

**A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of
Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the
Main Legal Problems?**

By

Mohammed I. ALEisa

LL.B. King Saudi University

LL.M in International Trade Law, Essex University

Certified Lawyer and Arbitrator by the Saudi Ministry of Justice

A Thesis Submitted for the Degree of
Doctor of Philosophy in Law

School of Law
University of Essex

May 2016

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

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

أَقْرَأْ بِاسْمِ رَبِّكَ الَّذِي خَلَقَ ﴿١﴾ خَلَقَ الْإِنْسَانَ مِنْ عَلَقٍ ﴿٢﴾

أَقْرَأْ وَرَبُّكَ الْأَكْرَمُ ﴿٣﴾ الَّذِي عَلَّمَ بِالْقَلَمِ ﴿٤﴾

عَلَّمَ الْإِنْسَانَ مَا لَمْ يَعْلَمْ ﴿٥﴾

The Almighty Allah said,

*Read! In the Name of your Lord, who has created (all that exists) (1),
He has created man from a clot (a piece of thick coagulated blood) (2).*

Read! And your Lord is the Most Generous (3),

Who has taught (the writing) by the pen (4),

He has taught man that which he knew not (5).

(Surat Al-Alaq, the Clot: the Noble Quran)

Acknowledgements

First and foremost, All full praises and thanks are addressed to the God (*Allah*), the most gracious and most kind, who gave me the strength, patience, and knowledge to complete my Ph.D. study successfully.

I owe a special debt of gratitude to my great parents for their prayer, love, morale and constant support. Sincere thanks are due to my sisters and brothers, who have continually encouraged and supported me in the pursuit of my goals. I am indebted to my father-, mother- in-law for their support and encouragement.

The accomplishment of this thesis would never have come without the kind, pleasant support and encouragement of my wife, Dr. Monira ALOud, who thoughtfully followed every single step of my Ph.D. study. I am also grateful to my children Ibrahim, Nora and Eissa for their patient understanding of my continued work. With them, the Ph.D. journey was a pleasant experience.

My sincere appreciation should go to my supervisor, Dr. Youseph Farah, for his invaluable guidance, support and constant feedback in conducting and completing the thesis; this Ph.D. thesis could not have been possible without his and his patience. I am looking forward to continuing working together in the nearest future. Many thanks to all the administrative staff at the School of Law.

Last but not least, I am deeply grateful to the Ministry of Education for their scholarship, and to the Saudi Cultural Bureau in London for their services and support. I would like to express my sincere thanks to everyone who offered kind assistance or support to me during my Ph.D. study.

Contents

Table of Abbreviations	viii
Statutes.....	x
List of Cases.....	xii
Saudi Cases.....	xiii
Abstract	xviii
1 Chapter One: Introduction.....	1
1.1 Motivation.....	1
1.2 Aim and Objectives.....	3
1.3 Research Questions	6
1.4 Thesis Structure	7
1.5 Limitations of the Study.....	8
1.6 Related Works.....	9
1.7 Research Methodology	14
1.8 Significance of Contribution to the Arbitration Field.....	15
2 Chapter Two: A Brief Overview of the Saudi Arbitration, the Saudi Legal and Judicial Systems.....	16
2.1 Introduction.....	17
2.2 The Saudi Legal System	17
2.2.1 Foundations of the Saudi Legal System.....	17
2.2.1.1 The Islamic <i>Sharia</i> Law	18
2.2.1.2 Saudi Regulations	19
2.2.2 The Legislative Authority	20
2.2.3 The Executive Authority	21
2.3 The Saudi Judicial System	21
2.3.1 The <i>Sharia</i> Courts	26
2.3.1.1 The Supreme Court	27
2.3.1.2 The Courts of Appeal.....	28
2.3.1.3 The Courts of First Instance.....	29
2.3.2 The Board of Grievances (<i>Diwan AL-Mazalim</i>).....	30
2.3.2.1 The Supreme Administrative Court	30
2.3.2.2 The Administrative Courts of Appeal.....	31
2.3.2.3 The Administrative Courts.....	31
2.3.3 The Quasi-Judicial Committees	32
2.4 The Brief Background of Arbitration in Saudi Arabia	35

2.4.1	The First Phase - the Law of Commercial Court (1931).....	35
2.4.2	The Second Phase - the Labour and Labourers Law (1969).....	36
2.4.3	The Third Phase - the Chamber of Commerce and Industry Law (1980).....	36
2.4.4	The Fourth Phase - Saudi Arbitration Law (1983)	37
2.4.5	The Fifth Phase - the New Saudi Arbitration Law (2012).....	37
2.5	Conclusion	38
3	Chapter Three: The General Structure of Saudi Arbitration Law	40
3.0	Introduction.....	41
3.1	The Arbitration Agreement.....	42
3.1.1	The Validity of an Arbitration Agreement.....	42
3.1.1.1	The Formation of an Arbitration Agreement	43
3.1.1.2	The Disputing Parties to an Arbitration Agreement	46
3.1.2	Arbitrators	48
3.1.2.1	The Qualifications Required of an Arbitrator	48
3.1.3	Submission of an Arbitration Agreement and the Judicial Approval Decision...50	
3.2	The Arbitral Procedures	52
3.2.1	Seat of Arbitration.....	52
3.2.2	Applicable Law	55
3.2.2.1	Procedural Rules	56
3.2.2.2	Substantive Law	58
3.3	The Arbitral Decision	62
3.3.1	Making the Arbitral Awards	62
3.3.1.1	The Time-limit in Issuing the Arbitral Award	62
3.3.1.2	The Methods of Issuing the Arbitral Award	64
3.3.2	Challenge of Arbitral Awards	66
3.3.2.1	The Type of Judicial Review under the SAL (1983).....	66
3.3.2.2	The Appeal Levels under the SAL (1983).....	69
3.3.2.3	The Grounds for Challenge that were Adopted by the SAL (1983)	70
3.3.3	Recognition and Enforcement of Arbitral Awards	71
3.3.3.1	Recognition and Enforcement of Domestic Arbitral Awards under SAL 1983 ..72	
3.3.3.2	Recognition and Enforcement of Foreign Arbitral Awards.....	75
3.3.3.2.1	What were the formal requirements for recognising and enforcing the foreign arbitral awards?	77
3.3.3.2.2	What were the grounds for refusal of recognition and enforcement of the foreign arbitral awards in Saudi Arabia?	79

3.4	Conclusion	86
3.4.1	The main characteristics of Saudi Arbitration Law 1983	86
4	Chapter Four: A Comparison of the New Saudi Arbitration Law 2012 and SAL 1983	91
4.1	Introduction	92
4.2	The General Characteristics of the Saudi Arbitration Law	93
4.2.1	The Definition of Arbitration Law’s Terms	93
4.2.2	The Concept of International Arbitration	94
4.2.3	Applying the Modern Legal Principles	96
4.3	The Characteristics Relating to Arbitration Agreement	96
4.3.1	The Meaning of ‘Arbitration Clause’, ‘Submission Agreement’ and ‘Arbitration Instrument’	96
4.3.2	The Parties to an Arbitration Agreement	99
4.4	The Characteristics Relating to Arbitral Procedures	100
4.4.1	The Saudi Judicial Supervision over Arbitration Proceedings	100
4.4.2	The Concept of ‘Applicable Law’	103
4.4.3	The Concept of ‘ <i>Lex Arbitri</i> ’ or ‘Seat of Arbitration’	105
4.5	The Characteristics Relating to Arbitral awards	106
4.5.1	The Type of Judicial Review	107
4.5.2	The Levels of Applicable Appeal	108
4.5.3	The Grounds for Challenge	109
4.5.4	Applying the Principle of ‘ <i>res judicata</i> ’ on Arbitral Awards	111
4.5.5	The Basic Requirements in Terms of Enforcing an Arbitral Award	112
4.6	Conclusion	113
5	Chapter Five: Recognition and Enforcement of Arbitral Awards under the New SAL (2012)	115
5.1	Introduction	116
5.2	The Issuance of an Arbitral Award	117
5.2.1	The Method of Issuing an Arbitral Award	117
5.2.2	The Time-limit in terms of Issuing an Arbitral Award	120
5.3	Challenge of Arbitral Awards under the New SAL (2012)	122
5.3.1	Competent Court to Decide the Challenge	123
5.3.1.1	Types of Competent Court in Saudi Arabia	124
5.3.1.2	Courts of Appeal in Saudi Arabia	125
5.3.2	Time Limits for Challenge	127

5.3.3	The Grounds for Challenge ‘Setting Aside’ that are Adopted by the New SAL (2012)	128
5.4	The Procedures of Enforcing Arbitral Awards in Saudi Arabia	131
5.4.1	The New Enforcement Law of Saudi Arabia	133
5.4.1.1	What are the Expected Effects of the Saudi Enforcement Law?	134
5.4.1.2	The Impact of the Enforcement Law on the Execution of Domestic and Foreign Awards	135
5.4.2	The Inadmissibility of the Competent Court to Review the Merits of the Dispute	138
5.4.2.1	When does the arbitral award in Saudi Arabia acquire the authority of <i>res judicata</i> under the New SAL (2012)?	139
5.4.2.2	The Main Results from the Case of <i>Jadawel (Saudi Arabia) vs. Emaar (UAE)</i>	140
5.4.3	Enforcing the Domestic or International Arbitral Awards under SAL 2012	141
5.4.3.1	The Documents that shall be Submitted at the Enforcement of the Arbitral Award under the SAL 2012	142
5.4.3.2	Requirements that shall be Provided to Enforce Domestic or International Arbitral Awards under the SAL 2012	142
5.4.4	Enforcing Foreign Arbitral Awards under the Saudi Law	143
5.4.4.1	Requirements that shall be Provided to Enforce a Foreign Arbitral Award	145
5.4.4.2	Procedural Requirements to Enforce the Foreign Arbitral Award	148
5.4.4.3	The Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia under the Most Recent Legislation	149
5.4.5	Conventions for Enforcement of Foreign Arbitral Awards	153
5.4.5.1	The Arab League Countries Convention (1952)	153
5.4.5.2	The New York Convention (1958)	153
5.4.5.3	The Washington Convention (1965)	154
5.4.5.4	The Riyadh Convention (1983)	154
5.4.5.5	The Amman Convention (1987)	155
5.4.6	Arbitration Institution Expected to be set up in Saudi Arabia	155
5.5	Conclusion	156
6	Chapter Six: The Potential Legal Obstacles that could Face the Enforcement of Arbitral Awards in Saudi Arabia	158
6.1	Introduction	159
6.2	Arbitration Agreement	161
6.2.1	The Validity of an Arbitration Agreement	164
6.2.2	The Separability Doctrine of the Arbitration Clause:	168

6.2.3	Can Women or Non-Muslims to be Arbitrators in the SAL 2012?	169
6.3	Arbitration Procedures	172
6.3.1	The Applicable Law	173
6.3.2	Seat (Place) of Arbitration	178
6.4	Arbitration Decision.....	181
6.4.1	Codification of Judicial Rules.....	182
6.4.2	The Main Potential Prohibitions of Islamic <i>Sharia</i> Law that may be contained in an Arbitral Award.....	184
6.4.2.1	Usury (<i>Riba</i>).....	184
6.4.2.1.1	Compensation for Missed Opportunities (Lost Profits)	187
6.4.2.1.2	Compensation for the Time Value of Money (Inflation Compensation)	188
6.4.2.1.3	Compensation Due to Debtor’s Procrastination in Repaying.....	190
6.4.2.2	Gambling or Uncertainty (<i>Gharar</i>).....	191
6.4.2.3	Ignorance or not knowing (<i>Jahaalah</i>).....	192
6.4.2.4	Injustice or deceit (<i>Ghabn</i>)	192
6.4.3	Arbitration Award Contrary to Public Policy	193
6.4.4	Is the ‘Principle of Finality’ applied under the SAL 2012?.....	199
6.4.5	Is the ‘Competence-Competence’ Principle applied under the SAL 2012?	201
6.5	Conclusion	202
7	Chapter Seven: Conclusion.....	205
	Chapter 7- Conclusion	206
7.1	Summary	206
7.2	Contributions.....	209
7.3	Future Work	209
7.4	The Most Significant Results.....	210
7.5	Recommendations	221
	REFERENCES	225
	APPENDICES.....	242
	Appendix A- The Saudi Arbitration Law (1983)	243
	Appendix B - The Implementation Rules (1985) of the Saudi Arbitration Law (1983)	248
	Appendix C- The Saudi Arbitration Law (2012).....	258
	Appendix D- The Saudi Enforcement Law (2012).....	274

List of Figures

Figure 1.1 Thesis Plan	5
Figure 2.1 The Structure of the Sharia Courts	27
Figure 3.1 The level of Friendliness to Enforce Foreign Arbitral Awards in the GCC Countries	144

Table of Abbreviations

AAA: American Arbitration Association

ABA: American Bar Association

ADCCCA: Abu Dhabi Centre for Commercial Conciliation and Arbitration

ADR: Alternative Dispute Resolution

BIT: Bilateral Investment Treaty

BCDR: Bahrain Chamber of Dispute Resolution

BSCD: Board for the Settlement of Commercial Disputes

CA: Court of Appeal of England and Wales

CRCICA: Cairo Regional Centre for International Commercial Arbitration

CSCD: Committee for the Settlement of Commercial Disputes

CSD: Commission for the Settlement of Disputes of the GCC Supreme Council

EU: European Union

GATT: General Agreement on Tariffs and Trade

GCC: Gulf Cooperation Council

GCAC: GCC Commercial Arbitration Centre

ICCA: International Council for Commercial Arbitration

ICC: International Chamber Commerce

ICSID: International Centre for Settlement of Investment Disputes

ILC - International Law Commission

ILA: International Law Association

ILR: International Law Reports

LCIA: London Court of International Arbitration

NCCP: New Code of Civil Procedure, French Code of Civil Procedure

No: Number

NYC: New York Convention

P: Page

Para: Paragraph

P.B.U.H: Peace be Upon Him

Sharia: Islamic Law

SAL: Saudi Arbitration Law

SEL: Saudi Enforcement Law

UAE: United Arab Emirate

UN: United Nations

UNCITRAL: United Nations Commission on International Trade Law

UK: The United Kingdom

WTO: World Trade Organisation

Statutes

The Geneva Convention on the Execution of Foreign Arbitral Awards (1927)

The Law of Commercial Court (1931)

The Egyptian Civil Code (1949)

The Libyan Civil Code (1954)

The New York Convention (1958)

The European Convention on International Commercial Arbitration (1963)

The Washington Convention (1965)

The Labour and Labourers Law (1969)

The United Nations Vienna Convention on the Law of Treaties (1969)

The Jordanian Civil Code (1976)

The Chamber of Commerce and Industry Law (1980)

The Kuwaiti Civil and Commercial Procedure law (1980)

The Saudi Arbitration Law (1983)

The Saudi Implementation Rules (1985) of Saudi Law of Arbitration (1983)

The Riyadh Convention (1983)

The Netherlands Arbitration Act (1986)

The Amman Convention (1987)

The Switzerland Arbitration Law (1987)

The Basic Law of Governance (1992)

The Yemen Arbitration Law (1992)

The G.C.C. Commercial Arbitration Centre (1993)

The Egyptian Arbitration Law (1994)

The English Arbitration Act (1996)

The German Arbitration Law (1998)

The Bahrain Civil Code (2001)

The UNCITRAL Model Law (2006)

The Italy Arbitration Law (2006)

The ICSID Convention Arbitration Rules (2006)

The Saudi Judiciary Law (2007)

The Grievances Board Law (2007)

The French Code of Civil Procedure (2011)

The Saudi Arbitration Law (2012)

The Saudi Enforcement Law (2012)

The ICC Rules of Arbitration (2012)

The Saudi Implementation Rules (2013) of Saudi Enforcement Law (2012)

The Law of Procedure before the *Sharia* Courts (2013)

The Law of Procedure before the Board of Grievances (2013)

The Law of Criminal Procedure (2013)

The Belgium Arbitration Law (2013)

List of Cases

Abu Dhabi Gas Liquefaction Co., Ltd. vs. Eastern Bechtel Corporation; [1982] 2 Lloyd's Rep.425 CA

AT&T Corp v. Saudi Cable Co.; [2000] 1 Lloyds Rep. 22

Bechtel vs. the Department of Civil Aviation of the Government of Dubai, Dubai Court of Cassation, Petition No. 503/2003, (May 15 2005).

Chromalloy Aeroservices vs. Arab Republic of Egypt - 94-2339

Ed. Züblin AG vs. Kingdom of Saudi Arabia (ICSID Case No. ARB/03/1)

Fung Sang Trading Ltd. vs. Kai Sun Sea Products & Food Co. Ltd.; Supreme Court of Hong Kong, High Court, YCA 1992, at 289 et seq

Jadawel International (Saudi Arabia) vs. Emaar Property PJSC (UAE); Case No. 4713/1/G in 1425 [2004]

Mitsubishi Motors Corporation vs. Soler Chrysler-Plymouth, Inc; 473 U.S. 614 [1985]

OTV vs. Hilmarton; [1999] 2 Lloyd's Rep 222

Petroleum Development (Trucial Coasts) Ltd. v. Sheikh of Abu Dhabi; I.C.L.Q 1 [1952] p.247.

Ruler of Qatar v International Marine Oil Co Ltd, [1957] 20 Int'l Law Rep 534.

Saudi Arabia Government vs. Arabian American Oil Co. (ARAMCO); [1958] 27 ILR 117

Soleimany vs. Soleimany [1999] QB 785

Westacre Investments Inc vs. Jugoinport SPDR-Holding Co Ltd [1999] 2 Lloyd's Rep 65 (CA)

Saudi Cases

Decision No. 2/20/26/1399 in 1979

Decision N. 29/T/1401 in 1980

Decision No. 57/T/4 in 1988

Decision No. 52/T/4 in 1988

Decision No. 122/T/4 in 1988

Decision No. 130/T/4 in 1988

Decision No. 142/T/4 in 1988

Decision No. 150/T/4 in 1988

Decision No. 38/T/4 in 1988

Decision No. 37/T/4 in 1988

Decision No. 44/T/4 in 1988

Decision No. 59/T/4 in 1988

Decision No. 136/T/4 in 1988

Decision No. 81/T/4 in 1988

Decision No. 142/1409 in 1989

Decision No. 191/T/3 in 1989

Decision No. 69/T/4 in 1989

Decision No. 136/T/4 in 1989

Decision No. 198/T/4 in 1989

Decision No. 116/T/4 in 1990

Decision No. 27/T/4 in 1990

Decision No. 6/T/4 in 1991

Decision No. 108/T/4 in 1991

Decision No. 87/T/4 in 1991

Decision No. 63/T/4 in 1992

Decision No. 148/D/T/2 in 1992

Decision No. 143/1/4 in 1992

Decision No 18/T/4 in 1992

Decision No. 33/T/4 in 1993

Decision No. 53/T/4 in 1994

Decision No. 99/T/4 in 1994

Decision No. 57/1414 in 1994

Decision No. 1851/1/9 in 1994

Decision No. 1903/1/9 in 1994

Decision No. 18/155/1415 in 1994

Decision No. 89/1415 in 1994

Decision No. 57/1414 in 1994

Decision No. 235/T /2 in 1994

Decision No. 101/T/4 in 1994

Decision No. 132/T/4 in 1994

Decision No 43/T/4 in 1995

Decision No. 109/1416 in 1995

Decision No. 39/T/4 in 1995

Decision No. 109/T/4 in 1995

Decision No. 139/T/4 in 1995

Decision No. 102/T/4 in 1995

Decision No. 99/T/4 in 1995

Decision No. 43/T/4 in 1995

Decision No. 175/T/4 in 1995

Decision No. 203/T/4 in 1995

Decision No. 155/T/4 in 1995

Decision No. 235/T/2 in 1995

Decision No. 18/D/TJ/1 in 1996

Decision No. 169/T/3 in 1996

Decision No. 87/T/4 in 1996

Decision No. 181/T/3 in 1996

Decision No. 134/T/3 in 1996

Decision No. 169/T/3 in 1996

Decision No. 42/D/T/1 in 1996

Decision No. 21/D/T/9 in 1996

Decision No. 6/D/T/2 in 1996

Decision No. 96/T/3 in 1996

Decision No. 174/T/3 in 1996

Decision No. 43/T/4 in 1996

Decision No. 208/T/2 in 1997

Decision No. 103/1418 in 1997

Decision No. 72/1418 in 1997

Decision No. 72/T/3 in 1997

Decision No. 102/T/2 in 1997

Decision No. 173/T/3 in 1997

Decision No. 145/T in 1998

Decision No. 59/D/T/4 in 1998

Decision No. 6/T/3 in 1998

Decision No. 8/1419 in 1998

Decision No. 191/1419 in 1998

Decision No. 251/T/2 in 1998

Decision No. 202/T/3 in 1998

Decision No. 19/D/T/10 in 1998

Decision No. 202/1420 in 1999

Decision No. 14/T/3 in 1999

Decision No. 151/T/3 in 1999

Decision No. 14/T/3 in 1999

Decision No. 8/T/3 in 1999

Decision No. 6/T/3 in 1999

Decision No. 115/T/3 in 1999

Decision No. 142/T/3 in 1999

Decision No. 46/D/TJ/1 in 1999

Decision No. 8/1420 in 1999

Decision No. 93/T in 2001

Decision No 15/T/4 in 2002

Decision No. 101/D/T/3 in 2003

Decision No. 15/1424 in 2003

Decision No. 58/D/T/3 in 2003

Decision No. 101/T/3 in 2004

Decision No. 663/T/3 in 2005

Decision No. 103/D/T/1 in 2005

Decision No. 270/D/T/1 in 2006

Decision No. 824/T/3 in 2006

Decision No. 234/T/3 in 2007

Decision No. 28/T/4 in 2007

Decision No. 204/T/4 in 2007

Decision No. 97/T/3 in 2007

Decision No. 7/T/7 in 2008

Decision No. 1097/T/7 in 2008

Decision No. 104/D/F/4 in 2008

Decision No. 115/D/A/15 in 2008

Decision No. 1/395 Q/7 in 2009

Decision No. 131/D/T/2 in 2009

Decision No. 135/D/F/4 in 2009

Abstract

The thesis critically analyses the legal problems associated with the recognition and enforcement of domestic and foreign arbitral awards in Saudi Arabia. The aim is to illuminate whether or not the new Saudi Arbitration Law 2012 (SAL) and the new Enforcement Law 2012 (SEL) will be able to resolve these problems.

In the thesis, we investigate the reasons for the problems with regard to the SAL 1983, and then discuss the SAL 2012 in terms of the possibility of resolving such problems. Moreover, the study includes a semi-comparative study in the light of *Sharia* Law and international practice. The thesis deals with Saudi judicial practices by looking at a significant number of Saudi judicial cases that relate to the enforcement of arbitral awards. This is what enhances the view that the thesis will make an effective contribution to the field of arbitration.

A number of legal problems, such as the lack of identification of the limited grounds for a challenge, the competent court to decide such a challenge, the arbitration having the authority of *res judicata*, and the potency of the competent court to review the merits of the dispute, should all be considered due to their negative impact on the enforcement process.

In this thesis, we have concluded that the new SAL 2012 and SEL 2012 can cope with and resolve many of the legal dilemmas associated with the matter of the enforcement of arbitral awards. These new pieces of legislation will be able, to some extent, to reassure and comfort national and international parties without violating *Sharia* law. However, some potential legal obstacles may emerge in terms of the enforcement process as it relates to arbitral awards. Therefore, the author of the thesis believes that the level of satisfaction may not be as much as is hoped for.

Chapter 1

1 Chapter One: Introduction

1.1 Motivation

There is no doubt that Saudi Arabia has attempted to cope with developments in international arbitration legislation. In order to achieve this, the Saudi Government has introduced a number of measures to allow a shift towards effective arbitration, and efficient tools to recognise and enforce arbitral awards. Various regional and international arbitration agreements have been signed, whilst a number of pieces of legislation have been enacted in this regard. Thus, the Saudi Government formally enacted and promulgated the New Saudi Arbitration Law (SAL) in 2012,¹ followed by the Saudi Enforcement Law (SEL) in 2012.² That is, after dealing with the old SAL 1983,³ for more than 29 years, new legislation was in place. The 1983 law had faced much criticism, especially on the issue of the efficiency of arbitration proceedings, as well as the enforcement of arbitral awards in Saudi Arabia. Therefore, all these indicate the desire of the Saudi Government to develop an effective arbitration law, and to reform the enforcement procedures of an arbitration award.

However, it should be made clear that the development of Saudi legislation is a difficult task because such a development must be achieved within the framework of the provisions of *Sharia* law, which was established more than 1,400 years ago. Consequently, it can be seen that the SAL 1983 had special characteristics that made it distinguished from other modern arbitration legislation. This said, the obstacles and legal problems faced in pursuit of the development of arbitration law in Saudi Arabia were not caused by the adoption of *Sharia* law itself. Instead, it could be seen that the main obstacle may be in the narrow and strict interpretation of applicable *Sharia* law. This approach has had the negative effect of preventing the harmonisation of the provisions of *Sharia* Law and international practice. However, the issuance of the New SAL in 2012 is considered as a new phase in the process of harmonisation. This is a very serious challenge to the success of the arbitration process, especially in terms of the issue of recognition and enforcement of arbitral awards in Saudi Arabia.

There were a number of loopholes and complex legal problems surrounding the SAL 1983 which had led some to say that the steps involved in developing Saudi arbitration may be slow and uncertain. It can also be seen that a lack of effective legal tools to address these issues further

¹ It was issued by virtue Royal Decree No. M/35 on 16th April 2012; it was approved by the Decree of Council of Ministers No. (156) on 9th April 2012.

² The Saudi Enforcement Law was issued by virtue of Royal Decree No. M/53 on 3rd July 2012. On 28th February 2013 it came into effect and its Implementation Roles were issued on 27th February 2013.

³ It was issued by virtue Royal Decree No. M/46 on 25th April 1983.

exacerbates developments in this area. Furthermore, the SAL 1983 and its Rules published in 1985 were not sufficiently detailed to facilitate international institutional arbitration. Moreover, there were a number of legal problems associated with SAL 1983, such as the issue of recognition and enforcement of arbitral awards, especially when arbitral awards contain matters forbidden under *Sharia* law, such as charging interest (*Riba*) or dealing with uncertain obligations (*Gharar*).

Further issues arose with regard to the full extent of judicial supervision of arbitration procedures in Saudi Arabia. This had led to arbitration in Saudi Arabia being conducted within the court system. It can be said that there had been a complete supervision by the Saudi judiciary of the arbitration procedure, from the inception of a dispute until the enforcement procedures of the arbitral award. Moreover, there was a lack of clarity in terms of the SAL 1983 and its Rules 1985.⁴ When it came to specifying the grounds for challenging an arbitral award, Saudi law failed to point out these grounds with regard to an arbitral award which are both satisfactory and acceptable. However, these issues were just examples from a broad range of legal problems accumulated in relation to the SAL 1983 and its Rules 1985.

The SAL 1983 and its Rules 1985 may appear to lack the capacity and ability to support arbitration procedures seated in Saudi Arabia, particularly disputes relating to international commercial matters. This is because of the loopholes and ambiguities with regard to some aspects of the SAL 1983, and its over-interventionist approach. It may also be due to certain negative practices on the part of the Saudi judiciary as a result of the full extent of its supervision of the arbitration procedures. In addition, there were a number of Decisions, Circulars and legal Rules that were used to organise the enforcement of arbitral award procedures in Saudi Arabia before the year 2012. These regulations were not sufficiently effective in terms of the process of enforcement procedures of arbitration awards for many reasons, all of which are presented in the thesis.

Against the backdrop of the challenges and the problems which were experienced under 1983, the Saudi Government has been trying hard to support arbitration as a means of settling national and international disputes, and to reform the means of enforcement of arbitration awards. Thus, the New SAL 2012 was approved by the Council of Ministers on 9th April 2012, and the

⁴ The Implementation Rules were published in 1985, it consisted of 48 articles to explain and provide details relating to the arbitration law. It was issued by Decree of Council of Ministers No. (7/2021/M) on 28th May 1985.

SEL 2012 and its Rules 2013 were issued,⁵ but what is the situation if the legal problems associated with the negative practices of the Saudi judicial system appear again?.

In this thesis, the author concentrates on the legal problems related to the recognition and enforcement of arbitral awards in Saudi Arabia, whether the awards are domestic or foreign. The legal problems with regard to this matter are discussed in terms of the SAL 1983 in order to find the real reasons for these issues, and then the discussion relates to the SAL 2012 in order to consider the possibility of resolving these legal problems. The study will be a critical analysis of the legal problems in the light of *Sharia* Law and international practice, in order to assess whether the new SAL 2012 will align Saudi approach to the practice of international arbitration, and resolve the weaknesses concerning recognition and enforcement which had existed in the SAL 1983.

1.2 Aim and Objectives

The thesis aims to study and identify the main legal problems related to the recognition and enforcement of arbitral awards in Saudi Arabia, in order to answer whether or not the new SAL 2012 and the new Enforcement Law 2012 will resolve these legal problems. Therefore, the aim is comprised of the following main objectives:

- The first objective provides an overview of the Saudi legal system, its judicial systems and the developments of arbitration under Saudi Law; a descriptive approach is adopted in this part. The purpose of this objective is to understand the mechanisms of the Saudi legal system and its judicial systems and to understand how they work, especially in matters associated with aspects of the arbitration process and the enforcement of arbitral awards. Then, the author presents a brief introduction to Saudi arbitration laws in order to appreciate the historical aspects and developments in terms of arbitration within Saudi laws.

- The second objective presents an analytical study of the SAL 1983. The aim of this part is to highlight a number of the special characteristics and mechanisms of SAL 1983 in order to identify the main legal problems, especially aspects of the enforcement of arbitral awards. The main inquiry is to assess whether these legal problems are caused by the adoption of *Sharia* law, or by the ambiguity of some textual aspects of the SAL 1983. If not, what are the real reasons for these legal problems? Consequently, these legal problems are discussed in order to observe their impact on the lack of success of arbitration as an alternative method of dispute resolution in Saudi

⁵ The Saudi Enforcement Law was issued by virtue of Royal Decree No. M/53 on 3rd July 2012 and its Implementation Rules that were released on 27th February 2013.

Arabia, and Saudi Arabia becoming an attractive seat of international commercial arbitration, and the disruption of the enforcement of arbitral awards in Saudi Arabia under the old law. Through the general structure and special characteristics of SAL 1983, a comparative study of the old and new SAL is presented in order to assess whether the obstacles to recognition and enforcement of arbitral awards, which were present under the SAL 1983, have been settled by the new 2012 law.

- The third objective of this thesis is to discuss a number of legal problems associated with the recognition and enforcement of arbitral awards in Saudi Arabia. This involves an analytical and critical study as a result of reviewing these issues through the SAL 1983 and the new SAL 2012. The real practices of the judicial system related to the arbitration process in Saudi Arabia under the SAL 1983 are simulated in the new law, in order to determine the efficiency of the new law in terms of avoiding potential legal problems. This is because that the practices of the judicial system have not yet altered, as the SAL 2012 has only recently been issued. Also, the author discusses whether or not these issues can be solved through the new SAL 2012 and the new Enforcement Law 2012. The purpose of this objective is to clarify the potential legal problems which may negatively have an impact on the enforcement of arbitral awards in Saudi Arabia. In addition, the work will aim to consider future developments in this area through a discussion of the new SAL 2012 and the Enforcement Law 2012. The thesis plan is presented in **Figure 1.1**.

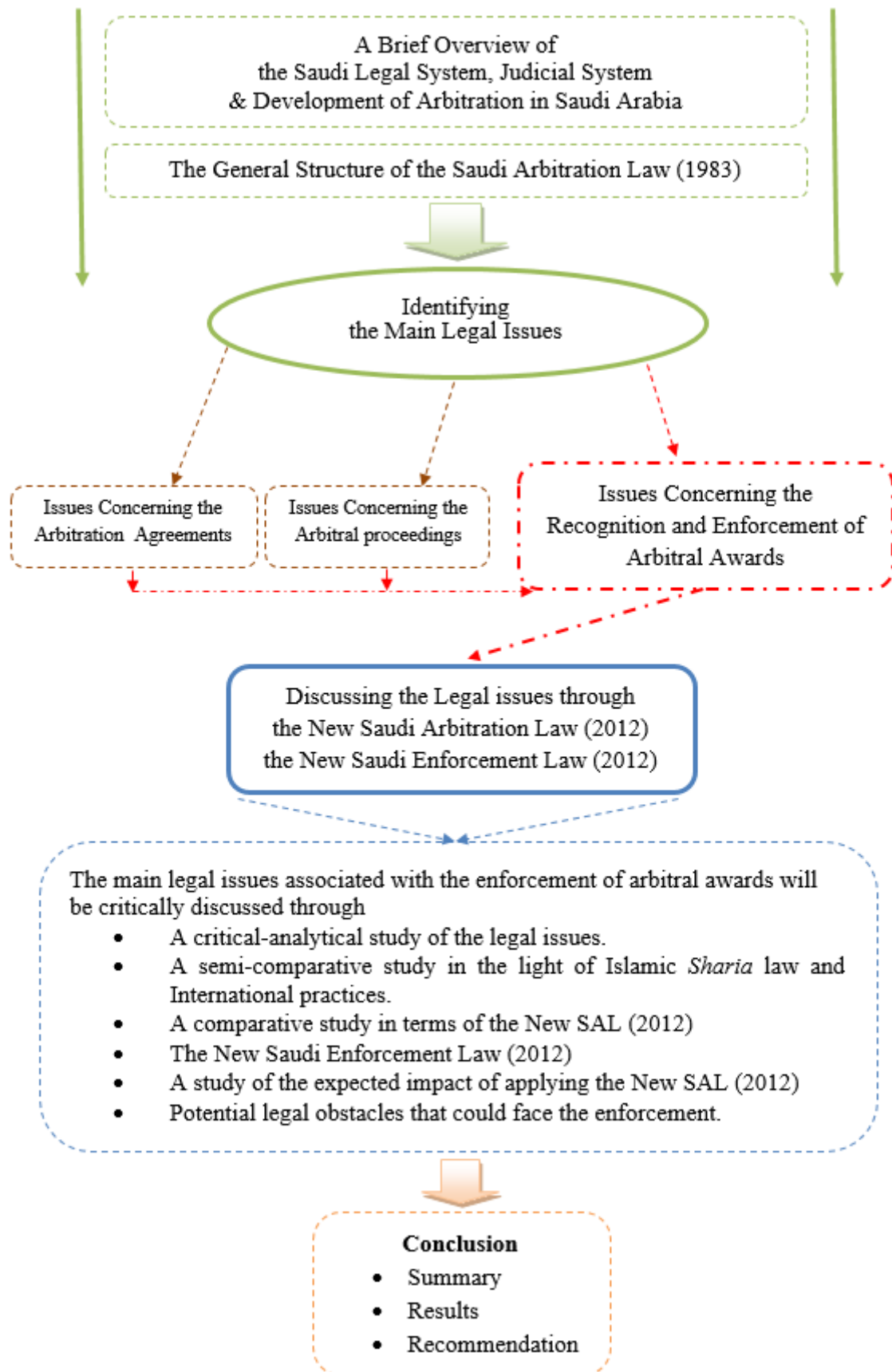


Figure 1.1 Thesis Plan

1.3 Research Questions

The main question examined by this thesis is whether or not the new SAL 2012 and the new Enforcement Law 2012 will resolve the main legal problems associated with the enforcement of arbitral awards that have emerged from the practices of the SAL 1983 and Saudi laws. In order to adequately answer this question, a number of sub-questions should be discussed. These are as follows:

- **The Questions associated with the First Objective**
 - How do the Saudi legal and judicial systems work?
 - What are the developmental stages of arbitration in Saudi Arabia?
- **The Questions associated with the Second Objective**
 - What is the scope, the special characteristics and the mechanisms of arbitration in Saudi law?
 - How valid is the SAL 1983, and to what extent was this law nationally and internationally utilized?
 - What were the main legal problems that had a negative effect on the arbitration process in general and, in particular, on the recognition and enforcement of arbitral awards in Saudi Arabia?
 - Were these legal problems caused by the adoption of *Sharia* law, or by the ambiguity of some textual aspects of the SAL 1983? If neither of these were relevant, what were the real reasons for these legal problems?
 - Through a comparative study of the old and new SAL, will these legal problems be settled by the new SAL 2012?
- **The Questions associated with the Third Objective**
 - What are the main improvements in the SAL 2012 in terms of the matter of recognition and enforcement of arbitral awards?
 - Do the legal problems that have historically existed have possible solutions through the new SAL 2012?

- Is there any future opportunity for an improvement in the enforcement of arbitral awards in Saudi Arabia, especially after the introduction of the new SAL 2012 and the Enforcement Law 2012?
- What are the possible legal obstacles that may face the enforcement of arbitral awards in Saudi Arabia after applying the SAL 2012 and the Enforcement Law 2012?

1.4 Thesis Structure

- **Chapter One:** this is the introductory chapter which deals with the motivation, the aim and objectives, the research questions, the research methodology and the contributions of the study.

- **Chapter Two:** the primary objective of this chapter is to present a brief overview of the Saudi legal system and the Saudi judicial system, and to give a brief background to arbitration in Saudi Arabia. This will be done in order to discuss the particular aspects of concern in terms of the enforcement of arbitral awards in Saudi Arabia. Moreover, this chapter helps to provide a clear basis for the reader to understand the legal problems that will be discussed. This chapter is considered as dealing with the first objective of the thesis.

- **Chapter Three:** this chapter discusses the SAL 1983 throughout a critical-analytical study, in order to determine the real reasons for the weaknesses in the current arbitration methods, as well as the difficulties associated with the recognition and enforcement of arbitral awards in Saudi Arabia. The new SAL 2012 is referred frequently in order to clarify the improvements. In this chapter, the main legal issues are identified, especially in relation to the enforcement of arbitral awards. These issues are then discussed to observe their impact on the lack of success with regard to the enforcement of arbitral awards. This chapter relates to the second objective of the thesis.

- **Chapter Four:** this chapter presents a comparative study of the new SAL 2012 and SAL 1983. This chapter contributes towards the ongoing debate with regard to the new SAL 2012, and discusses whether or not this law will resolve most of the outstanding legal problems associated with the SAL 1983. The SAL 2012 is reviewed through a consideration of the essential characteristics of SAL 1983 to observe the most significant developments, and to clarify whether or not the new SAL will remedy past defects in Saudi Arabia's arbitration system. The chapter is considered as a part of the second objective of the thesis.

- **Chapter Five:** this chapter seeks to assess the legal framework in Saudi Arabia for the recognition and enforcement of arbitration under the new SAL 2012, and the new SEL 2012,

including an investigation of what solutions could be offered. There is an evaluation of whether or not the SAL 2012 and the SEL 2012 offer the much-needed tools that will reform and improve the current, quite clearly, unacceptable situation when compared with international practice. Therefore, the general issues associated with the enforcement of domestic and foreign arbitral awards in Saudi Arabia are discussed. This chapter is considered as a part of the third objective of the thesis.

- **Chapter Six:** this chapter deals with the principle of the future vision of the implications of the new 2012 law. There is an expectation of possible solutions that may be resolved by the new SAL; and on the other hand, many challenges and obstacles may be expected, especially in relation to the enforcement of foreign arbitral awards. The chapter presents a number of important topics that must be considered in order to understand the potential legal obstacles that a winning party may currently be faced with when seeking the recognition and enforcement of arbitral awards in Saudi Arabia, whether the awards are domestic, international or foreign. The chapter is considered as a part of the third objective of the thesis.

- **Chapter Seven:** this is the concluding chapter of the thesis. This chapter presents a number of results and recommendations. In addition, the answer to the thesis question, and the contributions are provided as part of the summary. These findings are the answers to the research questions and the most significant contributions in the field of enforcement arbitral awards in Saudi Arabia. The recommendations present the most significant proposals for improving the methods of recognition and the enforcement of arbitral awards in Saudi Arabia. The results and recommendations are presented in the form of points which can easily be referred back to the main thesis.

1.5 Limitations of the Study

The research basically considers the main legal problems that are associated with the recognition and enforcement of arbitral awards in Saudi Arabia. This is a semi-comparative study in terms of Islamic *Sharia* law and international practice. From the perspective of *Sharia* law, particular emphasis is placed on the rulings of the *Hanbali* School due to the Saudi legal and judicial systems being mainly based on such rulings. From the point of view of international practice, Egyptian Law is considered in some detail because there are similarities in the legal framework of Egypt and Saudi Arabia; and also because the Common Law of England is used as a point of comparison in terms of certain solutions. In addition, French Law is considered to identify the original position of civil law and so on. However, some of the international

conventions such as the New York Convention 1957 and the UNCITRAL Model Law 2006 are mentioned.

The comparative study between the SAL 1983 and 2012 considers the legal problems that relate to the recognition and enforcement of arbitral awards in Saudi Arabia. Some legal problems are briefly examined due to the fact that these matters indirectly concern the main research question. These include such matters as the applicable law and the validation of arbitration agreements.

1.6 Related Works

Generally speaking, from the standpoint of relevant works, it can be said that there is a gap in the legal literature of research output that critically analyse and examine SAL 1983, although this law has continued to be effective for more than 29 years. Most of the researchers have dealt with SAL 1983 only in a general way, or from the *Sharia* perspective. On the other hand, the new SAL 2012 has recently been approved; certainly the studies that are associated with the new law are still very few in number, whereas there have been a small number of academic articles. Thus, the main feature of the thesis, without a doubt, is that it advances a unique, rigorous and distinctive critical assessment of the Saudi arbitration system and makes a significant contribution towards understanding the reforms in the SAL 2012 in general and, in particular, its approach to the recognition and enforcement of arbitral awards.

This part identifies the most important studies with regard to arbitration in Saudi Arabia. As we will indicate, there are no published books so far dealing with the new law. The studies that were published through books are as follows:

- Samir Saleh, in his book *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, 2012.⁶ This is the new edition of the book which covers the significant detail of the legislation in several additional countries including Saudi Arabia. Unfortunately, as the new 2012 law was published in April 2012, Saleh only mentioned the SAL 1983. Saleh has analysed the structure of arbitration law for the Arab countries detailed, by reference to judicial decisions and legislation. However, it should be clarified that Samir Saleh's books (both this edition or previous editions) are the best books in English in terms of explaining and analysing the process of arbitration law in various jurisdictions in the Arab world.

⁶ S. Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia* (Lexgulf Publishers Ltd, 2012).

- El-Ahdab, in his book *Arbitration with the Arab Countries, 2011*,⁷ considered a number of arbitration law systems in the Arab world; one of these countries is Saudi Arabia. The book consists three main parts; first, El-Ahdab describes arbitration through the various Islamic schools. Then, he deals with a number of Arab countries by studying their arbitration laws. The third part is about discussing a number of conventions entered into by Arab States. This study can be considered as a broad descriptive study with regard to SAL 1983, the book contains a historical evolution of arbitration from a perspective of Islamic *Sharia* law. However, the book has not identified the legal problems or obstacles which were present in SAL 1983, the fact is that there is a little of criticism has been presented in this study. Moreover, despite the fact that this book is the latest edition (the third edition), it should be noted that the information associated with Saudi Arabia has not changed or been updated from the second edition (1999). Many important regulations have been issued in the past ten years in Saudi Arabia, but the author has not referred to these changes.

- The book of '*Shari'a Law in Commercial and Banking Arbitration, 2010*'⁸ by Baamir, has a certain amount of respect compared to the rest of other books that discussed arbitration in Saudi Arabia. The book is divided into six chapters; one of these chapters was published as an article in the following title (Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice).⁹ There are three main parts in the book, beginning with a general discussion of the regulation of arbitration under *Sharia* law. The second part deals with the regulation of arbitration under the Saudi law before concluding with the banking disputes in Saudi Arabia in the sixth Chapter. The book provides an enormous amount of information related to arbitration in Saudi law; it is a clear and well-written book and contains an excellent descriptive study. However, the book lacks a critical analysis, substantive analysis or commentary; it does not actually deal with the legal problems in the SAL 1983.

- Samir Saleh, in his book '*Commercial Arbitration in the Arab Middle East, Shari'a, Syria, Lebanon, and Egypt, 2006*',¹⁰ has referred to domestic commercial arbitration practice, with an international dimension, under the Islamic Law and several Arab countries, without mention to

⁷ Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, 2nd ed. (Netherlands: Kluwer Law International, 2011).

⁸ Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing, Ltd., 2010).

⁹ A. Baamir and I. Bantekas, "Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice," *Arbitration International* 25, no. 2.(2009) At pp. 239-269

¹⁰ S. Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*, 2nd ed. (Hart Publishing, 2006).

Saudi Arabia. The first edition of the book¹¹ was considered as the only major title in the English language to give a full account of arbitration law in Arab and Islamic laws. However, the subject of Saudi arbitration was not studied in this book. This can be seen in the new edition of Saleh's book¹² which includes details of the legislation in several additional countries included Saudi Arabia, compared with the previous edition.

- AL-Bijad in his Arabic book¹³ broadly identified the nature of arbitration in Saudi Arabia; he described the SAL 1983. The book can be considered as a useful reference for a student who maybe studying the subject of arbitration for the first time as the book contains a practical approach to SAL 1983. The author emphasised in his book '*Arbitration in the Kingdom of Saudi Arabia*' that there is a lack of legal resources in Saudi Arabia that specialise in arbitration.¹⁴ AL-Bijad has suggested that legal experts and academics concentrate on issuing and producing legal studies that clarify the rules of arbitration in Saudi Arabia within the forum international practice.¹⁵

- The book of '*The Arbitration Agreement and its Independence, 2009*'¹⁶ by AL-Swage, we can see the first in-depth study of arbitration agreements within Saudi law. The book is an analytical and practical study of such agreements. It is also a comparative study of Islamic law and international practice, with a particular focus on SAL 1983. Although this study is an in-depth one, it does not address the legal problems associated with arbitration agreements in Saudi law. Rather, it is basically a descriptive study with comparisons.

There are a number of theses which have been presented at British universities which have focused on arbitration in Saudi Arabia and *Sharia* law.

- In the thesis entitled '*Party Autonomy and the Role of the Courts in Saudi Arbitration Law, 2010*', AL-Fadhel¹⁷ focused on two matters. The first examined the reality and degree of respect for the principle of party autonomy under the SAL 1983. The second matter was about examining the role of the Saudi judiciary during arbitration procedures under the SAL 1983. It can be said that this thesis is a well-written one which offers a good descriptive and analytical study involving a high standard of academic research. However, although the thesis is new in that it was submitted

¹¹ Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharī'a and Statute Law* (Kluwer Law Intl, 1984).

¹² Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*.

¹³ Mohammed AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia* (Riyadh: Institute of Public Administration Publications, 1999).

¹⁴ *Ibid.* At p.11

¹⁵ *Ibid.*

¹⁶ Ali Alswage, *The Arbitration Agreement and Its Independence* (Riyadh: Dar AL-Asima, 2009).

¹⁷ F. Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law" (Queen Mary College, 2010).

in 2010, it did not refer to a number of recent important decisions such as Decision No.116 on the identification of the regulations enforcing foreign arbitral awards.¹⁸

- Baamir in his thesis ‘Saudi Law and Judicial Practice in Commercial and Banking Arbitration, 2008’¹⁹ which was published in a book that was mentioned above.

- Abu Himed’s thesis, the title of which is ‘The rules of procedure of commercial arbitration in the Kingdom of Saudi Arabia (comparative study), 2006’.²⁰ The author has presented a general descriptive study of the SAL 1983, comparing it with the UNCITRAL Model Law. The study lacks a discussion of the associated legal problems.

- AL-Subaihi’s (2004)²¹ concentrates on using a comparative study approach in order to study SAL 1983 and to identify the harmony of *Sharia* Law with modern international regulations. He suggested the need for further modifications of SAL 1983 in order to develop it in order to encourage foreign investment.

- AL-Jarba in his thesis (2001)²² presented a broad analysis of commercial arbitration within Islamic Law without considering the legal problems of SAL 1983. There is a kind of analysis on the legal aspect of the SAL 1983 has been presented in this study, but this analysis did not reach to clarify of law or practical issues.

- AL-Shareef (2000)²³ discussed and addressed the effect of the New York Convention (1958) upon the SAL 1983 in order to recognise and enforce foreign arbitral awards in Saudi Arabia. The thesis concentrates on the grounds for refusal of an arbitral award in Saudi Arabia. The author has arrived at the conclusion that the Saudi courts will enforce foreign arbitral awards, whereas interest arising from late payment and legal interest will not be enforced. There are three legal obstacles to enforcement; these are ‘First, Saudi public entities are restricted in their capacity to submit to arbitration. Second, arbitral awards providing for interest violate *Sharia* mandatory rules. Third, investment contracts are not permitted to be settled by arbitration as they are deemed to be subject to Saudi administrative law and hence enjoy sovereign immunity’.²⁴

¹⁸ Issued by the President of the Board of Grievances on 25th July 2007

¹⁹ Abdulrahman Baamir, "Saudi Law and Judicial Practice in Commercial and Banking Arbitration" (Brunel University, 2008).

²⁰ Fahad Ahmed Mohammed Abuhimed, "The Rules of Procedure of Commercial Arbitration in the Kingdom of Saudi Arabia (Comparative Study)" (University of Hull, 2006).

²¹ A. AL-Subaihi, "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law" (the University of Birmingham, 2004).

²² M.A.H. AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context" (University of Wales, 2001).

²³ N.S. Al-Shareef, "Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958" (University of Dundee, 2000).

²⁴ Ibid. At p.242

- One of the oldest theses is AL-Mhaidib's thesis (1997),²⁵ he discussed arbitration as a means of commercial dispute resolution, and he concentrated on the position of Saudi Arabia. Most of his research is descriptive and comparative study; it is considered to be one of the best studies that explain in detail the stages of arbitration in Saudi Arabia. However, there is nothing in the matter of studying the issues or obstructs of the SAL 1983, so the critical study is absent in his study.

- There are a number of thesis or dissertations that written in Arabic such as AL-Dakheel (2004), who explained the concept of arbitration and its legal advantages,²⁶ and AL-Qarni (2008) who identified the role of the judiciary in the selection and dismissal of arbitrators and he points out the role of the judiciary in relation to the methods of arbitration.²⁷ However, most of these studies used a descriptive and explanatory methodology, without analysing the SAL 1983 or addressing its legal problems.

After the enactment of SAL 2012, a number of theses have been presented. These include:

- AL-Enazi's thesis, the title of which is 'Grounds for refusal of enforcement of foreign commercial arbitral awards in GCC states law, 2013'.²⁸ The thesis considers the UAE and Bahraini regimes. However, although the thesis related to the GCC States, AL-Enazi mentioned the SAL 1983 instead of the new SAL 2012 in his thesis.

- Yasser AL-Muhaidb's thesis, the title of which is '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'.²⁹ Through a passing reference on page 45, AL-Muhaidb clarified that the new law had been issued, but did not deal with it in his thesis. The most important thing is that he did not mention the Saudi Enforcement Law 2012, despite its close relevance to the subject of his research.

- AL-Mutawa's thesis, the title of which is 'Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council, 2014'.³⁰ This thesis has presented

²⁵ M.I.M. Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia" (University of Edinburgh, 1997).

²⁶ K. AL-Dhakeel, "Arbitration in Saudi Law" (Naif Arab University, 2004).

²⁷ Z. AL-Qarni, "Role of Judiciary in Arbitration" (Naif Arab University, 2008).

²⁸ Mohamed Saud Al-Enazi, "Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in Gcc States Law" (Brunel University London, 2013).

²⁹ Yasser Almuhaiddb, "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" (University of Hull, 2013).

³⁰ Ahmed Almutawa, "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council" (University of Portsmouth, 2014).

a comprehensive comparison of *Sharia* law, international practice, and the GCC arbitration laws. The significance of this work is a survey of those engaged in the field of arbitration in the GCC states which provides this research with added value. However, although the writer mentioned the new SAL 2012, he did not do so in depth which is understandable when we consider that he dealt with all the GCC states.

- Bin Zaid's thesis, the title of which is 'The recognition and enforcement of foreign commercial arbitral awards in Saudi Arabia: a comparative study with Australia, 2014'.³¹ Unfortunately, the author did not mention the new 2012 law, despite the fact that his thesis was discussed and approved in 2014.

In sum, the thesis can be seen to be original and to differ from other previous studies. This is because it is arguably the first study that has critically analysed and investigated the SAL 1983 and the legal problems associated with the enforcement of arbitral awards in Saudi Arabia. Moreover, this analysis is undertaken with a view to offering a comparison with the SAL 2012, in order to observe whether or not the new law will resolve these legal problems. What increases the originality of this thesis and contributes to our knowledge is that it deals with the new SAL 2012 and the new SEL 2012, both of which are regarded as new laws that, to the best of the author's knowledge, have not been addressed in detail so far in the published academic research. It should be mentioned that there are a number of academic articles that have dealt with the new SAL 2012, with these articles being cited in the thesis.

1.7 Research Methodology

The thesis used a legal research methodology which is library-based. It focuses on the analysis of primary legal authorities through a discussion of precedents, treaties, historical records and legislation. Furthermore, the research is supported by a debate with regard to secondary sources such as articles. In addition, the research includes fieldwork involving the gathering of information regarding arbitration rules in Saudi Arabia through court observation and a review of court decisions. This is undertaken in order to understand the reality of arbitration proceedings in Saudi Arabia. The main aim of data collection is to find out the practical procedures associated with arbitration in Saudi Arabia, particularly in relation to recognising and enforcing an arbitral award, in order to discover the legal problems associated with this matter in Saudi law.

³¹ Abdulaziz Mohammed Bin Zaid, "The Recognition and Enforcement of Foreign Commercial Arbitral Awards in Saudi Arabia: Comparative Study with Australia" (P.hD, University of Wollongong, 2014).

The thesis also examines and investigates a number of pieces of established international legislation, and organisations such as the New York Convention, the Riyadh Convention, the UNCITRAL Model law and the ICC, in order to gain a full understanding of their detail and scope. This research includes an analysis of the most widely available arbitral awards in Saudi Arabia. Examples of international practice such as the English Arbitration Act 1996 and the Egyptian Arbitration Act 1994 are compared with the SAL 2012, to obtain an understanding of the procedures and applications of arbitration in foreign courts with regard to international commercial disputes. A significant amount of written literature and legal documents, including books, journal articles, legal magazines, and academic materials with regard to arbitration, are reviewed.

The thesis is a critical-analytical study of the main legal problems related to the recognition and enforcement of arbitral awards in Saudi Arabia. Additionally, a semi-comparative study in light of Islamic *Sharia* law and international practice is undertaken in order to understand the causes of these legal problems and to propose appropriate solutions. The research includes a study of SAL 1983 and SAL 2012 in order to identify expectations of possible solutions that may be resolved by the new SAL, and potential legal problems that may arise in the future.

1.8 Significance of Contribution to the Arbitration Field

To conclude, this thesis aims to discuss and critically analyse the legal problems associated with the recognition and enforcement of arbitral awards in Saudi Arabia. These legal problems have caused delay and a degree of uncertainty in the development of arbitration, and in the enforcement of arbitral awards in Saudi Arabia. There is a need to undertake an in-depth study of the new SEL 2012 and the new SAL 2012 given that, to the best of the author's knowledge, no published has been undertaken in the form of an academic thesis. Moreover, the thesis deals with Saudi judicial practices in terms of a significant number of Saudi judicial cases that relate to the recognition and enforcement of arbitral awards in Saudi Arabia. What is well-known is that there is no publication of precedents and judicial decisions in Saudi Arabia. This is what enhances the view that the thesis will make an effective contribution to the field of arbitration. The anticipated result is that the new SAL 2012 and the SEL 2012 will be able, to some extent, to reassure and comfort national and international parties without violating Islamic *Sharia* law. This will happen when arbitration is practiced in a correct way without negatively prejudicing the text's interpretations of the new laws. If this is not the case, the author is of the opinion that the level of satisfaction may not be as much as hoped for when the new legislation is applied.

Chapter 2

2 Chapter Two: A Brief Overview of the Saudi Arbitration, the Saudi Legal and Judicial Systems

2.1 Introduction

The authorities in Saudi Arabia consist of the judicial, the executive and the legislative authorities. They are mentioned in Article 44 of the Basic Law of Governance (the Basic Law).¹ This Article also reported that: ‘... these authorities shall cooperate in the discharge of their functions in accordance with this Law and other laws. The King shall be the final authority’.² In this chapter, the executive and the legislative authorities in the Saudi legal system will be identified, and then during the discussion of the Saudi judicial system we will recognise the structure of the judicial authority in Saudi Arabia. The main aim of this chapter is to explain the judicial and legal system in Saudi Arabia, and to provide a brief background to arbitration in Saudi Arabia. As part of this, certain aspects of concern with regard to the enforcement of arbitral awards in the Kingdom of Saudi Arabia will be discussed, in order to prepare a clear base for the reader to understand the legal problems.

2.2 The Saudi Legal System

The Kingdom of Saudi Arabia is based on the monarchy,³ and thus the executive and legislative authorities are concentrated in the Council of Ministers. The King of Saudi Arabia has the final authority with regard to the judicial, executive and legislative authorities.⁴ This section will consider the sources of the legal system, and the nature of the legislative and executive authorities.

2.2.1 Foundations of the Saudi Legal System

The legal system of Saudi Arabia is derived from Islamic *Sharia* Law, and the *Sharia* is considered as the primary source of legislation, and it controls every aspect of the legal procedure.⁵ This is based on Article 1 of the Basic Law (1992) which describes the basis of the constitution of Saudi Arabia as ‘...the Book of God [*Quran*] and the *Sunnah* (Traditions) of His Messenger (PBUH)’.⁶ Moreover, Article 7 of the Basic Law emphasises that the ‘...Governance in the

¹ The Basic Law of Governance (1992), also it is called (the Saudi Constitution), it was issued by Royal Order No. (A/90) in 1 March 1992; published in *Umm AL-Qura* Gazette No. 3397 in 5 March 1992.

² Article 44 of the Basic Law (1992)

³ Article 5 (a) of the Basic Law (1992) states ‘The system of governance in the Kingdom of Saudi Arabia shall be monarchical’.

⁴ Article 44 of the Basic Law (1992)

⁵ A.A. Al-Ghadyan, "The Judiciary in Saudi Arabia," *Arab Law Quarterly* 13, no. 3 (1998). At p.235

⁶ May God’s blessings and peace be upon him

Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the *Sunnah* of His Messenger...’.

There are four main *Sunni*⁷ schools or ‘*mathahib*’ of Islamic *Sharia* Law – the *Hanafi*,⁸ *Maliki*,⁹ *Shafi’i*¹⁰ and *Hanbali*¹¹ schools. However, since there is a difference in terms of the time and place of the founding of each of these schools, each one has its own interpretation of *Sharia* Law. These differences are simply practical differences that result from differences in the interpretation of the Islamic *Sharia* texts.¹² When controversy arises with regard to a particular opinion between the schools, the core school interpretation that is applied by the Saudi Courts is that of the *Hanbali* School.¹³ The *Hanbali* School is considered to be a conservative school when compared to other *Sunni* Islamic schools.

2.2.1.1 The Islamic *Sharia* Law

The Islamic *Sharia* Law rely on two kinds of sources, (a) primary sources (b) secondary sources.¹⁴ The primary sources are the *Quran*¹⁵ and the *Sunna*,¹⁶ whereas there are a number of secondary sources such as Consensus ‘*Ijmaa*’,¹⁷ Analogy ‘*Qiyas*’,¹⁸ Juristic Preference ‘*Istihsan*’,¹⁹ Presumption of Continuity ‘*Istis’hab*’²⁰ and Local Custom ‘*Urf*’.²¹ The Saudi Courts issue their judgments based on Islamic *Sharia* sources and their interpretation, and the power of these sources is considered, starting with the *Quran* as the first source of Islamic *Sharia* law, then the *Sunna*, and so on. These sources shall be used by judges, legislatures and lawyers in order to support their decisions, regulations and arguments. One difficulty that may be encountered is that

⁷ There are two main branch in Islam, *Sunni* Islam which is the largest branch, and *Shia* Islam (*Shi’ah*).

⁸ It was founded by *Imam Abu Hanifah, Annuman ibn Thabit* (699-767 AD).

⁹ It was founded by *Imam Malik ibn Anas* (713-795 AD).

¹⁰ It was founded by *Imam ash-Shafi’i, Mohammed ibn Idris* (769-819 AD)

¹¹ It was founded by *Imam Ahmad ibn Hanbal* (780-855 AD)

¹² Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. At p. 15-16

¹³ El-Ahdab, *Arbitration with the Arab Countries*. At p.602-605

¹⁴ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. At pp.10-13.

¹⁵ The *Quran* is the word of God, ‘*Allah*’, which was repeatedly revealed to the prophet Mohammed. It is the main source of Islamic law.

¹⁶ The *Sunna* consists of the deeds and utterances of the Prophet Mohammed. Also, it is the approval of what is said and done.

¹⁷ The *Ijmaa* is the consensus of opinion on the part of scholars.

¹⁸ The *Qiyas* is reasoning by analogy.

¹⁹ It can be translated as ‘public interest’; it also can be defined as ‘the process of selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand, even though the selected solution may be technically weaker than the rejected one’ see Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. at p.12

²⁰ The concept of *istis’hab* is ‘well-known in western laws which provide that things or situations continue to exist until the contrary is proven’ see A.Y. Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Pub Co, 2010). At p.12

²¹ It means ‘the practiced by the people more often than in a particular geographic area’; see *ibid.*, p.13

there is a huge diversity of legal problems, and a corresponding number of different opinions, and sometimes there is no agreement on the prevailing opinion.

2.2.1.2 Saudi Regulations

The Saudi legislatures have used the term of '*Nizam*' which means 'regulation', instead of the term '*Qanun*', which means 'Law' or 'Act' in other Arab countries. The reason behind that is that God only can legislate, therefore the term *Qanun* is not used in Saudi Arabia.²² Hanson comments in this regard by saying that 'In place of *kanun* [*Qanun*] which represents secular or temporal law (and is therefore prohibited by the *Sharia*), Saudi Arabia employs the word *nizam* meaning "regulation".²³ With regard to the creation of legal instruments in Saudi Arabia, Ansari has explained that it is done through:

‘... Royal Decrees, regulations, executive regulations, lists, codes, rules, procedures, international treaties and agreements, ministerial resolutions, ministerial decisions, circular memoranda, explanatory memoranda, documents, and resolutions which have been designated by the government as the official sources of Saudi Arabian law’²⁴

Moreover, the King of Saudi Arabia has the authority to issue legislation through the use of Royal Orders. Through this legislative authority granted to the king, a number of Basic Laws (Constitutional Laws) had been issued, such as the Basic Law of Governance (1992), the Council of Ministers Law,²⁵ the *Shura* Council Law,²⁶ the Succession Commission Law,²⁷ and the Provinces Law.²⁸ It should be mentioned that the Saudi legal system is influenced by the French legal system as long as it does not violate Islamic *Sharia* law as a general framework. Hanson states in his article that ‘...the profound influence of French law on the development of Saudi law, an influence permeating all areas of the law with the exception of personal family law which remains strictly Islamic’.²⁹ The main reason is that modern legislation has been introduced by Egyptian legal advisers.

²² Maren Hanson, "The Influence of French Law on the Legal Development of Saudi Arabia," *Arab Law Quarterly* (1987). 272-291. At p.289

²³ *Ibid.* p.289

²⁴ Abdullah F Ansary, "A Brief Overview of the Saudi Arabian Legal System," *See* http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm (2008).

²⁵ It was issued by Royal Order No. (A/13) in 20 August 1994

²⁶ It was issued by Royal Order No. (A/91) in 1 March 1992

²⁷ It was issued by Royal Order No. (A/135) in 19 October 2006

²⁸ It was issued by Royal Order No. (A/92) in 1 March 1992

²⁹ Hanson, "The Influence of French Law on the Legal Development of Saudi Arabia." At p.289

2.2.2 The Legislative Authority

In order to make sure that legislation in Saudi Arabia does not contravene the provisions of Islamic *Sharia* Law as a 'Constitution Law' and Public Policy, the process of enacting any legislation shall be approved by the Council of Senior Scholars '*Ulama*' and the Consultative Council, as follows:

a) The Council of Senior Scholars '*Ulama*' (*Majlis hay'at kibar al-ulama*)

The last formation of the Council was in 2008 on the orders of King Abdullah Bin Abdul-Aziz, as a part of a number of legislative and judicial reforms. The Council that was formed consisted of 21 members of the four schools '*mathahib*' of *Sunni* Islam. This is considered as a significant improvement which will lead to '...more flexibility in the Saudi legal system, and this definitely affect the development of Arbitration Law'.³⁰ The Council is considered as the highest religious authority. It is also the official authority in terms of issuing a *fatwa* in Saudi Arabia. This is based on the Royal Order in 2010 which restricted the *fatwa* to a particular government body.³¹ The role of the Council is to review any controversial legal matter in Islamic law that is referred by legislatures, and to adopt a formal opinion or '*fatwa*'. Article 45 of the Basic Law states that: 'The source for *fatwa* (religious legal opinion) in the Kingdom of Saudi Arabia shall be the Book of God and the *Sunnah* of his Messenger (PBUH). The Law shall set forth the hierarchy and jurisdiction of the Board of Senior Scholars *Ulama* and the Department of Religious Research and *Fatwa*'. Moreover, the Council also oversees research and Islamic studies that have been carried out by the Permanent Committee for Islamic Research and Legal Opinion in order to be approved for the issue of a *fatwa*.

b) The Consultative Council (*Majlis AL-Shura*)

The Consultative Council is one part of the legislative process, in addition to the Council of Ministers and the King of Saudi Arabia, as is emphasised in Article 67 of the Basic Law of Governance.³² The *Shura* Council consists of 150 members who are appointed by the King for a four years term, with thirty seats of council being granted to women. Article 18 of the *Shura*

³⁰ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law." At p. 61

³¹ The Royal Order No. B/13876 in 12/8/2010

³² Article 67 of Basic law of Governance states 'The regulatory authority shall have the jurisdiction of formulating laws and rules conducive to the realization of the well-being or warding off harm to State affairs in accordance with the principles of the Islamic *Sharia*. It shall exercise its jurisdiction in accordance with this Law, and Laws of the Council of Ministers and the *Shura* Council'

Council Law states ‘Laws, international treaties and conventions, and concessions shall be issued and amended by Royal Decrees after review by The *Shura* Council’. This shows that any legislation enacted by Royal Decree, and international conventions and treaties shall be reviewed by the Consultative Council. The council also has an authority of suggestion with regard to new legislation based on the needs of the community.

2.2.3 The Executive Authority

The executive authority in Saudi Arabia depends on a number of bodies as follows: the King, the Council of Ministers, ministries, public agencies and quasi-public agencies.³³ The King has power over the legislative and executive authorities.³⁴ He is also the Chairman of the Council of Ministers; this council has the responsibility to discuss draft laws or modifications. The Council of Ministers, in fact, has two roles which are the legislative and executive functions.³⁵ It has direct executive authority in Saudi Arabia. On the other hand it exercises legislative power through the Bureau of Experts at the Council of Ministers. This is considered as the final step for enacting any legislation. It can be seen from the previous description that there is an overlap between the legislature and executive authorities in Saudi Arabia. This may lead to the situation where ‘...the legislative authority is not versed in a particular subject of legislation such as arbitration which is new or not discussed in detail in the most authoritative source of law namely the Holy *Quran*’.³⁶

2.3 The Saudi Judicial System

The Saudi judicial system consists of three sections: (a) *Sharia* Courts, (b) the Board of Grievances ‘Administrative Courts’ and (c) a number of quasi-judicial committees. The Saudi judicial system is considered to be complex and unclear to non-practitioners, due to the fact that there are a number of quasi-judicial committees, and what is applied in reality is different from what is provided in Saudi legal texts. Moreover, there is a possibility of a conflict of jurisdiction between the courts and the quasi-judicial committees. The Saudi Government initiative to reorganise the judicial system took place a long time ago; it has issued many regulations since 1981 to recognise the quasi-judicial committees in terms of the commercial courts, and the

³³ Ansary, "A Brief Overview of the Saudi Arabian Legal System."

³⁴ Article 44 of the Basic law states ‘...The King shall be their final authority’

³⁵ Ansary, "A Brief Overview of the Saudi Arabian Legal System."

³⁶ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law." p. 93

unification of the tasks of the judiciary.³⁷ The problem is that the impact of this legislation is not readily apparent; this is what has led to the judicial system appearing ambiguous to non-specialists.

However, in order to clarify the ambiguity in terms of the judiciary, it is necessary to clarify the position of the judicial system in Saudi Arabia. Article 46 of the Basic Law states ‘The Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic *Sharia*’. The primary source that applies in the Saudi Courts for all judicial matters is Islamic *Sharia* Law, whether it is referred by the *Quran* and *Sunna*. The interpretation of the Islamic *Sharia* Rules by the Saudi Courts is mainly based on the *Hanbali* School of thought, and the application of the taking of other schools is permitted when the legal issue is not covered by the *Hanbali* School.³⁸ The *Hanbali*’s books that are approved³⁹ in Saudi Courts as reliable sources are as follows:⁴⁰

- a. Explanation of *Muntaha al-Iradat* Manual, ‘*Sharh Muntaha al-Iradat*’;⁴¹
- b. Explanation of *al-Iqna* Manual, ‘*Sharh al-Iqna Kashif al-Kinna an Matn al-Ikna*’;⁴²
- c. A Summary of *al-Iqna*, ‘*Zad al-Mustaqni fi Ikhtisar al-Muqni*’;⁴³
- d. A Summary of *Muntaha al-Iradat*, ‘*Dalil al-Talib li Nayl al-matalib*’⁴⁴

Moreover, due to social and economic developments, the legislation relating to banking, finance, insurance, commerce, labour and arbitration are accepted in the Saudi Courts as long as they do not conflict with *Sharia* law. Article 48 of the Basic Law states that ‘The courts shall apply to cases before them the provisions of Islamic *Sharia*, as indicated by the *Quran* and the *Sunnah*, and whatever laws not in conflict with the *Quran* and the *Sunnah* which the authorities may promulgate’.

The Impact of the ‘*Wahhabi*’ Movement on the Saudi Judicial System

It should be mentioned that most Saudi judges operate in agreement with the ‘*Wahhabi*’ movement or the ‘*Wahhabism*’ doctrine, which is a *Sunni* Islamic movement derived from the

³⁷ the Council of Ministers' Decree No. (167) on 16/7/1981

³⁸ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia." At p.14

³⁹ The Judicial Supervision Board, Decision No.3 of (25/06/1928), approved by the Royal Decree of (8/9/1928)

⁴⁰ "Saudi Arabia Company Laws and Regulations Handbook," *Int'l Business Publications* (2008). at p.74

⁴¹ By *Mansur ibn Yunus al-Bahuti al-Hanbali*, he is a very famous *Hanbali* jurist.

⁴² By *Mansur ibn Yunus al-Bahuti al-Hanbali*.

⁴³ By *Sharf al-Din Abu al-Naja al-Hajjawi*.

⁴⁴ By *Mari ibn Yusuf al-Karmi*.

Hanbali doctrine.⁴⁵ The *Wahhabi* movement was founded by *Sheikh* Mohammed Ibn Abdul-Wahhab⁴⁶ in 1745. There was no significant effect on the part of the *Wahhabi* movement on ‘*Muamalat*’ matters,⁴⁷ in that most of their attention was paid to the ‘*Ibadat*’⁴⁸ side.⁴⁹ However, Dr. Al-Jarbou explained the impact of this movement on the judicial and legislation authorities, the ‘*Fatwa*’, and on education, when he said:

‘This movement is mainly represented by the ‘*ulama*’ at *Sharia* universities; *Sharia* Court judges; the Board of the Senior ‘*ulama*’ which gives fatwas in all life affairs including worship and legal transactions; the Higher Council of Justice which occupies the summit of the *Sharia* judicial structure; and, finally, by independent ‘*ulama*’ who are not within the structure of the government’⁵⁰

This movement has had an adverse attitude with regard to the codification of *Sharia* rules,⁵¹ as well as applying ‘man-made laws’. Thus, the movement towards the adoption of a modern law system in Saudi Arabia has been affected negatively.⁵² The *Wahhabi* movement applies the view that ‘man-made laws’ are inadmissible as the applicable law, and that *Sharia* Law shall be implemented in any disputed settlement. Consequently, this doctrine is still effective in Saudi Arabia up to the present time. This opinion was based on a message (a *Fatwa*) by *Sheikh* Mohammed Ibn Ibrahim AL-ALShaikh (who died in 1969 AD)⁵³ in a message entitled "Ruling by Man-Made Laws".⁵⁴ The *Fatwa* can be summarized by saying that any Muslim person who rejects the *Sharia* Law and replaces it with ‘man-made laws’, or believes that a ruling by ‘man-made laws’ is equal to a ruling by *Sharia* Law, is an act of ‘*Kufr*’⁵⁵ (disbelieving) which puts this person beyond the pale of Islam. This *fatwa* has had a significant impact on the issue of enforcement in

⁴⁵ The *wahhabism* is ‘...a Sunni Islamic movement that seeks to purify Islam of any innovations or practices that deviate from the seventh-century teachings of the Prophet Muhammad and his companions’; however, from the point of view of non-Muslim, the term has been used ‘...to denote the form of Sunni Islam practiced in Saudi Arabia and which has spread recently to various parts of the world’; see C.M. Blanchard, "The Islamic Traditions of Wahhabism and Salafiyya" (2007). Website: <http://digital.library.unt.edu/ark:/67531/metacrs5273/>. Accessed February 22, 2012.

⁴⁶ *Sheikh Mohammed ibn Abdul-Wahhab*, (1703-1792)

⁴⁷ The *Muamalat* relates to the Islamic rules on trade and financial transactions.

⁴⁸ The *Ibadat* means acts of worship.

⁴⁹ Ayoub M Al-Jarbou, "The Role of Traditionalists and Modernists on the Development of the Saudi Legal System," *Arab Law Quarterly* 21, no. 3 (2007). 191-229. At p. 192-193

⁵⁰ *Ibid.* at p. 193

⁵¹ *Ibid.* at p. 194 see section 6.4.1

⁵² See section 3.2.2 & 6.3.1

⁵³ Mohammed Ibn Ibrahim AL-ALShaikh was born in 1893. He was the highest religious authority in Saudi Arabia from 1953 until his death in 1969.

⁵⁴ In the *Fatwa* of Mohammed Ibn Ibrahim called (Ruling by the Man-Made Laws) No. 4065. Taken from ‘Collection of Letters and Legal verdicts’ (Volume 12, page 284)

⁵⁵ The meaning of *Kufr* is not believing in God ‘*Allaah*’ and His Messenger ‘*Mohammed*’.

terms of arbitral awards in Saudi Arabia, especially foreign arbitral awards, and this is what will be explained in Chapters 3 and 6.

Recent Legislation in the Saudi Judicial System

Without going into the historical narrative of the judicial system in Saudi Arabia, we will explain the recent legislation and present day practical attitudes, and how the latest developments are important with regard to the enforcement of arbitral awards in Saudi Arabia. The current structure of the Saudi Courts is very new, in that it was reorganised through the new Law of the Judiciary 2007⁵⁶ and the new Law of the Board of Grievances 2007.⁵⁷ On the procedural side, the new Law of Procedure before the *Sharia* Courts 2013⁵⁸, the new Law of Procedure before the Board of Grievances 2013⁵⁹ and the new Law of Criminal Procedure 2013⁶⁰ have all been issued recently. This actually is part of an initiative on the part of King Abdullah Bin Abdul-Aziz⁶¹ to develop the Saudi judicial system.

As previously explained, the Saudi judicial system is rather complicated. Therefore, it has been found that academic researchers who are not legal professionals such as lawyers in Saudi Arabia would find some difficulty in understanding this matter. This is because what is applied differs from what is provided for in legislation. One legal academic asked about the level of the competent court in the new SAL 2012 by saying ‘...what is unclear under the 2012 Law [SAL] is the level of the “competent courts” involvement.’⁶² In fact, this question is logical, as there are many diverse categories of Saudi court. Although the new judicial legislation have been in place since 2007, until the present time the Commercial Courts have not been established in the new form that is provided for in Article 22 of the Law of the Judiciary 2007 and Article 35 of the Law of Procedure before the *Sharia* Courts 2013. Dr. Baamir commented in respect of this matter, by saying ‘Although the Law of Judiciary of 2007 provided for the establishment of specialised commercial courts, no new commercial courts have been established yet and the Commercial Circuits of the Administrative courts have jurisdiction over commercial disputes till further notice’.⁶³

⁵⁶ Royal Decree No M/78 of 1st October 2007

⁵⁷ Royal Decree No M/78 of 1st October 2007

⁵⁸ Royal Decree No M/1 of 25th November 2013

⁵⁹ Royal Decree No M/3 of 25th November 2013

⁶⁰ Royal Decree No M/2 of 25th November 2013

⁶¹ King Abdullah Bin Abdul-Aziz is the sixth King of Saudi Arabia (1927-2015)

⁶² Dina Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?," *International arbitration law review* 15 (2012). At p.137

⁶³ A. Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice," *ibid.*, no. 6. At p. 223

However, at the present time, the supervisory courts for arbitration proceedings are the Administrative Courts in the Board of Grievances;⁶⁴ whereas the Administrative Courts contain the Commercial Departments, the Administrative Department and the Criminal Department. In this part of the study, we will offer a brief overview of the most recent legislation of the Saudi judicial system in 2007, and the importance of this legislation in terms of enforcing arbitral awards will be explained.

It can be said that the Saudi judicial system is made up of three judicial systems - the *Sharia* Courts, the Administrative Courts and the Quasi-Judicial Committees. The judicial courts can be divided into three sections as follows:

1. The Judicial Authorities ‘*Sharia* Courts’, under the supervision of the Supreme Judicial Council;⁶⁵
2. The Administrative Judicial Authority ‘Board of Grievances’,⁶⁶ under the supervision of the Administrative Judicial Council;⁶⁷
3. The Quasi-Judicial Committees, under the supervision of the Competent Ministries.⁶⁸

⁶⁴ Ibid. at p.221

⁶⁵ Article 6 of the Law of the Judiciary (2007) states ‘In addition to the other powers provided for in this Law, the Supreme Judicial Council shall:

(a) attend to judges’ personnel affairs such as appointment, promotion, disciplining, assignment, secondment, training, transfer, granting of leaves, termination of service and the like, in accordance with established rules and procedures, in such a way as to guarantee the independence of the judiciary.

(b) issue regulations relating to judges’ personnel affairs upon the approval of the King.

(c) issue judicial inspection regulations.

(d) establish courts in accordance with the nomenclatures provided for in Article 9 of this Law, merge or cancel them, determine their venue and subject jurisdiction without prejudice to Article 25 of this Law and constitute panels therein.

(e) supervise courts and judges and their work within the limits stated in this Law.

(f) name chief judges of courts of appeals and their deputies from among the appeals judges and chief judges of courts of first instance and their assistants.

(g) issue rules regulating jurisdiction and powers of chief judges of courts and their assistants.

(h) issue rules specifying the method of selecting judges as well as procedures and restrictions pertaining to their study leaves.

(i) regulate the work of Trainee Judges.

(j) determine equivalent judicial work required to fill judicial ranks.

(k) make recommendations relating to the Council’s established jurisdiction.

(l) prepare a comprehensive report at the end of each year including achievements, obstacles and relevant recommendations, and bring the same before the King.’

⁶⁶ It is called in Arabic ‘*Diwan AL-Mazalim*’

⁶⁷ Article 5 of the Law of the Board of Grievances (2007) states ‘Without prejudice to the jurisdictions of the Administrative Judicial Council provided for in this Law, the Administrative Judicial Council shall, in relation to the Board of Grievances, assume the powers of the Supreme Judicial Council provided for in the Law of the Judiciary. The Chairman of the Administrative Judicial Council shall, in relation to the Board of Grievances, have the powers of the Chairman of the Supreme Judicial Council.’

⁶⁸ These committees have been vulnerable to criticism by the Grievances Board due to the fact that these committees are under the ‘Executive Authority’ which breaches Article 44 and 46 of the Basic Law of Governance. See <http://www.alriyadh.com/402706>, Riyadh Newspaper, 17/01/2009; Issue No. 14817

2.3.1 The *Sharia* Courts

The first legislation enabling the establishment of *Sharia* Courts was in 1975, through the Law of the Judiciary issued by Royal Decree No. M/64 dated on 12/07/1975 which was amended in 1981 for the unification of the tasks of the judiciary.⁶⁹ However, it should be said that this step is considered as the first modern administrative organization of the Saudi Courts.⁷⁰ In 2007, the new Law of the Judiciary containing 85 Articles was issued by Royal Decree No. M/78 on 1st October 2007. Article 9 of the judicial law identifies the components of the *Sharia* Courts as follows: (see **Figure 2.1**)

1. The Supreme Court;
2. The Courts of Appeal; and
3. The First Instance Courts; which consist
 - a. The General Courts;
 - b. The Penal ‘Criminal’ Courts;
 - c. The Family ‘Personal Status’ Courts;
 - d. The Commercial Courts;⁷¹ and
 - e. The Labour Courts.⁷²

⁶⁹ the Council of Ministers' Decree No. (167) on 16/7/1981

⁷⁰ Ansary, "A Brief Overview of the Saudi Arabian Legal System."

⁷¹ It is not subject to the jurisdiction of the *Sharia* Courts until now; the Administrative Courts still have jurisdiction over commercial disputes.

⁷² It has not been subject to the jurisdiction of the *Sharia* Courts until now; the Committee for the Settlement of Labour Disputes still has jurisdiction over labour disputes.

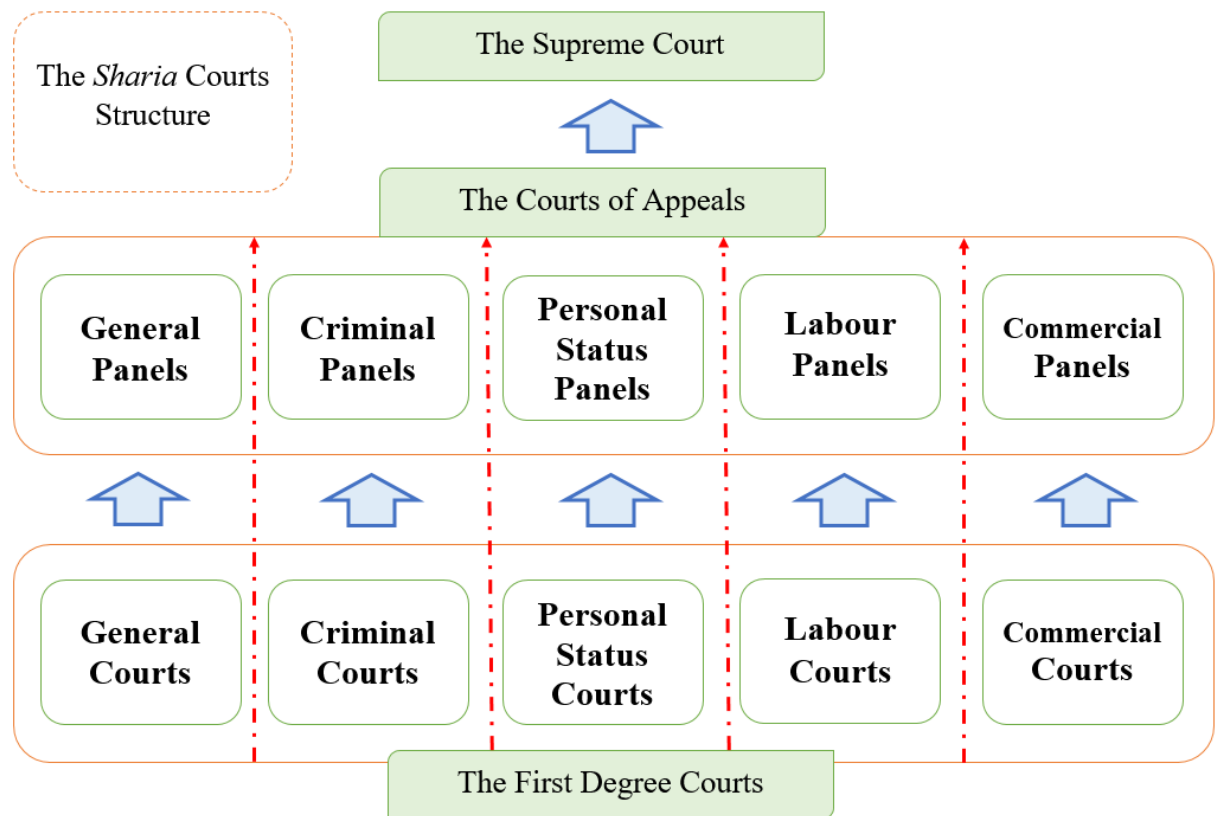


Figure 2.1 The Structure of the *Sharia* Courts⁷³

2.3.1.1 The Supreme Court

The legislatures identified the place of the Supreme Court as being in the city of Riyadh.⁷⁴ The Chief Judge of the Supreme Court shall be appointed by Royal Decree.⁷⁵ The second Chapter⁷⁶ of the Law of the Judiciary (2007) laid down all details about this Court. The most important function of the Supreme Court is to monitor the safety of applying the provisions of Islamic law and the legislation of Saudi Law, and ensuring that any decisions shall not be in violation of *Sharia* law in any dispute. Within the jurisdiction of the general courts;⁷⁷ the supervision relates to the following:

⁷³ The diagram has already been drawn in the article of Ansary, "A Brief Overview of the Saudi Arabian Legal System."

⁷⁴ Article 10 (a) of the Law of the Judiciary (2007)

⁷⁵ Article 10 (b) of the Law of the Judiciary (2007)

⁷⁶ Article 10-14 of the Law of the Judiciary (2007)

⁷⁷ Article 11 of the Law of the Judiciary (2007)

- 1) 'Review of judgments and decisions issued or supported by courts of appeals relating to sentences of death, amputation, stoning, or '*Qisas*' (*lex talionis retribution*) in cases of criminal homicide or lesser injuries.
- 2) Review of judgments and decisions issued or supported by courts of appeals relating to cases not mentioned in the previous paragraph or relating to *ex parte* cases or the like without dealing with the facts of the cases whenever the objection to the decision is based upon the following:
 - a. Violations of the provisions of *Sharia* or laws issued by the King, which are not inconsistent with *Sharia*.
 - b. Rendering of a judgment by a court improperly constituted as provided for in the provisions of this Law and other laws.
 - c. Rendering of a judgment by an incompetent court or panel.
 - d. An error in characterizing the incident or improperly describing it'⁷⁸

2.3.1.2 The Courts of Appeal

Chapter Three of the Law of the Judiciary (2007) explains the functions of the Courts of Appeal and identifies the specialized panels.⁷⁹ For each province in Saudi Arabia, there are one or more Courts of Appeal.⁸⁰ These courts shall review the appealable judgment rendered by the first-degree courts, while the courts of appeal shall hear the statement of litigants⁸¹. The panels of the courts of appeal are as follows:⁸²

- a. The General Panels;
- b. The Penal 'Criminal' Panels;
- c. The Family 'Personal Status' Panels;
- d. The Labour Panels;⁸³ and
- e. The Commercial Panels.⁸⁴

⁷⁸ Article 11 of the Law of the Judiciary (2007)

⁷⁹ Article 15-17 of the Law of the Judiciary (2007)

⁸⁰ Article 15 of the SJL (2007)

⁸¹ Article 17 of the SJL (2007)

⁸² Article 16 of the SJL (2007)

⁸³ It has not been subject to the jurisdiction of the Labour Panels until now; the High Commission for the Settlement of Labour Disputes still has jurisdiction over appeals relating to labour disputes.

⁸⁴ It has not been subject to the jurisdiction of the Commercial Panels until now; the Court of Appeals for the Administrative Courts still have jurisdiction over the appeals relating to commercial disputes.

2.3.1.3 The Courts of First Instance

The legislatures explained the function of First Instance Courts in Articles 18 to 24 in Chapter Four of the Law of the Judiciary 2007. According to Article 25, the Courts shall have jurisdiction to decide all disputes *in accordance with the rules governing the jurisdiction of courts set forth in the Law of Procedure before the Sharia Courts 2013*⁸⁵ and the Law of Criminal Procedure 2013.⁸⁶ Article 9 of the Law of the Judiciary identified the Courts of First Instance as follows:

- a. The General Courts⁸⁷;
- b. The Penal ‘Criminal’ Courts;⁸⁸
- c. The Family ‘Personal Status’ Courts;⁸⁹
- d. The Labour Courts;⁹⁰ and
- e. The Commercial Courts.⁹¹

It is worth mentioning that the legislature stipulated the existence of Enforcement Department in Article 19 of the Law of the Judiciary. The Enforcement Department is under the jurisdiction of General Courts. As the Article states, ‘General courts in provinces shall consist of specialized panels that include panels for execution and for *ex parte* cases and the like...’.⁹² The importance of this change in terms of establishing this department is that it did not previously exist, and its effectiveness actually began after the SEL 2012 was issued by virtue of Royal Decree No. M/53 on 3rd July 2012 and its Implementation Rules that were released on 27th February 2013. It then came into effect on 28th February 2013.⁹³ These adjustments have changed the way in which arbitral awards are enforced in Saudi Arabia, due to the fact that the enforcement law modifies the conduct of the enforcement of foreign arbitral awards from the Board of Grievances to the Enforcement Department in the General Courts.⁹⁴ Moreover, it should be clarified that Commercial Courts are still under the jurisdiction of the Commercial Department of the Board of Grievances as it was the case previously. This is because the administrative procedures for the

⁸⁵ Royal Decree No M/1 of 25th November 2013

⁸⁶ Royal Decree No M/2 of 25th November 2013

⁸⁷ Article 19 of the SJL (2007)

⁸⁸ Article 20 of the SJL (2007)

⁸⁹ Article 21 of the SJL (2007)

⁹⁰ Article 22 of the SJL (2007)

⁹¹ Article 22 of the SJL (2007)

⁹² Article 19 of the SJL (2007)

⁹³ It will be discussed in details in section 5.4.1

⁹⁴ It will be discussed in details in Chapter 5

transfer of the Commercial Department are not over yet.⁹⁵ This is what places commercial arbitration at the present time under the jurisdiction of the Board of Grievances. Moreover, the Labour Courts are still under the jurisdiction of the Committee for the Settlement of Labour Disputes.

2.3.2 The Board of Grievances (*Diwan AL-Mazalim*)

In terms of new legislation, the Board of Grievances is assumed to be unimportant in terms of the arbitration process in Saudi Arabia, and the previous significant role that it played in the enforcement of foreign arbitral awards shall be ended once the Enforcement law 2012 and the Enforcement Department of the General Courts is established. Consequently, the administrative judicial system needs to be briefly explained. The new Law of the Board of Grievances was issued with 26 Articles by Royal Decree No. M/78 of 1st October 2007. It supersedes the previous law that was issued by Royal Decree No. M/51 on 10/05/1982. Article 1 of the Board of Grievances Law noted the Board of Grievances as ‘...an independent administrative judicial body reporting directly to the King, and its seat shall be the City of Riyadh’. The components of the Board of Grievances are identified in Article 8 as follows:

- a. The Supreme Administrative Court
- b. The Administrative Courts of Appeal
- c. The Administrative Courts

2.3.2.1 The Supreme Administrative Court

The city of Riyadh is the seat of the Supreme Administrative Court⁹⁶ and the Chief Judge is named by Royal Order.⁹⁷ The Supreme Court considers and reviews the objections to decisions that are issued by the Administrative Courts of Appeal with regard to the following cases:⁹⁸

- a. ‘Violation of provisions of *Sharia* or laws not inconsistent therewith or an error in application or interpretation thereof, including violation of a precedent established in a judgment rendered by the Supreme Administrative Court.
- b. Being rendered by an incompetent court.
- c. Being rendered by a court not constituted in accordance with the Law.
An error characterizing the incident or in describing it.

⁹⁵ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.221

⁹⁶ Article 10 (1) of the Board of Grievances Law 2007

⁹⁷ Article 10 (2) of the BGL 2007

⁹⁸ Article 11 of the BGL 2007

- d. Deciding a dispute in contradiction with another judgment previously rendered in connection with the litigants.
- e. Conflict of jurisdiction among the Board's courts'.

2.3.2.2 The Administrative Courts of Appeal

The Courts of Appeal consider and review the objections to decisions that are issued by the Administrative Courts, and it decides *after hearing the litigants in accordance with legal procedures*⁹⁹. At present, when the subject matter of arbitration is related to a commercial relationship or international trade, the Court of Appeal in the Grievances Board is supposed to have the jurisdiction to hear actions of nullity.¹⁰⁰ Dr. Baamir commented in respect of Article 8 (2) that 'As a general rule, the jurisdiction to hear claims related to commercial arbitration is given to the Board of Grievances but this part of the law lacks clarity and needs elaboration'.¹⁰¹

2.3.2.3 The Administrative Courts

The Administrative Courts are the courts of the first-degree in the administrative judicial system. The courts have jurisdiction to decide the following cases:¹⁰²

- a. 'Cases relating to rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality or their heirs and their other beneficiaries.
- b. Cases for the revoking of final administrative decisions issued by persons concerned, when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards as well as decisions issued by public benefit associations – and the like – relating to their activities. The administrative authority's refusal or denial to make a decision required to be made by it in accordance with the laws and regulations shall be deemed administrative decisions.
- c. Tort cases initiated by the persons concerned against the administrative authority's decisions or actions.
- d. Cases related to contracts to which the administrative authority is a party.

⁹⁹ Article 12 of the BGL 2007

¹⁰⁰ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.222

¹⁰¹ Ibid. at p.222

¹⁰² Article 13 of the BGL 2007

- e. Disciplinary cases filed by the competent authority.
- f. Other administrative disputes.
- g. Requests for the execution of foreign judgments and arbitral awards’.

It should be made clear that Article 96 of the Enforcement Law 2012 eliminates and replaces Article 13 (g) of the Law of the Board of Grievances which considers the matter of the enforcement of foreign arbitral awards.¹⁰³ It is important to clarify that Article 13 (g) of the Board of Grievances Law was the only article that indicated the inherent jurisdiction for enforcing foreign arbitral awards by the Board of Grievances. This improvement has changed the way in which foreign arbitral awards are enforced in Saudi Arabia, due to the fact that the enforcement law modifies the conduct associated with the enforcement of foreign arbitral awards from the Board of Grievances to the Enforcement Department in the General Courts.¹⁰⁴ This will be discussed in detail in Chapter 5.

2.3.3 The Quasi-Judicial Committees

Administrative committees have jurisdiction over settlement of commercial, insurance, banking, negotiable instrument, investment, customs, and tax disputes in Saudi Arabia. The jurisdiction of these committees shall be determined by the Royal Decree in order to be constituted, and they work under the supervision of the competent Ministries. The need for establishing these judicial committees is to keep up with, and follow, the quick development and the change of commercial methods in Saudi Arabia. Another important reason is to avoid cases having to be considered by the *Sharia* Court which does not accept, for example, most banking transactions involving interest ‘*Riba*’,¹⁰⁵ or business transactions that include insurance agreements ‘*Gharar*’,¹⁰⁶ which are considered forbidden transactions in *Sharia* Law.¹⁰⁷ In respect of these types of transactions, Dr. AL-Jarbou commented that ‘Actually, not only the *Sharia* Courts, but also the Board of Grievances have refused to judge disputes of such issues on the basis of their illegality’.¹⁰⁸ Dr. AL-Jarbou stated clearly the reasons for the establishing of these quasi-judicial committees by saying:

¹⁰³ Article 96 of the Saudi Enforcement Law (2012) states ‘This Law shall repeal ... paragraph (G) of Article 13 of the Board of Grievance Law promulgated by Royal Decree No. M/78 dated 19/9/1428H and any provisions conflicting therewith’

¹⁰⁴ It will be discussed in details in Chapter 5

¹⁰⁵ It is forbidden in Islam due to a number of Quranic verses; see section (6.4.2.1)

¹⁰⁶ *Gharar* is an uncertain obligation in a trade transaction; it could be defined as a hazard, gambling, chance or risk.

¹⁰⁷ See Chapter 6.

¹⁰⁸ Al-Jarbou, "The Role of Traditionalists and Modernists on the Development of the Saudi Legal System." At p.203

‘These committees have been established due to the passive attitude of the *Sharia* Courts toward enacted laws, and sometimes, as a response to the *Sharia* Courts' refusal to entertain some issues such as bank shares and insurance contracts’.¹⁰⁹

However, it should be explained that these quasi-judicial committees are helping to ease the heavy workload of cases coming before the *Sharia* Courts, and deal with the unique requirements of economic, financial, investment and modern trade transactions in Saudi Arabia. It is also a practical solution to the legal issues related to the accuracy of specific knowledge which is difficult for *Sharia* judges to adjudicate on. There are more than 70 quasi-judicial committees in Saudi Arabia. The most notable examples which are worth mentioning are as follows:

1. The Committee for the Settlement of Tax Disputes
2. The Office for the Settlement of Negotiable Instrument Disputes
3. The Committee for the Settlement of Banking Disputes
4. The Committee for the Settlement of Insurance Disputes
5. The Committee for the Settlement of Investment Disputes
6. The Committee for the Resolution of Securities Disputes (Stock Market Disputes)
7. The Commission for the Settlement of the Copyright Disputes
8. The Committee for the Settlement of Mining Disputes
9. The Committee for the Settlement of Fraud, Cheating and Speculation Disputes
10. The Committee for the Settlement of Customs Disputes
11. The Committee for the Settlement of Labour Disputes.¹¹⁰

In a review of the legal problems associated with these committees, they have been vulnerable to criticism by the Grievances Board,¹¹¹ due to the fact that these committees are under the ‘Executive Authority’,¹¹² which breaches Articles 44 and 46 of the Basic Law of Governance.¹¹³ Moreover, the main legal issues that accompany this kind of judicial committee is the conflict of jurisdiction among the different courts as a result of the lack of clarity in their field of specialty. There are questions about the nature of these committees in terms of whether these could be considered as administrative or judicial authorities.¹¹⁴ Also, there is a degree of ambiguity

¹⁰⁹ Ibid. at p.223

¹¹⁰ This committee shall be turned into a Labour Court according to the new Law of Judiciary (2007)

¹¹¹ See <http://www.alriyadh.com/402706>, Riyadh Newspaper, 17/01/2009; Issue No. 14817

¹¹² Ansary, "A Brief Overview of the Saudi Arabian Legal System." See http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm (2008).

¹¹³ Royal Order No. A/90 dated 2/3/1992.

¹¹⁴ AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." At p267

of the Appeal authorities to some of these committees. When new legislation is taken into the consideration, the competent court of appeal for quasi-judicial committees is the Board of Grievances according to Article 13 (b) of the Law of the Board of Grievances (2007). This states that ‘Administrative courts shall have jurisdiction to decide the following: (b) Cases for revoking final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees...’. It is necessary to conclude on the issue of determining the nature of these committees, Dr. AL-Jarba has commented that these quasi-judicial committees are divided in terms of two primary functions, (a) some committees such as the Committee for the Settlement of Banking Disputes perform the function of the judiciary; (b) other committees such as the Committee for the Settlement of Customs Disputes carry out the function of the supervision of violators in order to decide on paying fines.¹¹⁵

In summary, there are very few legal studies that show the shortcomings of the Saudi judicial system. One of these studies was that of Dr. Hassan Mulla.¹¹⁶ This study has addressed the position of the Saudi judiciary based on the current Law of the Judiciary. The study provided a number of results; the most significant of which are as follows:¹¹⁷

1. The number of judges is not proportionate to the number of cases in Saudi Arabia. There are only 4.2 judges per 100,000 Saudi citizens, whereas there are 26.43 judges per 100,000 citizens in most developed countries in the same area. This situation shall help to spread the arbitration means, but this has not appeared.
2. There is no activation of the principle of specialization, and Saudi judges do not specialise in one type of dispute. Consequently, a Saudi judge could hear and decide disputes related to property ownership, the payment of a debt and an inheritance case on the same day.
3. There is a weakness in terms of the enforcement system for judicial decisions, and the enforcement may take a long time to implement.

¹¹⁵ Ibid. at p. 267-268

¹¹⁶ Hassan Eisa Al Mulla, "King Abdullah's Project for Reforming Saudi Judicial System," *Al-Eqtisadiyah Newspaper*, no. 5122 (2007). on 20/10/2007

¹¹⁷ The study is cited in Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the Uncitral Model Law." At p. 69-71

4. The *Sharia* Colleges need more improvements with regard to the curriculum, in that it does not include the new legislation and legal principles. Most of the current curriculum is based on the traditional jurisprudence of the *Hanbali* school.
5. There is no publication of precedents and judicial decisions. This has led to a lack of research related to court decisions.

It should be noted that judges operating within the Saudi judicial system, whether they are operating in the *Sharia* Courts or in the Board of Grievances, shall hold a degree of the *Sharia* colleges.¹¹⁸ This means that a graduate of a law school, even if highly educated, or with long experience, cannot be a judge in a Saudi Court. For example, according to Article 31 (d) of the Judicial law,¹¹⁹ a fresh graduate from a *Sharia* college can be accepted to be a judge, whereas a qualified lawyer, well educated in law school and with 40 years of experience, cannot be accepted as a judge. This attitude in the new law gives the impression that this issue is not considered a real problem by the Saudi Government in terms of the matter of the efficiency of Saudi judges, especially in the modern legislation side. Moreover, the quasi-judicial committees shall be reorganised and unified to be under the judicial authority. Their functions and the appeal authorities shall be defined.

2.4 The Brief Background of Arbitration in Saudi Arabia

The concept of commercial arbitration in Saudi Arabia has passed through five critical phases relating to five significant pieces of legislation as follows: **(a)** the Law of Commercial Court (1931), **(b)** the Labour and Labourers Law (1969), **(c)** the Chamber of Commerce and Industry Law (1980), **(d)** the Saudi Arbitration Law (1983) and **(e)** the New Saudi Arbitration Law (2012). These phases will be briefly explained.

2.4.1 The First Phase - the Law of Commercial Court (1931)

The first phase was in 1931, through the Law of Commercial Court,¹²⁰ in five Articles (493 to 497). These Articles have met significant needs arising from the Saudi Government starting to deal with foreign oil companies. It is considered as *ad hoc* commercial arbitration.¹²¹ As a result of this movement, the well-known case of *Saudi Arabia Government vs. Arabian American Oil*

¹¹⁸ Article 31 of the Judicial Law 2007 and Article 17 of the Board of Grievances Law.

¹¹⁹ Article 31 (d) states 'To be appointed as a judge, a candidate shall fulfil the following requirements: ... (d) He shall hold the degree of one of the *Sharia* colleges in the Kingdom or any equivalent degree, provided that, in the latter case, he shall pass a special examination to be prepared by the Supreme Judicial Council'

¹²⁰ This law was issued by virtue Decree No. M/32 on 2nd June 1931

¹²¹ El-Ahdab, *Arbitration with the Arab Countries*. At p. 609

*Co. (ARAMCO)*¹²² is considered to be the first application of arbitration in Saudi Arabia. According to this case, the position of Saudi Arabia in relation to the capacity of the government to resort to arbitration has been changed. In the ‘Aramco’ Case, there was no consideration given to the values of *Sharia* law by the arbitration tribunal, due to the fact that they lacked an essential knowledge of *Sharia* law and its principles in terms of commercial transactions ‘*Fiqh al-Muamalat*’.¹²³ This caused the Saudi Government to have doubts about international arbitration.¹²⁴ It was believed that the process of international arbitration was an advantageous tool which favoured foreign companies.¹²⁵ Consequently, the Government of Saudi Arabia has adopted a negative position with regard to arbitration. This position became apparent through the Royal Decree No. M/58 in 1963 of the Council of Ministers Resolution,¹²⁶ which stipulated that any government body and its agencies shall not resolve their disputes by arbitration,¹²⁷ unless authorised by the President of the Council of Ministers. This attitude is shown in the old SAL 1983 and its Rules 1985,¹²⁸ and the new SAL 2012.¹²⁹

2.4.2 The Second Phase - the Labour and Labourers Law (1969)

The second stage was through the Labour and Labourers Law in 1969.¹³⁰ As Article 183 of the Labour law regulated labour arbitration, it stated that ‘In all cases, the disputing parties may appoint by common agreement a sole arbitrator or several arbitrators for each of them in order to settle the dispute, in lieu of the committees foreseen in present chapter’.

2.4.3 The Third Phase - the Chamber of Commerce and Industry Law (1980)

Article 5 (h) of the Chamber of Commerce and Industry Law¹³¹ provided that ‘The Chambers of Commerce and Industry have the competence in the following matters ... (h) taking verdicts about the commercial and industrial disputes through arbitration if the parties of the conflict agreed to refer the case to the chamber’. This law was the first timid attempt to create institutional arbitration

¹²² *Saudi Arabia vs. Arabian American Oil Co. (ARAMCO)*, [1958] 27 ILR 117

¹²³ *Fiqh al-Muamalat* is related to the Islamic rules on trade and financial transactions.

¹²⁴ K.T. Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?," *Fordham Int'l LJ* 18 (1994). At p.951

¹²⁵ El-Ahdab, *Arbitration with the Arab Countries*. At pp. 617-622

¹²⁶ It was issued by virtue Royal Decree No. M/58 in 1963.

¹²⁷ Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?." At p. 922

¹²⁸ Article 3 of the SAL 1983 and Article 8 of the SAIR 1985.

¹²⁹ Article 10 (2) of the SAL 2012 as states ‘Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law’

¹³⁰ It was issued by virtue Royal Decree No. M/121 on 16th November 1969.

¹³¹ It was established by virtue Royal Decree No. M/6 on 18th March 1980.

in Saudi Arabia under the Saudi Commercial Chambers. As Article 37 (3) states, ‘The Saudi Council of Chambers of Commerce and Industry...shall have the following jurisdictions: (3) Practicing the arbitration and settle the commercial and industrial disputes, if the parties to the conflict agreed to refer the case to it, and if the dispute is among the parties that belong to more than one chamber or if one party is national and the other is a foreigner’.

2.4.4 The Fourth Phase - Saudi Arbitration Law (1983)

All the three phases consider the appearance and developmental phases of arbitration in Saudi Arabia without there being a specific law of arbitration. The fourth stage was introduced in 1983 when the first SAL was issued.¹³² This consisted of 25 articles. Subsequently, its Implementation Rules were published in 1985.¹³³ The Rules consisted of 48 articles to explain and provide details relating to the arbitration law; this law was replaced by the 2012 law. The 1983 law received much criticism, especially on the issue of the effectiveness of arbitration methods, as well as the enforcement of the arbitral awards in Saudi Arabia. This law will be discussed in detail in Chapter 3, this analysis will provide a significant review of the legal obstacles to international arbitration in Saudi Arabia which will inform the Saudi legislature with regard to their task of reforming SAL; this will provide a significant pool of resources that will, to some degree, guide the analytical and critical study of the enforcement of arbitral awards under the 2012 law.

2.4.5 The Fifth Phase - the New Saudi Arbitration Law (2012)

As a result of the Saudi Government joining the WTO,¹³⁴ it has been observed that there is a need to modernise the Saudi legal system to keep pace with the modern legal systems of the world, and one of these areas of legislation is arbitration law. Consequently, the Saudi legislatures have attempted to establish a new arbitration law by reviewing and improving the SAL 1983 in order to modify it to better serve the needs of the disputing parties when it comes to resolving their disputes, whether they are domestic or international. The new law applies a modern approach to harmonisation with international practice and *Sharia* law. The modernisation and harmonisation of the new law may face many challenges, and this aspect will be considered in Chapters 4, 5 and 6.

¹³² It was issued by virtue Royal Decree No. M/46 on 25th April 1983.

¹³³ It was issued by Decree of Council of Ministers No. (7/2021/M) on 28th May 1985.

¹³⁴ The Government of Saudi Arabia joined to the WTO in December 2005.

Currently, we are engaged with the issuance of the New SAL by the Council of Ministers on 16th April 2012.¹³⁵ The new SAL 2012 was approved by the Consultative Council (*Majlis Al-Shura*) on 15th Jan 2012 and then published on 8th June 2012.¹³⁶ Accordingly, it became effective law on 8th July 2012 according to Article 58 of the SAL 2012. The new SAL contains 58 Articles, and it is mainly based on the UNCITRAL Model Law. The Implementation Rules of this law shall be issued by the Council of Ministers according to Article 57; however, the SAL 2012 is silent as to an issuing date for these rules and so this is unknown.¹³⁷ According to Article 57, the SAL 2012 shall replace the SAL 1983.

2.5 Conclusion

The Saudi legal system has a unique characteristic as explained in Section (2.2). The impact of *Sharia* Law as a primary source in Saudi Law has been demonstrated.¹³⁸ Also, the extent of the overlap between the legislative and executive authorities in Saudi Arabia has been clarified.¹³⁹ The overlapping of the legislative and executive authorities is due to the extensive power of the Saudi King, based on Article 44 of the Basic Law (1992), as the King has the final authority over the three branches. This Chapter has identified the significant impact of the '*fatwa*' upon the legislative authority through the advisory bodies.¹⁴⁰ The discussion in this chapter has provided understanding of the weaknesses associated with activating the legal legislation, including the arbitration and enforcement laws, against the power of *fatwa* - an aspect of the Saudi context which has a very great impact on the Saudi judiciary. Therefore, this chapter helps the reader to understand some of the legal problems associated with arbitration procedures and the enforcement of arbitral awards.

Moreover, the substantial effects of the Saudi judicial system on the arbitration method and the enforcement of arbitral awards in Saudi Arabia have been discussed. In addition, because of the different structure of the Saudi judicial system from that of the rest of the world, this aspect has been explained in detail. The above discussion is significant because it demonstrates that Saudi legislation has only a weak impact on the judicial system. Evidence of this is that the many new courts in the structure in the Law of the Judiciary (2007) are not yet established, despite the fact that eight years have passed without any change. On the other hand, the inadequate effect of

¹³⁵ It was issued by virtue Royal Decree No. M/35 on 16th April 2012; it was approved by the Decree of Council of Ministers No. (156) on 9th April 2012.

¹³⁶ Published in the Official Gazette (*Oum AL-Qura*).

¹³⁷ Article 56 of the SAL 2012.

¹³⁸ See section 2.2.1.1

¹³⁹ See section 2.2.1 & 2.2.3

¹⁴⁰ See section 2.2.2

international conventions on the Saudi Courts can be imagined. This will be discussed in Chapters 5 and 6. This chapter also considered the special characteristics of the quasi-judicial committees in Saudi Arabia. The reasons for their existence, the nature of these committees, as well as the accompanying legal issues have been described.

Finally, the chapter has provided a brief background to arbitration in Saudi Arabia. The development of arbitration in Saudi Arabia has included five main stages. The first legislation was in 1983, and the current one was in 2012. The previous law faced a great deal of criticism, especially on the issue of enforcing arbitral awards in Saudi Arabia. Due to the fact that the enforcement of the arbitral awards is our core study, the old law will be discussed in detail in Chapter 3. Subsequently, the results of this discussion will be analytically and critically addressed with regard to the enforcement of the arbitral award under the new 2012 law.

Chapter 3

3 Chapter Three: The General Structure of Saudi Arbitration Law

3.0 Introduction

The Saudi Government believed that there is an urgent need for arbitration as an important method for resolving a commercial dispute between conflicting parties, particularly in regard to disputes arising from international trade transactions.¹ This belief is based on the fact that arbitration has become an essential legal means for settling disputes - outside the traditional justice of the State - imposed by the reality of both domestic and international trade. Therefore, this led to the issue of the first SAL in 1983,² which consisted of 25 articles. Subsequently, its Implementation Rules were published in 1985.³ This includes 48 articles which detail and explain the arbitration law. This law had an effect for almost 29 years before the new 2012 law was issued.⁴ The SAL 1983 faced much criticism during this period, especially on the matter of the effectiveness of arbitration methods, as well as the enforcement of arbitral awards in Saudi Arabia.

SAL 1983 was derived from the general principles of modern arbitration legislation within the framework of Islamic *Sharia* Law as a primary source of legislation in Saudi Arabia by Arab jurists in general, and particularly by Egyptian jurists.⁵ From the general overview of the arbitration regulations of Arab countries, it has become clear that most texts with regard to SAL 1983 may be quoted from the different Arab regulations, especially from the arbitration law of Kuwait, in that the Kuwaiti Arbitration Code were referred to in 1980 in Chapter Twelve, in Articles 173 to 188 of the Kuwaiti Civil and Commercial Procedure law 1980.⁶ However, in this section of the research, the Articles of SAL 1983 will be discussed in depth, and analysed in order to allow us to observe and identify the general structure and special characteristics of the SAL 1983 which made it unique in this regard in terms of the rest of modern arbitration statutes. During this debate, the real reasons for the weakness of arbitration methods as well as the difficulties of recognition and enforcement of arbitral awards in Saudi Arabia will be identified. This will clarify whether the new 2012 law will address the legal issues that have arisen from operation the SAL 1983. This will be done by discussing arbitration agreements, arbitral procedures and then arbitral

¹ A. Al-Ghadyan, "The Changing Phases of Arbitration in Saudi Arabia," *ARBITRATION-LONDON*- 63 (1997).At p. 132-134

² It was issued by virtue Royal Decree No. M/46 on 25th April 1983.

³ It was issued by Decree of Council of Ministers No. (7/2021/M) on 27th May 1985.

⁴ It was issued by virtue Royal Decree No. M/35 on 16th April 2012; it was approved by the Decree of Council of Ministers No. (156) on 9th April 2012.

⁵ El-Ahdab, *Arbitration with the Arab Countries*. at pp. 606-610

⁶ Law No. 38/1980 issued on 4th June 1980.

awards. The reason for this division into three phases is due to the logical structure of studying the obstacles and legal issues in the enforcement of arbitral awards.⁷

3.1 The Arbitration Agreement

The arbitration agreement is, without a doubt, the most important step in the arbitration procedures. It is considered as ‘the foundation stone of international arbitration’.⁸ The agreement usually regulates many of the main provisions agreed upon between the disputing parties for the assistance of the arbitration process, such as the composition of the arbitral tribunal, the seat of arbitration, and the applicable law. Moreover, according to both Article V (1-a) of the New York Convention and Article 36 (1-a-i) of the UNCITRAL Model Law, an arbitral award can be refused to be recognised and enforced by a local court if the arbitration ‘...agreement is not valid under the law to which the parties have subjected it’.⁹

According to the SAL 1983, the legislatures have recognised the different types of arbitration agreements, by distinguishing between an *arbitration clause* and a *submission agreement*. This classification has agreed as to what has been adopted by international legal experts on the basis that these two types are the fundamental and traditional types of arbitration agreement.¹⁰ Therefore, the parties to the agreement can submit any *future* or *existing* disputes to arbitration, according to Article 1 of the SAL 1983.¹¹

In this subsection, the arbitration agreement will be discussed by analysing the Articles of the SAL and their Implementation Rules (Rules 1985). The discussion will be undertaken through three main pillars which the arbitration agreement depends on when it comes to being validated and bound by Saudi Law. Therefore, the validity of an arbitration agreement will firstly be identified. The author will then consider arbitrators, before clarifying the submission of an arbitration agreement and the judicial approval decision.

3.1.1 The Validity of an Arbitration Agreement

⁷ The discussions will be for recognition and enforcement, but for ease of use we will refer to enforcement only.

⁸ Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford: Oxford University Press, 2009). At p.85

⁹ The New York Convention, Article V (1-a) and the UNCITRAL Model Law, Article 36 (1-a-i).

¹⁰ Philippe Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer law international, 1999). At pp. 193-194; See also Blackaby et al., *Redfern and Hunter on International Arbitration*. At p.86

¹¹ Article 1 of the SAL 1983 states that ‘It may be agreed to resort to arbitration with regard to a specific, existing dispute. It may also be agreed beforehand to resort to arbitration in any dispute that may arise as a result of the execution of a specific contract.’

The arbitration agreement clarifies that the conflicting parties have agreed to settle their disputes through arbitration. This agreement is necessary in order to verify the validity of the entire arbitration process. There are some essential conditions to ensure the validity of the arbitration agreement. These conditions are related to the formation of the arbitration agreement and the disputing parties. These will be addressed in detail.

3.1.1.1 The Formation of an Arbitration Agreement

Most pieces of modern arbitration legislation and all the international arbitration conventions,¹² require clearly that the arbitration agreement shall be concluded in a written form. For example, section 5 (1) of the English Arbitration Act 1996 required that the arbitration agreement should be *in writing*. Also, Article II (2) of the NYC provides that ‘...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’. Moreover, Article 7 (2) of the UNCITRAL Model Law¹³ stated that ‘...the arbitration agreement shall be in writing’. Therefore, the writing requirement with regard to the arbitration agreement is considered as one of the mainstays of the validity of an arbitration agreement.

In Saudi Arabia, it should be made clear that the legislatures of arbitration law 1983 did not expressly mention that an arbitration agreement must be in writing.¹⁴ The main requirement in the arbitration agreement is that the agreement must be drafted into a new arbitration instrument in order for it to be approved by the authority originally competent to hear the dispute.¹⁵ Thus, the legislatures of arbitration law actually went further than the specifying the writing requirement only. The reason behind this approach is that the legislature of SAL 1983 adopted the Islamic view with regard to the means of proof in order to verify any agreement; there are a number of means of the evidence in Islamic law such as the oral testimony of a witness, written evidence, the use of a confession, presumptions and an oath.¹⁶ These means can be reviewed by the authority originally

¹² Julian DM Lew, Loukas A Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003). At pp. 130-132; see also Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. At p.273-274; see also Blackaby et al., *Redfern and Hunter on International Arbitration*. at p.89

¹³ The UNCITRAL Model Law on International Commercial Arbitration Law (1985) with amendments as adopted in 2006.

¹⁴ Alswage, *The Arbitration Agreement and Its Independence*. At p.217

¹⁵ Article 5-6 of Saudi Arbitration Law (1983); and Article 7 of its Implementation Rules (1985).

¹⁶ For more details, see Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. At p.47-54

competent to hear the dispute, when one of the parties to a dispute submits their arbitral instrument in order to register and approve the agreement to arbitrate.

With regard to the means of proof in Islamic law, most Muslim scholars argue that the means of proof are limited to those which are explicitly named in the texts of the *Quran* and the *Sunna*, or those implicitly derived from the main Islamic sources.¹⁷ Examples for these are an oral testimony of a witness, written evidence, a means of confession, presumptions and the use of an oath. On the other hand, there are some who argue that there is no limit to the means of proof in Islamic Law.¹⁸ This point of view is adopted by the legislature in SAL 1983 who claimed that the means of proof could include anything that can be proved. This point of view is based on the *Hadith* of Prophet Mohammed, which says ‘Were people to be given according to their claims, some would claim the wealth and blood of others. But the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation)’.¹⁹ Therefore, it can be said that the term ‘evidence’, in order to prove the existence of an arbitration agreement in Islamic Law, is much wider than the one used by modern arbitration statutes. It is said that the method of proof was much easier and more relaxed than the international practice. However, this attitude has changed with the application of the new SAL 2012, where the new law follows the restricted attitude as Article 9 (2) states ‘The arbitration agreement shall be in writing; otherwise, it shall be void’. However, the international practice has started to apply a liberal approach in this matter, such as in the case of the new French Arbitration Law which does not have formal requirements,²⁰ similar to what was already implemented in practice in the SAL 1983.

Moreover, the significant article of the SAL 1983 related to the formation of an arbitration agreement is Article 5. This article requires a particular form of arbitration instrument in order to be registered and approved, as it states ‘...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’.²¹ Through this process, it shows us the full extent of supervision by the Saudi judiciary upon the arbitration procedure since its inception. Also, according to Article 5, the dispute parties must sign

¹⁷ Mansour AL-Bahooti, *Kashaaf Al-Qinaa Fee Maten El-Eqnaa*, 5 vols. (1636). At pp.332- 344

¹⁸ *Ibn Taymiyyah (1263-1328) and Ibn AL-Qayyim (1293-1350)*. *Ibn Taymiyyah* was a respectable teacher of the *Hanbali* School.

¹⁹ in *AL-Bukhari and Muslim*, (1711)

²⁰ Article 1507 of the French Code of Civil Procedure (2011)

²¹ Article 5 of Saudi Arbitration Law (1983)

the arbitration instrument and agree the names of the arbitrators, the subject matter of the dispute and to agree to resolve this dispute through arbitration. But what if one of the parties does not agree on one or more of these terms due to the difference of views or a desire to procrastinate? Article 10 of the SAL 1983 dealt with such a case through the judicial intervention by the authority originally competent to hear the dispute. Moreover, it can be seen that the principle of ‘competence-competence’ is absent in the old SAL, whereas the new 2012 law emphasised it in Article 20 (1) which stated that the arbitral tribunal has the competence to rule on its own jurisdiction.²² This attitude follows the UNCITRAL Model Law in Article 16, which supports the principle of competence-competence. This doctrine is set out in many international jurisdictions, such as in sections 30 and 31 of the English Arbitration Act 1996. This will further be discussed in Chapter 6 at Section 6.4.5.

Then subsequently, the arbitration instrument shall be registered and approved by the authority within 15 days,²³ as Article 6 of the SAL 1983 states ‘The authority originally competent to hear the dispute shall record applications of arbitration submitted to it and shall issue a decision approving the arbitration instrument.’²⁴ AL-Fadhel commented on this matter, by saying ‘This leads us to conclude that the freedom of the parties is reduced to no authority other than the courts can be involved in this process and approve the submission agreement’.²⁵ However, it should be clarified that Article 7 of Implementation Rules 1985 which states that the arbitral instrument must be approved within fifteen days, was in practice not applicable, and the process of approval may take months.²⁶

The SAL 2012 applied the prevailing approach to many jurisdictions and international arbitration rules, as Articles 9 to 12 of SAL 2012 deal with the perspective of arbitration agreements from the point of view of modern arbitration legislation. Under Article 9 (2) of the new law, the arbitration agreement is compulsorily required to be in writing; otherwise it will be null and void.²⁷ Article 1 of SAL 2012 clearly defines the formation of the arbitration agreement as ‘...may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement’. Therefore, the arbitration agreement may resolve a present dispute or a future dispute,

²² Article 20 (1) of SAL 2012 states ‘The arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject-matter in the agreement.’

²³ Article 7 of Implementation Rules (1985)

²⁴ Article 7 of Saudi Arbitration Law (1983)

²⁵ F.M. Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," *Arab Law Quarterly* 23, no. 1 (2009). At p.33

²⁶ This issue will be considered in Chapter 5.

²⁷ Article 9 (2) of SAL 2012 states ‘The arbitration agreement shall be in writing; otherwise, it shall be void’

according to Article 9 (1).²⁸ The new SAL allows an arbitration agreement to be as a reference or incorporated. Any reference in a contract to a document including the arbitral clause shall be considered as an arbitral agreement and deemed written, provided that *the reference clearly deems the clause as part of the contract.*²⁹

3.1.1.2 The Disputing Parties to an Arbitration Agreement

As a general rule, the parties to an agreement or a contract must have a legal capacity in order to enter into such an agreement or contract.³⁰ These parties can be private parties such as natural or legal persons, or government parties such as States or state agencies. Thus, the arbitration agreement must only be agreed on by those parties who have a full legal capacity to dispose of their rights. Otherwise, this agreement may not be valid. The NY Convention emphasised that *recognition and enforcement of the award may be refused* when the parties to the arbitration agreement were *under some incapacity.*³¹ In order to consider the position of Saudi Arabia, it is necessary to distinguish between private parties and government parties.

i. Private Parties

The meaning of the private parties in this section is such as natural persons and corporations. Article 2 of the SAL 1983 states that an arbitration agreement shall not be considered to be validated except if it has been established *by those who have the legal capacity to act.*³² In the same way, Article 10 (1) of SAL 2012 follows the same definition in this regard. In addition, Article 2 of the Implementation Rules 1985 identified some persons who cannot resort to arbitration or may not conclude an arbitration agreement until authorized by the court. These are

²⁸ Article 9 (1) states that ‘The arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract. The arbitration agreement may also be concluded after the occurrence of a dispute, even if such dispute was the subject of an action before the competent court. In such a case, the agreement shall determine matters included in the arbitration; otherwise, the agreement shall be void’

²⁹ Article 9 (3) of SAL 2012 states ‘An 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 in 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’

³⁰ Blackaby et al., *Redfern and Hunter on International Arbitration*. At p.95

³¹ Article V (1.a) of the NYC.

³² Article 2 of the SAL 1983.

a guardian of minors, appointed a guardian or endowment³³ administrator.³⁴ In his view, El-Ahdab added to that bankrupt persons³⁵ but in practice, this view is not applicable.³⁶

ii. Government Parties

The ability of the government or its agencies to enter into an arbitration agreement is different from country to country. Some countries, as is the case in most common law jurisdictions do not impose any restrictions on the capacity of a government and its agencies to resort to arbitration;³⁷ in the same way, some civil law jurisdictions, such as French Law, applied the same situation. But in other countries, especially in the Arab region, governments and its agencies may be required to obtain the approval of relevant authorities before resorting to arbitration with regard to international commercial disputes.³⁸

The position of Saudi Law in relation to the capacity of the government to have recourse to arbitration was changed after the Aramco Case.³⁹ The Saudi Council of Ministers Resolution⁴⁰ emphasised that is not permitted to refer any disputes, where the Saudi Government or its agencies are a party with others, to arbitration, unless authorised by the President of the Council of Ministers. The regulation that relates to this matter is clearly applied in Article 3 of the SAL 1983.⁴¹ Article 8 of the Implementation Rules 1985 provides essential details in the event that a governmental agency wants to submit its disputes to arbitration.⁴² According to these articles, it becomes clear that there was a narrowing of the scope for referring this kind of dispute to arbitration, by getting authorisation only from the President of the Council of Ministers. However, there are those who believe that the scope of prevention and restriction has been gradually

³³ It is called in Arabic '*waqf*'.

³⁴ Article 2 of the Implementing Rules (1985)

³⁵ El-Ahdab, *Arbitration with the Arab Countries*. at p. 632

³⁶ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia." At p. 110

³⁷ *Ibid.* at p. 106

³⁸ Blackaby et al., *Redfern and Hunter on International Arbitration*. At p.97

³⁹ *Saudi Arabia vs. Arabian American Oil Co. (ARAMCO)*, [1958] 27 ILR 117.

⁴⁰ It was issued by virtue Royal Decree No. M/58 in 1963.

⁴¹ Article 3 of the SAL 1983 states 'Government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This provision may be amended by a Resolution of the Council of Ministers'

⁴² Article 8 of the SAIR 1985 states 'In disputes where a government authority is a party with others, such a government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of the parties. Such a memorandum shall be submitted to the council of ministers for approval of arbitration. The prime minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the council of ministers shall be notified of the arbitration awards adopted'

reduced,⁴³ through the international conventions such as the ICSID Convention, which have been signed by the Saudi Government. In the same way, the new law emphasised that ‘Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister unless allowed by a special provision of law.’⁴⁴

3.1.2 Arbitrators

Appointing the arbitrators is one of the important steps with regard to constituting an arbitral tribunal. This is an essential step in order to begin arbitral proceedings. The arbitrators shall be appointed using a specific method, there should be an agreed number, and they should have special qualifications. The SAL 1983 and its Rules 1985 dealt with this matter through determining the number of arbitrators, the qualifications of the arbitrators, the method of selecting arbitrators, the duties of the arbitrators and the fees of the arbitrators. We will discuss the most important matters with regard to arbitrators.

3.1.2.1 The Qualifications Required of an Arbitrator

Starting with the qualifications required by arbitrators under Saudi Law, they are *required to be experienced and of good conduct and reputation and full legal capacity*.⁴⁵ Moreover, the arbitrators *shall be a Saudi National or Muslim expatriate from the private sector or others*.⁴⁶ Furthermore, the legislature of arbitration law 1983 gave permission for government employees to act as arbitrators after obtaining permission from the department to which he belongs⁴⁷. From the previous statement, it becomes clear that the arbitrator must be a ‘Saudi citizen’ or ‘foreign Muslim’. Consequently, this raised a number of questions - a) should the arbitrator be a Muslim only? b) What is meant by ‘or others’ in Article 4 of the Implementation Rules? From the meaning of ‘others’, is it acceptable for non-Muslims to act as arbitrators? c) Is there any chance of accepting a Saudi non-Muslim to act as an arbitrator? d) Can a woman be an arbitrator?

From the perspective of Islamic law, the qualifications of an arbitrator are associated with the same qualifications as those of a judge ‘*qadi*’.⁴⁸ Samir Saleh identifies seven qualifications

⁴³ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia." At p. 111

⁴⁴ Article 10 (2) of SAL 2012

⁴⁵ Article 4 of Saudi Arbitration Law (1983).

⁴⁶ Article 3 of the Implementation Rules 1985

⁴⁷ Article 3 of the Implementation Rules 1985

⁴⁸ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. At p.28

with regard to a judge. These are: the *qadi* or (an arbitrator) must be an adult male, Muslim, free,⁴⁹ must have intelligence,⁵⁰ should possess rectitude ‘*adala*’, should not be blind, deaf or dumb, should have a knowledge of *Sharia* law. In this regard *Ibn Qudama*,⁵¹ in his comprehensive work, *AL-Mughni*, states that a judge (an arbitrator) ‘...may only be appointed if he is of age, mentally sound, Muslim, free, and educated in matters of *fiqh*...’.⁵² This view is based on the Quranic verse: ‘... Allah will judge between you (all) on the Day of Resurrection. And never will Allah grant to the disbelievers a way (to triumph) over the believers’.⁵³

Reading Article 4 of the SAL 1983 and Article 3 and 4 of its Implementation Rules 1985, shall be within the perspective of Islamic law in order to identify the qualifications required of arbitrators. Article 12 of the SAL 1983 states ‘A request to disqualify the arbitrator may be made for the same reasons for which a judge may be disqualified...’ Therefore, it can be concluded that the arbitrator must be of good conduct and reputation, qualified, experienced,⁵⁴ Muslim, and must have legal knowledge,⁵⁵ full legal capacity⁵⁶ and must not have any interest in the case.⁵⁷

However, the question that will be considered later is whether women or non-Muslims can be arbitrators under the SAL 2012.⁵⁸ This is due to the new SAL 2012 that has changed the requirements in Article 14 which provides the conditions that shall be qualified as follows:

- a. Be of full legal capacity;
- b. Be of good conduct and reputation; and
- c. Be a holder of at least a university degree in *Sharia* or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meets such requirement.

The new law has not considered the remaining issues that are mentioned above. This may remain open to interpretation in the future, which may lead to uncertainty in respect of recognising

⁴⁹ It means freedom which is the opposite of slavery.

⁵⁰ It means the *qadi* must have the ability to solve intricate problems.

⁵¹ *Ibn Qudama Maqdisi* (1147-1223) is considered the most authoritative source of the *Hanbali* School.

⁵² Ibn Kudama, *AL-Mughni*, vol. 10 Issue No. 8221. Cited in El-Ahdab, *Arbitration with the Arab Countries*. At p. 581.

⁵³ *The Noble Quran, Surat al-Nisa* (the Women), Part 4 Verse 141 (4:141); MT Al-Hilali and MM Khan, "The Noble Quran: English Translation of the Meaning and Commentary," *King Fahd Complex for the printing of Holy Quran. Madinah, KSA* 13 (1985).

⁵⁴ Article 4 of Saudi Arbitration Law (1983)

⁵⁵ Article 3 of Implementation Rules (1985)

⁵⁶ Article 12 of Saudi Arbitration Law (1983)

⁵⁷ Article 4 of Implementation Rules (1985)

⁵⁸ See Chapter 6 at Section 6.2.3

and enforcing arbitral awards in Saudi Arabia. However, this issue will be discussed in Section (6.2.3).

3.1.3 Submission of an Arbitration Agreement and the Judicial Approval Decision

At the beginning of this chapter, we addressed a number of terms such as ‘arbitration clause’, ‘submission agreement’ and ‘arbitration instrument’. The SAL 1983 dealt with these terms differently from what is happening in modern arbitration statutes. It should be noted that the SAL 1983 recognised the differences between two types of arbitration agreements, the *arbitration clause* and the *submission agreement*.⁵⁹ However, in practice, there is a similarity between the two kinds of arbitration agreements without any discrimination at the commencement of arbitral procedures. Moreover, it should be mentioned that there was no clarity in the SAL 1983 and its Implementation Rules 1985 as to whether the *arbitration clause* by itself is legally valid and binding upon the parties in order to commence the arbitration procedures without the need to prepare a new arbitration instrument that must be registered and approved by the authority originally competent to hear the dispute.⁶⁰ As Article 5 of the SAL 1983 states ‘Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute...’. However, the ambiguity in this matter may be because Islamic law has not addressed the concept of the *arbitration clause*, due to the fact that *Sharia law* recognises the commencement of arbitration and the appointment of an arbitrator after the dispute has arisen between conflicting parties.⁶¹ In fact, this matter needs more discussion in order to clarify the provisions of the SAL and what is actually applied.

On the other hand, there is one legal expert who believes that the *arbitration clause* does not need to be drafted again into a new arbitration instrument,⁶² and the Article 5 of the SAL 1983 addressed only the *submission agreement*. Moreover, this belief is based on the alternative wording ‘or’ in the text of Article 7 of the SAL 1983 which states ‘Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute...’. In terms of this matter, El-Ahdab maintained ‘By using the word ‘or’ the Saudi legislature distinguished between arbitration clauses and decision by the court confirming arbitration agreements, but made them equal by specifying that both shall lead to the

⁵⁹ Article 1 of the SAL 1983

⁶⁰ El-Ahdab, *Arbitration with the Arab Countries*. at p. 629

⁶¹ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. at .39

⁶² El-Ahdab, *Arbitration with the Arab Countries*. at p. 629

same result'.⁶³ Therefore, it can be understood from this point of view that the *arbitration clause* does not need to be submitted to the court in order to be approved, and it is equal to the approved arbitration instrument. In addition, supporting this view, Article 12 of the SAL states '...The request for disqualification shall be submitted to the authority originally competent to hear the dispute within five days from the day a party is notified of the appointment of the arbitrator or from the day the reasons for disqualification appear or occur...'. This article addressed the *arbitration clause* as, on the other hand, the *submission agreement* must be approved by the court through a new draft of *arbitration instrument* which contains all the required information including the arbitrators' names.

According to what has been discussed above, it can be clearly seen that a judicial approval decision is important, and also that there is a difference in the meaning and procedures between the *arbitration clause* and the *submission agreement* under the SAL 1983. However, in practice, the two kinds of the arbitration agreement are quite different from what is stated in the Articles. An arbitration agreement of both types mentioned must be drafted again into a new arbitration instrument, and then this instrument must be registered and approved by the authority originally competent to hear the dispute,⁶⁴ this fact is supported by a number of legal writers.⁶⁵ Otherwise, an arbitral award may not be recognised and enforced, based on the grounds that the agreement is not valid. Examples of this issue are found in two cases - Decision No. 53/1415 in 1994 and Decision No. 99/1415 in 1994.⁶⁶ The arbitral awards in both cases were nullified by the Grievances Board '*Diwan AL-Mazalim*'⁶⁷ due to the fact that the awards were made without the approval and the supervision of the arbitral instruments by the Grievances Board.⁶⁸ Therefore, this particular issue will be carefully studied and compared with the approach of SAL 2012 in order to identify the improvement, and to observe whether this issue will be resolved. Under the SAL 2012, the Saudi legislature has provided a positive step by removing the broad supervision of the Saudi Courts over arbitration proceedings, as there is no longer a need for a judicial approval decision to

⁶³ Ibid. at p. 630

⁶⁴ Article 5 & 6 of the Saudi Arbitration Law 1983.

⁶⁵ AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*. At p. 96

⁶⁶ Decision No. 53/T/4 of 1994 and Decision No. 99/T/4 of 1994; where the arbitral awards in both cases were nullified by the Grievances Board '*Diwan AL-Mazalim*' due to the fact that the awards were made without the approval and the supervision of the arbitral instruments by the Grievances Board.

⁶⁷ Grievances Board or '*Diwan AL-Mazalim*' is a commercial and administrative court which has jurisdiction over disputes between government agencies and private individuals or companies. In addition, it has jurisdiction over disputes relating to forgery, corruption, trademarks and all things that are relevant to trade. See El-Ahdab, *Arbitration with the Arab Countries*. At p.545

⁶⁸ Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice." At p. 247

commence arbitral proceedings. Article 26 of SAL 2012 states ‘The arbitration proceedings shall commence on the day an arbitration request is received by an arbitration party from the other party, unless otherwise agreed by the two parties to arbitration’, this eliminates what was applied in Article 5 of SAL 1983. However, the question is whether or not this improvement will be properly exercised in Saudi Courts; there will be additional discussions in this regard in Section (4.4.1).

3.2 The Arbitral Procedures

The arbitral proceedings are initiated after the arbitration instrument is registered and approved by the authority originally competent to hear the dispute. The disputing parties, or one of them, have to submit the arbitration instrument in order to *issue a decision approving the arbitration instrument*.⁶⁹ The arbitration instrument shall contain the following:

- i. the names of the parties;
- ii. the name(s) of the arbitrator(s);
- iii. the subject matter of the dispute;
- iv. the express consent of the parties concerned to have the dispute submitted to arbitration;
- v. copies of the documents relevant to the dispute; and
- vi. the instrument signed by the concerned parties and the arbitrator(s).⁷⁰

Once the arbitration instrument has been approved, the arbitral proceedings will commence. These include a number of important steps. In this section, the author will focus on the most important of these steps which are unique to Saudi law and related to recognising and enforcing arbitral awards in Saudi Arabia.

3.2.1 Seat of Arbitration

The concept of the seat of arbitration or *lex arbitri* in Saudi law differs from other modern arbitration statutes due to the fact that Saudi law derives its regulations from Islamic Law. In the case of most modern arbitration laws, the arbitral tribunal could infer from the law of the seat of arbitration as the appropriate procedural law that may be applicable when the disputing parties do not expressly agree upon it.⁷¹ On the other hand, under Islamic Law, the seat of arbitration is often

⁶⁹ Article 6 of the SAL (1983)

⁷⁰ Article 5 of the SAL (1983) & Article 6 of its Implementation Rules (1985)

⁷¹ Blackaby et al., *Redfern and Hunter on International Arbitration*, P.168.

considered to be *immaterial* for two main reasons: the first is because the resolution of disputes under Islamic Law is exclusively subject to the procedural and substantive law of *Sharia*; the second reason is that Islamic law must be applied to Muslims wherever they live.⁷² Therefore, Islamic Law grants the disputing parties the freedom to choose the seat which they consider most appropriate.

Based on this, the SAL 1983 followed the Islamic view by not considering a seat of arbitration as being a serious matter. Dealing with this issue depends on the nationality of the parties concerned. When the disputing parties are Saudi, the seat of arbitration shall be in Saudi Arabia (see Decision No. 143/1412 in 1992).⁷³ On the other hand, in international practice, it can be seen that there are some ambiguity and lack of legislation and academic research with regard to this issue.⁷⁴ There are cases that leave the disputing parties to decide on the appropriate place (see Decision No. 43/1417 in 1996),⁷⁵ while in other cases, the competent authority may decide not give the disputing parties a freedom to choose the arbitral seat (see Decision No. 155/1416 in 1995).⁷⁶ In terms of the practical side, there is a debate. AL-Fadhel argued that the disputing parties could decide to have the arbitral proceedings outside Saudi Arabia and then, when they obtain the arbitral award, they could demand that the arbitral award be recognised and enforced as long as the arbitral proceedings are in accordance with the SAL 1983.⁷⁷ However, AL-Mhaidib considers that there is no realistic chance of this happening in practice, and it is just a theory.⁷⁸ He demonstrated the practical aspect which has been adopted in Saudi Arabia by saying:

‘In practice, the authority originally having jurisdiction over the dispute will not approve an arbitration instrument if it contains provisions which allow holding the

⁷² Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*, p.46-47.

⁷³ Decision No. 143/1/4 in 1992, where the competent authority decided that the arbitration clause is considered to be null and void due to the fact that the disputing parties were Saudi and the subject matter was a Saudi concern; see Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

⁷⁴ El-Ahdab, *Arbitration with the Arab Countries*, p.617.

⁷⁵ Decision No. 43/T/4 in 1996, where the parties were a Saudi and a US Corporation. The competent authority decided the chosen contractual seat should be obligated to the disputing parties, which was in the USA; see Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

⁷⁶ Decision No. 155/T/4 in 1995, where the parties were a Saudi and a foreign company and the chosen contractual seat was outwith Saudi Arabia. The competent authority decided that the arbitral tribunal shall be seated in Saudi Arabia, applying the Saudi procedural and substantive law on the merits of the dispute; and also it shall be supervised by the Board of Grievances; see *ibid*.

⁷⁷ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law," pp.137-38.

⁷⁸ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia," p.202. ; see also Y. Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," *Arab LQ* 9 (1994): p. 232.

arbitration abroad. Further, this authority will not recognise and enforce an arbitral award rendered in domestic arbitration held outside the Kingdom of Saudi Arabia.⁷⁹

AL-Mhaidib's point of view is likely to be right due to the decision of Ministry of Commerce No. 31/1/331/91 of 1979.⁸⁰ This decision was based on the Council of Ministers' Resolution No. 58 of 1963,⁸¹ which prohibits the Saudi Government or its agencies from accepting arbitration as a means of settling their disputes with others, whether they are domestic or foreign, unless authorised by the President of the Council of Ministers. This decision restricts such bodies from accepting a registration of the articles of association of a company incorporated in Saudi Arabia when it contains an arbitration clause providing that arbitration should be carried out in foreign countries. Instead, if there are any disputes they shall be settled by the Saudi Courts or through arbitration held within Saudi Arabia.⁸² Moreover, in Decision No. 155/1416 in 1995, the defendant - a foreign company - demanded, when a request was made for the arbitration instrument to be approved, that the arbitration seat should be outside Saudi Arabia due to the fact that the chosen contractual seat was outside Saudi Arabia; the competent authority decided that the applicable law of arbitration was Saudi Law, and it shall be obligated to the defendant. Therefore, the arbitral tribunal shall be seated in Saudi Arabia, applying the Saudi procedural and substantive law on the merits of the dispute, and also it shall be supervised by the Board of Grievances.⁸³ Based on what has been explained, this mechanism leads to the competent authority having a supervisory power over all arbitral proceedings, and then ensures that the subject of arbitration and its proceedings comply with the Public Policy of Saudi Arabia.⁸⁴

The new law presents a clear vision on this issue. Article 28 of SAL 2012 gives the right for disputing parties to agree the seat of arbitration within Saudi Arabia or abroad. In case of the absence of such an agreement, the arbitral tribunal has a right to decide the suitable seat for arbitration based on *the circumstances of the case, including the convenience of the venue to both parties*.⁸⁵ However, will the issuance of the new law be considered sufficient to resolve the

⁷⁹ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia," p. 202.

⁸⁰ The Saudi Ministry of Commerce, Decision No. 31/1/331/91 dated 21/01/1979

⁸¹ It was issued by virtue Royal Decree No. M/58 dated on 25/06/1963

⁸² Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p. 220.

⁸³ Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

⁸⁴ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law," p.157.

⁸⁵ Article 28 of SAL 2012 'The two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad. In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration

problem? This matter will be considered later in Sections (4.4.3) and (6.3.2), as one of the potential legal issues that may arise in the future.

3.2.2 Applicable Law

In the matter of choosing the applicable law, Saudi Law differs from other modern arbitration legislation. There is no doubt that the subject matter of applicable law is a thorny issue and includes converging opinions among legal experts around the world.⁸⁶ However, most Saudi judges adopt the ‘*Wahhabism*’ view which is Sunni Islamic movement derived from the *Hanbali* doctrine;⁸⁷ the *Wahhabi* movement applies the opinion of inadmissibility of man-made laws as the applicable law, and that Islamic law shall be applied in any dispute settlement.⁸⁸ The Saudi judicial system submits, as a general rule, that the procedural,⁸⁹ and substantive laws for any arbitration taking place in Saudi Arabia are Saudi Law.⁹⁰ The dilemmas that may arise are: **(a)** when the disputing parties have chosen a non-Saudi law for procedural or substantive laws as a governing law for a dispute held in Saudi Arabia. **(b)** In the event that the arbitral dispute is considered an international dispute, under these circumstances, what are the procedural and substantive laws when the disputing parties have not decided upon the governing law in the arbitration agreement? **(c)** What are the criteria upon which to determine whether the arbitral dispute is a national or international dispute, particularly as it was previously mentioned that SAL 1983 did not actually distinguish between the national and international arbitration?

Article 20 of the SAL 1983⁹¹ and Article 39 of its Rules⁹² emphasised that arbitral decisions shall be issued in accordance with the provisions of Islamic Law and the applicable regulations. According to these articles, it can be seen that there were some areas of ambiguity and uncertainty

tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties. This shall not prejudice the power of the arbitration tribunal to convene at any venue it deems appropriate for deliberation; hearing of witnesses, experts or the parties to the dispute; inspection of the subject matter of the dispute; and examination of documents or review thereof

⁸⁶ Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. At pp. 224-225 ; see also Blackaby et al., *Redfern and Hunter on International Arbitration*, pp.163-239.

⁸⁷ The *wahhabism* is ‘...a Sunni Islamic movement that seeks to purify Islam of any innovations or practices that deviate from the seventh-century teachings of the Prophet Muhammad and his companions’; however, from the point of view of non-Muslim, the term has been used ‘...to denote the form of Sunni Islam practiced in Saudi Arabia and which has spread recently to various parts of the world’; see Blanchard, "The Islamic Traditions of Wahhabism and Salafiyya." Website: <http://digital.library.unt.edu/ark:/67531/metacrs5273/>. Accessed February 22, 2012.

⁸⁸ In the *Fatwa* of Mohammed Ibn Ibrahim called (Ruling by the Law) No. 4065. Mohammed Ibn Ibrahim AL-ALShaikh was born in 1893. He was the highest religious authority in Saudi Arabia from 1953 until his death in 1969.

⁸⁹ This point was previously explained in 3.2.1

⁹⁰ El-Ahdab, *Arbitration with the Arab Countries*, pp. 660-61.

⁹¹ Article 20 states ‘...after ascertaining that there is nothing that prevents its enforcement in the *Sharia*.’

⁹² Article 39 states ‘... Awards shall follow the provisions of Islamic *Sharia* and the applicable regulations.’

in dealing with this matter.⁹³ This led to the applicable law of arbitration in Saudi Arabia having been discussed by many legal writers. They argue about the importance of discriminating as to whether arbitral disputes are domestic or international, in order to decide the governing law that shall be applied in Saudi Arabia in terms of the procedural and substantive issues, besides respecting the doctrine of the party's autonomy when they decide on any applicable law.⁹⁴ In fact, the debate is based on two aspects - a discussion in terms of theory, and debate in terms of application. Moreover, another issue must be clarified; this is that there is no distinction between procedural law and substantive law in Islamic Law. Thus, the application of Saudi substantive law means also involving the application of Saudi procedural law.⁹⁵ Therefore, the procedural rules and the substantive law will be considered, and this will clarify the most important pillars of the applicable law issues.

3.2.2.1 Procedural Rules

It should be mentioned to begin with that SAL 1983 did not address the matter of the application of procedural rules. The fact is that it does not give this issue any attention, even if the procedural law is agreed upon by the disputing parties or ordered by the arbitral tribunal.⁹⁶ This is because Islamic Law does not distinguish between procedural rules and substantive law as mentioned previously. The only mention of this matter is in Article 39 of the Implementation Rules 1985 which states: 'The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation...'. This Article has given complete freedom to the non-compliance with any legal procedures, and then the same Article gave an exception which is the procedures must not breach the arbitration law 1983 and its rules 1985. The arbitration proceedings in Saudi Arabia were derived from the procedural rules of the SAL 1983 and its Rules 1985. However, in Decision No. 93/1422 in 2001, the competent authority decided to reject the arbitral award due to the fact that the arbitral proceedings did not comply with the SAL and its Rules.⁹⁷ Moreover, with regard to applying a foreign procedural law, AL-Samaan said 'The officials based their rejection on the grounds that since the Arbitration Code provides sufficient procedural rules, there is no need for foreign

⁹³ Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," pp. 44-45.

⁹⁴ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia," p. 199.; see also El-Ahdab, *Arbitration with the Arab Countries*, pp. 660-61.

⁹⁵ A. Nerz, "The Structuring of an Arbitration Clause in a Contract with a Saudi Party," *Arab Law Quarterly* 1, no. 4 (1986): pp. 383-84.

⁹⁶ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.397.

⁹⁷ Decision No. 93/T in 2001, it is taken from AL-Subaihi, "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law."

arbitration rules.⁹⁸ This draws the conclusion that even *Sharia* law does not distinguish between procedural rules and substantive law. The Saudi judges emphasised the need to comply with specific procedural benchmarks. This may be based on what is stated in Article 38 of the Implementation Rules 1985 that were mentioned above.

The controversy in this matter is related to the arguments of substantive law; therefore, the detailed debates will be presented later when the substantive law is discussed. In procedural rule matters, there is who considered, as a general rule, that the law of procedural arbitration will be Saudi Law when the arbitration takes place in Saudi Arabia; there is no chance for the disputing parties choosing the appropriate law for arbitral proceedings.⁹⁹ This was previously mentioned in Decision No. 143/1412 in 1992 and Decision No. 155/1416 in 1995.¹⁰⁰ However, when the disputing parties agree on the non-Saudi procedural law, the arbitral dispute may face two obstacles. The first is that the arbitration instrument may not be accepted by the authority originally competent to hear the dispute when it comes to registering and approving it (see Decision No. 155/1416 in 1995).¹⁰¹ The second obstacle is that the arbitral award may not be recognised and enforced for two possible reasons, **(a)** in relation to domestic disputes, the arbitration agreement is considered to be null and void due to the fact that the arbitration instrument is not registered and approved by the competent authority (see Decision No. 53/1415 in 1994 and Decision No. 99/1415 in 1994);¹⁰² **(b)** in relation to international disputes, the arbitral award is not considered valid because the arbitration proceedings contain a violation of the provisions of Islamic Law or of Saudi Public Policy.¹⁰³ This matter will be discussed under the SAL 2012 in Chapter 6 at Section (6.3.1).

AL-Mhaidib explained a number of positions which the SAL 1983 and its Rules 1985 complement other Saudi procedural regulations in order to complete the arbitration proceedings within Saudi Law. The cases are as follows:¹⁰⁴

⁹⁸ Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p. 233.

⁹⁹ Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.46.

¹⁰⁰ Decision No. 143/1/4 in 1992 and Decision No. 155/T/4 in 1995.

¹⁰¹ Decision No. 155/T/4 in 1995, where the parties were a Saudi and a foreign company, and the chosen contractual seat was outside Saudi Arabia. The competent authority decided that the arbitral tribunal shall be seated in Saudi Arabia, applying Saudi procedural and substantive law on the merits of the dispute; and also it shall be supervised by the Board of Grievances; see Baamir and Bantekas, "Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

¹⁰² Decision No. 53/T/4 of 1994 and Decision No. 99/T/4 of 1994 where the arbitral awards in both cases were nullified by the Grievances Board '*Diwan AL-Mazalim*' due to the fact that the awards were made without the approval and the supervision of the arbitral instruments by the Grievances Board.

¹⁰³ Nerz, "The Structuring of an Arbitration Clause in a Contract with a Saudi Party," p. 384.

¹⁰⁴ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia," pp. 198-99.

- i. When the matter of arbitration dispute relates to real estate or civil disputes, then the arbitration proceedings shall be supplemented with the Law of Procedure before *Sharia Courts* 2013.¹⁰⁵
- ii. When the matter of arbitration deals with administrative disputes which are usually between a private party and the Saudi Government or any of its agencies, then the arbitration proceedings shall be complemented with the Procedural Rules before the Board of Grievances 2013.¹⁰⁶
- iii. When the matter of arbitration dispute relates to commercial disputes, then the arbitration proceedings shall be supplemented with the Saudi Commercial Court Regulation (1931).¹⁰⁷
- iv. When the arbitration dispute is conducted under the supervision of the Council of Saudi Chambers, then the arbitration proceedings shall be complemented with the Law of the Chambers of Commerce and Industry (1980).¹⁰⁸
- v. When the matter of arbitration dispute deals with labour disputes, then the arbitration proceedings shall be supplemented by the Labour Law (2005).¹⁰⁹

In contrast, the new law is more liberal than the previous practices. As Article 5 of the SAL 2012 allowed the disputing parties to agree to subject the relationship between them to the provisions of any document (model contract, international agreement, etc.) as long as they did not contravene the provisions of *Sharia* law.¹¹⁰

3.2.2.2 Substantive Law

As was previously mentioned, there was some ambiguity and uncertainty in drafting Article 20 of the SAL 1983 and Article 39 of its Implementing Regulations 1985. This led to an enormous confusion on the subject of the applicable law of arbitration held in Saudi Arabia. Moreover, due

¹⁰⁵ Royal Decree No M/1 of 25th November 2013

¹⁰⁶ Royal Decree No M/3 of 25th November 2013

¹⁰⁷ The Saudi Commercial Court Regulation, it was issued under Royal Decree No. M/32 Dated 02 June 1931

¹⁰⁸ The Law of Chambers of Commerce and Industry, it was issued under the Royal Decree No. M/6 Dated 18 Mars 1980

¹⁰⁹ The Labour Law, it was issued under the Royal Decree No. M/51 Dated 27 September 2005

¹¹⁰ Article 5 of SAL (2012) states 'If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, including those related to arbitration, shall apply, provided this is not in conflict with the provisions of *Sharia*.'

to the complexity of Islamic jurisprudence and its multiplicity of Schools,¹¹¹ this has led the Saudi legislation and its judiciary to follow and adopt the previous Islamic studies without identifying any new discussion of the dilemma posed by some modern legal issues. Thus, there are two reasons that cause this matter to be ambiguous. The first is a lack of theoretical studies on the subject of applicable law within Islamic and Saudi law; the second is the lack of clarity with regard to the matter of applicable law and its application in the Saudi jurisdictional field. However, in this part of the study, it is necessary to discuss the arguments related to substantive law within Saudi law. We should first clarify the Saudi Courts' position in terms of the party autonomy doctrine.

As a general rule, the Saudi Courts take into account the contractual agreements between disputing parties as long as these agreements do not conflict with the Islamic law and Saudi regulations.¹¹² The question which may arise is whether the choice of a foreign substantive law for non-Muslims is considered to be contrary to Islamic law, or the foreign regulation that itself may contain some articles that may be regarded as a violation of Islamic law, if so, the arbitral award may then be issued based on these articles. The second point that should be highlighted is that SAL 1983 did not actually distinguish between domestic and international arbitration. There is a lack of legal research associated with this matter.¹¹³ Therefore, there are no criteria for determining the regional kind of arbitral dispute.

When the seat of arbitration is Saudi Arabia, and the disputing parties are Saudi, as a general rule, there is no chance for the parties choosing a substantive law that governs the dispute, and Saudi law must apply.¹¹⁴ In this case, the Saudi Courts support the idea of *safeguarding national sovereignty*, especially when the dispute is between Saudis.¹¹⁵ In Decision No. 143/1412 in 1992, both the disputing parties were Saudis. In their arbitration agreement, they agreed to refer their dispute to the ICC Rules of Zurich. The competent authority decided that the arbitration clause was considered to be null and void, and the disputing parties were enforced to refer their dispute to the Grievances Board due to the fact that the disputants were Saudi, and the subject matter was

¹¹¹ These are the *Hanafi*, *Shafi'i*, *Maliki* and *Hanbali* Schools.

¹¹² Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.398-99.; see also Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.45.; see also Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p. 233-34.

¹¹³ El-Ahdab, *Arbitration with the Arab Countries*, p.617.

¹¹⁴ Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.46. see also, El-Ahdab, *Arbitration with the Arab Countries*, p.660-61. see also, Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255-56.

¹¹⁵ El-Ahdab, *Arbitration with the Arab Countries*, p. 661.

a Saudi concern. Finally, the agreement clause was contrary to Saudi Public Policy.¹¹⁶ In this case, it should be noted that the competent authority did not even refer this dispute to Saudi arbitration under Saudi Law. The competent authority commented on the decision:

‘This dispute is subject to Saudi law and the arbitration clause providing for the settlement of the dispute by means of arbitration in Zurich under the rules of the ICC is null and void. Regardless of its contradiction with the Saudi law of arbitration and its Implementing Rules, this is an attempt to eliminate the jurisdiction of the Saudi judiciary over the dispute, which is against the public policy of Saudi Arabia.’¹¹⁷

The second situation is the position of international arbitral dispute in Saudi Arabia with a foreign party. The first issue which may arise is whether or not the arbitration agreement specifies the applicable law. The Board of Grievances took the position that this depends on the rule of private international law, as it states in one of its judgments that ‘. . . in implementation of the rules of private international law, the law of the contract is that of its place of performance, that is, Saudi law is applicable if the contract is performed in Saudi Arabia.’¹¹⁸ The second issue that may arise is whether or not the disputing parties have decided that an applicable foreign law should govern their arbitration agreement. A legal writer explains in this regard that an arbitration agreement which includes an applicable foreign law or one in which an arbitration takes place outside Saudi Arabia *may face several obstacles*, particularly when the dispute is related to companies or commercial agencies.¹¹⁹

The situation of Saudi Courts on arbitration is not clear when one of the disputing parties is foreign, and when the parties have decided that an applicable foreign law should govern their arbitration agreement, or if they have decided that the arbitral seat is outside Saudi Arabia. In Decision No. 155/1416 in 1995, where the disputing parties were a Saudi and a foreign company, they agreed in the arbitration agreement that the seat of arbitration should be outside Saudi Arabia. The defendant - a foreign company - demanded that the arbitration seat should be outside Saudi Arabia due to the fact that the chosen contractual seat was outside Saudi Arabia. The competent authority decided that the arbitral tribunal should be seated in Saudi Arabia, applying Saudi procedural and substantive law on the merits of the dispute; and also that the dispute should be

¹¹⁶ Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

¹¹⁷ Cited in *ibid.*

¹¹⁸ Cited in El-Ahdab, *Arbitration with the Arab Countries*, p. 660.

¹¹⁹ *Ibid.*, p. 661.

supervised by the Board of Grievances.¹²⁰ However, there is another judicial decision in which the decision is completely different from the previous one, although the reasoning is similar. In Decision No. 43/1417 in 1996, where the parties were a Saudi Corporation and a US Corporation, the competent authority rejected the claim that the arbitral dispute should be settled in Saudi Arabia. The competent authority decided that the chosen contractual seat should be obligated upon the disputing parties; the place of arbitration was in the USA in the state of Iowa.¹²¹ This decision was based on the need to respect the contractual agreements between the disputing parties, and the fact that foreign laws could be accepted as the applicable law.¹²²

Therefore, the questions resulting from the lack of clarity on the part of Saudi Courts with regard to the issue of applying a foreign law to arbitration disputes are **(a)** what are the reasons for this lack of clarity? In terms of theory, **(b)** what is the legal opinion on this issue based on the *Sharia*? From a practical viewpoint, **(c)** what is the practical application of the Saudi Courts on the issue of applying a foreign law to arbitration disputes, and what are the causes of this practice? These questions will be addressed in detail in Chapter Four and Six.¹²³ We will discuss the perspective of *Sharia* on this issue which has led the Saudi Courts to adopt this position. However, from the standpoint of a vast number of legal experts, the real practice has proven to us that the Saudi Courts mostly apply Saudi Law in arbitral disputes when the arbitration takes place in Saudi Arabia, even though the arbitration agreement provides that the applicable law that must govern the situation is a foreign law.¹²⁴

On the other hand, under the SAL 2012, the Saudi legislature applied the principle of party autonomy in this regard. As Article 38 (1-a) states that ‘...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’.¹²⁵ When the dispute parties have not agreed on the applicable rules to the dispute’s substance, then the arbitral tribunal has the right to decide the

¹²⁰ Decision No. 155/T/4 in 1995; see Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

¹²¹ Decision No. 43/T/4 in 1996; see *ibid*.

¹²² *Ibid*.

¹²³ See sections (4.4.2) & (6.3.1)

¹²⁴ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.399-400. ; See also Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p. 233. ; See also Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255-56.; See also Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p. 46-48.

¹²⁵ Article 38 (1-a) of new SAL 2012

substantive rules that are the most relevant to the subject matter of the dispute.¹²⁶ This is an improvement on the legislative side, but it is still too early to assess the practical side. This issue will be discussed in Chapter 6 (section 6.3.1) as one of the potential legal issues that may arise in the future.

3.3 The Arbitral Decision

When the hearing and deliberation between the disputing parties closes, it means that the arbitral tribunal believes that the case is ready for decision. The arbitral tribunal is preparing to end the arbitral proceedings by holding its deliberations confidentially in order to issue the arbitral award. The SAL 1983 identified the procedures and criteria for issuing the arbitral awards, and how the arbitral decision should be issued. Also, it explains the information that should be included within the arbitral award. These were presented in Articles 16 to 21 of the SAL 1983 and Articles 38 to 44 of its Implementation Rules 1985. However, in this section, the matters related to arbitral decisions that contain legal issues in Saudi Arabia will be identified. Therefore, three specific areas will be discussed in order to identify the main legal issues and these are as follows: **a)** making the arbitral awards; **b)** challenge of arbitral awards; and **c)** recognition and enforcement of arbitral awards.

3.3.1 Making the Arbitral Awards

Discussing the matter of issuing the arbitral awards requires an explanation of two main subjects that have a special character in Saudi Arabia; the time-limit in issuing the arbitral award and the methods of issuing the arbitral award.

3.3.1.1 The Time-limit in Issuing the Arbitral Award

As a general rule, the arbitral tribunal is a commitment to issue the arbitral award within the time-limit specified in arbitration agreement between the disputing parties -contractual time limit-, or if the parties do not specify the time-limit then the award must be issued within 90 days from the day of the decision approving the arbitration by the competent authority, according to Article 9 of the SAL 1983. However, the SAL 1983 gave the arbitral tribunal the right to extend the consideration's period of the dispute and exceed the contractual time-limit. This is accepted when the arbitral proceedings take a long time due to reasons beyond the control of the arbitral

¹²⁶ Article 38 (1-b) of SAL 2012 states 'If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute'

tribunal, in which case a reasoned decision should be issued by the tribunal in order to excuse such an extension. In reality, when there is a delay in settling the dispute without any acceptable reason, the disputing parties can refer their dispute to the competent authority such as the Grievances Board '*Diwan AL-Mazalim*', and the dispute may be conducted in order to be settled, or the time-limit may be extended after looking at the excuses of the arbitral tribunal.¹²⁷ The accepted reasons are identified in Articles 13 to 15 of the SAL 1983; these are (a) the death of one of the disputing parties,¹²⁸ (b) one of the arbitrators is dismissed or withdraws,¹²⁹ (c) an extension at the behest of the majority of the arbitrators,¹³⁰ (d) settling a preliminary issue beyond the jurisdiction of the arbitral tribunal such as a claim of forging the documents.¹³¹ Another view is presented by AL-Mhaidib, as he explained that the competent authority may extend the time-limit of arbitration, due to the fact that the arbitral tribunal has excellent knowledge with regards to the dispute, and this will be better for disputing parties in order to save time and costs.¹³² The problem that may arise in this matter is when the arbitral award is issued after the expiration of the applicable time-limit, in which case is the award considered to be valid or not? The SAL 1983 and its Rules 1985 did not provide any answer on this matter. It seems that this issue is subject to the discretion of the competent authority as mentioned above.¹³³

From the perspective of the new law, Article 40 (1) of SAL 2012 states that 'The arbitration tribunal shall render the final award ending the entire dispute within the period of time as agreed upon by the two parties; failing such agreement, the award shall be rendered within twelve (12) months as of the date of commencing the proceedings'. According to that, the principle of party autonomy is applied for determining the permissible time limit, otherwise the legislature stipulates an end to the time-limit required in order to issue the decision when the parties do not agree on a particular period. This will be discussed in section (5.2.2) when considering the international practice.

¹²⁷ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia," p.277.

¹²⁸ Article 13 of the SAL (1983)

¹²⁹ Article 14 of the SAL (1983)

¹³⁰ Article 15 of the SAL (1983)

¹³¹ Article 37 of Implementation Rules (1985)

¹³² Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia," p.278.

¹³³ Ibid.

3.3.1.2 The Methods of Issuing the Arbitral Award

First of all, it should be mentioned that the Saudi legislature distinguished between arbitration and amicable settlement or reconciliation as ‘*Sulh*’ in the SAL 1983 and its Rules 1985.¹³⁴ *Sulh* or *Solh* means ‘a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party’¹³⁵ also, the concept of *Sulh* in Islamic law is ‘a contract that is concluded by two parties, under which each party waives part of his rights for the purpose of reaching a mutual and final resolution of a conflict.’¹³⁶ The arbitral award is issued through the unanimous decision of the tribunal, and could be issued by the majority vote of the arbitral tribunal. Article 16 of the SAL 1983 states, ‘The award of the arbitrators shall be made by majority opinion...’ whereas, when the award is made through amicable settlement or ‘*Sulh*’, then the arbitral tribunal’s members must be unanimous upon this decision as Article 16 of the SAL 1983 states, ‘...where they are authorized to settle, the award shall be issued unanimously.’ However, the concept of a majority vote is taken from Article 162 of the Law of Procedure before the *Sharia* Courts 2013 and Article 25 of the Procedural Rules before the Board of Grievances 2013. In the same way, the SAL 2012 does not deviate far from the approach of previous law in this matter. Article 39 (4) of SAL 2012 explains that when the disputants authorise the arbitral tribunal to act as a conciliator or ‘*Sulh*’, the decision shall be issued unanimously.¹³⁷

What types of awards can be issued by the arbitral tribunal through the SAL 1983 and its Rules 1985?

The term ‘final award’ is mentioned in Articles 18 and 20 of the SAL 1983, Article 18 states, ‘...otherwise such awards shall be final’ and Article 20 states, ‘the award of the arbitrators shall be enforceable when it becomes final by order of the authority with original competence to hear the dispute...’ The concept of final in these articles means that the award is ‘non-appealable.’¹³⁸ Moreover, according to Article 18 of the SAL 1983 and Article 24 of its Rules 1985,¹³⁹ the arbitral award can be interim or partial awards. However, the concept of ‘finality’ is

¹³⁴ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.420-21.

¹³⁵ A. Al-Ramahi, "Sulh: A Crucial Part of Islamic Arbitration," *LSE Legal Studies Working Paper No. 12/2008, Islamic Law and Law of the Muslim World Paper No. 08-45* (2008): p.2. Available at SSRN: <http://ssrn.com/abstract=1153659> or <http://dx.doi.org/10.2139/ssrn.1153659>

¹³⁶ E.A. Alsheikh, "Distinction between the Concepts Mediation, Conciliation, *Sulh* and Arbitration in Shariah Law," *Arab Law Quarterly* 25, no. 4 (2011): p.371.

¹³⁷ Article 39 (4) of SAL 2012 states ‘If the arbitration tribunal is authorized to settle the dispute amicably, its award shall be made unanimously’

¹³⁸ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.414.

¹³⁹ Article 24 of the Implementing Rules 1985 states ‘The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, assignment or otherwise, and the arbitration panel shall make an award of the same’

confused within the Saudi law, therefore, this will be detailed in sections (5.2.1) and (6.4.4) which will consider this concept under the new SAL 2012.

When the case is ready to be decided, and the tribunal is prepared to make a decision, the arbitral tribunal shall fix a date in order to issue their decision in front of the disputing parties.¹⁴⁰ According to Article 17 of the SAL 1983 and Article 41 of its Rules 1985, the arbitral award should be in writing and contain specific information; it should include the following details:

- a) The names of the arbitral tribunal's members;
- b) The date and place of the award;
- c) The subject matter of the dispute;
- d) The names of the disputing parties, their addresses and occupations, and their attendance and absence during the arbitration proceedings;
- e) Summary of the case facts including the claims and defences;
- f) Summary of the reasons for the award;
- g) The text of the decision;
- h) The signatures of the arbitral tribunal's members and the Clerk of arbitration; and
- i) The copy of arbitration instrument must be attached.

The arbitral award shall be pronounced by the Chairman of the tribunal in the specified hearing, and it should be in attendance of the disputing parties or their representatives.¹⁴¹ However, even if one of the disputing parties is absent, the decision is considered to be correct when he is correctly notified of the date of the pronouncement of the decision due to the fact the attendance at this session by the disputing parties is not a prerequisite for the validity of the decision. Therefore, the pronouncement of the decision is considered as a mandatory action that must be done under Saudi law. The consequence of this is that the Chairman of the tribunal shall read the decision, and then the award shall be submitted in writing. The arbitral decision shall be filed within five days with a competent authority, and then copies of the decision must be provided or sent to the disputing parties.¹⁴² However, this matter will be dealt with in section (5.2.1) in order to understand the position of the SAL 2012.

¹⁴⁰ Article 38 of Implementation Rules (1985)

¹⁴¹ Article 41 of the Implementing Rules 1985

¹⁴² Article 18 of the SAL 1983

3.3.2 Challenge of Arbitral Awards

The SAL 1983 gave the disputing parties the right to challenge an arbitral award, and this objection must be within the specified 15-day period from receiving the notification of the award being issued, and the dissatisfied party may submit a written appeal to the competent authority where the award is filed. This step was mentioned in Article 18 of the SAL 1983 and stipulates, ‘...parties may submit their objections against what is issued by arbitrators to the authority with which the award is filed, within fifteen days from the date they are notified of the arbitrators’ awards; otherwise such awards shall be final.’ The competent authority can hear the challenge in order to decide *either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon.*¹⁴³ The proceedings of the judicial review over arbitral awards had been organised through Articles 18 to 21 of SAL 1983.

However, it should be said that there was some ambiguity in the matter of challenging an arbitral award in Saudi Arabia. There are a number of questions associated with this issue; these are: **a)** what was the type of judicial review under the SAL 1983? Was the review related to the formality or is it beyond the merits of the dispute? **b)** How many appeal levels were under the SAL 1983? **c)** What were the grounds for challenge adopted by the SAL 1983? In order to answer these questions, each question should be discussed as a separate subject. The first subject is the type of judicial review under the SAL 1983, the second is the appeal levels under the SAL 1983, and the third subject is the grounds for challenge that are adopted by the SAL 1983.

3.3.2.1 The Type of Judicial Review under the SAL (1983)

First of all, it should be said that there was an ambiguity in Article 19 of the SAL 1983 concerning whether the competent authority can review only the proceedings of the dispute, or if it can review on the merits of an award. There are those who say that there is a lack of clarity in Article 19 due to the fact the legislature do not distinguish in this Article between objections on the formality and merits of an award.¹⁴⁴ However, there are arguments in this regard; the first argument is based on the fact that the competent authority has a right to review not only the proceedings of the dispute, but also it can review the merits of an award, This view can be seen in a number of cases and in the opinions of Saudi judges.¹⁴⁵ So it can be said this opinion is more applicable in practical reality. The second view believes that the competent authority has a right

¹⁴³ Article 19 of the SAL 1983

¹⁴⁴ See R. El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions," *International Business Law Journal* 5 (2006): pp.626-28.

¹⁴⁵ Judge Abdullah Bin Hamad AL-Sadaan and Judge Ali AL-Sawei

only to review the proceedings of the dispute; a number of legal experts believe this view.¹⁴⁶ The third lies in the middle where it is believed that the competent authority has a right to review the merits of an award when only the arbitral award contains a violation of the Islamic law and Saudi public policy.¹⁴⁷

In practice, the competent authority may extend the revision over the merits of the award; therefore, the objection is closer to being considered as an appeal than a challenge.¹⁴⁸ This approach was supported through the fact that there were no existing texts in the SAL 1983 or its Rules 1985 that can limit or restrict the competent authority's review. Abdullah Bin Hamad AL-Sadaan,¹⁴⁹ who was a judge on the Board of Grievances, has explained that when the Board of Grievances decides to accept an objection to the arbitral award, then it should deal with the arbitral dispute from its first proceeding until issuing the arbitral award.¹⁵⁰ He identified the cases where the competent authority can reject and return the arbitral award to the arbitral tribunal in order to be fixed. These cases are as follows: when the decision has an ambiguity or a lack of clarity, a lack of documents or evidence, a lack of a fair hearing, the reasons of the award were not clear or based on incorrect documents or evidence and the reasons for the award were not based on Islamic Law;¹⁵¹ also, when the decision is contrary to what has been approved in the arbitration instrument, a violation of the Islamic Law, the Saudi public policy or the SAL 1983 and its Rules 1985.¹⁵² Moreover, this approach is supported through the Judge Ali AL-Sawei¹⁵³ who asserts that 'when the competent authority accepts a challenge, it must settle the case because it is its original duty.'¹⁵⁴

There are two cases that prove that the judicial review over arbitral awards can be extended to the reasons of the arbitral award, in Decision No. 18/1416 in 1996, where the 'appeal circuit'¹⁵⁵

¹⁴⁶ See AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*. See also El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions."

¹⁴⁷ Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p.234.; see also K. Othman, "What Is the Extent of Judicial Review over the Arbitral Awards?," *AL-Eqtisadiyah* 24th October 2009.issue 5857; website: http://www.aleqt.com/2009/10/24/article_292224.html

¹⁴⁸ There are a number of cases will be presented later; such as Decision No. 18/D/TJ/1 in 1996 and Decision No. 46/D/TJ/1 in 1999.

¹⁴⁹ AL-Sadaan is now working as an adviser for the Justice Minister, (2012).

¹⁵⁰ Abdullah H. AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," in *Multaga Gadha Almadhalem Wa Altahkeem* (Jeddah, 2005), pp.6-9.

¹⁵¹ See Decision No. 18/D/TJ/1 in 1996 and Decision No. 46/D/TJ/1 in 1999.

¹⁵² AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," pp.7-8.

¹⁵³ Judge Ali AL-Sawei is a former president of the commercial department, a member of the appeal circuit on the Board of Grievances.

¹⁵⁴ Cited in AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," p.279.

¹⁵⁵ The appeal circuit was the highest authority in the Board of Grievances. There are a number of administrative and commercial circuits. Each circuit has a three members. The appeal circuit is now called the Court of Appeal of the Board of Grievances.

in the Board of Grievances observed that the reasons of the arbitral award were not formed on the correct basis, and the arbitral tribunal referred to an invalid conclusion in order to reach this decision, therefore, the Circuit rejected the award due to it being based on incorrect reasons.¹⁵⁶ On the other side, Decision No. 46/1419 in 1999, where the appeal circuit in the Board of Grievances emphasised that the reason to accept and enforce the arbitral decision was because it was based on correct reasons and principles.¹⁵⁷ Through these cases, the extent of the judicial review over arbitral awards can be seen.

On the other hand, some legal experts emphasised that despite the ambiguity of Article 19, this does not mean that it is interpreted in this existing way due to the violation of the norms and arbitration laws in most other countries in order to achieve the important aim of arbitration, which is the speed to end the dispute. The competent authority shall consider the objection as a challenge to the awards and not as an appeal, therefore, the revision should be over the proceedings of the dispute only. This view is supported by AL-Bjad¹⁵⁸ and EL-Rayes;¹⁵⁹ whereas this view has been rejected by AL-Sadaan in his article.¹⁶⁰

Moreover, there are also some legal academics who take a middle position where they expect that the revision of the competent authority may extend to the merits of the disputes only when the arbitral awards violate the Islamic Law and the Saudi public policy.¹⁶¹ Support for this view was in Decision No. 395/1430 in 2009,¹⁶² where this decision explained the limits of judicial review over arbitral awards. The appeal circuit in the Board of Grievances emphasised that the revision over the arbitral award must be restricted so as to not be in violation of Islamic Law, the Saudi public policy, and the SAL 1983 and its Rules 1985.

In summary, the Saudi legislature to arbitration law did not clarify the concept of a 'challenge'; and whether the term means 'objection', 'recourse' or 'appeal.' The expressions that were used in the SAL 1983 and its Rules 1985 are 'challenge' and 'objection', which means it is a subject to the decision of the competent authority in order to decide whether the award is not a

¹⁵⁶ Decision No. (18/D/TJ/1) in 1996; Cited in AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," pp.7-8.

¹⁵⁷ Decision No. (46/D/TJ/1) in 1999; Cited in *ibid*.

¹⁵⁸ AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, pp. 236-38.

¹⁵⁹ El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions," pp. 626-27.

¹⁶⁰ AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," pp.6-7.

¹⁶¹ Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p.234.; see also, Othman, "What Is the Extent of Judicial Review over the Arbitral Awards?."issue 5857; website: http://www.aleqt.com/2009/10/24/article_292224.html

¹⁶² Decision No. (1/395 Q/7) in 2009; the decision is mentioned in "What Is the Extent of Judicial Review over the Arbitral Awards?."issue 5857; website: http://www.aleqt.com/2009/10/24/article_292224.html

violation to Islamic Law and the Saudi public policy.¹⁶³ Saudi law did not mention the phrase ‘appeal’, whereas it practices it through dealing with reviewing the arbitral dispute from its first proceeding until issuing the arbitral award. On the contrary, the new law is clear on this aspect. Article 50 (4) of SAL 2012 has stipulated ‘The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute’. Additionally, the Article stresses that the competent court considers an action for nullification as specified in cases mentioned in Article 50 (1) without having examined the facts of the merits of the case.

3.3.2.2 The Appeal Levels under the SAL (1983)

From Article 18 of the SAL 1983, it can be noticed that there is no explicit text in order to specify the level of appeal after the arbitral award is issued by the tribunal. This had led to ambiguity in order to observe the position that must be applied. The first view believes that there is one level of appeal after the arbitral award is issued by the tribunal, and this causes the arbitral proceedings to have just two degrees of jurisdiction, which is similar to the procedures of most countries based on their national law.¹⁶⁴ The second view is broader and is more practically applicable on the Saudi reality.¹⁶⁵ This view is based on the premise that the award shall pass through three degrees of jurisdiction, which has an opposite side, as will be detailed.

In practice, what happened is that revision of an arbitral award is overtaken through three judicial stages¹⁶⁶ and these are: **a)** the arbitral tribunal; **b)** the competent authority; and **c)** the appeal circuit in the competent authority.¹⁶⁷ Therefore, through this process, it can be seen that the arbitration in Saudi Arabia takes longer proceedings than the litigation in order to arrive at a final decision. Thus, the primary purpose of arbitration, which is a quick resolution, is missing here. This is emphasised by Mr. Mohammed AL-Dossary,¹⁶⁸ who works as General Manager of the

¹⁶³ M.A.H. Al Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context" (University of Wales, 2001), p.283.

¹⁶⁴ AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, p.237.

¹⁶⁵ AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," pp.6-7.

¹⁶⁶ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law," pp.182-84.

¹⁶⁷ El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions," pp. 626-28.; see also AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, p.237.; see also, K. Othman, "Views in the Issues of Challenges Arbitral Awards," *AL-Eqtisadiyah* 12th January 2008.Issue 5206 ;Website: http://www.aleqt.com/2008/01/12/article_11172.html

¹⁶⁸ The interview was conducted as part of Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law," pp. 195-96.

Saudi Chambers of Commerce in Riyadh,¹⁶⁹ when he explained the difficulties of the arbitration proceedings having to pass three stages of jurisdiction in order to arrive at the final decision. On other hand, Judge Ali AL-Sawei asserts, 'In my estimation, it is necessary to consider appeal as a degree of arbitration by the Board of Grievances and should be stated by law.'¹⁷⁰ Therefore, the conflict of views between practitioners of arbitration and the Saudi judges in Saudi Arabia can clearly be observed.

AL-Bjad, in his book, emphasised that adding one more degree of litigation on arbitration proceedings is considered to be a violation of the constitution.¹⁷¹ AL-Jarba commented on AL-Bjad's view that this is not accurate due to the fact that, 'Saudi Arbitration law [1983] allows challenge and has been issued by virtue of a Royal Decree as are all the state's statutes. This may be accepted in some countries whose laws and specific arbitral challenges were explicitly specified by the concerned tribunal of appeal, but in the Kingdom of Saudi Arabia and especially in regard to arbitration law, there is silence on the subject. Therefore, challenging arbitral awards cannot be described as a breach of the constitution.'¹⁷²

The new solution is identified in the SAL 2012 where the challenge shall be submitted to the competent court for the dispute which is the Court of Appeal; as Article 50 (4) states 'The competent court shall consider the action for nullification in cases referred to in this Article [50-1]'. The new law identifies the competent court as the Court of Appeal according to Article 8 (1).¹⁷³ A further discussion will be presented in Section (5.3.1).

3.3.2.3 The Grounds for Challenge that were Adopted by the SAL (1983)

One of the problems issues associated with the challenge of arbitral awards in Saudi Arabia is that there were no clear rules that specify the grounds for challenging the arbitral awards within the framework of SAL 1983 and its Rules 1985. In fact, the Saudi legislature failed to point out the grounds for challenging the arbitral awards that would be satisfactory and acceptable.¹⁷⁴ Consequently, it can be said that there were an enormous ambiguity and wide scope for indecision

¹⁶⁹ The Saudi Chamber of Commerce is considered to be an institutional arbitration in Saudi Arabia.

¹⁷⁰ Judge Ali AL-Sawei, Cited in Al Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," p. 282.

¹⁷¹ AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, p.237.

¹⁷² Al Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," pp.280-81.

¹⁷³ Article 8 of SAL 2012 states 'The court of appeal originally deciding the dispute shall have jurisdiction to consider an action to nullify the arbitration award and matters referred to the competent court pursuant to this Law'

¹⁷⁴ F. Al-Fadhel, "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law," *Company Law* 30, no. 8 (2009): p. 254.

in the matter of challenging arbitral awards.¹⁷⁵ As a result of this, the chance of further challenges to any arbitral awards in Saudi Arabia will be permanent and frequent, and this might lead to a huge obstruction in the arbitral proceedings. Whereas, the SAL 2012 introduces an entire new chapter which categorises the grounds on which a party can challenge the validity of arbitral awards. Chapter 6 of SAL 2012 outlines three Articles (49 to 51) that organise the ways to challenge the validity of arbitral awards in accordance with specific provisions of the SAL 2012; this is considered to be a significant improvement in term of limiting the grounds for challenge. This improvement will be discussed in Chapter 5 (Section 5.3.3).

As a result of the absence of identifying grounds for challenging the arbitral awards within the framework of SAL 1983 and its Rules 1985, a number of legal writers stated some grounds for challenge as examples.¹⁷⁶ These reasons are as follows:

- i. When the arbitration agreement or instrument is invalid;
- ii. When the arbitral tribunal is not authorised, or the award is issued by unauthorised arbitrator(s);
- iii. When the arbitral tribunal exceeds the specific authorisation that has been agreed in the arbitration agreement;
- iv. When the arbitral tribunal reaches a different decision to that which is specified in the subject matter of the dispute;
- v. When the subject matter of the dispute is not able to be settled by arbitration;
- vi. When the arbitral proceedings contain a violation of the fair hearing, impartiality of arbitrator(s), the applicable law, or what is agreed in arbitration agreement; and
- vii. When the arbitral award violates the Islamic Law or Saudi public policy.

3.3.3 Recognition and Enforcement of Arbitral Awards

The step of recognising and enforcing the arbitral awards is considered to be the most important step of the arbitral proceedings. When this stage is not achieved, undoubtedly, the arbitral award becomes useless, and the whole arbitral proceedings may not have reached the main

¹⁷⁵ Al Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," p.280.

¹⁷⁶ See AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," p.9.; AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, p.239.; Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia," p.373.; Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, 420-21.; Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law," 182-85.

goal. Consequently, the success of any international or domestic arbitration shall be achieved with the result that the foreign or domestic arbitral award is recognised by the domestic competent authority in order to be enforced. However, in order to discuss this matter within the framework of Saudi law, it should be divided into two discussion subjects. Discussion of the recognition and enforcement will be through domestic and foreign arbitral awards.

3.3.3.1 Recognition and Enforcement of Domestic Arbitral Awards under SAL 1983

Article 20 of the SAL 1983 states, ‘The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute; This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the *Sharia*.’ Thus, the domestic arbitral awards must be final in order to be enforced by the competent authority, and the awards are considered to be final after going through one of three stages as follows:

- i. When the period set for objection to the award has finished without one of the disputed parties submitting an objection in the period of 15 days starting from the date of the party’s announcement.¹⁷⁷
- ii. When the objection to the award is submitted but the competent authority rejects this objection, accordingly, the award becomes final and binding.¹⁷⁸
- iii. When the objection to the award is submitted and the competent authority accepts this objection, subsequently, the competent authority reaches a decision on the disputes or returns it to the arbitral tribunal in order to fix the award; the award remains suspended until the competent authority accepts the modifications.

However, the legal issue that may arise is in the third stage (iii) where the enforcement of the arbitral award takes a long time, and the enforcement process is very difficult. This issue was previously discussed in Section (3.3.2.1); it was suggested that there are three main difficulties as follows:

- a) The type of judicial review under the SAL 1983 is close to be reviewed on the merits of an award, and it is not only regarding the proceedings of the dispute. Also, the concept of a ‘challenge’ that is used in the SAL 1983 and its Rules 1985 may be intended to be an

¹⁷⁷ Article 18 of the SAL (1983)

¹⁷⁸ Article 19 of the SAL (1983)

‘appeal’ due to the fact the competent authority deals with reviewing the arbitral dispute from its first proceeding until the arbitral award is issued.¹⁷⁹

- b) The degree of objection to arbitration in Saudi law differs from what is applied in most modern arbitration legislation; the arbitration goes through one extra stage of jurisdiction, which is more than what is implemented to the Saudi judiciary. Therefore, arbitration in Saudi Arabia takes longer than the litigation in order to arrive at a final decision.¹⁸⁰
- c) There are no clear or specific grounds for the challenge of arbitral awards in Saudi Arabia.¹⁸¹

In conclusion, the competent authority grants its order to enforce the arbitral award after approving the award through ensuring that it does not contain any violation of the Islamic Law and Saudi public policy.¹⁸² Then, the Clerk of the competent authority should give the winning party a copy of the arbitral award that contains a stamp with the following phrase:

“All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution require application of force by the police.”¹⁸³

The competent authority that is responsible for recognising and enforcing the arbitral awards is mentioned in Article 18 and 19 of the SAL 1983. Thus, the nature of the dispute should be looked at. When the matter of the dispute is commercial or administrative, then the competent authority will be the Board of Grievances; while the general courts will have a jurisdiction court when the matter of the dispute relates to real estate or civil disputes (please see Decision No. 57/1414 in 1994).¹⁸⁴ Moreover, it should be mentioned that the arbitral award can acquire the authority of *res judicata*, this is based on Article 21 of the SAL 1983 which states, ‘The award made by the arbitrators, after issuance of the order of execution in accordance with the preceding

¹⁷⁹ See Section (3.4.2.1)

¹⁸⁰ See Section (3.4.2.2)

¹⁸¹ See Section (3.4.2.3)

¹⁸² Article 20 of the SAL (1983)

¹⁸³ Article 44 of the Implementation Rules (1985)

¹⁸⁴ In the Decision No. 57/1414 in 1994, where the parties have a dispute over the properties’ division and they have agreed to refer the dispute to arbitration. The commercial circuit of the Board of Grievances held that the dispute shall be referred to arbitration; however, the appeal circuit revoked the ruling on the grounds that the Board of Grievances had no jurisdiction to hear the dispute due to the fact the matter was not a commercial dispute. Taken from AL-Subaihi, "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law," pp. 402-03.

Article, shall have the same force as a judgment made by the authority which issued the execution order.’

The new SAL 2012 follows the modern approach in this matter, as Article 53 of SAL specified the documents that shall be presented. Additionally, the new law emphasised a number of requirements that shall be provided in order to recognise and enforce the domestic and international arbitral awards; however, this matter will be discussed in detail in Section (5.4.3).

▪ **When does the arbitral award in Saudi Arabia acquire the authority of *res judicata*?**

This is an interesting question that may arise from the arbitral awards in Saudi Arabia, and essentially asks, can the arbitral award in Saudi Arabia be considered to be *res judicata*? The answer, in brief, is that the arbitral awards in Saudi Arabia will acquire the authority of *res judicata* only when the awards are confirmed by the competent authority in order to become final. In this matter, Saleh commented that, ‘In view of the tight control of the judiciary over arbitration, it is not certain that the award becomes *res judicata* before the Validating Authority has expressly confirmed it or when it becomes non-appealable as the result of the parties' inertia, i.e., when the 15-day time-limit has elapsed.’¹⁸⁵ Moreover, AL-Fadhel added another comment regarding this matter and said, ‘However, there is a provision that prevents the competent authority from issuing an order for partial enforcement of the award if it is divisible, as there is no restriction thereto even though it has become final, because any order contrary to the rules of Islamic *Sharia* is not reliable.’¹⁸⁶

In conclusion, it can be said that when the arbitral award becomes final, due to, for example, the 15-day time-limit elapsing, it is not enough to acquire the authority of *res judicata* according to article 20 of SAL 1983, as it states, ‘...this order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the *Sharia*.’ Also, EL-Ahdab asserts that ‘after expiry of the time-limit for making an appeal, the award becomes final but not *res judicata*.’¹⁸⁷ The award must be approved by the competent authority¹⁸⁸ in order to ensure that it does not violate the Islamic Law and Saudi public policy, and then it becomes *res judicata*. This approach is applied in reality in the Saudi courts, and it is

¹⁸⁵ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*. At p.416

¹⁸⁶ Al-Fadhel, "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law," p. 250.

¹⁸⁷ El-Ahdab, *Arbitration with the Arab Countries*, p.665.

¹⁸⁸ Article 21 of the SAL (1983)

emphasised by AL-Sadaan¹⁸⁹ who worked as a judge on the Board of Grievances.¹⁹⁰ As a result, from Article 18 to 21 of the SAL 1983, it can be seen that the legislature of SAL 1983 was determined to not give the awards made by arbitral tribunals the same power and force as the decisions that are made by the judiciary.¹⁹¹ On the other hand, the same question will be asked later in Section (5.4.2.1) in order to consider the position of the new SAL 2012.

3.3.3.2 Recognition and Enforcement of Foreign Arbitral Awards

There is no doubt that international commercial arbitration is one of the main pillars for the sake of stability in international trade transactions. Moreover, the matter of recognition and enforcement of foreign arbitral awards is considered to be the most important stage in the proceedings of international arbitration.¹⁹² Because there is a large number of different national legislation, the regulations of recognising and enforcing arbitral awards has become various according to diverse national legislation. As a consequence of this, a number of international and regional conventions have been established such as the New York Convention (1958) and the Washington Convention (1965). This has been done in order to unify and merge an international formula that can recognise and enforce arbitral awards. The Saudi Government has joined a number of regional and international conventions such as the Riyadh Convention on Judicial Cooperation (1983), the New York Convention (1958) and the Washington Convention (1965).¹⁹³ As a result of this approach, the Government of Saudi Arabia in joining this convention indicates clearly its attention in recognising and enforcing foreign arbitral awards. There is no doubt that the most important convention is the New York Convention (1958), the Saudi Government was one of the countries that joined this convention on 19th April 1994; but there was a reservation made by the Saudi Government when signing the convention and the principle of ‘reciprocity’ was applied.¹⁹⁴

Concerning the matter of whether the arbitral award is considered to be domestic or foreign, the Saudi law applies the same criteria as the New York Convention 1958 as Article I (1) states ‘This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are

¹⁸⁹ AL-Sadaan is working now as an adviser for the Justice Minister, (2012).

¹⁹⁰ See AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," p.6.

¹⁹¹ A. Alassaf and B. Zeller, "The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985," *Macquarie Journal of Business Law* 7: p.184.

¹⁹² Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*. At pp. 687-689

¹⁹³ For more details, see Chapter 2

¹⁹⁴ By the Royal Decree No. M/11 in 1994, based on the decision of the Ministers Council No. 78 on 27th January 1993

sought...’. Thus, the arbitral award in Saudi Arabia is considered to be international when it is released in a place that differs from the place that enforces the arbitral award. Article 13(g)¹⁹⁵ of the Law of Board of Grievances (2007),¹⁹⁶ explains that the Grievances Board ‘*Diwan AL-Mazalim*’ is the competent authority in Saudi Arabia in order to recognise and enforce foreign arbitral awards.¹⁹⁷ After the issuance of the SEL 2012,¹⁹⁸ the enforcement procedures and the competent authority for the enforcement have been changed in order to apply a professional and clear procedure for the recognition and enforcement of foreign arbitral awards. A detailed description of this matter will be provided in Section (5.4.4).

However, despite the apparent interest of the Saudi Government, which has theoretically desired to recognise and enforce the foreign arbitral awards, the practice has shown us that there are huge difficulties in this matter. This dilemma is considered to be one of the biggest obstructions to the growth of arbitration in Saudi Arabia, mainly with regards to the international aspect. The hesitant position of the Saudi Government in this matter has adversely affected the attraction of foreign investors and increased the cost of projects in Saudi Arabia by foreign investors based on a higher litigation risk.¹⁹⁹ One Saudi academic writer,²⁰⁰ in an international conference,²⁰¹ commented by saying, ‘I have the impression that we Saudis have made promises which we could not keep.’²⁰² He means to inquire whether the Saudi Government can actually recognise and enforce the foreign arbitral awards according to its obligations under the New York Convention (1958). On the other hand, there is one Saudi official who described joining the New York Convention (1958) as a, ‘...curative remedy of problems which were affecting Saudi external trade relations.’²⁰³ This view was given on the grounds that, ‘...non-Saudi Arabian investors may be

¹⁹⁵ Article 13 states ‘Administrative Courts shall have the jurisdiction to look into the following ... (g) Requests for the enforcement of foreign judgments and foreign arbitrators' judgments.’

¹⁹⁶ It was issued under Royal Decree No. M/78 Dated 1st October 2007

¹⁹⁷ For more details, see section (3.4.3.1)

¹⁹⁸ The Saudi Enforcement Law was issued by virtue of Royal Decree No. M/53 on 3rd July 2012. On 28th February 2013 it came into effect and its Implementation Rules were issued on 27th February 2013.

¹⁹⁹ Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?," p.923.

²⁰⁰ Mohammed Huchan, Saudi academic writer.

²⁰¹ Euro-Arab Arbitration Conference, Tunisia, 1985

²⁰² Mohammed Huchan, "Euro-Arab Arbitration Conference" (paper presented at the Tunisia Conference, Tunisia, 1985). Cited in El-Ahdab, *Arbitration with the Arab Countries*, p.666.

²⁰³ ‘Saudi Arabia’s Decision on New York Convention Praised’ [1994], *Riyadh Daily*, 8th February. Cited in F. Kutty, "The Shari’a Factor in International Commercial Arbitration," *Loy. LA Int’l & Comp. L. Rev.* 28 (2006): p. 618.

more confident that the courts of Saudi Arabia will honour a dispute adjudicated by a non-Saudi Arabian tribunal.’²⁰⁴ In this view, Kutty comments in his article that:

‘This may be too optimistic of a view, because all indications are that Saudi courts will continue to review the merits of arbitral decisions to ensure that decisions are consistent with Saudi public policy as determined in accordance with the *Sharia*. In fact, some writers even suggest that “the enforcement of an arbitral award depends upon the belief of the governor of the region in which enforcement is sought as to the fairness of the award.’^{205, 206}

There are huge debates on this matter, and this controversial issue will be discussed later. In this section, in order to understand the reasons for refusing to recognise and enforce the foreign arbitral awards in Saudi Arabia before the issuance of the SEL 2012, two important questions should be answered, which are: **a)** What were the formal requirements for recognising and enforcing foreign arbitral awards? **b)** What were the grounds for refusal of recognition and enforcement of the foreign arbitral awards in Saudi Arabia?

3.3.3.2.1 What were the formal requirements for recognising and enforcing the foreign arbitral awards?

There were a number of formal requirements that must be achieved in order to enforce foreign awards in Saudi Arabia. These requirements are based on Articles IV and V of the New York Convention (1958), Riyadh Convention on Judicial Cooperation (1983), the Procedural Rules of the Grievances Board, Decision No. 116 on the identification of the regulations in enforcing foreign arbitral awards,²⁰⁷ and Circular No.7 of the President of the Board of Grievances,²⁰⁸ which states some requirements as follows:

‘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

²⁰⁴ Ibid.

²⁰⁵ El-Ahdab, *Arbitration with the Arab Countries*, p.665. Cited in Kutty, "The Shari'a Factor in International Commercial Arbitration," p. 618-19.

²⁰⁶ "The Shari'a Factor in International Commercial Arbitration," p. 618-19.

²⁰⁷ Issued by the President of the Board of Grievances on 25th July 2007

²⁰⁸ Issued on 6 May 1985

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.²⁰⁹

According to these Articles, decisions and circulars mentioned above, the competent circuit of the Board of Grievances completes the case documents in order to hear the statements of both disputing parties; then it decides whether the competent circuit should dismiss the case or enforce the arbitral award.²¹⁰

The formal requirements are as follows:

- i. Provide the duly authenticated original award or the duly certified copy of the official award;²¹¹
- ii. Provide the original agreement or the duly certified copy of arbitration agreement which meets the requirements of Article 2 of the New York Convention (1958);²¹²
- iii. The award and arbitration agreement must be provided in Arabic; if the original language of the documents is not in Arabic, then the party who is seeking the enforcement should present the certified Arabic translation of these documents;²¹³ and
- iv. Provide a formal letter to the President of the Board of Grievances, requesting the recognition and enforcement of the foreign arbitral award.²¹⁴

²⁰⁹ The Circular No.7 issued by the President of the Board of Grievances on 6 May 1985;Cited in Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law," pp. 205-06.

²¹⁰ Article 6 of the Procedural Rules of the Grievances Board states '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".'

²¹¹ Article IV (1-a) of the NYC

²¹² Article IV (1-b) of the NYC

²¹³ Article IV (2) of the NYC

²¹⁴ Article 1 & 6 of the Procedural Rules of the Grievances Board

3.3.3.2.2 What were the grounds for refusal of recognition and enforcement of the foreign arbitral awards in Saudi Arabia?

After achieving all of the formal requirements, the competent circuit can hear the statements of both disputing parties. Thus, there were a number of grounds for refusal of recognition and enforcement of the foreign arbitral awards that must be avoided in order to accept an enforcement of the award. It should be said that these grounds are mentioned in the New York Convention (1958), the Riyadh Arab Convention on Judicial Cooperation (1983), the Procedural Rules of the Grievances Board, Decision No. 116 and Circular No.7 of the President of the Board of Grievances. However, it should be mentioned that the Decision and Circular have been repealed by the new SEL 2012 and its Rules 2013.

These reasons are as follows:

a) When the arbitral award is not final or binding;

This reason has been explicitly stated in Circular No.7 of the President of the Board of Grievances and states that, ‘... the competent Circuit which is required to enforce a foreign arbitral award shall verify that it has become final in the home country.’ Also, it is mentioned in Article V (1-e) of the New York Convention (1958) and Article 37 (b) of the Riyadh Arab Convention on Judicial Cooperation (1983).

b) When the arbitration agreement is invalid;

The Grievances Board applied the same standard as internationally accepted; it is mentioned in Circular No.7 of the President of the Board of Grievances, Article V (1-a) of the New York Convention (1958) and Article 37 (b) of the Riyadh Arab Convention on Judicial Cooperation (1983).

c) When the actions of arbitrator(s) contain irregularities, the arbitral tribunal is not authorised, or the award is issued by unauthorised arbitrator(s);

These grounds for refusing are set forth in Article 37 (c) of the Riyadh Arab Convention on Judicial Cooperation (1983); they are also set forth in Article V (1-d) of the New York Convention (1958). Moreover, this is mentioned in Circular No. 11 of the President of the Board of Grievances concerning the enforcement of foreign arbitral awards, the Circular states, ‘...[the award] was issued according to the execution of a condition or contract of proper arbitration and

within the powers of arbitrators according to arbitration conditions and law....'²¹⁵ Circular No. 7 states, '...the competent Circuit...shall verify that ... [the award] was issued...within the jurisdiction of arbitrators in accordance with the terms of the arbitration and law upon which the arbitration award was made....'.²¹⁶

d) When the arbitral proceedings contain a violation to the fair hearing, impartiality of arbitrator(s), the applicable law, or what is agreed in arbitration agreement;

The Grievances Board relies on a number of legislation documents. Circular No. 7 of the President of the Board of Grievances states, '...the competent Circuit...shall verify that...the arbitral award was based on valid procedures.' Also, these grounds for refusing are based on Article V (1-d) of the New York Convention (1958). However, in this regard, AL-Fadehl commented by saying, 'it is obvious that the Board of Grievances is concentrating on the proper procedures in notifying the convicted party.'²¹⁷

e) When the arbitral award was issued in absentia, without providing a certificate proving that the parties were duly notified by the arbitral tribunal;

The Riyadh Arab Convention on Judicial Cooperation (1983) identifies the reasons where enforcement of the arbitral award may be refused. Article 37 (b) states, 'If the judgement was passed in absentia without notifying the convicted party of the proceedings in an appropriate fashion that would enable him to defend himself.'; it is also set forth in Article V (1-b) of the New York Convention (1958).

f) When the subject matters of the dispute are not able to be settled by arbitration;

In Saudi Law, generally, most kinds of disputes are acceptable for arbitration, because there is no distinction between commercial matters and civil matters.²¹⁸ The exceptions are in Article 2 of the SAL 1983, which identifies that, 'Arbitration shall not be accepted in matters wherein

²¹⁵ Circular No.11/D/F/35/1997 of the President of the Board of Grievances; Cited in Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the Uncitral Model Law," p. 208.

²¹⁶ The Circular No.7 issued by the President of the Board of Grievances on 5 May 1985;Cited in *ibid.*, pp. 205-06.

²¹⁷ *Ibid.*, p. 208.

²¹⁸ The law governing commercial matters is by several regulations while civil matters are governed by the Islamic law.

conciliation is not permitted...’; also Article 1 of the Implementation Rules 1985 states, ‘Arbitration in matters wherein conciliation is not permitted such as ‘*Hudud*’²¹⁹ and ‘*Liaan*’²²⁰ between spouses, and all issues related to the public order, shall not be accepted.’ Moreover, any disputes involving the Saudi Government or its government agencies as a disputing party cannot be resolved through arbitration unless permission from the President of the Council of Ministers is granted.²²¹ On the other hand, the Grievances Board adopted Article V (2-a) of the New York Convention (1958), which identifies that the arbitral award may not be recognised and enforced when, ‘The subject matter of the difference is not capable of settlement by arbitration under the law of that country.’ Also, the Grievances Board applied the reason of refusing that is mentioned in Article 37 (a) and states, ‘If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration.’

g) When the arbitral award violates Islamic Law;

This ground for refusing is considered one of the most important reasons, and it has a lot of ambiguity due to a lack of clarity about Islamic Law to the rest of the non-Muslim world. Also, Islamic Law has several views in relation to different matters within jurisprudence of transactions or ‘*Fiqh al-muamalat*’²²² and according to the interpretation of the four Islamic schools.²²³ This has led to a huge obstacle associated with enforcing the arbitral of foreign awards. Take for example, that a huge number of foreign awards may contain the charging of interest (usury) ‘*Riba*’²²⁴, the uncertain obligation (*Gharar*)²²⁵ or the insurance ‘*Tamin*’²²⁶; these examples are considered forbidden under Islamic Law. Accordingly, it could be that the whole or part of the arbitral award cannot be recognised and enforced in Saudi Arabia, and this was based on Article 20 of the SAL 1983 and Decision No. 116 of the President of the Board of Grievances,²²⁷ which

²¹⁹ ‘*Hudud*’ means limit or restriction. It is used for referring to the class of punishments for the serious crimes of murder, injury, adultery, drinking alcohol, theft and robbery which are provided from the *Quran*.

²²⁰ *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 in order to terminate their marital relationship.

²²¹ Article 3 of the SAL (1983) & Article 8 of the Implementation Rules (1985)

²²² Jurisprudence of transactions or ‘*fiqh al-muamalat*’ means Islamic Law on transactions, such as commercial transactions. This concept could also cover the transactions of economic, social and political.

²²³ These schools are *Hanafi*, *Shafi’i*, *Maliki* and *Hanbali Schools*.

²²⁴ *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 Muhammad Ayub, *Understanding Islamic Finance* (Chichester, West Sussex: John Wiley & Sons, 2007), p. 100

²²⁵ *Gharar* means hazard, chance, stake or risk; See *ibid.*, p. 143.

²²⁶ The only insurance that is acceptable in Islamic law is the Islamic cooperative insurance ‘*Takaful*’, which is based on mutuality or cooperative risk sharing.

²²⁷ Issued on 25th July 2007

emphasised that the award shall not contain any sums prohibited in Islamic Law, even if it is just a small part of the award, this matter should be achieved in order to enforce it.²²⁸

Saudi Law emphasises that arbitral awards must not conflict with Islamic Law. According to Article 20 of the SAL 1983, which states that, ‘the award of the arbitrators shall be enforceable when...there is nothing that prevents its enforcement in the *Sharia*.’ The President of the Board of Grievances explained that the Saudi courts’ position regarding the foreign arbitral award is that, ‘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.’²²⁹ However, it should be clarified that the Board of Grievances currently applies a strict test with regards to forbidden matters in Islamic Law, compared to what was adopted before 2007. In order to clarify this view, a number of cases should be presented.

In Decision No. 115/1429 in 2008,²³⁰ the disputing parties were a foreign company (the Claimant) and a Saudi company (the Respondent); which underwent in the London Court of International Arbitration. The decision of arbitral award was to enforce the respondent to pay the following statements to the claimant: **a)** £450,000 for the compensation of damages; **b)** £194,000 for the costs of arbitration; and **c)** the charging of 6% interest on the amounts. The claimant demanded that the charge of interest to be dropped due to his knowledge that the interest would not be enforceable. However, the competent circuit of the Board of Grievances held that the foreign arbitral award cannot be enforced on the grounds that the award includes the charging of interest ‘*Riba*’, and this is prohibited in Islamic Law, even if it is just a small part of the award. The decision in this case was based on Decision No. 116 of the President of the Board of Grievances, which emphasised that the award shall not contain any sums prohibited in Islamic Law, even if it is just a small part of the award, this matter should be achieved in order to enforce it.

On the other hand, there are examples of previous decisions issued by the Board of Grievances with a different view. The arbitral awards involve the charging of interest but the Board of Grievances held a decision that the parts of the award containing the charging of interest ‘*Riba*’ were nullified and not enforced, while the rest of award was recognised in terms of being enforced.

²²⁸ Cited in *Decision No. (115/D/A/15) of 2008*

²²⁹ The Circular No.7 issued by the President of the Board of Grievances on 5 May 1985; ;Cited in Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the Uncitral Model Law," pp. 205-06.

²³⁰ Decision No. (115/D/A/15) in 2008

These cases are Decision No. 1851/1415 in 1994, Decision No. 1903/1415 in 1994,²³¹ Decision No. 235/1416 in 1995, and Decision No. 208/1418 in 1997;²³² all of these foreign arbitral awards included forcing the respondent to pay to the claimant a number of orders, including the charging of interest '*Riba*'. The Saudi court approved the part of the decision that did not violate *Sharia* Law, and declined the part that contained usury '*Riba*'. According to the decisions mentioned, it can be clearly observed that there is an enormous change with regards to decisions before and after 2007. Before 2012, there was a desire to apply a strict test with regards to prohibited matters in Islamic Law, especially after Decision No. 116 of the President of the Board of Grievances on 25th July 2007. However, it seems to us that there is a conflict in attitudes between the judiciary and the legislature of Saudi Arabia, mainly in view of Decision No. 116 of the President of the Board of Grievances and the court decisions. These issues will be discussed in detail as the potential prohibitions of *Sharia* law that may be contained in an arbitral award. The discussion will be in Section (6.4.2), and some proposed solutions will be presented.

h) When the arbitral award violates Saudi public policy;

Internationally, this reason is considered as one of the main grounds for refusing to enforce foreign arbitral awards. Article V (2-b) of the New York Convention (1958) explained that the foreign arbitral awards may not be recognised and enforced when, '...the award would be contrary to the Public Policy of that country.'²³³ Also, this reason for refusing is mentioned in Article 37 (e) of the Riyadh Convention and states that, 'If any part of the adjudication be in contradiction with the provisions of Islamic *Sharia*, the public order or the rules of conduct of the requested party.' The similarity can be seen between this Article and Article V (2-b) of the New York Convention (1958) on this matter, apart from that Article 37 contents clearly that the arbitral award should not be contrary to Islamic Law. However, the problem is that the concept of 'public policy' is vague and ambiguous to a certain extent, not only in Saudi Arabia but also in most worlds' legislation due to the fact this concept differs from country to country. Consequently, any losing party of arbitral disputes may benefit from this ambiguity, particularly in countries where the concept of public policy is not clear, or it is very broad such as in Saudi Arabia. Regarding this matter, Audley Sheppard commented that, '...International public policy is understood to be

²³¹ Decision No. (1851/1/9) in 1994 and Decision No. (1903/1/9) in 1994; cited in AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," p. 335.

²³² 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* (Riyadh: Dar AL-Maiman, 2007), pp. 247-69.

²³³ Article V (2) (b) of the NYC.

narrower than domestic public policy: not every rule of law which belongs to the order public international is necessarily part of the order public external or international.²³⁴

Based on what was explained, the Government of Saudi Arabia has benefited with regards to Article V (2-b) of the New York Convention (1958), as the Saudi Government has broadly adopted this Article, which has made foreign arbitral awards hard to recognise and enforce.²³⁵ The concept of ‘public policy in Saudi Arabia is generally related to Islamic Law, and this makes the public policy very broad in conception and also ambiguity. Regarding this matter, Mark Wakim commented that, ‘Other countries, such as Saudi Arabia, remain unclear about the public policy standards that will be invoked upon review during enforcement proceedings.’²³⁶ However, the Saudi public policy is based on three main principle sources: **(a)** Islamic Law, **(b)** Royal power²³⁷ and **(c)** public morals.²³⁸ Moreover, the concept in Islamic Law is explained by AL-Samaan, who has said that the foundation of the concept of public policy in Islamic Law is, ‘...in respect of the common spirit of the *Sharia* and its sources i.e. (the *Quran* and the *Sunnah*, *Ijma*, *Qayas*, etc.) and on the principle that individuals must respect their clauses, unless they forbid what is authorized and authorise what is forbidden.’²³⁹ Accordingly, Samir Saleh identified that there are two main problems in the substantive aspect to the Islamic concept of public policy; these problems are the charging of interest on loans ‘*Riba*’ and uncertain obligations ‘*Gharar*’, which are the most likely to arise in practice as part of the procedure for the enforcement of foreign arbitral awards.²⁴⁰ Due to the importance of this subject, as one of the potential legal issues that may face the enforcement of arbitral awards in Saudi Arabia even with the issuance the Arbitration Law and the Enforcement Law, this issue will be discussed in Section (6.4.3).

²³⁴ A. Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?," *Transnational Dispute Management*, Volume 1, Issue 01, 2004," *ALTA. L. REV.* 34.

²³⁵ Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?," pp. 953-58.

²³⁶ M. Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East," *New York International Law Review* 21, no. 1 (2008): p.27.

²³⁷ Royal power in Saudi Arabia is mainly drawn from Islamic law.

²³⁸ Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.263.

²³⁹ Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p. 235.

²⁴⁰ S. Saleh, "The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East," *ibid.*1 (1985): p. 27.

i) When there is no agreement to apply the principle of ‘reciprocity’.

The Saudi Government presented its reservation when they joined to the New York Convention (1958) on the 19th April 1994.²⁴¹ The reservation related to a stipulation in applying the principle of reciprocity through using its right in Article I (3) of the New York Convention (1958).²⁴² According to this reservation, the principle of reciprocity should be achieved between Saudi Arabia and the country that has issued a foreign arbitral award, therefore, reciprocity should be shown in order to recognise and enforce any awards. This condition is emphasised by the Grievances Board, and Article 6 of the Procedural Rules before the Board of Grievances states, ‘...The competent circuit shall render its judgment after completion of the case documents...on the basis of reciprocity, provided that it is not inconsistent with the provisions of *Sharia*.’ Also, Circular No.7 of the President of the Board of Grievances states the following, ‘... the party requesting enforcement of the foreign arbitral award must prove that the country to which he belongs abides by the doctrine of reciprocity as Saudi Arabia...’²⁴³ Moreover, in Decision No. 116 identifying the regulation of enforcing the foreign arbitral awards²⁴⁴ it was explained in ‘the second’ that enforcing the foreign arbitral award will be based on a bilateral agreement between Saudi Arabia and the country that has issued a foreign arbitral award, or based on the principle of ‘reciprocity’.

However, because most countries have now joined the New York Convention (1958), there are many who consider that the effects of the reservation clause for applying the reciprocity principle have reduced.²⁴⁵ Regarding this matter, Hunter and Redfern have commented by saying, ‘As more countries become Convention countries, the reciprocity reservation becomes less significant. Indeed, it is becoming a relic. The Model Law, for example, in Articles 35 and 36, requires the recognition and enforcement of an arbitral award *irrespective of the country in which it was made*.’²⁴⁶ In terms of application, in Case No. 115/D/A/15 in 2008 mentioned above, the competent circuit of the Board of Grievances decided that the foreign arbitral award cannot be enforced for two reasons. The first is because the award includes the charging of interest ‘*Riba*’,

²⁴¹ It issued by the Royal Decree No. M/11 based on the decision of the Ministers Council No. 78 on 27th January 1993

²⁴² Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?," p.952.

²⁴³ AL-Amer and M. AL-Magsudi, *Conditions of Executing Arbitral Awards* (Jeddah: King Abdulaziz University, 1998), p. 7. Cited in AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," p. 336.

²⁴⁴ Issued by the President of the Board of Grievances on 6 May 1985.

²⁴⁵ Blackaby et al., *Redfern and Hunter on International Arbitration*, p. 636.

²⁴⁶ *Ibid*.

which is prohibited in Islamic Law; the second is the claimant did not present any evidence that there is reciprocity between Saudi Arabia and the United Kingdom. Despite the fact that the UK joined the New York Convention (1958); the Board of Grievances did not consider that the principle of reciprocity exists between the two countries. However, this principle is still in force even after the SEL 2012, the principle of ‘reciprocity’ is mentioned in Article 11 of the Enforcement Law and Article 11 (5) of its Rules 2013. There will be more discussion in Section (5.4.4.1).

3.4 Conclusion

From what has been made clear in this chapter, it can be seen that there are a number of loopholes, ambiguities with regard to some textual aspects of the SAL 1983 and its Rules 1985, and complex legal issues surrounding their articles, which have led some to say that arbitration in Saudi Arabia is truly ineffective or provides uncertain means to resolve legal disputes when compared to litigation. However, in this thesis, the author focuses on the recognition and enforcement of arbitral awards in Saudi Arabia. It can be said that it is very complex issue due to the fact that it falls within the international framework via international conventions, and that legal experts have different points of view over these legal issues in terms of both theoretical and practical aspects. Therefore, these dilemmas will be the main subject of this thesis throughout the coming chapters. The research will be distinctive because it will be an analytical and critical study of the new SAL 2012, aimed at identifying potential solutions, and considering whether or not the new law will solve these issues. The discussions in the coming chapters will be based on what has been achieved in terms of the results contained in this chapter.

However, it is better to summarise the result of this chapter by identifying the main characteristics of the SAL 1983 within a separate sub-section which contains points which are easy to follow.

3.4.1 The main characteristics of Saudi Arbitration Law 1983

Through the research that is presented in Chapter 3, it can be seen that SAL 1983 had unique characteristics with regard to arbitration if it is compared with other modern arbitration legislation. Thus, the main characteristics of SAL 1983 are as follows:

a. SAL follows the provisions of Islamic *Sharia* law;

As a consequence of this, any arbitral dispute involving matters that are contrary to the provisions of Islamic law will not be accepted. Also, an arbitral award will not be recognised and enforced if it is contrary to Islamic law.²⁴⁷

b. There is no clear definition of a number of terms in SAL 1983;

SAL and its Rules do not provide a clear definition of important terms such as arbitration, conciliation, domestic and international arbitrations, arbitral tribunal, objection, or the competent authority.

c. There is no clear distinction between arbitration and conciliation in SAL 1983;²⁴⁸

The inability to distinguish between arbitration and conciliation in SAL 1983 is because this distinction has not been found by Islamic scholars in Islamic Law. Therefore, this distinction is unavailable in the text of the SAL 2012 despite its importance.

d. The concept of international arbitration did not exist in SAL 1983;

SAL and its Rules did not distinguish between domestic and international arbitration; there was no clear criteria to determine whether an arbitral dispute is a domestic or an international dispute.²⁴⁹

e. There was no clarity with regard to the terms ‘arbitration clause’, ‘submission agreement’ and ‘arbitration instrument’ in SAL 1983;

Saudi Law dealt with the terms ‘arbitration clause’, ‘submission agreement’ and ‘arbitration instrument’ differently from modern arbitration legislation in other countries.²⁵⁰ SAL recognised the difference between two types of arbitration agreement, the *arbitration clause* and the *submission agreement*.²⁵¹ However, by application, the two kinds of arbitration agreement were quite different from what is stated in the Articles. Therefore, it can be observed there was a

²⁴⁷ I Juhani, "Explaining the New Saudi Arbitration Law," *Chamber of Commerce Magazine*. However, this is considered as a one of main issues that face Saudi Arbitration Law.

²⁴⁸ Article 2 of the SAL and Article 1 of its Rules

²⁴⁹ See Section (3.2.2) above.

²⁵⁰ See Section (3.1.3) above.

²⁵¹ Article 1 of the SAL 1983

difference in the meaning and proceedings between the *arbitration clause* and the *submission agreement* under the SAL 1983. Also, SAL and its Rules made no mention of the independence of an arbitration agreement.

f. There was a broad supervision by the Saudi judiciary on arbitration proceedings;

From what has been previously explained,²⁵² it can be said that there is extensive supervision by the Saudi judiciary of arbitration proceedings, from the first proceedings through to the issue of the arbitral award.²⁵³ This has led us to believe that arbitration in Saudi Arabia is conducted within the court system.

g. SAL 1983 could be applied to any arbitration dispute between private or government parties;

SAL applied to natural persons and corporations who have a legal capacity to act. It also applied, with conditions, to government parties.²⁵⁴

h. Under Saudi Law, there was no clarity with regard to the applicable law that shall apply;

From the perspective of a large number of legal experts, in practice, Saudi Courts mostly apply Saudi Law in domestic arbitral disputes, even though the arbitration agreement provides that the applicable law that must govern the dispute is a foreign applicable law.²⁵⁵ In sum, any arbitration agreement which includes a foreign applicable law, or one in which arbitration takes place outside Saudi Arabia, may face several obstacles, particularly when the dispute is related to companies or commercial agencies.²⁵⁶

i. The concept of ‘*lex arbitri*’ ‘seat of arbitration’ under SAL differs from other modern arbitration legislation;

This is due to the fact that Saudi law derives its regulations from Islamic law in terms of which the seat of arbitration under Islamic law is often considered to be *immaterial*. Therefore,

²⁵² See Section (3.1.1), (3.1.3) & (3.3.2.1) above.

²⁵³ Articles 5, 6, 8, 9, 10, 18, 19, 20, 22 & 23 of the SAL

²⁵⁴ See Section (3.1.1.2) above.

²⁵⁵ See Section (3.2.2.2) above

²⁵⁶ El-Ahdab, *Arbitration with the Arab Countries*, at p. 660.

SAL follows the Islamic view by not considering a seat of arbitration as being a serious matter; this has led to conflict in terms of the Saudi Courts' decisions concerning the enforcement of arbitral awards.²⁵⁷

j. The type of judicial review under SAL was not clear;

In terms of arbitration law, the Saudi legislature has not clarified the concept of a 'challenge', and whether the term means 'objection', 'recourse' or 'appeal'. The expressions that are used in SAL and its Rules are 'challenge' and 'objection'. This means that, in order to decide whether or not an award is a violation of *Sharia* rules and Saudi public policy, this is subject to the decision of the competent authority.²⁵⁸ SAL or its Rules did not mention the phrase 'appeal', whereas in fact Saudi Law practices it through reviewing the arbitral dispute from its initial proceeding through to the issuing of the arbitral award.²⁵⁹

k. There were a number of appeal levels under SAL (1983);

SAL and its Rules did not present an explicit text which specifies the level of appeal after the arbitral award is issued by the tribunal. This has led to the arbitral award going through three judicial stages.²⁶⁰ These are **a)** the arbitral tribunal, **b)** the competent authority, and **c)** the appeal circuit in the competent authority.²⁶¹ Therefore, it can be seen that arbitration proceedings in Saudi Arabia take longer than the litigation in order to arrive at a final decision.²⁶²

l. SAL and its Rule did not specify the grounds for challenge that are adopted by Saudi law;²⁶³

There were no clear rules to specify the grounds for challenging an arbitral award within the framework of SAL 1983 and its Rules 1985. Saudi law fails to point out which grounds for challenging an arbitral award would be satisfactory and acceptable.²⁶⁴

²⁵⁷See Section (3.2.1) above

²⁵⁸ AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context," p.283.

²⁵⁹ See Section (3.3.2.1) above

²⁶⁰ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the Uncitral Model Law," pp.182-84.

²⁶¹ El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions," pp. 626-28. See also, AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, p.237. see also, Othman, "Views in the Issues of Challenges Arbitral Awards." Website: http://www.aleqt.com/2008/01/12/article_11172.html

²⁶² See Section (3.3.2.2) above.

²⁶³ See Section (3.3.2.3) above.

²⁶⁴ Al-Fadhel, "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law," p. 254.

m. The arbitral award must be approved by the competent authority in order to acquire the authority of *res judicata*;

The award must be approved by the competent authority²⁶⁵ in order to make sure that it does not violate Islamic law and Saudi public policy. It then becomes *res judicata*.²⁶⁶

n. Saudi law has special requirements in order to enforce foreign arbitral awards;²⁶⁷

In general, three main requirements must be met without controversy in order to enforce a foreign arbitral award. These are:

- i. The award must not violate *Sharia* Rules.
- ii. The award must not be contrary to Saudi public policy.
- iii. The principle of reciprocity must be achieved.

o. The Modern Legal Principles were absent in the SAL 1983;

It can be observed that the modern legal principles were absent under the SAL 1983, such as the principle of competence-competence, the finality principle, the principle of party autonomy and the separability principle.

²⁶⁵ Article 21 of the SAL (1983)

²⁶⁶ See Section (3.3.3.1) above.

²⁶⁷ See Section (3.3.3.2.2) above.

Chapter 4

4 Chapter Four: A Comparison of the New Saudi Arbitration Law 2012 and SAL 1983

4.1 Introduction

The economy of Saudi Arabia is growing quickly because, like other oil producing countries, its economy is based on exporting petroleum products,¹ while economies in the rest of the world are suffering many difficulties. Therefore, a large number of international investment and construction projects are seeking a place within existing developmental projects in Saudi Arabia. However, it is important to say that there is hesitation among some foreign investors and a high cost to some international projects, due to the lack of clarity of litigation and arbitration proceedings in Saudi Arabia. The Saudi Government has been slow to improve and clarify litigation and arbitration, which has undoubtedly reduced Saudi Arabia's attraction to foreign investors.² It has also naturally increased the cost of projects, in Saudi Arabia, by foreign investors, since their costs are based on the higher litigation risk. The annual reports of the Doing Business Website investigated the regulations and business activity of more than 181 countries. In 2015, it reported that Saudi Arabia is ranked 108 out of the 181 for enforcing contracts, 163 out of 181 for resolving insolvency, and 62 out of 181 for protecting minority investors; this was on the basis that the first rank meant the best.³ However, the Saudi Government has now allocated a huge budget in order to develop the whole judicial system,⁴ and one of these developments was the issuing of a new law of arbitration.

The New SAL was issued by the Council of Ministers on 16th April 2012;⁵ the SAL 2012 was approved by the Consultative Council (*Majlis El-Shoura*) on 15th Jan 2012 and then published on 8th June 2012.⁶ Thus, it became effective law on 8th July 2012 according to Article 58 of the SAL 2012. The new law contains 58 Articles and it is mainly based on the UNCITRAL Model Law on International Commercial Arbitration. The Implementation Rules of this law shall be issued by the Council of Ministers according to Article 57; SAL 2012 is silent as to an issuing date for these rules and so this is unknown.⁷ According to Article 57, the SAL 2012 shall replace the SAL 1983.

¹ Organisation of the Petroleum Exporting Countries (OPEC), http://www.opec.org/opec_web/en/

² Nada Kobeissi, "Impact of Governance, Legal System and Economic Freedom on Foreign Investment in the Mena Region," *Journal of Comparative International Management* 8, no. 1. (2005) at p.26-27

³ For more details see <http://www.doingbusiness.org/data/exploreconomies/saudi-arabia>

⁴ King Abdullah Project for the Development of Judiciary; see website: <http://www.alriyadh.com/2009/06/21/article439230.html>

⁵ It was issued by virtue Royal Decree No. M/35 on 16th April 2012; it was approved by the Decree of Council of Ministers No. (156) on 9th April 2012.

⁶ Published in the Official Gazette (*Oum AL-Qura*).

⁷ Article 56 of the SAL 2012.

This chapter contributes towards the ongoing debate on the SAL 2012, and discusses whether this law will resolve most of the outstanding legal issues in the old law 1983 which related to recognition and enforcement. These issues contributed, to some extent, to the failure of the arbitration process in Saudi Arabia, and the inability to enforce some foreign arbitral awards. To achieve the goal of this chapter, the new SAL 2012 will be reviewed through the essential characteristics of the old SAL 1983 to observe the most significant developments to clarify whether the new SAL 2012 will remedy past defects in Saudi Arabia's arbitration system.

A Comparison of the SAL 1983 and the SAL 2012

The comparison will be made by observing the essential characteristics of the SAL 1983, which were extracted in the discussion of the SAL 1983 in chapter three. These characteristics will then be studied and compared with the SAL 2012 in order to discover whether SAL 2012 will resolve the main legal issues of arbitration in Saudi Arabia. This methodology avoids lengthy explanation, but indicates the main legal issues, which must be resolved. These legal issues are explained in four subsections, namely:

- a) The General Characteristics of the Saudi Arbitration Law
- b) The Characteristics Relating to Arbitration Agreement
- c) The Characteristics Relating to Arbitral Procedures
- d) The Characteristics Relating to Arbitral awards

4.2 The General Characteristics of the Saudi Arbitration Law

4.2.1 The Definition of Arbitration Law's Terms

SAL 1983 and its Rules did not provide interpretations of many important terms used in the act, such as 'international arbitration', 'arbitration agreement', 'arbitration tribunal', conciliation, objection, or the competent authority. This has led to ambiguity in the interpretation of some provisions of the law, and the emergence of several legal issues in the practical application of the law by Saudi courts, such as a lack of distinction between domestic and international arbitration, and between an *arbitration clause* and a *submission agreement*, which will be clarified later. Whereas, Article 1 of SAL 2012 provides interpretations for only three terms, which are 'arbitration agreement', 'arbitration tribunal' and 'competent court'. Article 3, clarifies the situations where the arbitration is considered an international arbitration. However, although this is a positive step, a number of important terms still need to be defined such as 'commercial',

‘conciliation’ and ‘arbitration’. The definition of ‘commercial’ has clearly not been mentioned separately despite its importance. It is referred to in Article 2 of SAL 2012 which states ‘...the provisions of this Law shall apply to ... an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law’.⁸ Whereas, the Egyptian Arbitration Law 1994 explains the concept of ‘commercial’ in Article 2,⁹ as the Egyptian legislature follows the same approach of the UNCITRAL Model Law in a footnote to Article 1.¹⁰

4.2.2 The Concept of International Arbitration

SAL 1983 and its Rules 1985 did not distinguish between domestic and international arbitration; due to the fact that Saudi legislature did not provide clear criteria to determine whether an arbitral dispute is a domestic or an international dispute.¹¹ Therefore, it can be said that there was no distinction between the domestic and international arbitration in the SAL 1983 and its Rules 1985;¹² as well as that the distinction did not exist in practice. This view was observed by Samir Saleh in his article,¹³ where he described the most striking feature in the countries of the Arab Middle East is ‘the lack of distinction in status between domestic arbitration and international arbitration’,¹⁴ he added to these comment saying ‘In the countries of the Arab Middle East the effect in practice of this lack of distinction is a "nationalization" of international arbitration, a kind

⁸ Article 2 of SAL 2012 states ‘Without prejudice to provisions of *Sharia* and international conventions to which the Kingdom is party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law. The provisions of this Law shall not apply to personal status disputes or to matters not subject to reconciliation.’

⁹ Article 2 of the Egyptian Arbitration Law 1994 states ‘Arbitration is commercial within the scope of this Law when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, for instance, the supply of goods or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licenses, transfer of technology, investment and development contracts, banking, insurance and transport operations, and operations relating to the exploration and extraction of natural wealth, energy supply, laying of gas or oil pipelines, building of roads and tunnels, reclamation of agricultural land, protection of the environment and establishment of nuclear reactors’

¹⁰ The footnote of Article 1 of the UNCITRAL Model Law states ‘The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road’

¹¹ See Section (3.2.2) Chapter 3.

¹² El-Ahdab, *Arbitration with the Arab Countries*. At p.616

¹³ Samir A Saleh, "Settlement of Disputes in the Arab World: Arbitration and Other Methods, The," *Int'l Tax & Bus. Law* 4 (1986). Available at: <http://scholarship.law.berkeley.edu/bjil/vol4/iss2/11>

¹⁴ *Ibid.* at p.283

of phagocytosis of the international by the local'.¹⁵ With regard to this issue, EL-Ahdab states that '...it is worth noting that the international arbitrations held in Saudi Arabia will continue to raise problems, as there are no statutes, case law or academic writing in this respect'.¹⁶

Article (3) of SAL 2012 defines the concept of international arbitration, and also presents the cases where they can be considered international arbitration under SAL2012. The definition of international arbitration in Article (3) of SAL 2012 significantly derives from its statement in Article 1 (3-4) of the UNCITRAL Model Law. The New SAL recognises the principle of party autonomy, where the disputing parties have a right to choose the arbitration tribunal, organisation or arbitration centre located inside or outside Saudi Arabia, this is provided for in Article 3 (3) of the SAL 2012 as stated 'Under this Law, arbitration shall be international, if the dispute is related to international commerce, in the following cases: (3) if both parties agree to resort to an organization, standing arbitration tribunal or arbitration centre situated outside Saudi Arabia'. However, the right to refer to the international agreement or international arbitration centre must be compatible with *Sharia* Law; this limitation will be found permanently in the new law as it will be explained later.

Therefore, the arbitration, under the new law, is considered to be 'international' when the subject matter is a dispute associated with international commerce in one of the following cases:

1. 'If the parties to an arbitration agreement have their head office in more than one country at the time of conclusion of the arbitration agreement. If a party has multiple places of business, consideration shall be given to the place of business most connected to the subject-matter of the dispute. If a party or both parties have no specific place of business, consideration shall be given to their place of residence.
2. If the two parties to arbitration have their head office in the same country at the time of conclusion of the arbitration agreement, and one of the following places is located outside said country:
 - a. The venue of arbitration as determined by or pursuant to the arbitration agreement;
 - b. Any place where a substantial part of the obligations of the commercial relationship between the two parties is executed;
 - c. The place most connected to the subject-matter of the dispute;

¹⁵ Ibid. at p.283

¹⁶ El-Ahdab, *Arbitration with the Arab Countries*. At p.617

3. If both parties agree to resort to an organization, standing arbitration tribunal or arbitration centre situated outside the Kingdom;
4. If the subject-matter of the dispute covered by the arbitration agreement is connected to more than one country'¹⁷

Despite the detailed explanation of the international arbitration in the new SAL 2012, this Article follows Article 1 (3-4) of the UNCITRAL Model Law. Therefore, there may be some disputes regarding the issue of the concept of 'international arbitration' similar to the case of *Fung Sang Trading Ltd. vs. Kai Sun Sea Products & Food Co. Ltd.*¹⁸ where the conflict between parties concerned whether the arbitration shall be considered as domestic or international. The importance of a distinction between international and domestic arbitration under Saudi Law is due to the fact that Saudi courts have different criteria for dealing with the recognition and enforcement of arbitral awards when the arbitration is international. This is especially the case with regard to arbitration proceedings and enforcement awards. Many examples have been presented in Chapter Three that mention how the lack of distinction had caused confusion and a number of legal issues; for instance, see Sections (3.2.1) and (3.2.2). Therefore, there is a belief that the new law will help to settle many legal issues in this regard.

4.2.3 Applying the Modern Legal Principles

It has been said that the modern legal principles, such as the principle of competence-competence, the finality principle, the principle of party autonomy and the separability principle were absent under the SAL 1983.¹⁹ Whereas, the new SAL 2012 supports these principles through its apparent texts, which complies with international arbitration practice. However, what remains is the practical side, which will be discussed in the coming chapters to make sure of the existence of these principles.²⁰

4.3 The Characteristics Relating to Arbitration Agreement

4.3.1 The Meaning of 'Arbitration Clause', 'Submission Agreement' and 'Arbitration Instrument'

¹⁷ Article 3 of the SAL 2012

¹⁸ Supreme Court of Hong Kong, High Court, YCA 1992, at 289 et seq.

¹⁹ See Chapter 3

²⁰ For example, see sections (6.2.2), (6.4.4) and (6.4.5)

SAL 1983 presented a number of terms such as ‘arbitration clause’, ‘submission agreement’ and ‘arbitration instrument’, and the law treated these terms differently to modern arbitration legislation in other countries. In terms of the texts of law, SAL 1983 distinguished between the two types of arbitration agreement, the *arbitration clause* and the *submission agreement*.²¹ However, in practice, both terms have been dealt with as though they have the same meaning and they must be registered and approved by the authority originally competent to hear the dispute; also, arbitration agreements of both types must be redrafted into a new *arbitration instrument* before being submitted.²² This fact is supported by Article 5 & 6 of the SAL 1983 and a number of legal writers.²³ Therefore, there are significant differences, in both meaning and the proceedings, between an *arbitration clause* and a *submission agreement* under SAL 1983.²⁴

The previous step is called a judicial approval decision on the arbitration agreement; this process also proves the theory of a full extent of judicial supervision upon all phases of arbitration proceedings inside Saudi Arabia. AL-Fadhel commented on this matter, by saying ‘This leads us to conclude that the freedom of the parties is reduced as no authority other than the courts can be involved in this process and approve the submission agreement’.²⁵ Any breach of the previous step means that an arbitral award may not be recognised and enforced, based on the grounds that the agreement is invalid. Several decisions of the Saudi judiciary support this approach. For examples, Decision No. 53/1415 in 1994 and Decision No. 99/1415 in 1994,²⁶ where the arbitral awards in both cases were nullified by the Grievances Board ‘*Diwan AL-Mazalim*’ because the awards were made without the approval and the supervision of the arbitral instruments by the Grievances Board.

With regard to the new law, Article 1 of SAL 2012 clearly defines the concept of an arbitration agreement, and clarifies the existence of two types of arbitration agreement by saying ‘... An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.’²⁷ Moreover, Article 9 of SAL 2012 presents extra details about the arbitration agreement, providing that the arbitration agreement could be concluded prior to or after the occurrence of a dispute. In cases where an arbitration agreement is concluded after

²¹ Article 1 of the SAL 1983

²² Article 5 & 6 of the Saudi Arbitration Law 1983.

²³ AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*. At p.97; and Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia." At p. 96

²⁴ For more details, see Section (3.1.3) Chapter 3.

²⁵ Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law." At p.33

²⁶ Decision No. 53/T/4 of 1994 and Decision No. 99/T/4 of 1994

²⁷ Article 1(a) of the SAL 2012

a dispute has arisen, the agreement must clarify all dispute matters that are covered by arbitration; otherwise the agreement could be null and void. However, the legislature in the new law followed the old international approach, making it necessary that the arbitration agreement is in writing as Article 9 (2) stated that ‘The arbitration agreement shall be in writing; otherwise, it shall be void.’ This insistence did not exist in previous law, due to the legislature being content that the agreement must be drafted into a new *arbitration instrument* in order to be approved by the competent authority. In addition, Article 9 (3) SAL 2012 explained the circumstances where an arbitration agreement can be deemed to be in writing, these cases are similar to those stated in Article 7 of the UNCITRAL Model Law. However, the new approach to international arbitration does not insist on a written arbitration agreement. For example, the French arbitration law accepts an oral arbitration clause as one of the methods of recognising an arbitration agreement.²⁸

One question that may arise is whether it is possible that courts will, in practice, consider the two types of arbitration agreement in the SAL 2012 or deal with both terms as though they have the same meaning, as they did when applying the previous 1983 law. It is difficult to determine which approach the Saudi courts may take, especially as the implementation rules have not yet been issued. What makes it even more difficult is that the text of the previous 1983 law clearly distinguished between the two types of arbitration agreement, despite this clear distinction the courts dealt with both types as if the terms had a single meaning. However, it can be said that the criteria clarifying which approach is to be taken will decide whether arbitration proceedings will remain under the judiciary’s full control to continue as previously, or whether they will be freed from its grip. It is expected that the Saudi Government will be keen to try out the new arbitration proceedings under the full supervision of the judiciary, as was adopted previously under the SAL 1983. Therefore, activating the role of an arbitration institution will be a significant step forward for managing arbitration procedures, and for providing clear roles when it comes to starting arbitration activities without diligence in the interpretation of the legal texts of SAL 2012. Thus, this shall be clearly indicated in the Implementation Rules, as the 2012 law mentioned in Article 56. The Implementation Rules shall include the necessary conditions for the establishment of an arbitration institution in terms of its importance for the accomplishment of arbitration procedures and the selection of arbitrators.²⁹

²⁸ Article 1507 of the French Code of Civil Procedure (2011)

²⁹ For more details, see section (5.4.6)

There is a new addition in the new SAL 2012, relating to the independence of the arbitration clause from the other contract terms, which is clarified in Article 21 of SAL 2012, which states ‘An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract...’. This means that the arbitration clause shall not be nullified even if the contract, which includes this arbitration clause, is considered to be void or invalid.³⁰ The new law confirms the application of the principle of separability which is widely adhered to in international practice, such as in the UNCITRAL Model Law Article 16 (1), and Section 7 of the English Arbitration Act in the common law jurisdiction. This principle is an effective tool for the stability of an arbitration agreement.³¹ The principle of separability will be later discussed in Chapter 6 at section (6.2.2).

4.3.2 The Parties to an Arbitration Agreement

SAL 1983 applied to the corporations and natural persons, who have a legal capacity to act and sign, as is provided in Article 2 of SAL 1983, which states that the arbitration agreement shall not be deemed to be validated unless it has been signed *by those who have the legal capacity to act*.³² Moreover, Article 2 of its rules indicates private persons who cannot resort to arbitration, or may not conclude an arbitration agreement, until they are approved by the court. These persons have been limited, *a guardian of minors, appointed guardian or endowment³³ administrator*.³⁴ El-Ahdab, in his view, has added bankrupt persons³⁵ to this group, but this view is not practically applicable.³⁶ With regard to government organizations, Article 3 of SAL 1983³⁷ clarified that Government bodies or agencies are not permitted to refer any disputes to arbitration, unless authorised to do so by the President of the Council of Ministers,³⁸ This approach was adopted following the Aramco Case.³⁹

³⁰ Article 21 of the SAL 2012

³¹ Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. At p.198-199

³² Article 2 of the SAL 1983

³³ It is called in Arabic ‘*waqf*’.

³⁴ Article 2 of the Implementing Rules (1985)

³⁵ El-Ahdab, *Arbitration with the Arab Countries*. At p. 632

³⁶ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia." At p. 110

³⁷ Article 3 of the SAL 1983 states ‘Government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This provision may be amended by a Resolution of the Council of Ministers’

³⁸ It was issued by virtue Royal Decree No. M/58 in 1963

³⁹ *Saudi Arabia vs. Arabian American Oil Co. (ARAMCO)*, [1958] 27 ILR 117; it is supposed to discuss this case in Chapter 2.

In this regard, New SAL 2012 follows the same direction as the previous law, with little change. Article 2 provides the exception of applying this law *to personal status disputes or to matters not subject to reconciliation*. Article 10 (1) states that an arbitration agreement shall only be concluded by the natural persons or corporations who have a legal capacity to act and sign, Article 10 (2) emphasises that Government bodies or agencies *may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed to do so by a special provision of law*.

4.4 The Characteristics Relating to Arbitral Procedures

4.4.1 The Saudi Judicial Supervision over Arbitration Proceedings

One of the main dilemmas facing arbitration, in Saudi Arabia, is the matter of broad supervision by the Saudi judiciary over arbitration proceedings under the SAL 1983. Clearly under SAL 1983 the Saudi judiciary supervises the whole arbitration process from the initial legal proceeding until the end, when they enforce the arbitral award.⁴⁰ This approach is believed by many legal scholars and practitioners in arbitration in Saudi Arabia.⁴¹ Through the requirement of article 5 SAL 1983,⁴² it can be seen how the arbitration proceedings were subject to the complete supervision of the Saudi judiciary, since its commencement, under Article 5, requires a particular form of arbitration instrument, whether the type of arbitration agreement is *arbitration clause* or *submission agreement*, in order to be registered and approved by the competent authority.⁴³ Otherwise, an arbitral award may not be recognised and enforced, based on the grounds that the agreement is not valid.⁴⁴

In addition to the aforementioned, the broad supervision over arbitration proceeding was extended to include the judiciary's enforcing arbitral awards in the SAL 1983. For example, the type of judicial review under the SAL 1983 was not really clear, because there is an ambiguity in Article 19 of SAL 1983, regarding whether the competent authority can only review the dispute's proceedings or whether it can also review the merits of an award.⁴⁵ There are several opinions on

⁴⁰ Articles 5, 6, 8, 9, 10, 18, 19, 20, 22 & 23 of the SAL 1983

⁴¹ See the arguments below.

⁴² Article 5 of SAL 1983 states that: 'Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute. 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.'

⁴³ Article 6 of SAL 1983

⁴⁴ See section (3.1.3) Chapter 3

⁴⁵ See section (3.3.2.1) Chapter 3

this matter, one view is that the competent authority has the right to reconsider not only the proceedings of the dispute, but also the merits of an award, and this view can be seen in many decided cases and in the attitudes of Saudi judges,⁴⁶ therefore, one can say that this opinion is more applicable in practical reality in Saudi courts.

Proponents of the second view in this debate believe that the competent authority has a right to review only the dispute's proceedings, without interfering with reviewing the merits of an award, an opinion supported by a number of legal experts.⁴⁷ The last view in this debate takes a middle position believing that the competent authority has a right to review the merits of an award only when the arbitral award contains a violation of *Sharia* law or Saudi public policy.⁴⁸ In sum, this orientation has led a number of academic researchers and legal practitioners to believe that arbitration in Saudi Arabia is conducted within the court system.

In the new SAL 2012, and through its provisions, it can be said that legislature has removed the broad supervision of the Saudi Courts over arbitration proceedings. It makes judicial supervision compatible with that which is customary in most modern arbitration laws in other countries and confines it to specific forms. This movement can be devised from the provisions of the new law, as Article 26 of SAL 2012 states 'The arbitration proceedings shall commence on the day an arbitration request is received by an arbitration party from the other party, unless otherwise agreed by the two parties to arbitration', this contradicts Article 5 of SAL 1983. Through Article 26, it can be seen that the legislature liberated the commencement of arbitration proceedings from judicial supervision. On the other hand, Article 8 of SAL 2012 clarifies which court has jurisdiction to consider an action to invalidate an arbitration award. This Article states that only the Court of Appeal of competent authority has this jurisdiction, while previously the first court of competent authority had jurisdiction to consider an action to invalidate an arbitration award. However, this is considered as a significant development in the new law; with the passage of time will reveal the effects of the new SAL 2012 in this regard.

The new law recognises the important role of the Saudi courts in arbitration procedures whether the seat is inside Saudi Arabia or abroad. This role should be reserved to when arbitral proceedings require the support of the courts, such as in the appointment of arbitrators, the

⁴⁶ AL-Sadaan, "The Concept of Enforcing the Arbitral Awards." At p.7-8

⁴⁷ AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*. At pp. 236-38; El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions." At pp. 626-627

⁴⁸ Y. Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia," *Arab LQ* 9 (1994). At p.234; see also Othman, "What Is the Extent of Judicial Review over the Arbitral Awards?." issue 5857; website: http://www.aleqt.com/2009/10/24/article_292224.html

compelling of evidence, and at times when there is a clear breach of procedure and where public policy demands the intervention of the court. However, in international commercial arbitration whether conducted in Saudi Arabia or abroad, the jurisdiction lies within the Court of Appeal originally deciding the dispute in the city of Riyadh.⁴⁹ Whereas, the jurisdiction to support the arbitral procedures in domestic arbitration lies within the competent courts that have a legal jurisdiction to decide disputes agreed to be referred to arbitration.⁵⁰ Thus, the new law follows the same approach in the Egyptian Arbitration Law 1994 in Article 9 (1).⁵¹ This approach is considered as a logical sequence to avoid dispersion and to support customization, compared to what was applied in the old law.⁵²

It should be noted that most countries in the world require some degree of judicial supervision of the arbitration proceedings, in order to ensure that the basic general principles of the arbitration process are applied, the efficiency and effectiveness of the arbitration process are provided and that public policy is respected.⁵³ Mustill and Boyd said clearly that ‘The law of private arbitration is concerned with the relationship between the courts and the arbitral process’.⁵⁴ Therefore, it may be said that it is very hard to avoid the intervention of the domestic courts in arbitral proceedings. However, a question arises about the level of the intervention and the supervision of arbitration proceedings by national courts. It should be said that some countries have – to some extent - diminished the court’s role in the supervision of proceedings, such as in the case of the English court since the implementation of the 1996 English Arbitration Act. This is considered the ideal example of how to liberate arbitration proceedings, as Dr. Hakeem Seriki emphasised in this regard by saying ‘If the courts powers are not curtailed, this will give the one party the opportunity to delay the process’.⁵⁵

⁴⁹ Article 8 (2) of SAL 2012 states ‘In case of an international commercial arbitration within the Kingdom or abroad, the court of appeal originally deciding the dispute in the city of Riyadh shall have jurisdiction, unless the two parties to arbitration agree on another court of appeal within the Kingdom’

⁵⁰ Article 1 (3) of SAL 2012 states ‘Competent Court: a court having legal jurisdiction to decide disputes agreed to be referred to arbitration’

⁵¹ Article 9 (1) of the Egyptian Arbitration Law states ‘Competence to review the arbitral matters referred to by this Law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt’

⁵² See sections (3.3.2.1) and (3.3.2.2)

⁵³ Max Barrett, "Tale of Two Countries: A Comparison of the International Commercial Arbitration Laws of Egypt and Ireland, A," *Hibernian LJ* 1 (2000). At p.27

⁵⁴ Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 1989). Cited in Amazu A Asouzu, "Egyptian Law Concerning Arbitration in Civil and Commercial Matters, The," *Afr. J. Int'l & Comp. L.* 8 (1996). Arp. 149

⁵⁵ Hakeem Olalekan Seriki, "Judicial Involvement and Intervention in Arbitration Proceedings after the Arbitration Act 1996" A thesis (Cardiff University, 2002). At pp . 91-92

4.4.2 The Concept of ‘Applicable Law’

A large number of legal experts say that, in practice, Saudi courts often applied Saudi Law in domestic arbitration disputes whether the applicable law is for procedural rules or for the substantive law, despite the fact that the arbitration agreement between parties provided that the applicable law that must govern the dispute is a foreign applicable law.⁵⁶ It should be said that there was uncertainty and ambiguity, with regard to Article 20 of SAL 1983⁵⁷ and Article 39 of its Rules 1985⁵⁸, which emphasised that arbitral decisions shall be issued in accordance with the provisions of Islamic *Sharia* Law and the applicable regulations. The Saudi Courts applied the principle of *safeguarding national sovereignty*, particularly, when the dispute is between Saudi parties.⁵⁹

In addition, any arbitration agreement which included a foreign applicable law as a substantive law, or, in the case of arbitration, takes place outside the Kingdom of Saudi Arabia may face many obstacles, especially when the dispute is related to commercial companies or agencies and one of the parties is foreign.⁶⁰ This dilemma, which resulted from the lack of clarity in the position of Saudi Courts regarding the issue of applying a foreign law to arbitration disputes under the SAL 1983, has on the ground raised a number of questions. These questions are (a) Will SAL 2012 resolve the issues related to applicable law? (b) What is the Saudi legal attitude on this issue, based on *Sharia* law?

Will SAL 2012 resolve the issues related to applicable law? Article 4 of the new law gives the right for disputing parties to choose their legal procedure and they can do so through a third party such as an individual, organization centre, tribunal or arbitration centre, whether that third party is inside Saudi Arabia or abroad.⁶¹ Also Article 5 of the new law emphasises that the disputing parties can apply any branch of law, whether it is model contract, international convention etc. However, there is a condition that using these provisions must not violate Islamic law. This right was given in the old law, but with a limitation, the exception mentioned in Article

⁵⁶ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.399-400. ; See also Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia," p. 233. ; See also Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255-56.; See also Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.46-48.

⁵⁷ Article 20 states ‘...after ascertaining that there is nothing that prevents its enforcement in the *Sharia*.’

⁵⁸ Article 39 states ‘... Awards shall follow the provisions of Islamic *Sharia* and the applicable regulations.’

⁵⁹ El-Ahdab, *Arbitration with the Arab Countries*, p. 661.

⁶⁰ *Ibid.*, at p. 660.

⁶¹ Article 4 of SAL 2012

39 that the procedures must not breach the arbitration law 1983 and its rules 1985. As Article 39 states ‘The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation...’

There was a practical example in a previous law 1983, in the Decision No. 93/T in 2001, the competent authority decided to reject the arbitral award, due to the fact that the arbitral proceedings did not comply with the SAL 1983 and its Rules 1985. Furthermore, with regard to applying a foreign procedural law, AL-Samaan commented ‘The officials based their rejection on the grounds that, since the Arbitration Code provides sufficient procedural rules, there is no need for foreign arbitration rules.’⁶² Based on that decision and the reasons given for it, there is a great opportunity to reject many arbitral awards on the grounds that these awards contain proceedings, which violate the Islamic law, particularly as there are no standardised procedures for Islamic law, the tribunal can then review these proceedings to make sure that they do not to violate *Sharia* Law. However, where previously decisions were rejected on the grounds that they violated the provisions in SAL 1983, which specified and limited, on the face of the Act and in its Rules; the circumstances under which courts could reject decisions under the SAL 2012 can just as easily be rejected on the grounds that they are against *Sharia* Law, which is highly unspecific.

Article 25 of SAL 2012 gives the right for disputing parties to agree the procedures to be followed by the arbitral tribunal, and the law grants them the right to subjugate these proceedings to the effective rules of any agency, organisation or arbitration centre, inside Saudi Arabia or abroad, provided that these proceedings do not violate a provision of the Islamic law.⁶³ Moreover, in cases where there is an absence of such an agreement to decide which procedures are to be applied, the law gives the tribunal a chance to decide any arbitral proceedings that it deems appropriate.⁶⁴ Through this Article, the application of the principle of party autonomy, within the limits of the mandatory rules of Islamic law, can be seen.

With regard to substantive law, Article 38 of SAL 2012 grants the disputing parties the right to agree the substantive law that can be applied in their dispute, however, when the parties agree on *applying the law of a given state, then the substantive rules of that state shall be followed and not its conflict of laws rules, unless agreed otherwise.*⁶⁵ Otherwise, when the parties do not

⁶²Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia," p. 233.

⁶³ Article 25(1) of SAL 2012

⁶⁴ Article 25(2) of SAL 2012

⁶⁵ Article 38(1-a) of SAL 2012

agree on specific substantive law to be applied, then the tribunal shall apply the law that deems to be most closely related to the subject matter of the dispute.⁶⁶ Finally, it should be mentioned that this Article began with an important statement, which must be established by the arbitral tribunal, when considering any arbitral dispute; the statement is ‘Subject to non-violation of *Sharia* and the Public Order of Saudi Arabia...’.⁶⁷ This remains some questions that will be discussed in Chapter 6.

4.4.3 The Concept of ‘*Lex Arbitri*’ or ‘Seat of Arbitration’

The new arbitration law grants disputing parties the right to agree on the seat of arbitration, whether it is domestic or abroad.⁶⁸ Thus, it can be clearly said that the principle of party autonomy is applied in this regard, whereas this principle was absent in SAL 1983. However, the concept of *lex arbitri* under the SAL 1983 is different from other modern arbitration laws due to the absence of any explicit text in SAL 1983 with regard to the freedom of the disputing parties to choose the seat of arbitration. This has led to the application of the basic Islamic theory in this regard which is not developed in such a way as to be appropriate to the present era. Through the teachings of *Sharia* Law, the place of arbitration is often considered to be *immaterial* for two reasons: firstly the resolution of disputes under Islamic Law is exclusively subject to the procedural and substantive Law of *Sharia*; secondly, Islamic law must be applied to Muslims wherever they live.⁶⁹ Consequently, *Sharia* Law grants the disputing parties the freedom to choose the seat which they consider most appropriate.

⁶⁶ Article 38(1-b) of SAL 2012

⁶⁷ Article 38 of the SAL 2012 states ‘(1) Subject to non-violation of *Sharia* and the Public Order of Saudi Arabia, the arbitration tribunal shall consider the following when deciding a dispute:

- (a) It shall apply to the subject-matter of the dispute the rules agreed upon by the two parties. If they agree on applying the law of a given state, then the substantive rules of that state shall be followed and not its conflict of laws rules, unless agreed otherwise.
- (b) If the parties fail to agree on the legal rules to be applied to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most closely connected to the subject-matter of the dispute.
- (c) When deciding the dispute, the arbitration tribunal shall take into account the terms of the contract, the subject of the dispute, and the usages of the trade applicable to the transaction and the previous dealings between the two parties.

(2) If the two parties in arbitration expressly agree to authorize the arbitration tribunal to act as *amiable compositeur*, it may rule on the dispute *ex aequo et bono* (in accordance with the rules of justice and equity).

⁶⁸ Article 28 of SAL 2012 states ‘The two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad. In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties...’

⁶⁹ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. At pp. 46-47

From the practical point of view, the Saudi Courts, through the provisions of SAL 1983, based their decisions on the nationality of the parties concerned when choosing a seat of arbitration. The seat of arbitration shall be in Saudi Arabia when the disputing parties are Saudi, even though the Saudi parties have chosen an arbitration seat outside Saudi Arabia, otherwise the arbitration clause will be considered to be null and void (see Decision No. 143/1412 in 1992).⁷⁰ Furthermore, in terms of international practice, it can be said that there is some lack and ambiguity of legislation and academic research with regard to this issue⁷¹. There were cases in the SAL 1983 that left the disputing parties to decide on the suitable place (see Decision No. 43/1417 in 1996)⁷² whereas, in other cases, the competent authority decided not give the disputing parties a freedom to choose the arbitral seat (see Decision No. 155/1416 in 1995).⁷³

However, this approach, and inconsistencies in the Saudi courts' decisions is considered a natural result of the absence of explicit text in this regard in previous law. The question that may be raised now is whether or not the new law will resolve the conflicting decisions in Saudi courts due to it expressly providing for the disputing parties to agree on the seat of arbitration within Saudi Arabia or abroad. Moreover, the new law grants the arbitral tribunal discretionary powers to determine the seat of arbitration in the event of absence of such agreement⁷⁴, or to move the seat to another place if the need arises⁷⁵. This will be dealt in Chapter 6, Section (6.3.2)

4.5 The Characteristics Relating to Arbitral awards

In this part of the study, the characteristics of the SAL 2012 and the SAL 1983, both of which are related to the enforcement of arbitral awards, will be discussed briefly. However, there will be an extensive study of this matter in Chapter 5 and 6. In this part of the research, five main aspects will be studied. As far as SAL 1983 is concerned, these aspects are the subject of serious controversy, which have been conducted from the expanded study in chapter 3, where the reasons for the weaknesses in the arbitration legislation, and the difficulty of enforcing arbitral awards in

⁷⁰ Decision No. 143/1/4 in 1992, where the competent authority decided that the arbitration clause is considered to be null and void due to the fact that the disputing parties were Saudi and the subject matter was a Saudi concern; see Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

⁷¹ El-Ahdab, *Arbitration with the Arab Countries*, p.617.

⁷² Decision No. 43/T/4 in 1996, where the parties were a Saudi and a US Corporation. The competent authority decided the chosen contractual seat should be obligated to the disputing parties, which was in the USA; see Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

⁷³ Decision No. 155/T/4 in 1995, where the parties were a Saudi and a foreign company and the chosen contractual seat was out with Saudi Arabia, The competent authority decided that the arbitral tribunal shall be seated in Saudi Arabia, applying the Saudi procedural and substantive law on the merits of the dispute; and also it shall be supervised by the Board of Grievances; see *ibid*.

⁷⁴ Article 28 of SAL 2012

⁷⁵ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.223

Saudi Arabia, have been grasped. The purpose is to evaluate these reasons and to analyse the scope of their continuous presence under the SAL 2012, in order to know whether or not these problems have been handled positively, and if they have been overcome and addressed in the new law.

4.5.1 The Type of Judicial Review

This aspect has been studied in detail by examining the SAL 1983;⁷⁶ it was concluded that there is a controversy with regard to the issue of the legal review level in Saudi Arabia. This is due to the ambiguity of Article (19) and the lack of a proper legal understanding of the concept of judicial review in terms of the arbitration award. The reason behind this is that in Article (19) the legislature has not differentiated between objections to the formality and the merits of an award.⁷⁷ There are those who say that the competent court considers the facts of the dispute only from the formal side, without delving into the subject of the dispute, the merit side, and this is supported by many legal experts.⁷⁸ In fact, this view is not implemented in reality. The second opinion is supported by judiciary experts and by many judges,⁷⁹ who suggest that a judicial review should not be only on the formal side, but must delve into the depth of the subject of the dispute, the merit side. This approach was, in fact, applied under the old law, despite the ambiguity of the provisions of the Arbitration Law and the lack of explicit guidance. This approach is supported by the judicial consultant, Sheikh Abdullah AL-Sadaan,⁸⁰ who is a well-known judge on the Board of Grievances. He explained that when the Board of Grievances decides to accept an objection to an arbitral award, then it should deal with the arbitral dispute from its first proceedings until the issue of the arbitral award.⁸¹ Moreover, it is supported by Judge Ali AL-Sawei⁸² who asserts that, 'when the competent authority accepts a challenge, it must settle the case because it is its original duty.'⁸³

⁷⁶ See Section (3.3.3.1)

⁷⁷ El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions." at pp.626-28

⁷⁸ See AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*. See also El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions."

⁷⁹ Judge Abdullah Bin Hamad AL-Sadaan and Judge Ali AL-Sawei

⁸⁰ AL-Sadaan is now working as an adviser for the Justice Minister, (2012)

⁸¹ AL-Sadaan, "The Concept of Enforcing the Arbitral Awards," pp.6-9.

⁸² Judge Ali AL-Sawei is a former president of the commercial department, a member of the appeal circuit on the Board of Grievances

⁸³ Cited in AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." At p.279

In addition, there is a third opinion which takes an intermediate stand, one which some legal academics have adopted.⁸⁴ Their standpoint is built on that the fundamental of judicial review is to review only the formal side of an arbitral award. However, if the award includes a violation or a suspected violation of *Sharia* law or of public policy, the competent court has the right to access the subject's origin and to review. This view has been supported by a number of judicial decisions.⁸⁵ Nevertheless, reality shows that if the competent authority has accepted the objection, they will look into the conflict again, and that is what makes us say that there has been an abuse of the right of review by the Saudi courts which has led to damage in terms of the efficiency of the arbitration process.

The new law is clear on this aspect, and does not leave it subject to jurisprudence and various interpretations. Article 50 (4) of SAL 2012 has stipulated 'The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute', and it stresses that the competent court considers an action for nullification as specified in cases mentioned in Article 50 (1) without having examined the facts of the merits of the case. This is a very positive point, and it is supposed to have an evident positive impact on the speed of implementation of arbitral awards. With this article, the Saudi legislature has made the style of the judicial review compatible with that of international practice. Consequently, the review is specific to a consideration of cases of nullity only, without examining the facts of the dispute. In contrast, what had already happened with regard to the old SAL was an increase in the length of the period during extra degree prior to the judiciary. However, due to the importance of this topic, there will be more discussion in this regard in Chapter 5 at Section (5.4.2) and in Chapter 6 at Section (6.4.4) where the principle of finality under the SAL 2012 will be addressed.

4.5.2 The Levels of Applicable Appeal

By studying this subject under the light of the old SAL and with regard to practices associated with that period,⁸⁶ the conclusion can be reached that is the applicable procedure formerly in Saudi Arabia is that arbitration is considered a judicial stage before litigation proceedings. In these circumstances, arbitration proceedings go through three stages: (1) the

⁸⁴ Al-Samaan, "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The," p.234.; see also Othman, "What Is the Extent of Judicial Review over the Arbitral Awards?," issue 5857; website: http://www.aleqt.com/2009/10/24/article_292224.html

⁸⁵ Decision No. 18/D/TJ/1 in 1996 and Decision No. 46/D/TJ/1 in 1999; they have been discussed in section 3.3.2.1

⁸⁶ See section 3.3.2.2

arbitral tribunal, (2) the competent court, (3) the Court of Appeal to the competent authority.⁸⁷ The judge, Ali AL-Sawei, asserts, 'In my estimation, it is necessary to consider appeal as a degree of arbitration by the Board of Grievances and should be stated by law.'⁸⁸ This issue is considered as a greater legal problem, which has led to delays in the arbitration process, and to the destabilization of the enforcement of its awards. Given that the main purpose of arbitration is to speed procedures and sentencing, it is considered a private judicial mean used by the parties to the dispute in the hope of speeding a resolution to the dispute.

What is applied currently through the new SAL is the challenge of nullity by a number of reasons for voiding an arbitral award. It is identified in the new SAL that it shall be submitted through the competent court of the dispute which is the Court of Appeal. Article 50 (4) explicitly stipulates this, as does Article 8, where it is identified that the competent court is the Court of Appeal. This is considered a fundamental evolution compared to the past, as this will shorten the arbitration proceedings through the direct enforcement of the arbitral award without going into a spiral of judicial proceedings and the corridors of the courts. However, this matter will be discussed in Chapter 5 at Section (5.3).

4.5.3 The Grounds for Challenge

The SAL 2012 follows the modern arbitration statutes by creating legal guidelines to specify grounds for challenging an arbitral award under the Saudi Courts. These guidelines have been clarified in the new law through Articles 49-51.⁸⁹ Whereas, the old law was silent on the matter; there were no specific reasons to submit an action to nullity.⁹⁰ What was even applied in the old law was the challenge to an arbitral award for various reasons, such as formal and substantive matters. This is what made the losing party try to delay the enforcement of the arbitral award by exploiting these weak point, and prolonging the trial time by considering the dispute again by the competent court, to make sure to provide grounds for nullity on the part of the losing party. However, the new law has adopted modern practices which are applied in most arbitration laws throughout the world. In addition, Article 50 (1) identified a number of reasons for nullity in

⁸⁷ Al-Fadhel, "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law." At pp.182-84

⁸⁸ Judge Ali AL-Sawei, Cited in AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." At p.282

⁸⁹ See Section (5.3.3) Chapter 5

⁹⁰ For more details, see Section (3.3.2.3)

Seven key paragraphs,⁹¹ which included a number of reasons which should not come out of the challenge if they are presented to the competent court. However, it should clarify that Saudi legislation emphasised that the right of an action for nullification is acceptable, even when *the party invoking nullification waives his right to do so prior to the issuance of the arbitration award*.⁹² These will be detailed in Chapter 5.

Waiver of Challenge

In the matter of whether the challenge of an arbitral award should be brought before the arbitral tribunal as soon as it is discovered, and whether or not it should be applied to the offence that is apparent after issuing the arbitral award under the SAL 2012; the law has shown a clear position in this regard. As Article 7 stipulated, ‘It shall be deemed a waiver of his right to object, if a party to arbitration proceeds with arbitration procedures knowing that a violation of a provision that may be agreed to be violated or of a term in the arbitration agreement was committed and he fails to object to such violation within the agreed upon period or within thirty days from his knowing of the violation in the absence of an agreement’. This is considered to be in line with international practice.⁹³ By contrast, the old SAL 1983 was absent in this particular matter, as neither party loses its right to challenge the arbitral award as a result of failing to raise the specific objection throughout the arbitration procedure.

For example, if we took the side of an action to nullity of the arbitral award because of the lack of jurisdiction of the arbitral tribunal, this challenge should be submitted initially before the arbitral tribunal. Otherwise, it should not be raised before the competent court. This principle is

⁹¹ Article 50 (1) states ‘An action to nullify an arbitration award shall not be admitted except in the following cases:
a. If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term;
b. If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;
c. If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;
d. If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;
e. If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;
f. If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration.
g. If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it.’

⁹² Article 51 (1) of SAL states ‘An action for nullification of the arbitration award shall be filed by either party within sixty days following the date of notification of said party of the award; and such action is admissible even if the party invoking nullification waives his right to do so prior to the issuance of the arbitration award.’

⁹³ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*. At pp. 683-686

applied at the discretion of some jurisdictions, such as the arbitration law of Switzerland, England, Belgium and the France.⁹⁴ It is stipulated in Article 32 of the UNCITRAL Rules⁹⁵ that ‘A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified’. Here, silence about any violation is regarded as an implied consent on the part of both parties, and evoking it by the losing party is opposed to the principle of good faith in the proceedings.

4.5.4 Applying the Principle of ‘*res judicata*’ on Arbitral Awards

This subject was considered in the form of a question in Chapter 3.⁹⁶ The answer to this question is that the arbitral award does not acquire the authority of *res judicata* unless it is approved by the competent court in order to become final. It is very important to make sure that the decision does not involve any violation of the provisions of *Sharia* law or the public policy of Saudi Arabia. In this regard, Saleh mentioned that, ‘In view of the right control of the judiciary over arbitration, it is not certain that the award becomes *res judicata* before the Validating Authority has expressly confirmed it or when it becomes non appealable as the result of the parties’ inertia, i.e., when the 15-day time-limit has elapsed.’⁹⁷ This is what is applied in terms of the actual practice in Saudi courts. Articles 18-20 indicated that the field is not open to an arbitration award that has *res judicata* only by the competent court, which has made the arbitral awards ineffective when the enforcement is requested.

The New SAL 2012 states the following in Article 52: ‘Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law is deemed to have the authority of *res judicata* and shall be enforceable.’ This is an explicit and clear statement that has power and a positive expected effect. These issues are considered to be important issues in order to ensure the enforcement of arbitral awards. They are even seen as the cornerstone of the success of arbitration in general, and they correspond with international procedures.⁹⁸ Thus, the arbitration

⁹⁴ Blackaby et al., *Redfern and Hunter on International Arbitration*. At pp. 592-594

⁹⁵ UNCITRAL Arbitration Rules 2013.

⁹⁶ For more details, see section 3.3.3.1

⁹⁷ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*. At p.416

⁹⁸ Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. At pp. 779- 780

award must be intact and free from defects that might lead to its annulment, in order to have the authority of *res judicata*.

This, in fact, agrees with *Sharia* law, especially from the point of view of the *Hanbali* School, in that the *Hanbali* scholars see that if the arbitrator wrote to the Judge with regard to his ruling, it would be necessary for the judge to accept and execute this, because it is a rule in force and is binding on the parties that have agreed to this arbitrator.⁹⁹ *Ibn Qudamah*, who is the well-known *Hanbali* jurist, said ‘The judges do not have to follow the issues that happened before them because they appear to be authentic and genuine, and the judiciary is given only for the qualified person to be a judge’. Therefore, we can say that the Saudi legislature in the 2012 arbitration law has taken the principles of *Sharia* as a foundation in this matter, as well as to keep pace with international developments in this regard. Thus, the application of this principle achieves two main objectives: (1) to put an end to the conflict and to prevent its recurrence, (2) to avoid falling into contradictory verdicts and their duplication. However, there will be a discussion of the potential legal obstacles that are related to the principle of finality under the SAL 2012.¹⁰⁰

4.5.5 The Basic Requirements in Terms of Enforcing an Arbitral Award¹⁰¹

The old law has put into place several requirements in order to carry out the award. However, as a result of the study of judicial practices, it can be said that the requirements have been expanded. We can return to Chapter 3 to see the number of required applications.¹⁰² These are divided into formal and substantive requirements which amount to more than 8 requirements. These requirements are necessary in terms of the form of the enforcement of the award, in addition to other requests on the subject of the dispute. In general, these requirements for the enforcement of an arbitral award are numerous and lengthy. However, the three main requirements in order to enforce a foreign arbitral award is (a) the award must not violate *Sharia* law; (b) the award must not be contrary Saudi public policy; (c) the principle of ‘reciprocity’ must be achieved.

The new law has determined these requirements with the inclusion of clear and explicit provisions, beginning from formal points to the issue of an order for enforcement of the arbitral award. The documents that shall accompany an award are as follows:

1. the original or a signed copy of the award;
2. A true copy of the arbitration agreement;

⁹⁹ Al Mughni V. 10 P.137

¹⁰⁰ See section (6.4.4)

¹⁰¹ See Section (3.3.3.2.2) Chapter 3.

¹⁰² See section 3.3.3.2.1

3. An Arabic translation of the arbitration award, authenticated by an authorized entity if the award is issued in a foreign language; and
4. Evidence or any proof of the delivery of the award to the competent court, pursuant to Article 44 of this Law.¹⁰³

Moreover, there are substantive requirements for the enforcement of an arbitral award, which are better organized than what was previously presented in the practicing of the old law. These requirements are as follows:

- 1- The period of time to file a nullification action must be elapsed.¹⁰⁴
- 2- The arbitral award shall not violate *Sharia* law and public policy. If this happens, the violating part shall be separated from the other part and the non-violating part shall be enforced.¹⁰⁵
- 3- The arbitral awards shall not be contrary to a judicial decision issued through the Saudi Courts.¹⁰⁶
- 4- The arbitral award must be notified to the opposing party.¹⁰⁷

Turning now to the main requirements when it comes to enforcing a foreign arbitral award, these will be detailed in Chapter 5 at Section (5.4.4.2). Thereafter, the competent court should give the winning party a copy of the arbitral award that contains a stamp with the following phrase:

‘All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution requires application of force by the police.’

4.6 Conclusion

We would like to conclude by stating that this chapter has focused on the main characteristics that distinguish the new SAL 2012 from the old law 1983; the distinction was set with regard to the extent of its suitability in terms of the custom internationally. Have these characteristics in the SAL 1983 had a negative impact on the means of the arbitration in Saudi Arabia? We have found 13 of the important characteristics that have had an impact on the arbitration process in general, and on the enforcement of arbitral awards specifically. After

¹⁰³ Article 53 of SAL 2012

¹⁰⁴ Article 55 (1) of SAL 2012

¹⁰⁵ Article 55 (2-b) of SAL 2012

¹⁰⁶ Article 55 (2-a) of SAL 2012

¹⁰⁷ Article 55 (2-c) of SAL 2012

identifying these properties, a comparative study of these properties has been conducted with regard to the new SAL 2012, in order to determine the answers to the important question in our research, will the new arbitration law resolve the legal problems that existed in terms of the old law? Will it contribute effectively to the enforcement of arbitration awards in general, and foreign arbitral awards in particular? In our study contained in this chapter, it has been determined that there has been a significant evolution in the stipulations of the new law, and an effective attempt had been made to cope with the arbitration laws of other States, as well as the international conventions and bilateral treaties signed by Saudi Arabia. There is no doubt that the legislature who created the new law have done their best to keep up with evolution, and have avoided the previous obstacles. However, this leaves open the question of practice on the ground, the need to look at the results, and the need to study the extent to which Saudi courts meet Saudi Arabia's ability to commit to the provisions of the new law. This is what we will delve into in detail in Chapter 5 and 6.

Chapter 5

5 Chapter Five: Recognition and Enforcement of Arbitral Awards under the New SAL (2012)

5.1 Introduction

There is no doubt that the enforcement of arbitral awards faces obstacles in most jurisdictions of the world, these difficulties vary from one jurisdiction to another. In this regard, this matter will be considered within Saudi Law, which is based on Islamic Law and built on various interpretations, often diverging of *Sharia* Law. In fact, the coherence of *Sharia*, as a recognized body of law, is not that great due to the lack of a single set of rules. In other words, *Sharia* law lacks the codification of the interpretations of *Sharia* rules through specific Articles. It is a subject of interpretation under the School to which it belongs and tends to vary based on the time and place. Saudi Arabia adopts the *Hanbali* School, which is considered to be stricter and more conservative than other Islamic Schools. However, in this study, which is related to the enforcement of arbitral awards, legal issues may be based on the practice side, rather than legislative, since the new SAL 2012 promises a lot of significant legal solutions. As explained in Chapter 2, the Saudi Courts are interested in considering the interpretation of *Sharia* law followed by the complementary legislation, only if it does not conflict with Islamic law.¹ Therefore, *Sharia* Law is the primary jurisprudential foundation when applying the various provisions of Saudi arbitration law by the court.

It has become well known to most legal scholars around the world² that enforcing foreign arbitral awards in Saudi Arabia is uncertain. This uncertainty has been caused, *inter alia*, by the fact that many foreign arbitral awards were refused recognition and enforcement without much explanation by clear grounds founded on applicable rules.³ This result has prompted this research, which seeks to assess the legal framework for recognition and enforcement in Saudi Arabia including investigation of the reasons leading to such uncertainty and what solutions could be offered instead. In particular, this research is set out to examine whether the new SAL and the SEL offers the much needed tools that will reform and improve the current, quite clearly, unacceptable situation when compared with the international practice.

Therefore, in this chapter, we will start by envisaging the actual practices adhered to in Saudi Courts such as dealing with issuance of an arbitral award and the challenge of the arbitral awards, and procedures of enforcing the arbitral awards in Saudi Arabia, bearing into mind the important distinction between a domestic and a foreign arbitral award. By doing this, the general

¹ See subsection (2.2)

² See subsection (3.3.3.2)

³ Mohamed Al-Hoshan, "Arab Legislative Polices in International Arbitration," *Euro-Arab Arbitration Conference – Tunisia, London: Lloyd's of London Press LTD* (1987). Cited in El-Ahdab, *Arbitration with the Arab Countries*. At p.666

issues associated with enforcement of domestic and foreign arbitral awards in Saudi Arabia will be discussed.

5.2 The Issuance of an Arbitral Award

In this subsection, we will deal with the matter of the issuance of arbitral awards. This requires us to consider two important aspects: (a) the methods of issuing an arbitral award, (b) the time-limit in terms of issuing an arbitral award.

5.2.1 The Method of Issuing an Arbitral Award

The method of issuing an arbitral award under the old SAL 1983 has been discussed previously.⁴ It was explained that, under the old law, an arbitral award was issued through the unanimous decision of the tribunal, or through a majority vote of the arbitral tribunal. As Article 16 of the SAL 1983 stated, ‘The award of the arbitrators shall be made by majority opinion...’ whereas, when the award was made through an amicable settlement or ‘*Sulh*’, then the arbitral tribunal was required to make an unanimous decision. As Article 16 of the SAL 1983 stated, ‘...where they are authorized to settle, the award shall be issued unanimously.’ As can be seen in this article, the legislature distinguished between arbitration and amicable settlement or reconciliation as ‘*Sulh*’.⁵ The new SAL 2012 does not deviate far from this structure. Article 39 (4) explains that when the disputants authorise the arbitral tribunal to act as conciliation or ‘*Sulh*’, the decision shall be issued unanimously. However, the legislature applied international practice in that the arbitral award must be rendered through the majority of the arbitral tribunal. Article 42 (1) of SAL 2012 states ‘...If the arbitration tribunal is composed of more than one arbitrator, the signatures of the majority of the arbitrators shall suffice, provided that the reasons for the non-signing of the minority shall be stated in the minutes’; thus, the reasons for non-signing must be attached by the arbitrator who is in disagreement, had adopted another view or is non-participating. In this matter, the Saudi Law follows the approach of the Egyptian 1994 Law in Article 43 (1) as it states that ‘...provided that the award states the reasons for which the minority did not sign’. In general, both of these laws derive from the attitude of the UNCITRAL Model Law in Article 31 (1) which states ‘... provided that the reason for any omitted signature is stated’. Moreover, Article 39 (1) of SAL 2012 emphasises that the award shall be made through confidential deliberations ‘*in camera*’.

⁴ See section (3.3.1.2)

⁵ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*. 492 at p.420-21

There is an important question that is essential in this matter. This relates to what types of award can be issued by the arbitral tribunal through the SAL 2012.⁶ This question has been asked previously in terms of SAL 1983.⁷ Here, there was no clear answer due to the legislature using the term ‘final award’ in Article 18 of the old SAL, but the concept of ‘non-appealable’ or *res judicata* was not granted until the authority originally competent to hear the dispute, approved the tribunal’s award.⁸ According to Article 52 of SAL 2012, which states ‘Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law is deemed to have the authority of *res judicata* and shall be enforceable.’ Thus, the type of tribunal award under the new SAL is supposed to be ‘final’ and ‘non-appealable’.⁹ However, the real answer is not clear because it is linked to the actual practices, which so far have some ambiguities due to the newness of SAL 2012.

When the arbitral tribunal is ready to make a decision on the disputed matter, the tribunal shall render the final award within a time-limit agreed by the two parties.¹⁰ According to Article 42 of SAL 2012, the arbitral awards shall be made in writing and shall contain reasons for the judgement, and shall be signed by the arbitrators. Despite the fact that SAL 2012 follows the UNCITRAL Model Law in most of its Articles, the Saudi legislature insists that the arbitral award must contain the reasons for the judgement, there is no option other than that. This is supported in Article 42 (1) of SAL as it states ‘The arbitration award shall be made in writing and shall be reasoned and signed by the arbitrators...’. Whereas, Article 31 (1) of the UNCITRAL Model Law provides that the awards shall be reasoned unless the parties to the arbitration have agreed otherwise. Moreover, there is a question as to whether the agreed applicable law to the arbitral proceedings does not require reasons for the arbitral awards to be provided. The Egyptian Arbitration Law 1994 addressed this issue in Article 43 (2) whereas the Saudi law remains silent.¹¹

However, the award shall contain the following details:

- j) The date and place of issuance of the award;
- k) The names of the disputing parties, and their addresses;
- l) The names, addresses, nationality and the capacities of the arbitral tribunal members;
- m) The subject matter of the dispute;

⁶ See section (6.4.4) and (5.4.2.1)

⁷ See section (3.3.1.2)

⁸ Article 20 of SAL (1983) states ‘the award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute...’

⁹ The matter of finality has been discussed in section (6.4.4) and (5.4.2)

¹⁰ See section (5.2.2)

¹¹ Article 43 (2) the Egyptian Arbitration Law 1994 states ‘The arbitral award shall state the reasons upon which it is based, unless the two parties to arbitration have agreed otherwise or the law applicable to the arbitral proceedings does not require the award to be supported by reasons’

- n) A summary of the arbitration agreement;
- o) A summary of the case facts, including the claims and defences;
- p) A summary of the reasons for the award;
- q) A summary of the expert view, if any;
- r) The text of the decision;
- s) The arbitrator's fee, the costs of arbitration and the distribution of such costs between the parties; and
- t) The signatures of the arbitral tribunal members.¹²

Finally, the authentic copy of the arbitral award shall be delivered to the disputing parties within 15 days of the issuance of the arbitral award.¹³ The award in whole or in part shall be private and unpublished, unless the two parties consent by writing.¹⁴ The signed copy (the original copy) in its original language shall be filed in the competent court within 15 days, and accompanied by an Arabic translation if it is in a foreign language.¹⁵ The translation shall be authenticated through an accredited body.¹⁶ However, the legislature does not clarify who is responsible for doing this task or who will pay for the translation costs, but it is generally accepted that the winning party will have this responsibility bear this cost. The responsibility of the winning party for translating the awards, paying the costs and filing the arbitral award in the competent court in Saudi Arabia within 15 days,¹⁷ indicates that this act is considered as ‘...highly unusual and onerous in international arbitration, especially when the award has to be translated by an accredited translation service in Saudi Arabia within that time period’¹⁸ Failure to undertake this responsibility may lead to the arbitral award refused recognition and enforcement through the competent court due to the requirements mentioned in Article 53 (4) of SAL 2012. What makes this procedure difficult and risky is that this practice is generally unusual in the international arbitration tribunals.¹⁹ Under the Egyptian Arbitration Law 1994, the winning party is responsible for filing the arbitral award in the

¹² Article 42 (2) SAL (2012) as states ‘The arbitration award shall state its date and the place of issuance, as well as the names and addresses of the parties to the dispute; the names of the arbitrators, their addresses, nationalities and capacities; a summary of the arbitration agreement and of the disputants' sayings, claims, pleadings and documents; a summary of the expert report (if any); and the text of the award. The award shall also determine the arbitrators’ fees, the costs of arbitration, and the way of distributing such costs between the parties, without prejudice to the provisions of Article 24 of this Law’

¹³ Article 43 (1) of SAL (2012)

¹⁴ Article 43 (2) of SAL (2012)

¹⁵ Article 43 of SAL (2012)

¹⁶ Article 44 of SAL (2012)

¹⁷ Article 44 of SAL (2012)

¹⁸ Saud Al-Ammari and A Timothy Martin, "Arbitration in the Kingdom of Saudi Arabia," *Arbitration International* 30, no. 2 (2014). 387-408. At pp399

¹⁹ *Ibid.* at pp 399

competent court; it is also responsible for translating the awards, and paying all the costs according to Article 47.²⁰

In his article, Al-Ammari and Martin comment in this respect by saying that this situation is contrary to Article 44 of SAL 2012 and Article 36 (2) of Model Law, as the latter states '*The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language*'.²¹ Al-Ammari and Martin explain the aspects of difference, the international arbitration practice, according to Article 36 (2) of the Model Law, provides two aspects: (a) 'The award is filed in the court by the party seeking to enforce the award, not by the arbitration tribunal', (b) 'The award is only filed in the court at the point of time when one of the parties wants to enforce it, not when the tribunal issues it'.²²

5.2.2 The Time-limit in terms of Issuing an Arbitral Award

The issuance of an arbitral award is considered to be a decision on the part of the arbitral tribunal upon a dispute that has been referred to the tribunal by the disputing parties, and is considered to be a final resort to be taken by the arbitral tribunal. Article 40 (1) of SAL 2012 states that 'The arbitration tribunal shall render the final award ending the entire dispute within the period of time as agreed upon by the two parties; failing such agreement, the award shall be rendered within twelve (12) months as of the date of commencing the proceedings'. Here, the principle of party autonomy is applied to determine the permissible time limit, otherwise the legislature stipulates an end to the time-limit required in order to issue the decision when the parties do not agree on a particular period. There are some who believe that this time-limit is double the time of the comparable provisions in other arbitral rules such as the UAE Arbitration Law which provides six months to render the final award.²³ Moreover, the Saudi legislature gives an exception to the arbitral tribunal, where the contractual time-limit can be extended by no more than six months. In this regard, a specialist writer considers that to be an improvement compared to the old SAL because '... it gives parties a realistic timeframe to resolve a dispute'.²⁴ In addition, the disputing

²⁰ Article 47 of the Egyptian Arbitration Law 1994 states 'The party in whose favour the arbitral award has been made shall deposit, at the Secretariat of the court referred to in Article 9 of this Law, the original award or a copy thereof in the language in which it was rendered, or an Arabic translation thereof authenticated by a competent organism if it was rendered in a foreign language. The court's secretary shall evidence such deposit in a procès-verbal, and each of the two parties to arbitration may request a copy of the said procès-verbal'

²¹ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." at pp. 398-399

²² Ibid. at pp. 399

²³ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.223

²⁴ Dina Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?," *ibid.* at P. 137

parties are entitled to agree to a longer period.²⁵ It should be added that when the contractual time-limit that has been agreed has expired without the issuance of an arbitral award, either party may request the competent court to order additional time or, in the worst case scenario, either party can terminate the arbitration proceedings, and then *either party may bring an action before the competent court.*²⁶ Dr. Baamir commented in this regard by saying ‘Article 40.3 may create another gap in the arbitral practice through which the time of the dispute can be lengthened or used to escape from arbitration’.²⁷ In this matter, one legal expert emphasised that ‘...for the sake of certainty around the enforceability of an award, parties should provide in their arbitration clause that the tribunal can issue its award within a reasonable time after the completion of the arbitration proceeding’.²⁸

Through the new SAL 2012 the Saudi legislature provides a workable legislation that is closer to reality in order to hear and decide the dispute within a realistic timeframe, which was not the case with the old SAL 1983. The old SAL 1983 identified that the time period for the issue of an arbitral award was ninety days from the day of the decision approving the arbitration by the competent authority, according to Article 9.²⁹ It was mentioned previously that there were a number of excuses for accepting an extension of the time-limit.³⁰ Articles 13 to 15 of the old SAL 1983 identified these exceptional cases as follows: **(a)** the death of one of the disputing parties,³¹ **(b)** one of the arbitrators is dismissed or withdraws,³² **(c)** an extension at the behest of the majority of the arbitrators,³³ **(d)** settling a preliminary issue beyond the jurisdiction of the arbitral tribunal, such as a claim that the documents had been forged.³⁴

In both the new and the old SAL, when there was a delay in the settlement of the dispute in terms of the contractual time-limit that was agreed without any valid reason, the disputing parties can refer their dispute to the competent court, according to Article 40 (3) of SAL 2012 and

²⁵ Article 40 (2) of SAL (2012) states ‘In all cases, the arbitration tribunal may extend such period provided that the extension shall not exceed six months, unless the two parties agree on a period of time exceeding that period.

²⁶ Article 40 (3) of SAL (2012) states ‘If the arbitration award has not been rendered within the period of time as provided for in the preceding paragraph, either party may request the competent court to give an order setting an additional period or terminating the arbitration proceedings. In the latter case, either party may bring an action before the competent court’

²⁷ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.224

²⁸ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia."

²⁹ Article 9 of SAL (1983) states ‘The dispute shall be decided on the date specified in the arbitration instrument unless it is agreed to extend it. If parties do not fix in the arbitration instrument a time limit for decision, arbitrators shall issue their award within ninety days from date of the decision approving the arbitration instrument...’

³⁰ See Chapter 3 section (3.3.1.1)

³¹ Article 13 of the SAL (1983)

³² Article 14 of the SAL (1983)

³³ Article 15 of the SAL (1983)

³⁴ Article 37 of Implementation Rules (1985)

Article 9 of SAL 1983. In the old SAL, the acceptance with regard to hearing the dispute was a matter subject to the discretion of the competent authority.³⁵ However, in the new SAL 2012, the legislature does not give the competent court this authority. Rather, it has become a right for the disputing parties only.³⁶ In section (3.3.1.1), a very important issue was mentioned with regard to when the arbitral award is issued after the expiration of the time-limit, in which case is the award considered to be valid or not? On the grounds that the old SAL did not provide any answer in this regard, therefore it seems that this issue is subject to the discretion of the competent court. This is what provides a significant risk with regard to enforcing the arbitral award. However, the new SAL is not better than the old SAL in this respect, in that it is not mentioned in the new SAL 2012, which leads to the possibility of this issue continuing to be a source of confusion.

5.3 Challenge of Arbitral Awards under the New SAL (2012)

Most modern arbitration laws specify the limit reasons of challenge the arbitral awards, and this is what was absent in previous SAL 1983. This led to a great deal of ambiguity in the procedures surrounding the rules regarding the challenging of arbitral awards in Saudi Arabia, under the previous SAL 1983 and its Rules 1985. This led to not clarify the limits in the scope of the component court to review arbitral awards. The competent courts had the ability to review the dispute's merits before making a decision regarding a request to challenge arbitral awards.³⁷ This view is supported by a number of legal experts.³⁸ On the other hand, there are some³⁹ who believe that the competent court may review the dispute's merits only when it violates the interpretations of either *Sharia* Law, or public policy.⁴⁰

The new SAL 2012 introduces an entire new chapter which identifies the grounds on which a party can challenge the validity of arbitral awards. Chapter 6 outlines three Articles (49 to 51) that highlight the ways to challenge the validity of arbitral awards in accordance with specific provisions of the SAL 2012; this is considered to be a significant improvement in term of limiting the grounds for challenge. The Saudi legislature has provided a number of reasons for voiding an

³⁵ Article 9 of SAL (1983) states '...otherwise, any litigant who so desires may submit the matter to the authority originally competent to hear the dispute, which may decide either to hear the subject matter or extend the time limit for a further period'

³⁶ Article 40 (3) old SAL (2012)

³⁷ See (3.3.2.1)

³⁸ See El-Rayes, "The Law of Arbitration in Saudi Arabia, Reality and Perceptions." pp.626-28; and AL-Bjad, *Arbitration in the Kingdom of Saudi Arabia*, pp. 236-38.

³⁹ Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia." At p. 234; see also, Othman, "What Is the Extent of Judicial Review over the Arbitral Awards?."issue 5857; website: http://www.aleqt.com/2009/10/24/article_292224.html

⁴⁰ Article 8 (1) of SAL (2012) states 'The court of appeal originally deciding the dispute shall have jurisdiction to consider an action to nullify the arbitration award and matters referred to the competent court pursuant to this Law.'

arbitral award. The aim of this is to remedy all the flaws associated with an arbitral award as a form of legal action. Examples of these grounds of challenge are whether or not these actions relate to convening rules for an arbitral agreement, an arbitral award issuance, or through arbitration procedures; also the formality aspect of the awards should be considered, together with the information that should be included within the decision, with considering the formality of the award which shall be followed according to the SAL 2012. In the new 2012 law, Saudi legislature has emphasized that expanding the grounds for nullity in the Act will not be allowed, given that these grounds of challenge have been specified in Article 50 (1).⁴¹

However, in this part of the research, it will be necessary to discuss the most important issues related to challenging arbitral awards under the SAL 2012, whether domestic or international awards. This is what makes it necessary to divide the research into the following points of discussion, **(a)** the competent court to decide the challenge will be discussed, then **(b)** the time-limits for challenge will be considered, and finally it is important to discuss **(c)** the grounds for challenge that are adopted by the new SAL.

5.3.1 Competent Court to Decide the Challenge

The concept of the competent court is very broad and differs from one jurisdiction to another. In the matter of domestic arbitration, some countries give the jurisdiction to decide the challenge to the competent courts of first instance,⁴² whereas other countries give the jurisdiction to decide the challenge to the Court of Appeal of the competent courts.⁴³ In the matter of international arbitration, the competent court may be dependent on the procedural rules that are agreed,⁴⁴ however, many countries give the jurisdiction to decide the challenge to the Court of Appeal of the competent courts.⁴⁵ In Saudi Arabia, the competent court to decide the challenge is the Court of Appeal that originally deciding the dispute. This court specializes in hearing an action of nullity. Its role in arbitration proceedings is limited to the rejection and acceptance of challenges to arbitral awards exclusively based on the reasons cited by the legislature. Also, the competent court hears disputes related to the arbitrator's appointment, as well as resolving the issues referred by the arbitrators. The Saudi legislature defines the term in Article 1 (3) of SAL 2012 stating that

⁴¹ It will be discussed in section 5.2.3

⁴² Such as Belgium and the Netherlands.

⁴³ Such as Egypt and France; in the English Arbitration Act (105), the High Court or the County Court has the jurisdiction.

⁴⁴ Blackaby et al., *Redfern and Hunter on International Arbitration*. At p.591-592

⁴⁵ Al-Mhaidib, "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kingdom of Saudi Arabia." At p. 277

the competent court is ‘a court having legal jurisdiction to decide disputes agreed to be referred to arbitration’; Article 8 specifies that the competent court, which has legal jurisdiction to consider an action to challenge arbitral awards, is the Court of Appeal originally deciding the dispute rather than the court of first instance, which was applied under the previous law 1983.⁴⁶ This legal text is considered to be a significant development in Saudi arbitration, when compared to the previous arbitration law where there were a number of appeal levels under the SAL 1983 which has led to shorten the arbitration proceedings through the direct enforcement of the arbitral award without going into a spiral of judicial proceedings and the corridors of the courts.⁴⁷

In Article 8 (2), it is clarified when will be deemed to be international whether or not carried out Saudi Arabia. Article 8 (2) states ‘In case of an international commercial arbitration within the Kingdom or abroad, the court of appeal originally deciding the dispute in the city of Riyadh shall have jurisdiction [to consider an action to nullify the arbitration award and matters referred to the competent court pursuant to this Law], unless the two parties to arbitration agree on another court of appeal within the Kingdom’. It is also illustrated through the phrase, ‘the two parties to arbitration agree on another court of appeal within the Kingdom’ where the principle of party autonomy is respected. This gives plenty of freedom to the party, which could not be found under the previous law 1983.⁴⁸ It should be noted that this approach is identical to the approach provided under Article 9 of the Egyptian Arbitration Act 1994.

An important conundrum arises as to whether the competent court’s is empowered under the new act to review the arbitral award on the merits. Article 50 (4) expressly clarifies that the competent court shall not review the award on the merits. It states, ‘the competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute’.⁴⁹ Whereas the SAL 1983 did not expressly prescribe review of the dispute’s merit, which enabled expansion of the grounds of review of arbitral awards under the previous law 1983.

5.3.1.1 Types of Competent Court in Saudi Arabia

In Chapter 2, the Saudi judicial system was discussed. This discussion included the structure of the Saudi Courts. In this section, we will focus on the competent courts in Saudi Arabia that have a legal jurisdiction to consider disputes that have been referred to arbitration upon

⁴⁶ See section (3.3.2.1)

⁴⁷ Chapter 4.2 (4.5.2)

⁴⁸ Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law." 31-57.

⁴⁹ Article 50 (4) of the SAL 2012

agreement by the disputing parties. However, the Saudi judicial system is rather complicated; therefore, it has been found that academic researchers who are not in a professional job such as lawyers would find some difficulties in understanding this matter. One legal writer asked ‘...what is unclear under the 2012 Law is the level of the “competent courts” involvement.’⁵⁰ In fact, this question is logical as there are very diverse categories of the Saudi courts. At present, the supervisory courts for arbitration proceedings are the Administrative Courts in the Board of Grievances;⁵¹ the Administrative Courts contain the Commercial Departments, the Administrative Department and the Criminal Department. The importance of the competent court is to deal with issues associated with the arbitral procedures such as the appointment of arbitrators, dismissing the arbitrator, and injunctions or temporary reliefs. Nevertheless, the structure of the Saudi Courts is a very new one, in that it was re-organised through the new Law of the Judiciary 2007,⁵² the new Law of the Board of Grievances 2007,⁵³ the new Law of Procedure before the *Sharia* Courts 2013⁵⁴ and the new Law of Procedure before the Board of Grievances 2013⁵⁵. For deciding the challenge, the competent court shall be the Court of Appeal which shall have the original jurisdiction to decide upon the dispute,⁵⁶ and if the arbitral dispute is international, than the court shall be the court of appeal in Riyadh unless the disputing parties agree otherwise.⁵⁷

5.3.1.2 Courts of Appeal in Saudi Arabia

The Courts of Appeals under the new Law of the Judiciary (2007);⁵⁸ the Court of Appeal is the competent court for the first instance courts which consist of the following: **(a)** General Courts, **(b)** Penal (Criminal) Courts, **(c)** Family (personal status) Courts, **(d)** Commercial courts, **(e)** Labour Courts.⁵⁹ However, it should be mentioned that even though the new Law of Judiciary (2007) identified the specialised Commercial Courts, until now no new Commercial Courts have been established based on the new legislation, and the Commercial Departments are still working under the Administrative Court (the Grievances Board) which now has the jurisdiction over commercial disputes.⁶⁰

⁵⁰ Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?." At p.137

⁵¹ A. Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice," *ibid.*, no. 6. At p.221

⁵² Royal Decree No M/78 of 1st October 2007

⁵³ Royal Decree No M/78 of 1st October 2007

⁵⁴ Royal Decree No M/1 of 25th November 2013

⁵⁵ Royal Decree No M/3 of 25th November 2013

⁵⁶ Article 8 (1) of SAL 2012

⁵⁷ Article 8 (2) of SAL 2012

⁵⁸ Article 9 of the Law of Judiciary (2007)

⁵⁹ Article 9 of the Law of Judiciary (2007)

⁶⁰ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." p.222

The Administrative Courts of Appeal (the Grievances Board '*Diwan AL-Mazalim*'⁶¹); under the Law of the Board of Grievances (2007)⁶² this is the competent Court of Appeal for administrative courts in the Board of Grievances. At present, when the subject matter of the arbitration is related to a commercial relationship or international trade, then the Court of Appeal in the Grievances Board is supposed to have the jurisdiction to hear actions of nullity.⁶³ Dr. Baamir commented in respect of Article 8 (2) by saying that 'As a general rule, the jurisdiction to hear claims related to commercial arbitration is given to the Board of Grievances but this part of the law lacks clarity and needs elaboration'.⁶⁴

The Appeal Committees; there are a number of quasi-judicial committees working under the supervision of the competent Ministry. The reason behind establishing these committees is to avoid cases having to be considered under the *Sharia* Court which does not accept, for example, most the banking transactions involving interest, or business transactions that include insurance agreements⁶⁵. Therefore, while these committees are helping to ease the heavy workload of cases before the *Sharia* Courts, and deal with the requirements of economic, financial, investment and modern trade transactions, these committees are also considered to be a practical solution to the matters related to the technical side of accurate knowledge as it is difficult for *Sharia* judges to issue a decision on these matters; but however, these committees have been vulnerable to criticism by the Grievances Board '*Diwan AL-Mazalim*'⁶⁶ due to the fact that these committees are under the 'Executive Branch'⁶⁷ which breaches Article 44 and 46 of the Basic Law of Governance.⁶⁸ In this regards, Al-Shareef explained in the matter of interest in Saudi Arabia as he said 'the paying and receiving of interest are prohibited but the banking system in the Saudi State is based on interest. The general assumption among [the Grievances Board] officials and lawyers that the legal committee of (SAMA)⁶⁹ enforces arbitral awards involving interest'.⁷⁰

⁶¹ Grievances Board or '*Diwan AL-Mazalim*' is an administrative court which has jurisdiction over disputes between government agencies and private individuals or companies. In addition, it had a jurisdiction over disputes relating to commercial matter, forgery, corruption, trademarks and all things that are relevant to trade before being converted to specialised courts that mentioned the Law of Procedure before Board of Grievances, Royal Decree No M/3 of 25th November 2013.

⁶² Article 8 of the Law of the Board of Grievances (2007)

⁶³ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." at p.222

⁶⁴ Ibid. at p.222

⁶⁵ The details related to this matter is mentioned in Chapter 2

⁶⁶ <http://www.alriyadh.com/402706> , Riyadh Newspaper, 17/01/2009; Issue No. 14817

⁶⁷ Ansary, "A Brief Overview of the Saudi Arabian Legal System."

⁶⁸ Royal Order No. A/90 dated 2/3/1992.

⁶⁹ The Saudi Arabian Monetary Agency.

⁷⁰ Al-Shareef, "Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958." At p. 200

However, the competent court of appeal for quasi-judicial committees is the Board of Grievances according to Article 13 (b) of the Law of the Board of Grievances (2007). This states ‘Administrative courts shall have jurisdiction to decide the following: (b) Cases for revoking final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees...’. Currently, each one has an appeals committee which has to be the appellate authority in respect of each committee. There are many quasi-judicial committees in Saudi Arabia, where they have been mentioned in Section (2.3.3).

5.3.2 Time Limits for Challenge

Many countries identify a specific period of time in order to challenge an arbitral award.⁷¹ In Saudi Arabia, Article 51 (1) explains that the time limits for challenging arbitral awards shall be filed by the aggrieved party within 60 days following the date of notification.⁷² When the competent court approves the arbitral awards it will acquire the authority of *res judicata*, and shall not be subject to appeal (or challenge); then the competent court shall issue an order of execution. Otherwise, when the competent court decides to nullify the arbitral award, the decision is subject to appeal by the dispute parties within 30 days following the date of notification⁷³. The main result of these improvements is that the losing party will experience difficulty in Saudi Arabia obtaining a delay in enforcing an arbitral award as the award will be final and has acquired the authority of *res judicata*. This means there will be greater speed in the procedure of enforcement than in the past.

Under the previous law 1983, Article (18) stipulates, ‘Parties may submit their objections against what is issued by arbitrators to the authority with which the award is filed, within fifteen days from the date they are notified of the arbitrators’ awards; otherwise such awards shall be final’. The period in which to challenge arbitral awards was 15 days. So what are the reasons for changing this? In fact, the reason is to keep up with international practice, and it is sufficient time, especially when the arbitration is international. For example, the time limit in Egypt, Oman and

⁷¹ The examples in the same region are the G.C.C States and Egypt.

⁷² Article 50 (1) of SAL (2012) states: ‘1. an action for nullification of the arbitration award shall be filed by either party within sixty days following the date of notification of said party of the award; and such action is admissible even if the party invoking nullification waives his right to do so prior to the issuance of the arbitration award’

⁷³ Article 50 (2) of SAL (2012) states: ‘2. If the competent court approves the arbitration award, it shall order its execution and its decision shall be non-appealable. If, otherwise, the court decides the nullification of the award, its decision shall be subject to appeal within thirty days following the date of notification of such decision.’

the UNCITRAL Model Law is three months, and in the UAE it is two months. Under the English Arbitration Act, it is provided that any appeal of an arbitral award shall be made within 28 days of the date of the award.⁷⁴ In the French Code of Civil Procedure 2011, Article 1519 provides that the appeal of an arbitral award shall be made *within one month following notification of the award*.

It is worth mentioning that what the new law has stipulated, is that the filing of an action for nullity does not entail the suspension of the enforcement of an arbitral award.⁷⁵ However, the competent court may order the suspension of an award if the plaintiff for nullity has requested so in the claim's statement, and the request was based on 'substantial grounds'.⁷⁶ In such a situation the legislature shall interpret the concept of 'substantial grounds' in order to accept the stay of execution, otherwise, this will open the door for discretion in the matter of the interpretation of the term 'substantial grounds', which often will be interpreted as a violation of *Sharia* Law or public policy. The competent court must make a decision about the request with regard to the stay of execution within fifteen days of the date of submission. This attitude is following the approach of the Egyptian Arbitration Act, Article 57 and the new French Law, Article 1526.

Moreover, if the court orders a stay of execution, it may order the provision of a guarantee or financial warranty, as is applied in international practice.⁷⁷ Also, when the competent court orders a stay of execution, it must make a decision in the action for nullity within one hundred and eighty days from the date of the issuance of this order.⁷⁸ These periods support the success of Saudi commercial arbitration, as it is also stipulated that the request for the enforcement of an arbitration award is not accepted unless the date of filing the action for nullity of verdict is included.

5.3.3 The Grounds for Challenge 'Setting Aside' that are Adopted by the New SAL (2012)

The previous law 1983 required that in order to recognise and enforce arbitral awards, which must be approved and ratified by the competent court, the court could hear any objection presented by any party to ensure whether the arbitral awards violated *Sharia* Law or public policy.⁷⁹ Dr. AL-Fadhel comments on this aspect, saying that the old SAL and its Rules failed '...

⁷⁴ Sec. 70 of the English Arbitration Act states 'Any application or appeal must be brought within 28 days of the date of the award...'

⁷⁵ Article 54 of SAL 2012 states 'Filing of a nullification action shall not stay execution of the arbitration award...'

⁷⁶ Article 54 of SAL 2012 states '... the competent court may order a stay of execution if the plaintiff so requests in his nullification action and if his request is based on sound grounds...'

⁷⁷ Article 54 of SAL 2012 states '...If the court decides a stay of execution, it may order that a bail or financial guarantee is provided...'

⁷⁸ Article 54 of SAL 2012 states '...If the competent court orders a stay of execution, it shall decide on the nullification action within one hundred eighty days from the date of issuance of said order'

⁷⁹ Article 20 of SAL (1983)

to indicate on which grounds the challenge to the arbitral award will be successful.’⁸⁰ This led to a great risk regarding the enforcement of arbitral awards, as the Saudi court could make its decision on the dispute, despite the existence of decision of the arbitral tribunal.⁸¹ In this regard, the new SAL 2012 has changed this attitude, at least in terms of the provisions of the law and it remains to be seen its real impact in practice. The new SAL 2012 adopts the international arbitration practice and expressly states, ‘The arbitration award rendered in accordance with this Law shall have the authority of *res judicata* and shall be enforceable’.⁸² Article 53 stipulates in this regard that ‘The competent court, or designee, shall issue an order for enforcement of the arbitration award’, which is considered to be an improvement in order to speed up the enforcement proceedings; whereas, the president of the competent court has the jurisdiction to issue enforcement of the arbitral award in Egypt according to Article 56.

With regard to the grounds of challenge, the new 2012 law applies the same grounds as international arbitration practices. Actually, the legislature has applied the same grounds for challenge that apply in the UNCITRAL Model Law. One specialist writer said that ‘these circumstances are mostly based and provided in the New York and the UNCITRAL Model Law’.⁸³ Many international conventions and foreign laws have ensured and respected the right of the disputing parties to challenge the arbitral award under the grounds similar to those which can be found in Article V of the New York Convention and Articles 34 of the UNCITRAL Model Law, and also Article 53 of the Egyptian Arbitration Act 1994 and Sections 67 and 68 of the English Arbitration Act 1996. However, in Saudi Arabia, the arbitral awards can be accepted as a valid award from the tribunal, and the court shall recognise and enforce the award except for limited reasons,⁸⁴ which are identified in Article 50 (1) of SAL 2012. The new Law stipulates that the challenge of an arbitral award shall not be accepted unless no arbitration agreement exists, the agreement is void or voidable, the agreement is nullified because of expiration of its time limit, or if one of the parties who signed the arbitration agreement was incompetent or lacked capacity. Furthermore, the case exists when one of the arbitral parties has an excuse to not provide a defence because the appointment of an arbitrator or arbitration procedures have not been rightly reported, or for any other reason beyond his control.

⁸⁰ Al-Fadhel, "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law." at p. 254

⁸¹ For more details, see Chapter 3, Subsection (3.3.3.2.1)

⁸² Article 52 of SAL 2012

⁸³ Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?." At p. 138

⁸⁴ Article 49 of SAL 2012 stipulates ‘Arbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law’

Moreover, there are more reasons for accepting the challenge. Another ground is when the arbitration award fails to apply any of the legal rules that the arbitral parties agreed with regard to governing the subject matter of the dispute; when the arbitral tribunal or arbitrator was composed in contradiction to the law or to the agreement that had been agreed by both parties; or when the arbitration award ruled on a matter that was not included in the arbitration agreement. However, if it is possible for the arbitral award to be separated from the part that included the legal issues that were not agreed upon, then the nullification shall be applied to the non-arbitration issues. The last case is one when the arbitral tribunal does not comply with the conditions that must be met in the arbitral award in such a way that it affects its content; or the arbitral award has been based on void arbitral procedures that have affected it. These limited reasons are explained as the grounds for challenge that is specified in the following instances:⁸⁵

- a.** If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term;
- b.** If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;
- c.** If either arbitration party is prevented to present his defence due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;
- d.** If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;
- e.** If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;
- f.** If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters submitted to arbitration can be separated from those not so submitted, then nullity shall apply only to the latter parts;

⁸⁵ Article 50 (1) SAL 2012

g. If the arbitration tribunal has not complied with the conditions of the award in a manner affecting its content, or that the award has been based on void arbitration proceedings affecting it.⁸⁶

However, it could be said that Saudi Arabia has taken the principle of determining the reasons of nullity such as some neighbouring countries.⁸⁷ In fact, it may be difficult to fully adopt such a principle in Saudi Arabia. As it states in Article 50 (2), the court can nullify arbitral awards on its own motion '*sua sponte*' or '*ipso jure*', when the award violates one of these cases: **(a)** the provisions of *Sharia* Law, **(b)** Saudi Public Policy, **(c)** the agreement of the two parties, **(d)** the subject matter of the dispute cannot be referred to arbitration.⁸⁸ Consequently, the grounds for nullity or setting aside may not be limited in Saudi Arabia. However, when the competent court considers the actions for nullification or setting aside, the court shall not have a right to review the merits of the case.⁸⁹ On the other hand, there is a question as to whether the parties in the dispute could waive the right to challenge the arbitral award under the SAL 2012, where the condition can be included in a specific agreement. The ability of the parties to waive the right of appeal differs from one nation's legislation to another.⁹⁰ Redfern and Hunter stated 'The possibility of waiver is set out both in some national legislation, and in the major arbitration rules'.⁹¹ Under the SAL 2012, the legislature explicitly provides in Article (51) (1) that the right of an action for nullification is acceptable, even when *the party invoking nullification waives his right to do so prior to the issuance of the arbitration award*.⁹²

5.4 The Procedures of Enforcing Arbitral Awards in Saudi Arabia

The arbitral tribunal's role is '*functus officio*' once it issues the award. However, it does not have the authority to recognise and enforce such an award. The winning party will seek to recognise and enforce the arbitral award, whereas the losing party could either fulfil the award, or

⁸⁶ Article 50 (1) SAL 2012

⁸⁷ All the G.C.C States applied this principle.

⁸⁸ Article 50 (2) as states 'The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of *Sharia* and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law.'

⁸⁹ See section 5.3.1

⁹⁰ For example, French Law allows the parties to waive the right of appeal; see Article 1522 of the French Code of Civil Procedure (2011).

⁹¹ Blackaby et al., *Redfern and Hunter on International Arbitration*. at p.593

⁹² Article 51 (1) of SAL states 'An action for nullification of the arbitration award shall be filed by either party within sixty days following the date of notification of said party of the award; and such action is admissible even if the party invoking nullification waives his right to do so prior to the issuance of the arbitration award.'

fight in a different way so as not to have it enforced. This marks the beginning of procedures to enforce the arbitral awards.

As explained earlier, the Arbitration proceedings of the previous law were subjected to a heavy-handed judicial supervision,⁹³ as Article 5 and 20 of SAL 1983 stated clearly.⁹⁴ Consequently, any award did not become final unless the competent authority approved it. This meant that the probability of enforcing an arbitral award was uncertain, and could not be guaranteed because the competent court could reconsider the merits of the subject. According to the case of *Jadawel vs. Emaar* which will be discussed later,⁹⁵ the competent court took the usual position by reviewing the arbitral awards and examining the merits of the dispute. Therefore, it was difficult for lawyers or executors of the arbitral awards to ensure that the award would be enforced or not. The other reason for this was that the decisions were neither published nor available to the public or to specialists in order to understand the reasoning of the Grievances Board '*Diwan AL-Mazalim*' upon which their decision was based regarding the enforcement the arbitral awards.

In introducing the new arbitration law 2012 the legislature has changed this approach, because the old law 1983 led to a lot of delay and instability in the proceedings associated with enforcing the arbitral awards, leading to the situation that the arbitration method in Saudi Arabia was not recommended.⁹⁶ Examples of actual cases, where a delay was experienced, have been mentioned previously, such as Decision No. 18/1416 in 1996,⁹⁷ and Decision No. 57/1414 in 1994.⁹⁸ It should be noted that the new law emphasises on a number of modern principles as follows: (1) the arbitration award acquires the authority of *res judicata*,⁹⁹ (2) the non-eligibility of

⁹³ For more an explanation see section 4.4.1

⁹⁴ Article 20 of SAL 1983 states 'The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the *Shariah*'

⁹⁵ See section 5.4.2.2

⁹⁶ For more details, see section 3.3 and 4.5

⁹⁷ Decision No. (18/D/TJ/1) in 1996, where the 'appeal circuit' in the Board of Grievances observed that the reasons of the arbitral award were not formed on the correct basis, and the arbitral tribunal referred to an invalid conclusion in order to reach this decision, therefore, the Circuit rejected the award due to it being based on incorrect reasons.

⁹⁸ Decision No. 57/1414 in 1994, where the parties have a dispute over the properties' division and they have agreed to refer the dispute to arbitration. The commercial circuit of the Board of Grievances held that the dispute shall be referred to arbitration; however, the appeal circuit revoked the ruling on the grounds that the Board of Grievances had no jurisdiction to hear the dispute due to the fact the matter was not a commercial dispute. Taken from AL-Subaihi, "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law," pp. 402-03.

⁹⁹ Article 52 of SAL 2012 states 'Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable'

the competent court to review the merits of the conflict.¹⁰⁰ In addition, the new law also stresses (3) the necessary documents shall be submitted to the competent court for the enforcement,¹⁰¹ and (4) all the necessary conditions for enforcement shall be available, such as the arbitral award must not violate to the rules of *Sharia* law and public policy.¹⁰²

Once the required documents are provided and the necessary conditions for the enforcement are fulfilled, the competent court issues the enforcement of the arbitration award, whether domestic or international, and it becomes *executive bond*. Then the parties proceed to the final stage, which is the execution phase carried out through the enforcement courts based on the Enforcement Law 2012.¹⁰³ All previous points with regard to the conditions and demands for the enforcement of the award will be provided in detail through specific topics below in this Chapter.

5.4.1 The New Enforcement Law of Saudi Arabia

The SEL 2012 was issued by virtue of Royal Decree No. M/53 on 3rd July 2012. On 28th February 2013 it came into effect and its Implementation Rules were issued on 27th February 2013. This law is the first law in Saudi Arabia that is an enforcement law; there was no previous law. In the matter of enforcing foreign arbitral awards, the Law of the Board of Grievances 2007 was applied.

Article 96 states that the new law eliminates and replaces Articles 196 to 232 of the Law of Procedure before *Sharia* Courts 2000.¹⁰⁴ However, this law is replaced through a new Law of Procedure before *Sharia* Courts 2013, which was issued by virtue of Royal Decree No. M/1 on

¹⁰⁰ Article 50 (4) of SAL 2012 stipulates ‘The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute’

¹⁰¹ Article 53 of SAL 2012 states ‘The competent court, or designee, shall issue an order for enforcement of the arbitration award. The request for enforcement of the award shall be accompanied with the following:

- a. The original award or an attested copy thereof.
- b. An authentic copy of the arbitration agreement.
- c. An Arabic translation of the arbitration award attested by an accredited authority, if the award is not issued in Arabic.

- d. A proof of the deposit of the award with the competent court, pursuant to Article 44 of this Law.

¹⁰² Article 55 of SAL 2012 stipulates ‘1. A petition to execute the arbitration award shall not be admitted, unless the deadline for filing a nullification action elapses.

2. The order to execute the arbitration award under this Law shall not be issued except upon verification of the following:

- a. The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia;
- b. The award does not violate the provisions of *Sharia* and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.
- c. The award is properly notified to the party against whom it is rendered...’

¹⁰³ The Saudi Enforcement Law was issued by virtue of Royal Decree No. M/53 on 3rd July 2012. On 28th February 2013 it came into effect and its Implementation Roles were issued on 27th February 2013.

¹⁰⁴ The Law of Procedure before *Sharia* Courts, it was issued under Royal Decree No. M/21 Dated 20 Aug 2000

22th November 2013. Article 96 also eliminates and replaces Article 13 (g) of the Law of the Board of Grievances which states, ‘Administrative Courts shall have the jurisdiction to look into the following: ... (g) Requests for the enforcement of foreign judgments and foreign arbitrators’ judgments.’ It should be noted that Article 13 (g) of the Law of the Board of Grievances was the only article that indicated the inherent jurisdiction of the Board of Grievances for enforcing foreign arbitral awards. In this section, we will discuss the expected effects of the SEL in general, and then the impact of the Enforcement Law on the execution of domestic and foreign arbitral awards will be considered.

5.4.1.1 What are the Expected Effects of the Saudi Enforcement Law?

The previous practise was extended and inflexible due to the competent court making a full review of the award on the merits, to make sure that there are no violations with *Sharia* Law and public policy. Moreover, there are a number of appeal levels after the tribunal issues the arbitral award. Therefore, there was a significant chance that the arbitral award may be refused enforcement for many reasons. This is the reason why arbitral awards faced significant delays when brought to the competent court (Board of Grievances), or even rejected. However, the new law will have a special influence on the enforcement of arbitral awards, whatever their nature, i.e. national or international.

The Enforcement law is considered a major progress in terms of reform of the enforcement method of arbitral awards in Saudi Arabia, not only in terms of the enforcement of the arbitral awards, but also in terms of the execution of all judicial and quasi-judicial judgments. These include attested contractual obligations and documents which do not have any ambiguity, as well as the enforcement of negotiable instruments such as cheques and bills of exchange.¹⁰⁵ The enforcement is done without the need for an injunction in that the new law of enforcement has excluded the provisions of administrative and criminal issues, as Article 2 of the Enforcement Law provided that ‘Except for judgments and decisions issued in criminal and administrative suits, the enforcement judge shall have the power of ...’. Thus, this will ease the amount of business and

¹⁰⁵ Article 9 of Enforcement Law stipulates ‘Compulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are:

1. Judgments, decisions, and orders issued by courts.
2. Arbitral awards which include enforcement order in accordance with the Law of Arbitration.
3. Settlement documents issued by competent bodies or endorsed by courts.
4. Negotiable instruments.
5. Attested contracts and documents.
6. Judgments, judicial orders, arbitral awards and attested documents issued in a foreign country.
7. Ordinary documents whose content is acknowledges in whole or in part.
8. Other contracts and documents having the power of the enforcement document according to law.’

their accumulation with regard to courts of various kinds. It is important in this part to discuss the impact of this law on the enforcement of arbitral awards, whether domestic or foreign.

5.4.1.2 The Impact of the Enforcement Law on the Execution of Domestic and Foreign Awards

There is no doubt that the commitment to the provisions of this law will lead to a positive impact on the enforcement of the arbitral domestic or foreign awards. Article 9 (2) of the Enforcement law explicitly states that ‘Compulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are: (1) Judgments, decisions, and orders issued by courts. (2) Arbitral awards which include enforcement orders in accordance with the Law of Arbitration...’. In addition, the explicit text gives strength and rigidity in the matter of the speed of execution.

It is worth mentioning that the enforcement judge works in the enforcement circuit which is part of the General Court according to Article 19 of the Saudi Judicial Law 2007. The legislature has allowed for an element of privacy for foreign awards, whether arbitral or judicial¹⁰⁶. This is clearly mentioned in Article 14 which states explicitly that ‘Judgments, judicial orders, arbitral awards, and attested documents issued in a foreign country shall be presented to the enforcement judge in charge of enforcement of foreign judgments to ascertain that the document fulfils the conditions required for enforcement and affix the seal of enforcement thereon’; and after making sure that the conditions in the award intended to be enforced, the judge puts the seal of enforcement, including the phrase ‘judicial decision’¹⁰⁷ in order to allow the competent authorities to allow the litigant to enforce his resolution.

Article 14 of the Enforcement Law shows without a doubt that there is an interest on the part of the legislature on the issue of the enforcement of the arbitration foreign awards, in terms of devoting a specific judge to the enforcement of foreign arbitral awards, given that the law specifies the need for an enforcement judge who understands the nature of these awards. The reason for this is that these judges need to be familiar with international conventions, bilateral treaties and international laws, and with the application of the principle of reciprocity. One legal expert suggested that ‘Saudi Arabia needs specialised arbitration courts with highly trained judges and staff and these arbitration courts should be branches of the commercial courts’.¹⁰⁸

¹⁰⁶ Articles 9 (6), 11, 12 and 14 of Enforcement Law.

¹⁰⁷ Article 6 (2) of the implementation Rules of the Enforcement Law.

¹⁰⁸ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.225

It is assumed that the enforcement judge should enforce a ruling without going into the details of the subject of the dispute. In this regard, there is a Royal Order¹⁰⁹ containing a guidance on the issue of the enforcement judge at the General Court. This guidance is for a case where the judge was stating the need to refrain from enforcing the resolution for inclusion the transaction of usurious dealings between the parties (one of which is a bank). The judgment was final and issued by the Office for the Settlement of Negotiable Instrument Disputes. The Royal Order has included an answer¹¹⁰ of the Bureau of Experts at the Council of Ministers (the legislative body) that the enforcement judge should enforce what is contained in the ‘executive bond’ without reference to the subject origin *unless contrary to public policy*.¹¹¹ The term ‘unless contrary to public policy’ may open the way for the enforcement judges to review the executive bond, especially given that the above-mentioned Royal Order explained what public policy means, and stated that ‘the overall rules in *Sharia* Law are based on the texts of the Quran and Sunnah’; the phrase ‘and so without reference to the merits of the dispute’ has been added. This means that the revision is to be with regard to the formal aspect of the executive bond. This is an example of a judicial decision which was issued from one of the judicial authorities in Saudi Arabia. In the case of domestic or foreign arbitral awards, the situation may be worse. Due to the enforcement, the judge has to emphasise that the award complies with *Sharia* law, especially when the award is issued from an arbitral tribunal or foreign court that may not have enough knowledge of *Sharia* law.

As previously explained, the quasi-judicial committees were established for specific reasons, including to avoid the need to subject the dispute to the Islamic courts, which does not accept any transactions involving usurious or insurance aspects. The other reason for this is that this kind of dispute should be considered through a specialised court in order to resolve the conflict through the use of legal specialists. The question that emerges is; can the enforcement judge enforce the adjudication issued by quasi-judicial committees if it is in violation of the rulings of *Sharia* law? Although many of the trading business and contractual relationships in Saudi Arabia are based on financial agreements with banks or take the form of insurance obligations with insurance companies. As well as other example such as tariff or customs, they involve a fee that some scholars see as relating to ‘*Mukoos*’ *Fatwa* No. (4012);¹¹² this *Fatwa* provides that ‘Charging customs taxes on imports and exports is regarded as a kind of *Mukoos*, which is *Haraam* (Forbidden), even if the authorities spend it on various projects to build the country’s

¹⁰⁹ The Number of Royal Order is (44983), dated on 22/08/2012.

¹¹⁰ The inquiry number is (8898), dated on 27/05/2012, issued by the Supreme Judicial Council.

¹¹¹ Record Number (497) dated on 04/08/2012, issued by the Bureau of Experts at the Council of Ministers.

¹¹² *Fatwa* No. (4012), Chapter 3 at page 490-493, issued by the General Presidency of Scholarly Research and Ifta.

infrastructure, because the Prophet Mohammed (P.B.U.H.)¹¹³ forbade taking the *Maks* (signal *Mukoos*) and spoke sternly concerning it'.¹¹⁴ The *Fatwa* based on the *Hadith* (Saying) of Prophet Mohammed said 'No one who collects the *Maks* will enter Paradise'.¹¹⁵

However, this is one of the many examples which are permitted by the Saudi Government and banned in the view of Saudi *Sharia* scholars. The previous examples are considered as legislated regulatory transactions in the Saudi legal system. The current need to apply to legislation to business transactions has led to the need to establish these laws. This matter has caused instability in terms of transactions and agreements, and has made the banks change the names associated with usurious interest to names found in *Sharia* Law, such as '*Tawarruq*'¹¹⁶ and '*Murabaha*'¹¹⁷ or 'Cooperative Insurance', despite the fact that the used means are similar to international practice. In any case, the answer to the previous question will be the same as the answer concerning arbitral awards, whether domestic or foreign. The enforcement law has only recently been applied, and we are waiting for the results of the legislation in practice. In the author's opinion, there will be a change for the better in terms of stability of judicial and arbitral decisions. The instability will lead to serious consequences in the environment of justice, trade transactions and the legal agreements in Saudi Arabia. The aim of the Saudi Government is to stabilise the justice environment and the success of King Abdullah's project for reforming the Saudi Judicial System.¹¹⁸

To return to the subject of reviewing of the enforcement judge in terms of what is stated in the executive bond, it should not relate to the merits of a dispute.¹¹⁹ In addition, judicial review in the enforcement is only by the means of refraining from applying the violator stipulation without the abolition of the executive bond or the adjudication.¹²⁰ The negativity of this approach is that the issue of accepting or refraining from enforcing the bond or arbitral award by the judge, is dependent on the point of view of each enforcement judge and according to his personal convictions, or to his jurisprudence doctrine and the extent of its severity, rigour or leniency; it is ultimately a matter of discretion. Thus, it may be unsettled with this disposition in terms of the

¹¹³ 'Peace be upon him'

¹¹⁴ Islam Question and Answer website, <http://islamqa.info/en/42563>

¹¹⁵ Narrated by Ahmad, Abu Dawood and al-Haakim narrated from '*Uqbah ibn 'Aamir*'.

¹¹⁶ This is a product in Islamic finance used as a substitute for a traditional bank loan that involves interest rates. For example, a client can buy a saleable asset such as metals from an Islamic bank at a marked up price in order to be paid at a later date. The bank then sells the asset instead of the client in order to raise the cash.

¹¹⁷ It is very similar to *Tawarruq*, as it is not an interest-bearing loan, based on buying a property.

¹¹⁸ for more details about the project, see section 2.5

¹¹⁹ See Royal Order No. (44983), dated on 22/08/2012, mentioned above note. 13

¹²⁰ Article 9 (1) of the implementation Rules of the Saudi Enforcement Law.

principle of equality between the litigants. In sum, it can be generally said that the 2012 Enforcement Law has introduced a more efficient approach and has created a more accepting culture with regard to the enforcement of arbitral awards. Undoubtedly, it will have a positive impact on the enforcement of domestic and foreign arbitral awards.

5.4.2 The Inadmissibility of the Competent Court to Review the Merits of the Dispute

This principle is in fact known and applied internationally, but the silence of the previous law 1983 about this, partially led to unusual exercises that made Saudi-based arbitration unappealing and unpopular in that the enforcement of such awards was a cumbersome and not guaranteed affair. It should be noted that Article 19 and 20 of the old law ¹²¹ was not accompanied by jurisprudential and legal understanding in terms of realizing the dimensions of arbitration and its uses. Therefore, the practical application of Saudi Courts had led to entering into the merits of the dispute,¹²² however, this issue has been detailed previously.¹²³ In the previous law, The concept of a review of the merits of the dispute by the competent court is based on the text ‘...the authority originally competent to hear the dispute shall hear the objection and decide either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon’.¹²⁴

However, with regard to domestic and international awards that applied the SAL as a procedural law, the Saudi legislature, in Article 50 (4) of SAL 2012, has provided a clear position in this matter. This Article stipulated that ‘The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute’, and it emphasised that the competent court considers an action for nullification as specified in the cases mentioned in Article 50 (1) without having examined the facts of the merits of the dispute. This is a very positive improvement, and it is anticipated that it will have a positive impact on the speed of enforcement of arbitral awards. Through this Article, the Saudi legislature has improved the method of the judicial review in such a way as to make it compatible with international practice. Accordingly, it supposed that the review is specific to a consideration of

¹²¹ Article 19 of SAL 1983 states ‘Where one or more of the parties submit an objection to the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall hear the objection and decide either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon.

Article 20 of SAL 1983 states ‘The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the *Sharia*’.

¹²² AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." pp. 277- 285

¹²³ See section 3.3.2.1

¹²⁴ Article 19 of SAL 1983

cases of nullity only, without examining the facts of the dispute. In this regard, it should be noted that some legal specialists have doubts,¹²⁵ as the competent court may exercise unlimited supervision when there is a suspicion of violations of *Sharia* law or public policy. Dina comments in this regard by saying ‘...this is envisaged to be, as it was under the 1983 Law, a highly discretionary process, showing the clear influence of *Sharia* on the new law’.¹²⁶ The issue now is a matter of time in order to see the real practice by the Saudi courts under the SAL 2012 and the Enforcement Law 2012. However, due to the difficulties of finding judicial decisions taken after the adoption of the new SAL 2012, there is a need to predict how the Saudi courts will deal with this issue based on the provisions of the SAL 2012. Therefore, the potential practices will be discussed in Chapter 6.¹²⁷

Regarding the recognition and enforcement of foreign arbitral awards, as was mentioned in (5.4.1.2), the Enforcement Court should enforce what is contained in foreign arbitral awards without reviewing the merits of the dispute *unless contrary to public policy*.¹²⁸ When the foreign award contains any violation of *Sharia* Law or of public policy, then the part with the breach shall be separated from the rest of the decision, and the non-violating part shall be enforced.¹²⁹ Therefore, the judicial review of the Saudi Enforcement Court is supposed only to refuse recognition and enforcement of the part of the foreign award relating to the violation; this is mentioned in Article 9 (1) of the Implementing Rules of the new SEL (2013).

5.4.2.1 When does the arbitral award in Saudi Arabia acquire the authority of *res judicata* under the New SAL (2012)?

This question was asked previously under the SAL 1983,¹³⁰ the summary answer was that the arbitral awards under the SAL 1983 acquired the authority of *res judicata* and became final only when the awards were approved and confirmed by the competent court.¹³¹ However, there are some changes in the new SAL 2012, according to Article 52 states ‘Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law is deemed to have the authority of *res judicata* and shall be enforceable.’ This improvement in the legal text leads to

¹²⁵ See Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia."; Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice."; and Dina Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?," *ibid.* p. 138

¹²⁶ Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?." P. 138

¹²⁷ See section 6.4.4

¹²⁸ Record Number (497) dated on 04/08/2012, issued by the Bureau of Experts at the Council of Ministers.

¹²⁹ Article 9 (1) of the Implementing Rules of the Saudi Enforcement Law

¹³⁰ See Subsection (3.3.3.1)

¹³¹ For more details, see subsection (3.3.3.1)

keep up with international standard in regard of arbitration side due to consider that as a fundamental principle of international practice. It is strictly applied in Germany, Sweden and Switzerland, while it is less in France,¹³² Italy, and Belgium.¹³³ Therefore, according to Article 52 of the SAL 2102, the arbitral awards shall be recognised as a binding and a final effect award without needing for any further conformal and approval by the competent court, there are some exceptions related to violation Islamic *Sharia* law or public policy reasons which will be discussed later in Chapter 6. However, the concept of ‘finality’ will be discussed in detail, because there is a debate from the point of view of *Sharia* law, which makes the principle of finality unstable in Saudi Arabia.¹³⁴

5.4.2.2 The Main Results from the Case of *Jadawel (Saudi Arabia) vs. Emaar (UAE)*¹³⁵

The case of *Jadawel vs. Emaar* is a prime example used by academic to indicate the ambiguity of enforcing arbitral awards in Saudi Arabia with regard to foreigners.¹³⁶ It is actually considered as a notorious example that has impacted negatively on the reputation of arbitration in Saudi Arabia, even though it was a national arbitration and was done through Saudi Arbitration law. However, it encountered an issue with regard to the grounds for challenge and the enforcement.

In this case, *Jadawel* (the plaintiff) started its claim of arbitration against *Emaar* (the respondent) before a three-member tribunal situated in Saudi Arabia in 2006, claiming damages in the amount of US\$ 1.2 billion. The claim was based on an alleged breach of contract by *Emaar* in terms of the partnership between the two companies. In 2008, the final award issued by the arbitral tribunal states that it dismissed *Jadawel*'s claims. However, the plaintiff challenged the arbitral award at the Second Commercial Circuit of the Board of Grievances. The court reviewed the award and examined the merits. It declined to enforce the arbitral award, and decided that *Emmar* had to pay damages of more than US\$380 million to *Jadawel*.¹³⁷

This case was used several times as example of the unclear position of arbitral awards as they are enforced in Saudi Arabia. It shows the obstacles that disputing parties face before

¹³² Article 1351 of the French Code of Civil Procedure (2011)

¹³³ Blackaby et al., *Redfern and Hunter on International Arbitration* . At p. 561

¹³⁴ See section 6.4.4

¹³⁵ *Jadawel International (Saudi Arabia) vs. Emaar Property PJSC (UAE)*; Case No. 4713/1/G in 1425 (2004)

¹³⁶ For example, see Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." At pp 387-408; Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?." At p.140; And Abdel Hamid El Ahdab, "The Recognition and Enforcement of Foreign Arbitral Awards in the Arab Gulf Region," *BCDR International Arbitration Review* 1, no. 1 (2014). At pp.105-119.

¹³⁷ Decision No. 131/D/T/2 in 1430 (2009)

enforcing an arbitral award, whether domestic or foreign. This case was considered under the procedures of Saudi arbitration law and was seated in Saudi Arabia; that is, the award was international. However, the award was reversed by the Saudi Court, and the frequent inquiry in the non-Saudi academic; it is articles focused on the likely outcome of foreign awards, if this is the case of a domestic arbitral award. As a matter of fact, this unclear situation was even subject of inquiries by Saudi academics.

- **Enforcing the Arbitral Awards under SAL 2012**

The procedures for enforcing arbitral awards in Saudi Arabia differ in terms of domestic and foreign arbitral awards; but in terms of the potential legal issues, they are similar. Due to the research's discussions about the legal issues of recognition and enforcement of arbitral awards in Saudi Arabia, there are many issues raised in this research that may defeat recognition, and enforcement of arbitral awards is generally common to domestic and foreign awards. Therefore, it is necessary to study and discuss each issue separately; the following discussion will begin by enforcement of domestic and international arbitral awards under the SAL 2012, and then foreign arbitral awards under the Saudi Law will be taken as a second main part.

5.4.3 Enforcing the Domestic or International Arbitral Awards under SAL 2012

Based on the preceding discussion in subsection (3.3.3.1) which described how to enforce the domestic arbitral awards under the SAL 1983, this section will assess this matter under the SAL 2012. The legal issues in the previous law will be examined through the new SAL 2012 in order to see if there is any improvement in legislative and practical sides. Therefore, the documents that shall be submitted at the enforcement under the SAL 2012 will be explained, and then the main requirements that shall be provided for enforcement will be discussed based on the SAL 2012. However, it should be clarified that the formal aspect is important in the current Saudi legislation. It is also important for many jurisdictions in the Islamic countries in the Middle East which have adopted an extremely formalistic methodology concerning the practical requirements in order to issue the arbitral awards.¹³⁸

¹³⁸ Nayla Comair-Obeid, "Salient Issues in Arbitration from an Arab Middle Eastern Perspective," *Arb. Brief* 4 (2014). 52; at p.65

5.4.3.1 The Documents that shall be Submitted at the Enforcement of the Arbitral Award under the SAL 2012

The legislature has determined a number of documents that should be made available for enforcing an arbitral award. Through these documents, the competent court will issue an order to enforce the arbitral award according to the SAL 2012.¹³⁹ It can then be enforced by the enforcement judge in the enforcement circuit according to Article (9) of the SEL 2012.¹⁴⁰ These documents are as follows:

1. the original or a signed copy of the award;
2. An authentic copy of the arbitration agreement;
3. An Arabic translation of the arbitration award, authenticated by an authorized entity if the award is issued in a foreign language; and
4. Evidence or any proof of the delivery of the award to the competent court ‘*proces-verbal*’, pursuant to Article 44 of this Law.¹⁴¹

Subsequently, the competent court should give the winning party a copy of the arbitral award that contains a stamp with the following phrase:

‘All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution requires application of force by the police.’¹⁴²

5.4.3.2 Requirements that shall be Provided to Enforce Domestic or International Arbitral Awards under the SAL 2012

There are a number of necessary verified conditions that will be discussed in some detail. Article 55 of SAL 2012 deals with the recognition and enforcement of arbitral awards with the provision of brief and specific conditions, in a similar way to what is stated in Article 58 of the Egyptian Arbitration Act 1994. On the other hand, the details that are mentioned in Section (103) of the English Arbitration Act, or Article 36 of the Model Law, are more extensive. These

¹³⁹ Article 53 of SAL (2012)

¹⁴⁰ Article (9) of the Saudi Enforcement Law (2012) stipulates that ‘Compulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are: ... (b) Arbitral awards which include enforcement order in accordance with the Law of Arbitration’

¹⁴¹ Article 53 of SAL 2012

¹⁴² Article 168 of the Law of Procedure before the *Sharia* Courts (2013)

requirements are better organized than what was previously presented in the practicing of the old law. These are as follows:

1. The arbitral award shall not violate *Sharia* Law and public policy.¹⁴³ This will be discussed in detail in a specific subsection later due to the importance of this requirement in Chapter 6.¹⁴⁴ Moreover, this requirement will be mentioned with examples in Section (5.4.4.1) as one of the requirements for enforcing foreign arbitral awards in Saudi Arabia.
2. The arbitral award shall not violate a previous judgment of any of Saudi Arabia's courts.¹⁴⁵ The problem with regard to this condition is that Saudi Arabia does not release or publish details of Saudi legal cases. There has been a cautious attempt to release some selected awards for a period of three years, which has led to the difficulty of knowing the violating aspects. Al-Ammari and Martin comment in this matter by saying that 'Saudi legal cases were not published in the public domain and because Saudi courts have customarily not applied the concept of *stare decisis* as practiced in Western jurisdictions'.¹⁴⁶ It should be mentioned that this approach is contrary to international practice.
3. Deadline for filing the action of nullification shall be lapsed.¹⁴⁷
4. The party against whom the arbitral award shall be informed properly.¹⁴⁸

5.4.4 Enforcing Foreign Arbitral Awards under the Saudi Law

The definition of 'foreign arbitral awards' is mentioned in Article I (1) of the New York Convention, which stipulates that the foreign arbitral award is the award that is 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal'.¹⁴⁹ This matter is considered as a critical step at an international commercial level due to the need to achieve the effectiveness of the means of arbitration. Therefore, various regional and international conventions

¹⁴³ Article 55 (2-b) of SAL 2012 states 'The award does not violate the provisions of *Sharia* and public policy in the Kingdom...'

¹⁴⁴ See section (6.4.2) and (6.4.3)

¹⁴⁵ Article 55 (2-a) of SAL 2012 states 'The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia'

¹⁴⁶ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." At p.405

¹⁴⁷ Article 55 (1) of SAL 2012 stipulates 'A petition to execute the arbitration award shall not be admitted, unless the deadline for filing a nullification action elapses'

¹⁴⁸ Article 55 (2-c) of SAL 2012 stipulates 'The award is properly notified to the party against whom it is rendered'

¹⁴⁹ the New York Convention Article I (1)

have been established, and many countries have joined these conventions.¹⁵⁰ However, these conventions are supposed to agree on a unified international formula to enforce foreign arbitral awards, but some difficulties arise, despite countries having joined the convention. In a survey prepared by the researcher Dr. Almutawa, the level of friendliness to enforce foreign arbitral awards in the GCC countries was measured. It shows that both Bahrain and the UAE received a high rating as the friendliest of the GCC countries, whereas Saudi Arabia recorded the lowest at 3.44 out of 10, which means it is the least friendly (see **Figure 3.1**).¹⁵¹

However, the explanation for the enforcement of foreign arbitral awards under the Saudi Law requires a discussion of three aspects, (a) the requirements that shall be provided for enforcement, (b) the procedural requirements for enforcement and (c) the grounds for refusal of recognition and enforcement of foreign arbitral awards in Saudi Arabia under the most recent legislation.

Figure (3.1)¹⁵²

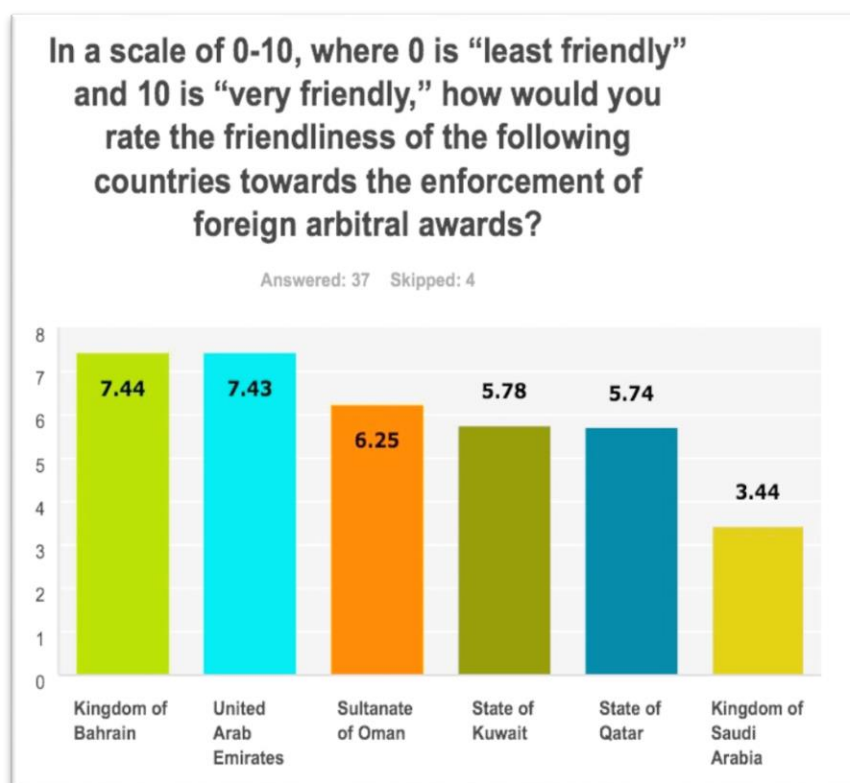


Figure 3.1 The level of Friendliness to Enforce Foreign Arbitral Awards in the GCC Countries

¹⁵⁰ See section (5.4.5)

¹⁵¹ Almutawa, "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." At p. 283

¹⁵² This figure is taken from *ibid.* at p. 283

5.4.4.1 Requirements that shall be Provided to Enforce a Foreign Arbitral Award

In the matter of foreign arbitral awards, there are a number of necessary verified conditions that are mentioned in the SEL 2012. These requirements are mentioned in Article 11 of this law, and focus on enforcing a foreign judgment or order, but Article 12 explains that Article 11 applied to foreign arbitral award as it stipulates ‘The provisions of the previous article shall apply to the arbitral awards issued in a foreign country’. However, this needs to be discussed in some detail. These provisions are as follows:

1. The principle of reciprocity shall be applied in order to enforce foreign arbitral awards in Saudi Arabia;¹⁵³ this is partially accentuated by Article 11 which stipulates that ‘Without prejudice to treaties and agreements, the enforcement judge may not execute a foreign judgment or order unless on the basis of reciprocity and upon ascertaining the following ...’. The rigidity of enforcement in foreign arbitral awards is not defined, and this is an applied principle following on from the previous arbitration law, but the question is whether the level of attention is the same or whether there has been an increase, especially as the enforcement judge is required to review the basic conditions, including the principle of reciprocity. There are old examples of requests by the Board of Grievances to prove the extent of reciprocity.¹⁵⁴ One of these examples is an arbitration award issued by the United States in which the plaintiff was unable to prove that there was reciprocity with the United States, and the enforcement was rejected by the Board of Grievances.¹⁵⁵ Article 11 (5) of the implementation of Rules of Enforcement law stressed that ‘The enforcement judge shall verify that the State in which the foreign award or order was issued, reciprocates with the Saudi Arabia, by an official statement from the Ministry of Justice’. The problem is that there is no official accredited list provided by the Ministry of Justice with regard to those countries that hold an agreement in terms of reciprocity. Therefore, there are two options. The first is that the party who wishes the enforcement proves the existence of this principle; the second is that the enforcement judge inquires of the Ministry of Justice in this regard, and there may be no answer. Al-Ammari and Martin comment in this respect by saying that ‘Saudi Ministry of Justice applies that protocol properly, arbitration awards issued by tribunals seated in countries that have ratified either of those conventions should satisfy the requirement of reciprocity since Saudi Arabia has ratified

¹⁵³ Article 11 of Enforcement Law 2012

¹⁵⁴ See section 3.3.3.2.2 (i)

¹⁵⁵ Case No. 115/D/A/15 in 2008

those same conventions and has acquired similar reciprocal rights'.¹⁵⁶ Article 94 of SEL states that 'The application of this Law shall not prejudice treaties and agreements concluded between the Kingdom and countries, international institutions and organizations'.

The principle of reciprocity was previously discussed under the SAL 1983,¹⁵⁷ the Saudi Government presented its reservation when they joined to the New York Convention (1958) on the 19th April 1994. Through using its right in Article I (3) of the New York Convention (1958), Saudi Arabia emphasised the application of the principle of reciprocity. However, the new legislation, such as Article 11 of the Enforcement Law 2012 and Article 11 (5) of its Rules 2013, are based on an earlier approach from the Saudi Government through circulars and previous instructions.¹⁵⁸ The noticeable thing is the attention of the Saudi courts to this requirement despite the fact that the Saudi Government joining the NY Convention, which most countries having now joined, means the issue of the principle of reciprocity has become marginal.¹⁵⁹ In this respect, Redfern and Hunter comment by saying 'As more countries become Convention countries, the reciprocity reservation becomes less significant. Indeed, it is becoming a relic.'¹⁶⁰ One Saudi jurist said that 'international arbitration treaties to which the Kingdom is a party, including the Riyadh Convention and the New York Convention, should establish the necessary reciprocity'.¹⁶¹

2. The arbitral award shall not violate public policy¹⁶² which, in Saudi Arabia, means *Sharia* Law.¹⁶³ This aspect will be discussed in detail later in a specific subsection due to the importance of this requirement.¹⁶⁴ However, when the award contains a violation of *Sharia* Law or public policy, the part with the violation shall be separated from the rest of the decision and the non-violating part shall be enforced.¹⁶⁵ Article 9 (1) of the Implementing Rules of the SEL emphasised that the judicial review of the enforcement is the only means of refraining from applying the violator stipulation without the abolition of the executive bond or the

¹⁵⁶ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." p.404

¹⁵⁷ See section 3.3.3.2.2 (i)

¹⁵⁸ Such as Circular No.7 of the President of the Board of Grievances and Decision No. 116 of the President of the Board of Grievances on 6 May 1985.

¹⁵⁹ Blackaby et al., *Redfern and Hunter on International Arbitration*. At P.636

¹⁶⁰ *Ibid.*, p. 636.

¹⁶¹ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." At p.404

¹⁶² Article 11 (5) of Saudi Enforcement Law as states 'The judgment or order is not in conflict with public policy in the Kingdom'

¹⁶³ Article 11 (3) of the implementation Rules of the Saudi Enforcement Law, which stipulates 'The public policy in Saudi Arabia means the *Sharia* law'

¹⁶⁴ See section (6.4)

¹⁶⁵ Article 55 (2-b) of SAL 2012 states that '... If the award is divisible, an order for execution of the part not containing the violation may be issued'

adjudication.¹⁶⁶ This is considered a significant improvement, because the Saudi courts' attitude was to apply a strict test with regard to prohibited matters in *Sharia* Law, especially after Decision No. 116 of the President of the Board of Grievances,¹⁶⁷ on 25th July 2007. An example of this attitude is in Decision No. (115/1429) in 2008, where the competent court of the Board of Grievances held that the foreign arbitral award cannot be enforced on the grounds that the award includes the charging of interest '*Riba*', and this is prohibited in Islamic Law, *even if it is just a small part of the award*.¹⁶⁸ The new approach that is mentioned in Article 55 (2-b) in SAL 2012 and Article 9 (1) of the Implementing Rules of the SEL has reminded us of the Saudi court's position before 2007, where the Board of Grievances made a decision that the parts of the award containing the charging of interest '*Riba*' were refused and not enforced, while the rest of the award was recognised in terms of being enforced, examples of this attitude are Decision No. (1851/1414) in 1994, Decision No. (1903/1414) in 1994,¹⁶⁹ Decision No. (235/T/2) in 1995, and Decision No. (208/T/2) in 1997;¹⁷⁰ all of these foreign arbitral awards included forcing the respondent to pay to the plaintiff a number of orders, including the charging of interest '*Riba*'. The Saudi court approved the part of the decision that did not violate *Sharia* Law, and declined the part that contained usury '*Riba*'.¹⁷¹ Dr. Almutawa, in his survey, explained that public policy is '...the most common reason for non-enforcement of foreign arbitral awards, when public policy is a common ground among the GCC states.'¹⁷²

3. It shall be confirmed by the Enforcement Judge that 'the courts of the Kingdom have no competent jurisdiction to review a dispute regarding which a judgment or an order was issued. The foreign courts, that issued such judgment or order, have jurisdiction over it in accordance with rules of international judicial jurisdictions stated in their laws'.¹⁷³
4. The Enforcement Judge has to ascertain that the disputing parties in a case in which the decision was made, have been assigned to attend properly, and are able to defend themselves.¹⁷⁴ It should be clarified that there is a concern in many Muslim countries in the

¹⁶⁶ Article 9 (1) of the implementation Rules of the Saudi Enforcement Law.

¹⁶⁷ Circular No. 116 of the President of the Board of Grievances, which emphasised that *the award shall not contain any sums prohibited in Islamic Law, even if it is just a small part of the award, this matter should be achieved in order to enforce it*.

¹⁶⁸ For more details, see section (3.3.3.2.2) (g)

¹⁶⁹ AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." At p.335

¹⁷⁰ AL-Firyaan, *The National and Foreign Arbitration in Saudi Arabia*. At p.247-69

¹⁷¹ For more details, see section (3.3.3.2.2) (g)

¹⁷² Almutawa, "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." At p. 182

¹⁷³ Article 11 (1) of Saudi Enforcement Law.

¹⁷⁴ Article 11 (2) of Saudi Enforcement Law, which stipulates 'The litigants of a lawsuit in which a judgment was rendered were summoned to appear, were duly represented and were given the right to defend themselves'

Middle East in the matter of requiring the witnesses to swear an oath while presenting their oral testimony to the tribunal during the hearing; therefore, this matter is considered a crucial issue in Islamic countries. For example, the Cassation Court of Dubai refused to enforce a \$25 million award in the Bechtel Case because the arbitral tribunal ‘failed to swear in the witness using the formula prescribed for Dubai court hearings’.¹⁷⁵

5. The Enforcement Judge has to ascertain that the arbitral award has to be final, and has acquired the authority of *res judicata* in accordance with the foreign court that issued it.¹⁷⁶
6. It shall be confirmed by the Enforcement Judge that the arbitral award is not in conflict with any other judgment or judicial order issued on the same case by a competent court in Saudi Arabia.¹⁷⁷

5.4.4.2 Procedural Requirements to Enforce the Foreign Arbitral Award

The procedural requirements are mentioned in Article 11 of the implementation Rules of the SEL 2013. They shall be provided in order to enforce the foreign arbitral awards in front of the Enforcement Judge who is required to enforce the foreign arbitral awards in the enforcement circuit.¹⁷⁸ However, there are a number of procedural requirements that shall be met in order to end the enforcement phase in Saudi Arabia. These are as follows:

1. A certified official copy of the arbitral award issued by the foreign competent authority shows that the award is ready to be enforced, and shall be appended by executive formats, or shall accompany it.¹⁷⁹
2. A certification that the arbitral award has become a final award, and has acquired the authority of *res judicata*, unless it is stipulated in the same award, and that the award is issued by a competent judicial authority to the case in the foreign country.¹⁸⁰

¹⁷⁵ *Bechtel vs. the Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Petition No. 503/2003, (May 15 2005). Cited in Comair-Obeid, "Salient Issues in Arbitration from an Arab Middle Eastern Perspective." At pp. 65-66

¹⁷⁶ Article 11 (3) of the Saudi Enforcement Law, which stipulates ‘The judgment or order became final in accordance with the law of the court that issued it’

¹⁷⁷ Article 11 (4) of the Saudi Enforcement Law, which stipulates ‘The judgment or order is not in conflict with any other judgment or order issued on the same case by a competent judicial body in the Kingdom’

¹⁷⁸ Article 14 of Saudi Enforcement Law.

¹⁷⁹ Article 11 (1-a) of the implementation Rules of the Saudi Enforcement Law.

¹⁸⁰ Article 11 (1-b) of the implementation Rules of the Saudi Enforcement Law.

3. A copy of the notification document of the foreign arbitral award, authorized so that it matches the original, or any other document that would prove the defendant's declaration that it is a correct declaration in the case of an absentia sentence.¹⁸¹
4. It is required that there has been no existing case in Saudi Arabia before the lawsuit that the foreign arbitral award was issued for.¹⁸²
5. All submitted documents that have been issued by the official authorities in the foreign country or which have come from outside Saudi Arabia, are required to be certified by the Foreign and Justice Ministries of the Saudi Government and translated into Arabic by an accredited translation office.¹⁸³
6. The Enforcement Judge shall verify that the State in which the foreign arbitral award was issued, reciprocates with Saudi Arabia, through an official statement from the Ministry of Justice.¹⁸⁴
7. The foreign arbitral award shall not be enforced in issues that are unique in the area of legal jurisdiction considering that they are under the Saudi courts, such as a lawsuit involving real estate in Saudi Arabia and so on.¹⁸⁵

5.4.4.3 The Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia under the Most Recent Legislation

This matter has been discussed previously. A number of grounds for refusal were presented based on the New York Convention 1958, the Riyadh Arab Convention on Judicial Cooperation 1983, the Procedural Rules of the Grievances Board, Decision No. 116,¹⁸⁶ and Circular No.7 of the President of the Board of Grievances.¹⁸⁷ There are nine grounds for refusal to recognise and enforce foreign arbitral awards in Saudi Arabia.¹⁸⁸ This part will present the changes that have been introduced by the SEL 2012 and its Rules 2013. Moreover, it will consider whether Saudi Arabia has adhered to the letter and spirit of Article V of the NYC 1958 in their grounds for refusal to enforce the foreign arbitral awards.

¹⁸¹ Article 11 (1-c) of the implementation Rules of the Saudi Enforcement Law

¹⁸² Article 11 (2) of the implementation Rules of the Saudi Enforcement Law.

¹⁸³ Article 11 (4) of the Implementation Rules of the Saudi Enforcement Law.

¹⁸⁴ Article 11 (5) of the Implementation Rules of the Saudi Enforcement Law.

¹⁸⁵ Article 11 (6) of the Implementation Rules of the Saudi Enforcement Law.

¹⁸⁶ Issued by the President of the Board of Grievances on 25th July 2007

¹⁸⁷ Issued on 6 May 1985

¹⁸⁸ See section (3.1.3.2.2) in Chapter 3

The SEL 2012 and its Rules 2013 have identified the grounds for refusal to enforce foreign arbitral awards, based on a request of the party against the enforcement of the foreign arbitral award. However, it should be clarified that Article 96 states that the new law repeals and re-organises the Decision No. 116 and Circular No. 7 which was issued by the Board of Grievances.¹⁸⁹ Therefore, according to Article 11 of Enforcement Law 2012 and Article 11 of its Rules 2013, the new grounds for refusal to enforce foreign arbitral awards can be identified as follows:

- a. When there is no agreement to apply the principle of ‘reciprocity’;¹⁹⁰ or
- b. When the Saudi Courts have a competent jurisdiction to review a dispute;¹⁹¹ or
- c. When the foreign tribunal that issued the awards does not have jurisdiction over the dispute in accordance with the rules of international judicial jurisdictions stated in their laws;¹⁹² or
- d. When an aggrieved party in a case in which the decision was made, has not been assigned to attend properly, and is not able to defend themselves;¹⁹³ or
- e. When the arbitral award is not final or binding according to the law of the court that issued it;¹⁹⁴ or
- f. When the arbitral award is in conflict with any other judicial judgment issued in the same case by a competent court in Saudi Arabia;¹⁹⁵ or
- g. When the arbitral award is in conflict with the public policy in Saudi Arabia;¹⁹⁶ or

¹⁸⁹ Article 96 of the Enforcement Law 2012 states ‘This Law shall repeal Articles (196 to 232) of the Law of Procedure before *Sharia* Courts issued by Royal Decree No. M/21 dated 20/05/1421H and paragraph (G) of Article 13 of the Board of Grievance Law promulgated by Royal Decree No. M/78 dated 19/9/1428H and any provisions conflicting therewith’

¹⁹⁰ Article 11 of the Saudi Enforcement Law 2012 states ‘Without prejudice to treaties and agreements, the enforcement judge may not execute a foreign judgment or order unless on the basis of reciprocity...’

¹⁹¹ Article 11 (1) of SEL 2012, which stipulates ‘...the enforcement judge may not execute a foreign judgment or order unless ... upon ascertaining the following: (1) The courts of the Kingdom have no competent jurisdiction to review a dispute regarding which a judgment or an order was issued...’

¹⁹² Article 11 (1) of SEL 2012, which stipulates ‘...the enforcement judge may not execute a foreign judgment or order unless ... upon ascertaining the following: (1) ... The foreign courts that issued such judgment or order have jurisdiction over it in accordance with rules of international judicial jurisdictions stated in their laws’

¹⁹³ Article 11 (2) of SEL 2012, which stipulates ‘...the enforcement judge may not execute a foreign judgment or order unless ... upon ascertaining the following: (2) The litigants of a lawsuit in which a judgment was rendered were summoned to appear, were duly represented and were given the right to defend themselves’

¹⁹⁴ Article 11 (3) of SEL 2012, which stipulates ‘...the enforcement judge may not execute a foreign judgment or order unless ... upon ascertaining the following: (3) The judgment or order became final in accordance with the law of the court that issued it’

¹⁹⁵ Article 11 (4) of SEL 2012, which stipulates ‘...the enforcement judge may not execute a foreign judgment or order unless ... upon ascertaining the following: (4) The judgment or order is not in conflict with any other judgment or order issued on the same case by a competent judicial body in the Kingdom’

¹⁹⁶ Article 11 (5) of SEL 2012, which stipulates ‘...the enforcement judge may not execute a foreign judgment or order unless ... upon ascertaining the following: (5) The judgment or order is not in conflict with public order in the Kingdom’

- h. When there is an existing case in Saudi Arabia before the lawsuit that the foreign arbitral award was issued for;¹⁹⁷ or
- i. When the arbitral award is issued in matters that are unique to the area of legal jurisdiction that is only considered under the Saudi courts, such as a lawsuit involving real estate in Saudi Arabia.¹⁹⁸

Does Saudi Arabia adhere to the letter and spirit of Article V of the NYC in their grounds for refusal to enforce foreign arbitral awards?

Turning now to the international conventions, Article 11 of the Enforcement Law emphasised that the enforcement procedure shall be compliant with the requirements of international treaties and conventions. The most important conventions that the Enforcement Circles will consider is the New York Convention 1958 and the Riyadh Convention 1983. The question that may arise is whether Saudi Arabia adheres to the requirements of Article V of the NYC in their grounds for refusal to enforce foreign arbitral awards? From a review of the previous grounds for refusal that have been applied under the Saudi law, it can be seen that some of these grounds are taken from Article V of NYC. Nevertheless, the Saudi legislation emphasised that the grounds of refusal that are mentioned in the international conventions, which Saudi Government has signed, shall be considered in order to recognise and enforce foreign arbitral awards in Saudi Arabia.¹⁹⁹ Therefore, it can be said that the grounds of refusal that are applied in Saudi Arabia are those mentioned in Article (11) of the SEL and its Rules, in addition to what are referred to in the international conventions, taking into consideration the duplicate grounds of refusal. On the issue of an applicable law, it should be noted that the grounds for the total disregard of the applicable law to the contract is not expressly included in the NYC. However, through judicial activism, it has been applied in a number of jurisdictions. In this regard, Fouchard explained that ‘The [New York] Convention allows the courts to refuse enforcement where the arbitrators fail to comply not only with any of the procedural rules adopted by the parties, which is not the case in French law, but also, if the parties have not chosen procedural rules, where the arbitrators failed to comply with the procedural rules of the law of the seat of the arbitration’.²⁰⁰ According to Article V of NYC, the recognition and enforcement of arbitral awards may be refused when one of the following cases is met:

¹⁹⁷ Article 11 (2) of the implementation Rules of the Saudi Enforcement Law.

¹⁹⁸ Article 11 (6) of the Implementation Rules of the Saudi Enforcement Law.

¹⁹⁹ Article 11 of the Saudi Enforcement Law 2012

²⁰⁰ Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. At pp. 988-990

- a. When there is a lack of capacity in one of the parties to conclude the arbitration agreement under the law applicable to them; or there is a lack of validity of the arbitration agreement under the law to which the parties agreed, or failing any indication thereon under the law of the country where the award was made; or
- b. When an aggrieved party in the award that is invoked was not properly permitted to appoint the arbitrator or to notify about the arbitration proceedings, or was not able to defend or present themselves; or
- c. When the arbitral award deals with issues that were not contemplated by or do not fall within the terms of the arbitration clause; or the arbitral awards contains matters beyond the scope of the submission to arbitration; or
- d. When the composition of the arbitral tribunal or the arbitral proceedings violate what was agreed between the dispute parties, or breach the law of the country in which the award was made when this agreement is absent; or
- e. When the arbitral award is not final or binding according to the law of the court that issued it, or has been set aside or suspended by the competent courts;²⁰¹

Moreover, the recognition and enforcement of arbitral awards may also be refused when the Saudi Enforcement Courts - on its own motion '*ipso jure*'- finds one of the following cases:

- f. When the subject-matter of the conflict is not capable of settlement by arbitration under the law of that country; or
- g. When the arbitral award is in conflict with the public policy of the country that will enforce it.²⁰²

On the other hand, Article 37 of the Riyadh Convention 1983 provided five grounds on which recognition and enforcement of foreign arbitral awards may be refused under this convention. However, this convention has been discussed previously,²⁰³ but it should be mentioned that the most significant ground is Article 37 (e) which states, 'If any part of the adjudication be in contradiction with the provisions of Islamic *Sharia*, the public order or the rules of conduct of the requested party'. The content of this Article clearly shows that the arbitral award should not be contrary to *Sharia* law. In summary, during the previous review it was said that the Saudi government applied Article V of NYC in their grounds for refusal to enforce foreign arbitral awards. In addition, Article 11 of SEL 2012 and its Rules clarify that the Saudi law was compatible

²⁰¹ Article 5 (1) of the NYC

²⁰² Article 5 (2) of the NYC

²⁰³ See section (3.1.3.2.2)

with the international conventions, such as the NYC. The reality, according to what was presented, is that the grounds for refusal that are applied in Saudi Arabia are broader than those implemented internationally.

5.4.5 Conventions for Enforcement of Foreign Arbitral Awards

The Saudi Government has signed a number of regional and international conventions which were considered to be very significant steps in the matter of recognising and enforcing foreign arbitral awards. Accordingly, due to their importance, they will be briefly discussed in order to understand the position of Saudi Government from them, these conventions are as follows:

5.4.5.1 The Arab League Countries Convention (1952)

Saudi Arabia signed the agreement for this convention on 5th April 1954. The Arab countries joined this convention in order to recognise and enforce foreign judicial and arbitral awards among Arab nations when it is final. This was considered as the first step of the Saudi Government in order to recognise and enforce foreign awards between Saudi Arabia and the rest of the Arab nations.

5.4.5.2 The New York Convention (1958)

The main purpose of this convention was to recognise and enforce foreign arbitral awards related to international commercial arbitration.²⁰⁴ The number of members that have joined the convention has grown to 149 countries.²⁰⁵ The Saudi Government was one of these countries which joined this convention on 19th April 1994²⁰⁶ by the Royal Decree No. M/11, based on the Decision of the Ministers Council No. 78 on 27th January 1993. It is worth mentioning that Saudi Arabia has made a reservation concerning the stipulation of the principle of reciprocity²⁰⁷ through its right in Article I (3) of the New York Convention.²⁰⁸ Given that 149 countries have joined the convention, the importance of the reservation clause has diminished. Redfern and Hunter comment by saying ‘As more countries become Convention countries, the reciprocity reservation becomes less significant. Indeed, it is becoming a relic’²⁰⁹ However, it should be noted that the Saudi

²⁰⁴ Blackaby et al., *Redfern and Hunter on International Arbitration*. At p.72

²⁰⁵ The NY Conventions website, <http://www.newyorkconvention.org/contracting-states>

²⁰⁶ Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?." At p.920

²⁰⁷ It has been previously discussed in Section 5.4.4.1

²⁰⁸ Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?." p.952

²⁰⁹ Blackaby et al., *Redfern and Hunter on International Arbitration*, p. 636.

Government has adopted Article V (2-b) of the NYC,²¹⁰ which is related to the fact that the award shall not breach the public policy that exists in Saudi Arabia. This has made it difficult for foreign arbitral awards to be recognised and enforced.²¹¹ Roy stated in his article that, ‘Saudi Arabia has traditionally been hostile to the recognition and enforcement of non-domestic arbitral awards, finding these awards contrary to Saudi Arabian law and public policy’.²¹² There is also a legal expert comments by saying ‘Critics condemn the New York Convention for allowing Saudi Arabia to accomplish the goal of “modernizing” its international dispute resolution methods while concurrently providing a “safe harbor” for the country to electively enforce foreign arbitral awards that are contrary to its public policy’.²¹³

5.4.5.3 The Washington Convention (1965)

The Washington Convention is formally known as ‘the Convention on the Settlement the Investment Disputes between States and National of other States.’ or, less formally, as ‘the ICSID Convention’.²¹⁴ The Saudi Government signed the convention in September 1979, and it entered into force on the 7th June 1980.²¹⁵ It should be noted that the Saudi Government has emphasised that the framework of this convention shall not apply in terms of any matter relating to national sovereignty or its oil disputes.²¹⁶ There has only been one ICSID case involving the Saudi Government and it was settled amicably.²¹⁷

5.4.5.4 The Riyadh Convention (1983)

The Riyadh Convention is clearly similar to the NYC (1958), excepting that it was obviously emphasised that the arbitral award shall not be in violation of the *Sharia* Law. The Riyadh Convention was established in Riyadh on 6th April 1983; it is considered to be one of most conclusive conventions within the framework of the Arab League Countries. The Riyadh Convention stressed that the authority competent to issue the order of enforcement is not permitted to look into the merits of the dispute, and the rejection of enforcement of the judicial and arbitral

²¹⁰ Article V (2-b) of NYC states ‘...(2) 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: (b) The recognition or enforcement of the award would be contrary to the public policy of that country’

²¹¹ For more details, see section 6.4.3

²¹² Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?." At p. 922

²¹³ Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East." At P.50

²¹⁴ Blackaby et al., *Redfern and Hunter on International Arbitration*. At p. 64

²¹⁵ Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. At p.110-111

²¹⁶ Ibid.

²¹⁷ *Ed. Züblin AG vs. Kingdom of Saudi Arabia* (ICSID Case No. ARB/03/1); cited in *ibid.* at p.110-111

awards shall be the basis of the cases that are mentioned in the convention. Article 37 of the Convention provides that Member States have to recognise and enforce arbitral or judicial awards issued by another Member without looking at the merits of the case, but there are a number of exceptions.²¹⁸ The exception (e) to this Article states ...‘If any part of the adjudication be in contradiction with the provisions of Islamic *Sharia*, the public order or the rules of conduct of the requested party’.²¹⁹

5.4.5.5 The Amman Convention (1987)

The Amman Convention is a regional convention on arbitration. Through the Council of Arab Ministers of Justice, the Convention was concluded on 14th April 1987 in Amman, Jordan. This convention is considered to be one of the most important Arab conventions; this is because the convention structured commercial arbitration on the basis of institutional arbitration.²²⁰ It adopted the limited grounds for challenge in order to enforce the arbitral award. Article 35 of the Convention²²¹ stressed that when the arbitral award is contrary to the public policy of a country where it shall be enforced, the award cannot be enforced.²²²

5.4.6 Arbitration Institution Expected to be set up in Saudi Arabia

The old law did not tackle this issue, and there is no official body for these institutions. The Chambers of Commerce in the Kingdom of Saudi Arabia accomplish this mission by its diligence. Moreover, the majority of adversaries would favour the use of an arbitration institution in Bahrain, Cairo or Dubai, since it is easy and simple when it comes to dealing with these institutions. In fact, the new law was issued in 2012, and it indicated that there are arbitration institutions. But details of the activity of these institutions, were expected to be explained by the Implementation Rules that the law recommended in Article 56. It did not specify the part that was obliged to issue it. This has actually hindered its creation up to the present day. The

²¹⁸ A.J. Gemmill, "Commercial Arbitration in the Islamic Middle East," *Santa Clara Journal of International Law* 5, no. 1 (2006). At p. 190; see website: http://www.scu.edu/scjil/archive/volume5_issue1.shtml

²¹⁹ Without prejudice to the provisions of Articles 28 and 30 of this Agreement adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this Part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgement except in the following cases: ... (e) If any part of the adjudication be in contradiction with the provisions of Islamic *Sharia*, the public order or the rules of conduct of the requested party...’

²²⁰ AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." at pp. 352-354

²²¹ Article 35 of Amman Convention states ‘The Supreme Court of each contracting State must give leave to enforce to awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public order.’

²²² El-Ahdab, *Arbitration with the Arab Countries*. at pp.886-887

Implementation Rules must include the necessary conditions for the establishment of an arbitration institution, in terms of its importance for the accomplishment of arbitration procedures and the selection of arbitrators.

In addition, the Council of Ministers presented Order N° 257 on 14/04/2014 to set up the Saudi Centre for Commercial Arbitration that is expected to manage the arbitration procedures and the registration of qualified arbitrators, in addition to the supervision of the private arbitration institutions that await the new Implementation Rules in order to start their activities. The proposed Centre will have to deal with a number of business activities related to commercial arbitration, nominate the arbitrators, set arbitrators' standards, and supervise the issuance of other branches, both inside and outside Saudi Arabia. It will also supervise issues related to private commercial disputes. Moreover, the Centre will represent Saudi Arabia in the field of commercial arbitration locally and internationally, in coordination with the Ministry of Justice. The quick establishment of these institutions will help to achieve confidence in the SAL 2012, whereas delay will increase the worry and uncertainty about the new arbitration law. One legal writer comments by saying '...the absence of a recognized arbitral institution and the uncertain intervention of the state courts in arbitration proceedings can leave skeptics weary of the new law'.²²³ She added that there is a need for these arbitration institutions to establish clear published guidelines and schedules of fees of arbitrators in order to avoid the non-professional arbitrators and high costs which were observed in *Jadawel vs. Emaar*.²²⁴ There is a writer who said that it is necessary to wait until it can be seen whether the new institutions will be received with the same acceptance as other regional and European institutions.²²⁵

5.5 Conclusion

This chapter has dealt with the matter of enforcement of arbitral awards in Saudi Arabia, whether the award is domestic or foreign. The methods of issuing the arbitral awards and procedural steps for enforcement have been discussed. The issues related to challenging arbitral awards, such as the competent court to decide the challenge and the grounds for the challenge, have been considered and addressed. In this regard, the details of the procedural requirements of

²²³ Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?." At p. 138

²²⁴ Ibid. p. 137

²²⁵ JPN Harb and AG Leventhal, "What to Expect When Arbitrating in the Kingdom of Saudi Arabia," *Transnational Dispute Management (TDM)* 12, no. 2 (2015). At p.15

enforcing domestic and foreign arbitral awards have been described and criticised, before discussing the international conventions and establishing the arbitral institutions in Saudi Arabia.

It is concluded that the new law, in general, promises a new approach which is supportive of the enforcement of arbitral awards. It conforms in many parts to new internationally recognised legal principles, which promises an ‘arbitration-friendly’ approach. The SAL 2012 has removed many legal obstacles which related to the previous law, such as identifying the limited grounds for the challenge, the competent court to decide the challenge and the inadmissibility of the competent court to review the merits of the dispute. There is a serious desire to move towards to the modernisation and harmonisation between the SAL 2012 and international practice. Moreover, issuance of the SEL 2012 gave a strong push towards the systemisation and organisation of the procedures to enforce foreign judicial and arbitral awards. However, there are a number of legal issues remain unresolved, which were identified in this chapter. These issues may likely to compromise the pro-enforcement approach envisaged under the SAL 2012. The new law contains many restrictions due to the requirement that the arbitral award should not violate *Sharia* law or public policy. This will lead to a number of potential legal obstacles which will be discussed in Chapter 6. Moreover, the inability of legislature to be open and clear in some matters, such as the principles of finality, reciprocity and separability.

In parallel with the international conventions, there are some outstanding and unclear issues related to the aspect of jurisdiction to hear claims associated with commercial arbitration in Saudi Arabia. Furthermore, on the subject of speed the enforcement of arbitral awards does not appear to be rapid, the one who wants to enforce the arbitral domestic or international award under the SAL 2012 will exceed through a number of phases before he achieves his aim, beginning with the approval of the award by the competent court, then confronting the other obstacle which is the issuing of the enforcement order for the arbitral award by the enforcement judge. Both phases need to provide a number of documents and verify all the required conditions. Finally, the matter of delay in the issuance of the Implementation Rules of the SAL 2012 and establishing the arbitration institutions could increase the worry and uncertainty about the new arbitration law. However, it should be clarified that even if the argument is that the SAL 2012 is very progressive, there is the possibility that applying new laws will be influenced by a Saudi judicial culture which is not used to the international practice pro-arbitration stance that was mentioned in Chapter 2.²²⁶

²²⁶ See section (2.3)

Chapter 6

6 Chapter Six: The Potential Legal Obstacles that could Face the Enforcement of Arbitral Awards in Saudi Arabia

6.1 Introduction

The issuance of the new Arbitration Law 2012 and the Enforcement Law 2012 is considered to be a substantial improvement, making the future looks promising with regard to the enforcement of arbitral awards in Saudi Arabia, whether domestic or foreign. On the other hand, many challenges and obstacles remain, especially in relation to the enforcement of foreign arbitral awards. These challenges and obstacles could be observed through Saudi legislation or judicial practices, and the outcomes are not yet clear. More effort should be put into the harmonisation of the rules of Islamic *Sharia* that are applied to arbitration, and to the practice of international commercial arbitration. The complete harmonisation may be a mammoth task and therefore too difficult to realise, but a good degree of harmonisation may be achievable. First we will turn to discuss areas of conflict between *Sharia* and the practice of international commercial arbitration, and then turn to offer possible answers.

There are some difficulties that could be expected when it comes to enforcing an arbitral award in Saudi Arabia. The legal issues that will be discussed in this section are the issues that are related to the judicial practices that existed during the previous SAL 1983 regime. The other difficulty is due to the lack of clarity in the position of the new 2012 law about certain legal issues; therefore, there are still outstanding legal issues within the new regime, because some legal issues that existed during the old regime have not been fully resolved by the new law.

In this section, there are a number of important topics that must be considered in order to understand the potential legal obstacles that a winning party may be faced with when seeking the recognition and enforcement of the arbitral awards in Saudi Arabia, whether the awards are domestic, international or foreign. These legal issues may affect the different types of arbitral award without distinction. However, the real reasons behind these legal issues are unclear. They may be due to the conflict between the provisions of Islamic *Sharia* law and international practice, or due to an anti-Western bias against the enforcement of arbitral awards. It should be mentioned that there are some Arab Countries in the Middle East that have an anti-Western bias against the enforcement of arbitral awards, which led to adverse decisions about the enforcement of arbitral awards carrying the nationality of a Western country.¹ There are historical reasons explaining this which go back to the era of ‘Western imperialism’, which has left many scars on the Middle East.²

¹ Barrett, "Tale of Two Countries: A Comparison of the International Commercial Arbitration Laws of Egypt and Ireland, A." At p.25

² Ibid. At p.25

All Phases of Arbitration Procedure shall not be Conflict with the Provisions of Islamic Sharia:

When the Saudi legislature prepared the new SAL 2012, they adopted the consensus view of Muslim jurists that an arbitral award should not violate the principles of Islamic *Sharia* Law; otherwise, the award would be null and unenforceable. Therefore, the disputing parties and the arbitral tribunal should take the provisions of *Sharia* Law into account, principally when the arbitration dispute is international or deals with foreign arbitral awards that will be enforced in Saudi Arabia. In Article 50 (2) of new SAL it is stated that the competent court can decide on the invalidity of an arbitral award when the arbitral award violates the provisions of Islamic *Sharia* Law and goes against public policy in Saudi Arabia.³ According to the inquiry on the part of the Supreme Judicial Council⁴ to the King of Saudi Arabia on the definition of public policy in Saudi Arabia, the answer in the Royal Order was that public policy in Saudi Arabia means the overall provisions of Islamic *Sharia* Law based on the interpretation of the Muslim Holy Book (*Quran*⁵) and the traditions of his messenger (*Sunnah*⁶).⁷

Nevertheless, the significant commitment of the Saudi Government to apply *Sharia* law has faced many difficulties with regard to compatibility with international legislation. Some Western jurists believe in the greatness of *Sharia* law, but it is not capable or appropriate for modern commercial transactions; as Ballantyne explained, ‘The *Sharia* is one of the great systems of law, but it is not, in my view, appropriate in many respects to what the world has made of commerce. In this, it may well be that commerce, not the *Sharia*, is at fault- but the fact remains’.⁸ This view is worthy of consideration to understand its causes and ascertain the accuracy of this opinion. However, the phases of arbitration that will be covered in this chapter are: (a) the arbitration agreement, (b) the arbitration procedures, and (c) the arbitration decision. The legal issues that will be presented are associated with the enforcement of arbitral awards in Saudi

³ Article 50 (2) of SAL (2012) states ‘The competent court deciding the action for nullity shall, by its own initiative, nullify the award if its content violates the provisions of *Sharia* (Islamic Law) and public order in the Kingdom...’

⁴ The inquiry number is (8898), dated on 27/05/2012.

⁵ The *Quran* is the word of God, ‘*Allah*’, which was repeatedly revealed to the prophet Mohammed. It is the main source of Islamic law.

⁶ The *Sunnah* consists of the deeds and utterances of the Prophet Mohammed. Also, it is the approval of what is said and done.

⁷ Royal Order Telegraph No. 44983 dated on 22/08/2012.

⁸ W.M. Ballantyne, "Arbitration in the Gulf States: Delocalisation: A Short Comparative Study," *Arab LQ* 1 (1985). 205-215

Arabia.⁹ The reason for this division into three phases is due to the logical structure of the challenges in the enforcement of arbitral awards.

6.2 Arbitration Agreement

In a review of the provisions of the new SAL 2012, it should be noted that the legislature was keen to maintain the conformity of all aspects of arbitration procedures with the provisions of Islamic *Sharia* Law, and that such procedures should not violate *Sharia* Law. In the beginning, when the matter of agreement on arbitration is considered, it can be found that the Saudi legislature stressed the need to apply the provisions of the new SAL to any arbitration, irrespective of the nature of the legal relationship of the matter under dispute, provided the provisions shall not contravene the provisions of Islamic Law and the international conventions to which Saudi Arabia is party, whether the arbitration is national or international.¹⁰ Similarly, Article 5 of the new SAL allowed the disputing parties to agree to subject the relationship between them to the provisions of any document (model contract, international agreement, etc...) as long as they did not contravene the provisions of *Sharia* Law.¹¹ Dr. Baamir comments in this regard by saying that ‘This theory has not yet proved to work in practice and we need some time to observe whether institutional arbitration will be accepted by the supervisory courts or not’.¹² However, the contracts and agreements in Saudi Arabia are strictly enforced and respected. This is based on the general rule in *Sharia* Law that clearly calls upon people to honour their contracts. As *Allah* said in His Holy *Quran*: ‘*O you who believe! Fulfill (your) obligations...*’.¹³ There is another general rule of contract under *Sharia* Law that should be mentioned, which is that all matters are permitted unless they are prohibited under *Sharia* Law.¹⁴

⁹ The discussion is relevant to the recognition and enforcement, but for ease of use it will be referred only to the enforcement.

¹⁰ Article 2 of SAL (2012) states ‘Without prejudice to provisions of *Sharia* and international conventions to which the Kingdom is party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law’

¹¹ Article 5 of SAL (2012) states ‘If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, including those related to arbitration, shall apply, provided this is not in conflict with the provisions of *Sharia*.’

¹² Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." P.223

¹³ *The Noble Quran, Surat al-ma'idah* (the Table spread with Food), Part 5 Verse 1; Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary."

¹⁴ *The Noble Qur'an, Surah AL-Jathiyah* (the Couching); 45:13; As *Allah* said in His Holy *Quran* ‘*And has subjected to you all that is in the heavens and all that is in the earth; it is all as a favour and kindness from Him*’; *ibid*.

There is an important question as to whether the new law gives a right to subject the Saudi government to foreign arbitration. Although the text of Article 10 (2) states that ‘Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law’, but what is the position in case that an arbitration agreement has been approved to enter into. Articles 2, 3, 4 and 5 refer the attention of the new SAL to international conventions, as well as making an implicit reference to Bilateral Investment Treaties (BITs) for the protection of investment between Saudi Arabia and those friendly countries that have signed a bilateral treaty with them. As Article 5 stipulates ‘If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, including those related to arbitration, shall apply, provided this is not in conflict with the provisions of *Sharia*’. There are unexpected consequences as a result of these bilateral treaties aimed at protecting investment in that they offer to foreign companies operating in Saudi Arabia, the possibility of resorting to the ICSID Convention,¹⁵ and other Investor-State Dispute Resolution (ADR) mechanisms. Consequently, Dr. AL-Hoshan has critically assessed the situation in his article by saying ‘...these bilateral investments treaties, which seem to be friendly treaties aimed at cooperation, but in reality give foreign companies, operating in the Kingdom, the possibility to resort to arbitration under ICSID with the opportunity to bargain these claims which constitutes an indirect threat against the State’.¹⁶

Another question is related to whether the Saudi courts will dismiss the hearing of a dispute when there is an arbitration agreement between the dispute parties and the defendant raises it? The Saudi legislature applied the attitude of most domestic legislation and the international conventions, such as Article 13 of the Egyptian Arbitration Law 1994 and Article 8 (1) of the UNCITRAL Model Law. Article 11 (1) of SAL 2012 states that ‘A court before which a dispute, which is the subject of an arbitration agreement, is filed shall dismiss the case if the defendant raises such defence before any other claim or defence’. However, will there be an actual application of this Article by the Saudi courts? There are a number of cases supporting this principle, such as the Case No. 981/1409 in 1989, Case No. 1150/1414 in 1992 and Case No.

¹⁵ There has only been one ICSID case involving the Saudi Government and it was settled amicably; *Ed. Züblin AG vs. Kingdom of Saudi Arabia* (ICSID Case No. ARB/03/1)

¹⁶ Mohamed Al-Hoshan, "The New Saudi Law on Arbitration: Presentation and Commentary," *International Journal of Arab Arbitration* 4, no. 3 (2012). Pp. 11-12

110/1419 in 1998,¹⁷ but there is no real guarantee that the principle will be applied by all Saudi courts. As Dr. Baamir states, ‘Article 11 obliges domestic courts to reject any claim if it has an arbitration agreement; however, there is no guarantee that judges, especially in general courts will enforce this article’.¹⁸

The validity of an arbitration agreement is a very important matter. According to both Article V (1-a) of the New York Convention and Article 36 (1-a-i) of the UNCITRAL Model Law, an arbitral award can be refused recognition and enforcement by a local court if the arbitration ‘...agreement is not valid under the law to which the parties have subjected it’.¹⁹ Through the arbitration agreement, the main provisions agreed upon between the disputing parties for the assistance of the arbitration process, such as the composition of the arbitral tribunal, the seat of arbitration, and the applicable law can be regulated and agreed. Article 9 (2) of the SAL 2012 clearly illustrated that ‘the arbitration agreement shall be in writing; otherwise, it shall be void.’ The new SAL is well-founded and clear on the issue of the importance of the arbitration agreement applying the requirements of international practice. Through the practices in international perspective, Article II (2) of the NYC provides that ‘...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’. Therefore, the formal requirements have been relaxed; some jurisdictions require writing as a means of proof. Under the French law,²⁰ the writing requirement is not currently a condition of validity, but it is close to being a rule of evidence. The French Arbitration law starts to apply the liberal approach in this matter, it accepts an oral arbitration clause as one of the methods to recognise the arbitration agreement. The Section 5 of the English Arbitration Act 1996 required that the arbitration agreement shall be *in writing*. This section ‘... moves the definition 'in writing' a little further forward to an 'agreement evidenced in writing' and to other circumstances when the arbitration agreement can be deemed to be in writing’.²¹

Compared to the previous 1983 Law, the arbitration agreement does not need to be approved by the competent court, according to the new 2012 law, in order to start the arbitration proceedings. This is without any doubt considered a positive improvement to help the success of

¹⁷ These are Decisions issued by the Examination Circuit ‘the Court of Appeal in the Board of Grievances’; the Case No. 981/1409 in 1989 - the Decision No. 72/1418 in 1997, Case No. 1150/1414 in 1992 – the Decision No. 109/1416 in 1995 and Case No. 110/1419 in 1998 – Decision No. 191/1419 in 1998.

¹⁸ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." At p.223

¹⁹ The New York Convention, Article V (1-a) and the UNCITRAL Model Law, Article 36 (1-a-i).

²⁰ Article 1507 of the French Code of Civil Procedure (2011)

²¹ Annemarie Grobhans and Niccolo Landi, "Arbitration Agreements: Written Form Requirements and New Means of Communication," *Bocconi Legal Papers* 4 (2014). At p. 231

arbitration in Saudi Arabia, after dilution of the judicial supervision over the arbitration process. In this section, three matters will be discussed, (a) the validity of an arbitration agreement under the SAL 2012, (b) the separability doctrine in the arbitration clause, and (c) the question of whether women and non-Muslims can to be arbitrators under the SAL 2012.

6.2.1 The Validity of an Arbitration Agreement

A question has been raised in this matter as to whether the provisions of the old SAL 1983 were unable to cover the legal issues associated with an arbitration agreement, it has been concluded that there were a number of issues associated with the validity of an arbitral agreement.²² This matter has been discussed previously through the SAL 1983,²³ and it has been mentioned that there is no clarity with regard to the terms ‘arbitration clause’, ‘submission agreement’ and ‘arbitration instrument’ in the SAL 1983.²⁴ It should be noted that the provisions of the old law were not so negative in order to cause a huge amount of disruption to the arbitration process in Saudi Arabia. In fact, the mechanism that was used to deal with arbitration agreements in Saudi Arabia was different from the international practice.²⁵ The arbitration agreement, in whatever form, should be an ‘arbitration instrument’, which is considered to be the first stage of the judicial supervision over the arbitration proceedings.²⁶ Therefore, it has been concluded that the mechanism used to deal with arbitration agreements is the main reason for the emergence of such legal problems.²⁷

Thus, the question arises from this conclusion as to whether stopping the use of a previous mechanism and applying the new SAL 2012 can avoid these legal issues? The answer will appear in the Saudi judicial practice, in the phase of enforcing the arbitral awards. However, in order to clarify this matter, it is necessary to discuss the previous judicial practice and some Saudi judicial cases and then, simulate these issues with the new SAL 2012.

Case (1); in the Case No. 1804/1422, where the plaintiff was a Saudi contracting company and the respondent was a French Contracting Company, the arbitral clause stated that any dispute between the parties shall be considered by the ICC International Court of Arbitration, the applicable law is

²² See section 3.1.1 and 3.1.3

²³ See Section 3.1.

²⁴ See section 4.3.1.

²⁵ Article 5 of SAL 1983 states “Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute...”.

²⁶ See section 4.4.1 and

²⁷ For more details, see section 3.1.3

Swiss law, and the seat shall be in Switzerland. The third Commercial Department in the Board of Grievance issued Decision No. 101/1424 in 2003, which provided for non-validity of the arbitration clause and stated that the Board of Grievance had the jurisdiction to hear the dispute for the following reasons:

1. A Muslim cannot prosecute in non-Muslim courts and cannot apply non-Muslim Laws, by doing that he is considered to be a disbeliever and committing apostasy against the religion of Islam, based on the *Quranic* verse (4:60).²⁸
2. The basic rules in a tribunal's decision shall be in accordance with the provisions of Islamic Law, and non-Islamic laws are not permitted to be applied, especially if the party to the conflict is Muslim.
3. The principle of jurisdiction does not depend on what the disputing parties agreed, but it is restricted in accordance with the provision of Islamic Law. What the parties agreed in these clauses is considered to be void and null, because it violates the constitution of the religion of Islam in general and the constitution of Saudi Arabia, in particular.

Therefore, the Commercial Department considered the arbitral clause to be null and void, because it violated the principles of Islamic law. In addition, the court emphasised that the *Hanbali* School, which is the *Islamic* school that applied in Saudi Arabia, has established two fundamental requirements for the validity of a contract or agreement: (1) it must not be contrary to the purpose of the contract, and (2) it must not be contrary to Islamic *Sharia* law.²⁹ Thus, when considering the arbitral clause it was noted that the applicable law is the Swiss Law, and thus, it violated the principle of Islamic Law, where it is not permissible for a Muslim to use non-*Sharia* Laws in litigation or arbitration. The decision states that 'it is well known that applying the non-Islamic Laws or arbitration in non-Islamic tribunals is forbidden in Islam, therefore, the arbitral clause is considered invalid'.³⁰

Case (2); another case in this regard is Case No. 159/1416, where the plaintiff was a Saudi medical company, and the respondent was a Korean Supply Company. The arbitral clause stated that any

²⁸ The *Quranic* verse (4:60) 'Have you seen those (hypocrites) who claim that they believe in that which has been sent down to you, and that which was sent down before you, and they wish to go for judgement (in their disputes) to the Taghut (false judges, etc.) while they have been ordered to reject them. But Shaitan (Satan) wishes to lead them far astray'. The Noble Qur'an, *Surah An-Nisa* (the Women); 4:60. Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary."

²⁹ Ibn-Taymiyah, *Al-Fatawa Al-Kubra (the Greatest Fatwas)*, vol. 4 (Beirut, Lebanon: Dar AL-Kitab AL-Elmiah, 1987). At p.76

³⁰ Case No. 1804/1422, Page 9-11

dispute between parties shall be considered through the ICC in the United Kingdom, the applicable law is Saudi law, and the seat shall be in London. The fourth Commercial Department in the Board of Grievance considered the dispute and issued decision No. 59/1419 in 1998, forcing the respondent to pay the amount of 1,706,409 US\$. With regards to the arbitration agreement, the Saudi court stated, 'Although the text of the arbitration clause is in the parties' contract; however, the basic rule in Islamic Law denies that the litigants can resort to the court or tribunal of non-Muslims, because resorting to non-Islamic Laws is considered non-belief, therefore, the arbitration agreement is considered to be nullified'.³¹

Case (3) in Decision No. 142/1409 in 1989, the Examination Commission of the Board of Grievances emphasised 'that the parties have the right to refer their dispute to litigation even if they have a valid arbitration clause, since litigation is the primary method for settling disputes and arbitration is an exception, which itself has no bearing on public policy.'³²

Another legal issue is related to arbitration agreements, especially when the agreement comes in the form of an arbitration clause in a contract, which was concluded prior to the occurrence of the dispute, as mentioned in the new SAL 2012 Article 1 (1), 9 (1). Although it is recognized in the new SAL 2012, in some views of Islamic law as one Islamic expert stated, 'the doctrinal writings of the scholars of the *Sharia* Schools are silent about arbitration clauses, which refer future dispute to arbitration. This issue has been a subject of controversy among some classical scholars of *Sharia*.'³³ Thus, there is a possibility that an arbitration clause will be nullified. This is because such agreements could be rejected on the ground of uncertainty of the arbitration clause. Dr. Baamir comments in this regard by saying that 'One of the conditions of the validity of an arbitration agreement is to have an existing dispute; therefore, the legality of the arbitration clause is controversial. Under *Sharia*, a contract whose object did not exist at the time of the conclusion of the contract is not acknowledged, which is similar to the prohibited contracts related to selling fish in the sea or birds in the sky.'³⁴ However, it does not consider this to be a very serious issue at the present time, but it is a potential legal issue under some classical Islamic interpretations.

³¹ Case No. 159/1416, page 16

³² Decision No. 142/1409 in 1989; cited in Baamir and Bantekas, "Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice." Pp. 239-270

³³ Md Shahadat Hossain, "Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview," *Journal of Philosophy, Culture and Religion* 1 (2013). 1-13. P. 11

³⁴ Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. p.123

However, it should be noted that this view does not represent the majority of the judges in Saudi justice, but it should be admitted that this view does exist to some extent. A Saudi writer said, 'The vast majority of judges at the supervisory court used to reject arbitration agreements under institutional rules inside Saudi Arabia; however, some judges approved them as following the Islamic equivalent of the principle of *Pacta Sunt Servanda*'.³⁵ Thus, the enforcement of arbitral awards in general and foreign arbitral awards in particular could face such a disruption due to the presence such this view. However, this view is based on an existing *fatwa* of Sheikh Mohammed Ibn Ibrahim,³⁶ in a message entitled 'Ruling by Man-Made Laws',³⁷ which will be discussed later in the matter of applicable law.³⁸

Nevertheless, by reviewing a number of judicial cases, it has been observed that referring to international tribunals or foreign laws has been recognised by the Board of Grievances, and this is mentioned in many decisions issued by the Examination Commission (the Court of Appeal) in the Board of Grievance, such as Decision No. 251/1419 in 1998,³⁹ Decision No. 8/1420 in 1999,⁴⁰ and Decision No. 18/155/1415 in 1994.⁴¹ The Examination Commission repealed the decision and stated that, 'Saudi party who is a plaintiff waived his right to resort to the judiciary in Saudi Arabia, which must be taken into account'. Therefore, 'the decision shall be repealed in regard that the arbitration shall be in Saudi Arabia, and respect the parties' autonomy to seat the arbitration outside Saudi Arabia'.⁴²

As a result of the foregoing, the prevailing approach, especially in the Saudi Court of Appeal, is to recognise the arbitration agreement, but there are some opposing practices which are based on the viewpoint of *Sharia* Law and *fatwa* of Islamic *Sharia* Scholars in Saudi Arabia, which have been accepted and respected by some judges. However, the thing which must be taken into account is the concern of legislature to ensure that the arbitration agreement complies with the provisions of Islamic *Sharia* Law and leaves the door open for discretion in the matter of choosing non-Islamic Laws or arbitrating in non-Islamic foreign tribunals. Thus, the subject of the arbitration agreement may be challenged on the ground of setting aside, when the arbitral award

³⁵ Baamir, "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." p.223

³⁶ Mohammed Ibn Ibrahim AL-ALShaikh was born in 1893. He was the highest religious authority in Saudi Arabia from 1953 until his death in 1969.

³⁷ In the *Fatwa of Mohammed ibn Ibrahim* called (Ruling by the Man-Made Laws) No. 4065. Taken from 'Collection of Letters and Legal verdicts' (Volume 12, page 284)

³⁸ See section 6.3.1

³⁹ Case No. 159/1416 dated in 1995

⁴⁰ Case No. 237/1419 dated in 1998

⁴¹ Case No. 151/1415 dated in 1994

⁴² Case No. 151/1415 dated in 1994, Page 2-3

is domestic or international that applied the SAL, as mentioned in Article 50 (1-a) of the SAL 2012.⁴³ Therefore, because of the judicial cases mentioned,⁴⁴ as well as a number of *fatwa* issued by important scholars in the Council of Senior Scholars, ‘*Majlis Hay'at Kibar al-'Ulama*’, in the matter of choosing non-Islamic Laws or arbitrating in any non-Islamic foreign tribunals. Moreover, as there is no respective published research or *fatwas* that oppose this view, as a result, there may a possibility of voiding the arbitration agreement, or refusing the recognition and enforcement of a foreign arbitral award based on the grounds of refusal as mentioned in Article V (1-d) of NYC. There is no doubt that when the jurisdiction for enforcing the arbitral awards has been transferred from the Board of Grievances to the Enforcement Circuit, which is part of the General Court in accordance to the new Enforcement Law,⁴⁵ this will lead to wider possibilities in the matter of the enforcement based on the judge’s view.⁴⁶

6.2.2 The Separability Doctrine of the Arbitration Clause:

What is stipulated in Article 21 of SAL 2012 is very close to what is mentioned in Article 16 (1)⁴⁷ of the Model Law, which is considered as in line with international practice. It is an improvement in terms of the stability of arbitration agreements, and the arbitration shall not be claimed to be nullified,⁴⁸ this leads the arbitration clause to continue to be valid even the main contract is null or void. One Saudi legal expert⁴⁹ considers it to be an exaggeration in considering the arbitration clause, as he comments in this matter by saying that ‘This Article corresponds to Article 16 (1) of the Model Law, which provides that “[...] a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause”. We note that this latter article is more reasonable than Article 21 of the New Arbitration Law’⁵⁰. Moreover, he continued by saying that this stipulation is unusual, The reason behind that is the arbitration clause in the null contract is considered valid and binding even though that the main

⁴³ Article 50 (1-a) of the SAL 2012 states ‘An action to nullify an arbitration award shall not be admitted except in the following cases: (a) If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term...’

⁴⁴ Case No. 1804/1422 and Case No. 159/1416.

⁴⁵ The Saudi Enforcement Law was issued by virtue of Royal Decree No. M/53 on 3rd July 2012. On 28th February 2013 it came into effect and its Implementation Roles were issued on 27th February 2013.

⁴⁶ See section 5.4.1.2

⁴⁷ Article 16 (1) of the Model Law states ‘...an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause’

⁴⁸ Article 21 states ‘An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of the contract which includes said arbitration clause shall not entail nullification of the arbitration clause therein, if such clause is valid’

⁴⁹ Dr. Mohammed AL-Hoshan is a former Chairman of the National Committee of Lawyers and Legal Advisors, and He is a member of the I.C.C. National Committee, Council of Saudi Chambers of Commerce & Industry.

⁵⁰ Al-Hoshan, "The New Saudi Law on Arbitration: Presentation and Commentary." p. 9

contract is void and null, whereas ‘...when a contract is declared void under the *Sharia* Law, such nullity affects all the clauses contained in said contract. Several authors specialized in *Sharia* Law have confirmed the same’.⁵¹ However, this point is, in fact, the subject of an inquiry into Saudi Courts practices. Consequently, we should wait until we can see the real practices. A specialist writer said ‘it has yet to be seen whether a Saudi Judge would view as separable and valid an arbitration agreement found in a contract that would be invalid due its violation of Islamic law’.⁵² However, through studying this particular issue, it could not be found in any in-depth modern studies of Islamic law. This is because the Islamic law does not recognise the concept of ‘arbitral clause’. As this matter has been discussed previously⁵³ there is no need for further consideration.

From the practices in an international perspective, this doctrine is considered as an effective tool for stability of the arbitration agreement. The UNCITRAL Model Law Article 16 (1) states that ‘...an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract...’, where the arbitral tribunal has a right to adopt the principle of competence-competence to rule on its own jurisdiction. Moreover, this doctrine is set out in many international jurisdictions, such as Section 7 of the English Arbitration Act. However, there are many jurisdictions in the Islamic countries in the Middle East that apply the separability doctrine in the arbitration clause, such as the Egyptian Arbitration Law in Article 23.

6.2.3 Can Women or Non-Muslims to be Arbitrators in the SAL 2012?

This matter has been discussed in Section (3.1.2). The conclusion was reached that the previous SAL 1983 required that the arbitrator shall be of good conduct and reputation, qualified, experienced,⁵⁴ a ‘Saudi citizen’ or ‘foreign Muslim’,⁵⁵ and shall have legal knowledge,⁵⁶ full legal capacity⁵⁷ and shall not have any interest in the case.⁵⁸ Moreover, from the perspective of the provisions of *Sharia* Law, the requirement of qualifications of an arbitrator are associated with the same qualifications as those of a judge ‘*qadi*’.⁵⁹ In this regard, Samir Saleh identifies seven qualifications with regard to a judge. These are: the *qadi* or (an arbitrator) must be an adult male,

⁵¹ Ibid. p. 9

⁵² Harb and Leventhal, "What to Expect When Arbitrating in the Kingdom of Saudi Arabia." P.14

⁵³ See section 5.5.2.1 and 3.1.1

⁵⁴ Article 4 of Saudi Arbitration Law (1983)

⁵⁵ Article 3 of the Implementation Rules 1985

⁵⁶ Article 3 of Implementation Rules (1985)

⁵⁷ Article 12 of Saudi Arbitration Law (1983)

⁵⁸ Article 4 of Implementation Rules (1985)

⁵⁹ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. P.28

Muslim, free,⁶⁰ must have intelligence,⁶¹ should possess rectitude ‘*adala*’, should not be blind, deaf or dumb, should have a knowledge of *Sharia* law. In addition, *Ibn Qudama*,⁶² in his comprehensive work, *AL-Mughni*, states that a judge (an arbitrator) ‘...may only be appointed if he is of age, mentally sound, Muslim, free, and educated in matters of *fiqh*...’.⁶³

(a) The first matter is nominating women as arbitrators. Most Islamic Schools, such as the *Shafi’i*, *Maliki* and *Hanbali* Schools, consider that arbitrators shall be adult males, which means that this view is held by the majority of Muslim scholars.⁶⁴ In this regard, Dr. AL-Jarba presented a detailed study of the subject and he concluded that:⁶⁵

‘...it is possible to say that women can be chosen as arbitrators in subjects where they feel capable of settling disputes in the same way as men. It is worth noting here that Saudi Arbitration Law does not preclude women from being arbitrators. A woman can arbitrate in Saudi Arabia if she has been chosen by the arbitrating parties.’⁶⁶

(b) The second matter is nominating a non-Muslim as arbitrator, which is considered to be one of the important issues facing the new SAL 2012. The old law was clear when it was stated that an arbitrator shall be a ‘Saudi National’⁶⁷ or ‘foreign Muslim’,⁶⁸ whereas the new law is silent on this issue. However, illustrating this subject from the perspective of *Sharia* law leads to recognition of the position of Saudi Law on this subject. Most Islamic Schools such as the *Hanbali*, *Shafi’i*, and *Maliki* Schools do not accept any exceptions which would allow an arbitrator to be non-Muslim.⁶⁹ This view is based on the *Quranic* verse: ‘... *Allah will judge between you (all) on the Day of Resurrection. And never will Allah grant to the disbelievers a way (to triumph) over the believers*’.⁷⁰ Nevertheless, the scholars of the *Hanafi* School have considered this matter in more detail. They have assumed that non-Muslim arbitrators may

⁶⁰ It means freedom which is the opposite of slavery.

⁶¹ It means the *qadi* must have the ability to solve intricate problems.

⁶² *Ibn Qudama Maqdisi* (1147-1223) is considered the most authoritative source of the *Hanbali* School.

⁶³ Ibn Kudama, *AL-Mughni*, vol. 10 Issue No. 8221. Cited in El-Ahdab, *Arbitration with the Arab Countries*. p. 581.

⁶⁴ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. p. 29; see also El-Ahdab, *Arbitration with the Arab Countries*. p.40

⁶⁵ AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context."

⁶⁶ *Ibid.* Pp. 73-82

⁶⁷ The legislature which enacted this law assumed that all Saudis are Muslims

⁶⁸ Article 3 of the Implementation Rules 1985

⁶⁹ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. P.28

⁷⁰ *The Noble Quran, Surat al-Nisa (the Women)*, Part 4 Verse 141; Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary."

arbitrate to three categories of conflict. These are where (a) all the parties are Muslim, (b) the parties are non-Muslim, and (c) the parties are Muslim and non-Muslim.⁷¹

There was a considerable debate among the *Hanafi* jurists with regard to the details of the three categories mentioned. In the first category (a), the majority of *Hanafi* scholars have stressed that arbitrators must be Muslims when there is a conflict between Muslim parties. In the second category (b), the majority of *Hanafi* scholars allow a non-Muslim arbitrator to arbitrate between non-Muslim parties. The third category (c) has generated more debate. The *Hanafi* jurists consider that with regard to the substance of arbitration, with respect to commercial, financial and civil issues, it is accepted that a non-Muslim can be arbitrated, while in the issue of personal estates and family cases, it is not allowed for non-Muslims to be arbitrated.⁷² In support of this attitude, Samir Saleh commented ‘...thus, modern *Hanafi* jurists conclude that a non-Muslim may be appointed as judge in financial civil and commercial cases, but not in family and personal states cases, the law bringing restriction to the last two which are essentially scriptural.’⁷³

The previous discussion concerned whether the matter of the arbitration was in one of the Islamic countries or in Saudi Arabia in our case. However, what happens when the arbitration is international? AL-Jarba reached a conclusion in this regard, stating that ‘it seems apparent that the non-Muslim may be allowed to arbitrate in international commercial disputes on the basis of the known legal rules of necessity.’⁷⁴ Overall, with regard to international arbitration, it is difficult to identify the religion of arbitrators, and there is no room for questioning this. Moreover, in practical terms it could be said there was no refusal to enforce foreign arbitral awards in Saudi Arabia based on the fact that the arbitrators are not Muslim.

The new SAL 2012 is silent in this regard, as Article 14 of SAL 2012 states ‘An arbitrator shall satisfy the following conditions: (1) Be of full legal capacity; (2) Be of good conduct and reputation; and (3) Be a holder of at least a university degree in *Sharia* or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meets such requirement’. It can be seen that the legislature does not mention the religion or the gender in the arbitrator’s requirements, which means there is tacit acceptance of these matters. This is what is understood from the Article, especially since the old law stated that the arbitrator shall be a

⁷¹ For more details see AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." pp. 84-88

⁷² Ibid. pp. 84-88

⁷³ Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt.*, p.30

⁷⁴ AL-Jarba, "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." p.99

Muslim.⁷⁵ It is possible to take advantage of the silence of the new law in this matter, as there is no objection that the arbitrator can be a non-Muslim or a woman. This based on the Modern *Sharia* Rules which states ‘...but silence is tantamount to a statement where there is an absolute necessity for speech. That is to say, it may not be said that a person who keeps silence has made such and such a statement, but if he keeps silence where he ought to have made a statement, such silence is regarded as an admission and statement’.⁷⁶ However, there are those who may argue in this regard, due to the fact that the purpose of the new law is to reform the old law. Therefore, there may be a need for statutory interpretation similar to that applied under English law entitled ‘the Mischief Rule.’ This can lead to instability in the courts.

It should be noted that this issue will remain open to interpretation in the future. This may lead to uncertainty in respect of recognising and enforcing arbitral awards in Saudi Arabia. The legislature was supposed to be explicit in this regard, especially with a difference of interpretation of *Sharia* Law in this aspect. For example, in the Decision No. 59/1419 in 1998, the Commercial Department of the Board of Grievance emphasised that ‘the arbitrator’s requirements shall have the same required of the judge, as in the book of *‘Iqd al-Jawahir al-Thamina’*⁷⁷ states “if the dispute parties nominate a slave or non-Muslim as an arbitrator, the award shall be not enforced”.⁷⁸ This opinion was founded in a court decision. There is nothing to prevent future recurrence of this opinion in the absence of explicit texts. In such subjects where there is a difference of opinion, it was assumed from the legislature to be clear through the explicit text. In order to close the area of interpretation such as Article 16 (2) of the Egyptian Arbitration Law which states that ‘the arbitrator is not required to be of a given gender or nationality unless otherwise agreed upon between the two parties or provided for by law’.

6.3 Arbitration Procedures

Moving to the side of arbitration proceedings, it can be observed that the legislature gave the disputing parties the right to agree on the procedure rules that could be adopted by the arbitral tribunal, provided that procedural rules shall not prejudice the provisions of Islamic Law. This is provided in Article 25 (1) of the new SAL which states: ‘The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including

⁷⁵ Article 3 of the Implementation Rules 1985

⁷⁶ Article 67 of the Ottoman Court Manual ‘*AL-Majalla*’

⁷⁷ ‘*Iqd al-Jawahir al-Thamina fi Madhhab ‘Alim al- Madina*’, Chapter 3, Page 1003, the book available at website: <https://archive.org/details/FP78669>

⁷⁸ The Case No. 159/1416 in 1995 of the Board of Grievance, p. 21

their right to subject such proceedings to effective rules of any organization, agency or arbitration center within the Kingdom or abroad, provided said rules are not in conflict with the provisions of *Sharia*...'. When such an agreement is absent, the arbitral tribunal may decide on the appropriate procedure rules, provided that the rules do not prejudice the provisions of *Sharia* Law.⁷⁹ This is similar to what is applied in some International Rules,⁸⁰ Al-Ammari and Martin comment in this matter by saying that 'this allows Saudi companies to utilize arbitration rules and institutions of their choosing in contracts with other Saudi parties for business within Saudi Arabia'.⁸¹

Concerning the procedures with regard to deciding on an arbitral dispute, it appears that in Article 38 of the new SAL 2012, the legislature began with the need for compliance with the provisions of Islamic Law during the consideration and determination of a dispute. In terms of the choice of rules relating to the subject of a dispute, the application of *ad hoc* international rules or the application of the objective rules of the law of a certain state on consideration of the subject of the dispute by the disputing parties, *Sharia* Law shall not be violated. This Article emphasizes that '...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'.⁸² On this regard, a question may be raised relating to the principle of party autonomy when they agreed to applying the rules relating to any conflict of laws, and whether there is a room to move in this respect. The answer to this question is not clear. More time is needed to see what happens in practice, and how the Saudi courts will apply and interpret this matter. However, the discussion of the arbitral procedures will be considered in two main topics: (a) the applicable law and (b) the seat of arbitration.

6.3.1 The Applicable Law

This matter has been detailed previously in the discussion of the old law (see subsection 3.2.2). The topic of applicable law is a sensitive issue due to the fundamental principles of *Sharia* Law having a point of view regarding the application of non-*Sharia* Law to any disputes that involve a Muslim as one of its parties; therefore, the old law was silent in this regard. According

⁷⁹ Article 25 (2) of new SAL as states 'In the absence of such an agreement, the arbitration tribunal may, subject to the provisions of *Sharia* and this Law, decide the arbitration proceedings it deems fit'

⁸⁰ Article 21 (1) of ICC Rules of Arbitration (2012) states: '... In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate...'; Article 35 (1) of the UNCITRAL Arbitration Rules (2013) states: '...Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.'

⁸¹ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." 387-408. pp.394

⁸² Article 38 (1-a) of new SAL 2012

to the previous practice in Saudi Arabia, when the arbitration procedures have been undertaken in Saudi Arabia, other substantive law cannot be applicable even if the parties agree to this. Nevertheless, if arbitration procedures have undertaken outside Saudi Arabia, the important aspect in the eyes of Saudi courts when enforcing the foreign arbitration award is that the decision or procedures must not contravene *Sharia* Law. The previous commentary has led to a great deal of debate in terms of procedural law and substantive law. It has been concluded that the actual practice has proved to most legal experts that the Saudi Courts generally apply Saudi Law in any arbitral disputes, even though the arbitration agreement between disputing parties provides that the applicable law that shall govern the disputed matter is a foreign law.⁸³

With regard to discussing and clarifying some judicial practices in Saudi Arabia, there are a number of cases such as Case No. 1804/1422 and Case No. 159/1416 which were mentioned previously. These cases identified some Saudi judicial practices on the subject of applicable law. The court decided that the arbitration agreement was considered to be null and void due to the fact that Muslims shall not arbitrate on non-Islamic Laws or in non-Islamic tribunals.⁸⁴ Moreover, in Case No. 54/1411 in 1991, the plaintiff was a Saudi company and the respondent was a foreign Company, the arbitral clause stated that any dispute between the parties shall be considered in Zurich, and the applicable law is Swiss law. The Court of Appeal decided to revoke the decision of the Commercial Department, and stated:

‘arbitration is to be held in the kingdom in accordance with Saudi Law because the dispute relates to an agreement which is subject to Saudi Law, and that the original agreement which called for the referral of disputes to the International Chamber of Commerce in Switzerland amounts to robbing the Saudi Judiciary of its authority. This embodied violation of Saudi General Law and as such it is considered invalid’.⁸⁵

This is a very important matter that needs to be discussed because there is an argumentative principle in *Sharia* Law concerning adopting man-made laws (Non-Muslim Laws) other than Islamic *Sharia* Law. Most Saudi judges adopt the ‘*wahhabism*’ movement, which is a Sunni

⁸³ See section 3.2.2; see also Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.399-400. ; See also Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia," p. 233. ; See also Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255-56.; See also Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.46-48.

⁸⁴ it has been discussed previously in the arbitration agreement in the section of validity of an arbitration agreement (6.2.1) .

⁸⁵ the Board of Grievance, in the Case No. 54/1411 in 1991. Cited in AL-Subaihi, "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law."

Islamic movement derived from the *Hanbali* doctrine.⁸⁶ The *wahhabi* principle applies the view of the inadmissibility of man-made laws as the applicable law, and that *Sharia* Law shall be applied in any disputed settlement. Therefore, this principle is still effective in Saudi Arabia up to the present time. This view was raised as a message (a *Fatwa*) by Sheikh Mohammed Ibn Ibrahim AL-ALShaikh (who died in 1969 AD)⁸⁷ in a message entitled "Ruling by Man-Made Laws".⁸⁸ This message has had a broad effect due to the fact that he filled the highest judicial positions in Saudi Arabia, in addition to being Grand *Mufti* of Saudi Arabia. However, it can be summarized by saying that any Muslim person who rejects the *Sharia* Law and replaces it with man-made laws, or believes that a ruling by man-made laws is equal to a ruling by *Sharia* Law, is an act of '*Kufr*'⁸⁹ (disbelieving) which puts this person beyond the pale of Islam. This is very serious matter, and this person may be considered an apostate who could be sentenced to death in Islam. The *Fatwa* is based on a text of the *Quranic* verse (4:65).⁹⁰

This matter has also been discussed previously through the very famous *Fatwa* of *ibn Taymiyyah* against the Mongols (Tartars) in the *Mamluk's* war. *Ibn Taymiyyah* declared *AL-Jihad* upon the Mongols, even those who had converted to Islam, due to the fact that they ruled their country by man-made laws rather than *Sharia* Law.⁹¹ However, the matter of applicable law has been discussed previously under the old SAL.⁹² The result that has been arrived at is that the Saudi courts mostly apply Saudi Law in arbitral disputes, even though the arbitration agreement provides that the procedural rules that must govern the dispute are foreign or international procedural rules. This point of view is based on real practice and on the perspective of a large number of legal

⁸⁶ The *wahhabism* is '...a Sunni Islamic movement that seeks to purify Islam of any innovations or practices that deviate from the seventh-century teachings of the Prophet Muhammad and his companions'; however, from the point of view of non-Muslim, the term has been used '...to denote the form of Sunni Islam practiced in Saudi Arabia and which has spread recently to various parts of the world'; see Blanchard, "The Islamic Traditions of Wahhabism and Salafiyya." Website: <http://digital.library.unt.edu/ark:/67531/metacrs5273/>. Accessed February 22, 2012.

⁸⁷ Mohammed Ibn Ibrahim AL-ALShaikh was born in 1893. He was the highest religious authority in Saudi Arabia from 1953 until his death in 1969.

⁸⁸ In the *Fatwa* of Mohammed ibn Ibrahim called (Ruling by the Man-Made Laws) No. 4065. Taken from 'Collection of Letters and Legal verdicts' (Volume 12, page 284)

⁸⁹ The meaning of *Kufr* is not believing in God '*Allaah*' and His Messenger '*Mohammed*'.

⁹⁰ the *Quranic* verse (4:65) states '*But no, by your Lord, they can have no Faith, until they make you (O Muhammad) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission.*'; the Noble Qur'an, *Surah An-Nisa* (the Women); 4:65. Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary."

⁹¹ Hunt Janin and André Kahlmeyer, *Islamic Law: The Sharia from Muhammad's Time to the Present* (McFarland, 2007). p.79

⁹² See subsection (3.2.2)

experts.⁹³ As was explained before, we need more time to see what happens in practice, and how the Saudi courts will apply and interpret the matter of applicable law under the new SAL 2012.

In this regard, the legal issues associated with applying the procedural rules which have been mentioned in sections (3.2.2.1) under the SAL 1983 will be discussed. According to Article 2 of SAL 2012, it shall be considered that the SAL 2012 is a comprehensive law covering domestic and international disputes.⁹⁴ Thus, there is an important question that arises as to whether the Saudi dispute parties may apply the international procedural rules, such as the ICC Rules of Arbitration or the UNCITRAL Arbitration Rules in their dispute, and, furthermore, could it be seated outside Saudi Arabia? According to Article 3 (3) of SAL 2012, the answer would be to support this view.⁹⁵ However, according to the previous judicial practice in a number of cases under the SAL 1983, the answer would be not clear. With regard to applying international procedural rules in Saudi Arabia, AL-Samaan also comments by saying ‘Yet, practice has shown that the Saudi courts, including the Board of Grievances, apply Saudi law even though a contract stipulates the application of a foreign law’.⁹⁶ Moreover, there is who considered, as a general rule, that the rules of procedural arbitration will be Saudi Rules when the arbitration takes place in Saudi Arabia; there is no chance for the disputing parties choosing the appropriate law for arbitral proceedings,⁹⁷ Dina Elshurafa comments in this regard saying that ‘Shari'a will remain the sole applicable law in domestic arbitration’.⁹⁸

In the Decision No. 155/T/4 in 1995,⁹⁹ where the parties were a Saudi and a foreign company, and the chosen contractual seat was outside Saudi Arabia. The competent authority decided that the arbitral tribunal shall be seated in Saudi Arabia, applying Saudi procedural and

⁹³ Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, p.399-400. ; See also Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia," p. 233. ; See also Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255-56.; See also Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.46-48.

⁹⁴ Article 2 of SAL 2012 states ‘Without prejudice to provisions of *Sharia* and international conventions to which the Kingdom is party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law...’

⁹⁵ Article 3 (3) of SAL 2012 states ‘Under this Law, arbitration shall be international if the dispute is related to international commerce, in the following cases: ... (3) If both parties agree to resort to an organization, standing arbitration tribunal or arbitration center situated outside the Kingdom...’

⁹⁶ Al-Samaan, 'Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The', (at p. 233

⁹⁷ Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law," p.46.

⁹⁸ Elshurafa, "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?." P. 140

⁹⁹ Decision No. 155/T/4 in 1995, see Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.255.

substantive law to the merits of the dispute; and also it shall be supervised by the Board of Grievances. Moreover, there are a number of decisions that supported this attitude in the Saudi Courts, including the Decision No. 101/1424 in 2003,¹⁰⁰ and the Decision No. 59/1419 in 1998¹⁰¹ which were discussed above.¹⁰² It should be noted that decisions in the previous examples mentioned involve a foreign party, however, the courts did not agree the chosen contractual procedural rules, the applicable law or the tribunal seat. Therefore, it can be said that the apparent practice is contrary to what is acceptable in the practice of international commercial arbitration.

However, the new law has applied more favourable standards and has allowed the parties to agree to choose another country's laws, under the condition of applying 'substantive rules' without 'its conflict of laws rules'.¹⁰³ If the parties do not agree on a specific law, the arbitral tribunal could choose the appropriate substantive rules that seems most relevant to the subject matter of the dispute¹⁰⁴. The main condition that Article 38 was built on, is that the rules must not contravene the provisions of *Sharia* Law and public policy in Saudi Arabia¹⁰⁵. However, this condition is very hard to achieve for non-Muslim's arbitrators, due to the difficulties associated with a full understanding of the provisions of *Sharia* Law which so far have not been codified in Saudi Arabia.¹⁰⁶

For this reason, when the arbitral tribunal has to choose the substantive rules of other countries, they have to be careful with regard to the issue of what is compatible with, or what contravenes, *Sharia* Law, because the issue is related to the enforcement of the arbitration award. In this regard, Nesheiwat and Al-Khasawneh state in thier article that 'difficulties arise when attempting to enforce arbitral awards issued under non- *Sharia* rules in Saudi Arabia'.¹⁰⁷ Any outcomes that exceeds the provisions of *Sharia* Law may adversely affect the enforcement of the arbitral award in Saudi Arabia. In order to overcome this problem, the parties must do the following:

¹⁰⁰ Case No. 1804/1422

¹⁰¹ Case No. 159/1416

¹⁰² See section 6.2.1

¹⁰³ Article 38 (1-a) of SAL 2012

¹⁰⁴ Article 38 (1-b) of SAL 2012

¹⁰⁵ Article 38 (1) of SAL 2012 states 'Subject to provisions of *Sharia* and public policy in the Kingdom...'

¹⁰⁶ There is an attempt to codify the judicial rules, see section 6.4.1

¹⁰⁷ Faris Nesheiwat and Ali Al-Khasawneh, "2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia, The," *Santa Clara J. Int'l L.* 13 (2015). At p. 445

1. Choose one of the arbitrators who is aware of the provisions of *Sharia* Law, to ensure the validity of procedures and to ensure that the decision does not contravene the provisions of *Sharia* Law.
2. Formulate the clause of choosing the substantive law by adding the phrase "under the condition of not applying rules that contravene *Sharia* Law or public policy."

There is a chance for the Saudi Appeal Court to nullify the arbitral award when the arbitral tribunal excludes the substantive or procedural rules that were agreed by the dispute parties; as Article 50 (1-d) of the SAL 2012 states that ‘An action to nullify an arbitration award shall not be admitted except in the following cases: (d) If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute...’ whereas Article 34 (2-b) of the UNCITRAL Model Law does not mention this matter, attempting to reduce the grounds for setting aside. The Saudi approach follows the Egyptian Law approach where Article 53 (1-d) states that ‘An arbitral award may be annulled only: (d) If the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute...’. However, this may open the floodgates to nullifying on the ground of non-application of the agreed rules of law. In the case of *Chromalloy Aeroservices vs. the Arab Republic of Egypt*, the Cairo Court of Appeal nullified the arbitral award based on the premise that the tribunal had failed to apply the applicable law (the Egyptian Administrative Law) that was agreed by the dispute parties to the arbitration. This violated Article 53 (1-d) of the Egyptian Arbitration Law 1994;¹⁰⁸ without a doubt this scenario may be applied by the Saudi courts.

6.3.2 Seat (Place) of Arbitration

According to what is stipulated in the new 2012 law, the disputing parties have the right to choose the seat of arbitration or ‘*lex arbitri*’, whether inside or outside Saudi Arabia¹⁰⁹. In the event that parties do not reach an agreement on the appropriate seat, the arbitral tribunal has the authority to decide the place of arbitration, taking into account the circumstances of the case and the appropriate place for the parties involved.¹¹⁰ Moreover, the arbitral tribunal has the authority

¹⁰⁸ The case of *Chromalloy Aeroservices vs. Arab Republic of Egypt* - 94-2339; cited in Stephen T. Ostrowski, Shany, Yuval, "Chromalloy: United States Law and International Arbitration at the Crossroads," *NEW YORK UNIVERSITY LAW REVIEW* 73 (1998). At p. 1666-1668

¹⁰⁹ Article 28 of SAL 2012 as states ‘The two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad...’

¹¹⁰ Article 28 of SAL 2012 as states ‘...In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties...’

to convene at any seat which it deems appropriate for the ‘...deliberation of its members, for hearing witnesses, experts or the parties to the dispute, or for inspection of the subject-matter of the dispute, or examination of documents or review thereof.’¹¹¹

This new attitude was applied under the old law. However, there was not enough flexibility to apply the principle of party autonomy. The matter of acceptance and rejection was related to the personal convictions of the judge when he approved the arbitration instrument. This matter has been discussed in detail under subsection (3.2.1). Under *Sharia* Law, the principle of ‘*lex arbitri*’ is often not considered to be immaterial. Two reasons have been provided for that: (a) because the determination of disputes under *Sharia* Law is exclusively subject to the procedural and substantive law of *Sharia*; (b) owing to the fact that *Sharia* law shall be applied to Muslims wherever they live.¹¹² Therefore, under the SAL 1983, a conclusion has been arrived at that *Sharia* Law grants the disputing parties the freedom to choose the place which they consider most appropriate. In the Decision No. 138/1424 in 2003, the Court of Appeal of the Board of Grievance stated that ‘The place of arbitral tribunal is a matter that has no effect on the merits of the disputes, nor is it considered to arbitrate to non-Islamic law or tribunal’.¹¹³ Here, Saudi justice shows that the important features are the formation of the arbitral tribunal and the applicable law, but the seat is not an important matter.

Based on this trend, the Saudi courts show commitment to respecting the enforcement of international arbitration awards that have made inside or outside Saudi Arabia, as well as party autonomy in accordance with the new Law. It is worth mentioning that the enforcement of arbitral awards that have been made outside Saudi Arabia may be accompanied by some complexity and uncertainty, due to the fear that such arbitral decisions or procedures might contravene *Sharia* Law. However, this is the only expected negative aspect.

The solution that was used in the past under the auspices of the old law was to situate the arbitration seat in the Arab Gulf countries, or Arab countries in general, such as the G.C.C. Commercial Arbitration Centre in Bahrain, Dubai International Arbitration Centre or the Cairo Regional Centre for International Commercial Arbitration. These centres are characterized by an overview in dealing with parties’ agreements, as well as ensuring the autonomy of international companies when it comes to applying the various laws. Also, they apply the rules agreed by

¹¹¹ Article 28 of SAL 2012

¹¹² Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. at p.46-47

¹¹³ Decision No. 138/1424 in 2003. The Examination Commission (the Court of Appeal) of the Board of Grievance, in the Case No. 1804/1422 in 2001

disputing parties. This is a good option when it comes to ensuring the enforcement of arbitration awards without fear of rejection by Saudi courts.¹¹⁴

To conclude in the matter of arbitration procedures, especially on the issue of the applicable law and the attitude of the Saudi Courts. As it has been explained, there is uncertainty about this issue¹¹⁵ and a need to clarify the expected practices in the Saudi courts when applying the new SAL 2012. Thus, the text of a decision¹¹⁶ of the Court of Appeal of the Board of Grievance, defined a number of basic rules to be followed by the Board of Grievance when dealing with dispute parties, one of whom is a foreigner. There are four cases as follows:¹¹⁷

1. When a clause in the disputing parties' contract stipulated that the Saudi Courts or Saudi tribunals have the jurisdiction, then the clause is applied between conflicting parties and the dispute shall be heard in Saudi Arabia.
2. When one of the conflict parties is foreign, and has business activities in Saudi Arabia and a business place in Saudi Arabia, and when the parties do not agree a seat to hear the dispute then it would be automatically heard in Saudi Arabia; due to the place of conclusion of the contract and the place of performance in Saudi Arabia.
3. When a clause in their contract stipulated that the dispute shall be heard in a foreign court or tribunal, and the foreign party waives his right and demands that the conflict be heard in Saudi Arabia. Then, the Saudi Courts or tribunals have a jurisdiction to hear this dispute even though the Saudi party requests litigation or arbitration in the foreign court or tribunal. This is because that 'the Muslim party cannot be referred to non-*Sharia* law.' This view is based on a text of the *Quran*.¹¹⁸
4. When a clause in their contract stipulated that the dispute shall be heard in a foreign court or tribunal, and the foreign party demands this, then the foreign party has the right to claim this clause; this is due the agreement and covenant that must be respected. This is based on a text of the *Quran* that states '*O you who believe! Fulfill (your) obligations*'.¹¹⁹

Moreover, supporting this approach, there are a number of cases issued by the Court of Appeal of the Board of Grievance that repealed the decisions of the Commercial Department by saying that the Saudi party waived his right to apply the Saudi Law in Saudi Arabia. Therefore,

¹¹⁴ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." At pp. 394-395

¹¹⁵ See section 5.5.3.1 and 5.5.2.1

¹¹⁶ Decision No. 15/1424 in 2003, in the Case No. 1804/1422 in 2001

¹¹⁷ These four cases are mentioned in the Decision No. 15/1424 in 2003, in the Case No. 1804/1422 in 2001

¹¹⁸ the Noble Qur'an, *Surah An-Nisa* (the Women); 4:60

¹¹⁹ the Noble Qur'an, *Surat Al-Mā'idah* (The Table Spread); 5:1

the agreement between the parties should be applied, such as Decision No. 8/1419 in 1998,¹²⁰ Decision No. 132/1415 in 1994,¹²¹ and Decision No. 103/1418 in 1997.¹²² In all of these previous cases,¹²³ the contract between the dispute parties (one of whom was a foreign company) agreed that the competent court to hear the dispute was the foreign court, and the applicable law was not Saudi Law. The Court of Appeal emphasised that the competent court to hear the dispute, according to the agreement between the parties, was the foreign arbitral tribunal, and the applicable law was the foreign law. Also, an example of case (2) was Decision No. 97/1428 in 2007, where the plaintiff was a Saudi Company and the respondent was a Syrian Company. The plaintiff demanded to consider the arbitration in Saudi Arabia under the Saudi Law, whereas the respondent demanded the seat shall be in Syria, and the arbitration clause did not specify the seat or the law of arbitration. The competent court issued a decision that parties should conduct the arbitration in Saudi Arabia under the Saudi Law, due the basic rule that the arbitration shall be seated locally unless the parties agree otherwise.¹²⁴

6.4 Arbitration Decision

Concerning the matter of challenging an arbitral award, the competent court has the legal authority, *on its own initiative*, to nullify the arbitration award when the arbitral award contains a violation of the provisions of Islamic *Sharia* Law. As Article 50 (2) states ‘The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of *Sharia* and public policy in the Kingdom...’. However, the part regarding the enforcement of an arbitral award in Saudi Arabia is the cornerstone of this research. No order may be placed for the enforcement of a domestic or foreign arbitral award when it violates the provisions of Islamic *Sharia* Law as provided for in Article 55 (2) which states: ‘The order to execute the arbitration award under this Law shall not be issued except upon verification of the following: ... (b) The award does not violate the provisions of *Sharia* Law and public policy in the Kingdom...’. Moreover, with regard to foreign arbitral awards, Article 11 (5) of the Enforcement Law emphasises that ‘The judgment or order shall not in conflict with public policy [*Sharia*] in the Kingdom’. There are a number of cases that are considered to be a violation of

¹²⁰ the Board of Grievance, the Case No. 237/1419 in 1998

¹²¹ the Board of Grievance, the Case No. 936/1414 in 1994

¹²² the Board of Grievance, the Case No. 519/1414 in 1997

¹²³ There are other cases, Case No. 2683/1409 in 1989 and Case No. 72/1415 in 1994 of the Board of Grievance.

¹²⁴ the Board of Grievance, the Case No. 1701/1427 in 2006

Sharia law, which will be discussed when the arbitral award contained one of such violation in Saudi Arabia.

In sum, through the above review, it can be observed that compliance with the provisions of Islamic *Sharia* Law in all stages of arbitration in Saudi Arabia is a necessary requirement, whether the arbitration is domestic or international. In this respect, Al-Ammari and Martin emphasized that:

‘As repeatedly enunciated in the New Arbitration Law, parties and arbitrators must take *Sharia* into account when dealing with international arbitration awards that will be enforced in Saudi Arabia. Failure to do so will result in the award not being recognized and enforced in Saudi courts. An award that cannot rely upon the muscle of the local courts where the assets of the losing party are located, is of little or no value. Therefore, consideration of *Sharia* and its requirements must be part of any successful strategy for the enforcement of an arbitration award in the Kingdom of Saudi Arabia.’¹²⁵

It goes without saying that the violation of the provisions of *Sharia* Law concerning domestic arbitration rarely occurs, since one of the arbitral tribunal members usually has a knowledge of Islamic Law. However, the problem lies in terms of foreign or international arbitration, since the arbitral tribunal member may not have sufficient knowledge of what violates Islamic Law, particularly due to the lack of codification of the provisions of Islamic *Sharia* Law. However, there has been an attempt by Saudi Arabia to codify the judicial rules as will be explained in the next section. However, the important questions are whether or not issuance of such codification will help an arbitral tribunal to understand most of the issues of the provisions of Islamic *Sharia* Law, and what are the main potential prohibitions of *Sharia* law that may be contained in an arbitration award? What is the situation when the arbitral award is opposed to public policy in Saudi Arabia? And finally, is the principle of finality applied under the SAL 2012?

6.4.1 Codification of Judicial Rules

The question is whether issuing the codification of judicial rules will help to understand the *Sharia* Islamic law by specialist non-Muslims? There is no doubt that the codification of judicial rules will help to understand the legal principles and the stability constant in Islamic jurisdiction that is applied in the courts of Saudi Arabia. The codification will not only help the

¹²⁵ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." At pp.405

non-Muslims specialists, but also will help the Muslim specialists. It will also help to stabilise the judicial decisions and prevent contrasts, on the ground of Article 14 of The Ottoman Court Manual *AL-Majalla* which states that ‘Where the text is clear, there is no room for interpretation’. In this matter, it is noteworthy that Royal Order No (A/20) was issued on 29/11/2014 AD, to order the creating of a Senior *Sharia* Scholars’ Committee for the preparation of a draft of ‘Codification of Judicial Rules’¹²⁶ within six months of the issuance of the Order - presumably on 29/5/2015 AD - to be classified as Articles based on the chapters of Islamic jurisprudence and its topics, in order to record the *Sharia* topics required for the judiciary. Drafting of this codification will depend on the collection of the current topics in judicial disputes, and recording of the prevalent opinions of *Sharia* scholars concerning the stated topics and generally accepted issues as certain clear Articles.

However, this matter is not new or innovative. The ‘*AL-Majalla*’ or ‘The Ottoman Court Manual’¹²⁷ was issued by the Ottoman Empire in 1877 AD, in 16 volumes which contained 1,851 Articles. It was based on the opinions of the majority *Sharia* scholars of the *Hanafi* School. Afterwards, the ‘Codification of Legislative Rules’¹²⁸ was drafted through 2,382 Articles based on the order of King Abdel Aziz at the beginning of the Third Saudi State (the current state). This code was prepared by the Judge of Mekkah, Sheikh Ahmed bin Abdalla Al-Qarie, based on the opinions of a majority of *Sharia* scholars in the *Hanbali* School, which is the *Islamic* school that applied in Saudi Arabia. Unfortunately it was not adopted due to differences in the points of view between the senior *Sharia* scholars at that time, as there was objection to the codification of the *Sharia* provisions until almost today, on the pretext that it is a reason for stopping ‘*Ijtihad*’¹²⁹ (interpretation) on the part of judges. In fact, this codification does not prevent the judge having access to the right to *Ijtihad*. When the judge is satisfied with an opinion or *Ijtihad* other than the Articles of the Codification, the judge shall have the right to adjudge at his discretion with reasoning in a situation in which the Articles of the Codification are not adopted, and to refute the argument of his *Ijtihad* to be acceptable to a court of higher instance, and primarily before litigants. However, a Saudi lawyer said ‘the *ulama*, themselves admit that not all Saudi judges are qualified

¹²⁶ In Arabic called ‘*Mudonat el-Ahkam Ash-Shariyyah*’

¹²⁷ In Arabic called ‘*Majallat el-Ahkam el-Adliya*’

¹²⁸ In Arabic called ‘*Majallat el-Ahkam Ash-Shariyyah*’

¹²⁹ *Ijtihad* is an Islamic legal term which means ‘an independent reasoning’ or ‘the utmost effort an individual can put forth in an activity’. see Marinos Diamantides, "Shari'a as Discourse: Legal Traditions and the Encounter with Europe Edited by Jørgen S. Nielsen and Lisbet Christoffersen, Farnham: Ashgate, 2010. 280 Pp. Isbn 978-0-75467-955-4£ 70.00," *International Journal of Law in Context* 10, no. 03 (2014).

to exercise *ijtihad* in adjudicating disputes brought to *Sharia* courts'.¹³⁰ Therefore, the codification of judicial rules will help at least in the stability of judicial decisions.

6.4.2 The Main Potential Prohibitions of Islamic *Sharia* Law that may be contained in an Arbitral Award

The most well-known principle of jurisprudence of Islamic *Sharia* Law is that all actions are allowed and permitted except those that are specifically prohibited according to explicit evidence of *Sharia* Law, this is based on a text of the *Quran* as follows 'And has subjected to you all that is in the heavens and all that is in the earth; it is all as a favour and kindness from Him.'¹³¹ Cases that may be committed by an arbitral tribunal in violation of *Sharia* Law are difficult to count, in that most of these cases are considered under the Islamic jurisprudence of trade transactions '*Fiqh al-Muamalat*'.¹³² However, we will try hard to discuss the main prohibited cases:

- 1- Usury (*Riba*);
- 2- Gambling or Uncertainty (*Gharar*);
- 3- Ignorance or not knowing (*Jahaalah*)
- 4- Injustice or deceit (*Ghabn*).

Every case will be considered in detail:

6.4.2.1 Usury (*Riba*)

One of the main prohibitions to be included in an arbitral award in Saudi Arabia is that of usury '*Riba*'; usually known as interest of any kind. It is forbidden in Islam due to a number of Quranic verses.¹³³ The *Quran* does not provide any specific reasons for the prohibition of interest. John Gotanda explained the reasons for the prohibition of interest in Islam are based on the rationale which is logically accepted by Muslims. He provides three reasons as follows:

¹³⁰ Ziad A Al-Sudairy, "The Constitutional Appeal of Shari'a in a Modernizing Saudi State," *Middle East Law and Governance* 2, no. 1 (2010). At p. 10

¹³¹ The Noble Qur'an, *Surah AL-Jathiyah* (the Couching); 45:13

¹³² *Fiqh al-Muamalat* is related to the Islamic rules on trade and financial transactions.

¹³³ One of the Quranic verses explicitly states that: '*Those who eat Riba (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by Shaitan (Satan) leading him to insanity. That is because they say: "Trading is only like Riba (usury)", whereas Allah has permitted trading and forbidden Riba (usury)*'; Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary." The Noble Quran, *Surat al-Baqara* (the Cow), Part 3 Verse 275, (3:275)

- ‘1) Interest or usury reinforces the tendency for wealth to accumulate in the hands of a few, and thereby diminishes man's concern for his fellow man.
- 2) Islam does not allow gain from financial activity unless the beneficiary is also subject to the risk of potential loss; the legal guarantee of at least nominal interest would be viewed as guaranteed gain.
- 3) *Islam regards the accumulation of wealth through interest as selfish compared with accumulation through hard work and personal activity*¹³⁴

The concept of interest is broader in scope than usury, as usury is related to the agreed automatic prior increase to achieve a specific profit, while legal interest in an arbitral award may be in the form of damages shall include losses suffered by the creditor as well as lost profits. Since the arbitrator grants it, it is similar to damages or compensation for loss.¹³⁵ There is a renowned rule in *Sharia* Law, the principle of ‘Loss of Profits’ or ‘*Lucrum Cessans*’. Moreover, the second theory to explain the concept of interest within a foreign arbitral award could be compensation for the time value of money taken by the other party. The third theory is compensation due to a debtor’s procrastination in repaying.

However, compensation for lost profit is not recognised within the *Hanbali* School, neither is compensation for the time value of money. The Saudi Courts gives a legal right for any of the affected parties to claim damages under *Sharia* Law when the damages are a direct consequence of a breach of contract. This attitude is more restricted than what is applied in common law or civil law jurisdictions. This is due to the fact that ‘...*Sharia* will only restore a party to the position it was in before the breach, not to where it would have been had the obligations been performed. Otherwise, this would be speculative in nature, which is not enforceable under *Sharia*’.¹³⁶ Determining the amount of damages does not leave to the claimer, the Saudi Courts have extensive powers to evaluate actual and direct damages that can be recognised with certainty, and are quantifiable.¹³⁷ Al-Ammari and Martin comment in this regard by saying ‘This approach will

¹³⁴ Talib Siraaj Abdus-Shahid, "Interest, Usury and the Islamic Development Bank: Alternative, Non-Interest Financing," *Law & Pol'y Int'l Bus.* 16 (1984). At 1102-1103 Cited in John Yukio Gotanda, *Supplemental Damages in Private International Law: The Awarding of Interest, Attorneys' Fees and Costs, Punitive Damages and Damages in Foreign Currency Examined in the Comparative and International Context* (Kluwer Law International, 1998). At pp.34-36

¹³⁵ John Y Gotanda, "Awarding Interest in International Arbitration," *American Journal of International Law* (1996). At pp. 41-42

¹³⁶ Al-Ammari and Martin, "Arbitration in the Kingdom of Saudi Arabia." at pp.406

¹³⁷ *Ibid.* at pp.406

likely be repeated when Saudi courts are asked to recognize and enforce damages awarded in international arbitration awards, since the New Arbitration Law and the Enforcement Law require them to be *Sharia*-compliant.¹³⁸ In contrast, some Islamic countries such as Egypt, UAE, Kuwait and Bahrain allowed for ‘moratory interest’ which is based on ‘an integral compensation of the damage without stipulating any provisions as to compensatory interest’.¹³⁹ In this matter, the Kuwaiti and Bahraini legislatures make a distinction between civil and commercial situations. In a commercial matter, the creditor is entitled to charge interest on commercial compensation or moratory interest. In the matter of compensatory interest, there is no distinction between civil and commercial obligations under the Bahraini Law.¹⁴⁰

Through the review of the international practice of arbitration, it can be seen that the practice of granting indemnity in terms of interest is internationally recognized, and there is a difference in the matter of interest rates, the International Centre for Dispute Resolution (ICDR) in Article 28 (4) states ‘...and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.’. Moreover, the matter of interest is mentioned in the *London Court of International Arbitration (LCIA)* in Article 26 (4).¹⁴¹ However, the international arbitration rules of ICC, UNCITRAL and ICSID are silent on the issue of interest.¹⁴²

Moreover, many international arbitration legislations have organised this matter, such as Section 49 of the English Arbitration Act 1996 and Section 18 of the Irish Arbitration Act 2010. The international arbitration law in Ireland provided a fair solution to the matter of interest, as Section 10 of the Irish Arbitration Act 1998 (international commercial), which was repealed and replaced by the Irish Arbitration Act 2010, grants an arbitral tribunal broad flexibility in deciding the amount of interest to award or they may completely ignore interest when the dispute parties have decided that in their arbitration agreement. This is considered as a great advantage of the previous Irish law.¹⁴³ This may be an appropriate solution on an arbitral award that shall be enforced in Saudi Arabia; where the dispute parties, one of whom is Saudi, can agree to ignore interest by explicit text in the arbitration agreement. However, Professor Gotanda has explained

¹³⁸ Ibid. at pp.406

¹³⁹ Comair-Obeid, "Salient Issues in Arbitration from an Arab Middle Eastern Perspective." At p.72

¹⁴⁰ Ibid.

¹⁴¹ Article 26 (4) of the LCIA states ‘... the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate...’

¹⁴² Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*, vol. 17 (Kluwer Law International, 2008). At pp. 266-267

¹⁴³ Barrett, "Tale of Two Countries: A Comparison of the International Commercial Arbitration Laws of Egypt and Ireland, A." at pp.39-40

in his article that there are three main issues that shall be addressed by the tribunal when granting the compensatory interest, these are: '(1) the debtor's liability to pay-interest, (2) the period of time over which interest accrues, and (3) the rate of interest'.¹⁴⁴

There are a number of legal solutions will be presented in this part; however, it should be clarified that these proposed solutions are in order to re-imagine the concept of interest in the foreign arbitral awards. This review is just a re-examination of the concept of interest in order to spark the ignition of an analysis of this term by others who will study and discuss these solutions in depth from the modern Islamic perspective. Most studies considered this issue as obvious usury in Islam, whereas there is a possible of misunderstanding of the terms of 'profit' or 'interest' that are used within the foreign arbitral awards. The proposed solutions will be discussed as follows:

6.4.2.1.1 Compensation for Missed Opportunities (Lost Profits)

This principle has led to a great deal of controversy, and a certain view has not been agreed in the *Sharia* Law in particular. It distinguishes between compensation for loss of profit with regard to two matters: (1) definite future damage, (2) possible future damage. In the first case, there should be compensation due to the damage that will arise and one with regard to which its impact in the future is clear and sure. An example is of a person's injury leading to permanent disability. The damage arises due to his inability to profit, and so the compensation is obligatory. The second matter is probable; its reason has not been realized fundamentally. Consequently, such compensation is not obligatory. This is what *Ibn Taymiyyah (Hanbali)* decided clearly on the issue of compensation for lost profit that had a *raison d'etre* of two types: (1) present damage, (2) non-existent destruction held its *raison d'etre*, and the associated profit was not achieved. This is what the Saudi judiciary applies in fact. This can be seen in the decision of the Board of Grievances No. 235/1415 in 1994¹⁴⁵ which stated: '... what was contained in the foreign judgment to be enforced in Saudi Arabia which is what the Claimant has a loss of profit contrary what is set in Islamic *Sharia* Law because the profit that the Claimant claims that he will lose is not certain, but is possible. It is a metaphysical matter revolving between existence and non-existence, and in the jurisprudence of Islamic *Sharia* Law, the guarantee and compensation should not be excepted where its reason is sure-positive ...'. On the other hand, by practical application in the Saudi courts, some decisions have applied compensation for missed opportunities or 'lost profits' on condition

¹⁴⁴ Gotanda, "Awarding Interest in International Arbitration." At p. 40

¹⁴⁵ the Board of Grievances, Decision No. 235/T /2 in 1415

that this profit had a *raison d'etre*. In Case No. 773/1412 in 1992,¹⁴⁶ the decision gave the plaintiff his claim for real estate and compensation for damage done, including missed opportunities which had a *raison d'etre*. In the case No. 172/1419 in 1998,¹⁴⁷ the decision forced the respondent to guarantee the lost profit of the disputed stocks to the plaintiff, as these benefits were held to be a *raison d'etre*. Moreover, AL-Mutawa explained in his thesis that 'A Saudi arbitral tribunal in Final Award No 7063 (1993) has also upheld an arbitral award that included interest, stating that the doctrine of the *Riba* under Saudi law did not bar all arbitral awards of reasonable compensation for financial loss'¹⁴⁸ In summary, it can be said that the Saudi judicial system recognised the ascertained damages and the lost profit in a situation where there is a breach of contract. Nevertheless, any agreement in advance to grant ascertained damages is considered to be invalid when it contains compensatory interest.¹⁴⁹

Through a review of many of the civil laws in various Arab countries, it is evident that the compensation principle for lost profits exists and is codified in a number of Articles. Article 221 (1) of the Egyptian Civil Code states 'the judge will fix the amount of damages, if it has not been fixed in the contract or by the law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived, provided that the damages are the normal result of the failure to perform the obligation or of delay in performance...'. This is also mentioned in Article 224 of the Libyan Civil Code, Article 266 of the Jordanian Civil Code and Article 223 of the Bahrain Civil Code. However, it should be mentioned that these modern civil laws in Arabic countries have been drafted by Abd El-Razzaq El-Sanhuri,¹⁵⁰ who is an Egyptian legal scholar. He attempted to recreate the modern Islamic law by modernising *Sharia* law using the Western civil law, especially the French law.¹⁵¹

6.4.2.1.2 Compensation for the Time Value of Money (Inflation Compensation)

It should be clarified that there is a lack in Islamic studies with regard to this topic in Saudi Arabia. The reason may be that this study is very close to the concept of usury (*Riba*) which has

¹⁴⁶ the Court of Appeal in the Board of Grievance, Decision No. 89/1415 dated in 1994. Cited in Nasir M. AL-Jofan, "The Compensation for Lost Profits on a Condition That This Profit Had a *Raison D'etre*," (2006), <http://islamselect.net/mat/32318>

¹⁴⁷ the Court of Appeal in the Board of Grievance, Decision No. 202/1420 dated in 1999. Cited in *ibid*.

¹⁴⁸ Almutawa, "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." At p. 202

¹⁴⁹ For more details see Al-Shareef, "Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958." At p. 184

¹⁵⁰ He is Egyptian jurist, born in Alexandria in 1895, he died in 1971.

¹⁵¹ Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971*, vol. 10 (American University in Cairo Press, 1987)..

led to an avoidance of this topic. However, in order to accept compensation for the time value of money, it shall be considered that there is no interest rate that has been contractually agreed, and the amount of compensation is not contractually agreed as there is no certainty as to any consequences. An Indonesian researcher said in this regard: ‘That is the *Sharia* does allow for compensation for the time value of money for sales contracts but not for loans. Since a *Murabahah* is a sales contract, scholars argue compensation for the time value of money is lawful’.¹⁵² M Khan asked a question in his article saying, ‘a legitimate question arises as to what is the correct position of Islam on the issue of time value of money’,¹⁵³ he concluded an answer by saying that:

‘(a) Islam has nothing against having a positive time preference. However, it is more reasonable to think of the time preference as a function of time rather than treating it as fixed and independent of the time-frame under consideration.

(b) There is also nothing against realizing time value of money as long as it is not claimed as a predetermined value...’¹⁵⁴

There is an example of awarding interest by the government in one of the Islamic countries, which is Egypt. Article 226 of the Egyptian Civil Code states ‘when the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtors shall be bound, in case of delay in payment, to pay to the creditor, as damages for the delay, interest at the rate of 4% in civil matters and 5% in commercial matters...’. Professor Gotanda has established several principles from studying the concept of interest as a part of an arbitral award, as he states:

- 1- ‘The prevailing practice permits an award of interest as compensation for the use or detention of money. Even some countries whose religious beliefs generally prohibit the payment of interest have allowed it in certain commercial transactions. Indeed, the practice has become so widespread that it can be said that the liability to pay interest as part of an award of damages in contract and debt claims is an accepted international legal principle.
- 2- With respect to the period for which interest is allowed, the laws of most countries provide that interest starts to accrue from the date of default... the prevailing view

¹⁵² Rininta Nurrachmi et al., "Time Value of Money in Islamic Perspective and the Practice in Islamic Banking Implications," (2012). At p.21

¹⁵³ M Fahim Khan, "Time Value of Money and Discounting in Islamic Perspective," *Review of Islamic Economics* 1, no. 2 (1991). 35-45. at p.35

¹⁵⁴ *Ibid.* at p.45

is that interest begins to accrue only after the claimant provides the debtor with a demand for performance.

- 3- With respect to the rate at which interest accrues, the laws of most countries provide for payment at the rate set forth in the parties' agreement... [the interest rate] vary significantly from country to country, ranging from 4 to 16 percent'.¹⁵⁵

The concept of inflation compensation is recognised in the Saudi Courts, as long as the claim is based on breach of contract. In the decision of the Board of Grievances No. 29/1401 in 1981,¹⁵⁶ the Board held that:

‘due to a defendant's failure to allow the contractor to initiate the required work, the plaintiff would be compensated for the increase in the market value of materials due to inflation. The conduct of the defendant led to the extension of the contract to take into account the rate of inflation. An increase in the market value of materials and wages would have been avoided if the defendant had performed the contractual obligation, as intended at the signing of the contract’¹⁵⁷

6.4.2.1.3 Compensation Due to Debtor’s Procrastination in Repaying

The late repayment of debt could be due to procrastination. ‘*Mumaatalah*’ which means delaying payment of the debt for no reason.¹⁵⁸ In our case, it is a delay in paying the obligation between the parties to a contract due to their involvement in an arbitration dispute. There are a number of Islamic studies in this regard which support the additional amount of money or ‘profit’ as compensation or a fine for delay in repaying, with a condition that the debtor is rich and delaying on purpose.¹⁵⁹ This view is based on the *Hadiths* ‘*Sunnah*’, as the Prophet Mohammed (P.B.U.H.) said ‘Procrastination (delay) in repaying debts by a wealthy person is injustice’.¹⁶⁰

¹⁵⁵ Gotanda, *Supplemental Damages in Private International Law: The Awarding of Interest, Attorneys' Fees and Costs, Punitive Damages and Damages in Foreign Currency Examined in the Comparative and International Context*. At 47-50

¹⁵⁶ the Board of Grievance, the Case No. 392/1399 in 1979

¹⁵⁷ Cited in Al-Shareef, "Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958." At p. 202

¹⁵⁸ Sad Bin Abdul-Aziz Ash-Shuwayrikh, "Compensating Creditors for the Late Repayment of Debts," *AL-Adel* 56. At pp. 85-130; see at <https://adlm.moj.gov.sa/ENG/attach/254.pdf>

¹⁵⁹ See Sheikh Abdullah bin Mune'a ‘the rich debtor’s procrastination is injustice’ Also, Sheikh Dr. Mustafa El-Zarqa ‘Compensation due to debtor’s procrastination in repaying, between jurisprudence and economics’

¹⁶⁰ Narrated by Muslim (1564) and al-Bukhaari (2400)

6.4.2.2 Gambling or Uncertainty (*Gharar*)

Gharar is an uncertain obligation in a trade transaction. It is the second most extreme forbidden act that shall not be included in contracts or arbitral awards for them to be enforced in Saudi Arabia. *Gharar* could be defined as a hazard, gambling, chance or risk. According to the Muslim jurists, the *Gharar* is ‘...the sale of a thing which is not present at hand or whose consequence is not known or a sale involving hazard in which one does not know whether it will come to be or not, as in the sale of a fish in water or a bird in the air.’¹⁶¹ Therefore, it is considered forbidden, and any contract must be certain and clear, as is mentioned in Article 266 of the Codification of Legislative Rules.¹⁶² The decision is based on the *Quranic* verse (7:90).¹⁶³

Also, from the perspective of *Hadiths ‘Sunnah’*, the Prophet Mohammed (P.B.U.H.)¹⁶⁴ forbade transactions involving *Gharar* (ambiguous).¹⁶⁵ One of the main practical examples is that of commercial insurance which is not permitted in Islam, especially from the point of view of the *Hanbali* School, which has very restricted Islamic rules regarding transactions involving gambling ‘*Gharar*’ or ‘*Maiser*’¹⁶⁶ such as in the case of buying an insurance policy when it is unknown whether or not the benefit will actually be achieved.¹⁶⁷ The idea behind this point of view is that both parties must be fully aware of their obligation, and any uncertainty with regard to the obligation such as price, goods and date may lead to the invalidity of such contracts. This view considering insurance to be forbidden in Islam is based on the Islamic *Fiqh* Council Decision,¹⁶⁸ with registered a dissent from Dr. Mustafa AL-Zarqa¹⁶⁹ whereas cooperative insurance is permitted according to the Modern Muslim Jurists.¹⁷⁰

¹⁶¹ Ayub, *Understanding Islamic Finance*. at p. 143

¹⁶² In Arabic called ‘*Majallat el-Ahkam Ash-Shariyyah*’

¹⁶³ the *Quranic* verse (7:90) explicitly states: ‘*O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, al-Ansaab [sacrifices for idols, etc.] and al-Azlaam [arrows for seeking luck or decision] are an abomination of Shaytaan’s handiwork. So avoid (strictly all) that (abomination) in order that you may be successful*’; Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary." p.162

¹⁶⁴ ‘Peace be upon him’

¹⁶⁵ Narrated from Abu Hurayrah; Imam Muslim, "Sahih Muslim", Hadith 1513

¹⁶⁶ *Maiser* is another definition meaning for gambling or easy money.

¹⁶⁷ Mahmoud A El-Gamal, "An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence," *Islamic Economic Studies* 8, no. 2 (2001). At pp. 29-58.

¹⁶⁸ The Islamic Fiqh Council Decision No. (5) in 12/09/1977; the First Session, the Fifth Resolution on Insurance with Its Various Kinds and Forms.

¹⁶⁹ For more details see MA Al-Zarqa, "Aqd Al-Tamin (Al-Sawkarah) Wa-Mawqif Al-Sharia’h Al-Islamiyah Minh (Insurance Contract and the Position of Sharia’h Law from This Contract)," *Dimashiq, Matba’at Jami’at Dimshq, Syria* (1962).

¹⁷⁰ The Islamic Fiqh Council Decision No. (5) in 12/09/1977; the First Session 1977, the Fifth Resolution on Insurance with Its Various Kinds and Forms.

Moreover, there are many examples of *Gharar* transactions in the present time other than insurance, such as asset recovery, stocks and forex which are considered as aleatory contracts. These are based on ‘...a book-out contract, in which a person buys an asset and then sells it without taking possession, only getting/paying the difference in the purchase and sale prices. This happens in commodities, stocks and the foreign exchange markets.’¹⁷¹ The main problem is that most international trade contracts include insurance, sales, investment in futures and carriage of goods contracts which are based on aleatory contracts and are subject to future variations. However, it is necessary to clarify that the main role of *Sharia* law is that the obligations in commercial transactions contracts must be clear to the parties due to ‘a proper balance between the two contracting parties and a elimination of uncertainties that can give lead to illicit gains by either party’.¹⁷²

6.4.2.3 Ignorance or not knowing (*Jahaalah*)

Jahaalah as a definition is very close to *Gharar*. One example of *jahaalah* is selling a product or selling on a shipment bought from abroad, before it arrives. One of the main requirements of trade transactions under *Sharia* law is that the obligation of any contract shall be recognised by the parties when they commit to it. The reason behind the *jahaalah* being forbidden is because neither the seller nor the purchaser knows how much of the goods will be sold or what are the commitments that will be obligated. The issue is related to ignorance and this is what can lead to a dispute between parties.¹⁷³

6.4.2.4 Injustice or deceit (*Ghabn*)

Ghabn in Islamic jurisprudence means weakness, injustice, fraud or deceit. It is also measured through the term ‘*Fahish*’.¹⁷⁴ *Fahish* is used to define the aspect which affects financial contracts such as excessive injustice ‘*Ghabn*’. It relates to a good’s price, where there is cheating and misrepresenting things in order for the seller to get a higher price than what the good is worth. One Muslim writer said that ‘the fraud must have caused *ghabn* or loss to the contracting party and the loss incurred must come from the act of the fraud’.¹⁷⁵ When the concept of fraud is

¹⁷¹ Ayub, *Understanding Islamic Finance*. At pp. 144

¹⁷² Jamaal al-Din M Zarabozo, "The Question of Insurance Outside of the "Lands of Islam"." At P. 5 at <http://www.jamaalzarabozo.com/audio/insurance.pdf>

¹⁷³ Muhammad Saed Abdul-Rahman, "Islam: Questions and Answers-Jurisprudence and Islamic Rulings," *MSA Publication Limited* 23 (2007). At pp. 275-276

¹⁷⁴ *Fahish* means the increasing amount of something which exceeds the logical limits.

¹⁷⁵ Siti Sara Ibrahim, Norajila Che Man, and Abd Halim Mohd Noor, "Fraud: An Islamic Perspective," *The 5th International Conference on Financial Criminology (ICFC)* (2013). At p. 448

considered here, it is obviously forbidden within international practice through international public policy. Therefore, it is unreasonable for it to be approved in foreign arbitral awards.

In summary, it is necessary to clarify that the author does not differ on the matter of the prohibition of these issues such as *riba*, *gharar*, *Jahaalah* and *ghabn*; due to the existence of evidence on the explicit prohibition. What we discuss here is whether these modern practices in international commercial transactions apply these forbidden terms in Islamic law, or whether the prohibition was due to a lack understanding of the mechanism of these international practice. One Muslim writer stated that, 'It is these four concepts of *Jahaalah*, *gharar*, *riba* and *qimaar* in particular that have led the majority of Muslim scholars to declare modern commercial insurance impermissible';¹⁷⁶ whereas Dr. Mustafa AL-Zarqa declares that cooperative insurance is permitted according to the Modern Muslim Jurists.¹⁷⁷ AL-Zarqa has a different view with regard to commercial insurance. He believes that commercial insurance is permissible in *Sharia* law¹⁷⁸, and this view has been agreed by Sheikh Abdullah Suleiman Al-Munea, a well-known Islamic jurist in Saudi Arabia, who is a member of The Council of Senior *Ulema*.¹⁷⁹

6.4.3 Arbitration Award Contrary to Public Policy

The issue of public policy is regarded as one of the thorniest and complex legal matters throughout the world, due to its association with the legal rules of the country that governs the community and achieves its interests, as well as its association with state policy and achieving its interests. Therefore, public policy is linked to the primacy of the state and how it achieves public, social, economic, and political interests, and affects the laws concerning these interests. For this reason, it has been found that the judiciary has the upper hand in interpreting public policy in Saudi Arabia, and it acts as the source of legislation.¹⁸⁰

Scholars have distinguished between national and international arbitration in the implementation of the principles of public policy, and they have noted a difference between

¹⁷⁶ Zarabozo, "The Question of Insurance Outside of the "Lands of Islam"." At P. 5 at <http://www.jamaalzarabozo.com/audio/insurance.pdf>

¹⁷⁷ The Islamic Fiqh Council Decision No. (5) in 12/09/1977; the First Session 1977, the Fifth Resolution on Insurance with Its Various Kinds and Forms.

¹⁷⁸ For more details see Al-Zarqa, "Aqd Al-Tamin (Al-Sawkarah) Wa-Mawqif Al-Sharia'h Al-Islamiyah Minh (Insurance Contract and the Position of Sharia'h Law from This Contract)."

¹⁷⁹ For more details see Abdullah Al-Munea, "Insurance between Lawful and Unlawful," *King Faisal Foundation* (2002).

¹⁸⁰ El-Ahdab, *Arbitration with the Arab Countries*. At pp. 669-670

national and international public policy.¹⁸¹ However, an arbitral award may be refused and not enforced in a particular country based on the opinion that it is contrary to the public policy of that country, according to Article V (2-b) of the New York Convention. In Saudi Arabia, the question of accepting usurious transactions ‘*Riba*’, and business dealings involving compromised ambiguity, uncertainty or injustice ‘*Garar, Jahaalah or Ghabn*’ such as insurance transactions, are unacceptable due to the prohibition of Islamic *Sharia* law with regard to such transactions, Wakim comments in this matter by saying that ‘... arbitral awards upholding aleatory contracts or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy’.¹⁸² The supposition is that the domestic public policy has been applied to them, because these transactions are considered acceptable in the rest of the world. To take another example, in the United States of America, antitrust regulations are usually based on American public policy.¹⁸³ Therefore, the US courts monitor arbitral awards on the subject in order to protect competition. They consider how such awards apply to the internal public policy of the US, as they believe that the antitrust regulations shall not be vested in arbitrators due to the fact that arbitrators are often members of the business community. They do this in order to preserve the economic system in the United States.¹⁸⁴

From the perspective of the international conventions, Article V (2-b) of the New York Convention (1958) explained that the foreign arbitral awards may not be recognised and enforced when, ‘...the award would be contrary to the Public Policy of that country.’¹⁸⁵ In the same approach, Article 37 (e) of the Riyadh Convention states that, ‘If any part of the adjudication be in contradiction with the provisions of Islamic *Sharia*, the public order or the rules of conduct of the requested party’. As it can be noticed that Article 37 stipulates clearly that the arbitral award should not be contrary to *Sharia* Law. Moreover, the UNCITRAL Model Law Article 36 (2-b) emphasised that ‘Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (b) if the court finds that: (ii) the recognition or enforcement of the award would be contrary to the public policy of this State’. However, international public policy is linked to the public, social, economic and political interests of the international community. Transactions that involve drug trafficking or human trafficking, sexual

¹⁸¹ A. Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?," *Transnational Dispute Management, ALTA. L. REV.* 34, no. 01 (2004). At p.137

¹⁸² Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East." At P.49

¹⁸³ Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. At pp. 996-997

¹⁸⁴ The case of *Mitsubishi Motors Corporation vs. Soler Chrysler-Plymouth, Inc* 473 U.S. 614 (1985)

¹⁸⁵ Article V (2) (b) of the NYC.

exploitation, as well as the bribery of arbitrators and buying off witnesses and forgery, are usually unacceptable in arbitration proceedings.¹⁸⁶ Moreover, any arbitral awards involved with legal issues, such as smuggling, bribery, fraud or corruption, will not be enforced on the ground of the violation of public policy.¹⁸⁷

From the perspective of national legislation, it should be clarified that there is a similarity in the explicit texts between the national and international legislation. Article 50 (2) of the SAL 2012 states ‘The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of *Sharia* and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law’. The Saudi law follows the Egyptians’ attitude in this matter, as Article 53 (2) of the Egyptian Arbitration Law states that ‘The court adjudicating the action for annulment shall *ipso jure* annul the arbitral award if it is in conflict with the public policy in the Arab Republic of Egypt’. Moreover, in Section 68 (2-g) of the English Arbitration Act 1996, it is emphasised that the arbitral awards shall not be contrary to the public policy.¹⁸⁸ However, these laws do not illustrate whether the national court shall consider the public policy from the domestic perspective or under the general principle of international public policy. The question that may arise is whether the grounds of public policy under the national jurisdictions shall be restricted to the international standard of public policy? In this regard, Gary Born emphasised that ‘...it is well-settled that a narrower concept of public policy should apply to foreign awards than to domestic awards’.¹⁸⁹ However, through international cases, some international practices can be drawn upon, such as in the Case of *Soleimany vs. Soleimany*,¹⁹⁰ when the Court of Appeal in England refused to enforce the arbitral award on the grounds of violation of public policy, due to the fact that the transaction [illegal smuggling] was illegal under both Iranian law and English law, even though the illegal contract was enforceable under the applicable law [Jewish Law]. On the other hand, in the Case of *Westacre vs. Jugoimport*,¹⁹¹ the defendants assumed that the consultancy agreement that the contracts in Kuwait would be obtained through bribes, which meant that it was void on the ground

¹⁸⁶ Blackaby et al., *Redfern and Hunter on International Arbitration*. At pp. 660-662

¹⁸⁷ There are a number of cases such as *Soleimany vs. Soleimany* [1999] QB 785, *Westacre vs. Jugoimport* [1999] 2 Lloyd’s Rep 65 (CA) and *OTV vs. Hilmarton* [1999] 2 Lloyd’s Rep 222. Cited in *ibid.* at pp. 656-662

¹⁸⁸ Section 68 (2-g) of the English Arbitration Act 1996 states ‘Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant... (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy’

¹⁸⁹ Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012). At p.403

¹⁹⁰ *Soleimany vs. Soleimany* [1999] QB 785

¹⁹¹ *Westacre Investments Inc vs. Jugoimport SPDR-Holding Co Ltd* [1999] 2 Lloyd’s Rep 65 (CA)

of violation of public policy. The Court of Appeal held that fraud and bribery in a contract to be executed in Kuwait did not breach the public policy of Kuwait. Therefore, it could be considered arbitrable and the award could be enforceable under English law, due to the fact that there was no basis for non-enforcement under public policy grounds. Similar to this attitude is the Case of *OTV vs. Hilmarton*,¹⁹² in which the OTV requested that the claim of Hilmarton be dismissed on the grounds that the award violated the contract's place of performance which is Algeria. However, this request was rejected by the tribunal due to the fact that there was no evidence of corruption or bribery. The English High Court held that the award was enforceable, and was not contrary to English public policy. The NYC makes a specific reference to the domestic law while English law followed the distinction in the *Westacre Case*.

At the signing of the New York Convention,¹⁹³ Saudi Arabia put forth its reservations on the condition so as not to breach the public policy that exists in the Saudi Arabia, in that public policy in Saudi Arabia is closely related to the provisions of Islamic *Sharia* law. In this regard, it should be clarified that the Government of Saudi Arabia has widely adopted Article V (2-b), which made it difficult for foreign arbitral awards to be recognised and enforced.¹⁹⁴ Roy stated in his article that, 'Saudi Arabia has traditionally been hostile to the recognition and enforcement of non-domestic arbitral awards, finding these awards contrary to Saudi Arabian law and public policy'¹⁹⁵. There was always a question of what is the public policy in Saudi Arabia, and does it have specific and well-known features? In fact, the public policy in Saudi Arabia is the general provisions of *Sharia* law, according to Article 11 (3) of the implementation Rules of the SEL, which stipulates 'The public policy in Saudi Arabia means the *Sharia* law'. Moreover, a telegram from the King of Saudi Arabia containing a Royal Order¹⁹⁶ and an explanation of public policy's meaning, and stated that the public policy in Saudi Arabia is 'the overall rules in *Sharia* Law are based on the texts of the *Quran* and *Sunnah*'. In this case, it should be moved to the question of what is the concept of public policy in *Sharia* Law. It has been explained by AL-Samaan, who has said that the foundation of the concept of public policy in Islamic Law is, '...in respect of the common spirit of the *Sharia* and its sources i.e. (the *Quran* and the *Sunnah*, *Ijma*, *Qayas*, etc.) and on the principle that *individuals must respect their clauses, unless they forbid what is authorized and authorise*

¹⁹² *Omnium de Traitement et de Valorisation SA vs. Hilmarton Ltd*, [1999] 2 Lloyd's Rep 222

¹⁹³ Saudi Arabia was one of countries which joined this convention on 19th April 1994, by the Royal Decree No. M/11 based on the decision of the Ministers Council No. 78 on 27th January 1993.

¹⁹⁴ Roy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?." at pp. 953-958

¹⁹⁵ *Ibid.* p. 922

¹⁹⁶ The Number of Royal Order is (44983), dated on 22/08/2012.

*what is forbidden.*¹⁹⁷ However, once public policy was associated with the provisions of *Sharia* Law, this has opened the floodgates on the issue of the limits of public policy in Saudi Arabia, as the concept of public policy will be wide in conception and also unclear. Mark Wakim argued ‘Other countries, such as Saudi Arabia, remain unclear about the public policy standards that will be invoked upon review during enforcement proceedings.’¹⁹⁸ Therefore, it could be concluded that public policy in Saudi Arabia is based on three principle sources: (a) *Sharia* Law, (b) Royal power¹⁹⁹ and (c) public morals.²⁰⁰

However, what are the main legal issues in the substantive aspect of the *Sharia* law concept of public policy? According to Samir Saleh, there are two main issues; these issues are the charging of interest on loans (usury) and uncertain obligations (*Gharar*), which are most likely to arise in practice as part of the procedure for the enforcement of foreign arbitral awards.²⁰¹ The issue of applicable law could also be added, especially when both parties are Saudis. This will be discussed due to the new law that allows the parties to choose another country’s laws, under the condition of applying ‘substantive rules’ without ‘its conflict of laws rules’,²⁰² with a condition mentioned in Article 38 of SAL 2012 which emphasised that the rules must not contravene the provisions of *Sharia* Law and public policy in Saudi Arabia.²⁰³ In this respect, it should be mentioned that one Saudi expert has said that due to the lack of clarity of the new SAL 2012, the two Saudi parties that are involved in national arbitration could apply the foreign substantive or procedural rules in their arbitration proceedings,²⁰⁴ according to Article 5 and 38 of SAL 2012,²⁰⁵ he also added ‘...and may even choose a foreign language. Here the lawmakers’ intent is unclear’.²⁰⁶ In the Decision No. 43/1415 in 1995, the Court of Appeal in Saudi Arabia upheld the arbitration proceedings for a dispute between two Saudi parties even though the arbitrators were non-

¹⁹⁷ Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia." At p.235

¹⁹⁸ Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East." at P.27

¹⁹⁹ Royal power in Saudi Arabia is mainly drawn from Islamic law.

²⁰⁰ Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice," p.263.

²⁰¹ Saleh, "The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East." At p. 27

²⁰² Article 38 (1-a) states ‘Subject to provisions of *Sharia* and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following: (a) 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...’

²⁰³ Article 38 (1) of SAL 2012 states ‘Subject to provisions of *Sharia* and public policy in the Kingdom...’

²⁰⁴ Al-Hoshan, "The New Saudi Law on Arbitration: Presentation and Commentary." At p. 10

²⁰⁵ Article 5 and 38 of SAL 2012

²⁰⁶ Al-Hoshan, "The New Saudi Law on Arbitration: Presentation and Commentary." At p. 10

Muslims, due to the fact that ‘the parties had agreed to resolve their disputes by arbitration in the US, France, and Austria’.²⁰⁷

In contrast to this approach, in the Decision No. 143/1412 in 1992,²⁰⁸ where the both dispute parties are Saudis and the arbitration clause agreed to refer the dispute to arbitration under the ICC’s Rules in Zurich, the competent court considered the arbitration clause was void and null due to the fact that it was contrary to public policy. The Review Committee in the Board of Grievances commented as follows:

‘This dispute is subject to Saudi law and the arbitration clause providing for the settlement of the dispute by means of arbitration in Zurich under the rules of the ICC is null and void. Regardless of its contradiction with the Saudi law of arbitration and its Implementing Rules, this is an attempt to eliminate the jurisdiction of the Saudi judiciary over the dispute, which is against the public policy of Saudi Arabia’²⁰⁹

The court decisions that support this view were mentioned in Case No.1804/1422 in 2001, where the Review Committee in the Board of Grievances clarified that ‘the Muslim party cannot be referred to non-*Sharia* law.’²¹⁰ This view is based on a text of the *Quran*.²¹¹ In Case No. 54/1411 in 1991, the Review Committee stated ‘the referral of disputes to the International Chamber of Commerce in Switzerland amounts to robbing the Saudi Judiciary of its authority. This embodied violation of Saudi General Law and as such it is considered invalid’²¹². Also, in Case No. 125/1417, where both dispute parties were Saudis, the Review Committee in the Board of Grievances stated that because ‘the two parties were Saudis and are not entitled to agree on arbitration outside Saudi Arabia because that contradicts public policy on the ground that it robs the jurisdiction from the Saudi Judiciary’.²¹³

Many Muslim countries in the Middle East have a different view in the matter of the strict approach regarding the public policy requirements; for example, the Egyptian Courts have applied

²⁰⁷ The 4th Review Committee, Decision No 43/T/4 (Saudi Arabia 1995); The 4th Review Committee, Decision No 18/T/4 (1992); The 3rd Review Committee, Decision No 15/T/4 (Saudi Arabia 2002). Cited in Almutawa, "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." 2014. At P.92

²⁰⁸ The case mentioned in Baamir and Bantekas, "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice." At pp. 255-256

²⁰⁹ The Decision No. 143/1412 in 1992; cited in *ibid.* pp. 255-256

²¹⁰ the Decision No. 15/1424 in 2003, in the Case No. 1804/1422 in 2001

²¹¹ the Noble Qur’an, *Surah An-Nisa* (the Women); 4:60

²¹² the Board of Grievance, in the Case No. 54/1411 in 1991. Cited in AL-Subaihi, "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law."

²¹³ Cited in *ibid.*

a restrictive approach when allowing the losing party to invoke the public policy exception to recognition and enforcement of an arbitral award.²¹⁴ Another example of invalidating the arbitral award on the ground of violation of public policy is the Court of Appeal in Qatar when the arbitral award has not included the name of the Prince ‘*Amir*’ of Qatar in the award.²¹⁵ Dr. AL-Mutawa has drawn a conclusion in his thesis by saying, ‘It is interesting to note that public policy was identified in the survey as the most common reason for non-enforcement of foreign arbitral awards, when public policy is a common ground among the GCC states.’²¹⁶ However, Dr. AL-Fadhel’s article identified a number of recommendations, one of these is that the Saudi Government shall adopt the international public policy in the international arbitration, as it is standard policy ‘...which has been adopted by some developed arbitration countries, [it] is important for attracting further foreign investments’.²¹⁷

6.4.4 Is the ‘Principle of Finality’ applied under the SAL 2012?

It should be noted that the following discussion is related to the recognition and enforcement of arbitral awards, whether domestic or international, that applied the SAL as the procedural law. However, it is difficult to discuss this question briefly, as this subject is complex, controversial and widely discussed in the position of provisions of *Sharia* Law. Therefore, previous discussions in this regard will be referred to, where the matter was discussed under the old SAL 1983,²¹⁸ as well as the new SAL 2012.²¹⁹ Under the SAL 1983, the conclusion has been reached that the arbitral award cannot acquire the authority of *res judicata* as it only becomes final when the 15-day time-limit has elapsed, according to article 20 of SAL 1983. EL-Ahdab declares that, ‘after expiry of the time-limit for making an appeal, the award becomes final but not *res judicata*.’²²⁰ Therefore, it must be approved by the competent court²²¹ in order to make sure that the award does not violate *Sharia* Law or Saudi public policy, and then it becomes *res judicata*. As a result, the answer to our topic question is, under the SAL 1983, the arbitral award does not acquire the authority of *res judicata* unless it is approved by the competent court in order to become final.

²¹⁴ Comair-Obeid, "Salient Issues in Arbitration from an Arab Middle Eastern Perspective." At pp. 66-68

²¹⁵ Court of Appeal (Qatar) no. 316/2012 (Nov. 2012); cited in *ibid*.

²¹⁶ Almutawa, "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." at p. 182

²¹⁷ Al-Fadhel, "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law." At p.255

²¹⁸ See sections 3.3.3.1 and section 4.5.4

²¹⁹ See sections 4.5.4 and 5.4.2.1

²²⁰ El-Ahdab, *Arbitration with the Arab Countries*. At p.665

²²¹ Article 21 of the SAL (1983)

The new SAL 2012 applies a more favourable approach by bringing the approach closer to international practice. Article 52 of SAL 2012 states, ‘Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable’. This Article is considered a significant improvement and the cornerstone of the success of arbitration in general, and particularly in the issue of easing the enforcement of arbitral awards in Saudi Arabia. However, it should be mentioned that the legislature has taken the provisions of *Sharia* law as a foundation in this matter, as well as keeping pace with international developments. From the point of view of the *Hanbali* School, some believe that if the arbitrator wrote to the judge with regard to his ruling, it would be necessary for the judge to accept and execute this, because it is a rule in force and is binding on the parties that have agreed to this arbitrator.²²² *Ibn Qudamah*, who is the well-known *Hanbali* jurist, said ‘The judges do not have to follow the issues that happened before them because they appear to be authentic and genuine, and the judiciary is given only for the qualified person to be a judge’.²²³ Through applying this approach, arbitration in Saudi Arabia will achieve two main objectives: **(1)** to put an end to the conflict and to prevent its recurrence, and **(2)** to avoid falling into contradictory verdicts and their duplication.

In contrast, there are some opinions in *Sharia* law, which contradict the principle of finality in arbitral awards. Article 1849 of the Ottoman Court Manual ‘*Majalla*’ states ‘A decision by an arbitrator, upon submission to a properly constituted Court, shall be accepted and confirmed, if given in accordance with law. Otherwise, it shall not be so confirmed’. This modern Islamic rule is respected in the Saudi courts, although it is under the *Hanafi* School as it presents the modern Islamic view. Moreover, in addition to the *Hanbali* School, Article 2094 of the Codification of Legislative Rules states ‘The arbitrator’s award is like a judge’s award. Thus, a judge is obligated to accept it and conclude it unless he is minded to revoke it, and an arbitrator’s writing [decision] is as a judge’s writing [decision]’. However, it should be observed that there is some difference of opinion on the issue of finality of arbitral awards. In contrast, the legislature was decisive in this matter when Article 52 was included in the new law. This will help to stabilise the orientation of Saudi Courts on this issue, but it is necessary to wait until we can see the real practices.

There is one issue which has been faced, where a query issued by the Supreme Judicial Council²²⁴ was sent to the King of Saudi Arabia to obtain guidance on the issue of the enforcement

²²² *Al Mughni* V. 10 P.137

²²³ *Al Mughni* V. 10 P.137

²²⁴ The inquiry number is (8898), dated on 27/05/2012

judge at the General Court. The execution judge was asking about the need to refrain from enforcing the resolution for inclusion of the transaction of usurious dealings between the parties (one of which is a bank). The decision was final and issued by the Office for the Settlement of Negotiable Instrument Disputes. The answer²²⁵ of the Bureau of Experts at the Council of Ministers (the legislative body), through the Royal Order,²²⁶ emphasised that the enforcement judge shall enforce what is contained in the 'executive bond' without reference to the merits of the dispute *unless contrary to public policy*.²²⁷ Thus, there are doubts on the issue of adopting the finality principle in Saudi Arabia, as any uncertainty of the execution judge on the issue of violation of the provisions of the Islamic law or public policy, means that the awards could be not enforced based on this violation.²²⁸

6.4.5 Is the 'Competence-Competence' Principle applied under the SAL 2012?

Under the old law of 1983, the arbitral tribunal could not decide the tribunal jurisdiction or the principle of competence-competence, or the validity of the agreement, including the arbitration clause under which the arbitral tribunal or arbitrator had been appointed. This is because the power and the whole process of arbitration were under the supervision of the Saudi judiciary. This has led to the shortcoming in the previous law being addressed under Article 20 of the SAL 2012.²²⁹ An approach has been incorporated which grants the arbitral tribunal the power to decide their own jurisdiction as Article 20 (1) states 'the arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject-matter in the agreement'. This approach follows the same approach as provided in Article 16 of the UNCITRAL Model Law.

²²⁵ The inquiry number is (8898), dated on 27/05/2012, issued by the Supreme Judicial Council.

²²⁶ The Number of Royal Order is (44983), dated on 22/08/2012.

²²⁷ Record Number (497) dated on 04/08/2012, issued by the Bureau of Experts at the Council of Ministers.

²²⁸ For more details see sections 4.5.4 and 5.4.2; see also Nesheiwat and Al-Khasawneh, "2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia, The." At p. 448

²²⁹ Article 20 of SAL 2012 states '1. The arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject-matter in the agreement.

2. Pleas of lack of jurisdiction shall be raised on dates referred to in Article 30 (Paragraph 2) of this Law. The appointment or participation in the appointment of an arbitrator by either party shall not preclude his right to file any of such pleas. The plea that the arbitration agreement does not include matters raised by the other party while the dispute is being reviewed must be raised immediately; otherwise, the right to raise such plea shall terminate. In all cases, the arbitration tribunal may accept a late plea if it deems the delay justified.

3. The arbitration tribunal shall decide on pleas referred to in Paragraph 1 of this Article prior to deciding on the subject of the dispute. However, it may join said pleas to the subject and decide on them both. If the arbitration tribunal decides to dismiss the plea, such plea may not be raised except through the filing of a case to nullify the arbitration award ending the entire dispute, pursuant to Article 54 of this Law.'

On the other hand, what is the situation when the plea is rejected by the arbitral tribunal? Under Article 16 (3) of the UNCITRAL Model Law,²³⁰ both parties have the right to request the court mentioned in Article 6 of the Model Law to decide the matter. The objection shall be submitted within 30 days after having received notice of that ruling; then, the court decision shall be final. Whereas, under the SAL 2012, the right of appeal for rejection is not permitted, and it can be raised again after the final award by challenging the validity of arbitral awards for specific reasons that are mentioned in Article 50 (1) of SAL 2012. Article 20 (3) states that ‘...If the arbitration tribunal decides to dismiss the plea, such plea may not be raised except through the filing of a case to nullify the arbitration award ending the entire dispute...’. The legal issue is that the nullification may be decided by the court of appeal, as a result both parties have to suffer the expense, arbitration proceedings and delay due to the lack of a regular procedure to assess the decision of the arbitral tribunal from the beginning of the arbitration proceedings. This absence may raise some legal issues in the future. The reason for this deficit may be an attempt to stay away from invoking the jurisdiction of the Saudi courts, fearing that it could be used to frustrate the arbitration proceedings. It should be mentioned that this approach is adopted under the Egyptian Arbitration Law 1994 in Article 22 (3) which states ‘...if the arbitral tribunal rules to dismiss a plea, such motion may not be raised except through the institution of recourse for the annulment of the arbitral award disposing of the whole dispute pursuant to Article 53 of this Law’.

6.5 Conclusion

This chapter clarified the potential legal obstacles that may affect the enforcement of arbitral awards in Saudi Arabia. The main issue is harmonising the provisions of *Sharia* Law in classic form, as applied in Saudi Arabia, with the international arbitration practices. However, this will no doubt lead to some legal obstacles, especially with regard to recognising and enforcing arbitral awards in Saudi Arabia, whether the award is domestic, international or foreign.

The Saudi legislature has made a significant effort to deliver the SAL 2012, but there are a number of potential legal issues that have been drawn from the practices of the old SAL 1983 and the practices of Saudi judicial system. The new law appeared to be a special version of the UNCITRAL Model Law with some modifications to suit the environment of Saudi law that are

²³⁰ Article 16 (3) of the UNCITRAL Model Law states ‘The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.’

associated with the provisions of *Sharia* Law. The legislature has modified the new law by adding some phrases such as *without prejudice to provisions of Sharia*. This has been added more than six times in the new law. In this regard, Dr. AL-Hoshan said that ‘the Saudi New Arbitration Law is almost identical to the Model Law although it inserted, here and there, terms stating compliance with the rules of Islamic Law (*Sharia*) and public policy’.²³¹ Logically, the addition of these phrases is very simple, especially to ensure that the new law does not violate the *Sharia* Law; the really difficulty is applying the new law’s text in practice. However, frequent reference to the need to comply with the provisions of *Sharia* law in SAL 2012 may lead to an alienation of foreign investors in terms of using the new SAL, given that it is the law used to regulate arbitration. It is better for them as the provisions of the new law allows the arbitration proceedings to be subject to foreign or international substantive or procedural rules.²³²

This chapter has considered some legal obstacles associated with the enforcement of arbitral awards. These issues are related to the validity of an arbitration agreement,²³³ the separability doctrine²³⁴ and the issue of nominating women or non-Muslims as arbitrators.²³⁵ On the other hand, there may be legal issues associated with the applicable law²³⁶ or the seat of arbitration.²³⁷ Finally, there are real legal issues that still have not been studied in depth, such as the prohibition of matters in *Sharia* that may be contained in an arbitral award like *Riba*²³⁸, *Gharar*²³⁹, *Jahaalah*²⁴⁰ and *Ghabn*²⁴¹. The author has provided an analytical and critical study of these potential legal obstacles, and has suggested some possible solutions through *Sharia* law,²⁴² questions and comments, which can be discussed by others in depth. With regard to public policy, it appears that the position of the Saudi Government applies strict compliance, even though the definition of public policy in Saudi Arabia is very wide and ambiguous; this has led to wide criticism from many international legal experts.²⁴³

²³¹ Al-Hoshan, "The New Saudi Law on Arbitration: Presentation and Commentary." At p.9

²³² Article 5 and 38 of SAL 2012

²³³ See section 6.2.1

²³⁴ See section 6.2.2

²³⁵ See section 6.2.3

²³⁶ See section 6.3.1

²³⁷ See section 6.3.2

²³⁸ See section 6.4.2.1

²³⁹ See section 6.4.2.2

²⁴⁰ See section 6.4.2.3

²⁴¹ See section 6.4.2.4

²⁴² For example, see section 6.4.2.1.1-3

²⁴³ Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East."

The modern legal principles in the new law that comply with international arbitration practice are not considered to be sufficient. These legal issues should be consolidated through the provisions of Islamic *Sharia* law, and the new legal solutions must be modernised to suit modern international practice through the new *fatwas* in Saudi Arabia. The conclusion has been reached that the modernisation of the laws may not be enough in Saudi Arabia, when it is not accompanied with updating of the *fatwas* of *Sharia* law or applying *fatwas* of other Islamic countries that have developed the *Sharia*. This is because the effect of the *fatwa* in Saudi Courts is greater than the effect of the provisions of law.

Chapter 7

7 Chapter Seven: Conclusion

Chapter 7- Conclusion

In this conclusion, we provide a summary of the work presented in this thesis, indicating the thesis's contributions to the field of recognition and enforcement of arbitral awards, and identifying some potential opportunities for future research by which this work can be extended. The most significant results and recommendation are then presented.

7.1 Summary

One of the main goals of this thesis is to provide a clear insight into the issue of the recognition and enforcement of arbitral awards in Saudi Arabia. Furthermore, this thesis contributes to the research field of the enforcement of arbitral awards by means of answering the question of whether or not the new Saudi Arbitration Law (SAL) 2012 will resolve the main legal problems associated with the enforcement of arbitral awards that emerged from the practices of SAL 1983. This is done through an analytical-critical study which includes the semi-comparative study in the light of Islamic *Sharia* law and international practice, the thesis identified the legal problems that arose under SAL 1983, and predicts some of the potential legal issues in terms of SAL 2012.

In **Chapter Two** we have presented a brief overview of the Saudi legal system and the Saudi judicial system and have provided a brief background to arbitration in Saudi Arabia. **Chapter Three** has discussed the SAL 1983 through the use of a critical-analytical study, in order to determine the real reasons for the weaknesses and the difficulties associated with the recognition and enforcement of arbitral awards in Saudi Arabia. It has reached the conclusion that thirteen essential characteristics have had an adverse impact on the arbitration process in general, and on the enforcement of arbitral awards in particular. In **Chapter Four**, a comparative study of the new SAL 2012 and SAL 1983 has been presented. It discusses whether or not the new law will resolve most of the outstanding legal problems associated with the SAL 1983. We have concluded there has been a significant evolution in the stipulations of the new law, and an effective attempt had been made to cope with the arbitration laws of other countries, as well as with the international conventions and bilateral treaties signed by Saudi Arabia. However, this leaves open the question of the situation in practice, the need to look at the results, and the need to study the extent to which Saudi courts meet Saudi Arabia's ability to commit to the provisions of the new law. **Chapter Five** has sought to assess the legal framework in Saudi Arabia with regard to the recognition and enforcement of arbitration under the new SAL 2012, and the new SEL 2012, including an investigation of what solutions could be offered. It has concluded that the new laws, in general,

promise a new approach which is supportive of the enforcement of arbitral awards. However, there are a number of legal issues that remain unresolved, as has been identified in Chapter Five. In **Chapter Six**, we have dealt with the future vision of the implications of the new 2012 law, which indicates that there is an expectation of possible solutions arising from the new SAL. On the other hand, however, many challenges and obstacles may be expected, especially in relation to the enforcement of foreign arbitral awards.

However, the thesis has concluded that the new SAL 2012 can cope with and resolve many legal dilemmas associated with the arbitration process in general, and in particular the issue of recognition and enforcement of arbitral awards in Saudi Arabia, with the new SEL 2012 is a great asset in terms of this objective. In addition, the new SAL 2012 appears to be a special version of the UNCITRAL Model Law, with some modifications to suit the environment of Saudi law that are associated with the provisions of *Sharia* Law. This may give the foreign investor some reassurances, and allow a restoration of confidence in arbitration in Saudi Arabia. However, from what is presented, there are some potential legal obstacles that may face the enforcement process of arbitral awards in Saudi Arabia.¹ Therefore, the author of the thesis believes that the level of satisfaction may not be as much as hoped.

In sum, the new laws² will be a significant improvement, in general, in terms of the enforcement process of an arbitral award in Saudi Arabia. However, it may not be sufficient for a number of reasons. These are as follows:

1. The SAL 2012 is drafted under the legal framework of *Sharia* law. This is clear from a number of phrases that are used, such as *without prejudice to provisions of Sharia*. These phrases have been used more than six times in the wording of the new law. The addition of these phrases is very simple by the legislature, especially to ensure that the new law does not violate *Sharia* Law. However, the real problem is to what extent the new law could be applied in actual practice without any legal issues arising.³ Also, until now, *Sharia* law has not been codified through the use of specific Articles which would make it easier, for Muslim practitioners in general and non-Muslims in particular, to understand what constitute violations of *Sharia* law.⁴

¹ See Chapter 6

² The SAL 2012 and the Enforcement Law 2012

³ See section 6.5

⁴ See Section 6.4.1

2. There are a number of legal issues in the SAL 1983 that are not conclusively resolved under the new SAL 2012 through clear and explicit legal provisions. An example is the matter of nominating women or non-Muslims as arbitrators.⁵ Moreover, there are a number of controversial legal issues under *Sharia* law, such as the matter of interest, insurance and applying non-Muslim laws, that have not been discussed in any depth by the Islamic *Sharia* Scholars ‘*Ulama*’ in Saudi Arabia in order to provide a clear legal opinion or ‘*Fatwa*’ in these matters. These legal issues could adversely affect the matter of recognition and enforcement, particularly of foreign arbitral awards.
3. Despite this, the new SAL 2012, in general, is promising, and it has applied modern legal principles which comply with international arbitration practice, and has demonstrated an ‘arbitration-friendly’ approach.⁶ However, these advantages are not considered to be sufficient in practice as part of the Saudi judicial system. The new legal solutions under the SAL 2012 must be modernised to suit modern international practice through the provision of new *Fatwas* in Saudi Arabia. This is because the effect of a *Fatwa* in Saudi Courts is greater than the effect of legal provisions.⁷
4. The issue of the enforcement of arbitral awards in Saudi Arabia is considered to be an old problem, in spite of the fact that there were an arbitration law and enforcement rules before 2012. However, there were negative practices on the part of the Saudi Courts that led to a significant weakness in the enforcement process in Saudi Arabia.⁸ The reform of the legislation such as the new SAL 2012 and the Enforcement Law 2012, without a reform of the Saudi judicial system as a whole, may not offer a practical solution. For example, it has been seen that there is a difficulty with regard to applying the new judicial legislation under the Saudi judicial system itself, given that a number of new courts as part of the Law of the Judiciary (2007) have not established, despite eight years having passed since the setting up of these courts was announced. Most Saudi judges do not pay enough attention to the legal regulations.⁹
5. The Saudi Government has not reconsidered the concept of public policy which is interpreted now as the provisions of *Sharia* law. Rather, the government is strictly compliant with regard to public policy in terms of international arbitration. There is an urgent need to introduce new standards of public policy which would be appropriate to

⁵ See section 6.2.3

⁶ See section 5.5

⁷ See section 6.5

⁸ See Section 3.3.2 and 3.3.3

⁹ See Section 2.3

international standards of public policy. This indeed will help to resolve a lot of issues associated with enforcing foreign arbitral awards.

7.2 Contributions

This thesis contributes to the field of the recognition and enforcement of arbitral awards. This is due to the fact that this study has contributed to our knowledge as follows:

1. To the best of the author's knowledge, no in-depth study of SAL 2012 has been presented in the form of a thesis or dissertation. This thesis presents such a study.
2. The thesis discusses the legal issues of recognition and enforcement of arbitral awards in Saudi Arabia, in light of the new SEL 2012 and the new SAL 2012.
3. The thesis addresses the new SEL 2012, and considers whether or not the law is compatible with the requirements of Article 5 of the NYC.
4. The study has identified the main legal issues associated with the recognition and enforcement of arbitral awards in Saudi Arabia under SAL 1983, and Saudi judicial practices such as the ambiguity of the types of judicial review in Saudi Arabia, the number of appeal levels in the Saudi Courts, and the lack of grounds for challenge that have been adopted in Saudi law. These issues are then simulated through the new law in order to imagine the efficiency of the new law in terms of avoiding potential legal issues. This is because the practices of the judicial system have not yet appeared, as the SAL 2012 has only recently been enabled.
5. The thesis deals with Saudi judicial practices in terms of a significant number of Saudi judicial cases that relate to the recognition and enforcement of arbitral awards in Saudi Arabia. It is well-known that there is no publication of precedents and judicial decisions in Saudi Arabia. This has led to a lack of research related to court decisions. However, these judicial cases have been collected from academic theses, dissertations and articles, and also through the author's work as a lawyer.

7.3 Future Work

It should be clarified that a number of important subjects have been mentioned in this thesis. However, the author has only briefly dealt with them due to the fact that these subjects need to be considered as part of an in-depth academic study. Therefore, the author suggests and recommends that the following subjects be explored in the future:

1. The application of the ‘finality’ principle under Saudi Law and the extent of its influence upon the Saudi judicial review process associated with arbitration awards after the introduction of the new legislation.
2. The legal solution for some practices that are forbidden under *Sharia* law such as interest that may be contained in a foreign arbitral award. It is necessary to reconsider them from a modern Islamic perspective.

Results and Recommendations

However, what is provided in this summary are the answers to the thesis’s questions. The reasons for obtaining these answer are presented in the section of the most significant results, with each point of the results being supported with a reference. It also contains a section in which we discuss the thesis, and how we reached this outcome. Finally, the recommendations are provided.

7.4 The Most Significant Results

In order to present the research results associated with the main research questions, we can divide the results into four sections in terms of outcomes related to **(a)** Will the new legislations be able to resolve the legal problems? **(b)** The relationship of the enforcement of an arbitral award with *Sharia* Law and Saudi Court Practices, **(c)** The relationship of the SAL with international practice, **(d)** The effectiveness of the recognition and enforcement of arbitral awards in Saudi Arabia.

a) Will the New Legislations Be Able to Resolve the Legal Problems?

1. It should be said that the new law, in general, is promising and positive. There are many new international legal principles incorporated into the new law that proves and shows an ‘arbitration-friendly’ approach. There is a serious desire to move in the direction of modernisation and harmonisation between the SAL 2012, which operates under the restrictions of *Sharia* law, and international practice. The new law appears to be a unique version of the UNCITRAL Model Law with some modifications to suit the environment of the Saudi legal system that are associated with the provisions of *Sharia* law.¹⁰
2. The main characteristics that distinguish the new SAL 2012 from the old law 1983 are presented in Chapter 4. The distinction was set with regard to the extent of its suitability in terms of the international customs. There are more than 13 important characteristics under

¹⁰ See section 6.5

the SAL 1983 that may have a negative impact on the arbitration process in general, and specifically on the enforcement of arbitral awards in Saudi Arabia.

3. Many legal issues associated with the previous 1983 law have been addressed in the SAL 2012, such as identifying the limited grounds for a challenge,¹¹ the competent court to decide such a challenge,¹² the arbitration having the authority of *res judicata*,¹³ and the inadmissibility of the competent court to review the merits of the dispute.¹⁴
4. One of the legal problems was due to a lack of an organisation to enforce foreign arbitral awards.¹⁵ The SEL 2012 gave a strong push towards the systematisation and organisation of the procedures to enforce foreign judicial and arbitral awards.¹⁶
5. The limits to the grounds for challenging an arbitral award have been identified in the SAL 2012 through chapter 5 in the law. The chapter outlines three Articles (49 to 51) that organise the ways in which it is possible to challenge the validity of an arbitral award in accordance with the specific provisions of the SAL 2012.¹⁷ This is considered to be a significant improvement in terms of limiting the grounds for a challenge. However, this improvement was absent in the earlier SAL 1983, which had led to a great deal of ambiguity about the procedures surrounding the rules regarding the challenging of arbitral awards in Saudi Arabia.¹⁸
6. The SAL 2012 expressly clarifies that the competent court shall not review the merits of the dispute.¹⁹ While the SAL 1983 did not expressly prescribe an examination of a dispute's merit, which is what made an expansion in reviewing the arbitral awards under the previous 1983 law.²⁰
7. The ability of the parties involved to waive the right of appeal differs from one nation's legislation to another.²¹ Under the SAL 2012, the legislature explicitly emphasise in Article (51) (1) that the right of an action for nullification is acceptable, even when *the party*

¹¹ See section 5.3.3

¹² See section 5.3.1

¹³ See section 5.4.2.1

¹⁴ See section 5.4.2

¹⁵ See section 3.3.3.1

¹⁶ See section 5.4.1 and 5.4.4

¹⁷ See section 5.3

¹⁸ See section 3.3.2

¹⁹ See section 5.3.1

²⁰ See section 3.3.2.1

²¹ For example, French Law allows the parties to waive the right of appeal; see Article 1522 of the French Code of Civil Procedure (2011).

*invoking nullification waives his right to do so prior to the issuance of the arbitration award.*²²

8. The Enforcement Law 2012 is considered a major leap forward in the enforcement method in Saudi Arabia, not only in terms of the enforcement of the arbitral awards, but also in terms of the execution of all judicial and quasi-judicial judgments.²³
9. The new SAL was issued in 2012, and it indicated that there were to be arbitration institutions. But the details of the activity of these institutions were expected to be explained by the Implementation Rules as mentioned in Article 56. However, it has not specified the authority that was obliged to issue it; this has actually hindered its creation up to the present day.²⁴
10. The quick establishment of the arbitral institutions may help to achieve confidence in the SAL 2012, whereas delay may increase the worry and uncertainty about the new arbitration law.²⁵
11. The SAL 2012 applies the principle of separability to the arbitration clause. However, there are some doubts and concerns due to the presence of another point of view in *Sharia* law.²⁶
12. The author discussed the issue of whether women or non-Muslims could be arbitrators according to SAL 2012. However, the new law is silent in this regard. Consequently, this issue may remain open to interpretation in the future. This may lead to uncertainty in respect of recognising and enforcing arbitral awards in Saudi Arabia. The legislature was supposed to be explicit in this regard, especially with a difference of interpretation with regard to this aspect of *Sharia* law. A negative view in this regard was founded by a judicial decision; there is nothing to prevent future recurrences of this opinion in the absence of explicit texts.²⁷
13. The SAL 2012 appears to apply the principle of finality in the case of arbitration awards. However, there are some doubts and concerns due to the fact that there are some differences of opinions in terms of the four Islamic schools, which contradict the principle of finality of arbitral awards. However, the legislature was decisive in this matter when Article 52 was included in the new law. This may help to stabilise the orientation of Saudi Courts on this issue, but it is necessary to wait until we can see how they operate in practice.²⁸

²² See section 5.3.3

²³ See section 5.4.1

²⁴ See section 5.4.6

²⁵ See section 5.4.6

²⁶ See section 6.2.2

²⁷ See section 6.2.3

²⁸ See section 6.4.4

However, as a result of expectations and possibilities, there are still doubts with regard to the issue of adopting the finality principle in Saudi Arabia, as any uncertainty on the part of the execution judge on the issue of the violation of the provisions of Islamic law or public policy, means that the awards could be not enforced due to this breach.²⁹

14. Since 2012, the legislature has not issued the Implementation Rules of the SAL 2012, and the arbitration institutions have not been established as of the time of writing. This delay could increase the worry and uncertainty about the new arbitration law.³⁰

b) The Relationship of the Enforcement of an Arbitral Award with the *Sharia* Law and Saudi Courts Practices:

1. Through the study of the SAL 2012 and judicial practices, it can be observed that compliance with the provisions of Islamic *Sharia* law in all stages of arbitration in Saudi Arabia is a necessary requirement, whether the arbitration is domestic or international.³¹
2. The disputing parties and the arbitral tribunal must take the provisions of *Sharia* law into account seriously. Principally, this is the case when the arbitration dispute is international or deals with foreign arbitral awards that will be enforced in Saudi Arabia. When the SAL 2012 and Enforcement law 2012 were prepared, the Saudi legislature adopted the consensus view of Muslim jurists that an arbitral award should not violate the key principles of Islamic *Sharia* law; otherwise, the arbitral award would be refused to recognise and enforce.³²
3. In terms of the arbitral proceedings, it should be noted that with regard to SAL 2012 were circumspect when it comes to maintaining the conformity of all aspects of arbitral proceedings with the provisions of Islamic *Sharia* law, and that such procedures should not violate *Sharia* law.³³ In terms of this reservation, Article 5 of the new SAL allows the disputing parties to agree to subject the relationship between them to the provisions of any document (model contract, international agreement, etc...) as long as they do not contravene the provisions of *Sharia* law.³⁴
4. It should be clarified that a number of legal issues still remain, and they have been identified in Chapter 5. The new law contains many restrictions so as not to violate *Sharia*

²⁹ see sections 5.4.1.2 and 5.4.2

³⁰ See section 5.4.6

³¹ See section 6.1

³² See section 6.1

³³ See section 6.2 and 6.3

³⁴ See section 6.2

law or public policy. Potentially, this may lead to a number of legal obstacles which are discussed in Chapter 6. This study is based on actual practices that have not appeared until now, due to the fact that the laws are still new.

5. As a result of the different interpretations of Islamic *Sharia* law, there is a lack of codification of the *Sharia* Rules in order to govern any matter being considered by the Saudi judiciary. This is what makes *Sharia* law incomprehensible to non-Muslim jurists. Moreover, *Sharia* law is the basis of exercising the judiciary in Saudi Arabia, and not legal statutes.³⁵
6. The legislature is not provided with a clear and firm view with regard to some critical matters associated with *Sharia* law, such as the principles of finality and separability.³⁶
7. It should be clarified that the kind of a tribunal award envisaged under the SAL 2012 is supposed to be ‘final’ and ‘non-appealable’. Nevertheless, the real answer is not clear at present because it is associated with actual judicial practices, which so far have revealed some ambiguities due to the newness of SAL 2012 and the Enforcement law 2012.³⁷
8. There are real legal issues that still have not been studied in depth, such as the prohibition of matters in *Sharia* that may be contained in an arbitral award such as *Riba*³⁸, *Gharar*³⁹, *Jahaalah*⁴⁰ and *Ghabn*.⁴¹ The author has provided an analytical and critical study of these potential legal obstacles, and has suggested some possible solutions to *Sharia* law,⁴² queries and observations, which can be discussed by others in depth.
9. It has been concluded that the modernisation of the new laws may not be enough in Saudi Arabia. The modernisation of Saudi laws shall accompany an updating of the *fatwas* of *Sharia* law or applying the *fatwas* of other Islamic countries that have developed the *Sharia*. This is because the effect of the *fatwa* in Saudi courts is greater than the effect of the provisions of law.⁴³
10. With regard to Saudi judicial practices prior to 2012, some of the Saudi courts of first instance such as the Commercial Department, considered the arbitral clause to be null and void,⁴⁴ because it violated the principles of Islamic law. Examples of nullity are when the

³⁵ See section 6.4.1 and section 2.3

³⁶ See section 6.2.2 and 6.4.4

³⁷ See section 6.4.4 and 5.4.2.1

³⁸ See section 6.4.2.1

³⁹ See section 6.4.2.2

⁴⁰ See section 6.4.2.3

⁴¹ See section 6.4.2.4

⁴² For example, see section 6.4.2.1.1-3

⁴³ See Section 6.5

⁴⁴ This attitude was found in some judicial cases; however, it did not represent the majority.

applicable law is non-*Sharia* such as Swiss law, or the seat of the arbitral tribunal is in a non-Muslim country such as the London Court of International Arbitration, then the arbitration agreement may be considered to be nullified.⁴⁵

11. The prevailing approach, especially in the Saudi Court of Appeal, is to recognise the arbitration agreement. However, there are some opposing practices which are based on the viewpoint of *Sharia* law and the *fatwas* of Islamic *Sharia* scholars in Saudi Arabia, which have been accepted and respected by some judges. Nevertheless, the thing which must be taken into account is the concern of the legislature to ensure that the arbitration agreement complies with the provisions of Islamic *Sharia* law, and leaves the door open for discretion in the matter of choosing non-Islamic laws or arbitrating in non-Islamic foreign tribunals.⁴⁶
12. In the matter of arbitration procedures, especially with regard to the issue of the applicable law and the attitude of the Saudi judiciary. As a result of Saudi judicial practices prior to 2012, there is a degree of uncertainty about the subject of applicable law or the seat of arbitration; some courts had decided that an arbitration agreement was considered to be null and void due to the fact that Muslims shall not arbitrate on non-Islamic laws or in non-Islamic tribunals. This view was based on an argumentative principle in *Sharia* law by the ‘*Wahhabism*’ movement, which is a Sunni Islamic movement derived from the Hanbali doctrine. This movement is concerned about adopting man-made laws (non-Muslim Laws) other than Islamic *Sharia* law. Also, the movement has adopted an adverse attitude with regard to the codification of *Sharia* rules.⁴⁷ Most Saudi judges adopt the *Wahhabism* view which is still currently effective in Saudi Arabia. Consequently, the movement towards the adoption of a modern legal systems in Saudi Arabia has been negatively affected.⁴⁸
13. It should be clarified that the author does not object on the matter of the prohibition of the Islamic terms such as *Riba*, *Gharar*, *Jahaalah* and *Ghabn*; due to the existence of evidence of explicit prohibition. What we discuss in our research is whether or not these modern practices with regard to international commercial transactions apply these forbidden terms in Islamic law, or whether the matter of prohibition is due to a lack of understanding of the mechanism of these international practice.⁴⁹
14. The legal interest in an arbitral award may be interpreted in the form of damages. These shall include losses suffered by the creditor as well as lost profits. This is because the

⁴⁵ See section 6.2.1, 6.3.1 and 6.3.2

⁴⁶ See section 6.2.1

⁴⁷ See section 2.3

⁴⁸ See section 2.3 and 6.3.1

⁴⁹ See section 6.4.2

concept of interest is broader in scope than usury, as usury is related to an agreed automatic prior increase to achieve a particular profit.⁵⁰

15. The author has presented a number of proposed solutions which are detailed in the recommendations.⁵¹ The aim of these solutions is to re-imagine the concept of interest in the case of foreign arbitral awards. This review is just a re-examination of the concept of interest in order to spark an analysis of this term by others who will study and discuss these solutions in depth from a modern Islamic perspective. Most studies considered this issue as obvious usury in Islam, whereas there is a possibility of misunderstanding the terms ‘profit’ or ‘interest’ that are used in foreign arbitral awards.⁵²

c) The Relationship of the SAL with International Practice:

1. The Saudi Government has signed a number of regional and international conventions which are considered to be very significant steps in the matter of recognising and enforcing foreign arbitral awards.⁵³
2. It appears that the Saudi Government applies a policy of strict compliance with regard to public policy, in spite of the international conventions that have been signed. The main issue is that the definition of public policy in Saudi Arabia is very broad and ambiguous, and this has led to wide criticism from many international legal experts.⁵⁴
3. In the matter of applying the principle of reciprocity, the problem is that there is no officially accredited list provided by the Saudi Ministry of Justice with regard to those countries that hold an agreement in terms of reciprocity. The noticeable thing is the attention of the Saudi courts to this requirement despite the fact that the Saudi Government has joined the NY Convention, which most countries have now joined, means the issue of the principle of reciprocity has become marginal. However, the principle is still required despite the change of circumstances; it has been referred to in the new Enforcement Law 2012.⁵⁵
4. In general, it could be said that the Saudi judiciary appeared, to some extent, to have a commitment to respecting the enforcement of international arbitration awards that have made inside or outside Saudi Arabia. Moreover, party autonomy in accordance with the

⁵⁰ See section 6.4.2.1

⁵¹ See section 6.4.2.1 and section 7

⁵² See section 6.4.2.1

⁵³ See section 5.4.5

⁵⁴ See section 6.4.3

⁵⁵ See section 5.4.4.1

new Law is respected. However, it is worth mentioning that the enforcement of arbitral awards that have been made outside Saudi Arabia may be accompanied by some degree of complexity and uncertainty, due to the fear that such arbitral decisions or procedures might contravene *Sharia* law.⁵⁶

5. The position of the Court of Appeal on the subject of applicable law or the seat of arbitration can be observed in the text of a judicial decision that was mentioned previously.⁵⁷ This set out a number of basic rules to be followed by the Board of Grievance when dealing with disputing parties, one of which is foreign. These basic rules may be followed by the Enforcement Circuit. There are four cases as follows:⁵⁸
 - a. When a clause in the disputing parties' contract stipulated that the Saudi Courts have jurisdiction, then the clause is applied between conflicting parties and the dispute shall be heard in Saudi Arabia.
 - b. When one of the conflicting parties is foreign, has business activities in Saudi Arabia and a business place in Saudi Arabia, and when the parties do not agree on a seat to hear the dispute, then it would be automatically heard in Saudi Arabia; this is due to the place of conclusion of the contract and the place of performance being in Saudi Arabia.
 - c. When a clause in the contract stipulated that the dispute shall be heard in a foreign court or tribunal, and the foreign party waives his right and demands that the conflict be heard in Saudi Arabia. Then, the Saudi Courts or tribunals have the jurisdiction to hear this dispute, even though the Saudi party requests litigation or arbitration in a foreign court or tribunal. This is because 'the Muslim party cannot be referred to non-*Sharia* law.' This view is based on a text in the *Quran*⁵⁹.
 - d. When a clause in their contract stipulates that the dispute shall be heard in a foreign court or tribunal, and the foreign party demands this, then the foreign party has the right to claim that this clause be adhered to; this is due the agreement and covenant that must be respected. This is based on a text in the *Quran* that states '*O you who believe! Fulfill (your) obligations*'⁶⁰.⁶¹

⁵⁶ See section 6.3.2

⁵⁷ Decision No. 15/1424 in 2003, in the Case No. 1804/1422 in 2001

⁵⁸ These four cases are mentioned in the Decision No. 15/1424 in 2003, in the Case No. 1804/1422 in 2001

⁵⁹ The Noble Qur'an, *Surah An-Nisa* (the Women); 4:60

⁶⁰ The Noble Qur'an, *Surat Al-Mā'idah* (The Table Spread); 5:1

⁶¹ See section 6.3

6. It goes without saying that the violation of the provisions of *Sharia* law concerning domestic arbitration rarely occurs since one of the arbitral tribunal members usually has a knowledge of Islamic Law. Nevertheless, the main issue lies in the matter of foreign or international arbitration, since the arbitral tribunal member may not have sufficient knowledge of what violates Islamic Law, particularly due to the lack of codification of the provisions of Islamic *Sharia* law.⁶²
7. It is worth mentioning that the Saudi Government has widely adopted Article V (2-b), which makes it problematic for foreign arbitral awards to be recognised and enforced. The public policy in Saudi Arabia is in line with the general provisions of *Sharia* law; as a result, this has opened the floodgates on the issue of the limits of public policy in Saudi Arabia, as the concept of public policy in *Sharia* law is wide in conception and also unclear.⁶³

d) The Effectiveness of the Recognition and Enforcement of Arbitral Awards in Saudi Arabia:

1. Regarding the matter of the speed of enforcement proceedings, the enforcement of arbitral awards does not appear to be rapid in Saudi Arabia. Any party who wants to enforce an arbitral domestic or international award under the SAL 2012 will have to go through a number of phases before he achieves his aim, beginning with the approval of the award by the competent court, then confronting another obstacle which is the issuing of the enforcement order for the arbitral award by the enforcement judge. Both phases involve the provision of a number of documents and the verification of all the required conditions.⁶⁴
2. As a result of the lack of clarity of the texts associated with the new law, it is the responsibility of the winning party to translate the awards, pay the costs and file the arbitral award in the competent court in Saudi Arabia within 15 days.⁶⁵
3. It should be noted that the legislature stipulates an end to the time-limit required in order to issue the decision when the parties do not agree on a particular period which is 12 months. However, there is a crucial issue mentioned with regard to when the arbitral award is issued after the expiration of the time-limit, in which case, is the award considered to be valid or not? The SAL 2012 follows the old SAL in this respect as it did not provide any

⁶² See section 6.4

⁶³ See section 6.4.3

⁶⁴ See section 5.4.3

⁶⁵ See section 5.2.1

answer in this regard. This may lead to the possibility of this issue continuing to be a source of confusion, which is a substantial risk in terms of enforcing an arbitral award.⁶⁶

4. It should be clarified that it may be difficult to fully adopt a principle for determining the reasons for nullity in Saudi Arabia. As Article 50 (2) states, the competent court can nullify an arbitral award on its own motion '*sua sponte*', when the award violates one of the following cases: **(a)** the provisions of *Sharia* law, **(b)** Saudi public policy, **(c)** the agreement of the disputing parties, **(d)** when the subject matter of the dispute cannot be referred to arbitration.⁶⁷ Accordingly, the grounds for nullity may not be limited to Saudi Arabia.⁶⁸
5. Under the SAL 2012, the competent court to decide a challenge is the Court of Appeal that was originally deciding the dispute, rather than the court of first instance, as was applied under the previous law 1983.⁶⁹ When the arbitral dispute is international, then the court shall be the Court of Appeal in Riyadh unless the disputing parties agree otherwise. The Court of Appeal specializes in hearing an action of nullity; and its role in arbitration proceedings is limited to the rejection and acceptance of challenges to arbitral awards exclusively based on the reasons cited in Article 50 (1) of SAL 2012.⁷⁰ This legal text is considered to be a significant development in Saudi arbitration when compared to the previous arbitration law where there were a number of appeal levels under the SAL 1983.⁷¹
6. It should be mentioned that the new law has specified that the filing of an action for nullity does not entail the suspension of the enforcement of an arbitral award. Nevertheless, the competent court may order the suspension of an award when the plaintiff for nullity has requested so in the claim's statement, and the application was based on 'substantial grounds'. In such a circumstance, the legislature shall interpret the concept of 'substantial grounds' in order to accept the stay of execution. Otherwise, this will open the door for discretion in the matter of the interpretation of the term 'substantial grounds', which often will be interpreted as a violation of *Sharia* law or public policy.⁷²
7. Article 14 of the Enforcement Law demonstrates without a doubt that attention is being paid on the part of the legislature to the matter of the enforcement of the arbitration of foreign awards, in terms of devoting a specific judge to the enforcement of foreign arbitral

⁶⁶ See section 5.2.2

⁶⁷ Article 50 (2) as states 'The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of *Sharia* and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law.'

⁶⁸ See section 5.3.3

⁶⁹ See section 3.3.2.2

⁷⁰ See section 5.3.1

⁷¹ See section 3.3.2.2 and (4.5.2)

⁷² See section 5.3.2

awards, given that the law specifies the need for an enforcement judge who understands the nature of these awards. The reason for this is that these judges need to be familiar with international conventions, bilateral treaties and international laws, and with the application of the principle of reciprocity.⁷³

8. The judicial review of enforcement, under the SEL 2012, is only by means of refraining from applying the violator stipulation without the abolition of the executive bond or the adjudication. The main negative aspect of this method is that the subject of accepting or refraining from enforcing the bond or arbitral award by the judge, is dependent upon the point of view of each enforcement judge and according to his personal convictions, or to his jurisprudence doctrine and the extent of its severity, rigour or leniency; it is ultimately a matter of discretion. Consequently, the disposition in terms of the principle of equality between the litigants may be unsettled.⁷⁴
9. Through Article 50 (4) of SAL 2012, the Saudi legislature has provided a clear position in the matter of reviewing the merits of a dispute by the competent courts. This is a very positive development, and it is expected that it may have a positive impact on the speed of enforcement of arbitral awards. Through this Article, the Saudi legislature has improved the judicial review method in such a way as to make it compatible with international practice. Accordingly, it supposed that the review is specific to a consideration of cases of nullity only, without examining the facts of the dispute. However, it should be mentioned that some legal specialists have doubts, as the competent court may exercise unlimited supervision when there is a suspicion of violation of *Sharia* law or public policy.⁷⁵
10. There are a number of requirements that shall be provided for enforcing domestic or international arbitral awards under the SAL 2012. These are: (a) the arbitral award shall not violate *Sharia* law and public policy; (b) the arbitral award shall not violate a previous judgment of any of Saudi Arabia's courts; (c) the deadline for filing the action of nullification shall be lapsed; and (d) the party against whom the arbitral award is made, shall be informed correctly.⁷⁶
11. There are a number of requirements that shall be provided for enforcing foreign arbitral awards under Saudi Law. These are: (a) the principle of reciprocity shall be applied; (b) the arbitral award shall not violate public policy; (c) the Enforcement Judge shall ensure

⁷³ See section 5.4.1.2

⁷⁴ See section 5.4.1.2

⁷⁵ See section 5.4.2

⁷⁶ See section 5.4.3.2

that the Saudi courts have no competent jurisdiction to review a dispute; (d) it shall be guaranteed that the disputing parties have been assigned to attend appropriately and are able to defend themselves; (e) it shall be ensured that the arbitral award is not in conflict with any other judgment or judicial order issued in the same case.⁷⁷

12. The grounds on which the recognition and enforcement of foreign arbitral awards may be refused under the Saudi Law are broader than the grounds that are applied internationally.⁷⁸
13. When the jurisdiction for enforcing arbitral awards has been transferred from the Board of Grievances to the Enforcement Circuit, which is part of the General Court in accordance with the new Enforcement Law 2012, there is no doubt that this may lead to wider possibilities in the matter of enforcement based on the judge's view. This is especially the case given that the Enforcement Circuit is under the *Sharia* Court, and the application of the provisions of *Sharia* may be more cautious.⁷⁹
14. Through the practices of the old SAL 1983 and the Saudi judicial system, with the simulation of these practices with the SAL 2012, it can be said that a number of potential legal issues may emerge.⁸⁰ As a result, there may be many challenges and obstacles, especially in the enforcement of foreign arbitral awards. These challenges and barriers could be observed in terms of Saudi legislation, due to the lack of clarity in the position of the new 2012 law with regard to certain legal issues or judicial practices, and the outcomes are not yet clear.

7.5 Recommendations

The author has provided a number of the solutions and recommendations regarding some legal issues that are mentioned in this thesis. In this part, some of these recommendations are provided in separate points that must be urgently needed to ensure the success of the arbitration process in general, and to enforce arbitral awards in Saudi Arabia, in particular.

1. The Saudi Legislature shall quickly issue the Implementation Rules of the SAL 2012 as is stated in Article 56; the Rules are expected to explain the details of the activity of arbitral institutions in Saudi Arabia which have not yet been established. The problem is that the Article does not specify the competent authority that is obliged to issue it. This has actually

⁷⁷ See section 5.4.4.1

⁷⁸ See section 5.4.4.3

⁷⁹ See section 6.2.1 and 5.4.1.2

⁸⁰ See Chapter 6

hindered its creation up to the present day. The Rules shall include the necessary conditions for the establishment of an arbitration institution, in terms of its importance for the accomplishment of arbitration procedures and the selection of arbitrators. However, any further delay may be a negative sign of the seriousness of the Saudi Government with regard to reforming the means of arbitration. This may reinforce the view of sceptics who are wary of, and uncertain about, the new arbitration law.⁸¹

2. The Senior *Sharia* Scholars' Committee shall quickly issue the Codification of Judicial Rules which were supposed to be issued in 29/5/2015. This codification has not been issued at the time of writing of this thesis, which gives the impression that this committee is not interested in issuing this codification. Issuing such codification may help promote the codification of *Sharia* law in the future. The need for this is due to there being an urgent need to codify the provisions of *Sharia* law, and to issue a special version based on the opinions of a majority of *Sharia* scholars in the *Hanbali* School; this is similar to '*AL-Majalla*' or 'The Ottoman Court Manual',⁸² which was issued during the Ottoman Empire based on the *Hanafi* School. This may help interested parties to understand the legal principles and the stability constant in an Islamic jurisdiction that is applied in the Saudi Arabian courts. Moreover, the codification will not only help non-Muslims specialists, but also may help Muslim specialists.⁸³
3. There is a need to establish an Enforcement Court that specialises in the recognition and enforcement of foreign arbitral or judicial awards. This can be achieved based on Article 14 of the SEL 2012 which states 'Judgments, judicial orders, arbitral awards, and attested documents issued in a foreign country shall be presented to the enforcement judge in charge of enforcement of foreign judgments to ascertain that the document fulfills the conditions required for enforcement and affix the seal of enforcement thereon'. The possibility of expansion by establishing a specialised court rather than a specialist judge is suggested as an urgent improvement in order to achieve a better performance; through the appointment of trained judges and staff who have knowledge of international conventions, bilateral treaties and international law, and with the application of the principle of reciprocity.⁸⁴
4. There is a need to reconsider the matter of requiring the principle of reciprocity in order to enforce the foreign arbitral awards in Saudi Courts; this is due to the fact that recent

⁸¹ See section 5.4.6

⁸² In Arabic called '*Majallat el-Ahkam el-Adliya*'

⁸³ See section 6.4.1

⁸⁴ See section 5.4.1.2

procedures make the principle very difficult requirement to achieve. Moreover, the Saudi Government has joined the NY Convention, as have most other countries, and the Arab League Convention and the Riyadh Convention. This means that the issue of the principle of reciprocity is now supposed to be marginalised.⁸⁵

5. In the case of the arbitral tribunal, in a dispute involving parties, one of which is from Saudi Arabia, they will have to be careful when it comes choosing the substantive rules of other countries, especially in terms of the issue of what is compatible with, or what contravenes, Sharia Law. Because the issue is related to the enforcement of the arbitration award, any outcomes that exceed the provisions of *Sharia* law may adversely affect the enforcement of arbitral awards in Saudi Arabia.⁸⁶
6. The concept of ‘interest’ that may be part of some foreign arbitral awards shall be reconsidered; it may be considered as damages or compensation for loss.⁸⁷ The author has presented a number of solutions in order to redefine the concept of ‘interest’ as a form of compensation in one of the accepted legal forms in *Sharia* law as follows:
 - a. Compensation for missed opportunities (Lost Profits);⁸⁸
 - b. Compensation for the time value of money (Inflation Compensation);⁸⁹ and
 - c. Compensation for a debtor’s procrastination in terms of repaying.⁹⁰
7. As a consequence of our research, it is believed that legal issues such as *Riba*⁹¹, *Gharar*⁹², *Jahaalah*⁹³ and *Ghabn*⁹⁴ have not been discussed in depth. The author has suggested some possible solutions through *Sharia* law,⁹⁵ questions and comments, which can be discussed by others in depth. There are a lot of legal issues that deserve a deeper level of study.
8. With regard to public policy, as has been explained in this thesis, the concept of public policy in Saudi Arabia is very broad and also unclear. Therefore, the Saudi government should narrow the concept of public policy and not link it to *sharia* law, at least as far as international and foreign arbitral awards are concerned.⁹⁶ In his article, Dr. AL-Fadhel identified a number of recommendations, one of which is that the Saudi Government

⁸⁵ See section 5.4.4.1

⁸⁶ See section 6.3.1

⁸⁷ See section 6.4.2.1

⁸⁸ See section 6.4.2.1.1

⁸⁹ See section 6.4.2.1.2

⁹⁰ See section 6.4.2.1.3

⁹¹ See section 6.4.2.1

⁹² See section 6.4.2.2

⁹³ See section 6.4.2.3

⁹⁴ See section 6.4.2.4

⁹⁵ For example, see section 6.4.2.1.1-3

⁹⁶ See section 6.4.3

should adopt an international public policy in terms of international arbitration, as it is a standard policy ‘...which has been adopted by some developed arbitration countries, [it] is important for attracting further foreign investments.’⁹⁷

9. As has been explained, there are many modern legal principles in SAL 2012 that comply with international arbitration practices. However, this is not considered to be sufficient. These potential legal issues should be consolidated through the provisions of Islamic *Sharia* law, and the new legal solutions must be modernised in order to suit modern international practice through new *fatwas* in Saudi Arabia.⁹⁸
10. The application of the principle of finality is uneven in Saudi Arabia, in spite of the clear legal provisions in this regard. The problem is that there are some doubts and concerns due to the fact that there are some opinions from the four Islamic schools, which contradict the principle of the finality of arbitral awards. Therefore, there is a need to understand the extent of the level of Saudi judicial review on the arbitration of awards subsequent to the new laws, and modify it when needed.⁹⁹

⁹⁷ AL-Fadhel, Recognition and enforcement of arbitral awards under current Saudi arbitration law, 2009 p. 255

⁹⁸ See section 6.5

⁹⁹ See section 6.4.4

REFERENCES

- Abdul-Rahman, Muhammad Saed. "Islam: Questions and Answers-Jurisprudence and Islamic Rulings." *MSA Publication Limited* 23 (2007).
- Abdus-Shahid, Talib Siraaj. "Interest, Usury and the Islamic Development Bank: Alternative, Non-Interest Financing." *Law & Pol'y Int'l Bus.* 16 (1984): 1095.
- Abuhimed, Fahad Ahmed Mohammed. "The Rules of Procedure of Commercial Arbitration in the Kingdom of Saudi Arabia (Comparative Study)." University of Hull, 2006.
- Ahdab, Abdel Hamid El. "The Recognition and Enforcement of Foreign Arbitral Awards in the Arab Gulf Region." *BCDR International Arbitration Review* 1, no. 1 (2014): 105-19.
- AL-Amer, and M. AL-Magsudi. *Conditions of Executing Arbitral Awards.* Jeddah: King Abdulaziz University, 1998.
- Al-Ammari, Saud, and A Timothy Martin. "Arbitration in the Kingdom of Saudi Arabia." *Arbitration International* 30, no. 2 (2014): 387-408.
- AL-Bahooti, Mansour. *Kashaaf Al-Qinaa Fee Maten El-Eqnaa.* 5 vols1636. Beirut, Alam Alkotob.
- AL-Bjad, Mohammed. *Arbitration in the Kingdom of Saudi Arabia.* Riyadh: Institute of Public Administration Publications, 1999.
- AL-Dhakeel, K. . "Arbitration in Saudi Law." Naif Arab University, 2004.
- Al-Enazi, Mohamed Saud. "Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in Gcc States Law." Brunel University London, 2013.
- Al-Fadhel, F. "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law." Queen Mary College, 2010.
- Al-Fadhel, F. . "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law." *Company Law* 30, no. 8 (2009): 249-56.
- Al-Fadhel, F.M. "Respect for Party Autonomy under Current Saudi Arbitration Law." *Arab Law Quarterly* 23, no. 1 (2009): 31-57.

- AL-Firyaan, A. *The National and Foreign Arbitration in Saudi Arabia* [in Arabic]. Riyadh: Dar AL-Maiman, 2007.
- Al-ghadyan, A. "The Changing Phases of Arbitration in Saudi Arabia." *ARBITRATION-LONDON*- 63 (1997): 130-34.
- Al-ghadyan, A.A. "The Judiciary in Saudi Arabia." *Arab Law Quarterly* 13, no. 3 (1998): 235-51.
- Al-Hilali, MT, and MM Khan. "The Noble Quran: English Translation of the Meaning and Commentary." *King Fahd Complex for the printing of Holy Quran. Madinah, KSA* 13 (1985).
- Al-Hoshan, Mohamed. "Arab Legislative Polices in International Arbitration." *Euro-Arab Arbitration Conference – Tunisia, London: Lloyd's of London Press ltd* (1987).
- . "The New Saudi Law on Arbitration: Presentation and Commentary." *International Journal of Arab Arbitration* 4, no. 3 (2012): 5-13.
- AL-Jarba, M.A.H. "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." University of Wales, 2001.
- Al-Jarbou, Ayoub M. "The Role of Traditionalists and Modernists on the Development of the Saudi Legal System." *Arab Law Quarterly* 21, no. 3 (2007).
- AL-Jofan, Nasir M. "The Compensation for Lost Profits on a Condition That This Profit Had a Raison D'etre." (2006). <http://islamselect.net/mat/32318>
- Al-Mhaidib, M.I.M. "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia." University of Edinburgh, 1997.
- Al-Munea, Abdullah. "Insurance between Lawful and Unlawful." *King Faisal Foundation* (2002).
- AL-Qarni, Z. "Role of Judiciary in Arbitration." Naif Arab University, 2008.
- Al-Ramahi, A. "Sulh: A Crucial Part of Islamic Arbitration." *LSE Legal Studies Working Paper No. 12/2008, Islamic Law and Law of the Muslim World Paper No. 08-45* (2008).
- AL-Sadaan, Abdullah H. "The Concept of Enforcing the Arbitral Awards." In *Multaga Gadha Almadhalem Wa Altahkeem*. Jeddah, 2005.

- Al-Samaan, Y. "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia." *Arab LQ* 9 (1994).
- . "Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, The." *Arab LQ* 9 (1994): 217.
- Al-Shareef, N.S. "Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958." A Thesis, University of Dundee, 2000.
- AL-Subaihi, A. "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law." the University of Birmingham, 2004.
- Al-Sudairy, Ziad A. "The Constitutional Appeal of Shari'a in a Modernizing Saudi State." *Middle East Law and Governance* 2, no. 1 (2010).
- Al-Zarqa, MA. "Aqd Al-Tamin (Al-Sawkarah) Wa-Mawqif Al-Sharia'h Al-Islamiyah Minh (Insurance Contract and the Position of Sharia'h Law from This Contract)." *Dimashiq, Matba 'at Jami 'at Dimshq, Syria* (1962).
- Al Jarba, M.A.H. "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." University of Wales, 2001.
- Al Mulla, Hassan Eisa. "King Abdullah's Project for Reforming Saudi Judicial System." *Al-Eqtisadiyah Newspaper*, no. 5122 (2007).
- Alassaf, A., and B. Zeller. "The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985." *Macquarie Journal of Business Law* 7: 170.
- Almuhaideb, Yasser. "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." University of Hull, 2013.
- Almutawa, Ahmed. "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." University of Portsmouth, 2014.
- Alsheikh, E.A. "Distinction between the Concepts Mediation, Conciliation, *Sulh* and Arbitration in Shariah Law." *Arab Law Quarterly* 25, no. 4 (2011).
- Alswage, Ali. *The Arbitration Agreement and Its Independence*. Riyadh: Dar AL-Asima, 2009.

- Ansary, Abdullah F. "A Brief Overview of the Saudi Arabian Legal System." See http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm (2008).
- Ash-Shuwayrikh, Sad Bin Abdul-Aziz "Compensating Creditors for the Late Repayment of Debts." *AL-Adel* 56.
- Asouzu, Amazu A. "Egyptian Law Concerning Arbitration in Civil and Commercial Matters, The." *Afr. J. Int'l & Comp. L.* 8 (1996): 139.
- Ayub, Muhammad. *Understanding Islamic Finance*. Chichester, West Sussex: John Wiley & Sons, 2007.
- Baamir, A. "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." *International arbitration law review* 15, no. 6 (2012): 219-35.
- Baamir, A., and I. Bantekas. "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice." *Arbitration International* 25, no. 2 (2009): 239-69.
- Baamir, A.Y. *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. Ashgate Pub Co, 2010.
- Baamir, Abdulrahman. "Saudi Law and Judicial Practice in Commercial and Banking Arbitration." Brunel University, 2008.
- Baamir, Abdulrahman Yahya. *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. Ashgate Publishing, Ltd., 2010.
- Ballantyne, W.M. "Arbitration in the Gulf States: Delocalisation: A Short Comparative Study." *Arab LQ* 1 (1985): 205.
- Barrett, Max. "Tale of Two Countries: A Comparison of the International Commercial Arbitration Laws of Egypt and Ireland, A." *Hibernian LJ* 1 (2000): 23.
- Bin Zaid, Abdulaziz Mohammed. "The Recognition and Enforcement of Foreign Commercial Arbitral Awards in Saudi Arabia: Comparative Study with Australia." P.hD, University of Wollongong, 2014.
- Blackaby, Nigel, Constantine Partasides, Martin Hunter, and Alan Redfern. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.
- Blanchard, C.M. "The Islamic Traditions of Wahhabism and Salafiyya." 2007.

- Born, Gary. *International Arbitration: Law and Practice*. Kluwer Law International, 2012.
- Comair-Obeid, Nayla. "Salient Issues in Arbitration from an Arab Middle Eastern Perspective." *Arb. Brief* 4 (2014): 52.
- Diamantides, Marinos. "Shari'a as Discourse: Legal Traditions and the Encounter with Europe Edited by Jørgen S. Nielsen and Lisbet Christoffersen, Farnham: Ashgate, 2010. 280 Pp. Isbn 978-0-75467-955-4£ 70.00." *International Journal of Law in Context* 10, no. 03 (2014): 416-20.
- El-Ahdab, Abdul Hamid. *Arbitration with the Arab Countries*. 2nd ed. Netherlands: Kluwer Law International, 2011.
- El-Gamal, Mahmoud A. "An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence." *Islamic Economic Studies* 8, no. 2 (2001): 29-58.
- El-Rayes, R. "The Law of Arbitration in Saudi Arabia, Reality and Perceptions." *INTERNATIONAL BUSINESS LAW JOURNAL* 5 (2006): 617.
- Elshurafa, Dina. "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?". *International arbitration law review* 15 (2012): 132-39.
- Fouchard, Philippe, Emmanuel Gaillard, Berthold Goldman, and John Savage. *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. Kluwer law international, 1999.
- Gemmell, A.J. "Commercial Arbitration in the Islamic Middle East." *Santa Clara Journal of International Law* 5, no. 1 (2006): 169.
- Gotanda, John Y. "Awarding Interest in International Arbitration." *American Journal of International Law* (1996): 40-63.
- Gotanda, John Yukio. *Supplemental Damages in Private International Law: The Awarding of Interest, Attorneys' Fees and Costs, Punitive Damages and Damages in Foreign Currency Examined in the Comparative and International Context*. Kluwer Law International, 1998.
- Grobhans, Annemarie, and Niccolo Landi. "Arbitration Agreements: Written Form Requirements and New Means of Communication." *Bocconi Legal Papers* 4 (2014): 221.

- Hanson, Maren. "The Influence of French Law on the Legal Development of Saudi Arabia." *Arab Law Quarterly* (1987): 272-91.
- Harb, JPN, and AG Leventhal. "What to Expect When Arbitrating in the Kingdom of Saudi Arabia." *Transnational Dispute Management* 12, no. 2 (2015).
- Hill, Enid. *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971*. Vol. 10: American University in Cairo Press, 1987.
- Hossain, Md Shahadat. "Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview." *Journal of Philosophy, Culture and Religion* 1 (2013): 1-13.
- Huchan, Mohammed. "Euro-Arab Arbitration Conference." Paper presented at the Tunisia Conference, Tunisia, 1985.
- Ibn-Taymiyah. *Al-Fatawa Al-Kubra (the Greatest Fatwas)*. Vol. 4, Beirut, Lebanon: Dar AL-Kitab AL-Elmiah, 1987.
- Ibrahim, Siti Sara, Norajila Che Man, and Abd Halim Mohd Noor. "Fraud: An Islamic Perspective." *The 5th International Conference on Financial Criminology (ICFC)* (2013).
- Janin, Hunt, and André Kahlmeyer. *Islamic Law: The Sharia from Muhammad's Time to the Present*. McFarland & Compant, Inc, 2007. London
- Juhani, I. "Explaining the New Saudi Arbitration Law." *Chamber of Commerce Magazine*.
- Kantor, Mark. *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*. Vol. 17: Kluwer Law International, 2008.
- Khan, M Fahim. "Time Value of Money and Discounting in Islamic Perspective." *Review of Islamic Economics* 1, no. 2 (1991): 25-45.
- Kobeissi, Nada. "Impact of Governance, Legal System and Economic Freedom on Foreign Investment in the Mena Region." *Journal of Comparative International Management* 8, no. 1 (2005).
- Kutty, F. "The Shari'a Factor in International Commercial Arbitration." *Loy. LA Int'l & Comp. L. Rev.* 28 (2006): 565-641.

- Lew, Julian DM, Loukas A Mistelis, and Stefan Kröll. *Comparative International Commercial Arbitration*. Kluwer Law International, 2003. The Hague, London and New York
- Mustill, Michael J, and Stewart C Boyd. *The Law and Practice of Commercial Arbitration in England*. Butterworths, 1989.
- Nerz, A. "The Structuring of an Arbitration Clause in a Contract with a Saudi Party." *Arab Law Quarterly* 1, no. 4 (1986): 380-87.
- Nesheiwat, Faris, and Ali Al-Khasawneh. "2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia, The." *Santa Clara J. Int'l L.* 13 (2015): 443.
- Nurrachmi, Rininta, Mia Fathia, Ashanee Mad-ahdin, Ninasrin Radenarmad, and Rulia Akhtar. "Time Value of Money in Islamic Perspective and the Practice in Islamic Banking Implications." (2012).
- Ostrowski, Stephen T., Shany, Yuval. "Chromalloy: United States Law and International Arbitration at the Crossroads." *New York University Law Review* 73 (1998): 44.
- Othman, K. "What Is the Extent of Judicial Review over the Arbitral Awards?" *AL-Eqtisadiyah* 24th October 2009.
- Othman, K. . "Views in the Issues of Challenges Arbitral Awards." *AL-Eqtisadiyah* 12th January 2008.
- Roy, K.T. "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?". *Fordham Int'l LJ* 18 (1994): 920.
- Saleh, S. *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*. Lexgulf Publishers Ltd, 2012.
- . *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. 2nd ed.: Hart Publishing, 2006.
- . "The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East." *Arab LQ* 1 (1985): 19-26.
- Saleh, Samir. *Commercial Arbitration in the Arab Middle East: A Study in Sharī'a and Statute Law*. Kluwer Law Intl, 1984.

- Saleh, Samir A. "Settlement of Disputes in the Arab World: Arbitration and Other Methods, The." *Int'l Tax & Bus. Law* 4 (1986): 280.
- "Saudi Arabia Company Laws and Regulations Handbook." *Int'l Business Publications* (2008).
- Seriki, Hakeem Olalekan. "Judicial Involvement and Intervention in Arbitration Proceedings after the Arbitration Act 1996." Cardiff University, 2002.
- Sheppard, A. "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?". *Transnational Dispute Management, ALTA. L. REV.* 34, no. 01 (2004): 137.
- . "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?, *Transnational Dispute Management, Volume 1, Issue 01, 2004.*" *ALTA. L. REV.* 34: 137.
- Wakim, M. "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East." *New York International Law Review* 21, no. 1 (2008).
- Zarabozo, Jamaal al-Din M. "The Question of Insurance Outside of the "Lands of Islam"."

BIBLIOGRAPHY

BOOKS

- AL-Amer, and M. AL-Magsudi. *Conditions of Executing Arbitral Awards*. Jeddah: King Abdulaziz University, 1998.
- AL-Bahooti, Mansour. *Kashaaf Al-Qinaa Fee Maten El-Eqnaa*. 5 vols 1636. Beirut, Alam Alkotob.
- AL-Bjad, Mohammed. *Arbitration in the Kingdom of Saudi Arabia*. Riyadh: Institute of Public Administration Publications, 1999.
- AL-Firyaan, A. *The National and Foreign Arbitration in Saudi Arabia* [in Arabic]. Riyadh: Dar AL-Maiman, 2007.
- Alswage, Ali. *The Arbitration Agreement and Its Independence*. Riyadh: Dar AL-Asima, 2009.
- Ayub, Muhammad. *Understanding Islamic Finance*. Chichester, West Sussex: John Wiley & Sons, 2007.
- Baamir, A.Y. *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. Ashgate Pub Co, 2010.

- Baamir, Abdulrahman Yahya. *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. Ashgate Publishing, Ltd., 2010.
- Baderin, M.A. *International Law and Islamic Law*. Ashgate, 2008. SOAS, University of London
- Blackaby, Nigel, Constantine Partasides, Martin Hunter, and Alan Redfern. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.
- Born, Gary. *International Arbitration: Law and Practice*. Kluwer Law International, 2012.
- De Seife, R.J.A. *The Shar'ia: An Introduction to the Law of Islam*. Austin & Winfield, 1994.
- El-Ahdab, Abdul Hamid. *Arbitration with the Arab Countries*. 2nd ed. Netherlands: Kluwer Law International, 2011.
- Fouchard, Philippe, Emmanuel Gaillard, Berthold Goldman, and John Savage. *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. Kluwer law international, 1999.
- Gotanda, John Yukio. *Supplemental Damages in Private International Law: The Awarding of Interest, Attorneys' Fees and Costs, Punitive Damages and Damages in Foreign Currency Examined in the Comparative and International Context*. Kluwer Law International, 1998.
- Hill, Enid. *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971*. Vol. 10: American University in Cairo Press, 1987.
- Ibn-Taymiyah. *Al-Fatawa Al-Kubra (the Greatest Fatwas)*. Vol. 4, Beirut, Lebanon: Dar AL-Kitab AL-Elmiah, 1987.
- Janin, Hunt, and André Kahlmeyer. *Islamic Law: The Sharia from Muhammad's Time to the Present*. McFarland & Compant, Inc, 2007. London
- Lew, Julian DM, Loukas A Mistelis, and Stefan Kröll. *Comparative International Commercial Arbitration*. Kluwer Law International, 2003. The Hague, London and New Yourk
- Mustill, Michael J, and Stewart C Boyd. *The Law and Praticce of Commercial Arbitration in England*. Butterworths, 1989.
- Otto, J.M. *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*. Amsterdam University Press.
- Rehman, J. *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of The 'clash of Civilizations' in the New World Order*. Vol. 7: Hart Publishing, 2005. Oxford and Portland, Oregon.
- Saleh, S. *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*. Lexgulf Publishers Ltd, 2012.
- . *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt*. 2nd ed.: Hart Publishing, 2006.

Saleh, Samir. *Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law*. Kluwer Law Intl, 1984.

Sookhdeo, Patrick. *Understanding Shari'a Finance*. McLean, VA: Isaac Publishing, 2008.

ARTICLES

Aba-Namay, R. "The Recent Constitutional Reforms in Saudi Arabia." *International and Comparative Law Quarterly* 42, no. 3 (1993).

Abdul-Rahman, Muhammad Saed. "Islam: Questions and Answers-Jurisprudence and Islamic Rulings." *MSA Publication Limited* 23 (2007).

Abdus-Shahid, Talib Siraaj. "Interest, Usury and the Islamic Development Bank: Alternative, Non-Interest Financing." *Law & Pol'y Int'l Bus.* 16 (1984).

Ahdab, Abdel Hamid El. "The Recognition and Enforcement of Foreign Arbitral Awards in the Arab Gulf Region." *BCDR International Arbitration Review* 1, no. 1 (2014).

Al-Ammari, Saud, and A Timothy Martin. "Arbitration in the Kingdom of Saudi Arabia." *Arbitration International* 30, no. 2 (2014).

Al-Fadhel, F. "Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the Uk, Egypt and Bahrain and the Uncitral Model Law." Queen Mary College, 2010.

Al-Fadhel, F. . "Recognition and Enforcement of Arbitral Awards under Current Saudi Arbitration Law." *Company Law* 30, no. 8 (2009).

Al-Fadhel, F.M. "Respect for Party Autonomy under Current Saudi Arbitration Law." *Arab Law Quarterly* 23, no. 1 (2009).

Al-Ghadyan, A. "The Changing Phases of Arbitration in Saudi Arabia." *ARBITRATION-LONDON*- 63 (1997).

Al-Ghadyan, A.A. "The Judiciary in Saudi Arabia." *Arab Law Quarterly* 13, no. 3 (1998).

Al-Hoshan, Mohamed. "Arab Legislative Policies in International Arbitration." *Euro-Arab Arbitration Conference – Tunisia, London: Lloyd's of London Press LTD* (1987).

———. "The New Saudi Law on Arbitration: Presentation and Commentary." *International Journal of Arab Arbitration* 4, no. 3 (2012).

Al-Jarbou, Ayoub M. "The Role of Traditionalists and Modernists on the Development of the Saudi Legal System." *Arab Law Quarterly* 21, no. 3 (2007).

AL-Jofan, Nasir M. "The Compensation for Lost Profits on a Condition That This Profit Had a Raison D'etre." (2006). <http://islamselect.net/mat/32318>

- Al-Munea, Abdullah. "Insurance between Lawful and Unlawful." *King Faisal Foundation* (2002).
- Al-Ramahi, A. "Sulh: A Crucial Part of Islamic Arbitration." *LSE Legal Studies Working Paper No. 12/2008, Islamic Law and Law of the Muslim World Paper No. 08-45* (2008).
- AL-Sadaan, Abdullah H. "The Concept of Enforcing the Arbitral Awards." In *Multaga Gadha Almadhalem Wa Altahkeem*. Jeddah, 2005.
- Al-Samaan, Y. "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia." *Arab LQ* 9 (1994).
- Al-Sudairy, Ziad A. "The Constitutional Appeal of Shari'a in a Modernizing Saudi State." *Middle East Law and Governance* 2, no. 1 (2010).
- Al-Zarqa, MA. "Aqd Al-Tamin (Al-Sawkarah) Wa-Mawqif Al-Sharia'h Al-Islamiyah Minh (Insurance Contract and the Position of Sharia'h Law from This Contract)." *Dimashiq, Matba 'at Jami 'at Dimshq, Syria* (1962).
- Al Jarba, M.A.H. "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." University of Wales, 2001.
- Al Mulla, Hassan Eisa. "King Abdullah's Project for Reforming Saudi Judicial System." *Al-Eqtisadiyah Newspaper*, no. 5122 (2007).
- Alassaf, A., and B. Zeller. "The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985." *Macquarie Journal of Business Law* 7.
- Alsheikh, E.A. "Distinction between the Concepts Mediation, Conciliation, *Sulh* and Arbitration in Shariah Law." *Arab Law Quarterly* 25, no. 4 (2011).
- Ansary, Abdullah F. "A Brief Overview of the Saudi Arabian Legal System." See http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm (2008).
- Arsic, J. "International Commercial Arbitration on the Internet-Has the Future Come Too Early?." *Journal of international arbitration* 14 (1997).
- Atia, Hoda. "Egypt's New Commercial Arbitration Framework: Problems and Prospects for the Future of Foreign Investment." *Int'l. Trade & Bus. L. Ann.* 5 (2000).
- Ash-Shuwayrikh, Sad Bin Abdul-Aziz "Compensating Creditors for the Late Repayment of Debts." *AL-Adel* 56.
- Asouzu, Amazu A. "Egyptian Law Concerning Arbitration in Civil and Commercial Matters, The." *Afr. J. Int'l & Comp. L.* 8 (1996).
- Azizi, R. "Grounds for Refusing Enforcement of Foreign Arbitral Awards under the New York Convention (Comparison of the Us and Sharia Law)." (April 20 2010).

- Baamir, A. "The New Saudi Arbitration Act : Evaluation of the Theory and Practice." *International arbitration law review* 15, no. 6 (2012).
- Baamir, A., and I. Bantekas. "Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice." *Arbitration International* 25, no. 2 (2009).
- Ballantyne, W.M. "Arbitration in the Gulf States: Delocalisation: A Short Comparative Study." *Arab LQ* 1 (1985): 205.
- Barrett, Max. "Tale of Two Countries: A Comparison of the International Commercial Arbitration Laws of Egypt and Ireland, A." *Hibernian LJ* 1 (2000).
- Blanchard, C.M. "The Islamic Traditions of Wahhabism and Salafiyya." 2007.
- Boshoff, LL. "Saudi Arabia: Arbitration Vs. Litigation." *Arab LQ* 1 (1985).
- Comair-Obeid, Nayla. "Salient Issues in Arbitration from an Arab Middle Eastern Perspective." *Arb. Brief* 4 (2014).
- com, I., and USA International Business Publications. *Saudi Arabia Company Laws and Regulations Handbook*. International Business Publications USA, 2008.
- Diamantides, Marinos. "Shari'a as Discourse: Legal Traditions and the Encounter with Europe Edited by Jørgen S. Nielsen and Lisbet Christoffersen, Farnham: Ashgate, 2010. 280 Pp. Isbn 978-0-75467-955-4£ 70.00." *International Journal of Law in Context* 10, no. 03 (2014).
- El-Gamal, Mahmoud A. "An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence." *Islamic Economic Studies* 8, no. 2 (2001).
- El-Rayes, R. "The Law of Arbitration in Saudi Arabia, Reality and Perceptions." *International Business Law Journal* 5,(2006).
- Elshurafa, Dina. "The 2012 Saudi Arbitration Law and the Shari'a Factor : A Friend or Foe in Construction?". *International arbitration law review* 15 (2012).
- Gemmell, A.J. "Commercial Arbitration in the Islamic Middle East." *Santa Clara Journal of International Law* 5, no. 1 (2006).
- Gotanda, John Y. "Awarding Interest in International Arbitration." *American Journal of International Law* (1996).
- Grobhans, Annemarie, and Niccolo Landi. "Arbitration Agreements: Written Form Requirements and New Means of Communication." *Bocconi Legal Papers* 4 (2014).
- Hanson, Maren. "The Influence of French Law on the Legal Development of Saudi Arabia." *Arab Law Quarterly* (1987).
- Grobhans, Annemarie, and Niccolo Landi. "Arbitration Agreements: Written Form Requirements and New Means of Communication." *Bocconi Legal Papers* 4 (2014).

- Hanson, Maren. "The Influence of French Law on the Legal Development of Saudi Arabia." *Arab Law Quarterly* (1987).
- Harb, JPN, and AG Leventhal. "What to Expect When Arbitrating in the Kingdom of Saudi Arabia." *Transnational Dispute Management* 12, no. 2 (2015).
- Hossain, Md Shahadat. "Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview." *Journal of Philosophy, Culture and Religion* 1 (2013).
- Homsy, P.C. "Legal Aspects of Doing Business in Saudi Arabia." *The International Lawyer* (1982).
- Huchan, Mohammed. "Euro-Arab Arbitration Conference." Paper presented at the Tunisia Conference, Tunisia, 1985.
- Ibrahim, Siti Sara, Norajila Che Man, and Abd Halim Mohd Noor. "Fraud: An Islamic Perspective." *The 5th International Conference on Financial Criminology (ICFC)* (2013).
- Jalili, M. "Saudi Arabia Adopts Arbitration Regulations." *Int'l Fin. L. Rev.* 2 (1983): 12.
- Juhani, I. "Explaining the New Saudi Arbitration Law." *Chamber of Commerce Magazine*.
- Kantor, Mark. *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*. Vol. 17: Kluwer Law International, 2008.
- Kaufmann-Kohler, G., and T. Schultz. *Online Dispute Resolution: Challenges for Contemporary Justice*. Vol. 11: Kluwer Law International, 2004.
- Khan, M Fahim. "Time Value of Money and Discounting in Islamic Perspective." *Review of Islamic Economics* 1, no. 2 (1991).
- Kobeissi, Nada. "Impact of Governance, Legal System and Economic Freedom on Foreign Investment in the Mena Region." *Journal of Comparative International Management* 8, no. 1 (2005).
- Kutty, F. "The Shari'a Factor in International Commercial Arbitration." *Loy. LA Int'l & Comp. L. Rev.* 28 (2006).
- Meyer-Reumann, R. "The Banking System in Saudi Arabia." *Arab Law Quarterly* 10, no. 3 (1995).
- Nerz, A. "The Structuring of an Arbitration Clause in a Contract with a Saudi Party." *Arab Law Quarterly* 1, no. 4 (1986).
- Nesheiwat, Faris, and Ali Al-Khasawneh. "2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia, The." *Santa Clara J. Int'l L.* 13 (2015).

- Nurrachmi, Rininta, Mia Fathia, Ashanee Mad-ahdin, Ninasrin Radenarmad, and Rulia Akhtar. "Time Value of Money in Islamic Perspective and the Practice in Islamic Banking Implications." (2012).
- Ostrowski, Stephen T., Shany, Yuval. "Chromalloy: United States Law and International Arbitration at the Crossroads." *NEW YORK UNIVERSITY LAW REVIEW* 73 (1998): 44.
- Othman, K. "What Is the Extent of Judicial Review over the Arbitral Awards?" *AL-Eqtisadiyah* 24th October 2009.
- Othman, K. . "Views in the Issues of Challenges Arbitral Awards." *AL-Eqtisadiyah* 12th January 2008.
- Roy, K.T. "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?". *Fordham Int'l LJ* 18 (1994).
- "Saudi Arabia Company Laws and Regulations Handbook." *Int'l Business Publications* (2008).
- Saleh, Samir. "The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East." *Arab LQ* 1 (1985).
- Saleh, Samir A. "Settlement of Disputes in the Arab World: Arbitration and Other Methods, The." *Int'l Tax & Bus. Law* 4 (1986).
- Global Investment & Business Center, "Saudi Arabia Company Laws and Regulations Handbook." *Int'l Business Publications* (2008).
- Sayen, G. "Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia." *U. Pa. J. Int'l Econ. L.* 24 (2003).
- Sfeir, G.N. "Saudi Approach to Law Reform, The." *Am. J. Comp. L.* 36 (1988).
- Shoult, A., and ASA Consulting. "Privatization and Economic Reforms." *Doing business with Saudi Arabia* (2006).
- Sheppard, A. "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?". *Transnational Dispute Management, ALTA. L. REV.* 34, no. 01 (2004).
- . "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?, Transnational Dispute Management, Volume 1, Issue 01, 2004." *ALTA. L. REV.* 34.
- Smolik, A. "The Effect of Shari'a on the Dispute Resolution Process Set Forth in the Washington Convention." *J. Disp. Resol.* (2010).
- Thomas, S.B. "International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia." *Am. Rev. Int'l Arb.* 17 (2006).

- Turck, N.B. "Resolution of Disputes in Saudi Arabia." *Arab Law Quarterly* 6, no. 1 (1991).
- Wakim, M. "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East." *New York International Law Review* 21, no. 1 (2008).
- Ulmer, N.C. "Drafting the International Arbitration Clause.", *In Int'l L.*, vol. 20, 1986.
- Yamani, M. "The Two Faces of Saudi Arabia." *Survival* 50, no. 1 (2008).

THESIS

- Abuhimed, Fahad Ahmed Mohammed. "The Rules of Procedure of Commercial Arbitration in the Kingdom of Saudi Arabia (Comparative Study)." A Thesis, University of Hull, 2006.
- AL-Amer, and M. AL-Magsudi. *Conditions of Executing Arbitral Awards*. A Dissertation, Jeddah: King Abdulaziz University, 1998.
- AL-Dhakeel, K. . "Arbitration in Saudi Law." A Dissertation, Naif Arab University, 2004.
- Al-Enazi, Mohamed Saud. "Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in Gcc States Law." A Thesis, Brunel University London, 2013.
- AL-Jarba, M.A.H. "Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context." A Thesis, University of Wales, 2001.
- Al-Mhaidib, M.I.M. "Arbitration as a Means of Settling Commercial Disputes (National and International) with Special Reference to the Kindom of Saudi Arabia." A Thesis, University of Edinburgh, 1997.
- AL-Qarni, Z. "Role of Judiciary in Arbitration." A Dissertation, Naif Arab University, 2008.
- Al-Shareef, N.S. "Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal under Article (V) of the New York Convention of 1958." A Thesis, University of Dundee, 2000.
- Al-Shubaiki, Torki. "The Saudi Arabian Arbitration Law in the International Business Community: A Saudi Perspective." A Thesis, London School of Economics and Political Science (University of London), 2003.
- AL-Subaihi, A. "International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law." A Thesis, the University of Birmingham, 2004.
- Almuhaidb, Yasser. "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." A Thesis, University of Hull, 2013.
- Almutawa, Ahmed. "Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council." A Thesis, University of Portsmouth, 2014.

- Baamir, Abdulrahman. "Saudi Law and Judicial Practice in Commercial and Banking Arbitration." A Thesis, Brunel University, 2008.
- Bin Zaid, Abdulaziz Mohammed. "The Recognition and Enforcement of Foreign Commercial Arbitral Awards in Saudi Arabia: Comparative Study with Australia." P.hD, A Thesis, University of Wollongong, 2014.
- Seriki, Hakeem Olalekan. "Judicial Involvement and Intervention in Arbitration Proceedings after the Arbitration Act 1996." A Thesis, Cardiff University, 2002.

Paper and Conference Proceedings

- Huchan, Mohammed. "Euro-Arab Arbitration Conference." Paper presented at the Tunisia Conference, Tunisia, 1985.
- Ibrahim, Siti Sara, Norajila Che Man, and Abd Halim Mohd Noor. "Fraud: An Islamic Perspective." *The 5th International Conference on Financial Criminology (ICFC)* (2013).
- Zarabozo, Jamaal al-Din M. "The Question of Insurance Outside of the "Lands of Islam"." *the AMJA, Conference in Copenhagen, Denmark*, 2003.

WEBSITES

- AL-Jofan, Nasir M. "The Compensation for Lost Profits on a Condition That This Profit Had a Raison D'etre." (2006). <http://islamselect.net/mat/32318>
- Ansary, Abdullah F. "A Brief Overview of the Saudi Arabian Legal System." See http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm (2008).
- Jamaal al-Din M Zarabozo, "The Question of Insurance Outside of the "Lands of Islam"." at <http://www.jamaalzarabozo.com/audio/insurance.pdf>
- King Abdullah Project for the Development of Judiciary; see website: <http://www.alriyadh.com/2009/06/21/article439230.html>
- The Bureau of Experts in Saudi Council of Ministers; www.boe.gov.sa
- The ICC International Court of Arbitration; www.iccarbitration.org
- The International Centre for the Settlement of Investment Disputes (ICSID); www.worldbank.org/icsid
- The Internet Archive website; www.archive.org/details/texts
- The Doing Business Website ; <http://www.doingbusiness.org/data/exploreconomies/saudi-arabia>
- The Grievances Board website; <http://www.bog.gov.sa/>

The Ministry of Commerce and Industry in Saudi Arabia; www.commerce.gov.sa

The Ministry of Justice in Saudi Arabia; www.moj.gov.sa

The NY Conventions website; <http://www.newyorkconvention.org/contracting-states>

The Organisation of the Petroleum Exporting Countries (OPEC);

http://www.opec.org/opec_web/en/

The Riyadh Newspaper, 17/01/2009; Issue No. 14817; <http://www.alriyadh.com/402706>

The UNCITRAL Website; www.uncitral.org

The United Nations Conference on Trade and Development; www.unctad.org

APPENDICES

- **Appendix A: The Saudi Arbitration Law (1983)**
- **Appendix B: The Implementation Rules (1985) of the SAL (1983)**
- **Appendix C: The Saudi Arbitration Law 2012**
- **Appendix D: The Saudi Enforcement Law 2012**

Appendix A

Appendix A- The Saudi Arbitration Law (1983)

Appendix A- The Saudi Arbitration Law (SAL) 1983

Royal Decree No. M/46

Dated 12/7/1403H – 25/4/1983

Article 1:

It may be agreed to resort to arbitration with regard to a specific, existing dispute. It may also be agreed beforehand to resort to arbitration in any dispute that may arise as a result of the execution of a specific contract.

Article 2:

Arbitration shall not be accepted in matters wherein conciliation is not permitted. Agreement to resort to arbitration shall not be deemed valid except by those who have the legal capacity to act.

Article 3:

Government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This provision may be amended by a Resolution of the Council of Ministers.

Article 4:

An arbitrator is required to be experienced and of good conduct and reputation and full legal capacity. In case of multiple arbitrators, they shall be odd in number.

Article 5:

Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute. 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.

Article 6:

The authority originally competent to hear the dispute shall record applications of arbitration submitted to it and shall issue a decision approving the arbitration instrument.

Article 7:

Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this Law.

Article 8:

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

Article 9:

The dispute shall be decided on the date specified in the arbitration instrument unless it is agreed to extend it. If parties do not fix in the arbitration instrument a time limit for decision, arbitrators shall issue their award within ninety days from date of the decision approving the arbitration instrument; otherwise, any litigant who so desires may submit the matter to the authority originally competent to hear the dispute, which may decide either to hear the subject matter or extend the time limit for a further period.

Article 10:

Where parties fail to appoint the arbitrators or one party abstains from appointing the arbitrator(s) who are to be chosen solely by him, or where one arbitrator or more refuses to work, or withdraws, or a contingency arises which prevents him from undertaking the arbitration or if he is dismissed and there is no special stipulation by the parties, the authority originally competent to hear the dispute shall appoint the arbitrator(s) as necessary, upon request of the party interested in expediting the arbitration, in the presence of the other party or in his absence, after being summoned to a session to be held for this purpose. The number of arbitrators appointed shall be equal or complementary to the number agreed upon among the parties. The decision in this respect shall be final.

Article 11:

The arbitrator may not be dismissed except by the consent of the parties. The arbitrator so dismissed may claim compensation, if he had already commenced work prior to dismissal, and as long as the dismissal is not attributable to him. An arbitrator may not be challenged from judgment save for reasons that occur or appear after filing the arbitration instrument.

Article 12:

A request to disqualify the arbitrator may be made for the same reasons for which a judge may be disqualified. The request for disqualification shall be submitted to the authority originally competent to hear the dispute within five days from the day a party is notified of the appointment of the arbitrator or from the day the reasons for disqualification appear or occur. A ruling on the disqualification request shall be made at a hearing specially convened for this purpose to which the parties and the arbitrator whose disqualification is requested are summoned.

Article 13:

The arbitration shall not expire with the death of one of the parties, but the time for the award shall be extended by thirty days unless the arbitrators decide to extend for a longer period.

Article 14:

Where an arbitrator is appointed in place of a dismissed or a withdrawing arbitrator, the date fixed for the award shall be extended by thirty days.

Article 15:

Arbitrators may, by the same majority required for making the award and by a decision giving the grounds for so doing, extend the period fixed for an award due to circumstances pertaining to the subject matter of the dispute.

Article 16:

The award of the arbitrators shall be made by majority opinion, and where they are authorized to settle, the award shall be issued unanimously.

Article 17:

The award document shall contain in particular the arbitration instrument, a summary of statements of the parties and supporting documents, the reasons for the award, its text, date of issue and the signature of the arbitrators. Where one or more arbitrators refuse to sign the award, this shall be recorded in the document of the award.

Article 18:

All awards passed by the arbitrators, even though issued under an investigation procedure, shall be filed within five days with the authority originally competent to hear the dispute and the parties notified with copies thereof. Parties may submit their objections against what is issued by arbitrators to the authority with which the award is filed, within fifteen days from the date they are notified of the arbitrators' awards; otherwise such awards shall be final.

Article 19:

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

Article 20:

The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the Sharia.

Article 21:

The award made by the arbitrators, after issuance of the order of execution in accordance with the preceding Article, shall have the same force as a judgment made by the authority which issued the execution order.

Article 22:

Arbitrators' fees shall be determined by agreement of parties. Sums not paid to arbitrators shall be deposited with the authority originally competent to hear the dispute within five days after the approval of the arbitration document and shall be paid within one week from the date of the issuance of the order for the enforcement of the award.

Article 23:

Where no prior agreement exists as regards arbitrators' fees and a dispute arises, the authority originally competent to hear the dispute shall decide the matter, and its judgment shall be final.

Article 24:

Resolutions necessary for the implementation of this Law shall be issued by the President of the Council of Ministers pursuant to a recommendation by the Minister of Justice after agreement with the Minister of Commerce and the Chairman of the Board of Grievances.

Article 25:

This Law shall be published in the Official Gazette and shall be effective after thirty days from the publication thereof.

Appendix B

Appendix B - The Implementation Rules (1985) of the Saudi Arbitration Law (1983)

Appendix B- The Implementation Rules (1985) of the Saudi Arbitration Law (1983)
Decree of Council of Ministers No. (7/2021/M)
Dated 8/9/1405H – 28/5/1985

Article 1

Arbitration in matters wherein conciliation is not permitted such as *Hudoud* and *Laan* between spouses, and all matters relating to the public order, shall not be accepted.

Article 2

An agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court.

Article 3

The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others. The arbitrator may also be an employee of the state, provided approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the umpire shall have knowledge of *Sharia* rules, commercial regulations, customs and traditions applicable in Saudi Arabia.

Article 4

Any person having an interest in the dispute or having being sentenced to a *hud* or penalty in a crime of dishonour, or being dismissed from a public position following a disciplinary order, or being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator.

Article 5

Subject to the provisions of Sections 2 and 3 above, a list containing the names of arbitrators shall be prepared by agreement between the ministers of justice, the minister of commerce and the chairman of the Grievance Board. The courts, judicial committees, and chambers of commerce and industry shall be informed of such lists and the respective parties may select arbitrators from these lists or from others.

Article 6

The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument which shall sufficiently outline the dispute and the names of the arbitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract.

Article 7

The authority originally competent to decide in the dispute shall issue a decision for approval of the arbitration instrument within 15 days and shall notify the arbitration panel of the same.

Article 8

In disputes where a government authority is a party with others, such a government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of the parties. Such a memorandum shall be submitted to the council of ministers for approval of arbitration. The prime minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the council of ministers shall be notified of the arbitration awards adopted.

Article 9

The clerk of the authority originally competent to decide on the dispute shall act as secretary for the arbitration panel, establish the necessary records for registration or arbitration application and shall submit the same to the concerned authority for approval of the arbitration instrument. Such clerk shall also be in charge of the summons and notices provided for in the arbitration regulations and by any other assignments as may be decided by the relevant minister. The concerned authorities shall make the necessary arrangements regarding the above.

Article 10

The arbitration panel shall fix the date of the hearing for consideration of the dispute within a period not exceeding five days from the date in which approval of the arbitration document had been notified to the arbitration panel, and shall notify the disputing parties of the same through the clerk of the authority originally competent to decide on the dispute.

Chapter II

Notification of Parties, Appearance, Default and Proxies in Arbitration

Article 11

Every summons or notice relating to the subject matter of arbitration made through the clerk of the authority originally competent to decide on the dispute, shall be made through the messenger or the official authorities, whether the said proceeding is requested by the disputing parties or initiated by the arbitrators. Police or mayors are required to assist the relevant authority in performing its duties within their prescribed jurisdiction.

Article 12

The summons or notice shall be written in the Arabic language and shall consist of two or more copies - according to the number of disputing parties - and shall contain the following:

- a) The date, day, month and year in which the summons or notice was made.
- b) The first name, surname, title, profession and domicile of the party requesting the summons or notice, and the first name, surname, title, profession and domicile of his representative, if he is working for another person.
- c) The name of the messenger who forwarded the summons or notice, his employer and his signature on the original and copy of the summons or notice.

d) The first name, surname, profession and domicile of the person to be summoned or notified, and if his domicile is not known at the time of issuance of the summons, then his latest domicile.

e) Title of the person to whom copy of the summons has been served, and his signature on the original indicating receipt, or indication of his refusal to take receipt of the summons when returned to the concerned authority.

f) Name and place of the arbitration panel, the subject matter of procedures, and the date specified therefore.

Article 13

1. The papers to be served on summons shall be delivered to the respective person, or to his place of domicile, and may be delivered to a chosen place of domicile determined by the concerned parties.

2. In case such person is not present in his place of domicile, the summons papers shall be delivered to any person who declares that he is an agent or responsible for the business of the person to be summoned, or his employee, or that he or she is living with him - such as spouse, relative or other.

Article 14

If the messenger did not find the proper person to whom the papers are to be delivered pursuant to the preceding section, or if the person mentioned therein refrained from accepting the papers, the messenger shall state that in the original copy and deliver the same that day to the police commissioner or mayor or the representative of any of them, if the residence of the person summoned falls within their authority. Also, the messenger shall within 24 hours send the person summoned at his original or chosen domicile a registered letter, informing that the copy had been delivered to the administration and stating all such details in the original copy of the summons. The summons or notice shall be valid and effective from the time of delivery thereof as aforementioned.

Article 15

Except as provided for in special regulations, the copy of summons or notice shall be delivered in the following manner:

a) In matters relating to the state, it shall be delivered to the ministers, district governors, and directors of government departments or their representatives.

b) In matters relating to public persons, it shall be delivered to the person acting on his behalf according to the law, or his representative.

c) In matters relating to companies, societies and private establishments, it shall be delivered to the head offices, as indicated in the commercial registration, to the chairman, managing director or his representative from among the employees. With respect to foreign companies having branches or agents in Saudi Arabia, the papers shall be delivered to the branch or the agent.

Article 16

The official in charge shall submit the arbitration file to the authority responsible for trial of the dispute, for approval of the arbitration instrument. The clerk of such authority shall notify the parties and the arbitrators of the decision taken with respect to approval of the arbitration instrument within one week from the date of adoption of such decision.

Article 17

On the day fixed for arbitration, the parties shall appear by themselves or through their representatives, by virtue of a notarized power of attorney, or by a proxy issued by any official authority or certified by one of the chambers of commerce and industry. A copy of the power of attorney shall be kept in the file of the claim after the original has been reviewed by the arbitrator, without prejudice to the right of the arbitrator or arbitrators to require the personal appearance of the respective party if the circumstances so require.

Article 18

1. In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel may decide on the dispute as long as the respective parties have filed their statements of claim, defences and documentation. The award adopted shall, in such case, be considered a decision made in the presence of the parties. However, if the defaulting party was not properly served a summons, the hearing shall be adjourned to another hearing so that the defaulting party is properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties are properly served notice, and the award adopted in such other hearing shall be deemed as if made in the presence of all defaulting parties.

2. Also, the award of arbitration shall constructively be deemed made in the presence of the party who appears personally or by proxy in any of the hearings, or filed his statement of defence in the claim or in document relating thereto. However, if the defaulting party appeared prior to the end of the hearing, any award or decision adopted therein shall be deemed null and void.

Article 19

If the arbitration panel discovers that a summons published to a defaulting party in a newspaper is not proper, it shall adjourn arbitration of the dispute to another hearing and such defaulting party shall be properly served a summons in respect thereto.

Chapter III

Hearings, Trial and Recordings of Claim

Article 20

The claim shall be tried openly unless the arbitration panel decides by its own motion, or if one of the parties so requests, that the hearing be held in camera for reasons appreciated by the arbitration panel.

Article 21

The arbitration of the claim shall not, without an acceptable reason, be adjourned more than once for a reason attributed to one of the parties.

Article 22

The arbitration panel shall reasonably allow each party to make his remarks and defences either orally or in writing in the times specified by the arbitration panel. The defendant party shall be the last to make submission and the panel shall complete the case and prepare the award.

Article 23

The umpire shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing anyone in contempt of the hearing. However, if anyone present commits a violation, the umpire shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the umpire.

Article 24

The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, assignment or otherwise, and the arbitration panel shall make an award of the same.

Article 25

The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussions or in correspondence. The arbitration panel and the parties may not speak other than the Arabic language and any party who does not speak Arabic shall be accompanied by an accredited translator, who shall sign with him the minutes of the hearing, approving the statements made.

Article 26

Any party may request adjournment of the proceedings for a reasonable period, that period to be decided by the arbitration panel, so that such a party can submit any documents, papers, or remarks which may be productive or have a material effect on the case. The arbitration panel may allow further adjournments if there is justification therefore.

Article 27

The arbitration panel shall record the facts and proceedings which take place in the hearing, in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties; the minutes shall be signed by the umpire, arbitrators and the secretary.

Article 28

1. The arbitration panel may, by its own motion, or pursuant to a request from one of the parties, require the other party to produce any document which he may possess and which may have material effect on the proceedings, in the following cases:

- a) If such document is a joint document between the parties. Such document will be deemed joint if, in particular, it is in favour of both parties or if it proves their mutual rights and obligations.
 - b) If one of the parties invoked such a document in any phase of the claim.
 - c) If the regulations permit demand for delivery or release of such a document.
2. The application must state the following:
- a) Description of the document requested
 - b) Contents of the document, with as much detail as possible
 - c) The fact in issue for which such document is called
 - d) The evidence and circumstances proving that the document is under the possession of the other party
 - e) The reason for obligating the other party to present the said document.

Article 29

The arbitration panel may designate the effective means of inquiry in the claim whenever the facts to be proven are proximate to the dispute and are admissible.

Article 30

The arbitration panel may disregard the evidentiary procedures it has ordered, provided that reasons for such disregard shall be stated in the minutes of the hearing. The arbitration panel may not consider the result of such procedures and shall state its reasons in the award.

Article 31

The party requesting testimony of witnesses shall specify the facts to be proved in the testimony, either orally or in writing, and shall accompany his witnesses in the specified hearing. Admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to the *Sharia* rules, and the other party may refute such testimony in the same manner.

Article 32

The arbitration panel may cross-examine the parties at the request of either party or on its own motion.

Article 33

The arbitration panel may, if necessary, seek the assistance of one or more experts to provide a technical report regarding a technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the expert's mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them, and the deposit to be made to the account of the expert. In case such deposit is not made by the party required to do so, or by the other parties to the arbitration, the expert will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of either parties or others and shall submit a report of his opinion on the specified date. The arbitration panel may cross-examine the expert in the hearing concerning the result of his report. If there is more than one expert, the panel shall specify the manner of their performance, whether severally or collectively.

Article 34

The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions.

Article 35

The arbitration panel may, on its own motion or at the request of either party, decide to move for inspection of some facts or matters which were disputed and have a material effect on the claim and shall make a report of the inspection proceedings.

Article 36

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defences and contents in the hearing, either orally or in writing, and to record them in the minutes.

Article 37

If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arose during the process of arbitration, or if a document had been claimed to have been forged, or if criminal proceedings had been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen.

Chapter IV

Awards, Objections and Execution

Article 38

When the arbitration panel is ready to render a decision, the panel shall close the case for review and deliberations. Deliberations shall be held in camera and shall only be attended collectively by the arbitration panel who attended the hearings. The panel shall fix, at the time the case is closed or in another hearing, a date for issuance of the award, subject to the provisions of articles 9, 13, 14 and 15 of the arbitration regulations.

Article 39

The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation. Awards shall follow the provisions of Islamic *Sharia* and the applicable regulations.

Article 40

When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memorandum or document without the document being

reviewed by the other party; if such explanation, memorandum or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons and justifications therefore, and shall notify the parties of the date fixed for continuation of the proceedings.

Article 41

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the umpire in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defences, substantial defences, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall be kept in the file of the claim.

Article 42

Without prejudice to the provisions of articles 18 and 19 of the arbitration regulations, the arbitration panel shall rectify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such rectification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its right of rectification as provided for in this section. The decision issued against a request for rectification may not be objected to independently.

Article 43

The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well to the rules relating to means of objection.

Article 44

Whenever an order is issued for execution of the arbitration award, the latter becomes an executioner instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase:

“All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution required application of force by the police.”

Fees of Arbitrators

Article 45

If both opponents fail to agree on the fees, a decision may be issued for division of fees between them at the discretion of the authority originally competent to try the case; a decision also may be issued for payment of all such fees by one of the parties in dispute.

Article 46

Any party may object to the estimate of the arbitrators' fees to the authority which issued the decision, the objection to be made within eight days from notification of the fees; the authority's decision on the said objection shall be final.

Article 47

The concerned authorities shall execute these rules.

Article 48

These rules shall be published in the Official Gazette and shall be effective from their date of publication.

Appendix C

Appendix C- The Saudi Arbitration Law (2012)

Appendix C- The Saudi Arbitration Law (SAL) 2012
Royal Decree No. M/34
Dated 24/5/1433H – 16/4/2012

Chapter I
General Provisions

Article 1

The following phrases, wherever mentioned in this Law, shall have the meanings assigned thereto, unless otherwise required by context:

1. Arbitration Agreement: is 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 may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.
2. Arbitration Tribunal: a sole arbitrator or a panel of arbitrators in charge of deciding a dispute referred to arbitration.
Competent Court: a court having legal jurisdiction to decide disputes agreed to be referred to arbitration.

Article 2

Without prejudice to provisions of Sharia and international conventions to which the Kingdom is party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.

The provisions of this Law shall not apply to personal status disputes or to matters not subject to reconciliation.

Article 3

Under this Law, arbitration shall be international if the dispute is related to international commerce, in the following cases:

1. If the parties to an arbitration agreement have their head office in more than one country at the time of conclusion of the arbitration agreement. If a party has multiple places of business, consideration shall be given to the place of business most connected to the subject matter of the dispute. If either or both parties have no specific place of business, consideration shall be given to their place of residence.
2. If the two parties to arbitration have their head office in the same country at the time of conclusion of the arbitration agreement, and one of the following places is located outside said country:
 - a. The venue of arbitration as determined by or pursuant to the arbitration agreement;
 - b. Any place where a substantial part of the obligations of the commercial relationship between

the two parties is executed;

c. The place most connected to the subject matter of the dispute;

3. If both parties agree to resort to an organization, standing arbitration tribunal or arbitration center situated outside the Kingdom;

4. If the subject matter of the dispute covered by the arbitration agreement is connected to more than one country.

Article 4

In cases where this Law allows the parties to arbitration to choose the procedure to be followed in a certain issue, this shall include the right of the two parties to authorize a third party to choose that procedure. A third party in this respect includes any individual, tribunal, organization, or arbitration center within the Kingdom or abroad.

Article 5

If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, including those related to arbitration, shall apply, provided this is not in conflict with the provisions of Sharia.

Article 6

1. Unless otherwise agreed upon by the parties to arbitration regarding notifications, the written notice shall be delivered to the addressee personally or to his designee, or to the mailing address specified in the contract subject of the dispute or in the arbitration agreement or the document governing the relationship addressed by the arbitration.

2. If the written notice cannot be delivered to the addressee according to Paragraph 1 above, it shall be deemed to have been received if it is sent by registered mail to the addressee's last-known place of business, habitual residence or to a known mailing address.

3. The provisions of this Article shall not apply to judicial notifications relating to court proceedings with regard to nullification of the arbitration award.

Article 7

It shall be deemed a waiver of his right to object, if a party to arbitration proceeds with arbitration procedures knowing that a violation of a provision that may be agreed to be violated or of a term in the arbitration agreement was committed and he fails to object to such violation within the agreed upon period or within thirty days from his knowing of the violation in the absence of an agreement.

Article 8

1. The court of appeal originally deciding the dispute shall have jurisdiction to consider an action to nullify the arbitration award and matters referred to the competent court pursuant to this Law.

2. In case of an international commercial arbitration within the Kingdom or abroad, the court of appeal originally deciding the dispute in the city of Riyadh shall have jurisdiction, unless the two parties to arbitration agree on another court of appeal within the Kingdom.

Chapter II

Arbitration Agreement

Article 9

1. The arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract.

The arbitration agreement may also be concluded after the occurrence of a dispute, even if such dispute was the subject of an action before the competent court. In such a case, the agreement shall determine matters included in the arbitration; otherwise, the agreement shall be void.

2. The arbitration agreement shall be in writing; otherwise, it shall be void.

3. An 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 in 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.

Article 10

1. An arbitration agreement may only be concluded by persons having legal capacity to dispose of their rights (or designees) or by corporate persons.

2. Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law.

Article 11

1. A court before which a dispute, which is the subject of an arbitration agreement, is filed shall dismiss the case if the defendant raises such defense before any other claim or defense.

2. Filing the action referred to in Paragraph 1 of this Article, does not preclude the commencement or continuation of the arbitration proceedings or the rendering of the arbitration award.

Article 12

Subject to the provisions of Article 9 (Paragraph 1) of this Law, if an agreement to resort to arbitration is reached while the dispute is being considered before the competent court, said court shall refer the dispute to arbitration.

Chapter III

Arbitration Tribunal

Article 13

The arbitration tribunal shall be composed of one arbitrator or more, provided the number of arbitrators is an odd number; otherwise, the arbitration shall be void.

Article 14

An arbitrator shall satisfy the following conditions:

1. Be of full legal capacity;
2. Be of good conduct and reputation; and
3. Be a holder of at least a university degree in Sharia or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meet such requirement.

Article 15

1- The two parties to the arbitration shall agree on appointment of arbitrators. If they fail to reach an agreement, the following shall apply:

- a. If the arbitration tribunal is composed of one arbitrator, the competent court shall appoint that arbitrator.
- b. If the arbitration tribunal is composed of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the umpire. If a party fails to appoint his arbitrator within fifteen (15) days from receipt of a petition to this effect from the other party, or if the two appointed arbitrators fail to agree on appointment of the umpire within fifteen (15) days from date of appointment of the last arbitrator, the competent court, pursuant to a petition filed by the party seeking to expedite the arbitration, shall appoint the umpire within fifteen (15) days from date of submission of the petition. The umpire, whether selected by the two appointed arbitrators or appointed by the competent court, shall preside over the arbitration tribunal. These provisions shall apply to cases where the arbitration tribunal is composed of more than three arbitrators.

2- If the two parties to the arbitration fail to agree on the procedures for appointment of arbitrators, or if one party thereof fails to adhere to such procedures, or if the two appointed arbitrators fail to agree on a matter that requires their agreement, or if a third party fails to perform a function entrusted thereto under such procedure, the competent court shall, pursuant to a petition filed by the party seeking to expedite the arbitration, take the necessary measure or action unless the agreement provides for other means for completing such measure or action.

3- In appointing an arbitrator, the competent court shall observe the conditions stipulated in the arbitration agreement as well as the conditions required under this Law, and shall issue its decision appointing the arbitrator within thirty (30) days from the petition submission date.

4- Without prejudice to the provisions of Articles 49 and 50 of this Law, the decision of the competent court appointing the arbitrator shall not be independently subject to any form of appeal.

Article 16

1. An arbitrator shall have no vested interest in the dispute. He shall also, from the time of his appointment and throughout the arbitration proceedings, disclose to the arbitration parties in writing any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, unless he has already informed them thereof.

2. An arbitrator shall be barred from considering or hearing a case for the same reasons for

which a judge is barred, even if neither party so requests.

3. An arbitrator may not be disqualified except in the presence of circumstances giving rise to justifiable doubts as to his impartiality or independence, or if he lacks the qualifications agreed to by the arbitration parties, without prejudice to the provisions of Article 14 of this Law.

4. Neither arbitration party may disqualify an arbitrator appointed by him, or in whose appointment he participated, except for reasons that become known after the appointment of such arbitrator.

Article 17

1. If the two parties to arbitration fail to agree on a procedure for disqualifying an arbitrator, the party who seeks to disqualify an arbitrator shall, within five days from date of knowing of the formation of the arbitration tribunal or of any circumstances justifying such disqualification, send a written statement giving grounds for the disqualification of the arbitration tribunal. If the arbitrator sought to be disqualified fails to recuse himself or the other party rejects the petition for disqualification within five days from date of submission thereof, the arbitration tribunal shall decide on the disqualification within fifteen days from date of receipt of such petition. If the disqualification is not successful, the party seeking disqualification may petition the competent court, within thirty days, to decide on the disqualification; said court decision shall not be subject to appeal.

2. A disqualification petition may not be accepted from a party who has previously submitted a petition to disqualify the same arbitrator in the same arbitration on the same grounds.

3. Submission of a disqualification petition before an arbitration tribunal shall result in suspension of the arbitration proceedings. An appeal against the arbitration tribunal's decision rejecting the disqualification petition shall not result in suspension of the arbitration proceedings.

4. If the petition to disqualify an arbitrator is accepted, whether by the arbitration tribunal or by the competent court when considering an appeal, all previous arbitration procedures, including the arbitration award, shall be deemed null and void.

Article 18

1. If an arbitrator fails to perform his functions or ceases to do so in a manner that leads to unjustifiable delay in arbitration proceedings, and yet does not recuse himself and the two arbitration parties do not agree on dismissing him, the competent court may dismiss him pursuant to a petition by either party; said court decision shall not be subject to appeal.

2. Unless appointed by the competent court, an arbitrator may not be dismissed except by the consent of the two parties to arbitration, without prejudice to the provisions of Paragraph 1 of this Article. The dismissed arbitrator may claim compensation unless such dismissal is attributed to him.

Article 19

If the mandate of an arbitrator expires due to death, disqualification, dismissal, recusal, disability or any other reason, a replacement shall be appointed according to the procedures followed in the appointment of the arbitrator whose mandate has expired.

Article 20

1. The arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject-matter in the agreement.
2. Pleas of lack of jurisdiction shall be raised on dates referred to in Article 30 (Paragraph 2) of this Law.

The appointment or participation in the appointment of an arbitrator by either party shall not preclude his right to file any of such pleas. The plea that the arbitration agreement does not include matters raised by the other party while the dispute is being reviewed must be raised immediately; otherwise, the right to raise such plea shall terminate. In all cases, the arbitration tribunal may accept a late plea if it deems the delay justified.

3. The arbitration tribunal shall decide on pleas referred to in Paragraph 1 of this Article prior to deciding on the subject of the dispute. However, it may join said pleas to the subject and decide on them both. If the arbitration tribunal decides to dismiss the plea, such plea may not be raised except through the filing of a case to nullify the arbitration award ending the entire dispute, pursuant to Article 54 of this Law.

Article 21

An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of the contract which includes said arbitration clause shall not entail nullification of the arbitration clause therein, if such clause is valid.

Article 22

1. The competent court may, upon the request of either party, order provisional or precautionary measures prior to commencing arbitration proceedings, or upon request by the arbitration tribunal during arbitration proceedings. Said measures may be revoked in the same way, unless otherwise agreed by the two parties to arbitration.
2. The competent court may, upon request by the arbitration tribunal, issue an order of judicial delegation.
3. The arbitration tribunal may, as it deems fit, seek the assistance of the competent agency in the arbitration proceedings, such as calling a witness or an expert, ordering the submission of a document or a copy thereof, reviewing said document, or any other proceeding, without prejudice to the right of the arbitration tribunal to conduct said proceeding independently.

Article 23

1. The two parties to arbitration may agree that the arbitration tribunal shall, upon the request of either party, order either party to take, as it deems fit, any provisional or precautionary measures required by the nature of the dispute. The arbitration tribunal may require the party requesting such measures to provide sufficient financial guarantee for the execution of such proceeding.
2. If the party against whom the order has been issued fails to execute such an order, the arbitration tribunal may, upon the request of the other party, authorize said party to take necessary measures for its execution, without prejudice to the right of the arbitration tribunal or the other party to request the competent agency to enforce such order.

Article 24

1. Upon appointment of an arbitrator, a separate contract shall be concluded with him specifying his fees. A copy of the contract shall be deposited with the agency specified in the Implementing Regulations of this Law.
2. In the absence of such agreement between the two parties to arbitration and arbitrators regarding arbitrators' fees, the competent court shall decide the matter pursuant to a non-appealable decision. If the arbitrators are appointed by the competent court, said court shall determine their fees.

Chapter IV

Arbitration Proceedings

Article 25

1. The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including their right to subject such proceedings to effective rules of any organization, agency or arbitration center within the Kingdom or abroad, provided said rules are not in conflict with the provisions of Sharia.
2. In the absence of such an agreement, the arbitration tribunal may, subject to the provisions of Sharia and this Law, decide the arbitration proceedings it deems fit.

Article 26

The arbitration proceedings shall commence on the day a request for arbitration made by one arbitration party is received by the other party, unless otherwise agreed by both parties.

Article 27

The two parties to arbitration shall be treated equally, allowing each party a full and equal opportunity to present his case or defense.

Article 28

The two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad. In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties. This shall not prejudice the power of the arbitration tribunal to convene at any venue it deems appropriate for deliberation; hearing of witnesses, experts or the parties to the dispute; inspection of the subject matter of the dispute; and examination of documents or review thereof.

Article 29

1. Arbitration shall be conducted in Arabic, unless the arbitration tribunal or the two parties to arbitration, agree on another language or languages. Such agreement or decision shall apply to the language of the written statements and notes, oral arguments and any decision, message or award made by the arbitration tribunal, unless otherwise agreed by both parties or decided by the

arbitration tribunal.

2. The arbitration tribunal may require that all or some of the written documents submitted in the case be accompanied by a translation into the language or languages used in the arbitration. In case of multiple languages, the arbitration tribunal may limit the translation to some of them.

Article 30

1. Within the period of time agreed upon by the parties or determined by the arbitration tribunal, the plaintiff shall send to the defendant and to each arbitrator a written statement of his claim, containing his name and address, name and address of the defendant, full statement of the facts of the claim, his demands, evidence; and any other matter required by the agreement of the two parties to be mentioned in this statement.

2. Within the period of time agreed upon by the parties or determined by the arbitration tribunal, the defendant shall send to the plaintiff and to each arbitrator a written statement of his defense in response to the statement of claim. The defendant may include in his response any demands connected to the subject-matter of the dispute, or may assert any right arising therefrom for the purpose of set-off defense. This right may be asserted to the defendant even at a subsequent phase of the proceedings, if the arbitration tribunal deems such delay justified.

3. Each party may submit with the statement of claim or response thereto, as the case may be, copies of supporting documents and cite all or some of the documents as well as the evidence he intends to submit. This shall not prejudice the arbitration tribunal's right at any phase of the case to request submission of the original documents on which either party relies, or copies thereof.

Article 31

A copy of any briefs, documents or papers submitted by either party to the arbitration tribunal shall be sent to the other party. Likewise, a copy of any expert reports, documents and any other evidence submitted to the tribunal to rely on in issuing its award shall be sent to both parties.

Article 32

Either arbitration party may amend or complete his demands or defense during the arbitration proceedings, unless the arbitration tribunal decides not to accept the same to avoid delaying adjudication of the dispute.

Article 33

1. The arbitration tribunal shall hold hearings to enable each of the two parties to present his case and submit his arguments and evidence. It may, unless the two parties to arbitration agree otherwise, deem the submission of the written briefs and documents sufficient for adjudicating the dispute.

2. The two parties to arbitration shall be given sufficient advance notice at their addresses with the arbitration tribunal of any hearing, date of award pronouncement and any meeting of the arbitration tribunal for the purpose of inspection of the subject-matter of the dispute or any other property or the examination of documents.

3. The arbitration tribunal shall record the summary of each hearing in minutes signed by witnesses, experts, attending parties or their agents, and members of the arbitration tribunal. A

copy thereof shall be delivered to each party, unless the two parties to arbitration agree otherwise.

Article 34

1. If the plaintiff, without acceptable justification, fails to submit a written statement of his claim in accordance with Article 30 (Paragraph 1) of this Law, the arbitration tribunal shall terminate the arbitration proceedings, unless otherwise agreed by the two arbitrating parties.
2. If the defendant fails to submit a written statement of his defense in accordance with Article 30 (Paragraph 2) of this Law, the arbitration tribunal shall continue the arbitration proceedings, unless otherwise agreed by the two arbitrating parties.

Article 35

If either party fails to appear at a hearing after notification or to submit required documents, the arbitration tribunal may continue the arbitration proceedings and issue an award in the dispute, based on available evidence.

Article 36

1. The arbitration tribunal may appoint one or more experts to submit a written or oral report on certain issues determined by the tribunal, and this shall be recorded in the minutes of the hearing. The arbitration tribunal shall notify both parties thereof, unless they agree otherwise;
2. Each party shall provide the expert with information relating to the dispute and enable him to examine and inspect any documents, goods or other property relating to the dispute which he requires. The arbitration tribunal shall decide any dispute that may arise between the expert and either party in this respect pursuant to a non-appealable decision.
3. Upon receiving the expert's report, the arbitration tribunal shall provide each of the two parties with a copy of such report and allow each party to give opinion thereon. Both parties shall have the right to review and examine documents upon which the expert relied. The expert shall submit his final report after reviewing the two parties' comments thereon.
4. Upon submission of the expert's report, the arbitration tribunal may, at its own discretion or upon request of either party, decide to hold a hearing with the expert and allow both parties to discuss the report with him.

Article 37

If, in the course of the arbitration proceedings, a matter outside the jurisdiction of the arbitration tribunal arises, or if a document submitted to it is challenged for forgery or criminal proceedings were initiated for its forgery or for any other criminal act, the arbitration tribunal may continue reviewing the subject of the dispute if it deems deciding such matter, on the forgery of the document or on the other criminal act is not necessary for deciding on the subject matter of the dispute. Otherwise, the tribunal shall stay the proceedings pending a final judgment in this regard, and such decision entails the suspension of the deadline determined for rendering the arbitration award.

Chapter V

Proceedings for Deciding Arbitration Cases

Article 38

1. Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:
 - a. 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.
 - b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute.
 - c. When deciding the dispute, the arbitration tribunal shall take into account the terms of the contract subject of the dispute, prevailing customs and practices applicable to the transaction as well as previous dealings between the two parties.
2. If the two parties to arbitration expressly agree to authorize the arbitration tribunal to settle the dispute amicably, it may rule on the dispute in accordance with the rules of equity and justice.

Article 39

1. If the arbitration tribunal is composed of more than one arbitrator, its decision shall be made by majority vote of its members. Deliberation shall be in camera.
2. If members of the arbitration tribunal fail to reach an agreement and a majority decision is not attainable, the arbitration tribunal may appoint a casting arbitrator within fifteen days. Otherwise, the competent court shall appoint a casting arbitrator.
3. Decisions regarding procedural matters may be issued by the presiding arbitrator, if so authorized by both parties in writing or by all members of the arbitration tribunal, unless otherwise agreed by both parties.
4. If the arbitration tribunal is authorized to settle the dispute amicably, its award shall be made unanimously.
5. The arbitration tribunal may issue provisional or partial awards, prior to making the final award ending the entire dispute, unless the parties agree otherwise.

Article 40

1. The arbitration tribunal shall render the final award ending the entire dispute within the period agreed upon by both parties. In the absence of agreement, the award shall be issued within twelve months from the date of commencement of arbitration proceedings.
2. In all cases, the arbitration tribunal may extend the arbitration period provided that such extension does not exceed six months, unless the parties agree on a longer period.
3. If the arbitration award is not issued within the period provided for in the preceding paragraph, either party may request the competent court to issue an order specifying an additional period or terminating the arbitration proceedings. In such event, either party may file a case with the competent court.
4. If an arbitrator is appointed in place of another in accordance with the provisions of this Law, the period set for the award shall be extended by thirty days.

Article 41

1. The arbitration proceedings shall terminate by the issuance of the award ending the dispute or by the issuance of a decision by the arbitration tribunal to end the proceedings in the following cases:
 - a. If both parties agree to terminate the arbitration proceedings;
 - b. If the plaintiff abandons the arbitration case, unless the arbitration tribunal decides, upon the defendant's request, that the latter has a genuine interest in the continuation of the arbitration proceedings until the dispute is decided;
 - c. If the arbitration tribunal deems, for any other reason, the continuation of the arbitration proceedings pointless or impossible;
 - d. The issuance of an order ending the arbitration proceedings pursuant to Article 34 (Paragraph 1) of this Law.
2. The arbitration proceedings shall not terminate upon the death of either arbitration party or loss of his legal capacity, unless a person with capacity in the dispute agrees with the other party to terminate the arbitration. In such case, the deadline for the arbitration shall be extended for thirty days, unless the arbitration tribunal decides to extend it for a similar period or the parties to arbitration agree otherwise.
3. Subject to the provisions of Articles 49, 50 and 51 of this Law, the mandate of the arbitration tribunal shall end upon completion of the arbitration proceedings.

Article 42

1. The arbitration award shall be made in writing and shall be reasoned and signed by the arbitrators. In case of multiple arbitrators, the signatures of the majority of arbitrators shall be sufficient, provided that grounds for the non-signing of the minority be recorded in the minutes.
2. The arbitration award shall include date of pronouncement and place of issuance; names and addresses of parties to the dispute; names of the arbitrators as well as their addresses, nationalities and capacities; a summary of the arbitration agreement and of the parties' statements, pleadings and documents; a summary of the expert report (if any); and text of the award. The award shall also determine arbitrators' fees, costs of arbitration and their distribution between the parties, without prejudice to the provisions of Article 24 of this Law.

Article 43

1. The arbitration tribunal shall deliver to each arbitration party a true copy of the arbitration award within fifteen days from its date of issuance.
2. The arbitration award may not be published in whole or in part except with the written consent of the parties to arbitration.

Article 44

The arbitration tribunal shall deposit the original award or a signed copy thereof in its original language with the competent court within the period set in Article 43 (Paragraph 1) of this Law, accompanied by an Arabic translation of the award attested by an accredited body if the award is issued in a foreign language.

Article 45

If, during the arbitration proceedings, the parties agree on a settlement ending the dispute, they may request that the terms of settlement be recorded before the arbitration tribunal, which shall, in this case, issue an award which includes settlement terms and ends proceedings. Such award shall have the same force and effect as the arbitration awards.

Article 46

1. Either arbitration party may, within thirty days following the date of receipt of the arbitration award, petition the arbitration tribunal to interpret any ambiguity in the text of the award. The party requesting interpretation shall, prior to submitting the petition to the tribunal, send a copy of such petition to the other party at the address specified in the arbitration award.
2. The interpretation shall be issued in writing within thirty days following the date on which the petition for interpretation was submitted to the arbitration tribunal.
3. The decision of interpretation shall be deemed complementary to the relevant arbitration award and subject to rules applicable thereto.

Article 47

1. The arbitration tribunal shall, pursuant to its own decision or upon request by either party, rectify any material errors in its award, whether in text or in calculation. The rectification shall be carried out without pleadings within fifteen days following the date of rendering the award or of submitting the petition for rectification, as the case may be.
2. The rectification shall be issued by the arbitration tribunal in writing and shall be notified to both parties within fifteen days from the date of issuance. If the arbitration tribunal exceeds its power in rectification, the decision of the tribunal may be nullified by an action for nullification subject to the provisions of Articles 50 and 51 of this Law.

Article 48

1. Each arbitration party may, even upon expiry of the time limit for arbitration, petition, within thirty days following the date of receipt of the arbitration award, the arbitration tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the award. The other party shall be notified of such petitions on his address indicated in the arbitration award prior to its submission to the arbitration tribunal.
2. The arbitration tribunal shall issue its award within sixty days from the petition submission date, and it may, if it deems it necessary, extend such period for an additional thirty days.

Chapter VI

Nullification of Arbitration Award

Article 49

Arbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law.

Article 50

1. An action to nullify an arbitration award shall not be admitted except in the following cases:
 - a. If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term;
 - b. If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;
 - c. If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;
 - d. If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;
 - e. If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;
 - f. If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration.
 - g. If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it.
2. The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law.
3. The arbitration agreement shall not terminate with the issuance of the competent court decision nullifying the arbitration award unless the arbitration parties agree thereon or a decision nullifying the arbitration agreement is issued.
4. The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute.

Article 51

1. An action for nullification of the arbitration award shall be filed by either party within sixty days following the date of notification of said party of the award; and such action is admissible even if the party invoking nullification waives his right to do so prior to the issuance of the arbitration award.
2. If the competent court approves the arbitration award, it shall order its execution and its decision shall be non-appealable. If, otherwise, the court decides the nullification of the award, its decision shall be subject to appeal within thirty days following the date of notification of such decision.

Chapter VII

Authority and Enforcement of Arbitration Awards

Article 52

Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable.

Article 53

The competent court, or designee, shall issue an order for enforcement of the arbitration award. The request for enforcement of the award shall be accompanied with the following:

1. The original award or an attested copy thereof.
2. A true copy of the arbitration agreement.
3. An Arabic translation of the arbitration award attested by an accredited authority, if the award is not issued in Arabic.
4. A proof of the deposit of the award with the competent court, pursuant to Article 44 of this Law.

Article 54

Filing of a nullification action shall not stay execution of the arbitration award. Nevertheless, the competent court may order a stay of execution if the plaintiff so requests in his nullification action and if his request is based on sound grounds. The competent court shall decide the stay of execution application within fifteen days from the petition submission date. If the court decides a stay of execution, it may order that a bail or financial guarantee is provided. If the competent court orders a stay of execution, it shall decide on the nullification action within one hundred eighty days from the date of issuance of said order.

Article 55

1. A petition to execute the arbitration award shall not be admitted, unless the deadline for filing a nullification action elapses.
2. The order to execute the arbitration award under this Law shall not be issued except upon verification of the following:
 - a. The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia;
 - b. The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.
 - c. The award is properly notified to the party against whom it is rendered.
3. An order to execute the arbitration award may not be appealed, while an order denying execution of the award may be appealed before the competent authority within thirty days from the date of its issuance.

Chapter VIII

Concluding Provisions

Article 56

The Council of Ministers shall issue the Implementing Regulations of this Law.

Article 57

This Law shall supersede the Law of Arbitration promulgated by Royal Decree No. (M/46) dated 12/7/1403H

Article 58

This Law shall enter into force thirty days from date of publication in the Official Gazette.

Appendix D

Appendix D- The Saudi Enforcement Law (2012)

Appendix D- The Saudi Enforcement Law (SEL) 2012
Royal Decree No. M/53
Dated 13/8/1433H – 03/7/2012

Article 1

The following terms and phrases – wherever mentioned in this Law – shall have the meanings assigned thereto unless the context requires otherwise:

Law: Enforcement Law.

Regulations: Implementing Regulations of the Law.

Minister: Minister of Justice.

Enforcement judge: Head of the enforcement circuit and its judges, the judge of enforcement circuit, or a judge with the power of an enforcement judge, as the case may be.

President: Head of the enforcement circuit, the judge of the enforcement circuit, or a judge with the power of an enforcement judge, as the case may be.

Enforcement officer: A person in charge of executing enforcement procedures in accordance with the provisions of the Law.

Judicial document server: A court process server, a person requesting enforcement or a person licensed by the Ministry of Justice to serve notices, court dates, orders, and judicial documents required for enforcement.

Judicial sale agent: A person licensed by the Ministry of Justice to sell the assets of a debtor in order to repay the creditor.

Decisions: The procedures and orders carried out by the enforcement judge except for his judgment on disputes.

Enforcement disputes: Suits arising from enforcement contesting its validity filed by the litigants or others.

Section One

Chapter One: Enforcement Judge Jurisdictions

Article 2

Except for judgments and decisions issued in criminal and administrative suits, the enforcement judge shall have the power of compulsory enforcement and supervision thereon, and shall be assisted by an adequate number of enforcement officers. Provisions of the Law of Procedure before *Sharia* Courts shall be applied before the enforcement judge unless otherwise provided for herein.

Article 3

The enforcement judge shall decide on enforcement disputes regardless of their value, in accordance with provisions governing summary proceedings. The enforcement judge shall also issue enforcement decisions and orders and may seek the assistance of the police or the law enforcement agency. He shall also have the power to order or lift travel bans, order imprisonment or release therefrom, order disclosure of assets and review insolvency claims.

Article 4

The venue of jurisdiction of the enforcement judge shall be, as the case may be, as follows:

1. In the court circuit issuing the enforcement document;
2. In the location where the document was issued;
3. In the debtor's domicile; and
4. In the location of the debtor's real estate or movable assets.

The Regulations shall specify the necessary provisions of this Article.

Article 5

In case of multiple enforcement circuits, the enforcement judge who carried out the initial enforcement proceeding shall supervise the enforcement and distribution of its proceeds. He may assign an enforcement judge from another circuit to enforce upon the debtor's property. The Regulations shall specify necessary provisions.

Article 6

All decisions of the enforcement judge shall be final. His judgments relating to enforcement disputes and insolvency claims shall be subject to appeal and the appeal judgment shall be final.

Article 7

In case of aggression, resistance, or attempt to hinder execution, the enforcement judge shall take all precautionary measures. He may order the competent agencies to provide necessary assistance. Enforcement officers may not break doors or undo locks forcibly to carry out the enforcement except with the permission of the enforcement judge and in accordance with minutes prepared for that purpose.

Chapter Two: Enforcement Document

Article 8

1. The enforcement circuit in each general court shall undertake the enforcement and its proceedings. More circuits may be formed if the need arises.
2. A single judge in a general court may carry out the enforcement and its proceedings.
3. Foreign judgments, orders, and documents shall be enforced by one or more judges, when necessary.

The Supreme Judicial Council may, when necessary, form enforcement courts.

Article 9

Compulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are:

1. Judgments, decisions, and orders issued by courts.
2. Arbitral awards which include enforcement order in accordance with the Law of Arbitration.
3. Settlement documents issued by competent bodies or endorsed by courts.
4. Negotiable instruments.
5. Attested contracts and documents.
6. Judgments, judicial orders, arbitral awards and attested documents issued in a foreign country.
7. Ordinary documents whose content is acknowledges in whole or in part.
8. Other contracts and documents having the power of the enforcement document according to law.

Article 10

Judgments, decisions and orders may not be subject to compulsorily execution as long as they are challengeable, unless they are self-executing or self-execution is provided for in relevant laws.

Article 11

Without prejudice to treaties and agreements, the enforcement judge may not execute a foreign judgment or order unless on the basis of reciprocity and upon ascertaining the following:

1. The courts of the Kingdom have no competent jurisdiction to review a dispute regarding which a judgment or an order was issued. The foreign courts that issued such judgment or order have jurisdiction over it in accordance with rules of international judicial jurisdictions stated in their laws.
2. The litigants of a lawsuit in which a judgment was rendered were summoned to appear, were duly represented and were given the right to defend themselves.
3. The judgment or order became final in accordance with the law of the court that issued it.
4. The judgment or order is not in conflict with any other judgment or order issued on the same case by a competent judicial body in the Kingdom.
5. The judgment or order is not in conflict with public order in the Kingdom.

Article 12

The provisions of the previous article shall apply to the arbitral awards issued in a foreign country.

Article 13

Attested documents issued in a foreign country may be enforced under the same conditions stipulated in the laws of that country for enforcement of enforceable attested documents issued in the Kingdom on the basis of reciprocity.

Article 14

Judgments, judicial orders, arbitral awards, and attested documents issued in a foreign country shall be presented to the enforcement judge in charge of enforcement of foreign judgments to ascertain that the document fulfills the conditions required for enforcement and affix the seal of enforcement thereon.

Article 15

- 1- If the debtor acknowledges an entitlement written on an ordinary paper, such acknowledgment shall be recorded by the enforcement judge and the paper shall be deemed an enforcement document.
- 2- If the debtor challenges such entitlement or part thereof, the enforcement judge shall order the debtor to sign a statement giving grounds for such challenge subject to penalties stipulated in this Law. Such paper shall be deemed an enforcement document with regard to the unchallenged part. The creditor may file a suit for the remainder before the competent court.

Chapter Three: Declaration of Assets

Article 16

The enforcement judge may order the debtor to declare assets sufficient to repay the enforcement document. The declaration and seizure order shall be issued upon notifying the debtor of the enforcement order. However, if it appears to the enforcement judge that the debtor is persistently in default as reflected by his credit record or circumstantial evidence, the judge may order disclosure and seizure of his assets prior to notifying him of the enforcement order.

Article 17

All competent authorities or bodies overseeing asset registration as well as the debtor's debtor, accountant, and employees shall disclose the assets of the debtor pursuant to the order of the enforcement judge in a period not exceeding ten days from the date of notification of such authorities.

Article 18

Asset registration bodies or authorities overseeing them or their management, as the case may be, shall:

1. Set up departments to handle various judicial enforcement orders.
2. Build asset database whether real estate, financial, commercial, intellectual, or any other asset.

3. Maintain confidentiality of the data or information to which the employees are privy to and shall not disclose for any reason.
4. Set up a security system to prevent an unauthorized access to data.
5. Notify asset owners of the data disclosed after a period specified by the Regulations, subject to applicable laws.

Article 19

Disclosure of assets may be exchanged with other countries pursuant to an order by an enforcement judge on the basis of reciprocity, with the exception of cases provided for by laws, Council of Ministers' resolutions and matters jeopardizing the national security of the Kingdom.

Chapter Four: Assets Subject to Enforcement

Article 20

All debtor's assets guarantee his debts. Seizure of debtor's assets invalidates any action regarding his attached assets.

Article 21

Seizure and enforcement shall not apply to the following:

1. State assets.
2. The residence of the debtor and his dependents. The enforcement judge shall determine its adequacy, unless it is subject to a lien to the creditor.
3. Mean of transport for the debtor and his dependents. The enforcement judge shall determine its adequacy, unless it is subject to a lien to the creditor.
4. Wages and salaries except for the following:
 - a. One-half of the total wage or salary for the payment of alimony and child support.
 - b. One-third of the total wage or salary for the payment of other debts.

In case of contention of debts, half of the total wage or salary shall be allocated for payment of alimony and child support, and one-third of the other half shall be allocated for other debts. In case of multiple debts, one third of the half of the wage or salary shall be distributed between creditors in accordance with *Sharia* and law.

5. Tools necessary for the debtor to practice his profession.
6. The debtor's personal needs. The enforcement judge shall determine their adequacy.

Article 22

1. A person whose assets are attached – regardless of attachment procedures – may deposit a sum of money sufficient to repay the debt in the court's account designated for repayment of the debt. Such deposit shall result in removal of the attachment of attached assets and subjecting the deposited fund to seizure.

2. The seizure may be enforced only against the part of the debtor's assets that satisfies the debt claimed, unless the seized asset is indivisible.
3. The enforcement judge shall allocate the asset under seizure to guarantee prompt repayment.

Section Two: Provisional Attachment

Article 23

The competent authority considering the dispute shall have the power of ordering provisional attachment in accordance with the provisions of summary proceedings.

Article 24

The creditor may request provisional attachment of debtor's movable property if that debtor has no established residence in the Kingdom or the creditor fears (on reasonable grounds) that the debtor's property may disappear or be smuggled.

Article 25

A lessor of a real property may request provisional attachment of movable property or products of the leased asset to guarantee the payment of the due rent.

Article 26

A claimant of ownership of a movable property may request provisional attachment against a person in possession thereof if there are clear proofs supporting his claim.

Article 27

A creditor of an established and due debt – even without an enforceable judgment – may request provisional attachment against debts due to his debtor by third parties even if such debts are deferred or conditional as well as his funds or movable property in the possession of third parties. The person in possession of the attached property shall, with ten days from date of notification of the attachment, declare all debts, realties, and properties he owes to the debtor and shall, with ten days from date of notification of a valid attachment order, deposit the same with the court's account or a part thereof sufficient to satisfy the debt.

Article 28

Provisional attachment in the aforementioned cases may not be enforced unless the debt is evident and due.

Article 29

Provisional attachment provided for in the aforementioned articles may be enforced only by the order of the court or the authority having jurisdiction to consider the dispute where the person whose properties are attached resides. Prior to issuing its order, the court or authority may carry out the necessary inquiry if it finds that the documents in support of the attachment request are insufficient.

Article 30

If the claim is filed before a court or a competent authority, such court or authority shall have jurisdiction to issue the provisional attachment order.

Article 31

The debtor whose property is subject to attachment and the garnishee shall be notified of the attachment order within a maximum period of ten days from the date of issuance of such order; otherwise, the attachment shall be deemed null and void. The garnishor shall, within the ten days referred to above, institute a claim before the court or the competent authority to prove the right and validity of the attachment; otherwise, the attachment shall be deemed null and void.

Article 32

The garnishor shall present to the court or the competent authority a written declaration attested by a guarantor or a guarantee satisfying all the rights of the person whose property he requests to be attached as well as any sustained damage if the garnishor's claim is proved invalid.

Article 33

Attachment proceedings, except for sale procedures, shall apply to provisional attachment of movables and property owed to the debtor by third parties.

Section Three

Enforcement Proceedings

Chapter One: Attachment

Article 34

1. Enforcement is carried out upon a request presented to the enforcement judge using the form specified by the Regulations.
2. (a) The enforcement judge shall ascertain that the writ of enforcement is included in the enforcement document stipulated in Article 9(1, 2, 3) of this Law.

(b) With exception to provisions of paragraph 2(a), the enforcement judge shall ascertain that the enforcement documents stipulated in Article 9(4, 5, 6, 7 and 8) satisfy the statutory conditions and affix the seal of enforcement thereon including the phrase (enforcement document) accompanied by the name of the enforcement judge as well as his court and signature.
3. The enforcement judge shall promptly issue an enforcement order to the debtor along with a copy of the enforcement order stamped as a true copy by the court. The debtor shall be notified in accordance with the notification rules stated by the Regulations. If the debtor could not be notified within 20 days from the date of issuance of the writ of enforcement, the judge shall order immediate publication of the notification in the most circulated newspaper in the area of the court and the debtor shall incur the cost of such publication along with the due debt.
4. The Ministry of Justice and the concerned authorities shall coordinate to disclose the addresses of the persons whose places of residence are unknown.

Article 35

- A- Attachment of movable property shall be enforced by the presence of the enforcement officer at the location of the property place or by issuing a writ to the competent registration authority, as the case may be. The officer shall prepare the minutes of the attachment upon the order of the enforcement judge and the property registry shall indicate the gist of the minutes.
- B- If the attachment cannot be carried out in full in a single day, it may be completed in consecutive days even during official holidays.
- C- Attached property may not be moved to another place of attachment except upon an order by the enforcement judge.

Article 36

- A- The enforcement judge shall appoint, along with the officer, one accredited valuer (or more) specializing in evaluating the property attached to determine its value and record the valuation in the attachment minutes with his signature. The enforcement judge may empower the officer to valuate property of low value as determined by the Regulations unless the creditor and debtor agree on its value.
- B- If the valuation of the movable property requires entry to the property, the valuer and the enforcement officer shall enter it in the presence of the police. The enforcement judge may authorize use of force in case of debtor's refusal or absence.

Article 37

The officer shall deposit the money, jewelry, precious metals, antiques and precious things in the court account or in its safe box, as the case may be.

Article 38

The officer may, if necessary, secure the attached property and place locks and court seal thereon and record the same in the minutes.

Article 39

Fruits and crops may be attached before ripening and the enforcement officer shall place a signboard on the entrance of the cultivated land to which the attachment minutes is affixed. The fruits and crops shall be sold when matured.

Article 40

Attachment minutes shall be prepared according to the Regulations, and shall include:

1. The identity of the distrainor, distrainee and garnishee.
2. The writ of execution and the attachment order's number, date, and source.
3. Property designation, description, quantity, weight, type, number, and distinguishing characteristics, title and registration records, as the case may be.
4. Type of property title deed, its number, date and issuing authority as well as property location, borders, dimensions, and space shall be stated as well.

5. Value of the attached property as determined by the valuer.
6. Place of attachment.
7. Name of guardian entrusted with safeguarding the attached property.
8. Name of the sale agent, time, date, and place of sale.

Attachment minutes shall include the signature of the enforcement officer, debtor (if present), guardian, and other parties identified in the minutes according to the Regulations.

Article 41

Attachment minutes shall be displayed in the place where enforcement announcement are posted within five days from the date of attachment. This shall be deemed notification to all parties concerned with the attached property. However, the enforcement officer shall notify the distrainee and any party identified by the enforcement judge to have a right to the attached property, if their addresses are known to the enforcement judge.

Article 42

The enforcement judge may entrust the distrainee with the custody of the attached property under his control provided he furnishes security or a competent guarantor that guarantees non-infringement on the attached property in a manner detrimental to the creditor. If the distrainee refuses the custody or fails to provide security or a guarantor, the enforcement judge shall appoint an authorized guardian.

Article 43

In all events, the attached property shall be delivered to the guardian by virtue of the attachment minutes signed by him. The guardian may not benefit, lend or expose the attached property to damage. The enforcement judge may allow the guardian to manage the attached property if necessary and the guardian shall safeguard the revenues of the property along with the property. If the guardian is the owner of the attached property attached, the enforcement judge may allow him to benefit therefrom.

Article 44

A guardian who is not an owner of the attached property shall be entitled to the due fees in return for his custody and management. Said fees shall be estimated by virtue of an order from the enforcement judge and shall be calculated towards enforcement fees.

Article 45

Attachment shall be carried out on a real estate by virtue of attachment minutes and the authority issuing the title deed shall be provided with a copy of the minutes indicating to indicate the same in the deed registry.

Article 46

If the debtor fails to comply or disclose property sufficient to satisfy the debt within five days from the date of notifying him of the writ of execution or from the date of its publication in a newspaper if notification was not possible, he shall be deemed in default. The enforcement judge shall immediately order the following:

1. Banning the debtor from travel.
2. Banning him from issuing power of attorney directly or indirectly regarding the property and whatever relates thereto.
3. Disclosing the debtor's present and future property in the amount that satisfies the debt in the enforcement document as well as charges of attachment and enforcement in accordance with the provisions of the Law.
4. Disclosing the debtor's commercial and professional licenses and registers.
5. Notifying an authorized notary to register the credit information of the non-enforcement deed thereof.

In addition to the above as the case may be, the enforcement judge may undertake any of the following:

- A. Barring government agencies from dealing with the debtor and seizing his dues therewith. Said agencies shall notify the enforcement judge of their compliance.
- B. Barring financial institutions from dealing with the debtor.
- C. Ordering disclosure of the property of the debtor's spouse, children, and whoever the circumstantial evidence indicates that any property may be transferred to or that he is being favored therewith. If the suspicion is established by evidence or presumptions that property has been concealed, the matter shall be referred to the competent judge for review.
- D. Imprison the debtor according to the provisions of this Law.

Article 47

The enforcement judge may question the debtor, his accountants, employees, persons suspected of favoring him and his debtors for the purpose of tracing his property. Said judge may assign an expert to trace the debtor's property.

Article 48

The original copy of the enforcement document shall be appended with whatever is actually executed and the enforcement document data shall be recorded in the registry of the enforcement document at the court.

Chapter Two: Sale of Attached Property

Article 49

No person may be admitted to the auction hall unless qualified. Participants in the auction shall qualify pursuant to arrangements set by the Ministry of Justice in agreement with the Saudi Arabian Monetary Agency (SAMA) which regulates financial competency of the participants in the auction, method of deduction of sums of money, and payment immediately upon winning the auction as specified by the Regulations.

Article 50

1. An auction shall, within a period not more than 30 days and not less than 15 days from the auction date, be announced in the place where enforcement announcements are displayed and by posting the announcement on the entrance of the attached property indicating day, time and location of sale as well as type and a brief description of the attached property. The enforcement judge may order publication of this announcement in one or more daily newspapers, deducting publication cost from the sale proceeds.
2. The auction shall commence in the presence of the enforcement officer and the agent shall declare the initial value of the attached property for opening the auction. The property may not be sold for less than the reserve price. In the absence of a sale, the enforcement officer shall appoint another date for the auction within two days, and the attached property shall be sold to the highest bidder unless the property is a real estate, precious metals, jewelry or the like where the enforcement judge shall order the revaluation. The auction shall be opened according to the last valuation and the property shall be sold to the winning bidder.

The winning bidder shall pay immediately according to the Regulations.

3. If the winning bidder fails to pay within the set time, the property shall be reauctioned at his own risk in accordance with paragraphs 1 and 2 of this Article. The defaulting bidder shall incur the shortfall and the auction cost and shall be entitled to any excess amount.

Article 51

No one may influence the auction price by any arrangement and the judge shall request the Bureau of Investigation and Prosecution to conduct the required investigation in case of suspicion of collusion.

Article 52

The enforcement officer shall stop the sale of the remainder of the debtor's property if the sale proceeds satisfy the debt for which the attachment is placed, in addition to the execution cost, or if the distrainee pays the due amount.

Article 53

1. The enforcement officer shall prepare minutes recording proceedings taken, name of winning bidder and auction price.
2. The enforcement judge shall issue a decision declaring the winning bidder after depositing the amount in the court account including summary of the minutes of attachment and sale. Such decision shall include delivery of sold property to the buyer and the sale decision shall be deemed an enforcement document.

Article 54

The decision awarding the auction shall clear the property from any claims against the winning bidder.

Article 55

Securities subject to the Capital Market Law shall be sold by means of a broker licensed by the Capital Market Authority. The Ministry of Justice and the Capital Market Authority shall

agree upon setting necessary controls for sale of such securities in a manner that ensures fair price and execution.

Article 56

1. Bank accounts shall be opened in the name of the court for deposit of execution proceeds and disbursement therefrom. The Regulations shall specify provisions for deposit, disbursement, and management of such accounts.
2. Precious metals, jewelry and the like shall be deposited in the safe of the bank which has the accounts of the enforcement court.

The Regulations shall govern the provisions and procedures facilitating participation of banks in the execution proceedings upon agreement between the Minister of Justice and the Governor of SAMA.

Chapter Three: Distribution of Execution Proceeds

Article 57

Execution proceeds shall be distributed, by order of the enforcement judge, to distrains and parties involved in the proceedings.

Article 58

If the execution proceeds are not sufficient to satisfy the due rights of parties concerned (distrainers and parties involved in the proceedings) and said parties agree to an amicable settlement regarding distribution of said proceeds, the enforcement judge shall record their agreement in minutes signed by the enforcement officer, distrainers, other parties involved in the proceedings and the judge. These minutes shall be deemed an enforcement document against them.

Article 59

If the proceeds are insufficient and the parties concerned fail to reach an amicable settlement for the distribution of the proceeds, this shall be recorded in minutes signed by the enforcement judge, the enforcement officer and parties concerned. The enforcement judge shall issue a judgment for the distribution of the proceeds among creditors in accordance with legal and Sharia principles.

Chapter Four: Garnishment

Article 60

1. Garnishment of funds owed to debtors with a financial institution – specified by the Regulations – shall be carried out by the supervisory authority in accordance with the following controls:
 - a. Garnishment of credit current account shall be through the financial institution barring the holder of the account from withdrawing from his credit balance or any incoming deposits thereto. The financial institution may – upon approval of the

enforcement judge – deduct debt liabilities on the account receivable on the account before garnishing the debtor's balance.

- b. Garnishment of investment accounts shall be through the financial institution barring the holder of the account from withdrawing from the cash credit balance or any incoming deposits thereto. If the cash credit balance is allocated for payments for positions or other investments on their due dates which were established before notifying the financial institution of the garnishment, they shall not be subject to garnishment proceedings except upon closure of all positions.
 - c. Garnishment of term deposits shall be barring the debtor from withdrawal while allowing said deposits to gain lawful interests if the debtor so requests, notifying the enforcement judge of its nature, due date and consequences of early liquidation.
 - d. Garnishment of assets deposited in safe boxes shall be carried out by opening the safe boxes and listing their contents in the presence of the enforcement officer at the financial institution. Minutes to this effect shall be signed by the enforcement officer, the financial institution officer and, if possible, the debtor. The debtor's key of the safe boxes shall be delivered to the enforcement court.
 - e. Garnishment of insurance compensations shall be by recording the content of the enforcement document on the register of the debtor's entitlements. Any due or future compensation shall be deposited in the enforcement court account.
 - f. The authorities overseeing financial institutions shall set necessary mechanism that ensures prompt execution of the enforcement judge's order.
2. The enforcement judge shall be notified of the outcome of garnishment within three working days from the date of receipt of the garnishment order.
 3. The enforcement judge shall order the authority overseeing the financial institution to transfer to the court account the debtor's due cash credit balances referred to in subparagraphs a, b, c, d and e of paragraph 1 of this Article in an amount sufficient to satisfy the debt.

Article 61

1. Garnishment of company's equity shares shall be carried out by the Ministry of Commerce and Industry by endorsement on the ownership registry and recording the content of the enforcement document on the company's register.
2. Garnishment of securities shall be carried out by the Capital Market Authority which shall, within three working days from the date of receipt of the garnishment order, notify the enforcement judge as to whether garnishment was carried out or not, in accordance with the following controls:
 - A. Garnishment of securities shall be by barring the debtor from disposal thereof.
 - B. Garnishment of open positions of securities shall be by barring the debtor from disposing of due amounts following closure.

Article 62

Garnishment of negotiable instruments shall be according to the following controls:

1. If the check is held by the payee debtor, the officer shall record the garnishment minutes and collect the value or the available part thereof and shall be deposited in the court account.
2. Garnishment of the value of the endorsed check and its deposit in the court account shall be carried out by the drawee bank when the debtor is notified of the enforcement order and the check is presented by the endorsee for collection.
3. If the check is dishonored for lack of sufficient funds, the enforcement judge shall subrogate the right of the debtor to the creditor to claim payment from the drawer or the endorser of the check and the amount shall be deposited in the court account. In case the drawer or the endorser refuses to pay, the creditor may file a suit with the concerned judicial authority of his objection within ten days from the date of claim, and shall notify the enforcement judge of the proceedings of the suit and the its outcome. If said period ends without such suit, he must pay the value of the check to the court.
4. Garnishment of promissory notes and bills of exchange in the possession of the debtor shall be by drafting the garnishment minutes by the enforcement officer. The amount stated in the negotiable instruments shall be deposited in the court account and if payment is deferred, collection shall be deferred until maturity date.
5. If the drawer or the endorser challenges the beneficiary debtor's entitlement to the value of the promissory notes and bills of exchange, he shall file a challenge suit in accordance with paragraph 3 of this Article.

Article 63

Garnishment of funds due to the debtor in the future shall be by the party obligated to pay such funds. The enforcement officer, the party obligated to pay such funds and the creditor shall draft minutes of these funds and their due date. Such funds shall be deposited in the court account. Funds, whether in cash, movables or real estate, shall be dealt with according to controls provided for in this Law.

Article 64

Garnishment of intellectual property shall be through the competent authority in charge of registering such property by recording the gist of the enforcement document in the registry. The enforcement judge shall be notified as to whether garnishment was carried out or not within three working days from date of receipt of the garnishment order.

Article 65

The creditor may impose garnishment in his possession owed to his debtor. Garnishment shall be carried out by notifying the debtor. Such notification shall include necessary information stated in the garnishment notification. In case where garnishment is imposed by order of the enforcement judge, the distrainor must, within the ten days subsequent to the debtor's garnishment

notification date, file a suit before the competent judicial authority to establish entitlement and validity of garnishment. Otherwise, garnishment shall be deemed void.

Article 66

If the garnishee has more than one branch, then notification of any branch shall be deemed effective against the garnishee.

Article 67

If the garnishee disposes of the attached property contrary to the order of the enforcement judge, said judge shall, upon the distrainor's request, execute against the garnishee's property in equal amount.

Section Four

Chapter One: Direct execution

Article 68

If the object of execution is an act or omission and the concerned party fails to execute within five days from such order in accordance with provisions of this Law, the enforcement judge shall order the use of force (the police) to take necessary measures for execution unless execution requires the debtor to carry it out himself.

Article 69

If the use of force is not feasible or if execution can only be carried out by the debtor but fails to do so, the enforcement judge shall issue a judgment imposing a daily fine not exceeding ten thousand riyals to be deposited in the court account. The enforcement judge may annul the fine or part thereof if the party subject of the execution proceeds with execution.

Article 70

If the use of force to carry out execution is not possible or if a fine is imposed on the debtor and he fails to comply with the enforcement order within the period set by the enforcement judge, said judge may issue an order to imprison the debtor to enforce him to comply with the order.

Article 71

Provisions of direct execution shall apply to the legal representative of the private corporate person or the person impeding execution from among personnel of said private corporate person.

Article 72

Evicting occupants of real estate shall be carried out in the presence of the officer at the location of the real estate on the day following the lapse of five days from the date of notification of the enforcement order. The officer shall hand over the real estate to the creditor and he may use force to enter the real estate if necessary.

If the holder of the real estate fails to attend or refuses to receive movables belonging to him, said movables shall be handed over to the judicial receiver and the enforcement judge shall

order selling them in auction after two months unless received by the possessor and the amount shall be deposited in the court account.

If the holder is indebted to the creditor, the provisions of this Law shall apply to the movables of the debtor holder.

Chapter Two: Execution in Personal Status Issues

Article 73

Decisions and judgments in personal status issues shall be enforced in accordance with this Law if attachment and sale of property is necessary. If execution requires periodic payment of funds, execution shall be carried out through arrangements specified by the Regulations.

Article 74

Judgments regarding custody of minors, separation of spouses and the like shall be executed by the use of force even if enforcement requires resorting to the police or entry into houses and the enforcement judgment may be repeated as necessary.

Article 75

A judgment ordering the wife return to the marital home may not be deemed compulsory.

Article 76

The enforcement judge shall determine the manner of executing the judgment regarding visitation of the minor unless provided for in the judgment. Execution shall be carried out by delivery of the minor to a proper place suitable for the purpose. The Ministry of Justice shall designate such places in the Regulations, provided they are not located at police stations and the like.

Section Five

Chapter One: Insolvency

Article 77

If the debtor fails to repay the debt and claims insolvency, the enforcement judge shall verify the insolvency claim upon completion of the procedures of disclosing of property, questioning, and tracking of such property in accordance with the provisions of this Law and upon an announcement that includes grounds for filing for insolvency published in one or more daily newspapers in the area of the debtor.

Article 78

1. If the debtor claims insolvency and if it appears to the enforcement judge that there are presumptions that the debtor is concealing property, said judge shall – by virtue of a judgment – seeks disclosure of his actual financial status by imprisoning him for a period

not exceeding five years, taking into consideration the value of the property. Such judgment shall be subject to review by the appeals court.

2. The enforcement judge shall summon the debtor – during the imprisonment period stipulated in paragraph 1 of this Article – and question him periodically at intervals not exceeding three months so as to disclose his financial status according to the Regulations.
3. The Regulations shall determine what constitutes a large or small amount of debt, types of debts and debtors' statuses with regard to the debt in coordination with the Ministry of Interior and the Ministry of Finance.

Article 79

If the debt arises out of an unintentional criminal occurrence and the debtor claims insolvency, the enforcement judge shall establish the insolvency upon hearing his evidence. In the absence of evidence, the judge shall order the debtor to take oath for establishing his insolvency.

Article 80

If the debtor claims insolvency but on examination it appears to the enforcement judge that it is a fraudulent claim or if the failure to repay on the part of the debtor is due to transgression or negligence, the judge shall record the occurrence, complete execution proceedings, and order detention of the accused and referral of the indictment to the Bureau of Investigation and Public Prosecution within a period not exceeding seven days to initiate the suit. Interested parties may submit a report to the Bureau seeking the filing of the suit and the competent judge shall consider the case. In case of a conviction, the penalty prescribed in this Law shall apply.

Article 81

1. The enforcement judge shall issue his order to the authorities in charge of assets stipulated in this Law to seize prospective property owned by the insolvent debtor.
2. The judge shall notify an entity licensed to register credit information of the insolvency.
3. The creditor may present in the future the enforcement document to the enforcement judge in case of the discovery of any property owned by the insolvent debtor.

Article 82

Upon declaration of bankruptcy, the merchant shall be subject to applicable statutory bankruptcy rules.

Chapter Two: Imprisonment

Article 83

The enforcement judge shall – under the provisions of this Law – issue a judgment of imprisoning the debtor if the debtor refuses execution and the imprisonment shall continue until the execution is enforced.

Article 84

The debtor may not be imprisoned in the following cases:

1. If he has established property sufficient for satisfying the debt and can be attached and executed upon.
2. In case he presents a bank guarantee, a competent guarantor, or in kind security equivalent to the debt.
3. In case his insolvency is established in accordance with the provisions of this Law.
4. If he is an ancestor of the creditor unless the debt is a financial support required by *Sharia*.
5. If it is established – by virtue of a certificate from the competent medical board – that he suffers from an ailment that renders imprisonment unbearable.
6. If the debtor is pregnant or a mother of an infant under the age of two years.

Article 85

The enforcement of imprisonment shall not satisfy the debt and such imprisonment shall be enforced apart from criminal prisoners. The prison administration shall make available the means that enable him to repay or settle his debts.

Article 86

Imprisonment provisions shall apply to the legal representative of the private corporate person or the person impeding execution from among his employees.

Chapter Three: Penalties

Article: 87

Penal courts shall have jurisdiction to consider imposition of penalties provided for in this Law. The Bureau of Investigation and Public Prosecution shall file a suit upon a referral issued by the enforcement judge or a complaint by the aggrieved person.

Article 88

1. Any debtor committing any of the following crimes shall be sentenced to a term of imprisonment not exceeding seven years:
 - A. Refusing to comply with enforcing a final judgment issued against him or if it is established that he conceals or smuggles property, or refuses to disclose his property.
 - B. Initiating a suit with the intention to obstruct execution.
 - C. Resisting execution – by himself or others – by threatening or assaulting an official or a person licensed to carry out execution or committing any of such acts against the creditor, or any other unlawful act intended to obstruct execution.
 - D. Providing false statements before the court or in proceeding, or providing false data.

2. Any person who helps or provides assistance to the debtor in committing any of the crimes provided for in paragraph 1(a, b, c and d) of this Article shall be subject to penalties stipulated in paragraph 1 of this Article.

Article 89

The public servant and the like shall be imprisoned for a period not exceeding seven years if he prevents or obstructs execution. Such act shall be deemed a crime infringing upon integrity.

Article 90

Any debtor whose indebtedness is established to have been caused by a fraudulent act or squandering of substantial funds shall be imprisoned for a period not exceeding 15 years even if his insolvency is established in both cases. Such acts shall be deemed serious crimes requiring detention.

Article 91

The following shall be subject to imprisonment for a period not exceeding three years:

1. A person privy to information relating to the debtor's assets if he discloses such information. The same penalty shall be applied to any person who becomes privy to such information without a court order.
2. The judicial receiver or custodian and affiliates thereof, if any of them breaches his duty out of negligence, transgression, or evasion of delivery or receipt of funds.
3. The assessor or sale agent and their affiliates, or the bidder in an auction if any of them tries to influence the price or provides misleading information regarding fair pricing.

Article 92

Any parent or others who refuse, resist or impede execution of a judgment relating to custody, guardianship or visitation shall be penalized by imprisonment for a term not exceeding three months:

General Provisions

Article 93

An enforcement deputy ministry for administrative and financial affairs shall be established in the Ministry of Justice to undertake the following:

1. Licensing the following enforcement service providers:
 - a. Process server.
 - b. Judicial sale agent.
 - c. Judicial receiver.
 - d. Judicial custodian.

- e. Repossession companies to oversee the process of the lessor's receipt of moveable assets in accordance with controls stipulated by the Ministry of Justice in coordination with the Ministry of Interior.
- f. An enforcement service provider for the private sector upon Council of Ministers' approval to assign such service to said sector.

The Regulations shall specify provisions for licensing and qualification including required financial guarantee, work procedure rules, supervising them, policies for defining their wages and penalties imposed upon them.

2. Hiring a company or more to carry out execution proceedings or a part thereof under the supervision of the enforcement judiciary.
3. Drafting a regulation for training enforcement employees.
4. Publishing enforcement announcements.
5. Exchanging disclosure of assets with other countries.

Article 94

The application of this Law shall not prejudice treaties and agreements concluded between the Kingdom and countries, international institutions and organizations.

Article 95

The party aggrieved by the intentional delay in carrying out enforcement procedures may file a suit before the enforcement judge to indemnify him for such damage.

Article 96

This Law shall repeal Articles (196 to 232) of the Law of Procedure before *Sharia* Courts issued by Royal Decree No. M/21 dated 20/05/1421H and paragraph (G) of Article 13 of the Board of Grievance Law promulgated by Royal Decree No. M/78 dated 19/9/1428H and any provisions conflicting therewith.

Article 97

The Minister shall issue the regulations within 180 days from the date of issuance of the Law and shall come into effect upon its entry into force.

Article 98

This Law shall enter into force 180 days from its date of publication in the Official Gazette.