changed significantly with its accession to the NYC in 1994 through a Royal Decree.[15]

To comply with obligations under the Convention, Saudi government enacted the new Saudi Arbitration Law in 2012 (SAL 2012) together with the Saudi Enforcement Law (SEL) of the same year.[16] The new laws replaced old SAL 1983, after criticisms that it lacked capacity to deal with arbitration in term of efficiency and enforcing foreign arbitral awards. The Saudi Arbitration Law of 1983 (SAL 1983) suffered complex enforcement challenges.[17] The main issues were recognition of arbitral awards containing Sharia-forbidden matters, such as interest (*Riba*) and transactions involving uncertainty in obligations *(Gharar).* These positive developments demonstrate Saudi compliance and willingness to enhance recognition and enforcement of foreign arbitral awards.[18] Arbitration is the default way of resolving

[13] Khaled Alanazi, 'Legal Treatment of Foreign Direct Investment In Saudi Arabia' (2021) 24 (7) Journal of Legal, Ethical and Regulatory Issues 1-15.

[14] Ahmed Altawyan, (n-2)

[15] Ayoub M Al-Jarbou, 'The Saudi Board of Grievances: Development and New Reforms' (2011) 25 Arab Law Quarterly 177, 177-202.

[16] The Saudi Arbitration Law, Royal Decree No. M/34 dated 24/05/1433 H (16/04/2012); it was approved by the Decree of Council of Ministers No. (156) 09/042012; Enforcement Law, Royal Decree No. M/53 dated 13/08/1433 H (03/07/2012) came into effect and its Implementation Roles were issued on 27th February 2013.

[17] Ahmad Q. Farah, and Rasha M. Hattab, 'The Application of Sharīʿah Finance Rules in International Commercial Arbitration' (2020) 16 (1) Utrecht Law Review 117-139

[18] Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 Santa Clara Journal of International Law 443-465; Ahmed A. Altawyan, 'Saudi Law as an Applicable Law in the International Commercial Arbitration Agreement: Challenges and Suggestions' (2017) 3 (1) International Journal of Law and Interdisciplinary Legal Studies 15-25.

international commercial disputes.[19] Moreover, it is an efficient way of solving domestic and international disputes related to commercial transactions, as formal court systems follow all substantive and procedural formats to reach a decision.[20] However, arbitration provides liberty to parties in choosing arbitrators, setting up convenient rules, suitable laws, and location of arbitral proceedings.[21] The most important factor in achieving full effectiveness of arbitration as a vehicle to settle international disputes is its recognition and enforcement under domestic laws. Due to inconsistent interpretations of what constitutes acceptance and enforcement of arbitral awards based on public policy, Saudi Arabian domestic courts have had difficulty recognising and enforcing arbitral awards.

1.2. Research Problem

With reference to Saudi Arabia, it has earned a reputation for the refusing international arbitral awards based on Islamic laws. The problem is deeply rooted in the Article V of the NYC (New York Convention) where there is a window of opportunity for an award not applicable on public policy grounds.[22] The broad concept of public policy, in domestic and international frameworks, allows enforcing authorities a certain level of freedom to accept or refuse arbitral award because of incompliance with public policy. The domestic concept of public policy of Saudi Arabia has been developed based on national laws and the principles of Sharia, which in some instances conflicts with modern concepts of international trade. Besides the merits of Saudi compliance, recognition, and enforcement of arbitral awards, the legal framework faces challenges of harmonising domestic public policy with international standards of arbitration. Public policy of Saudi Arabia mainly derives from national laws and aspirations of principles of Sharia.[23] Article V of the NYC authorises member states to decline enforcement of foreign arbitral awards if they are found not to be in conformity with public interest or public policy,

[19] Dr Khalid Alnowaiser, 'The New Arbitration Law and its Impact on Investment in Saudi Arabia' (2012) 29 (6) Journal of International Arbitration 723, 723-725.

[20] Essam Al Tamimi, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1 BCDR International Arbitration Review 97, 95-103.

[21] Hamid Khan J D, *Practitioner's Guide, Islamic Law* (International Network to Promote the Rule of Law 2013) 20-21.

[22] Mohammad Alharbi, 'Key Challenges facing Online Dispute Resolution in Saudi Arabia' (2019) 88 Journal of Law Policy & Globalization 76.

[23] Ahmad Alkhamees, 'International Arbitration and Shari'a Law: Context, Scope, and Intersections' (2011) 28 (3) Journal of International Arbitration 255, 255-264.

which leaves a large potential margin of interpretation for domestic judges. The concept of public policy in Saudi Arabia, stems from national laws and principles of Sharia,[24] both of which have nuanced and expansive scope for public policy that may make the process of recognition and enforcement of arbitral awards uncertain. Indeed, the broad interpretation of principles of Sharia has led to inconsistent practices related to arbitral awards, resulting in the development of new Saudi legislation aiming to bringing certainty to the treatment of arbitral awards. However, interactions between modern global principles of trade and arbitration and the classical Saudi legal framework continue to raise complexities relating to harmonising the two different legal frameworks.[25]

The KSA is the largest economy in the Arab world and in the Middle East, accounting for a fifth of the region's total GDP (Gross Domestic Product), and it is one of the G20 states.[26] Saudi Arabia some of the most valuable natural resources in the world, with a total estimated value of USD 34.4 trillion, and has the second largest proven reserves of petroleum, making it the largest exporter of petroleum worldwide.[27] Among Middle Eastern countries, the KSA wields considerable social, political, religious, and economic influence. The Saudi economy largely relies on petroleum exports,[28] but ambitious national development plans encapsulated in the Vision 2030 framework seek to diversify economic activity, increase private sector development, and reduce dependence on fuel exports.[29] Due to the economic boom and the Kingdom Vision 2030 National Development Plan, The Kingdom of Saudi Arabia is seeking to attract markets for foreign investments with the aim to diversify their economic by reducing dependency on oil as source of their GDP. The Vision and other factors of economic growth potentials have attracted numerous national and international investors to become part of

[24] Adis Duderija, *Constructing a Religiously Ideal "Believer" and "Woman" in Islam, Neo-Traditional Salafi and Progressive Muslims' Methods of Interpretation* (Palgrace Macmillan 2011).

[25] Erin Sisson, 'The Future of Sharia Law in American Arbitration' (2015) 1 (48) Vanderbilt Journal of Transnational Law, 894.

[26] The World Bank Data, GDP (current US$) – Saudi Arabia, <https://data.worldbank.org/> accessed 10 October 2022.

[27] Sarah Muhanna Al Naimi, 'Economic diversification trends in the Gulf: The case of Saudi Arabia' (2022) Circular Economy and Sustainability 1-10.

[28] Organisation of the Petroleum Exporting Countries, Saudi Arabia facts and figures, <https://www.opec.org/opec_web/en/about_us/169.htm> accessed 05 August 2019.

[29] Habib M. Alshuwaikhat, Ishak Mohammed, 'Sustainability matters in national development visions—Evidence from Saudi Arabia's Vision for 2030' (2017) 9(3) Sustainability 408.

commercial contracts. The Kingdom is continually attracting foreign direct investment (FDI) in all sectors of the economy in order to achieve economic diversification (and growth in general), and to reduce its overreliance on hydrocarbons.[30] As foreign companies and business entities take up commercial opportunities in Saudi Arabia, they do so with concern about what might arise if they experience commercial disputes, due to the low likelihood of obtaining a legally binding and enforceable resolution from local courts.[31]

Despite the fact that the KSA accepted the 1958 NYC (the New York Convention) on the Recognition and Enforcement of Foreign Arbitral Awards, it has been noted that the arbitration process and result are extraordinarily complicated in the Kingdom, and vulnerable to intervention by regional judicial rulings such as Sharia law and its public policy.[32] Additionally, any awards from local and international arbitration faces challenges of being enforced in Saudi Arabia because of public policy.[33] There is no doubt that Saudi Arabia has tried to cope with the development of international arbitration legislation development and has established a number of measures in order to allow the shift towards effective arbitration and efficient mechanisms to recognise and enforce arbitral awards. This demands a transparent, reliable, and prompt arbitration system to help protect domestic and foreign engagements with national economical endeavours.[34] Furthermore, the issue of recognition and enforcement of arbitral awards is significant as it contributes to the relatively low foreign investment in Saudi Arabia, due to a lack of trust in the existing arbitration mechanism. Moreover, the issue has been addressed with broader debate on notion of public policy and its impact on recognition and enforcement of arbitral awards.

This research critically analyses the enforcement of arbitral awards under new SAL 2012, with reference to interaction between recognition and enforcement of arbitral awards with Sharia-dominated public policy in Saudi Arabia. The concept of arbitration discussed in this thesis

[30] Nahla Samargandi and Kazi Sohag. 'The interaction of finance and innovation for low carbon economy: Evidence from Saudi Arabia' (2021) 44 Energy Strategy Reviews 100847.

[31] Mohamed Sweify, 'Domestic Courts' Impact on Arbitral Awards: Pragmatic Reflections on the New York Convention' (2021) Journal of Dispute Resolution 1-38.

[32] Mahantesh GS., 'Public policy as a ground for refusing recognition and enforcement of foreign arbitral awards' (2021) 4 International Journal of Law Management & Humanities 3684-3701

[33] ibid.

[34] David G Victor, David R Hults and Mark C Thurber (eds), *Oil and Governance State-Owned Enterprises and the World Energy Supply* (Cambridge University Press, 2012) 189.

encompasses both domestic and international arbitration, with reference to their enforcement and recognition under the Saudi concept of public policy. To build up arguments in this research, the focus is on highlighting the significance of recognition and enforcement of arbitral award, analysis of Saudi government efforts to recognise arbitral awards, challenges in the way of enforcing arbitral awards because of public policy, and harmonising international standards with domestic gauge of Sharia-led public policy.[35] Finally, the thesis suggests various potential solutions to enhance the efficacy of the legal framework, bringing certainty in enforcing and recognising arbitral awards, establishing fairness in enforcement, and most significantly bringing certainty in concept of public policy in arbitral awards.

1.3. Significance of the Research

The Kingdom has earned a reputation for rapid socio-economic development, which encouraged to adopt modern standards of commercial arbitration to ensure that domestic laws are on par with international agreements, including the NYC and UNCITRL. As previously said, the NYC permits countries to refuse to recognise and enforce foreign arbitral judgements on the basis of their public policy interests. However, the Convention provides no advice with which countries can interpret relevant laws for its interpretation. Saudi Arabia has created new changes to align the Kingdom's legal system and worldwide business practises with those of the rest of the globe. The government of Saudi Arabia has reflected serious commitments in its arbitration legislation, including the SAL (Saudi Arbitration Law) 2012 and the Enforcement Act 2012. These attempts to upgrade arbitration laws have their merits, but there are still some areas that need attention from both legislative and academic researchers. One of the areas that need special attention is broad concept of public policy on which recognition and enforcement of arbitral award may be denied by the domestic courts of Saudi Arabia. Principles of public policy in Saudi Arabia, mainly depends on Sharia interpretation of various aspects of life, and these interpretations sometimes conflict with international arbitration standards.

Recognition and enforcement of arbitral awards is often unpredictable in the KSA, and international investors are not well-versed in Sharia principles to guide their commercial transactions related to Saudi Arabia.[36] It has long been evident that there is a disconnect

[35] Mahmood Ahmad Ghazi, *Islam International Law and the World Today, Concept of State, international Relations, Minorities, War and Jihad* (Institute of Policy Studies 2011) 1-2.

[36] Joshua Karton, 'The Culture of International Commercial Arbitration and the Evolution of Contract Law' (2015) 81(1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 109.

between the international norms (particularly concerning the NYC) and the Saudi legal provision, particularly in relation to the Sharia prohibition of numerous forms of transactions. Therefore, process of recognising and enforcing arbitral awards in the KSA remains unpredictable for wider interpretation of public policy. Saudi Arabia has also been misunderstood in terms of its willingness to discourage the recognition and enforcement of foreign arbitral awards, and it has actively called for more transparency and reliability in line with Vision 2030. Domestic and global businesses are increasingly adopting arbitration for their dispute resolutions, as it is prompt, efficient, and cost-effective. Certainty is one of the fundamental traits of arbitration process that needs clear rules and principles dealing with arbitration. Any uncertain principles may affect the certainty of arbitration process and discourage investments. In the case of Saudi Arabia, the principles of Sharia are open to interpretations based on multiple religious text from jurists,[37] but while this flexibility can offer practical solutions in some cases, it can also add uncertainty in arbitral awards. The issue of the impacts of Sharia on the commercial arbitration process has not drawn sufficient attention from domestic researchers. Additionally, the SAL 2012 adopts broad principle of public policy without marking the domain of public policy and its relationship with the principles of Sharia.[38] This research contributes towards recognition and arbitration of arbitral awards with regard to the concept and role of Sharia in arbitration, which can help brining certainty in arbitral awards, directly and indirectly, and help with the legal facilitation of economic development in Saudi Arabia.

In case where a foreign arbitral judgement violates Sharia law, the fundamental tenets of which form the cornerstone of Saudi Arabian public policy, it may not be recognised or enforced there.[39,40] This research aims at finding a normative scope of Sharia in defining public policy and its challenges. Later, the study focuses on more certain ways of interpretation of public policy with reference to Sharia. This research will help scholars, lawyers, and judges in understanding and interpreting role of Sharia in public policy. By recommending various ways

[37] Nicolas Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2017) 3 McGill Journal of Dispute Resolution 37, 55.

[38] Nicolas Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in Egypt and the Mashriq Countries' (2018) Journal of Dispute Resolution 109.

[39] Peter Cresswell, 'The Future of Arbitration in the Changing World of Dispute Resolution' (2013) 79(3) Arbitration 285, 285-94.

[40] A S Al-Safi, *State Powers in the Kingdom of Saudi Arabia (1st edn, King Fahd National Library Cataloging-in-Publication Data, 2011)* 14.

to bring uniformity in recognising and enforcing arbitral awards, the study will help winning trust of international investors in legal process related to arbitral awards in Saudi Arabia.[41] This thesis mainly contributes to legal debate on the role of Sharia in public policy for recognising and enforcing arbitral awards. The case will be presented as a Sharia-focused analysis of the issue. Consequently, the study aims at finding arbitration solutions that comprise both internal solutions (within Sharia), and external solutions for the legal system of KSA. The research also contributes to improving the status of KSA in facilitating international investments and attracting FDI. By defining scope of Sharia in recognition and enforcement of arbitral awards in the KSA, it offers international investors assurance of the predictability of the Saudi legal, judicial, and arbitral systems.

1.4. Scope of the Research

The thesis limits itself to the role of Sharia, as part of public policy, in influencing recognition and enforcement of arbitral awards in Saudi Arabia. Apart from the stated main limitation, the research further confines itself to boundaries of modern development in regulating arbitration in Saudi Arabia. These modern developments include the SAL 2012 and its interpretation through various judicial structures. The argument is limited to new arbitration laws, as new legislation dealing with recognition and enforcement of arbitral awards is distinct from previous mechanisms. The SAL 2012 is supplemented by the SEL, and together they comprise the new legislative set-up that aims to offer more efficient recognition and enforcement of arbitral awards. However, a strong foundation and operational maturity is needed for these laws to achieve their objectives. To evaluate the new legislative and enforcement, the focus of this study concentrates on assessing the reality, checking the actual enforcement of arbitral awards. Furthermore, the analysis focuses on solving existing issues of bringing predictability in recognising and enforcing arbitral awards in Saudi Arabia. The scope of this research is also focused on the extent of influence of new laws on traditional judicial attitudes and a tendency to refuse arbitral awards based upon the principles of Sharia.

The strength of this study is its focus on the scope and role of Sharia in interpreting public policy in Saudi Arabia which also distinguishing from other studies. The concept of Sharia is distinct from fundamental rules stemming from international arbitration laws. The principles

[41] Mona Elayed Omran, 'A Review about FIDIC Contracts in Saudi Arabia' (2019) 12 Indian Journal of Science and Technology 36.

of Sharia are integral part of public policy concept of Saudi Arabia, as the laws mainly follow Sharia morals as superior norms. The difference between principles of modern arbitration and Sharia often come in conflict in term of recognising and enforcing arbitral awards when commercial transactions are perceived to be in contravention of principles of Sharia. Commercial transactions, especially international commercial transactions, and related awards, include non-Muslim parties, and the principles of Sharia relevant to public policy are equally enforced on them. Sharia is collection of various principles that have evolved from basic sources such as Quran and Sunnah.

Finally, this research selected the Hanbali School of jurisprudence to explore the juristic input on principles of commercial transactions under Sharia, as this is the official school of KSA in interpreting and enforcing Sharia in the country. The Hanbali School has extensive juristic literature and commentary to clarify the concept of commercial transactions in Sharia. The legislative process in Saudi Arabia mainly follows principles of Sharia, with a large degree of autonomy for individual judges in interpreting the laws of the land. Adopting one school of jurisprudence for interpreting Sharia provides options for the judges interpreting various laws such as public policy with a good latitude of discretion. This open discretion, in case of recognising and enforcing arbitral awards, leads towards unpredictable outcomes and uncertainty. Adopting one school of jurisprudence itself puts question on the recognition and enforcement of arbitral awards with reference to public policy.

1.5. Contribution to Knowledge

There are several studies that have already discussed and addressed the new SAL 2012, mainly focusing on the implementation of the issue of arbitration for the commercial interests; this study specifically addresses the role and challenges of interpreting public policy and Sharia law in the Saudi context with regard to refusing awards.[42] The expansion of information and academic literature on the subject of fairness in award refusal and the review of arbitration legislation from this angle are both significant contributions of this work. The findings of this study also serve as a priceless tool for lawmakers and policymakers, particularly in countries with Islamic laws, in deciding whether to employ public policy as a just and practical basis for the enforcement and acceptance of international arbitral judgements. This study also contributes to the development of mechanisms to reach agreeable decisions in cases where

[42] R M K Al-Wakeel, *Comments on the New Saudi Arbitration Law* (1st Ed., 2014) 47-49

foreign arbitral awards might conflict with Saudi public policy. Moreover, this study contributes to existing knowledge related to the interpretation of public policy within the context of foreign arbitral awards regarding Sharia and cultural issues. In addition, this study also discussed challenges face by NYC within the domestic jurisdiction. Finally, this study is considered an invaluable resource for all key stakeholders in the process of arbitration in the KSA, including the judiciary, contracting parties, and others, by providing clearer system than the current one marred by judicial conflict. The ultimate outcomes of this study enable practitioners to leverage decisions regarding arbitral awards where they may be considered to conflict with the interpretation of Saudi public policy under Sharia.

1.6. Aims and Objectives

1.6.1. Aims

The main aim of this research is to critically investigate the key challenges and problems faced in recognising and enforcing arbitral awards in the KSA. The gist of related arguments concerns the influence of Sharia on recognising and enforcing arbitral awards. Moreover, the research analyses the efficiency of the new Saudi arbitration framework with reference to its capacity and efficiency to harmonise international arbitral standards with Sharia standards, an integral part of Saudi public policy.

1.6.2. Objectives

The following are the key objectives achieved in this thesis:

- To critically investigate how arbitration has evolved from traditional to modern frameworks.
- To study how the principles of Sharia affect the interpretation of public policy in enforcing arbitral awards.
- To examine the limitations in harmonising principles of Sharia with global trends enforcing arbitral awards.
- To evaluate how using principles of Sharia as a part of public policy in the KSA affects the recognition and enforcement of arbitral awards.

1.7. Research Questions (RQs)

This research examines the interpretation of public policy with reference to Sharia and its impact on recognising and enforcing arbitral awards. Article V2(b) of the NYC provides member states with the authority to refuse recognition and enforcement of arbitral award if the award is in contravention with the domestic public policy of the contracting state. This means that all awards contrary to the public policy of KSA may be refused based upon domestic public policy, and Sharia is the fundamental source of public policy of KSA. Therefore, this thesis hypothesises that regulation of arbitral award in KSA based on public policy in general and Sharia in particular may affect the certainty and credibility of the system as applied in the country.

The principles of Sharia, as part of public policy, give the enforcing authority a certain deal of advantage to accept or refuse recognition and enforcement of arbitral awards. The principles of Sharia are broad and are open to wide interpretation, based on jurisprudential and moral scope. However, a good deal of ambiguity arises in recognising and enforcing arbitral awards due to this flexibility, and the ambiguity in enforcing and recognising arbitral awards ultimately affects investment in the country. There is need for further study on legal and jurisprudential fronts, to determine how uncertainty in enforcing and recognising can be minimised. The fundamental research question that this thesis addresses is:

- ***RQ1:*** *Does using Sharia principles as part of public policy in KSA affect the recognition and enforcement of arbitral awards?*

The research mainly focuses on examining the role of principles of Sharia as part of public policy in recognising and enforcing arbitral awards. As explained earlier, modern system of international arbitration stems from the NYC, which is part of international law; the framework for international law itself is distinct from that of KSA in general, and principles of Sharia in particular. The principles of Sharia, in their broader scope, may or may not recognise and enforcement of awards according to Sharia standards governing commercial transactions. These standards are numerous, but the most significant ones are prohibition of interest (*Riba*) and ambiguity in commercial transaction (*Gharar*). The research answers the question of the role of Sharia in public policy towards recognising and enforcing arbitral awards. The arguments revolve around the merits and demerits of including principles of Sharia in public policy of KSA with reference to recognition and enforcement arbitral awards. The following

sub research questions were developed with a view to answering the overarching research question, and are addressed in the following chapters of this thesis:

- ***RQ2****: How has Saudi Arabian arbitration evolved from the traditional to modern framework?*
- ***RQ3****: What are the issues of selection of laws in recognising and enforcing arbitral awards with reference to interpreting public policy?*
- ***RQ4****: How do the principles of Sharia affect the interpretation of public policy towards enforcing arbitral awards?*
- ***RQ5****: What are the limitations in harmonising principles of* Sharia *with global trends of enforcing arbitral awards?*

1.8. Research Methodology

1.8.1. Doctrinal Research

With a focus on doctrinal research methods, this research engages with theoretical and doctrinal approaches. Choosing doctrinal research helps in evaluating, examining, and analysing the scope of matters pertaining to recognising and enforcing arbitral awards in KSA under the New SAL 2012. Moreover, the method helps in critically examining the effect of principles of Sharia as public policy on recognition and enforcement of arbitral awards. Doctrinal research methods fits the purpose of the research question, as it examines the issue of effectiveness and efficiency of new arbitration law in KSA, the interpretation of public policy, the interaction of Sharia with arbitral awards, and the way forward. Doctrine is defined (in the legal context) as:

> '[a] synthesis of various rules, principles, norms, interpretive guidelines, and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be abstract, binding or nonbinding'.[43]

There is no consensus on specific principles of doctrinal research, leaving a wide scope to support legal research.[44] However, overall, doctrinal research shares common patterns of research. According to some authors, doctrinal research is a twofold process. First, research focuses on the accepted sources of the area of research, such as laws in relation to the subject,

[43] Terry Hutchinson, Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 84.

[44] Ibid.

theories and doctrines as explained in literature.[45] Secondly, it embarks on theoretical understanding of the research issue. In this way, doctrinal research presents the law as a reliable set of doctrines, rules, and their application.[46] The doctrinal approach is also known as the systematic exposition method, which highlights and evaluates juristic commentators' analyses. Therefore, both primary and secondary data sources are utilised to critically assess the topic. Since the KSA adheres to Sharia, it is imperative that examination of Islamic law is conducted to establish the key challenges to recognition and enforcing of arbitration awards in the Kingdom. The methodological design under the doctrine approach entails a criterion based on examining from the Sharia perspective by developing arguments from the primary sources of Sharia: the Quran,[47] the *Sunnah*,[48] *Qiyas*,[49] *Urf*,[50] *Ijtihad*,[51] and *Ijma.*[52] However, it is also important to understand the notion that there must be distinction made between the Sharia and other technical legal rules that derived from *fiqh*,[53] which is also based on the Quran and Sunnah, and indeed the other primary sources of Sharia.

Christopher McCrudden comments that, '[l]aw is not a datum; it is in constant evolution, developing in ways that are sometimes startling and endlessly inventive'.[54] Legal research is closely tied to existing laws and studying them exclusively, as well as it remains marginal in the interpretation of laws and related concepts.[55] The doctrinal research process may be divided in two parts, as explained below.

The first stage is to investigate the issues in this research, the thesis starts by identifying laws in Saudi Arabia related to arbitration and their enforcement mechanisms. This stage may

[45] Aleksander Peczenik, 'A Theory of Legal Doctrine' (2001), 14 Ratio Juris 75, 76.

[46] Ibid.

[47] Dr Muhammad Muhsin Khan and Dr Muhammad Taq-ud-Din Al-Hilali, *The Noble Qur'an: The English Translation of the Meanings and Commentary* (King Fahd Glorious Quran Printing Complex Madina, 1998) 113 ch 4 para 135.

[48] Precedent set by Prophet Muhammed; Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 Loyola of Los Angeles International and Comparative Law Review 565.

[49] A valid reasoning with analogy to resolve the legal issues based on the Sharia or Islamic Laws

[50] Build the body of law based on the custom of the country.

[51] Independent reasoning by a cleric; Kutty (n-46) 586.

[52] Community Consensus is known as Ijma; Kutty (n-46) 588.

[53] Islamic jurisprudence, based on Sharia; Kutty (n-46) 579.

[54] Hutchinson (n 41).

[55] ibid

remain expository or descriptive, and may seem *lex lata* in its nature. In this regard, the research focuses on old arbitration law, particularly SAL 1983, and then explores the developments of the new arbitration law (SAL 2012 and the SEL). Moreover, the research critically analyses the case laws available on recognition and enforcement of awards in KSA. The research evaluates reasoning based on public policy in recognising and refusing arbitral awards. Likewise, the research examines the principles of Sharia in relation to recognition and enforcement of arbitral awards.

The second stage is demystifying legal reasoning as explained by Geoffrey Samuel: 'Can legal reasoning be demystified?'[56] In second stage, the arguments may stand as *lex ferenda*. To substantiate the argument of making use of public policy effective in KSA, the research interprets available literature on the subject by applying theories related to the issue. This stage is mainly suggesting what law should be on notion of public policy in relation to recognition and enforcement of arbitral awards in Saudi Arabia.

1.8.2. Islamic Jurisprudence and Arbitration

Islamic jurisprudence has been expounded by major jurists throughout history; known as *Usul al-Fiqh*, this science was one of the major achievements of classical Arab-Islamic civilisation.[57] There are four major schools of jurisprudence in Islam, which are important to consider during the research and collection of primary and secondary data sources in this study: the *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali* schools, the latter of which is the official school of the KSA. All of these schools converge on certain fundamental axioms, such as the absolute supremacy of the Quran and then the Sunnah as sources of Sharia, but they differ on interpretation and the varying degrees of importance attached to ancillary considerations (such as customary law, and the practices of the early generations of Muslims). Jurisprudence is explained in more detail in the following chapters, but it should be noted in this introductory explanation that arbitration itself is embedded in the origins of Sharia, including the injunction to appoint arbitrators in marital disputes found in the Quran:

> 'if you fear a breach between them twain (husband and wife), appoint two arbitrators, one from his family and the other from hers; if they wish for peace,

[56] Geoffrey Samuel, 'Can Legal Reasoning Be Demystified?' (2009) 29(2) Legal Studies 181; Hutchinson (n 41) 110.

[57] Oxford Dictionary of Islam defines Fiqh as human efforts to codify Islamic norms in practical terms, and such human-generated legislation is considered fallible and open to revision.

Allah will cause their reconciliation, indeed Allah hath full knowledge and is acquainted with all things.'[58]

Furthermore, there are practical examples from the Sunnah of the Prophet Mohammed (ﷺ) using arbitration as a mechanism to settle disputes among his companions and other communities. However, international scholars and academics have been in doubt about the arbitration within Islamic laws and other jurists have cited interest as the main reason behind this rejection.[59]

1.8.3. Study Context

This study uses doctrinal approach to analyse various interpretations related to public policy in various cases that decided on the issue of recognising and enforcing arbitral awards. The research aims at providing logical exposition of the rules regulating public policy as a tool to recognise or refuse arbitral awards in relation to Sharia (particularly when construed as public policy). Moreover, the research analyses existing law in KSA for recognising and enforcing arbitral awards as a reality check, to determine the status and enforcement of arbitral awards in Saudi Arabia with the overall aim of increasing the efficiency and enforceability of arbitration laws. By means of doctrinal research analysis, the research proposes a way forward for arbitration laws in Saudi Arabia.[60] The researcher analysed different materials for this thesis including case laws, understand new trends in arbitration through available documentations, and analysing enforcement of arbitration of awards in various enforcement courts by reading specific literature. This research also analysed a survey outcomes which conducted by Almutawa and Maniruzzaman[61] in relations to understand the reasons for non-enforcement of foreign awards in the GCC countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the USA). The main purpose of the undertaking doctrinal research of a critical quantitative analysis (e.g. survey) of legal materials to support the research domain. The use of empirical evidence conducted by Almutawa and Maniruzzaman provide rich sources of the legal materials to understand the core reasons for non-enforcement of foreign awards from the perception among

[58] Yusuf Ali (tr), The Holy Quran, ch 4 para 35.

[59] Lord Asquith *Petroleum Development (Trucial Coast) Ltd v the Sheikh of Abu Dhabi* [1952]

[60] The statement explains doctrinal research as process explained in Hutchinson (n 41).

[61] Ahmed Almutawa, and A.F.M. Maniruzzaman, 'Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Coucil States and the prospect of a uniform GCC Arbitration law: an empirical study', 2015, SSRN, available at: https://ssrn.com/abstract=2559690

practitioners in the field of the arbitration and the enforcement of arbitral awards in the GCC states.

1.9. Research Limitations

The researcher faced several issues and challenges during this research, which can help contextualise its findings and directions for future inquiries. This study has been done in this particularly way such as sharia driven policy challenges to enforcement of arbitration awards in Saudi Arabia which is focused research. There can be more written about this topic in the form of book or further study; however, this study focused on two major areas: the reputation of the KSA for refusing arbitral awards on the basis of Sharia-based public policy, with the potential for injustice in the consideration of arbitral awards; and the key challenges and problems faced in recognising and enforcing arbitral awards in the KSA. It has been determined during this study that there is a classification of the public policy under Sharia principle related to the arbitration and foreign arbitration the process should be much clearer for the arbitrators.

Existential challenges need to be addressed, including uncertainty and interest, both of which are prohibited under Sharia, and which could be conditional or material components of foreign arbitral awards. These issues pertain to the principle of Saudi public policy being based on Sharia. National public policy allows scope for rejection of arbitration, as accommodated by the international arbitration framework, including the NYC, but the Sharia-based public policy of the KSA may entail additional difficulties for the recognition and enforcement of arbitral awards. It was also found that the number of cases and judges heard in the Kingdom of Saudi Arabia are outdated and not latest data is found during the research. However, this is research limitation which should be acknowledged because new and more recent data or statistics could be more appropriate in providing better and clear picture of the situation discussed.

Although it was identified as necessary to answer the identified questions concerning these issues, it is important to investigate those who have expectations regarding the enforcement of foreign arbitral awards and how they feel about the principles themselves (i.e., whether they perceive them to be fair and just). This can be done by the using either interviews or surveys to understand their perceptions. People who have knowledge in this area can be reached through interviews, particularly those who have worked or involved in departments or organisations representing foreign companies. It is important to take their views on this matter; therefore, this is considered limited research, which does not encompass original perspectives from actual companies and people involved in seeking the enforcement of awards in the KSA.

While such research methods had been contemplated, most of the study fieldwork occurred during the context of international lockdowns relating to the COVID-19 pandemic, rendering it impractical to interview and otherwise access such firms and arbitrators.

1.10. Structure of Thesis

1.10.1. Chapter One

This chapter presents the basis for the structure of the research, including the background, the issues under discussion, and the significance of the research, along with its aims and objectives. The research questions are identified, along with the methodology of thesis. It is an introductory chapter presenting a preliminary overview of arbitral award enforcement and recognition issues and the context of the KSA, presented from both policy and normative perspectives. Finally, a thesis structure is outlined.

1.10.2. Chapter Two

This chapter reviews a detail literature pertaining to the researched subject. It starts by discussing international arbitration and public policy and the context of the KSA, situating the current study in the context of existing literature on the topic. The literature review systematically builds the arguments developed throughout the remainder of the thesis.

1.10.3. Chapter Three

This chapter analysed the development of arbitration in Saudi Arabia in terms of both historical and contemporary practices, to better understand modern legislation dealing with commercial arbitration. The chapter also increases awareness about Saudi legislative, judicial, and administrative structures, and introduces the reader to modern reformative trends in the Saudi legislative and judicial systems, with specific reference to arbitration. The chapter includes analysis of arbitration proceedings under new arbitration law (SAL 2012). The fundamental purpose of the chapter is to highlight the potentials and limitations of the arbitration system of KSA in recognising and enforcing arbitral awards. This chapter answers the second research question, examining how Saudi arbitration evolved from its traditional to its modern framework.

1.10.4. Chapter Four

This chapter presents the arguments for effective enforcement of arbitral awards in KSA. The chapter critically reflects upon issues of selection of laws in recognising and enforcing arbitral awards with reference to public policy. The research includes trends of interpreting public

policy in KSA with reference to recognition and enforcement of arbitral awards. In this way, the research identifies correlation between wider scope of public policy and arbitral awards. It identifies the challenges of unpredictability of arbitration awards. The most significant contribution of the chapter is to present the various factors that may create challenges in enforcing arbitral awards in KSA. This study focused on these challenges with reference to Sharia interpretations of public policy related to recognition and enforcement of arbitral awards. This chapter answered the third research question, identifying issues of the selection of laws in recognising and enforcing arbitral awards with reference to interpreting public policy.

1.10.5. Chapter Five

This chapter addresses the fundamental issue of the research: the role of Sharia in defining scope of public policy in KSA. Sharia has gained supra-constitutional status in the KSA. The chapter examines the superior influence of Sharia on recognising and enforcing arbitral awards, and arguments concerning the domain of Sharia influence in the new arbitration law (SAL 2012). Importantly, the focus remains on Sharia's role in international commercial arbitration. To accomplish this objective, the chapter examines various challenges faced by international commercial arbitration with reference to the superior status of the principles of Sharia, in domestic as well as international arbitrations. In the end, the chapter evaluates the limitations of harmonising scope of Sharia in defining public policy in relation to arbitral awards. This chapter provides an answer to the fourth research question, understanding how the principles of Sharia affect the interpretation of public policy with regard to the enforcement of arbitral awards.

1.10.6. Chapter Six

Due to the wide-ranging interpretive range of Islamic law, this chapter continues to address the difficulties in the recognition and execution of both domestic and international arbitral judgements. Islamic law is fundamentally interpreted from two primary sources: the Quran and the Sunnah. However, diverse interpretations can be derived from Sharia. Cannons of interpretation are followed to extract rules, and jurists play a significant role in developing interpretative cannons of Islamic law. These schools have developed their maxims to interpret injunctions of Quran and Sunnah on specific areas of law. Schools of jurisprudence in Sharia interpret various transactions related to commercial law. This chapter analyses these schools of jurisprudences and explains the relevance of public policy in Sharia. The research also

examines the scope of liberalising these interpretations to facilitate vibrant recognition and enforcement of arbitral awards.

1.10.7. Chapter Seven

This chapter focuses on the recognition and enforcement of arbitral awards and associated problems in KSA, with reference to role of Sharia in defining public policy. The examination encompasses both domestic and international arbitral awards, while special focus remains on recognition and enforcement of arbitral awards in domestic courts. The research evaluates foreign standards of enforcing arbitral awards, and discusses international agreements such as the NYC and UNCITRAL and their scope of enforcement in Saudi domestic law. The research analyses various issues of enforcement for international investors in defining Sharia, with a view to explaining the concept of public policy. It is appropriate to mention that Sharia is part of public policy in the Kingdom, and the courts may refuse any foreign arbitral award based upon inconsistency with Sharia standards of commercial transactions. This exercise appears to be in accordance with Article V of the NYC; but, the recognition and execution of international arbitral judgements may be impacted by a broad interpretation of public policy under uncodified principles of Sharia. The chapter provides an example of how Sharia can be used to understand public policy. Later in the chapter, it looks at how domestic courts can interpret public policy itself. The fifth study question was addressed in this chapter, which also identified the major obstacles to harmonising Sharia law with current world trends on the enforcement of arbitral awards.

1.10.8. Chapter Eight

This chapter provides suggestions on the interpretation of Sharia law in defining public policy. The chapter puts forward workable recommendations that may raise the standards of efficient recognition and enforcement of arbitral awards. These are focused on improving the predictability of the enforcement of arbitral awards by defining interpretative tools for the concept of public policy with certain principles of Sharia. Accordingly, the thesis concludes by contributing to the debate on the role of Sharia in defining public policy that may, in some instances, adversely affect the enforcement of arbitral awards. The research presents a uniform concept of public policy with special reference to Sharia. Finally, this chapter answers the primary research question, understanding how the use of the principles of Sharia as part of public policy in KSA can affect recognition and enforcement of arbitral awards.

Chapter 2 : Literature Review

2.1. Introduction

This section reviews a detail literature review that relevant to the issues of concern to this study, including the understanding and operation of arbitration within the Saudi legal system, which has been intimately shaped by the historical context, as presented in the following section. Further, it provides an investigation of arbitration in the context of Sharia law, as well as a discussion of the fundamental points of departure between Sharia and the extant international and Western systems. A proper understanding of the Sharia system requires a brief explanation of the historical development of this approach since its inception. A brief overview is provided of the different forms that arbitration has taken at different times and places, as it evolved towards its current iteration, looking at the functional utility that this approach has offered to those societies that utilise it. Furthermore, this section also focuses on understanding of arbitration among Arab countries, which are deeply rooted in Arab-Islamic governance and Sharia law traditions.

This help to understand how other Arab countries handle arbitration, taking into consideration related challenges and public policies. There has been increased use of arbitration among Arab countries, and over recent decades the Arab countries have become key areas for studies of international arbitration expansion.[62] Arbitration strengths and weaknesses also discussed in this chapter, with a review of literature detailing the legitimacy of arbitration within the context of Sharia and international law. The literature on the scope of arbitration is presented, which shows arbitrability for dealing with specific subject. Cases of recognition and enforcing foreign arbitral award which shows various arbitration-related decisions from different sources, including judicial records. Finally, the section concludes with a summary of the findings arising from this analysis of related literature.

2.2. Definition and History of Arbitration

2.2.1 Definition of Arbitration

The Arabic term for arbitration is known as *tahkim,* which is used to describe both the act of moving away from a path of misdemeanour, and the act of appointing an individual as an

[62] Amin Dawwas, and Tareq Kameel, 'Applicability of the UNIDROIT Principles as the Law Governing the Merits of Arbitration in the Gulf Cooperation Council Countries' (2020) 35 (4) Arab Law Quarterly 466-487.

arbitrator (known as the *hakam*/*muhakkam*).[63] Translated literally, *tahkim* describes the act of making an individual *hakam*, imbuing them with the authority to judge others or empowering them to preside over a given negotiation or dispute.[64] In a broader sense, *tahkim* describes the process by which parties in a dispute defer to an authoritative third party, who it is understood will resolve the issue in view of Sharia law.[65] This study adopts this broad definition of *tahkim,* as it is most faithful to the initial civil codification of Sharia, the *Majallah al-Ahkam al-Adliyyah*, which was developed in the tradition of Hanafi fiqh on *mu'amalot* (transactions), the official jurisprudence school of the Ottoman Empire.[66]

Although there are many subtly different interpretations of the semantic content of *tahkim*, but all stipulate that *tahkim* occurs because of an active appointment; the appointed individual is ascribed authority, which enables the empowered individual to facilitate the resolution of disputes in conflicts between parties.[67] Scholars like Zahraa and Hak have also noted the close relationship between the terminological and literal meanings of *tahkim*.[68]

The English equivalent of *tahkim* is 'arbitration', which is defined as 'the just and appropriate clearing of a dispute between two or more parties, which is facilitated by an agreed-upon third party'.[69,70] The definition used by academics like Rone is comparable, although it emphasises the importance of power being given to the arbitrator by the private act of appointing, rather than by being sanctioned by the state.[71] Arbitration can also be understood as follows:

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[63] Cristina Puglia, 'Will Parties Take to Tahkim: The Use of Islamic Law and Arbitration in the United States' (2012) 13 Chi.-Kent Journal of International & Comparative Law 151.

[64] M Zahraa and N Hak, 'Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) 20 Arab Law Quarterly 2.

[65] Cristina Puglia (n-59)

[66] Majallah al-Ahkam al-'Adliyyah, article 1790.

[67] Maurits S. Berger, 'Sharia and the Nation State', in Rudolph Peters and Peri Bearman (eds.), *The Ashgate Research Companion to Islamic Law* (Routledge, 2014), 223; F Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 2, 2-15

[68] Zahraa and Hak (n 60).

[69] William Little, H.W. Fowler and J. Coulson, *The Shorter Oxford English Dictionary on Historical Principles* (3rd edn, Clarendon Press, 1969)

[70] Nicolas Bremer (n-37)

[71] Dana Rone, *Arbitration in International Trade,* (5th edn, Kluwer Law and Taxation Publications 1985) 252.

> The reference of a dispute or difference between no less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.[72]

These definitions are mirrored in Halsbury's *Laws of England*, which again stresses that arbitration refers to a process in which at least two parties, who are both involved in the same conflict, are attended to by an 'arbitral tribunal' rather than an official legal institution. Importantly, this definition stresses the additional caveat that the arbitral decision has a binding effect.[73] This latter point, namely that the decision is ultimately binding in nature, is absolutely critical in understanding arbitration and situating it within the wider legal environment.[74] In fact, this is central to many definitions of the process, assuming that: (1) multiple conflicting parties will voluntarily agree to grant power to a third party to settle their dispute in an arbitration tribunal; and (2) all parties will accept any outcome of that tribunal as binding.[75]

All the above definitions ultimately illustrate that arbitration is a multifaceted process that clearly seeks to ensure the settlement of conflicts between two or more parties, through an equitable binding agreement.[76] However, while this principle is relatively simple, it is complicated by the fact that each jurisdiction has its own system of jurisprudence, creating differentiation on regional, domestic, and international levels.[77] This has made it difficult to provide a universal, unified definition of arbitration that satisfies all parties and contexts. This has often been exacerbated by oversights in legislation.[78] For example, the UK's Arbitration Act 1996[79] neglected to provide a clear definition of the term, instead offering principles to

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[72] John B. Saunders (ed), *Words and Phrases Legally Defined* (3rd edn, Butterworths 1988) 105.

[73] *Halsbury's Laws* (4th edn, Butterworths 1991).

[74] Leon Sarpy, 'Arbitration as a Means of Reducing Court Congestion' (1965) 41(2) Notre Dame Lawyer 182.

[75]Julian D. M. Lew, Loukas A. Mistelis, and Stefan M. Kröll,*Comparative International Commercial Arbitration* (Kluwer Law International 2003) 22.

[76] Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements', in H M Ramadan, *Understanding Islamic Law, From Classical to Contemporary* (Altamira Press, 2006) 1.

[77] R Abu-Manneh, M Stefanini and J Holden, 'Is Arbitration Damaging the Common Law?' (2016) 19(3) *International Arbitration Law Review* 65, 65-69.

[78] Alkhamees (n 22).

[79] The UK's Arbitration Act 1996 is an act which passed by Parliament in 1996 for the arbitration in the UK. The Act governing arbitration in England, Wales and Northern Ireland and the Arbitration Act 2010 (Scotland). The main purpose of this Act is to restate and improve the law relating to arbitration pursuant to agreement of disputes among trade parties. Therefore, it is a kind of dispute resolution Act which provide legal platform to the agree

outline what should be expected from arbitration. According to Section 1 of the Act, arbitration aims to ensure that dispute resolution can take place between two or more parties in a just, objective, and timely manner.[80] The second provision in the Act is that each disputant is at liberty to determine how the dispute resolution process should take place. The sole condition of this provision is that there must be agreement between the disputants and any arbitral decision should be made in the public interest.[81]

Similarly, neither the International Commercial Law Commission (UNCITRAL) nor the Kingdom of Saudi Arabia's arbitration system provided definitions of arbitration in their systems of international commercial arbitration.[82] Despite the fact that the current arbitration system enforced in the KSA defines what is meant by the term 'arbitration agreement', it still leaves the concept of arbitration flexible. Article 1 of the present system stipulates that an arbitration agreement constitutes a promise, either within a contract or independently, that exists between two or more parties for the purpose of addressing an existing or prospective dispute (irrespective of contractual status).[83]

2.2.2 History of Arbitration

Arbitration (*tahkim* in Islamic jurisprudence) is an ancient practice, albeit one that cannot be traced to a particular place or period in history.[84] Anthropological scholarship argues that dispute resolution mechanisms did not necessarily exist in conjunction with public courts or

parties to submit disputes for resolutions. This is to be submitted to a neutral third party also known as arbitrator or an arbitral tribunal for determination and all parties to be bound by the resulting decisions or also famously known as arbitral award.

[80] Lew, Mistelis, and Kröll (n 71).

[81] Saud Al-Ammari, A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) The Journal of the London Court of International Arbitration 387, 387- 408.

[82] UNICTRAL, 'Model Arbitration on International Commercial Arbitration 2006' (*UNICTRAL* 2017) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 15 March 2017; IM Borba, *International Arbitration: A comparative study of the AAA and ICC rules* (ProQuest LLC 2009).

[83] Arbitration Law No. M/34 (n 18) art 1.

[84] R V Massey Jr., 'History of Arbitration and Grievance Arbitration in the United States' (*West Virginia University Extension Service Institute for Labor Studies and Research*, n.d.) <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003> accessed 15 March 2010; E S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 University of Pennsylvania Law Review and American Law Register 132.

formal institutional frameworks.[85] However, it could be argued that one of the indicators of civilisation is the presence of a dispute resolution mechanism within the structure of society. Evidence suggests that arbitration was present in many human communities long before formal courts and trials.[86] As an example of this, early documents show that priests in ancient Egypt (c. 2500 B.C.) resolved internal conflicts through consultation with an institution of peers.[87] All ancient civilisations (i.e., organised human communities with systematic economic activities) axiomatically practiced some form of arbitration, and it is mentioned in ancient Mesopotamian sources, and is dated from 2100 B.C. in China.[88]

Even before the formalisation of Islamic tenets, Arabic peoples routinely practiced arbitration practices in tribal and individual contexts.[89] Arbitration effectively enabled individuals and groups to be accorded rights, which could be protected despite the absence of a centralised authority. The arbitrators who populated these ancient tribunals tended to be elders, tribal leaders, or individuals who were famed for their wisdom, objectivity, or sense of justice.[90] With the emergence of Islam and the Islamic polity across the Arabian Peninsula and beyond, many pre-Islamic Arab traditions were forbidden or abrogated, while others were reaffirmed, including arbitration. Arbitration was enthusiastically encouraged by Islam, and is referred to in a range of passages recorded in the Holy Quran, such as the following:

> (وان خفتم شقاق بينهما فابعثوا حكمـا من أهله وحكمـا من أهلهـا إن يريدا إصلاحـا يوفق الله بينهما إن الله كان عليما خبيرا).
>
> Translation: "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things". (4:35)[91]

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[85] Abdul Karim Aldohni, 'The Emergence of Islamic Banking in the UK: A Comparative Study with Muslim Countries' (2008) 22(2) Arab Law Quarterly 180.

[86] Ibid.

[87] Sarpy (n 80).

[88] Simon Greenberg, Christopher Duncan Kee, J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) 89.

[89] F M Al-Fadhel, 'Legislative Comment: The New Saudi Arabian Arbitration Law' (2016) 82(4) Arbitration 415, 415-26.

[90] Zahraa and Hak (n 60).

[91] Quran, Surah An-Nisa 4:35

The above passage describes marital divorce. Importantly, this excerpt contains the phrase 'And if you fear'. Here, the holy text recommends that parties in disputes assign just and capable arbitrators, who can make an impartial determination of guilt and ensure that the matter is resolved appropriately.[92]

One of the most notable arbitration cases of the Islamic era occurred in 37 A.H. (657 A.D.).[93] The case concerned two leaders, Ali ibn Abi Talib and Mu'awiyah ibn Abi Sufyan, who agreed upon the need to end the Battle of Siffeen. They determined that the most effective and equitable way to achieve this aim was through arbitration.[94] In order to reach consensus, two arbitrators were selected, who produced an agreement in Udhruh (present day Southern Jordan). The text of their *tahkim* agreement is as follows:

> The arbiter, Abu Musa Al-Asha'ari and Amr ibn Al-'Aas, were required to give their decision in accordance with the injunctions of the Holy Quran. In the absence of any guidance from the Holy Quran, the traditions of the Holy Prophet were to be followed. The umpires were guaranteed the security of their life and property and of their families, whatever the outcome of the arbitration might be. It was provided that the decision of the umpires was to be binding on all concerned. The umpires were required to give their decision within six months.[95]

It is evident in the text that the two arbitrators (referred to as 'umpires' in the above excerpt) came to an agreement that the Muslims present in the conflict needed to dissociate themselves

[92] J Almahalli and J As-sutee, *Tafsir Al-Jalalayn* (Dar Altaqwa 2007).

[93] This signifies the period after Hijrah, which describes the period after the historic migration of the Holy Prophet Muhammad to Medina.

[94] This war between Muslims occurred because Uthman ibn Affan (may Allah be pleased with him), who was the Head of the Islamic State, was killed unfairly by Muslim protestors who had come to the capital, Almadinah Almunwarah, to challenge his authority. Regardless of the illegality of their actions, Uthman wished to avoid blood being shed in his name. He therefore ordered his army and the other surviving companions of the Holy Prophet to remain indoors, neither protecting him nor combating the insurgents. After the death of Uthman, other Muslims demanded revenge under Islamic law by killing his murderers. The companions of the Prophet (those who had met and lived with Prophet Muhammad (ﷺ)) agreed that the murderers should be punished, but there was no consensus on whether punishment should be immediate or deferred until normalcy was returned to the State. This disagreement ultimately sparked the first Islamic civil war.

[95] E Ibn-Kather, *Albidaiah and Alnihaiah* (Dara-alem 2003)

from the disputants (the two leaders). The implication of this was that they could effectively choose the leader that they wished to serve as their Imam.

2.2.3 Meaning of Arbitral Awards

Even though the United Nations strives to bring uniformity and standardisation in the international arbitration protocol,[96] there are deficiencies in terms of definition and universality of the term the meaning of 'arbitral awards'.[97] The model arbitration law (UNCITRAL) recognises the varied nature of legal, social, and economic systems that nations are bound to have, but strives to harmonise the protocol for which arbitration could be conducted.[98] However, there are challenges associated with the differing definitions of an award from the times of the original 1958 NYC to date.[99] Consequently, nations have a prerogative to define awards as they see fit; and in accordance with the provisions of the Model Law provided by the UNCITRAL.[100]

According to Hwang and Lee,[101] the categorisation of arbitral awards commences from the state; for instance, each state that ratifies the NYC is at liberty to apply its own rules for the implementation of arbitration as an alternative to dispute resolution. For example, the KSA established an institution that handles and provides rules for arbitration under the Cabinet Decree 257 dated 14/06/1435 A.H. to 15/03/2014 A.D.[102] With effect from October 2018, the Saudi Centre for Commercial Arbitration (SCCA) has been providing the legal guidance and regulations for parties to resolve disputes using arbitration.[103] If there are arbitration cases set in Saudi Arabia with contractual parties operating within the jurisdiction of the KSA, then the arbitral awards would be termed as "domestic" because they would arise from the agreements

[96] United Nations 'UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006', Vienna, Austria (2008).

[97] Michael Hwang and Shaun Lee, 'Survey of Southeast Asian Nations on the Application of the New York Convention' (2008) 25(6) Journal of International Aritration, 873,892.

[98] UNCITRAL Model Law (n 103)

[99] Nicolas Bremer (n-37)

[100] Michael Hwang and Shaun Lee (n 93) 892.

[101] ibid.

[102] Saudi Centre for Commercial Arbitration 'Arbitration and mediation rules', Saudi Centre for Commercial Arbitration, (Riyadh 2018) < https://sadr.org/ADRServices-arbitration-arbitration-rules?lang=en> accessed 01 January 2022.

[103] ibid.

between business entities or disputants under the same state[104] (i.e., Saudi Arabia) under the SCCA rules (as explained in more detail in Chapter 4).

El-Ahdab and El-Ahdab[105] opined that if an arbitral award was granted by a particular court in a particular state (A), but the interpretation, registration and enforcement thereof should take place in another state (B), such an award is termed as "foreign". Under the NYC, a foreign arbitral award is designated as one under the circumstances where the recognition and enforcement thereof would take place in a state other than the one it was conferred.[106] Hence, there is a difference between the legal system in the state where it was awarded and that where it would eventually be recognised and enforced.[107] Kabra opined that the recognition and enforcement of foreign arbitral awards is not as straightforward as one might expect, mainly because each state would have a public policy under which foreign arbitral awards would either be recognised and enforced or rejected outright.[108] At the close of 2013, Kabra argued that the support for international commercial arbitration has been increasing over the years; however, the judicial mind-set has not caught up. This has rendered the scope and interpretation of foreign arbitral awards more complex in many jurisdictions, because of heterogeneous doctrinal perceptions of public policy, public interest, and justice or morality.

For any country to recognise and enforce a foreign arbitral award, it would have to test its legal system against the state jurisprudential principles, referred to as public policy.[109] A foreign arbitral award is tested against the scope and interpretation of public policy, to determine whether the rule on public policy conforms to domestic laws, or conflicts with them.[110] In the case of the KSA, public policy has been central to the uncertainty associated with the

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[104] Alan Redfern, Martin Hunter, and Nigel Blackaby 'Law and Practice of International Commercial Arbitration' (4th edn, Sweet & Maxwell 2005) 13, 1-23.

[105] Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Wolters Kluwer 2011) 50.

[106] Nicolas Bremer (n-37)

[107] Greenberg, Kee, Weeramantry (n 95) 400.

[108] Ashish Kabra, Payel Chatterjee and Vyapak Desai, 'Enforcement of foreign awards becomes easier: 'patent illegality' removed from the scope of public policy' (*Lexology*, 19 July 2013) <https://www.lexology.com/library/detail.aspx?g=4d6c99ad-4ab6-43f8-83e4-2d5d7c0cb4bf> Accessed 26 January 2019.

[109] Abdullah Alassaf and Bruno Zeller, 'The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985' (2010) 7(10) Macquarie Journal of Business Law 170, 187.

[110] Kabra, Chatterjee and Desai (n 115).

recognition and enforcement of foreign-seated arbitral awards.[111] Article 36(b) of the UNCITRAL argues that recognition and enforcement is subject to state laws and or the state public policy; consequently, if the legal system finds that the case to be enforced goes against local laws or public policy in general, then enforcement can be rejected.[112]

Apart from the designation of domestic or foreign arbitral awards, there are countries that refer international arbitral awards as "non-domestic" – such as the USA and France.[113] There are times when the courts of a particular state would use the NYC to deem arbitral award as "non-domestic" even if it was rendered and enforced in the same state. This implies that there is a recognition of non-domestic awards in addition to those considered as domestic.[114]

The most comprehensive way of looking at the recognition and enforcement of arbitral awards, according to the United Nations,[115] is to take a holistic view that upholds the legal elements of the award irrespective of the country of origin. This implies that the UNCITRAL Model Law promotes the treatment of arbitral awards rendered in international commercial arbitration as uniform as possible based on the categorisation of "international" and "non-international".[116] Therefore, the critical distinction between the traditional perspective of foreign and domestic awards is superseded by use of substantive grounds as opposed to territorial borders.[117] If arbitral awards are non-domestic under traditional view, they could now be classed as international because they do not need to fall under foreign or domestic,[118] simply because parties to the contract would be at liberty to determine how the dispute was to be resolved based on convenience, cost-effectiveness, and an amicable environment. The recognition and enforcement of an international arbitral award, therefore, would not be tested based on the "state", but the provisions previously designated by the parties – amongst which would be convenience and the like:

[111] Naif S. Al-Shareef, 'Enforcement of Foreign arbitral awards in Saudi Arabia: Grounds for refusal under article (V) of the New York Convention of 1958' (Unpublished PhD thesis, University of Dundee, 2000)5, 15; 120,132.

[112] UNCITRAL Model Law (n 103)

[113] Nicolas Bremer (n-37)

[114] El-Ahdab and El-Ahdab (n 101) 50.

[115] UNCITRAL Model Law (n 103).

[116] ibid.

[117] ibid.

[118] Michael Hwang and Shaun Lee (n 93) 892.

> "There is a potential for developing a process-based framework that could mitigate the impact of unrecognised international arbitral awards in Saudi Arabia, and hence contribute to the overall government drive for attracting foreign direct investment".[119]

2.2.4 Arbitration's Strengths and Weaknesses

Arbitration is a profoundly useful alternative to conventional litigation, not least because the number of conflicts requiring resolution in contemporary society is continually increasing. According to the International Chamber of Commerce (ICC), 759 requests for arbitration were submitted to the ICC Court in 2012.[120] Almost all developed countries operate, or are in the process of establishing, dedicated arbitration centres. There are several potential explanations for this, including the popularity of arbitration among litigants or the desire to minimise the burden of increasing claims on national court systems. Perhaps the main benefit of arbitration over litigation is timeliness. According to the U.S. Federal Mediation and Conciliation Services (FMCS), the average duration of arbitrated cases from filing to ruling is 475 days, in contrast with 1,095 days required to complete a comparable litigation case.[121] Even in situations where a litigation hearing may be comparatively simple, the sheer number of cases that many judges must hear each day can slow the process considerably. In contrast, most arbitrators manage a significantly smaller volume of cases, enabling them to allocate more time to each case and help to ensure timely completion.

In the context of the current study, it is useful to examine the current level of congestion in the courts of the KSA. Presently, Saudi Arabia has a population of more than 23 million, and fewer than a thousand judges.[122] According to the Saudi Ministry of Justice (MoJ), the 662 judges in Ministry-related courts heard 715,885 cases in 2005.[123] This is exacerbated by the reputation of numerous sectors of the government bureaucracy for intentionally slowing the legal process.

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[119] Redfern, Hunter, and Blackaby (n 100) 13, 1-23.

[120] International Chamber of Commerce (2012) <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC Arbitration/Statistics/> accessed 15 August 2020.

[121] Ann C. Hodges, 'Mediation and the Transformation of American Labor Unions.' (2004) 69 Modern Law Review 365.

[122] Ministry of Economy and Planning, KSA (2013) <http://www.cdsi.gov.sa/socandpub/resd> accessed 19 November 2020.

[123] Ministry of Justice, KSA (2013) <http://www.moj.gov.sa/documentations/30/3dl-1.pdf> accessed 28 October 2020.

Perhaps because of the need for timeliness, business is promoted and enhanced in societies that have established accessible arbitration practices because clear, quick resolution enables commercial disputants to reduce financial and legal uncertainty. Through quick resolution, arbitration frees revenue streams that which would otherwise have been reserved to a favourable ruling at litigation, added to which arbitration is typically more cost-effective than the conventional route. It is also worth noting that the clarity of the arbitration process means that commercial planning activities can often occur more effectively when arbitration is the chosen dispute resolution mechanism.

Another important strength of arbitration is its flexibility. The judges and arbitrators who hear the issues brought by the disputants are selected, meaning that these individuals will often be selected based on their topic-specific specialism.[124] Arbitration cases are also not restricted to common law, meaning that they can utilise whatever aspect of the law is desired or most likely to obtain a mutually agreeable outcome. Unlike litigation, which operates under the open justice paradigm, there is a limited level of discovery associated with arbitration, which typically serves to offer parties a higher degree of anonymity than conventional litigation routes, as it is less likely that any identifying information regarding the case or the disputants will become publicly available. This position was supported in the UK by the ruling of the Court of Appeal, which cited Section 994 of the Companies Act 2006 in its refusal of the right to private hearings, based on unwarranted prejudice.[125] Privacy is a core strength of arbitration for many disputants, particularly in industry.[126] This quality can be attributed to the ability of participants to direct the nature of the arbitration process based on their own choices, in addition to which there are no public hearings or public records in arbitration proceedings, meaning that privacy can be ensured throughout the process.

Arbitration can also be a more suitable option for disputants who are less able to utilise the litigation system of a country. For example, minorities can often benefit from undertaking arbitration proceedings, because the operational laws within many countries of residence may hamper or even nullify their customs, religions, and opinions.[127] At the same time, exclusionary regulations of proof are not applicable in the context of arbitration, and so relevance and noncumulative considerations are the only caveats to evaluate before introducing evidence.

[124] Nesheiwat (n 18) 459.

[125] *Global Torch Ltd v Apex Global Management* [2013] EWCA Civ 819.

[126] Berger (n 63) 223; Blavi (n 63).

[127] Wakeel (n 48) 47-49

Additionally, the informalities inherent in arbitration can also be more advantageous and less adversarial than traditional litigation methods. For example, many disputants remain friendly during the process than typically occurs in the court-based approach.[128]

Another advantage of arbitration over the classic litigation route is the ability to avoid juries, because of the risk that they can bring in terms of bias, lack of specialisation and even incompetence.[129] In addition, arbitration enables disputants to avoid many other parties and requirements associated with litigation, such as courtroom, clerk, and bailiff charges. This can lower costs for those involved and reduce the caseload of public courts, benefiting the system.[130] Lastly, arbitration does not have a formal appeals system, meaning that arbitral awards are concrete and final, which is a core benefit of the process.[131] In addition to this, the independence of the decisions made by arbitrators can often exceed those of judges, especially as political considerations can significantly affect courtroom determinations in some jurisdictions.[132] This is further supported by the relative ease of enforcing foreign arbitration awards, especially in comparison to the potential complexity involved in enforcing the determinations of foreign courts, due to the influence of numerous international conventions. However, almost all governments in contemporary society pressurise the public courts in some way or another, oftentimes to firmly entrench themselves in power.[133]

Despite its numerous strengths, arbitration has certain inherent limitations. It is often more expensive to embark on arbitration, and it can be considerably more expensive than the litigation route, with costs increasing in directly proportion to the number of arbitrators involved and the complexity of the case.[134] The fact that arbitral awards cannot be appealed can also serve as a weakness, especially since these procedures are not subject to judicial reviews. In the case that a disputant did not sufficiently support their case, the determination cannot be reviewed or changed at a future date. This can result in a party refusing to pay, which

[128] A Mazirow, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' (2008) <http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf> accessed 12 May 2020.

[129] Ibid.

[130] Sarpy (n 80).

[131] Ibid; Lew, Mistelis, and Kröll (n 71); Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986) 25 Columbia Journal of Transnational Law 9, 9-34.

[132] Gary B. Born, *International commercial arbitration* (Kluwer Law International BV, 2020) 179

[133] Scott L. Hoffman, *The Law, and Business of International Project Finance* (CUP 2008) 57.

[134] ibid.

leads to the fundamental weakness of arbitration: the possibility that the disputants may engage in litigation proceedings after the completion of arbitration, making it a costly waste of time.[135] This scenario arises commonly among investors and companies who sought to avoid litigation, but ultimately resort to the public courts in response to an unfavourable determination. This can be remedied by approaches like a *Scott v Avery* clause, which attempts to ensure that the stated awards are collected prior to litigation. These kinds of clauses are outlined in greater detail in Section 1.4.3 and Chapter 4.4.[136]

2.2.5 Arbitration in Arab Countries

Previous studies have not addressed the recognition and enforcement of arbitral awards in Arab countries in general, and particularly in the Gulf Cooperation Council (GCC) states. Most studies of international arbitration issues have focused on China and the US (the jurisdictions with the largest economies in the world), and (to a lesser extent) other Western jurisdictions (such as the UK).[137] In this regard Fawcett discussed the void concerning the enforceability of awards in origin states, noting the minimal discussion regarding the recognition and enforcement of foreign arbitral awards in the GCC.[138]

Moses emphasised the consequences of Article 3 of the NYC, a treaty to which GCC governments are parties with regard to enforcement, but the study lacked information on the problems related to Islamic law in those states..[139] Similarly, Saleh studied the domestic laws of Arab countries in general and examined different countries' legislative orientations towards arbitration, and the associated impacts on their domestic courts.[140] He discussed the enforcement of domestic arbitral awards in the GCC in terms of different aspects of legislation and its contributions to the management of the domestic and international claims. However,

[135] Nesheiwat (n 18) 445.

[136] D Jiang-Schuerger, 'Perfect Arbitration = Arbitration + Litigation?' (1999) 4 Harvard Negotiation Law Review, 231.

[137] Alan Redfern and others, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) 585.

[138] J. J. Fawcett, 'Trial in England or abroad: The underlying policy considerations' (1989) 9 *Oxford Journal of Legal Studies* 205.

[139] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) 202.

[140] Samir Saleh, *Commercial Arbitration in the Arab Middle East* (2nd Ed, Oxford University Press, 2006).

the contribution of the study was lacking with regard to international arbitration and enforcement in relation to Islamic jurisprudence.[141]

Abdul Hamid El Ahdab critically examined the legislations related to the arbitration within Arab states and tried to understand the fundamental legal jurisdictional structure and the important role of FDI within Arab countries.[142] The study revealed that the formation of arbitration-related legislation is essential to increase international investors' confidence to conduct their business without any concerns, and for this purpose, Arab states need to carefully consider the recognition and enforcement of foreign arbitral awards and compare their legislations with the other countries where best practices are being implemented.

In this vein, the current study is of great importance, since it focuses on the key challenges and issues that are associated with the enforcement of foreign arbitral awards in the KSA. However, there are other factors which need to be highlighted in relation to the enforcement of foreign arbitral awards such as public policy, Sharia law, Islamic legislation's structure, and other relevant issues. Debates concerning the role of Sharia in the KSA's public policy came to the fore after the country's accession to the NYC on 19 April 1994. Kristin T. Roy reflected upon the issue, stating that:

> "With the decreased threat of war in the Middle East, investors are realizing sound financial reasons for investing in countries such as Saudi Arabia… Nonetheless, investors have been hesitant to contract within Saudi Arabia due to Saudi Arabia's favouritism toward its own agencies and rejection of international dispute resolution methods. The Saudi government recognizes the need to eliminate this hesitation, thus increasing investment and contracting within its borders".[143]

This is a potentially important issue that is implicit in discussion of arbitration in the KSA/GCC.[144] The major corporate interests likely to be involved in international arbitration issues in Arab states are all deeply embedded in a matrix of what international investors and

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[141] *ibid.*

[142] El-Ahdab and El-Ahdab (n 101) 50.

[143] Kristin T Roy, 'New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards' (1995) 18 Fordham International Law Journal 920.

[144] Ahmed Almutawa, and A.F.M. Maniruzzaman, 'Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Council States and the prospect of a uniform GCC Arbitration law: an empirical study', 2015, SSRN, available at: https://ssrn.com/abstract=2559690

corporations would consider super-corruption and nepotism known as a '*wasta* networks', which also pervades the governmental and justice apparatus. In this context, any disputes with foreign corporations that are judged by local authorities will face the issue that the local authorities (whether judges or other quasi-governmental authorities or governmental agencies) are designed to favour the interests of the politico-economic elite cartels who own Arab states. For example, large businesses, governments, and legal systems in Arab countries are dominated by government-affiliated cliques who favour their own interests.

The KSA, as well as other Islamic states following principles of Sharia, may find it difficult to connect modern standards of commercial arbitration with its religious, cultural, and historical standards.[145] It is easy to conceal this in Arab states behind the sentimental veils of patriotism in republics such as Egypt and Syria, or a veneer of Sharia respectability in the GCC. It may seem naive to some international scholars and researchers to assume that judges in KSA are sitting in ivory towers with their *fiqh* books, generating by Sharia rulings Saudi arbitration history has remained aloof in recognising and enforcing arbitral awards based on Sharia's role in defining public policy. During the early 1950s, the courts of Saudi Arabia refused recognition and enforcement of foreign arbitral awards based on the notion of this being contrary to the chartered principles of public policy.[146] In 1963 Saudi Arabia did not recognise and enforce foreign arbitral awards in the ARAMCO case, as discussed below. Moreover, the law on arbitration in 1983 explicitly restricted the recognition and enforcement of arbitration awards in KSA.[147] Since 1963, the Kingdom of Saudi Arabian agencies and government bodies were not allowed for having resource to arbitration for settling disputes which was enacted in Resolution No. 58. 17/1/1383H (25th June 1963). This stated that *"[i]t is prohibited for any Government body to accept arbitration as method for settlement of disputes which may arise between it and contracting individual and companies*" which was also affirmed by further in Arbitration Law of 1983.[148]

The early writers on the subject of Sharia's role in defining public policy remained sceptical and advanced reservations on the exploitation of public policy in Saudi arbitration

[145] David A. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order', 33 Virginia Journal of International Law 819, 848 (1993).

[146] Roy (n 138) 922.

[147] Arbitration Law, Royal Decree No. M/46 dated 12/07/1403 H (25/04/1983).

[148] ibid

enforcement.[149] The literature on the subject reveals that such scepticism was proven by experience over time, and a good deal of international arbitration faced the issue of unpredictable interpretation of public policy under Sharia, which led to a trust deficit from international investors in KSA. Similarly, evidence from various perspectives such as business, law, and economics have contributed towards the debate of recognising and enforcing arbitral awards in the KSA from numerous perspectives.[150,151]

An Arabic book entitled 'Arbitration in the Kingdom of Saudi Arabia' (1999) discussed the subject broadly, identifying the nature and scope of arbitration in the country with regard to the old SAL 1983.[152] It is a fundamental academic work for modern debates on the role of Sharia in defining public policy. The author emphasised the need for a legal framework to govern arbitration in the KSA and concluded that academics and legal classes should not concentrate only on substantive aspects of recognition and enforcement of arbitral awards; they should also focus on complex procedural aspects of international arbitration.[153]

A doctoral thesis from 2001 by N. S. Al-Shareef examined the issue of the recognition and enforcement of arbitral awards in the KSA, concentrating on the possible impact of the NYC on SAL 1983. The thesis broadly analysed various grounds for denying recognition and enforcement of arbitral awards in the KSA and identified three main hindrances: (1) restricted legal access of foreign companies; (2) foreign arbitral awards may be turned down based on the principles of Sharia;[154] and (3) Saudi administrative law enjoys immunity towards foreign arbitral awards. The thesis broadly discussed the obstacles to arbitration, but mainly analysed the role of Sharia in defining public policy that may obstruct recognition and enforcement of foreign arbitral awards.[155] Al-Subaihi at the University of Birmingham (UK) in 2003 found that there is scope for harmonising Sharia standards with global trends in international commercial arbitration, but noted that it is the duty of the courts to harmonise both standards

[149] Moses (n 138) 202.

[150] ibid

[151] Born, International Arbitration: Cases & Materials (2011) (n 107) 1125.

[152] Mohammed AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia* (Riyadh: Institute of Public Administration Publications, 1999) 11.

[153] ibid.

[154] N.S. Al-Shareef, (n 107) 242.

[155] ibid.

during the enforcement process.[156] A similar conclusion was reached by Al-Qarni at Naif Arab University in 2008: that it is duty of judiciary to harmonies classical interpretation for arbitration with modern standards.[157]

After the promulgation of new arbitration law under SAL 2012, a number of academic researchers focused on the issue of the recognition and enforcement of arbitral awards in the KSA. During 2013, research from the University of Hull examined the scope and use of article V of the NYC in recognition and enforcement of arbitral awards in the KSA. The thesis presented a descriptive account of various obstacles preventing the honouring of foreign arbitral awards; however, it did not practically focus on the new legislation and its future implications.[158] Almutawa's 2014 research at the University of Portsmouth examined the challenges of recognition and enforcement of arbitral awards in GCC, and thoroughly examined role of Sharia in the legal system of various states and its practice towards recognition and enforced of arbitral awards.[159] The thesis adopted a comparative investigation for highlighting multiple standards of recognising and enforcing international arbitral awards, with data collection through survey from various stakeholders and institutions involved in enforcement of arbitral awards. The research has also touched upon SAL 2012.[160] Abdulaziz Mohammed Bin Zaid's 2014 research at the University of Wollongong explored the issue in the comparative manner with Australian arbitration standards. However, the broad scope of such studies prevented them from specifically reflecting upon substantive and procedural aspects of arbitration in Saudi Arabia.

In the wake of studies such as those adumbrated above, there was clearly a literature gap with regard to identifying key challenges in recognition and enforcement of arbitral awards in GCC states, in particular the KSA, regarding Sharia and other fiqh juristic impacts. Therefore, an increasing number of studies attempted to identify the challenges of recognition and enforcement of arbitral awards in the KSA, and attempts to recommend solutions from other

[156] Abdulrahman A I Al-Subaihi, 'International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law' (Ph.D. thesis, The University of Birmingham, 2004).

[157] Z AL-Qarni, 'Role of Judiciary in Arbitration' (Ph.D. thesis, Naif Arab University, 2008)

[158] Y. Almuhaidb, "The recognition and enforcement of foreign arbitral awards in Saudi Arabia: an examination of the function of article (V) of the 1958 New York Convention in the Saudi legal order", 2013 <https://hydra.hull.ac.uk/resources/hull:8219> accessed: 10 October 2022.

[159] Nicolas Bremer (n-37)

[160] ibid.

well-known practices related to arbitral awards.[161] Saad Badah's opines that Sharia in recognition and enforcement of arbitral awards explored the challenges in honouring international arbitral awards with a specific focus on the emerging arbitration legislation in the GCC.[162] The research concluded that while the emerging framework was promising, laws on the recognition and enforcement of arbitral awards should remain flexible to accommodate international trends and help the GCC attract investment. The thesis analysed the scope of flexibility in the recognition and enforcement of arbitral awards but did not present any practical way of harmonising principles of Sharia with international standards of commerce.

The researcher from Victoria University dealt with the same issue, with special focus on SAL 2012.[163] The objective of the research was to assay the efficiency of modern arbitration law, and it concluded that the law is essentially effective, but it faces challenges in terms of interpreting the concept and scope of public policy with reference to Sharia. The research concluded that principles of Sharia in public policy need further research. Therefore, the thesis embarked upon analysing scope of Sharia in defining public policy under new arbitration law, SAL 2012. By using doctrinal legal analysis rather than comparative research methods, the thesis set itself apart from past studies. Understanding how other GCC nations execute arbitration awards can aid in understanding how Arab countries launched legislation and the difficulties they face. Studies conducted prior to the NYC's implementation concentrated on SAL 1983 and the extent of Saudi Arabia's recognition and execution of arbitral rulings. .[164] Al-Muhanna thesis centres on scope of adoption of new international commercial arbitration standards in the KSA. After becoming party to the NYC, the government of Saudi Arabia agreed to align its laws with international commercial standards. This marked the start of a new era, wherein the role of the KSA was expanding in the global economy. The KSA has become a hub for international investments not only in the oil industry, and it has also embarked on a new vision to attract investment in multiple fields. Therefore, it is pertinent that the KSA should

[161] Abdulaziz Mohammed Bin Zaid, 'The Recognition and Enforcement of Foreign Commercial Arbitral Awards in Saudi Arabia: Comparative Study with Australia' (Ph.D. thesis, University of Wollongong, 2014).

[162] Saad Badah, 'Recognition and enforcement of foreign arbitral awards in Kuwait' (Ph.D. thesis, Brunel University 2016)

[163] Ahmed Alsirhani, 'The refusal of feign arbitral awards in Saudi Arabia on the grounds of public policy – an issue of fairness and justice' (Ph.D. thesis, Victoria University, Australia, 2019).

[164] Sabah Abdullah Al-Somali, Roya Gholami, and Ben Clegg, 'A stage-oriented model (SOM) for e-commerce adoption: a study of Saudi Arabian organisations' (2015) 26 (1) Journal of Manufacturing Technology Management 2-35.

introduce predictability in its arbitration laws and outcomes. Recognition and enforcement of arbitral awards in the Kingdom has faced interpretative uncertainty based upon principles of Sharia. This research focuses on the scope and domain of principles of Sharia in defining public policy, presenting a mode of harmonising the principles of Sharia with global concepts of international commercial arbitration to bring certainty to arbitration laws in the KSA.

2.3. Legislation on Arbitration

To analyse global trends of recognition and enforcement of arbitral awards in KSA, it is pertinent to have a bird's eye view of historical developments.[165] The concept of arbitration was prevalent in the Middle East before the advent of Islam in the Arabian Peninsula to resolve tribal disputes, as attested from the 7th century.[166] The same trend was continued after Islam, reinforced by the injunctions of the Quran and Sunnah, the two primary sources of Sharia.[167] The prevalent practice of resolving disputes through swift arbitration, it remained a major source of administration in the subsequent centuries. With the passage of time, arbitration in the area developed to new standards of uniformity and productivity.

Overall, the history of Saudi arbitration may be discussed in three major parts. Firstly, one may discuss the evolution of modern Saudi arbitration starting from 1940 to 1970. This was the early stage of formation of arbitration rules in KSA. The era was primarily guided by traditional standards of culture and religion. Afterwards, the era of oil agreements from the 1970s onwards saw an increasing volume of high-value agreements between the KSA and foreign companies.[168] It is important to mention that during this era foreign companies enjoyed several concessions to establish their business and oil exploration in the KSA.[169] This was a time when arbitration rules started accommodating various international standards of arbitration on the condition of their conformity with the culture and religious standards. In this regard, a famous arbitration case was that of *Saudi Arabia v.* Aramco, which is very significant in connecting classical arbitration standards with Western conceptualisation of arbitration.

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[165] Bremer (n 37) 66.

[166] Charles N. Brower & Jeremy K. Sharpe, 'Note and Comment, International Arbitration and the Islamic World: The Third Phase' (2003) 97 American Journal of International Law 643.

[167] Andrew Smolik, Comment, 'The Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention' (2010) Journal of Dispute Resolution 151, 157.

[168] Brower and Sharpe (n 160).

[169] ibid.

The arbitration happened during 1963 when the Saudi oil business was primarily dominated by US oil companies. A dispute arose between the Saudi government and ARAMCO, and the case was later referred to arbitration. The arbitration panel, for the first time in history, took a lenient view by acceding to the stance of ARAMCO on the notion that the rights of the company may not be protected under the traditional laws of the KSA. The decision stated that Saudi laws: "had to be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business, and by notions of pure jurisprudence".[170] This decision opened ways for accommodating international investors in traditional Saudi laws. Moreover, the decision paved the way for the global standardisation of Saudi laws of arbitration. However, the decision was deeply unpopular, and the Council of Ministers (CoM), through Resolution no. 58, stopped the use of arbitration in Saudi Arabia.[171] Such decisions and political actions have profound impacts on trust among international investors, as arbitration is one of the most reliable sources of solving international commercial disputes.

The new regulation such as Saudi Arbitration Law 2012 focused on two aspects: to introduce uniform rules for guiding and benefiting foreign investors suffering from uncertainty about the Saudi arbitration system; and to enshrine the government's decision on various aspects of recognition and arbitration of foreign arbitral awards. The authority to deal with the regulation was named the Board of Grievances (BoG), which governed in all disputes to which the Saudi government was a party.[172] This means the BoG is directly responsible for the Kingdom of Saudi Arabia and it is only jurisdiction over claim against the government; however, claims related to the most types of commercial disputes also included. It is appropriate to mention that the regulation strictly followed Sharia standards of arbitration. Additionally, the regulation authorised the Board of Grievance to review and ensure Sharia compliance of all arbitral awards.[173] The next era in Saudi arbitration history started with its formal adoption of the NYC. The objective of the Convention was to ensure recognition and enforcement of arbitral awards globally.

[170] Whitney Hampton, 'Foreigners Beware: Exploring the Tension between Saudi Arabian and Western International Commercial Arbitration Practices: In re Aramco Services Co.' (2011) Journal of Dispute Resolution 431.

[171] Brower and Sharpe (n 160).

[172] ibid.

[173] ibid.

The KSA thus started adopting international standards of arbitration under international commercial laws. To comply with obligations under the convention, the Saudi government enacted the new SAL 2012, along with SEL,[174] replacing SAL 1983, which had been criticised because of its lack of capacity to deal with arbitration in terms of efficiency and enforcing foreign arbitral awards. SAL 1983 suffered complex enforcement challenges, with the main issues being those related to recognition of arbitral awards containing Sharia-forbidden matters, such as interest (*Riba*) and transactions involving uncertainty in obligations *(Gharar).* These positive developments demonstrated Saudi compliance and willingness to enhance recognition and enforcement of foreign arbitral awards.[175]

2.4 The Legitimacy of Arbitration

This section seeks to examine the legitimacy and lawfulness of arbitration within the context of Sharia law, international law, and English common and statute law. This examination will be followed by a discussion of the general status of arbitration in these distinct legal systems, with reference to germane legal texts.

2.4.1 Sharia Law

In the broad context of Islam, Islamic schools and Muslim scholars agree that arbitration is legitimate and that it therefore constitutes a legal dispute resolution mechanism. Extensive support can be found for this position within the pillars of Islamic jurisprudence, namely the Holy Quran, the Sunnah, *Ijma'* (consensus), and *Qiyas* (analogy).[176] For example, the Holy Quran clearly describes the intention to use arbitration, in the following words:[177]

[174] Arbitration Law No. M/34 (n 22); Enforcement Law No. M/53 (n 22).

[175] Nesheiwat (n 18) 443-465

[176] ***The Holy Qur'an*** means: the book that contains the words of Allah, which were revealed to his Prophet Mohammed (ﷺ) through Archangel Gabriel. ***Sunnah*** means: all that Prophet Muhammad (ﷺ) said, did, or permitted. ***Ijma'*** means: the consensus of all Muslim scientists (mujtahids) at one period after the death of the prophet regarding a particular ruling on a matter or event. **Qiyas** means establishing and obtaining a decision, a rule and judgment for a case because of the existence of a similar cause, rule and judgment in another case.

[177] The Holy Qur'an, Sura An-Nisa', 4/35, Translation: "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things" (Yusef Ali tr <http://www.islam101.com/quran/yusufAli/QURAN/4.htm> accessed 10 November 2015.

(وان خفتم شقاق بينهما فابعثوا حكما من أهلـه وحكمـا من أهلهـا إن يريدا إصـلاحـا يوفق الله بينهمـا إن الله كان عليمــا خبيرا).

"If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything".

This verse explicitly and specifically stipulates the legitimacy of arbitration in the adjudication of familial matters. However, it is also evident that these words also serve as evidence for the legitimacy of the practice in broader terms. These are supported by other instances in the Holy Quran, such as the following:[178]

(ومن لم يحكم بما انزل الله فاولئك هم الكافرون).

"If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) Unbelievers".

Another verse that supports the practice of arbitration is as follows:[179]

(ان الله يامركم ان تؤدوا الامانات الى اهلها واذا حكمتم بين الناس ان تحكموا بالعدل).

"Allah doth command you to render back your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who hearth and seethe all things".

Although these two passages are less clear than the first excerpt, it is nevertheless essential to note that Allah is talking to all people, not simply addressing judges and other leaders. This distinction is critical and allows us to conclude that there is a divine injunction for the legitimacy of arbitration in the context of Sharia law. The Sunnah, which recounts the deeds and decisions of the Prophet Muhammad (ﷺ), reports that the Prophet consented to the appointment by the Jews of Quraidhah of Sa'ad bin Muad'ad as an arbitrator in the matter of the Quraidhah children, reflecting the position that people (including, or rather particularly

[178] The Holy Qur'an, Sura Al-Ma'ida, 5/44, Translation: "If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) Unbelievers" (Yusef Ali tr <http://www.islam101.com/quran/yusufAli/QURAN/5.htm> accessed 10 November 2015.

[179] The Holy Qur'an, Sura An-Nisa', 4/58, Translation: "Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things" (Yusef Ali tr <http://www.islam101.com/quran/yusufAli/QURAN/4.htm> accessed 10 November 2015.

non-Muslims) are generally empowered to make legitimate determinations about legal matters.[180] The legitimacy of the practice of arbitration is reinforced in an additional passage from the Sunnah, in which the Prophet Muhammad (ﷺ) was visited by Abu Shuraih Hanee bin Yazeed and his tribe, and upon learning that the visitor operated as an arbitrator within his tribe, the Prophet Muhammad (ﷺ) stated, "This is good, what is better than this?!"[181]

Sharia also examines legitimacy through an examination of *Ijma'.* Support for arbitration can be seen in the example of the events that took place between Omar and Ka'ab regarding palms, where the two parties appointed Zaid as an arbitrator without any party objecting, enabling him to end their dispute.[182] Finally, evidence from *Qiyas* supports the legitimacy of arbitration in Sharia law through passages that explicitly underline the close relationship between litigation and arbitration in Islam, with both litigators and arbitrators being described as judges who administer the rules and tenets of Sharia in the fulfilment of their duty. The central distinction in this definition is that a judge is designated by an Imam, while arbitrators are chosen by the parties in a particular case. Aside from that difference, Sharia determines that because litigation and arbitration are the same practice, thus they must have the same level of legitimacy.[183]

In the context of Saudi Arabia, the profound influence of the aforementioned texts has resulted in arbitration being enshrined as a legitimate practice within the legal system. This was codified in statutory law through the Saudi Arbitration System 1983 and the Saudi Arbitration System 2012, which stipulate the legality of arbitration for use by conflicting parties to facilitate dispute resolution.[184]

2.4.2 International Law

The international community recognised the unique challenges and needs of the continually expanding system of global trade, and determined that the most appropriate course of action would be the establishment of legislation and conventions to promote and regulate arbitration as an accepted dispute resolution mechanism.[185] Therefore, the legitimacy of arbitration was enshrined in international law, and embedded in a series of international treaties and

[180] A Ibn Hajer, *Fath Albari sharh Sahih Albukhari* (Almaktabah Alssalafiah 1960).

[181] A Alnnisa'ee, *Sunan Alnnisa'ee* (1st edn, Dar Alfeker 1930).

[182] M Alssarkhasi, *Almabsoot* (Dar Alma'arefah 1986); A Ibn Qudamah, *Almughni* (3rd edn, Dar Aalm Alkutub 1997) 157.

[183] ibid.

[184] Royal Decree No. M/46, 12 Rajab 1403 (25 April 1983)art 1; Arbitration Law No. M/34 (n 22) art 9.

[185] Lew, Mistelis, and Kröll (n 71).

conventions, with legitimacy and accepted procedures across jurisdictions, engendering the binding nature of arbitral determinations. In the context of international law, the earliest steps taken to legitimise, regulate, and encourage arbitration took place in 1899, at the first Hague Peace Conference (HPC), which created the Permanent Court of Arbitration (PCA). At this convention, clear provisions were introduced to govern the structure and operation of the arbitration of international disputes. The 1899 Convention for The Pacific Settlement of The International Dispute (CPSID) was altered in 1907, at the second HPC, but the broad structure of this initial approach remains in place in the modern context.[186]

Articles 15 and 16 of the CPSID establish that arbitration is a legitimate dispute resolution mechanism if diplomatic initiatives are unsuccessful. Article 15 stipulates that international arbitration should enable state-to-state disputes to be settled on the terms of each party, while maintaining a reference to a lawful process.[187] Meanwhile, according to Article 16, the signatories to the CPSID are required to acknowledge that if diplomacy fails, the most effective and effective alternative is arbitration.[188]

International arbitration was subsequently recognised as an important legal approach by the League of Nations Assembly in Geneva in 1923, which led to the Geneva Protocol, a treaty with approximately forty signatory powers. Article 1 of the Geneva Protocol required all signatories to acknowledge the legality of the decisions made in any consensual arbitration processes, especially regarding commercial issues.[189] The subsequent Geneva Convention, ratified in 1927, specifically addressed the legitimacy of foreign awards and their binding enforcement in the territories of signatories, which profoundly affected the way that foreign arbitral awards are executed. Article 1 of the Convention states the following:[190]

> In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to

[186] Lew, Mistelis, and Kröll (n 71).

[187] Convention for the Pacific Settlement of the International Dispute (Hague I) 1899 (adopted 29, July 1899, entered into force 4 September 1900) art 15.

[188] *Ibid*, art 16.

[189] Convention on the Execution of Foreign Arbitral Awards, Geneva (26 September 1927, entered into force 25 July 1929) art 1.

[190] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art VII (2).

> arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

The Geneva agreements were later superseded by the NYC 1958, which underpinned the recognition and enforcement of arbitration agreements and arbitral awards, and is therefore largely viewed as the foundation of modern international commercial arbitration.[191] The NYC now has 142 signatories, who have integrated the international regime into their domestic laws, making it a rare private law convention that is accepted broadly in the international community.[192] The aim of arbitration is stated in its first article, which also clarifies the fact that international arbitration is a legitimate and recommended dispute resolution process.[193]

The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) were devised in 1976, with the aim of creating a broad set of process-related regulations that would enable commercial entities to submit their disputes. The Arbitration Rules are unusual in that they outline all the characteristics of the arbitral process, including the ideal form of an arbitration clause; the process by which arbitral proceedings occur; and regulations that describe the form, effect, and interpretation of arbitral awards.[194] UNCITRAL released the Model Law on International Commercial Arbitration in 1985, offering guidelines for signatory powers to modernise their legal frameworks governing arbitration. This was intended to allow participating states to create domestic arbitration systems that would be compatible with the needs and interests of international commercial arbitration. As with its 1976 predecessor, the UNCITRAL Model Law is comprehensive, as it was designed to encompass all aspects of the arbitral process. These include arbitration agreements, the format and jurisdiction of arbitral tribunals, the degree and manner of court intervention, and all

[191] ibid.

[192] Lew, Mistelis, and Kröll (n 71).

[193] New York Convention (n 197), art I.

[194] UNICTRAL, 'Arbitral Rules' (*UNICTRAL* 2017) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html> accessed 20 April 2017.

aspects pertaining to the recognition and enforcement of arbitral awards. Given that it was ratified by a wide range of countries, with a diverse array of legal systems, the Model Law effectively served as a summary of the global position on the essential characteristics of international arbitration.[195]

In addition to the conventions discussed above, the legitimacy and utility of arbitration agreements have been further supplemented and refined through the creation of additional multilateral and bilateral conventions and treaties over the past century. However, the treaties examined in this section comprise the key conventions pertaining to the global community.

2.4.3 English Law

Modern arbitration is ultimately rooted in the English common law system as practiced in the UK and the US. The first law formally relating to arbitration in the English context was formulated by John Locke 1698, in contrast with 1806 in France and 1925 in the US. The strengths of arbitration have been well known and, furthermore, capitalised on within the English legal framework for centuries, during which time the state has implemented a series of Arbitration Acts.[196] These acts legitimise the practice of arbitration, and clearly outlining the distinction between arbitration and traditional litigation.

The endorsement of arbitration by English common law is evident in the numerous arbitration cases that have taken place in the English courts, perhaps the most important of which is *Scott v Avery*,[197] which was heard in the mid-nineteenth century. In this matter, the court was not positive on the subject arbitration, and a stay of litigation to arbitration was highlighted as only being applicable when determined to be so by the judge. It is important to recognise here that no binding provisions were imposed in this case to order a stay, with numerous arbitration clauses being neglected by one of the parties on several occasions, leading to the initiation of proceedings in the public courts as a result. Following this, it was typical for the courts to participate in disputes without consideration of the arbitration clause, based on the supposition that their jurisdiction could not be overruled. As a result of this ruling, and the criticism levelled

[195] UNICTRAL (n 89).

[196] Lew, Mistelis, and Kröll (n 71); J Oldham and SJ Kim., 'Arbitration in America: The Early History' (2013). 31(1) Law and History Review 241.

[197] Scott v Avery [1843–1860] All E.R. Rep. 1 HL.

against judges by Lord Campbell, *Scott v Avery* represented a momentous shift in the validity and reliability of arbitration.[198]

The most critical outcome of this case was the incorporation of a clause that was expressly designed to bypass the historical issue regarding the jurisdiction of the court being overruled. Nevertheless, in order to be effective, the clause needed to postpone a cause of action from developing until the point when an arbitral award had been established. Given that this would be impossible with a sole reference to arbitration, Lord Cranworth expressed its validity, concluding that no aspect of the law existed to restrict the parties from committing to a contract of that kind, "as no breach shall occur until after a reference has been made to arbitration". Lord Cranworth argued that, in the context of an arbitration, the accrual of no cause of action persists until the arbitral award is made, which stems from the right of each party to an action representing a claim for the sum stated by the tribunal. This kind of clause is now known as a *Scott v Avery* clause.[199]

The Arbitration Act 1996 is the latest legislation to be established to support the legitimacy of arbitration and to stipulate its operation in the domestic context. The Arbitration Act 1996 applies in England and Wales, as well as applying to a large degree in Northern Island, but it is not relevant in Scotland (s. 108). However, with the Scottish 2010 Act, the English Arbitration Act 1996 was essentially cloned. The main features of the Arbitration Act 1996 are to foster the autonomy and independence of arbitration proceedings. Part I of the act stipulates that arbitration should provide timely, effective dispute resolution by means of tribunal, as well as clarifying the rights of the parties, and the relationship between the court and the arbitration proceedings.[200] It should be noted that although this Act does not affect Scotland, the Scottish courts have ruled that the comparable Scottish Act 2010 can use English case law as a reference.[201]

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[198] Wolaver (n 80).

[199] Tweeddale A and Tweeddale K, '*Scott v Avery* Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' (*Corbett*, 2011) <http://corbett.co.uk/wp_content/uploads/Arbitration-article-Scott-v-Avery.pdf> accessed 10 November 2020.

[200] Arbitration Act 1996, s. 1.

[201] Scottish Arbitration Centre, 'Advantages of Scottish Arbitration' (Scottish Arbitration Centre, 2013) <http://www.scottisharbitrationcentre.org/index.php/arbitration/arbitration-in-scotland> accessed 21 October 2013; F Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 Journal of Business Law 43.

The above discussion on the legitimacy of arbitration in the context of Sharia, international, and English law has illustrated that a significant degree of agreement exists across the three systems. Most notably, there is broad concurrence with respect to the legitimacy of the proceedings, the binding nature of arbitral awards, and with their recognition.

2.4.4 The Scope of Arbitration

The scope of arbitration is referred to as the 'arbitrability' of a subject, which indicates how viable it is to deal with a specific subject by means of arbitration. This issue is central to all discussions of International Commercial Arbitration, with many documents having unsuccessfully attempted to determine how a matter may or may not been arbitrable, largely because this is not formally defined in major arbitration laws or instruments.[202] This section therefore seeks to outline the scope of arbitration in the context of this study, namely in terms of the Sharia, International, and English systems of law.

2.4.4.1 Under Sharia Law

Arbitration has been applied frequently and broadly in Sharia law. The result of this is that the issue of arbitrability is wide and complex. Certain issues are international, such as the incident of the Quraidhah children mentioned previously; political, like the case of Ali and Mu'awiyah; and commercial and financial, like the case of Ka'ba and Omar. Additionally, while certain types of disputes, such as family issues, must be resolved by arbitration, in accordance with the rulings of the Holy Quran,[203] arbitration is actively forbidden for certain categories of dispute. Clearly, this area is highly complex and contains a multiplicity of views that pertain to each issue.[204]

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[202] Ahmed Aldhafeeri, 'Administrative contracts and arbitrability: Obstacles and barriers' (2021) 26 (1) Journal of Humanities and Social Science 37-41.

[203] See Ch 1, para 1.2.4 and 1.4.1.

[204] There are four large and respected schools in Islamic jurisprudence: Hanafi: founded by Abu Hanifa an-Nu'man (699-767), this school was important in the Ottoman Empire and is still followed by Muslims in Central Asia, and some Arab states such as Iraq, Egypt and others. Maliki: founded by Malik ibn Anas (711-795) and followed by Muslims in North Africa and West Africa. Shafi`i: founded by Muhammad ibn Idris ash-Shafi`i (767-820), this school is now followed by Muslims in Somalia, Jordan, Palestine, Indonesia, as well as the government of Malaysia. Hanbali: founded by Ahmad ibn Hanbal (780–855), this school is followed by Muslims in Saudi Arabia and Qatar, as well as in minority communities in Syria and Iraq.

According to the Hanafi School, arbitration is not an option in the context of *hudud*.[205] The judge must be the sole authority in such punitive measures, as *hudud* is chiefly in the purview of Allah. *Qisas* (retribution) also cannot be arbitrated, as arbitration is designed around the reconciliation of disputants. The concept of *diah* is also relevant here, since the outcomes that it describes will result in the disputants being surpassed to other parties.[206] As such, it is necessary for *diah* to be paid for by the murderer, along with those individuals to whom they are related. Importantly, *lee'an* cannot be a case settled in the context of arbitration, as it is an alternative form of *al-haad* (the singular term for *hudud*).[207] In addition, as with *hudud, waqf* cannot be under arbitration,[208] because *waqf* is the sole responsibility of Allah, and so no human has the authority to countermand *waqf* conditions and agreements.[209]

The Maliki schools formulated a list of the cases that fall outside the scope of arbitration: an essential condition for owning a property under Islamic jurisdiction and (namely, *al-rushd*), wills, *waqf*, determining the matter of an absent individual, parentage, allegiance (*walaa*),[210] *al-haad*, *qisas*, orphan money, divorce, hoariness, and *lee'an*. These thirteen issues are excluded from the category of arbitrable cases because they are all matters over which Allah is the sole authority. This relates to the standards for arbitrability proposed by Ibn Arafah, who states that arbitration can occur when the disputants have the authority to waive their own rights.[211]

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[205] ***Hudud*** refers to a category of crimes in Sharia that include murder, assault, adultery, drunkenness, theft and robbery.

[206] ***Diah*** denotes the money paid as compensation to a murdered family, who can choose this compensation instead of ***qisas***.

[207] ***Lee'aan*** is a Sharia procedure whereby a married couple terminate their marital relationship due to one party accusing the other of adultery.

[208] ***Waqf*** means the detention of specific entities in the ownership of Allah and the devoting of its profit or products for charitable or altruistic purposes.

[209] M Al-Auine, *Al-Binaiah Sharah Al-Hidaiah* (1st edn, Dar Al-Fikr 1981); A Al-Kasanee, *Bda'ea Alsana'eea* (2nd edn, Dar Al-Kitab Al-Arabi 1982); M Abdulwaheed, *Sharh Fath Al-Qadeer* (Dar Ihia' Al-Turath Al-Arabi n.d.).

[210] ***Walaa*** means the right of a slave to inherit from his former master, if he has gained his freedom, in situations when there are no other relatives.

[211] M Al-Dusoqi, *Hashiat Al-Dusoqi* (Dar Al-Fikr n.d.).

According to the Shafi'i school, arbitration proceedings cannot resolve disputes relating to *hudud*, but other cases can be settled under arbitration.[212] Hanbali scholars argue that arbitration can occur in all litigious cases, because the arbitrator has the authority to serve as judge in all these cases, encompassing financial issues, marital disputes, and *hudud*. The Hanbalis also argue that financial issues can be addressed with arbitration proceedings, as they are based on *ihtiaat* (provision), and so must be taken and shown on judgement.[213]

In summary, Arabic scholars differ in terms of their perspectives on certain arbitrable issues. However, there is broad agreement that commercial issues can be settled in the context of arbitration and that *hudud* is outside its scope. It is also important to note that the Hanbali School is characterised by the broadest Islamic perspective on arbitration, as will be made clear in the following sections, and this is the prevalent school upon which Saudi jurisprudence and Sharia is based.

In the specific Saudi context, a 1983 addition to the domestic legal framework prohibited arbitration in every situation where settlement would contravene Sharia law.[214] Further prohibitions were added in the Arbitration System 2012, which also forbade arbitration in every conflict of personal status.[215] This study argues that the 1983 version is favourable, as it characterises a broader arbitration scope. At the same time, an unambiguous text in the Islamic canon states that family disputes are arbitrable (cf. Sura 'Al-Nisa').[216]

2.4.4.2 Under International Law

Under contemporary international law, certain cases are compatible with arbitration proceedings and others are not. However, the decision of whether a case falls under the scope of arbitration is handled in different ways in many states and contexts. It is interesting to note that almost all international conventions clarifying the applicability of arbitration are confined to commercial cases. Additionally, when factors are outside the remit of international law, decisions about arbitrability are made by domestic law. The signatory powers to the Geneva Protocol 1923 explicitly acknowledged the legitimacy of all submissions to arbitration of

[212] ibid.

[213] Ibn Qudamah (n 46); A Ibn Qudamah, *Al-Kafi* (1st edn, Huger 1997); M Al-Bhoti, Kshshaf Al-Qina' (Dar Al-Fikr 1982).

[214] Arbitration Law No. M/46, art 2.

[215] Arbitration Law No. M/34

[216] Yusuf (n 62) ch 4 para 35.

commercial cases and any other cases within the scope of arbitration. In this way, the Protocol effectively served to broaden the matter of what is arbitrable in the context of international conflicts. More specifically, a case is arbitrable when it satisfies certain criteria, rather than simply when it is a commercial case.

Irrespective of the way in which the Geneva Protocol afforded signatory powers the authority to restrict the responsibility to exclusively commercial disputes based on their domestic law, the Protocol also allowed arbitration to occur when the Secretary-General of the League of Nations was notified beforehand. In contrast, as the Geneva Protocol neglected to specify the authority required to determine arbitrability, there is a high degree of ambiguity regarding the notion of whether or not a given case is arbitrable.[217] The 1927 revision of the Geneva Protocol addressed this ambiguity through the addition of specifications that clarified that a legitimate and legally enforceable arbitral award required the topic to be arbitrable in the domestic law of the country in which the award will be supplied. More restrictions on arbitrability were also stipulated in terms of the enforcement of its awards, with the rules requiring that awards cannot contravene public policy or the domestic legal framework.[218]

The NYC 1958 updated the understanding of arbitration by stating that the legitimacy and enforceability of an arbitral award can be countered when the domestic legal framework prevents the matter from being settled by arbitration, or when the acknowledgement of the enforcement of the arbitral award would contravene public policy.[219] The NYC grants signatory powers the option to restrict the applicability of the document to only those disputes regarded as being commercial under their local domestic legal framework.[220] In addition to this, Article 34(2) (b) of the UNCITRAL Model Law stated that arbitral awards are negated when the issue under arbitration cannot be settled under domestic law or, alternatively, when it contravenes public policy.[221] However, despite the aforementioned clarifications, the notion of the meaning of the term 'public policy' remains somewhat unclear in this issue, which led to the recommendation that provision 34 (2) (b) should be removed from the Model Law.[222]

[217] New York Convention (n 197) art 1(a)(b)

[218] Ibid, art V.

[219] New York Convention (n 197) art I.

[220] New York Convention 1958, art I.

[221] UNCITRAL Model Law, art 34(2)(b).

[222] El-Ahdab and El-Ahdab (n 101) 50.

2.4.4.3 Under English Law

The scope of arbitration is extremely broad in English law. The Arbitration Act 1996 does not deal with issues that cannot be arbitrated. Similarly, there is little precedent in English common law on this issue. It must therefore be concluded that English law does not contain specific statements that clearly delineate the scope of arbitration. This has given rise to the practice of adopting a situational model rather than establishing the criteria of arbitrability based on a particular set of standards. The sole rule of thumb in this jurisprudence only prescribes non-arbitrability when disputes have a widespread public impact, such as when the subject matter relates to an individual who is not party to the arbitration agreement (e.g., the annulment of a patent).[223] It is also forbidden for arbitrators to settle disputes on the issues of family rights, criminal law, insolvency, illegal contracts, or those falling within the jurisdiction of the admiralty.[224]

Section 81 of the Arbitration Act 1996 stipulates that the basis of the scope of arbitration is English common law, although this section neglects to forbid the operation of arbitration of the refusal of recognition or enforcement of an arbitral award based on public policy. Section 68 adds that awards can be appealed when an aberrance has occurred, such as the loss of a case due to fraud or the contravention of public policy.[225] Importantly, Section 103 of the Arbitration Act 1996 states that the awards of the NYC should be recognised and enforced unless certain criteria are met. For example, recognition and enforcement can be circumvented when the award in question pertains to a subject matter that is not eligible for settlement by means of arbitration, or when enforcement of the award would lead to the contravention of English public policy.[226] Nevertheless, upon consultation of the scope of arbitration set forth in certain texts within the Arbitration Act 1996, it is possible to conclude that arbitration is theoretically

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[223] Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 59; Besson Sebastien, Poudret Jean-François, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 159.

[224] Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd edn, Kluwer Law International Pub, 2001) 219.

[225] Arbitration Act 1996, s 81& 68, article 2(g).

[226] ibid, s 103.

unrestricted in all cases that do not have the aforementioned conflict with domestic public policy.[227]

The unifying theme across all the conventions and domestic laws that have been examined in this context is that limitations regarding arbitrability will always come into force in response to the risk of public policy being undermined. Without such a provision, arbitration operations would lack utility in a comprehensive way. It should be noted that public policy in this context (otherwise known as *ordre public)* refers to the foundational tenet that links the social, moral, and economical values of a contemporary civil society. This concept was discussed in historic cases, such as *Egerton v Brownlow*.[228] Here, the House of Lords described public policy in the following way: "that principle of law which holds that no subject can lawfully do that which tends to be injurious to the public or against public good".[229] However, numerous commentators have protested against the flexibility of this definition, with Ginsburg referring to public policy as "an unruly horse". Ginsburg argues that if courts are substituted for arbitration proceedings, the same determination will be made either way. Sabharwal argues that a global interpretation of public policy is therefore required, as arbitration systems are not useful if they will result in the same outcome, with the losing party referring to public policy and thereby effectively bypassing their commitment to the award.[230]

In the context of Islamic jurisprudence, although 'public policy' is not an effective expression, 'public interest' is applicable and even analogous in all meaningful senses. Public interest refers to the obligation for Sharia and Muslim judges to consider the wider implications of their ruling before reporting a verdict. However, bypassing definitive texts cannot take place with recourse to the issue of public interest.

In summary, in terms of the scope of arbitration, the Sharia, International, and English systems of law are comparable in many respects. Common themes are that certain cases cannot be settled through arbitration, although the Hanbali School is an outlier in this regard, and there is consensus that all disputes pertaining to commercial matters are valid and arbitral. In addition, all legal systems treat criminal disputes differently and both Islamic and English law clearly

[227] Fifi Junita, 'Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms' (2012) 5(1) Contemporary Asia Arbitration Journal 45, 45-82.

[228]Egerton v Lord Brownlow [1853] 4 HLC 1.

[229] El-Ahdab and El-Ahdab (n 101) 50.

[230] El-Ahdab and El-Ahdab (n 101) 50.

stipulate that any determinations that would affect individuals other than the disputants cannot be settled through arbitration.

2.5 Cases of Recognition and Enforcement of Foreign Arbitral Awards in the KSA

Literature on arbitration-related decisions in the KSA is very scarce. Most of the literature is found in the form of Arabic text from newspapers and other judicial records, and sources from MoJ. The following part will discuss some of the cases to demonstrate global trends of recognising and enforcing foreign arbitral awards in the Kingdom.

2.5.1 ICC Award (UAE Subsidiary), 2016

The prime illustration of recognition and enforcement of arbitral awards under modern standards of international commercial law is ICC Award on 31 May 2016. The Enforcement Court of Riyadh decided to allow application for the foreign enforcement by the subsidiary of Greek Telecommunication Company versus Saudi Data Company. An ICC Award in favour of subsidiary was granted in London. The Telecommunication Company had claimed approximately USD 350 million from the Saudi Data Company, and was awarded approximately USD 18.5 million. The arbitration was decided during 2011. Its enforcement commenced before the Board in the KSA and the award was recognised.

2.5.2 US Court Judgment, 2018

The MoJ recognised and enforced a judgment from the US against a tourism company in Saudi Arabia, with the value of the judgment in the sum of USD 3,758,000. The Riyadh Enforcement Court entertained the foreign enforcement application and the Saudi company was ordered to compensate the foreign company within five days of the passing of the order.

2.5.3 Chinese Award, 2018

The MoJ recognised and enforced a foreign award through the court of Jeddah. The award of Chinese international arbitration worth USD 10.1 million was enforced against a Saudi mining company, and the court again ordered the Saudi company to compensate the amount within five days of the award or face penalties related to enforcement of the dispute.

2.5.4 ICC Award (Malaysian Company), 2018

In the same year, the MoJ reported enforcement of another award in Riyadh Enforcement Court in favour of a Malaysian company. A private Saudi educational institution was ordered to compensate an amount of USD 24,684,266 to the party within five days of the award.

2.5.5 Implications

These instances of the recognition and enforcement of foreign arbitral verdicts unequivocally show the Saudi government's intention and the readiness of its judicial institutions to do so. Furthermore, it is evident that the Saudi court system has continued to be quite active in dealing with and upholding foreign arbitral verdicts. To define public policy while giving Sharia supremacy is still a difficult task for enforcement courts.

2.6 Literature Summary

This chapter has discussed the foreign arbitration within context to the Saudi Arabia to present a comprehensive overview of the current position. The historical review of arbitration history shows further understanding of the positon of the KSA in relation to the foreign arbitration recognition and enforcement system and norms. There are different possible reasons that may lead to the refusal of awards on the bases of the public policy, the Sharia law is one of them, which is upheld as the national constitution and the national political and economic interest. This review presented the different pertinent issues which highlighted the arbitration from Arab countries, and particularly from Saudi perspectives. The chapter also noted important areas which need to be further explored and considered as a research gap. These include how Saudi Arabia sees foreign arbitration as a means of dispute resolution and challenges the Kingdom faced due to some of the part award contradicts its public policy despite the pledges made under its Vision 2030 development plan to modernise its legal system and economy. Therefore, within this perspective, this research looks into the principle of Sharia as a part of public policy in the KSA, to understand how it affects the recognition and enforcement of arbitral awards.

Chapter 3: The Development of Saudi Law of Arbitration and Impact of Conventional Legal Framework

3.1 Introduction

This chapter explains the Saudi arbitration which has evolved from the traditional to modern framework. Therefore, the fundamental aim of this chapter is to critically discuss the growth of the arbitration system in the Kingdom from traditional to modern arbitration trends, and to examine the efficiency of enforcing and recognition of foreign arbitral award through domestic legal structure. In this regard, this chapter presents a comprehensive overview of Saudi Arabia's arbitration framework initiatives, reflecting upon the Saudi legal system and the overall structure of arbitration in protecting both local and foreign investments. The chapter encompasses a critical analysis of the development of the Saudi arbitration system through assessing the roots of contemporary arbitration trends in the Kingdom and the related treatment of domestic laws. The chapter provides a framework for examining the efficiency of recognising and enforcing foreign arbitral award through the domestic legal system. Related arguments concern legislation, interpretations under the courts and arbitral forums, and their enforcement in the KSA. To this end, the chapter directly delves into the development of the legal framework relating to recognition and enforcement of arbitral awards, albeit it is mainly confined to the modern developments of arbitration.

To do this, the research provides in-depth analysis of laws in three main phases. First, it discusses the arbitration development before Arbitration Law 1983, and then focuses on the SAL 2012, examining the efficiency of both laws critically, to ascertain the levels of protection they provided to the recognition and protection of arbitral awards. As discussed earlier that the fundamental aim of the research revolves around ascertaining the efficiency of the arbitration framework, its limitations toward gaining confidence of the parties to the arbitration proceedings, issues related to enforcing foreign arbitral awards, and difficulties of recognition and enforcement of arbitral awards within overall legal framework of the KSA. Finally, the chapter contributes to the existing debate of analysing various complications concerning the relationship of arbitration structure and the conventional legal framework of the KSA.[231] The study of the Saudi legal framework helps in analysing the standards of protection provided to

[231] Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26(1) American Review of International Arbitration 131, 131-54.

arbitral proceedings in the KSA's domestic legal system. The analysis discusses how the domestic system treats the recognition and enforcement of foreign arbitral awards. The History of Arbitration in Saudi Arabia

3.2 Arbitration in Pre-Islamic Arabia

Prior to the advent of Islam, Arabian societies had a tribal judicial system to rule on disputes between different parties or traders, whereby Arabs and other under the protection of recognised and powerful tribes could select their own arbiters and apply any conventional terms in their agreements; it should be noted that this society was highly stratified, and those not protected by powerful tribes, such as slaves and foreigners who were not formally accorded tribal support, were powerless in any disputes with those protected under the tribal system.[232] Arbitrators had power either to accept or refuse settlements, based on their personal interpretation, regardless of providing reasons for their action. However, sworn oaths were considered very important during arbitral proceedings (which were typically sworn in the name of the most important idol venerated at the Ka'ba in Mecca).[233] In that age, the best settlement between parties were based on their voluntary agreements, between individuals and tribes, who mutually consented to the dispute and agreed on a specific individual to act an arbitrator. Arbitrators, known as *hakams*, would be appointed when no settlement reached regarding disputes in succession, torts, or property by negotiation.[234] A *hakam* could hypothetically be anyone, but was conventionally a respected male tribal elder possessing a reputation for justice and fairness, noted for competence in dispute settlement.

Arbitration was also used for deciding the winners in various kinds of literary or sporting competitions in the pre-Islamic era. For example, Hassan Bin Thabet took part in a poetry competition in which the well-known poet Alnabegha Althubyani was an arbitrator, who had to explain why one poet was better than another.[235] However, this mechanism frequently led to more disputes than resolutions emerging in many cases, and arbitrators themselves could be accused of nepotism due to their own tribal interests. After the emergence of Islam, traditional tribalism, the foundation of pre-Islamic Arabian society, was overtly condemned, particularly

[232] Frank E. Vogel, *Islamic Law and Legal System of Saudi Arabia* (Leiden: Brill, 2000) 173
[233] ibid
[234] Awad Ali Alanzi (n 5) 1-7.
[235] ibid

in terms of favouritism in legal judgments, but arbitration was elevated to a whole new level, overtly disavowing any form of favouritism (even against non-Muslims).

The Prophet Muhammed (ﷺ) used arbitration to resolves many disputes among his companions, and also advised his followers to do so as well. Arbitration was conducted between different tribes under the development of Sharia. The Quran enjoins families to use arbitration to mediate disputes, and extends approvals to parties that arbitrators nominate for the arbitration of government and political matters. In Islamic era, arbitration played a significant role, including the most famous arbitration of early Islamic history, between the fourth Caliph Ali Bin Abi Taleb and Mu'awiyaah Bin Abi Sufyan, the longstanding Governor of Syria. In 658 their political dispute underwent arbitration, resulting in a written agreement which included nominated arbitrators, applicable laws, and terms of references, and time limits for awards to be rendered.

Arbitrators have resolved political, commercial, and family disputes since the early Islamic era into modern Arab-Islamic states, such as the GCC, where arbitration comprises a voluntary arrangement which depends on the goodwill of parties involved. Arbitration *per se* continues to be an effective mechanism to resolve disputes, but difficulties can arise in relation to the enforcement of foreign arbitral awards within local jurisdictions, as explained throughout this thesis.

3.2.1 Arbitration in Saudi Arabia

The Saudi quest for facilitating foreign investment through enhancing its standards of foreign arbitral awards is evolving with every passing day, but its efforts are often viewed with scepticism in terms of practical effectiveness by foreign investors.[236] It has been alleged that the Saudi arbitration model has not achieved adequate efficiency in protecting both local and foreign investments through a vibrant arbitration system. The efforts for reforming Saudi arbitration laws in relation to international agreements started with the adoption of specific laws for this in 1983. However, with the passing of time, the KSA has continually tried to improve its arbitration laws and ensure that they are on par with global standards of arbitration, in order to protect investors.[237] SAL 2012 is one of the key efforts in this direction, and it

[236] Ibid, 135.

[237] Reyadh Mohamed Seyadi, The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States (Cambridge Scholars Publishing 2017) 162.

provides more room to provide remedies to foreign investors and aims to enhance the trust of foreign investors in the effective working of the Saudi legal system.[238]

The KSA pursued arbitration methods to resolve disputes arising from oil exploration from the early 1950s onwards, to handle disputes between Saudi bodies and foreign companies.[239] However, the arbitration established by *ARAMCO* in 1958 caused a radical change in the country towards arbitration rulings and procedure. To understand the arbitration established by *ARAMCO* it is necessary to consider the history of the eponymous organization.[240] During the 1930s, ARAMCO entered a contract with government to explore oil or petroleum resources in the Kingdom, under which the company was entitled to enjoy exclusive rights over the exploration, anticipation, manufacturing, transport, and export oil for a period of six years.[241] During this period, ARAMCO discovered one of the major oil fields in the KSA and in the world. ARAMCO approached the Saudi government with the intention to make an oil concession contract for the vesting of transportation rights of oil from Kingdom. In reply, the government imposed certain obligations through the concession contract on the shipping company, including building a maritime school at Jeddah to educate natives; advance Saudi port infrastructure and operations on the west coast; and maintain a taskforce of tankers in the Kingdom.[242] The consideration of the contract entitled the shipping company with the right of tax incentives and petroleum transportation from the country for a period of thirty years. Thereafter, a Royal Decree was issued requiring the compliance of above-mentioned regulations by all oil companies in Saudi Arabia, but this was opposed by ARAMCO.[243]

ARAMCO objected that if the Royal Decree was enforced it would violate their exclusive rights of oil exploration conferred upon them by the separate concession agreement between

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[238] ibid.

[239] Aida Maita, 'Arbitration of Islamic Financial Disputes' (2014) 20 Annual Survey of International & Comparative Law 35.

[240] Saudi Arabia v Arabian American Oil Co. (ARAMCO) <https://www.trans-lex.org/260800/_/aramco-award-ilr-1963-at-117-et-seq/> accessed 8 January 2020; The Award of 23 August 1958 between Saudi Arabia and the Arabian American Oil Company (Aramco) is reproduced in International Law Reports, 27, pp 117–229; Saudi Arabia Government vs. Arabian American Oil Co. (ARAMCO); [1958] 27 ILR 117.

[241] Stephen M. Schwebel, 'The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement' (2010) 3 Journal of World Energy Law & Business 245, 245-256

[242] Tarin (n 225) 131-54.

[243] Ibid.

government and company.[244] ARAMCO refused to comply with the shipping concession agreement (i.e., the Royal Decree), and alleged that the government had breached its contract by violating ARAMCO's exclusive right to transport domestic petroleum to foreign markets. They argued that this exclusive right of exportation was substantially associated with the rights of transportation. The government was not able to compose a strong argument against these objections, and the dispute was ultimately referred to arbitration, in accordance with the terms of the contract.

In its defence, the Kingdom submitted that the terms laid down in the concession agreement did not grant ARAMCO exclusive rights for transportation of petroleum to foreign markets, and that a state is empowered to take any steps necessary to preserve its national economic interests.[245] They claimed that ARAMCO was importing oil from the Saudi coast using customers' own oil tankers rather than sending ARAMCO's own oil freighters to export oil goods to overseas markets. Since buyers were not granted the authority to import oil using their own oil tankers under the terms of the concession agreement, the Saudi government's evidence was taken as fact..[246] The legal representative for Saudi Arabia further argued that the concession agreement with ARAMCO was not in conflict with the contract between the Saudi government and the shipping company because it did not contain a clause regarding ARAMCO's exclusive rights for the transportation of petroleum to foreign terminuses..[247]

In reply, ARAMCO denied the contentions presented by counsel of the Kingdom. They said that the contents of the concession agreement made between company and government entitled them to exercise their exclusive rights in respect of export and transport petroleum from concession areas to foreign destinations. They further argued that the word 'transport' entitled the company to use all means for transportation and exportation of oil, including all facilities, such as terminals and seaports. ARAMCO also rejected the Saudi claim that in order to ensure the flow of oil and its byproducts to global termini, foreign buyers of oil import petroleum using their own freighters. The Corporation insisted that the contract did not contain clauses allowing the Kingdom to change the terms of the deal or to limit the monopoly rights granted to ARAMCO and that it adhered to types of sale defined by maritime law. Ultimately, the incompatibility of the Royal Decree and the Concession Agreement hinged on the obligations

[244] Ibid.

[245] ibid.

[246] ibid.

[247] Ibid.

presumed by the Government in exercise of its sovereignty. A tribunal composed of three arbitrators was formed to ascertain the actual intention and contested points of law raised between ARAMCO and Saudi government in respect of concession pact. In determining the issues, the arbitral commission referred to the local Saudi law and the Hanbali School of jurisprudence, which included no exact rules about mining concessions or (*a fortiori*) the activities of the oil industry.[248] The panel concluded that although ARAMCO was given exclusive rights under the concession agreement to explore for, treat for, extract, transport, and export oil in the concession region, the government alone maintained title to the land. Additionally, the arbitral tribunal went on to say that the system of mining concessions based on contracts was acceptable under Islamic law. Thus, two fundamental tenets of Islamic law—the idea of free consent to enter into a contract and the principle of respect for contracts—could be traced back to the origins of concession agreements.

It was further explained by the tribunal that the essence of a contract lies in equal contractual rights of parties, irrespective of having different status; i.e., in the ARAMCO contract, the parties were bearing the status of sovereign and private entities, but the law provided them with equal rights regardless of their different statuses.[249] According to the tribunal, Islamic law does not support the Saudi government's claims; on the other hand, Sharia holds that the principle of party autonomy should be upheld in all contracts..[250] Finally, it was held by the arbitral tribunal that the Saudi government possessed no authority or capacity to enter a supplementary concession contract with a shipping company while having a prior concession contract with ARAMCO. The most noticeable initiative about this decision was that the tribunal also reflected upon loopholes and need of fresh legislation in reference to concession agreement between ARAMCO and Saudi government.[251]

However, the Saudi government found it difficult to accept the verdict passed by arbitration panel based purely on the disputed concession agreement, whereas the matter was referred to them to decide in accordance with the injunctions of Islamic law. However, the arbitrators proposed that the application of Islamic law's injunctions should be applied for interpretation

[248] A. Timothy Martin, 'Aramco: The Story of the World's Most Valuable Oil Concession and Its Landmark Arbitration' (2020) 7 (1) BCDR International Arbitration Review 3-53.

[249] ibid.

[250] Ibid.

[251] Dawood Adesola Hamzah, *International Law and Muslim States: Saudi Arabia in Context*. (Routledge, 2021) 158.

when necessary in cases of legislative gaps, which was viewed by both parties as a failure by the tribunal to resolve the issue and interpret the concession agreement from the perspective and scope of Islamic law. The government's arguments had no chance of success because the arbitrators' analysis of the issue focused solely on the ARAMCO oil concession deal and completely disregarded the government's other arguments. The Saudi government, however, cooperated with the arbitral tribunal's decision and refrained from attempting to implement the shipping agreement..[252]

The verdict passed in the 1963 *ARAMCO* concession agreement had a very adverse impact on the attitude of the KSA regarding international arbitration. The government subsequently prevented all companies in the Kingdom from resorting to arbitration in resolving disputes without prior permission from the CoM, and the policy to apply to the government still remains to date, despite the Kingdom adopting the International Convention for the Settlement of Investment Disputes among States and the Citizens of other States.[253] Nevertheless, despite the government's attempts to stop agencies from using arbitration to settle their disputes, there were a number of occasions when they did so in an effort to get around this ban by pursuing a number of international treaties that recognised state compliance with arbitral processes. It should be noted that the decision of the arbitration panel in the ARAMCO concession agreement did not just have an impact at the government level; the Saudi society as a whole developed a dislike for arbitration in light of the outcome. After the *ARAMCO* award in 1963, the Commercial Court Act governed private sector arbitration. This Act followed *ad hoc* arbitration to resolve commercial disputes within the Saudi Kingdom or the matter with foreign entities involving local parties.[254] By implementing the Chamber of Commerce's rules (i.e., if merchants agreed, they could appoint the Chamber as an arbitrator with the authority to settle their commercial disputes between them), institutional arbitration was created within the Kingdom as a result of this use of ad hoc arbitration.[255] Eventually, the rules and regulations in governing arbitrations for the Chamber of Commerce and the Industry Act 2013 were promulgated and enforced.

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[252] W M Ballantyne & H L Stovall, *Arab Commercial Law: Principles and Perspectives* (American Bar Association, 2002) 4.

[253] ibid.

[254] A. Timothy Martin (n-238)

[255] Ballantyne and Stovall (n 251) 4.

3.2.2 Saudi Arbitration Law of 1983 (SAL 1983) & the NYC

The Saudi legislature enacted the SAL 1983 and the Implementing Regulations of 1985 to address the context of arbitration, as no law was enforced which specifically dealt with arbitration. It was an important Law which established a set of provisions which superseded of the Commercial Court Law, and was considered an important evolution for arbitration law and practices in the KSA. The basic purpose of the Arbitration Law 1983 was to improve the commercial relations between domestic and international companies, and to ensure the effectiveness of procedural and implementation process, as first experience in the legal history of Arbitration Law 1983, which particularly recognised the legitimacy of arbitration provisions in the agreements.[256] However, the effectiveness of the Arbitration Law 1983 was restricted by numerous limitations, because the Saudi courts continued to intercede in the arbitration process, resulting in arbitration proceedings being blocked in numerous cases.[257]

Cases in which Saudi public entities were involved in disputes with foreign investors did not usually reach the stage of arbitration.[258] The SAL 1983 restricted the application of arbitration law by government entities without consent of the CoM.[259] Under the limitations, Saudi public entities were not allowed to enter into arbitration agreements, thereby limiting the effectiveness of SAL 1983, as most trade with international partners was carried out through state entities. The SAL 1983 permitted the BoG to exercise exclusive jurisdiction over matters relating to the implementation of international arbitral awards in foreign jurisdictions.

Moreover, the stipulation that the arbitration law should satisfy Islamic law and the legal system of the Kingdom was imposed on international companies, whereby any foreign company entering into an agreement with Saudi companies faced clauses regarding arbitration subject to prior approval from the BoG. Another clause of the SAL 1983 stated that if any party were successful in getting arbitral award outside the Saudi arbitration, they would be liable to confirm its applicability within the KSA with the BoG.[260] Additionally, under this condition, it was clear that the enforcement of any arbitral award not confirmed by the BoG would be held

[256] Arbitration Law No. M/46 (n 191) art 1.

[257] Samir A Saleh, 'The Settlement of Disputes in the Arab World: Arbitration and Other Methods (1986) Berkeley Journal of International Law 280, 282.

[258] ibid.

[259] ibid.

[260] Al-Ammari and Martin (n 100) 390.

to be annulled, on the basis that parties had attempted to avoid the jurisdiction of the Saudi courts.

Opposing this reality, international companies started to evade the Saudi legal system entirely, such as by the incorporation of 'stabilisation' clauses in investment arbitration agreements.[261] The purpose of such provisions was to assure the application of international law in case of any disputes between the parties. The problem of validating the arbitral awards by the BoG remained unresolved, but it reduced the practical intervention of Saudi courts in the process of arbitration. Here, it is mandatory to mention that there was another crucial debate regarding the SAL 1983: the uncertainty of the competence of the court to hear the submissions challenging arbitral awards. The reason behind the non-enforcement of the arbitral awards without taking approval from the BoG was to secure the policy that the national law and public policy prevailed over treaty obligation, including the Saudi government's ratification of the NYC. Thus, the Saudi government used the public policy as a ground to refuse enforcement of non-domestic arbitral awards.

The SAL 1983 was also silent on the question concerning the grounds on which a competent court could deny the enforcement of the non-domestic arbitral awards. When Saudi courts interpreted the NYC after the Kingdom assented to the Convention in 2007, they relied on the NYC's stipulation that states' 'recognition and enforcement of awards made only in the territory of another Contracting State' was voluntary and reciprocal, enabling potential reservations when contracting.[262] As soon as Saudi Arabia became a signatory of the NYC another question emerged regarding the enforcement of arbitral awards. Because there were no express provisions in the SAL 1983 concerning whether Saudi Arabia, in conjunction with other member states, assented to an international convention, it was questionable whether it validated arbitral awards in mutual trade, or the BoG still required factual evidence in accordance with the enforcement of domestic awards.[263]

A number of cases were seen where Saudi courts held with the reciprocity concept after Saudi Arabia consented to the NYC in 1994. The BoG recognised a judgement of the US District Court for the District of Columbia, in which it was concluded by the US District Court judge

[261] ibid.

[262] A. Timothy Martin (n-238)

[263] Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge, 2016) 1201

that the decisions passed by the Saudi courts would be enforced in the District of Columbia if the grounds for mutual advantages had been established. Another judgement from 2004 involved the BoG requiring the enforcement of Saudi judgment in a US court, although denying the legal opinion from the US State Department that US Courts would recognise and enforce Saudi judgments.[264] After looking into these examples, it can be observed that the BoG adopted a case-by-case consideration, depending on the country involved, relying on reciprocity under treaties such as the NYC. Thus, the matters regarding the enforcement of arbitral awards remained uncertain, resulting in obscurity for parties seeking the enforcement of arbitral rewards.[265]

Consequently, the practicality of the SAL 1983 was no more advantageous to comply with international arbitration proceedings. Ultimately, the Kingdom had to acknowledge the need to modernise the old law to cope with new challenges. Although the SAL 1983 recognised the concept of international arbitration, the law was ineffective in pursuing international arbitration in Saudi Arabia.[266] The uncertainty surrounding the effectiveness of arbitration process was considerable, to the extent that legal practitioners simply recommended that their clients not pursue arbitration as a mode of dispute resolution when entering into contracts with Saudi entities, because if arbitration occurred, it would result in the full retrial of the case, thus making the arbitration process merely a waste of time and money. The crucial point being argued through this research can be summarised that there was no effective mechanism available to an international party seeking the enforcement of arbitral awards under the SAL 1983 in Saudi Arabia.

Apart from this, the SAL 1983 was incapable of providing a speedy trial and remedy to the aggrieved parties. This called for dire need to advance the arbitration law in the Kingdom and enhance the effectiveness of the procedure and party autonomy in a practical manner. Moreover, this would also minimise the frustrations of a foreign investor dealing with the Saudi courts. Faced with all these uncertainties and inefficiencies of the old arbitral law, the Kingdom enacted the new SAL 2012 with the intention of enabling a more expeditious arbitral process. The next section explores the extent to which this goal was achieved.

[264] ibid.

[265] ibid.

[266] ibid.

3.3 The Role of Saudi Arbitration Law of 2012 (SAL 2012)

3.3.1 Overview of SAL 2012

The SAL 2012 emerged as a result of the lack of effectiveness of the SAL 1983, with the intention of reducing uncertainty of old law.[267] At first glance, the SAL 2012 shows that it was just an amended copy of the previous Model Law of 1985, whereby Saudi Arabia had patched together its arbitration law in order to align with practical international customs. However, the new law was consciously designed to remove the unpredictability involved in arbitration procedure and to assure the enforcement of arbitral awards in a uniform manner in Saudi Arabia.[268] The purpose of SAL 2012 was to reform the arbitration process in the KSA and to introduce judicial reforms in the Kingdom, which resulted in reformation of the hierarchy of the Saudi courts, the establishment of a Supreme Court and regional appellate courts, and the amendment of laws in accordance with foreign investment law and company's law.[269]

Despite some new directions, many provisions of the Law mirrored its predecessor Model Law, including the scope of international arbitration's application, the definition of the agreement between arbitrators, the composition and competence of arbitral tribunals, and the clauses of location of arbitration and language used in arbitration.[270] However, the new law was successful in making a distinction between domestic and international arbitration laws in both statutory and procedural contexts for the first time in the Kingdom's history. Numerous provisions were introduced to the SAL 2012 in order to modernise the outdated arbitration legislation and bring it into compliance with international standards as well as to create consistency and certainty in Saudi Arabia's legal processes. This section examines a few of those clauses to demonstrate how the updated law attempts to harmonise Saudi arbitration law with international norms.[271]

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[267] Arbitration Law No. M/34 (n 22)

[268] George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2014) 9(2). University of Pennsylvania Journal of International Law 211, 216.

[269] ibid.

[270] Jean-Benoit Zegers, National Report for Saudi Arabia (2013). Published in Jan Paulsson and Lise Bosman (eds), ICCA International Handbook on Commercial Arbitration, Kluwer Law International 1984, Supplement No. 75, July 2013, 1 – 58, at p. 4. (The Report).

[271] Sayen (n 271) 216

It is noteworthy that the drafters attempted to reconcile Hanbali principles with international arbitration standards to advance Saudi domestic law.[272] The SAL 2012 was an amended or modified version of the UNCITRAL Model Law of 1985 and 2006 amendments whereby the KSA legislature reformed its arbitration law. The Model Law is the basis for arbitration law in 94 countries, while many other countries have incorporated aspects of this into their legal systems verbatim. The adoption of Model Law by most countries, including Saudi Arabia, advanced the ground for international consensus pertaining to arbitration proceedings. This has significantly impacted court practice and reduced variance between domestic laws.[273]

As Saudi Basic Law stated that no law should be promulgated in the country that does not comply with Islamic law, SAL 2012 adopted only those modifications from Model Law which were not obviously repugnant to Sharia rulings. Consequently, the new arbitration law appears to be a mixture of both Model Law containing international standards of arbitration law and Islamic law based on Hanbali jurisprudence (which is universally respected in conventional Islamic jurisprudence). Thus, the legislature of Kingdom adapted Model Law to carve out its own arbitration policies, and used it as a reference in decisions to the extent it does not violate the spirit and public policy of Islamic law.[274]

The SAL 2012 consists of eight chapters and 58 articles, and its implementing rules were issued in May 2017, providing numerous clarifications.[275] These include that the Court of Appeal is competent to supervise arbitration settled by Saudi Arabia, and in case it recognised and enforced an arbitral reward, its decision will be final and non-appealable, Moreover, if the Court of Appeal set aside an arbitral reward, the appeal against the decision could be made within 30 days following the date of decision's notification.[276] It is important to discuss the key issues that appeared because of the implementation of the SAL 2012, with focus on the functional scope of this publication, such as enforcement Law of 2012 and procedural rules.[277]

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[272] ibid.

[273] ibid.

[274] John Balouziyeh and Amgad T. Husein, 'Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia' (Kluwer Arbitration Blog 2013) <http://arbitrationblog.kluwerarbitration.com/2013/05/29/saudi-arabias-new-arbitration-law-sees-more investorsopting-for-arbitration-in-saudi-arabia/> accessed 13 November 2019.

[275] ibid.

[276] Ihab Amro, 'The Use Of A Machine Arbitrator As An Application Of Artificial Intelligence In Making Arbitral Awards' (2021) 24 Journal of Legal, Ethical and Regulatory Issues 1-8.

[277] ibid.

The SAL 2012 revoked the previous SAL 1983, which also including its implementing regulations as well.[278]

3.3.2 Scope of SAL 2012

The most important thing concerning the scope of SAL 2012 is its own statement that arbitration law is subject to the international conventions to which the Kingdom is a signatory. For example, the NYC and Riyadh Convention are overarching international regimes to which Saudi Arabia is subject. The SAL 2012 is applied as a basic or primary law for any Saudi-seated arbitration, or it could be said that in any arbitration proceedings originated in the Kingdom or outside it where the parties have explicitly agreed to apply SAL 2012. SAL 2012 itself provides a definition of international arbitration which is equivalent to similar provisions in UNICTRAL Model Law. In effect, SAL 2012 covers international disputes commenced in Saudi Arabia, and disputes involving foreign entities in general, including disputes where parties suggest resolving the matter in compliance with some other international arbitration, such as ICC and LCIA, as internal rules of procedure. The implementation of these provisions had excluded the use of procedural rules provided under the SAL 2012 to such an extent that it opposes the preferred international arbitration law that parties themselves choose to apply. Thus, the scope of SAL 2012 expanded the chances for successful enforcement of arbitral awards. Article 2 imposed a condition that the Law's 'provisions shall apply without prejudice to the provisions of Islamic law, considering it the Supreme law of the Kingdom'. It remains mandatory for jurists to consider Sharia principles while interpreting the arbitration laws.

In this regard, the hierarchy of Sharia law, domestic law, and international conventions must be maintained in theory; in practice, the instrumentality of each of these domains in practical implementation of SAL 2012 remains unclear.[279] In this sense, SAL 2012 has had the same impact as its predecessor, SAL 1983.[280] Under the SAL 1983, it was binding upon parties who entered into an agreement with Saudi Arabia that in case of any dispute resolution by arbitration that clauses should satisfy the basic requirements of both Saudi and Islamic law. While the SAL 2012 safeguards the right of parties to choose any other international law in reference to dispute resolution and enforcement of arbitral awards, there was an exception: in case the

[278] Zegers (n 273).

[279] Saad A. Aljloud, 'Ijtihad and Ikhtilaf: Re-interpreting Islamic Principles in Contemporary Times' (2014) 28(1) Arab Law Quarterly 85, 85-98.

[280] ibid.

arbitration clause was considered contrary to public policy, it could be subjected to enforcement challenges.[281]

Except for an action filed in accordance with its rules to annul an arbitration award, Article 49 of SAL 2012 states that arbitration awards delivered in line with its provisions are not subject to appeal. According to Article 50(2), an arbitral award may be revoked if the competent authority determines that it is against public policy or Sharia principles. Article 8, which permits the Court of Appeal to consider arbitral awards, provides another illustration of invalidating the arbitral awards.

3.3.3 Challenges and Issues of SAL 2012

The case of ARAMCO described earlier was referred to an arbitral tribunal to decide based on the settled principles of Islamic law relating to commercial transactions. This case is often discussed as illustrative of the key challenges facing SAL 2012. The tribunal failed to decide it on Sharia merits due to a lack of essential knowledge of Islamic law on the said issue of *Fiqh al-Muamalat*. Ultimately, it resulted in changing the behaviour of Saudi government, with an aversion to resort to arbitration for the settlement of their disputes. The concept of commercial arbitration in Saudi Arabia has passed through five critical phases relating to five significant pieces of legislation. The first stage started with the Law of Commercial Court from Articles 493 to 497 in 1931.[282] These articles played an important role to cope with the needs of that time, and to enable the settlement of disputes between the government and foreign oil companies. This created certain doubts about international arbitration within the Saudi government, and a sense of belief that international arbitration authorities tended to favour foreign companies. Accordingly, the government espoused a negative position towards international arbitration. The CoM Resolution passed M/58 in 1963; this Decree imposed a condition on all government bodies that no agency could resort to arbitration to resolve their disputes without first seeking and obtaining taking a formal approval by the President of the CoM. This attitude is reflected in the old SAL 1983 and its Rules (1985).[283]

The next phase started with the Labour and Labourers Law in 1969, Article 183 of which deals with labour arbitration. Article 183 stated that disputing parties in all cases could appoint (by common agreement) a sole arbitrator or several arbitrators for each of them to settle the dispute.

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[281] ibid.

[282] Decree No. M/32 on 2nd June 1931.

[283] A. Timothy Martin (n-238); Arbitration Law No. M/34

Article 5(h) of the Chamber of Commerce and Industry Law notes the competence of the Chambers of Commerce and Industry to appoint arbitrators to resolve their disputes regarding commercial or industrial contests where the parties have agreed to refer the case to arbitration and with the promulgation of this law, which contributed to the foundations of institutional arbitration in Saudi Arabia. Under article 37(3) the Saudi Council of Chambers of Commerce and Industry Law, jurisdiction to conduct arbitration in resolving commercial and industrial disputes in both cases if it belongs to parties from various chambers or if one party is local and the other is foreigner.[284]

All three phases discussed above could be considered as development stages of arbitration law in the KSA, because during that period there were no specific laws regarding arbitration in the country, and there were limited laws in form of a few disparate articles supporting arbitration under various enactments.[285]

The fourth stage began in 1983 when the first Saudi Arbitration Law was issued.[286] SAL 1983 contained 25 articles, and its implementation Rules were published in 1985, comprising 48 articles describing details relating to arbitration law. This law was effective for decades until superseded by SAL 2012. SAL 1983 received much criticism on various grounds, especially on the issue of the effectiveness of arbitration methods and enforcement of arbitral awards in Saudi Arabia.[287,288] Such critiques promoted awareness amongst the Saudi legislature about the need to enact new legislations going forward. As a result of the KSA joining the World Trade Organisation (WTO), it has been observed that there is need to harmonise the Saudi legal system to meet the expectations of international norms, including in terms of arbitration law. Consequently, the Saudi legislature developed SAL 2012 as a conscious revision of SAL 1983, intended to streamlined and integrate the KSA's arbitration processes in alignment with global norms.[289]

SAL 2012 applies contemporary methods to synchronise the international arbitration and Islamic law.[290] It contains explicit provision in term of challenging the petitioning for the

[284] ibid

[285] Nicolas Bremer (n-37)

[286] Nesheiwat (n 18).

[287] ibid.

[288] Berger (n 63) 223; Blavi (n 63).

[289] Nesheiwat (n 18) 459

[290] ibid.

dismissing of an arbitrator through tribunal. In this regard, under Article 16, there are concerns about the arbitrator's qualification and impartiality that may come to the knowledge of parties after the arbitrator's appointment.[291] A common requirement for the rules in arbitration and national laws is that the arbitrators must have no conflict of interest in the dispute at the time of the arbitrator's appointment and throughout the proceedings, and any potential conflicts must be disclosed to all key parties in writing. An arbitrator will be barred from the case during hearing for the same reasons, despite other parties' requests. Arbitrator shall not be dismissed without any circumstances where qualifications is not appropriate upon by two parties. Also, neither of two parties shall be entitled to request for dismiss except for reasons.

3.4 Legal Framework of Saudi Arabia

3.4.1 Overview

A series of modernising reforms were introduced to overhaul the economic and governance hierarchy of Saudi Arabia from its formation by King Abdul-Aziz Al-Saud, including pioneering investment in science, education, and technology.[292] The King also tried to advance the administratively organised area of Al-Hejaz, and fostered social cohesion among the people of different regions by efforts to promote public policy rooted in social bonds, nationhood, customs, and Islamic law. The civil law of the modern Kingdom was developed in conformity with Sharia rulings, and judicial authorities were obliged to adapt from the Quran, *hadith* (narrations) of the Holy Prophet (ﷺ) (i.e., the Sunnah), and the practices of the early generations of Muslims while acting under their judicial capacity. Civil reconciliation, commercial activities, power sharing, and deliberation were all based on Islamic law.[293] These Islamic conceptions of good governance have been fundamental to the KSA's development to the present. Before his death in 1953, the King had established a ministerial system with centralised policy-making powers, and he took practical steps to modernise the government structure, bringing development in the Kingdom and uniting and stabilising a tribally divided society.[294]

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[291] Mulhim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (v Kluwer Arbitration Blog, 2016) <http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> accessed 01 January 2022.

[292] Abdullah Saleh Al Sadaawi, 'Saudi national assessment of educational progress (SNAEP)' (2010) 5 (1) International Journal of Education Policy and Leadership 1-14.

[293] Nicolas Bremer (n-37)

[294] Wynbrandt (n 271) 32.

It is crucial to state that King also faced many challenges in the modernisation of old laws while ensuring conformity with Islamic values.

The Saudi political structure of the constitution is relatively ordinary relative to global norms in terms of its legislature, executive, and judiciary, but as an absolute monarchy the executive is stronger. This is reflected in royal decrees being sources of law in Saudi Arabia, which affects many rules and regulations, although in practice most laws, including sovereign acts or legislation, are implemented after a deliberative process resulting in resolutions passed by ministers, in consultation with the Council of Senior Scholars.[295] Secondary law-making occurs in the forms of regional laws, by laws and administrative circulars. Law produced from these sources may be considered part of Saudi law. A constitution is considered as supreme law of a country; it is a document that comprehensively defines, regulates, and governs the organs of the government. However, in the KSA, the basic law constitutes based on the Sunna (traditions) of Prophet Muhammed and the Holy Qur'an which means the Kingdom's national constituted being premised on pure Sharia.[296]

In 1993, the Kingdom made efforts to codify their constitutional law, with three basic regulations to codify the Kingdom's constitutional framework in terms of the Basic System of Governance, the Law of Consultative Council (Shura), and Regional Law. These instruments were designed to define, constitute, and regulate the powers and functions of the organs of the government. Accordingly, the Basic Law of the Kingdom is equivalent to a constitutional document in other countries. Similarly, the Law for the CoM describes the responsibilities and functions of the executive branch of government. The CoM consist of the Head of the Department and subordinate ministers. Each head is responsible for framing policies on various issues. It is crucial to mention that the Basic Law of Kingdom codifies existing legal practice and does not stress upon establishment of new institutions in the country. To understand the changing aspects between judicial and legislative organs in Saudi Arabia, we will briefly explain the main organs of government.[297]

[295] N M Al-Assaf (tr), *The Shura Council, a Historical Perspective* (Department of Information and Public Relation, 2004) 4.

[296] ibid

[297] ibid.

3.4.2 Global Trends in the Saudi Legislative System

According to the prevailing theory on constitutional law, the legislature is bound to perform three basic functions: (1) the enactment of laws in compliance with the prescribed parameters of legislation; (2) keeping the executive power in check; and (3) designing policies or laws according to the will and welfare of the people.[298] The role and functions of the legislative organ of the KSA are quite different from legislatures in the Western world, where the authority for the functions of the legislature under the theory of the social contract are derived from popular sovereignty, reflected in democratic elections of legislative representatives for a determined period.[299] However, the case of the Saudi legislature is different, as God is sovereign, and laws are rooted in Sharia; consequently, all man-made laws are subordinate to that superior law.[300] These specifications were held as the bases for assuming that Saudi Arabia does have a dependant legislature with restricted authority for enacting laws.

It is also assumed by Western analysts that the word 'law' itself is considered a secular concept in the Kingdom, and the word '*nizam*' is used as an alternative to the word 'regulation'.[301] In actual fact, these presumptions are not true, and the legislature of the Saudi Arabia is unicameral, consisting of two authorities: (1) the CoM, which acts in a dual capacity as both the executive and legislative branch of the government; and (2) the Council of Senior Scholars (CoSS), which was established in 1992.

The CoSS is composed of Hanbali jurists and civil society professionals.[302] Any citizen of the Kingdom who wants to be a representative in the CoSS is required to attain the complete knowledge of the legal system of the country, including Islamic traditions. Another important responsibility of the CoSS is to make suggestions on any proposal or draft in accordance with Islamic injunctions on that specific point, to assure that all promulgations protect the interests of the government.[303] Thus, the Kingdom has assured stability in governance with a *de facto* bicameral parliamentary system, with a strong executive in the Crown, analogous to the traditional British constitutional framework. It empowered the CoM to enact laws for advancing the legal system of Kingdom to cope with the international standards, while

[298] Al-Muhanna (n 27)

[299] ibid.

[300] ibid.

[301] ibid.

[302] Al-Safi (n 39) 52-53

[303] Nesheiwat (n 18) 445.

appointing the CoSS to maintain a checking power and to advise the state on such recommendations, disclosing all the Islamic perspectives of proposed legislation.[304] Which is like the House of Commons (Council of Ministers) and House of Lords (Council of Senior Scholars). Following an election, the Prime Minister (which means the 'first servant' of the King) would be invited by the King to form a government to draft laws.

3.4.3 The Judicial Framework of Saudi Arabia

The modern Sharia courts of Saudi Arabia began under the reign of King Abdul Aziz Al-Saud, who was the King of al-Hejaz and of al-Najd in 1926.[305] He gave specific orders to construct more courts and extend existing ones in the cities of the Hejaz. All courts in the Saudi state emerging from this time were subordinate to Supreme Court located in Mecca, known as *Almahkamah Alshariyah Alkobra*. Another court was established named *Hay'at Altadqeqat Alshar'iyah* to work in the capacity of a Court of Appeal, to maintain checks and balances over the decisions of other constituted courts. In 1962, another decree was issued containing the provisions related to the powers of Court of Appeal, adopting new amendments to expand the Court's power.[306] Later, these provisions were properly codified.[307] To modernise the structure of the judicial system of the Saudi Arabia to international standards, the Kingdom divided it into three basic courts: the Courts of General Jurisdiction, the BoG (also known as Administrative Courts), and Special Tribunals.[308] The Courts of General Jurisdiction are conventional Sharia courts that work according to Sharia principles and new judicial reforms, which are discussed below.[309]

The role of the BoG (i.e., Administrative Courts) is discussed in detail below. Along with these and Courts of General Jurisdiction there are numerous quasi-judicial committees which were established with the jurisdiction to settle banking, commercial, and labour disputes.[310] Article 46 of the Basic Law recognised the independence of judiciary from political authorities, but Article 50 of the Basic Law empowered the King to reverse the decisions of the courts if

[304] ibid.

[305] Bin Zaid (n 155) 353.

[306] Ibid.

[307] Ibid.

[308] Nesheiwat (n 18), 445.

[309] ibid.

[310] ibid.

deemed necessary in the interest of justice.[311] Some notable features of the judicial process in the KSA include that all courts are bound to consider Islamic rulings when passing verdicts; oral testimonies play a highly significant and instrumental role; pre-trials may be observed; and there are no conditions of time bars in starting trial which are also considered as statuary limitations as well.[312]

Under the SAL 2012, a timeline clause was added under which prescribed specifications must be fulfilled, but if a court considers it reasonable, it may pardon any delay. Citizens of Saudi Arabia are permitted to consult a religious scholar or judge to resolve their disputes, known as muftis or qadis (i.e. a religious leaders or clerics), who are commonly consulted for family matters. They provide consultation in accordance with the Islamic principles. The law of the Kingdom provides an exception for matters settled out of court, which are deemed binding on all parties if they gave their express consent. Before the legislatures of the Kingdom introduced new reforms in the country, it was common practise to decide all matters of civil and commercial nature under the jurisdiction of General Courts, which overburdened the judicial branch, resulting in an inefficient and unsystematic system.

The lack of express provisions in relation to the apportioning and cases across the judicial system resulted in legal inefficiency, with cases being processes extremely slowly; in particular, the publishing of decisions was extremely delayed following the issuance of verdicts. Therefore, the system needed to develop to overcome this situation, and two key recommendations were proposed by the Judicial Council of the Kingdom: (1) to review the mechanism and make comprehensive laws to reconstruct the judicial system;[313] and (2) to improve the inactive judicial procedure by constituting more courts and dividing their burden. Consequently, the new reformative laws were adopted in 2007 to cope with time pressures.[314]

Subsequently, numerous courts were constructed to reduce the burden on existing ones, including Higher Courts, Courts of Appeal, Lower and Summary Courts, and more General Courts.[315] These reforms aimed to rationalise, reconstruct, and unify the judicial system under a logical order. Moreover, separate Courts of Appeal were established for each region and

[311] El-Ahdab and El-Ahdab (n 101) 593 – 671.

[312] Nesheiwat (n 26), 445.

[313] Bremer (n 45) 37-55.

[314] Berger (n 6) 2-15.

[315] ibid.

province; these Appellate Courts were assigned the duty of reviewing previously decided cases in accordance with Islamic principles, while the BoG preserves the jurisdiction of highest Administrative Court.[316]

3.4.4 The Board of Grievances (BoG)

The SAL 2012 was considered to enacting to cover the execution of proceedings of domestic and foreign judgements, including the enforcement of arbitral awards; therefore, the law was to be applied in a broader sense to cover commercial matters where both parties conducted their business locally or where the business involved international parties.[317,318] Under new enactments, the execution judge (i.e. who play a key role in the enforcement of civil judgment and awards in the Kingdom of Saudi Arabia) was empowered to enforce judgements either domestic or foreign, by issuing an execution deed. The applications made to enforce an arbitral reward which is not concluded would be liable to dismissal under the SAL 2012. The BoG (*Diwan Al Mazalem*) was created by a Royal Decree as an Administrative Court.

The BoG was authorised to propose recommendations on the issues presented to it for approval by the CoM, but after the amendment introduced under new judicial laws in 2007, the Board was granted power to issue judgements binding in nature. Later, another decree was issued under the seal of the King containing rules relating to the procedure of the Board. It stipulates that all the decisions made by the Board shall not be in conflict with Islamic laws, and the Board is bound to pass the decisions in accordance with the explicit rules of Quran, hadith, and practice of the early generations of Muslims.[319] Under new reforms in 2007, the power to resolve commercial disputes were vested in the court of general jurisdiction, but arbitration authorities retained with the BoG until SAL 2012 was passed, which authorised the execution court to exercise jurisdiction over arbitration matters instead of referring them to the Board.

The SAL 2012 improved previous enforcement laws in various respects. Under Article (11), the competent judge should enforce arbitral awards, subject to reciprocity, and the competent authority to enforce arbitral awards is the execution court, rather than the BoG, which had hitherto caused lengthy, slow, and expensive procedures. This aspects of SAL 2012 accelerated procedures and reduced the frequent delays faced by involved parties. The SAL 2012

[316] Kramer (n 305) 20-37.

[317] Ibid.

[318] Nesheiwat (n 18) 445.

[319] Kramer (n 305) 20-37.

reaffirmed that arbitral awards had to comply with public policy and Sharia principles, but the BoG and other courts were no longer authorised to review the merits of *a priori* awards.

3.4.5 The New Judicial Framework

The Judicial Council possess the authority to supervise the new judicial system, and with the High Court it is vested with powers under which they can develop laws and policies that are binding on subordinate courts. The Council has other crucial tasks to perform, including the appointment of judges, establishment of tribunals, and construction of special courts to work on the orders of the King and CoM[320]. However, in its implementation, the SAL 2012 caused some jurisdiction conflicts in the judicial system of the Kingdom, and the new streamlined model struggled to handle the disruptive jurisprudence of local courts, in the absence of established and advance principles of law and Sharia. Some other dilemmas of new judicial system are discussed below.

Under new judicial system some committees were constructed to address the special issues by the expertise of that field, such as the Committee for the Settlement of Banking and Insurance Issues, having jurisdiction on the respective cases. Under the provisions contained in the Royal Decree, the Judicial Council is empowered to establish committees and subordinate committees for the settlement of the disputes in relation with banking and finance.[321] These committees are vested with special powers to settle the banking disputes with the aim of transferring jurisdiction in the banking cases from Sharia courts to committees. Under the said decree, the committees enjoy broad powers in determining the rights and obligations of parties, including available remedies and asset freezing. However, it can be observed that there are no explicit clauses regarding the implementation procedure of the decisions made by committees.[322]

A more combative issue regarding the authority of committees is what law should be preferred in cases of conflict in the application of contractual terms or Islamic principles; for example, a banking contract may contain terms relating to interest rates, but under Islamic law the provision of interest or uncertainty (*riba* and *gharar*, as discussed previously) are prohibited,

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[320] Ahmed Altawyan, 'The legal system of the Saudi judiciary and the possible effects on reinforcement and enforcement of commercial arbitration' (2017) 10 Canadian International Journal of Social Sciences & Education 269-288

[321] ibid

[322] R Abu-Manneh, M Stefanini and J Holden, 'Is Arbitration Damaging the Common Law?' (2016) 19(3) *International Arbitration Law Review* 65, 65-69

which may entail conflicts in the application of pertinent laws.[323] In such dilemmas, it becomes the responsibility of the committee to apply a policy which protects the public interest by acting under the doctrine of *al-syasa al-fdi'ivva* (i.e. the act of ruler or policy based on Sunnah and Quran), which permits judicial autonomy to preserve and prefer the spirit of law and justice rather than to stick with the letter of the law. Consequently, rulings may be adjusted for the social and political stability.

A pertinent example can be seen regarding the relaxation of guardianship rules regarding women in 2017.[324] The legislature and scholars of the Kingdom considered the Hanbali fatwas on this issue prior to establishing a new personal law in the country. However, the variety of available legal opinions and flexibility of interpretation of rules make it difficult for scholars to apply a uniform method to resolve such issues.[325] These difficulties, varied legal opinions, and jurists' disagreement caused different legal outcomes and confusion dramatically. Under these limitations, it could be said that the principles of Islamic law lack a unified code, but it is true that the different schools of jurisprudence have different approaches and different rules of interpretation. Consequently, the Islamic principles *per se* may be considered to vary from one school of jurisprudence to another, and one social context to another. This brings the need for the modernisation of the law along with the application of Sharia rulings.[326]

Based on the developments adumbrated above, the current circumstances present an uncertain picture concerning the application of laws, which actual litigants continue to simply desire favourable decisions and expeditious proceedings, regardless of the administrative and *de jure* theoretical basis for the current system. We have already discussed that the first regional courts were established by Royal Decree in 1926, along with an exception for the application of Islamic principles, whereby state courts can apply any of the rules prescribed by various schools of jurisprudence. This rule enabled Muslim scholars or judges to pass a verdict based on any of the Muslim schools of law. The rationality behind passing this order was to enable maximum flexibility in the dispending of justice. In this scenario it could be said that the KSA is a state in which judges enjoy great judicial autonomy in the broader sense. Historically, Saudi judges have tended to follow the legal opinions and rulings traced to the teachings of the 13th-century scholar Ibn Taymiyyah, who is considered the ideological founder of the Salafi form

[323] ibid.

[324] Gary B. Born, *International commercial arbitration* (Kluwer Law International BV, 2020) 179.

[325] ibid.

[326] Nesheiwat (n 18).

of Islam later endorsed by Muhammad Ibn ‘Abd al-Wahhab, and this trend in the context of the KSA has tended toward a more austere and stringent interpretation of Sharia than that seen in other historical and contemporary Islamic states.

The practice of the judiciary of the historical theocratic establishment of the Saudi heartland in Najd relied on the rulings of the Hanbali School, and according to the traditional practice, judges had to meet with public at their homes and markets and invite them for meetings on various issues. It was a condition that judges appointed in the KSA had to have studied Hanbali jurisprudence. Obstacles in the codification of the laws into a uniform system created certain doubts among legal authorities and religious groups that government was unable to draft a law on elusive religious matters. This was the reason for the need of *ijtihad*, and getting experts to evaluate all pertinent sources of Islamic law (i.e., the Quran, Sunnah, practices of the early generations of Muslims, and the schools of jurisprudence). These needs were of utmost importance, especially cases involving commercial issues and laws.[327] Therefore, the codification of law on a single format is really an anathema to the Saudi legal paradigm, creating a dilemma between how to reduce uncertainty and unpredictability in judicial decisions concerning arbitral awards while resorting to a broader scope of interpretation for judges.

3.5 Enforcement of Awards

The executive branch of the Saudi government comprises the King (i.e., the Crown) and the CoM, both of which are authorised to enact laws. The orders passed by the King have the status of the Royal Decrees, and are published in the Saudi Gazette, after which they become effective.[328] The CoM is also authorised to initiate and pass resolutions having binding legal effect.[329] The King as political sovereign has powers to issue orders which may abrogate existing laws or supplant resolutions passed by the CoM, and possess the ultimate authority to ratify international treaties.[330] The CoM encompasses several ministerial offices to perform various governance functions under the supervision of the King and his assignees. The CoM is liable to formulate laws in reference to all the administrative and developing issues of the Kingdom, including the laws related to the development of education, economy, finance, and

[327] Duderija (n 314) 195-206.

[328] Al-Ammari and Martin (n 100) 387-408.

[329] Al-Assaf (n 286) 4.

[330] ibid.

administrative matters.[331] The Council is empowered to establish such committees which may be assigned the responsibility of implementing policies in the concerned department and reviewing the work of governmental authorities.

The political structure of the KSA is thus highly centralised, and the executive branch of the government is vested with comprehensive powers to formulate or abrogate laws. The King exercises extensive powers, which is compatible with a theoretical constitutional monarchy in the sense that the Saudi interpretation of Sharia rulings is considered to constitute the national constitution, as the supreme source of law and authority, although this would conventionally be described as an absolute monarchy from a Western perspective.[332] All ruling powers in the Kingdom are fundamentally bound by the limits of the Sharia, which raises the question of how the executive branch is empowered with exclusive powers to impose domestic law according to new legislation and policies when the traditional Sharia framework accords local judges extensive authority and autonomy in interpreting Sharia. In practice, judges have always been appointed by governing authorities throughout Arab-Islamic history, thus the issuance of national legislation, alongside the appointment of judges to execute national laws, is in effect a continuation of the classical paradigm.

This is important in the sense that it illustrates important judicial perspectives of the Saudi government in empowering the executive branch to develop and protect the legal system of the Kingdom.[333] King Abdul Aziz Al-Saud already reiterated to incorporation of *ijtihad* (juristic opinion) as a source of law in the national legal system during the formative years of the modern Kingdom, considering it to be the basic need of time, although this was opposed by many traditional Saudi clerics from Najd. The clerical establishment upon whom the King and CoM depend for social legality generally opposed the development of social reforms, while the new generation increasingly look to the King to uphold Islamic principles.[334] It is important to mention that in the case of Saudi Arabia the appointing of CoM by the King was a major component of the government that provided basis for social developments. Some examples of these developments are the facility of dialogue between Islamic scholars and society with the setting up of the Forum of National Dialogue, to protect the rights of Muslims, non-Muslims,

[331] Saad Badah, 'Recognition and enforcement of foreign arbitral awards in Kuwait' (Ph.D. thesis, Brunel University 2016).

[332] ibid.

[333] ibid.

[334] Al-Muhanna (n 27).

and foreigners, and to organise municipal elections in the Kingdom.[335] To sum up, it is logical to say that the best way of protecting Islamic heritage of Saudi Arabia was to create a more stable and centralised system with an exclusively empowered executive branch.

3.6 Chapter Summary

The new SAL 2012 marks a significant milestone in terms of bringing improvements within the practice of arbitration legislations in the Kingdom. It uses the UNCITRAL Model Law as a base, and applies global practices that adhere with the Kingdom's system and international norms. This chapter answered the second research question, to understand how Saudi arbitration has evolved from the traditional to modern framework. In this regard, this chapter has set the framework for analysing recognition and enforcement of foreign arbitral awards in the KSA. The arguments revolve around highlighting the Saudi efforts related to reforming arbitration framework and overall Saudi legal system in general. The main theme of the arguments concerned how the traditional legal system of Saudi Arabia has evolved to accommodate international legal standards on arbitration and protection of foreign investments. The energies of the government have focused on aligning domestic standards of recognising and enforcing foreign arbitral awards with the standards of WTO and the NYC. The SAL 1983 started its journey towards adopting modern standards and the SAL 2012 expedited the efforts in more concentrated manner, seeking to create certainty, an effective system for redress, and transparency for the enforcement of foreign and indeed domestic arbitral awards. This helps alleviate the burden of domestic courts.

Moreover, to further improve the arbitration standards in the country, the government have introduced reforms in the judicial system by introducing a specialised enforcement forms to expedite recognition and enforcement of both domestic and foreign arbitral awards. The role of Saudi government in reforming its domestic framework for arbitration has been evolving for the last three decades. There is room for improvement and still a great deal of work to be accomplished of winning the confidence both local community and foreigners in relation to the recognition and enforcement of arbitral awards. The fundamental challenge for the Saudi legislative system is harmonising the modern standards of arbitration with the religious orientation of its legal system. The principles of Islamic jurisprudence contradict many standards of recognising and enforcing modern arbitral awards decided in countries not

[335] ibid.

following Sharia, and the domestic legislative system in the KSA demands strict adherence to the principles of Quran and Sunnah. However, it is important for the Saudi government to harmonise both standards, instead of letting them conflict with each other.

Recent government efforts have moved in the direction of creating harmony between international arbitral awards and the domestic requirements of legislating, interpreting, and executing the laws. Consequently, the SAL 2012 limits the power of the Kingdom's courts and intervenes to make progress in alignment with the principles of Islamic jurisprudence and Saudi commitments to the NYC. The Saudi legal system has opened itself to the international standards of recognising and enforcing foreign arbitral awards, although particular issues of harmonising require detailed attention from researchers and jurists. The debate revolves around solving complex issues of harmonising the normativity of two different legal systems.

Chapter 4: Saudi Public Policy in Arbitration and Sharia Jurisprudential Principles

4.1 Introduction

To seek the settlement of contractual disputes, parties to international commercial agreements resort to arbitration, which means businesses cannot function adequately without adjudication in Saudi Arabia. Many countries, including Saudi Arabia, have signed and ratified the NYC (which succeeded the Geneva Convention on the Execution of Foreign Arbitral Awards 1927), but there are practical problems of implication facing the leading arbitration convention for arbitration in international commercial transactions. Although there are some caveats and reservations concerning the NYC in diverse jurisdictions worldwide, the enforcement of arbitration awards with reference to its provisions comprises the cornerstone of international arbitration, but its allowance of public policy in member states' jurisdictions can cause unpredictable arbitration outcomes. As discussed in the previous chapters, SAL 2012 established an arbitral regime which recognises modern law as compare to other regulations and legislations in the past. However, like many countries around the world, the KSA also has some reservations on the NYC, especially when it comes to the country's law governed by Sharia, and the extent to which this overlaps with the zone of public policy is pertinent to the applicability of the conventional arbitration subject to the NYC. Saudi public policy is axiomatically aligned with Sharia law as per the national constitution.

This main aim of this chapter is to add central point of arguments to answer research question which is to explain the key issues of selection of laws in recognising and enforcing arbitral awards with reference to interpreting public policy. Therefore, this chapter analyses and highlights various interpretative challenges pertinent to the enforcement of arbitral awards. It identifies the issue of volatility of arbitration awards. The most important impact of the chapter is to identify various factors that may create challenges in enforcing arbitral awards in KSA. This chapter discusses the issues of public policy, considering the limitations and circumstances in which parties may seek annulment of international arbitral awards. This chapter strives to explore three themes with a view to grasp the underlying legal principles behind them. Firstly, this chapter examines the perception that commercial contracts in Saudi Arabia are recognised and enforceable when they are aligned with the Islamic jurisprudential principles. This forms the first element of the critical examination of jurisprudential principles

in Saudi Arabia based on Islamic beliefs. Secondly, the chapter explores the view that the international commercial arbitration awards that conflict with the Saudi public policy are not aligned with the Islamic principles in general. It cites elements of decided cases to further examine how international organisations engage with Saudi counterparts prior to the materialisation of disputes. Thirdly, this chapter critically examines evidence of arbitral awards that conflict with Saudi public policy and if they have an impact on Saudi social and economic development.

4.2 Saudi Execution Law (2013)

As was previously mentioned, the BoG is the competent court in Saudi Arabia for the purposes of recognising foreign judgements; however, in 2013 with the introduction of the Saudi Execution Law, Article 13(g) of the law of the BoG stated that the Execution Department was the most competent authority for the purposes of hearing applications for the recognition of foreign awards.[336] Similarly, Article (11) of Saudi Execution Law 2013 emphasised that any treaty which govern the recognition will take measure over any provision of the Law and would therefore application to the NYC.[337] Similar to how the foreign verdict can still be respected, Saudi courts are unable to consider matters for whom a court ruling was rendered by a competent foreign court (in accordance with the international jurisdiction). This is due to Article 11 of the Execution Law. The litigants in the case where the judgement was issued may also be called and given the opportunity to defend themselves in court. The court's law must be followed in order for the order to become final, and the court's decision cannot in any way conflict with the rulings made by Saudi Arabia's courts. Last but not least, the judgement shouldn't allow for anything determined to violate Saudi Arabia's public order or ethics.[338]

Analysis of Article 11 (1) leads to the understanding that Saudi courts should not have any jurisdiction over the subject matter disputes, and foreign judgments could not be recognised where Saudi courts have competing the jurisdiction in international matters.[339] However, Article 11 (4) provides that any judgment, including foreign ones, will not be recognised in the KSA if there is conflict with a previous judgment passed by Saudi courts on the same subject,

[336] Arbitration Law No. M/34,art 55(1).

[337] Saudi Arabia Execution Law 2013, Art 11.

[338] Ibid.

[339] Bremer (n 37).

which raises a clear conflict and restriction in the interpretation of Article 11 (1).[340] With reference to the public order provision in cases of foreign judgments under the previous regime, the recognition by the BoG under Article 6 of the Procedural Rules stated that foreign judgement is not applicable when it is contrary to public order, unlike the Execution Law Article 11; however, Article 6 of the Procedural Rules does not require compliance with Saudi Islamic law and the principles of Sharia.[341] Therefore, any foreign award in conflict with the existing principles of Sharia as understood by the KSA's courts would not be considered under the new regulations. Saudi Arabia has been using the Article V (2(b)) in the situation as a defence when the Kingdom does not enforce arbitral awards under the influence of the Sharia law and cultural constraints. The following section provides a detailed overview of national public policy and its influence over the enforcement of arbitration awards.

4.3 Public Policy

4.3.1 Public Policy in Arbitration

As discussed in the previous section, there is no settled definition for 'public policy' in previous literature.[342] The question of the recognition and execution of foreign arbitral awards in regard to the NYC is complicated by the difficulty of arriving at an accurate definition of the notion. This is mainly because public policy can be considered to encompass any and every sphere of domestic law. There are extensive debates about the extent and scope of public policy in English and in other languages, reflecting divergent opinions about public policy and associated terminologies that can be applied for expressing similar ideas, including *public order*, *public interest*, *international public policy*, *transnational public policy* and more.[343]

While it is difficult to reach a consensus on the definition of public policy, its impact on the enforcement and recognition of foreign arbitral awards is significant. There are three major areas where public policy practices have had an impact on the enforcement of arbitral awards: (1) arbitral rules can be reshaped by national public policy; (2) public policy can influence

[340] Ibid. 37.

[341] The Rules of Procedure before the Board of Grievances, issued by the decision of the Cabinet Ministry, No. 190 dated 16/11/1409 H, art 6.

[342] M Aboul-Enein, 'Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes', (2000) 2 Journal of Arab Arbitration, p 1-6.

[343] Ariel Ezrahi, 'Arbitration in the Arab Middle East, a Snapshot' (2005) 20-11 Mealey's international arbitration report 17, 5 (stating that public policy is one of the grounds for refusal to enforce a foreign arbitration award).

court decision in terms of refusal; and (3) public policy can have a great influence to set aside the enforcement of the foreign arbitral award.[344] Public policy becomes pertinent when foreign arbitral awards are at issue in a particular national jurisdiction, including (1) the country where the foreign arbitral award is established, and (2) the country where the foreign arbitral award is to be enforced.[345]

Aside from the definition of public policy, the scope of public policy is also difficult to define, especially in relation to the relevant jurisdiction.[346] The concept of public policy also differs among the GCC states. In Saudi Arabia, the concept of interest is a contrary to the public policy, which creates difficulties in the process of enforcement of the foreign arbitral award; however, in other GCC states' commercial codes, interest conditions are acceptable. The International Law Association's Commercial Arbitration Committee provides different classifications of public policy and resolution in terms of the enforcement of foreign arbitral awards.[347] In Saudi Arabia, the public policy is mainly identified and determined by the influence of Sharia law and other important Islamic doctrinal approaches (i.e., *fiqh*).[348] In other GCC states like the UAE, Sharia is also considered as the main component of public policy, despite the national legal system being based on civil law. El-Ehdab[349] stated that the general meaning of public policy in the KSA is based on Sharia, and must particularly respect sources from the Quran and Sunnah in their formation, and individuals must respect their terms and conditions. However, Lew argued that in practice public policy additionally considers fundamental economic, political, social, and other factors.[350]

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[344] Bernard Hanotiau and Olivier Caprasse, 'Public Policy in International Commercial Arbitration' in E Gaillard E and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2009) ch 27, 798.

[345] ibid.

[346] Hamid Gharavi and Lara Karam, 'Arbitration in Yemen' (2006) 17 ICC International Court of Arbitration Bulletin 41, 44.

[347] ILA Committee on International Commercial Arbitration, Public Policy as a Bar to the Enforcement of International Arbitral Awards, London Conference report (2000). The Final Report of the ILA Committee was presented at the 2002 New Delhi conference and published in the 2002 Proceedings and at <www.ila-hq.org>.

[348] Aboul-Enein (n 332).

[349] El-Ahdab, A., Arbitration with the Arab Countries, p.569 notes that the main characteristic of the Arbitration Regulation 1983 was the recognition of the validity and binding force of arbitration clauses, pp. 553-554.

[350] Julian D. M. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards (Ocean Publications, Dobbs Ferry, N.Y. 1978) 532.

The most appropriate way to understand the public policy in the context of foreign awards is to understand first the different conventions that triggered the enforcement and refusal of awards on the grounds of public policy. As discussed in previous chapters, the NYC allows the refusal of awards on the ground of public policy, which is an important element (and indeed one reason why the Convention itself is so widely adopted worldwide). There is a fundamental assumption about the public policy issue of the NYC is that it seems to be a sensible precondition for states to join the Convention. Apparently public policy is more important than particular international arbitral awards (this is an absolute maxim). It is fine for Saudi Arabia to unilaterally remove its own right to reject awards based on public policy if that's what they want to do; however, if the US or China and other countries around the world were forced to do this (i.e., as a condition of membership), they would maybe withdraw from the Convention.

The NYC states:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that… the recognition or enforcement of the award would be contrary to the public policy of that country.[351]

The public policy exception to the enforcement and recognition of arbitral awards has negative impacts on the use of arbitration and constrains achievement of the fundamental purposes of arbitration, such as achieving fairness, transparency, and good governance.[352] This means the competent authority in the national jurisdiction can annul an arbitral award under the NYC through deciding that the award is contrary to public policy. This means the public policy can challenge the normal applications of any dispute in selecting arbitration as a mean to settle disputes between different parties. The broad application of this exception on the ground of public policy enables competent local authorities to reject foreign arbitration awards.[353] This is because the NYC has left the space for the local courts to select certain principles for the refusal of awards.

Each member state of the NYC (1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards) has a legal prerogative to ratify the Convention to ensure that national

[351] New York Convention (n 190), Art V (2)(b).

[352] Born: ICA, supra note 16, at p. 3166. Each State has its own concept of what is required by its 'public policy' (or *ordre public*, in civil law terminology); Redfern, supra note 2, at p. 614.

[353] ibid.

and international arbitral awards can be dealt with under their public policy.[354] However, ratification of the Convention *per se* does not *ipso facto* entail the recognition and enforcement of awards under the Convention's terms; rather, each country's authorities retain the prerogative to reject awards based on public policy.[355] Public policy refers to a varied nature of legal reasons, conditions, rules, and regulations used to holistically deal with national and international commercial arbitral awards,[356] in the event of commercial and or contractual disputes.[357] To date, it is very common to find nations where domestic judges decline to enforce international arbitral awards based on the premise that the awards contradict local public policy.[358] This implies that each country would have its way of operationalising their public policy, such that once the substantive and procedural legal system fails to align with that of the international convention,[359] rejection thereof becomes inevitable.[360]

4.3.2 Public Policy in Saudi Arabia

In Saudi Arabia, Islamic principles and Sharia law are the most important foundations of the constitutional and legal system, comprising the jurisprudential principles that govern the national law of the KSA and public policy.[361] Saudi public policy is driven by jurisprudence, as is the case with any country.[362] In the KSA, public policy plays an important role in the judicial system, and the government has long recognised its related difficulties associated with commercial disputes. The MoJ have been expanding the establishment of commercial courts

[354] Wolfgang Kühn, 'Current Issues on the Application of the New York Convention A German Perspective' (2008) 25 Journal of International Arbitration 743, 757.

[355] Leon Trakman 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) The Chinese Journal of Comparative Law, 6 (2), 174, 227.

[356] Kühn (n 344) 757.

[357] Richard A. Cole 'The public policy exception to the New York Convention on the recognition and enforcement of arbitral awards', (1985) Ohio state journal on Dispute Resolution, 365.

[358] ibid.

[359] Anton G. Maurer *Public Policy Exception under the New York Convention: History, Interpretation, and Application* (Revised Edition, Juris: Huntington, New York, 2013) 49.

[360] Bedanta Chakraborty, 'Enforcement of Set aside Awards' (2020) 2 Indian Arbitration Law Review 112.

[361] Amel K. Abdallah, 'Islamic Sharia and arbitration in GCC States: The way ahead' (2020) International Review Law 318.

[362] Ronald M Dworkin, 'Does Law Have a Function--A Comment on the Two-Level Theory of Decision', (1964) 74 The Yale Law Journal 640.

in major cities around the country, including in Makkah, Riyadh, Jeddah and Dammam.[363] This implies that commercial courts could serve the industry in larger cities, while chambers and appellant panels can serve other parts of the country, supporting the business community to develop and prosper based on integrity, trust, and stability.[364] It is believed that a legally stable commercial environment spurs investment and economic growth needed for the actualisation of Vision 2030.[365]

The focus of the commercial courts is to facilitate the "swift determination of commercial disputes".[366] For instance, the MoJ reported that, as of October 2018, commercial courts were issuing over 2,600 rulings per month.[367] At a regional level, the KSA has been participating in the training of commercial arbitrators whose focus has been to settle commercial disputes with speed,[368] rather than to channel such disputes to ordinary courts. This strategy has facilitated the smooth movement of trade and investment at local and regional level.

Public policy often serves as a national interest of the origin country or state while NYC is largely focussing on the international arbitration. In the case of KSA, it remain with silent features of constitutes public policy. NYC and arbitration conventions aim to develop a reliable arbitration mechanism to resolve disputes. The commercial interaction between business entities at the local and international scene has inevitably increased, with a steady rise in disputes and the eventual need for arbitration.[369] There are many ways in which to deal with commercial dispute resolution; for organisations operating in Saudi Arabia, Nesheiwat and Al-Khasawneh[370] opined that they prefer arbitration to alternative dispute resolution. This is

[363] Saudi Gazette report 'Commercial court in Makkah by next August, The Saudi Gazette (Riyadh, 23 December 2018) <http://saudigazette.com.sa/article/550875/SAUDI-ARABIA/Commercialcourt-inMakkah-by-next-August> accessed 17 January 2019.

[364] Saudi Gazette 'JCCI honing skills in commercial arbitration, *The Saudi Gazette* (Riyadh, 05 March 2013) <http://saudigazette.com.sa/article/34805/JCCI-honing-skills-in-commercial-arbitration> accessed 17, January 2019.

[365] ibid.

[366] ibid.

[367] ibid.

[368] Saudi Gazette 'JCCI honing skills in commercial arbitration, The Saudi Gazette (Riyadh, December 2013) http://saudigazette.com.sa/article/34805/JCCI-honing-skills-in-commercial-arbitration <Cited: Thursday January 17, 2019 / 11, Jumada al-ula, 1440>.

[369] ibid.

[370] Nesheiwat and Al-Khasawneh (n 18).

because arbitration offers expediency, the ability to use experience on solving disputes, and the opportunity to avoid national courts and their perceived bias influenced by the socio-cultural framing of disputes.[371] However, the speedy resolution of disputes using arbitration faces high risk of non-performance, because Saudi Arabia faces challenges associated with poor recognition and enforcement of arbitral awards because of public policy.[372] It also implies that the customs, laws, social-cultural norms as well as religious-centred legal philosophy conspire to form a negative force embedded in public policy,[373] which creates conflict and negative publicity of the foreign arbitral awards in Saudi Arabia. This research, therefore, sets out to explore four major issues linked to the problem of non-recognition and enforcement arbitral awards in the KSA:

i. That commercial contracts in Saudi Arabia are recognised and enforceable when they are aligned with the Islamic jurisprudential principles.

ii. That the international commercial arbitration awards that conflict with the Saudi public policy are not aligned with the Islamic principles in general.

iii. That the arbitral awards that conflict with Saudi public policy have an impact on Saudi social and economic development.

iv. There is a potential for developing a process-based framework that could mitigate the impact of unrecognised international arbitral awards in Saudi Arabia.

The distinguishing characteristic of the KSA in comparison to other national jurisdictions is that its jurisprudential principles are rooted in Sharia and Islamic religious, social, and cultural perspectives on law.[374] For one to examine the importance of the concept of jurisprudence to public policy in general, Shiner argued that the application of jurisprudential principles imply the use of practical wisdom about the law, including, the legal philosophy.[375] For Islamic countries such as the KSA, jurisprudential principles do not end at legal philosophies, but also

[371] ibid.

[372] Asam Saud Alsaiat, 'Disputes in administrative contracts and the possibility of utilizing; arbitration to solve them' (2015) 5 (6) Public Policy and Administration Research 45-48.

[373] Nesheiwat and Al-Khasawneh (n 18).

[374] Roger A. Shiner 'Strictly Institutionalized Sources of Law: Some Further Thoughts' (2007) 20 Ratio Juris, 2, 310, 324.

[375] ibid.

the embodiment of legal policies and principles embedded in Sharia law.[376] Therefore, the concept of public policy in Saudi Arabia is based on the philosophical understanding of Sharia, and how it interacts with the Saudi legal system.[377] Sharia law is critical to the exploration of public policy in the KSA because it offers the basis upon which Saudi local judges base their decisions.[378]

Islamic *principles* differ from Islamic rulings; however, they all have an impact on the decisions made by judges.[379] However, the principle of public policy in general does not emanate from Islamic rules *or* principles; only the public policy for the KSA is linked to Islamic jurisprudence, hence the need to explore this feature in more detail. The literal and traditional meaning of jurisprudence refers to the "practical wisdom about law", including but not limited to "the intellectual capacity to frame and apply laws to sound theoretical principles".[380] On one hand, jurisprudence could take the form of abstract legal philosophy that deals with attributes of legal rules, norms, systems, institutions, and topics that could be used for legal reasoning and decision-making.[381] This arm of jurisprudence would equally deal with legal validity, rights, and the legal interpretation[382,383] On the other hand, jurisprudence could relate to the embodiment of legal, moral, social, political, and economic policies and principles in the body of law or of legal decisions applied in general,[384] and in particular countries.[385]

In Islamic jurisprudence, explicitly stated laws are found in the Quran, and in documents produced by a consensus reached by the Muslim community (*ijma*).[386] Otherwise, laws are

[376] Asam Saud Alsaiat (n-363)

[377] El-Ahdab and El-Ahdab (n 101) 669 – 670.

[378] Nesheiwat, Al-Khasawneh (n- 18)

[379] ibid.

[380] Roger A. Shiner 'Jurisprudence' The Canadian Encyclopaedia (2007) https://www.thecanadianencyclopedia.ca/en/article/jurisprudence <accessed: 17/01/2019>.

[381] ibid.

[382] ibid.

[383] Dworkin, Ronald M., "Does Law Have a Function? A Comment on the Two-Level Theory of Decision" (1965). Faculty Scholarship Series. Paper 3614. http://digitalcommons.law.yale.edu/fss_papers/3614.

[384] Roger A. Shiner 'Jurisprudence' The Canadian Encyclopaedia (2007) https://www.thecanadianencyclopedia.ca/en/article/jurisprudence <accessed: 17/01/2019>.

[385] Roger A. Shiner 'Strictly Institutionalized Sources of Law: Some Further Thoughts' (2007) 20 Ratio Juris, 2, 310, 324.

[386] Charles P. Trumbull, 'Islamic arbitration: a new lath for interpreting Islamic contracts', 59 Vanderbilt Law Review, (2006) 609, 631.

subject to personal interpretation by judges. The window of opportunity for judges to interpret a commercial dispute in their own understanding had been a critical factor that weakened perceptions of international arbitral awards in Saudi Arabia. Some key factors include the lack of transparency in the rationale for judgements; unclear legal processes being used; and general protection of contracts for government institutions against any private sector ones.[387] The international community uses the concept of public policy for arbitrators to implement international commercial disputes resolution by enforcing an award in a host country.[388]

However, if such an enforcement becomes unsubstantiated at law on the grounds of public policy of a particular jurisdiction, there is a potential negative impact or perception that international commercial arbitration would be seen as ineffective alternative dispute resolution for a commercial contract.[389] From the onset, commercial contracts bring organisations together to form contractual entities (or parties). In the case of the KSA there has been a government drive to promote FDI by the Crown Prince Muhammad Bin Salman,[390] Deputy Premier and Minister of Defence. For instance, the Crown Prince launched "Vision 2030"; aimed at weaning the Kingdom of oil revenues, and referred to the "dangerous addiction to oil" and the need to diversify the economy.[391] One of the major investment commitments by the government has been the proposed development of the USD 500 billion futuristic new city along the Red Sea called "NEOM", which will link Saudi Arabia with Egypt and Jordan and create high-tech businesses and thousands of new jobs.[392]

4.4 The Role of Sharia Jurisprudence

4.4.1 The Saudi Legal System

According to Article 44 of the Basic Law, the Saudi legal system is derived from the judiciary, the executive, and the legislature.[393] The Constitution demands cooperation between the three

[387] ibid.

[388] Kühn (n 344) 757.

[389] Maurer (n 349).

[390] Ahmed Aldhafeeri, 'Administrative contracts and arbitrability: Obstacles and barriers' (2021) 26 (1) Journal of Humanities and Social Science 37-41.

[391] ibid.

[392] ibid.

[393] Basic Law (n-6).

arms of government,[394] although the final say concerning governance and legal issues rests with the Crown.[395] Therefore, while there is a constitutional separation of powers, the monarch is ultimately the deciding factor in Saudi governance.[396] This fundamental structure of government can be traced back to the formation of the modern Kingdom in Najd in 1902.[397] In line with the formation of the KSA, El Ahdab and El Ahdab[398] observed that the Saudi legal system comprises of Sharia jurisprudential principles. Hence, the initial interpretation of the SAL 1984 and SAL 2012 need to consider the application of Sharia as the mainstay of Saudi public policy, as well as the legal system that governs it.[399] SAL 2012 requires the consideration of Sharia law and related public policy, stating that:

> "Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following: Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise".[400]

The law does not directly explain or specify the implementation of Sharia rules with regard to arbitrability, and the Kingdom's legislature does not mention its application of Sharia according to clearly defined principles, because it reflects certain principles under Sharia law that vary between individual cases. Therefore, Sharia law needs to be codified in alignment with prevailing global norms in commercial law, which is the key challenge addressed throughout this thesis.

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[394] ibid.

[395] Basic Law (n 6), art 5(a), states that "the system of governance in the Kingdom of Saudi Arabia shall be monarchical".

[396] ibid.

[397] Mary B. Ayad, 'The Doctrines of Public Policy and Competence in Investor–State Arbitration' (2013) 27 (4) Arbitration Law Quarterly 297-341.

[398] El-Ahdab and El-Ahdab (n 101)

[399] Ibid.

[400] Arbitration Law No. M/34, art 38.

4.4.2 Sharia Law as the Foundation

The word "Sharia" symbolises two things; either a pathway or a source of pure water from which people and their domestic workers and farm animals can get nourishment.[401] It is a way of life prescribed by Allah; which is interpreted under Islam to mean the rules and the protocols set forth in the Quran,[402] including the exemplar evidence left by the Prophet Muhammad (ﷺ), in his Sunnah – the traditions, actions, experiences, and parables of his life.[403] The supremacy of the Quran emanates from the belief that Allah's creations serve and fulfil His will; hence, Allah is the source of authority and sole sovereign, particularly as expressed in the Holy Quran.[404]

The Quran offers detailed principles and guidelines for Islamic religious living, but such guidelines are not codified, and are generally subject to interpretation.[405] As a result, the Islamic legal system has proven to be highly flexible and adaptable to many different civilizations throughout history, because it can be applied to a myriad of issues that reflect sensitivity to prevailing cultural norms, and it has naturally been particularly germane to the culture of the religion of the Arabian Peninsula.[406] Hence, Sharia jurisprudence naturally fostered the development of the judiciary, executive, and regulatory bodies in the KSA.[407] However, there

[401] Abdulrahman Baamir and Ilias Bantekas 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2014) 25(2) Arbitration International 239, 263.

[402] Harb, supra note 143 at p. 115. 'Shari'a, a word whose etymology evokes a 'path' or 'way', refers to a divinely commanded code of conduct for human behaviour' Id. See in general:

[403] Harb (n 14) 130.

[404] Qur'an 12:40: "The command is for none but God. He hath commanded that ye worship none but Him".; Qur'an 7:54: "Verily, His are the creation and the command".

[405] Jean-Pierre Harb, and Alexander G. Leventhal, "What to Expect When Arbitrating in the Kingdom of Saudi Arabia" (2015) 12 Transnational Dispute Management 1.

[406] Mutasim Ahmad Alqudah, '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 and Regulatory Issues 1-17.

[407] Ibid.

is no principle of separation of powers between the three authorities; meaning that the CoM and the Crown have full powers,[408] to legislate and work as executive decision makers.[409]

Sharia law is not only considered as the primary source of legislation, but the driving force of all elements of governance,[410] manifest in the Saudi constitution and Basic Law.[411] The Holy Quran is the source of the legal structure and governance systems that have been put in place to form a clear foundation for general jurisprudential principles are operationalised.[412] It is expected that judges, the legislature, and lawyers are to use Sharia law and the Sunnah to make consistent and coherent decisions regarding law and regulations, including the settlement of disputes, in alignment with the overriding principle of divine justice, which varies among individual circumstances.[413] The legal system, therefore, is not codified; hence, judgements and legal opinions are expected to vary from judge to judge, considering that the field of Sharia law and Sunnah is extremely vast and complex, making it difficult to discern uniformity and consistency in the delivery of judgements for complex issues.[414]

4.4.3 The Executive Arm

The role of the Saudi Monarch in creating the executive unit of the government is enshrined in the constitution, which declares that the King is the supreme leader and the source of political power. The Basic Law (i.e., the constitution), Article 44, guides the composition of the executive at any point in time. The King of the KSA heads the executive,[415] but the executive

[408] The Law of Judiciary, Royal Decree No. (M/64) Article 20 states that "A decision of the General Panel shall become final when approved by the Minister of Justice. If the Minister does not approve the decision, he shall remand it to the General Panel for further deliberation. If the deliberation does not result in reaching a decision acceptable to the Minister of Justice, the matter shall be referred to the Supreme Judicial Council for determination, and its decision shall be final". See also Articles.
9,11,22,24,27,48,55,63,70,71,73 and 74.

[409] ibid.

[410] Ahmed A. Al-Ghadyan,. 'The Judiciary in Saudi Arabia' (1998) 13 Arab Law Quarterly 3, 235.

[411] Basic Law (n 6) art 7 states that "Governance in the Kingdom of Saudi Arabia shall be derived from the Book of the Highest God and the Sunnah of his messenger".

[412] ibid.

[413] Khanifah Khanifah, et al. 'The effect of corporate governance disclosure on banking performance: Empirical evidence from Iran, Saudi Arabia and Malaysia' (2020) 7 (3) The Journal of Asian Finance, Economics and Business 41-51.

[414] Ibid.

[415] Basic Law (n 6) art 44 says "The King shall be the final authority".

arm also comprises the CoM, the Ministries, government agencies, and semi-public agencies that produce regulations and the like.[416] The role of the CoM and other executive units is to draft and modify laws and regulations, as well as to examine the existing laws to see if they are fit for their intended purposes.[417] The involvement of the King in such activities is to oversee the process and chair the final decisions, be they legislative or executive in nature.[418]

Because of the structure of the government, the executive arm through the CoM have a dual role of creating legislation,[419] as well as undertaking the executive functions.[420] The overlap between the executive arm and the legislature is facilitated by the Sharia jurisprudential principles that apply in Saudi Arabia.[421] If there is new legislation for which the CoM have no expertise, they have a right to appoint a bureau of experts to provide an expert opinion, before the executive makes its final decision.[422] Ultimately, the CoM applies Sharia law and the guidance from the supreme law provided by the Quran and Sunnah as the ultimate guide.[423]

It can be argued that the executive arm of the government plays a critical role in setting the public policy, which in turn is influenced by the Sharia as well as general jurisprudence.[424] Therefore, the interpretation of the Saudi public policy largely depends on the personal experiences and understanding of the concerned judges. How these judges view or interpret the position of the executive arm of government's intentions (through laws or executive orders) is critical to understanding the impact of public policy on arbitration.

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[416] Al-Ghadyan (n 414).

[417] Khanifah Khanifah, et al (n-404)

[418] ibid.

[419] Bantekas, B Chigara and Abdulrahman Baamir 'Saudi law and judicial practice in commercial and banking arbitration' (OpenGrey Repository, 2009) https://core.ac.uk/display/40012462?source=3&algorithmId=14&similarToDoc=10831084&similarToDocKey=CORE&recSetID=478c554b-c756-4eb3-9b4e-599a8c8757be&position=1&recommendation_type=same_repo&otherRecs=40012462,40042229,143475663,46519416,74374454.
<accessed: 27/01/2019>.

[420] Alkahtani (n 409).

[421] El-Ahdab and El-Ahdab (n-101).

[422] Khanifah Khanifah, et al (n-404)

[423] Ibid.

[424] El-Ahdab and El-Ahdab (n-101).

4.4.4 The Legislature

The importance of the legislature in the Saudi legal system cannot be underestimated when it comes to international commercial arbitration.[425] Even though the virtues of international commercial arbitration are clearly known, there are times when it becomes highly likely that a party to arbitration would fail to honour or enforce it.[426] When there is a risk that a party expects the enforcement of foreign arbitral awards to fail, or that a party to arbitration fails or refuses to honour it, the first thing to question would be the status of legal system and structures in the jurisdiction (or state) where the arbitral award is to be enforced.[427] Kerin and Cullen[428] believe that one might question the status of the ratification of the NYC by the country involved as well as level of reputation a country or city in relation to the ease of implementing international arbitration law. In this context, the legislature plays a critical role in guiding the nation concerning the necessary commercial navigation through the 1958 NYC to the laws and regulations that could have been set to simply the complexity of international commercial arbitration.[429] The legislative arm of the Saudi government comprises the CoSS and the Consultative Council (Majlis Al-Shura).[430]

- *Council of Senior Scholars (CoSS)*

The King appoints members of the CoSS to make legislative and judicial reforms that can represent all elements of Islam.[431] The King invites members to represent all four known schools' Islamic thoughts as a means of creating law in a flexible environment.[432] This Council forms the highest religious authority.[433] It can be argued that the structure and composition of the legislative arm derives authority from the Islamic Sharia law,[434] the Basic Law of

[425] Bantekas, Chigara and Baamir (n 410).

[426] Lughaidh Kerin and Anthony Cullen 'Enforcement of foreign arbitral awards: a London perspective' (2017) 3(4) International Journal of Diplomacy and Economy 388.

[427] ibid.

[428] ibid.

[429] Mutiara Hikmah, 'The Roles of the Supreme Court of the Republic Indonesia in Enforcement of International Arbitral Awards in Indonesia' (2013) 3 Indonesia Law Review, Islamic University of Indonesia 238.

[430] Khanifah Khanifah, et al (n-404)

[431] ibid.

[432] ibid.

[433] ibid.

[434] Basic Law (n 6) art 1 states that "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's messengers"..

Governance (i.e., the Saudi constitution), and public policy.[435] as the country undertakes legislative reforms to accommodate, *inter alia*, the new SAL 2012,[436] it can be said that adopting council members representing the four main schools of Islamic jurisprudence allows for deeper reflection and balance within the legislature.

- *Majlis Al-Shura*

The Consultative Council (Majlis Al-Shura)[437] comprises 150 members appointed by the King, including 30 seats reserved for women.[438] The Consultative Council issues laws, international treaties, conventions, and any concessions that can be amended eventually by the Royal Decree.[439] It can be opined that the Consultative Council was critical for the examination of the new SAL 2012 and SEL, in order to include a wider perspective from multiple stakeholders and members.[440]

However, despite the existing number of legal problems associated with the recognition and enforcement of foreign arbitral awards,[441] there is no evidence that existing 'authority of res judicata, and the potency of the competent court to review the merits of the dispute' have resolved the weakness associated with the international commercial arbitration enforcement process in the KSA.[442] In other words, the legislature is a critical arm of government that works in conjunction with the executive, and it operates within the Islamic Sharia law; however, there is no evidence that it has been examining the impact of current arbitral law under the Saudi public policy. There has been practical realisation and implementation of the legal reforms instituted by the legislature regarding the adjustments of international commercial arbitration mainly because the government realised how critical FDI has become to the nation. Therefore, the role of multinational corporations in the creation of a viable transnational movement of capital to the Kingdom has been a key diver for legislative reforms under the umbrella of 'legal

[435] Harb (n 14), 113.

[436] Khanifah Khanifah, et al (n-404)

[437] Basic Law (n 7) art 67: the regulatory shall have the jurisdiction of formulating laws and rules conducive to the realisation of the wellbeing or wadding off harm to state affairs in accordance with the principles of the Islamic Sharia. It shall exercise its jurisdiction with the Law, and the Laws of the Council of Ministers and the Shura council.

[438] Khanifah Khanifah, et al (n-404)

[439] ibid.

[440] Khanifah Khanifah, et al (n-404)

[441] ibid.

[442] ibid.

and policy' reforms to improve the investment climate in the country.[443] For this reason, the CoSS and Consultative Council are critical to the legislative arm of the Saudi government, and they operate within the realm of Islamic Sharia jurisprudence while being closely aligned with the vision and policies of the national executive branches of government.

4.5 Islamic Sharia Courts in Saudi Arabia

The judiciary of the KSA comprises three arms, namely: (i) the Sharia courts[444]; (ii) the BoG, also referred to as Administrative Courts; and (iii) and semi-legal committees.[445] Lawyers have found the Saudi judiciary to be highly complex because of the flexibility that it offers to its people, although this complexity is sometimes exacerbated by the poor knowhow of the operations and application of Sharia law and Islamic jurisprudence, especially by international law practitioners.[446] However, Article 46 of the Basic Law states that the judiciary of Saudi Arabia should operate independently as its own authority, and judges should not be subjected to any external force or power other than that of the Islamic law of Sharia.[447] The largest form of court system of Saudi Arabia is set on Islamic Sharia and its jurisprudence.This implies that matters such as civil, criminal, family, and property matters are all heard in Sharia courts.[448] Only commercial cases as well as cases that require the establishment of an express committee are not covered by the conventional Sharia court system. For the cases heard at Sharia courts, there is a critical feature of expediency; cases are disposed of as speedy as possible.[449] As of 1 October 2007, there was a Royal Decree No. M/78 on 19/09/1428H aimed are reforming the judicial arm of the government; hence, the following courts system is operational in the Kingdom[450]:

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[443] ibid.

[444] Basic Law (n 6).

[445] Al-Ghadyan (n 404).

[446] Mhamed Biygautane, Graeme Hodge, and Paula Gerber, 'The prospect of infrastructure public-private partnerships in Kuwait, Saudi Arabia, and Qatar: Transforming challenges into opportunities' (2018) 60 (30) Thunderbird International Business Review 329-346.

[447] Basic Law (n 6) art 46.

[448] ibid.

[449] ibid.

[450] Bandar Al Hamidani, 'The New Court System in Saudi Arabia' (Al-Tamimi &com, Riyadh, 2014) <https://www.tamimi.com/law-update-articles/the-new-court-system-in-saudi-arabia/> Accessed: 27 January 2019.

i. i.The Law of Criminal Procedures, based on Royal Decree No. M/2 of January 22, 1435 H, supplements the Royal Decree No. M/1, which governs the Court of First Instance in several provinces. The General Courts, according to Article 31 of the Law of Procedures Courts, have jurisdiction 'over all claims and cases or the like not under the jurisdiction of other courts, notary public, and Board of Grievances'.451

ii. Criminal courts are granted powers under Article 128 of the Law of Criminal Procedures to deal with criminal cases, with the help of specialised panels (Article 20) for punishments and the like.452

iii. Family courts have jurisdiction under Article 33 of the Law of Procedures to deal with family status cases, such as marriage, divorce, custody, and the like.

iv. Commercial Courts under Article 35 of the Law of Procedures have jurisdiction over commercial disputes amongst businesses.

v. Labour Courts, under Article 34 of the Law of Procedures have jurisdiction over employment disputes such as contracts, wages, and the like.[453]

The Supreme Court remains the highest appellant court within the Sharia law system, with jurisdiction over all the decisions from the lower courts, as well as any fundamental challenges or inconsistencies with the interpretation of the Islamic Sharia law.[454]

4.5.1 Board of Grievances (BoG)

Another key part of the judicial arm of the government in KSA is the BoG, which was created in 1982 by Royal Decree No. M/51 (1).[455] The BoG has jurisdiction over cases between business entities and government institutions, having been established as a court with supreme administrative powers that could adjudicate or resolve contractual disputes on behalf of governmental and quasi-governmental institutions.[456] The BoG has jurisdiction over commercial disputes such as arbitration and the like; as a result, the performance of this court is largely dependent on the evaluation from a particular economic sector. For instance, the

[451] ibid.

[452] ibid.

[453] ibid.

[454] ibid.

[455] ibid.

[456] Khanifah Khanifah, et al (n-404)

banking sector reported challenges with uncertainty in dispute resolution.[457] The perception of weaknesses in the performance of arbitration law in Saudi Arabia meant that the judiciary needed to harmonise international standards of arbitration with the general Islamic jurisprudence.[458] If the BoG struggled with the settlement of international commercial arbitration cases, it meant that there was a void in the general jurisprudence and Sharia law. As a result, it must be borne in mind that 'the Saudi legal system, Shari'a law and Islamic jurisprudence are the main laws of the land, and they are applicable whenever there is a statutory vacuum'.[459]

4.5.2 Specialised Committee Courts and Tribunals

There are several committees and tribunals set up by various government ministries with specific jurisdictions mandating them to deal with legal issues pertaining to their reason for being established.[460] For instance, the Commercial Paper Committee was established to deal with commercial paper disputes, while the Agency Conciliation Committee dealt with the conciliation of commercial agency disputes.[461] Committees relating to banking, insurance, labour and the settlement of securities disputes are expected to be operational within the judicial system of the KSA.[462] Further, "the arbitral awards that conflict with Saudi public policy have an impact on Saudi social and economic development".[463]

4.6 International Commercial Arbitration as an Alternative Dispute Resolution

The government drive to invite international investment in Saudi aims to draw "the attention of key decision-makers, pioneers, regional and international experts"[464] as the country

[457] Bantekas, Chigara and Baamir (n 410).

[458] Yunus Emre, 'A refusal reason of recognition and enforcement of foreign arbitral awards: Public policy.' (2019) 56 (2) Zbornik radova Pravnog fakulteta u Splitu 503-522.

[459] ibid.

[460] ibid.

[461] ibid.

[462] Hamidani (n 441).

[463] Ibid.

[464] Saudi Gazette 'Saudi Int'l Franchise Expo 2019 set' (*The Saudi Gazette*, Riyadh, 2019) <http://saudigazette.com.sa/article/552047/BUSINESS/Saudi-Intl-Franchise-Expo-2019-set> accessed January 17, 2019.

showcases the "most prominent investment prospects, acquiring 50% of the market value in the Middle East and Africa estimated at $30 billion, of which about $15 billion is just for Saudi Arabia".[465] The Kingdom's plan is to end dependence on oil exports and open new horizons for commercial, global, and investment opportunities by attracting more investors and creating an investment climate signalling that the country is open for business to the world.[466] In practical terms, the government has demonstrated that it supports international commercial arbitration as a mechanism for settling commercial disputes by introducing new arbitration legislation,[467] and formulating an institution such as SCCA (by government decree) that focusses on arbitration as an alternative dispute resolution.[468]

The recognition of international commercial arbitration implies that Saudi Arabia sees the potential in the versatility and flexibility that it offers to the current legal system, including the ease with which arbitral awards against assets in foreign jurisdictions can be recognised and enforced locally.[469] Theoretically, international arbitration protocols allows disputants to take control of the process in the most flexible, and cost-efficient.[470] Over recent years successive Saudi regimes have engaged in the transformation and reformation of the KSA's approach to international commercial arbitration law.[471] They have done so by the introduction of institutions as well as the affirmation of the UNCITRAL Model Law through the introduction of arbitration codes.[472] Over the past years, there has been a realisation of the challenges associated with the SAL 1983, which led to the revised SAL 2012.[473,474] Legal practitioners

[465] ibid.

[466] ibid.

[467] Arbitration Law No. M/34 (n 22)

[468] Hamel Alsulamy, 'The Saudi Center for Commercial Arbitration: The Catalyst Most Needed' (2019) 37 (3) ASA Bulletin 585-591.

[469] Bedanta Chakraborty (350)

[470] ibid.

[471] Arbitration Law No. M/46

[472] Hamel Alsulamy (n 459).

[473] Arbitration Law No. M/34

[474] The Law contains 7 chapters and 58 articles: Chapter 1 (Articles 1-8) on General Provisions; Chapter 2 (Articles 9-12) on Arbitration Agreement; Chapter 3 (Articles 13-24) on Arbitration Tribunal; Chapter 4 (Articles (25-37) on Arbitration Proceedings; Chapter 5 (articles 38-48) on Proceedings for Deciding Arbitration Cases, Chapter 6 (Articles 49-51) on Nullification of Arbitration Award; Chapter 7 (Articles 52-55) on Authority and Enforcement of Arbitration Awards; Chapter 8 (Articles 56-58) on Concluding Provisions.

have seen the transformation from SAL 1983 to SAL 2012[475] as a positive move,[476] particularly the enactment of 'the Executive Regulations of the Arbitration Law ("Executive Regulations"), published in the Saudi Gazette', effective from 9 June 2017.[477] It has been argued that the aim of the Executive Regulations was to clarify certain key provisions of the SAL 2012, four years after the decree.[478]

According to Al Jarba, the KSA has been experiencing challenges in the operationalisation of the arbitration law, particularly with the recognition and enforcement of the foreign arbitral awards, because of public policy centred on Islamic jurisprudence.[479] Even though the issues pertaining to the application of the NYC on international commercial arbitration do not affect Saudi Arabia alone,[480] the Kingdom has had historical problems of uncertainty with arbitration for decades. There has been perpetual distrust of disputants in using arbitration to resolve disputes. The problem was compounded by the intervention of the Saudi legal system in the arbitral procedures and protocols resulting in high uncertainty of the recognition and enforcement of arbitral awards. While the transformation of arbitration regulations and laws has been considered positive,[481] there has been a need to examine the impact they have had over on general jurisprudence as well as the wider economy.

From a general perspective, commercial arbitration has scope in Islamic jurisprudence, and within the context of commercial contracts and dispute resolution it is expected that Saudi Arabia's commercial law would have influence from Islamic principles.[482] As contracts are formulated, the legal principles applied emanate from ordinary legal philosophies established in jurisprudence, as well as those based purely on Islamic sources *per se*.[483] Therefore, if the two are not interlinked in real terms, the principles clash at the time of dispute resolution. It is to be expected that Saudi judges would be well vested in Islamic jurisprudence, and that their

[475] Arbitration Law No. M/34

[476] Hamel Alsulamy (n 459).

[477] John Gaffney, Meteb AlGhashayan and Malak Nasreddine, 'Kingdom of Saudi Arabia Clarifies Certain Aspects of its Arbitration Law', (Al Tamimi and Company, Riyadh, 2018) <https://www.tamimi.com/law-update-articles/kingdom-of-saudi-arabia-clarifies-certain-aspects-of-its-arbitration-law/> accessed 19 January 2019.

[478] ibid.

[479] Asam Saud Alsaiat (n-363)

[480] Kühn (n 344) 757.

[481] ibid.

[482] Asam Saud Alsaiat (n-363)

[483] Gaffney, AlGhashayan and Nasreddine (n 468).

decisions would be influenced by socio-cultural (and Sharia) beliefs other than normative jurisprudence.[484] For example, in the time of Arab Spring, many Arab states failed to capture the complexity of judicial importance particularly their political dimensions attached as a results of the social, cultural and religious developments in the region.[485] Hence, local judges are bound to be perceived as biased because of the natural influence of the public policy under which they operate.

4.7 Impact of Arbitral Awards

4.7.1 Perception of the Judiciary

There has been a wider critique of the operationalisation of foreign arbitral awards, and how international commercial arbitration law has lagged behind in the KSA.[486] Islamic jurisprudence and law have produced *res judicata*[487] conducive to negative perceptions and distrust of the recognition and enforcement of protocols for international commercial arbitration cases in Saudi Arabia.[488] For instance, it has been observed that when arbitral awards are rendered abroad, or when they apply foreign law as an integral part of the said arbitral awards, Saudi judges tend to reject them on public policy grounds.[489] As a result, Saudi judges may not support international arbitral awards because they fell short of the public policy under Sharia jurisprudential principles.[490]

In situations where the judiciary has been identified as the main obstacle to the operationalisation of international commercial arbitral awards based on the UNCITRAL Model Law, nations strive to reform the law. For instance, Hikmah[491] reported that Indonesia's Supreme Court issued a regulation that facilitated the enforcement of international arbitral awards in Indonesia because the procedural law that governs the procedures for the

[484] Asam Saud Alsaiat (n-363)

[485] Nathan Brown, 'Tracking the Arab Spring: Egypt's Failed Transition' (2013) 24 Journal of Democracy 45, p.53

[486] Ibid.

[487] Khanifah Khanifah, et al (n-404)

[488] Mohammad Alharbi, 'Key Challenges facing Online Dispute Resolution in Saudi Arabia' (2019) 88 Journal of Law Policy & Globalization 76.

[489] El-Ahdab and El-Ahdab (n 101) 50.

[490] Khanifah Khanifah, et al (n-404)

[491] Hikmah (n 420).

enforcement of arbitral awards had been clarified.[492] The risk has been compounded by the recent rise to power of Islamist parties in various countries, thereby increasing reliance on the application of Sharia law as a modern legal framework for the Middle East region.[493] As the government of Saudi Arabia strives to promote economic diversification through multinational entities to promote economic diversification, the uncertainty emanating from weak arbitral award recognition and enforcement counteracts government efforts.[494] Multinational corporations and their lawyers have a general lack of knowledge about Islamic Sharia law and general jurisprudential principles of Saudi Arabia, and the Middle East in general.[495] As a result, investors often worry about the Saudi public policy and how it may negatively influence their investment should there be a commercial dispute.

Until recently, the typical perception of arbitral awards in the KSA has been negative, based on experiences arising from SAL 1983.[496] This was mainly attributable to the autonomy of Saudi judges in their rulings, which played a critical role in applying the concept of public policy in arbitral award cases. For years, the perception of the Saudi public policy from the arbitration perspective is one that has been faced with limitations, because the natural inclination has been that the Saudi public policy is driven by Sharia rules and public interest, making the process highly subjective and uncertain in terms of outcomes.[497] The issue of public policy emanates from the operations of the legal arm of the government as well as the general jurisprudence. Shtromberg[498] opined that a nation's public policy should promote predictability in terms of the recognition and enforcement of international arbitral awards for parties to engage freely in business ventures without fearing they could suffer from negative impact of disputes.

[492] UNCITRAL Model Law

[493] Tarek Badawy, 'The General Principles of Islamic Law as the Law Governing Investment Disputes in the Middle East' (2012) 29(3) Journal of International Arbitration, 255, 267.

[494] Ibid.

[495] Michael Hwang, 'Commercial courts and international arbitration—competitors or partners?' (2015) 31 (2) Arbitration international 193-212.

[496] Abdullah Alassaf and Bruno Zeller (n 105) 187.

[497] ibid.

[498] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94 Nebraska Law Review 685.

In other words, an ideal public policy is one that can be perceived as arbitration-friendly; and can attract investment because of such a positive perception.[499] Arbitration-friendly public policy strives to respect contractual wills while respecting the integrity of parties' autonomy. If, however, the enforcement of foreign arbitral awards cannot be predicted, as is the case with the Russian Federation, commercial contracts become challenging to manage, because the public policy is deemed hostile to international commerce.[500] The incoherency in the judicial decisions from commercial courts triggers a poor reputation for business.

4.7.2 Reforming the Law

Having seen the negative perceptions of judicial decisions, the government embarked on reforming the arbitration law to create a positive influence on the international market and generate a positive theory of the delocalisation of the arbitration protocol in the KSA.[501] Al-Shareef stated that Saudi arbitration law operates mandatory rules of Sharia, public morality, and royal decrees.[502] Consequently, an arbitral award concerning an otherwise 'legal' commercial transaction that contravenes Sharia law would be liable to be revoked, and that would entail that the arbitration process would be null and void.[503] However, this fact may not have been explained clearly to the world and international investors, making it extremely difficult for them to apply the mandatory rules in the Saudi legal system, and how these would align arbitral awards.

As discussed in previous chapters that all national laws in the KSA are based on Sharia law which derived from the Sunnah and Qur'an and endorsed by royal decree; consequently, arbitrators, investors, and stakeholders need to examine the value of executive decrees on public policy. Every public policy rule is mandatory, but not every mandatory rule forms part of public policy, as argued by Al-Shareef.[504] The KSA and its government view public policy in terms of the public interest and the protection of its people[505]; however, it is equally vital to consider the interests of investors, who needs a stable legal framework that they can interpret

[499] ibid.

[500] ibid.

[501] Inae Yang, 'A Comparative Review On Substantive Public Policy In International Commercial Arbitration (2015) 70 (2) Dispute Resolution Journal 49-83.

[502] Al-Shareef (n 107) 5, 15, 120, 132.

[503] ibid.

[504] ibid.

[505] Abdullah Alassaf and Bruno Zeller (n 105) 187.

and apply. There has been a lack of detailed publications on the Saudi legal provisions; specifically, there is a lack of official publications on court provisions concerning arbitral awards, which could be useful to analyse the Saudi legal framework for arbitration.[506] Given this information vacuum, it is prudent to understand that Saudi public policy is driven by Sharia rules and public interest, whereby the subjective and potentially unpredictable rulings of individual judges are highly instrumental.

This problem emanates from the complexity of the Saudi legal system, which has a sea of statutes without critical data that can be used for navigation to arrive at consistent outcomes.[507] However, it should be noted that there is nothing illegal about Saudi court judgements, because they fall within the provisions of the law,[508] and have been operating within the then confines of Article V (2) (b) of the NYC,[509] which state, *inter alia*, that member states retain the discretion to refuse to recognise and enforce arbitral awards deemed to contradict their public policy. As a result, the Saudi government is alert to the perception that the country was deemed traditionally hostile to the negotiation and enforcement of non-domestic arbitral awards.[510]

While this thesis primarily concentrates on particular issues concerning the KSA, it should be noted that this is part of the broader milieu of the Middle East and North Africa, where there are similar negative perceptions among international corporations concerning the enforcement and recognition of arbitral awards at the regional level.[511] To this effect, the Zegars and El Zorkany[512] argued that there has been uncertainty about what constituted grounds for refusal of enforcement because of the arbitrary nature of the decision protocol of the legal system.

Using the Royal Decree No. M/46 of 12/07/1403H (April 24, 1983), the Saudi government responded to the requirements of arbitration[513]; similarly, Royal Decree No. M/34 dated

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[506] ibid.

[507] George Sayen 'Arbitration, conciliation and the Islamic legal tradition in Saudi Arabia'; (2003) University of Pennsylvania Journal of International Economic Law; 24, 12.

[508] Roy (n 138) 1953.

[509] Mark Wakim 'Public policy concerns regarding enforcement of foreign international arbitral awards in the middle east', (2008) 21 New York International Law Reviewv1, 44,96.

[510] Ibid.

[511] Thomas C. Childs, 'Egypt, Syria and Saudi Arabia: Enforcement of Foreign Arbitral awards in Egypt, Syria and Saudi Arabia', (2010) 07 Arbitration Newsletter, 71, 72.

[512] Jean-Benoît Zegars and Omar El Zorkany, 'Kingdom of Saudi Arabia' (2014) International Bar Association, 8-9.

[513] Arbitration Law No. M/46

24/5/1433H (April 16, 2012) embarked on reforming the arbitration law.[514] These legal reforms are said to be critical to the normalisation and alignment of the Saudi arbitration procedure with the UNCITRAL Model Law. Quinlan et al.[515] believe that SAL 2012, SEL, and the opening of the SCCA in Riyadh in 2016 demonstrate a critical shift in the government's drive to clear the path so that FDI can thrive.[516] The government, through the SCCA, published rules of arbitration that are modelled on the UNCITRAL Arbitration Rules, which have already been tested when:

> "a US$18.5 million International Chamber of Commerce (ICC) award handed down in London against a Saudi award debtor was recorded and enforced within three months".[517]

The Saudi arbitration reforms have been assessed as 'arbitration friendly'; hence, they are deemed to facilitate the resolution of disputes in Saudi Arabia and 'complement the recent arbitral progresses'.[518] This is because the new SAL 2012 addresses the scope of arbitration law, the composition of arbitral tribunals, arbitration agreements, and procedures, and arbitration awards using detailed clauses that lawyers can use.[519] In addition, there are executive regulations that seek to clarify what constitutes a competent court, which has codified the law for ease of application by arbitral parties.[520]

4.7.3 Sharia Jurisprudence

The structured and tiered government structure of the KSA is enshrined in the Basic Law of Governance, with the King[521] wielding ultimate power and authority, subject to the Quran. Fundamentally, the Sharia jurisprudential principles permeate the governance structure in such a way that the application of any law should commence and end at comprehensive application

[514] Arbitration Law No. M/34 (n 22)

[515] Simon Nesbitt, and Henry Quinlan, 'The status and operation of unilateral or optional arbitration clauses' (2006) 22 (1) Arbitration International 133-150.

[516] Gaffney, AlGhashayan and Nasreddine (n 468).

[517] Ibid; Nesbitt and Quinlan (n 505)

[518] Asam Saud Alsaiat (n-363)

[519] ibid.

[520] Gaffney, AlGhashayan and Nasreddine (n 468).

[521] Basic Law (n 6) art 5(a) states that "the system of governance in the Kingdom of Saudi Arabia shall be monarchical".

of such principles to a particular case or scenario.[522] This includes commercial arbitration at both the local and international levels involving Saudi Arabia.[523] There should be a clear recognition of the three sources of law in the KSA, i.e., the Islamic law of Sharia (based on the Holy Quran and the Sunnah traditions of the Prophet Mohammad (ﷺ)); the state regulations; and the customs and practices of the people. Within the KSA, Islamic jurisprudence under Sharia is deemed to provide a comprehensive and optimal legal framework for the people of the Kingdom, consistent with their heritage and the socio-cultural traditions of the Arabian Peninsula.[524] It is for this reason that the Islamic jurisprudence has doctrinal attributes that form an integral part of the law, public policy, judicial system as well as the way of life for Muslims within the Kingdom Saudi Arabia and beyond.[525]

Over many decades, international corporations, particularly those of the US, have generally profitably engaged with Saudi Arabia, and the associated implications of its legal system, under the economic paradigm of the oil-based economy. It is only in the context of the changing economic conditions of the push to diversify the Saudi economy and to attract more diverse corporate investors, partners, and activities in the Kingdom that arbitration issues have become more salient concerns for national legislative reform. At the current juncture, Islamic Sharia jurisprudence is considered to imbue arbitral proceedings involving Saudi Arabia with uncertainty, which reduces confidence among international investors about dispute resolution.[526] To understand this more fully, it is critical to conduct an evaluation of the impact of the legal provisions on arbitration review perceptions held by those new to such a legal environment.

The influence of Sharia law cannot be underestimated, because it provides the basis not only for the Saudi legal system, but also the principles for educating, training, and qualifying lawyers and judges, based on both Hanbali jurisprudence and Sunni Islam more generally.[527]

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[522] Trakman (345) 227.

[523] Harb (n 14).

[524] ibid.

[525] Harb (n 14) 113.

[526] Bantekas, Baamir, and Chigara (n 410) 269.

[527] Legal Thought and Jurisprudence: The idea of divine law in Islam is traditionally expressed by two words, fiqh and sharīʿah. Fiqh originally meant understanding in a broad sense. The specialist usage, meaning understanding of the law, emerged at about the same time as the first juristic literature, in the late eighth and early ninth centuries. All efforts to elaborate details of the law, to state specific norms, to justify them by reference to revelation, to debate them, or to write books or treatises on the law are examples of fiqh. The word connotes human and

Oxford Islamic Studies Online explains that the qualifications and training of judges based on Sharia law is detailed enough for them to understand the intricacies of the law and *hadud* (i.e. the set of laws and punishment that specified by the God in the Qur'an),[528] their role, and how the whole judicial system ties with the arms of government such as the legislature and the executive. The application of Islamic Sharia jurisprudence has never made concessions for arbitration law,[529] but there have been efforts to explain how it can be applied in dispute resolution within the Saudi legal system.[530]

Currently, Saudi Executive Courts have the jurisdiction to implement international commercial arbitration awards according to Art (12) of Royal Decree (M/53) dated 13/8/1433 AH –

specifically scholarly activity. By contrast, sharīʿah refers to God's law in its quality as divine. Loosely used, it can indicate Islam, God's religion. It refers to God's law as it is with him or with his Prophet, or as it is contained (potentially) within the corpus of revelation. Practitioners of fiqh (the fuqahā'; sg., faqīh) try to discover and give expression to the sharīʿah. For Muslims, the sharīʿah evokes loyalty and is a focus of faith; fiqh evokes at best respect for juristic scholarship and for a literary tradition—and, among some modern thinkers, distaste for dry-as-dust legalism. The word sharīʿah is sometimes used in place of fiqh, in which case its positive connotations will be transferred to the scholarly tradition; it has also been applied to actual bureaucratic systems thought to conform adequately to the norms expressed in theoretical writings—always a matter of perception. Western designation of the Muslim juristic tradition as "Islamic law" has led to the emergence, perhaps in the late nineteenth century, of the calque realized in Arabic as al-qānūn al-Islāmī, and now part of the vocabulary in all Muslim countries. This phrase, though applied to the tradition as a whole, carries many of the connotations of "legal system" in a Western sense, related to the bureaucratic structures of a nation-state. Such ideas have now permeated much Muslim thinking about the law. http://www.oxfordislamicstudies.com/article/opr/t236MIW/e0473#e0473-s0001 <accessed 22/01/2019>.

[528] Hadd: Limit or prohibition; pl. hudud. A punishment fixed in the Quran and hadith for crimes considered to be against the rights of God. The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death). Strict requirements for evidence (including eyewitnesses) have severely limited the application of hudud penalties. Punishment for all other crimes is left to the discretion of the court; these punishments are called tazir. With the exception of Saudi Arabia, hudud punishments are rarely applied, although recently fundamentalist ideologies have demanded the reintroduction of hudud, especially in Sudan, Iran, and Afghanistan. http://www.oxfordislamicstudies.com/article/opr/t125/e757?_hi=1&_pos=5 <accessed: 22/01/2019.

[529] Abdul Hamid El-Ahdab, 'Saudi Arabia Accedes to the New York Convention, (1994) 11Journal of international arbitration 3, 88,

[530] According to the first article of the old board of grievance law, Royal decree no (M/51) dated 17/7/1402H (11/05/1982), the board of grievance was the only authority with jurisdiction over international arbitration disputes.

3/7/2012). This demonstrates that judges have had some powers over the past decade, and a pattern has been developed.[531] Even though the law has changed, the impact of previous powers has not been diminished with the change of the law. Hence, one could expect public policy impacts (which may be viewed as unpredictable socio-cultural biases) on judgements. The core argument is that principles of Sharia under the Quran can be isolated and be dealt with; however, the element of interpretation for Islamic scholars that emanate from Islamic jurisprudence and which is seen as intrinsic within Sharia law itself forms the largest challenge concerning international arbitral awards. Rulings aimed to preserve public policy may be viewed as subjective and prone to bias in interpretation. Furthermore, public policy can be seen as a fundamental principle of Sharia itself,[532] because all arbitration agreements and cases that violate Sharia jurisprudence are axiomatically non-enforceable within Sharia jurisdictions, such as Saudi Arabia. Put simply, violation of Islamic law is *ipso facto* a violation of Saudi public policy.[533]

However, Saudi courts have distinguished between violations of Sharia principles and violation of Sharia rules in general; only violations of the former are deemed to be violations of Saudi public policy.[534] Zaid established a clear causal relationship between public policy and the court decisions when he argued that the general principles of Sharia and essential administrative rules form public policy.[535] However, he was of the view that there has been a challenge in isolating court decisions under the current Saudi legal system that can unpick and support the rationale of consistency in the application of Sharia law in arbitral awards.[536] There are many instances (e.g. granting interest or in Arabic known as *Riba*) where a breach of fundamental Islamic principles have been cited as the main reason for revoking arbitral awards, and such decisions are directly linked to the public policy as the main form of defence. This demonstrates that there has been no examination of the impact of public policy on court

[531] Ibrahim bin Mahdi bin Al-Yami, and Ibrahim Al-Asloumi, 'Execution of Foreign Judgments in the Kingdom of Saudi Arabia and the Role of the Will in it' (2021) 11 (12) Review of International Geographical Education Online 1312-1323.

[532] Ilias Bantekas, 'Transnational Islamic Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration' (2021) 12 (3) Journal of International Dispute Settlement 505-523.

[533] Bin Zaid (n 155) 289.

[534] ibid.

[535] ibid.

[536] ibid.

judgements and vice versa. The causal relationship between public policy and court decisions remains elusive; and needs critical review in this research.

4.8 Chapter Summary

The SAL 1983 and the SAL 2012 have each had varied impacts in the KSA; however, there has been knowledge gap concerning detailed understanding of such impacts. Although judicial reform has been an indicator of factors that have triggered executive arm of the government to react, there is a gap regarding the wider impact of Saudi public policy and Islamic jurisprudence on commercial arbitration, the law, and commercial activities in general. One could argue that the shear vastness and complexity of the factors surrounding public policy paves the way for widespread refusals for enforcement. Assessing the impact of non-enforcement has the potential to contribute to the unpicking of factors worth improving. The SCCA strives to respond to the necessity of the reformed legal provisions suitable for the operationalisation of the Saudi arbitration law.[537] However, there is no evidence on how the issue of international arbitral awards has been impacting the law, industry, and the wider realm of Saudi public policy.

Although there are legal reforms, the Saudi legal system remains anchored in Sharia law and Islamic jurisprudence, which are applicable whenever there is a statutory space.[538] The government policy on foreign investment changes with time, but the Islamic jurisprudential principles remain. This research proposes that it examines the potential impact of public policy in Saudi Arabia in the recognition and enforcement of arbitral awards, considering the legal reforms that have taken place over recent years. This research proposes the development of a framework that could demonstrate a holistic view of the issue of arbitral awards in the application of the international commercial arbitration of the emerging new era of the KSA.

[537] Saudi Centre for Commercial Arbitration (n 109).

[538] Yunus Emre (n-449)

Chapter 5: The Role of Sharia in Recognition and Enforcing Arbitration in Saudi Arabia

5.1 Introduction

Building on the preceding discussion, it can be argued that there is a high degree of uncertainty regarding the principles used by Saudi courts in evaluating and applying the adjudications made by international courts of arbitration. The consequence of this uncertainty is that arbitration cannot develop effectively in the Kingdom, which has had a corresponding impact upon levels of FDI, ultimately driving these revenue streams away from the KSA and to more predictable environments. For example, a company from the UK wishing to do business in KSA faces the risk that, should they need to make a future claim against a Saudi corporation, the decision made by a London court may not be recognised or enforced by Saudi courts. This uncertainty has profound ramifications that extend beyond the exclusively legal sphere. This main aim of this chapter is to explain the principles of Sharia affect the interpretation of public policy towards enforcing arbitral awards. This chapter attempt to answer research question such as how do the principles of sharia affect the interpretation of public policy towards enforcing arbitral awards in Saudi Arabia.

In this regards, preceding sections have outlined the public policy in arbitration within the KSA for both domestic and foreign arbitral awards. While there are different substantive and procedural laws subject to arbitration proceedings and the enforcement of awards in Saudi Arabia, governed by the courts and by both domestic and international instruments, the application of Sharia law ultimately ensures award compliance. This chapter also outlines the principles governing the understanding and enforcement of foreign arbitral awards in the jurisdiction of the KSA and how the principles of Sharia affect the interpretation of public policy towards enforcing arbitral awards. In the previous chapters, importance of Sharia law in the KSA in terms of arbitration and its jurisdiction has been discussed for both domestic and foreign proceedings. This chapter highlights on a coherent basis to inform the examination in this study, through a discussion of the implementation of foreign arbitral awards in Saudi Arabia in terms of recognition and enforcement. A failure to implement awards correctly can result in the meaning of the overall process being unclear and the arbitral proceedings failing to achieve their objective. This is followed by the role of Islamic jurisprudence and the

relevance of Sharia perspectives on arbitration are discussed and the core role of Sharia law in interpreting Saudi legislations, concluding with a summary of the chapter.

5.2 The Importance of Understanding the Role of Sharia

The most important and unique aspect of the SAL 2012 in the KSA that distinguishes it from other landmark legislation is that it overtly seeks to bring the Kingdom's arbitration in line with prevailing international arbitral trends.[539] This is part of the national development plan adumbrated in Vision 2030, whose various commitments entail that more parties will resort to arbitration more frequently as a preferred method of resolving disputes. However, as discussed in previous chapters, there are some aspects of global arbitration norms that need to be considered in the context of Islamic law, which forms the basis for local legislation, and which is instrumental in the applicability of foreign arbitral awards within the KSA.[540]

As discussed in previous chapters, the influence of Sharia in Islamic countries, especially in the KSA, has an important effect of the acceptance and interpretation of arbitration agreements. Given the implicit nature of the Saudi culture and legal regulations, Sharia has become a recognised element of the public policy of the Kingdom, which provides grounds for the non-enforcement of international arbitral awards as per the NYC.[541] As the economy of Saudi Arabia continues to grow and develop, foreign commercial actors increasingly seek more opportunities in the Kingdom, making it more important than ever for non-Islamic investors to understand the Sharia implications for arbitral proceedings (and their operations in the KSA in general).[542]

The role of Sharia in the resolution of disputes in the KSA is essential, including with regard to arbitration laws. Regardless of time or cultural setting, the foundation of arbitration procedures are the applications must adhere with Islamic law in the Kingdom, which is the basis for the whole governance framework and stability of the country, for various socio-cultural and political reasons, in addition to religious injunctions.[543] However, Sharia itself, and the Saudi legal system, and not static and unchanging; rather dynamic developments are possible and apparent in both, and in recent years the Saudi legal system has become

[539] Roy (n 138).

[540] Harb (n 14) 113.

[541] Nesheiwat and Al-Khasawneh (n 18) 459.

[542] Alkhamees (n 22) 255.

[543] Ibid.

increasingly centralised, seeking more alignment with the common and civil law models adopted by Western countries.

However, the regulations and statutes of international agreements often fail to align with the provisions of Sharia, and modern Muslim states' courts encounter issues and face challenges when applying law exclusively based on Sharia procedures in order to resolves any dispute among international parties.[544] For example, in the case of An-Na'im contents which discussed that Sharia is considered as a primary guideline, based on the further development of both political and social relationships, and these principle do not rise to the level of legal code of principles.[545]

5.3 Implementation of Foreign Arbitral Awards in Saudi Arabia

Before considering the implementation of foreign arbitral awards in the KSA, it is essential to understand and differentiate between recognition and enforcement.[546] Although arbitral awards may be *recognised* in the legal framework of a state, the court may nevertheless refrain from the *enforcement* of the award because it is perceived to infringe *ordre public* in some way.[547] In other words, *recognition* in a certain territory does not guarantee that an arbitral award will be *enforced* in that jurisdiction. However, while recognition does not necessarily entail enforcement, the latter never occurs without recognition. In other words, in all jurisdictions, enforcement supposes recognition. Another important term to outline is that of 'implementation', which is related to the concept of enforcement. Operational definitions for the two terms can be formulated as follows: 'recognition' refers to an arbitral award where the decision was correct and binding on the relevant parties; while 'implementation' refers to an enforceable arbitral award that can be executed by force, in the event that the losing party fails to comply.[548]

It should be noted that the central position of arbitration proceedings in the domain of global trade are key motivating factors in states striving to establish a system that effectively recognises and implements foreign arbitration awards. This has resulted in numerous treaties,

[544] F E Vogel, 'Shari'a in the Politics of Saudi Arabia', in MA Baderin, *Islamic Law in Practice, Vol III* (Ashgate, 2014) 67.

[545] Ibid.

[546] Lew, Mistelis, and Kröll (n- 71)

[547] Bremer (n 37) 55.

[548] Al-Ammari and Martin (n 100), 387-408.

international conventions, domestic laws, regional agreements, and bilateral agreements being formulated to determine the recognition and implementation of foreign arbitration awards worldwide. In general terms, these internationally applicable regulations limit the freedom of judges to recognise and implement foreign arbitration awards in cases where the arbitration is occurring in a state that is a signatory to the said agreements. This limitation of the authority of judges constitutes an evaluation of the official requirements and procedural rules utilised by arbitral tribunals, as well as ensuring that the relevant parties have satisfied their official obligations, particularly in terms of the official documentation required for the legal implementation of foreign arbitration award.[549]

Given this consideration, the collective regulations referred to above have not included an evaluation of the subject matter of the dispute from the authority of the judge. Nevertheless, national laws retain the power to determine the competent court, as well as the various procedural regulations involved in the implementation of the foreign arbitration award. This illustrates a certain level of flexibility in terms of the international instruments specifically related to foreign arbitration award, as they permit domestic laws to determine the court that will evaluate the foreign arbitration award, which potentially accords the state with a reasonable degree of control. In essence, these international agreements give national authorities the ability to abstain from the implementation of foreign arbitration award when so doing would prevent an infringement of *ordre public,* at the same time as establishing formal procedural requirements in litigation laws.

5.4 Recognition and Enforcement of Arbitral Awards

As outlined in the discussion in the preceding section, the most consequential phase in arbitral proceedings is that of recognition and enforcement. Failure to implement this stage correctly can result in the meaning of the overall process being unclear and the arbitral proceedings failing to achieve their objective. The implication of this is that the degree to which an international or domestic arbitration proceeding is successful can be determined by whether the foreign or domestic arbitral award is recognised and enforced by the relevant competent domestic authority. For the purpose of illuminating this issue in relation to the Saudi legal context, the discussion will first centre on domestic arbitral awards (DAA), after which the issue of foreign arbitral awards is considered.

[549] Nesheiwat and Al-Khasawneh (n 18) 459.

5.4.1 Recognition and Enforcement of Domestic Arbitral Awards

According to Article 20 of SAL 1983, arbitral awards can be enforced by Saudi courts as soon as the award has been finalised by the order of the competent authority. This order can be provided in response to any of the disputants, as long as it does not contravene any tenets of Sharia law. It is therefore clear that enforcement of DAA can only be undertaken by the competent authority when the DAA is finalised. Finalisation can occur when any one of the following conditions is met:

i. In the event that the timeframe specified for an appeal against the award has elapsed without the submission of an objection by a disputant. Such an objection must be submitted within 15 days of the date of the party's announcement.[550]

ii. When an objection to the arbitral award has been lodged by one of the disputants, but this has been rejected by the competent authority. If these events transpire, the award is considered to be final and binding.[551]

iii. If one of the disputants submits an objection of the arbitral award and it is accepted, then the competent authority either releases a determination about the dispute or passes it back to the arbitral tribunal to review the award. In this case, suspension of the award takes place until a time when the competent authority finalises any alterations that have been made.

It is evident that a legal issue can emerge in the third scenario, particularly where DAA enforcement is prolonged and challenging and it was noted that three critical complexities exist:

i. SAL 1983 stipulates that the type of judicial review must undergo review based on the strong points of an award, not just in terms of the proceedings associated with the dispute. At the same time, 'appeal' may be the intention of the notion of a 'challenge' expressed in SAL 1983, along with its Rules (1985). This stems from the fact that the competent authority handles the reviewing of the arbitral dispute from the initial proceeding until the issuance of the arbitral award.[552]

ii. The degree of objection to arbitration in the context of Saudi law is not similar with most of the contemporary arbitration legislation. In particular, the arbitration

[550] Article 18 of the SAL (1983).

[551] ibid.

[552] ibid

proceedings undergo an additional stage of jurisdiction, which is regarded as supplementary in relation to what the Saudi judiciary implements. In view of this, arbitration in the KSA is typically more protracted than litigation in terms of the time required to produce a final determination.[553]

iii. In the KSA, no unambiguous or specified bases exist for objecting to arbitral awards.[554]

In the KSA, the competent authority to recognise and enforce DAA is as stipulated in Articles 18 and 19 of SAL 1983, although the actual choice is ultimately dependent on the nature of the individual case. This means that particulars of each dispute must be examined. In the case of commercial or administrative disputes, the competent authority is the BoG. In contrast, in real estate or civil affairs, the authority is the general courts (see Decision No.57/1414 in 1994).[555] It is also possible for an arbitral award to obtain the authority of *res judicata*, which is founded on Article 21 of SAL 1983. In this context, the arbitral award carries the same force as issuance by the competent authority, as long as it is executed in accordance with Article 20 of SAL 1983.

In the revised SAL 2012, a more streamlined method is pursued, with Article 53 specifying the documents that must be presented. Additionally, the revised law stipulates several requirements that must be presented in order to ensure the recognition and enforcement of the DAA and FAA.

5.4.2 Arbitral Awards in Saudi Arabia and Res Judicata Authority

Arbitral awards issued in Saudi Arabia acquire a force equivalent to that of an order of execution issued by the competent authority, *res judicata*, only when granted by the competent authority. Saleh suggests that based on the right control of the judiciary regarding arbitration, we cannot confirm that *res judicata* authority is acquired by an arbitral award prior to the competent authority's express confirmation (or, alternatively, when objections can no longer

[553] ibid

[554] ibid.

[555] In Decision No. 57/1414 of 1994, the parties agreed to refer the dispute to arbitration and have a dispute over the division of properties. The commercial circuit of the BoG held that the dispute should be referred to arbitration, but the appeal circuit revoked the ruling on the grounds that the Board had no jurisdiction to hear the dispute, as the matter was not a commercial one.

be lodged against the award owing to the passing of the 15-day limitation).[556] According to Al-Fadhel, a fundamentally important provision in Saudi law also safeguards against the issuance of an order for partial enforcement of an arbitral award by the competent authority in any cases where the award is divisible.[557] However, no restriction exists in such cases, despite the finalisation of the award, because any orders that contravene the tenets of Sharia cannot be enacted.

To summarise, it is possible to conclude that the finalisation of an arbitral award owing to the elapsing of the 15-day limitation does not constitute sufficient grounds for an award to become *res judicata*. According to the requirements of Article 20 of SAL 1983, the issuance of such an order can occur, once it has been clearly determined that the enforcement does not contravene any Sharia principles. In addition, the award becomes finalised after the 15-day limitation, but it does not acquire *res judicata* authority.[558] In this way, the fundamental consideration in determining the enforceability of arbitral awards is the approval from the competent authority, which is dependent on ensuring that the implementation of the award would not infringe on any aspect of Sharia or Saudi *ordre public*, after which the award acquires the authority of *res judicata*.[559] This is the practical strategy implemented in Saudi courts, as outlined by Al-Sadaan, one of the judges on the BoG.[560,561] Consequently, with reference to Articles 18, Article 19, Article 20, and Article 21 of SAL 1983, it is evident the legislature was adamant about not affording the same status to arbitral awards as those awards provided by the judiciary.[562]

5.4.3 Recognition and Enforcement of Foreign Arbitral Awards

A significant volume of data exists to illustrate the importance of international commercial arbitration in the functioning of stable international trade.[563] In this context, and in recognition of this importance, the issues of recognition and enforcement in the context of foreign arbitral

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[556] Samir Saleh, *Commercial Arbitration in the Arab Middle East: Jordan, Kuwait, Bahrain, & Saudi Arabia* (2nd Edn, Aseanlex, 2011) 67.

[557] Faisal Al-Fadhel, 'Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law' (2009) 30 Company Lawyer 249.

[558] J El-Ahdab, *Arbitration with the Arab Countries* (Riverwoods 2012) 665.

[559] Article 21 of the SAL (1983).

[560] AL-Sadaan is working now as an adviser for the Justice Minister, (2012).

[561] AL-Sadaan, *The Concept of Enforcing the Arbitral Awards (2011)* 6.

[562] Abdullah Alassaf and Bruno Zeller (n 105) 184.

[563] Altawyan (n 271) 169-288.

awards are central to all proceedings in international arbitration.[564] There is a wide array of different legislation in jurisdictions around the world, resulting in corresponding diversity in the various rules governing the recognition and enforcement of foreign arbitral awards. This has created a situation in which international arbitration instruments, including the NYC and the Washington Convention, which are playing an increasingly prominent role in the globalized economy. These instruments enable the complexities of arbitration awards to be bypassed, especially in terms of enforcement and arbitration.

In recent decades, the Saudi government has signalled its clear intention to recognise and enforce foreign arbitral awards by becoming a signatory to many regional and international conventions, including the NYC (1958), the Washington Convention (1965), and the Riyadh Convention on Judicial Cooperation (1983).[565] The most significant of these conventions is the NYC (1958), which the government ratified in April 1994, although it should be noted that this decision was made because of the principle of 'reciprocity'.[566] With respect to the issue of whether an arbitral award should be considered foreign arbitral awards or a DAA, the standards of the Saudi legal system are identical to those in Article I (1) of the NYC (1958). In other words, it recognises and enforces arbitral awards even if they were awarded in another state. The result of this is that arbitral awards that are afforded to a disputant in the KSA are regarded as international in any cases in which they are released in a location that differs from the location in which the arbitral award is to be enforced. According to Article 13 (g) of the Law of BoG (2007),[567,568] the BoG represents the competent authority in Saudi Arabia with respect to the recognition and enforcement of foreign arbitral awards.

Nevertheless, it is important to recognise that while the Saudi government is theoretically interested in the recognition and enforcement of foreign arbitral awards, the practicalities are typically somewhat restrictive, particularly prior to the last decade. Before SAL 2012, the government placed extremely onerous limitations on such agreements, to the degree that they constituted one of the central impedances from the international perspective to the development

[564] ibid

[565] Lew, Mistelis, and Kröll (n 71) 687.

[566] This is discussed in more detail in Chapter 3.

[567] By the Royal Decree No. M/11 in 1994, based on the decision of the Ministers Council No. 78 on 27th January 1993.

[568] Article 13 states that "Administrative Courts shall have the jurisdiction to look into the following. (**g**) Requests for the enforcement of foreign judgments and foreign arbitrators' judgments".

of arbitration in the KSA. The degree to which the Saudi government was perceived to be hesitating in implementing progress with respect to this issue has was considered to have a serious impact on the level of FDI into the country. Furthermore, the prevalent perceptions of litigation risk have resulted in project implementation costs in Saudi Arabia generally being higher than elsewhere.[569] Critics argued that the Saudis were making promises that they were not at liberty to keep with regard to enforcement.[570,571] This encapsulates the difficulties that have resulted from the status that the KSA enjoys as signatory power to the NYC, while simultaneously being a territory in which the recognition and enforcement of FAA is fraught with difficulties and uncertainty.

However, others argue that the KSA's decision to ratify the NYC in itself represented a great leap forward in terms of attempting to mitigate its external trade problems.[572] This belief is predicated on the perception that prospective external trade partners can have confidence that courts within the KSA will enforce the awards afforded to international disputants by arbitration tribunals outside the country.[573] Kutty argued that the requirement for Saudi courts to adhere to the tenets of Sharia means that the degree to which foreign arbitral awards can be enforced within the country is ultimately limited, but this is analogous to conventional public policy and normative domestic jurisdiction implications for international awards.[574] However, other commentators have criticised the unpredictability of enforcement, and even suggested that the likelihood of foreign arbitral awards being enforced within the KSA is dependent on the piety of regional governors.[575] This is a hotly debated topic that has far-reaching implications for the future of Saudi Arabia. The full ramifications of this debate are expounded throughout this thesis. The following discussion determines why foreign arbitral awards' recognition and enforcement may not be realised it in Saudi courts, through consideration of the following questions:

[569] Issued under Royal Decree No. M/78 Dated 1st October 2007.

[570] Enforcement Law No. M/53 (n 181).

[571] Roy (n 138)

[572] ibid.

[573] W M Ballantyne, 'Euro-Arab Conference: The Euro-Arab Conference on Arbitration in Euro-Arab Commercial Relations' (1985) 1(1) Arab Law Quarterly, 108.

[574] El-Ahdab (n 101) 666.

[575] Ibid.

i. What criteria do the Saudi courts use to determine whether foreign arbitral awards are to be recognised and enforced?

ii. On what bases do Saudi courts determine not to recognise and enforce foreign arbitral awards?

5.4.3.1 Criteria Used to Recognise and Enforce

To examine this topic, this section first outlines the official requirements that must be met to facilitate the recognition of foreign arbitral awards and their subsequent enforcement in the diverse jurisdictions of the powers that have become signatories to international arbitration instruments. The most important of these instruments are Articles IV and V of the NYC (1958), along with the Riyadh Convention on Judicial Cooperation (1983), the Procedural Rules of the BoG, Decision No. 116, on the identification of the rules in enforcing foreign arbitral awards,[576] and Circular No. 7 of the President of the BoG.[577] The last instrument in this list, Circular No. 7, states the following:

> Whereas the agreement for enforcement of foreign decisions among foreign arbitral awards and foreign juridical judgments, whereas the arbitrator's judgment is merely a special one, the competent Circuit which is required to enforce a foreign arbitral award shall verify that it has become final in the home country and that it was issued and to enforce a valid clause or contract within the jurisdiction of arbitrators in accordance with the terms of the arbitration and law upon which the arbitration award was made, and that the arbitral award was based on valid procedures. Further, it is necessary that the arbitral award is made in a dispute for which arbitration may be sought in accordance with the applicable regulations in the Kingdom. Intuitively, foreign arbitral awards should have all the other requirements provided in a statement about the foreign juridical judgment which can be enforced in the Kingdom, and foremost it would not be in contravention to any of the assets of Islamic law.[578]

The competent circuit of the BoG must give due attention to each of the aforementioned articles, decisions, and circulars to complete the case documents prior to admitting the statements of the disputants in a particular case. Once this has been achieved, the determination

[576] El-Ahdab (n 101), cited in Kutty (n 53).

[577] Ibid.

[578] The Circular No.7 issued by the President of the Board of Grievances on 6th May 1985

is made regarding whether the competent circuit should facilitate the dismissal of the case or, alternatively, whether they should take measures to underpin the enforcement of the arbitral award.[579] The formal requirements to be considered are as follows:

- It is necessary to present the verified initial award or, alternatively, a permissible record of the original award.[580]
- The original agreement or a permissible copy of the arbitration agreement must be presented, and it must conform to the stipulations of Article 2 of the NYC (1958).[581]
- Each of the documents requested up to this point must be presented in the Arabic language, and where the original documents were not written in Arabic, official Arabic translations must be provided by the disputant intending for enforcement.
- Finally, a letter must be written to the President of the BoG, which contains a formal request for the recognition and enforcement of the foreign arbitral awards.[582]

5.4.3.2 Criteria Used to Not Recognise and Enforce

Once the competent authority is satisfied that the formal requirements stipulated under Article 2 of the NYC (1958) have been met, they can admit the statements of each disputant. However, it is possible that Saudi courts will determine whether they will recognise or enforce a foreign arbitral awards, which will ultimately assist non-Saudi parties in facilitating enforcement in the case of a foreign arbitral awards. The conditions for this to occur will be presented below. Formerly, this matter was governed by the aforementioned international instruments, including the NYC, the Riyadh Arab Convention on Judicial Cooperation (1983), the Procedural Rules of the BoG, Decision No. 116, and Circular No. 7 of the President of the BoG, which were

[579] Article 6 of the Procedural Rules of the Grievances Board states that 'Cases for enforcement of foreign judgments shall be filed in accordance with the procedures for filing administrative cases stipulated in Article One of these Rules. The competent circuit shall render its judgment after completion of the case documents and hearing the statements of both parties to the dispute, or their representatives, either by dismissing the case or enforcing the foreign judgment on the basis of reciprocity, provided that it is not inconsistent with the provisions of Sharia. The party in whose favour the judgment is rendered shall be given an execution copy of the judgment affixed to it the following caption: "All competent government bodies and agencies are required to enforce this judgment by all applicable lawful means even if this leads to use of coercive force by the police".'

[580] New York Convention (n 197) art IV(1)(a).

[581] Ibid, art IV (1)(b).

[582] Ibid, art IV (2).

recently repealed by SAL 2012 and its Rules (2013). The basis for determination of recognition and enforcement of a foreign arbitral awards in the KSA is therefore as follows:

(i) In the event that the foreign arbitral award is not final or binding

Circular No. 7 of the President of the BoG states that DAAs that have not been finalised by the domestic territory's judiciary cannot be enforced as foreign arbitral awards within Saudi Arabia. In addition, this point is also referenced in Article V (1-e) of the NYC (1958) and Article 37 (b) of the Riyadh Arab Convention on Judicial Cooperation (1983).

(ii) In the event of an invalid arbitration agreement

According to the BoG, the KSA holds to this internationally valid criterion. The requirement is also referenced in Circular No. 7 of the President of the BoG, Article V (1-a) of the NYC (1958), and Article 37 (b) of the Riyadh Arab Convention on Judicial Cooperation (1983).

(iii) In the event of irregular arbitrator actions, which means that the arbitral tribunal lacks the authority to authorise the adjudication of an unauthorised arbitrator

The legal arguments for refusal on these grounds are stipulated in Article 37 (c) of the Riyadh Arab Convention on Judicial Cooperation (1983), as well as in Article V (1-d) of the NYC (1958). With respect to foreign arbitral awards enforcement, Circular No. 11 of the President of the BoG states that irregularities may constitute the issuance of an award based on "the execution of a condition or contract of proper arbitration".[583] In addition, Circular No. 7 stipulates that the competent authority must ensure consistency between the terms of the arbitration and the laws most relevant in the context in which the arbitral award was issued.[584]

(iv) In the event of arbitration proceedings which violate arbitrator objectiveness, operational laws, aspects of the arbitration agreement, or the right to a fair hearing

The BoG maintain the above position based on the requirements stipulated by several key instruments, including Article V (1-d) of the NYC (1958). In addition, Circular No. 7 of the President of the BoG stipulates the requirement for the competent authority to confirm the validity of the process by which a given arbitral award is issued. Nevertheless, Al-Fadehl

[583] Rules of Procedure (n 334) art 1, 6.

[584] Circular No.11/D/F/35/1997 of the President of the Board of Grievances.

argues that the BoG is explicitly focused on the appropriate processes in relation to the notification of the losing party.[585]

(v) In the event that issuance of the foreign arbitral awards took place in absentia, and in the absence of a certificate confirming that notification of the disputants by the arbitral tribunal

Article 37 (b) of the Riyadh Arab Convention on Judicial Cooperation (1983) provides that the passing of judgement *in absentia* without providing due notification to the losing party means that the said party has been deprived of an opportunity to offer an adequate opportunity to mount a defence, which invalidates the award. This basis for the rejection of the recognition and enforcement of an arbitral award is also covered in Article V (1-b) of the NYC (1958).

(vi) In the event that the subject matter of the dispute cannot be resolved by way of arbitration

In the context of the Saudi legal framework, almost all disputes can be resolved by means of arbitration, because there is no formally recognised difference between the sphere of commerce and civil affairs. Cases that fall outside the scope of arbitration are listed in Article 2 of SAL 1983, which stipulates that any cases in which conciliation cannot be allowed in the Saudi system must not be resolved by means of arbitration. In addition, Article 1 of the Implementation Rules (1985) prohibits arbitration from being used in cases of *hudud* or *lee'an* between man and wife.[586,587] Every case relating to public order is also prohibited from arbitration in Article I. Furthermore, arbitration is forbidden in any disputes between the Saudi government and its agencies as disputants, in the event that specific authorisation from the CoM is provided.[588]

In contrast, the BoG took up Article V (2-a) of the NYC (1958), which is chiefly concerned with stating which arbitral awards cannot be recognised or enforced. According to Article V, this allows for the deciding role to be played by domestic legal frameworks. Moreover, the

[585] Circular No.7 (n 568)

[586] The law governing commercial matters is by several regulations while civil matters are governed by Islamic law.

[587] '*Hudud*' means limit or restriction. It is used for referring refers to the class of punishments for the serious crimes of murder, injury, adultery, drinking alcohol, theft and robbery, which are outlined in the *Quran*.

[588] *'Liaan'* is a kind of Sharia court procedure. When one spouse directs an accusation of adultery against the other, the court procedure will be undertaken to terminate their marital relationship.

BoG implemented the rationale for refusal covered in Article 37 (a), arguing that recognition and enforcement of foreign arbitral awards cannot take place when the requested party's law fails to "permit the settlement of the subject of the dispute by arbitration".

(vii) In the event that Sharia law is infringed upon by the foreign arbitral awards

This point is one of the central reasons why Saudi courts are likely to refuse to recognise or enforce a foreign arbitral awards. This consideration is significant because Sharia law is not well understood internationally. Additionally, it is important to note that Sharia law is not uniform across the Muslim world, with substantial differences existing within the legal traditions and various schools of jurisprudence (particularly concerning *fiqh al-muamalat*),[589] which have different interpretations of core legal questions, especially with respect to the enforcement of foreign arbitral awards.[590] Given that numerous decisions on foreign arbitral awards are likely to be concerned with the matter of usury (*riba*),[591] uncertain obligations (*gharar*),[592] and insurance (*tamin*),[593] all of which are prohibited under Sharia law, the recognition and enforcement of many foreign arbitral awards in Saudi courts would violate these tenets, which means that these practices are prohibited/ This position was underlined in Article 20 of SAL 1983, along with Decision No. 116 of the President of the BoG,[594] which stressed that arbitral awards may not feature any aspect or action that is forbidden by Sharia law, irrespective of the relative proportions of forbidden and permitted aspects under consideration.[595]

These considerations clearly indicate that the central issue is presented in Article 20 of SAL 1983, which states that FAAs can only be enforced in those cases in which the awards conform to the tenets of Sharia law. According to the President of the BoG:

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[589] Arbitration Law No. M/34 (n 22)) art 3 and Article 8 of the Implementation Rules (1985).

[590] Jurisprudence of transactions or *'fiqh al-muamalat'* means Islamic Law on transactions, such as commercial transactions. This concept can also cover economic, social and political transactions.

[591] The Hanafi, Shafi'i, Maliki and Hanbali schools, the latter of which is prevalent in the KSA.

[592] *Riba* means the charging of interest on loans; it also 'would include all gains from loans and debts and anything over and above the principle of loans and debts and covers all form of "interest" on commercial personal loans', see M Ayub, *Understanding Islamic Finance* (John Wiley & Sons 2007) 100.

[593] *Gharar* means hazard, chance, stake, or risk.

[594] The only insurance that is acceptable in Islamic law is the Islamic cooperative insurance known as *'takaful*', which is based on mutuality or cooperative risk sharing.

[595] Issued on 25th July 2007.

> Foreign arbitral awards should have all the other requirements provided in a statement about the foreign juridical judgment which can be enforced in the Kingdom and foremost it would not be in contravention to any of the assets of Islamic law.[596]

Given this consideration, it is essential to recognise that the BoG operates under a rigid criterion that it implements regarding any and all affairs that are prohibited in the context of Sharia law, especially when comparatively examined against the nature of the situation prior to 2007. Several cases are presented below to clarify this point within the context of the present study. Decision No. 115/1429 was formulated in 2008.[597] The case took place in the London Court of International Arbitration, with the claimant being a non-Saudi company and the respondent being a Saudi company. The arbitral award involved the following conditions:

- The respondent should provide the claimant with GBP 450,000 for damages.
- Arbitration expenses amounting to GBP 194,000 were to be covered by the respondent.
- Interest of 6% should be paid on the aforementioned sums.

The respondent recognised that the final component of the arbitral award would violate Sharia law, thus they demanded that this be stricken from the award. The competent authority (the BoG) ruled that the inclusion of *riba* violated Sharia law, and that the foreign arbitral award could therefore not be enforced within Saudi Arabia. Importantly, despite only one portion of the overall foreign arbitral award constituting a breach of Sharia, the decision was made that the entire FAA could not be enforced by Saudi courts.

Contrasting decisions have also been issued by the BoG, with several decisions having nullified the violating components of a given foreign arbitral awards, while permitting those components of the arbitral award that did not contravene Sharia law. These cases include Decision No. 1851/1415 (1994), Decision No. 1903/1415 (1994),[598] Decision No. 235/1416 (1995), and Decision No. 208/1418 (1997).[599] In each case, the components of the foreign arbitral awards

[596] Cited in Decision No. (115/D/A/15 (2008).

[597] The Circular No.7 (n 568), cited in Al-Fadhel (n 547) 205.

[598] Decision No. *(*115/D/A/15) in 2008, Decision No. (1851/1/9) in 1994 and Decision No. (1903/1/9) in 1994; Asam Saud Alsaiat (n-363)

[599] Decision No. (235/T/2) in 1995 and Decision No. (208/T/2) in 1997, cited in A. Al-Firyaan, *The National and Foreign Arbitration in Saudi Arabia* (Dar AL-Maiman 2007) 247.

that included *riba* were not enforced by the courts, while the remaining clauses were enforced, as they did not infringe upon the principle of respecting the tenets of Sharia law.

There is a fundamental difference between the decisions made before and after 2007, following the stated position of the President of the BoG in Decision No. 116 in July 2007. Indeed, a disparity seemed to exist between the Saudi legislature and judiciary, primarily based on a consideration of the 2007 decision. A comprehensive discussion is given in previous chapters concerning the problems regarding the issue of foreign arbitral awards containing components that infringe upon Sharia law, as well as the viability of certain solutions.

(viii) In the event that Saudi public policy is violated by the foreign arbitral awards

This consideration is another significant factor in the potential refusal to recognise and enforce FAAs in Saudi Arabia. This provision is laid out in Article V (2-b) of the NYC (1958),[600] as well as in Article 37 (e) of the Riyadh Convention. The latter states this requirement clearly, with specific reference to the Saudi context, in which it is argued that refusal to recognise or enforce a foreign arbitral awards is permitted if any aspect of the arbitral award contravenes the tenets of Sharia law, upsets public order, or conflicts with "the rules of conduct of the requested party".

A point of contact exists between the above considerations and those listed in Article V (2-b) of the NYC (1958). Article 37 clearly stipulates that the recognition and enforcement of an award cannot occur concerning any adjudications that violate the principles of Islamic Sharia. Nevertheless, a problematic area exists in this context in terms of the notion of the lack of clarity regarding 'public policy'. Analogous problems have been noted with regard to the legal systems of other nations, including the English concept of *ordre public*. In view of this, provision which holds that respondents who fail to defend themselves adequately from the point of view of an international court of arbitration may reject the said adjudication in the event that the enforcement of the award occurs in a jurisdiction where there is ambiguity surrounding its conceptualisation of 'public policy', 'public interest', or 'public order'.

The Winning parties in the KSA frequently benefit from the broadness of the term. The fact that international public policy is perceived as less broad than domestic public policy led Sheppard to suggest that "not every rule of law which belongs to the order public international

[600] New York Convention (n 190) Article V (2)(b).

is necessarily part of the order public external or international".[601] This suggests that the Saudi government's broad adoption of Article V (2-b) of the NYC (1958), made while cognisant of the often-ambiguous tenets of Islamic Sharia, and has provided substantial advantages to the Saudi, primarily in the form of selective and elusive recognition and enforcement of foreign arbitral awards.[602] However, several countries, including the KSA, suffer from major inconsistencies in the matter of the public policy standards referred to in the course of enforcement proceedings.[603]

The literature indicates that the Saudi vision and understanding of public policy is founded on Sharia law, Crown authority,[604] and public morality.[605] Meanwhile, Al-Samaan argues that the organising factors of public policy according to Sharia law are the Quran, the Sunnah, *ijma*, and *qayas*, among other foundational religious texts.[606] This led Saleh to identify *riba* and *gharar* as critical problems that exist in terms of the notion of public policy in the Islamic context. As previously mentioned, these issues are forbidden by Sharia law, but are embedded in the bulk of foreign arbitral awards adjudicated by international courts of arbitration.[607] More information on the crucial legal pitfalls that can arise with respect to foreign arbitral awards' recognition and enforcement in the Saudi context is presented in previous chapters. It should also be noted that remedies have yet to be found to many of these problems, despite the introduction of the SAL 2012 and SEL.

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[601] Audley Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?' (2004) 1(1) Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=48> accessed 21 January 2019.

[602] Roy (n 138) 953.

[603] Wakim (n 499) 27.

[604] Crown authority in Saudi Arabia is subject to and is mainly drawn from Islamic law.

[605] Baamir and Bantekas (n 410).

[606] Y Al-Samaan, 'Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' (1994) 9(3) Arab Law Quarterly 217.

[607] Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' in Lew J D M (ed), *Contemporary Problems in International Arbitration* (Springer, 1987) 147.

(ix) In the event that consensus regarding the application of the principle of 'reciprocity' does not exist

During the process of becoming a signatory to the NYC (1958) in April 1994,[608] the Saudi government stated their reservation, which was borne from its application of a right accrued to the government in Article I (3) of the Convention.[609] This reservation underlined the need to apply the principle of 'reciprocity' between the KSA and the country adjudicating the foreign arbitral awards, which would have to be indicated to facilitate foreign arbitral awards recognition and enforcement. In Article 6 of its Procedural Rules, the BoG underlined this rule, stating that the competent authority must conform to the principle of reciprocity and thereby "render its judgement after completion of the case documents … provided that it is not inconsistent with the provisions of Sharia". In addition, Circular No. 7 of the President of the BoG stated that a claimant in an arbitral award must clearly demonstrate that their home country conforms to the principle of reciprocity.[610] This was supported by Decision No. 116, which identified the regulation of enforcing foreign arbitral awards,[611] noting that foreign arbitral awards enforcement would be conducted in view of this principle and that enforcement would therefore necessarily require the award to be delivered with the understanding that a bilateral agreement must exist between the KSA and the country of the claimants.

Nevertheless, given that the NYC (1958) has been signed by almost all members of the current international community, it is widely held that the reservation clause for ensuring reciprocity has significantly weakened international arbitration.[612] In other words, it can be argued that the importance of the principle is inversely proportional to the number of signatories to the convention.[613] Furthermore, it is also important to consider the impact of the Model Law in Articles 35 and 36, which requires a foreign arbitral awards to be recognised and enforced regardless of where it was adjudicated. On this matter, in Case No. 115/D/A/15 in 2008, the

[608] It issued by the Royal Decree No. M/11 based on the decision of the Ministers Council No. 78 on 27th January 1993.

[609] Roy (n 138) 952.

[610] M AL-Amer and M AL-Magsudi, *Conditions of Executing Arbitral Awards (*King Abdulaziz University 1998) 7, cited in Al-Jarba (n 146) 336.

[611] Circular No.7 (n 568).

[612] N Blackaby et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) 636.

[613] Blackaby (n 100).

competent authority of the BoG forbade foreign arbitral awards enforcement because of *riba*, which automatically infringes Islamic law, as well as because of the lack of reciprocity between the KSA and the UK, despite the UK being a signatory to the NYC (1958). Nevertheless, the principle has been operational since the passing of SEL in 2012, referred to in Article 11 of SEL itself, and Article 11 (5) of its Rules (2013).

5.5 The Role of Islamic Jurisprudence Schools in Saudi Arabia

Before understanding the recognition and enforcement of arbitration award, there are different schools of Islamic jurisprudence that need to be understood concerning these issues.[614] The four major school of jurisprudence in the Islamic world are the Hanafi, Maliki, Shafi'I, and Hanbali, as discussed previously in detail. Islamic jurisprudence is the umbrella term for these schools of law, which are all based on interpretations of the Holy Quran, the Prophet's Sunnah, and some auxiliary sources (such as the customs of the early Islamic generations and local practises, whose relative importance varies among the schools). To establish the procedural rules of Sharia law, which have a wide range of applications, including in the political, business, legal, religious, social, and personal lives of Muslims and others, is the main issue, and the focus of the various schools of jurisprudence is the same..[615]

Some Islamic scholars emphasise that there are differences between *fiqh* and Sharia law *per se*; while the former is a more comprehensive term governing all aspects of religious observance, 'Sharia' tends to refer to public and state issues.[616] If an injunction is obtained by the courts under Sharia law, then this injunction is not changeable; however, *fiqh* rulings are highly flexible, in accordance with circumstances and facts of the case. This is similar to English common law jurisprudence, where particular disputes are considered based on the circumstances of the situation and party's practices, and such broader considerations are factored into court deliberations.

It is important for understanding the role of Islamic schools of jurisprudence to understand the scope of the Sunnah.[617] The Sunnah itself is based on *hadith*, texts which narrate the words and deeds of the Prophet Muhammad (ﷺ). Islamic Sharia ultimately seeks to ensure that deeds are in accordance with religious prohibitions, obligations, and permissions, in line with the vision

[614] Bin Zaid (n 155) 289.

[615] Majallah al-Ahkam al-'Adliyyah, article 1790.

[616] Alanzi (n-6) 1-7.

[617] J Almahalli and As-Sutee (n 88).

of Islam of enjoining justice in human affairs. The fundamental point of Sharia is to achieve justice, which ought to be the intention of parties in a dispute as well as judges (from an Islamic perspective). As noted by numerous Islamic scholars, including Ibn Taymiyya, "deeds are judged according to intentions; each man's accounts are drawn up according to his intentions".[618] Goldziher[619] relies on the *hadith* interpretation and urges to follow the interpretation of Sharia law over the interpretation of *fiqh*, reflecting Ibn Taymiyya's interpretation that "God says in the Holy Book that come, meet me with your intentions, not with your deeds".[620] However, during the early centuries of the development of Islamic jurisprudence, there was no clear codification and interpretation of *hadith* among Muslim Scholars and preachers, and the interpretation of the Sunnah was mainly recited orally.

A paradigm shift occurred when the 9th-century Hanbali scholar Mohammed Al-Bukhari compiled the canonical compendium of verified *hadith*, known as *Sahih al-Bukhari*, based on rigorous exegetical analysis of thousands of narrations traced back through authenticated chains of narration to the Companions of the Prophet.[621] With this codification and formalisation, Islamic scholars throughout the Muslims world, such as Ibn Al-Hajjaj and others, gathered all the evidence from *hadith* to compile and present a major series of books to increase understanding of the *hadith*, Quranic exegesis, and the increasingly formalised schools of jurisprudence.[622] Nevertheless, contradictions in jurists' interpretations of the Sunnah and Sharia continued, reflected in different opinions about the interpretation of the same texts.[623] The different rulings of jurists in different schools has particular implications for the interpretation of Sharia in the KSA and elsewhere.

There are several interpretations and perspectives within Islamic law, based on the various schools, which have an impact on how arbitration rulings are enforced in Saudi Arabia. Giving the right interpretation of the hadith serves a vital purpose since it can make the context of the text's language simpler and enable even a logical person to understand the hadith's actual

[618] Paul R. Powers, 'Interiors, Intentions, and the Spirituality of Islamic Ritual Practice', (2004) 72(2) Journal of the American Academy of Religion 425-459.

[619] Mukhibat Mukhibat, 'The teaching management and study of Hadith: method, contents, and approaches' (2019) 24 (6) Utopía y Praxis Latinoamericana153-162.

[620] Ibid.

[621] ibid.

[622] ibid.

[623] ibid.

meaning and interpretation..[624] Most importantly, Islamic scholars believe that with the right interpretation of the *hadith* is important because of the construction of legal texts, to determine the appropriate meaning, and every individual should understand without changing the meaning. However, there are arguments as well on this issue, as the enforcement of legal principles does not always involve arguments based on theoretical abstractions reflected in traditional rulings; both international trade and local trade contracts are much more based on practical grounds.[625]

Arbitrators, judges, and lawyers face different disciplinary perspectives and understand different approaches and methods to interpret based on assumptions and interpretations. For example, in the case of Bronitt and Bottomley, it was claimed that "*the rules are made by those with experience and expertise in the field and, so it is assumed, compliance with the rules is therefore more likely*".[626] The assessment was considered a fair one, because rules can be changed as setting the standards based on different school of jurisprudences. This is the main reasons for the lack of uniformity with the a diversity of interpretation from one Islamic court to another, and scholars acknowledge that difficulties can emerge in relation to the authoritativeness of laws and the precedents of courts.

Therefore, it is difficult to understand the character of legal contexts of legislation, because of the many unclear legal texts with their contextual meaning and lack of clarity when it comes to the judicial interpretations. However, with the introduction of parliamentary system in modern times, the process of identifying and approval of legislation makes it easier to facilitate legal interpretation. Modern states also have a system of law which interprets the written law, generally known as jurisprudence. However, there is still controversy in defining the scope of interpretation of legislation. This is the main theme of legislation in the KSA, as previously discussed, based on Sharia law or more fundamental principles of the Holy Quran and Sunnah.[627]

Given the situation of the essential understanding of the philosophy of Islam and *fiqh* the source of Sharia is also exclusive in the sense of a rule of law which also seen the debate between local domestic courts and contemporary international legal doctrine. For example, the lack of

[624] AL-Qarni (n 151).

[625] Nicolas Bremer (n-37)

[626] S Bottomley & S Bronitt, Law in Context (4th Edition, the Federation Press, 2012) 343.

[627] ibid.

uniformity between the domestic courts and international law in respect of determination and interpretation. There are different legal cultures, whereby international lawyers and domestic courts can be affected by questions of international legislation. Therefore, with the variety among rulings arising from (and indeed within) different schools of jurisprudence, modern legal practitioners and ordinary people such as parties to arbitration are left uncertain about the potential and likely outcomes of Sharia deliberations.[628] There is a practical need to develop legal certainty in judgements establishment from Islamic sources and in compliance with applicable international legislation and treaties in the KSA.

5.6 Influence of Sharia Law and Arbitration in Saudi Arabia

As discussed in previous chapters, Sharia sets the basic principles on contracts and enforcement, including capacity, mutual consent, agreed upon terms, and other key areas between different parties involved; furthermore, Sharia is of fundamental importance in Saudi legislation and in practice concerning arbitral proceedings. This section highlighted various crucial aspects of the arbitral process and how Sharia affects the interpretation of Saudi legislation, with the purpose of rising awareness of the concerns of foreign investors with regard to arbitral award recognition and enforcement in the KSA. There is a foundation of the theory of contract law and construction within Islamic law; however, contracts are only valid under the clauses that *riba* (interest) and *gharar* (deception or excessive risk) are not allowed, as discussed above in detail.[629] The main element of the private law doctrines of the Islamic law are complex, and fall beyond the scope of this study; therefore, only key areas are discussed here with regard to the validity of arbitration according to Islamic law, with reference to Sharia precedent and jurisprudence.[630]

For many jurists, arbitration is considered as the most appropriate non-binding form of dispute resolution, which means the decision rendered by the arbitrator is either non-binding or final for any parties involved. However, this is a highly significant area of controversy among Islamic jurists, which implies that it does not have final jurisdiction to settle dispute in an arbitrator's decision which based on the national public policy.[631] This means that Islamic law upholds the principle of party autonomy, which means one can have right to present challenges

[628] Alssarkhasi (n 176); Ibn Qudamah (n 207).

[629] Aljloud (n 269), 85-98.

[630] Nesheiwat and Al-Khasawneh (n 18).

[631] Al-Assaf (n 286) 4.

at the enforcement level of foreign awards, despite the fact that arbitrators have no inherent jurisdiction to revoke arbitration agreements. This issue was often described by the Islamic scholars with reference to the following verse of the Holy Quran:

> "if you fear a breach between them twain (the main and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is ever all knower, well acquainted with all things".[632]

It is increasingly accepted among Muslim scholars that an arbitration agreement should be bound by the arbitrator's decision, approving arbitration in order to align with the prevalent international form today, whereby authority is accorded to arbitrators to issue awards that bind both parties.[633]

In the Hanafi School of jurisprudence, arbitration is considered a form of binding conciliation or award,[634] albeit Hanafi scholars accept the notion that parties involved are not obliged to comply with the award because of the agreement to resort to arbitration being binding between different parties in the way they often contract with each other. Shafi'i jurists consider arbitration to have less decisional autonomy, with final authority being accorded to judges without understanding the outcome.

There is a connection between the interpretation of public acts of law-making and the development of Sharia-compliant private law, in the Kingdom and elsewhere in the Islamic world.[635] The Islamic principles of contract law mainly emphasise honour, equity, and good faith in the enforcement of the agreements, and require all parties to obey the rule of law and honour their contracts, without imposing any unfair financial burden on any other party. In this regard it is important to understand the Saudi legal interpretation of legislation, which is generally determined by Sharia, but whereby Islamic legal theories and practices as a whole never directly impinge on the court system (which is held to be a Sharia instrument in its own right, by default). In the KSA, once an arbitral award is rendered, it must be recognised by the courts, and nothing can prevent its legal execution.

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[632] Ibid.

[633] Wynbrandt (n 271) 32.

[634] Al-Safi (n 39) 52-53.

[635] Bin Zaid (n 155) 353.

5.6.1 Arbitration Clause

The arbitration clause is an important provision involved in commercial contracts and agreed upon by arbitral parties who submit any dispute arising from the contract to arbitration. The arbitration clause also specifies the arbitration with crucial law for the governance of the dispute. Any award resulting from the proceedings of an arbitration will be upheld and the arbitration clause will be deemed valid. There are several ways which can help to understand the ground on which an arbitration clause may be found invalid when it comes to Sharia law in the KSA.

First, clauses might not provide for the appointment of non-Muslim arbitrators.[636] Some argue that permitting non-Muslim arbitrators in disputes may render the arbitration clause invalid, which is against any Islamic legislation and Sharia at large.[637] Second, the most important element which needs to be considered is terms contrary to the provisions of Islamic law that are conditional for the arbitration clause, restricting all parties involved in the proceedings and obligations under the contract. The third important point is the arbitration clause containing any *gharar*, whereby the clause would be violating Sharia's main principles, potentially rendering it invalid. Finally, the last important point is that the arbitration clause cannot be immoral to the public policy of the KSA, which could result in the award being deemed invalid.

As explained previously, the Hanbali School of jurisprudence is the default school of Saudi Sharia interpretation, whereby any clauses that accompany a contract are valid unless they are injurious to public policy.[638] In Saudi Arabia, prior to the establishment of regulation on arbitration regime, the common practice, as discussed in previous chapters, was for contractual parties to agree orally to submit disputes arising from transactions to arbitration. This oral agreement was an allowance for illiterate disputants, for whom commercial transactions were commonly mediated by literate intermediaries. Oral agreements required witnesses to prove the transactions and contracts formed between parties. However, in modern times, most agreements between different parties are in written form, which avoids any confusion. Written evidence is essential for disputes and adjudicating before the judiciary in the KSA, and judicial regulations make it clear that any agreement used for the contract must be in writing, and must

[636] Ben D. Mor, 'The Middle East Peace Process and Regional Security' in Ariel E. Levite, Emily B. Landau, *Confidence and Security Building Measures in the Middle East* (Roudlege 1997) 172.

[637] David F. Rolewick, 'Unconscionability Under the Uniform Commercial Code - Two Trends in Cases Decided on Unconscionability Grounds' (1970) 1 Loyola University of Chicago Law Journal 313-327.

[638] ibid.

be recognised by the competent court. Article 9(3) of the SAL 2012 explains the scope of an arbitration agreement as follows:

> [A]n arbitration agreement shall be deemed written if it is included in a document issued by the two parties or in an exchange of documented correspondence, telegrams or any other electronic or written means of communication. A reference to a contract or a mention therein of any document containing an arbitration clause shall constitute an arbitration agreement. Similarly, any reference in the contract to the provisions of a model contract, international convention or any other document containing an arbitration clause shall constitute a written arbitration agreement, if the reference clearly deems the clause as part of the contract.[639]

There are some important issues that need to be understood at the outset of arbitration agreements in the KSA. Although the use of arbitration clauses in the KSA is welcome, there are risks that an award may not be enforced, which causes significant impacts on the commercial transactions, for which arbitration is quickly becoming the most popular and preferred mechanism worldwide for expeditious dispute resolution. However, Sharia law allows Saudi courts extensive scope to refuse to recognise or enforce foreign arbitral awards. This produced a lack of clarity in agreements, which is deemed to run afoul of Sharia in the Kingdom. While courts have wide jurisdiction to set aside arbitration clauses *per se* in their rulings on individual cases, as per the traditional norms of Sharia implementation, SAL 2012 attempts to curtain this power to a certain extent in alignment with national policy (and international agreements such as the NYC).[640] The SAL 2012 specifically requires that all parties to a dispute should agree to resort to a specific dispute resolution mechanism, which may be previously stipulated according to their prior contracts. The new arbitration law has a simplified statement about arbitration agreements under the Articles 1 and 9. Article 1(1) of SAL 2012 refers to:

> An agreement between two or more parties to refer to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement

[639] Arbitration Law No. M/34

[640] Alan Scott Rau, 'Understanding (And Misunderstanding) Primary Jurisdiction', 2010, 21, The American Review of International Arbitration, 47-188.

may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.[641]

Article 9(1) clarifies that on the basis of an arbitration, which can be invoked and provide the prior to the occurrence of the disputer the arbitration agreement can be concluded whether ion the form of separate agreement. Both of the abovementioned Articles are consistent with the international arbitration practices; however, the main issue is that Saudi judges under Sharia law can override these provisions and refuse to recognise or enforce any judgment.[642]

5.6.2 The Absence of an Arbitration Agreement

Commercial parties that need to resolve disputes and protect their investments and relationships will prefer the state laws in their arbitration agreements, because it has been observed that when the parties agreed on the arbitration, they can opt out from system which obliges into an arbitration and create rights.[643,644] In Saudi Arabia, the courts and tribunals encourage parties to resolve their issues mutually, and by means of arbitration. Article 25(2) of the SAL 2012 is important in this regard, acknowledging the arbitral tribunal's authority to adjudicate arbitral disputes in the absence of an arbitration agreement.[645] Similarly, Article 28(2) of the SAL 2012 also empowers Saudi courts to consider the enforcement of a settlement award entered into amicably by the involved parties.[646]

5.6.3 Criteria for the Selection of Arbitrators

The appointed arbitrator in Saudi legal norms is expected to be familiar with Sharia law, and under a Sharia law system and Islamic cultural context this remains important. In the KSA, when Sharia law was implemented during the creation of the formal court system, arbitral disputes automatically appointed judges as official arbitrators, with the role of providing resolutions to any dispute that parties agreed upon.[647] However, the most important point in

[641] Arbitration Law No. M/34 art 1.

[642] J Budziszewski, 'Natural Law, Democracy, and Shari'a', in R Ahdar & N. Aroney (eds), *Shari'a in the West* (Oxford University Press, 2010) 139.

[643] Ibid.

[644] E. Branet and others, *'Arbitration Law in America, a critical Assessment'*, *A Critical Assessment* (Cambridge University Press, 2006) 100.

[645] Peter Rosher, 'Adjudication in Construction Contract' (2016) 5 International Business Law Journal 497, 497-5100.

[646] Ibid.

[647] ibid.

this regard is that there is prerequisite for the judge who will responsible for this matter and requirements for the arbitrators and meet the all eligibility criteria that set for the appointment to preside over a dispute. The following are considered essential criteria needed for the appointed arbitrator:

i. The first and most important requirement is that the arbitrator must be practicing Islamic values and be familiar with Sharia law and its implementation. The rationale for this requirement is that the arbitrator should be qualified and have experience in Sharia law, and also be a person of good moral standing in the community (this usually implies that the arbitrator be a practising Muslim, although this is not necessarily the case, as discussed below), capable of understanding the principles of Islam correctly when it comes to resolving disputes among different parties. The arbitrator in the KSA must have the prerequisite knowledge of Islam and Sharia, and the capacity to define legal rules, which is useful and efficient for the arbitration to avoid any arbitrator's award being contrary to public order.[648] However, there are some limitations associated with this conventional expectation, including in international contexts when non-Muslim parties are involved. For example, if the commercial dispute is arbitrated in a non-Muslim country and the law is according to the foreign country's law, the arbitrator might choose a non-Muslim arbitrator for their disputes, which is a permissible choice under Sharia law as well according to some jurists.[649] The Hanafi School accepts non-Muslim judges over Muslim litigants as valid in various types of commercial, civil, and financial cases.[650]

ii. The second important point is that arbitrators can be selected only after a dispute has arisen. In the Islamic legal literature there have been arguments that Western arbitration procedures permit the appointment of arbitrator under the provision of the clauses within their agreements, which should not be recognised within Islamic Sharia. This is also mentioned by Saleh,[651] concerning the appointment of arbitrators and the arbitration commencement after the dispute arises between two or more parties. The main reason for this is to recognise the specific appointments for which Islamic law requires unanimous consent before cases start. In the case of KSA, the appointment of

[648] Saleh (n 148) 40.

[649] Ibid. 41.

[650] Kramer (n 305) 20-37.

[651] Saleh (n 148) 48-49.

the arbitrator could be refused by the court under Sharia law.[652] In the KSA, according to Hanbali School of thought a Muslim arbitrator can adopt the regulations and Sharia law to interpret the dispute as non-legislated of enforcing the contract. This is because the Hanbali school of thought does not allow the arbitration process other than for mandatory Sharia doctrines, which is a clear a source of tension between the doctrines of global arbitration and the UNCITRAL Model Law and the prevailing arbitration rule and influence of Sharia on Saudi arbitration law.

iii. The third important element is the gender of the arbitrator; only men can be arbitrators under Saudi law, including for either domestic or foreign arbitrations, which is also a high source of tension and controversial issue when it comes to the international disputes where non-Muslim parties is involved.[653] Sharia compliance could be achieved if two women were selected as arbitrators, as per the Quranic verse that 'the testimony of a single man is equivalent to the testimony of two women'. While it is unlikely that Saudi courts would accept the proposition of women acting as arbitrators in practice, Article 14(2) of the SAL 2012 merely stipulates that arbitrators must hold a university degree in Sharia law, and the stipulations do not explicitly exclude the appointment of women as arbitrators. This leaves an opportunity for legal debate on the appointment of women as arbitrators in the Saudi legal system for arbitration-related cases.

5.6.4 Legal Requirements for Arbitrator Appointment

SAL 2012 has certain requirements which allow or disallow the appointment for the potential arbitrator, pertaining to three important characteristics: qualification in Sharia law, legal capacity, and good conduct.[654] However, there are arguments for these requirements which need to be taken into consideration that require for the selection of arbitrators, as complying these requirements for the appointment means that the new law provides increased certainty when proceeding Sharia law. For example, these provisions main goals is to prevent the parties from determinedly violating the principles of Sharia law and Saudi legal system, which could create issues in the recognition and enforcement of arbitral awards in the KSA.[655] Under the

[652] Kramer (n 305) 20-37.

[653] Felicitas Opwis, 'Islamic Law and Legal Change: The Concept of *Maslaha* in Classical and Contemporary Islamic Legal Theory', in A Amanat & F Griffel (eds*), Shari'a Islamic Law in the Contemporary Context* (Stanford University Press, 2007) 62-82.

[654] Arbitration Law No. M/34 , art 14(3).

[655] R M K Al-Wakeel, *Comments on the New Saudi Arbitration Law* (1st Ed., 2014) 47-49.

article 14 of SAL 2012, there are certain conditions imposed on arbitrator selection, such as educational qualifications and legal status. The law incorporates the standards for the selection based on the Sharia law, including full legal capacity, being of good character, and being educated in the domain of Sharia compliance.[656] The law also make it important for an arbitrator to follow the law of Sharia and decide the dispute accordance to the Sharia principles; however, the SAL 2012 mainly adopts the Hanbali interpretation of Sharia, which is notably more liberal concerning the scope and role of arbitration in general, as discussed previously.

5.7 Chapter Summary

This chapter addresses the various challenges and difficulties that arbitration proceedings in business disputes may encounter under Saudi law and regulations. Despite efforts by revised legislation (particularly SAL 2012) to protect foreign investors and their claims, the main issue for non-Saudi parties in Saudi Arabia is uncertainty regarding the recognition and enforcement of arbitral awards on the provisions based on Sharia law or public policy. Although, there are different of opinions among Islamic scholars about developing sources of Sharia to apply to the contemporary globalised world, including with regard to arbitration procedures and enforceability, these differences of interpretation need to be further investigated in future studies by highlighting new era of the Kingdom after the development of Vision 2030 plan.

The importance of the understanding and interpreting legal texts and Islamic jurisprudential views are important to understand. There is a lack of clear understanding about the modern Islamic thought about the role of modern legislation, such as in the SAL 2012 and Sharia, which is mainly considered uniformly in the legal system in Islamic legislation. Challenges exists for jurist, such as those pertaining to international contracting parties and arbitrators in interpretation, whereby many different political, social, and legal views converged. The majority of Islamic jurists tend to be very liberal and conciliatory when it comes to the interpretation of source of the Sharia in relation to new subjects such as the enforcement of arbitral awards in the KSA. However, this discussion has highlighted that a range of considerations exist to impede the development of arbitration in Saudi Arabia, largely arising from the specific particularities of its national legal framework.

Most significantly, the development of arbitration in the KSA is hampered by the staunch adherence of Saudi public policy to Sharia principles, the decision of the Saudi government in

[656] Cresswell (n 38) 285-94.

terms of the principle of reciprocity upon acceding to the NYC (1958), and the way the government interprets and applies Article V (2-b) of the Convention. These issues are problematic for the KSA as it is generally acknowledged that a streamlined and effective international arbitration system, designed to offer a modernised alternative to traditional litigation, is central to the stability and effective functioning of global trade in the current context.

Finally, this chapter provides the detail on the uncertainties and challenges faced by the contracting parties with the respect of the recognition and enforcement of their commercial arbitral awards in the KSA and how Sharia influences the whole arbitral process. Indeed, there are several differences between the Saudi arbitration process and the other non-Muslim countries and their arbitration regulations, particularly in the selection of arbitrators to resoles the disputes. A major debate is emerging in the Muslim world about the authoritativeness of schools of Islamic jurisprudence. It can be further affirmed that Islamic legal practices in the KSA are not static in understanding or interpretation in resolving disputes, especially when it comes to arbitration disputes, which should be concluded by the free and valid will of the parties involved. In the next chapter, further principles of Sharia and their influence on interpreting public policy in relation to the enforcement of arbitral awards are explored in relation to global trends.

Chapter 6: Grounds for Challenges in Recognition and Enforcement of Arbitration Awards in Saudi Arabia

6.1 Introduction

There is no doubt that the enforcement of arbitral awards faces enormous challenges not only in the KSA but in most national jurisdictions worldwide; however, the particular issues or challenges faced vary from one jurisdiction to another. The SAL 2012 is a novel legislative instrument seeking to align the Saudi approach to arbitration with global norms, and it purports to facilitate significant legal solutions to the issues raised in the previous chapter. However, most legal scholars around the world and also Muslim critics believe that enforcing foreign arbitral awards in the Kingdom is uncertain. As discussed earlier that this research mainly focuses on the legal side of the recognition and enforcement of arbitral awards in the KSA in relation to uncertainty, and solutions that could be offered to address.

This chapter sheds further light on the potential challenges in recognition and enforcement of arbitral awards in the KSA, discussed with the reference to the current legislations and jurists based on Sharia principles. It considers the grounds for issues and obstacles in recognition and enforcement for arbitral awards in the KSA, particularly under the NYC and other juristic considerations, and highlights the grounds for non-enforcement which used in the context of the KSA in consistency with the NYC, and identifies ways in which foreign arbitral awards could be challenged, and the reasons behind non-enforcement of foreign arbitral awards in the Kingdom. Finally, the chapter provides detailed arguments on some of the potential challenges and difficulties associated with the enforcement of foreign arbitral awards under the NYC, which has been interpreted as encouraging the non-enforcement in the KSA, by giving authority to local courts in the interpretation of provisions and their discretion. This chapter explains how Islamic legislation and practices largely affects the enforcement or non-enforcement of the foreign arbitrary awards in the Kingdom.

6.2 Challenges to the Enforcement of Foreign Arbitral Awards

In the KSA, the NYC was acceded to in 1994, with the main purpose of recognising arbitration agreements and arbitral awards issued by other countries who are member states of the

Convention.[657] The main reason behind the acceptance and introduction of the NYC was primarily to improve the Kingdom's position and role within the international business community and develop new investment channels in the Kingdom at that time. When the Kingdom adopted the NYC, the government and international organisations could resolve their own disputes more effectively, and private organisations could also use arbitration as a method to resolve their disputes. Currently, due to the milestones achieved so far, implementation can be sought by any contractors who are not of Saudi nationality, who can enter into arbitration in the Kingdom by following laws to resolve their disputes both domestically and internationally.[658]

The grounds for the enforcement of foreign arbitral awards under the NYC in the KSA need to be considered based on Article V of the NYC. This can be explained using the example of the non-Saudi arbitrator, where the issue was brought up because an award for their assets had previously been enforced and they were required to submit it to the Kingdom courts, where the courts would then determine and conduct their investigation into whether the award is enforceable. However, as most awards were not enforced prior to the ratification of the NYC, there were consequences to rejecting foreign honours based on public policy..[659] After the adoption of the NYC, the procedures completely changed, and procedures do not require any more decisions from the Kingdom to further reinvestigate arbitral awards.[660] Saudi courts do not use public policy solely as basis of refusal of recognition and enforcement of arbitral awards; rather, they look at other factors including administrative issues.

However, arguments from evidence suggest that there are instances where refusal of awards is based on protection of the local interest of the legal structure (i.e., public policy), whereby authorities can refuse arbitration awards in the KSA.[661] Although, it is important to understand that the KSA looks to move toward transparent and fair system of arbitration by adopting NYC, their own legal system is mostly influenced by Sharia, whereby the Kingdom's courts can still refuse to enforce arbitral awards if they deem them to entail any contradiction with public

[657] Roy (n 138).

[658] ibid.

[659] New York Convention (n 197) Article V(2).

[660] Roy (n 138).

[661] ibid.

policy.[662] This can be found in the Article V.2 of the NYC, which means the courts can still refuse to enforce an arbitral award on the ground of the country's public policy.[663]

Al-Ghadyan[664] discussed similar principles that exists in the Riyadh Convention in Article 30 (a), which states that signatory states have the authority to refuse the recognition and enforcement of the foreign arbitral awards if there is any contradiction found with the principles of the Sharia and public policy. This shows that challenges and issues still exists in the recognition and enforcement of the foreign arbitral awards in the KSA, despite the Kingdom ratifying the NYC and other jurisdictions alignment with international legal structure regarding foreign arbitral awards.[665] There are requirements which are needed for the formation of arbitration agreements discussed under the NYC Article II (2): '*the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*';[666] and in the English Arbitration Act 1996. This is similarly found in the UNCITRAL Model Law, with the statement that "*the arbitral agreement shall be in writing*".[667]

ElEisa conducted a critical analysis of the legal problems associated with recognition and enforcement of arbitral awards in the KSA, and highlighted the fact that SAL 2012 has no specific requirement for the arbitration agreement to be in a written format, but there are several other laws under the jurisdiction mentioning the writing of agreements, which have to be drafted in arbitration award-related agreements as well.[668] Therefore, the issue of the writing in the specific law within the SAL 2012 needs to be addressed by Islamic scholars for amendments. In Islamic laws, the written word is a highly important proof of evidence for an agreement.[669] Evidence from Islamic scholars often highlights and acknowledges the importance of such proof, and the Quran itself encourages written agreements for anything which can be proved later if required. There is evidence that the arbitration law in the KSA

[662] ibid.

[663] Ibid.

[664] A. Al-Ghadyan, 'The Changing Phases of Arbitration in Saudi Arabia' (1997) 63 Arbitration-London 132.

[665] Khanifah Khanifah, et al (n-404)

[666] New York Convention (n 197) art II (2).

[667] UNCITRAL Model Law (n 223) Art 7(2).

[668] Khanifah Khanifah, et al (n-404)

[669] ibid.

needs to be improved and aligned with the international principles that require an arbitration agreement to be in writing.

SAL 2012 clearly mentions that the agreement need to be in a written form, in Article 9 (2): '*the arbitration agreement shall be in writing; otherwise, it shall be void'*.[670] Another important element that needs to be considered is in relation to Article 5:

> 'The said instrument shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration. Copies of the documents relevant to the dispute shall be attached'.[671]

Article 5 of the SAL 2012 is important in relation to NYC for several reasons relating to the validity of arbitration agreements such as conditions that agreements must be signed, and the parties should agree that disputes will be settled through arbitration.[672] This principle can be found in the NYC, because an arbitration agreement may be annulled if any party lacks the capacity to enter into that agreement: *'recognition and enforcement of the award may be refused when the parties to the arbitration agreement are under some incapacity'*.[673]

NYC Article V (1) (a) highlights that enforcement of foreign arbitral awards can be refused if the agreement is not valid under national law; therefore, courts can enforce an arbitral agreement unless it is null or void.[674] The null and void agreements are known as defective, such as those which involve misrepresentation, illegality, and lack of capacity or fraud. The scope of the "null and void" agreements has been explained by the US Court of Appeal under the Article II (3) as:

> 'an agreement to arbitrate is "null and void" only (a) when it is subject to an internationally recognized defence such as duress, mistake, fraud, or waiver or (b) when it contravenes fundamental policies of the Forum State. The "null and

[670] Arbitration Law No. M/34, Art 9 (2).

[671] Arbitration Law No. M/46, Art 5 5.

[672] Khanifah Khanifah, et al (n-404)

[673] New York Convention (n 197) art V (1(a).

[674] New York Convention (n 197) art II (3). The Convention leaves the terms "null and void, inoperative or incapable of being performed" undefined.

void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.'[675]

The other issue that needs to be emphasised is the 'inoperative arbitration'[676] agreements that become inapplicable of being performed by the parties because of the action associated with them. The main example of such case is the arbitration clause in Shanghai Foreign Trade Corp v. Sigma Metallurgical Co, where the court judgement concluded that "*the settlement agreement without [an] arbitration clause rendered [the] arbitration clause in [the] earlier agreement 'inoperative'*".[677] The following are some attributes which are inoperative in agreements: (1) expensive and inconvenient agreements, or those burdensome to implement; (2) the arbitral award that could not be enforceable; (3) claim in tort; (4) litigation and arbitration of the clause contemplating; (5) decision can be risked to multiple and conflicting; and (6) arbitration becoming imperfect.[678]

The other provision under the NYC Article V (1) (a) which discussed the incapacity defence shows the refusal of enforcement based on the proof that parties to the agreement and under the law applicable to them under some incapacity. However, the NYC has no specific definition of incapacity, therefore this concept can be misused in different jurisdictions around the world, including in the KSA. Therefore, as NYC Article V (1) (a) states that the law applicable to parties should be determined, it is possible for Islamic law to be applied when determining party's capacity in the KSA.

6.3 Arbitral Award Enforcement Challenges in Arab Countries

There are several challenges associated with the enforcement of arbitral awards in Saudi Arabia. However, it must be understood that the key facet of enforcement in the KSA is the fact that the national jurisdiction and public policy is rooted in Sharia law, thus arbitrational law and norms follow Islamic values and the principles. The SAL 2012 itself adheres to Sharia law; Article 5 explicitly states that arbitration must be followed with the fundamental principles

[675] *Rhone Mediterranee Compagnia Francese v. Lauro* 555 F. Supp. 481 - Dist. Court, D. Virgin Islands (1982).

[676]; Michael Mustill and Stewart Boyd, Commercial Arbitration (2nd Ed., Buttersworth 1989) 464.

[677] Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd, Pang Kee Lee and Chi Ju Chan, (1997) XXII YBCA 609, 614 (Australia, NSW S Ct 1996).

[678] W Laurence Craig, William Park, Jan Paulsson, International Chamber of Commerce Arbitration (3rd Ed., 2000) 130.

of the Sharia.[679] SAL 2012, created and adopted by Royal Decree No. M/34, changed the landscape of the long-standing issues regarding the arbitration and its enforcement.[680] The law is in line with other GCC states and international norms related to arbitration.

The SAL 2012 adheres to Islamic fundamental principles and standards. Article V of this law state that arbitration must be applied under the Sharia law. Prior to the SAL 2012, there were issues and problems faced by the KSA regarding the enforcement of an arbitral awards.[681] It was essential for the KSA and other GCC countries to enact laws for this purpose. They set out provisions that addressed both enforcement and non-enforcement of the arbitral award.[682]

Al-Sharif[683] highlighted the issues and challenges faced by the KSA in recognition and enforcement of arbitral awards, based on the analysis of experts and researchers, which he found particularly related to the use of the word *"may*" in Article V of the NCY. This term is used to indicate that the recognition and enforcement of arbitration awards may be refused based on the evidence provided by the arbitrator to the relevant authority. The major challenges to recognition and enforcement of the foreign arbitral awards include the legal capacity of the parties in the agreement or under the country's own legislation. In some cases, the arbitrator does not have the legal capacity. Another problem arises if the composition of the arbitral proceedings were not made based on the consent of the parties involved in the arbitration process, or in the absence of such agreement, or this is not included in the country's own law relating to the enforcement and recognition of foreign arbitral award.

There is a lack of specificity on the mechanisms for the justification of the invalidation of such cases for the recognition and enforcement of the arbitral awards under the NYC, including in the KSA. In addition to this, there are different laws and regulations that Saudi Arabia follows in terms of implementing foreign arbitral awards, which contributes to challenges and obstacles (and sometimes total rejection) concerning awards. The Saudi judiciary's application of Sharia stipulations concerning interest (*riba*) may be particularly antipathetic to international arbitral awards and procedures. Al-Sharif further explained that other countries around the world have their own mechanisms in place that deal with obstacles during implementation of foreign

[679] Arbitration Law No. M/34 (n 22)

[680] ibid

[681] Arbitration Law No. M/34 (n 22)art 55.

[682] ibid.

[683] Dimah Talal Al-Sharif, 'The Case: Foreign arbitral awards enforcement: obstacles'<https://www.arabnews.com/node/1982786> <accessed 03 January 2022>.

arbitral awards related to delays and reconsideration process. Therefore, the main challenges in recognition and enforcement of the foreign arbitral awards in the KSA need to be systematically addressed.

6.4 Arbitral Award Enforcement Challenges in Saudi Arabia

In the KSA there are enormous challenges in the enforcement of foreign arbitral awards. The the enforceability of an arbitral award within the perspective of Islamic legislations and in particular with regard to Sharia, which has clear concepts about the binding nature of contracts, which must be honoured according to Quranic injunction: "*O ye who believe? Fulfil obligations*".[684] However, there are jurisprudential caveats and exceptions to this principle. Alsheikh[685] noted that the Shafi'i school of jurisprudence considers an arbitral award to be a binding contract only when all the disputing stakeholders agree to this; consequently, when both parties agree on the terms and conditions of the arbitration, then the arbitral award is valid. The position is feasible for contemporary needs, and it emphasises that the main duty of the arbitrator is to determine and arrive at the point where an enforceable award can be made. Most Sharia jurists concur that arbitral awards are bindings contracts; once all parties agree upon such contracts, they must all comply, whereby the award itself is not contradictory to Islamic Sharia (and, by extension, public policy in the KSA).

Baamir[686] noted that Hanbali scholars stipulate the necessity of ratification by a court for an arbitral award to be enforced, whereby the judge can review the whole agreement and consider whether it is deemed binding between parties before making a judgment. Also, the judge can examine the arbitral award and determine whether it meets the requirements of Islamic laws or not, as underscored by the Sharia. Saleh[687] disagreed with this statement and asserted that judges merely have authority to confirm and accept the arbitral award, because the majority of the judgements are already given within the arbitral award and are binding between different parties. Therefore, in practice, according to the court judgement, there are conditions where

[684] Al-Quran, Al-Ma'ida 5:1.

[685] UNCITRAL Model Law (n 97) ch 7, art 34(1). Baamir agrees with this position. Abdulrahman Baamir, *Shari'a Law in Commercial and Banking Arbitration, Law and Practice in Saudi Arabia* (Ashgate Publishing Limited, 2010) 91.

[686] Baamir and Bantekas (n 410).

[687] Saleh (n 142) 66.

both parties and any opposing party can withdraw the enforcement of the award; however, the confirmation from the judge needs to be sought.

Aside from statements on general Sharia positions on the enforcement of arbitral awards, the particular grounds for challenging awards have been debated.[688] Alshaikh found that the grounds on which enforcement of arbitral awards can be refused vary, but the most important are those that violate the fundamental principles of the Islamic laws.[689] An empirical study found that almost 48.30% of awards refused across the GCC were due to the failure to meet Sharia principles. Consequently, judges and arbitrators should scrutinise the principles of Sharia and determine the public policy, when it has been established that the enforcement award does not meet the criteria.[690] Courts in the KSA have accepted that arbitral award recognition and enforcement is based on the principles of Sharia.[691]

It is noted that the ground for the non-enforcement of arbitral award will be same as the Sharia principle for the acceptance and recognition, because there are instances of overlap with the decision for enforcement of an arbitral award. There are seven major grounds for refusal of awards in Oman, which can be considered as basic guidance that all parties must follow to avoid any refusal and non-enforcement outcomes in GCC states:

- The valid agreement of arbitration must be presented.
- There must be written agreement to arbitrate presented.
- All parties must have the capability and resources to enter into the arbitration agreement.
- Arbitrators must be competent.
- The scope of the agreement and other applicable law must be followed by the arbitrators.
- Sharia principles and mandates must be followed by all parties involved.

[688] El-Ahdab and El-Ahdab (n 101) 50

[689] Alsheikh (n 688) 51, citing UNCITRAL Model Law (n 97), ch 7, art 34(1)..

[690] Survey Report on Arbitral Award Enforcement in the GCC, II (2.2.1.) [hereinafter "Survey Report"] Survey Report, II (2.6.2.).

[691] Board of Grievances, 4th Review Committee, decision No. 43/T/4 dated 1416 H (1995); Board of Grievances, 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992); Board of Grievances, 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997).

- Sharia law must be considered for the material subject of concern to the arbitrator and all key stakeholders.

The capacity of the parties as a challenge to enforcement under the Islamic law by stating that Sharia requires that the parties must have the capability to conduct the agreement of arbitration.[692] For instance, those who are minors, bankrupt, or who have serious mental disability cannot be a part of an arbitration process under the Islamic laws.[693] There are certain requirements for the arbitrator which need to be fulfilled under the Sharia law in the KSA for entering into an agreement to arbitrate, as discussed previously. SAL 2012 requires that an arbitrator should have a university degree in Sharia from the KSA,[694] which is an exceptional requirement compared to other GCC states.[695] This applies to both international and domestic commercial arbitration. Another important problem is whether a non-Muslim can be part of the arbitration in case the other party involved in the dispute is a Muslim (as mentioned previously, there are Hanafi jurists who argue that non-Muslims can arbitrate, but this has not been practically tested in the KSA).

There is a procedural challenge to the enforcement and recognition of awards in the KSA as well. There are several procedures which need to be followed under the general Sharia laws in the KSA that also apply to arbitration, including the right to fair and transparent treatment, the right to present the case and provide the evidence that must be examined before making any informed judgements, and finally the principle of the substantial trust in the judicial system.[696]

6.5 Reasons for Non-Enforcement of Foreign Awards

This section provides evidence from the case survey conducted by Almutawa and Maniruzzaman[697] in the GCC states (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the

[692] ibid.

[693] ibid.

[694] Arbitration Law No. M/34,art 14(3).

[695] Ibid. (Arbitration Law No. M/34 states that the provision applies to any arbitration within the legal relationship of the dispute, and if this takes place in Saudi Arabia then there is a requirement for all parties to agree that arbitration be subject to the provision of this law).

[696] Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1 Arab Law Quarterly 19

[697] Ahmed Almutawa, and A.F.M. Maniruzzaman, 'Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Council States and the prospect of a uniform GCC Arbitration law: an empirical study', 2015, SSRN, available at: https://ssrn.com/abstract=2559690

UAE) among expert practitioners in the field of arbitration concerning the enforcement of arbitration awards. As discussed in the methodology (section 1.7.3) that the main purpose of the undertaking doctrinal research of a critical quantitative analysis (e.g. survey) of legal materials to understand the core reasons for non-enforcement of foreign awards from the perception of practitioners in the field of the arbitration and the enforcement of arbitral awards in the GCC states especially in the Kingdom of Saudi Arabia. Out of 41 participants who participated in the survey, only 4 were from the Kingdom of Saudi Arabia and majority of 28 were from the United Arab Emirates. The participants had the following title of their positions includes: attorney, arbitrators, judges, and legal consultants. In this survey, both open-ended and closed-ended multiple questions were asked. The participants who participated in the survey whose contact information is not publicly available; however, Almutawa and Maniruzzaman approached to the groups including the GCC Arbitration Centre, the International Islamic Centre for Reconciliation and Arbitration and the DIAC where they requested to send the survey link to their mailing list. Due to their busy schedules many attorney, judges, and legal consultant and arbitrators could not be able to participate in this survey.

The overall results from the survey were analysed to understand the perspectives of experts with experience in this field. There were four major professions found in the survey outcomes, including legal consultants (35%), attorneys (47.5%), and arbitrators (42.5%), as shown in Figure 1. None of the participants declared themselves to be judges, although a quarter of selected professionals did not specify their professions.

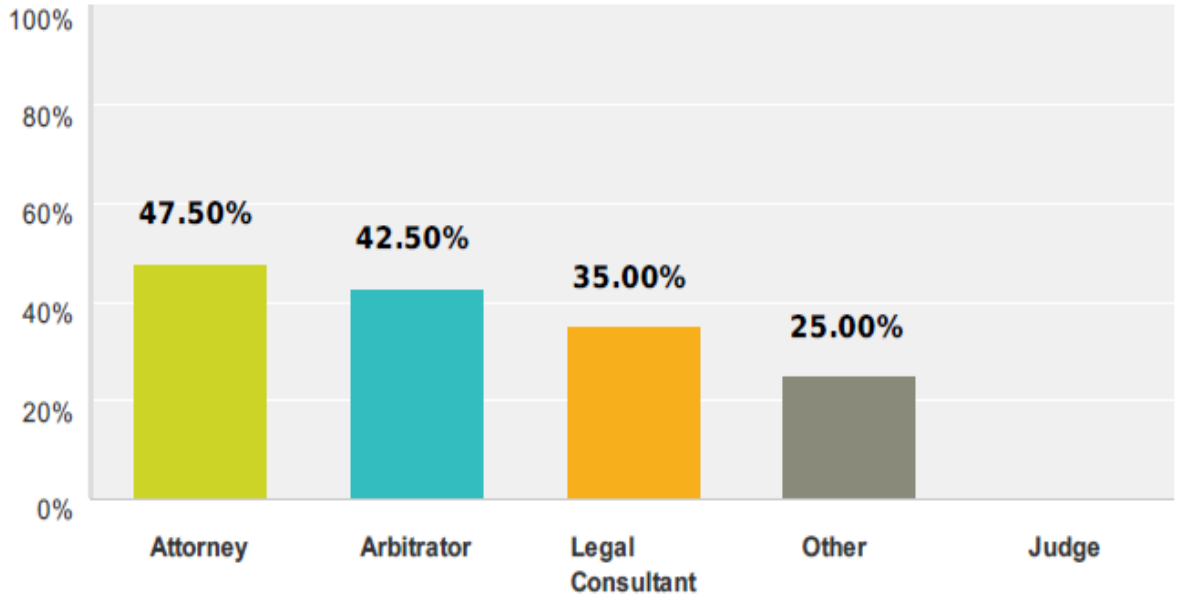

Figure 1: Participants' professional specialties[698]

The vast majority (80%) of participants had more than 5 years of experience working in arbitration (60% had 10 or more years, and 20% had 5-10 years' experience), as shown in Figure 2. Only 5% had less than a couple of years' experience, while 15% cited 2-5 years.

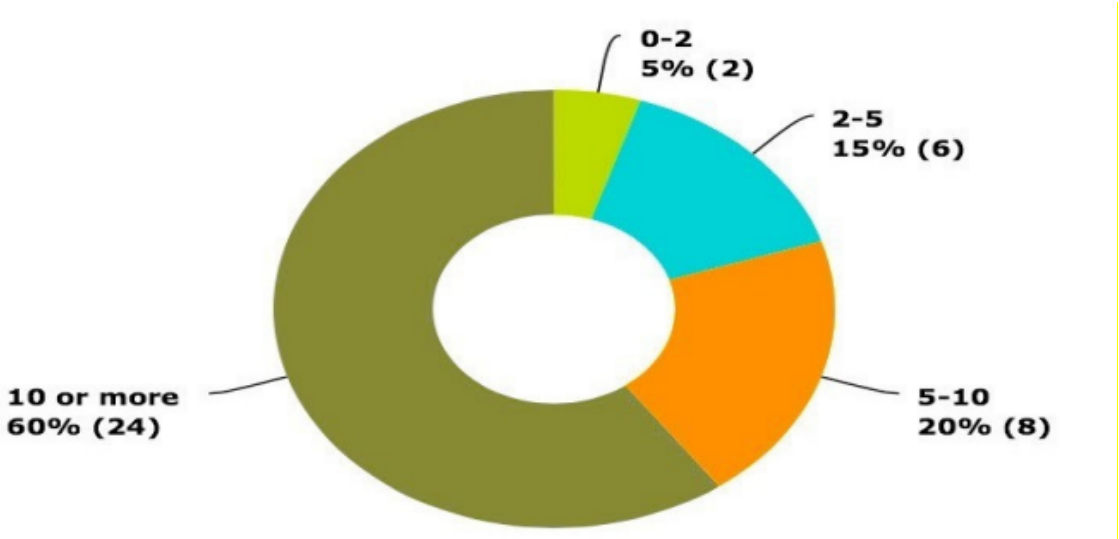

Figure 2: Participants' years of experience[699]

The school of jurisprudence in which Sharia experts is trained is significant to understand their views, as *fiqh* affects the interpretation and implementation of Sharia. Put simply, the school of jurisprudence of legal experts influences the enforcement of arbitral awards within Islamic

[698] Almutawa, and Maniruzzaman (n-20)
[699] Almutawa, and Maniruzzaman (n-21)

jurisdictions. When the participants were asked about their Sharia school of jurisprudence, the largest cohort (40%) suggested that this is not applicable to them, as they were not primarily practicing Sharia within their jurisdiction (Figure 3). Most Saudis follow the Hanbali School in the KSA, reflected in 17.50% of participants identifying themselves as being affiliated with this school. The largest group citing a school were the Malikis, with 30%, which is the official school in the UAE and Kuwait.

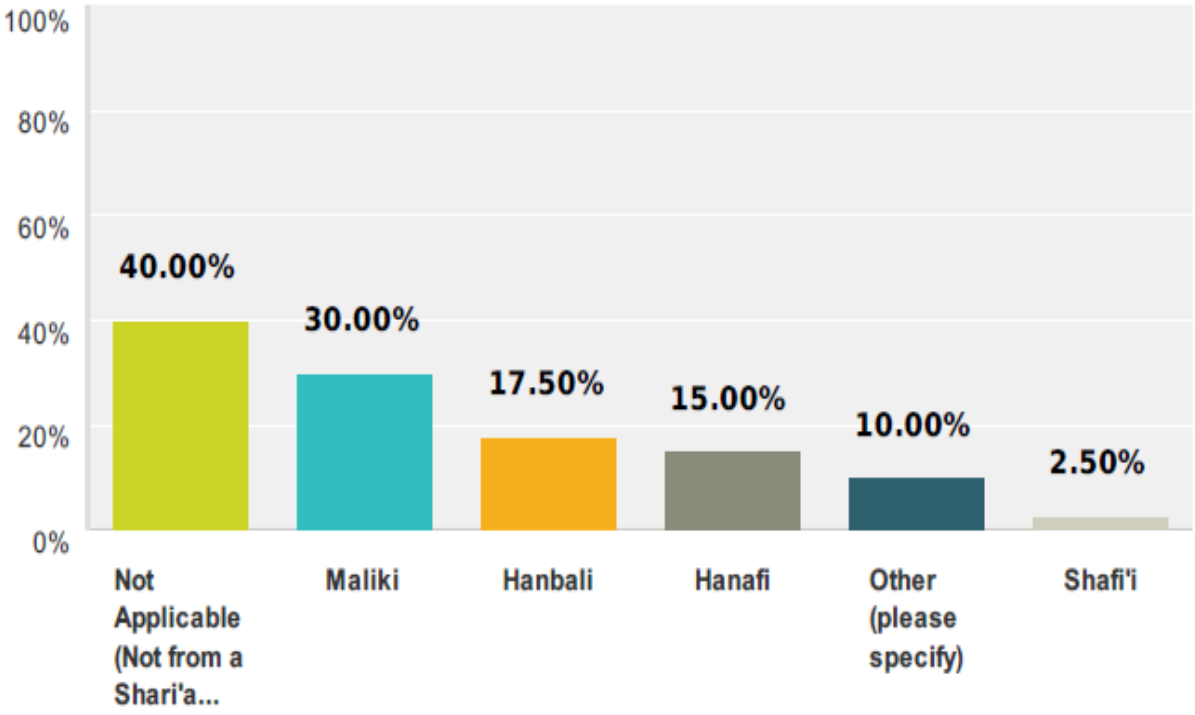

Figure 3: Participants' schools of jurisprudence[700]

Participants were also asked about their understanding of different types of arbitration award such as foreign, domestic, and international awards. The results revealed that the majority of the participants were not satisfied (i.e., scoring 6.16 out of 10) about their country's definition of international arbitration awards. This shows that it is important to explain to the public in each GCC state the definition of arbitration awards, and a lack of awareness is considered a common and major challenge. An open-ended question asked participants about reasons for non-enforcement of foreign arbitral awards, to ascertain GCC experts' views and experiences about this, and compare this with the outcomes of the reviewed literature concerning this area. There were different responses recorded during the survey. The most important reasons categorised by the frequency of responses are adumbrated below, in descending order:

[700] Almutawa, and Maniruzzaman (n-23)

- Public policy (n = 11).
- Lack of familiarity with and knowledge about international arbitration, judicial activism, and the NYC (n = 6)
- Lack of understanding of arbitration statutes (n = 5)
- Jurisdiction-specific issues (n = 4)
- Political and social reasons (n = 3)
- The remaining nine participants elicited varied reasons; only one cited Sharia law

Furthermore, participants were also asked about the domestic and foreign arbitral awards and different conditions for enforcement. The results revealed that the majority of participants (62.5%) suggested that both foreign and domestic enforcement have the same conditions. This reflects a lack of knowledge of the conditions of enforcement of arbitral award in the KSA and other GCC states. However, with the low sample size of 41 respondents and only 4 respondents from the KSA may not reflects the larger opinion. Therefore, in future research a wide population size need to be included in the study.

Participants were asked about the effect of the Sharia on the enforcement of arbitral awards, based on the findings of reviewed studies that Sharia is generally consistent with the NYC, The survey particularly explored whether public policy could be grounds for refusing awards on the grounds of public policy, which spanned three questions.

First, participants were asked about the outcome of any conflicts between the NCY and Sharia; the majority (53.13%) stated that NYC would prevail, while 46.88% believed Sharia would prevail.

In the second question, Sharia and public policy was discussed and participants were asked which Sharia should apply in determination of public policy. In previous literature it was revealed that Sharia within the context of public policy is largely consistent with NYC, while a few substantive Sharia public policies are prohibited. However, in the survey, 48.39% of participants suggested that Sharia should apply when any violation of fundamental Islamic law has been established.

Finally, participants were asked whether interest (*riba*) should be allowed or not in different circumstances. There were diverse views from participants, with 29.03% believing that interest should be allowed in an arbitral award based on the contract conditions; 25.81% stated that

interest should be allowed in an arbitral award to a certain percentage; 22.58% believed that interest should be allowed in an arbitral award without any limitations imposed; and only 3.23% stated that interest should not be allowed in an arbitral award because it is prohibited under Sharia law (Figure 4).

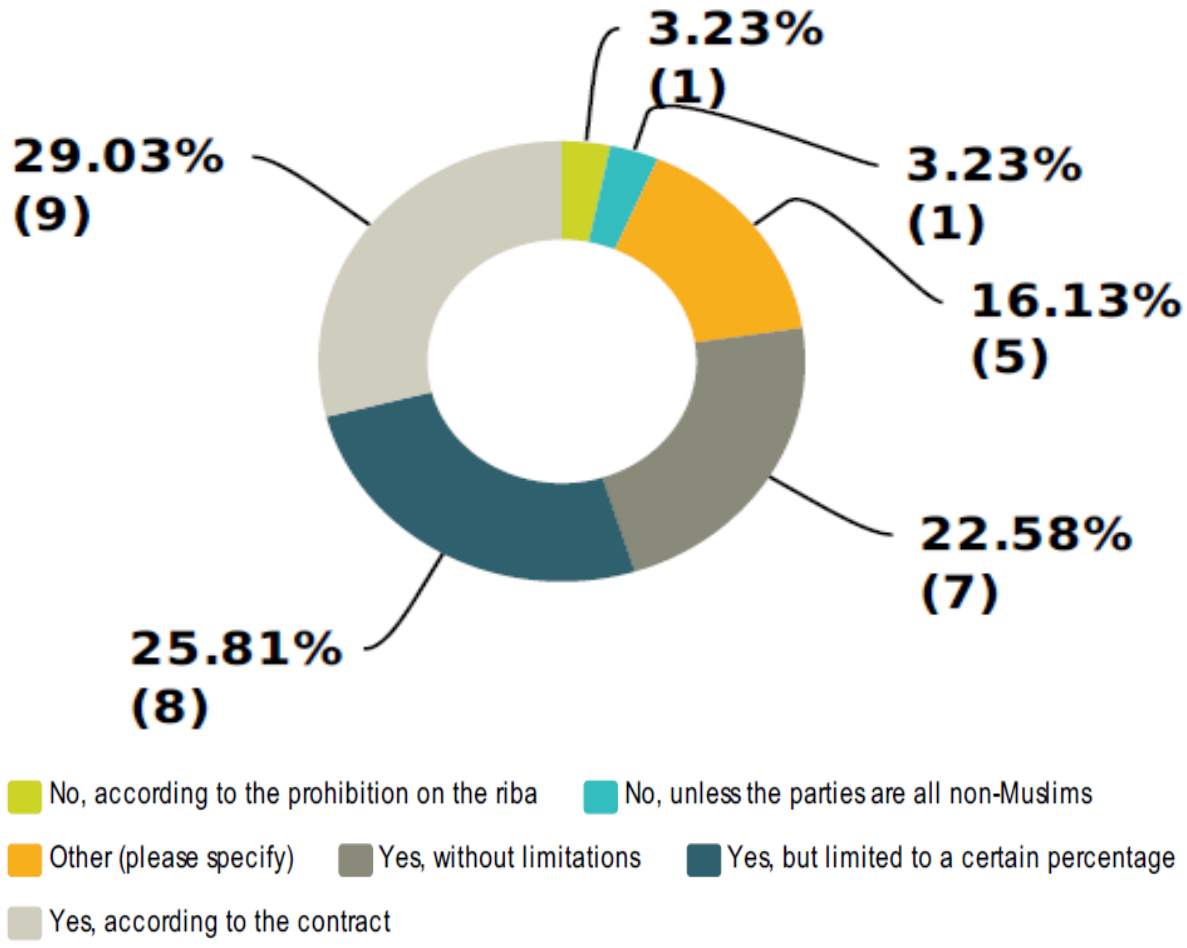

Figure 4: Participants' views on interest-based conditions for the enforcement of arbitral awards[701]

In this survey, the overall results revealed that there were many consistencies with the reviewed literature, including the most important elements identified in terms of national definitions of foreign, international, and domestic arbitral awards. This is illustrative of the enormous challenges that the KSA faces in enforcement of foreign arbitration award. The survey also recommended that the GCC states, particularly the KSA, need to improve their legislation regarding the implementation and adoption of foreign arbitral awards. The low satisfaction rating among participants about the definition of foreign arbitral award was striking, and

[701] Almutawa, and Maniruzzaman (n-33)

supports a call for a definition consistent with that of the NYC. Furthermore, the arbitral awards in the KSA need to be governed by the national law too, and implicitly by the NYC in terms of foreign arbitral awards.

Survey participants were also provided an opportunity to express their views about domestic and foreign arbitral awards and whether they should be implemented the same of differently. While responses varied, the majority of participants (62.50%) stated that the conditions should be same for the enforcement or implementation of both international and domestic arbitral awards, while over a third (37.50%) were in favour of different enforcement protocols for domestic and international arbitral awards. This survey results showed that majority of the arbitration practitioners are in favour of treating foreign and domestic arbitration enforcement similarly. However, in the GCC countries there are different conditions and laws which need to be considered too. For example, in the KSA, most of the laws adhere to the Islamic law and all arbitrators and practitioners need to follow it, while they have obligations under international agreements as well.[702]

When respondents were asked an open-ended question about arbitration needing to establish a balance between Sharia and public policy in detail, the majority of the respondents stated that arbitrators need to apply the Sharia principles in order to determine the public policy only when there is a violation established. The most important element that was noted during the outcome of the survey revealed that there were participants who were also in favour of Sharia not being considered or applied when public policy has been violated, reflecting changing attitudes on the development of national legislation in the GCC. People are looking for reconciliation with contemporary mechanisms. This is also a challenge for the enforcement of arbitral awards in the KSA in terms of dealing with these new emerging divergent views among the population.

The most important questions concerned whether interest should be allowed in the enforcement of arbitral awards in the GCC countries. As discussed earlier, interest (*riba*) is absolutely prohibited under Sharia law in the KSA; however, a major challenge to the enforcement of arbitral awards in the KSA is interest conditions, as discussed extensively above. From the survey, it was found that a large majority of participants (77.42%) believed that interest should be allowed in terms of awards, while over a fifth (22.51%) stated that it should not be allowed. This results show that the majority of participants in the GCC countries believe that interest should be allowed, but the absolute prohibition of interest in the KSA may pose a fundamental

[702] M Hamid, 'Islamic Law of Contract or Contracts' (1969) 3 Journal of Islamic and Comparative Law 1, 1–11.

challenge for the Kingdom in establishing effective enforcement of foreign arbitration awards, although some legal mechanisms may be developed in this regard concerning foreign contracts.

Participants were asked to rate the enforcement of foreign arbitral awards in the GCC according to their perceptions. The majority of respondents believed that despite the passage of new legislation such as SAL 2012 to facilitate enforcement, there is still some antipathy toward the recognition and enforcement of awards. Finally, the survey revealed that public policy was identified and considered as one of the most important reasons for non-enforcement of foreign arbitral awards, and public policy is the common ground upon which enforcement of foreign arbitral awards is declined in the KSA. The survey concluded that public policy under the Islamic law is more relevant than the public policy under the domestic or international agreements. Therefore, outcomes from the survey supported the notion that both in the GCC states and particularly in the KSA use of the public policy under influence of Islamic laws for either enforcement or non-enforcement of foreign arbitration awards. It is also suggested that because public policy is under Sharia law, this could be promoted and harmonised with the international norms within the context of arbitration, and specifically Sharia, due to major failures of compliance because of the prohibited practices. The overall results of the survey reveal that Sharia does affect the enforcement of the foreign arbitral awards in the KSA.

Concluding remarks of the survey conducted by Almutawa, and Maniruzzaman[703] identified that the challenges as discussed fully comprehend to the enforcement of foreign arbitral awards in the Kingdom of Saudi Arabia and other GCC states. The experts who participated in the survey agreed that all statements proposed in the survey require to be considered regarding enforcement of foreign arbitral awards.

6.6 Chapter Summary

Overall, this chapter demonstrates that there are several challenges and issues that foreign arbitral awards encounter within the context of enforcement in the KSA. It is underlined in this chapter that the NYC is the most common point of convergence in the GCC states, including in the KSA, within the context of recognition and enforcement of foreign arbitral awards. This aberration can arise happen when there are different laws intervening in the process of arbitration, and the laws of the GCC states allow general grounds to refuse or allow the recognition and enforcement of the foreign arbitral award. Although there is a significant

[703] Almutawa, and Maniruzzaman (n-19)

inclination toward arbitration enforcement in the GCC countries, particularly in the KSA, it seems that the country's own laws as established create challenges to the enforcement of arbitral awards. As a survey conducted by Almutawa, and Maniruzzaman conducted in the GCC countries revealed, the main ground for challenges in the enforcement of foreign arbitral awards influence from public policy particularly in awards concerning interest (*riba*). ince the KSA ratified the NYC, the potential issues relating to the enforcement of foreign arbitral awards are consistent with general practices and principles around the world. However, in practice, the Riyadh Convention is mainly adhering to the Islamic laws, resulting in challenges to the enforcement of foreign arbitral awards in the Kingdom. This chapter discussed challenges and issues to the recognition and enforcement of foreign arbitral awards in the GCC states, particularly the KSA. To understand these phenomena more fully, the following chapter analyses the impact of public policy on the enforcement of foreign arbitral awards in the Kingdom.

Chapter 7: Enforcing and Refusing Foreign Arbitral Awards in Saudi Arabia

7.1 Introduction

Arbitration remains one of the most important and growing solutions among parties to resolve disputes on the bases of the doctrines of party autonomy, severability, and competence and the finality of the binding award, regardless of the domestic or foreign court with the power to enforce arbitral awards. As discussed in previous chapters, dispute resolutions must be fully endorsed by national courts and judicial systems to enforce awards as court judgments. There are differences between domestic and international arbitration, the most important element of which is the country which is going to enforce the award. However, Saudi Arabia Sharia law remains critical elements when it comes to enforcing and refusing foreign arbitral awards. In similar context the Sharia courts acknowledged the limitations and drawbacks regarding enforcement of arbitral award on public policy grounds as the legislations requires that arbitrators must adhere to the Islamic values despite that many foreign awards are pursued by non-Muslims.[704] In addition, arbitrators should also follow the Kingdom laws and must not violate its public policy and the principle of Sharia.[705]

This chapter presents in detail the several issues within the context of the public policy and understanding the enforcement and recognition of foreign arbitral award in the KSA in this context. As some of the issues have already been discussed in the previous chapters regarding the enforcement and refusing foreign arbitral awards in Saudi Arabia, this chapter focuses on public policy and its influence *per se*. It first provides some insights into public policy and the background of this analysis, and addresses the public policy under Islamic laws and in the context of international agreed laws, including the NYC and the ICSID. Different concepts of public policy in the KSA are also outlined in this chapter, and it finally considers how public policy influences the enforcement of foreign arbitral awards in the Kingdom. According to Christopher Schreuer:

> "Public policy (*ordre public*) is a classic reason for excluding the application of foreign laws by domestic courts. It represents the superiority of basic value

[704] Khanifah Khanifah, et al (n-404)
[705] ibid

choices of the local community over the technical application of conflict of law rules". [706]

Therefore, the interpretation of the public policy under the NYC is not defined properly, which means this is one of the major drawbacks that remains undefined in Islamic law in the KSA.[707] The fact is that in the KSA if the award offends public policy, then enforcement is seldom effected, and refusal to enforce is often the outcome. This is based on the NYC itself, which provides that the enforcement of an award may be refused due the country's own laws if it is contrary to public policy.[708] In the KSA, no provision exists which can deal with this challenge; however, the BoG can issue a circular to deal with this issue, but only if the award is in conformity with public policy, in order to empower the court to accept enforcement.

7.2 Foreign Investment Arbitration under Public Policy

The fundamental source of legislation in the KSA is Sharia, which is generally germane to the resolution of commercial disputes through arbitration processes, as discussed in previous chapters.[709] However, alternative dispute mechanisms are subject to restrictions and face issues regarding capacity and arbitrability.[710] During its modern socio-economic and political development, the KSA has overcome enormous challenges in revising its legal structure, including allowing the government to participate in arbitration proceedings under the 1983 Commercial Regulations and SAL 2012; however, despite the new modern approach, there are still some restrictions in place, many of which can be attributed to the Hanbali School of jurisprudence.[711] Saudi jurists' understanding of public policy in relation to Sharia differs from the norms in other GCC states, which is reflected in many awards that require enforcement concerning goods that are considered prohibited in the KSA (e.g., tobacco and musical items), which renders such awards inconsistent with Sharia under the Article 37 of Riyadh Conventions, whose clauses state that the law of the arbitration cannot govern the arbitration

[706] Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 568.

[707] Ezrahi (346) 5.

[708] New York Convention (n 19), Art V (2) (b).

[709] Michael O'Kane, *Doing Business in Saudi Arabia* (Al- Andalus Legal Publishing 2009) 238.

[710] Mohamed S Abdel Wahab and Mona Mansour, 'Saud Arabia, The International Comparative Legal Guide to: International Arbitration 2009 (2008) 48, 387-389.

[711] Baamir (n 410) 17.

of a dispute involving Sharia violations, and the parties cannot select the arbitrator in the process of appointment.[712]

This shows that the KSA's ratification of the NYC in no way entails the easy or automatic enforcement of foreign awards. Judges and courts demand that the arbitrator must be knowledgeable in Islamic law, among other stipulations, as discussed in the previous chapter. There is limited literature available about the impact of Sharia on public policy, with notable exceptions such as the contributions of Saleh[713] and Wakim.[714] Saleh posed the question of how Sharia affects public policy in relation to awards. Within the context of Arab countries and particularly GCC states, public policy under the Sharia does not always have same meaning, because each state has different views and policies, related to national legislation and jurisprudence interpretations of Sharia. Wakim agreed with this statement that Arab-Islamic norms have standardised political values.[715] Also, Arab countries, the discussion of public policy under the Sharia law continues, and it is important to understand the meaning of the public policy. In this regard, the studies of Saleh and Wakim are important because they highlight the major issues concerning public policy in relation to Sharia. The following subsections provide details on the general concept of public policy under the Sharia law.

7.2.1 National and International Public Policy

In their discussions on national and international public policy issues and violations of standards, many scholars and researchers have distinguished between domestic and international public policy within the context of recognition and enforcement of arbitral awards. Van den Berg stated that it is not necessary to develop public policy for domestic awards, as they should be the same as those for international awards within these criteria, there are several issues associated with public policy in international cases, such as the influence of Sharia on international cases where arbitrators belong to different religions or schools of jurisprudence.[716] Similarly, Gaillard and Savage also revealed in their study that:

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[712] Anthony Shoult, *Doing Business with Saudi Arabia* (GMB Publishing Ltd 2006) 59.

[713] Saleh (n 684) 26

[714] Wakim (n 499) 47.

[715] Ibid.

[716] Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International and Taxation, 1981) 49.

> "not every breach of a mandatory rule of a host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value".[717]

This can be shown in the example of the Luxemburg Court of Appeal, where the NYC public policy issue concerning the country where arbitration is invoked entails the need to take decisions based on international public policy, not the internal public policy of the country where the decision is made.[718] This is because the main principles of the justice should be served on the international level, and the arbitrator needs to be supported in foreign jurisdictions. However, Lalive argues that international public policy and national public policy have no clear definition to understand, because there is no formula to define them.[719] Some analysts have related the bifurcation between international and global treaties on one hand and the parochial restrictions of national jurisdictions to the need for globalised public policy, which:

> "establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations".[720]

However, Article V (2) (b) of the NYC described public policy as a national prerogative where enforcement of arbitral awards is established. Hence, international public policy respects the hosting state where the enforcement of arbitral award is sought. Gaillard and Savage[721] further stated that within the NYC Article V (2) (b), the references to the host country entails the application of international public policy, but there is lack of understanding on these issues because national laws have no clear reference to a community of nations. However, some

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[717] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague; 1999) para 1353.

[718] ibid.

[719] Pierre Lalive, *Transnational (or Truly International) and International Arbitration* (ICC Congress Series No 3 New York 1986) 1.

[720] Jacob Dolinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws', (1982) 17(2) Texas International Law Journal 167.

[721] Gaillard and Savage (n 697).

countries have already distinguished between international and national public policy in order to understand the arguments advanced by Gaillard and Savage in terms of clarity and understanding of both terms in court judgements.

The question that arises is whether the KSA applies the concept of international public policy, which needs to be clear and in accordance with the NYC, as the Kingdom[722] adheres to legislation as stipulated in NYC on the enforcement of arbitral awards. There is no such distinction provided by the Kingdom's[723] laws on the application of public policy to determine whether it is domestically or internationally designed or defined.[724] However, this deeper ontological topic is not covered in this thesis, because goes beyond the scope of this research, whose primary intention is identifying the key challenges to recognition and enforcement of foreign arbitral awards in the KSA.

In future there is a potential for the Kingdom's legislators and Islamic scholars to adopt a narrower concept of public policy, to accommodate the challenges faced during the enforcement of foreign arbitral awards.[725] The Kingdom's own laws mandate that any procedural or substantive violation of public policy conflicting with political, economic, social, and other issues related to the interest of larger community can be ground for refusal of awards, but refusal in general should not be based on the general consideration of the public policy, but clearly defined provisional grounds.[726] Studies by Faris[727] and Mohammed Al Jarba[728] and Abdul Hamid El Ahdab and Jalal El Ahdab[729] found that defences against public policy in the KSA are rarely successful. However, in the case of the Egyptian Cassation Court, despite a lack of distinction between international and national public policy, stated that:

> "According to article 28 of the Civil Law, it is not allowed to exclude the application of a foreign law unless it is contrary to Egyptian public policy and morality, or it contradicts the state constitution or an essential public interest of the community. However, a court must consider the application of international

[722] Nesheiwat and Al-Khasawneh (n 18).

[723] Saudi Gazette (n 32).

[724] Saleh (n 697) 26 (one of the earliest discussions of Islamic public policy).

[725] El-Ahdab and El-Ahdab (n 548).

[726] ibid.

[727] Nesheiwat and Al-Khasawneh (n 18).

[728] Asam Saud Alsaiat (n-363)

[729] El-Ahdab and El-Ahdab (n 548).

public policy in that if the difference between the foreign law and the Egyptian public policy rules is not substantial, then the court should not consider that difference as leading to a violation of national public policy".[730]

According to the Egyptian perspective, enforcing arbitral judgements under the NYC should therefore take precedence if the public policy concern is not seen to be significant, and it should also limit the KSA's associated scope of refusal. Therefore, the judges in the KSA's courts should refrain from abusing the conflict between public policy and private international law to deny the recognition and enforcement of foreign arbitral awards, especially when a defence is offered based on the disputants' ignorance of the KSA's foreign law. This situation in the KSA can lead to hindering relations with international arbitrators and negatively affect FDI, which is a major national policy priority as per Vision 2030.

7.2.2 Procedural Public Policy under Sharia Law

Sharia law has no explicit reference to the principle of international public policy regarding enforcement of arbitral awards in the KSA, which poses a challenge to the country and arbitrators, as well as judicial precedent.[731] SAL 2012 states that an arbitral award should be enforced after ascertaining that it does not contain elements contrary to Sharia. However, the Sharia courts in the KSA also acknowledge that there are limitations regarding the enforcement of arbitral award on public policy grounds, because the law requires that the arbitrators must be Muslims (although this is not necessarily a *de jure* requirement under Sharia *per se*, as discussed previously), even though within the courts many foreign awards are sought by non-Muslims.[732,733] This shows that the challenge remain enormous in terms of procedural public policy under the Sharia law in the KSA regarding enforcement of arbitral awards, particularly in cases where the enforcement of awards is sought by non-Muslims.

The second most important point is that the arbitrators declaring the awards must follow Islamic law and applicable regulations despite the foreign awards being made by non-Muslims. In this regard, the KSA affirms applying foreign law for the award if it does not violate the

[730] The Court of Cassation decision dated 5/4/1967, the collection of cassation decisions (civil departments).

[731] Roy (n 138)

[732] ibid.

[733] Khanifah Khanifah, et al (n-404)

Kingdom's public policy and the principles of Sharia.[734] This shows that many awards have been enforced regardless of not having been issued under the Sharia law.

The other major important points raised recently is that there should be compensation granted to disputants who have lost profits, even though the element of profit is not recognised by the Hanbali school generally applied in the KSA.[735] Nevertheless, the KSA has previously enforced arbitral awards which compensate for actual lost profit. This means that the Appeal Court can overturn the decision made by lower courts refusing foreign arbitral awards because of the stipulation of compensating a party for the loss of future profit. Similarly, Saleh[736] and Wakim[737] explained the three fundamental rights covered by procedural public policy under Sharia, which "*are not necessarily found in the Quran or Sunna but. .. constitute the immutable rules of Islamic judicial law".* Saleh described three major fundamental principles as:

> "(1) the strictly equal treatment of the parties to the judicial or arbitral action; (2) the prohibition against a judge or arbitrator deciding a dispute without hearing both plaintiff and defendant; (3) the prohibition against a judge or arbitrator making his judgment or award without giving the parties the opportunity to submit their evidence, pleas, and defences".[738]

These procedural principles under the Sharia law are consistent with the NYC; Wakim stated that such procedural concerns are addressed under the NYC under the Article V (1) (b).[739]

7.3 Recognition and Enforcement of Arbitral Award and Public Policy

There are slight differences amongst GCC countries regarding the enforcement of arbitral award within the context of Sharia public policy.[740] For example, in the GCC countries and

[734] Harb (n 14).

[735] Saudi Gazette (n 32)

[736] Saleh (n 148) 29.

[737] Wakim (n 499) 41.

[738] Saleh (n 148) 27.

[739] Andrés Jana, Angie Armer, Johanna Kranenberg, 'Article V(1)(b)' in Herbert Kronke, Patricia Nacimiento, Dirk Otti and Nicola Port (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer 2010) 231-256.

[740] Zeyad Alqurashi, 'Arbitration Under the Islamic Shari'a' (2003) Oil Gas and Energy Law Intelligence, 5.1, http://www.gasandoil.com/ogel/samples/freearticles/article_63.htm accessed 12 December 2021.

particularly in the KSA, cases can be rejected for admission to the arbitral award if the consideration of case falls within the scope of personal status which is within the domain of conciliation and relates to the partner financial status. Therefore, the scope of the arbitration is considered similar as the case of the *Sul'h* (i.e. it is an Arabic word which means to stop quarrelling and promote compromise).[741] However, the question arises of where the arbitrational related dispute cannot be subject to *Sul'h* based on the Sharia law.[742]

Furthermore, it can be explained that any arbitration whose objective is to deal with the actions or products that are prohibited under the Sharia are not arbitrable.[743] There are other rights categorised by the Prophet (ﷺ), including adultery, theft, consumption of pork or alcohol, and others that do not fall within the remit of arbitration, and arbitrating on them may offend the tenets of Islamic laws based on Sharia. For other matters relating to the personal issues, such as divorce, marriage, and guardianship of children, Sharia law is construed according to divergent opinions among different schools of jurisprudence.[744] The Islamic countries of the GCC have diverse jurisprudential traditions and national laws, but in all of these jurisdictions personal status and criminal conduct are not arbitrable.

Therefore, from the above explanation, the scope of human rights, personal status, criminal acts, and issues that need to be involved within arbitral awards related to Sharia need to be addressed and delineated, with anything contradicting the principles of Sharia being absolutely prohibited as per domestic laws. However, commercial disputes are perceived differently under Sharia laws in most Islamic countries, including in the KSA itself, and there is a wider divergence of legal opinions on particular issues. In the event of contracts involving uncertainty (*gharar*),[745] which is prohibited under Sharia law, this can be addressed as described by Saleh:

> "future disputes between commercial agents/distributors cannot be made the subject of an arbitration clause in certain States but can be submitted to arbitration after the dispute has arisen (e.g., Lebanon). The same applies to an

[741] Alsheikh (n 677)

[742] Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) Journal of International Arbitration 8.

[743] Saleh (n 148) 8; an example given of pork and interest related.

[744] Saleh (n 697) 26 (one of the earliest discussions of Islamic public policy).

[745] ibid.

arbitration clause inserted in the printed terms of an insurance contract which the Libyan Civil Code renders null and void".[746]

There are different views among different schools of jurisprudence about the arbitrability of different matters which are still not fully addressed under Islamic Sharia itself, such as the arbitrability of bankruptcy and intellectual property.[747] It has also been noted in recent years that Sharia has been expanded within the scope of arbitration to cover elements such as family and property disputes, which are among the most important issues commonly faced by people.[748] Therefore, from this expansive scope, there are more views on the potential flexibility for the redefining and development of adjustment for arbitrability under Sharia law, such that the recognition and enforcement of foreign arbitral awards can be possible.[749]

While many practitioners and scholars have criticised Islamic countries, particularly the KSA, regarding the refusal to enforce foreign arbitral awards, Al Jafri assessed these arguments and concluded that they are generally lacking careful analysis, particularly as Sharia is largely consistent with the NYC.[750] Islamic principles of public policy also exhibit consistency with international arbitration norms.[751] Indeed, the only substantive issues pertinent to the potential refusal of foreign awards concern particular Sharia prohibitions, such as interest and uncertainty (*riba* and *gharar*, respectively).[752] It is also important to highlight that *gharar* has not been implemented within the context of arbitration in Saudi Arabia, and arbitration has been facilitated to conduct future disputes; however, interest (*riba*) is resolutely forbidden in the KSA and other GCC states *de jure*. The prohibition of *riba* ought to be limited or eliminated for practical expediency.[753]

Nevertheless, Sharia public policy emphasises these two important prohibitions such as interest and uncertainty, which are observed in Islamic courts in the KSA. However, Islamic scholars and researchers are viewing this as an obstacle to the recognition and enforcement of foreign arbitral awards in the KSA. Evidence also shows that Sharia public policy influence has a

[746] Saleh (n 148) 28-29.

[747] Marc Blessing, 'Arbitrability of Intellectual Property Disputes' (1996) 12 Arbitration International 191.

[748] Alsheikh (n 677) 64

[749] Nesheiwat and Al-Khasawneh (n 18).

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[751] Noor Mohammed, 'Principles of Islamic Contract Law' (1998) 6(1) Journal of Law and Religion 115, 120.

[752] Saleh (n 148).

[753] ibid.

limited role to play in future regardless of the refusal from courts to enforce foreign arbitral awards, because of the development of new business models in alignment with the Kingdom's Vision 2030, which encourages FDI, economic diversification, and private sector expansion.[754]

7.4 Chapter Summary

This chapter examined the effect of the public policy under the Sharia law inside the KSA within the context of enforcement of foreign arbitral awards. A common thread shows the classification between the substantive and procedural public policy under the Sharia law in the KSA, which has created challenges between the domestic and international agreements, despite the Kingdom's arbitration law following the NYC. However recently, the mode has shifted, and the national imperative to encourage foreign investment under Vision 2030 is providing softer ground for investors on the social, economic, and legal fronts, so investors can be more comfortable and secure in their investments. For this purpose, providing legally stable procedures is essential, especially when it comes to the foreign arbitrations and enforcement of the foreign arbitral award in the KSA. For example, when there is a difference between the scope of the public policy under the Sharia law and international agreements, then narrowing a stem from the Islamic laws to the cases.

Challenges and issues emerge in these conditions, when there is enforcement of foreign arbitral award under Sharia-based public policy in the KSA. Saudi public policy under Sharia law has been relaxed in different cases; nonetheless, the prohibition of the interest remains firm, whereas in other GCC countries there is debate on how foreign arbitration should be handled to improve the prospects of the enforcement of foreign arbitral award. There is also a tendency among judges to refuse the enforcement of arbitral awards whenever Sharia principles are invoked, which can be construed as viewing public policy more favourably. Presently, it is impossible to establish a balanced approach between the international agreement under the NYC and public policy under Sharia in the KSA.

[754] Kingdom of Saudi Arabia, 'Vision 2030', available at: <https://www.vision2030.gov.sa/> accessed 22 December 2021.

Chapter 8: Conclusion

8.1 Introduction

This chapter concludes this thesis and makes some recommendations based on the outcomes of this research. It provides a detailed summary of the work undertaken, indicating its contributions to the field of recognition and enforcement of arbitration awards in the KSA, and the challenges it faced from different perspectives. It also identifies potential opportunities for future study by which this work can be further extended.

8.2 Conclusion on Key Findings

The recognition and enforcement of arbitral awards in the KSA has been presented and explored throughout this thesis. The outcomes indicate that the potential refusal of enforcement of arbitral awards in the KSA comprises a major and crucial issue related to domestic courts, public policy, Islamic laws, cultural values, and most importantly whether the arbitral award is consistent with the Saudi legal structure. This research scope was to understand the Sharia-driven policy constraints to enforcement of arbitration awards in the KSA. The fundamental question of this research was *Does using Sharia principles as part of public policy in KSA affect the recognition and enforcement of arbitral awards?* Simplifying the enforcement of the foreign arbitral award process is important to consider, because it is one of the most crucial characteristics for the success of enforcement of foreign arbitral awards in the KSA. If arbitral awards have no effective mechanism for their enforcement, the value of the foreign arbitration award itself would be rendered nugatory.

This research reaffirmed the fundamental importance of enforcement and recognition, and the *de jure* normalisation of this area in domestic legislation as per the Kingdom's Arbitral Law 2012; however, the *de facto* legal reality in the KSA is inconsistent with this position, mainly because the Kingdom's public policy, which is deeply embedded in Sharia law, can contradict foreign arbitrary award enforcement, specifically with regard to interest (*riba*) and uncertainty (*gharar*), which are absolutely prohibited under the Sharia jurisdiction, but which are normal aspects of international arbitration conditions globally. This pertains to the fundamental question of whether using the principles of Sharia as a part of public policy in the KSA affects the recognition and enforcement of arbitral awards. The arguments revolve around Saudi traditional legal system and how it accommodates international legal standards on arbitration and protection of foreign investments.

The Kingdom's efforts in aligning domestic standards of recognising and enforcing foreign arbitral awards with the international standards such as NYC and WTO continue to gain momentum, and efforts are being made in an increasingly coherent and consistent manner in terms of legislative developments and judicial decisions. New arbitration legislation (particularly the SAL 2012) is the main factor which has sought to increase certainty, with an effective system for redress, and increased transparency for the enforcement of foreign arbitral awards. Furthermore, the new system of arbitration also tries to improve enforcement of domestic arbitral issues (in addition to foreign arbitration), and can help alleviate the burden on domestic courts. To improve arbitration standards in the country, the government have introduced reforms in the judicial system by introducing specialised enforcement forms to expedite the recognition and enforcement of both domestic and foreign arbitral awards. With the passing of the SAL 2012, the KSA embraced the NYC and significantly increased the scope of its applicability. This gave the Kingdom a pro-enforcement strategy that encouraged more arbitrations by creating a welcoming climate and abiding with international arbitration standards. Concerns and criticism persist, nonetheless, because assuring that the arbitral ruling is in line with public policy is crucial to the KSA's ability to enforce international arbitral awards.

The role of Saudi government in reforming its domestic framework for arbitration has been evolving for the last three decades, and at the current juncture the national strategy is embedded in the national development plan, Vision 2030, which seeks to promote a vibrant society, a thriving economy, and an ambitious nation. However, there is room for improvement and still a great deal of work to be accomplished in terms of winning the confidence of international investors, including in relation to the recognition and enforcement of arbitral awards, among other areas. However, the Saudi legislative system faces a fundamental challenge to harmonise global standards of arbitration with its Sharia-based legal system. The principles of Islamic jurisprudence contradict a good number of standards of recognising and enforcing modern arbitral awards decided in the countries not germane to Sharia precepts.

In this regard, there is a bifurcation between the domestic legislative system, which demands strict adherence to the principles of Sharia, and the conventional expectations of parties to agreements governed by instruments of international arbitration such as the NYC. It is important to harmonise national (Saudi) and international standards in order to facilitate trade and commerce. In this regard, efforts are made in the same direction of creating harmony between international arbitral awards and the domestic requirements of legislating,

interpreting, and executing laws. The Kingdom's legal system has opened itself to the international standards of recognising and enforcing foreign arbitral awards.

Aside from the underlying epistemological issues pertaining to Sharia and global arbitration standards, this research also found that there are outdated and incomplete procedures for the enforcement of arbitral awards within the conventional Saudi legal framework. This frustrates the purposes of both the NYC and SAL 2012, and there are other key areas that will need to be seriously addressed, including public policy under Sharia law, which is the major cause for the refusal the refusal of enforcement of foreign arbitral award in the Kingdom. As regards arbitration in general, the public policy in the Kingdom adheres to the Quran and Sunna, which recognise the validity of arbitration as a mechanism that can be used to resolve dispute between disputants. However, arbitration in the KSA has somehow failed to progress in its development to reconcile with international arbitration, despite the recognition of NYC and Saudi SAL 2012.

The main issues arising in this regard concern public arbitration between Muslim and non-Muslim disputants. Public policy based on the Sharia clearly provides guidelines of the arbitration and enforcement of the arbitral award. Therefore, from the outset, the Kingdom adopted secular law based on the Sharia code for the arbitration of foreign arbitral awards.[755] It is also important to note that these laws were (initially) primarily applied at the national level; however, when the Kingdom acceded to the NYC and the ICSID and Riyadh Conventions, there was potential to overcome challenges such as interest and uncertainty, and other matters that are prohibited under Sharia. However, this research has revealed that in the KSA and in other GCC states the application of the domestic rules and procedures regarding the arbitration and enforcement of the foreign arbitral awards is still practiced in cases concerning arbitration.[756]

The KSA's SAL 2012 was explicitly modelled after the NYC and UNICTRAL Model Law to portray a modern image and encourage enforcement of the foreign arbitral law. This was seen as a positive sign, marking a positive development in the nature of the judgment and court decisions moving away from being primed by the public policy focus under Sharia law. The results of a survey conducted in the GCC states regarding the enforcement of foreign arbitration awards indicated that most of the participants were in favour of the adoption of NYC and UNCITRAL Model Law, which might be beneficial in overcoming related challenges.

[755] Saleh (n 148).

[756] El-Ahdab and El-Ahdab (n 101).

However, the fact is that Sharia law has been perceived as conflicting with the settlement of foreign arbitral awards in the KSA. This is mainly because Sharia law overlaps with NYC and other conventions.

This research has expounded the implications of Sharia law and how it can impede the enforcement of the foreign arbitral awards in the KSA. Sharia law has its own interpretations, derived from the Quran and Sunnah, which mostly define the domestic nature of offences, including arbitration. At first glance, Sharia law is inconsistent with the NYC; however, a more in-depth analysis reveals that it is consistent with NYC in many ways, which is a positive indicator for the enforcement of the foreign arbitral award in the KSA. The extent of influence that Sharia has on the enforcement of the foreign arbitral awards depends on the nature of particular elements within contracts subject to arbitration, particular interest and uncertainty (which are prohibited).

Foreign arbitral awards under Sharia-based public policy present complicated issues because of the religious aspects discussed by different scholars and found in the academic literature, as analysed in this research. El-Kadi and El-Ahdab[757] stated that when a Muslim becomes the party of the contract, then Islamic laws are involved in the case and the contract; however, foreign arbitral awards are not governed by the Sharia, and this creates further complications. The first concern is that for a party the arbitral award in that the contract should have a clear distinction between the jurisdictional applications. Sharia could potentially affect the enforcement of foreign arbitral awards based on the related conditions. The other main concern is that arbitration differs among schools of jurisprudence, all of which recognise and codify arbitration, and varying interpretations of Sharia have affected the enforcement of foreign arbitral wards.

The impact of public policy under Sharia on the enforcement of the foreign arbitral awards in the KSA is significant in terms of procedural public policy, because it is largely concerned with fairness and trust. The major impediments to the enforcement of foreign arbitral awards are usually the countries own judicial approach and the public policy defence, either narrowly or broadly defined. In the context of the KSA, the attitude of judges is also important whenever Islamic laws are involved, which casts a wider net for the influence of public policy under Sharia laws. This reinforces the challenges and issues that exist in current legislation regarding the enforcement of arbitral awards in the KSA, specifically public policy, lack of familiarity

[757] El-Ahdab and El-Ahdab (n 101) 50.

and knowledge with the international arbitration from the country's judiciary, and the NYC, which itself has played a role in the non-enforcement of arbitral awards in the KSA. Furthermore, public policy needs to be interpreted with the pro-enforcement policy of the NYC. However, the limitations within the Sharia on public policy is considered the major problem when dealing with the arbitrability, for example the prohibition of interest and uncertainty. It is required that the government establishes a clear set of guidelines for the public policy interpretation of disputes.

In a very latest development, on 1st May 2023, the Kingdom of Saudi Arabia announced the SCCA[758] (Saudi Centre for Commercial Arbitration) also known as the 2023 Rules which has introduced significant amendments in the arbitration rules that were constituted in SAL 2012. Although, at the start of this thesis, the SCCA was not the scope of the research; however, with the new development in the Kingdom of Saudi Arabia regarding arbitration process and the challenges it faced because of the Sharia law and public policies, the Kingdom sought to improve its image in this context to build a soft image and attract investors in the Kingdom to achieve Vision 2030 National Development Plan. This new rules includes the expansion of arbitral tribunal powers, new ground for arbitral challenges, removal of references to the Sharia Law, new provisions for the cybersecurity and consolidation of proceedings, and new mechanism for defences and claims of depositions. In this regards, the 2023 Rules provides the SCCA Court which considered as an independent body and make decision making functions which will have the power of arbitrator challenges, appointing arbitrators, reviewing emergency applications, resolving disputes and scrutinising awards. The main purpose of this establishment is to compliance with major oversees administration institutions such as the ICC and LCIA in order to observing highest standards of quality and efficiency in the arbitration related cases in the Kingdom of Saudi Arabia. The 2023 Rules are significant achievement for the Kingdom of Saudi Arabia in term of providing good image to the world and become a regional industry leader in arbitration process. The main purpose of the 2023 Rules is to bring the Kingdom arbitration in the line with the international arbitration practices and become preferred alternative dispute resolution option in the region by 2030.[759]

[758] Herbert Smith Freehills, 'New SCCA Rules: strengthening the case for arbitration in the KSA', 2023, available from: https://hsfnotes.com/arbitration/2023/05/31/new-scca-rules-strengthening-the-case-for-arbitration-in-the-ksa/ accessed: 20 August 2023.

[759] ibid

8.3 Research Recommendations

This research has found that current legislation on the enforcement of foreign arbitrary awards is not effective, therefore the following key recommendations are made for the KSA to apply and reform current laws.

8.3.1 Establishment of a Quasi-Judicial Committee

Although, there are special courts for foreign and domestic arbitral awards enforcement in the Kingdom of Saudi Arabia. These courts are established for the enforcement domestic arbitral awards, to handle cases more effectively and efficiently within the various jurisdictions, with expanding practices of the various schools of jurisprudence. However, the question remains that these courts do not implement foreign arbitral award as it violate the provisions and rules of Sharia. Therefore, in this perspective, quasi-judicial committees are important to implement foreign arbitral awards. Quasi-judicial committees are special that deal with disciplinary cases or settlement the commercial disputes. As these are non-judicial body which are like arbitration panel that interpret the law and given power to resolve disputes with resembling court of law or judge. Such intervention are helpful and effective in situation where public policies or Sharia law impact on the judgment or may affect the legal rights of parties involved in the arbitration process. In this process, both parties are free to select arbitrators and the arbitrator allow the parties to present their case before the arbitral tribunal in person or through authorised representation who support their claim. This could be also useful in other Muslim countries with uniform and collaborative action, particularly among GCC states (the main local trading partners of the KSA). This would help to increase the level of knowledge and experience among Muslim countries and facilitate general socio-economic development across the region especially in those region where Sharia law or public policy undermine the effectiveness of the international commercial arbitration and its enforcement of the foreign award.

8.3.2 Defining Arbitration for Domestic and Foreign Arbitral Awards

There should be a clear definition of domestic and foreign arbitral awards. The Kingdom should also cooperate with other Muslim countries in defining domestic and foreign arbitral awards, to help eliminate potential confusion about the concerns of applicability of domestic and foreign arbitral awards. This was also revealed from the review of related previous literature: for the growth of economy the two distinct regimes must be clearly defined, to boost investor trust, confidence, and fairness, and to facilitate increased investment. This can also help to

address concerns among foreign investors concerning the current public policy under Sharia law and the risk of non-enforcement of foreign arbitral awards in the KSA.

8.3.3 Providing and Clarifying Conditions for Enforcement

There should be clear conditions for the enforcement of foreign arbitral awards, and a clear distinction between enforcement for domestic and foreign arbitral awards. Therefore, there should be an enactment process to define both foreign and domestic arbitral awards in clear and simple terms, so investor confidence and trust in the overall process can be increased.

8.3.4 Limiting Judges' Capacity to Refusal of Arbitral Awards

In the case of KSA, judges should not impose any additional reasons for the non-enforcement of a foreign arbitral award, as was highlighted in the previous literature. Judges' continued refusal of the enforcement of foreign arbitral awards based on public policy under Sharia law continues to be a major obstacle. As discussed in previous chapters that judges in KSA are always under the influence of public policy of the state. Therefore, legislators and relevant stakeholders in the Kingdom should seek for new amendment to prevent judicial officers from refusing enforcement of foreign arbitral awards

8.3.5 Clarifying the Ground for Public Policy and Limiting Automatic Incorporation of Sharia Rules

There is a need to clarify the grounds for public policy and Sharia law for the enforcement and refusal for foreign arbitral awards in KSA. This can be done through mandating a narrow interpretation of the public policy under the Sharia law, and establishing a distinction between domestic and foreign arbitration. The KSA should also engage in the application of public policy for the prohibited (*haram*) terms, and when there is no consensus then scholars should interpret the public policy based on the NYC. This will create a more balanced approach between domestic and foreign arbitration related cases. The 2023 Rules or famously known as SCCA omit the reference to the Sharia rules and the selection of the applicable law leaves to the parties involved in the arbitration process.[760] In the previous rules of the arbitration, the parties agreed to the governing law by tribunal; however, in the new SCCA Rules 2023 these provisions are completely omitted which means the Sharia law is now removed but is still not disregarded which includes "the governing law clause have to take consideration that any new

[760] J.H, Sutcliffe, and T, Parkin, 'The Saudi centre for commercial arbitration new arbitration rules', 2023. Available at: <https://riskandcompliance.freshfields.com/post/102iepr/the-2023-scca-arbitration-rules-what-you-need-to-know> accessed: 29 August 2023.

law or clause should not conflict with the Sharia".[761] Therefore, this need to be revisited by policy makers and parties should be allowed to agree on governing law without any alternatives clause and provide fully international standards to bring the Kingdom of Saudi Arabia's arbitration in the line with the best practices.

8.4 Implications of the Study

This research has implications for some different areas of interest in the KSA for those who are involved in the recognition and enforcement of foreign arbitral awards. The research has implications for commercial firms, particularly those who are non-Muslims from Western nations who require more assurance when doing investment with businesses in the KSA. They require a level of trust, fairness, and governance in the application of public policy within the context of enforcement of foreign arbitral awards.

This research also has significant implications for those who are looking for the reforms and development within the KSA's current arbitration law. From the research it has been found that although there is a fair and just *de jure* system for the refusal of foreign arbitral award on the ground of public policy based on Sharia law; however, there is a perception that the Kingdom is still using public policy as a basis for protecting the principle of Sharia and refusing certain cases. Therefore, this research will have implications for these stakeholders in their considerations to bring or suggest further reforms in this particular area.

Furthermore, this study also will influence on those who are involved in the decision-making process in the government, who are responsible for making decisions regarding the enforcement of foreign arbitral awards, such as judges and other concerned departments. In particular, judges and other persons who are involved in serving and implementing the law have responsibility to investigate the identified issues and make the process fairer for arbitrators.

8.5 Contribution to the Literature

The academic community has an important role to play in the development of new strategies, and should propose new suggestions to make the current laws more effective and efficient in its implementation. Therefore, this study has also implications for the understanding of the KSA's current situation in terms of the enforcement of foreign arbitral awards, and how to

[761] ibid

avoid any issues and challenges that might lead to the refusal of foreign arbitral awards. Therefore, this thesis has contributed on the field of knowledge with an improved understanding of the key challenges facing the enforcement of foreign awards in the KSA by comparing the overlapping rules, public policies, and influence of Sharia law and the Hanbali School of jurisprudence, procedures, policies, and government interests that govern arbitration in the Kingdom. This provides additional knowledge to the practitioners in the field of arbitration, academics, and potential clients who weighting the benefits of the arbitration within the GCC states, particularly in the KSA.

The outcomes from this study also provide a balancing approach in the Saudi Arabia to overcome the overlapping rules and incorporate Sharia into the procedures for the enforcement of foreign arbitral awards in the Kingdom while remaining consistent with international trends. The study also suggested that the challenges might not necessarily be associated with arbitral rules and policies, but also might be due to inconsistent practices which are uninformed and unstructured. This research provides recommendations to address areas of concern, and identifies the requirements for further academic investigation to improve responses to the challenges identified.

8.6 Recommendations for Future Studies

Simplification of arbitration law in the KSA is essential to the whole structure of the arbitration for domestic and international arbitrators. The recognition and enforcement of foreign arbitral awards in the KSA requires an effective system of dispute resolution to develop confidence, justice, and fairness among parties in the arbitration process. As discussed throughout this research, there is need to explore the current law of the arbitration, simplify it, and make it more suitable for its purpose, namely to meet the needs of local and international investors and businesses. There should be an effective dispute resolution in place, and confidence needs to be built amongst foreign organisations seeking arbitration, as suggested by the results of previous studies.

Legal professionals are already involved in the potential development of the process of arbitration in the KSA for increased clarity of the law and fairness. The Kingdom has already confirmed that public policy must be interpreted in accordance with Sharia, and this should not be contravened; however, the majority of foreign investors have no full (or indeed partial) understanding of the principles of Sharia. Therefore, in the light of these views revealed from this study, future research needs to be conducted to critically investigate the views of foreign

investors with regard to their understanding of the principle of the Sharia law regarding enforcing foreign arbitral award in the KSA. This can be done by including qualitative exploratory interviews with foreign investors and other stakeholders who are either involved directly or indirectly in FDI and the new areas of concern identified in this thesis and the principle of Sharia.

The Law of Arbitration 2012 was implemented with the object of boosting the international community's confidence about their investment and, ultimately, fairness and trust in the enforcement of foreign arbitral awards. However, there is need to conduct future studies to investigate the perception of the new legislative developments in the KSA in relation to the grounds of refusal based on public policy (as per the NYC). Such inquiries would help to understand the views of foreign investors about the intention of the law, and how it is serving their needs. Researching their perspectives would also provide an opportunity for foreign investors to articulate their concerns and provide their input to inform the legislative process and development, along with government policy in general. Finally, in future work, it is strongly recommend to focus on the New SCCA Rules 2023 which are the latest rules in the Kingdom of Saudi Arabia regarding bringing the Kingdom's Arbitration in the line with international standards and practices. In addition, the New SCCA Rules 2023 are also considered a major step toward achieving the Kingdom's Vision 2030.

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Appendix A: Table of Saudi Board of Grievance Cases Relating to Arbitration

- Board of Grievances, 1st Review Committee, decision no. 152/T/1 dated 1412 H (1991)
- Board of Grievances, 4th Review Committee, decision no. 150/T/4 dated 1413 H (1992)
- Board of Grievances, 4th Review Committee, decision no. 1 56/T/4 dated 1413 H (1992)
- Board of Grievances, 4th Review Committee, decision no. 187/T/4 dated 1413 H (1992)
- Board of Grievances, 12th Subsidiary Panel, decision no. 21/D/F/12 dated 1414 H (1993)
- Board of Grievances, 4th Review Committee, decision no 33/T/4 dated 1414 H (1994)
- Board of Grievances, 4th Review Committee, decision no. 155/T/4 dated 1415 H (1994)
- Board of Grievances, 2nd Review Committee, decision no. 235/T/2 dated 1415 H (1994)
- Board of Grievances, 2nd Review Committee, decision no. 89/T/2 dated 1415 H (1994)
- Board of Grievances, 4th Review Committee, decision no. 43/T/4 dated 1416 H (1995)
- Board of Grievances, 10th Subsidiary Panel, decision no. 20/D/F/10 dated 1416 H (1995)
- Board of Grievances, 25th Subsidiary Panel, decision no. 11/D1F125 dated 1417 H (1996)
- Board of Grievances, 2nd Review Committee, decision no. 208/T/2 dated 1418 H (1997)
- Board of Grievances, 9th Administrative Panel, decision no. 32/D/A/9 dated 1918 H (1997)
- Board of Grievances, 1st Review Committee, decision no. 268/T/1 dated 1419 H (1998)
- Board of Grievances, 1st Review Committee, decision no. 30/T/1 dated 1419 H (1998)
- Board of Grievances, 2nd Review Committee, decision no. 10/T/2 dated 1419 H (1998)
- Board of Grievances, 4th Review Committee, decision no. 197/T/4 dated 1409 H (1989)
- Board of Grievances, 1st Review Committee, decision no. 140/T/1 dated 1420 H (1999)
- Board of Grievances, 3rd Review Committee, decision no. 202/T/3 dated 1420 H (1999)
- Board of Grievances, 2nd Commercial Panel, decision no. 65/D/TJ/2 dated 1420 H (1999)
- Board of Grievances, 3rd Review Committee, decision no. 15/T/3 dated 1423 H (2002)
- Board of Grievances, 18th Subsidiary Panel, decision no. 8/D/F/18 dated 1424 H (2003)
- Board of Grievances, 4th Review Committee, decision no. 36/T/4 dated 1425 H (2004)

Appendix B: Saudi Statutes Relating to Arbitration

- The Basic Law of Governances 1992.
- Arbitration Law of 1983.
- Chambers of Commerce and Industry Regulation of 1980.
- Commercial Agencies Act.
- Commercial Companies Law of 1965.
- Commercial Court Act of 1931.
- Labour and Workmen Regulation of 1969.
- Ministerial Decision No (1277) of 2004 for issuance the regulation of Bordered Procedures for Protection of Intellectual Property Rights of Trademarks and Copyrights.
- Royal Decree No (M/15) of 1999 Implementing Regulation of the Law of Trade Names.
- Royal Decree No (M/21) 20 JumadaI 1421 [19/8/2000] Regarding the law of Procedure before Shari'ah Courts.
- Royal Decree No (M/21) of 2002 Implementing Regulation of the Law of Trademarks.
- Royal Decree No (M/27) of 2004 Implementing Regulation of the Law of Patents, layout
- -Designs of Integrated Circuits, Plant Varieties, and Industrial designs.
- The Arbitration Regulation of 1985.
- The Board of Grievances Act 1982. − The Board of Grievances Act 2007.
- The Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985).
- The Code of the Settlement Preventing Bankruptcy issued by Royal Decree No (M/16) of 4/9/1416 (H).
- The Competition Law.
- The Execution Regulation of Competitions Law.
- The Executive Regulation of the Foreign Investment Law.
- The law of Judiciary Royal Decree No (M/64) of 1975.
- The law of the Consultative Council No (A/91) of 1992.
- The Law of the Council of Ministers No (A/13) of 1993.
- The Legal Practice Act 2001.

- The President of the Board (Circular No. 7 issued in 15/8/1405 H).
- The Regulation of Companies No (6) of 1965.
- The Royal Decree No. 2716 of 17/05/1351 Hegira (18/09/1932).
- The Rules of Procedure before the Board of Grievances, issued by the decision of the Cabinet Ministry, No. 190 dated 16/11/1409H.

APPENDIX C: List of Legislations, Treaties and Cases

England, Wales and Northern Ireland

- Arbitration Act 1996

Saudi Arabia

- Arbitration Law, Royal Decree No. M/34 dated 24/05/1433 H (16/04/2012)
- Arbitration Law, Royal Decree No. M/35 dated 16/04/2012
- Arbitration Law, Royal Decree No. M/46 dated 12/07/1403 H (26/04/1983)
- Basic Law of Governance 1992, Royal Decree No. A/90 dated 27/08/1412 H. (01/03/1992)
- Chambers of Commerce and Industry Regulation of 1980
- Commercial Agencies Act
- Commercial Companies Law of 1965
- Commercial Court Act of 1350 H (1931)
- Designs of Integrated Circuits, Plant Varieties, and Industrial designs
- Enforcement Law, Royal Decree No. M/53 dated 13/08/1433 H (03/07/2012)
- Labour and Workmen Regulation of 1969
- Ministerial Decision No. (1277) of 2004
- Royal Decree No. M/15 of 1999
- Royal Decree No. M/21 dated 20/05/1421 H (19/08/2000)
- Royal Decree No. M/21 of 2002
- Royal Decree No. M/27 of 2004

- The Arbitration Regulation of 1985
- The Board of Grievances Act 1982 − The Board of Grievances Act 2007
- The Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, No. 7 dated 15/08/1405 H (1985)
- The Code of the Settlement Preventing Bankruptcy issued by Royal Decree No (M/16) of 04/09/1416 H
- The Competition Law
- The Execution Regulation of Competitions Law
- The Executive Regulation of the Foreign Investment Law
- The law of Judiciary Royal Decree No. M/64 of 1975
- The law of the Consultative Council No. A/91 of 1992
- The Law of the Council of Ministers No. A/13 of 1993
- The Legal Practice Act 2001
- The President of the Board (Circular No. 7 issued on 15/8/1405 H, 06/05/1985)
- The Regulation of Companies No. 6 of 1965
- The Royal Decree No. 2716 dated 17/05/1351 H (18/09/1932)
- The Rules of Procedure before the Board of Grievances, issued by the decision of the Cabinet Ministry, No. 190 dated 16/11/1409 H

Treaty Legislation/Conventions

- Convention for the Pacific Settlement of the International Dispute (Hague I) 1899 (adopted 29, July 1899, entered into force 4 September 1900)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention)

- Convention on the Execution of Foreign Arbitral Awards, Geneva (26 September 1927, entered into force 25 July 1929)

- Protocol on Arbitration Clauses, Geneva (adopted 24 September 1923, entered into force 28 July 1924)

- United Nations 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' Vienna Austria (2008)

Australia

- *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd*, Pang Kee Lee and Chi Ju Chan, (1997) XXII YBCA 609, 614 (Australia, NSW S Ct 1996).

United Kingdom

- *Egerton v Brownlow* [1853] 4 HLC 1

- *Global Torch Ltd v Apex Global Management* [2013] EWCA Civ 819

- *Petroleum Development (Trucial Coast) Ltd v the Sheikh of Abu Dhabi* [1952] International & Comparative Law Quarterly 247

- *Scott v Avery* [1843–1860] All E.R. Rep. 1 HL.

Saudi Arabia

- Board of Grievances, 1st Review Committee, decision No. 152/T/1 dated 1412 H (1991)

- Board of Grievances, 4th Review Committee, decision No. 150/T/4 dated 1413 H (1992)

- Board of Grievances, 4th Review Committee, decision No. 1 56/T/4 dated 1413 H (1992)

- Board of Grievances, 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992)

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- Board of Grievances, 4th Review Committee, decision No. 33/T/4 dated 1414 H (1994)
- Board of Grievances, 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994)
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- Board of Grievances, 25th Subsidiary Panel, decision No. 11/D1F125 dated 1417 H (1996)
- Board of Grievances, 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997)
- Board of Grievances, 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997)
- Board of Grievances, 1st Review Committee, decision No. 268/T/1 dated 1419 H (1998)
- Board of Grievances, 1st Review Committee, decision No. 30/T/1 dated 1419 H (1998)
- Board of Grievances, 2nd Review Committee, decision No. 10/T/2 dated 1419 H (1998)
- Board of Grievances, 4th Review Committee, decision No. 197/T/4 dated 1409 H (1989)
- Board of Grievances, 1st Review Committee, decision No. 140/T/1 dated 1420 H (1999)

- Board of Grievances, 3rd Review Committee, decision No. 202/T/3 dated 1420 H (1999)
- Board of Grievances, 2nd Commercial Panel, decision No. 65/D/TJ/2 dated 1420 H (1999)
- Board of Grievances, 3rd Review Committee, decision No. 15/T/3 dated 1423 H (2002)
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- Board of Grievances, 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004)

United States of America

- *Rhone Mediterranee Compagnia Francese v. Lauro* 555 F. Supp. 481 - Dist. Court, D. Virgin Islands (1982)