



Saudi Administrative Contracts and Arbitrability

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Abstract

This study will explore the legal regulation and character of administrative contracts in Saudi Arabia, in order to prepare the ground for a critical investigation into arbitration agreements and clauses in administrative contracts. The site of scholarly focus will be directed to the legal characteristics of contracts caught by Saudi's public and administrative laws, with a special emphasis on the highly regulated and politically sensitive area of public procurement contract regulation.

Set against this background, this thesis aims to provide a critical appraisal of the validity and enforcement of arbitration agreements and clauses in the context of administrative contracts. The proposed thesis will consider the potential impacts of *Shariah* on arbitration proceedings initiated in Saudi Arabia, with particular attention focused on the requirements of the applicable procedural and substantive laws.¹

Drawing on the administrative systems of France and Egypt, this thesis will consider how other civil law systems have balanced the rights of private parties with the unilateral authority of public administration, and the extent to which these systems have recognised the rights of private parties to resolve disputes through the mechanisms of arbitration. It will conclude that Saudi Arabia has unduly restricted the right to arbitrate disputes involving administrative contract, often times through arbitrary exercise of the sovereign power, and through the unjustified of public policy and other arbitrability defences. The limitations of the current legal framework governing the treatment and dispute resolution of administrative contracts is made

¹ Royal Decree No. M/34, the New Saudi Arbitration Law; Royal Decree No. M/53, the New Saudi Enforcement Law. For an overview of all salient aspects of the New Law, see e.g. Lalive. 'Transnational (or Truly International) Public policy and International Arbitration, Comparative Arbitration Practice and Public Policy' Arbitration ICCA International Arbitration Congress, (1987), 261

more challenging because public authorities can unilaterally amend or limit the rights of private parties, including by denying parties a general right to bring their disputes before a neutral arbitrator. This unilateral power is, however, not adequately constrained through statutory or judicial control. By exploring how public interest is balanced against private rights in Egypt and France, and by considering the “internationalised” elements of contracts which are nonetheless regulated by ad hoc the public law rules of Saudi municipal law, the thesis seeks to shed light on the legal effects and regulatory complexities of the modern administrative contract in the globalised economy.

At the level of normative analysis, this thesis seeks to reconcile two ideals: the legitimate diversity of sovereign states to decide the laws that will apply to their contractual agreements in pursuit of the public interest, and the moral need to protect longstanding principles of contract law. The latter of these ideal is intimately related to concept of the sanctity of contract (*or pacta sunt servanda*), the legal protection of the substantive legitimate expectations of parties impacted by the decisions of the state and finally, the freedom of parties to choose the laws and means by which they can settle their dispute, as embodied by the principle of party autonomy. As this thesis will aim to show, the Islamic foundation of the Saudi legal system provides the necessary impetus for reform: a commitment to, both administrative justice and equity under contract law is entirely consistent with Islamic *Shariah*. From these premises, the proposed thesis will proceed to assess and critically evaluate the extent to which Saudi law has reconciled its modernising ambitions of a modernised arbitration regime with the enduring forces of (religious) tradition.²

² Khalid Alnowaiser, ‘The New Arbitration Law and its impact on investment in Saudi Arabia’ 29 J. Int’l. Arb. (2012) 6, 723-25

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Declaration

I hereby declare that the work in this thesis is my own work and has been generated by me as the result of my own original research.

Where other sources of information have been used, they have been acknowledged. This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

Date: 31/3/2017

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Chapter 1

Background and Introduction

1.1. Background

1.1.1 The Arbitration Framework in Saudi Arabia

In harmonising its national laws and procedures with leading international arbitration institutions and jurisdictions, the new Saudi Arbitration Act 2012 (“SAL 2012”) represents a significant step towards the reform and modernisation of the Kingdom’s arbitration framework. It is widely recognised to have established a more commercially attractive and stable arbitration environment, strengthening legal certainty around decisional outcomes, while providing litigants with a viable “choice” of law and jurisdiction for settling disputes.³

The new arbitration law, and the national regulatory framework which structures it, suffers from a number of “gaps” or challenges, both theoretical and practical.⁴ While many of the reforms instituted under the SAL 2012 can be seen to be representative of the ‘normative pull’ towards the *procedural* harmonisation of international rules and principles on arbitration, the Saudi legal system remains deeply anchored in the *Shariah* (Hanbali) arbitral tradition.⁵ And in formal deference to the Islamic basis of Saudi Arabia’s legal system, the Saudi Arbitration Law 2012 contains a number of provisions

³ Raza Mithani, ‘Saudi Arabia, The Emerging Arbitration Landscape’ (2014) 1 Corporate Disputes Magazine

<http://www.kslaw.com/imageserver/kspublic/library/publication/2014articles/1-14_corpdisputes.pdf>

accessed 23 March 2017

⁴ Jeanne-Pierre Harb and Alexander Leventhal, ‘The New Saudi Arbitration Law: Modernization to the Tune of Shari’a’ (2013) 20(2) Journal of International Arbitration, 113-135

⁵ Saud Al Ammari and A. Timothy Martin, ‘Arbitration in the Kingdom of Saudi Arabia’ (2014) 30(2) Arbitration International 387

which explicitly mandates that arbitration proceedings shall be in compliance with *Shariah*.⁶ Correspondingly, while the new law significantly curtails the review power of local courts, judicial authorities in Saudi Arabia continue to enjoy broad discretion to determine whether an arbitration agreement is invalid, or to set a final award aside. The grounds for annulment, revision or refusal to enforce during arbitration include any agreement deemed to contravene *Shariah* law, Saudi public policy and prior Saudi court decrees⁷ – in addition to more familiar public policy and arbitrability defences. The more important issue however is whether administrative contracts are arbitrable under the current framework governing arbitration in KSA. The answer to this question would appear to be answered in the negative, as discussed below. The negative answer can be observed in the perspectives of contextual examination of historical judicial decisions within KSA, by international arbitration panels exercising jurisdiction over administrative contracts, and through systematic comparisons with other civil law states such as France and Egypt.

1.1.2 Administrative Contract in Context

1.1.2.1 Highlights of Administrative Law Theories and Conflict

The theory of administrative contracts relates to the municipal practice of states who enter into contracts with private individuals or entities. As these are treated as a special or

⁶ For an overview of all salient aspects of the New Arbitration Law, see Mohammed Al-Hosban, ‘The New Saudi Arbitration Law on Arbitration: Presentation and Commentary’ (2012) 4(3) Int’l. J. Arab Arb. 3, 5; see also Jeanne-Pierre Harb et al (n 9); Khalid Alnowaiser, ‘The New Arbitration Law and its impact on investment in Saudi Arabia’ (2012) 29(6) J. Int’l. Arb. 723

⁷ SAL 2012, (n 1) Article 14

sui generis class of contract that escape the ordinary rules of contract, they are limited and conditioned upon, the supervening authority of the state.

Administrative law is fundamentally concerned with the exercise, and limits of public power. By extension, administrative law is deeply rooted in constitutional and public law theories and the principle of sovereignty. Embodied by the principle are the rights and duties of the state, and its representatives to act on behalf of the public from which it draws legitimacy and authority.⁸ Public law itself is founded on the notion of differentiated rights and responsibilities between the sovereign state and private person.⁹ Indeed, in continental and common law theory this inequity between the state and individual is a defining feature of public power.¹⁰ Public law on the other hand, presupposes that the state exercises its power in service to the needs and interests of the public.¹¹

The evolution and experience administrative law and administrative justice in late modernity is eclectically diverse. For instance, contemporary comparisons can be drawn from the American experience (e.g. the tests of participation, reason giving and public functions that are employed in the State action doctrine), and from principles long established in common law systems (legality, judicial review, rationality, fairness and good faith) as well as other such general principles blended from a comparative or common denominator reading of various domestic legal systems e.g. non arbitrariness,

⁸ Jerry L Mashaw, 'The Economics of Politics and the Understanding of Public Law' (1989) 65 Chicago-Kent Law Review 123, 132; Richard B. Stewart, 'The Reformation of American Administrative Law' (1975) 88(8) Harvard Law Review 1667

⁹ Giorgio Pino, 'The Place of Legal Positivism in Contemporary Constitutional States'(1999) 18 Law and Philosophy 513

¹⁰ S. Badaui, *General Theory of Administrative Contracts* (2nd ed., AI-Nahdah Publication 1976) 103

¹¹ Alec Stone Sweet, 'Constitutionalism, Legal Pluralism and International Regimes' (2009) 16(2) Indiana Journal of Global Legal Studies 621

proportionality, reasonableness etc.¹² However, such a special or *sui generis* class of contract does not seem to work well with private contracts which is a very different animal, in Western legal systems at least. And it is here that we find another source of conflict. Not all contracts are treated equally from one legal system, and culture to another. Islamic countries have made strong use of administrative law theory in their treatment of contracts of public interest or benefit, and have done so precisely to defend their sovereign authority, immunity and autonomy as will be discussed in the context of a discussion of the *ARAMCO* arbitration.

1.1.2.2 The Legal Character of an Administrative Contract

In classic conceptions, an administrative contract is typically concluded with a governmental authority or public administrator and will typically include provisions and other regularities which are not typically present in private contracts.

Three legal tests are applied to determine the public nature of a contract:

- i. One of the parties to the contract is a public authority.
- ii. The contract contains provisions which are not typically found in private contracts.
- iii. The objective of the contract is the achievement of a public good or benefit.

Administrative contracts have been defined elsewhere as:

¹² For a sample of the relevant literature see Richard B. Stewart, 'The Reformation of American Administrative Law' (1975) 88(8) *Harvard Law Review* 1667. Daphne Barak-Erez, 'A State Action Doctrine for an Age of Privatization' (1995) 45 *Syracuse Law Review* 1169, 1171; Sheila S. Kennedy, 'When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships' (2003) 11 *George Mason University Civil Rights Law Journal* 203

[C]ontracts which the administration [has] concluded with private persons, corporations, or other departments to aim to regulate and facilitate public utility, provided that these contracts include provisions unparalleled in private law contracts. For these contracts administration would have exclusive powers, and provided restriction cannot be afforded between private law persons in their relation with each other, and subject to the administration and contractor being together with regard to the special legal system which is the administrative law.¹³

In the main, a contract concluded between a state authority and a private firm can be classified as either an ordinary civil law contract or as a public contract. The legal implications of this classification are significant, since each contract is governed under the (presumptively) distinct and mutually exclusive domains of private or public law, respectively. That is to say, the laws governing administrative contracts are legally distinguishable from the rules governing the treatment and dispute resolution of a commercial or civil contract.

A public contract shares certain commonalities with its civil cousin. As with an ordinary contract, a public contract will include terms relating to its formation, expiry and material effects on the involved parties. On the other hand, the terms and stipulations of an administrative contract are of a substantially different nature and character from those

¹³ Mansour Al-Saeed, 'Legal Protection of Economic Development Agreements' (2002) 17(2) Arab Law Quarterly 150, 156. See more generally, Anne C. L. Davies *The public law of government contracts*, (2008 Oxford University Press, New York) 200-220 and. Săraru, Silviu Catalin, *Administrative Contracts. Regulators. Doctrine. Law*, (2009 C.H. Beck Publishing) 245-250

found in a private contract. In short, administrative contracts are subject to the rules and regularities of public law.¹⁴

In classic conceptions, an ordinary civil contract is based on the private law principle of mutual consent of the parties. By extension, neither party to a contract has the right to unilaterally amend, penalise or terminate the contract, absent the consent of the other party, or through the normal operation and execution of rights provided for under the express or implied terms of contract. In capsule, the contracting State party enjoys equal footing with the other party in the content of an ordinary commercial agreement, an arrangement that embodies the foundational precepts of private law – equity and formal equality. Subject to the condition of mutual consent, both parties of the contract are to amend or modify the terms of the contract as required. Above all, the state party does not enjoy special privileges in the contractual relationship, and cannot unilaterally amend or terminate the contract, regardless of whether it is in its interest to do so.¹⁵

Furthermore, subject to the conventional rules of contract law an ordinary court has jurisdiction to hear and adjudicate any disputes relating to the terms and operation of the contract. Moreover, consistent with the principle of party autonomy, the parties are free to negotiate the terms of contract which bind them, including methods of dispute settlement. Parties are free to pursue less cumbersome and costly alternatives to litigation and will in this regard, frequently refer their disputes for arbitration.

¹⁴ Soliman Al-Tammawi, *General Basis of the Administrative Contracts: A Comparative Study*, (5th edition Dar Al-Fiker Al-Arabi, 1991) 52-54

¹⁵ Khaled Mohammed Al-Jumah, 'Arab State Contract Disputes: Lessons from the Past' (2002) 17(3) Arab Law Quarterly 280-284

The laws which are applicable to an administrative or governmental contract depart from ordinary contractual rules and procedures in several significant ways.¹⁶ As an illustration of this point, the state party to an administrative contract can exercise its sovereign authority to impose penalties on the other party for breach of contract, even if this right is not expressly provided for in the terms and conditions of the original contract.¹⁷ A public entity may also elect to terminate the contract before the contract has been executed if such an action is deemed necessary to protect the public interest.

The administrative law of a state may include specific rules governing the personality or capacity of entities with authority to enter into administrative contracts, or otherwise exclude the application of certain rights or conditions in the formation and execution of the contract. As will be discussed in the context of our comparative study of civil law systems, Saudi Arabia, Egypt and France, the treatment and regulation of administrative contracts are sensitive to questions of sovereignty, the exclusivity of state law, and state immunity in connection with public contract pursued in the public interest or public policy.¹⁸ One of the most pivotal ways in which the doctrine of sovereignty comes to bear on the rules applied to administrative contracts is the limited recourse to arbitration as a method of dispute resolution. As the next chapters will detail and explore, an agreement to arbitrate a dispute is deemed valid and enforceable only with the express authorisation of competent state authorities, usually in the form of the consent of the executive branches of government. Saudi Arabia is no exception in the above regard, and

¹⁶ Neville Brown and John Bell, *French Administrative Law* (5th ed., Oxford University Press 1998) 202.

¹⁷ Al-Wehaiby, *The Organising Principles for Administrative Contracts and their Applications in Saudi Arabia* (1st ed., Riyadh, 2002) 215-218

¹⁸ Brown N and Bell J, *French Administrative Law* (5th ed., Oxford University Press 1998)

administrative contracts have till very recently been considered non-arbitrable on public policy and sovereignty grounds under the applicable statutory frameworks and codified laws of the KSA legal order.

It is precisely this feature of administrative contracts – the lack of parity between parties – which distinguishes it from contracts governed by private law. That is to say, in an administrative contract it is assumed that private contractors have expressed an intent and willingness to enter into a public contract, even with the knowledge that they are denied safeguards under private and public law (e.g. equal treatment, in the former, and transparency and non-retroactivity in rule and decision-making, in the latter). Furthermore, the mere fact that private contractors acquiesce to these terms is itself evidence of the *sui generis* character of the contract, since provisions of this type are not usually present in an ordinary civil contract. The question posed by this thesis in the above regard can be articulated as follows: to what extent can a contract be determined to have a public character, where the intent of one or both parties is itself unclear, or whether the contract is not expressly identified as either public or private?

1.1.2.3 The Treatment and Dispute Resolution of Administrative Contracts in Saudi Arabia

Saudi Arabia's model of administrative law is loosely based on the French concept of the *droit administrative*. This model has been adopted by a number of Islamic legal systems, such as Morocco, Tunisia, Lebanon and Algeria, and French administrative law has

remained a guiding principle in all these legal systems.¹⁹ Apart from contracts subject to civil and commercial codes, Arab nations who have implemented the French model acknowledge public or administrative contracts governed by administrative law.

Under Saudi municipal law, any contract involving a public service concession, or to which the state or its representatives is a party, is subject to its legislative or judicial (re)classification as an “administrative contract”.²⁰ Public contracts will typically include regulatory features or provisions that are not analogous to those contained with private contracts, including for instance clauses related to penalties, inspection and supervision, the formulation of detailed governmental plans, and so on.²¹ Public authorities, as stressed above, may also unilaterally modify²² or rescind²³ the contract.

Saudi Arabia’s Consultant Department has said on this question:

A public contract differs in nature from a private contract. It is entered into between a public legal person, and a private contractor.....The legal rights of both contractors are not equal because the public benefit causes the public party to have precedence. The private contractor must know and accept these privileges before signing the contract.²⁴

¹⁹ Al-Fayad Abraham, *Administrative Contract: The Public Theory and its Application in the Kuwaiti and Comparative Law* (Al-Fallah Press 1981) 9-10 and Mansour Al-Saeed, ‘Legal Protection of Economic Development Agreements’ (2002) 17(2) Arab Law Quarterly 157

²⁰ See for example See Henry Cattán, *The Law of Oil Concessions in The Middle East and North Africa* (1967, New York: Oceana Publications Inc) 75

²¹ Saudi Chambers of Commerce, *The Finance Difficulties which Face Saudi Contractors*. Working paper produced at the Saudi Contractors’ Annual Meeting, Saudi Chambers of Commerce, Riyadh, 10/2/2001.

²² Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 25

²³ Ibid, Art. 29

²⁴ Consultation no. 637, dated 23/10/1956

On this view, the government has the sovereign right to control, regulate or modify the contract's execution, irrespective of the other party's consent. By virtue of its sovereign status, moreover, the state has the exclusive power to grant or deny a private entity the right to perform public services on its behalf.²⁵

The administrative law of KSA, encompassing uncodified provision of *Shariah* law,²⁶ also regulates the personality or capacity of entities with authority to enter into administrative contracts. For instance, state immunity defences may apply, the effect of which is to prevent private parties from pursuing legal claims against the state for breach or non-satisfaction of contractual conditions. The state may also impose penalties on the contractor for actions (or inaction) not covered in the terms of contract.²⁷ Notably, however, Islamic *Shariah* does provide relief and grounds for compensation for parties who have suffered losses suffered due to the unilateral exercise of authority which result in the adaption, renegotiation or termination of a contract. These provisions extend, equally, the adaptation of contracts which have been rendered impossible due to unforeseen circumstances.²⁸ Furthermore, Islamic principles of contract allow for the flexible construction and adaption of a contract when, for instance, a private party suffers

²⁵ See Saudi Chambers of Commerce paper (n 26) and on issues of dispute resolution Karl-Heinz Böckstiegel, *Arbitration and State Enterprises: A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 44–45

²⁶ Basic Law of the Government (Basic Law), Royal Decree no: A/90 March I, 1992, Arts. 44, 46, 55 and 67

²⁷ Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 29

²⁸ Samir Amin, 'The Theory of Changed Circumstances in International Trade' (1984) 4 Int'l & Comp L. Qtr'ly 577, 582–83

economic or physical hardship occurring from a change or modification of the terms and performance of the contract, as discussed in chapter 3.²⁹

Above all, any administrative contract concluded with a governmental authority may be treated as non-arbitrable under the relevant national law, except with the explicit consent of a competent authority, and only when the agreement to arbitrate has been formed by parties with consent to conclude arbitration agreements or enforce arbitration clauses. This is the prevailing approach of all legal systems who apply the model of *droit administratif*, including France, Egypt and, most crucially, the Kingdom of Saudi Arabia. The non-arbitrability rule, however, is subject to criticism on the grounds it deprives private contracting parties with an effective means of resolving their disputes, or in some instances, with an effective remedy with which to recover losses stemming from a governmental authority or agency's modification or termination of contract.³⁰

Over the past decades, the Saudi government expanded its reach into all areas of society and with it, the demands placed on state resources and expertise grew exponentially. The Kingdom's infrastructure commitments witnessed the rise in public works, procurement and the supply of public utilities. In the late eighties, the myriad laws applicable to concession of public service were finally consolidated in a single document through an act of the Council of Saudi ministers.³¹ Yet, with the exception of enacted legislation in the area of public procurement (chapter 3), rules governing the supply of public services and utilities are largely uncodified and have evolved largely through discretionary

²⁹ Alwasit Alsanhoury, Nazareiat Al-Eltezam (*The Theory of Obligations*) (Dar Alnahda Alarabia 1964) 717–24.

³⁰ Hassan Mahassni and Neal Grenely, 'Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court' (1987) 21(3) *The International Lawyer* 836. 838; Royal Decree No. 17 dated December 26, 1344 (17 June 1926)

³¹ Council of Ministers' Act, Royal Decree no. A/13 dated 3/3/1414 (1993), Art. 31.

exercises of royal power and the decisions of Saudi Arabia's principal administrative court, the Board of Grievances (chapter 2).

In 1955, the Saudi Arabian government established an administrative tribunal known as the Board of Grievances. As the principal administrative court, all disputes between government agencies and private individuals are subject to the jurisdiction of the Board of Grievances.³² The Board is empowered to hear cases involving abuse of powers and other acts of illegality committed by government officials, including complaints concerning the denial of justice in the *Shariah* courts,³³ the *ultra vivre* acts of administrative officials and similar claims involving the government.³⁴ This tribunal, the Grievance Board, has power to hear any complaints filed with its chairman.³⁵ The limitation of the Board, as with other Saudi administrative tribunals and *Shariah* courts, stems from the informality of its procedures, which are not regularly published or bound by judicial precedent or other formal administrative law-like guarantees and related rule-of-law principles e.g. legal rationality, generality, non-retroactive application of rules or decisions and publicity.³⁶ The parties are required to offer evidence to an independent administrative judicial board that has broad discretionary power to decide the case based on non-standardised interpretations of the relevant rules and principles of *Shariah*.³⁷ The

³² The Board Act Royal Decree No. (M/51) dated July 17, 1402 (21 May 1982)

³³ Royal Decree No. (M/21) 20 Jumada I, 1421 [19/8/2000] regarding procedure before *Shariah* Courts Article 1

³⁴ Royal Decree No. (M/51) of 17-7-1402 Hegira; *See also* Article 29-32, The Law of Judiciary, Royal Decree No. (M/64) (1975) 73

³⁵ Jeanne Asherman, 'Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law' (1982) 16 *Intl LJ* 325

³⁶ *See the Board Act* Royal Decree No. (M/51) dated July 17, 1402 (21 May 1982). For a related discussion, see Lon L. Fuller, *The Morality of Law* (1969) 39

³⁷ For instance, the full list of "rule of law" criteria identified by the legal scholar Lon Fuller: rules must be general so as not to privilege or discriminate against particular interests; they must be publicly promulgated; prospective in effect; expressed in clear and intelligible terms; consistent with one another; must be predictable in that they must not require conduct beyond the powers of the affected parties; or be

board's decision is appealable directly to the Council of Ministers.³⁸ Despite exercising judicial functions, neither the Board nor the Council has provided a comprehensive definition of administrative contracts or their constitutive features, as discussed in chapter 3. As will be discussed throughout the thesis, the following issues are central to our understanding of the constraints placed on exercises of sovereign authority assessed against the standards, doctrines and concepts of classic administrative law. Thus will be outlined in the sections below.

1.1.2.4 Jurisdiction over Administrative Disputes

All administrative judicial systems have jurisdiction over disputes involving the decisions of a public entity at the level of municipal law, or so called “state acts” of a sovereign authority in respect of international trade or investment agreements. As affirmed by the judicial decisions of the French Conseil d’Etat law, there are three main types of governmental contract or “*contract administrative*”: contracts relating to the concessions of public utilities, public procurements, and public works.

However, the categories of contract enumerated under French case law are not exhaustive per se. In the era of rapid and rapacious globalisation, the traditional contract takes on ever more sophisticated and complex forms. Administrative contracts will often have regulatory and commercial features. Moreover, there has also been a rise in “internationalised” administrative contracts, usually in the form of international public-

changed so frequently that the subject cannot rely on them. Finally, they must be administered in a manner consistent with their wording; See also Fuller (n 36) 39-42

³⁸ A new Board of Grievances Law, promulgated on May 10, 1982 by Royal Decree No. M/51 reforms Saudi Arabian judicial practice.

private partnerships, international procurement agreements and concession agreements.³⁹

These contracts take on an international character principally because such agreements are concluded with a foreign party,⁴⁰ and, in some instances, as a party of an “umbrella” trade or investment agreement.⁴¹

The most common kinds of administrative cases include, in France for example, those related to the application of economic or social regulations, taxation, town-planning, building permits, public works, public service procurement, environmental projects, hospital liability, immigration permits, civil servants’ career and pensions, European and local government elections.⁴² These are similar to the types of administrative contracts and the nature of such contracts that are discussed throughout this study. The difference between KSA and other jurisdictions, however, is that KSA has less consistency, predictability, and transparency in how it may rule in cases or which ones it chooses to adjudicate than the other states. In addition, it appears to more often than not exercise an administrative authority or power of review as often as possible regardless of unpublished results or statistics for such matters. The comparison in transparency and predictability comes with examining which States have codified laws, judicial precedent, and record-keeping practices, and what each of those entails in the particular jurisdictions.

³⁹ See Abul F.M. Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist Versus Dualist Controversies’ (2001) 12(2) Eur. J. Int’l L. 309, 311; Karl-Heinz Böckstiegel, ‘The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises’ in *International Arbitration: 60 Years of ICC: A Look at the Future* (International Chamber of Commerce 1984) 117

⁴⁰ A. H. Hermann, ‘Disputes Between States and Foreign Companies’ in Julian D. M. Lew (ed.), *Contemporary Problems in International Arbitration* (Springer Netherlands 1987) 250; B. Poznanski, ‘The Nature and Extent of an Arbitrator’s Powers in International Commercial Arbitration’ (1987) 4(3) J. Int’l Arb. 71, 86

⁴¹ Ibid; On the issue of umbrella clauses, see Christoph Schreuer, ‘Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 J. World Inv. & Trade 231, 251–55.

⁴² Christoph Schreuer, ‘Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 J. World Inv. & Trade 231, 251–55

1.1.2.4.1 Administrative Justice

The basic definition of administrative justice is a legal guarantee to citizens that they have the right to be heard when they have a grievance against the State. It is also the process by which a legal system of a government is executed. At its core are the administrative decisions by public authorities that affect individual citizens and the mechanisms available for the provision of redress for those citizens. Specifically, it includes substantive evaluation and procedural due process through adjudication in administrative tribunals.

The mechanisms of French administrative justice work to permanently balance two fundamental priorities: “a balance between the respect for the specific requirements of administrative action and the protection of citizens’ rights; and, secondly, a balance between the concern to ensure the efficiency of the administrative judge and the respect for procedural guarantees of the parties.”⁴³

The administrative body has a responsibility to act in a manner congruent to the interests of the public, but the public has a right to call into question any administrative act that goes beyond the scope of that authority to personal benefit of the administrative entity. This accords with the very core principle of constitutional law and theory, in which political power (and royal power in the case of KSA) is made subject to legal constraints or “checks and balances” to ensure that public authorities act within the bounds of legality, and that they do not abuse the rights of individuals impacted by their decisions,

⁴³ M. Patrick Frydman, ‘Administrative Justice in France’ (11th Annual AIJA Tribunals Conference, Queensland, Australia, 5 June 2008) < <http://www.ajja.org.au/Tribs08/Frydman.pdf> > accessed on 12 March 2017

on the pretext of public policy or public order.⁴⁴ Under classical administrative law, accordingly, a citizen or party to a dispute has a right to notice and to be heard, not dissimilar to the common law concepts of procedural due process. This right is recognized and incorporated into all administrative law systems.

The methodology for procedures and finding of substance, is not universal, however because each State prioritizes different understandings of administrative duties; has different court procedures and structures; and has different administrative laws that are applied to each adjudicatory proceeding. Thus, the inevitable debate about the level of administrative justice achieved within each State's administrative system. In common law systems, it is usually a process of appeal through the judicial system. In general, administrative justice is measured by its ability to be challenged judicially if a party believes it was applied incorrectly. Ideally, it is a system of accountability, access, and transparency.

1.1.2.4.2 Due Process: Substance of the Matter and Procedural Concerns

In administrative systems, the administrative court looks to the grounds of public policy (moyen d'ordre public), the potential lack of legal authority "incompetence" and the scope of pertinent legislation to determine the substance of the matter.⁴⁵ Procedurally speaking, a citizen has a right to notice, a right to be heard, a right to a decision by the adjudicating body in a reasonable time under the particular circumstances of the case, and

⁴⁴ Jean-Marie Auby, 'The Abuse of Power in French Administrative Law' (1970) 18 *The American Journal of Comparative Law* 148

⁴⁵ Jean Massot, 'The Powers and Duties of the French Administrative Judge' (adapted from "Les pouvoirs et les devoirs du juge administratif dans l'examen des requêtes," lecture delivered in Split, Croatia, at the Troisièmes journées juridiques et administratives franco-croates, 26-27 October 2009) <https://www.law.yale.edu/system/files/area/conference/compadmin/compadmin16_massot_powers.pdf> accessed 12 March 2017

a right to enforcement of that decision. Administrative Judges are granted specific procedural powers to this effect. For example, in France, a jurist may “now accompany his decisions with measures to ensure that they will be properly enforced, and may give emergency rulings within the framework of interim injunction proceedings (with the possibility of giving a ruling within 48 hours).”⁴⁶

Egypt has comparable priorities, in promoting access to justice with low administration fees, a system of court appointed lawyers for citizens who cannot afford them, and timelines for appeal.⁴⁷ Enforcement of judicial decisions seem to be effectuated on a regular basis.

As will be explored in the following chapters, the administrative law of Saudi Arabia only grants a citizen the right to notice and to be heard. There are some procedural guarantees for timelines of appeal, but there are no regulations pertaining to the timeliness or enforcement of matters.⁴⁸ The absence of legal certainty, specifically certainty over judicial or arbitral outcomes, is not helped by the fact the Saudi courts do not follow a system of judicial precedent or *stare decisis*. Accordingly, private parties who seek to resolve their dispute in Saudi Arabia will struggle to predict the legal outcome of a dispute with state authorities. Such a legal situation makes it impossible for a private party to rely on any kind of legitimate contractual expectation, much less its substantive protection, since the construction of the contract is entirely dependent on the

⁴⁶ France Council D’Etat, ‘The Administration Justice System: An Overview’ (Le Conseil d’État, July 2013)

<http://www.legislationline.org/download/action/download/id/4505/file/France_administrative_justice_ove_rview_July2013_en.pdf> accessed 23 March 2017

⁴⁷ Mohamed S. E. Abdel Wahab, ‘An Overview of the Egyptian Legal System and Legal Research’ (2012) HGLP NYU <<http://www.nyulawglobal.org/globalex/Egypt1.html>> accessed 23 February 2017

⁴⁸ Section 3, Art 13-15, Procedural Rules Before The Board Of Grievances, Council of Ministers Resolution No. 190, Dated 16 /11/1409H

interpretation of the competent local court, or on the decision of state authorities not to regulate to the contrary.

1.1.2.4.3 Capacity and Consent

While the above sections have dealt with “substantive” considerations of the contract, the issue of capacity or consent of a party is a matter of authority in formation and mutuality in understanding between the parties, as well as procedure. Any administrative contract must be considered under its procedural merits as well as what the French call “incompetence” or “want of authority”.

Whether a party has capacity or authority to enter into a contract is an acrimonious and crucial topic in administrative contracts practice in Saudi Arabia. This is not a question of traditional capacity, but is that the ability to retroactively-determine (or reclassify) whether a party is an administrative authority, with unilateral authority to alter the terms of a contract. It invokes consideration of whether that practice leads to the formation of contracts lacking in material disclosure and mutual understanding, or as legally classified: illusory, null and void. The legal quandaries generated by issues of capacity include retroactive authority to unilaterally change terms and condition; invalidation based on lack of original authority to enter into contract; questions of authority to modify before classification; loss of mutuality and understanding in formation issues; undermining of materiality within a contract; and application of regulations restricting arbitrability.

In several administrative law systems, it is possible to find several examples of “incompetence”, for instance when an administrative contract is formed without the consent or permission of the applicable governmental authority before engaging in the

contract itself, or as what will be of importance to this study, consent to agree to an arbitration clause or to arbitrate an administrative contract.

1.1.2.5 The Non-Arbitrability of Public Contracts Under Saudi Law

Pursuant to the arbitration law of KSA, administrative contracts, or any contract to which a Saudi governmental authority is a party, cannot be arbitrated without the consent of the Prime Minister (chapter 3).⁴⁹ This rule, which has survived the reforms made to Saudi Arbitration Law under the newly modernised SAL 2012,⁵⁰ is broadly justified on public policy grounds. As will be discussed in later chapters in the context of the *ARAMCO* dispute and the updated SAL 2012, the absence of a clear definition of “public policy” has significant bearing on the class of disputes which the Saudi government has designated - through a prospective law or regulation, or retrospective exercise of royal power - to be non-arbitrable on procedural or substantive grounds (chapter 4). This leaves open the question of the circumstances under which an administrative contract is arbitrable, including instances in which the consent of prime minister has not been obtained in advance. Other relevant considerations are the formality and choice of law requirements of arbitration agreements contained in administrative contracts, and the jurisdiction of international tribunals to determine whether an administrative contract is arbitrable, even without governmental consent, for instance when the “public” or domestic character of that contract is subject to challenge on the merits (chapter 4).

As will be discussed in chapters 5 and 6, a number of tribunals have considered questions around the “commercial” character of a contract which is otherwise regulated as public

⁴⁹ SAL 2012, (n 1) Article 10(2)

⁵⁰ SAL 2012, (n 1) Article 10(2)

contract under the governing laws of the state, of state officials with whom the contract has been concluded.⁵¹ This may lead tribunals to assert competence to hear disputes with the Saudi government has deemed inarbitrable. Other tribunals have sought to review the legality of state actions on public law type grounds, for instance retrospectivity law-making affecting the rights of private parties in the context of administrative contracts.⁵² Similar questions have been raised over the extent to which international law and rules can be applied to control and constrain the actions of States, at odds with classic doctrines such as sovereign immunity (or, at the level of national law the unfettered discretion of public officials and restrictions on administrative liability) (discussed in chapter 5 and 6).

1.1.2.6 The Relationship between Constitutional Norms of Shariah and the Regulatory Power of Saudi Authorities

The above discussed issues reflected on some of the main problems or doctrinal issues associated with the treatment and dispute resolution of administrative contracts – the features of administrative contracts, governing regime i.e. public or private law, judicial review versus judicial law making and so on – as governed under the laws and legal system of Saudi Arabia. In a variety of ways, it has raised issues around administrative legality and legitimate contractual expectations, and correspondingly between the rules of public and private law, which each overlap and conflict in various ways in the Saudi context. The comparative analysis that will be developed in the main chapters of the thesis (chapter 5 and 6) is that the structure and powers of the Saudi government seems to tilt heavily in favour of an absolute conception of sovereign authority (i.e. unilateral

⁵¹ Most notably in *In re Aramco Services Co.*, No. 01-09-00624-CV, (Tex. App. – Houston [1st], March 19, 2010)

⁵² See *Commisa v PEP*, ICC Case No 13613/JRF

authority to restrict or regulate the rights of private individuals, in both the public and contractual sphere) and sovereign immunity (actions carried by public authorities acting in the capacity of state actors in the interest of the state and public interest attract no liability). The Basic Law mentions three governing authorities applicable to administrative law; Judicial, Executive and Regulatory.⁵³ Nonetheless, as will be discussed in chapter 2, the system of government in the Kingdom of Saudi Arabia is not clearly based on the principle of separation of powers.⁵⁴ Furthermore, Saudi Arabia does not have a formal constitution *per se*, in the guise of a comprehensive constitutional document that defines, distributes, and subjects to legal limits the powers and responsibilities of distinct organs of the state.⁵⁵

On the other hand, the Saudi Arabia is an avowedly Islamic state. The Basic Law which was adopted in 1992 stipulates that the *Holy Quran* and *Sunnah* is the constitution of the country, which is governed on the basis of Islamic law (*Shariah*).⁵⁶ Substantively, however, the powers of the Saudi sovereign, the King, cannot be absolute, if only because all statutory law, and all expressions of legal authority, are subject to the supreme law of the law: the law of the Islamic *Shariah*.⁵⁷

By extension, the political authority vested in the King, and the Council of Ministers, or the discretionary judicial powers vested in the Board of Grievance, are subject to constitutional-like restraints: all laws, decisions or rulings may be consistent with the spirit and text of the primary sources of Islam. And yet, *Shariah* imposes a duty on all

⁵³ Law of Judiciary, Royal Decree No. (M/64) Articles 1- 4; also Basic Law (n 31) Articles 46 and 47.

⁵⁴ Basic Law, Royal Decree No. 2716 of 17/05/1351 Hegira (1932)

⁵⁵ See M. Abdulaal, *Constitutional Law* (Dar Alnahdah Al Arabia 1992) 98

⁵⁶ Basic Law (n 31), Article 1

⁵⁷ Basic Law (n 31), Article 1; SAL 2012, (n 1) Article 39

followers of the faith – in their private or public life- to honour their contractual obligations in good faith, a principle that is similarly honoured in most Western civil and common law traditions.⁵⁸ There is no doctrinal difficulty or conflict between Islamic and “Western” models of contract law, public law, or arbitration. Public authorities must conduct themselves with regard for the public interest and the good faith principle of Islamic law. Indeed, Islamic principles are in many respects fundamentally reconcilable with similar concepts developed over centuries in common law systems, including the principle of sanctity of contract, promissory estoppel or *pacta sunt servanda*.

1.1.2.7 The Nexus between the Administrative Contract and Extra-National Laws

As the discussion on Saudi law on administrative contracts will show, the legal value and binding effect of a contract is shaped to a large extent by the law applied to the contract, specifically in relation to how the nature of the contract is determined, and the character of rights that flow from it.

It is perhaps the category of internationalised administrative contracts, more commonly known as the internationalised state contract which presents the most challenging questions around the treatment, determination and dispute resolution of administrative contracts. Indeed, what is called an administrative contract at the level of national law is often regarded as something quite different from an international perspective. From within the national legal system, an administrative contract is essentially bound by, and subject to, the rules and decisions of actors with public legal capacity to act on behalf of

⁵⁸ Under Islamic law, every lawful contract must be fulfilled and performed in good faith. This principle is supported by the following verse from the Holy Quran: “Oh you who believe, observe covenants.” For a historical record see Al-Tabari, Tafsir VI, 33 (1905–12); Al-Qurtubi, Al-jami’li Ahkam Aq-Qurania VI, 33 (1935)

the public interest or in accordance with national policy. From outside the national legal system, an international contract involving a state (public or corporate) entity and a foreign party is not necessarily viewed in the same terms. The regulatory or public dimension of the agreements may recede into the background, and the state authority may be seen to act in the character of a commercial partner.

Viewed in the above light, a whole series of related legal issues or challenges come into contact and conflict as soon as we consider arbitration of administrative contracts (chapter 4), and especially the arbitration of administrative contracts involving a foreign party or choice of law elements. Such issues, include:

- i. the arbitrability of administrative contracts *ab initio*;
- ii. the validity of the arbitration agreement that has been entered into and those with legal capacity to conclude such agreement
- iii. the applicable law of the contract and disputes over choice of law,
- iv. and the forum with jurisdiction and competence to decide these procedural issues (is the dispute arbitrable, and the agreement valid), or substantive questions (what laws regulate or govern the contract).

1.1.2.8 The Relationship Between Contract Law and Public Law

One reason why internationalised state or administrative contract raises significant challenge concerns the nature of the agreement itself, and more specifically the risks involved (chapter 5). Given their duration, these projects are exposed to several risks, risks which may be commercial as well as legal or political, or environmental (i.e. acts of God, or force majeure). As a result, foreign contractors may only enter such agreements if

they can be assured that the financial payoff will exceed the possible risks of the project's fiscal and regulatory regime. This is not mere trifling point but impacts directly on the future economic prospects of a country such as Saudi Arabia. If the fiscal and regulatory conditions in a state are seen to be overly burdensome or inequitable, then there are few incentives for foreign firms or entities to do business with Saudi Arabia. While this may be justifiable from the perspective of the classic theories of sovereignty and the sovereign powers of the State (the sovereign is not and should not be bound by the same law as its subjects) or in view of the normative assumptions underlying public law (an administrative body should be free to take any necessary action to protect the public interest, within the bounds of its lawful power), such a policy is hardly likely to advance the regulatory or financial objectives of the state on the international stage. A retrospective amendment to the existing statutory law, or ad hoc modification to a contract based on the unilateral decisions of an administrative agency or Board decision, is likely to upset the financial bargain struck under the contract, placing the private party at a significant disadvantage, while holding that party hostage to the unpredictable or discretionary decisions of public officials. This clearly constitutes an affront to the legitimate expectations of the private contractor, and is precisely the kind of scenario in which public and private law ought to overlap. A public official who fails to fulfil a promise on which the private actor relies both infringe the principle of trust or legal certainty, a public law concept, and the principle of legitimate expectations, a principle commonly associated with private law.

1.1.2.9 Summary

Bearing such complexities in mind, the researcher intends, in chapter 6, to highlight the distinctive nature of administrative contracts in so far as they are subject to the discretionary justice of administrative authorities, and their unilateral modification by state authorities on the grounds of public interest within both statutory and *Shariah* frameworks. Taking all of the above as its starting point, this thesis will critically appraise the Saudi legal systems to assess its adherence to principles of natural justice and administrative legality. The treatment and dispute resolution of administrative contracts in Saudi Arabia will be also be assessed against emerging international law standards and principles, focusing on contemporary concepts such as the denial or access to justice, discrimination and minimal standards of fair treatment of foreign nationals.

1.2 Introduction

Due to their distinctive nature, administrative contracts involving the Saudi government sit uncomfortably within the Saudi statutory and *Shariah* frameworks. On the one hand, administrative contracts straddle between public and private law which attracts different interpretations and dispute resolution mechanisms. On the other hand, administrative contracts can be regulated and, more importantly, unilaterally amended by King's orders, statutes, and perhaps more fundamentally the *Shariah* law. Consequently, the Kingdom of Saudi Arabia (referred to as 'KSA') has long been recognised as a difficult jurisdiction in which to bring disputes or enforce foreign awards and judgments involving administrative contracts or, indeed, all contracts. Such complexities is further compounded by an undefined role of execution judge, replacing the functions of Board of

Grievances, under the recently introduced New Enforcement laws which came into effect on March 2013 by issue of Royal Decree No. M/53 (the ‘Enforcement law 2013’ hereinafter) and the move taken in the Saudi Arbitration Law 2012 (the ‘SAL 2012’ hereinafter) to exclude *ab initio* the arbitration of any disputes involving members of the government, and by extension contracts entered into by public authorities, except with explicit permission of the Council of Ministers.⁵⁹

Under the existing laws of Saudi Arabia – a complex blend of the ad hoc rulings of commercial and administrative courts, enacted legislation and customary principles of Islamic law – an administrative contract, by definition, is a contract formed on request of a public authority.⁶⁰ In this regard, the Saudi legal system blends principles derived from the French system of administrative law, or *droit administratif* with an Islamic system of arbitration, as governed by norms of *Shariah*.⁶¹

An uneasy relationship links these two distinct spheres of law and governance: the administrative domain of law-making and the Islamic foundation of Saudi Arabia’s (unwritten) constitution.⁶² As conventionally understood, classic theories of administrative law are deeply rooted in principles of natural justice and bounded power. For the outsider, the Saudi legal system may seem to legitimize the illegitimate: the unprincipled, arbitrary and unbounded exercise of sovereign power. Such challenges may

⁵⁹ Article 10(2), Saudi Arbitration Law (SAL 2012) issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers

⁶⁰ Herbert Liebesny, *The Law of the Near East and Middle East: Readings, Cases, and Materials* (SUNY Press 1975) 1-44

⁶¹ Mohamed Raouf, ‘The Call for Ethical Guidelines for Counsel in International Arbitration’ (IBA Conference, Dubai, 2011); Robert Karrar-Lewsley, ‘Revolution in Bahrain- Decree No.30 of 2009 and the World’s First Arbitration Freezone’ (2011) 14(3) Int’l A.L.R. 80

⁶² Royal Decree No. 1320 of July 19, 1950. Saudi Arabia is one of ten countries which has no written political constitution. Albert Blaustein, *Constitutions of the Countries of the World* (Oceana Publications 1984) 14. Fouad Al-Farsy, *Saudi Arabia: A Case Study in Development* (John Wiley & Sons 1978) 89-128. James Anderson, *Islamic Law in the Modern World* (New York University Press 1959) xvi

also be levelled at the treatment of administrative contracts, in so far as these have been construed in a manner which escape or evade their control by ordinary rules of contract law or to the jurisdictional claims of international arbitration tribunals. Taken together, the Saudi legal system may well encounter “external” challenges on grounds that its system of administrative law is subversive to the rights of foreign (and national) private contractors and antithetical to the principle of administrative or natural justice.⁶³

This thesis however looks more particularly on the impact of administrative law on administrative contracts, and more particularly on rules governing arbitration of administrative contracts. In the Saudi context, this requires an examination of both the statutory and *Shariah* based framework governing arbitration in KSA, and in particular arbitration agreements and clauses in administrative contracts.

1.3 Aims and Objectives of the Research

Situated from within this wider context, the aim of the current research is to explore the possibility of a reform on the law governing administrative contracts under Saudi public law and the Kingdom’s newly streamlined commercial arbitration laws, including the national implementation of international arbitration standards.⁶⁴ Through comparative study, this thesis aims to assess and critically evaluate the legal treatment and construction of state contracts under the current legal system, focusing on the rights of private actors who have entered into transnational agreements with Saudi governmental authorities.

⁶³ Jeanne Asherman, ‘Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law’ (1982) 16 Intl LJ 321, 322

⁶⁴ SAL 2012, (n1); Saudi Enforcement Law, Royal Decree no. M/53 dated 13 Sha’baan 1433H, corresponding to 3 July 2012 Gregorian

To achieve this aim, the researcher intends to use research data to provide answers to the following robust questions.

1.3.1 Commercial Contracts in Disguise as Administrative Contracts

The first question to resolve is: Are all contracts labelled “administrative” under Saudi Law properly understood as such, or does this designation disguise the “true” intentions and motives of the governmental authorities? If so, how can the law governing administrative contracts in Saudi Arabia be reformed to achieve a more just and effective balance between the sovereign authority of the state and the rights of the private contractor?

In the above light the thesis will reflect on the use of contractual clauses that are designed to exclude or limit the scope and applicability of mandatory national laws, including choice of law rules, stabilisation clauses, and mandatory arbitration clauses.⁶⁵ The above points to tension that is well known to international legal scholars and contract theorists alike. In the first sense, there is a “normative pull” towards the harmonisation of international private law standards, grounded in Western principles of sanctity of contract and to a lesser extent, the good faith customary law principle known as *pacta sunt servanda*.⁶⁶ On the other hand, there is the principle of sovereignty which requires that states are accorded some autonomy and flexibility to determine the laws, procedural and substantive, which apply to them.

⁶⁵ Georges R. Delaume, ‘State Contract and Transnational Arbitration’ (1981) 75(4) AJIL. 784

⁶⁶ In *Sapphire Int’l Petroleums Ltd. v. National Iranian Oil Co.* (1963) 35 ILR 136, 51, the tribunal held that it is a ‘fundamental principle of law which is constantly being proclaimed by international courts, that contractual obligation undertaken must be respected. The rule ‘*pacta sunt servanda*’ is the basis of every contractual relationship’.

1.3.2 International Law and Saudi Administrative Contracts

The examination will be followed by the second question to the role then, if any, international law should play in administrative contracts in which municipal law is the exclusive choice of law: the law, more often than not, of the host state and its law alone. Can international law intervene in the performance of state contracts?⁶⁷ And what of the reverse scenario where application of international law or third country municipal law leads to a “breach” or violation of *Shariah* law? What reconciliation may occur, if any? Furthermore, can a nexus between a state contract and international law be established under existing private international law rules?⁶⁸ Otherwise put, can the parties’ intention to internationalise the contract be soundly presumed from the inclusion of foreign ‘choice of law’ stabilisation clauses, through reference to mandatory provisions for international arbitration or internationalised “conflict rules”, for example with procedurally harmonised arbitration rules and codes (ICC, UNICTRAL etc), or does an internationalized contract with a party whose domestic law is *Shariah* law require an alternative “choice of law” or expression of intent?⁶⁹

1.3.3 Arbitration of Administrative Contracts: Scope for Reform?

From the above premises, the next question highlighted in this thesis – are state or “public” contracts arbitrable under the applicable law of Saudi Arabia – is, by definition, “dualist” in orientation. It offers a critical appraisal of the national treatment of administrative contracts as though it was a closed or autonomous legal system.

⁶⁷ M Al-Saeed, ‘Legal Protection of Economic Developments Agreements’ (2002) 17(2) Arab. L Qtr’ly 150.

⁶⁸ Maniruzzaman (n 44) 309

⁶⁹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 1994) 330; Samir Saleh, *Commercial Arbitration in the Arab Middle East* (Hart Publishing 2006) 173

Currently, the Saudi legal system forbids governmental authorities from entering into any agreement with mandatory arbitration provisions, nor are governmental authorities permitted to enter into arbitration agreements or initiate arbitral proceedings without the consent of the Council of Ministries. Yet, is such an arrangement equitable from the perspective of private law theory, international law or, crucially, the constitutional norms of the *Shariah* governed Saudi legal system? More importantly, under what circumstances could an arbitration agreement or clause be deemed valid and, thereafter, an arbitral award made enforceable under the existing statutory and *Shariah* frameworks.

1.3.4 *Shariah* Law, Saudi Administrative Contract and Arbitrability

This takes us to the central question posed by this thesis: are administrative contracts, as governed under Saudi municipal law, arbitrable? And if so, who has the final authority and competence to determine these issues? Saudi courts or international arbitration panels? Moreover, which actors have capacity to enter into arbitration agreements under the existing law? Is the arbitrability of a contract itself arbitrable?

In the absence of codified rules on private or public law, or determinate guidelines on *Shariah* Saudi legislation suffers from its inconsistent and non-transparent interpretation and application.⁷⁰ The institutional or “rule of law” challenges outlined in earlier sections are no means unique to the legal system of Saudi Arabia. However, the Islamic

⁷⁰ Mark Wakim, ‘Public Policy Concerns regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21(1) NY Int’l L Rev 40

foundation of its legal system does present thorny questions as to the legitimate role and function of public law and power in the regulation of internationalised state contracts.⁷¹

Saudi laws comprise a mix of regulations and principles derived from the authoritative sources and texts of Islam, a body of public and private law principles known as *Shariah*.⁷² Strikingly, Saudi Arabia is equally unique in so far as it is the only the legal system to have adopted *Shariah* in an uncodified form.⁷³ When a matter of public policy is raised in a dispute, Saudi authorities are obliged to consider requirements of *Shariah* law at first instance, which are to be balanced against the wider public interest (so called “public order” considerations). Yet it is by means clear what is included, or excluded, by public policy under existing Saudi legislation, specifically in respect of those contracts which are governed by the “special” rules of administrative law and in connection with agreements which are determined non-arbitrable.

1.4 Methodology

The research initially employs a textual analysis methodology, a data-gathering process whereby valid inferences can be made by interpreting and coding textual material. This represents an objective tool of analysing data as it provides evidence contained in texts. The subject matter required a simultaneous reading of texts used in international contractual or transnational instruments; comparative civil law administrative law systems; and jurisprudential texts extracted from the sources of Islamic law (*Shariah*).

⁷¹ See *Petroleum Development (Trucial Coast) Ltd. v Sheikh of Abu Dhabi*, (1951) 18 ILR 144; See also *Ruler of Qatar v. International Marine Oil Co. Ltd* (1953) 20 ILR 534 ; *Sapphire* (n 66)

⁷² Ahmad Alkhamees, ‘International Arbitration and Shariah Law: Context, Scope, and Intersections’ (2011) 28(3) JOIA 255

⁷³ R. Doak Bishop, ‘International Arbitration of Petroleum Disputes: The Development of a ‘*Lex Petrolea*’ (University of Dundee, CEPMLP,1997) 4

These are represented by the primary sources of the Shariah: the Quran and the Sunnah (the sayings, actions and tacit approval of Prophet Muhammad) and its secondary sources, as represented by the unanimous agreement of Islamic scholars (ijma) and analogical reasoning (qiyas), as well as the Saudi laws which tackle the issues discussed in the thesis.

This thesis adopts a mixed approach to its methodology. Where possible, this research has examined the jurisprudence of KSA with the aim of illustrating or contrasting how KSA courts have attempted to balance public policy issues with rights protection in the context of administrative contracts. The limitations of the current system of adjudicating the administrative contract adjudication, and obstacles to arbitration, are explored through use of the method of comparative jurisprudence, specifically by focusing on how other courts and tribunals in foreign legal systems, or through the framework of international arbitration, have approached the most contentious issues associated with the treatment and dispute resolution of administrative contracts.

The study of the KSA legal system is critically appraised from the standpoint of constitutional law and public law theory, particularly in chapter 2. By examining further the relationship between public and private law, chapter 3 focuses on the differential treatment of administrative and commercial contracts under the relevant administrative, regulatory and contractual regimes, and does so by highlighting key points of comparison and contrast between civil law and Islamic concepts of contract law, which are then used to critically appraise the current practice of administrative (and private) contract regulation in KSA. While this research does not apply a comparative method in the

strictest sense, it does attempt to contrast many key aspects of the governance, contract law, adjudication and dispute resolution of administrative contracts in KSA with two key legal systems: France and Egypt. Chapters 2, 3 4 include sections which draw final comparisons with Saudi *Shariah* and domestic laws, which address the issues relevant to the subject of this study.

Saudi Arabia has, in-part, adopted its administrative law and contracts practice from international law and *Shariah* based models. Given the strong influence of French models of administrative contract law on KSA, key insights are drawn from similarities and differences in structures, administrative law processes and dispute settlement practices in France, Similarly Egypt is selected because of its application of Islamic *Shariah* law which is also a defining feature of the KSA legal system.

The primary difference between a common-law system and a civil law system is that a common law system is strict in its system of binding judicial review and administrative decisions, basing those powers in systems of checks and balances; legislation; and promulgated standards for proper rule-making. While there are similar practices of sovereignty of the state, indemnification, good faith and fairness in civil law systems, under *Shariah* law, and specifically in KSA rules and regulations; individual rights to contract are fiercely protected within the common-law systems, with no unilateral modifications or authority by one party over the other, it is a system of mutuality, exhaustive remedies, and notions of fairness.

Egypt is considered closely related to Saudi Arabia in both civil and Islamic legal systems, similarly based in *Shariah* Law as well as civil law, but it operates under a more

comprehensive system of codified law, judicial and case law precedence, scholarly influence, and settled principles of contract law. Egypt promulgated its civil law into a Civil Code in 1948 and is considered to be the “code” which other Islamic states have modelled their existing codes after.⁷⁴ France, also a civil law system, is considered to be the “father” of administrative law in a civil law, consultative system, the first to establish an administrative judicial review tribunal and system of legal regulation.

The French system provides the distinction that an administrative contract could be defined as such by function of law, i.e. codified, regulated, original authorization, etc., or by function of a judicial interpretation which considers the content and satisfaction of certain criteria. However, French system does not default to a *Shariah* construct in its evaluation, but is characterized by recorded judicial precedent, sophisticated legal tests and principles, documented case law, fully developed dispute resolution techniques, and a restrictive handling of arbitration matters. Over the course of their history, France's administrative courts have developed an extensive and coherent case law (*jurisprudence constante*) and legal doctrine (*principes généraux du droit* and *principes fondamentaux reconnus par les lois de la République*), often before similar concepts were enshrined in constitutional and legal texts.⁷⁵ Both France and Egypt have a *Conseil d'Etat*, which is similar to the Council of Ministers and the Board of Grievances in Saudi Arabia. They also practice public interest notions of unilateral modification, unilateral cancelation,

⁷⁴ Nabil Saleh, "The Law Governing Contracts in Arabia." *International and Comparative Law Quarterly* 38.04 (1989): 761-787

⁷⁵ Edwin Borchard, 'French Administrative Law' (1933) 3445 *The Yale Law Journal Faculty Scholarship Series* 133 http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4446&context=fss_papers accessed 12 March 2017

financial equilibrium, and penalties. These comparisons will be dealt with in greater detail throughout the thesis.

As will be discussed, the legal order of France and Egypt each impose restrictions on the arbitration of governmental disputes, extending to disputes arising from administrative contracts (chapters 5 and 6). This methodology is critical as France is considered to be the ‘patriarch’ of administrative law whereas Egypt directly adopted and trained under French jurists and experts, while being the first Islamic state to codify and incorporate *Shariah* law into a civil administrative law system. The Saudi system has been adapted from these two legal systems, but customized to Saudi Arabia’s terminology and ideology of *Shariah* law, as well as its autonomous domestic administrative law and jurisprudence. This method highlights the parallels and gaps between the systems. It further establishes customary standards and legal concepts for examination of arbitration in administrative law within civil law and *Shariah* law based systems, within the broader context of western based arbitration practices. This method is also objective as it makes the study more structured and conclusions derived more precise.

One of the overarching objectives of this study is to distinguish between Islamic law, KSA domestic administrative law, international administrative law, and western based contractual practices. However, the inherent differences in the theoretical basis for each of these systems is the source of tension in practice as well as scholarly study. In considering these issue, chapter 5 broadens the focus away from its study of the law governing administrative contracts in the state setting to consider how international law and other relevant customary practices can be applied to the rise of international state

contracts. These comparative or international insights are then used to identify key areas of reform and progress in the context of KSA, particularly in respect of the future development of KSA' arbitration framework.

One of the limits of the methodology applied to this research is that it is extremely difficult to find published decisions of Saudi courts, administrative or commercial, and case law covering the direct differences between Saudi Arabia's administrative law system and other legal systems. What case law or jurisprudence that is available is often only known about through verbal accounts from Saudi legal professionals or limited references in previous studies. So, the researcher was either limited in the information available on orally shared cases, or found it necessary to access Arabic and English translated sources with references to previous cases, again with limited documentation of case proceedings, judicial reasoning, and decision-making authorities, thereby limiting his ability to get a detailed understanding of the facts of a dispute or judicial reasoning.

1.5 Research Rationale

This thesis will focus primarily on administrative contracts and in particular those contracts which straddle the boundaries between public and private law, and which do not fit neatly within the categories of state-regulated public contracts and international commercial contracts governed by the rules of private law (and international law). These contracts are best described as transnational state contracts which is commonly interchanged with the term international administrative contracts in the literature.⁷⁶ Saudi Arabia has experienced a period of tremendous growth over the last three decades. On the

⁷⁶ A. Von Verdross, 'Quasi International Agreements and International Economic Transactions' in *Year-Book of World Affairs* (1964) 2; Abraham (n 24) Ch. 1

surface, the Saudi government has introduced a number of reforms are designed to liberate Saudi's fledgling, and low-growth, private sector from excessive state control or monopolisation. This leads to the conclusion of international state contracts;⁷⁷ including concession agreements, treaty based investment agreements, transnational state contracts and most importantly international administrative agreements concluded with the state such as international private partnership contracts or procurement agreements.⁷⁸ Despite their similarities, these agreements may well be subject to rules of a different legal system. The legal effects of the agreement may depend, for instance, on relevant choice of law, or the nature and terms of the agreement itself. This thesis will focus on those agreements that establish a contractual relationship between a public authority and private foreign entity.⁷⁹

For instance, international public procurement or transnational agreements strike a fragile balance between the sovereign authority of the contracting state and the economic interests of the private contractor. The "legitimate expectations" of the private contracting party must be balanced against the "legitimate diversity" of state laws, including its exclusive authority to determine the legal character of the contract and the laws applicable to the contractual regime.⁸⁰ As such, the effective conclusion and enforcement of an international administrative contract entered into between a state and private foreign parties will largely depend on the extent to which the balance of rights and

⁷⁷ Rainer Geiger, 'The Unilateral Change of Economic Development Agreements' (1974) 23 Int & Comp' Law Q, .74-76

⁷⁸ Verdross (n 76)

⁷⁹ Curtis Christopher, 'The Legal Security of Economic Development Agreements' (1988) 29 Harv. Int'l L. J .319-322

⁸⁰ See *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)*, (1952) ICJ 2, 112

responsibilities of each party are justly weighed and balanced.⁸¹ Of course, this only begs but does not yet answer the question: how are these dual and seemingly conflicting imperatives to be brought into harmony, and which takes priority in the event of a dispute? The regulatory autonomy of the sovereign state or the private autonomy of parties to decide the rules (of contract and dispute resolution) that bind them?⁸²

The above issues have significant bearing on the treatment and dispute resolution of administrative contracts under the governing and applicable laws of the Saudi legal system. In the Saudi context, after the *ARAMCO* decision, the site of controversy centres on those contractual elements of an investment, procurement, or concession agreement that can be properly determined as “administrative” in nature.⁸³

As suggested above, one noteworthy characteristic of administrative contracts is the exclusive power reserved to the state, and its authorities, to unilaterally modify, suspend or terminate the execution of a contract without the express consent of the counterparty.⁸⁴ With this, effective protection of the private contractor’s rights is subject to the discretionary justice of administrative courts and legislators who are endowed with wide powers to deny or abrogate the rights of the private party, or otherwise dissolve the contractual bond.⁸⁵ More contentiously, private contractors may well find themselves deprived of effective remedies absent judicial or other “rule of law” guarantees, including

⁸¹ Henry Cattan, *The Law of Oil Concessions in the Middle East and North Africa* (Oceana Publications Inc. 1967) 75; El- Koshari A and Riad T, ‘The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process’ (1985) 1 ICSID Review-Foreign Investment Law Journal 260.

⁸² Fath El Rahman Abdalla El Sheikh, *The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia: A Case Study of Developing Countries* (CUP 1984) 23. http://assets.cambridge.org/97805218/17721/frontmatter/9780521817721_frontmatter.pdf (last visited 16 March 2017)

⁸³ Cattan (n 81) 31

⁸⁴ *Ibid.*, 57

⁸⁵ Rabah Khasan, *International Commercial Contract* (Dar Al-Fiker Al-Arabi 1988) 170-173

opportunities to challenge acts or decisions in an international or domestic forum.⁸⁶ As such, the legal character of these contracts demands further scrutiny and delineation.

As it stands, the existing laws of Saudi Arabia – Saudi legislation and the judicial decision of the Board of Grievances, the Saudi equivalent of the French Council D’Etat – fail to provide clear and determinate legal criteria by which an “administrative contract” - their constitutive features and their legal effects – can be distinguished from a civil contract governed under the ordinary rules of private law.⁸⁷ This creates a legal vacuum in which Saudi judicial authorities, chiefly the Board of Grievance, are offered broad latitude to decide how such terms are to be interpreted and applied to the facts of a particular dispute or legal controversy. The effect of this is to imbue judicial authorities with wide discretionary authority to determine the content of these principles, and to invalidate any laws or contracts which are held to contravene these.⁸⁸ For instance, in Saudi Arabia as in other GCC countries there has been a tendency to reclassify energy sector disputes as matters of public policy, for reasons that have as much to do with the nation’s economic sovereignty as they are an attempt by Saudi Arabia to assert the constitutional and jurisdictional priority of its national laws and courts.⁸⁹ The upshot of this “public policy” designation is to render arbitral proceedings pursued outside of formal courts as null and void.⁹⁰

⁸⁶ Abraham (n 24) Ch. 1; Al-Tammawi Soliman, *General Basis of the Administrative Contracts: A Comparative Study* (5th ed., Dar Al-Fiker Al-Arabi 1991) 53

⁸⁷ Arthur Taylor Von Mehren, John J. Barceló, and Tibor Várady, *International Commercial Arbitration: A Transnational Perspective* (Kluwer Law International 2002) 83-86

⁸⁸ Abul F.M. Maniruzzaman. ‘The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration’ (1999) 14(3) *Am. U. Int’l L. Rev.* 657

⁸⁹ Verdross (n 76)

⁹⁰ See Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of Foreign Arbitral Awards’ (2000) 2(4) *Int’l Law Forum Du Droit Int’l* 248, 252

The larger problem is that the Saudi legal system currently lacks a settled body of legal principles that can be effectively applied to the construction of modern commercial instruments.⁹¹ Judicial constructions of terms like “public authority” do not only have bearing on the legal tests used to distinguish a public contract from a private one, they also implicate wider questions around the capacity of certain institutions to enter into contracts on behalf of state authorities, and their relationship to the non-arbitrability of contractual disputes involving government entities under Saudi law.

1.6 Originality in Contributing to the Knowledge

There is very little literature on the treatment of administrative contracts in KSA, and even less on dispute resolution methods in the context of administrative contracts. This thesis therefore seeks to ‘fill’ a gap in the literature, thereby providing practitioners with some understanding of the relevant features of the legal system in Saudi Arabia, and the regulatory frameworks governing administrative contracts and arbitral recourse. At a more conceptual level, the thesis will argue in favour of a constructive “best light” interpretation of *Shariah* law in the context of KSA regulation and dispute settlement of contract. If the legal system of Saudi Arabia is to remain competitive in the face of the increasing complexities of modern commercial practice, it will need to developed a more consistent and coherent set of standards for governing administrative contracts, *Shariah* and administrative law.

This thesis aspires to expose and critically assess, through comparative analysis, the principal limitations on Saudi statutory and *Shariah* frameworks, and seeks to propose a

⁹¹ Martin Hunter, ‘International Commercial Dispute Resolution: The Challenge of the Twenty-first Century’ (2000) 16(4) LCIA Arbitration International 388

set of reforms towards the advancement of a “gap-less” and coherent framework on the regulation and arbitration of public and private contracts, rooted in principles of justice and rule of law. By drawing on comparative jurisprudence, and reflecting on the relationship between Saudi Arabia’s municipal law and the rules of international law, the thesis will conclude that conflicts between laws and legal system presents an exciting opportunity for mutual learning and accommodation between Islamic and non-Islamic legal systems. Such mutual learning will enable Saudi authorities to develop more effective models of contract construction and dispute resolution. The goal here is to propose a set of legal reforms which allow for an effective and equitable balancing of sovereignty related concepts (immunity, exclusivity of national law, administrative freedom and so on) with the commercial demand for regulations which respect long established contractual freedoms and rights, particularly in respect of foreign entities and individuals made subject to the laws and legal system of KSA.⁹²

By extension, this thesis will contend that *Shariah* principles need not be seen as an impediment to doing business in Saudi Arabia, but, rather, the reverse. Saudi arbitration law is ripe for change and innovation. By looking, extrinsically, to other systems for comparative guidance, and to the *Shariah* traditions intrinsic to Saudi legal system, the thesis attempts to expose the limitations of the existing treatment of administrative contracts in Saudi Arabia and considers the impact this may have on its commercial development. If Saudi Arabia is to become an arbitration “hub” of the region, and attract future business and enterprise through international contracts and partnerships, it will need to prove that its laws, and its legal system, are predictable, fair, and effective. This thesis

⁹² Herbert Liebesny, ‘Stability and Change in Islamic Law’ (1967) 21(1) Middle East Journal 16, 18

will examine the arbitration of administrative contracts in KSA as a paradigmatic example of the strengths and weaknesses of Saudi Arabia's system of governance and dispute resolution, in view of legal systems which share similar features, and in light of comparative assessments of the appropriate and legitimate regulation and dispute resolution of increasingly complex and internationalised state contracts.

1.7 Thesis Outline

The subsequent Chapters in this thesis will provide an introduction to the issues arising from administrative contracts and place them in the context of the current research. The second chapter will explore the structure of the historical context for the Saudi legal system, the governing bodies of administrative law, and Islamic foundation of its constitution, focusing on the sources of Islamic law as derived from the holy text of the Quran. This chapter also introduces concepts of separation of powers, judicial subjectivity, sovereignty and capacity of the parties. The third chapter introduces the Islamic based definitions of contracts; considers "private" v. "public" contractual rights of parties within *Shariah* Law; presents the framework for the legislative or judicial identification and classification of administrative contracts; delineates the rights of parties within an administrative contract, including the unilateral authorities of a public entity; and establishes the concept of due process and legitimate expectation guarantees. The fourth chapter delves into the historical and comparative reforms of Saudi Arbitration Law and the arbitrability of administrative contracts, while leveraging contemporary perspectives from France and Egypt. This chapter becomes a practical anchor to theoretical concepts, enabling a transition to the next chapters. The fifth chapter conducts extensive international case law comparisons to universal administrative law practices;

including hindrances to KSA's integration of international contractual tools such as stabilization clauses or force majeure concepts. The sixth chapter initiates the discussions of socio-economic and policy oriented impediments, economic imperatives, and proposed reforms to arbitration practices. This conclusion to the study offers a comprehensive and holistic approach to practical and realistic based solutions to expanding arbitrability of administrative contracts within KSA under the international construct of harmonization and cultural dualism; thereby producing improved economic realities for KSA.

1.8 Conclusion

In the next chapters, the thesis will consider the implications of above discussed shifts in constitutional theory, including administrative law theory, and emerging international legal arbitration practice, reflecting, along the way, on the tensions that exist between them. In the first sense, this entails a consideration of how domestic courts and international tribunals have differentiated contractual and public administrative law from contract law. The differentiation is shown to have important procedural "choice of law" consequences, as well as impacting the substantive outcomes of decisions in which the rights of states are balanced against the rights of domestic and foreign contractors before national courts. To the extent that international tribunals may reject the national characterisation of an internationalised state contract as an administrative contract, significant questions remain over the legal basis and character of a disputed agreement, and the choice of forum and law used to determine these issues.

Chapter 2

The Legal Framework and State Institutions of Saudi Arabia

This chapter considers the institutional framework and structure of the Saudi legal system, and key sources of statutory, codified and *Shariah* law. It will provide the reader with an understanding of the key institutions that perform administrative functions in Saudi Arabia and the relationship between the administrative bodies of Saudi Arabia and other organs of the state i.e. the legislative and judicial branches. The chapter then sets out the main rules and guidelines which govern administrative action, specifically which relate to and govern administrative contract-making. These issues entail a broader discussion of the relationship between administrative authority, administrative principles and constitutional rules.

In recent decades, the general legal subjects of “administrative contracts” and “arbitration” have been deduced and contemplated *ad naseum* by scholars, the Islamic legal community, and the international law arena, and yet as presented in this thesis, this moment in history may provide a fresh perspective for the Kingdom of Saudi Arabia as impetus for reform. Falling oil prices is an undeniable and uncontrollable force on Saudi Arabia’s economy, even attracting the attention of the most stalwart religious scholars within the Kingdom. Such strident developments have been centrifugal in Prince Muhamad’s “Vision 2030” initiative, a trend of “Saudisation” in private firms or with

foreign contractors, and the progressive approach King Salman established pursuant to the forecasted economic challenges within the Kingdom.⁹³

The inevitability of these economic forecasts on the political economy and social fabric of the KSA are speculative in nature, but the potential consequences, especially in terms of the legal implications and interplay of foreign investors, are significant and should not be underestimated. A natural interface to these concerns is the functionality of Administrative Law in Saudi Arabia's metamorphosis from an oil-based economy to one based on diversification of industries.

Aged statistics from the Chamber of Commerce in Jeddah suggested even in 2002, "more than 108,648 companies and establishments are working in the procurement sector with a combined capital investment of 70 billion Saudi Riyals, or 14.4 per cent of non-oil GDP. These activities account for more than one million jobs, employing 15 percent of the total labor force."⁹⁴ As evidenced by KSA's labour statistics and the rise of state initiatives to refocus vast resources internally, these numbers for government workers, contracts, and the procurement sector have exponentially grown in the past decade.

This means any diversification in industry or economic growth depends on administrative contracts, governed under KSA's Administrative Law, having legal or judicial mechanisms in place to resolve these disputes. Administrative Law includes

⁹³ Editorial, 'Building on Sand: The kingdom's young reformers are meeting old obstacles' *The Economist* (Riyadh, 5 November 2016) <<http://www.economist.com/news/middle-east-and-africa/21709548-kingdoms-young-reformers-are-meeting-old-obstacles-building-sand?zid=308&ah=e21d923f9b263c5548d5615da3d30f4d>> accessed 23 February 2017; *See also* Abdullah F. Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (Hauser Global Law School Program, New York University School of Law, July 2008) <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 23 March 2017

⁹⁴ Ibrahim Alhudaithy, 'Historical Review of Saudi Administrative Contracts' (2002) 11(3) *Public Procurement Law Review* 186; *See also* 'The Finance Difficulties which Faced Saudi Contractors' (n 24); Ministry of Planning, 'Sixth Development Plan' (1995-2000) 241

considerations of international and foreign notions of standard contract practices, KSA's own administrative contract practice, the unique characteristics of an administrative law construct based in a civil law system, and the overarching adherence to *Shariah* law regardless of the character of a contract. Administrative Law, and in particular the system of arbitration in administrative contracts, are the cornerstones to KSA's governing choices and indicative of what its economic future will be.

While this introduction has thus far described the economic and practical state of Saudi Arabia, the thesis seeks to achieve a broader understanding of how the Saudi legal framework and state institutions come together to create their version of administrative law. Viewed through this lens, this chapter contextualizes its study of administrative contracts, and arbitration agreements in administrative contracts, from within a wider examination of the structure and institutional features of the Saudi government and legal system. This progression invites broader enquiry into classic questions of public and constitutional law, including questions of functionality, separation of powers, constitutionality, duty and authority.

This study also considers the alleged unilateral rights of administrative authorities under the constitutionality of *Shariah* law and its tension with the protection of rights of private parties or contractors. The ultimate question is what are the legitimate expectations of rights of parties, and how are such rights derived from within Saudi Arabia's administrative framework and arbitration proceedings. This question is answered independently within KSA's system as well as through comparative study of France, Egypt, and similarly related administrative systems. What can be assumed by this study is that all civil law systems that avail themselves of administrative contracts accept that

performance of the contract is subject to the paramount principle of protection of public welfare through the driving force of public law. There is traditionally an inherent balancing of rights of parties even within these systems biasedly designed to protect public interests. A public authority can only claim to act in the public interest if their authority is legitimate, within the bounds of law, and subject to requirements of fairness as determined by the control function of an independent court. As can be shown through comparisons to France, for example, the balancing is effectuated through an advanced system of constitutionalized checks and balances, procedural “rule of law”, and legality.

2.1 The Legal Structure and Basis of Administrative Laws Regulating Administrative Contracts

2.1.1 Saudi Arabian Administrative Law and Court Structure: Basic Definitions, Historical Formation, and Contemporary Mechanisms

Administrative Law in KSA is a combination of influences from French civil and administrative laws as well as Egypt’s *Shariah*-based, civil law and administrative law system; and its own interpretations of *Shariah* law into domestic KSA decrees, rules, and regulations⁹⁵ Administrative law is typically identified as being derived from constitutional and public law theories and the principle of sovereignty.

KSA’s entire body of domestic law originates from *Shariah* law and is part of the characterized legal collective of Arab states, as administrative law is vested in the axiom that divine sovereignty, or the protection of *Shariah* law through the autonomous interests, actions and laws of the State, is supreme. It also utilizes what it perceives as

⁹⁵ Alhudaithy (n 94) 8

model components from other Islamic states, such as Kuwait or Egypt,⁹⁶ who comparatively have a more structured and codified approach to oversight of administrative contracts than KSA. More generally as a guide, KSA uses the civil law based system of France's *droit administrative*,⁹⁷ considered the birthplace of the administrative law model under a civil law system. Similar to these models, KSA utilizes the administrative contract as the primary tool for exercise of administrative law.

The Kingdom's concept of administrative law began with the formation of Saudi Arabia itself. Dr. Abdullah Ansary, has succinctly articulated the vast and intricate history of the development of Islamic tenets and administrative authority in Saudi Arabia:

In 1924, the first King of Saudi Arabia (1932-1953)-took control over the Western Province of Saudi Arabia and transformed the territory into a nation by uniting the people, their culture and heritage, under *the doctrine of Islam*, while simultaneously validating *Islamic practices* as an infinite alternative to imposed governmental, societal, and ruling methodologies or ideologies.....toward the establishment of a system of governance based on the Islamic principle of consultation, as advocated by the Quran (Islam's Holy Book) and the authentic Sunnah (Traditions of the Prophet)."⁹⁸ [Italics added]

⁹⁶Abdullah F. Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (Hauser Global Law School Program, New York University School of Law, July 2008); See also, Roger Perrot, *Institutions Judiciaires* (1983). 223 - 234; Kiren Aziz Chaudhry, *The Price of Wealth: Economies and Institutions in the Middle East* (1997) 86; Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia', (1987) 2(3) Arab L. Q. 286-288; George N. Sfeir, 'An Islamic Conseil d'État: Saudi Arabia's Board of Grievance' (1989) 4(2) Arab L.Q. 130

⁹⁷ A Al-Wehaiby, *The Organising Principles for Administrative Contracts and their Applications in Saudi Arabia* (1st ed., Riyadh, 2002)

⁹⁸ Ansary (n 96)

The creation of a “complaints box” by King Abdulaziz in 1927⁹⁹ is considered a seed of administrative law and the origin of administrative tribunals. Subsequent Kings preserved the spirit of this historical precedent by reforming the government structure into a version with more delineated functions and clear chains of authority. Arguably, the most important player to administrative law are the King, *with executive, legislative, and ultimate authority*; the Council of Ministers, *with executive and legislative authority*;¹⁰⁰ and the Board of Grievances (“the Board”), *the independent administrative judicial system*.¹⁰¹

2.1.2 The King (Executive, Legislative, and Administrative Authority)

The King in KSA serves as President, Prime Minister, Commander-in-Chief of the Armed Forces and ultimate decision-maker.¹⁰² He can issue administrative, legislative, and executive Orders and Decrees, which take priority over all other governmental actions or entities.¹⁰³ He crafts the public policy and the leading figures in each initiative, such as the National Transformation Plan, through these powers. His power, however, is only legitimate so long as he adheres to *Shariah* law,¹⁰⁴ including honouring his commitments, being fair, and upholding moral and communal tenets. He is also subject to controversial limitations or conflict that may arise with the *ulema* (religious elites) or the *Hanbali* religious school in their interpretations of *Shariah* law and their assessment of the King’s

⁹⁹ Alhudaithy (n 94) 6

¹⁰⁰ Ansary (n 96) Section II.1. In 1958, Faisal bin Abdulaziz, Crown Prince and Prime Minister, transformed the Council of Ministers into a legislative, executive and administrative body with decision-making powers.

¹⁰¹ Ibid.

¹⁰² Alhudaithy (n 94) 3

¹⁰³ Ibid.

¹⁰⁴ Kevin M. Whiteley, Brad S. Keeton, and Matthew T. Nagel, *Kingdom of Saudi Arabia (Al Mamlakah Al Arabiyah As Suudiyah)* (ICM Publication 2006).
<<http://law.wustl.edu/GSLR/CitationManual/countries/saudi-arabia.pdf>> accessed 23 March 2017

actions or authority under those interpretations. Regardless, it is through these multi-faceted roles that the King participates in the oversight of administrative contracts, and has the corresponding ultimate discretion in accepting, rejecting, or creating any administrative action or decision.

2.1.3 The Council of Ministers (Legislative Body and Executive Advisor)

The Council of Ministers (“the Council”, also referred to as the Cabinet) serves as the legislative body, executive advisor, and regulatory arm of the King, and is comprised of the heads of 22 ministry departments. The council drafts resolutions, which are binding upon a majority vote of the members, but enactment of the resolution is dependent upon ratification by the King’s decree. The Council both as a whole and each minister individually, is responsible for drafting regulations and implementing the policies of the Kingdom.¹⁰⁵ As Article 18 of the Council Act 1958 encapsulates the all-encompassing essence of the Council’s responsibilities:

“The Council of Ministers shall lay out the matters of the country in relation to international and foreign matters, finance, education, the economy, defence, and all public affairs and will supervise the implementation thereof. It retains legislative power, executive authority and administrative power. It is the ultimate power for financial affairs and for the entire affairs connected with the different ministers of the state and other government offices, and will determine what measures are to be taken in these matters...”¹⁰⁶

¹⁰⁵ Ibid.

¹⁰⁶ Council of Ministers Act, Art. 18, Royal Decree No. 38, dated October 22, 1377 AH (October 16, 1958), (revised in 1993)

Despite the declaratory nature of Article 18, as previously mentioned, an important point in the flow of power and authority within the administrative bodies, is that the King is also the Prime Minister of the Council and the person whom all decisions have to be ratified by for acceptance and implementation, regardless of the authorities bestowed upon the entirety of the Council or its individual ministers. Aside from the supreme nature of *Shariah* law and religious interpretations, the KSA hierarchy begins and ends with the King. The Council is also subject to share some of its administrative powers with judicial bodies.

While judicial autonomy and independence are landmark features in *Shariah* and KSA law,¹⁰⁷ there is protruding authority between the Council of Ministers and the Board of Grievances when it comes to the oversight and accountability of administrative contracts. The Council has reserved certain types of administrative decisions or contracts, which would normally fall under the purview of the Board, for itself, e.g. concession contracts that deal with investors and public projects or contracts regarding public loans which prevents any government official from signing a loan document without the Council's permission.¹⁰⁸ The Council also authorized its ministers, serving as heads of ministries, to enter into administrative contracts on behalf of their ministry. The Minister of Finance is one of the more influential ministry positions as that ministry has the authority to control the execution of government contracts under the Tenders and Procurement Laws,¹⁰⁹ which comprises the majority of disputes brought before the Board of Grievances and are the subject of efforts to delineate administrative law from matters between private parties.

¹⁰⁷ The Board of Grievances was given the power of autonomy by the King in 1968 through action of the King which amounted to the force of Royal Decree. King's letter no. 20942/1, dated 1387 AH (1968).

¹⁰⁸ Alhudaithy (n 94) 8; *See also* Council of Ministers Act, Articles 9, 31, 33, Royal Decree No. 5/19/4288 dated February 1, 1373 (1953)

¹⁰⁹ Alhudaithy (n 94) 9

Finally, the Council has authority to establish quasi-judicial committees to assist with its oversight of executive affairs.¹¹⁰ Often these quasi-judicial committees are commonly the first stop for resolving administrative disputes between contracting parties.

Each type of contract is a potential grievance situation that could be subject to the jurisdiction of the Board of Grievances based on each unique fact pattern.¹¹¹ In many instances, the Board serves as an appeal tribunal based on the decision of a Council review committee of specific complaints or situations, such as labour issues in a procurement contract.¹¹² Ironically, it was the Council which gave the Board its “essence” as an administrative court by issuing a Decision in 1976, which validated the Board’s power of review and determination, as well as its binding nature.¹¹³ The Council is also the source of shifting some adjudication jurisdiction away from the Board, for example a new Enforcement judge tribunal, created in 2012 through Arbitration law reforms, erodes some of the Board’s authority by vesting the power of enforcement and review of arbitral awards with this new tribunal. As would be expected, there seems to exist a subtle struggle for control, and separation of powers, between the governing bodies as to directing administrative policy and establishing domestically and internationally established protocols for handling administrative matters.

¹¹⁰ Ansary (n 96)

¹¹¹ Art. 8; Law of the Board of Grievances (promulgated by Royal Decree No. M/78 of 18 Ramadan 1428H (October 1st, 2007))

¹¹² Government Tenders and Procurement Law, Royal Decree No. M/58 dated 4 Ramadan 1427H / 27 September 2006, Art 78

¹¹³ Mahassni (n 30) 170; *See also* Royal Decree No. 17 dated December 26, 1344 (17 June 1926); The Board Act Royal Decree No. M/51 dated July 17, 1402 (21 May 1982)

2.1.4 Dual-Court System (Judicial and Quasi-Judicial Bodies): *Shariah* Courts and the Board

Established by the King's Announcement of 1926, inviting all people to bring their complaints or grievances against other persons to him, and the Council of Ministers' Act of 1958; the dual-court system is comprised of the *Shariah* Courts, which have jurisdiction over land, family, civil, and criminal matters; and the Board (or Diwan Al-Madhalem), which is the primary adjudication authority for disputes in administrative matters, in particular public sector projects.¹¹⁴ The court systems have equal authority and the power to bind parties within their judicial decisions.

Shariah courts appear to have overlapping jurisdiction with the Board of Grievances in some instances. Not every contract entered into by a government agency or entity is deemed to be an administrative contract, and therefore are subject to the civil and commercial authority of the *Shariah* courts. An example would be when the government rents offices, or sells parts of its goods or property, they enter into a private contract, subject to the normal evaluation of *Shariah* contractual standards. As is evident in evaluation of the nature of administrative contracts, this difference in jurisdiction is not always a clear.

The *Shariah* courts also include or stand alongside specialized committees who have specific jurisdiction over types of cases.¹¹⁵ These often overlap with the Board of Grievances and on a case-by-case basis it is determined which tribunal has authority of review and jurisdiction. Examples are the Committee for Banking Disputes, The

¹¹⁴ Alhudaithy (n 94) 172

¹¹⁵ Ansary (n 96)

Commission for Settlement of Labour Disputes, and the Committee for Adjudication of Insurance Related Disputes and Violations of the Saudi Arabian Monetary Agency.¹¹⁶ As a result of legal reforms in KSA in 2007 and 2012, jurisdiction for commercial cases will be transferred from some of these tribunals, as well as the Board of Grievances, to the *Shariah* courts and a new commercial tribunal that is to be established.¹¹⁷ While the intent of this tribunal is to clarify adjudication jurisdiction and procedures, it may well magnify existing confusion amongst parties to contracts as to which judicial authority is the appropriate venue to file a claim. As is evident from this discussion, some hybrid contracts or matters with commercial, administrative, and topic-specific provisions may well fall into the simultaneous jurisdictions of the *Shariah* courts, the Board, the new Enforcement tribunal, and even quasi-judicial committees under the Council.¹¹⁸

2.1.5 The Board of Grievances (Judicial – Administrative Body)

The Board is the primary authority in administrative law and has terminal discretion in administration of matters or contracts involving a public entity. The Board went through a series of reforms in 2007, namely the Law of the Board of Grievances (promulgated by Royal Decree No. M/78 of 18 Ramadan 1428H (October 1st, 2007))¹¹⁹ which clarified the parameters of its adjudicative authority and established a hierarchy. The SAL 2012 reforms by the Council and the Board, later revised the Arbitration Laws and established

¹¹⁶ Hatem Abbas Ghazzawi & Co. ‘Dispute Resolution’ (Saudilegal, 2016) Saudi Arabian Law Review 19 <http://www.saudilegal.com/saudilaw/19_law.html> accessed 23 March 2017

¹¹⁷ Ibid.

¹¹⁸ Faisal Al-Fadhel, ‘The New Judicial System of Saudi Arabia’ (2009) 75(1) Arbitration Journal. 91-94.

¹¹⁹ Ayoub M. Al-Jarbou, ‘Saudi Board of Grievances: Developments and New Reforms’ (2011) 25(2) Arab Law Quarterly. 177-202. Specifically, the Board restricted its authority to administrative actions, whereas previously it had also considered matters of a criminal or commercial nature. The only reservation of authority, pertained to enforcement, consideration, and execution of domestic or foreign arbitration decisions and awards, regardless of the nature of the dispute.

Enforcement Laws; which amongst many articles, created an Enforcement Judge who presides over enforcement decisions related to commercial or administrative contracts, international alternative dispute resolution decisions (such as arbitration agreements), and arbitral awards.¹²⁰

The Board has the general jurisdiction to adjudicate the disputes in which the administration is one of its parties, whether raised by an award, a contract or an incident. While under the Act, the Board's actual decision-making authority and power applies to seven specific types of cases,¹²¹ for purposes of this thesis they can be categorized into 1.) disputes relating to annulment, or assessing the validity, of administrative decisions 2.) integrated judicial disputes (such as disputes of employment and retirement rights between a government employee and the ministry which employs them; or compensation disputes by public procurement private contractors), and 3.) the judiciary as a disciplinarian of administrative staff (within each ministry as brought by the aggrieved party or the ministry whose rules an employee has violated; or through external complaints by private parties against government officials).¹²² It has also been accepted

¹²⁰ Saud Al-Ammari & A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) *Arbitration International* 389; *See also* Royal Decree No. M/34 dated 24 Jumada 1433H, corresponding to 16 April 2012G. On 8 June 2012, the law was published in the official gazette, Um Al-Qura. In accordance with Article 58 of the New Arbitration Law, the law came into force 30 days after the date of its publication, which was 19 Sha'baan 1433H corresponding to 9 July 2012G. The Implementing Regulations of the New Arbitration Law were not published as of the date that this article was written. The English translation of the New Arbitration Law can be found on the website of the Saudi Bureau of Experts, which provides all official translations of Saudi laws and regulations: <<http://www.boe.gov.sa>> accessed 23 February 2017;

See also Royal Decree No. M/53 dated 13 Sha'baan 1433H, corresponding to 3 July 2012G. The Enforcement Law was published in the official gazette, Um Al-Qura in Issue No. 4425, Year 90, 13 Shawal 1433H, corresponding to 31 April 2012G. In accordance with Article 98 of the Enforcement Law, the law came into force 180 days after the date of its publication, which was 16 Rabi II 1434H corresponding to 27 February 2013G. The Implementing Regulations of the Enforcement Law were published on 17 Rabi II 1434H corresponding to 28 February 2013G

¹²¹ Al-Jarbou (n119) 19-21; *See also* Board of Grievances 2007 Statute, Art. (1) enacted by Royal Decree No. M/78 dated 19/9/1428

¹²² Board of Grievances 2007 Statute, Art. 13(A-C), enacted by Royal Decree No. M/78 dated 19/9/1428

that the Board has general jurisdiction to hear any administrative party-related case, even if the party or case is normally adjudicated in other courts or if neither the party nor the case is clearly defined as administrative. If a matter is found to fall outside of the Board’s jurisdiction, it has the authority to transfer the case to the appropriate tribunal.¹²³ This broad stroke rule has diminished jurisdictional lines and exaggerated the number of instances in which the Board has exercised its adjudicative authority, particularly when it comes to matters involving foreign parties.

The 2007 reforms attempted to resolve conflicting jurisdiction between the Board and other court systems within the Kingdom, and set forth guidelines for the jurists in reaching decisions on matters under consideration such as administrative decisions, compensation, contracts and disciplinary measures.¹²⁴ Some of these procedures were promulgated into rules in 2013, but reservations remained in place for any procedures that may conflict with *Shariah* law.¹²⁵ In these reforms, the Board’s authority was expanded to include wide powers of review, such as the general jurisdiction , and the task of expanding the list of administrative law contracts beyond those classed as such under existing legislation.¹²⁶ As will be discussed later, the latter classification is considered to be “by function of law” and the former is by “judicial determination”. Within its adjudicative authority, as immunized by *Shariah* law, the Board shall classify (or re-classify) contracts as administrative or non-administrative, determine lawfulness and validity, assess penalties against parties, and exercise independent discretion in

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid Section 3.4

¹²⁶ Alhudaithy (n 94) 29

enforcement.¹²⁷ This authority exists regardless of whether an opposing party to a government entity is public, private, or foreign.

The Board is considered an ultimate guardian of Saudi Arabia's sovereignty. As such, the Board has final say on any administrative related grievance or complaints filed with its chairman,¹²⁸ whether international or domestic. It should be noted that sovereign acts are generally understood, not justiciable in any court. Rather, sovereign acts are afforded safe harbour under international law doctrine of sovereign immunity (in classic administrative law this is known as administrative liability). Leaving aside the delicate matter of justiciability of sovereign acts in foreign courts, applying international or domestic law, it is fairly established that the administration of domestic affairs are generally considered distinct from sovereign acts. This is an important point If as it will be shown, a private party to an administrative contract is generally refused opportunities to bring disputes before a neutral and independent arbitrator or tribunal, it becomes vitally important that the discretionary power of public authorities are subject to independent review and control by the competent court: in this case the Board of Grievances. The public authority could still exercise its functions and powers appropriately in the administration of an administrative contract or public-private partnership whenever necessary, provided that the Board is sufficiently vigilant to any abuse of power or infringement of administrative (procedural fairness) rights, or substantive breach of the party's expectations under contract. It is not entirely obvious, however, that the Board does in fact bring into equitable reconciliation the rights of the individual and freedom of administrators to exercise their powers in the service of public needs and interests.

¹²⁷ Royal Decree No. M/78, dated 19/9/1428 AH. (2007), enacting the Board of Grievances 2007 Statutes.

¹²⁸ Ibid, Art 14

The independence, and supreme authority, of the Board is enshrined in Article 46 of the Kingdom's Basic Law of Governance which states "the judiciary shall be an independent authority and, in their administration of justice, judges shall be subject to no authority other than that of the Islamic *Shariah*."¹²⁹ This authority of independent review is unprecedented, figuratively and literally speaking. It means the Board is not bound by legal precedent, or in some cases codified or statutory laws, requiring individual jurists to delicately apply legal sources of law and logical reasoning to perceived "gaps" in *Shariah* law, based on their many years of service and experience within the KSA legal system.

2.1.6 Enforcement Tribunal (Judicial – Administrative and Commercial Body)

Growing international pressures and economic realities forced the Council to re-evaluate the possibility of using arbitration practices and international mechanisms for dealing with disputes, outside the construct of the Board system. The international reputation of the Board as being complicated in its procedures dampened executive efforts to grow industry, thus necessitated a fresh approach by KSA to an efficient process of enforcement. Established through the passage of the New Enforcement Law of 2012,¹³⁰ this new judicial body has adopted the Board's powers of review and enforcement of arbitral awards. Similar to the Board, this tribunal sits separate and apart from the *Shariah* courts and is enshrined with authority through the executive and legislative interests of the Council and the King. Its purpose is to improve the transparency and consistency in enforcement of arbitral awards, and to make the process more accessible to

¹²⁹ Ibid Section 3.7

¹³⁰ The New Enforcement Law, Royal Decree No. M/53 of Sha'ban 1433 Hejra corresponding to July 3, 2012, Georgian

private parties and foreign entities who enter into arbitration proceedings with Saudi Arabian parties.¹³¹

Under the 2007 Board of Grievances Law, parties who sought enforcement of arbitral awards before the Board were often exposed to entire retrials of an original dispute based on the merits of *Shariah* law.¹³² Article 2 of the new Enforcement Law, authorizes the Enforcement Tribunal to review and enforce such awards related to commercial, private, and international matters, but confusingly restricts review of administrative or criminal matters. Article 10 provides for Appeal of the Enforcement Judge's decision to the Supreme Administrative Body of the Board. It is not clear how the enforcement judge bypasses full consideration of an arbitration proceeding in enforcing an award or any adherence to *Shariah* law, for as we have already established, *Shariah* law is the binding authority for all governmental entities within the KSA. This seems to be an inherent flaw in the new regulations. This then becomes a more complicated question of separation of powers, of which we will discuss further in this chapter.

2.2 Sources of Law Created or Utilized by Administrative Decision-Makers

Administrative bodies and jurists tasked with decision-making authority, or in consideration of contractual disputes between parties, functionally rely on a system of secondary sources of administrative law: Basic Law of Governance, Royal Decrees, Royal Orders, Council of Ministers' Orders, ministerial regulations and circulars, as well as promulgated regulations or limited codification, and case-by-case independent judicial

¹³¹ Judiciary Regulation, Royal Decree No. M/78 of 19 Ramadan 1428 Hejra corresponding to October 1, 2007 Georgian

¹³² The Board of Grievances Law 2007, Article 13(g)

analysis. This system does not include record-keeping practices, case law precedent, or publication of rendered decisions. Further, all secondary sources, decisions made, and even contracts themselves are subject to reversal or dismantling in order to perpetuate the sanctity of *Shariah* Law.

2.2.1 Statutory Mechanisms in Saudi Arabian *Shariah* Law: The *Quran*, the *Sunnah*, *Fatwa*, Royal Decrees, Royal Orders, Council of Ministers’ Regulations, Circulars, Codes, and Independent Jurisprudence

2.2.1.1 Supremacy of Shariah - Primary Sources of Law

Shariah Law is the divine, unequivocal authority for all social, cultural, religious, public, private, and governmental affairs in the Kingdom. Any normative practice, cultural imperative, or legal perspective is ordained from within *Shariah* Law. *Shariah* Law is comprised first and foremost of the *Quran* (the written word of Allah) and the *Sunnah* (the teachings and practices of the Prophet Muhammad). Secondarily important are human interpretations (*fiqh and fatwa*) or consensus by the religious scholars (*ijma*)¹³³, the religious elite (*ulema*) or specific religious schools of thought such as Wahhabism or Hanbali, which can range from traditional or contemporary¹³⁴; literal or theoretical; and patriarchal or progressive readings. This religious establishment has an authority that supersedes that of any Royal family or governmental entity. As alluded to in the previous section on judicial structures in KSA, independent judgment and legal reasoning using

¹³³ Brian B. Kettell, *Introduction to Islamic Banking and Finance* (Wiley 2011) 13–21

¹³⁴ “The four main Islamic schools of jurisprudence are Maliki, Hanbali, Hanafi, and Shafi. The predominant school in Saudi Arabia is the Hanbali school,” (meaning its interpretations and fatwas are the most influential in government actions, societal norms, and community practices).

analogy by jurists (*ijtihad*) is also accepted as a secondary authority in *Shariah* law, particularly within the legislative or judicial constructs.

2.2.1.2 Secondary Sources of Law

Saudi Arabia does not have a formal constitution, traditional legislation or comprehensively codified laws, but instead operates under the Basic Law of Governance, Royal Decrees, Royal Orders, and Council of Ministers' Regulations, as well as other similarly functioning sources.¹³⁵ The purpose of these sources is to “execute” *Shariah* law and principles into practical governmental and societal rules for the people of KSA to follow. The Basic Law outlines the responsibilities and processes of the governing institutions but is insufficiently specific to be followed as a conventional constitution would be.¹³⁶ The King has the discretionary authority, within the confines of *Shariah* Law and religious scholarly interpretation, to issue Royal Decrees or Orders of his own cognizance or upon ratification of resolutions, regulations, or implementation policies from the Council of Ministers.¹³⁷ Royal Decrees, or Orders, are considered to be regulations, not laws, because the term “law” is considered to be *Shariah* law, namely the *Quran* or *Sunnah*.¹³⁸ Noticeably missing as a traditional source for administrative law discussion, is a comprehensive, working body of developed laws or codes. Instead, KSA

¹³⁵ Brian (n 133)

¹³⁶ Whiteley (n 104) “To the extent that the Basic Law can be considered an ‘informal’ constitution, Article I establishes the Quran and the Sunnah as the ‘formal’ constitution.”

¹³⁷ Basic Law of Governance, Royal Order No. (A/91) dated 27 Sha’ban 1412H – 1 March 1992. (See Article 70: Laws, international treaties and agreements, and concessions shall be issued and amended by Royal Decrees. See also Articles 5, 8, 55 and 56 pertaining to the King’s authority.)

¹³⁸ Gayle E. Hanlon, ‘International Business Negotiations in Saudi Arabia’, in James R Silkenat, Jeffrey M. Aresty & Jacqueline Klosek (eds), *The ABA Guide to International Business Negotiations* (American Bar Association 2009) 918

operates on limited codified rules and regulations, with deference to religious or independent interpretations and applications of *Shariah* law.

2.2.1.2.1 Royal Decrees

Royal Decrees are issued in the name of the King, as the head of the Council. He has ultimate discretion as to whether or not to issue a Royal Decree. General policy, treaties, charters, and public concessions are all issued and amended in accordance with Royal Decrees. The underlying laws or regulations to each Decree have been drafted, debated, and approved by a majority of the Council. Royal Decrees prevail over any other regulation except *Shariah* law, and are more consequential than other sources of law, as to their effect on the administrative system.¹³⁹

More recent examples of Decrees which have had significant effect on administrative law in KSA include, Royal Decree No. M/SI, art. 8, dated 17/07/1402 A.H. (1982), which established the Board of Grievances as an independent body and the subsequent Royal Decree No. M/78, dated 19/9/1428 AH. (2007), which established the 2007 statutory reforms of the Board of Grievances. These Decrees have already been introduced, but their importance lies in their creation of a powerful, independent administrative, judicial entity, which is at the centre of this study and the discourse surrounding administrative contracts and the rights of parties within those contracts.

Other Decrees relevant to administrative law, and as impactful as the creation of the Board, include Royal Decree No. M/46, art. 3, 12/7/1403 AH. (1983), The Law of Arbitration, which established that approval of the Council of Ministers has to be

¹³⁹ See Whiteley et (n 104)

obtained before a government entity can submit to arbitration. It also entrenched the authority of the King, the Council of Ministers, or the Board to alter the arbitrator's decision. This Decree created a significant threshold issue and deterrent to foreign elements in administrative contracts within KSA.

Royal Decree No. M/34, dated 24/5/1433H (16 April 2012) solidifying the Arbitration and Enforcement Reforms¹⁴⁰ and Royal Decree No. M/53 March 2013, promulgating rules for the creation of the Enforcement tribunal and laws, distinct from the Board of Grievances. As will be more appropriately discussed in later chapters, the Arbitration and Enforcement Laws similarly set new standards within KSA for how they intend to oversee administrative contracts and to engage in fresh dialogues concerning the practice of arbitration with foreign elements.

Decrees also regulate industry and set standards for performance and accountability for execution, inferring specific obligations for both private and public parties engaged in contracts, subject to the Decrees. For example, Royal Decree No. M/58, dated 4/9/1427 A.H. (2006), the Government Tender and Procurement Statute, Art. 54 require a public agency to execute an administrative contract in accordance with its terms. This Decree and associated "Code" is the most often leveraged Code in the body of KSA law because, as the statistics have illustrated, procurement and concession contracts in administrative law, are the most prolific contracts within KSA and therefore those most often subject to disputes and means of relief or resolution. As will be analysed, there are rules within this code that apply to government entities during the bidding and award processes, but

¹⁴⁰ The Arbitration Regulations of Saudi Arabia were enacted by Royal Decree M/34 on 24/5/1433H (16 April 2012). The Regulations were promulgated in the Saudi Official Gazette (Um-Al Qura) on 18/7/1433H (8 June 2012) and came into force on 17/8/1433H (7 July 2012)

the burden primarily rests on the private party who has the responsibility of execution of the contract.

The oft-cited concern of Royal Decrees, and a grave weakness in administrative law, is the breadth of Royal Decrees not implemented, or done so in a fragmented fashion, such as in codified laws which only address certain provisions of the Royal Decree (or Regulation) and intentionally omit other equally important provisions whose implementation would enhance transparency, enforcement, and consistency within KSA's administrative law practice. This is evident in the fact that KSA does not have an actual Administrative Law Code, but instead relies on a conglomeration of Decrees, Regulations, and Circulars. Another example is Article 47 of the 1982 Board's Act which requires that the Board classify, print, and publish their decisions on an annual basis. However this has not been carried out since 1980 due to lack of consistency in the codification and enforcement process.¹⁴¹ Given that the Council of Ministers and the King assisted in the creation and authority of the Board, deliberate choices are being made by officials as to which laws, rules, and regulations to promulgate or enforce, the motivation behind which is not always evident.

2.2.1.2.2 Royal Orders, Council of Ministers' Regulations, Ministerial Regulations and Circulars

Adding to the complexity and highlighting the fragmentary nature of the Saudi legal system are Royal Orders, Council of Ministers' Regulations, Ministerial Regulations and Circulars. A Royal Order, akin to an executive order, has a variety of functions all

¹⁴¹ Alhudaithy (n 94) 12

stemming from the King, as the head of state. Likewise, the Council of Ministers issues regulations regarding the executive work of government agencies focused on internal policy and functionality of government entities, and are the “promulgation” and “implementation” mechanism for Royal Decrees.¹⁴² The Regulations often serve as the substance to the Royal Decrees, transforming into the “codified laws”, ministerial procedures or directives, and authority for quasi-judicial committees and are intermittently published in *The Gazette*. Each Minister and heads of government agencies may also issue circulars or regulations, known as Ministerial Regulations or Circulars and not to be confused with Council of Minister regulations. These ministerial regulations and/or circulars serve to instruct its public employees or private contractors regarding the function, operations, and procedures of that agency. They are not typically published, but may be posted on websites, physically posted in the individual ministries, or dispersed to employees via technological means and are insubordinate to Royal Decrees, Royal Orders, and Council Regulations.

2.2.2 Consideration of Codified Laws Applicable to Administrative Contracts

Codified law in Saudi Arabia is limited in scope and nature, based on intentional omissions or gaps in *Shariah* Law, or as another explanation the Kingdom has only codified areas of law in which there is clearly no conflict with the purpose and guidance of *Shariah* Law. As Dr. A. Alasry has observed, “modern statutory laws and regulations can be introduced and adopted only through the doctrine of public interest (a *l-maslahah*

¹⁴² Ibid.

al-mursalāh) as a basis for rule making.”¹⁴³ Neither “contracts”¹⁴⁴ nor specifically classified “administrative contracts” have their ‘own’ set of codified laws in Saudi Arabia, rather they are governed and classified by the Board’s independent judicial reasoning and inter-related Codes.¹⁴⁵ Current “codified” laws affecting administrative authority and contracts include but are not limited to areas of procurement, labour, real property, finance, bribery, insurance, utilities, enforcement, and arbitration.¹⁴⁶ These codes are construed as administrative in nature because administrative contracts regularly involve projects of construction, public utility, and commercially regulated activities that have a fiduciary or economic interest for the state.¹⁴⁷

The Board applies these codes as part of their evaluation, reclassification, and enforcement considerations. The Board assimilates these regulations into its contractual assessment of valid conditions, public interest operations, and administrative authority. Many of the codes reflect the Board’s punitive authority to issue financial sanctions or terminate contracts. The codes markedly utilized by the Board in their independent evaluations include the Government Tender and Procurement Law, the Labour and Workmen’s Law, the Contract Law Licensing Requirements and Insurance Law, and codes pertaining to bribery of public officials as well as environmental and safety issues. Many of these codes apply to private or commercial contracts, but due to the pervasive

¹⁴³ Ibid.

¹⁴⁴ Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (The University of Chicago Press 2010) 167

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Amgad T. Husein, ‘Construction and Projects in Saudi Arabia: overview’, (Practical Law Multi-Jurisdictional Guide 2013/14, sections 21, 29) <<http://www.dentons.com/en/insights/articles/2013/september/24/~media/301CE5B8688C43C3964F0F7B38338492.ashx>> accessed on 12 March 2017; See also A. Alrabayah, ‘Construction Cases in Court Houses’ *Al-Al Sharaq Al Awsat* (2007)

use of procurement contracts in administrative matters, there is significant interchange between these types of contracts and seemingly commercial codes. This is illustrated in the way the codes themselves are written and in the non-linear jurisdictional lines between the Council, the Board, and *Shariah* courts.

Originally called the Bids and Tender Act, the Procurement Code was created by the Council of Ministers in 1968.¹⁴⁸ In the wake of increased government spending and oil related profits, the Council recognized the need for a cohesive system in dealing with government-related purchases and projects.¹⁴⁹ Throughout the following decades, the Tender Act grew exponentially in power, scope, and uniformity to become the Procurement Code, currently mandated by the KSA.¹⁵⁰ The Government Tender and Procurement Law of 2006 is the ruling code, but is unabatedly subject to commentary, revision, and modification through the Council's actions or circulars. Created by Royal Decree in 2006, this Statute contains significant provisions for the expected roles of parties, their rights, obligations, and means of defining the intent of a contract.¹⁵¹ This statute is demonstrative of the issues related to the adjudicative and classification authority of the Board, and in specific instances the Council of Ministers, within administrative contracts.

Article 77 of the Procurement Law mandates “contractors and government authorities shall execute their contracts in accordance with contract terms, in good faith and as the proper functioning and interest of the public utility.”¹⁵² This applies for any contract

¹⁴⁸ Alhudaithy (n 94). 46

¹⁴⁹ Alhudaithy (n 94)

¹⁵⁰ Alhudaithy (n 94)

¹⁵¹ The Government Tenders and Procurement Law (n 112)

¹⁵² Ibid Article 77

under the purview of the procurement code. The procurement code also emphasizes the principles of equal treatment, or no discrimination, of potential contractors (including foreign entities) in either the bidding or awarding process; as well as transparency through publication requirements of the projects and awards.¹⁵³ This sets a certain expectation that all private parties or foreign contractors will be fully engaged and unbiasedly considered in the bidding process and in contract formation. The code stipulates that national products and contractors are to be favoured in order to protect Saudi industries. The bidding and award processes are divided into open, selective, or direct categories, depending on the type of contract, the nature of the project, and the timeline with which the project needs to be completed. Finally, the code distinguishes between public works, supply, concessions, and operations or maintenance contracts, providing different rules for each type of contract regarding the bidding, awarding, and performance stages of the project.

The code's stated purpose is designed around economic efficiency, timely completion of government projects, and the protection of public funds expended in the course of performance of procurement contracts. Ideally, it sets the expectations, rights, and obligations of the parties involved in an administrative contract, but as is evident in practice, the role of the government authority and its weighted obligations towards the public distort the normal expectations of parties in a contract. For example, instead of parties being on "equal footing" of mutuality in actions or decisions, a contractor is subject to unilateral authorities of the government entity within a procurement contract that severely restricts the contractor's ability to seek relief from any decision made by the

¹⁵³ Alhudaithy (n 94) 56-61; See also the Government Tenders and Procurement Law (n 112) Articles 1-3.

government entity. Specifically, the government authority has the power to modify or terminate the contract as well as to penalize the contractor for delays, failures to perform, or certain criminal acts, such as bribery of a public official.¹⁵⁴ Conversely, as Articles 54 and 78 state, a contractor's rights are limited to compensation related matters and adjudication through the Board.¹⁵⁵ Such articles within this Code illustrate the differences in the rights and obligations of the party, including limitations to the use of unilateral powers by a government entity, exorbitantly detailed requirements for foreign related contractors who are awarded an administrative procurement contract, high-risk performance expectations which are set for each contractor, and the consistency with which the Board rules in favour of the government authority in light of public interest.

Recent governmental policies such as the *Nitaqat* programme ("Saudisation") are directly affecting the nature and administration of procurement contracts, and being integrated into everything from the Laws themselves to Decrees, Regulations, and Circulars as well as into the government sponsored project of every ministry within KSA. Generally, KSA is taking initiative to promote the training and retention of a Saudi workforce, and reducing dependence on foreign labour, by promulgating specific rules and regulations.¹⁵⁶ Specifically, procurement contracts now include provisions obligating a contractor, in particular foreign contractors, to meet certain standards. Examples include the Council of Ministers Resolution No. 124, which states "foreign entities engaged in public works contracts are required to give 30% of the work under the contract to Saudi Arabian nationals", i.e. direct employees or subcontractors who are Saudi nationals; or

¹⁵⁴ The Government Tenders and Procurement Law (n 112)

¹⁵⁵ Ibid Art. 54 and Art. 78

¹⁵⁶ Labour and Workmen's Law. Article (26)(1) <http://www.the-saudi.net/business-center/labor_law.htm> accessed on 12 March 2017 See also Ministry of Labour Ministerial Resolution no. 4040 (2011)

requirements that private firms must employ a certain percentage of Saudi nationals; and limit any foreign workers under its payroll for a particular project to those with 3 or more years of explicit experience.¹⁵⁷ This means that a contractor is subject to sanctions or penalties by the government authority (in case of procurement contracts, the Minister of Finance or the Board) for any violations related to these new criteria, no matter how unduly burdensome they may be to a contractor to administrative contracts.

As demonstrated by the foregoing discussion, the KSA codified law is complicated, yet reflective of the country's commitment to standardize certain processes for maximum efficiency and benefit to both the KSA and its partners. The totality of secondary sources of administrative law in KSA are inherently concentric in their nature to protect the sovereignty of the state, while respecting the religious traditions of the past and commercial pressures of the future. The application of *Shariah* Law, however, can be confounding for foreign partners in administrative contracts, but provides consensual markings, which serve as the basic understanding for any contractual issue in KSA.

2.3 Arbitration-Specific Mechanisms

The above legal structures and mechanisms apply to all administrative contracts, but there are tools and issues specific to the management of arbitration agreements and clauses, which themselves are also administrative contracts or provisions within administrative contracts. The tools are the powers of review by the judicial or executive bodies and legislation or regulations that have been passed by the Council of Ministers to

¹⁵⁷ Royal Decree No. M/46 of 05/05/1436 H (promulgated 18 October 2015); See also, Ministry of Labour Ministerial Resolution No. 4040 June (2011) this has been referenced twice; See also, Amgad T. Husein (n 147)

control rights and expectations of parties; as well as to set procedures and substantive matters of arbitration. Explanation of these tools is important in framing the rest of this thesis.

2.3.1 Legislative and Judicial Bodies

2.3.1.1 Board of Grievances

When issues arise as to jurisdiction, interpretation and enforcement of arbitration in the context of Administrative Contracts, such as application of *Shariah* to an arbitration clause within a contract or the scope of the Prime Minister approval requirement, i.e. what are and what are not “governmental bodies” under Article 10(2) of the New Arbitration Law, the Board of Grievances is typically the supervising and reviewing court. Their discretion is determinative of the rights of parties within arbitration, the threshold for proceeding with or enforcement of arbitration matters, and a purportedly biased weapon in upholding the constitutionality and convoluted sovereignty of Saudi Arabia.

2.3.1.2 Council of Ministers

As was discussed in Council of Ministers earlier, their ability to pass regulations and resolutions is the mechanical implementation of specific laws. In terms of Arbitration, the Council has passed specific laws related to the Arbitration process, including the New Arbitration Law (“SAL 2012”) see below, and the controversial yet historically significant Resolution No. 58, but has poignantly failed to issue a resolution pertaining to

any Prime Minister approval of arbitration for Administrative Contracts, rendering such approval a subjectively volatile interpretive matter for all parties involved.

2.3.1.3 Enforcement Judge

As review, the Enforcement Judge oversees specific and limited matters of review and enforcement of arbitral awards. Their authority overlaps with that of outside tribunals and the Board.

2.3.1.4 Saudi Arabia Commercial Chamber of Commerce Arbitration Centre

The new centre, opened in October 2016, is an example of a thriving, in-house arbitration system which provides parties access to *Shariah* and international law experts.¹⁵⁸ It serves as a case study in how Muslim and non-Muslim based systems can cooperate to the mutual benefit of both parties within arbitration within Saudi Arabia. While, this centre is not currently used for arbitration of administrative contracts, it is a reference point for reform.

2.3.2 Codified Laws or Regulations Pertaining to Arbitration Matters

2.3.2.1 Resolution 58

Resolution 58 was passed on June 25, 1963 in response to a notorious arbitration case involving the Saudi Government as a party. While the case shall be discussed at length throughout this study, what is pertinent to a framework discussion is that this Resolution forbid state agencies to resort to arbitration except in some cases where special

¹⁵⁸ Cabinet Decree No. 257 dated 14/6/1435 H corresponding to 15/03/2014, establishing the Saudi Center for Commercial Arbitration
< <http://www.sadr.org/index.php?file=index.php&module=&id=&lang=en> > accessed 23 February 2017

authorization is required. In practice, it confined arbitration to the private sector and severely restricted any administrative participation in resolving disputes through arbitration proceedings. This Resolution is an obstacle to the arbitration of administrative contracts and the subject of debates on reform, and example of what can happen when parties make certain choices related to venue, rule of law, and arbitrators within the confines of Saudi Arabia.

2.3.2.2 The New Arbitration Law (“SAL 2012”)

Touted as significant strides towards international standards and a statutory scheme more accepting of foreign participants, the SAL 2012 is modelled after the 1985 UNCITRAL standards on international commercial arbitration. It sets up new systems, procedures, and requirements for arbitration in KSA. Primarily designed for commercial or international proceedings, it does contain reservations for administrative contracts and matters involving the Saudi Government. The reigns of sovereignty are still tightly gripped within this new law, but signs of a loosened hold still emerge. For instance, it empowers the Council of Ministers to modify the provisions of SAL that prohibit State entities from resorting to arbitration. For such entities, an authorization to resort to arbitration no longer needs a legislative act issued by Royal Decree amending the Act, but a simple decree of the Council of Ministers is now sufficient. In any case, the Prime Minister (e.g. the King) is empowered to authorize state entities to resort to arbitration, for example, if he approves a procurement contract containing an arbitration clause. Thus, SAL confirmed the former prohibition, under Res. 58, but gave the Prime Minister, who is also the King of Saudi Arabia, the power to depart therefrom.

2.3.2.3 *The Enforcement Law*

This law passed in July 2012 introduces the institution of *quadi al tanfiz* or the enforcement judge (similar to a “*juge de l’execution*” in France).¹⁵⁹ It establishes authority, procedures, and regulations pertaining to this new court and its interplay with the Board in effectuating the review and enforcement of arbitral awards.

2.3.3 International Conventions and Agreements

2.3.3.1 *NYC Convention*

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC) sets the international standards for awards in arbitration of administrative contracts in international spheres. Saudi Arabia ratified the convention and appointed the Board as the competent court for the enforcement of arbitral awards and awards rendered outside Saudi Arabia.¹⁶⁰ KSA made no reservation concerning the nature of the dispute to be settled by the award, meaning whether they had to be commercial or administrative, but did make reservations concerning reciprocity and public policy. The reservation on public policy exception requires that any and all awards must be compliant with *Shariah* law. This same exception has been made by other Islamic states such as Egypt and Kuwait. This authority is also specifically provided for under Article V(2)(b) of the NYC granting signatories the discretion to decline enforcement of foreign arbitral awards which would be “contrary to the public policy of the contracting state.”

¹⁵⁹ The Enforcement Law, Resolution No. 261 of the Council of Ministers, 12 Sha’ban 1433H (2 July 2012)

¹⁶⁰ Royal Decree No. M/11 dated 16/7/1414H (30 December 1993), subsequently published in the Um-Al Qura on 9/8/1414 (21 January 1994)

2.3.3.2 1983 Riyadh Convention

In April 1983, Saudi Arabia signed, but has yet to ratify, the convention on Judicial Cooperation between States of the Arab League. The Convention distinguishes between public order and morality versus *Shariah* law. Specifically, Articles 25 and 37 of the Convention provide that an arbitral award or enforcement may be rejected if it violates the public order, morality, or principles of *Shariah* law of the State in which enforcement is sought. It is a companion convention to the NYC for Saudi Arabia and the crux for its policies concerning arbitration within the State.

2.4 Comparative International Civil Administrative Law Judicial Structures

2.4.1 Dual Court Systems

Most administrative law systems in civil law models, such as France and Egypt, have a dual court system similar to Saudi Arabia's. It consists of one tract of civil, domestic, or commercial matters, and another tract for purely administrative matters. Both France and Egypt have what is called a "*Council d'Etat*" or a Council of State as their administrative body. Another interesting aspect of these systems is that often, the administrative body serves as both legislator and adjudicator, meaning they not only decipher, but they advise, revise, and provide research on administrative laws and regulations.¹⁶¹ An important distinction can be made between these civil law examples and common law examples, in that common law models have a single court system with hierarchy and levels of appeal as well as a body of government codes and separate laws

¹⁶¹ Patrick Frydman, 'Administrative Justice in France', (Keynote Address delivered at the 11th Australasian Institute of Judicial Administration Tribunals Conference, Surfers Paradise, 5 June 2008) .; See *also* France Council D'Etat (n 51)

for government contracts, instead of a specialized court system reserved for administrative matters and creation of laws.

A few Arab nations provide alternative structures. For instance, Kuwait is different than its fellow Arabian or administrative states in that it has a full Parliament which dilutes the authority of the administrative tribunal. UAE, as another example, has a unified court system (more similar to common law systems) in which a special regulatory framework for administrative contracts has been established to resolve disputes relating to the mutual rights and obligations of the parties under an administrative contract.¹⁶²

Again, this is in contrast to the KSA, whose Board is considered to be a stand-alone entity, who answers only to the King, and not other judicial bodies, such as a Supreme Court or a Court of Appeals. UAE's system would be more identified in the quasi-judicial committees of KSA who answer to the Ministers, the judicial bodies in appeal, and the King.

2.4.2 Legislative Bodies: Who Makes the Administrative Laws?

In France and Egypt, the administrative laws are made by their respective *Council D'Etats* or *State Councils*, which functions as legislative drafter and advisor; adjudicator; as well as executive arm in contracts. They can render legal opinions for proposed legislation, issue administrative regulations, and rule on disputes. The powers appear to be all encompassing, but they have intricate systems and hierarchies of administrative

¹⁶² Rana El Husseini, "The Challenge of Defining An Administrative Contract" (HadeF & Partners website, 06 September 2011) <<http://www.hadefpartners.com/News/101/THE-CHALLENGE-OF-DEFINING-AN-ADMINISTRATIVE-CONTRACT>> accessed on 12 March 2017

and judicial bodies within the Council whom are assigned specific functions and authority, including specific Administrative courts and Courts of Appeal.

Article 190 of Egypt's 2014 constitution states: "The State Council is an independent judicial body that is exclusively competent to adjudicate in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions. It is also solely competent to issue opinions on the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review draft contracts to which the state or any public entity is a party. Other competencies are to be determined by law."¹⁶³

Specifically, the Couseil has departments for opinions and legislation, which advise public entities on diverse aspects of public law such as administrative contracts, tenders, ministerial decrees, etc."¹⁶⁴ There are four "categories" of courts within Egypt's system, including the Administrative court as well as an Administrative Court of Appeal. It should also be noted that Egypt has an official Parliament "People's Council" with legislative authority as well as a *Shura* "Consultative Council".

Article 52 of France's original constitution of December 1799 reads: "A council of State shall be responsible for drafting the bills and regulations of public administration and for solving difficulties arising in administrative matters".¹⁶⁵ France has an unprecedented 42

¹⁶³ Constitution of the Arab Republic of Egypt, Article 190 (2014)

¹⁶⁴ Adel Omar Sherif, 'Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences, in Eugene Cotran & Adel Omar Sherif, Democracy, the Rule of Law and Islam (Kluwer Law 1999) 22-34

¹⁶⁵ Jean-Marc Sauve, 'The French Administrative Jurisdictional System' (Australian Administrative Appeals Tribunal Conference, Hunter Valley, 17 March 2010) <<http://www.conseil-etat.fr/Actualites/Discours-Interventions/The-French-administrative-jurisdictional-system>> accessed 11 March 2017

administrative tribunals and 8 courts of appeal spread across its domestic and international jurisdictions.¹⁶⁶ Combined, these tribunals adjudicate close to 200,000 cases a year. The jurists, clerks, and staff are trained through the highly acclaimed National School of Administration (ENA),¹⁶⁷ thereby providing consistency in procedure and quality of adjudication opinions as well as legislative actions. France's system has interwoven accountability, transparency, and enforcement techniques to make sure they are taking administrative action that is not contrary to existing law, consistent with previous rulings, in the interest of the public, fair, reasonable, and having rulings which are duly executed by public authorities.¹⁶⁸

KSA's Council of Ministers and the Board fulfil the same legislative and judicial roles, but again, there is significant overlap and convolution in their roles as legislative advisors, drafters, "think tank" to the King, and judicial or semi-judicial binding authorities. Their responsibilities also go beyond mere administrative considerations, breeding potential conflicts-of-interest in handling certain matters. The Board, for instance, is not given legislative advisory authority, like the Conseils of Egypt or France; but has the same keystone of independence. The Council, has a quasi-judicial role with special committees under each Ministry and a system of appeal to the Board. The challenge with KSA's system is the constant concern of competition and lack of communication between the two bodies. The Conseil designs of Egypt and France promote a more comprehensive and efficient means of administering law because, while their Conseils share legislative and judiciary duties; they access the same resources, have

¹⁶⁶ France Council D'Etat (n 51) 7

¹⁶⁷ Ibid

¹⁶⁸ Sauve (n 165)

clear means of cooperation between their administrative clerks, legislative clerks, and jurists, and an internal system of accountability if say the legislative advice is disconnected from the jurisprudence. Whereas, KSA's system suffers from conflicts-of-interest, lack of cooperation, and stymied accountability due to their weaknesses in rule of law, separation of powers, and record-keeping practices.

2.4.3 Source of Administrative Laws: Code Comparisons and Judicial Precedent, Who Has Them and What do they Use to Make their Decisions?

All administrative judicial systems have jurisdiction over disputes involving the decisions or actions of a public entity or authority. The most common kinds of administrative cases include, in France for example, those related to the application of economic or social regulations, taxation, town-planning, building permits, public works, public service procurement, environmental projects, hospital liability, immigration permits, civil servants' career and pensions, European and local government elections. These are similar to the types of administrative contracts and the nature of such contracts that were previously discussed in this study. The difference between KSA and other jurisdictions, however, is that KSA has less consistency, predictability, and transparency in how it may rule in cases or which ones it chooses to adjudicate than the other states. In addition, it appears to more often than not exercise an administrative authority or power of review as often as possible regardless of unpublished results or statistics for such matters. The comparison in transparency and predictability with KSA comes with examining which States have codified laws, judicial precedent, and record-keeping practices, and what each of those entail in the particular jurisdictions.

2.4.3.1 Application of Laws: The Experience of Egypt

The Egyptian legal system, being considered as a civil law system, is based upon a well-established system of codified laws. Egypt's supreme law is its written constitution. With respect to transactions between natural persons or legal entities, the most important legislation is the Egyptian Civil Code of 1948 (the "ECC") which remains the main source of legal rules applicable to contracts.¹⁶⁹ Much of the ECC is based upon the French Civil Code and, to a lesser extent, upon various other European codes and upon Islamic (*Shariah*) law (especially in the context of personal status). Other Arab states, including KSA, use Egypt's civil code system as a model for their own system of laws.

Unlike France and more like KSA, Egypt's system is heavy on judicial discretion as it has not fully codified its administrative legal rules and similar gaps occur in judicial precedents: "Despite the non-existence of an established system of legally (*de jure*) binding precedents, previous judicial decisions do have persuasive authority. Courts are morally and practically bound (*de facto* binding effect) by the principles and precedents of the Court of Cassation (for civil, commercial, and criminal matters) and the Supreme Administrative Court (for administrative and other public law matters)."¹⁷⁰ Some judicial decisions are published online or soft copies are made available to the public, but there are no regular periodicals or journals that publish full collections of cases or judicial decisions. Egypt does, however, have "crystallized rules and regulations for the

¹⁶⁹ Wahab (n 52)

¹⁷⁰ Global Ethics Observatory (GEObs) Database 4: Legislation and guidelines
<<http://www.unesco.org/shs/ethics/geo/user/?action=Geo4Country&db=GEO4&id=9&lng=en>> accessed 5 December 2016

administrative courts.¹⁷¹

KSA, in comparison, has even fewer published opinions and rules and regulations. For example, “the Law of the Board of Grievances” and the Board’s “Law of Pleadings”, give authorities and a hierarchy of judicial courts; but are scarce on clear and precise rules, definitions, or procedures for jurists or parties in actually accessing and using the system.¹⁷² Simply explaining that there is a hierarchy to the courts or that judges may be held accountable for certain violations of law, does not suffice in providing genuine access by parties to grievance proceedings.

2.4.3.2 Application of Laws: The Experience of France

France’s “Napoleonic” codes have been crafted by the Conseil, including: the civil code, the penal code, the civil procedure code, the criminal instruction code and the commercial code; with policy and legislative advisory work being done by "administrative sections" within the Conseil.¹⁷³ Each section includes approximately twenty members of the Conseil and a chairman.¹⁷⁴ These codes set the precedent for administrative law, as adopted by other civil law systems; but what is fascinating is that while France is considered to have a sophisticated and highly functional system of administrative law, they have a limited administrative code, instead relying primarily on patterns of ruling and determination through case law.¹⁷⁵ They do extensively publish

¹⁷¹ Egyptian Council of State (*Conseil d'Etat*) by virtue of Law No.112 of 1946 as amended by Law No. 9 of 1949

¹⁷² Law of the Judiciary, Law of the Board of Grievances (‘The Law of Pleadings’), issued by Royal Decree No. (M/78) 19 Ramadan 1428H – 1 October 2007. See also Article 25 of The Board of Grievances Law.

¹⁷³ Sauve (n 165) 1.2

¹⁷⁴ Sauve (n 165) 1.2

¹⁷⁵ Lionel Neville Brown, John S. Bell, Jean-Michel Galabert, *French Administrative Law* (OUP 1998) 177

caselaw and provide access to codified laws as well as judicial opinions to interested parties. It is considered to be a transparent and successful system. Again, this is in stark contrast to KSA's sparsely published opinion, accessibility to the public, and limited codified law.

These structural and legislative comparisons will be reintroduced in the following chapters as a means of possible reforms and open-ended questions, which often seem insurmountable in international public debates. Such questions as whether a standardised international body of administrative law shall be established or whether a universally understood practice of international arbitration shall be accepted by Arab countries; can only be addressed through comparisons to best practices and failures from other jurisdictions. It is through cooperative learning and shared information that continuity and consistency in legal practices may be developed.

2.5 Conclusion

This chapter has begun the process of identifying reoccurring issues or themes manifest within Saudi Arabia's legal framework as well as in the promotion or restriction of arbitration of administrative contracts. Substantively speaking, this thesis questions the constitutionality of Sharia law as automatic grounds for an inexhaustible public authority. Standards to assess what policy or Sharia norms have been contravened or a threshold for review have not been adequately tested through the independent judicial review. More generally, the Saudi legal system is subject to criticism on the grounds that it lacks a settled body of law, or developed theory of public law and (the limits of) public authority, or developed principles of private law which can be applied consistently towards the fair

and equitable settlement of contractual disputes. Rather, Saudi courts have tended to adopt a highly discretionary approach to matters of justice, while failing to subject to exercise of administrative power to the requirements of legality or constitutional constraints. In contrast, States like Egypt, have an Islamic system but a more apparent and determinate set of standards and grounds for judicial review.

Ideas such as separation of powers and scope of review can only be comprehended if, as this chapter has done, an encyclopaedia-like explanation is given of the legislative bodies and functions of law within KSA. It leads the curious reader down a line of questioning into what helps or hinders the setting of legitimate expectations of parties' rights within administrative contracts? A truncated answer is that all of these "issues" can be attributed to powers and behaviours of the Board, the Council, and the administrative authority participants to arbitration and individual contracts.

The next chapter considers how these issues of fairness, authority, rule of law, and separation of powers between public and private parties permeates the actual contracts and arbitration proceedings. These themes represent the problematic approaches to arbitration and administrative law in Saudi Arabia, as well as the organic solution to altering international perceptions of a system uniquely shrouded in a technicolor coat of *Shariah*, domestic, administrative and international law.

Chapter 3

The Theory, Determination and Treatment of Administrative Contracts under Saudi Law

The last chapter discussed the legal structure and sources of administrative law in Saudi Arabia, focusing on the key statutes, regulations and codes, which govern, or are applicable to administrative contracts. This chapter offers a more detailed analysis of the doctrinal issues surrounding the classification, defining features and judicial treatment of administrative contracts. This will prepare the ground for a discussion of specific obstacles to the arbitration of administrative contracts in the next chapter. In this chapter we will discuss contract law in the context of Saudi Arabia, focusing on how established contractual doctrines such as “changed circumstances”, the juxtaposition of legitimate expectations of rights of parties to a contract, and the tensions between public and private parties. We will also discuss the distinction between the *Shariah* perspectives of contractual obligations and KSA public law approaches.

Under the KSA legal system there is no formal criterion to distinguish between administrative contracts and ordinary contracts governed under private law. However, in its most basic definition and function, an administrative contract is qualified as being “administrative” by either a function of law or through a process of judicial determination.¹⁷⁶ The process to identify the nature and character of the contract is challenging regardless of how it is defined. Administrative contracts are often categorized, then labelled as different types under those categories. But the more critical distinction between contracts is not whether they are of one categorization or type, but in

¹⁷⁶ ‘Saudi Chambers of Commerce, The Finance Difficulties which Face Saudi Contractors’ (n 26).

whether they are of the private or administrative nomenclatures. Each nomenclature associates different rights and responsibilities to the parties involved. Specifically, there is a unilateral authority present in an administrative contract, which drastically impacts the nature of, dealings within, and administrative grievance procedures associated with these contracts. This raises significant questions about contracts which have a mixed public or private character, the judicial treatment of such contracts, and the extent to which contract law principles, and in particular contractual defences, do or should apply to administrative law contracts.

By pursuit of these questions within this chapter, we also consider a comparative analysis of the defence of “changed circumstances” as a contractual concept, focussing on the applicability of this private law doctrine to (public law governed system of) administrative contracts and to the model of contract law prescribed under *Shariah* law.

More specifically, normative tenets of Islamic *Shariah* law within private contracts establish principles of freedom to contract, consent, and right to choose. Contrarily, administrative contracts revolve around public law elements of unilateral authority, sovereignty, and systems of feigned separation of powers, thus creating an inherent tension with *Shariah* law. Here, we will establish the nature, identifying features, and classification of administrative contracts, so that we can then expand upon the unilateral authorities of public entities within administrative contracts and the powers exercised by the Board of Grievances in defining or legitimizing rights of parties. Finally, this chapter touches on high level concerns in administrative law, which resonate in arbitration practice, and presents a basic comparative law structure with France and Egypt as bifurcated lenses for examination of these issues.

3.1 The Administrative Contract: Classification, Definitions and Judicial Determination

This section identifies what an administrative contract is, and what it is not. What follows is a discussion of the identification and treatment of administrative contracts by the Saudi Board of Grievances. Finally, this section highlights some of the doctrinal and normative issues and challenges associated with the public law rules applied to administrative contracts in the context of a wider discussion of some the more unusual or problematic features of the Saudi legal system. This lays the groundwork for a discussion of the relationship between the public and private laws of Saudi Arabia: the particular administrative laws and codes which govern the unilateral authority of Saudi public authorities, and the general rules and principles applied to contracts under *Shariah*.

3.1.1 Types of Administrative Contracts

Public contracts typically include regulatory features or provisions that are not analogous to those contained with private contracts, including clauses related to penalties, inspection and supervision, the formulation of detailed governmental plans, and so on.¹⁷⁷ At the outset, it is important to visualize that an administrative contract is not a type of contract, necessarily, but rather a category by which types of administrative contracts are analysed. While this section serves to elucidate the features and the tensions of administrative contracts as a *category*, those features of the category will then have to be contextualized as *specific types* of contracts within the category defined as administrative contracts such as procurement contracts or concession contracts, for example.

¹⁷⁷ Saudi Chambers of Commerce (n 26)

Identifying the specific types of contracts that fall within the overall category of administrative contracts is a tedious and complicated process for the parties and the judicial authorities. Through years of adjudication and careful administrative and legislative regulations of the Council, certain types of administrative contracts have been created by function of law or used as part of the above classification process. The Procurement Law, alone, distinguished four of them. This section introduces two of the most commonly used types of contracts to “set the stage” for later analysis.

3.1.1.1 Concession Contract

The first contract type to be explored is the concession contract. A concession contract is an agreement between the government (or most often Ministry in KSA) and a private entity, in which the private entity assumes the exclusive right to construct, operate, maintain a public service or utility (such as supplying water, gas, electricity, or sanitation services) for a given number of years.¹⁷⁸ The private company assumes the risk in the endeavour, and is responsible for bringing equity and providing financing for the project, but is awarded with a monopoly over a particular service to the government.¹⁷⁹ Concession contracts create an environment where private capital and know-how can be mobilized to complement public resources enabling new investment in public infrastructure and services without increasing public debt.¹⁸⁰

KSA currently subcontracts its responsibilities for providing quality of life services to the public through concession contracts, including services for public utility, public works

¹⁷⁸ Shavarsh Toriguian, *Legal Aspects Of Oil Concessions In The Middle East*(Hamaskaine Press 1972) 21.

¹⁷⁹ Ali Yesilirmark, ‘Jurisdiction of International Center for Settlement of Investment Disputes over Turkish concession Contracts’ (1999) 14(2) Foreign Investment Law Journal 395

¹⁸⁰ Saeed Nabeel, ‘The Legal Nature Of The Oil Concession Agreement As An Administration Contract’ (Fifth Arab Petroleum Conference, Cairo, 16-23 March 1965) 2

concessions, and national resources concessions (such as mining operations).¹⁸¹ Not all concession contracts are governed by the Procurement Law¹⁸² or the Minerals Act, and are instead governed by the Council of Ministers.¹⁸³ As will be discussed, historic decisions such as ARAMCO involve concession contracts and are a significant factor in not only the authorities of administrative contracts but in their arbitrability.

For instance, through an executive act, the Council singled out oil concession contracts related to the exploitation of natural resources, such as petroleum and minerals, as an exclusive class of administrative contract in their own right.¹⁸⁴ Subject to the executive act, the Council is conferred exclusive authority to grant rights to contractors to perform and execute public projects related to the exploitation of natural resources.¹⁸⁵ Crucially, the executive act states that ‘no privilege is to be granted and no public resource is to be exploited without a law’.¹⁸⁶

The difficulty is that very rarely does a Saudi regulation, which are frequently drafted in open-ended and indeterminate terms, provide clear statutory mandate, failing to define the scope and boundaries of delegated power to public officials. Thus, the Board has few guidelines for policing the functions and legality of administrative actions, or to make positive determinations of *ultra vivre* acts, illegality or administrative liability (as the

¹⁸¹ Mining Investment Law Royal Decree No. M/47 20 Sha’ban 1425 / (4 October 2004); *See also*, Mineral Resources Executive Regulation 2004

¹⁸² Government Tenders and Procurement Law (n 112). 6

¹⁸³ Council of Ministers Resolution No. 58, dated 17/1/1383H (25 June 1963). For example, Article 3 of the Saudi Arabia Council of Ministers Resolution provides that

‘The law applicable to disputes to which the state is a party shall be determined in accordance with the established general principles of private international law, the most important of which is the principle of the application of the law pertaining to the place of execution. Government agencies may not choose any foreign law to govern their relationship with such individuals, companies, or private organizations’.

¹⁸⁴ Council of Ministers’ Act, Royal Decree no. A/13 dated 3/3/1414 (1993), Art. 31.

¹⁸⁵ A. Kritzer, *Contract Handbook Saudi Arabia* 304 (undated and unpublished manuscript available in the library of Patton, Boggs & Blow) 38. *See also*, Asherman (n 35) 325.

¹⁸⁶ Council of Ministers’ Act, (n184), Art. 31

basis on a general right of compensation). These issues will be returned to later in this chapter.

3.1.1.2 *Public Works*

The second of the two prolifically used contracts, “public works” contracts, are currently the most lucrative contracts within the KSA.¹⁸⁷ In these types of contracts the government contracts with private companies, or pseudo-private corporations, to build infrastructure.¹⁸⁸ It is within this industry that the KSA has spent billions, and despite the current tenuous economic state, continues to push forward with infrastructural projects. Because a majority of these contracts are executed by foreign contractors, a mingling of interests, public and private, national and international naturally occurs. It is here that the balancing of rights of parties is a catalyst for improved administrative law practices and a platform for reform.¹⁸⁹

The Council issues standard public works contracts under Art. 10 of the Procurement Law. Similar to other “public” related terminology, however, no regulation or code provides a definition of “public works”, but inference suggests that this occurs through the contractual practice, which includes projects for construction of buildings, roads, bridges and civil engineering work.¹⁹⁰

¹⁸⁷ Royal Decree No M14 dated 7/4/1397 AH (27 March 1977). Executive Regulations No 2131/17 dated 5/5/1397 AH (21 April 1977)

¹⁸⁸ A Al-Wehaiby, *The Organising Principles for Administrative Contracts and their Applications in Saudi Arabia* (1st ed., Riyadh, 2002)

¹⁸⁹ Soliman Al-Tammawi *General Basis of the Administrative Contracts: A Comparative Study*, (5th edn Dar Al-Fiker Al-Arabi,) 53

¹⁹⁰ Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 25

Despite KSA's initiatives to minimize the participation of foreign influence in its industries, these large infrastructure projects include requirements for mandatory solicitation of bids from international contractors and qualifications of unique expertise due to the high standard of execution necessary for these types of projects.¹⁹¹ This international requirement is indicative of the inevitable influence of foreign elements in KSA administrative law, and will continue to be a subject of study.

3.1.2 Classification of Administrative Contracts and Expectations for Rights of Parties

3.1.2.1 Inherent Inequality of the Parties to an Administrative Contract

There is an inherent tension between the expectations of private parties and public parties in an administrative contract setting. This tension is not unique to the KSA due to the requirement that states must enter into contracts with private parties, in order to protect the sovereignty and for the wise use of taxpayer monies. In the KSA, the validity, operation and arbitrability of these contracts are subject to the municipal law of the contracting state, in this case the administrative law of Saudi Arabia.

The general nature of administrative contracts creates a legal relationship where the public authority, as party to an administrative contract, acts as both a contractor and as a political institution. By virtue of its political status, duty to protect the sovereignty and protect taxpayer funds, a public entity issues to itself broad public powers to pursue

¹⁹¹ Government Tenders and Procurement Law (n112) Art. 3(b).

regulatory or policy objectives on behalf of the general public or good.¹⁹² Public authorities, as well as the Board, may modify or rescind administrative contracts.¹⁹³

This ability to modify the performance of the contract may be stipulated in the terms of the agreement, mandated under national legislation or brought about through direct intervention by state or administrative decision.¹⁹⁴ These powers are the inherent nature of administrative contracts and the ever-present tension in disputes. This, of course, is unlike a normal setting for contracts where the parties have more equal footing to negotiate terms of the contract. The very nature of the administrative contract, immediately creates a dynamic of “inequality” in negotiating terms or fulfilling the obligations contained within a contract.

In the KSA, any contract involving a public service concession, or to which the state or its representatives is a party, is subject to its legislative or judicial (re) classification as an “administrative contract”.¹⁹⁵ In order to effectuate the classification process, the Board of Grievances formulated general principles from its judicial interpretations of the relevant legislation, which are commonly used as objective “tests” in determining the administrative nature of any contracts. While the test itself is objective, the application without precedent and without expounding upon specific terms highlights that the Board’s administrative classification is subjective, non-technical nature.

¹⁹² Christopher F. Forsyth and William Wade, *Administrative Law* (9th ed., OUP 2004) 775

¹⁹³ Implementation of Purchasing Regulations (Implementing Regulations), (n233), Art. 25 and Art. 29

¹⁹⁴ Alhudaithy (n 94) 29

¹⁹⁵ Khaled Mohammed Al-Jumah, ‘Arab State Contract Disputes: Lessons from the Past’ (2002) 17(3) Arab Law Quarterly 215

3.1.2.2 Means of Determining the Character of Administrative Contracts

The KSA government can enter into private or public contracts. When entering into a private contract, the KSA is treated no differently than a private party. Private contracts aim for mutual material and interest of the parties. Public contracts differ in that the government is, presumably, pursuing benefits on behalf of the public, not of its own self-interest. The sheer importance of protecting the public interest is what makes the contract public. For instance, providing the public with water or sanitation services is more important than increasing the financial bottom-line profits of a private contractor. It is because of this nature that the private party to an administrative contract must intrinsically accept that it is on ‘unequal footing’ with a public party.¹⁹⁶ When a private party enters the realm of administrative contracts it is assumed that it is aware of this imbalanced nature, however the difficulty of the administrative relationship arises when the nature or classification of the contractual relationship is unknown until *after* a dispute arises or if it determined during the fulfilment of obligations of a contract that there are nuances of a commercial contract within the administrative contract. It is not necessarily that administrative contracts are inherently “unfair”, but rather that they become “unfair” to a private party when the nature of the contract is defined *ex post facto*.¹⁹⁷

Consider that private contracts tend to involve the sale of basic goods or property thereby falling within the *Shariah* court system. Whereas administrative contracts involve public interest and are subject to “special” rules causing them to be classified within a different

¹⁹⁶ Al-Tammawi Soliman, *General Basis of the Administrative Contracts: A Comparative Study*(5th ed., Dar Al-Fiker Al-Arabi 1991) 53

¹⁹⁷ Ibid.

jurisdiction, where review is handled by the Board of Grievances.¹⁹⁸ While either type of contract uses the same basic elements of offer and acceptance, consideration, and a legal objective to establish validity, the “special” nature of administrative contracts is often undefined, ambiguous and misleading.¹⁹⁹ This necessitates courts to do a factual analysis under accepted criteria to determine whether they are private or administrative, leaving the private party at the mercy of subjective review and determination of nature, and therefore the laws that may or may not support their position.²⁰⁰

An administrative contract is not, however solely defined by judicial determination. Administrative contracts can also be classified by function of law. The general nature of an administrative contract is one which includes an administrative entity as a party, is subject to adjudication by an administrative judicial authority, contains special or unusual provisions giving privileges to the administrative party, and whose purpose is to serve or benefit the public at-large. If a contract fails to include the final two aspects (it does not contain privilege provisions to the public party and does not serve the public at large), it is often deemed to be private. It is rather confusing because while private categorization usually places the parties in the jurisdiction of the *Shariah* courts, there are circumstances where private commercial contracts can be subject to the jurisdiction of the Board of Grievances. This creates even murkier waters for the private party.

Procurement contracts are often the subject of these murky evaluations. However, KSA Codes, Decrees, or Regulations do provide some clarity to the private party by specifying

¹⁹⁸ There are a few exceptions for first instance review by special committees under the Council as discussed earlier in this chapter.

¹⁹⁹ See Maren Hanson, ‘The Influence of French Law on the Legal Development of Saudi Arabia’, (1987) 2(3) Arab L. Q., 283-285

²⁰⁰ Ibid.

certain conditions that should equate to a contract being classified as administrative. This can include types of procurement contracts, contracts related to specific subjects or ministries, or contracts involving certain parties. Silence or omission of any of these conditions by the law triggers a judicial determination as to the nature and characteristics of the contract as administrative or non-administrative.

3.1.2.3 *Function of Law*

An administrative contract by function of law happens in any of the following three instances: 1) it is one that is specifically defined by an actual law (regulation), 2) it is defined by the final objective or scope of an infrastructure (or procurement related) project, or 3) it has granted contractual powers to a public administration or compulsory powers of review to the administrative judicial authorities. Any and all cases involving an administrative authority, transactions, liabilities, or privileges agreed upon or undertaken to ensure the progress of a public interest, such as public works, sales of immovable property, use of public buildings, or conflicts in municipality fees would all be classified as administrative.²⁰¹

The mere participation of a public party is insufficient to meet the function of law standard. There must be an element of public interest or need in the contract and related responsibilities and it cannot be a ministry specific or daily operational need. For instance, lease agreements for a fleet of ministry vehicles or contracts with independent legal consultants are not administrative contracts because there is not a broader public

²⁰¹ Gholamreza Arbabi and Reza Fanazad, 'Survey of Constraints and Barriers of Administrative Contracts in Public Law' (2014) Journal of Novel Applied Sciences 1367, 1370 < <http://jnasci.org/wp-content/uploads/2014/12/1367-1370.pdf> > accessed 12 March 2017

benefit; these contracts are for the functional health of the ministry. The same logic applies to contracts for office supplies or machinery, regardless of whether they go through a type of procurement process.²⁰² A contract to purchase reams of papers, computers, or red staplers is not considered administrative, but private between the public entity and the private distributor or supplier.

Where the confusion sets in is that even though contracts with ‘specific or daily operational needs’ aspects are classified as private, they still fall within the jurisdiction of the Board of Grievances, which has adjudicative authority over any contract, whether commercial or administrative, that includes a public entity as a party. The ‘specific or daily operational needs’ aspects can therefore become one element that would go into a judicial determination of the nature of a contract, but would not necessarily be the sole determining factor.²⁰³

Private parties can typically rely on a generally accepted premise that the following types of procurement or purchasing contracts are classified as administrative, by either the Procurement Law or Article 6 the Purchasing Law, which specifically mandates that all government works and procurements apply to the administrative rules including, but not limited to: concession contracts, public works contracts, public supply contracts, public transportation contracts, public loan contracts, as well as maintenance and operation contracts.²⁰⁴ This may provide parties with some degree of certainty and confidence, though as will be discussed and analysed further in this thesis, the dividing line between

²⁰² B. Badran, *Nzhaht alkhatr ala'atr shrh ktab roudhah alnathr wjnah almnathra* (1st ed, Dar Al Koutb Al Elmiah 2009) - <http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/42256/24715>> accessed 24 March 2017

²⁰³ Ibid.

²⁰⁴ Governmental Tenders and Procurement Law (n 112) Art 47, Section 3.2.1

commercial and public agreement is not clear-cut. The competent authorities in Saudi Arabia have historically favoured a more expansive definition of the class of agreements or state acts which are treated as “administrative” rather than commercial, thereby barring state actions from arbitral or judicial determination of state liability.

3.1.2.4 Judicial Determination

Judicial determination in administrative contracts is by either the Board of Grievances, or a quasi-judicial body within the Council of Ministers. The Board of Grievances also often serves as the appellate body for the Council of Ministers. Correlating to public entities in an administrative contract, the Board has the sovereign, independent, and unilateral authority to modify, classify (or re-classify), rescind, or terminate an administrative contract as well as to issue sanctions and penalties against either party. A majority of the cases brought before the Board are by an aggrieved contractor (private party) against a public entity and the jurist is most commonly considering the lawful or unlawful nature of the actions of the public entity in the scope of the contract.

In recent years, the Board has classified an increasing number of contracts as administrative in direct correlation to the explosive infrastructure and industrial growth of KSA. The subject matter of these contracts tends to be a public agency that has contracted with a private party to meet a public need. They also tend to involve some modicum of government funds or subsidies being integrated into the contract or as part of the operational budget of the initiating entity. Case illustrations include decisions in which all other aspects of a party appear to be private and independent from public agency, but who participate in the government tender and procurement process as well as

receive some form of government financial assistance; for example, the King Faisal Specialist Hospital (KFSH), Electricity Companies, and Saudi Arabian Airlines (Saudi).²⁰⁵ These contracts with external parties are classified as administrative because the entities subject themselves to the Government Tenders and Procurement Law when entering into these contracts. All three of them also receive some sort of funding or subsidies from the government.

The basis of the Government's administrative classification for these types of entities is couched in its obligation to protect public funds. Again, even these examples personify the difficulties in classification and the blurring of lines between administrative and commercial matters, thus the thematic dilemma of administrative contracts; and the immense challenge the Board faces in its deliberations for classification.

3.1.3 Elements and Classification of Administrative Contracts

The Board, and the Council in its administrative and quasi-judicial capacities, have developed identifying markers and tests to assist in their identification, classification, and adjudication of disputes within these contracts. Any analysis of the treatment of public contracts begins with the understanding that an administrative contract is a contract between a public party and a private party for the benefit of society. The public party is not contracting for itself, but is in essence a broker for the interests of the public whom which it serves, and from whose pinnacle authority is the reason both parties even have the opportunity to contract. This requires the public party, as the broker, to have

²⁰⁵ Royal Decree No. 5, dated June 25, 1382 AH (1962), Art. 6/1; *See also*, Royal Decree No. 43/M, dated August 22, 1396 AH (1976); Royal Decree No. 45 dated February 19, 1963

precedence in formation, oversight, and execution of the contract.²⁰⁶ This is an imbalance of rights that is non-negotiable, must be accepted by the private contractor, and is an emblematic feature of judicial determination of administrative contracts.

On this issue, the Board of Grievances has said:

Public contracts are distinguished from private contracts in that, because of their importance (for example, the need for the public services which the public contract aims to provide), the public benefit is favoured over that of the private individual. The two contracting parties in a private contract aim to realise material and private interest. It is different in a public contract, since the government does not pursue its own private interest but contracts for the public benefit. These contracts are concerned with public services, which must operate efficiently and on time.²⁰⁷

Specifically, in establishing an administrative contract by judicial determination, the threshold analysis involves three legal prongs or criteria and is the overarching framework for determining if a contract is “administrative” based on its elements and nature.²⁰⁸ This can often be a laborious analysis because administrative contracts may have hybrid or ambiguous character, having features, which are identified with private or commercial document or agreement. The Board has developed the specific criteria based

²⁰⁶ Case no. 460/ K dated 1396 AH (1976)

²⁰⁷ Ibid.

²⁰⁸ AI-Wehaiby (n188)

on repetition of factual scenarios, considerations of existing law, and their own inherent discretion.²⁰⁹ A jurist shall examine the following, whether:

- One of the parties to the contract is a public (*administrative*) authority.
- The objective or *ratione materiae* of the contract is the achievement of a public good or benefit.
- The contract contains provisions that are not typically found in private contracts (*unusual or special*).²¹⁰

3.1.3.1 Public (Administrative) Authority Criterion

The Board's assessment of whether a public authority is party of the case is typically swift if a ministry, municipality, or prominent administrative agency is a named party. The Basic Law assists in this identification through its references to the three branches of government; the executive, financial and administrative authorities bestowed upon the Council; and its recognition of two types of public authority: corporate bodies and those which receive state funding²¹¹ e.g. public corporations like ARAMCO or public bodies like the Ministry of Finance. Institutions such as universities, the General Presidency for Girls' Education and the Grain Silos and Flour Mills Organisation are all public corporations who receive state funding, and were created by laws and regulations like

²⁰⁹ S. Haikal, *Saudi Administrative Law* (King Saud University Press 1995) 77

²⁰⁹ Al-Fayad Abraham, *Administrative Contract: The Public Theory And Its Application In The Kuwaiti And Comparative Law* (Al-Fallah Press 1981), 9

²¹⁰ Saudi Arabia's Consultant Department has said on this question: A public contract differs in nature from a private contract. It is entered into between a public legal person, and a private contractor.....The legal rights of both contractors are not equal because the public benefit causes the public party to have precedence. The private contractor must know and accept these privileges before signing the contract. See Consultation no. 637, dated 23/10/1956

²¹¹ Basic Law of Governance (Basic Law), Royal Decree No. A/90, dated (1 March 1992) Arts. 44, 46, 37, and 56

those which establish ministries, but have their own corporate laws instead of being regulated by Acts of the Council. They stand as examples of public authorities.²¹²

In contrast, if such an entity or agency is not involved, the Board applies “sub-tests” to determine what types of parties are involved, asking: ‘(1) is the agency established as any other governmental agency? (2) Do the purposes for the establishment of the agency fall within the traditional functions of the state? And (3) Are the employees of that particular agency considered to be public employees?’²¹³

From this rule, it is often summarized that if an entity has authority to act like an administrative party and is in some manner funded by the state, then they are most likely given the designation as such by the Board. For example, the Board considered a case involving the Saudi Red Crescent Agency where it found the Agency to have public authority because of its creation by Royal Decree; and because similar to a Ministry, its operating laws and procedures were also approved by Royal Decree.²¹⁴ Other contrasting comparisons with this sub-test can be made using three almost entirely private entities previously mentioned; the King Faisal Specialist Hospital (KFSH), the Electric Companies and Saudi Arabian Airlines (Saudia)²¹⁵ whose labour relationship is subject to

²¹² Ayoub M. Al-Jarbou, ‘Administrative Contracts under Saudi Arabian Law’ (2011) 41(1) Public Contract Law Journal 78

²¹³ Ibid.

²¹⁴ Ibid 77

²¹⁵ Royal Decree No. 45 dated (19 February, 1963). Saudia is a commercial airline, formed via Royal Decree No. 45, but is considered to be autonomous and private with its own Board of Directors and Corporate Laws. It does, however, receive some government funding and its Board of Directors is chaired by the Ministers of Defence and Aviation. Its employees are subject to private Labour Laws.

private law but other parts of their operations are subject to public purpose, the Public Procurement Law²¹⁶ or serving a public interest.²¹⁷

Each of these can be applied to the sub-test as follows:

(1) How was the entity formed, including but not limited to, by resolution, regulation, governmental department, public/private consortium? (All, but the last, of these would indicate a public authority): All three are private, but were somehow formed by Royal Decree or through government financial endorsement.

(2) What general authority or decision-making powers were given as part of formation or authorization of entity? Where does its funding come from and was the entity tasked with a public project or government defined scope as part of its formation? All of them have their own company laws and Boards of Directors, but receive government funding of some sort. Additionally, all three of them subject their procurement activities and contracts to the Public Procurement Code.

(3) Are the employees given the same benefits, held to the same job standards or policies, as stipulated to in for example an employee handbook, and essentially interchangeable with government employees? All three entities manage their employees under the Labor Laws instead of the Civil Employee Law.

Each of these organizations have mainly characteristics of a private entity, but they are treated as public entities (or authority) and their contracts are classified as administrative,

²¹⁶ Case no. 13/T / 3/ K dated 1411 AH (1991), Case no. 21 /T/3/ K dated 1410 AH (1990), Case no. 14/ T /1/ K dated 1412 AH (1992)

²¹⁷ Royal Decree No. M/43, dated August 22, 1396 AH (1976)

because their contracts involve public interest, public funding, and are subjected to the procurement law.²¹⁸

Accordingly, this private-public distinction is one of the more difficult comparisons to make within an administrative contract. Even this sub-test can be convoluted in application due to the pervasiveness of joint ventures, public-private-partnerships (PPPs), public entities acting as private companies, “Saudisation” requirements that promote employment for Saudi nationals,²¹⁹ and parallels of municipal laws governing employees with the same legal rights as other government employees.²²⁰ This aspect is a bit more ambiguous when examining an otherwise public entity acting in a seemingly private, commercial manner.²²¹ In such instances of ambiguity, the Board often moves to the remaining two criteria in its considerations.

3.1.3.2 Public Interest Criterion

When ambiguity prevails from the above analysis, the Board will examine whether the purpose of a contract falls within the scope of a public interest, good, service, welfare or utility. While sources of KSA law, including the public procurement code, have failed to define terms such as “public interest” or “public service” an understanding of such definitions are based on a need identified in the public, which the government has a responsibility to discharge, to the full access and equal benefit of every person, and at a collective cost of the whole, through mechanisms such as taxes. Further, based on the

²¹⁸ Al-Jarbou (n 212) 78-80

²¹⁹ Amgad T. Husein (n 147)

²²⁰ Ibid.

²²¹ Ismail S. Nazer, ‘Shari’a Law and Its Commercial Application’ (1979) 2 Middle East Executive Reports 2; See also Al-Khunami Mohamad, ‘Arbitration Clause in the Petroleum Agreements’(Third Arab Petroleum Conference, Al-Escandaria, October 1961)3, 6

Board's pattern of decision-making under this prong, a working definition of this criterion would be: 'any activity that is formed, managed, and supervised by a public agency with the intention of satisfying public needs in the public interest.'²²² Common examples of public interest projects or contracts include public works: building roads or installing utility lines; health services: building hospitals and clinics; basic humanitarian needs: housing complexes and schools; and cultural benefits: building museums and performing arts centres.²²³

Often these involve carrying out a publicly mandated service to provide an infrastructure service. Entities engaging in these types of projects might be promoting commerce and infrastructure, but the purpose of the project is improving public welfare.²²⁴ In contrast, however, when the Board has found that a public authority engaged in a contract for its personal financial gain it is not considered to be in the public interest.²²⁵ The Board tends to accept a public interest where there is ownership by a public authority and benefits as well as access to society as a whole. This criterion is the least ambiguous of the three, but the third criterion is the Achilles heel that shifts a contract entirely to an administrative classification.

3.1.3.3 *Special or Unusual Provisions Criterion*

The Board may classify a contract as administrative if it contains special or unique clauses, not typically found in private or commercial contracts, i.e. "...it includes a clause or several clauses granting the administrative entity rights that are different in nature or

²²² Ibid., 81

²²³ Amgad T. Husein (n 147)

²²⁴ George Delaume , 'The State Contract and Transnational Arbitration' (1981) 75 Amer.J. Int'l. L 11

²²⁵ Board of Grievances Decision No. 13/D/1/2 in 1415 A.H. (2d Admin. Cir. 1995) (unpublished decision).

substance to those which would be accepted by a person of his own free will and accord within the frame of the civil or commercial laws...”²²⁶ [emphasis added]. As previously discussed, there are almost universally accepted provisions and practices to contract law, but administrative law, by its nature, veers from that standard and requires clauses which cause an imbalance of interest and parity within the contract, in favour of the public entity for the benefit of the public good. French jurists call this power the doctrine of necessity.²²⁷ These provisions allow agencies to be more effective and efficient in carrying out their missions.²²⁸

In civil or commercial contracts between two private parties, the public authority is given a certain autonomy, control, and power over the contract and the other party. Inherently, this means that contracting parties are consenting to be governed by a regulatory scheme including, for instance, clauses related to inspection and supervision, the formulation of detailed governmental plans, rescission, and so on.²²⁹ Moreover, the administrative agency has the unprecedented authority to pursue unilateral actions that would not be condoned in a civil or commercial contract, under typical international contractual practice, or in agreements between two private parties in Saudi Arabia.

A private party also has obligations that arise under an administrative contract that are not compulsory in private contracts, such as mandatory continued performance of the contract despite a “change in circumstance”, i.e., non-payment by the public party, what amounts to “frustration” or interruption of performance, or the existence of a dispute

²²⁶ Ibid., 81

²²⁷ S Al-Tamaui, *General Principles of Administrative Contracts* (5th ed. Dar Al-Feker Al-Arabi, 1991) 60, 27

²²⁸ Ibid., 82; See also, Al-Jarbou (n 212)

²²⁹ ‘Saudi Chambers of Commerce, The Finance Difficulties which Face Saudi Contractors’ (n 26)

being adjudicated by an administrative court. For instance, a public party has the administrative authority of control over the subject matter of the contract; the right to adapt the contract to any changing needs of public interest, regardless of whether this authority is expressly given in the contract; and the right to impose penalties on a contractor, including termination, without obtaining permission of the Board or any judicial body.²³⁰

In the KSA context, the Procurement Code provides examples of these vast privileges including empowering the government to “extend the contract deadline, terminate the contract before the due date, to perform the contract at the contractor’s expense if he defaults in his performance, and to bar the contractor from taking away tools, equipment and materials which are on the site and to use them to complete the work.”²³¹

Statutory law and the Board’s jurisprudence does however, set minor limitations and parameters to this authority of adaptation.²³² These include limiting the percentage of change in scope of the project; limiting changes to the percentage of cost or payment to performance ratios; and prohibiting modification or termination after completion of the contract.²³³ The restrictions on the public party’s ability to modify a contract price without the consent of the private party, is a *Shariah* principle in the right of a person to be paid per the terms of an agreement and under the doctrine of fairness and good faith between the parties.

²³⁰ Ibid.

²³¹ Procurement Law, Royal Decree No. M/14, dated April 7, 1397 AH (1977) Art. 9, See also Implementation of Purchasing Regulations, Ministerial Decision No. 17/2131, dated May 5, 1397 AH (1979) Art. 25

²³² Badran (n 202); See also Ayoub, M. Al-Jarbou, ‘Administrative Contracts under Saudi Arabian Law’ ABA Public Contract Law Journal (2011) 84, See also Amgad T. Husein “Construction and Projects in Saudi Arabia: Practical Law: Construction and Projects Multi-Jurisdictional Guide 2013/14, section 29.

²³³ Husein (n 147)

The Board has recognized these “extraordinary powers” to be:

Administrative in nature but technically contractual: If the [agency] relies on contractual relationships to take certain actions such as modifying the contractor’s obligation, imposing penalties, suspending the contractor’s operations, or any other actions that the administrative contract empowers the contracting [agency] with, such actions taken by the contracting [agency] within the contractual relationship are not considered administrative decisions; rather, they are considered part of the contractual relationship.²³⁴

In other words, the public party was taking action of a nature that it was explicitly authorized to do in the contract, e.g. public works contracts that are formulaic in their inclusion of the unilateral powers of the public party. Therefore, the Board evaluates the actions taken in both a traditional, contractual content sense as well as an administrative light, using notions of Shariah contract law principles and terms such as financial equilibrium, terms and conditions, or fairness to the parties.²³⁵

3.1.3.4 Summary

The power of the administrative authority to unilaterally modify the contract to ‘adapt to the changing needs of the public welfare even when the contract does not expressly give it that right,’ is a springboard consideration in the nature and function of administrative contracts.²³⁶ It gives credence to how classification, or (re) classification of parties and contracts as well as the exploitation of administrative authority, by either the public entity

²³⁴ Ibid.

²³⁵ Al-Saleh, ‘Decisions on Capital Structure in a Zakat Environment with Prohibition of Riba: The Case of Saudi Arabia’ (2009) 10 The Journal of Risk Finance 460-476

²³⁶ Ibid., 84; See also, Al-Jarbou (n 212); Badran (n 202)

or the Board, manifests real consequences and concerns regarding what actual rights the parties may or may not have within the parameters of each contract.

For instance, any protests to the unilateral nature of the modifications, by the private party (even if it was not understood by either party during formation of the contract that the public entity was in-fact an administrative authority, but was “re-classified” as such by the Board of Grievances) is not taken into consideration. Further it becomes evident that maintained mutuality is not a pre-requisite to these actions under an administrative contract, thereby limiting assumed defences by a private party. The feigned adequate substitute and consolation is that a private party may still make a specific grievance claim in relation to its limited rights under an administrative contract. Therefore, the existence, or not, of doctrines like “rule of law” or “separation of powers” or “change in circumstances” become necessary considerations.

These are classic issues of administrative law. The litany of potential concerns includes an undue burden on the private entity to meet undefined or shifting deliverables and deadlines; the risk of a private party entering an agreement only to “discover” after-the-fact that the other party is a public authority, thereby altering the nature and terms of the contract altogether; and a private party being left without compensation or recourse despite partial or full performance under perceived contractual obligations. These risks and concerns pertaining to unilateral actions are often exacerbated or alleviated through statutory and common provisions, or jurisprudence, which govern contractual issues under Saudi Law.

3.1.4 The Applicability of Contract Law Defences and Principles to Administrative Contracts

The vast majority of the risks and exposure in administrative contracts intentionally, by design, falls to the private or non-administrative entity. The private party has only a few rights under an administrative contract, namely a right to compensation and financial equilibrium; a right for extenuating circumstances to be considered in evaluation of performance and compensation; and the right to bring grievances before the Board.²³⁷

Thus in comparing the explicit rights for each party below, this section demonstrates the truly lopsided nature of administrative contracts and the magnitude of the power vested in the public entity.

3.1.4.1 Cancellation or Termination

Cancellation of a project is judged based on the performance, behaviour, or even attributes of the private party or foreign entity, not the public party. Certain actions or circumstances permit cancellation and consequences of such cancellation may be assessed due to the alleged fault or non-fault of the contractor or private party.²³⁸ These rules may be established in various Saudi Arabian statutes, but they have equal application to commercial or administrative contracts.

²³⁷ Abdulla Khalid Medallah. 'A Review of Projects and Construction Law Practice in Saudi Arabia.' (2015) 8 Journal of Politics and Law 100

²³⁸ This assessment of fault or non-fault in categorization for purposes of this study does not take into consideration any potential contributing actions of public authority, e.g. the public figure accepting or soliciting a bribe, had knowledge of the potential insolvency of the private entity, caused the insolvency through lack of payment, etc.

If a contract is cancelled due to “fault” the contractor may not have right to compensation and is subject to additional penalties. Bribery with a public authority, for instance, would be subject to immediate termination of the administrative contract, resulting damages, as well as potential criminal charges and civil liabilities.²³⁹ Article 53(d) of the Saudi Arabia Procurement Law stipulates that bankruptcy or insolvency of the private party is grounds for immediate rescinding of an administrative contract.²⁴⁰ Assignment of execution of the contract, or subcontract, by the contractor to a subcontractor, without the prior, written permission of the government entity is also valid grounds for termination.

Fact-specific scenarios in other cases, such as death of the party assigned performance under the contract or failure to perform, dictate whether a contract can be cancelled. In the circumstance of death, the public entity can assess whether the contractual award and performance was dependant on the personal qualifications of the deceased or whether the contract can be re-assigned to the heir or successor to the contractor’s role and obligation. Failure to perform is another example. If the contractor is at fault, they have fifteen days to resume performance or the contract shall be cancelled and penalties imposed.²⁴¹ However, if the facts are more convoluted as to why performance is or has not occurred, there may be leniency in cancellation, for example force majeure is only accepted in situations of absolute impossibility, events beyond a party’s control, not unduly burdensome scenarios.²⁴²

²³⁹ The Combating Bribery Law (CBL) Article, 27. Royal Decree No. M/36, dated 29/12/1412 A.H. corresponding to 30 June 1992

²⁴⁰ Procedural Rules before The Board Of Grievances (n 53) Section 28.

²⁴¹ Abdulla Khalid Medallah. ‘A Review of Projects and Construction Law Practice in Saudi Arabia.’ (2015) 8 Journal of Politics and Law 100

²⁴² Ibid.

The public authority or government agency has the right to terminate a contract for public interest, but this is considered to be cancellation, without fault of the contractor and the contractor retains their right to compensation.²⁴³

3.1.4.2 Sanctions or Penalties

A government entity has the full authority to sanction or penalize a contractor who fails to perform, improperly executes, untimely performs, or generally violates contractual terms and obligations. These may include financial penalties, boycotting the use of the contractor for future projects, termination, and issuing public sanctions in accordance with Shariah Law.²⁴⁴ In addition to its own punitive powers, the Board of Grievances may evaluate the appropriateness of the sanction on a case-by-case basis, but this subjective practice heightens the potential exposure and risk for any foreign partner or private party.

3.1.4.3 Delays in Performance and Mandatory Performance

Saudi law dictates that if a private party or foreign entity seeks juris clarification or grievance proceedings against a public entity, for any unilateral authority the public entity may exercise during the scope and duration of a contract, the private party or foreign entity must continue to perform its obligations under the contract unless or until such time as the Board determines otherwise. The Board of Grievances has that in an administrative contract, it is imperative to give priority to the public interests over private interest. Therefore, it is impermissible for the contractor 'to refuse to carry out his contractual obligations or the pleas of fault of the [agency]. Instead, he has to continue

²⁴³ Husein (n 147), 94

²⁴⁴ Marie Grace Seif, 'The Administrative Contract' (*Al Tamimi & Co.*, May 2011) Section III.2. <<http://www.tamimi.com/en/magazine/law-update/section-7/may-6/the-administrative-contract.html>> accessed on 11 March 2017

carrying out his contractual obligations, if he can, and after the completion of the contract, he can seek compensation for all damages and losses.²⁴⁵

This requirement is “unwaiveable” and is detrimental to a contractor who is obligated to perform regardless of whether they are burdened with “self-financing” a project until a dispute is settled, or continue on a performance path that may or may not be subject to drastic change depending on if the Board decides that a reformation of the scope of a project was within the public party’s authority.

3.1.4.4 Failure to Pay

A contractor’s only recourse in an administrative contract is through the Board of Grievances. In the absence of clear guidance under the KSA Purchasing and Procurement Laws, if a public party fails to pay the contractor in accordance to the agreed upon terms and price, (even to the point of rendering a contractor insolvent as a result of forcing the contractor to self-finance the project during a period of mandated continued performance) the contractor cannot obtain a “mechanics lien” for services performed, nor an injunction, nor obtain a bond.²⁴⁶ In fact, regardless of whether a contractor is properly paid upon partial or full performance; the public entity alters the payment terms or price during the course of the contract; or as a result of some other

²⁴⁵ Case no. 257/1 I K I dated 1405 AH (1985)

²⁴⁶ Subject to Article 10 and Article 50 of the Purchasing Law, the Council of Ministers issues standard contracts for public works. Council of Ministers' Decision no. 136, dated 13 I 6 I 1408 AH (1986). 43 Ibid., Art. 50 (b)

action or potential breach by either party, the contractor remains obligated to perform and seek payment only after-the-fact from the Board of Grievances.²⁴⁷

3.1.4.5 Limitations on Damages

Contractors are barred under Shariah law from collecting liquidated or anticipated damages. Under Shariah law, discussed below, the aforementioned interest (riba) and aleatory contracts (gharar) are considered to be self-interested in nature and against the good of the community or public, therefore it restricts damages to “actual” damages, with no projections of future or potential damages allowed in traditional calculations. It is irrelevant whether parties provide for liquidated damages under an administrative contract during formation, as the Board will prohibit them.

3.1.4.6 Sanctions and Public Shame

Consequences can be severe for private parties and foreign entities for any finding of breach, default, or wrongdoing under a contract. The Board, in addition to whatever fines or penalties may be assessed against the party, may require the contractor to pay for a published “exposure” of their actions in two local newspapers and boycott their ability to conduct business in Saudi Arabia for a period not to exceed five years.²⁴⁸ As for a public entity which breaches a contract, consequences can be similar but are also subject to the full force of Shariah law and principles, discussed below.

²⁴⁷ Section 16. Procedural Rules Before The Board Of Grievances, Council of Ministers Resolution No. 190, Dated 16 /11/1409H. See case Case no. I 56/1 I K I dated 1419 AH (1999)

²⁴⁸ Ibid, discussed in Abdulla Khalid Medallah. ‘A Review of Projects and Construction Law Practice in Saudi Arabia.’ (2015) 8 Journal of Politics and Law 100

These are not just statutory or theoretical scenarios for how unilateral authority may be exercised within an administrative contract, certain cases have exposed the exacerbated risks and the potential distortion associated with these contracts. For example, cases have cited instances of a contractor being forced to continue performance despite non-payment by the public party,²⁴⁹ or a public party rescinding a contract, replacing the contractor, and refusing to pay the original contractor because the contractor had attempted to stop performance based on the public authority's unilateral action to change the place of the contract.²⁵⁰ Another case involved the Ministry of Health prematurely rescinding a contract and giving a second contractor a promissory note stating he would be operating at the expense of the original contractor, until such time as the funds for the contract could be obtained from the Finance Ministry.²⁵¹ The Board, rightfully, rejected the case against the original contractor.²⁵² In this instance, the public party, not only wrongfully rescinded the original contract, but it violated procurement laws by giving the second contractor a promissory note, amounting to an unenforceable contract. An important observation that will be expanded upon later is that all of these actions were in drastic opposition to the contractual principles of *Shariah* law as well.

In order to fully understand the discrepancy of rights, obligations, and risks of the parties' under a Saudi law governed administrative contract, it is useful to return to one of the central pivots of this thesis: to what extent do Saudi public authorities i.e. the Council of Ministers and particular administrative agencies, have a duty to protect the rights and freedoms of private parties under accepted doctrines of public and private law, and more

²⁴⁹ Case no. 215/T/1, dated 1418 AH (1988)

²⁵⁰ Case no. 241/K, dated 1396 AH (1976)

²⁵¹ Case no. 142/K/1, dated 1415 AH (1985)

²⁵² Ibid.

importantly under the constitutional-like rules of Islamic *Shariah*. These issues will be unpacked and discussed in the below sections.

3.2 Conceptualising the Relationship Between Public and Private Law in the Administrative Contract: Conflict or Compatibility

As we have seen above, the relevant laws of Saudi Arabia are based on a fundamental private-public distinction. First there is the category of private contracts, subject to rules contained in Saudi Arabia's Civil and Commercial Code. Second there is the category of administrative contracts largely governed by the distinctive rules and (extra-legal) principles of public law. Finally, public law also defines the special privileges of the state sovereign, or the discretionary power vested in public authorities by virtue of the doctrine of delegated powers.

In connection with the third point, powers conferred upon a public authority under the Saudi legal system are not always traceable to a statutory warrant or executive "authorisation". Absent constitutional constraints or separated powers, Saudi authorities such as the Council of Ministers and other regulatory agencies exercise virtually unlimited discretionary power. This is best exemplified by *ad hoc* or unreasonable use of public policy defences to justify state acts, including unilateral undertakings of a contractual nature, and the retrospective recession or revocation of obligations or undertakings which bind them, irrespective of the fairness, predictability or legality of such actions. This has particular implications from a classic public and private law perspective.

The administrative law requirement of procedural fairness is closely connected with the regulatory ideal of legal certainty and, in private law, the good faith protection of the *substantive legitimate expectations* of a private individual who organizes their affairs based on the unilateral promises or representations of a public authority, even if these representations are not expressed in the form of binding agreement.²⁵³ If this argument holds true, the contractual bargain must be enforced, and not resiled from without good reason. This simple idea finds an obvious corollary in the private law concept of estoppel or justified reliance, but the question posed here is this: With the administrative contract, have we already crossed the conceptual barrier established between public and private law?

The legal concept of legitimate expectations is the doctrinal expression of an enduring political ideal or value: trust. Absent this trust, rule of law risks being replaced by rule by power or coercion. The protection of legitimate expectations has been championed in the rulings of courts across the globe by courts who have endorsed an increasingly substantive conception of the aforementioned doctrine.²⁵⁴ The legitimate expectations were upheld by the Hong Kong Court of Appeals, which affirmed that the doctrine ‘facilitates the task of governance in so far as the subjects bound by administrative decision and acts should feel able to put their faith in what their government says and does’.²⁵⁵ In connection with the above, the Indian supreme court went further to rule that ‘the existence of a legitimate expectation may even in the absence of a right of private

²⁵³ For a relevant discussion see Paul Craig, “Legitimate expectations: a conceptual analysis” (1992) 108 L.Q.R. 79, 94

²⁵⁴ See *R v. Inland Revenue Commissioners, ex p MFK Underwriting* [1990] 1 WLR 1545, at 1569H-1570A (Bingham LJ); *CCSU v. Minister of Civil Servants* [1985] AC 374 at 415C-G (Lord Roskill)

²⁵⁵ *Ng Siu Tung v Director of Immigration*, [2002] 1 HKLRD 561 at [349] admittedly dissenting.

law, justify its recognition in public law'.²⁵⁶ This concept has also been accorded recognition by the European Court of Justice.²⁵⁷

At root, the doctrine of legitimate expectations is fundamentally concerned with negating or constraining the abuse of administrative discretionary power. But while the value of trust in government as a whole presents no special doctrinal or theoretical difficulty at the more general level, even if the practical operation of this concept will be subject to the vagaries of politics, the same cannot be said at the level of a specific administrative act or decree. It is open to question, for instance, whether the doctrine of legitimate expectations can be simply expanded to cover the trust (justified reliance) that a private individual, in this case a private contractor, reposes in a public authority in the context of an administrative contract. After all, while non-administrative contracts focus on fairness, equality, and justice, administrative contracts allow for less “mutuality” in the contract obligations and materiality of terms because public entities are allowed unilateral modification, reformation, and cancellation authority in the name of public interest and sovereignty.²⁵⁸ Therefore, a breach of substantive legitimate expectations which is reflected in the agreed terms of contract, as governed by the ordinary rules of contract law, may still constitute an entirely lawful and *intra vires* act which binds both parties from the standpoint of public law. Substantive protection of the contractual expectation on which a party justifiably relies can therefore be denied, on the grounds of public interest, or on the basis of the “no fetter principle” in cases where the exercise of

²⁵⁶ *Official Liquidator v Dayanand* Civil Appeal NO.2985 OF 2007, Singhvi J, para 78.

²⁵⁷ *Deuka and others v Einfuhr- und Vorratsstelle* [1975] ECR 759, 777.[Reynolds]

²⁵⁸ Al-Tammawi Soliman, *General Basis Of The Administrative Contracts: A Comparative Study* (5th ed., Dar Al-Fiker Al-Arabi 1991) 53-58

discretionary unilateral authority falls within the scope of powers vested upon that body or official.

On this logic, courts cannot challenge the merits of unilateral decision on grounds of public policy which is a matter reserved for the government and its representatives. As the *Pemex* decision discussed in chapter 5 suggests, there are however procedural, if not substantive limits, on the exercise of unilateral authority, including those which in being retroactively applied infringe basic standards of procedural fairness so as to render unilateral undertaking voidable, while permitting discharge of the private party by the tribunal, from any obligation imposed on it through an improper or unfair exercise of public power.²⁵⁹

The above has bearing when considering the legality of administrative action under the Saudi framework of administrative law and associated mechanisms of judicial review. As such suggested in chapter 2, there may be no clear way of determining whether the administrative actions of KSA's executive organs, such as the Council of Ministers, or regulatory agencies falls within the bounds of legality, and is consequently binding on authorities or private parties. Such procedural irregularities are most likely to occur when subject matter of the act or decision is not explicitly regulated under statute or codified law. This limitation of the KSA administrative law system (and public law framework) has not been sufficiently accounted for the extant scholarship, leading to a widespread misconception around the role of *Shariah* in the sphere of public and private law.

²⁵⁹ *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción*, No. 13-4022 (2d Cir. Aug. 2, 2016)

It is commonly implied that the more problematic aspects of contract construction and adjudication in Saudi Arabia derive from the Islamic foundation of its constitution.²⁶⁰ However, this is to misunderstand the spirit and principles underlying Islamic law which require that a mutual or unilateral undertaking be upheld in good faith. Reflected in the case of *Saudi Arabia vs. Saudi Arabian- American Oil Company (ARAMCO)*, the Arbitration Tribunal noted that ‘Moslem law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil, commercial law’,²⁶¹ the inherent nature of the administrative contract that creates this dynamic of “inequality” seems, accordingly, contrary to requirements set forth in *Shariah* law.

If an administrative contract is still a contract, and as such underlying the most basic premise of administrative contracts are the tenets of contract construction, under what circumstances can a unilateral action be found to breach a legitimate contractual expectation? Pertinent to the above discussion, the next section considers the treatment of contracts under Islamic law or *Shariah*. It is, as suggested above, implied that Islamic law is founded on rules and traditions anomalous to the Western model of contract law and dispute resolution.

3.3 An Islamic Perspective on Contract Law and Theory

In common with other jurisdictions, Islamic *Shariah* mandates that every lawful contract must be observed. It is explicitly affirmed in the *Quran* that all Muslims have a religious

²⁶⁰ Gamal Moursi Badr, ‘Islamic Law: Its Relation to Other Legal Systems’ (1978) 26(2) American Journal of Comparative Law 187, 188-193

²⁶¹ *Saudi Arabia vs. Saudi Arabian- American Oil Company* [1963] 27 ILR 117 (Aramco)

duty to fulfil their contractual obligations in good faith and with firm determination.

Several passages of the holy text make explicit reference to these duties:

‘Oye who believe fulfil the contractual obligations’,²⁶²

‘And fulfil you covenant with me and as I fulfil my covenant with you’,²⁶³ and,

‘[T]hey keep their promises whenever they promise’.²⁶⁴

In Islamic legal literature, the word ‘contract’ is used in two ways.⁶ The first offers a more general definition. ‘Contract’ is the term given to every action, covenant, oath or promise undertaken with a specific intent and determination - *including unilateral undertakings*, both public and private, e.g. repayment of a debt, or the promise to hold funds in trust or fulfil an oath of marriage.²⁶⁵ In the *Quran*, the word “contract” is the more general term given to the duty to honour personal obligations.²⁶⁶ The term ‘contract’ is also used to denote a more specific meaning, in this case referring to an agreement resulting from a mutual undertaking based on consent. Most Islamic jurists have accepted, for instance, that a contract is concluded when corporeal goods or property are exchanged between two persons of sound mind and capacity.²⁶⁷ Notably, the Hanafi School has determined that a sale of contract is formed when a coveted item is exchanged for another, orally or by deed.

²⁶² The *Quran* 5:1

²⁶³ The *Quran* 2:40

²⁶⁴ The *Quran* 2:177 13 Saleh

²⁶⁵ The *Quran* 2:282. For a wider discussion, see Moghul & Ahmed, ‘Contractual forms in Islamic finance law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd v. Symphony Gems N.V. & Ors.: a first impression of Islamic finance’ (2003) 27 *Fordham International Law Journal* <<https://pdfs.semanticscholar.org/4ec7/7b8b360570db6324f70c8a998df0faa4458c.pdf>> accessed 12 March 2017

²⁶⁶ Jamila Hussein, *Islam: Its Law and Society* (2nd ed., Australia, Federation Press 2004) 178.

²⁶⁷ Muhammad Tahir Mansoori, *Islamic law of Contracts and Business Transactions* (4th ed., Islamabad Shariah Academy 2008) 19

As with other common law jurisdictions, all individuals have freedom to contract under *Shariah* law. However, the degree of freedom of contract is governed by the prohibitions in the *Quran* and *Sunnah*, and as applied by scholars and independent jurists.²⁶⁸ *Shariah* law also does not distinguish between public contract and commercial law, instead expecting all persons to honour their word.²⁶⁹ The *Quran* prescribes believers ‘not to devour your assets among yourselves in vanity, except in trading by your consent.’²⁷⁰ Accordingly, these tenets are at the heart of the contractual relationship be it a normal or “non-administrative” contract which may nonetheless have public law type regularities or which otherwise implicate issues of public interest or welfare.

3.3.1 Contractual Restrictions under *Shariah*

The basic requirements, or “sale conditions”, for construction of a valid contract within *Shariah* law mirror those of standard contractual practice. *Shariah* requires mutual consent, capacity, agreed upon terms and conditions, agreed upon price or benefit, and *Shariah* based consideration. The actions and decisions by parties during formation and performance of a contract in Saudi Arabia encompass these more universally accepted tenets.

As stated, *Shariah* law does not distinguish between public contracts and commercial law, these tenets equally apply to all types of contracts, including those of sale, procurement, or services. Terms and conditions become a secondary-evaluative concern

²⁶⁸ Abdullah Khalid Medallah ‘A Review of Projects and Construction Law Practice in Saudi Arabia’ (2015) 8(1) Journal of Politics and Law 99, sec 3.4

²⁶⁹ Paul E. Pompeo, ‘East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems’ (1991) 14 Loy. LA Int'l & Comp. LJ 815; See also, Asherman (n 35) 322

²⁷⁰ *The Quran* 4:29

in determining the validity of a contract, specifically, a contract cannot lead to “*Muhrram*” (an issue forbidden under *Shariah* law).²⁷¹ Examples of “*Muhrram*”, forbidden issues include *riba* (“usury”)²⁷² and *gharar* (speculation, deception or excessive risk).²⁷³ Contracts that contain *facid* or *fayed* (immorally one-sided, non-equilibrium based, or obstructionist in nature) clauses are also grounds for finding a contract to be invalid, unlawful, or voidable.²⁷⁴ These provisions are thematically applied throughout every stage of administrative contracts from formation to performance to dispute resolution, including matters of arbitration and award.²⁷⁵ They also tend to be the most accepted and understood

practices of contract law within KSA.

3.3.2 *Shariah* and the Administrative Contract

As further analysis in this study will show, secondary sources in Saudi Arabia’s *Shariah* Law have adopted many of these tests, practices, and theories in determining the validity, lawfulness, void ability, and enforceability of contracts. On its face, the KSA has the operative procedures for defining a contract as administrative. So, while there might be a seemingly inherent *Shariah* law tension, there is nothing on the surface that makes Saudi administrative law any different than other states. Distinctions from general Islamic

²⁷¹ The Quran 4:29

²⁷² The Quran 2:275-280, 3:130, 4:161, and 30:39

²⁷³ The Quran 2:1888

²⁷⁴ Abdullah Khalid Medallah, “A Review of Projects and Construction Law Practice in Saudi Arabia” (2015) 8 J. Pol. & L.94

< <http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/42256/24715>> accessed 12 March 2017.

²⁷⁵ See Al-Fayad Abraham, *Administrative Contract: The Public Theory And Its Application In The Kuwaiti And Comparative Law* (Al-Fallah Press 1981) Chapter 1; Al-Tammawi Soliman, *General Basis Of The Administrative Contracts: A Comparative Study*, (5th ed., Dar Al-Fiker Al-Arabi 1991) 53

Shariah law administrative practices, and those of other countries, remain in extent of codification, terminology, and jurisprudence application.

The guiding principle of being faithful to your word and the idea of consent are core elements to contracts within *Shariah* law. Understood this way, there is no conflict, *ab initio*, between the doctrine of administrative freedom exercised in the public interest ('unfettered discretion') and the Islamic conception of, and normative commitment to, sanctity of contract. That is to say, a court enforcing a legitimate expectation created by an undertaking, by word or by deed, made by an official would not be violating the no-fetter principle²⁷⁶ since the court would merely be upholding the terms of the contract in good faith (which, arguably, falls within the scope of administrative court's powers), rather than substituting its own judgement for that of the law-maker by reviewing the merits of the public authority's decision i.e. what constitutes a legitimate breach in the public interest or equitable allocation of resources (which may attract criticisms on grounds of judicial overreach).²⁷⁷ In this sense, some equivalent to the private law concepts of promissory estoppel (enforcement of contractual obligations) or equity (compensation for losses suffered by the private party in the event of non-performance or non-satisfaction) in the treatment of public contracts would provide sufficient protection for the private party without going so far as treating all undertakings as binding, without consideration of the wider public interest.

²⁷⁶ See AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, MacMillan and Co 1939) 388

²⁷⁷ For a discussion see Paul Craig *Administrative Law* (6th ed, 2008), para 20-004. For an English discussion of this idea see *R v. Secretary of State for Transport, ex parte Richmond upon Thames LBC* [1994] 1 W.L.R. 74, 93

These become controversial themes when applied to administrative contracts, which may waive issues of being consistent or faithful to one's word and in foregoing consent when retroactive actions or reclassification occurs within the contract, or by an administrative authority.²⁷⁸ As will be argued throughout this thesis, the concept of consent seems to be vague and diminished in contractual practice, despite the seemingly clear language of *Shariah* law.

These issues will be discussed in the next section, focusing on a comparative analysis of strict and flexible theories of contract interpretation. This will provide a basis on which to analyse Islamic and civil law perspectives on the balance that should be struck between the principle of sanctity of contract, and the countervailing doctrine of 'changed circumstances'. This higher level analysis will then be used to assess more practical questions around the extent to which the performance of an administrative contract can be unilaterally modified and the rights and obligations of both parties in such circumstances in different legal systems. This will allow for a comparison of Islamic principles of contract law and their application to administrative contracts in general *vis-a-vis* the rights of contractors under the prevailing framework governing administrative contracts under Saudi codified and common law.

3.3.3 The Application of Contract Principles to Unilateral Authority: *Lessons from other civil law systems*

Contract law is the core set of rules and principles regulating the formation, validity and operation of commercial and trade related exchange relationships, and the obligations

²⁷⁸ Asherman (n 35) 325

arising from these legal forms. The principles governing contract law lies in private law theory and its *raison d'être* – the sanctity of contract – in legal systems everywhere, Islamic and Western alike.²⁷⁹ On the other hand, it is worth noting that the doctrine of change of circumstances has long been recognised as a customary principle of international law and as a principle of contract law, which is recognised by civil law systems such as Egypt and France.²⁸⁰ ‘A contract is said to be frustrated when a supervening event occurs which so fundamentally affects the performance of the contract that in the eyes of the law the contract comes to an end and both parties are discharged from any duty to perform.’²⁸¹ The next section examines the relationship between the legitimate exercise of unilateral authority and the contractual defences such as the doctrine of *rebus sic stantibus*/change of circumstance.

3.3.3.1 *The Customary Law Status of the Doctrine of Changed Circumstances under International Law*

Remarkably, the principle of “changed circumstances” or *rebus sic stantibus* may apply under international law even if a “change of circumstances” clause is not included in the agreement in dispute itself.²⁸² Indeed, the *rebus sic stantibus* doctrine has been elevated to a general principle of international law, as embodied by Article 62 of the Vienna Convention on the Law of Treaties of 1969.²⁸³ The principle, however, has been narrowly

²⁷⁹ Ernest J. Weinrib, *The Idea Of Private Law* (Oxford University Press 2012); Arthur Ripstein, *Equality, Responsibility, And The Law* (Cambridge University Press 2001); Roy Kreitner, *Calculating Promises. The Emergence of Modern American Contract Doctrine* (Stanford University Press 2007)

²⁸⁰ Amin (n 28)

²⁸² Abba Kolo & Thomas W. Walde, ‘Renegotiation and Contract Adaptation in International Investment Projects’ (2000) 1 J. World Inv. & Trade 5, 7

²⁸³ Art. 62 *Reprinted in* 37 I.L.M. 162 (1998); Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ 92 (Sept. 25)

construed by the supranational courts. In rendering its judgment in *Gabcikovo-Nagymaros Project* case, the ICJ formulated the following test: ‘a fundamental change of circumstances must have been unforeseen’²⁸⁴ with the Court adding that the plea of a ‘fundamental change of circumstances be applied only in exceptional circumstances.’²⁸⁵ It is worth keeping in mind that while this provision provides a disadvantaged party with grounds to request renegotiation or withdrawal from an agreement, international law is largely concerned with a particular kind of agreement: those concluded in treaties by way of state consent.²⁸⁶ However, there is some ambiguity over whether this principle might also apply, in certain limited and exceptional circumstances, to agreements concluded between a state or state entity and a private party. On this point the International Court of Justice (ICJ) has said:

Article 62 is a strong argument for the existence of a general legal principle (of changed circumstances) which might also be relevant to transnational contract with or between private parties.²⁸⁷

Yet, even if a general principle exists, the legal effects or application of such a principle remains uncertain and highly contested. For instance, does the acceptance of such a principle impose a duty on States to renegotiate transnational agreements involving a private firm or entity? Developing Islamic countries are naturally suspicious of arguments which expand the scope of international rules which can be wielded against states and

²⁸⁴ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, (1973) I.C.J. 63, 36. See also ‘Free Zone of Upper Savoy and the District of Gex’, (1932) P.C.I.J. (ser. A/B) No. 46

²⁸⁵ *Ibid.*, 55, 104

²⁸⁶ This is of course subject to a procedure prescribed by art. 65; See also, György Haraszti, *Treaties and the Fundamental Change of Circumstances* (Leiden, the Netherlands: Martinus Nijhoff 1975).

²⁸⁷ ‘Declaratory Statement of Petroleum Policy in Member Countries’, Res. No. XVI. 90 of the Sixteenth OPEC Conference, *reprinted in* 7 I.L.M. 1183 (1968)

state agreements to protect the interests of large corporations, for instance where a change in circumstances has onerously effected the economic equilibrium of the original contract. Any attempt by an international court or tribunal to displace the concept of sanctity of contracts in favour of a duty of renegotiation or contractual adaption or compensation would, at the very least, dilute or diminish the exclusivity of state law and local customs in the resolution of contractual dispute, while undermining the jurisdictional priority of national courts.

In light of the above, the next section will consider the rules governing the doctrine of 'changed circumstances' under civil law systems. The section will also assess how national courts have policed the exercise of unilateral authority in respect of administrative contracts, particularly where contractual change has resulted in non-performance of the contract or otherwise resulted in some form of loss or hardship for a private party.

3.3.4 Civil Law Systems: A Comparative Analysis of Changed Circumstances in France

As Saudi Arabia most closely represents a civil law system, clear analogies can be drawn between the law governing contractual performance in KSA and other civil law jurisdictions such as French law. The principle of sanctity of contract is strictly upheld in the French model.

While French law recognises defences to contractual performance, these are strictly construed and are generally limited to cases of impossibility resulting from a judicial

determination of force majeure.²⁸⁸ The doctrine of force majeure is traditionally defined as the presence of an unforeseeable and irresistible event which renders a contract impossible.²⁸⁹ Even here, the defence can be overridden if there is a contractual clause to the contrary. Furthermore, the burden of proof lies on the party seeking relief to demonstrate not only that the contract was rendered impossible, but also that the occurrence of unforeseen event was not the fault of either party.²⁹⁰ Crucially, evidence of a change in circumstance does not provide adequate grounds for relief from contract performance. However, the strict adherence to the principle of sanctity of contract is, importantly, tempered by other provisions of the French Civil Code²⁹¹ aimed to protect the rights of private parties, namely the requirements of good faith²⁹² and equity.²⁹³

Public bodies or governments are not immune to these requirements of good faith and equity and must respect these principles in connection with the performance of administrative contract. Most of the nominate forms of public contract i.e. public works, public concessions and procurement contracts implement EU directives Public Procurement directive (Nr 2004-17/CE and 2004/18/CE) which while not directly effective are nonetheless subject to review by the Court of Justice of the European Union. The directives have since then been implemented in France in the French Public Procurement Code (CMP or Code des Marchés Publics) and under the French ordinance Nr 2005-649 (dated 06/06/2005) which together, define and delimit the powers of the

²⁸⁸ David R. Rivkin, 'Lex Mercatoria and Force Majeure' in Gaillard (ed) *Transnational Rules in International Commercial Arbitration* (ICC Paris 1991) 161

²⁸⁹ A. H. Puelinckx, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative Study in English, French, German and Japanese Law', (1986) 3(2) *J. Int'l Arb.* 47

²⁹⁰ *Ibid.* 178, See also J.-L. Delvolve, 'The French Law of "Imprévision" in International Contracts' (1981) *Law & Finance Review* 3, 4

²⁹¹ Puelinckx (n 289)

²⁹² Art. 1134

²⁹³ Art. 1135

relevant public authorities who can enter into contracts relating to regulated utilities sectors.

In the above regard, the French Conseil d'Etat has over a series of judicial decisions developed the French doctrine of "*imprévision*" as applied to contracts entered into with a state or administrative authority.²⁹⁴ In this regard it is worth noting that the regulation of administrative contracts is fairly well defined, following the implementation of the Public procurement EU directives (Nr 2004-17/CE and 2004/18/CE) in France.

The effect of this doctrine is to enable the competent French courts to modify or adapt the terms of contract following the occurrence of an unforeseen circumstance, should its continued performance unfairly or inequitably impact the economic equilibrium of the contract. It should be noted however that the courts have set a high threshold for a successful determination and application of the principle of *imprévision*. Non-performing parties must demonstrate that the potential losses suffered by the changed circumstances are significant.²⁹⁵

Thus, under French law, a contract can be terminated and/or the contractual obligations owed by one of both parties discharged only when the loss bearing party can demonstrate that the change in the economic equilibrium is both irremediable and final.²⁹⁶ It is worth

²⁹⁴ *Gas Bordeaux* case, Conseil d'Etat, (March 30, 1961), S. 1916.3.17; See also, Puelinck (n 289)

²⁹⁵ The arbitral tribunal in *Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic* observed that "This doctrine empowers the Courts to revise those provisions of a contract as might become excessive and exorbitant due to the advent of extraordinary circumstances," 20 I.L.M. 1, 73 (1978) 4 Y.B. COM. ARB. 177 (1979)

²⁹⁶ The court has a duty to take steps in order to help towards the survival of the contract and, in particular, to suggest to the parties an agreement on new bases and it may decide in favour of termination only if the attempt to reach agreement has failed. See A.F.M. Maniruzzaman, 'State Contracts with Aliens: The

bearing in mind that the French doctrine of *imprévision* bears relevance to the subject of this thesis, in so far as these defences specifically apply to contracts entered into with states and/or state enterprises.²⁹⁷ Furthermore, as will be discussed below, the general concept of frustration and impossibility has been influential in the development of the similar provisions in the Civil Codes of many Islamic and Arab countries.

3.3.4.1 *Islamic Law Systems: A Comparative Analysis of Changed Circumstances in Egypt*

The Egyptian Civil Code, similar to the French Code, recognises certain contractual defences to non-performance in changed circumstances. Under the Egyptian system, a defence of changed circumstances will only be upheld and applied if the event in question is unforeseeable, and where a direct causal link can be established between the changed circumstances and the impossibility or contractual performance.²⁹⁸ Furthermore, the non-performing or debtor party must demonstrate that continued performance of the contract as originally contemplated would threaten the party with exorbitant losses.²⁹⁹ Once satisfied that all of these tests have been met, the competent Egyptian court is vested with powers to adapt or modify contractual obligations. However, the court has a duty to ensure that any modification or adaptation is reasonable, proportionate (to potential hardship suffered) and takes sufficient account of the rights and interests of both parties. Moreover, while the court can adapt the terms of the contract, under Egyptian law the contract cannot be discharged or terminated. That is to say, the Egyptian courts do not

Question of Unilateral Change by the State in Contemporary International Law' (1992) 9(4) J. Int'l Arb.141, 172

²⁹⁷ Ibid.

²⁹⁸ Egyptian Civil Code of 1949, Art. 147, as translated in M. Davies, *Business Law in Egypt* (Kluwer Law and Taxation Publications 1984)

²⁹⁹ Egyptian Civil Code of 1949, Art. 147(2)

have competence to fully discharge the parties of their duties under contract or require both parties to dissolve the contractual bond entirely.³⁰⁰

However, Articles 668–673 of the Egyptian Civil Code (known as the “Code”) explicitly provides that public contracts concluded with governmental authorities or state entities should be afforded special or differential treatment from ordinary contracts governed by the ordinary law of contract (governed under the Egyptian Commercial Code). Similar to KSA, this seemingly gives the state the power to unilaterally intervene in the performance of a contract in pursuit of public interest considerations and to do so by imposing general regulations of an extra-contractual nature (i.e. the exercise of Royal power or through retrospective acts or decisions which amend the terms of the contract through non-statutory executive decisions).³⁰¹

While, the Code implies that a contract can *only* be terminated or renegotiated on the government’s request,³⁰² in other respects, it provides greater scope for flexibility in the construction of administrative contracts; including provisions that allow for the adaption and renegotiation of a contract which imposes an undue hardship or burden on one or both parties.³⁰³

As with France, the Egyptian administrative system is embedded from within a developed from a more developed system of codified law. As such, the laws governing

³⁰⁰ Alqanun Almadani, *Majmuât Alamal Althdiriya (The Civil Code: Collection of the travaux préparatoires)* (1949) 278–84

³⁰¹ T. F. Riad, ‘The Applicable Law Governing Transnational Development Agreements’ (unpublished SJD Dissertation, Harvard Law School, 1985) 35

³⁰² Alsanhourî (n 29); See also Amin (n 28)

³⁰³ These issues were discussed in a study prepared by the Permanent Committee for Research and Iftaa’ [Giving Islamic Verdicts]. This study was conducted pursuant to the decision of Lajnat Kibar Al-Olamaa’ [The Body of Most Knowledgeable Islamic Scholars], i.e., the highest Islamic authority in Saudi Arabia, in the seventh circulation (1981) 72

the treatment of administrative contracts, including the unilateral authority of the administration to modify such contracts, benefits from greater degree of clarity and specificity than is the case under the Saudi legal system (largely because of the Egyptian government's comprehensive attempt to codify rules governing the identification and treatment of administrative contracts).

However, a criticism that can be posed to the French, Egyptian and Saudi legal system is the failure to define both the scope of regulation and scope of review, which governs the relationship between the administration and the private contractor or concessionaire. For instance, while the Egyptian Civil Code does delineate the relevant duties and responsibilities of a public utility concessionaire to its consumers,³⁰⁴ it remains silent on the question of the rights and duties owed by a public authority to a concessionaire.

The Egyptian Conseil d'Etat has stepped in to fill the legal vacuum and close the legislative "gap". The court has held that the unilateral public power exercised by the state is not restricted to the nominate forms of public contract (e.g. public service concessions, public works, and public procurement contracts) explicitly and prospectively identified and regulated under the statutory Code.³⁰⁵ This wider discretion therefore, allows the Conseil to subjectively define not only what unilateral authority may be, but in whether a change of circumstances effects an administrative contract, legitimate expectations of the parties, or even the arbitrability of such contracts.

³⁰⁴ The relevant rules are embodied in arts. 668–673 of the Civil Code under the heading of Concessions of Public Utility. See also Art. 147(2) of the Egyptian Civil Code of 1949

³⁰⁴ Ibid

³⁰⁵ Pompeo (n 269)

This takes us to a crucial point in our comparative discussion. While France and Egypt provide rich comparisons, a closer examination of how Islamic *Shariah* law is unique in its approach to changed circumstances and concepts of unilateral authority is better applicable to KSA's system, which is more heavily reliant on *Shariah* law within its administrative law. Or more specifically, what does a judicial body take under consideration while exercising *ijihad* in its duties of review and determination under Islamic law.

3.3.4.2 *Islamic Law Systems: The Comparative Analysis of General Shariah Principles on Changed Circumstances to Contractual Authority*

As stated above, the Islamic legal tradition places great onus on the good faith performance of contracts and the related principle of *pacta sunt servanda*.⁸⁷ Further, *Shariah* law mandates that a person shall not take advantage of the misfortune of another, as such may be the case with a change of circumstances in relation to a contractual arrangement.³⁰⁶ However, commonly accepted interpretations of Islamic sources do allow for contractual defences to non-performance to account for an unforeseeable change in circumstances.

In Islamic Law, dissolution of contract occurs after a valid (*sahih*) contract has been formed, whereas the annulment of contract is only applicable to an invalid contract (*ghayer sahih*).³⁰⁷ Islamic jurists tend to distinguish between two modes of contractual

³⁰⁶ Sue Rayner, 'A Note on Force Majeure In Islamic Law' (1991) 6(1) Arab Law Quarterly 86.; See also Susan Elizabeth Rayner, 'The theory of contracts in Islamic law: a comparative analysis with particular reference to the modern legislation in Kuwait, Bahrain and the United Arab Emirates' (Graham & Troutman, London, 1991)

³⁰⁷ Islam Muhammad, 'Dissolution of contract in Islamic Law' (1998) 13 Arab Law Quarterly 336, 368.

dissolution. The first results from the cessation (*zawal*) of contract through the effective execution and performance of contractual obligations, thereby ending of the contract.³⁰⁸

The second way in which a contract can be rendered dissolute (*inhilal*) is by the termination of a contract after it has been concluded but before contractual obligations have been performed. Dissolution of the contract can only occur with mutual agreement of both parties, and as a result of frustration of contract, or by breach of contract. Accordingly, the first category refers to discharge of contract by performance of contract, whereas the second type involves the discharge of contract by agreement, breach of contract, and frustration.

Under the latter conception, breach of contract, and frustration, can provide grounds for the discharge of contractual obligations if the frustration results from an unforeseen or supervening event, which renders the contract impossible, or otherwise results in losses beyond the control of parties.³⁰⁹ For instance, there is doctrinal acceptance among Islamic jurists that supervening events or circumstances which render a contract impossible or unlawful imposes may impose undue difficulties on the party, and therefore can provide grounds on which the contract can be discharged, or otherwise offer a partial or full defence against breaches.³¹⁰ Under Islam, frustration can be applied in a manner that ensures that an undue burden or loss will be eliminated or compensated (*al-darar yuzal*) for instance in respect of the doctrine of mistake, hardship and impossibility.³¹¹

³⁰⁸ Samir Saleh, 'Some Aspects of Frustrated Performance of Contracts under Middle Eastern Law' (1984) 33 *International and Comparative Law Quarterly* 1046

³⁰⁹ Muhammad (n 307)

³¹⁰ The Quran 7:42

³¹¹ Ahamad Ibn Najaum, *Alshbah Wal nazair* (Dar Alkutub Aliilmyha 1984) 94

Under these conceptions, a judge that applies Islamic contract principles is empowered to modify or adapt the parties' obligations in a manner that balances between the rights and interests of both parties. The judge is also at liberty to terminate the contract if such an action is of mutual benefit to both parties, and if compensation is awarded to the loss bearing party. The important point here is that the concept of discharge by performance is broadly construed in the Islamic context, therefore allowing for a much higher degree of flexibility in the enforcement and construction of contractual rights and obligations.

To the above point, passages of the *Quran* express the divine belief that *Allah* does not wish to place undue burdens on his subjects, and seeks to relieve them of excessive physical or economic hardships. Religious authority provides specific legal defences which can be applied to relieve a party of these duties, or to excuse contractual non-performance resulting from unintentional or unavoidable acts. The below verses of the *Quran* can be cited in this regard.

- *Allah* intends ever facility for you; He does not want to put to difficulties;³¹²
- On no soul does *Allah* place a burden greater than it can bear;³¹³
- *Allah* has imposed no difficulties on you.³¹⁴

Extrapolating from these verses, it is evident that a law that enforces obligations in blind indifference to the undue or unjust burden this may impose on a party is inconsistent with the spirit and text of Islamic conceptions of rights and justice. Thus, Islam calls for a purposive or teleological interpretation of law, inviting rulers, jurists and courts to

³¹² *The Quran* 2:185

³¹³ *The Quran* 2:286

³¹⁴ *The Quran* 22:78

consider the justice of legal (contractual) outcomes when applying and enforcing the law. In short, Islamic theories of law eschew formalism in favour of a natural law conception of justice (sometimes known as or policy orientated theory of contract law).³¹⁵ This relationship between law and morality is not confined to the sphere of contract law and construction, but extends to all forms of law making and adjudication, in all areas of life, public and private.³¹⁶

Specifically, the Islamic conception of hardship or “changed circumstances” provides a mechanism under contractual defences, including a claim for compensation as discussed below, can be invoked to avoid inflicting an economic harm or injustice upon the private party to a contract. In this regard, the Prophet Mohammed has said, ‘*la darar wala dirar fi alislam*,’³¹⁷ the translation of which is that the law should not oblige or enforce individuals to endure harm, injustice or unfair loss. One can therefore reasonably assume that something equivalent to the concept of frustration is a mandatory principle of all Islamic legal systems, and in this case Saudi Arabia.

In the context of an administrative contract, a contract may be avoided if its performance becomes extremely burdensome for the private party,³¹⁸ These changes must be unforeseeable at the time of concluding the contract; materially affect the substance of the contract and thus, render the contract impossible or unduly onerous. Moreover, the event resulting in the changed circumstances must not be the fault of either party, and should lie beyond both parties control. Finally, the hardship suffered by the party must be

³¹⁵ Susan Rayner, ‘A Note on Force Majeure In Islamic Law’ (1991) 6(1) Arab Law Quarterly 86, 260

³¹⁶ This principle is well-explained in a saying of Aishah. She said: ‘Whenever the Prophet had to choose between two options, he always opted for the easier choice.’ see Sahih Al-Bukhari Hadith No 6404

³¹⁷ Sunan Ibn Majah, Hadith No 341.

³¹⁸ Kamal ibn al-Hammam, Fath Alqadir (1st edn Dar al kotob al ilmiyah 2003) 168

significant and exceed the financial benefits that would be gained from a continuation of the contract.

The above ideas may have significant bearing on the powers of Saudi public authorities such as the power to unilaterally modify or rescind their obligations under an administrative contract, usually on a discretionary basis, and their duties under Islam. When performance of a contract is rendered impossible or problematic, the law should not bind the parties to the fulfilment of these promises, without opportunities to challenge or contest the decision, if doing so will result in an excessive hardship for one or both parties.

3.3.4.3 The Islamic Concept of Changed Circumstances Applied to Administrative Contracts within Saudi Arabia

As previously discussed, a distinction can be drawn between private law contracts and public law contracts. By extension, different principles govern the validity, performance and enforcement of each type of contract, even under the doctrine of changed circumstances.

In the context of an administrative contract within KSA, the private party cannot rely on changed circumstances, such as the doctrine of frustration, to escape obligations held under the contract if non-performance of those obligations is judged detrimental to the public interest or public policy. The private party is, accordingly, required to continue performance of the contract, even where the event is unavoidable, and no fault or

omission can be established on the part of either party.³¹⁹ From the perspective of ordinary contract law, such an outcome would seem inequitable or even strip the very object and purposes of the doctrine of its coherency and protective value. A private party is liable to accrue significant losses from continuance of the contract because of damages, disruption or delay arisen from a supervening event. To remedy these concerns, the doctrine of unforeseen events does not apply with full effect to the private contractor in countries including Kuwait and Egypt.³²⁰ The consequence is that the public authority is required to share the financial burden, even if it has not suffered losses of its own.

In practice, as evidence indicates, public authorities will oftentimes suffer the greater proportion of losses as a result of events over which it had no or little control; a burden which a public agency, and by implication the state itself, assumes as part of its broader duty to protect and safeguard the public interest. The protection of the public interest is recognised by Islam, a principle known as *Maslahah*. *Maslahah* or public interest is an essential influence in the development of the *Shariah* and was known as the only overriding objective of the *Shariah* which encompasses all measures beneficial to people.³²¹ That being said, there are two principles which are distinctly applicable to the administrative contracts in particular. Both principles fall under the umbrella of defences or exceptions to the doctrine of frustration of contracts, specifically the doctrine of impossibility. The first concerns the French principle of administrative risk.³²² This principle is applied in circumstances under which the administrative authority who has

³¹⁹ Saed Ali, *Nazariyat al- zuruf al- tariyah fi al- aqd al-idari wa al-Shariah* (Dar al kitab al arabi 2006) 86

³²⁰ Articles 165, 168, 304, 127 and 233 of the Egyptian, Libyan, Syrian, Yemeni, Algerian, Kuwaiti, Qatari Civil Codes respectively and Saudi Labour Law Article 86

³²¹ H. S. Shaaban, 'Commercial Transaction in the Middle East: What Law Governs?' (1999) 31 *Law and Policy in International Business* 157, 158'

³²² Saed Ali (n319)

entered into the contract introduces a change or modification into the execution of the contract which acts, causally, as a trigger for an unforeseen event, thereby rendering continued performance impossible. Furthermore, if the contractual modification is the result of an *ultra vires* act – wherein the administrative authority exercises a power which has not been lawfully conferred upon it – or if the action itself contains an illegality, then the public authority must assume financial liability for any losses suffered by the private contractors as a consequence of the contract being rendered impossible.

The second doctrine which produces particular legal effects when applied to the administrative contract, as distinct from the commercial or civil law contract, relates to presence of significant of economic or physical hardship.³²³ Under ordinary contract law, any hardship suffered in the performance of obligations held under contract is considered part of the usual risks assumed by private parties upon entering into a contract. Certain exceptions may, however, apply when the hardship in question is of a degree or character, which is reasonably anticipated by the parties, thereby triggering grounds for the judicial or quasi-judicial rendering of a contractual impossibility. This in turn provides grounds for the losing party to seek partial compensation for any costs incurred from the unforeseen hardship.³²⁴ Economic or physical hardships are not confined to “force majeure” and may extend to scenarios previously known to the party seeking compensation.³²⁵

³²³ Ibid.

³²⁴ Jacqueline McCormack, ‘Commercial Contracts in Muslim Countries of the Middle East: A Comparison with the United States’ (2009) 37 International Journal of Legal Information <http://works.bepress.com/jacqueline_mccormack/1> accessed 9 December 2016

³²⁵ Shaaban (n 329)

The Board of Grievances court has dealt with these issues in the context of commercial clauses in an administrative contract. In one case, the court held that a change in a commercial government set fuel prices in a contract may be subject to the doctrine of frustration, on fulfilment of two conditions: the price increase imposes an undue burden on the private party, as compared with usual commercial standards. Secondly, if the price change was introduced after the conclusion of the contract.³²⁶ One further illustration of a set of factual circumstances under which the hardship doctrine may be successfully applied is when parties have contracted to a public service concession to mine resources on a particular site, only to discover some geological or public safety related obstacle to the continuation of the project. The same might also apply to injunction on the building of a school in an area found to have high levels of background radiation. Each of these examples might also be encompassed by the broader doctrine of contractual impossibility, blurring the line between the former and the narrower doctrinal category of hardship as grounds for compensation. It would appear therefore that the doctrine of unforeseen events and impossibility have a much wider scope and legal effects, entitling private parties who suffer losses to a general right of compensation.³²⁷

However, it is worth noting that Saudi Arabia does not provide for a general statutory compensation scheme which governs the circumstances under which the state is liable for losses suffered by a private individual, through fault or unforeseen circumstances. More generally, practice seems to suggest that the doctrine of hardship, administrative risk, mistake or impossibility is applied more narrowly in disputes involving administrative contracts.

³²⁶ The Board of Grievances, Administrative Appeal Court, Judgement no 416/T/1427

³²⁷ See the Board decision No. 7/T of 1978 (1398) in case No. 205/Q of 1976

A quantitative floor on losses has not been established by Saudi administrative courts, but the decisions of the Board suggest a private party would have to demonstrate significant or unusual loss before they could sue a Saudi authority or institution for financial relief. The Board, has held: ‘If any supervening events occurred during a performance of the administrative contract which caused an abnormal loss, the contractor can claim for compensation from administrative body.’³²⁸ Moreover, the decision of the Board suggests that the party can only claim for actual pecuniary losses and not for future or anticipated losses.

It is open to question whether the practice of the Board is consistent with the general principles of Islam. Under Islamic conceptions, losses and risks must be distributed among both parties, regardless of the nature of the contract being performed, or the identity of the actors who have formed it.³²⁹ If a contractual bargain proves to be less desirable than originally anticipated e.g. because services have been procured at prices greatly in excess of the market, or because of a change in circumstances, the public authority may have no choice but to live with the consequences.³³⁰ Facts do, however, have to be taken into account and the substantive protection of a substantive expectation should be carefully weighed and balanced against other public policy considerations, including the protection of the wider public welfare, goods and needs. It is nonetheless difficult to see how this can be achieved if Saudi courts are under no obligation to base their decision on sensitive appraisal of the contingencies of each case, and to do so with reasoned and published decisions, as discussed in the previous chapter.

³²⁸ Board of Grievances, Administrative Court, Judgement No. 3/T/1401 in 1980

³²⁹ For a discussion see H. S. Shaaban, “Commercial Transaction in the Middle East: What Law Governs” (1999) 31 *Law and Policy in International Business*. 157

³³⁰ Philip Sales and Karen Steyn, ‘Legitimate expectations in English public law: an analysis’ (2004) 3 *Public Law* 564, 591

3.3.4.4 Summary

Just as a number of common law legal systems tend to converge around common principles of administrative law, contract law is deeply rooted in a general theory of private law, and in the evolving norms and customs of the law merchant, and in the newest forms of international commercial law i.e. international treaties and emerging forms of transnational “soft” law.³³¹ What we have discovered from the brief comparative study of civil and Islamic law systems, focusing on France and Egypt, is that most legal systems give recognition to the principle of *pacta sunt servanda*. Most, moreover, call for a strict interpretation of the sanctity of contract. This principle continues to be a fundamental tenet of all contract law models and theories, regardless of whether the contract is regulated as public or private contract, or is judicially determined to have the nature or regulatory (public interest) purposes of either.³³² Yet, it is equally clear that no legal system subscribes to an absolute or fixed interpretation of this principle, although some systems adopt a stricter approach than others. Islamic contract law models, like their secular civil or common law counterparts, recognise that a contract loses its validity and effectiveness when the very subject or objective of the contract is radically changed following an unforeseen circumstance.

By contrast, the above analysis suggests that the Islamic legal tradition allows for a greater degree of flexibility in contracts and contractual renegotiation, primarily by

³³¹ A.F.M. Maniruzzaman, ‘State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law’ (1992) 9(4) J. Int’l Arb. 141, 172

³³² However, it should be noted that Islamic law has its own criteria as to the question of compensation in such cases. For further discussion on the question of compensation under Islamic law, *see generally* H. Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States*. See Frank E. Vogel, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States*’ (1989) 83(1) American Journal of International Law 227

providing contractual defences or relief to parties who are likely to suffer exorbitant loss or hardship as a result of continued performance of a contract (by enabling parties to seek compensation or renegotiate the contract, discussed below). This concept is more widely accepted in countries with a civil law tradition, and particularly in respect of contracts entered into with governments, having public law elements. The relevant provisions of Egyptian law, for instance, empower courts to adapt the terms of the contract when a change in circumstances radically disturbs the economic equilibrium underlying the original terms of the contract, to the detriment to the weaker party, as will be discussed in greater detail below. French law, by comparison, places greater onus on the sanctity of a contract and French courts are less prone to interfere with the negotiated term of a contract, even when the contract has been concluded with a public authority. It would seem therefore that Islamic legal systems tend to more fully embrace the concept of unilateral modification *and* mutual re-negotiability of long-term contracts in cases of extreme change or hardship.

3.4 The Relationship between Public and Private: Comparative Analysis of the Scope and Limits of Unilateral Authority

As discussed above, civil law courts are increasingly more prepared to accept that the actions or statements of a public authority on which a private individual or entity relies can sometimes create an enforceable obligation to satisfy a legitimate expectation.³³³

From the standpoint of private law, there is no doctrinal difficulty in the substantive

³³³ See generally, Thijmen Koopmans, 'Comparative Law and the Courts' (1996) 45 ICLQ 545; R. Errerra, 'Legitimate expectation – Principle of Law to be Applied Only in Relation to the Implementation of EC Law - Legal Certainty' (2006) 11 PL 858; Meinhard Schroeder, 'Administrative Law in Germany' in René Seerden and Frits Stroink (eds) *Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis* (vol. 39, Intersentia 2002) 119

protection of legitimate expectation about the idea that a private party must fulfil its end of a contractual bargain, regardless of whether that contract is formed through mutual consent or by means of a unilateral undertaking or representation. Contract law protects the other parties' reliance on these unilateral representations, and the expectation it creates. The sanctity of the contract remains intact.³³⁴

This is all very good in the context of a bilateral exchange relationship between two parties of equal standing. Yet, we know that public law rests on a different set of value assumptions. Public authorities, or so it is assumed, do not act in accordance with their own self-interest when making decisions. They are accountable to the public. The task of balancing between the rights of affected individuals and the wider needs of society has always been the province of public law.³³⁵ When making these decisions, the public authority is required to take a number of factors into account, social, political and economic (how to budget for a public project, and prioritise resources and interests etc.).³³⁶ Conventional wisdom has it that courts are not institutionally fit to determine whether the decisions made by public authority are either sound or judicious, since they do not have a full understanding of the factors involved. Nor do courts have the statutory authority to do perform this function. The substantive protection of a legitimate expectation would, on this view, constitute an “unacceptable fetter” on the decision-maker's power because it would cast the judge into the role of law-maker, which is an

³³⁴ Paul Craig, 'Legitimate expectations: a conceptual analysis' (1992) 108 L.Q.R. 79, 94.

³³⁵ Christopher Hall, 'The Provenance and Protection of Legitimate Expectations' (1988) 47 Cambridge Law Journal 238

³³⁶ See generally, Richard Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell 2009); Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000); Søren Schønberg, *Legitimate Expectations in Administrative Law* (OUP 2000)

infringement of the principle of delegated power.³³⁷ But this reasoning only stands if we close the distance between the principle of unfettered unilateral authority and a much older constitutional ideal – separation of powers principle.³³⁸

While this chapter discussed unilateral authority in specific terms of the contract itself and public authorities, a broader understanding of unilateral authority is common to all administrative law systems. Intrinsically connected to the idea of sovereignty, and indeed the existential extension of its practice, unilateral authority is also a matter of what may establish subject matter jurisdiction within contractual or administrative matters. It is this authority, or its absence, which defines an administrative or commercial act. The rule accepted by all administrative law jurisdictions is that an “exorbitant” or “excessive” authority or clause must exist for there to be an administrative act. An administrative act is necessary for there to be an administrative contract. Again, the purpose of this is for the government to have the means and ways of protecting the good of the whole and to perform its duties to the public.

3.4.1 Similarities between the Administrative Regimes of France, Egypt and Saudi Arabia

Similar to KSA, the mechanism of unilateral authority is the public party’s authority to amend, terminate or rescind a contract with a private party.³³⁹ The administrative contract, or the notion of “*Le Contrat Administratif*” as it is called in French and Egyptian doctrines, is a tool unique to civil law legal systems, and as already analyzed within KSA

³³⁷ *R v. Secretary of State for Transport, ex parte Richmond upon Thames LBC* [1994] 1 W.L.R. 74,93.

³³⁸ Craig (n 334)

³³⁹ Mohamed A.M. Ismail, *Globalization and New International Public Works Agreements in Developing Countries* (Ashgate Publishing 2011) 26

jurisdiction, the elements of such contract are benefits to public interest, the participation of a public party with a private entity, and the inclusion of “excessive or special” clauses, “*Les Clauses Exorbitantes*.”³⁴⁰ Some administrative scholars have coined these clauses as “nationalization clauses”.³⁴¹ The development of these authorities was based a French theory and practice for providing public services that are uninterrupted, consistent, and regular, also known as “*Principe du Deroulement des Utilities Publiques avec Regularite et Continuite*”.³⁴² This principle is the cornerstone for French and Egyptian jurisprudence and doctrine, which ‘elucidates the unilateral and unlimited powers exercised by the state.’³⁴³

3.4.2 Differences between the Saudi Framework on Administrative Contracts and Egypt and France

What may be the most important contemporary distinction in this practice between KSA and other civil administrative systems, is that the requirement that an administrative contract must contain an “exorbitant clause”, thereby confirming the parties’ intentions to adopt public law stipulations, does not align with KSA’s practice of re-classifying contracts through the Board or of the potential lack of capacity or consent of parties who are subject to the regime of reclassification. Thus, the existence of these “exorbitant” clauses or unilateral authorities, and whether or not they indicate the parties’ awareness of the nature of the contract, becomes an issue beyond consent to one of substantive and procedural due process, or administrative justice, within administrative contracts. In

³⁴⁰ André de Laubadère, Franck Moderne, Pierre Delvolvé, "Traité des contrats administratifs, 2nd éd." (1983) Tome I: 150, 211

³⁴¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It?* (Oxford University Press, 1994) 54, 302

³⁴² De Laubadere (n 340), 150, 211

³⁴³ Ismail Ibid (n 339) 25

classification of administrative contracts, France and Egypt use similar evaluation criteria to Saudi Arabia, but France requires two out of three criteria to be met in order for a contract to be classified as “administrative”, whereas Egypt requires all three.³⁴⁴ They both similarly accept that a contract can be named administrative under the law.

3.4.3 The Islamic Dimension: Key Differences between French and Islamic Systems

While there are significant areas of overlap between Western and Islamic theories and doctrines of contract law, there is, potentially, one significant point of departure between the two, with bearing on the arbitrability of administrative contracts: the freedom of parties to choose applicable law. This analysis is particularly applicable to the legal systems of Saudi Arabia and Egypt.

In Western practice, it is commonly accepted that contracting parties should be free to choose for themselves which laws regulate their agreement and which Courts or arbitrators preside over any dispute that arises. Under Islamic law, the freedom to choose applicable law and jurisdiction does not have formal basis under the recognised sources of Islamic law. As Atai writes, “Islam recognises the concept of freedom of contract therefore the parties can choose *Shariah* principles as the governing law of the contract. They can also choose the jurisdiction of the courts of a designated country as the forum for resolving disputes between the contracting parties. However, the application of

³⁴⁴ Mustapa Wasfi, Ahkam Al-Egraat Al-Edariayay, *The Rules of Administrative Procedures* (2d ed. 1972) (Egypt) 66

Islamic principles by the selected forum depends on the laws of the country in which the enforcement is sought.”³⁴⁵

Saudi courts do recognise the validity of the freedom of parties to choose applicable law. However, there is little case law to support the claim that courts in Saudi Arabia are willing to hear any case relating to dispute in contracts that include choice of applicable law or arbitration agreement because the case is out of the jurisdiction of the court. This is especially in the case of administrative contracts, which will be discussed in the next chapter. Such a hostile approach was demonstrated in a case involving a dispute between a Saudi company and a Swedish company where the commercial court ruled to refused to hear the disputes relating to the supplementary contract as there is an arbitration agreement in the main contract,³⁴⁶ and the other case involving both a Saudi company and a British company where the court’s decision refusing to hear the case was due to parties’ agreement in choosing non-Saudi law.³⁴⁷

3.5 Conclusion

An argument in favour of a private law approach to contract construction and choice of law in administrative contracts may, however, prove futile. In the context of Saudi Arabia, administrative contracts are classified as such under the applicable laws or (discretionary) decision making processes precisely in order to circumvent a private law analysis – specifically on the question of when a substantive expectation ought to be

³⁴⁵ Ardeshir Atai, ‘Overview of Islamic Financial Investments’ (Philosophical Foundation of Law and Finance Seminar, University of Westminster School of Law, London, 21 May 2010) <goo.gl/m1KDsY> accessed 12 March 2017

³⁴⁶ Case No 110/1419 on (26/04/1994) Riyadh Grievance Board

³⁴⁷ Case No 54/1420 on (30/11/1999) Riyadh Grievance Board. See Also case No 93/1420 on 0/02/2000 Riyadh Grievance Board

substantively protected. But this only brings a familiar “constitutional” dilemma into fresh relief. A court can only be accused of improperly fettering the unilateral authority or discretion of a public authority in the context of an administrative contract, when the authority has been divested with statutory power to act in accordance with its designated powers. But what if the regulation or executive act in question fails to define the scope of powers with any clarity or precision.

The substantive protection of legitimate expectations relating to administrative contract ultimately boils down to a fairly pedestrian set of issues already well known to public lawyers: was the public authority exercising a lawful i.e. statutory power to enter into the contract and, more importantly, to bind itself to contractual type expectation. Through this argumentative step, the focus moves from the “substantive” question of how courts ought to balance between rights and interests to the procedural issue of whether a public authorities exercise competence to form, perform or modify a contract in the first place. As Craig puts it “The decision as to whether legitimate expectations can or should ever have a substantive as opposed to procedural impact is...simply another way of asking the question...as to whether an ultra vires representation should ever be held to bind”.³⁴⁸

In the Saudi context, this analytical shift allows us to explore to related issues. Saudi Arabia’s legislative and judicial structure gives the Board ultimate discretion and final authority upon completion of a contract or in dispute resolution proceedings.³⁴⁹ The

Board shall apply its authority to a litany of probative issues ranging from the

³⁴⁸ Craig (n 334)

³⁴⁹ Article 1 of the Law of Procedures before the Board of Grievances of 2013 stipulates that “the Board of Grievances’ courts shall, in the cases filed therewith, apply the rules of the Islamic Shariah in accordance with the Quran, the Sunnah and laws not conflicting with the present Law, and their proceedings shall comply with the provisions thereof.” See also, Article 46 of Basic Law of Governance pertaining to independent authority of the Board of Grievances.

determinative nature of the contract or parties; the right to unilateral modification; and the permissibility of an arbitration clause. It has the power of nullification and reclassification of any administrative contract, arbitration clause, proceedings, or arbitral awards, on the basis of violations of *Shariah* law, public policy, or failure to obtain prior permissions for arbitration matters from the Council of Ministers or the King, as Prime Minister.³⁵⁰

Any re-classification by the Board or voiding of a contract based on a lack of permissibility in arbitration proceedings may also be retroactive in nature with significant financial, sub-contractual, and obligatory repercussions.³⁵¹ Unlike similar *Shariah* or civil law systems, these decisions are inalterably binding for all domestic, private, public and foreign parties within Saudi Arabia. Such consequences raise legal considerations of mutuality, material disclosure, capacity, and good faith.

Procedurally, a private, or foreign party is left impotent of the ability to exercise objective basic rights to choice of law, language, venue, arbitrator, and rule of law.³⁵² They also have little relief from interim measures, such as injunctions, which are rarely granted, or in binding dispute resolution matters, as the Board often fails to enforce arbitral awards and there is no higher authority with which to file an appeal.³⁵³ A Saudi court can simply

³⁵⁰ Resolution No. 58 June 25; 1963, Art 3 of 1968 Arbitration Law; and Article 12 of the New Arbitration Law 2012. See also *Saudi Arabia vs. Saudi Arabian- American Oil Company (Aramco)*; Henry Cattán and Willis LM Reese, *The Law of Oil Concessions in The Middle East and North Africa* (Oceana Publications Inc. 1967) 75

³⁵¹ Council of Ministers Resolution No. 58 dated 17/1/1383H (25 June 1963)

³⁵² See Article 1 of the Implementation of Arbitration Rules. See also 'Arbitration in Saudi Arabia' in Abdul Hamid El Ahdab and Jalal El- Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 593

³⁵³ Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25(2) *Arbitration International* 239

refuse to recognize proceedings or rulings issued by international or foreign judicial or semi-judicial bodies.³⁵⁴

Shariah contractual concepts, the doctrine of sovereignty and legitimate expectations have all been discussed within this chapter. However, in the broader context of arbitration, the invoking of such justifications as public policy, national interest and communal morality based law in administrative contract determinations becomes a larger, more complicated element under arbitration agreements with foreign or private entities. Specifically, it gives rise to issues of procedural and due processes, the balance of legitimate interests with inherent private rights, and contracts based in predictability and harmonization. We have deduced the doctrinal issues of contracts within both *Shariah* and public administrative law within KSA, as well as conducted a brief comparison to other administrative civil law systems. The next chapter carries this inquiry into how this will relate to matters of arbitration.

³⁵⁴ See Article 46 of the Basic Law of Governance.

Chapter 4

The Arbitration Framework in Saudi Arabia and the Treatment of Administrative Contracts Involving the Saudi Government

This chapter will assess the requirements applied to arbitration agreements in administrative contracts. Focus will be directed to the relevant provisions of Saudi law, focusing on the Saudi 2012 Arbitration Law. Issues around the validity, formality requirements and related issues of choice of law and venue will be discussed and assessed. This chapter will consider the specific challenges that confront private parties who seek to enter into arbitration agreements with Saudi governmental authorities, using the types of contracts grouped under the umbrella of “administrative contracts”, as delineated in the previous chapter.

In the broadest context, as was seen in the previous chapters, an administrative contract is one involving a government body or a subject matter of a public kind. Arbitration functions as “a private method of dispute resolution chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the court of law.”³⁵⁵ To describe its form, rather than function, Arbitration can either be a clause within a contract, such as a concession or public works contract, known as an arbitration clause or it can be altogether a separate contract between the parties, known as an arbitration agreement.³⁵⁶

³⁵⁵ Alan Redfern, *Law and Practice of International Commercial Arbitration* (2nd edition Kluwer Law International, 2004) 1-4

³⁵⁶ On how to structure an arbitration clause in a contract with a Saudi party before The New Arbitration Law, see Alexander Nerz, ‘The Structuring of an Arbitration Clause with a Saudi Party’ (1985-1986) 1 Arab Quarterly L.Q. 380

When talking about arbitration in administrative law in the KSA, we are simply talking about a specific method of dispute resolution with a government body or involving a public subject matter that does not involve the court system. Generally speaking, arbitration is one of several methods for resolving legal issues. It has procedural and substantive qualities that can be advantageous as a resolution mechanism, but the use of such in an administrative context depends upon the government's perception of its autonomy.

What can be seen so far in understanding administrative law in the KSA is that the seemingly subtle gradations of and minor differences with other administrative law systems, which are mostly rooted in how to protect sovereignty, results in drastically different outward appearances, both domestically and internationally. As will be seen in this thesis, the strict methods by which KSA protects its sovereignty is not confined to administrative law, but rather extends itself into the realm of arbitration, making this avenue of dispute resolution with a public entity all but impossible.

4.1 History and Background

Prior to the adoption of SAL 2012, arbitration was governed by the 1983 Royal Decree known as M/146,³⁵⁷ along with its Executive Regulations promulgated by Prime Minister Resolution No. 7/2021 and dated 8/911405.³⁵⁸ Under this law, the Saudi Board of Grievances³⁹⁵ exercised exclusive jurisdiction over matters relating to the enforcement of domestic and foreign arbitral awards.³⁹⁶ In view of the mandatory status of *Shariah* law, in addition to a number of other regulatory restrictions on the types of disputes which can

³⁵⁷ Royal Decree M/146 dated 12/0711403 H (corresponding to September 14, 1983)

³⁵⁸ Prime Minister Resolution No. 7/2021 dated 8/911405 (corresponding to April 29, 1985) 94

be referred for arbitration, the availability of arbitral recourse under Saudi law proved, in practice, to be fraught with difficulties and highly circumscribed. Even if domestic or foreign parties were successful in bringing arbitration before a non-Saudi arbitrator or tribunal, there was no guarantee that the enforcement of a foreign award would be executed in practice. Under the previous 1983 Act, commercial disputes between private parties were subject to oversight by the Board who would act as supervising judge. Accordingly, the Board was entrusted with wide powers to determine the validity and enforceability of an arbitration award, and to assess whether an award violated mandatory provisions of *Shariah* Law.

An administrative contract, however, is more likely to be rendered procedurally in-arbitrable from the outset, *irrespective of the validity of the underlying contract or the public policy implications of the contract's subject or purpose*. In practice, Saudi governmental authorities are denied access to arbitration as a matter of law. Moreover, the very purpose of this rule – the rendering of governmental disputes non-arbitrable absent the express consent of the Prime Minister – is to preclude the application of a non-Saudi choice-of-law which may constrain or supplant KSA's expansive definition of public policy.

To gain a deeper understanding of the treatment of arbitration agreements and clauses within administrative contracts, it is necessary to first consider the landmark arbitral decision would come to shape KSA's arbitration laws for decades to come.

4.2 The ARAMCO Dispute: Pushing Arbitration to a Dead End in Saudi Arabia?

Arbitration was allowed to deal with administrative contract until the Saudi Government reacted to the result arising from the dispute between Arabian American Oil Company (ARAMCO)³⁵⁹ and the Saudi government in the 1960s, with Resolution No.58 of 1963 imposing a blanket restriction on arbitration clauses and agreements in contracts entered into with members of the Saudi government. This represented a major turning point in Saudi Arabian arbitration. The case concerned an arbitration relating to the interpretation of a concession agreement concluded on May 29, 1933 between the Saudi Arabian government and Arabian American Oil Company ('*ARAMCO*'). The facts of this dispute concerned a contract concluded between the Saudi Arabian government and Aristotle Onassis, the Greek shipping tycoon (Onassis Agreement). Under the terms of the contract, the company Aristotle was assigned a thirty-year right of priority to transport oil from Saudi Arabia. ARAMCO sought to challenge the Onassis contract on the grounds that it conflicted with an agreement it had previously entered into with Saudi Arabia.

The Saudi Arabian government subsequently adopted Royal Decree No. 5737 of 09/0411954 subject to which the Onassis Agreement was accorded equivalent legal status to the ARAMCO concession agreement. In essence, by promulgating this Decree, the Saudi government essentially sought to amend the contract *by act of law*. The legal effect of the Royal Decree was to deprive both the Greek and Arabian American companies of an exclusive right to transportation. ARAMCO challenged the legality of the state action on the grounds that the Onassis Agreement constituted a flagrant breach of internationally

³⁵⁹*Saudi Arabia v. Arabian Oil Company (Aramco)*, (1963) 27 International Law Report 213

recognised customs and practices applied in the global oil industry. ARAMCO subsequently brought a dispute before an international tribunal.

In its written submissions to the tribunal, the Saudi government relied upon two arguments. The first was that the contract in question was administrative rather than commercial in nature, principally because the agreement has been concluded with the Saudi government as a public service concession. In other words, the agreement constituted a “state act “and was therefore subject to its unilateral amendment or revocation in pursuit of the public interest, and as an exercise of state sovereignty. From these premises, the Saudi government put forward a second argument. The counsel for the KSA government contended that the concession agreement of 1933 (concluded with ARAMCO) did not exempt ARAMCO from binding effects of retrospectively enacted law, in this case by means of the exercise of royal power by the Saudi government in its sovereign capacity.³⁶⁰ On this reasoning, the Onassis agreement had been elevated to the law of the land and therefore could not be treated as a commercial contract made subject to the international or domestic rules of private law. The Arbitral Tribunal law however rejected this argument, opining that the Onassis Agreement did not constitute a law or governmental regulation, conventionally understood.

The Tribunal also considered the nature of the contract in dispute itself. Drawing on French administrative law, the arbitral body concluded that the character of the contract in dispute more closely resembled a commercial agreement than the enumerated categories of public contracts under French law i.e. contracts relating to the concessions of public utilities, public procurements, and public works. In reaching its decision, the

³⁶⁰*Saudi Arabia v. Arabian Oil Company (Aramco)*, (1963) 27 International Law Report 213

Tribunal made reference to the fact that agreement conferred (property) rights to both the private and state party (ARAMCO was found to have a vested interest in the control and use of the petroleum based natural resource). Finally, the Tribunal deduced that the agreement was primarily entered into for the mutual economic benefit of both parties and not as a means of facilitating a public good or service, even if the execution of the agreement served some incidental public interest.³⁶¹ Building on the reasoning of the ARAMCO Tribunal, the Onassis Agreement, as will be discussed in chapter 5, can be seen to be a paradigmatic example of a transnational or international state contract. The defining feature of a transnational state contract is its hybrid character which combines both international and domestic elements and regulatory and commercial features. In this sense, such contracts muddy the classic distinction maintained between treaties or contracts, or private and public law.

As will be explored in more detail in below sections, the most contentious aspect of the Tribunal reasoning and award was its observations on the mandatory status of Islamic law in the Saudi legal order and public policy. Adopting a rather dismissive attitude, the Tribunal proffered that Islamic law lacked sufficient provisions or settled standards so as to be wielded in connection with the construction of complex commercial instruments, such as an oil concession agreement. Owing to the absence of consistently applied standards, the Tribunal averred that *Shariah* could not be governing law of the dispute.³⁶² The Tribunal opted instead to apply a variant of *lex mercatoria*, and, to this end, relied

³⁶¹ *Saudi Arabia v. Arabian American Oil Company (Aramco)*, op. cit., 157, 162. 1- Kosheri A & Riad T, 'The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process', (1986) 1 ICSID Review-Foreign Investment Law Journal, pp.12,18

³⁶² *Ibid.*, 158

heavily on common contractual usages and principles applied to international oil and petroleum contracts.

The dismissal of *Shariah* law by the tribunal is the crux of the substantive momentousness to KSA and matters of arbitration. KSA did not protest arbitration of the ARAMCO dispute nor the use of an international panel nor did they *carte blanche* argue that an arbitration panel lacked the right to review administrative contracts. Further, they did not dispute whether public or private law as the bonafide “choice of law” in the matter. Instead, KSA reacted to what they perceived as a gross misinterpretation of and bias against *Shariah* law by the international tribunal, and an utter failure to respect much less consider *Shariah* as the proper or even supplemental “choice of law”. KSA might have chosen to educate the international community on *Shariah* law and its parallels to *lex mercatoria* or *pacta sunt servanda*, as well as to insist on more reasoned ways of incorporating *Shariah* law into international contracts and arbitration proceedings. As will be discussed throughout the rest of this chapter and the remaining chapters, KSA instead chose to take an arguably extreme positioning. This positioning could be perceived as an over-reaction and, circumstances of administrative contracts and arbitrability might be very different versions of themselves in today’s KSA had the ARAMCO tribunal understood and properly applied *Shariah* law.

A landmark decision, ARAMCO has dramatically shaped KSA’s arbitration laws, practices and economic policy. Many of the ensuing consequences of the decision were less than positive. Chief among the steps taken by the KSA government in the aftermath of the award was the Council of Minister’s decision to issue Resolution No.58 of 1963. This Resolution imposed a blanket restriction on arbitration clauses and agreements in

contracts entered into with members of the Saudi government, a decision that was later supplemented by the Ministry of Commerce Circular of 1979.³⁶³ Again, Res. 58 will be further discussed, but its legacy is seen through continued restrictions to arbitration in SAL 2012.

The power of local courts, and in particular the Board, has been significantly further curtailed under the new SAL 2012. Notwithstanding these reforms, parties seeking to resolve disputes relating to administrative contracts are likely to encounter a myriad of procedural and substantive hurdles, before they are able to initiate arbitral proceedings.

In many respects, any enquiry into the recognition and enforcement of arbitration agreements and clauses in administrative contract would seem to draw the reader into a closed alley or dead end. After all, Article 10(2) of the New Saudi Arbitration Law 2012 (“SAL”)³⁶⁴ states “[t]he government authorities may only agree to arbitration after the approval of the president of the Council of Ministers, unless there is a special legal provision authorizing it.” Moreover, there has never been a single case documented since the implementation of the SAL where approval has been granted nor has there been a special legal provision authorizing arbitration. In view of the above, it is difficult to escape the conclusion that arbitration is simply not an available avenue of dispute resolution in the administrative law context. Thus, in some ways, knowing these legal parameters and associated facts, ends the discussion.

³⁶³ Article 3 of the Saudi Arabian Arbitration Act 1983 provides "Government bodies may not resort to arbitration for settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This Provision may be amended by resolution of the Council of Ministers."

³⁶⁴ Article 10(2), Saudi Arbitration Law ('SAL 2012') issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers

But, if one takes into account the historical context and evolution of arbitration in the KSA, and the role of *Shariah* law and its application to KSA arbitration in a rapidly modernising economy, then one is also prone to conclude that the current laws on administrative contracts nor arbitration are neither absolute nor immune to international or foreign rules or interventions. This chapter and the following chapters build on the evolution of arbitration and the interconnectedness in a global economy to show, in due course that more adaptable arbitration laws will come.

It is worth briefly, but explicitly, connecting arbitration agreements or clauses as administrative contracts or provisions. First, as identified above, there is the procedural threshold of governmental consent before an agreement can be arbitrated. But even before this, there is the question of whether an arbitration agreement is valid perforce. This raises questions about formality and capacity. Assuming the agreement meets the general requirements of Islamic contract law, there is also the secondary question of legal capacity. Islamic *Shariah* provides specific rules that both arbitrators, and contractors, must satisfy before they are judged to have capacity.³⁶⁵ These are more or less consistent with the formality requirements of other common law systems. Any party who consents to arbitration in the context of an administrative contract must also bear in mind that the clause or agreement will only be valid if the other party has capacity, by virtue of consent, to enter into such an agreement. As such, they impliedly receive the same or similar treatment and considerations by legislative and judicial bodies.

³⁶⁵ Article 14 of the SAL 2012 now requires that arbitrators be of full legal capacity, of good conduct and reputation, and have at least a university degree. No prejudice should be had in the selection of arbitrators to the nationality, religion, gender or race of the arbitrators. It does require arbitrators to be independent, have no personal interest in the dispute and to state so in writing. Islamic sharia also requires that arbitrators be knowledgeable in matters of *Shariah* and be of sound mind and good reputation. Parties to a contract must also have full legal capacity, being of sound mind and of adult age, not being under the influence of drugs or alcohol, or being forced into the contract through coercion, duress, or deceit.

The next section will consider the formality and arbitrability requirement imposed on arbitration agreements of any kind under Saudi law. This will prepare the ground for a more detailed discussion of the regulation and treatment of arbitration clauses and agreements in administrative contracts, as determined by the applicable choice of law.

4.2.1 The Saudi Arabia Constitution and Basis for All Law and All Human Behaviour: *Shariah*

In Saudi Arabia, analysis of all law and human behaviour begins and ends in the *Shariah* law context. In the context of its characteristics as a legal doctrine, *Shariah* serves a similar purpose to that of a Constitution, because all legal analyses must pass the scrutiny of it before reaching any other conclusions. However, it is here, *ab initio* that western notions of constitutions and *Shariah* law part ways. While western notions on fundamental principles of law are rooted in their separation *from* religion, the underwriting principal of *Shariah* law is that Islam is the source of constitutional and legal basis for the Saudi legal regime.³⁶⁶

Under the law of the Hanbali School of thought, parties to a transaction are free to select the terms of their choosing, so long as these terms do not transgress established Islamic legal principles of *Shariah*. This ‘freedom to contract’ principle established within *Shariah* mirrors the “freedom to contract” principle that is a foundation for international

³⁶⁶ “The Basic Law of Government which organizes power is normally the Constitution. However, Saudi Arabia considers that the Quran is its Constitution. Indeed, Article 1 of this law provides that the Constitution of the Kingdom is ‘the Book of God (the Quran) and the Sunnah of his Prophet.’ The Basic Law partially fulfills the role of the Constitution as it organizes the rules of power.” AH El Ahdab and J El Ahdab *Arbitration with the Arab Countries* (Kluwer Law International; Kluwer Law International 2011) pp. 593 - 671

arbitration norms. It is from this common denominator principle that SAL 2012 incorporates the fundamentals of the UNICTRAL model.

As Wakim has argued, and as discussed in chapter 3, the best approximation to the concept of public policy under *Shariah* is the concept of 'general interest'. The general rule is that: '[i]t is a must for all Muslims to comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized, for example those which prohibit speculative contracts (*Gharar*) and those that forbid usurious interest (*Riba*).'³⁶⁷ Thus, any contract based on speculation or contract clauses which rely upon the occurrence of a specified, yet uncertain event i.e. an insurance contract will be deemed null and void.

In the above regard, an arbitration agreement presents a doctrinal challenge from the perspective of Islamic *Shariah*, since it takes the form of a contract in which the parties agree to arbitrate a future or expected dispute. Pursuant to the doctrine of *Gharar*, an arbitration could, in principle, be regarded as void if seen as being premised on the occurrence of an uncertain and unexpected event. In practice, however, the law of Saudi Arabia recognises the right to arbitrate future dispute and to have the award enforced on its conclusion. It should, however, be borne in mind that an 'arbitral award supporting aleatory contract or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy.'³⁶⁸

³⁶⁷ Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards In The Middle East', (2008) *New York International Law Review*, 40-42

³⁶⁸ Faisal Kutty, 'The Shari 'a Law Factor in international Commercial Arbitration', (2006) 28 *Loy..L.A. Int'l&Comp.L.Rev* 565, 605 available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1609&context=ilr>>(Last visted 2 March 2017)

4.2.2 Formality Requirements of an Agreement to Arbitrate

Under the new SAL 2012 regulation, parties may agree to submit a specific existing dispute to arbitration even if litigation has commenced, providing parties may agree in advance to submit to arbitration any dispute arising from a specific contract.

In the Saudi context, it is incumbent upon parties, particularly private parties to an arbitration agreement, to ensure that an arbitration clause satisfies the formality requirements, as specified under Saudi regulations and Islamic *Shariah*. As Ballantyne notes, ‘even where the [*Shariah*] is not applied in current practice, there could be a reversion to it in any particular arbitration...and [knowledge of it is] increasingly important for practitioners.’

While Islamic *Shariah* recognises some oral contracts as valid, under SAL 2012 arbitration agreements must be given in writing.³⁶⁹ Failure to satisfy this formal requirement renders an undertaking to arbitrate future disputes null and unenforceable. While arbitration agreements cannot be concluded orally, written exchanges through electronic communication can be treated as formative of an arbitration agreement.³⁷⁰ The inclusion of an arbitration clause is usually considered dispositive evidence of the mutual intention of both parties to refer to future disputes to arbitration, subject to final review by a competent Saudi court.³⁷¹

³⁶⁹ M. Ballantyne, ‘Book Review of Commercial Arbitration in the Arab Middle East: A Study in Shari’a and Statute Law’ (1989) 4(3) *Arbitration International* 269

³⁷⁰ See Article 9 of SAL 2012. For a discussion on Islamic arbitration see M. Abu-Nimer, ‘Conflict Resolution in an Islamic Context: Some Conceptual Questions’ (1996) 21(1) *Peace and Change* 22

³⁷¹ Pierre Lalive, ‘Contracts Between a State or a State Agency and a Foreign Company, Theory and Practice: Choice of Law in a New Arbitration Case’, 13 *ICLQ* (1964) 987, 997

The existing regulations do not provide for a model arbitration clause to which parties are expected to conform in drafting their own agreements. On a *prima facie* reading of the new arbitration and enforcement regulations, as well as the governing principles of Islamic *Shariah*, parties have autonomy to establish the terms of their contractual relationship.³⁷²

It would appear therefore that the general rule is that foreign (or Saudi nationals) are free to contract with another Saudi party and to negotiate the specific rules and terms that will govern arbitration, whether by conclusion of a separate arbitration agreement or through the inclusion of arbitration clause within contract to be performed. This is, however, one crucial exception to this rule. Respect for freedom of contract and formal equality under contracts does not extend to contracts formed between the Saudi government and private party, foreign or national. The private party does not enjoy “shared” contractual rights with the state official. As such, a private party does not enjoy freedom (of contract), equal standing or general participatory rights under the contract, extending to any general right to refer future disputes to a non-governmental arbitration body.³⁷³ This may, however, go against the fairness and contractual principles of *Shariah* law discussed in previous chapters, therefore providing a basis to have the Regulation brought into question.

4.2.3 Subject Matter Arbitrability of Administrative Contract

Arbitrability and public policy are the most common grounds for refusing the enforcement of foreign arbitral award in Saudi Arabia. This is especially in the case of

³⁷² Kutty, ‘The Shari ‘a Law Factor in international Commercial Arbitration, ‘28 (2006) *Loy.L.A. Int’l& Comp.L.Rev.* 565

³⁷³ Alkhamees (n 72), 255–264.

disputes with the government. Public policy, as it is defined in Saudi Arabia, is construed expansively and the relevant arbitration laws fail to enumerate a list of exhaustive grounds on which a dispute can be rendered non-arbitrable or the enforcement of an arbitral award can be refused. As will be discussed below in the context of the updated SAL 2012, the absence of a clear definition of “public policy” has significant bearing on the class of disputes which the Saudi government has designated, by means of a prospective law or regulation, or retrospective exercise of royal power, to be non-arbitrable on procedural or substantive grounds. The subject-matter arbitrability of certain disputes, including disputes involving public contracts, remains woefully undefined, despite the recent reforms to laws governing arbitration in KSA. The legal situation is exacerbated owing to the fact that *Shariah* is considered part of KSA’s public policy. It will be recalled that the *ARAMCO* tribunal attributed the failures of the Saudi legal system to the incomplete or unsettled nature of Islamic *Shariah*. Yet, this thesis reaffirms the view that this type of attribution oversimplifies the problem. Islamic law, as the previous chapter explored, is highly sympathetic to the rights of private individuals and seeks to uphold the good faith interpretation of contracts. That is, this thesis argues that there is no real conflict between Islamic approaches to arbitration and international approaches. The problem lies ultimately with the failure to subject the exercise of public power to robust legal constraints, applied consistently.

Tellingly, the new SAL 2012 does not significantly depart from the previous law in one crucial respect. Saudi Arabian government entities are, *prima facie*, precluded from entering into contracts that nominate arbitration as a method of dispute resolution. Denying a private party the means to settle disputes arbitration (and to set the terms of the

legal relationship under the principal contract) does not only reduce the autonomy and mutuality of both parties, it may also significantly affect the outcome of a dispute, or deprive that party of effective remedies altogether.³⁷⁴ Again, this approach contradicts with *Shariah* teachings on equality of rights examined in chapter 3.

4.2.4 Choice of Law

In most jurisdictions, a party to a commercial arbitration agreement can select the law they deem appropriate to govern their agreement.³⁷⁵ If national law is chosen, arbitrators are obligated to apply that law.³⁷⁶ Parties may elect to apply international law to govern their agreement.³⁷⁷ Alternatively, parties may choose some combination of international law, national law, and general principles of law³⁷⁸ In such circumstances, the arbitral

³⁷⁴ Bourquin, 'Arbitration and Economic Development Agreements', (1964) In Selected Readings On Protection By Law Of Private Foreign Investments (1964) 99, 111 and 113; van Houtte, 'International Arbitration and National Adjudication', (1983) in C.C.A. Voskuil and J.A. Wade (eds), Hague-Zagreb Essays 4 on the Law of International Trade 312, 322-327

³⁷⁵ According to the principle of party autonomy, the parties can choose the law they deem appropriate to govern their agreement. This principle is universally known and widely accepted. See J. Lew, *Applicable Law in International Commercial Arbitration* 75 (1978); K. Böckstiegel, *Arbitration and State Enterprises: A Survey on the National and International State of Law and Practice* 28 (1984); W. Craig et al., *International Chamber of Commerce Arbitration* 301 (1990). See also *Texaco Overseas Petroleum Company/California Asiatic Oil Company and Government of the Libyan Arab Republic (TOPCO)* 17 I.L.M. 3, 11 (1978); *Serbian Loans*, 1929 P.C.I.J. (ser. A) No. 20/21, at 42. But see A. Tang, 'The Law Applicable to a Transnational Economic Development Contract', (1987) 21 JWTL 95, 113

³⁷⁶ The host country's national law may also be applicable, though subject to international law, if the agreement provided for arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) (§ 24)

³⁷⁷ However, there is some controversy as to whether public international law rules and principles alone can govern all aspects of the contractual relationship between a government and a foreign company. See W. Freidmann, 'Some Impacts of Social Organisation of International Law', (1956) 50 AJIL 475, 484; P. Lalive, 'Contracts between a State or a State Agency and Foreign Company', (1964) 13 ICLQ 987; K. Böckstiegel, 'The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises', in *International Arbitration: 60 Years of ICC: A Look at the Future* 117 (ICC ed., 1984) 268

³⁷⁸ Delaume, (n 65) 45. It should be noted that in the field of international commercial arbitration the question of the law applicable is rarely a primary issue. Arbitrators rely on contract interpretation and trade usages. Nonetheless, this is not the case in state contracts. The question of the law applicable to state contracts is one of the most disputed issues.

tribunal may consider whether the various legal systems converge on points of law.³⁷⁹

When those legal systems result in divergent legal outcomes, arbitrators will tend to give most weight to common customs and usages in the relevant field or industry, as we have seen in the *ARAMCO* dispute.

In the received wisdom, commercial arbitration is regarded principally, if not exclusively, as a form of private international law.³⁸⁰ Though there is little doubt that arbitration is a mechanism used to resolve disputes between private entities, including states who act as private actors in state contracts, international commercial arbitration is also influenced and impacted by the norms and principles of public international law, as highlighted by the central role played by the New York Convention.³⁸¹

In determining what rules ought to apply, or which rules should prevail in the event of a conflict (of rules or jurisdiction), tribunals may call upon both principles of public and private international law. Private international law is the body of rules used to decide the laws applicable to arbitration. Indeed, a properly constituted arbitral may be required to call upon various law in the course determining the applicable procedural and substantive law relied upon a tribunal in arbitration can be numerous and diverse. The law applicable

³⁷⁹ Kolo & Waelde, (n 282) a33

³⁸⁰ Whytock, 'The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights From the U.S. Federal Courts', (2008) 2 *World Arb. & Med. Rev.* 39, 43–52

³⁸¹ Most national jurisdictions have enacted or amended national legislative instruments with the aim of substantially limiting the grounds on which an award can be set aside. On the other hand, many jurisdictions also empower courts to challenge awards on grounds of lack of jurisdiction or procedural irregularities. In jurisdictions such as the UK where courts may hear appeals against an award on the merits (e.g. on a point of law) However, even in the UK, natural justice remedies, including judicial review of arbitral awards, may, nonetheless, be excluded from an arbitration agreement with the consent of all parties. It is not clear, however, whether parties to a dispute seated in Saudi Arabia would be permitted to 'contract out' of judicial review of compliance with mandatory requirements, including appeal mechanisms, on grounds of [*Shariah*] or public policy. For instance, Belgium amended its Uniform Law of 1972 in 1985, thereby drastically narrowing any scope or possibility for an arbitral award to be set aside (which were limited to those procedures where a party with a connection to Belgium was party to the dispute).

to the contract, known as the *lex causae*, will determine the tribunal's interpretation of the rights and obligations arising from the contract in dispute.³⁸² The proper law of the contract is usually the law of the state in which the contract is being performed, a principle known as the "closest connection" rule.³⁸³ The law of the seat of the arbitration, or *lex fori*, is generally determined accordance with the governing procedures of the tribunal. These procedures may be *ad hoc* (informal or pre-arbitration procedures), treaty based or institutionalised.³⁸⁴ In the latter of the above examples, tribunals are given wider latitude to auto-determine their own competency and jurisdiction to consider the admissibility and merits of a dispute referred to them.³⁸⁵

Finally, the law of the arbitration agreement is the governing law of the validity of arbitration agreement. While the law of the arbitration agreement is not typically different from the substantive law of the contract, this is not always the case. Moreover, it is important to distinguish the law of the contract and the law of the arbitration agreement, since the latter has significant bearing on the scope of a tribunal's jurisdiction as discussed below.

It is worth mentioning one other category of applicable law known as the law of reference. This is the law governing the arbitration clauses, or other clauses of the underlying contract which make specific reference to arbitration. In most cases, the

³⁸² Huleatt-James M. & Gould N., 'International commercial arbitration: a handbook', (1999 2PndP ed., LLP, London, Hong Kong) 62

³⁸³ Ibid.

³⁸⁴ For example, the London Court of International Arbitration (LCIA) recommends: "Any disputes arising out of connection with this contract, including any questions regarding its existence, validity or termination, shall be referred to a finally resolved arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause."

³⁸⁵ For example in art. 16 (1) of the Model Law: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. [...]"

applicable law is usually the same as the substantive law of the arbitration agreement. In exceptional circumstances, however, there may be a variance between specific clauses and the law governing the arbitration agreement. The parties may subsequently execute a separate or standalone agreement in which it is determined that certain aspects of the contract or the arbitration agreement, which might include specific contractual or regulatory issues, be governed by the (administrative or public) law of the contracting state.

The successful recognition and enforcement of an arbitral award by Saudi courts is perhaps best secured through the inclusion of a standard arbitration clause in a contract.³⁸⁶ However, a Saudi national or foreign private entity who concludes a contract with a host government may not be able to insist upon, or even negotiate, the applicable choice of law of an arbitration agreement, or propose a contractual forum selection clause. In the rare event that the Saudi government has consented to arbitrate a public contract, the proceedings will *prima facie* be governed by Saudi constitutional (*Shariah*) law and relevant regulations, and, accordingly, made subject to the ultimate jurisdiction of its courts, in accordance with Resolution 58. The questions then weigh the validity of Resolution 58 against the principles of *Shariah* law and the traditions of the KSA.

³⁸⁶ Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration', (1997) 14 J.Int.Arb, 23 - 40

³⁸⁶ See Jack M. Graves and Joseph F. Morrissey, "Arbitration as a Final Award: Challenges and Enforcement," (January 2008) Toro Law Center: International Sales Law and Arbitration: Problems, Cases, and Commentary, Chapter 10

4.2.5 Arbitration Agreements in Administrative Contracts

Arbitration agreements or clauses often retain a hybrid character themselves of both public and private elements. In some situations, the public administration involved establishes the private law rules in its arbitration agreements or clauses, and then we consider if it withdraws the relevant contracts from the description of administrative contracts. This action is one of sovereignty, where a government determines how a contract will be described regardless of its actual parties or features. Therefore, our examinations will include the layers of evaluation of the arbitration language itself as well as the underlying or connected contract. Classification of one or both of the agreements as administrative spurs legal and scholarly debate, but Saudi Arabia is not unique in defining arbitration agreements or clauses as administrative based on their tandem or inclusive function to the overarching administrative contract.

4.2.6 Comparative Definitions of Arbitration Agreements or Clauses as Administrative Contracts

By comparison and contrast, jurisprudence in both Egypt and France consider a contract administrative whenever its purpose or objective involves execution of a public facility, such as the execution of public works (roads, bridges, and tunnels), or an undertaking to collect the municipal fees. In France, whose administrative law is highly developed, the judge may declare a contract as an administrative one with respect to several criteria, one pertaining to the contracting entity (a personal criteria), and one pertaining to the contract's content (a material criteria). In theory, a contract is administrative if one of the contracting parties is a public entity. In the case where both the contracting parties are

public entities, French precedents have confirmed the existence of a “presumption of administrative quality”.³⁸⁷ This presumption may be overturned if the contract does nothing but create private engagements that have no relation with public interest.

A contract between two private contracting parties is generally a private law contract, even if one of the private contracting parties is in charge of the execution of a public service, according to French law.³⁸⁸ However, in one case, the administrative law judge applied the criteria regarding a representation mandate, which led to qualify such a contract as an administrative contract, on the basis that one of the parties acts for a public entity.³⁸⁹ Further, under established French law, clauses exorbitant render a contract an administrative one by “granting of rights to the parties or charge them with obligations of foreign nature to those obligations which are freely agreed to generally by any person within the framework of civil and commercial laws.”³⁹⁰

In these situations, a contract may be deemed administrative if there is:

- i. The possibility for the contracting authority to terminate the contract,³⁹¹ but not in case of non-performance of certain obligations;³⁹²
- ii. The possibility for the contracting authority to direct, supervise or monitor the execution of the contract,³⁹³ or

³⁸⁷ Tribunal des Conflits, Union des Assurances de Paris (1983)

³⁸⁸ Marie Grace Seif, The Administrative Contract, “Administrative contracts: A complex definition Administrative contracts are contracts where one of the parties is a public person.” <http://www.tamimi.com/en/magazine/law-update/section-7/may-6/the-administrative-contract.html>. [Note: All online references were accessed for verification between 10/11/2016-20/11/2016]

³⁸⁹ Conseil d'état, Société Brossette, 1931

³⁹⁰ State Council, 20 October 1950, Stein

³⁹¹ Disputes Court 1967, the Velodrome Company of Parc des Princes

³⁹² (Disputes Court 1970, Comblanchien Town)

³⁹³ Agricultural Cooperative, ‘Farmer Prosperity’, (1963) State Council

- iii. The possibility for the party contracting with the government to directly deduct taxes, though this is not the case if it is the administration that carries out such deduction on behalf of the contracting party.³⁹⁴

Drawing on the French view, in distilling the foregoing, a contract or arbitration agreement might therefore be classified as an administrative contract in any one of the following situations: (1) the government itself, i.e., The Kingdom of Saudi Arabia, is an express party; (2) a legally-recognised governmental entity is a party; (3) the entity is 100% government owned and controlled; (4) the government has invested in and claims a partial ownership to the company, but does not control it; (5) it involves a matter of public concern; or (6) it includes a clause exorbitant. This may therefore subject judicial jurisdiction to the Administrative Judicial Body, formerly the branch of the Board of Grievances,³⁹⁵ as discussed below.

Article 10(2) of SAL 2012 does not use the phrase “administrative contract” when invoking the Prime Minister approval requirement. Nor does it in any way, shape or form invoke the body of administrative law previously described. Instead, it states, much more narrowly: “*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.” Applied to the categories distilled above, only Categories (1) and (2) would seem to meet the plain language of the law, with Category (3) leaning in that direction. The remaining categories, equally plainly, would demand an expanded definition of “government bodies” to require Prime Minister approval.

³⁹⁴ State Council, 1986, SA of credit to the French Industry (CALIF)

³⁹⁵ For a schematic of the structure of the Board, see Ayoub M. Al-Jarbou, Arab Law Quarterly, 193

For our purposes going forward in this Chapter, we will employ the phrase “administrative contract” to mean any contract that satisfies the definition set forth in Article 10(2) of The New Law of Arbitration, to wit: 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.” In the next section, the broader application and reforms introduced under the new SAL 2012 will be considered and critically appraised with a view to identifying how it might apply to administrative contracts.

4.3 The New Arbitration Law (“SAL 2012”): A Change in Practice or Stifled Progress?

Saudi Arabia has set forth in its Vision 2030 to rival the success of UAE’s arbitration systems, in becoming the next arbitration leader for the Gulf region. Moreover, the Kingdom’s membership to important international arbitration frameworks, including, the NYC should be treated as significant progress towards Saudi Arabia’s embrace of international arbitration, while its newly established Saudi Arabian Commercial Centre for Arbitration, and integration with Vision 2030 signifies a new domestic promotion of arbitration.³⁹⁶

SAL 2012 was devised as a corrective to the perceived failures of the “old” arbitration law, which had hitherto been criticised as being ill adapted to the increased flow of global interactions and new pressures to Saudi’s oil rich economy.³⁹⁷ Viewed through this lens, one might argue that SAL 2012 is an attempt to bring two related objectives into greater

³⁹⁶ Gus van Houtte, ‘International Arbitration and National Adjudication’, (1983) in C.C.A. Voskuil and J.A. Wade (eds), *Hague-Zagreb Essays on the Law of International Trade* 312, 322-327

³⁹⁷ Faisal Kutty, ‘The Shari’a Law Factor in international Commercial Arbitration’, (2006) 28 *Loy.L.A. Int’l&Comp.L.Rev.*565

harmony: the freedom of parties to arbitration agreement to select the laws and procedures which will govern in the event of a dispute, on the one hand, and, respect for formal principles of *Shariah* law. However, it remains open to considerable doubt whether the SAL 2012 has successfully reconciled its guiding aims.

These challenges are intensified in respect of the administrative contract. In its current form SAL 2012 may yet hinder, rather than safeguard the sanctity of the arbitral process, in the context of arbitrating administrative contracts. However, an analysis of its general framework, the procedural powers of the arbitration tribunal, and challenges associated with enforcement clauses, suggests that parties seeking to arbitrate disputes in the context of administrative contracts are presented with significant challenges.

4.3.1 The Arbitration Framework in Saudi Arabia

Borrowing heavily from UNCITRAL Model Law, the New Saudi Law sets forth rules similar to those followed by leading Western arbitration institutions, including the European Union,³⁹⁸ member European Union states,³⁹⁹ and even the United States⁴⁰⁰. Influenced by the harmonising pull of international regulation on national practice, SAL 2012 draws on elements of UNCITRAL Model Law and other leading international arbitration regimes, including rules codified under the International Court of Commerce (ICC) or the London Court of Investment Arbitration (LCIA) as the basis for sound

³⁹⁸ European Commission - Fact Sheet, The European Commission tables proposals to improve transparency in Investor-to-State Dispute Settlement (ISDS) based on existing investment treaties (Brussels, 29 January 2015), online at: http://europa.eu/rapid/press-release_MEMO-15-3882_en.htm

³⁹⁹ *Ibid.*

⁴⁰⁰ *Methanex Corporation v. United States*, Final Award of the Tribunal of Jurisdiction and Merits (August 2005), Part IV, 2, online at: <http://www.state.gov/documents/organization/51052.pdf> accessed 24 March 2017

reform.⁴⁰¹ In keeping with best international arbitration practices, parties are afforded considerable freedom to select the rules and procedures applicable to arbitral proceedings under SAL 2012. Such reforms can be seen to reflect and embody established principles and values of modern contractual law, including freedom of contract, arbitral finality⁴⁰² and party autonomy.⁴⁰³

On a *prima facie* reading of the 2012 New Arbitration Law, the parties are afforded substantial freedom of contract. Among other things, the parties enjoy freedom to choose the substantive law,⁴⁰⁴ a foreign seat of arbitration;⁴⁰⁵ select the procedural rules to the extent that such application does not contravene the principles of *Shariah* law,⁴⁰⁶ and finality of awards

SAL 2012 attempts to avoid the inherent risk from the previous framework regarding finality of an arbitral award.⁴⁰⁷ Ideally an arbitration award would be final and binding without subsequent approval by the Saudi Board of Grievances (verses the Old Saudi

⁴⁰¹ SAL 2012 Article 25(1)

⁴⁰² The principle of finality of the award and authority of a tribunal to determine their own competence to decide issues is partially codified in Article 19 of the 1975 ICC Rules, Article 25 (1) of the 1998 ICC Rules, Article 16 (2) LCIA Rules.

⁴⁰³ G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a', (2013) 20 J. Int'l. Arb. 2, 113-30; For a historical overview see Brower & Sharpe, 'International Arbitration and the Islamic World: The Third Phase,' (2003) 97 AJIL., 643, 647

⁴⁰⁴ SAL 2012 Article 38(1)(a)

⁴⁰⁵ Article 28, SAL 2012

⁴⁰⁶ Article 25(1), SAL 2012

⁴⁰⁷ The Kingdom's hostility to international arbitration regimes has a chequered history. The inequitable outcomes of Western arbitration were first placed into contention in the Abu Dhabi oil arbitration case.

⁴⁰⁷ In a notorious statement, the arbitrator Lord Asquith would first decide that since a contract was performed there, Abu Dhabi's legal system, founded on the Islamic principles of *Shariah*, would seem to be the applicable choice of law. The final decision, held in favour of the foreign company, was highly critical of cultural traditions and autonomy of Islamic Arab states. Declaring Abu Dhabi an 'absolute, feudal monarch' and 'primitive region' which 'administers a purely discretionary justice with the assistance of the Holy Quran.' See *Petroleum Development Ltd v. Sheikh of Abu Dhabi*, 18 International Law Report, 1951 *Ibid.*, 19. Also see, *International Marine Oil Company v. Ruler of Qatar*, 20 International Law Report, 1

Law which, required Board approval in every case).⁴⁰⁸ As was illustrated in *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*⁴⁰⁹ the risk of subjective review and refusal to enforce an arbitral award is of grave concern to private parties. In this case, the award was submitted to the Board for enforcement. In its review, the Board proceeded to re-examine the merits of case and not only did it decline to enforce the result reached by the arbitration tribunal, it reversed the award and ordered Emaar to pay damages to Jadawel. Differently, SAL 2012 delineates the specific legal authority under which the supervising court can review the arbitral award. The next section outlines these, and other important reforms.

4.3.2 Key Reforms of the New Arbitration Law

Article 49 of SAL 2012 states ‘[a]rbitration 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.’⁴¹⁰ This means that a party seeking to challenge an award made by the arbitral tribunal can only do so through a nullification process, which greatly diminishes the extent by which a supervising court can reconsider the merits previously considered, significantly strengthening the doctrine of *res judicata*. The binding nature of awards that SAL 2012 seeks embody is again reinforced by Article 50(4). Under Article 50(4)⁴¹¹ a court tasked with determining whether to nullify an arbitral award is legally required *not* to ‘examin[e] the facts and merits of the dispute when it has been engaged to make a nullification

⁴⁰⁸ SAL 2012 Article 52

⁴⁰⁹ *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*, ICC (2006)

⁴¹⁰ Article 49, SAL 2012

⁴¹¹ *Ibid* Article 50, SAL 2012

decision'. Only pursuant to Article 50(2) does a reviewing court have the capability to engage in a more in depth review of the arbitral award, and it can only do so here if it deems *sua sponte* that there is a possible violation of Islamic *Shariah*, the award violates the Kingdom's public policy, there was an agreement between the parties, or that one of the issues arbitrated was not covered in the arbitration agreement.⁴¹²

SAL 2012 also affords the parties wider discretion over setting procedural rules for the governance of the arbitration.⁴¹³ Of first procedural consideration is Article 11. Article 11(1) obligates the court 'seized of the dispute' to deem the matter inadmissible whenever a respondent demands arbitration before raising any claims or defences.⁴¹⁴ Contemporaneously, Article 11(2) does not preclude arbitral proceedings from commencing even though a court that has received the dispute, has yet to rule the matter inadmissible.⁴¹⁵ Article 11 essentially renders fruitless any party's attempt to use the court system to delay an otherwise appropriately arbitral matter, which expedites the matter and prevents undue use of the judicial system.

In relation to administrative contract, Article 11 is also significant because of what it does not say. Article 11 does not mention either *Shariah* compliance or prime minister approval of a public entity as prerequisites to its determination that it will not hear the matter. The implications of these omissions are broad. On the one hand, it could be a mistake that would need to be legislatively addressed, or it could be that the drafters believed that these two omissions were handled elsewhere. However, it is not a mistaken

⁴¹² Ibid

⁴¹³ Faisal Kutty, 'The Sharia Law Factor in international Commercial Arbitration', (2006) 28 Loy.L.A. Int'l &Comp.L.Rev. 565

⁴¹⁴ SAL 2012, Article 11

⁴¹⁵ Ibid

omission, it could imply that the Courts are simultaneously encouraging arbitration as a method of dispute resolution and the limited use of the court system when a valid arbitration agreement exists among the parties. When viewed in light of the overall evolutionary progress of arbitration in the KSA system, an argument could be made that this is another sign of the government's attempts to make a better business environment within the kingdom.

Arbitration seems to be impliedly favoured over use of the court system in Article 15 as well. Explicitly, Article 15 is straightforward: it empowers a court of competent jurisdiction to select the arbitrator or arbitrators when the parties fail to do so, but before so doing it directly confirms the freedom of the parties to select their own arbitrators, even for resolution of disputes involving administrative contracts.⁴¹⁶ While the arbitrators must be qualified, as set forth in Article 14,⁴¹⁷ in a real-life scenario the parties might select arbitrators more moderate in their application of *Shariah* and even liberal in their application of a Prime Minister approval component. Without any published decisions, this remains speculative in nature, but also implies that KSA is very subtly and incrementally softening its grip on sovereignty, leading to a greater likelihood that arbitration can be a tool used in the administrative law setting.

The loosening sovereign grip can also be theoretically implied by the separability or severability doctrine laid out in Article 21. In general, severability clauses are designed to permit parties to raise claims that would attack the validity of the underlying contract without undermining and rendering the very tool for raising such claims also invalid. This

⁴¹⁶ Ibid Article 15

⁴¹⁷ Ibid Article 14

is why the severability clause exists, and is a common clause amongst parties throughout the world. In KSA, hypothetically, a party could negotiate that the government agency it wishes to form a binding contract with, as a condition precedent to the contract, first receive the written approval of arbitration from the Prime Minister.⁴¹⁸ If the arbitration clause was deemed validly obtained, then theoretically a party could engage the government entity in arbitration on the voidability of an underlying contract with only limited oversight from the judicial system. Importantly, it would almost remove complete control of the sovereignty other than that afforded to the government by *Shariah* law or public policy of the Kingdom.

Furthermore, Article 38(1) of the Regulations stipulates:

“After ensuring that the rules of Islamic *Shariah* and the laws of the Kingdom are not contravened, the arbitral tribunal shall, in the course of hearing the dispute, proceed as follows: (a) It shall apply the rules agreed upon by the parties to the subject matter of the dispute; if the parties to the dispute have agreed to the implementation of the laws of a particular country, the substantive rules of that law, excluding the rules related to conflict of laws, shall be implemented, unless agreed otherwise.”

It is noteworthy that Article 38(1)(a) has a striking resemblance to Article 28(1) of the UNCITRAL Model Law of 1985 (as amended in 2006). This is an important step to improving the attractiveness of the arbitration of environment of the KSA. It means that a contract containing a Saudi-seated arbitration clause can be governed by the laws of

⁴¹⁸ Park, (ed) ‘Arbitration In The Kingdom Of Saudi Arabia’, (Oxford University Press, Oxford Journals June 2014) 10-15

another jurisdiction provided that, in applying the substantive rules of the governing law of the contract to the subject matter of the dispute, the arbitral tribunal ensures that such rules do not violate the rules of Islamic *Shariah* and the laws of Saudi Arabia. In practice, this will mean that the parties will be more likely to select an arbitrator that is knowledgeable about both *Shariah* law and the law of the selected jurisdiction, which could manifest new methods of making the rules of both jurisdictions to reach a compliant and satisfactory result between the parties.

4.3.3 Procedural Powers of the Tribunal

In a further departure from SAL 1983, SAL 2012 confers additional powers on both the arbitral tribunal and the parties that foster freedom of contract and efficiency of process. As a first example, Article 14 now qualifies an arbitrator by requiring that he have full capacity, good conduct and a degree in *Shariah* law if he is the presiding arbitrator of a panel. Where previously the arbitrator had to be Muslim. By slightly altering from a requirement that the arbitrator be a practising Muslim to one where the arbitrator must rather have an education in *Shariah*, the KSA is perhaps opening the door to a less restrictive approach to the interpretation of *Shariah*, and overturning precedent set by *ARAMCO*. KSA may be altering its own perceptions of interactions in internationalised or administrative contracts. At the very least the change certainly creates a legal environment for a multi-faceted and more instructive interpretation of *Shariah* requirements.

Of the procedural aspects of SAL 2012, Article 20 is a most insightful revelation of what KSA's intentions are with its sovereign grip within the future of arbitration in

administrative contracts. In *ARAMCO*, one of KSA's defences was that it could challenge the arbitration tribunal's authority using the principle of sovereignty. KSA's position was that it could simply remove the case altogether from the arbitral tribunal's jurisdiction. The arbitral tribunal, of course, rejected this defence, confirming that it had the jurisdiction to determine its own competence.⁴¹⁹

Over half a century after the *ARAMCO* decision, where the KSA took the position that its sovereignty could not be challenged in arbitration (reinforced by Resolution 58), the KSA adopted Article 20. Article 20 embraces the position taken by the *ARAMCO* arbitral tribunal in its rejection of the KSA's position. It empowers the arbitrator to determine his own jurisdiction before adjudicating the merits, giving him the option to combine the two if it is desirable, just as the arbitrator posited and KSA opposed in *ARAMCO*.

Among developed nations, it is a quite common legal doctrine. The French call it the doctrine of *Competence-Competence* meaning simply that the tribunal that is seized of the dispute has the competence to determine whether it is the competent tribunal to be seized of it.⁴²⁰ In other words, the tribunal has the broad competence to determine the more doctrinal question of competence in an individual dispute.⁴²¹ Imagine the scenario

⁴¹⁹ S M Schwebel, 'The Kingdom of Saudi Arabia and ARAMCO arbitrate the Onassis agreement.' (2010) *Journal of World Energy Law & Business* 245,425

⁴²⁰ This principle has a legal basis in various instruments. Article 28 (2) of the UNCITRAL Model Law: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflicts of laws rules which it considers applicable."; sect. 1051 (2) of the German Act (ZPO): "Failing any designation by the parties the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected."

⁴²¹ Saudi Arabia is not atypical in this regard. A contracting or host state will typically insist on the contractual forum selection on the grounds that such provision signals the mutual will and intention of both parties to resolve disputes in national courts had chosen to domestic courts, rather than through international arbitration. In international investment cases especially, there is abundant case law g *CMS v. Argentina*, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494, paras. 70-76; *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416, paras. 26, 79; *IBM v. Ecuador*, Decision on Jurisdiction, 22 December 2003, 13 ICSID Reports 105, paras. 50-70; *Enron v. Argentina*,

without Article 20's grant of authority to the arbitral tribunal. In that scenario, a party not wanting to arbitrate could simply take the matter to the overseeing court to determine the arbitration tribunal's competence. Article 20's design is for the efficiency of arbitration as an effective tool for dispute resolution. The construction of the above-mentioned provision also keeps matters out of the court system unnecessarily.

As it relates to KSA's understanding of its sovereignty, a hypothetical is in order. Under Article 20, technically, the scenario could exist where a government authority is involved in a dispute and the parties to the contract developed and agreed to a valid arbitration agreement. This scenario would put the KSA in the very position that it faced in *ARAMCO*, where it would have to acknowledge the arbitral tribunal's authority over its own, now unable to remove the matter from arbitration. While Article 10(2), as will be discussed later, currently prevents this scenario from becoming a likely one, Article 20 does reveal how close the KSA is coming to a paradigm shift.

KSA's increasingly self-aware shifts in perspective of its sovereignty are also conveyed by accumulative-effect throughout the body of arbitration laws. When looked at together, SAL 2012's characteristics seem to fit inside a greater interconnected realm of international law. For example, Article 28 permits that '[t]he parties to arbitration may agree on a place of arbitration in the Kingdom *or* abroad.' Likewise, if no agreement is between the parties, the arbitral tribunal is tasked with selecting a location. Interestingly, when the matter defaults to the arbitration tribunal for selection, it too is not bound to the Kingdom for a choice of venue. Only must the tribunal select a location based upon 'due

Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273; *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, paras. 43-74, 147-173

consideration to the circumstances of the dispute and the convenience of the place to the parties.’ Of similar colour, Article 29 does not mandate that the language of the arbitration be Arabic. Rather, Arabic is the default language, but ‘another language or languages [can be] agreed upon by the parties or decided by the Arbitration Tribunal.’ More robustly, Articles 23 and 39(5) impart procedural powers in the Arbitral Tribunal to “take...conservatory measures”, ensure “financial guarantees” and “issue interlocutory awards”, each having the effect of gaining confidence of those using it as an effective dispute resolution tool.

Together, these procedural mechanisms serve a multitude of purposes, all culminating in a possibility of a more reliable and more efficient arbitration system for the resolution of matters between parties. This has the indirect effect of creating a better business environment, which ultimately fulfils KSA’s goals of diversifying and strengthening its economy. More indirectly and more subtly, the minor language adjustments indicate shifts in KSA’s relationship with *Shariah* law and to its own sovereignty. But as will be seen through an analysis of still more of SAL 2012, arbitration in an administrative context will require major amendments if it is ever going to be considered a reliable dispute resolution system for those desiring to enter contact with a KSA public entity.

4.3.4 Challenge and Enforcement

Perhaps the most compelling virtues of arbitration are that the issued awards are, with few exceptions, unappealable final decisions.⁴²² The arbitral process is also attractive because it avoids the cost, delay and uncertainty of findings that come from a trial before a judge or jury. However, some form of review is necessary. Thus, while Article 49 of SAL 2012 affirms that awards are final and non-appealable, it does nonetheless authorise a method for setting certain awards aside. Interconnected thereto, Article 8 allows awards in international commercial arbitration to be reviewed by a competent Riyadh Court of Appeals (unless agreed to otherwise).

Article 50(1) numerically follows Article 49 and is also sequentially logical. Article 50 delineates the specific scenarios that trigger an otherwise unappealable review. The following circumstances warrant review or appeal to a competent court of proper jurisdiction: invalidity of arbitration agreement, incapacity of the parties, breach of due process, beyond scope of submission, irregularities of tribunal's composition, and totality of the circumstances.

The most obstructive subsection to the private party arbitrating with the KSA government is Article 50(1)(b), which says that at the time of entering into the contract, both parties must have capacity. Taking into consideration that SAL Article 10(2) and Resolution 58 of the Basic Laws each codify specific language declaring that the power to approve arbitration by a government entity is exclusively one that rests with the Prime Minister,

⁴²² Art. V (1) (e) of New York Convention: "The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Article 50(1)(b) merely serves to highlight the overwhelming advantageous position that the KSA places itself in when arbitrating administrative contracts. Theoretically, however, arbitration could be permitted for a government entity, and would therefore satisfy simultaneously all 3 criteria, one in the same.

Also raising questions over the stability of Saudi arbitral process is the totality of circumstances clause which reads: ‘if the Arbitral Tribunal does not take into consideration the conditions that should be provided in the arbitral award in a manner that affects its content, or if the arbitral proceedings are tainted by nullity affecting the award.’ This clause requires that for an arbitration to succeed in its finality, that it must apply all legal provisions agreed to by the parties to the subject matter.⁴²³ The problem here is that legal provisions are a matter of interpretation, and provide vast arrays of grey area on which one could challenge the arbitral award. Again, the more opportunity to challenge the award, in turn, destabilizes the process as an effective one, and thus makes the business climate hazardous. Likewise, the all-encompassing language of subsection 1(g) allowing for an appeal when the arbitrator fails to consider “conditions”, provides additional broad-sweeping subjective selectivity for allowing for an appeal of an arbitral award. With no written precedent, nor written opinions to historically establish trends for these subsections, the unreliability unravels its effectiveness.⁴²⁴

While Article 50(1) (a-g) are challenges to an arbitral award that a party can make, Article 50(2) provides for self-assessed responsibilities of the arbitral tribunal to

⁴²³ Park, *Arbitration In The Kingdom Of Saudi Arabia* (Oxford University Press, Oxford Journals June 2014) 10-15

⁴²⁴ Al-Hosban, ‘The New Saudi Arbitration Law on Arbitration: Presentation and Commentary’, (2012) 4 Int’l. J. Arab Arb. 3, 5-13

determine whether an award should be annulled. It states: The competent court seized with the action for nullity shall rule *sua sponte* for the annulment of the arbitral award if its contents violate the provisions of Islamic *Shariah*, the public policy in the Kingdom, the agreement between the parties, or is the subject matter of the dispute is one of the issues that are not included in the arbitration in accordance with this law.

The first analysis here, is that the *sua sponte* duty commanded of the arbitrator is that *after* an award has been made, *only then* is the arbitrator invested with the power to review for its *Shariah* compliance. Interestingly, the temporal methodology for this particular *sua sponte* action inherently violates *Gharar* (a *Shariah* principle) in its duty to protect *Shariah*.⁴²⁵ Perhaps more importantly, is that the parties could go through an entire arbitration process and then, on the basis of an arbitrator's application of *Shariah*, after the award has been agreed upon, *must* then set aside the award.⁴²⁶ This process contravenes logic and is detrimental to the arbitral process. Of substantive importance is that there is little historical basis for how *Shariah* law might be violated, because there are no written records to work from.⁴²⁷

Complicating matters further for arbitrators is the juxtaposition of *Shariah* law against the backdrop of KSA public policy, which was the basis for the Prime Minister's permission for arbitration. Article 50(2) authorises a Saudi local court to annul an award or portions thereof *sua sponte* if the arbitral award transgresses either *Shariah* or KSA's public

⁴²⁵ Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a,' (2013) 20 J. Int'l. Arb. 2, 113-30

⁴²⁶ Khalid Alnowaiser, 'The New Arbitration Law and its impact on investment in Saudi Arabia' (2012) 29(6) J. Int'l. Arb. 723.723-25

⁴²⁷ For a general discussion, see Loukas Mistelis, 'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Islam Enforcement of Foreign Arbitral Awards', (2000) 2 Int'l Law Forum Du Droit Int'l 248, 252

policy, the agreement of the parties, or the permitted subject of the arbitration. The conundrum of the Prime Minister approval requirement is eloquently brought out here. On the one hand, it could be argued that Prime Minister approval, i.e., the King's approval, is *per se* a requirement of public policy on near equal-footing to *Shariah*. On the other hand, the same Article upholds the sanctity of the parties' agreement, thus creating a collision of results where the parties agreed to submit to arbitration without first obtaining official Prime Minister approval. It is this tension that leads this author to conclude that doctrines of waiver, estoppel, and reliance, or a time bar resolution for asserting Prime Minister non-approval, would better balance the competing interests of public and private parties, government and private economy.

Creating even more ambiguity is Article 54, which denies an automatic stay to challenge arbitration awards absent "serious reasons." Experts suggest "serious reasons" would include palpable violations of *Shariah* law or public policy. Thus, if Prime Minister approval invokes public policy, thereby making it a "serious reason," arbitral awards stemming from administrative contracts would likely be stayed pending challenge. This article leans heavily against arbitrating administrative contracts even if it were more readily permitted by law, due to the uncertainty of enforcement involved.

When comparing SAL 2012 to the former SAL 1983, and in consideration of the modern historical events that shaped them, one can see that the KSA has evolved into an organism that is growing in similarity to what are considered international arbitration norms. SAL 2012 does contain "arbitration-friendly" rules that mirror those that derive from the UNCITRAL Model Law such as the doctrine of self-determining jurisdiction and separability. However, when SAL 2012 is compared to policies of Egypt and France

who also have some variation of an approval provision, KSA is more restrictive. Egypt's, provision has historically been similarly controversial to KSA's, but has been 'softened' due to efforts in reform since the Arab Spring.⁴²⁸ France, has not only embraced a new and general form of Public-Private Partnership, the "*Contrat de Partenariat* *Contrat de Partenariat*" (literally, "Partnership Contract"), requiring among others an arbitration provision;⁴²⁹ it has created dual tracts for domestic and international administrative contracts, thereby obviating the need for a blanket prohibition on arbitration.⁴³⁰ Its success is in passage of precise legislation imposing strict requirements for when Minister approval is necessary, how it should be obtained, by whom it should be obtained and with detailed compliance guidelines.⁴³¹

⁴²⁸ See *Steam Boilers* case, Cairo Court of Appeal, circuit 63 Com. Case No. 64/113 (Mar. 19, 1997), see also Supreme Administrative Court, Case No. 4051, Judicial Year 65 (Dec. 17, 2012), see also Article 1 of Law No. 32 of 2014; See Cairo Regional Centre for International Commercial Arbitration Award Nos. 495/2006 (May 17, 2007), reprinted in 12 J. Arab Arb. 77 (2009) and *Malicorp Ltd. (UK) v. Government of the Arab Republic of Egypt and Others*, Final Award, Case No. 382/2004 (Mar. 7, 2006); See also Egyptian Arbitration Law (Law No. 47/1994), as last amended by Law No. 8/2000 of April 4, 2000) Article 1, as amended in 1997

⁴²⁹ *Ibid.*

⁴³⁰ Guidelines For Successful Public-Private Partnerships, European Commission, March 2003, available on www.europa.eu.int; See also Pierre Heitzmann, Mealey's International Arbitration Report, Commentary: 'A Welcome Surprise Decision: French Administrative Supreme Court Acknowledges The Adequacy Of Arbitration To Adjudicate Disputes Arising Out Of A New Kind Of Public Partnership,' (2005) 10 1-3; See also Law No. 72-626 dated July 5, 1972, inserted in the French Civil Code at Article 2061 until the 2001 reform; See also opinion N°370095 of the Administrative Supreme Court dated June 3, 2004, and Response by the Ministry of Economy, published at JO of September 6, 2005, 8357, stating that Partnership Contracts are considered as a category of public works not governed by the French Public Procurement Code.; See also Opinion dated March 6, 1986, C.E., Ass., Rev. Arb. 1992, 397.

⁴³¹ In May 2014, France adopted a series of rules requiring French Ministry approval of any foreign investment involving six business sectors: energy, water, transportation, communication, defense and health. Prior to the Decree, French government had already a veto right over foreign investments in eleven business sectors: gambling industry (except casinos), private security services, research and development or manufacture of means of fighting the illegal use of toxics, wiretapping and mail interception equipment, security of information technology systems and products, security of the information systems of companies managing critical infrastructure, dual-use items and technology, cryptology goods and services, companies dealing with classified information, research, development and sale of weapons, companies that have entered into supply contract with the French Ministry of Defense regarding goods or services involving dual-use items and technology, cryptology goods and services, classified information or research, development and sale of weapons.

<http://www.gibsondunn.com/publications/Documents/French-Decree-Requires-Government-Approval-for-Foreign-Investments-in-Strategic-Business-Sectors.pdf>

Conversely, SAL 2012 remains subject to the nuance and uncertainty of Saudi *Shariah* legal application and, with respect to administrative contracts, Prime Minister approval over what entities might qualify as “government bodies”. While the ‘great leap’ forward is thus offset in practice, when analysing the provisions, evidence hints that the possibility of arbitration could arise, and KSA could follow the softened or clear paths forged by Egypt and France.

4.4 Lessons from France and Egypt on Public Policy - The Key Obstacle in Saudi Administrative Contracts

As suggested above, SAL 2012 does not yet adequately delineate the scope of subject-matter arbitrability, including the extent to which disputes implicating matters of public policy may be set aside or otherwise deemed inarbitrable. This leads to a considerable amount of uncertainty over the categories of contracts which are arbitrable and the extent to which arbitrators, domestic or international, have the power to determine such matters. Likewise, while SAL 2012 seems to give recognition to the principle of party autonomy, it is difficult to ascertain the degree of freedom offered to parties in determining the manner and forum in which they could settle their disputes, particularly when matters of public policy are implicated. This section considers the arbitration frameworks of both France and Egypt with a focus on finding similarities between them.

4.4.1 The French Position on Public Policy

Prior to 1980, despite being obligated as a signatory of the New York Convention to adhere to the agreed upon international standards, French courts appeared to give greater weight to local laws of France in the recognition and enforcement of foreign arbitral

awards. However, in 1980 and 1981, France established its first basic law of arbitration in the French Code of Civil Procedure (“CCP”).⁴³² Considered ground-breaking at the time, it legitimized and encouraged the use of arbitration. It also distinguished between the use of domestic and international arbitration, choosing to maintain the sovereignty of the state and protection of public policy, in the midst of increased international cooperation.⁴³³

In the 30 years that followed, the Code remained unchanged, but rather was fine-tuned through case law and the use of the arbitration tribunals. In 2011, the government announced sweeping reforms to the arbitration laws.⁴³⁴ These reforms primarily incorporated case law that had developed in the last three decades, clarified the new civil procedures for arbitration, and allowed easy access to both the arbitration system as well as means of understanding what parties should expect by participating in the process in France.⁴³⁵

As with the new SAL 2012, the 2011 French arbitration law continues its distinctions between domestic⁴³⁶ and international arbitration.⁴³⁷ Accordingly, the French system sets examples of a dual-approach to arbitration that can be both compared to SAL 2012 as well as serve as a means of reforming KSA’s dual approach. For instance, unlike SAL

⁴³² Decree NO.81-500 (May 12, 1981); Decree No. 80-354 (May 14, 1980)

⁴³³ Articles 1442 to 1491 of the NCCP deal with domestic arbitration, *See also* Articles 1492 to 1507 addressing rules governing international arbitration.

⁴³⁴ Decree no. 2011-48, Codified in the French Code of Civil Procedure from Article 1442 to Article 1527 and entered into force on May 1, 2011. The original text of the Decree no. 2011-48, published in the Official Journal on January 14, 2011, and the Report to the Prime Minister are both available at:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023417517&dateTexte=&categorieLien=id> and at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023417498>.

An English translation is available at <http://www.parisarbitration.com/>. (last visited 15 March 2017)

⁴³⁵ *Ibid*

⁴³⁶ Articles 1442 to 1491 of the CCP deal with domestic arbitration

⁴³⁷ Articles 1492 to 1507 addresses rules governing international arbitration; Art. 1504 defines international arbitration

2012 which requires written agreements, Article 1422 of the 2011 French law requires parties in a domestic arbitration to put agreements in writing, such writing can be a casual reference and contain omissions of specific terms and similarly, Article 1507 provides that international arbitration agreements can come in any form agreed to by the parties, i.e. oral or written. But similar to SAL 2012's loosening of Arabic requirements and provisions for efficiency in arbitration proceedings: Article 1515 allows documents submitted in enforcement proceedings to be in a language other than French; Articles 1486, 1506, and 1519 shorten the time periods for review or annulment of awards in order to encourage efficiency and speed in the process; while similar provisions allow parties to preemptively forego appeal of an award altogether or to agree to automatic enforcement. Further, Article 1448 reinforces the "competence-competence" practice by the tribunals. Finally, unlike KSA where compliance with *Shariah* law is always a consideration, a claim related to an arbitration agreement in France is subject to the jurisdiction of the state court *only if* the agreement is "manifestly void or manifestly inapplicable" (new Articles 1448 and 1465). This is not unlike considerations of public policy in recognition and enforcement of arbitration agreements or awards seen in both KSA and France.

Under the 2011 French arbitration law, an application for setting aside a valid international award will be granted in very limited circumstances. Articles 1514 and 1520 of the amended CCP enumerates the grounds which a French court may consider when deciding whether to set aside a foreign or international award. Generally speaking, an award can be annulled or invalidated if certain procedural conditions have not been met i.e. where procedural irregularities can be demonstrated in the conduct of the tribunal

(e.g. where there the tribunal has acted beyond its competence), in the proceedings themselves (manifest fairness or irregularity in submission of arguments, gathering of facts and so on), or in respect of the substance of the award itself (the award addresses issues which fall outside of the scope of the arbitration agreement).⁴³⁸ An arbitration award may also be found to be invalid if arbitral recourse is not available under the terms of the agreement, or when the underlying agreement cannot be arbitrated as a matter of French law.⁴³⁹

Crucially, the French Arbitration law goes further to delineate, precisely the five grounds where a court can refuse enforcement of an award.⁴⁴⁰ The most contentious of these grounds is the non-enforcement of an award found to have contravened French public policy. Here we find a further similarity between the French model of arbitration law and that which has been established in KSA. Until relatively recently, any dispute involving an administrative contract was inarbitrable under the French Civil Code, and, therefore, could not be referred to arbitration. However, the decisions of the French courts over the past few decades have led to a gradual relaxation of this norm. A judgment rendered by the Cour de Cassation in *Hilmarton* saw the French courts adopt a less-restrictive approach on the basis that the mere fact that a subject matter of a dispute was subject to public policy was not, in of itself, grounds for rendering that dispute non-arbitrable.⁴⁴¹

⁴³⁸ Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: the French and U.S Experience,' (2009) 26(2), 1. Int'l.Arb. 267

⁴³⁹ For a general discussion see Bernard Hanotiau & Olivier Caprasse, 'Arbitrability, Due Process, and Public Policy under Article V of the New York Convention: Belgian and French Perspectives', (2008) 25(6) J.Int'l.Arb. 730

⁴⁴⁰ Ibid Art 1520

⁴⁴¹ Cour de Cassation, 23 March 1994, *Societe Himarton Ltd v Societe OTV, Revlje De L'arbitrage Irev. Arb.*

As for domestic arbitration, Articles 1488 and 1492 of the CCP stipulate that an arbitral award made in France is subject to its being set aside if it is found to be contrary to public policy⁴⁴² This concept enables the courts to determine whether an award is consistent with French public and legal values as a condition of enforcing the award in the French legal order.⁴⁴³ In practice, as statistics suggest, French courts have very rarely annulled an arbitral award on grounds of a public policy exception. That said, while France provides a strong model for reform for KSA in creating a robust dual arbitration system, it too still struggles with balancing international public policy and domestic public policy.

Prior to 2012, the French courts set a high bar for non-enforceability, and it was generally accepted that a public policy violation must be “flagrant, effective and concrete” before this ground could give rise to annulment.⁴⁴⁴ However, in the years following the new 2011 law, the French courts have been in disagreement about the standard for annulment based on violation of domestic public policy versus international public policy, with the Court of Appeals holding that the violation must be “clear and concrete”⁴⁴⁵ and the Cour de Cassation holding: “The judge acting in the set aside proceeding is able to rule on the admissibility of the award into the French legal system. He is not acting as the judge for the case which the parties agreed to submit to arbitration”.⁴⁴⁶ In other words, the Cour de Cassation seems to be stating that the judge may act upon any perceived or possible

⁴⁴² CCP, Article 1514 provides that "Arbitral awards shall be recognized in France if their existence is proven by the party relying on the award and if such recognition is not manifestly contrary to international public policy. Such awards shall be declared enforceable in France by the enforcement judge under the same conditions."

⁴⁴³ CA Paris, 27 October 1994, *Lebanese Traders Distributors v. Reynolds*, Rey.Arb.709 (1994)

⁴⁴⁴ The Cour d'appel de Paris has set a high threshold of admissibility for public policy related defences which must be "Flagrant, effective and concrete". See *Thales Air Defence v. Euromissile et al.*, (judgment of November 18, 2004~ REY.ARB., 751 (2005).*Thalès v. Euromissile*, CA Paris, 18 Nov. 2004; Linde, CA Paris 22 Oct. 2009

⁴⁴⁵ *SA Planor Afrique v Etisalat*, CA Paris, 17 January 2012

⁴⁴⁶ *Schneider*, Cass. Civ. 1, 12 February 2014

violation of public policy of the French system, not based on international public policy or laws which may have been used to issue the award. It is a step back from pro-international arbitration to prioritizing domestic public policy.

A decision by the Conseil d'Etat in November 2016, seems to support a more hard-line approach to even that taken by the Cour de Cassation in protecting domestic public policy. The *Conseil d'Etat* annulled an arbitral award involving an international party based on violations of public policy within an administrative contract.⁴⁴⁷ This is the first time the *Conseil* has done so in recent times and has garnered the attention of the international community. It is not yet known whether this will be the new standard for annulment based on public policy violations in French administrative contracts and arbitration agreements; or whether this was a more isolated incident, heavily reliant on subjective facts of the individual case.

If it is a new standard it would indicate France's arbitration law and case law has progressed from more rigid reluctance to allow international influence in arbitration to pro-arbitration participation in both domestic and international disputes to now being a bit hazy on when or how a public policy exception or violation should be acknowledged or enforced within arbitration agreements or awards. If it is an isolated incident, the French courts will have to more clearly define public policy and delineate expectations for parties. For KSA, this can be used as a case study between their use of *Shariah*, domestic, and international laws within their arbitration system.

⁴⁴⁷*Conseil d'Etat, Assemblée du contentieux*, 9 November 2016, n° 388806

4.4.2 The Egyptian Position on Public Policy

As suggested in previous chapters, the Egyptian legal order sources from a variety of legal traditions, most notably English common law, Islamic *Shariah* and the French Civil Code. Egyptian laws, codified or otherwise, are subject to judicial review by the Egyptian Supreme Court and the Council of State,⁴⁴⁸ with the latter of these bodies exercising a supervisory function by reviewing the legality and enforceability of administrative decisions. While Egyptian courts continue to observe the requirements of Islamic *Shariah*, the direct influence of Islamic law on the development of the Egyptian legal order has grown more muted over the past decade, in large part because of commercial demands for contract and arbitration laws which have been harmonised to international commercial standards, codes and practices.

Arbitration in Egypt is regulated and governed under the new Egyptian Arbitration Law, which came into force in 1994 ("Egypt Arbitration Law").⁴⁴⁹ In many respects, countries such as Saudi Arabia have taken their lead from earlier innovations in Egyptian arbitration law, one of the first Arab countries to embrace international arbitration standards through its adoption of the provisions of UNCITRAL Model Law.⁴⁵⁰ Egypt is also a signatory of the New York Convention.⁴⁵¹

The Egyptian Code of Civil and Commercial Procedure 1994 is largely consistent with international arbitration standards and practices. On issues relating to capacity and

⁴⁴⁸ Egyptian Arbitration Law No.27 of 1994, Article 11

⁴⁴⁹ Arbitration in Civil and Commercial Matters Law No. 27 of 1994 as amended by Law No. 8/2000 (the "Arbitration Law")

⁴⁵⁰ Essam Al Tamimi, 'Practitioner's Guide to Arbitration in the Middle East and North Africa', (2009) JurisNet LLC, 49

⁴⁵¹ Article 501(4), The Egyptian Code of Civil and Commercial Procedure 1994

arbitrability, Article 11 of Egyptian Arbitration Law mandates that “arbitration is not permitted in matters where compromise is not allowed.”⁴⁵² Disputes can only be arbitrated if, the contractual disagreement can be settled by means of mutual compromise, by two parties who are capable of legally disposing of their rights (to pursue alternative remedies in the courts).⁴⁵³

In the face of increased commercial demand, Egypt promulgated the Egypt Arbitration Act no. 27 of 1994 (as amended by Law no. 9 of 1997). Pursuant to the provisions of UNICTRAL Model Law, the 1994 act applies the same rules to international and domestic arbitration. This is a different approach from the KSA and French dual arbitration systems. Furthermore, consistent with common international practice, the Act expressly affirms the principles of party autonomy, while curtailing the power of local courts. These commitments were largely achieved by specifying a list of exhaustive grounds on which a valid arbitral award can be set aside.⁴⁵⁴ Notably, however, the Act does establish a separate basis for the annulment of acts on grounds of public policy, as stipulated in Article 58.⁴⁵⁵ One obvious point of departure between the new Egyptian and Saudi Arbitration laws is the possible impact of *Shariah* law on the procedural and substantive dimensions of foreign and domestic arbitration in both countries, respectively. As suggested above, scholars have discerned a noticeable retreat from *Shariah* in the recognition and enforcement of arbitration clauses and agreements.⁴⁵⁶

⁴⁵² Article 11 of Egyptian Arbitration Law No.27 of 1994

⁴⁵³ Egyptian Arbitration Law No.27 of 1994, Article 54. For instance, third parties may have interest in the performance of a contract but lack actual, direct or transitive rights of ownership, usage, participation or control over the physical property exchanged under contract.

⁴⁵⁴ Article 53 of the 1994 Act

⁴⁵⁵ Article 34 of UNICTRAL Model Law

⁴⁵⁶ Samir Saleh, *Commercial Arbitration in the Arab Middle East*, (ed. 2006) 342

In contrast with KSA, the Egyptian courts have adopted a more open attitude to enforcing arbitral awards, and is generally regarded as a hospitable environment in which to initiate arbitration proceedings. Article 55-58 of the Egypt's Arbitration Law stipulates that a request to enforce a foreign and final award will be upheld if the following conditions are satisfied: the award does not conflict with a previous precedent or ruling of the Egyptian court; does not contravene Egyptian public order norms; and only if the party has been given adequate and reasonable notice of the award and the request to enforce it. Unlike KSA it does not mention compliance with *Shariah* law, but it does rely on public policy norms.

Crucially, administrative contracts have been recognised by the Egyptian courts as arbitrable disputes in some limited cases. The most important case in this regard is the Cairo Court of Appeal's decision in the *Silver Night* case.⁴⁵⁷ In this case, the Egyptian Antiquities Organization petitioned the court set aside an award based on a dispute involving a construction contract between an English contractor and the Egyptian Antiquities Organization. Under the applicable rules of Egyptian law, this contract was subject to its regulation as an administrative contract (since one of the parties to the contract was an Egyptian public authority), thus rendering the underlying contract non-arbitrable. In a landmark decision, the Court of Appeal ruled that dispute arising from administrative contract could in certain and highly limited circumstances be settled by arbitration under the Egyptian Arbitration Act 1994.

⁴⁵⁷ Court of Appeal, Cairo, Commercial Circuit No. 63, 19 March 1997, No. 64/113(j) (*Antiquities Organization v. Silver Night Company*) Yearbook XXIII 169-174 (1998)

The Egyptian Court de Cassation also addressed the scope and limits of public policy in the *Amal Tourism* case of 2007.⁴⁵⁸ In this case, an Egyptian authority, in this case the Ministry of Tourism, filed a petition requesting the Court to annul an award on subject-matter grounds. The contract underlying an arbitral award concerned the sale of land over which the state of Egypt asserted a sovereign right of ownership, thereby violating public policy. However, the Court de Cassation rejected the claim by reopening the dispute and assessing the facts in dispute. This ruling was important for two reasons. First, it suggests that Egyptian courts have set a high threshold for both governmental and private parties before they are willing to consider public policy arguments as grounds for annulment. Furthermore, Egyptian courts *sua sponte* reserve the right to reopen disputes and to review an arbitral award issued by a tribunal outside Egyptian jurisdiction, on the merits. In this sense, Egyptian national courts defend their status as a “court of last resort”, primarily by asserting ultimate jurisdiction and competence to scrutinise the arbitrability or public policy implications of arbitral award. However, while this evidently undermines the finality of an arbitral award, the Egyptian courts have imposed limits on the scope of their own supervisory and review functions, while rejecting the requests of public authorities to set aside valid awards on public policy grounds, without good reason. Other cases, however, demonstrate the Egyptian courts attempts to reconcile its own local norms and laws, including *Shariah*, with respect for international rules and the decisions of domestic and international arbitral tribunals.⁴⁵⁹ One case for example, involved a contract with a government entity in which an arbitration award was annulled

⁴⁵⁸ Egyptian Court of Cassation, 27 December 2007, summary available at: www.kluwerarbitration.com

⁴⁵⁹ Al Tamimi, (n 450).

then revised based on considerations of: the international laws of the ICC, mandatory laws of Egypt and its public policy; and violations of *Shariah* law by use of *riba*.⁴⁶⁰

On the other hand, this case confirmed that religious concerns continue to play an important role in the regulation of arbitration in Egypt and can, in some cases, provide grounds for the nullification or non-enforcement of arbitral awards. From the perspective of the private or foreign private party, the Egyptian framework would seem to benefit from a degree of legal certainty and predictability that is lacking in its comparative equivalent in KSA. However, difficulties remain. Nowhere in the Egyptian 1994 Act is “public policy” explicitly defined. Similarly, the Act imposes no threshold or standard on the circumstance or criteria that must be met, in terms of subject matter or degree of seriousness, before a dispute can be deemed non-arbitrable.

4.4.3 Public Policy in Saudi Arabia

In contrast with other Islamic countries such as Egypt, Islamic law has far greater influence on public policy in Saudi Arabia. Saudi courts are required to consider Islamic norms and the relevant Royal decrees as having equal weight when determining whether public policy has been violated. One implication is that any instrument, agreement or contract understood to violate *Shariah* would be deemed contrary to public policy in Saudi Arabia. However, Saudi authorities are also under a duty to consider the public

⁴⁶⁰ Egyptian Court of Cassation, 27 December 2007, summary available at: www.kluwerarbitration.com; *See also* National Cement Company requested the annulment of International Chamber of Commerce (ICC) arbitral award CK19928 rendered on December 21, 1999.; *See also* Court of Appeal, Cairo, Commercial Circuit No. 63, 19 March 1997, No. 64/113(j) (Antiquities Organization v. Silver Night Company) Yearbook XXIII 169-174 (1998); *See also* Article 227 (1) of the Egypt Code of Civil and Commercial Procedure provides that ‘The parties may agree on a different rate of interest, whether it concerns delay in fulfillment of an obligation or in any other cases where interest is stipulated, provided that the rate does not exceed 7%. Agreements to a higher rate of interest shall result in the reduction of interest to the prescribed rate.’

interest. If a conflict arises between a regulation and Islamic norms, the Saudi authorities, as a matter of constitutional priority, are required to consider a dispute within the framework of *Shariah* law at the first instance, which is then balanced against the public interest. Interestingly, the Saudi government has enumerated a list of commercial activities that cannot be arbitrated for public interest reasons.⁴⁶¹

4.4.3.1 *The application of Shariah and the effects of the ARAMCO decision*

Contrary to the current legal obstacles that make arbitration with KSA government entities all but impossible, the peoples of the Arabian Peninsula have long used arbitration as a tool for resolving disputes. Arbitration in the Muslim world is a sanctified method of dispute resolution rooted in *Shariah* law.⁴⁶²

However, as illustrated in the case of *ARAMCO*, the tradition of using arbitration as an effective dispute resolution tool has faced major setbacks in modern history. In arbitration, *Shariah* principles, for better and for worse, serve as clearly delineated boundaries that arbitrators must work within in order to resolve disputes. These boundaries, do not of course carve out exceptions in the realm of administrative contracts.⁴⁶³ Within *Shariah* law, the fundamental principle of *haram* is defined as: that

⁴⁶¹ For instance, KSA has prohibited a number of investment activities on Islamic grounds, for example speculative investments, or contracts involving the sale or licensing of prohibited goods. For a list of activities excluded from foreign investment is available at the Saudi Arabia General Investment Agency (SAGIA) website at www.sagia.gov.sa/Jenibusiness-environment/Investment-laws/negative-list.html (last visited August 2012)

⁴⁶² Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (Kluwer, 2nd ed. 1999) 13. ‘The Arabs of Jahiliya (pre-Islamic period) knew arbitration because adversaries (be they individuals or tribes) usually resorted to arbitration in order to settle their disputes’.

⁴⁶³ See, generally, Denis MacEoin, ‘Sharia Law or “One Law for All” (2009) 6 *Civitas: Institute for the Study of Civil Society* London 9-13

which is forbidden and against *Shariah* principles.⁴⁶⁴ In any KSA arbitration, as previously stated, all awards must conform to the principles of *Shariah* or, conversely, must not contravene *Shariah* principles.

However, the *purpose* or intent of *Shariah* principles must be discussed separately than the *effects* of *Shariah* principles. The intent for the strict enforcement of the substantive *Shariah* principles serves to protect Muslims. However, by fulfilling that purpose, the enforcement actually has a contrary effect. The strict enforcement of principles harms the ability of KSA businesses to enter contracts with those outside of the Muslim world, who adhere to different principles. The result is dissonance and deterrence. The effects of course make their way into the realm of administrative contracts. For instance, *Shariah* principles that prohibit the payment of interest or the recovery of “speculative” damages such as good will, future profits, or future appreciation, provide discord in modern international contract negotiation where those provisions are commonplace; consequently, such remedies are not recoverable by the government or the private party in any dispute arising under Saudi Arbitration law.

The most cited example related to public policy is the prohibition of *riba*.⁴⁶⁵ In fact, interest-related transactions are not deemed illegal under KSA law. Rather, such transactions are merely considered void and unenforceable under a *Shariah* law interpretation. What does this mean for arbitrations of disputes arising under administrative contracts? The answer is straight-forward. *Shariah* compliant arbitrators

⁴⁶⁴ F Al-Dehais ‘Saudi Arabia’ (2016) The Middle Eastern and African Arbitration Review 2016 <http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2016/1036981/saudi-arabia> (last visited 12 March 2017)

⁴⁶⁵ Y. AJ-Samaan, The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, (1994) Arab L.Q. 217, 231

will not and cannot award interest, in any way, shape or form. If such an award is issued, it will be reviewable by the Saudi Courts and subject to nullification because it is not *Shariah* compliant. Thus, matter-of-factly, KSA courts and judicial tribunals, including the Board of Grievances arbitrators, do not award interest for disputes arising under administrative contracts. It is, however, important to note that any interest provisions in such administrative contracts are usually severable.⁴⁶⁶ This means that an administrative contract will not be considered void or voidable solely because that contract includes an interest-related provision(s).

The irony of this is that while the principle behind *riba* is clear, how it is adhered to, and thus the interpretive effects, seem to provide ambiguous results on a case-by-case basis, each to the favour of the Muslim party, and if there are two Muslim parties, to the more powerful Muslim party (in the case of the banks). If the concept of interest is to the advantage of a Muslim party (e.g. a bank or a public entity), then *riba* does not have to be prescribed to, whereas, if it is to the disadvantage, the principle of *riba* can be invoked to the Muslim parties' financial benefit. Considering the *Shariah* principle about uncertainty, below, the effect of an ambiguous interpretation of *riba* seems to simultaneously violate *gharar*.

⁴⁶⁶ Moghul & Ahmed, 'Contractual forms in Islamic finance law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd v. Symphony Gems N.V. & Ors.: a first impression of Islamic finance' (2003) 27 *Fordham International Law Journal* <<https://pdfs.semanticscholar.org/4ec7/7b8b360570db6324f70c8a998df0faa4458c.pdf>> accessed 12 March 2017

4.4.3.2 *The effect of “Gharar” (gambling or uncertainty) on the validity and enforceability of arbitration agreements*

Shariah abhors an uncertain contract. For a contract to be valid under *Shariah* law, it must be free from uncertainty.⁴⁶⁷ This is also known as “the rule against *gharar*.”⁴⁶⁸ In this regard Saleh states: “... any transaction should be devoid of uncertainty and speculation, and this ... [can] only be secured by the contracting parties’ having *perfect* knowledge of the counter-values intended to be exchanged as a result of their transaction ...”⁴⁶⁹ [emphasis added]. In other words, it is a near impossibility to write a contract that is *devoid of uncertainty*.⁴⁷⁰ A contract entered in this manner would be a clear violation of *gharar*, and thus not enforceable under *Shariah* law.

Consider that a general arbitration agreement for future disputes plays an essential role when parties are in dispute. In Saudi Arabia, arbitration is not only a tool with history but it is a principle from the *Quran*, and thus is *Shariah* law. Thus, the *Quran* recognizes that parties will have disputes, and thus will not always be in agreement. But in contracts, when they are entered to, it is expected that the parties have already dealt with all disputes prior to entering. *Gharar* presumes or commands that uncertainties become certainties as the result of the contract negotiation. Thus, *gharar* seems to impose a temporal requirement on parties to make uncertainties certain, i.e. mutual understanding *before* contracting.⁴⁷¹

⁴⁶⁷ *Quran* 2:275

⁴⁶⁸ Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (Cambridge, 1986), 81-85

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ Hunt Hanin and Andre Kahlmeyer, ‘The Sharia from Muhammad's Time to the Present Chapter: Tradition Sharia Law: Obligations to God and to Fellow Human Beings’, (2007) *Islamic Law*, 28

It could be argued that a rigid interpretation of *gharar* contravenes the *Shariah* principle of arbitration and thus more interpretative analysis between these two concepts could lead to a more dynamic and usable *Shariah*-based arbitration tool that would resonate as non-obstructionist in the modern globalized world.

While the *Quran* provides arbitration as a tool, the specificities and current interpretations of *Gharar* and *Riba*, are significant obstacles to effective arbitration. The inconsistent application of these principles, in particular, is unlikely to inspire confidence in the modern business world and demand further research. However, *Shariah* concepts can be affected over time through causing a variety of interpretations of principals that lead to an evolutionary adjustment to the norm.⁴⁷² Unlike the liberalized notions of the gradual adjustment of these principles, sovereignty is more steadfast in its definition. The mechanisms needed for change will only come in the form of amendment.

4.4.3.3 *The Impact of Sovereignty on the Validity and Enforcement of an Arbitration Agreement*

There is an important nuance in the discussion of how the doctrines of sovereignty and immunity apply to governmental actions and arbitration within the KSA. In generally understood international norms, sovereignty is the supreme authority of the state to govern itself, while immunity can be defined as a legal doctrine by which the sovereign or state cannot commit a legal wrong and is *immune* from civil suit or criminal prosecution. This principle is commonly expressed by the popular legal maxim *rex non*

⁴⁷² Gitanjali Bajaj, 'Arbitration in the Kingdom of Saudi Arabia' (DLA Piper News 2009) <http://www.dlapiper.com/arbitration-in-the-kingdom-of-saudi-arabia/> (last visited 18 March 2016)

potest peccare, meaning "the king can do no wrong".⁴⁷³ The objective behind sovereignty is to provide stability to the state and its people.

Contrastingly, in Muslim countries such as the KSA, *Allah* is the supreme authority, not the state. Meaning, even the state does not have supreme authority over itself. The word of Allah is to *Whom all human beings are subordinate*, including kings and their kingdoms. Accordingly, *Shariah* law, as the law of Allah, does not recognize the concepts of sovereignty or sovereign immunity.⁴⁷⁴ Following this logic, therefore, the KSA cannot recognize itself as immune in the name of protecting its sovereignty because it is not sovereign, Allah is supreme. However, in the name of public policy and maintaining legal existence as a state in the global community, it is in KSA's interest to acknowledge and leverage the doctrines of sovereignty and immunity.

In terms of arbitration agreements and awards, this translates to questions of whether the State can validly protect its sovereignty by refusing to acknowledge or enforce arbitration. If the above logic on immunity in KSA is applied, it means there is no inherent immunity to protect the state's assets from attachment, such as in arbitration proceedings or an arbitral award. In practice, however, were any attachment required through arbitration proceedings, it would essentially have the same effect as the general principles of sovereign immunity, because the government officials can choose to deny or refuse any attachment based on sovereignty, public policy or principles of *Shariah* law.⁴⁷⁵

⁴⁷³ See generally, Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions', (2011) 44 Vand. J. Transnat'l L. 1105

⁴⁷⁴ Courts elsewhere have properly treated state immunity as a matter not of discretion but of international law. See, e.g., *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, [36]–[49] (Lord Hoffman) (appeal taken from EWCA (Civ)) (U.K.) ("It is necessary carefully to examine the sources of international law concerning the particular immunity claimed.")

⁴⁷⁵ F Al-Dehais 'Saudi Arabia' (2016) *The Middle Eastern and African Arbitration Review* 2016

An important caveat is that KSA's tribunals and the Board of Grievances may exercise immunity if they so choose but they must always be in compliance with and prioritize *Shariah* law over actions of sovereignty or immunity; regardless of the consequences in public policy.

In principle, *Shariah* law, puts private parties and the government on more equal-footing, than non-Islamic based systems. Accordingly, as the doctrine of sovereignty does not find its authority in *Shariah* law and prohibiting arbitration is an act of immunity; from a *Shariah* law perspective, there is nothing wrong with arbitrating administrative contracts. Instead, the prohibition becomes an issue of domestic or international law, not a solemn protection of *Shariah* law.

Therefore the KSA must be careful in using *Shariah* law as protection of sovereignty, the 'authority of the state', including obstructing any challenge to it through arbitration, less it risks placing ideals of sovereignty above *Allah* and principles of *Shariah* law. For example, KSA's 'over-reaction' to the ARAMCO award⁴⁷⁶ was an attempt to recover its 'lost' sovereignty by means of Resolution No. 58 (Resolution 58) 1963; however, it was not an action supported by *Shariah* law, but one of domestic public policy interests of the state.⁴⁷⁷ Such public policy decisions can have the contrary effect of protecting *Shariah* law, and instead create a ripple of other public policy conflicts, i.e. Resolution No. 58. While Res. No 58 is evidently based on the underlying principle of governmental

<http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2016/1036981/saudi-arabia> (last visited 8 January 2017)

⁴⁷⁶ *Saudi Arabia v. Arab Am. Oil Co. (ARAMCO)*, 27 ILR 117 (1963). See also Stephen M. Schwebel, 'The Kingdom of Saudi Arabia and ARAMCO Arbitrate the Onassis Agreement,' (2010) 3 Journal of World Energy Law & Business, 245. Saud Al-Ammari, 'Saudi Arabia and the Onassis Arbitration – A Commentary,' (2010) 3 Journal of World Energy Law & Business 257

⁴⁷⁷ See Council Resolution No. 58. See, generally, Saud Al-Ammari & A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) *Arbitration International* 389

consent, as an expression of political autonomy, it is in conflict with international public and policy norms, encompassing *pacta sunt servanda* (sancity of contract) and with a understanding of *Shariah* law. The effect is to undermine contractual certainty while reinforcing prejudice against KSA's 'closed' system of governance. An action supported by *Shariah* law would have been to promote the education and use of *Shariah* law in international tribunals, which arguably, may have led to a different result in *ARAMCO*.

4.4.4 Summary

Fifty years on, that reactionary position of *ARAMCO* has finally begun to ease with the enactment of the SAL 2012.⁴⁷⁸ KSA's commitment to arbitration was reinforced by its intention to create Saudi Arabia as the centre of arbitration in the Middle East. SAL 2012 and the corresponding "Enforcement Law"⁴⁷⁹ have been lauded as another step toward regional and international integration, though the remaining sovereignty protecting provisions within SAL 2012 serve as a reminder of the delicacy of the evolutionary process of the arbitration of administrative contracts in the KSA. SAL 2012 is the first clear signal of KSA's intent to join a global and modernized economy,⁴⁸⁰ for UNCITRAL reflects a global consensus that there is a need for uniformity in the primary rules of international arbitration practice.

⁴⁷⁸ Royal Decree No. M/46 dated 12 Rajab 1403H, corresponding to 25 April 1983G

⁴⁷⁹ Royal Decree No. M/53 dated 13 Sha'baan 1433H, corresponding to 3 July 2012G. The Enforcement Law was published in the official gazette, Um Al-Qura in Issue No. 4425, Year 90, 13 Shawal 1433H, corresponding to 31 August 2012G. The Implementing Regulations of the Enforcement Law were published on 17 Rabi II 1434H corresponding to 28 February 2013G.

⁴⁸⁰ As of 31/12/15, published on <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

The new mechanisms in place only take the KSA so far in its quest to provide a more attractive business environment, and the most challenging obstacles to arbitrating administrative contracts remain. However, obstacles are not an impossibility.

In contrast with customary norms and practices of *Shariah*, SAL 2012 does contain a host of arbitration-friendly provisions.⁴⁸¹ In the researcher's view, outside of the Board and *Shariah* courts, in other cases still, a more specialised judicial or administrative body may be the appropriate venue. It is worth noting, and quite significantly, that Article 54 of The New Arbitration Law makes one thing clear: *Shariah* and Saudi public policies do not automatically bar enforcement of an arbitral award that might contravene their sensibilities. The award will remain enforceable *except where the claimant includes in its challenge a claim to preclude enforcement and the court decides on it.*

This necessarily raises the question whether an arbitration award arising from a dispute over an administrative contract might also remain enforceable absent the Council of Ministers or (the King's) approval *except where the claimant includes in its challenge a claim to preclude enforcement and the court decides on it.* In other words, it appears that Article 54 embraces notions of waiver, estoppel and fairness that, if applied to *Shariah* law, would certainly seem applicable to other provisions such as Prime Minister consent to arbitration. It remains open to question therefore whether administrative contracts are *always* inarbitrable, but for explicit consent of the King.

⁴⁸¹ F Al-Dehais 'Saudi Arabia' (2016) *The Middle Eastern and African Arbitration Review* available on <http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2016/1036981/saudi-arabia> (last visited 15 March 2017)

The dynamic interplay between *Shariah* law's supreme authority and the effects thereon KSA's necessity to protect sovereignty despite having none before Allah, is not the only feature that is affecting the current obstruction of arbitration in an administrative context. A spate of major oil-related disputes occurring in the international arena have deterred many Gulf countries from settling their disputes through international arbitration.⁴⁸² The next section will consider the seemingly unlikely scenario in which foreign or international rules may be applied to administrative contract entered into with the Saudi government, preparing the ground for a discussion of the impact of international and comparative laws and jurisprudence on the treatment and dispute resolution of administrative contracts performed in the KSA.

4.5 The Applicable Law of an Arbitration Agreement in An Administrative Contract

As has been discussed throughout this chapter, there is evidence to suggest that the Saudi government has, in recent years, been more willing to consent to arbitration of a dispute involving the Saudi government, which by implication extends to its "delegates" (public officials to whom power and decision making authority has been conferred).⁴⁸³ All private parties who enter into an agreement with the Saudi government will be governed by the applicable law of the contract, which is often the same as the law of the arbitration

⁴⁸² See generally: *Sapphire International Petroleum v. NIOC*, 13 Int'l & Comp. LQ (1964) 1011. *BP v. Libya*, 53 International Law Reports (1979) 297. *TOPCO v. Libya*, 17 ILM (1978) 3. *LIAMCO v. Libya* Award of 12 April 1977, Yearbook VI (1981) 89. *Kuwait v. AMINOIL*, 21 ILM (1982) 976

⁴⁸³ Al-Hosban, 'The New Saudi Arbitration Law on Arbitration: Presentation and Commentary', (2012) 4 Int'l. J. Arab Arb. 3, 5-13. See also Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a,' (2013) 20 J. Int'l. Arb. 2, 13-30

agreement. Any foreign party contemplating arbitration in respect of a contract formed with a Saudi or national should be aware of the pitfalls.⁴⁸⁴

As discussed, there is no strict separation of powers between the principal executive organ of the state – the Council of Ministers, who has at its head the King of Saudi Arabia– and the main administrative court, the Board of Grievances. Given the weak or questionable independence of adjudicative bodies from political functions, the State essentially acts as both contractor in an administrative contract, and ultimate arbitrator of justice. Opportunities for private parties to get a fair hearing – at the level of administrative justice and adjudication of contractual disputes – is, consequently, placed into peril. In view of these constitutional challenges, it is little wonder that a private party may prefer to settle their disputes through a neutral forum, moderated by independent experts who apply apolitical rules or international private law, to achieve mutually agreeable solutions, unfettered by public opinion or state intervention.

This has important implications in respect of the applicable law of the arbitration, which in most cases will be the applicable law of the contract. In pragmatic terms, private parties who satisfy the consent to arbitrate requirement will still have good reason to approach the conclusion of arbitration agreements with care and precision. Contractual certainty and prior understanding of potential public order issues, as well as some knowledge of Islamic *Shariah*, will provide private parties with some protection against the substantial discretionary power of courts and other adjudicative bodies in Saudi

⁴⁸⁴ Article 13(g) of the Grievances Board Law, Royal Decree No. M/78 dated 19 Ramadan1428H, corresponding to 1 October 2007G, which covered both foreign court judgments and foreign arbitral awards. This provision was previously enumerated under 8(1)(g) of the Grievances Board Law, Royal Decree No. M/51 dated 17 Rajab1402H and was only applicable to foreign court judgments

Arabia.⁴⁸⁵ Model clauses or provisions borrowed from other arbitration frameworks may also help to minimise legal risks that the terms of agreement will be (deliberately) misconstrued, disregarded or even set aside should it be judged in conflict with Saudi regulations, policy or *Shariah*.⁴⁸⁶

There is however one constitutional basis for legal constraint which Saudi authorities cannot deny or escape. By virtue of its own constitutional instruments and declarations, the Saudi government absolute power is limited only by the *Shariah* compliance requirement. As such, it is advisable that the governing law of the contract be based on Saudi law, or at least the laws of another Islamic country with similar jurisprudential traditions, for instance a Gulf Country state.⁴⁸⁷ To avoid the problems of politically charged contract construction, the arbitrator should have knowledge of both the commercial and Islamic laws applicable in Saudi Arabia.⁴⁸⁸

On the other hand, as the earlier discussion on the treatment of administrative contracts under Saudi municipal law in chapter 2 and 3 have shown, parties to administrative contract, may face significant risks. Foreign parties, in particular, face challenges when dealing with the local laws and institutions of an unfamiliar or unpredictable legal system. To avoid uncertainty or unfavourable decisional outcomes, private foreign parties will typically seek to exclude the application of national laws in all aspects of contractual execution or dispute resolution. To this end, they may look to include

⁴⁸⁵ See Mohamed Abdel Raouf, 'The Call for Ethical Guidelines for Counsel in International Arbitration', (2011) IBA Conference Dubai ; R. Karrar-Lewley, 'Revolution in Bahrain- Decree No.30 of 2009 and the World's First Arbitration Freezone', (2011)14 Int'l A.L.R. 3

⁴⁸⁶ For a general discussion of conflict of law issues see A Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin', (1981) International and Comparative Law Quarterly 358

⁴⁸⁷ Raouf, (n 485)

⁴⁸⁸ Ibid.

contractual or arbitration clauses in the terms of the agreement which are designed to exclude or limit the scope and applicability of mandatory national laws, including choice of law rules, stabilisation clauses, and mandatory arbitration clauses.⁴⁸⁹

In any event, as will be discussed in further detail in chapter 5 and 6, the Saudi government would have good reason to assert that an administrative contract falls subject to the exclusive jurisdiction of its own national laws and courts, for practical reasons (the contract was performed on its territories, thus satisfying the “closest connection” rule) and on public order or sovereignty grounds (the subject matter of the contract relates to issues of public and policy, matters which are traditionally reserved for the state).⁴⁹⁰

Indeed, with respect to contracts involving international law, KSA Resolution 58 provides:

“The choice of law governing any dispute to which a government authority is party is to be determined ‘in accordance with the established general principles of private international law’, the most important of which ... is the principle of the application of the law pertaining to the place of execution [execution meaning place of performance]...*Government authorities are not permitted to choose a foreign law to govern their relationship with individuals, companies or private organisations... No government authority is permitted to conclude a contract that contains any clause*

⁴⁸⁹ George Delaume ‘The State Contract and Transnational Arbitration.’ (1981) 75 Amer. J. Int’l. L 11,16

⁴⁹⁰ For a discussion see M Sornarajah ‘Supremacy of the Renegotiation Clause’, 5 (1988) Journal of International Arbitration, 141. For a related discussion see Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist Versus Dualist Controversies,’ (2001) Eur. J. Int’l L. 311.

*subjecting such authority to the jurisdiction of any foreign court or other adjudicatory body...*⁴⁹¹ [emphasis added]

Of course, the nature and subject matter of the contract itself may be in dispute (is it commercial or public ‘in kind’?), raising thorny questions over the competency of a non-Saudi court to tribunal to determine preliminary issues of arbitrability or its capacity to assert substantive jurisdiction over the terms of the dispute, as was the case in *ARAMCO*.

For the moment, let us assume that the laws governing an administrative contract entered into with a foreign party is neither immaterial nor self-evidently clear. Three possible scenarios can be identified.

- The absence of an explicit choice of law clause in the agreement;
- Little or no dispositive evidence to suggest that the parties had intended to choose the laws of another legal system as the applicable forum and law of the (arbitration) agreement and proper law of the contract
- That, both parties had failed to nominate, through mutual agreement, a contractual forum or law selection clauses, which would allow the arbitrators to determine the applicable law of the contract, arbitration, as well as the law of the forum or terms of reference.⁴⁹²

In the event that these choice of law issues have not been appropriately resolved with the consent of both parties, the only legal protection which may be available to a foreign party who has been denied justice in the national courts is to insist upon the initiation of

⁴⁹¹ Article 2, SAL 2012

⁴⁹² On relevant theme see Al-Khunami ‘Arbitration Clause in the Petroleum Agreements’, a paper presented at the Third Arab Petroleum Conference, held in Al-Escandaria, October 19613-7

neutral dispute settlement mechanisms, principally through international or transnational arbitration proceedings, whether through an institutionalised mechanism of international arbitration (e.g. the International Chamber of Commerce (ICC)) or by way of ad hoc participation in informal arbitration or pre arbitration schemes. The question posed is: should states be made to comply with and enforce the decisions of international tribunals, even when Saudi law explicitly constitutes the terms of the contract which is to be performed in accordance with the applicable law of the host state of Saudi Arabia. The applicable law, otherwise put, encompasses both national legislation and mandatory norms of *Shariah*.

4.6 The Impact of Foreign or International Law on Arbitration in Administrative Contracts

The probability that Saudi government or governmental parties will consent to be bound by a foreign choice of law clause remains an uncertain prospect, at least for the foreseeable future. What is less clear is whether an award against the government that has been decided on the basis of a foreign law has binding effect on the parties, under the relevant Saudi law. *Shariah* provides little guidance on this issue as the four leading Islamic schools have not reached a consensus on governing choice of law of an agreement and its legal effects.

The predicament revolves around the question of which body, a tribunal or court, has competence to determine the applicable law of agreement when the agreement itself is unclear on the issue. For instance, which law is to prevail when there is a conflict between the nominated law of the arbitration agreement or clause (which reference

foreign law e.g. stabilisation clauses or choice of law clauses) and the proper law of the contract (which in the case of the administrative contract is determined by the governing public law rules of contracting state). Moreover, who decides? In other words, who has ultimate authority to resolve the conflict, national courts or an arbitration tribunal?

If a dispute is raised over the governing law of the arbitration, the tribunal, or the national court where appropriate, may be called upon to refer the relevant statutory law, constitutional rules, principles of *Shariah*, as well as the relevant conflict of law rules. Under these circumstances, it is worth considering the three steps in choice of law, expressed choice, implied choice and closest and most real connection test, have been developed by the English courts to determine whether the arbitration agreement is separable from the underlying contract.⁴⁹³

In relation to the first test, it is improbable that the Saudi governmental authorities would give express consent to a choice of governing law other than the applicable laws of the Saudi Arabia. It is more probable to assume that the Saudi government would intend for the governing law of the arbitration to be that of the proper law of contract, as determined by evaluation of the character and its clauses. Administrative contracts are therefore subject to the jurisdiction of the Saudi legal system. But herein lies the rub; administrative contracts are characterized by features and clauses which are not usually found in civil or commercial contracts, and thus not governed by ordinary private law. Instead, the contract is subject to regulation by the applicable rules of public law and policy, and perhaps to a lesser extent the relevant principles of *Shariah*.

⁴⁹³ The relevant case is *SulAmérica Cia Nacional de Seguros SA & ors v Enesa Engenharia SA & ors* [2012] EWCA Civ 638)

In connection with the second test, it is possible that the arbitration agreement or specific clauses in relevant agreements make reference to a different choice of law. These would include contractual clauses that are designed to exclude or limit the scope and applicability of mandatory national laws.⁴⁹⁴ Nevertheless, the issue on enforcement of award made on tribunal's implied choice of law remains.

In connection with the third test, a credible case could be made that an administrative contract performed in KSA is a prime example of a contract that satisfies the closest connection rule. From the standpoint of the Saudi Arabia, there is a clear nexus between the applicable law and the performance of the contract, which takes place in territory of the host state. One does not have to be dualist or state apologist to accept this view, and even the most pragmatic of lawyers can appreciate that the state of contractual performance is best positioned to oversee the day-to-day operation of the contract, and to apply its own laws as issues arise.⁴⁹⁵

Ultimately, the validity of foreign arbitral awards will hinge on whether the governing law of arbitration clause should be treated as distinct from the contract – in this case an administrative contract – is contained (since the law of the contract is presumptively governed by the special public law rules which ordinarily govern administrative contracts in KSA as stipulated under resolution 58, above). If the law specified in the governing law clause of an arbitration agreement is different from the law of the contract, the tribunal may be able to assume jurisdiction.

⁴⁹⁴ Delaume, (n 65) 11

⁴⁹⁵ Alan Schwartz & Robert Scott 'Contract Theory and the Limits of Contract Law', (2003) 113 Yale Law Journal 541, 545

Movements in this direction will depend largely on whether national courts will impose limits on their discretionary power, for instance by giving effect to explicit statutory provisions of the SAL 2012 and to the general principles of Islamic *Shariah*, to the extent each give recognition and effect to fundamental principles of contract law: freedom of contract, good faith (or *pacta sunt servanda*) and party autonomy (the freedom to choose the applicable law and forum of dispute resolution).⁴⁹⁶ Yet, as has been made all too evident in recent disputes involving administrative contracts, the perennial tension between international regulation and its domestic enforcement will continue to impede progress in this area. Although states who jealously guard their sovereignty, will continue to do so, in the courts and in international treaty based processes, it remains to be seen whether new Saudi regulations will bring about a shift in judicial and governmental attitudes, and with it greater respect and recognition of the finality of foreign award.⁴⁹⁷

In the wider landscape, recourse to non-Saudi seated arbitration in any contract involving a foreign party, but especially when contracting with a governmental entity, may prove, ultimately, to be an exercise in futility.⁴⁹⁸ Faced with jurisdictional claims over disputes impacting issues over which the Saudi authorities seek to exercise absolute and sovereign control. Saudi arbitrators, and arbitration centres, who are strictly policed by the relevant courts and enforcement judge, are unlikely to apply the rules and procedures of another legal system if these are conflict with the official law and policy of the government.

⁴⁹⁶ Besides the right to agree on a private forum, the acceptance of this principle implies also that the parties are allowed to influence different aspects of arbitration by their agreement. Thus, they may choose the rules of procedure to be applied, to determine the seat of arbitration, to select arbitrators, as well as to choose the applicable substantive law.

⁴⁹⁷ International Arbitration: Corporate Attitudes and P

⁴⁹⁸ Thomas Childs, 'Egypt, Syria And Saudi Arabia: Enforcement Of Foreign Arbitral Awards', (2010) Kslaw.com available at <http://www.kslaw.com/imageserver/KSPublic/library/publication/9-10ArbitrationCommitteeNewsletterChilds.pdf> (last visited 10 March 2017)

Rather, they may be prone to uphold, rather than challenge, the exclusivity of the Saudi legal system over contractual issues or undertakings of public interest, or which undermine the unfettered discretionary authority of state organs.⁴⁹⁹

Yet, the mere fact that the law of the host state is designated the applicable law by both parties does not itself detract from the factual reality of the internationalised character of the administrative contracts. What role then, if any, does or should international law play in an administrative contract in which municipal law is the exclusive choice of law? Can principles of public international law be used to moderate or control the performance of contracts subject to the municipal law of the host state? Or can a nexus between the contract and the rules of private international law be established by means of objective and subjective contract construction, from which the parties intention to ‘internationalise’ the administrative contract, can be soundly presumed?⁵⁰⁰ The ‘choice of rules’ of private international law, otherwise put, establish the contact point at which the contract and international law meet. Notwithstanding, choice of law issues are ultimately governed by “subjective” contractual elements which are determined by the parties themselves, including rules governing the nature and terms of the contract, choice of law clauses and – this is crucial – non state-dependent legal safeguards including a provision for international arbitration.⁵⁰¹

⁴⁹⁹ See generally, A. Samuel, *Jurisdictional problems in International commercial arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West Germany*, 1989, Schulthess polygraphischer Verlag, Zurich, 33; R. Karrar-Lewley, ‘Revolution in Bahrain- Decree No.30 of 2009 and the World’s First Arbitration Freezone’, (2011) 14 Int’l A.L.R. 80-89

⁵⁰⁰ Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist Versus Dualist Controversies,’ 12 (2001) Eur. J. Int’l L. 309, 316, 316

⁵⁰¹ El-Ahdab, *Arbitration with Arab Countries* (1995) (The Netherlands :Kluwer Law International 1999)

The choices of the parties, including but not limited to: law, venue, and means of dispute resolution, are increasing in a paralleled complexity to that of the internationalised state contract. Without an “international law” governing such agreements, and given the hybrid nature of the agreements as well as the multi-jurisdictional spheres of legal certainty decorated in shades of “grey”, it leads one to question how any disputes are in fact resolution.

4.7 Conclusion

This chapter argues for the need to balance the legitimate sovereign authority of the state and state law, with greater respect for, inter alia, the jurisdictional rules of leading international arbitration regimes and the norms of international law. Here the pull towards harmonisation though international arbitration would still be tempered by respect for established “rule of law” principles which are deeply rooted in national public and constitutional law, values and traditions. Moreover, to the extent that international arbitration tribunal are expected to observe principles related to procedural legality, the fair and reasonable expectations of international parties are also ensured. While we will discuss these issues in the context of the internationalisation of state contracts and in-depth case law analysis of arbitration of administrative contracts in the next two chapters, it shall all be funnelled through the filter of this current chapter of arbitration. Therefore, a vital perspective should be made clear.

For centuries,⁵⁰² arbitration has been used in Saudi Arabia under *Shariah*. In this author’s view, allowing arbitration in administrative contracts in the modern world should be

⁵⁰² Al-Ammari (n 120)

embraced, not shunned. As the chapters of this thesis have shown, certain positions will be asserted that significantly contravene Saudi Arbitration law and Constitutional mandates in the context of administrative contracts. These positions would be countered and refused by the current system, however, the combination of *Shariah* law and modern interpretation of SAL 2012 may indicate a possibility of a valid incorporation of arbitration in administrative contracts.

What will ultimately be proffered in the remaining discussions is that in the vast majority of cases, it is urged that the Prime Minister approve the arbitral component with the caveat that it be applied consistent with fundamental Saudi Arabia law, policy, and *Shariah*. However, if Prime Minister's approval becomes a tool for legal upheaval or chaos, as it has in Egypt following the Arab Spring, it is urged that the condition of Prime Minister approval be abolished for the reasons outlined above and forthcoming in the concluding chapters.

Traditional doctrines of waiver, estoppel, and fairness, the latter of which is expressly embraced by *Shariah*, would all support such a view, as would the express provisions of The New Arbitration Law. The *Quran* itself accepts arbitration, providing: 'If ye fear a breach between them, then appoint arbiters . . . If they wish for peace, God will cause their conciliation, for God hath full knowledge and is acquainted with all things.'⁵⁰³ There is, therefore, no reason why it should not apply with full vigour to administrative contracts to which the Islamic government is a party. It is through this declaratory endorsement of arbitration of administrative contracts that we move forward to the next chapters.

⁵⁰³*Quran* 4:35

Chapter 5

The Internationalisation of the Administrative Contracts: Applying International Concepts to Domestic Public Contracts

This chapter will attempt to explore the interface between international law concepts, internationally recognised principles of administrative law, and the laws applicable to an administrative contract in the state. The discussion on administrative contracts and arbitration has thus far been assessed from the perspective of Saudi law, in other words from the perspective of the national legal system. This chapter ‘flips’ the focus to 1) the ‘internationalised’ nature of state contracts, and 2) a growing recognition and convergence around the relevance and applicability of international public and private law concepts to administrative contracts.⁵⁰⁴

For the purposes of this chapter, two key issues will be addressed which build on previous chapters. Firstly, the chapter will adopt a comparative perspective to explore the relevance and applicability of international concepts in the Saudi context. A second set of questions considers the role of international rules in the treatment of agreements concluded with a state or state entity. This section engages with familiar questions of legitimate authority, competency and jurisdiction in the settlement of disputes which have public and private elements, as well as foreign and domestic elements. This chapter will consider the interrelationships between international law and administrative law in the determination of regulatory versus commercial contracts, and of the wider role of international rules and case law on the treatment and dispute resolution of state contracts.

⁵⁰⁴ For a general overview on the boundary between state contract and international law see Maniruzzaman (n 500) 311

This is an important question because Res. 58, the rule which restricts the conditions under which internationalised state contracts can be arbitrated, can be seen to be an expression of the state's absolute sovereignty and immunity from action, including through arbitration.

In the final analysis, this chapter considers whether the Resolution 58 conflict or cohere with both general principles of international *and Shariah* law by unpacking the issues associated with the governing law of the contract, which is a necessary precursor to an assessment of issues around the applicable law of the arbitration.

5.1 The Rise of the Internationalised State Contract

As it has been established, administrative contracts are subject to a separate legal regime: they are governed by the specific rules, doctrines and prerogatives of public law and authority. It follows therefore that when an administrative contract is determined as such under i) the applicable statutory or delegated law or ii) through judicial determinations or judge-made law, the law applicable to any future contractual dispute will be the relevant public law rules and policies of the state in which the contract is being performed. There are at least two ways in which an administrative contract, including any arbitration clauses within it, can be seen to have double edged character, both of which have been alluded in previous chapters.

The first concerns the treatment of contractual issues arising from a project or venture which does not fit neatly within the established categories of public regulation or commercial undertakings which are the usual preoccupation of private law and lawyers. Indeed, as suggested below, the administrative contract is a paradigmatic example of

state governance which eludes its confinement within the classic distinctions of public v private law/ international law v domestic/ the state authority v individual subject and so on.⁵⁰⁵

In a market economy, characterised by glow flows of capital, finance, services and people, the state entity does not only structure the market by providing rules which allow individuals to plan their economic activities and to predict contractual outcomes. Rather, the state acts, increasingly, as both regulator and contractor,⁵⁰⁶ simultaneously setting the rules of contract formation while privately benefiting from the gains won from such transactions. These contracts can be described as having a “dual” regulatory and commercial character. With these developments, the imaginary line dividing an autonomous realm of public legal authority that neither interacts nor collides with the private world of economic life, no longer accurately describes the mixed nature of the state’s complex relationship with private actors.⁵⁰⁷

As the discussion on Saudi law on administrative contracts in chapter 3 and 4 has shown the value and binding effect of a contract is shaped to a large extent by the law applied to the contract. In the context of the KSA legal system, the functions of the public authority, and the obligations of the private party, will be structured and governed by the mandatory rules and unilateral decisions of a public authority, for instance in respect of procedures governing licensing, planning or state financing.⁵⁰⁸ In this instance, the legal relationship between the state and individual is consequently more

⁵⁰⁵ Maniruzzaman (n 500)

⁵⁰⁶ Ladeur H, ‘The Changing Role of the Private in Public Governance. The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation. A Comparative Approach,’ EUI Working Paper Law No. 2002/9 1 (2002)

⁵⁰⁷ Delaume (n 65) 784-819

⁵⁰⁸ Colin Turpin, *Government Procurement and Contracts* (Longman 1989) 97-98

regulatory in character. At other times, the state may act not as a regulator, who is charged with duties and powers exercised in the public interest, and more like an equal partner in a commercial transaction, based on terms which have been mutually agreed towards the fulfilment of some mutually beneficial or profitable outcome.⁵⁰⁹ Nonetheless, a public contract, defined as such under the applicable law, is automatically subsumed by, and governed under, the particular rules and principles of public law.

This takes us to a further complicating factor: what is the governing law of projects, agreements or ventures which have an “internationalised” character or element? The phenomena known as the ‘internationalisation’ of the administrative contract is not simply a theory, albeit a controversial one, it is, in some other sense, the hardboiled reality of an increasingly transnational legal system and globalised economy.⁵¹⁰

The administrative contract, and particularly the international procurement contract, is a by-product of networked society and knowledge economy.⁵¹¹ One obvious example of this for the purposes of this thesis is when the Saudi government puts out a tender for the delivery of public services to international as well as domestic firms. Frequently, developing economies will rely on the specialist skills and expertise of foreign firms. In addition to the nationality or corporate seat of the non-governmental party, the contract

⁵⁰⁹ El-Kosheri A and Riad T, ‘The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process’ (1985) 1 ICSID Review-Foreign Investment Law Journal 260

⁵¹⁰ See Gary Born, ‘A New Generation of International Adjudication’ (2012) 61 Duke L. J. 775, 778–81, 864–67

⁵¹¹ Sujit Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006)

itself may include references to a foreign legal system.⁵¹² With this, individuals or firms who contract with a public authority will increasingly find themselves subject to the foreign, and sometimes highly unfamiliar, laws of a foreign state.⁵¹³

A state contract which has a mixed or legally complex character may have bearing on the means of dispute settlement.⁵¹⁴ If for policy or other reasons a dispute is non-arbitrable and is regarded as the exclusive jurisdiction of national courts, it stands to reason that there is no ambiguity over the proper law to be applied to the contract: the law applicable to the contract is the law of the legal system, as enforced by the competent national courts, (the Board of Grievances in the case of KSA). However, if a dispute can, in principle, be arbitrated the next matter to be addressed is the question of what law is applicable to a internationalised state contracts, for instance the rules of Shariah, international law, or a foreign legal system.

This chapter will probe more deeply into the myriad ways in which the exclusivity of national law and legal system is increasingly being circumscribed or constrained by extra-national rules, customs and principles, including principles of public international law.⁵¹⁵ National legal systems are also subject to the influence of comparative jurisprudence, as globalisation of trade and services provides the impetus for the spread and circulation of legal concepts and doctrines across states with diverse legal systems,

⁵¹² Fath EI-Rahman, *The Legal Regime Of Foreign Private Investment In The Sudan And Saudi Arabia: A Case Study Of Developing Countries* (Cambridge University Press 1984) 241

⁵¹³ Masao Miyoshi, 'A Borderless World? From Colonialism to Transnationalism and the Decline of the Nation-State' (1993) 19 (4) *Critical Inquiry* 726

⁵¹⁴ *Ibid.*

⁵¹⁵ Delaume (n 65)

traditions and cultures.⁵¹⁶ In the same vein international rules, standards and practices (described as *lex mercatoria*) increasingly structure global markets, and influence the laws and decisions of national regulators and courts.⁵¹⁷ The next section will turn to a discussion of how international concepts can be applied to civil law systems, which share similarities to Saudi Arabia.⁵¹⁸

5.1.1 The Rise of the Administrative Contract in Saudi Arabia

As it stands, a significant number of transnational corporations have commenced high risk commercial projects in KSA, not only in relation to the more established national sector in oil production and exploration but also in a wide range of infrastructure projects. The Kingdom is currently investing huge sums in residential and commercial real estate, most notably as part of its long-term development plans to build 6 new “mega cities”.⁵¹⁹ Remarkably, only a small number of these projects contain selection clauses designating the law of the state of the foreign investor, or any national law other than the host state’s law, as the law applicable to the agreement between the state and foreign investor. This issue, as we saw in chapter 4 is critical to arbitration matters, as discussed below.

The inevitability of the increased use of internationalised state contracts is also reflected in the statistical composite of KSA’s workforce with over 78% of the labour market

⁵¹⁶ Alex Mills, ‘Rediscovering the Public Dimension of Private International Law’ (2011) 24 *Hague Y.B. Int’l L.* 13, 20–21; S.I. Strong, ‘Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law’ in Marko Novakovic (ed.), *Basic Concepts Of Public International Law: Monism & Dualism* (Faculty of Law University of Belgrade 2013) 547, 547–71

⁵¹⁷ Justice Mustill, ‘The New *Lex Mercatoria*: The First Twenty Five Years’ in Maarten Bos and Ian Brownlie (eds) *Liber Amicorum for Lord Wilberforce* (Clarendon Press 1987) 167-8

⁵¹⁸ A.F.M. Maniruzzaman, ‘State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law’ (1992) 9(4) *J. Int’l Arb.* 141, 172

⁵¹⁹ Suleman Muhammad Ali, ‘The Subprime Crisis and the Lessons for the Islamic Finance Industry’ (New Horizon, April 2013) < http://www.islamic-banking.com/newhorizondigital/iibijune2013/newhorizon_june.pdf > accessed 24 March 2017.

comprised of foreign workers.⁵²⁰ Foreign workers from nations such as Turkey, India and China have been working for several years on the restructuring of the city of Rabigh, for example, for increased economic input. The significant influence of foreign commercial and administrative actors in Saudi Arabia should be considered when developing reform proposals, including in respect of themes focused on in this thesis: decentralization of administrative power; commercial versus administrative contracts; role of law; due process; and rights of parties.

The difficulty is that internationalised state contracts are incredibly complex instruments, often obscuring, or at least profoundly complicating, the true nature of the contracts, the rights that flow from these and dispute resolution. On other hand, the KSA has strong incentives to diversify as well as strengthen its economy through public and private cooperation because:

‘The experiences of other developing and transitional countries have shown that lack of efficient administrative systems impedes the implementation of complex policies such as privatization, outsourcing or PPPs, and increases their likelihood to fail. The success of these policies necessitates high levels of efficiency within the machinery of government streamlined coordination and collaboration among government institutions, and qualified human capital to administer complex contractual

⁵²⁰ Mhamed Biygautane, Paula Gerber and Graeme Hodge, ‘The Evolution of Administrative Systems in Kuwait, Saudi Arabia, and Qatar: The Challenge of Implementing Market Based Reforms’ (2016) *Digest of Middle East Studies* 18

arrangements, and technical skills to partner with the private sector.⁵²¹

In other words, KSA's governmental infrastructure and economic policies depend on administrative contracts and robust commercial links with foreign partners, whose expertise and access to resources is necessary for the immense visions, growth, and reforms Saudi Arabia has set for itself. While these "market-based" administrative reforms, the process of liberalisation and open competition has seen administrative legal systems, in the West and East, increasingly converge in common understandings, customs and practices, many of which break down the classic boundaries set up between international commercial law, and the increasingly global form of administrative law.⁵²²

The next section considers how common definitions and constructions of the sub-categories of administrative contracts which were discussed in the context of the Saudi legal system have been differently or similarly developed at international or transnational levels. While these categories have been mentioned in previous chapters, the distinction in this discussion here is that the "internationalised" version of these contracts typically involves a foreign, private party, thereby forcing the examination of what happens when a dispute arises within these contracts and how arbitration may be managed. While a purely domestic or national administrative contract between a public entity and a KSA citizen may be seen fall within the undisputed competence of national courts, the internationalised contract is where the confusion lies, and the very purpose of passage of laws such as SAL 2012. As will be discussed below, the nature of the contract can greatly

⁵²¹ Ibid. See for general discussion Mhamed Biygautane, Graeme Hodge, and Paula Gerber, 'The Prospect of Infrastructure Public-Private Partnerships in Kuwait, Saudi Arabia, and Qatar: Transforming Challenges into Opportunities' (19 September 2016) *Thunderbird International Business Review* 2, 3

⁵²² Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemp. Probs.* 15, 26

affect the applicability of domestic law. Specific cases to such as *Pemex*, *ARAMCO*, and the *Pyramids* case, will help shed light on this critical point.⁵²³

In the above light, the chapter will expand on these concepts to critically analyse the common issues of administrative law; to isolate the unique problems to KSA; and to broaden the understanding to limitations in *Shariah* law that will always challenge a broad push to “westernize” KSA's approach to administrative law.

An important caveat to this analysis is that many scholars and business-interested parties attempt to focus any discussions on "foreign investment". While ‘foreign investment’ is not a phrase naturally inherent to administrative law, internal statistics in KSA demonstrate that “foreign parties” are an inevitable element of influences in KSA's administrative law system.⁵²⁴ That being said, foreign investment has its own distinct applicable domestic and foreign laws within KSA and its implementation of international treaties and conventions, including: Bilateral Investment Treaties (BITs), international investment dispute settlement frameworks such as ICSID and in the form of umbrella clauses attached to economic development agreements.⁵²⁵ All of these may be mentioned at times in the coming chapters, but it is critical to this study to understand that this concept of “foreign investment” is not the focus of reform, but rather an aid in framing

⁵²³ *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, No. 13-4022, 2016 U.S. App. LEXIS 13991 (2d Cir. 2016); *Pyramids Case Southern Pacific Properties (Middle East) Limited Arab Republic of Egypt* Case No. Arb/84/3 and *Saudi Arabia v. Arabian Oil Company (Aramco)*, 27 International Law Report 213

⁵²⁴ Alnowaiser (n 2)

⁵²⁵ See John A. Westberg, *International Transactions and Claims Involving Government Parties – Case Law of the Iran US Claims Tribunal* (International Law Institute 1991) 65-73

discussion of administrative contracts and the multitude of circumstances where *Shariah* law has or could serve as “choice of law”.⁵²⁶

5.1.2 Types of International Public Procurement Contracts: “The Nominated and Internationalised Administrative Contracts”

As later sections will show legal character, effects of an internationalised state contract and its dispute resolution are all issues over which there is intense contestation. The emerging jurisprudence on international administrative law allows us to distinguish between acts of state versus commercial acts or regulatory acts versus contractual acts. The case law and associated concepts are not so easily untangled, however, due to the multi-dimensional rights of parties and the increasing globalization of economic and infrastructure related projects.

5.1.2.1 Public Works Agreements

Due to globalization and socio-economic growth, it is more common to see administrative actions and contracts being legally or judicially established as part of what would typically be labelled as commercial or private contracts, e.g. International Public Works Agreements; Build, Operate, Transfer (BOT) – Build, Own, Operate and Transfer (BOOT) – and Public Private Partnerships (PPP). More specifically, international and civil law administrative doctrines have deemed supply agreements, public works, and concessions to be “the Nominated Administrative Contracts.” While domestic procurement contracts were introduced in previous chapters, it is the function of public

⁵²⁶ Christoph Schreuer, ‘Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the Vivendi I Case Considered’ in T. Weiler (ed.) *International Investment Law And Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties And Customary International Law* (Cameron May London 2005) 281

infrastructure and concession contracts in both domestic and international spheres which spurs the modern debate of administrative law. These contractual styles breed a more flexible interaction between public and private parties, while maintaining the state identity. France, for example, passed sweeping reforms in 2004 incorporating these new contractual entities into their administrative law, including provisions that PPP contracts may be considered administrative contracts, with the state maintaining the unilateral authority of penalization for delay or termination of the contract.⁵²⁷ Egypt has promulgated and amended laws pertaining to concessions for public utilities and exploitation of natural resources, including areas such as providing electricity, building roads, specialized ports, and airports.⁵²⁸ These laws have been recognized as being “a real revolution in administrative contracts and state international administrative transactions.”⁵²⁹ Modifications were made to rules surrounding review of contractual prices; arbitration authorities; and allowances for certain liquidated damages.

5.1.2.2 International Public Works Agreements

International Public Works Agreements are an important example of the transformed nature of administrative contracts; their increasingly global and transnational character, and the delicate balance of rights that ensues. The main distinction between these types of contracts and their domestic cousins are that they involve a foreign element, which provided the definition as “international”, otherwise the definition was the same e.g. there must be a public party; there must be public interest; and the project asset must be

⁵²⁷ Ismail (n 339) 6

⁵²⁸ Arbitration Act No. 27 of 1994, Egypt; See also Egyptian Parliament Law No. 67 of 2010, Law 100 of 1996, 229 of 1996, 3 of 1997, 22 of 1998, and 191 of 2008; See also Egyptian Civil Code Article 668

⁵²⁹ Ismail (n 339) 7

transferred to the public entity upon completion of the construction or after a certain period of time.⁵³⁰ Due to the pervasive use of PPPs, and similar legal mechanisms, these agreements have the same classification problems between commercial or administrative interests as a domestic “Public Works” administrative contract. In some rare instances, developing states, such as Egypt or KSA, are accepting the application of foreign law to these types of agreements. This is contrary to domestic Public Works Agreements in which, as set under France’s *le Contrat Administratif*, the application of foreign substantive law is rejected.⁵³¹ Again, the reason this seems to be occurring is increased demand from the international community to consider the rights of a foreign party, who have the weight of their own governments and national legal apparatus behind them.⁵³² There is international interest in protecting the state identity behind all parties to internationalised administrative contracts.

5.1.2.3 Concession Agreements

Concession contracts can also be constituted as commercial or administrative, and as such open to questions of domestic versus international applications; but as has been discussed they have a sordid history in Arab nations economically dependent on oil and gas industries dominated by foreign expertise. Concession contracts can involve public utility or they can involve the exploitation of natural resources, the latter being more controlled by KSA because natural resources, oil and gas are its source of economic vitality. Despite *ARAMCO*’s negative impacts on arbitration in KSA, other civil law

⁵³⁰ Ismail (n 339) 10

⁵³¹ Ismail (n 339) 10

⁵³² Mustill J, 'The New Lex Mercatoria: The First Twenty Five Years' in M Bos and I Brownlie (eds) *Liber Amicorum for Lord Wilberforce* (Clarendon Press, 1987) 23

administrative and Arab states regularly cite *ARAMCO* as a critical consideration for any arbitration, reforms or contractual requirements for government entities party to internationalised administrative contracts.⁵³³

Accordingly, other developing states, including KSA, have started using agreements such BOT, BOOT, and the International Public Works contracts to better manage expectations and control of administrative contracts involving massive, long-term projects. They allow the state to benefit from the company resources and institutional expertise of a private party, but to maintain unilateral authorities in overseeing the use of funds, timeline for completion, and quality of public service. The public party can also leverage penalization tools including imposing financial fees, forfeiture of bonds, or termination of contracts.⁵³⁴ However, State intervention is more limited than regular public works contracts in these agreements as they cannot amend service prices without consent of the contractor and service prices to end-users are considered contractual terms not regulatory authority.⁵³⁵ The purpose of these concessions is to satisfy the private party with more consistent economic expectations. In theory this practice complies with *Shariah* principles of risk and loss distribution, but while Egypt has fully implemented the reforms, KSA has not yet applied some of these new ideas due to concerns of

⁵³³ See *Sapphire International Petroleum Limited (Sapphire) and the National Iranian Oil Company (NIOC)* (1963) 35 I.L.R. 136; *Government of Kuwait v American Independent Oil Company* Award of 24 March 1982 published in (1984) 66 ILR 518 (1982) and 21 ILM 976 (hereafter *Ananotl*); See also *LIAMCO v. The Government of the Libyan Arab Republic*, YCA 1981, 89, 103 et seq. https://www.trans-lex.org/261400/highlight_ARAMCO/liamco-v-the-government-of-the-libyan-arab-republic-yca-1981-at-89-et-seq/ ; See also *ICSID Award Amco Asia Corp. et al. v. Republic of Indonesia*, 24 ILM 1985 1022, 1034 et seq. [https://www.trans-lex.org/240200/highlight_ARAMCO/icsid-award-amco-asia-corp-et-al-v-republic-of-indonesia-24-ilm-1985-at-1022-et-seq-\(also-published-in:-clunet-1987-at-145-et-seq-icsid-rep-1993-at-413-et-seq-int/\)](https://www.trans-lex.org/240200/highlight_ARAMCO/icsid-award-amco-asia-corp-et-al-v-republic-of-indonesia-24-ilm-1985-at-1022-et-seq-(also-published-in:-clunet-1987-at-145-et-seq-icsid-rep-1993-at-413-et-seq-int/)); See also *BP Exploration v. Libyan Arab Republic* (53 I.L.R. 297) 1973.

⁵³⁴ Biygautane et al (n 563)

⁵³⁵ Ismail (n 339) 18

relinquishing control of government projects and the rights to exercise unilateral authority in respect of internationalised state contracts.

5.1.3 Summary

Three broad points should be considered in light of the above discussion and the growth of the international form of nominate form of administrative contract which have long since been familiar to civil law systems.

The first is that contracts belonging to each of the sub-categories discussed above are likely to have a mixed or dual legal character, in that each cannot be clearly classed as regulatory or as commercial, or as international or administrative instruments. Equally, internationalised versions of the concessions, procurements or public works contract are, like their domestic counterparts, anchored in public-law (e.g. the civil law concept of “*contrat administratif*”).⁵³⁶ The mere fact that these agreements are concluded with foreign parties should not exempt a state entity from observing or giving effect to same sorts of administrative law guarantees which constrain public power at the level of domestic administrative law. On the other hand, internationalised contracts, like all contracts, vest private party with certain acquired rights which may require protection under contract law. These issues will be covered extensively throughout this chapter.

The second point is that all of the above contracts can be viewed as controversial or potentially forbidden under concepts of *riba* or *gharar* in *Shariah* and KSA law. It is striking therefore that Saudi Arabia is moving towards the acceptance of the following

⁵³⁶ Nagla Nassar, *Sanctity of contracts revisited: A Study in the theory and practice of long-term international commercial transactions* (Nijhoff, Dordrecht 1995)

types of internationalised administrative contracts by allowing a form of liquidated damages in specific, contractual instances; providing opportunities for parties to review contractual prices on a regular basis; and opening up the discussion for when and how a public entity may participate in arbitration proceedings, e.g. in a PPP.⁵³⁷ Long-term infrastructure projects require options for dispute resolution and adjustment for “changed circumstances” or even unexpected geopolitical events. The recent ‘freezing’ of several infrastructure administrative projects due to economic pressures and the implementation of Vision 2030 is a case point.

The above discussion reinforces the point that there will be situations in which their administrative law practices will require more flexibility including in respect of foreign “choice of law” clauses.⁵³⁸ In the coming decades, KSA may have little choice to reform and revise its arbitral and contractual law and practice if it is to remain competitive and attract foreign trade and commerce. Such changes will, however, have to be palatable to the Saudi public who may be hostile to reforms which are perceived to threaten the fundamental values of Islam. Set against this backdrop, this chapter offers a critical appraisal of the extent to which contractual flexibility should be balanced against the constitutional imperative to uphold and respect the requirements of *Shariah*.

⁵³⁷ See for general discussion Mhamed Biygautane, Graeme Hodge, and Paula Gerber, ‘The Prospect of Infrastructure Public-Private Partnerships in Kuwait, Saudi Arabia, and Qatar: Transforming Challenges into Opportunities’ (19 September 2016) *Thunderbird International Business Review* (Wiley Periodicals, Inc., doi:10.1002/tie.21853)

⁵³⁸ Tim Daiss, ‘Saudi Arabia Burns Through Cash Subsidies, Economic Crash Possible’ *Forbes* (14 October 2016) <<https://www.forbes.com/sites/timdaiss/2016/10/14/saudi-arabia-burns-through-cash-subsidies/#1c77c6da4288>> accessed 19 March 2017; See also ‘After a year of boldness, Saudi Arabia is in retreat’ *The Economist* (Riyadh, 10 December 2016) <<http://www.economist.com/news/middle-east-and-africa/21711529-kingdom-has-experienced-diplomatic-reverses-all-fronts-after-year?zid=308&ah=e21d923f9b263c5548d5615da3d30f4d>> accessed 19 March 2017; Press Release, International Monetary Fund, ‘Transcript of the Press Conference on Key Economic Developments in Saudi Arabia’ <<https://www.imf.org/en/News/Articles/2017/01/18/tr01172017-Transcript-of-the-Press-Conference-on-Key-Economic-Developments-in-Saudi-Arabia>> accessed 19 March 2017.

At first glance, the internationalisation of public-private partnerships would seem to dilute or even minimise the centrality of *Shariah* norms in the hierarchy of laws within the KSA legal order as whole. This writer argues that this view is mistaken. One can argue that a faithful reading of *Shariah* brings greater, and not less, demand for strengthened protection of private rights and legitimate governance in the treatment and dispute resolution of contracts.⁵³⁹ Such values are moreover consistent with emerging norms of international law, including rules on the protection of aliens, access to justice, fundamental human norms and the emerging body of law known as “global administrative law”⁵⁴⁰ (which sees diverse legal systems and jurisdictions converge on common ideas and elements of procedural justice).

The third and final point focuses on the limits of sovereign authority and immunity. In keeping with the focus on the extra-national dimension of administrative contracts, the scope of state immunity gains renewed importance: with the international state contract we are no longer dealing with a routine exercise of administrative discretion by a public official but a *legal expression of national regulatory sovereignty* – or state act. With this in mind, the next section will aim to demonstrate that the legal status and liability of state entities and officials may be brought within the scrutiny and ambit of international law, though perhaps not always to great effect.⁵⁴¹ The issue of sovereign authority has a significant bearing on many of the issues discussed below, including how to determine the regulatory v commercial nature of internationalised state contracts, in what forum,

⁵³⁹ Charles P. Trumbull, ‘Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts’ (2006) 59 Vand. L. Rev 59, 63

⁵⁴⁰ Sabino Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 N. Y. U. Int’l. L 663, 683

⁵⁴¹ See *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 AC 61 (HL)

applying what law. These issues will be evaluated both from the perspective of international law and domestic conceptions of sovereignty and immunity from the standpoint of regulatory, administrative and *Shariah* law in KSA.

5.2 What is the Relationship between Sovereignty, Immunity and International Law in the International State Contract?

The sovereign autonomy and independence of the state from external judicial and political interference is a longstanding principle of international law. Contemporary scholarly positions on the effect of international law on sovereign power tends to falls somewhere on a continuum between two argumentative extreme: those who regard the legal ‘fact’ of sovereignty, encompassing the immunity of a sovereign power from international legal liability, as more or less “absolute” and those who contend the sovereignty principle is being relativized by the operation of fundamental norms and principles commonly accepted by the “international community”. The tension between these positions will be fleshed out below.

5.2.1 The Concepts of Sovereignty and Immunity

Historically speaking, sovereignty is a word that carries a lot of baggage, having being wielded, both, as an instrument of power, and as a means of resisting power by external threats, interference and intervention.⁵⁴² In the globalising moment or so we are told, the autonomy and exclusivity of the sovereign state is contracting. As Al Husseni has argued: [T]he role of the post modern state, the “Welfare State”, is no longer limited to protecting

⁵⁴² Jean L. Cohen, ‘Whose Sovereignty? Empire versus International Law’ (2004) 18 *Ethics & Int’l Aff.* 1, 2; Andreas Paulus, ‘Jus cogens Between Hegemony and Fragmentation: An Attempt at a Re-appraisal’ (2005) 74 *Nordic J Int’l L* 297, 298

individual rights, freedoms and legitimate interests. Due to the diversity of the modern state's activities, its role has expanded to include the provision of public services to citizens either through the public sector or through public-private partnerships.”⁵⁴³

With these developments, 'rules and standards which are generated by private or supranational actors acting above, below and across jurisdictional boundaries penetrate deep within the state to affect its laws and constrain the decision-making power of its governments. The hands-tying effect of much international and global regulation is keenly demonstrated by the near universal levels of state membership in supranational organizations such as the World Trade Organization (WTO). Compliance with trade rules, in this case, has become an economic necessity⁵⁴⁴ More generally, supranational courts, such as the European (or Inter-American) Court of Human Rights or the more universal jurisdiction of the WTO adjudicative courts will adopt rulings and decisions which can – and often do – overrule the judgments of national courts.⁵⁴⁵

While the above picture suggests the “twilight” of sovereignty, many others have argued, conversely, that the regulatory power of the state has not weakened per se, but has instead been transformed. On this account, state actors no longer exercise power through the “long arm” of the executive branch of government. Rather, administrative power is dispersed and distributed through courts quasi-judicial (arbitral) tribunals who are

⁵⁴³ Rana El Hussein, 'United Arab Emirates: The Challenge Of Defining An Administrative Contract' (*Hadef & Partners* 21 September 2011) Hadef & Partners <<http://www.mondaq.com/x/146100/Government+Contracts+Procurement+PPP/The+Challenge+Of+Defining+An+Administrative+Contract>> accessed 19 March 2017

⁵⁴⁴ Ibid.

⁵⁴⁵ Ernst-Ulrich Petersmann, 'Multilevel Trade Governance Requires Multilevel Constitutionalism' in Christian Joerges & Ernst-Ulrich Petersmann (ed.) *Constitutionalism, Multilevel Trade Governance And Social Regulation* (Bloomsbury Publishing 2006) 5

involved in the adjudication of regulatory and administrative disputes.⁵⁴⁶ This creates a thick judicial network of national, international and institutional actors who relate to the other through varying levels of competition, dialogue, autonomy or mutual accommodation.

This more fluid idea of disaggregated and juridical sovereignty recasts the state not in the role of the absolute sovereign- cum-Leviathan but as an assemblage of political and legal actors who represent the shifting, rather than stable, interests of various constituencies through their participation in (increasingly transnational or international) administrative and quasi-adjudicative processes and proceedings.⁵⁴⁷ The process of mutual influence has a harmonising effect which may yet prove to be the strongest influence on Saudi Arabia's legal system, and its gradual willingness to bring its own laws into line with international rules, customs and dispute resolution practices.

5.2.2 Sovereignty and Issues of Immunity In Saudi Arabia

Closely related to the concept of sovereignty is the doctrine of sovereign immunity which has achieved customary status as a general principle of international law. The international community has adopted the basic construct and idea of sovereignty and sovereign immunity from the UK and French systems, with adaptations in Arab nations for compatibility with *Shariah* law.⁵⁴⁸ The origins of immunity has the function of deterring the average citizen from directly "suing" the King, thereby detracting from his

⁵⁴⁶ Ronen Palan, 'Trying to Have your Cake and Eating It: How and Why the State System Has Created Offshore' (1998) 42 Intl Studies Q 625, 630; See also, Georg Sorensen, 'Sovereignty: Change and Continuity in a Fundamental Institution' (1997) 47 Pol Studies 590, 604

⁵⁴⁷ Petersmann (n 545)

⁵⁴⁸ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal and International Human Rights Law* (Oxford University Press on Demand 2008) 12–64

ability to perform his duties to all citizens.⁵⁴⁹ Correspondingly, the modern *idea* of sovereignty is closely related to notions of public democracy, wherein the government exercises its power in the benefit of the collective good, rather than in pursuit of its own selfish ends, or the maximisation of the self-interested aims of privileged groups or individuals.⁵⁵⁰

Article 1 of the Basic Law of Governance states: ‘The Kingdom of Saudi Arabia is a sovereign Arab Islamic state. Its religion is Islam, and its constitution is the Holy Quran and the prophet's (peace be upon him) Sunnah (traditions). Its language is the Arabic language, and its capital city is Riyadh.’⁵⁵¹ This declaration of sovereignty is the first identifying feature of the Kingdom in its domestic law and indicative of the veracity with which the state protects its position and authority. Sovereignty of the State is established by domestic administrative law and justice procedures in Saudi Arabia, but is cemented by historical, and consistent theological precedent in Saudi Arabia’s domestic and international legal arenas.

However, as discussed in the previous chapter, sovereignty in KSA is a matter of public policy and domestic or international law, not a holy tenet of *Shariah* law. Further, while KSA leverages sovereign immunity to insulate its government or ‘monarchy from “suit” by its peoples’,⁵⁵² it has partially diverged from this more absolutist concept of

⁵⁴⁹ See Janet McLean, ‘Divergent Conceptions of the State: Implications for Global Administrative Law’ (2005) 68 *Law & Contemp. Probs.* 169

⁵⁵⁰ Chris Tollefson ‘Games without Frontiers: Claims and Citizen Submissions under the NAFTA Regime’ (2002) 27 *Yale J Intl L* 141, 144

⁵⁵¹ Basic Law of Governance, Article 1 Royal Decree No/90 dated 27/8/1412 AH

⁵⁵² See Asherman (n 35); see also Peter W. Wilson and Graham Douglas, *Saudi Arabia: The Coming Storm*, (Routledge 1994) 201. For a global perspective see, Yves Dezaley and Bryant G. Garth, *Dealing in virtue: international commercial arbitration and construction of a transnational legal order* (University of Chicago Press 1998)

sovereignty in recent years. Crucially, as argued in Chapter 4's discussion of SAL 2012 the Saudi government has allowed for some recourse for private parties through regulatory bodies or adjudication tribunals, and, importantly, relaxed its arbitration laws.⁵⁵³ While the KSA government's relaxation of its arbitration laws in recent years should be seen as an opportunity, it has created a degree of uncertainty and unpredictability in the matter of who has authority and jurisdiction to determine issues relating to the character or execution of administrative contracts, and, crucially, resolve disputes relating to them thereof. Foreign commentators, accordingly, have expressed some reservations about the consistency and justice of decisional outcomes reached through a reliance on KSA law, because they often see limited recourse for questionable sovereign acts or public interest purposes, and instead sees states misapply sovereignty related defences under the 'guise' of respect for *Shariah* law. Thus KSA is perceived as using *Shariah* law as self-interested tool instead of a morality-based law.

5.2.3 The Legal Review of Sovereign Acts and Immunity

All civil legal systems guard their autonomy and sovereignty to decide, apply and enforce matters of public policy. It is for this reason that all civil systems have an equivalent rule to KSA Res. 58 – a rule which preconditions the right to submit a certain kinds of disputes for arbitration on the consent of the sovereign state. But how insoluble should this rule be? And, what if any limits should be placed the exercise of sovereign power, consent, or immunity, when matters of rule of law, legality and justice as concerned.

⁵⁵³ Discussed in more detail in chapter 6

If the KSA government is to be held to account for failing to observe international accepted practices, judicial review becomes an essential tool. The process of judicial review, moreover, offers a transparent way of legally evaluating whether the acts of certain public entities or private entities who conduct public functions, do so with the consent or authority of government, thereby rendering the state liable or responsible for any breach or behaviour that falls within state control, as discussed below. These matters are commonly to reside with the exclusive jurisdiction of national law and courts.

In turn, legitimate concerns can be raised over the willingness or ability of KSA courts to ‘police’ the conduct of state entities who enter into contracts with foreign private entities, not least when domestic avenues to arbitration are closed. This will require that state acts are judged against authoritative standards of law, which may in the case of the KSA include the constitutional-like norms of *Shariah* or in terms of ‘universalisable’⁵⁵⁴ public law norms of legality, prospective law and substantive due process in contract enforcement and adjudication. On the other hand, as the *ARAMCO* dispute exposed, difficulties remain over the extent to which *Shariah* – which takes the form of indeterminate principles and guidelines – are sufficiently coherent so as to be successfully applied to disputes involving transnational, multi-actor and legally complex concession agreements. Moreover, the above issues provoke further scrutiny into the degree to which national courts have faithfully enforced requirements of *Shariah*, particularly when fundamental principles of Islam runs counter to the prevailing

⁵⁵⁴ On the concept of the ‘universalisable’ concepts, principles and requirements of public law principles see Pierre Dupuy ‘Some Reflections on Contemporary International Law and the Appeal to the Universal Values: A Response to Martti Koskeniemi’, 16 (2005) *Eur.J.Int’l. L.* 131

economic or political interests of the sovereign authorities, as represented by the highest organs of the state (i.e. the Council of Minister in the KSA, or the King).

Important decisions in the *ARAMCO* and *Pemex* arbitrations (discussed below) illustrate how sovereignty related arguments, including public policy defences, can be wielded to justify illegitimate exercises of state power at the expense of public and contractual law considerations of fairness, equity, and even public interest. This is especially relevant in the contexts of international state contracts in which the “public” character of a contract is itself contested or contestable.

Partly in response to the types of challenges, the sovereignty authority of a state is conditioned to some extent on its adherence to minimal requirements of international law. Indeed, as Judge Lauterpacht surmised in the Norwegian Loans case, ‘the conformity of national legislation with international law is a matter of international law’.⁵⁵⁵ For instance, the fair treatment of foreign nationals (aliens) by a host state has a long been a foundation of customary international law, in the area state responsibility.⁵⁵⁶ More particularly, the doctrine of sovereign immunity cannot be understood as absolute because a State can freely consent to be bound by the laws of a different legal system or order, as Finke explains:

The very foundation of sovereign immunity – the sovereignty of the foreign state – obviously allows a state to waive its immunity and reveals at the same time that immunity must be understood as a rule–exception relationship:

⁵⁵⁵ Case of Certain Norwegian Loans ICJ Reports, 9

⁵⁵⁶ Roberto Ago, ‘Second Report on State Responsibility – The Origin of International Responsibility’ (1970) A/CN.4/233, II Yearbook of the ILC, para 45

states are entitled to claim immunity as long as none of the exceptions apply or as long as the state has not consented to the jurisdiction of another country.⁵⁵⁷

The broader point which informs the above quote is not simply that sovereign immunity is a conditional, rather than absolute, right but that *it has become so* because of the expanding jurisdiction which international courts and tribunals assert over state acts which impair the rights of foreign parties, along with growing number of other issues which owing to the importance of their subject matter are deemed to fall under the control of international law.

Over the past three decades, international courts have been prepared to assert jurisdiction over disputes, and attribute liability to wrongdoing states, in cases involving abuses of governmental power or human rights, the denial of justice or national expropriation of private property (in addition to the more traditional enforcement mechanism applied to state who have breached their obligations under international treaties).⁵⁵⁸ In other words, the rise of international customary law has increasingly narrowed the circumstances under which claim safe harbour from liability under the banner of sovereign immunity.⁵⁵⁹

Crucially, it is not only supranational or national courts which place limits on the scope of

⁵⁵⁷ See Jasper Finke, 'Sovereign Immunity: Rule, Comity, or Something Else?' (2010) 21(4) Eur J Int Law 853

⁵⁵⁸ For an overview see *Pope & Talbot Inc. v. Canada*, Damages, (NAFTA Ch. 11) Arb. Trib 41 [2002] I.L.M 1347

On human rights see Krommendijk & Morijn, 'Proportional by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.) *Human Rights, International Investment Law, And Investor-State Arbitration* (Oxford University Press 2009) 422

⁵⁵⁹ See Stephen Myron Schwebel, 'Whether the Breach by a State of a Contract with an Alien is a Breach of International Law' in Dott. A. Giuffrè (ed.) *International Law At The Time Of Its Codification, Essays In Honour Of Roberto Ago* (Milan 1987) 401

sovereign power and immunity.⁵⁶⁰ Rather these issues are being addressed, through the back door, by an explosion of international arbitration tribunals such as the ICC in the Pemex dispute discussed below.⁵⁶¹

The resulting implication is that the balance between sovereign immunity and state liability are delicately balanced in the domain of international law, and more so than has typically been the case within the classic domain of administrative law.⁵⁶² This raises the question of the nexus between sovereignty, encompassing issues of public policy, and international law in respect of the governing law of the internationalised state contract. These issues will be discussed in the next section to prepare the grounds for an assessment into the apparent tension that exists between a more relativized conception of sovereignty under international law, and the more absolutist version of immunity that is embraced in the KSA context.

5.3 The Role of International Law in State Contracts

The question of international law's applicability to state contracts has been discussed extensively. Most of the traditional (i.e. 1950s and 1960s) discussion emphasises the

⁵⁶⁰ See *Sapphire v. NIOC* 35 I.L.R. 136 (1967); Award of 15 March 1963), Commentary to art 2 in J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP 2002) 85. *TOPCO/CALASIATIC v. Libya* (53 I.L.R. 389/1979; Award of 19 January 1977), *BP v. Libya* (53 I.L.R. 297/1979; Award of 1 August 1974), *LIAMCO v. Libya* (62 I.L.R. 141/1982; Award of 12 April 1977), *AGIP v. The Congo* (21 I.L.M. 726/1982; Award of 30 November 1979), *Revere Copper v. OPIC* (56 I.L.R. 258/1980; Award of 24 August 1978), *Elf v. NIOC* (Yearbook Commercial Arbitration 1986, 97; Award of 14 January 1982), *Kuwait v. Aminoil* (21 I.L.M. 976/1982; Award of 30 November 1979), *S.P.P. v. Egypt* (22 I.L.M. 752/1983; Award of 11 March 1983), *Deutsche Schachtbau v. R'As Al Kaimah and Shell* (1990 App.Cas. 295/1987, 2 All E.R. 769 and Yearbook Commercial Arbitration 1988, 522 and 1989, 737), *Wintershall v. Qatar* (28 I.L.M. 795/1989; Partial Award of 5 February 1988), *AMOCO v. EGPC* (ICC Case No. 5331 Award of 18 January 1988, not published), *MOD Iran v. Westinghouse* (ICC Case No. 7375, Preliminary Award of 5 June 1996, fully published in Mealey's International Arbitration Report, December 1996)

⁵⁶¹ *Commisa v PEP*, ICC Case No 13613/JRF Preliminary Award (20 November 2006)

⁵⁶² Schwebel (n 559)

“sanctity of contract” which is realised through an international law protection of foreign trade or investment contracts with governments. Yet, at the same time, many scholars recognised the inherent dangers and difficulties of enforcing the governmental contractual commitments at the level of international law, in large part because of long held assumption that legal issues concerning contract law, remedies and domestic jurisdiction were matters to be settled at the national level, applying commercial law, and not public international law. Even if international law had some role to play in the protection of contracts concluded within a wider (investment) treaty based agreement, this did not extend to the types of state contracts mentioned above (international procurement contracts etc.), chiefly because of what many would (uncritically and indiscriminately) perceive as their predominantly commercial and contractual nature.⁵⁶³

Regardless of these reservations, esteemed scholars from the fields of both public and private international law, including Higgins,⁵⁶⁴ Jennings⁵⁶⁵ and Mann⁵⁶⁶ have all envisioned a role for international law in the determining choice of law and contractual issues arising from internationalised state contracts. In broad strokes, these scholars will typically emphasize the point that because state contracts are formed by the agreements of a foreign private entity and a public entity representing a sovereign state, they are necessarily ‘international’ in character. This view is by no means novel, and international jurists such as Dupuy, the arbitrator in the landmark Texaco dispute,⁵⁶⁷ discussed below,

⁵⁶³ Georg Schwarzenberger, *Foreign Investments and International Law* (Sweet and Maxwell 1969) 117.

⁵⁶⁴ Rosalyn Higgins, *Problems and Process: International Law and How We Use It?* (Oxford University Press, 1994) 54

⁵⁶⁵ Robert Y. Jennings, 'State Contracts in International Law' (1961) 37 *British Year Book of International Law* 156

⁵⁶⁶ Fritz Alexander Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 *British Year Book of International Law* 34

⁵⁶⁷ *Texaco Overseas Petroleum Company v Libyan Arab Republic* (1978) 53 *ILR* 389, 455-6

reached the same conclusion many decades ago. More recently, Weil has expanded on this view:

‘[W]hether the application of international law is based on the will of the parties or the constitutional system of the host state, or whether one considers it to be a reflection of reality, the actual outcome is the same: the legal relationship arising out of an investment and the law governing the relationship are matters within the international legal order.’⁵⁶⁸

Scholars such as Toope, however, reach the opposite conclusion, arguing that state contracts are no different from any other contract in most material respects.⁵⁶⁹ Accordingly, given their similarities to other kinds of commercial contracts, any attempt to apply international law at odds with the “choice-of-law” agreed to by the parties is anathema to another widely accepted principle of international commercial law; the principle of party autonomy.⁵⁷⁰ Others have remarked upon the apparent dissimilarities between state contracts, which are concluded between a state and private party, and the classic form and sources of international law, namely international treaties concluded among formally equal sovereign states.⁵⁷¹ These scholars will typically stress the exclusivity of the national law as the proper law of the contract, and the applicable law in dispute resolution.⁵⁷² Other still warn against the dangers of an international legal system

⁵⁶⁸ Prosper Weil, 'The State, The Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage a Trois' (2000) 15 ICSID Rev, Foreign Investment Law Journal, 401, 408

⁵⁶⁹ J. Toope Stephen, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Grotius Publications, 1990) 75-77

⁵⁷⁰ *Ibid.* See also Mann (n 566)

⁵⁷¹ See *United Kingdom v Iran* [1952] ICJ 2 (commonly referred as the Anglo-Iranian Oil Co. case). See also, David Suratgar, 'Considerations Affecting Choice of Law Clauses in Contracts between Governments and Foreign Nationals' (1962) 2 Indian Journal of International Law 273, 278

⁵⁷² *Ibid.*

which intrudes upon the domestic policy and regulatory sovereignty of less powerful states.⁵⁷³

This writer is inclined, however, to move beyond the classic dualisms and distinctions of sovereignty/international and contract/regulatory around which much of the debate on the legal treatment and dispute resolution of state contracts has developed.⁵⁷⁴ As scholars such as Fatouros have posited, the complexities of modern and internationalised form of public-private partnership agreements necessitate a more finely-tuned and case-specific approach, as suggested by the discussion of the many forms which international state contracts, above.⁵⁷⁵ Fatouros says:

‘This body of law, variously named ‘extranational’ or, ‘transnational’ governs those situations where neither municipal law or traditional public law would be wholly appropriate.....the applicability of transnational law to state contracts is supported by the same considerations which militate against the application of public international law or municipal law each by itself. The relation between the two parties to such contracts is a peculiar one.’⁵⁷⁶

In view of the peculiarity of the ‘internationalised’ contract, vexing questions arise in respect of their commercial versus regulatory nature. In one respect, administrative contracts share many similarities with international instruments such treaties, both in negotiation and drafting. On the other hand, as Grigera-Naon has argued, the current

⁵⁷³ Muthucumaraswamy Sornorajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) 255

⁵⁷⁴ See Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims against the State’ (2007) 56 *Int’l & Comp. L. Q.* 371

⁵⁷⁵ Arghyrios A. Fatouros, *Government Guarantees To Foreign Investors, New York And London* (Columbia University Press 1962) 233-234

⁵⁷⁶ *Ibid.*

body of international law lacks developed rules or doctrines dealing with complex international regulatory-commercial agreements which essentially contractual and commercial in nature, rather than regulatory.⁵⁷⁷

Further controversies are revealed when considering whether the acts of private entities acting on behalf of the state or in a quasi-regulatory capacity should be subsumed under the umbrella of “state acts”, traditionally understood, and thereby brought within the ambit and control of international law? If the latter is true, do the laws applicable to an “internationalised” state contract encompass public international law rules on state immunity and, if so, how are such doctrine to be balanced against other principles such as the customary international law principles, such as *pacta sunt servanda* (the sanctity of contract) or *rebus sic stantibus*. Finally, in which forum are these conflicts, doctrinal and jurisdictional, most appropriately resolved, applying which laws? Do tribunals or national courts have inherent jurisdiction to apply an international “choice-of-law” to a contract entered into with a governmental party, even without the consent of the state, or both, parties?

The answer to each of these questions will, as the following analysis will show, depend on whether the contract in question is determined to fall under the public control of national regulatory sovereignty and the law of the relevant legal system, or is otherwise found to be predominantly contractual and commercial in its legal character, effects and dispute settlement mechanisms.

⁵⁷⁷ Horacio A. Grigera Naón, *Choice of Law Problems in International Commercial Arbitration* (J.C.B. Mohr, Paul Siebeck, 1992) 144

5.3.1 Immunity and the Distinction between Sovereign and Commercial Acts

In both international and state contexts, sovereignty and immunity are often defined by distinguishing between commercial acts and acts of state, or “the immunity of the sovereign is recognized in regard to sovereign or public acts (*jure imperil*) of a state, but not with respect to private acts (*jure gestionis*)”.⁵⁷⁸ The classification of such acts legitimizes the nature of a contract. But once again, there is element of circularity that pervades these distinctions: in matters of dispute you must first define the parties and the nature of the contract prior to drawing regulatory versus contractual lines, and deciding on matters such as choice of law or rights of parties. In questions of regulatory versus contractual authority, civil administrative law systems such as Egypt, apply the same general rule as KSA: autonomy of a party in a contract supersedes legislative and regulatory rules to the extent that the contractual clauses are not contrary to mandatory rules and public policy.⁵⁷⁹

International arbitral tribunals have prescribed legal tests for assessing the most important factors used to determine the character and effects of a state contract having an international component. As will be discussed below, these tests are both functional (does the party which is alleged to have abused proprietary rights, or breached a contract perform state functions?) and structural (does the abusive conduct fall under the public control of the state?). The site of legal controversy as it pertains to the administrative contracts is whether a court or tribunal can surpass “immunity” in matters relating to the

⁵⁷⁸ Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-85

⁵⁷⁹ The Egyptian Conseil d’Etat, The General Assembly for Legal Opinion (Fatwa) and Legislation, Legal Opinion No. 100, 20/3/1985, file No. 47/2/350, 294

annulment, reformation, termination, enforcement, or penalization by the adjudication authority.⁵⁸⁰

Principles of international law are largely concerned with tempering abuses of governmental power. As alluded to in chapter 3, international courts have utilised important concepts relating to “change of circumstances” or customary international law principles such as “*pacta sunt servanda*”⁵⁸¹ in their treatment of state contracts, many of which share similarities, in subject matter or form, to the types of international administrative contracts discussed above. That being said, a fundamental tension exists between the protection of international treaty-based agreements under customary international law and the more limited role of international law in determining issues of contractual law, remedies and jurisdiction for breaches which are properly classified as commercial in nature, and which do not involve abuses of government power.⁵⁸²

This presents considerable barriers to legal protection of the rights of foreign private party. Consider, for instance, the scenario in which an abusive, retrospective and unilateral application of domestic law is deployed by state or pseudo state entity who seeks to be discharged of its obligations under a now burdensome contract e.g. through an

⁵⁸⁰ See M Shabit Al-Hamd ‘*Al-Wilaya al-Qadaiyah li Diwan al Madhalirn flu Mamlakah al - A'rabiah al-Sa'udiah*’ (Arabic translation, Riyadh, 1989 also, Board of Grievance Case No. 944/1/Q of 1983 (1403 AH), decision of the Review Committee No. 116/T/1 of 1988 (1408 AH)

⁵⁸¹ See *Sapphire International Petroleum Limited (Sapphire) and the National Iranian Oil Company (NIOC)* (1963) 35 *I.L.R.* 136

⁵⁸² However, in the recent history of international law, the debate on the applicability of principles such as customary international law is typically confined to issues involving investment law - which fits more comfortably with the treaty based framework of international law - principally through the use of *pacta sunt servanda*/umbrella clause. Disputes pertaining to contracts which have commercial elements are generally assumed to fall outside the jurisdictional scope of international law. See *Vivendi v. Argentina* (n 587)

exploitative use of the “changed circumstances” doctrine or contractual defences.⁵⁸³ The absence of a genuine public policy or legitimating purpose for a breach or abuse of a contract should, at the very least, cast doubt on the appropriateness of state law as the proper law of the contract, even if the relevant “choice of law” contract has been resolved procedurally by state law (e.g. subject matter, public policy, jurisdiction or arbitrability exceptions) or by agreement of the parties. This is more so because of the circularity of treating all administrative/state contracts as contracts having a subject matter which excludes it from arbitration from the outset, thereby placing any further scrutiny into the “substance” of that contract, or its abuse, outside the sphere of legitimate public contestation, or judicial review. These issues will be considered below.

5.3.2 Can International Law be Applicable “Choice of Law” in a ‘Internationalised’ State Contract?

The ‘internationalised’ character of a contract may be discerned from its dispute settlement clauses. To the above point, Mann, a noted jurist, has argued that “internationalised” nature of a contract can neither be taken as implicit, nor simply denied by appealing to the absolute sovereign authority and exclusivity of national law and legal system.⁵⁸⁴ Rather, according to Mann’s view, the applicable law of the contract can only be determined by applying the conflict rules of private international law.⁵⁸⁵ International law can and should be applied in the construction and dispute resolution, but only if parties have so agreed.

⁵⁸³ Michael Gruson, 'Governing Law Clauses in Commercial Agreements – New York’s Approach' (1980) 18 Columbia Journal of Transnational Law 323, 324

⁵⁸⁴ Mann (n 566)

⁵⁸⁵ See for instance Article 28 the UNCITRAL Model Law.

Disputes involving contracts of an international nature are typically submitted for international arbitration, rather than adjudication by national courts (though the jurisdiction of national courts is not necessarily excluded). This is significant because national courts and arbitral tribunals will often exhibit very different attitudes in their approach to contractual disputes, owing to their distinct functions and orientations.

The general rule is that arbitral tribunals are obliged to give effect to the applicable “rules of law” (which may include the rules of both national and international law), as these have been agreed upon by not one, but both parties.⁵⁸⁶ Arbitral bodies must act within their powers, in accordance with “rules of law” agreed by both parties. Failure to do so is grounds for annulment of an award.⁵⁸⁷ In the above light, arbitration is anchored in principles of parity and consent of parties. As discussed in connection with the *Sandline* arbitration⁵⁸⁸ below, that the consensus position has been that an international arbitral tribunal does not possess inherent jurisdiction to apply international law to a state contract. It goes without saying that an arbitrator does not have the power to initiate arbitral proceedings in respect of state contract which is caught by general non-arbitrability rule or policy, for instance the class of agreements which cannot be arbitrated under KSA’s Res.58, as discussed in chapter 4.

The national courts of the jurisdictions considered in this thesis e.g. France or Egypt do not usually possess the power to give effect to a choice of international law, owing to

⁵⁸⁶ See Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply them to International Contracts?' (1996) 1 Uniform Law Review 652, 664

⁵⁸⁷ See *Vivendi v. Argentina* annulment decision (2002) 41 International Legal Materials 1135-1163.

⁵⁸⁸ William Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks between Courts And Arbitrators' (1997) 8 Am. Rev. Intl Arbitration 133

national regulatory restrictions on judicial applications of non-national rules.⁵⁸⁹ Domestic law will therefore usually prevail over a foreign or international “choice of law”, unless incorporated into national law by way of treaty agreements (e.g. EU regulations or international arbitration conventions and other treaties). It is important to note however that many jurisdictions do recognise customary international law as part of the domestic legal order in non-contractual cases,⁵⁹⁰ thereby enabling national courts to incorporate relevant international legal rules in their interpretation of statutory, administrative and codified law. There is however is, currently, little support for judicial incorporation of international law rules in the interpretation of national law in Saudi Arabia. In the case of the administrative contract, accordingly, it is improbable, though not impossible as will be discussed in chapter 6, that the Saudi government will choose to be governed by any other law, other than that of *Shariah*.

In the domain of private, commercial and contractual, the governing law is determined by the terms of the contract, and by the relevant rules of private international law. Where parties to a contract have failed to agree upon a choice of law, courts in the US and Germany are obliged to identify the legal system most closely connected with the contract as the governing law of the contract.⁵⁹¹ An application of non-national rules is restricted to the domestic laws of another legal system, and excludes international law. If the contract in dispute is a state contract, courts will typically apply the law of the host

⁵⁸⁹ Morris Dicey, *Collins, The Conflict of Laws* (14th ed., Sweet and Maxwell 2006) 1567-8.

⁵⁹⁰ See *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356 (CA), and in particular the obiter comments of Lord Denning at 365.

⁵⁹¹ See *Downs v American Mut. Liability Ins. Co.* (1964) 251 N Y S 2d 19. T. On civil law systems, see Article 4 of the Rome Convention and Article 28(1) of the Introductory Code to the German CCP.

state given the substantial connection between that state and contractual performance (known as the “closest connection rule”).⁵⁹²

The most plausible interpretation of the relevant SAL 2012 provisions (Article 10, 50 etc.) indicate that KSA courts would apply the closest connection rule, subject to the caveat that the applicable ‘rules of law’ do not transgress either *Shariah* or the Kingdom’s public policy, the agreement of the parties, or the permitted subject of the arbitration⁵⁹³

There are good reasons to suppose that international law has no role to play in the internal political and legal affairs of a sovereign state.⁵⁹⁴ It is also perfectly reasonable to suggest contractual disputes implicating ‘pure’ contractual or commercial law, “choice of law” issues are best left in the hands of the parties themselves. What it is less clear-cut, however, is whether a contract agreed to as part of broader set of regulatory-commercial agreements, such as an economic development agreement or public concession - and is based on a unilateral action that can be construed, as, both, a contractual breach and an abuse of state power - should *always* be considered in either/or terms as a legitimate exercise of national regulatory sovereignty, or, a pure matter of contract law.⁵⁹⁵ As discussed in Chapter 4, in KSA, Res. 58 would seem to restrict choice of law, while Article 2 of SAL 2012 seems to allow some judicial notice of the laws of a different forum or choice of law.⁵⁹⁶ While this apparent tension will be fully fleshed out in the

⁵⁹² See *Sapphire International Petroleum Ltd. v National Iranian Oil Company* (1963) 35 ILR 136. See also Pierre Lalive (n 371)

⁵⁹³ Peter E. Nygh, *Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort* (1995) 251 *Recueil des cours*, 297,301-303

⁵⁹⁴ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4

⁵⁹⁵ See Stephen Myron Schwebel, *International Arbitration: Three Salient Problems*, (Vol. 4. Cambridge University Press, 1987)

⁵⁹⁶ Article 2, Saudi Arbitration Law (SAL 2012) issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers; See Muddassir Siddiqui, ‘Arbitration under the *Shariah*: With Case Study of Saudi Arabia’ *International*

concluding chapter (chapter 6), it is suffice to say that a restrictive interpretation of Article 10 and Res. 58 would seem to compel the former conclusion (sovereignty prevails), while an application of the “closest connection” test would suggest the latter (the state contract should be treated as essentially commercial and therefore adjudicated in accordance with the contract law of the host state). And yet, from the point of view of the foreign private actor whose legitimate contractual expectations have been breached as a result of an abuse of governmental power, the protections each provides regarded sorely deficient.

To remedy these concerns, or at least address them, this chapter posits that KSA legislative texts and ministerial decisions (*SAL 2012* and the patchwork of regulations, codes and resolutions which regulate administrative discussed in chapter 2) ought to be interpreted in accordance with a more purposive interpretation of the applicable *Shariah* “rules of law”, and in accordance with the Islamic imperative that all law be prospective and just.

This, of course, raises the question once again around the boundary to be established between the ambit of public acts of sovereignty, include matters of legality and due process, matters usually reserved for national courts, and commercial acts which owing to their subject matter, or applicable law, are more appropriately decided in a arbitral forum, applying non-national laws.⁵⁹⁷ This is relevant because in contrast with national courts,

Dispute Resolution Committee of District of Columbia Bar, 11 January 2004; See also Council of Ministers Resolution No. 58 dated 17/1/1383 H. (9 June 1963)

⁵⁹⁷ Iain Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 525. The noted international legal jurist Brownlie has comment on these issues stating: It would seem that the courts must first make a choice of law depending on the nature of the subject-matter. Where it is appropriate to apply international law, rather than the law of the forum or a foreign law, then the courts will take judicial notice of the applicable rules.

arbitral tribunals have a greater latitude to apply international law and to grapple with complex international transactions than is the usually the case for national courts who are not generally permitted to give effect to international law. The next sections will consider some key cases which have the question of sovereign immunity.

5.3.3 The Interface between International Law and Sovereign Immunity on Saudi Arabia Today: Case Law

Due to the domestic restrictions on government entities in Saudi Arabia from participating in certain international administrative acts, such as arbitration, the case law on sovereignty from within the country is limited in scope. There is however one way in which customary international law may be still be brought to bear on a commercial contract. International law may come into play when matters of fundamental rights are concerned, for instance when a domestic court abuses their adjudicative power, for instance by denying private parties of effective justice or by violating principles of natural justice/due process.

In view of the above, international cases often focus more on human rights or employment related matters. The latter can be an example of administrative disputes within administrative contracts; but also highlights the importance of sovereignty which is universally intertwined with the morality of *Shariah* Law and seemingly incomprehensible to non-Muslim states.⁵⁹⁸ Examples of the breadth of sovereign considerations can be seen in international case law involving Saudi Arabia.

⁵⁹⁸ Nudrat Majeed, 'Investor-State Disputes and International Law: From the Far Side' (2004) 98 Am Socy Ind L Proceedings 30, 31. See also, Robert Wai, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation

In *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia*, a UK citizen was subjected to torture in a Saudi Arabian jail. The UK Court found Saudi Arabia to be protected by sovereign immunity from suit in the UK for such actions, finding the actions to be “*jus cogens*”⁵⁹⁹ human rights issues and administrative in nature, but outside the Court’s jurisdiction.⁶⁰⁰ This is relevant to this study, because while the act was morally, questionable, it was deemed to be administrative in nature, therefore an administrative matter to be handled within the jurisdiction of KSA, and protected under both sovereign immunity as well as administrative laws within KSA. This is an instance of a foreign administrative tribunal determining that the “chain of authority” evaluation was a legal matter for the KSA court to determine under its jurisdiction. As discussed above, the U.S. Supreme Court reached a similar decision in *Saudi Arabia v. Nelson* where it was held that Saudi Arabia was immune to suit based on the nature of the torture act in dispute as administrative, not commercial.⁶⁰¹ This commercial exception to sovereign immunity is an accepted international practice, but is the same distinction that the Board uses in Saudi Arabia when determining the nature of administrative contracts and whether there is a “public interest” criterion present.⁶⁰²

The most notorious case in Saudi administrative law and the nexus of all considerations of sovereign acts, is again *ARAMCO*, where the arbitrator found the governmental action

through Plural Legal Regimes’ in Christian Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford Hart 2011) 240

⁵⁹⁹ Anne Lagerwall and Anthony Carty, ‘Jus Cogens’ (2015) Oxford Bibliographies-International Law 1.

⁶⁰⁰ Hazel Fox and Phillippa Webb, *The Law of State Immunity* (Oxford University Press 2013) 43; See also *Jones v. Minister of Interior of Kingdom of Saudi Arabia & Ors* [2006] UKHL 26, [2006] 2 WLR 1424

⁶⁰¹ Fox (n 641); See also *Saudi Arabia v. Nelson* 123 L Ed 2d 47

⁶⁰² Jeanne-Pierre Harb et al (n 9)

to be commercial not immune, and therefore unlawful.⁶⁰³ As was discussed in Chapter 4, KSA's defence of sovereign immunity was rejected. KSA dogmatically rectified this position for any and all future dealings between its governmental entities and private parties, by avoiding the jurisdiction of international tribunals, hence reaching the same results as if a defence of sovereign immunity in *ARAMCO* had been successful.⁶⁰⁴ It subsequently passed regulations and administrative jurisprudence, which in almost all instances allow the government to act unilaterally or to engage in sovereign acts within any contract it enters into as a party. In this way, the Kingdom perpetually struggles to balance its commercial objectives with its desire to prevent another situation like *ARAMCO*.

5.3.4 Summary

The case law analysis above indicates that States, such as KSA, often defer to the concept of immunity unless an act or contract is found to be primarily commercial in nature. This distinction exists in the international sphere, as well as in Saudi Arabia's domestic administrative law. The challenge in Saudi Arabia, however, is a majority of its economic activities involve both the government and commercial aspects. This is distinct from other countries such as France or the United States, which have thriving private economies and have created separate and clear processes for dealing with commercial or administrative matters. KSA's progress towards privatisation and diversifying its economy may be hindered without similar processes, codes, delegation of powers, and distinctions between sovereign or commercial acts.

⁶⁰³ *Saudi Arabia v. Arabian Oil Company (Aramco)*, 27 International Law Report 213

⁶⁰⁴ Daniel Patrick O'Connell, *State Succession In Municipal Law And International Law* (Cambridge University Press 1967) 304-306; See also, Nabeel (n 180)

State sovereignty does not inherently mean isolation or domestic dominance in all public policy matters, nor does agreeing to certain provisions within international administrative contracts mean a waiver of immunity. International comparisons provide for international treaties, preservation of organically devised Islamic civil administrative law systems, and application of domestic laws in dispute resolution. Challenges persist, however, in this attempted “decentralization” and alleged “transnational” adoption of administrative standards. For Arab states such as Saudi Arabia, sovereignty and unilateral authorities are much more than administrative justice, transparency, and standardization of procedures, it is about protecting both *Shariah* law and a heritage of cultural norms.⁶⁰⁵ This was said to complicate attempts of Arab states to re-imagine an administrative legal system that fully embraces international standards based on perceived western financial advantages, and contrary to the interests of less experienced emerging markets and divergent cultural identities. However, as examined in the later sections, there may be acceptable cross boundaries between *Shariah* and public international law.

In a return to the previous discussion in this chapter on arbitration serving as accountability for state action, however, more controversial examples than not exist of states taking unilateral actions in the name of sovereignty. One such trend can be seen in unilateral actions of a retroactive nature or of such audacity as to bring obvious halt to blindly categorizing international tribunals as nefarious Trojan horses. This issues will be discussed within a broader discussion of how courts and tribunals have determined the nature of the contract, through assessment of the public or private nature of the entity.

⁶⁰⁵ Nazer (n 221)

However, as the above discussion on the various types of international state contract has hopefully shown, the nature and legal effects of state contracts will vary from one agreement to another. A rule prohibiting arbitration of any agreement which is held up as a state contract, without consideration of its subject matter or the personality/capacity of the parties involved, risks its abuse and manipulation by governmental or pseudo state parties who seek to escape their contractual commitments.⁶⁰⁶ That is to say, a general rule or policy of non-arbitrability will lack legitimacy for being too over-inclusive, and for failing to provide judicial criteria with which to distinguish “true” exercises of sovereign regulatory power and disguised commercial acts, especially rules which produce discriminatory effects for foreign nationals,⁶⁰⁷ based on public law tests of rationality and reason-giving. These requirements have their backbone in public law and increasingly permeate the jurisprudence of supranational adjudicatory bodies such as the WTO’s Appellate Body.⁶⁰⁸

5.4 The Nature of Contracts to be determined by the Public and Private Role Played by the Public Entity?

As discussed above, an internationalised state contract established a new category of state action which is, arguably, neither the exclusive preserve of public international law –

⁶⁰⁶ Schwarzenberger (n 563)

⁶⁰⁷ Investment arbitral tribunals have developed a structural test based on the concept of state control in deciding whether a matter abusive conduct leading to a contractual breach is essentially public in nature.

⁶⁰⁸ Bin Cheng, *General Principles of Law as applied by international courts and tribunals*, (vol 2, Cambridge University Press 1994). See also, WTO cases of alcoholic beverages; asbestos case; *Myers v. Canada and Feldman Karpa v. Mexico case*; *Nykomb v. Latvia case*)

which governs the law between sovereign states – nor municipal law – acts and decisions which are subject to the exclusive territorial control and jurisdiction of the state.⁶⁰⁹

The question that remains to be answered is: how does this reclassification help to define or redress the complex legal issues presented by these new, transnational or hybridised form and character of modern commercial instruments? Indeed, it is difficult to answer these questions without having regard for all other relevant factors, both subjective (did both parties exhibit a mutual understanding of the regulatory v commercial nature of the contract? did the state party misrepresent its intention or mislead the other party?) and objective elements of a contract (does the state party profit personally from execution of the contract? or is the subject matter of the contract one of the nominate forms of the French *contract administratif*?). Most contentious of all is the thorny issue of which body has the power or ultimate authority to decide these issues.

5.4.1 The Nexus between Administrative Law and the State Contract

The next section considers how international tribunals have grappled with the issues of, both, their own competence to determine the legal character of a putative administrative contract, and the substantive law which applies to it. For example, case law discussed in the next sections will show that a public entity can become private if it engages in commercial activity and includes commercial provisions in a procurement contract, or if it excludes certain commercial provisions from a procurement contract.⁶¹⁰ Accordingly, the public entity plays a pivotal part in whether it retains or loses its public authority and

⁶⁰⁹ Fatouros (n 575)

⁶¹⁰ Sue Arrowsmith, 'Transparency In Government Procurement: The Objectives Of Regulation And The Boundaries Of The WTO' (2003) 37 J World Trade 283

in defining the true nature of a contract. Its considerations of an administrative contract versus a commercial contract and evaluation of regulatory acts versus contractual acts, but confusingly, all can co-exist within the same contract.

The following categorization of contractual relationships attempts to provide some guidance and to delineate general rules for what a party may or may not legitimately expect in terms of how a contract may be defined based on their own actions, choices, and interpretations. These categories are organized based on common compositions of parties to an administrative contract between a public party and a private party.

5.4.1.1 Domestic Public v. International Public

An international administrative contract can be between one public entity and one private party. It can also be a scenario in which it is an administrative issue directly between the two states, with no private party, or one in which the public authority of sovereign immunity supersedes all other considerations within the nature of a contract. Arguably, you have two states with ‘equal’ sovereign footing, but with possibly competing public interests. One premise in scholarly discussion is whether a state is entitled to more protection of their “property” or rights abroad than other, private actors due to sovereignty concerns. An example of two sovereign nations engaged in conflict of rights is seen in the recent case between Egypt and Saudi Arabia, in which the guardianship of Tiran and Sanafir islands were in dispute.⁶¹¹

⁶¹¹ Mohamed Elgohari, ‘What Was in the Egyptian Court’s Reasoning in the Tiran and Sanafir Case?’ (*The Atlantic Council*, 24 June 2016) <<http://www.atlanticcouncil.org/blogs/menasource/what-was-in-the-egyptian-court-s-reasoning-in-the-tiran-and-sanafir-case>> accessed 19 March 2017

While this example discusses physical property, the concepts and debates of sovereignty are directly applicable to administrative contracts and acts of administrative authority which deprive another public entity of perceived “rights” of tangible or intangible natures. These can include issues of financial benefits, consistency in protecting rights of each state’s citizens, “taking” or expropriating physical property, or ensuring that disputes are settled on an even field or at least of the same understanding of the weight of each state’s sovereign rights and positioning in international administrative contracts. It is also an argument of the exercise of administrative justice for each state, including role or choice of law and due process. One state does not assume that it is automatically submitting to territorial, regulator, or public law of the other when its “property” is being held in the other state.⁶¹² In fact, classical theories of sovereign immunity say that a sovereign state must explicitly consent to the laws of another sovereign state or to be made a respondent in the courts of another sovereign.⁶¹³ Diplomacy in these matters lends itself to states attempting to reconcile their interests in a productive manner, acknowledging the legitimacy of each position and attempting to avoid embarrassment by displacing regulations or laws of the other state. This scenario is often reflected in oil and gas case law where two state or pseudo state actors are in dispute over a contract involving the control, management, and transport of one state’s natural resources using another state’s equipment and financial assets, e.g. *Aramco* or *Texaco v. Libya*.⁶¹⁴

⁶¹² Rosalyn Higgins, *The Taking of Property of the State: recent developments in international law* (Martinus Nijhoff 1983) 295, 298

⁶¹³ *Ibid.*

⁶¹⁴ See *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*(1963) 27 I.L.R. 117, See also *Texaco Overseas Petroleum Co. v. Libya*, Int’l Arbitral Award, 104 J. Droit Int’l 350 (1977), translated in 17 I.L.M. 1 (1978)

The U.S. resolves questions of sovereignty versus commercial acts by applying a “nature” acts test which identifies a sovereign act as one which cannot be performed by private persons; as opposed to a “purpose” acts test which determines if the objective of the act is of public character. KSA and other civil administrative law jurisdictions use similar evaluations in considering conflicting public policies of sovereign states but also run into challenges in consistency of application in this subjective approach; which can be incongruent between jurisdictions. The following two cases are examples of application of this purpose versus nature test in resolving issues of sovereignty when Saudi Arabia is a party to the matter.

Saudi Arabia v. Nelson, where Nelson sued the Hospital he worked for and the Saudi Government in U.S. courts for illegal imprisoned and falsifying employee records.⁶¹⁵ The question before the U.S. Court was one of subject matter jurisdiction in whether “a foreign state-owned enterprise’s activity in managing a hospital and disciplining employees qualifies as commercial activity”, thereby qualifying as a commercial exception to foreign sovereign immunity.⁶¹⁶ The Court found that a commercial activity did not exist and therefore Saudi Arabia was lawful in its exercise of sovereign immunity. A similar ruling was reached in *Zedan v. Kingdom of Saudi Arabia*, where the U.S. Court found Saudi Arabia to be immune in this case because regardless of the existence of a commercial act, there were not enough substantive connections to U.S. to invoke jurisdiction in the matter.⁶¹⁷

⁶¹⁵ *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1481 (1993)

⁶¹⁶ Steve Weisman, ‘Individual Protection Crumbles While Sovereignty Reigns: A Comment on *Saudi Arabia v. Nelson*’ (1994) 11(2) Hofstra Labor and Employment Law Journal 434

⁶¹⁷ *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1512 (D.C. Cir. 1988)

In applying the purpose versus nature tests, the United States Court found this to be a commercial contract based on the nature of the contractual relationship, while in KSA, this contract would be classified as administrative and therefore subject to sovereign and unilateral authorities as well as limited means of redress for the private party.⁶¹⁸

Here, despite the result, the U.S. Court failed to account for the domestic governmental and organizational structures within KSA, or the nature of KSA's administrative laws as contextualized in *Shariah* law.⁶¹⁹ Meaning, internationally accepted principles, not national law of the opposing party was applied to the facts in order to distinguish between sovereign or commercial acts. The courts' evaluation was from an internal U.S., non-Muslim, and common law perspective. As was addressed in Chapters 2 and 3, if *Shariah* law had been considered, the denial of payment under the terms of the contract would have been considered unjust and contrary to tenets of fairness and honouring one's word. Even in administrative contracts, a party has a right to due compensation. Thereby resulting in a U.S. court applying the domestic laws of KSA to a matter, of which one could see why that type of judicial intrusion would be problematic. It provides reasonable justification for why an Arab state such as KSA, would keep a tight rein on its authority involving other entities. Instead, the U.S. court determined the overarching matter to be one of domestic concern instead of international, using international principles, and abdicated the need to consider the more domestic issue of whether compensation was unjustly withheld.

⁶¹⁸ Ibid.

⁶¹⁹ Ibid.

5.4.1.2 Domestic Public v. Private / Foreign rights

The dynamic of rights of a domestic public entity and a private foreign party are exasperated in administrative contracts because not only are there considerations for domestic public policy and the individual rights of the private entity, but there are considerations of the private rights of the contractor under the umbrella of the sovereign duties of its own state to protect its private rights. The *Commisa v. Pemex* case is a prime example of this type of complication where⁶²⁰ the need to balance the rights of a private company, under the U.S. legal umbrella, against those of a sovereign state (Mexico), led to a multi-jurisdictional, multi-tribunal legal quagmire that was only recently resolved.⁶²¹

Concession contracts, are illustrative of this unique conflict and balance of rights, as they are contractual terms and conditions bound in regulatory acts designed for the “government to claim to reserve, for itself, powers to rectify and amend the arrangements entered into”.⁶²² States prefer provisions of executive necessity and flexibility to adjust contractual terms as necessary, therefore avoiding a permanently binding agreement adverse to the government’s ability to adjust to future economic and policy needs. The problem in *Pemex*, that will be discussed below and as some of the following cases will similarly show, is that States often learn difficult lessons in legal situations before they can develop a more savvy approach to crafting lucid yet binding unilateral provisions for

⁶²⁰ *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, No. 13-4022, 2016 U.S. App. LEXIS 13991 (2d Cir. 2016).

⁶²¹ *Ibid.*

⁶²² *Ibid.*

administrative contracts, which will also still entice private parties to engage in the contracts.

Mining concession cases, for instance provide rich opportunities for evaluation. In French law, such contracts are considered to be hybrids containing characteristics of commercial contracts and authority for unilateral acts of state.⁶²³ Other civil administrative law states have had similar considerations, including Libya, Kuwait, the UK, and KSA.⁶²⁴ The reason is that these contracts almost implicitly involve a public party contracting with a private party who is either foreign; partnered with a domestic party; or is a public party assuming private form. While hybrid entities will be discussed in a later section, this idea of a conflux of commercial and public characteristics within a contract and of the parties themselves, is again the essence of why determining the nature of some arbitration contracts seems an insurmountable task. Neither International nor KSA administrative tribunals have perfected a bright-line test for these legally duplicit creatures.

Internationally, the issues of hybrid nature were addressed in the international arbitration of *Texaco v. Libya* where a public party was classified as a commercial or private party engaging in a commercial act.⁶²⁵ Here, the public entity entered into a concession contract with a private company for the purpose of mining and managing natural resources in Libya by Texaco.⁶²⁶ Libya acted in the capacity of a state party but the Tribunal found the contract to be commercial not administrative because, although the subject mineral resources belonged to Libya, the contract itself was not for public service,

⁶²³ Renan Le Mestre, *Termes du droit administratif* (Gualino éditeur 2006) 58-62

⁶²⁴ *Ibid.*

⁶²⁵ *Texaco Overseas Petroleum Co. v. Libya*, Int'l Arbitral Award, 104 J. Droit Int'l 350 (1977), translated in 17 I.L.M. 1 (1978)

⁶²⁶ *Ibid.*

was not entered into by an administrative authority, and did not confer unusual powers. It cited the existence of a stabilization clause requiring mutual consent for any changes to the contract as evidence of equal footing of the parties, as exists in private agreements, not public contracts.⁶²⁷ The Tribunal did acquiesce that had the stabilization clause not been included, the contract would have been administrative, with the presumption that the State intended to retain its unilateral privileges. So, in essence a conclusion could be reached that Libya lost its administrative character because it engaged in a commercial contract, which contained commercial provisions contrary to regulatory acts and authority. Alternatively, a rule could be drawn that in order to retain the administrative nature of a contract and a public entities classification as a “public authority”, it must not agree to provisions within contracts, such as stabilization clauses, which are contrary to regulatory authority.

Similarly, a public entity in ARAMCO was found to be engaging in a commercial activity, thereby losing its administrative authority and altering what it understood the nature of the contract to be from administrative to commercial.⁶²⁸ A dispute arose as to whether Saudi Arabia had administrative authority to make unilateral changes to the terms of the contract.⁶²⁹ Upon assessment the Tribunal stated that these types of contracts were “embryonic in Moslem law and is not the same in the different schools.”⁶³⁰ Here, the Tribunal not only applied international law instead of Shariah law, it found the concession agreement to be contractual act and commercial in nature, not a regulatory act and administrative in nature, thereby rejecting arguments of sovereignty. The conclusion

⁶²⁷ Ibid.

⁶²⁸ *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*(1963) 27 I.L.R. 117

⁶²⁹ Ibid.

⁶³⁰ Ibid.

drawn from this case, is that not only are the classification and actions of a party critical to determining the nature of a contract, but it can have dire consequences for what laws can be applied to a dispute and which tribunal is able to make determinations concerning the nature of a contract. Saudi Arabia learned the importance of provisions within the four corners of a contract as interpreted in international law, as opposed to a blanket exercise of sovereignty.

In variation to the above cases, one example provides a distinction in parties and the nature of a contract, not on a confusion of the parties themselves but on the specific language used within the contract and the acts engaged in by the undisputed public authority. In *The Amphirite v. the British Government*, a public party was deemed to be engaged in an administrative act and as such, a party to an administrative contract.⁶³¹ In other words, the party and the contract retained the classifications as intended by the public party; but the contrast in case law is that the private party in this case assumed the two parties were engaged in a commercial contract due to the nature of the activity involved, namely the sale of goods. The Tribunal's dicta included this statement: "It is not competent for the Government to fetter its executive actions, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."⁶³² Here, the Tribunal found the denial of entry to port to be a valid executive action and as such,

⁶³¹ *Rederiaktiebolaget Amphirite v The King* [1921] 3 KB 500

⁶³² *Ibid.* 503; See also, Anthony Roland Blackshield, 'Constitutional Issues Affecting Public Private Partnerships' (2006) 29(3) UNSW Law Journal 302, 302-303; Adam D Perry, 'Fetters on Prerogative Powers' (International Journal on Constitutional Law, 25 January 2015), <<http://www.icconnectblog.com/2015/01/fetters-on-prerogative-powers/>> accessed 19 March 2017

that the ship-owner had no right to damages.⁶³³ The conclusion that can be drawn is that public interest activities may also encompass commercial activities.

The Tribunal cited that the Government's attempt to predict future executive permission to enter the port a second time, was an erroneous interpretation by the ship-owner as being in a binding or commercial guarantee; and the agreement should have been viewed only as an executive grant of permission for an initial entry to port, with any additional entries to be viewed on a case-by-case basis, not as an imminent authority.⁶³⁴ The importance of this case, is that it shows that the purpose of the contract (here the delivery of goods) and the intent or understanding of the parties (one as commercial and the other as fulfilling a duty to secure the port) may be conflicting but equally valid, thereby obscuring how a tribunal may interpret the facts. This case also demonstrates a concern of the retroactive nature of such decisions that are hallmark to unilateral and administrative authority. Here, the questions arise as to whether the tribunal "balanced" the rights of the parties or chose to ignore the right of the private party to receive compensation for good faith and reliance. The ship-owner suffered the financial burden and risk of the situation without being made explicitly aware of the unilateral authority of the public entity during formation of the contract.

Another "classic" case involved the Government of Kuwait v. American Independent Oil Company ('Amnoil').⁶³⁵ Here, a tribunal decided a contractual dispute based on the existence of a stabilization clause, by specifically finding that such clauses are essentially a limitation on nationalization and inclusion of these clauses supports the existence of a

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ *Government of Kuwait v. American Independent Oil Company* 66 ILR 518 (1982).

commercial act or contract, not an administrative act or contract.⁶³⁶ Therefore, it changed the expectation of the parties in what their rights or obligations were under this ‘hybrid’ contract of both commercial and administrative nature. One caveat in this legal perception though, is that in some international circles, these clauses are not seen to be wholly binding or complete waivers of sovereign rights, merely a self-imposed limitation by the government body. This debate goes beyond the full scope of this thesis however.

Consider another case from the UK involving a mineral, petroleum license. There, a tribunal ruled that the lack of a stabilization clause within a concession agreement caused the administrative party to retain its unilateral authorities.⁶³⁷ As with Saudi Arabia and all administrative law states, the UK government believes its sovereign right to legislate natural resources is in no way impeded by contracts previously entered into with foreign licensees, aka they are not perpetually and permanently bound.⁶³⁸ Ironically, this is similar to the position that Saudi Arabia took in ARAMCO and which the Tribunal rejected under international law.

One scholar questions whether ‘the nationalization of property rights protected by a concession (contract) may be an exception to the general principle that a government may always nationalize upon payment of compensation and evidence of non-discrimination and public purpose?’⁶³⁹ It leads the researcher to open the question of whether there are degrees of commercialization within administrative contracts and at what point a contract

⁶³⁶ Ibid; See also Martin Hunter and Antony C. Sinclair, ‘Aminoil Revisited Reflections on a Story of Changing Circumstances’ in T. Weiler (ed.) *International Investment Law And Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties And Customary International Law* (Cameron May London 2005) 347

⁶³⁷ Ibid. 348

⁶³⁸ Thomas W. Waelde and George Ndi, ‘Stabilising International Investment Commitments’ (1996) 31 *Tex. Int’l L.J.* 215

⁶³⁹ Higgins (n 612) 311

is clearly tipped one way or the other, or is it an irreconcilable point in which the two must co-exist in perennial suspension? Does the use of regulatory provisions clarify, prevent or exacerbate this precarious point? Case law seems unclear and inconsistent, but it may be a scholarly question worth pursuing.

The above cases illustrate a pattern of it being impossible to find breach by a governmental entity in an administrative contract, thereby always limiting the recourse and relief of the private party; but of dogmatically equalizing the rights of parties in commercial contracts regardless of whether a State is a party to the contract. This is particularly interesting in terms of international treaties and commitments to arbitration in concession agreements as suggests justification for having access to arbitration tribunals within administrative matters, as a way to preserve juridical resources and more quickly ascertain resolutions. States must calculate whether inclusion of certain clauses is considered to be an abandonment of sovereignty even though the contracts may be more public than commercial in nature or vice versa.

As the court in the Wimbledon steamship case stated:

[T]he Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of a State, in the sense that it requires them to be exercised in a certain way. But the

right of entering into international engagements is an attribute of State sovereignty.⁶⁴⁰

This note seems to be stating that a self-imposed restriction, or ratification, is actually a sovereign act, thereby preserving the sovereign nature of the governmental authority in its dealings with private parties and other States.

As the case of ARAMCO taught Saudi Arabia, mineral resources are clearly an attribute of KSA's State property and sovereignty, and States contracting to such agreements that are pivotal to the economic survival of the nation, should have the ability to rectify faulty contractual provisions or to revise as public policy conditions change over a long period of time. In the case of ARAMCO, Saudi Arabia was a burgeoning nation with newfound power; it deserved the opportunity to learn the extent and depth of its sovereignty against the wisdom of older nations. Instead, however, Saudi Arabia has gone to an overly restrictive regime that leads to unfettered exercise of its sovereign powers when it comes to allowance of arbitration in matters of governmental importance. However, Saudi Arabia is not the only State to enact protective or restrictive measures. The UK for instance, restricts the use of arbitration in agreements involving Petroleum Licenses because it considers arbitration to require the use of international law, which is often in conflict to the "national interests" involved in concession contracts.⁶⁴¹ Egypt has implemented a prohibition to government entities engaging in arbitration without permission, which is similar to KSA's provisions.⁶⁴² However, in comparison to countries

⁶⁴⁰ *United Kingdom and ors v Germany* (PCIJ, Ser. A., No. 1, 1923) (S.S. Wimbledon case)

⁶⁴¹ *Ibid.*

⁶⁴² Karim Abou Youssef, 'Consent Ltd.: A Brief History of Egypt's Ministerial Approval Requirement for Arbitration of State Contracts and Why it Should be Abolished' (2016) 3(1) BCDR International Arbitration Review 33

such as France, Egypt, the UK, or the UAE, KSA does seem to be a consistently shy participant in globalization reforms. Again, as this author will continue to argue, this shyness has a negative implication for aggressive timeline and goals Saudi Arabia has set forth in its economic, domestic, and industry initiatives.

We have discussed the challenges of two public entities balancing their sovereign rights, but there is some ambiguity when an administrative contract involves a public authority and a pseudo commercial, private, public hybrid party. Arguably and unlike an administrative contract involving a private party, two public authorities should have awareness that each exercises equal rights if not clearly delineated powers under a specified project. Most of these contracts will have been formed via an official government action or decree, thereby removing the same “issues” that can manifest with a private party. However, as the case in ARAMCO demonstrates,⁶⁴³ it is not always clear in the beginning that two parties have mutual understanding regarding their classifications as public or private, or a pseudo commercial nature of a formed LLC or corporate entity distorts classification, thus the Board becomes integral in establishing the nature of the contract and classifying the parties.

⁶⁴³ *Saudi Arabia v. Arab Am.Oil Co. (ARAMCO)*, 27 ILR 117 (1963). See also Schwebel (n 419); Saudi Al-Ammari, ‘Saudi Arabia and the Onassis Arbitration – A Commentary’ (2010) 3(3) *Journal of World Energy Law & Business* 257

5.4.1.3 Public-Private Partnerships / “Hybrid” Parties

Hybrid public/private entities not only exist in administrative contracts but they are the largest growing sector of parties to infrastructure procurement contracts. However, as illustrated by the administrative contract test, they can present challenges both to the judiciary and the parties. Their structure, function, and contractual authorities can create a “blurred” line effect between public powers and private gain, in addition to higher risks of imposing inordinate control, inappropriate modifications or rescissions. Efforts to distinguish the administrative or commercial aspects of these entities can be further exasperated by the State’s requirements that a foreign entity be a properly licensed LLC, or alternatively a sanctioned joint venture with a Saudi Arabian partner, who may often also be a partner with the Saudi Government, i.e. a company who partners with Saudi Railroad or a University.⁶⁴⁴ This means the State is imposing administrative characteristics on what would normally be a purely private entity, in order for them to operate in Saudi Arabia under even private contracts.

Alternatively, they may be a government entity that chooses to partner directly with a private entity and then engage in a public procurement bidding process. Public Works contracts such as the BOT’s, BOOTs, and Concession contracts often involve these types of parties, with pseudo commercial and public natures. Large projects such as construction of a new Terminal at King Khalid International Airport was awarded to a

⁶⁴⁴ See SAGIA guidelines for general reference on types of licensing requirements for certain private, foreign parties in KSA <<https://www.export.gov/article?id=Saudi-Arabia-openness-to-foreign-investment>> accessed 19 March 2017

local/international consortium of Saudi and Turkish entities falling into this “grey area” of identifying the entities involved.⁶⁴⁵

PPPs are the most popular example of these types of hybrid parties with a pseudo commercial nature, and have arguably become the most predominant means of a government to become a contractual party or parties in a procurement agreement for a large infrastructure project.⁶⁴⁶ In Saudi Arabia, PPPs are most often established by the Supreme Economic Council, with an intended purpose of public service or interest, such as recent projects involving water and sewage provisions, desalination plants, telecommunications, railroads, and building or operating public markets.⁶⁴⁷ Risks still exist with PPPs as, similar to administrative contracts themselves, they do not have specific laws that govern their creation or operations, nor are there standard contracts or procedures for how they might function. PPPs are a breeding ground for experimentation in cooperation between parties and methods of dispute resolution in contemporary administrative law systems.⁶⁴⁸

⁶⁴⁵ Nahed Taher and Bandar Al-Hajjar, *Energy and Environment in Saudi Arabia: Concerns & Opportunities* (Springer International Publishing Switzerland 2014) 80-90. See also Press Release, ‘AECOM joint venture awarded US\$72-million contract for King Khaled International Airport expansion project’ (*AECOM Technology Corporation*, 11 March 2013) <<http://www.aecom.com/press/aecom-announced-today-that-a-joint-venture-in-which-it-participates-was-awarded-a-five-year-us72-million-contract-for-the-redevelopment-and-expansion-of-king-khaled-international-airport-kkia-in-t/>> accessed 19 March 2017; ‘TAV to build new \$400m terminal at Riyadh Airport’ (*Airport-Technology.com*, 16 May 2013) <<http://www.airport-technology.com/news/newstav-to-build-new-400m-terminal-at-riyadh-airport>> accessed 19 March 2017

⁶⁴⁶ ‘PPPs in Saudi Arabia – bright opportunities or challenges ahead?’ (*Norton Rose Fulbright*, June 2016) <<http://www.nortonrosefulbright.com/knowledge/publications/140448/ppps-in-saudi-arabia-bright-opportunities-or-challenges-ahead>> accessed 19 March 2017

⁶⁴⁷ Ibid.

⁶⁴⁸ Taher (n 645)

5.4.1.4 *Public v. (Private Domestic v. Private Foreign), “Buy Local”*

This is a less controversial contractual pairing but worth mentioning nonetheless. The procurement process often requires the Saudi government to choose between awarding a contract to a domestic private party or a foreign private party. However, Saudi Arabia has numerous and comprehensive obligations and restrictions for foreign entities entering into administrative contracts, some of which cross over into commercial dealings, e.g. licensing requirements or restrictions on project financing. As was presented in Chapter 3 through KSA contractual comparisons of obligations for parties within administrative contracts, the same restrictions are not always applicable to a private party entering into similar contracts, who is not foreign. Shariah law provides private parties of the Kingdom more latitude in contracts. Additionally the communal, familial, and royal bonds of the State as rooted in tribal traditions, favours advantages to local family-run businesses with long-term relationships with the royal family over local businesses with unknown foreign partners.⁶⁴⁹ Companies such as Saudi Bin Ladin Group, Saudi Oger, El Seif, and others dominate the contractual market based on their strong ties, reputation, and performance record with the Saudi government.⁶⁵⁰ Saudi Arabia has a culture of internalization, nepotism, royal favour and community endorsement; often to its own detriment.⁶⁵¹ This can require any foreign entity to engage in a faux partnership with a local entity, in which the local entity is in a financially advantageous position but does not provide any capital, labour, or contribution to performance of a contract. This shifts a large burden to any foreign entity that may be awarded a contract, despite the preferences for domestic

⁶⁴⁹ Alhudaithy (n 94). 9

⁶⁵⁰ Amgad (n 159)

⁶⁵¹ See Abdulrahman Baamir and Ilias Bantekas, ‘Saudi Law as *Lex Arbitri*: Evaluation of Saudi Arbitration Law and Judicial Practice’ (2009) 25 J of Arb Int’l 239

parties. Not only are they potentially exposed to administrative proceedings which can define the terms, conditions, and nature of a contract for them, it means there are unexpressed higher expectations of performance and potential misunderstandings due to cultural differences. These dynamics should be taken into consideration by foreign parties eager to engage in the public procurement process.⁶⁵²

5.4.2 Administrative law and the International State Contract: Retroactivity as a Public Concept applied to Private Contracts

While unilateral actions were discussed at length in Chapter 3, the unilateral actions that result in a retroactive effect are the more controversial actions within KSA and international administrative law and worth discussing. The retroactive nature of these actions and emerging internationalised contractual concepts overlay between traditionally public and private law as well as between parties.

The authority to take unilateral actions under a contract is the epicentre of power, control, and controversy in administrative contracts. These actions are subject to corrupt practices and the majority of cases before adjudicatory bodies. In Saudi Arabia they are also the primary tools used in performance of administrative contracts to prevent violations of Shariah law, adjust to a fluid public interest, and comply with domestic law. They are socially compelling, defiant to traditional contractual practice, and disquieting in legal evaluation. They also serve as a significant deterrent for foreign partners, as these rules apply to administrative contracts and could shift powers of negotiation in an arbitration agreement. These actions are often manifested into contractual provisions.

⁶⁵² Abul F.M. Maniruzzaman, 'Some Reflections on Stabilization Techniques in International Petroleum, Gas and Mineral Contracts' (2005) *Int'l Energy L. & Tax. Rev.* 96, 100

Reclassification is an authority specifically given to the Board in Saudi Arabia, but a similar practice occurs when a party is simply ‘caught off guard’ by the classification or the nature of a contract, as determined by a judicial authority. The above cited *Amphitrite* case between the owner of a Swedish ship and the British Government is an example. One could argue that the ship owner was reliant on what he understood the terms of the contract to be and of his rights to compensation upon any breach of that contract. However, since the Court deemed the contract to be administrative, the ship-owner was inherently financially damaged by the loss of any anticipated compensation for the goods that spoiled on his ship as a result of not being allowed entry to port.

In France, these decisions are referred to as ‘retroactive’ effects of an annulment of administrative acts (“*recours pour excès de pouvoir*”).⁶⁵³ Under French law, nullification or annulment of an administrative act is essentially saying that the act or decision never existed and the consequences of this type of retroactivity could be devastating, causing other subsequent actions to become illegal; to overturn an entire regulatory regime; or to cause the loss of job for one individual.⁶⁵⁴ To limit, moderate, and rectify the retroactive effects of these actions, administrative judges are given the power to take whatever actions necessary to directly address these concerns and to rebalance the interests of the parties.⁶⁵⁵ Germany, Austria, and Italy have implemented similar reforms, but it is unclear whether such mechanisms exist in Arab states.

The discussion finally brings this study to the *Commisa v. Pemex* case as the most recent example of the controversy that can arise from unilateral actions, sovereignty and

⁶⁵³ Massot (n 50) 4-5

⁶⁵⁴ Ibid.

⁶⁵⁵ CE Ass., May 11, 2004, Association AC! Et autres (GAJA 2015), no. 107, 804

retroactivity in administrative contracts.⁶⁵⁶ There, both an ICC tribunal and a U.S. Court of Appeals determined unilateral actions by a Mexican administrative authority and governing bodies to have had deleterious effects on the rights of the private party to the administrative contract; finding their actions to be a ‘flagrant violation of public policy as well as inherently offensive to universal principles of justice’.⁶⁵⁷ There, *Pemex*, a state-owned entity, unilaterally annulled a long-term, large infrastructure contract with a U.S. registered company, well-after a dispute arose and was submitted to arbitration; while the Mexican Court then attempted to circumvent the international tribunal’s authority by relying on a retroactively applied law to set aside the arbitral award in favour of *Commisa*.⁶⁵⁸ Both actions were an attempt to rectify mistakes *Pemex* had made in formation of the contract and an immature body of administrative law, as well as both *Commisa* and *Pemex*’s mistakes in simultaneously submitting to the jurisdictions of an ICC tribunal and Mexico’s supreme administrative court.

The importance of this case is seen in not only the problems that arise from unilateral actions of a retroactive nature, but a parallel can be seen to *ARAMCO*. *ARAMCO* and *Pemex* both involve large procurement contracts and governing bodies attempting to retroactively apply newly passed laws to rectify disputes pertaining to those contracts. But, the question becomes less of what they did, but why they did it and whether there might be a better course of action in such situations. Mexico, similar to KSA at the time of *ARAMCO*, was considered a developing market, and its lack of delegated powers, choice of law provisions, and clear administrative authority at the time of the dispute,

⁶⁵⁶ *Corporacion Mexicana de Mantenimiento Integral v. Pemex-Exploracion y Production*, 962 F.Supp2d 642, 657, 659 (SDNY 2013)

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.*

manifested into an arbitration “debacle”. More specifically, in both cases, an international tribunal over-ruled the domestic administrative authority or court in the matter, thereby threatening the perceived sovereignty of the state and beguiling the rights of the private party.

While the after-effects are on-going, a contrast to KSA’s reaction to *ARAMCO* can be made in that instead of precluding any future participation in international arbitration proceedings as a result of this case, Mexico has so far chosen to strengthen its domestic laws, delegate clear administrative authority, and establish statutory-based guidelines for participation in arbitration. *Pemex* then becomes a positive study in choice of law, rule of law, unilateral authority, as well as retroactive effects.

KSA does not seem to address retroactive effects of reclassification in either its administrative law or limited available jurisprudence, although as cited in Chapters 2 and 3, some mention of deleterious effects on contractors and financial equilibrium has been brought up as issues within domestic cases. An examination of *Pemex* through a *Shariah* lens would be whether or not application of *Shariah* law would have come to the same result.

5.4.3 Summary

As the above case law shows, the decision to include a provision or not can shift the entire balance of the contract, altering not only the definition of a party but in the nature of the contract and therefore the options for adjudication of disputes or alleged breaches of contract. Often these decisions are made on an economic basis, but involve extraneous components that obscure the level of risk or alternatively, impose additional requirements or circumstances that could not have been anticipated by a party during formation of a contract.⁶⁵⁹ It is important to recall that Shariah law requires formation, offer, and acceptance to occur all in the same meeting, thereby limiting the ability of parties to reflect on what risks they have just assumed.⁶⁶⁰

For instance, you could argue from the above case law that licensing regimes for public works or concession agreement contractors are another mechanism of protecting sovereignty and regulating unilateral authority. Similar to questions of consent or permissions in arbitration clauses within administrative contracts, an administrative authority can choose to refuse, revoke, or penalize license holders under public interest powers.⁶⁶¹ Licensing implies consent by the private party to be controlled by the terms set by the government entity not in coming to a mutual understanding and freedom of negotiation of terms and conditions. Along this argument, should reclassification be permitted by the Board when: it is contrary to the requirements of consent in the formation of the contract and the agreed upon powers for terms and conditions and

⁶⁵⁹ Abdullah Alassaf and Bruno Zeller, 'The Legal Procedures of Saudi Arbitration Regulations 1983 (2010) 7 Macquarie J. Bus. L. 170, 186; Abdulrahman Yahya Baamir, *Shari'ah Law in Commercial And Banking Arbitration: Law And Practice In Saudi Arabia* (Routledge 2010) 91

⁶⁶⁰ Baamir (n 651)

⁶⁶¹ Alhudaithy (n 94)

control of the contract? What do these choices then mean for the risks each party takes when entering an internationalised contract or when resolving a dispute through arbitration?

5.5 International Law and the Limits of Administrative or State Immunity

In previous chapters it has been shown that in the Saudi legal system, public authorities exercise wide powers of supervision, control and modification over the terms and performance of an administrative contract. But as alluded to in earlier section the exclusivity of the chosen state law – the exclusive competence of the state to determine the proper law of the contract or contractual forum – has not escaped controversy or criticism.⁶⁶² Among the greatest challenges levelled against the principle of sovereignty is the *'brooding omnipresence of international law'*⁶⁶³ in the determination of legal issues relating to state contracts and economic development agreements.⁶⁶⁴

5.5.1 Do International Arbitral Tribunals Posses an Inherent Jurisdiction to Apply International State Contracts: Key Decisions

International arbitration may be the more appropriate forum in which to assess the contractual terms, rights and obligations under the contract, including whether a unilateral modification is covered by the defence of “changed circumstances.” Broadly speaking, international arbitration tribunals have shown themselves willing to draw on

⁶⁶² See Andreas L. Paulus, 'Jus cogens Between Hegemony and Fragmentation: An Attempt at a Re-appraisal' (2005) 74 Nordic J Int'l L 297, 298; see also Martti Koskenniemi & Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties,' (2002) 15 Leiden J Int'l L 553; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan J Int'l L 999

⁶⁶³ Houtte (n 416)

⁶⁶⁴ Veerle Heyvaert, 'Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law' (2009) 20 Eur. J. Int'l. L. 647

principles of international law. The ICC tribunal addressed this issue in the *Pyramids* case (also known as the *SPP case*).⁶⁶⁵ The Tribunal established that Egyptian law was the proper law of the contract but went further to find that principles of international law, while not self-executing per se, has been accepted as authoritative sources of Egyptian law, including principles of *Shariah*.⁶⁶⁶ Specifically, the Tribunal cited to notions of fairness, honouring your word (*pact sunta servanda*), fraudulent misrepresentation, and just compensation.⁶⁶⁷ Accordingly, Egyptian law could be relied upon as the law applicable to the contract only in so far as that law did not contravene international legal principles. If the tribunal's reasoning is sound in the event of a conflict or inconsistency between principles of international law and the applicable law of the state, then the authoritative norms of international law should, to some extent, prevail.⁶⁶⁸

Some tribunals have gone even further. In the *Sandline* arbitration, for instance, the tribunal relied on a passing reference to international arbitration in the contract as sufficient evidence of its "international" character, even if an international choice of law was not expressly agreed upon by both parties.⁶⁶⁹ While the dispute in question was undoubtedly a contractual one, the tribunal proceeded, nonetheless, to apply international law as the governing law of the contract, while asserting its inherent jurisdiction over the dispute. While the decision may seem to some a step in the right direction, the authority

⁶⁶⁵ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3

⁶⁶⁶ Herbert J. Liebesny, 'Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions' (1972) 20 Am. J. Comp L. 38, 46-52

⁶⁶⁷ Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay between National and International Law* (Oxford University Press 2013) 284-287

⁶⁶⁸ *Sandline International Inc. v The Independent State of Papua New Guinea* (1998) 117 ILR 552

⁶⁶⁹ *Ibid* Para 83 to 85, 142, 319

of both the *Sandline and Pyramid* decisions are questionable having little support in state practice or custom.⁶⁷⁰

Critics would argue that the reasoning applied in the *Pyramids* and *Sandline* Tribunals is faulty on grounds of principle as well as practice. The application of a ‘but for’ (compliance with international law) rule, when taken to the extreme, falls foul of the foundational principle of contract law: the freedom of parties to designate municipal law as the applicable forum (of dispute resolution) and proper (substantive) law of the contract. But the appropriateness of applying of international law to state contracts introduce concerns which go well beyond narrow and procedural issues of choice of law. Many would regard any attempt to apply non-national rules to state contracts as little more than veiled attempt to undermine the legal and political autonomy of the sovereign nation state.⁶⁷¹ International laws imposed “from above” may be regarded by Muslim and Arabs states as an assault on the ‘legitimate diversity’ of local cultures, norms and traditions, i.e. *Shariah*.⁶⁷² Following a spate of international arbitration disputes involving oil producing nations in the 50s and 60s,⁶⁷³ many developing states continue to regard the Western model of international arbitration with deep suspicion. For their opponents, international arbitral tribunals deploy (or rather misconstrue) principles such as *pacta sunt servanda* or *venire contra factum proprium* (a state or state official is bound by his own acts) not out of a sense of international legal obligation, but are, instead, for

⁶⁷⁰ See *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2; *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1

⁶⁷¹ Meissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007) 107 Colum. L. Rev. 628, 633

⁶⁷² See Geiger (n 77) 100

⁶⁷³ Brower & Sharpe, ‘International Arbitration and the Islamic World: The Third Phase,’ (2003) 97 AJIL., 643, 647

illegitimate purposes, for instance by vesting already powerful Western corporations with proprietary rights over a state's lucrative national resources.⁶⁷⁴

A more general criticism goes to the rather unruly jurisprudence of international arbitration. Fundamental principles of *pacta sunt servanda* or customary human rights norms do have authority and bearing on a dispute.⁶⁷⁵ However, rules of international law are often invoked by international arbitral tribunals in perplexing and incoherent manner. As an illustration of the above point, as discussed in Chapter 3 international law provides rules for dealing with a government that has made attempts to frustrate an arbitration agreement which it had previously entered into. These issues were addressed in the *SGS v Pakistan* award (while an investment dispute, the material issues involved in this dispute are relevant to state contracts). This dispute centred upon a non-arbitration injunction, applied by the Supreme Court of Pakistan against arbitration, which was justified at least in part on public policy as well as jurisdictional considerations⁶⁷⁶ In this case, the arbitral tribunal appealed to the inclusion of a *pacta sunt servanda*/umbrella clause (in the context of an investment treaty) to protect the sanctity of the treaty based agreement and the State party's arbitral commitment. But while international law may be sufficient to deal with the frustration of arbitral commitments in at the level of treaty law, usually in respect of national expropriation disputes, it does not provide precise rules for dealing

⁶⁷⁴ See F., V. Garcia-Amador, 'Calvo Doctrine, Calvo Clause' in Rudolf L. Bindschedler et al (eds.), *Encyclopaedia of Public International Law* (vol. 1, Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht 1992) 521-523; See also, Thomas W. Wälde, 'A Requiem for the New International Economic Order - The Rise and Fall of Paradigms in International Economic Law' (2002) *Oil, Gas & Energy Law Journal* (OGEL). See also, unanimous UN resolution on Permanent Sovereignty over Natural Resources of 1962 (1803 –XVII UNGA): "Foreign investment agreements freely entered into by sovereign states shall be observed in good faith".

⁶⁷⁵ *Sapphire Int'l Petroleums Ltd. V. National Iranian Oil Co.* 35 I.L.R. 136 (1967) para. 51

⁶⁷⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13; *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6

with contractual breaches resulting from abuses of governmental (economic or political) power e.g. retroactive action. It is little surprise then that international arbitral tribunals have sought to repurpose (the sovereign consent orientated) rules of international law, often by construing general principles of international law to give effect to legal outcomes for which they not necessarily intended, as well as their own powers of review, very widely and questionably.

Existing international jurisprudence remains largely silent or ambivalent on contractual breaches which involve abuses of unilateral authority in the performance, modification or recession of a state contract, *which are not backed by an investment treaty*.⁶⁷⁷ The decision held by the Tribunal in *Sandline*⁶⁷⁸ is a case in point. The *Sandline* decision, it will be recalled, concerned a breach of a state contract involving the repayment of debt. While the tribunal broke new ground by concluding that international law could in fact be applied ‘for the purpose of determining the validity of a contract’, the decision rendered was broadly in line with other arbitral decision of this nature. That is to say, the *Sandline* Tribunal affirmed the mainstream position, concluding that an ordinary example of contractual performance ‘was not illegal or unlawful under international law’.⁶⁷⁹

The doctrinal difficulty here is that while constructs such as party autonomy or *pacta sunt servada* have, in effect, crystallised into “hard(ish) law” in the context of mandatory arbitration at the level of investment treaty law, the same customary international law principles have been applied more cautiously and flexibly, if at all, in connection with state contracts, which are not tied to an international treaty through so called ‘umbrella

⁶⁷⁷ Schwebel (n 419)18-26

⁶⁷⁸ See *Vivendi v. Argentina* (n 587)

⁶⁷⁹ *Sandline* (n 668) 560

clauses'. The bright line established between international state contracts and international state contracts which are tied to a treaty appears somewhat arbitrary, not least because it relies upon the artificial distinctions of treaty law/ contract law vis a vis international/domestic law; distinction as this chapter has attempted to show are no longer adequate to describe how states and individuals interact in a globalised marketplace. In any case, the normative argument for the purposes of this discussion concerns the legal protections owed to private individuals, foreign or domestic. To treat international administrative contractual law and international investment law, both involving state parties, as impermeable to the other seems neither fair nor sustainable.⁶⁸⁰

A state can, of course, be persuaded, through soft forms of judicial, political and economic integration, to be bound by international rules, or to submit to international arbitration using non-national rules, but they cannot be compelled to do so. On this reasoning, and applied to the legal system of KSA, one may be forced to conclude that Res. 58 alludes judicial control, and that any agreement subsumed by the non-arbitrability rule is immune to its oversight or review by the laws of another forum, or choice of foreign or international law. But does this mean that any breach of a contract that is not subsumed by treaty based law can be retrospectively justified as a legitimate exercise of unilateral authority which, as a sovereign act, attracts no liability? And if so, are the grounds for reform, in principle even if this is not followed in state practice. This writer would suggest that is a case to be made that international law should be widened to include abuses or breaches beyond those involving expropriation of property or cognate

⁶⁸⁰ Nabeel (n 180) 5

areas of investment law, and include contractual arrangements of a hybrid nature, having regulatory and not just commercial elements or effects.

5.5.2 How Can International Tribunals Apply International Law with Respect for *Shariah*?

This brings us to the delicate matter of the legal outcome of a clash between principles of domestic law, for example *Shariah* law, and principles of international law in an internationalised contract. As ascribed in previous chapters, there is a certain commonality and standardization of practice that can be seen even across boundaries of *Shariah* and international public law. As such, the question could become less about how different they are, but in how easily two parties might bridge the differences to form a stronger agreement. As discussed, underlying doctrines such as *pacta sunt servanda* under an international custom complement rather than conflict with the Quranic prescription to honor your word to man and to *Allah* under *Sharia*. The concept of “justice”, unlike the concept of sovereignty (which has no formal basis in Islam), has remained an anchoring principle of Islamic since its dawn. The Quran states that: “We have sent our apostles (to mankind)..... the scales of justice, so than men might conduct them-selves with fairness” which should in company with another core principle of Islam, “Oh you who believe, observe covenant.”⁶⁸¹ Both amount to the same interpretation: agreements must be kept and it is the duty of the parties to find fairness in dispute resolution.

⁶⁸¹ The Quran, 57:25

While there does seem to be more of a general discomfort by international tribunals in applying Islamic law due to lack of education and understanding, this will be re-addressed in the final chapter under suggested means of reform. The relevance here, is to better understand what may have been the true motivating factor in both *Pemex* and *ARAMCO*. Self-identity of a state is seen in its exercises in immunity to protect cultural, religious, legal, and economic heritage. The use or non-use of national law, such as *Shariah* law, can be one indication of prejudice, but it can also simply be an opportunity for the States and the Tribunals to learn from each other. For instance in *Pemex*, the ICC tribunal and U.S. Court applied Mexican domestic law and supplemented it with international custom. This distinction is highly relevant to KSA because it brings one to ask whether the ICC tribunal would have similarly incorporated *Shariah* law into the equation, or whether the ICC's comfort level with Mexico's legal structure, which is based in French civil, administrative law, was influential in their decision-making process. This writer also contends that unlike national courts, an arbitrator tribunal may be better positioned to balance "choice of law" or sovereignty related concerns with respect for fairness and equity in a resolution based on the parties and the nature of the contract. As suggested, one can find authority for such public law principles in both international law and *Shariah* law. The difficulty lies in the interpretative 'openness' of concepts such as fairness, or the unavoidable 'subjectivity' that colours a judicial determination of the nature or purposes of a contract, both of which are prone to bias and dependent on 'rules of law' and expectations of the parties.⁶⁸² Therefore, when national law is inadequate, too

⁶⁸² See Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv. L. Rev. 1685, 1691

self-interested, or generally contrary to these notions, or if the arrangement of the parties includes a different law, arbitration can be better served by applying non-national law.⁶⁸³

5.5.3 The Limits and Possibilities of Applying International Law to Unilateral Authority: Some Signs of Hope?

One can make the normative case – even if it is not supported by the existing law – that an abuse or breach by a state entity acting not in a commercial but sovereign capacity exercising regulatory, administrative and political power is precisely the type of action which ought to be made subject to the controls of international law.⁶⁸⁴ This would include unilateral modification of a contract resulting in an unjustified breach of a legitimate expectation, i.e. a retrospective modification of a contract which imposes an undue hardship on the private party without judicial remedy or compensation. Indeed, such a position seems entirely justifiable from the viewpoint of both the traditional perspective of administrative law, and principles of Islamic contract law, discussed in chapter 3.⁶⁸⁵

The issue of governmental abuses, including the exercise of unilateral governmental powers as a means of rescinding its obligations under a state contract entered into with a foreign party (which may include frustration of a pre-existing arbitration agreement) was brought to light in the *Maffezini I* and II and *Salini* arbitrations.⁶⁸⁶ In the recent *Salini v*

⁶⁸³ See Karyn S. Weinberg 'Equity in International Arbitration: How Fair is 'Fair'? A Study of Lex Mercatoria and Amiable Composition'. (1994) 12 B.U. Int'l L.J. 227,252-253

⁶⁸⁴ See Maniruzzaman (n 44) See also, Majeed (n 639); Waters (n 671)

⁶⁸⁵ Charles P. Trumbull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts' (2006) 59 Vand L Rev 609; Nancy B. Turck, 'Dispute Resolution in Saudi Arabia' (1988) 22 International Law 415

⁶⁸⁶ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4

*Morocco*⁶⁸⁷ decision, the Tribunal’s reasoning turned on a familiar division between state acts which are “simply commercial” and state acts which are undertaken in a governmental capacity and are therefore found to have a (regulatory) “*iure imperii*” character, in this case a public-law concession as defined under French administrative law.⁶⁸⁸ In both arbitrations the Tribunal’s averred that there is insufficient reason to differentiate the actions of state from non-state actors when dealing with commercial disputes. A similar test has been developed in WTO and the Court of Justice of the European Union (CJEU) jurisprudence whereby competition law requirements do not apply to state enterprises and agencies’ conduct if it is shown that such actors are essentially driven by business and profit driven considerations.⁶⁸⁹

The more novel aspects of the reasoning employed in *Maffezini I and II* and *Salini*⁶⁹⁰ concerned the Tribunal’s determination that it was empowered to review the merits of a case in which a breach of a state contract was alleged to have arisen from, and this is crucial, an abuse of administrative/sovereign authority.

In making the above determination, the Tribunals’ applied a tripartite test. The first component was largely influenced by the public functions test,⁶⁹¹ which looks to distinguish legitimate exercises of public powers, on the one hand, and the abuse of governmental powers, on the other. Many of the same issues discussed in chapter 3 in

⁶⁸⁷ Ibid.

⁶⁸⁸ Thomas W. Wälde, ‘The “Umbrella” (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent’ (2004) 1(4) *Transnational Dispute Management* < https://www.biicl.org/files/946_thomas_walde_presentation.pdf > accessed 19 March 2017

⁶⁸⁹ *Van der Kooy and Others v Commission* [1988] ECR 219

⁶⁹⁰ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4

⁶⁹¹ See Alfred C. Aman Jr., ‘Administrative Law for a New Century’ in Michael Taggart (ed.), *The Province of Administrative Law* (Hart Publishing 1997) 90

respect of the appropriate balance to be struck between sovereign or administrative discretion in pursuit of the public interest *versus* the substantive legitimate expectation of the private party to a rely on contractual undertakings of a state entity should be considered, this writer argues, when applying this element of the test. If the first part of the test has been satisfied, i.e. there has been an abuse of power, the disputant must then, in a second component, demonstrate that the alleged breach or misconduct is sufficiently serious or significant in nature. Mere contractual non-performance which may caught under contractual defences and are justifiable such contractual impossibility or undue hardship “changed circumstances, discussed in chapter 3, would fail to meet the required threshold. The third and final test requires that the alleged abuse of regulatory or policy making power is directly and causally connected to breach, thus satisfying the rebuttable presumption that the alleged breach was commissioned by a state entity acting in governmental rather than commercial capacity.

Each element of this tripartite test is complementary and has bearing on the issue of unilateral authority and to a lesser extent arbitrability. On the one hand, it is seems entirely justified that matters involving of public should ultimately be a matter of national law, and accordingly subject to review on the merits by domestic courts. Yet, such a position is only defensible if the power of state entities to unilaterally amend, abrogate or rescind a contract is adequately policed and not abused. If however a state entity, or private entity who performs functions equivalent to state actors, unilaterally revokes its contractual commitments, or substantially modifies that contract with the precise intention of imposing punitive, disproportionate or excessively burdensome conditions or measures which pre-exist the contract, then one can arguably point to an abuse of powers.

Moreover, one can argue that when national courts fail to address the imbalance or police these powers or abuse their adjudicatory powers (“denial of justice” and lack of “due process”) that international law should come in to play.⁶⁹²

In the absence an international governing choice of law clause, consented to by the KSA government, an arbitral award which applies non-national rules with the effect of imputing liability to state actors are, however, unlikely to be enforced or respect at the level of domestic law.

It is difficult to avoid the reality of state practice and the practice of KSA in respect of retroactivity, choice of law, sovereignty, and the concepts mentioned in Chapter 3. In both Pemex and ARAMCO you had rather young or under-developed economies attempting to compete to defend the autonomy of their laws and legal system, and their discretionary power to pursue their own policies, exempt from international review or immunity. Both KSA and Mexico took unilateral actions with a retroactive effect that they claimed authority to do under the doctrine of immunity. Additionally, neither state had a clear system of dispute resolution of administrative contracts, nor of when a dispute was arbitrable.

On the other hand we have an international arbitration system which is looking to expand its influence and jurisdiction over state acts, through the application of rules blended from administrative, international and commercial law i.e. stabilisation of expectations, private rights protection and access to justice. Does this seemingly inherent conflict of interest justify or contradict notions of sovereignty or is there a way to

⁶⁹² Other courts such as the ECJ and WTO apply these tests ECJ – e.g. Commission of the European Communities v French Republic (1997) Case C-265/95

incorporate more protective measures for national actions into a new internationalised administrative contract? Or more specifically, is there a way for KSA to sanction the use of arbitration in administrative contracts and retain both measurable sovereign control and obedience to *Shariah* law?

As indicated in chapter 3, under Islamic law, which is arguably the supreme law of Saudi Arabia,⁶⁹³ albeit not codified, there are two broad positions on the circumstances under which Islamic contracts can be discharged. In one scenario, discharge of contract effectively enables parties to return to the original bargaining position before the contract was agreed, but only by mutual consent⁶⁹⁴ The latter position brings the contract forward in time, so that the legal rights of both parties is interpreted as though the contract had been performed. This is an important distinction since in the second position the contract has prospective effect even when performance has been rendered impossible and the contract dissolved. In the case of the administrative contract this affects the damages (compensation) which a private party can claim against the unjustly enriched governmental party. The crucial point is that Islamic law operates to discharge contract prospectively, meaning that only future obligations can be discharged on grounds of a ‘change of circumstances’, including any decision to unilaterally modify a contract on grounds of public policy or interest. Or as one administrative body observed “Indeed, a judgement of the *Conseil d’Etat* cannot act as a sort of ‘time- machine’ that can recreate a past moment in the legal order or in the context of social relations. [...] In particular, the complete re-establishment of legality may cause more harm than good to those

⁶⁹³ Mukesh Bajaj et al ‘Arbitration in the Kingdom of Saudi Arabia’ (DLA Piper News 2009) <http://www.dlapiper.com/arbitration-in-the-kingdom-of-saudi-arabia/> accessed 18 March 201

⁶⁹⁴ See Alkhamees (n 72)

individuals who were not responsible for the initial legal wrong, and thus have no call to carry the burden of an annulment caused by others [...]”⁶⁹⁵.

In the above light, one could speculate, that given the tenets of good faith, fairness, and equity in *Shariah* law, that the KSA Board or any international tribunal who may apply *Shariah* law in cases like *Pemex* or *ARAMCO* would similarly find some equilibrium in the positioning of each party upon reclassification or unilateral action. More specifically, *Shariah* law would not condone the retroactive effect of legislation to the administrative contracts in either *Pemex* or *ARAMCO*. Further, *Shariah* law would not sanction rescission or annulment of an administrative contract because the government party determined that the contract was not to its financial benefit, aka as in *ARAMCO* it wanted to enter into a more flexible and lucrative contract with Onassis or as in *Pemex*, the government was attempting to avoid the costly result of either breach of contract or arbitral award.

5.6 Conclusion

Saudi Arabia administrative law system is an unpredictable system when compared to its counter-parts, not because of its reliance on *Shariah* law, but because of its more apparent differences in legal procedural practices. Comparatively speaking, the system is a by-product of the struggles for growth and reform in a relatively young nation, whose instant economic success in oil, put it in a spotlight and position of development unique to other emerging markets. Saudi Arabia did not have the luxury of taking hundreds of years or

⁶⁹⁵ General Report of VIIIth Congress (Madrid, 2004) 11
<http://www.aihja.org/images/users/1/files/2004__Madrid_Congress__General_Report_VIII_congres_VIII__va_0.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu1> accessed 19 March 2017.

decades to adapt to western or non-Muslim styles of contractual or legal matters, instead it absorbed as much as it could from its much older “brethren” Egypt and initially took great legal risks in its administrative contracts with foreign partners. Suggested reforms based in arguments of “Lex Mercatoria”, Nature of KSA v. International Trends, Decentralization of Administrative Power, Developments of PPPs as hybrid tools, and Market-Based Solutions are *all* globally suggested means of unifying administrative systems under a standardized set of international norms and laws; but they are *all* also contributors to KSA’s legitimate attempts to protect its cultural heritage, sovereignty, and constitutional law qua *Shariah*. But Saudi Arabia can only make such arguments if legal limits are placed on the exercise of unilateral authority are invoked on spurious grounds of “sovereignty”, particular when the exercise of sovereign power effectively defeats the spirit and text of *Shariah*: the supreme law of Saudi Arabia. This is an argument not in favour of international law that trumps state sovereignty, but one which defends the supremacy of the *national* law of Saudi Arabia, in this case the *Shariah*, against unbounded unilateral exercises of political power. Saudi Arabia’s legal regime around arbitration in administrative contracts is where these dynamics are currently in conflict.

The final chapter will show that there is not necessarily a conflict between the principle of sovereignty – the exclusive or supreme legal and political authority of the nation state – and the gradual embrace of models of arbitration, which lest we forget are based on the principle of consent. Or more importantly that not only are international law and *Shariah* more aligned than they are understood to be, but both can be used separately and in harmony to override immunity for unilateral authority, when the outcome of unilateral

actions or of a contrary judicial or arbitral decision would be inconsistent with practice and manifestly unfair by depriving private parties of legitimate expectations and rights.

This argument is exemplified by the practice of the Saudi government. At first entirely hostile to foreign and international arbitration, and highly protective of its sovereignty over public law and order issues, Saudi state organs are beginning to refer disputes to arbitration, not because international rules have been imposed on it from above but by its own volition and through incremental reforms to its commercial (arbitration) and public laws and policy.

Therefore, *Shariah* law and international law in theory would both abhor the use of immunity to protect a contractual breach and abuse, which harms the other party without legally supported justification; and could likewise support the use of an arbitration panel to resolve and rectify the results of any such actions. This equally applies to a judgement by the Board or a Tribunal, that a party shall not take ‘advantage of a favourable judgment that he knows to be unjust.’⁶⁹⁶ The conclusory chapter to this study will not only these ideas together in harmonization of *Shariah* and international law, but flex the themes of separation of powers, delegation of authority, capacity, consent, and choice of law into suggestions for viable reform.

⁶⁹⁶ Ibid.

Chapter 6

Conclusion: Overcoming the Non-Arbitrability Challenge: Lessons for Saudi

Arabia

Building on this study of the regulation, governance and dispute resolution of administrative contracts in KSA, this final chapter reflects upon, and synthesizes some of the key themes and arguments developed in previous chapters, as the basis on which to identify existing gaps in KSA law, while proposing some key reforms which can be used to mitigate some of the most challenging obstacles to treatment and dispute resolution of administrative contracts under the current system of administrative decision-making and contract adjudication in KSA.

Above all, this thesis has identified as a major weakness of KSA law the obstacles to arbitration of a governmental contract without the consent of the KSA government. The non-arbitrability without consent rule present a serious question about the relationship between sovereignty and liability both at the state level, and most obviously in the growing body of internationalised administrative contracts in which prevailing distinctions between commercial and administrative contracts are breaking down.

In light of the above, this final chapter synthesizes the key findings and arguments developed in the above chapters, and proposes some key areas of reform and criticism. By first framing its insights in the context of a recent judicial decision in Saudi Arabia which perfectly encapsulates main of the key issues assessed in this thesis, this concluding chapter proceeds to identify key lessons which can be drawn from KSA's current non-arbitrability obstacles and from the experiences of other legal systems, which

are then used to isolate three crucial legal challenges, procedural, substantive and institutional. Ultimately, the suggested reforms attempt to reconcile respect for sovereignty of the state with the need for a more just and effective framework for the treatment and dispute resolution of administrative contracts.

6.1 Disappearing Sovereignty and The Internationalised Public Contract: A New Kind of Transnational Law

The findings of this thesis demonstrate that administrative contract arbitration agreements test the limits of the doctrine of sovereignty and the exclusivity of state law. Saudi Arabia readily uses “sovereignty” and “public policy” defences as a legal tool for not recognizing or enforcing arbitration agreements, clauses and arbitral awards whether governed by foreign state, international private, or international treaty law. While seemingly an extreme use of sovereignty, this practice finds common theoretical and practical support with other nations also grappling with ways of protecting sovereignty.

The *lex fori* theory, for instance, rigidly offers no space for any law other than the law of the place of arbitration even if that means forsaking sound outcomes, or tolerating the denial of (administrative) liability or justice. This rigid theorem is but a refinement of the territoriality principle on which the old dualist-paradigm finds its footing: the state alone has exclusive authority to determine the scope of its legal obligations and the limits of its authority.

Such theories make a categorical error: they treat the domains of public and private, international and domestic law as closed and mutually autonomous systems or “islands”

that do not interact or intersect in any way.⁶⁹⁷ These theories often take too little notice of the rise of the internationalised administrative contract, the ever-expanding ‘transnational’ law, and the decisively just, yet cooperative nature of *Shariah* law.⁶⁹⁸

Amongst the greatest challenges levelled against the principle of sovereignty is the ‘brooding omnipresence of international law’ in the determination of legal issues relating to administrative contracts and economic development agreements.⁶⁹⁹ The past three decades have witnessed a meteoric rise in the spread and influence of internationalised administrative contracts, PPP agreements, bilateral investment treaties, regional trade agreements, and above all, international arbitration regimes [chapters 4 and 5]. These developments produce effects that call into question the idea that a state alone has the power to determine the rules and decisions that will bind it.⁷⁰⁰ Private individuals, on the other hand, need no longer rely on the state to intervene on their behalf at the international level; they can now bring actions before international arbitral tribunals directly.⁷⁰¹ Developments in international human rights law and the globalisation of

⁶⁹⁷ For theoretical contrast, see *Red Sea Insurance Co. v. Bouygues SA* (1995) 1 AC 190, 201. A case involving *lex causae* in Saudi Arabia verses Hong Kong and English law of *lex fori processualis*. Hong Kong was the relevant forum but Saudi law was applied as the court found that foreign law should apply when the forum’s law does not give adequate remedy. The Court stated such rule is considered an exception that should have broader application to an entirety of a claim, not isolated issues.

⁶⁹⁸ See Andreas L. Paulus, ‘Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal’ (2005) 74 *Nordic J Int’l L* 297, 298; For a similar argument, see Martti Koskenniemi & Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden J Int’l L* 553; or from a systems approach see Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan J Int’l L* 999.

⁶⁹⁹ Veerle Heyvaert, ‘Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law’ (2009) 20(3) *Eur. J. Int’l. L.* 647

⁷⁰⁰ Jasper Krommendijk, John Morijn, ‘Proportional by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, Francesco Francioni (ed.) *Human Rights, International Investment Law, And Investor-State Arbitration* (ed.2009 Oxford: Oxford University Press) 42, 43, 75

⁷⁰¹ Andreas L. Paulus, ‘Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal’ (2005) 74 *Nordic J Int’l L* 297, 298; Oren Perez, *Ecological Sensitivity And Global Legal Pluralism: Rethinking The Trade And Environment Conflict, Vol.2* (Hart Publishing 2004) 259–262; Kal Raustiala and David G. Victor, ‘The Regime Complex for Plant Genetic Resources’ (2004) 58 *Int’l Org*

administrative law further corrode the legal boundaries between state responsibility and state immunity, the preserve of traditional international law.⁷⁰²

As this complex legal landscape ‘internationalises’, doctrinal tests to distinguish sovereign acts as (*jure imperii*) from commercial acts as (*jure gestionis*) [Chapter 5]; the means to apply those doctrines; as well as understanding how such acts manage the scope and breadth of administrative contracts and actions of associated parties become more critical. This also applies to the complexities of arbitration itself. Because private arbitration is widely accepted, even by *Shariah* standards, such distinctions could serve to strengthen sovereignty by not confounding the state’s commercial interests with its sovereign power. In a sense, the continued or abusive use of the immunity defence which has an undermining effect of the idea that sovereign authority of governments is unconstrained by independent and autonomous standards of law, both at the level of domestic administrative law and *Shariah*, and increasingly the constraining effect of international law and arbitration.

6.1.1 Disappearing Sovereignty: The Complicated Case of Unilateral Authority in Arbitration

The following case law discussion provides a paradigmatic example of the fallacies of Res. 58 and the arguments developed in this thesis, which include the consequences of

Vol. 32, 277, 279; For a similar argument, see Koskenniemi & Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ 15 (2002) *Leiden J Int’l L* 553 and Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan J Int’l L* 999

⁷⁰² *Pope & Talbot Inc. v. The Government of Canada, Damages, (NAFTA Ch. 11)* Arb. Trib 41 (2002) I.L.M 1347. This case concerned the rules of interpretation applicable to bilateral or multilateral investment treaties under the 31 (3) Vienna Convention on Treaty Interpretation. The tribunal also stated that the purpose of the arbitral mechanism was to ‘[a]ssure due process before an impartial tribunal.’ Id at para. 47

unfettered unilateral authority or the failure of the Board to “police” such authority; the doctrine of consent as a multi-faceted look at unilateral authority; and the tension which exists between unconstrained discretionary power of the administrative state to modify or abrogate its state party’s contractual commitments and the legitimate exercise of public authority in the public interest. It pulls these concepts of arbitrability together under considerations of administrative justice, sovereignty, and tests of authenticity in *Shariah* law. It also serves as a reference point for the rest of this chapter.

As chapter 4 unveiled, Res. 58 poses a particular threat to disclosure and fairness within an administrative contract. *Oujim BV (Dutch company) v. the University of King Abdul Aziz*, involving an administrative procurement contract, further exemplifies this issue and the results of “un-checked” unilateral authority.⁷⁰³ The contract included an arbitration provision.⁷⁰⁴ A dispute indeed arose and an award was entered against the University, which it failed to pay in its entirety. Oujim, in turn, initiated enforcement proceedings with the Board. The University attempted to invoke Res. 58 as grounds for non-payment of the remainder of the award. The Board agreed with the University, stating that the arbitration was nonbinding as the parties had not obtained permission therefore the arbitral award was unlawful.⁷⁰⁵ The Board further stated that permission was necessary as the University was a publicly-funded body, acting as a guardian of those public funds and had a duty to protect and control such funds in the public interest. They found the arbitral award to be an unlawful relinquishment of that duty to protect.⁷⁰⁶

⁷⁰³ *Oujim BV (Dutch company) versus the University of King Abdul Aziz* (The Board, Case No. 235/Q/1416/2)

⁷⁰⁴ *Ibid*

⁷⁰⁵ *University* (n 703)

⁷⁰⁶ *University* (n 703)

However, *Shariah* law mandates the fulfilment of contractual agreements and promotes justice, and here, the parties both mutually consented to arbitration as a means of settling their dispute. It was only after an award was issued against the University that it attempted to invoke Res 58, therefore violating the spirit of *Shariah* law in fulfilling its contractual obligations. As discussed in Chapter 4, *Shariah* law is ultimate law in KSA and does not itself advocate the principle or tools of sovereignty. Res 58 is expression of legislative power and sovereign political authority, therefore, it is inferior to principles of *Shariah* law. The University's actions to evade final payments of an arbitral award were contrary to *Shariah* principles of good faith, honour, and fair dealing; therefore proper application of *Shariah* law would indicate that Res. 58 should not have been a justifiable defence in this matter.

This is also an example of unlawful consent. Oujim had no notice or disclosure that the arbitration clause, or the award, would have a non-binding, much less illegal effect. Therefore, they could not have given adequate consent in the original contract. Such malfeasance and fraudulent misrepresentation would surely contradict *Shariah* principles of haram, "your word is your bond", and justice.⁷⁰⁷

Not only was the original agreement invalid due to lack of consent, unjust enrichment and estoppel, but also Oujim was denied the justice it deserved. This argument is only magnified by the University's behaviour, which is clearly an action of a retroactive power-play. They either failed to conduct their own due diligence in formation of the original contract, or intentionally entered into an illegal contract. There should be consequences to unfettered unilateral action, and the Board in this case failed to

⁷⁰⁷ The Quran 5:1; The Quran 2:40; The Quran 2:177; The Quran 2:282

adequately ‘police’ the issue. Regardless, not even *Shariah* law, would find fault with Oujim, and in fact *Shariah* law specifically states to do no additional harm to a contractual party. Forcing a party to forego an arbitral award after the administrative party had been found at fault, due to non-disclosure of a material term prior to dispute resolution, is in-fact doing harm to a party.

As discussed in chapters 3 and 5, and as illustrated by the case law from jurisdictions such as Egypt and France, the confusing nature of internationalised administrative contracts present challenges for arbitration panels or the Board in deciding how to classify the contract, which laws to apply, and what type of consent may or may not have been necessary.⁷⁰⁸ The assessment of this researcher is that consent must always be identifiable, regardless of its implicit or explicit nature.

To put it in context, arbitration of administrative contracts implicates a renunciation of initial dispute resolution in national courts, notwithstanding issues of appeal, with the parties’ arbitration agreement serving as the foundation for the arbitrator’s authority and mission. If a party has never consented to a contract or arbitration agreement or if consent was obtained from a party based on false or mistaken pretence, then that party would not have consented to the standards of the arbitral seat or the chosen rule of law within the arbitration agreement or clause. Therefore, any alleged consent is null and void or unlawful, under both *Shariah* and international law, making the effect of the contract or of the arbitration measures equally null and void or unlawful.

⁷⁰⁸ *Westland Helicopters v. Egypt, AOI & Arab British Helicopter Co.*, ICC Case No. 3879 (1991) XVI Y.B. Com. Arb. 174

This argument can be ‘turned on its head’ if you take an ‘innocent’ party who gave their willing consent to arbitrate, only to be told that they were mistaken in the ability of the governmental authority’s capacity to enter into arbitration and give consent equal to that of the private party. As we have already mentioned, tribunals are then faced with the hefty decision of whether to ‘punish’ the private party by denying arbitration and due process based on lack of consent, or to recognize a waiver or estoppel by the actions of the governmental entity, e.g. the University case and Pemex.⁷⁰⁹ While international bodies have accepted the latter option, KSA is reluctant to recognize the underlying concepts of waiver or estoppel, and in fact do not typically use such terms in their administrative law due to the then associated relinquishment of independent control and ability to default to public interest. However, proper application of Shariah principles of equilibrium, fairness and “do no harm” could provide adequate justice in this scenario, thereby eliminating the need for internationally “coined” waiver or estoppel.⁷¹⁰

In complicated cases requiring analysis of whether or not consent exists, as discussed, the French rely on chains of transactions, or consideration of all circumstances, and transfers of the parties’ substantive rights within a specific contractual and arbitral procedural framework [Chapters 3 and 4]. In other words, if the parties’ reasonable and legitimate expectations require that arbitration be imposed by virtue of facts, then those expectations and facts will, in legal fairness, amount to implicit or subjective consent. In other legal systems, this practice is called equitable estoppel. One such example was seen in the case of a services agreement between two parties to construct a power plant in KSA

⁷⁰⁹ *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013)

⁷¹⁰ *Rhone Mediterranee v. Achille Lauro*, 712 F.2d 50 (3d Cir. 1983)

where the court found an arbitration clause to be valid, holding that the claimants ‘could not rely on the contract when it works to their advantage...but then repudiate the contract and its arbitration clause when they believe it works against them.’⁷¹¹ To KSA’s credit, this ruling attempted to prevent repudiation, but its application as a standing rule in KSA’s non-precedent legal system is unlikely.

The reasonable limits of unilateral authority in administrative contracts and arbitration, e.g. consent, duty to the public, and sovereign immunity, are a legal quandary for KSA that has not been alleviated, only softened, by SAL 2012. As the analysis has shown, there are still consequential gaps within the system that equate to gross abuse of unilateral authority, serve as a deterrent to private contractors, and have been costly for even the Saudi Government itself, as the sorting of limits to unilateral authority or acts by parties has led to the “re-trying” of cases through both arbitration panels and the Board.

Given this framing, the following lessons and discussion of reforms attempt to set a path forward for KSA and to evaluate what its future may look like in terms of its arbitration process.

6.2 Lessons in Unilateral Authority: The Hallmark of Administrative Contracts

Unilateral authority is the hallmark feature of administrative contracts, but as analysed in this thesis [Chapter 3], left unconstrained its power distorts notions of fairness, good faith, and justice. The Board has failed to adequately police this power due to the lack of

⁷¹¹ *Fluor Daniel Intercontinental, Inc. v. General Electric Co., Inc* no. 98-Civ. 7181 (WHP), 1999 WL 637236 (S.D.N.Y. 1999)

codification, precedent, and consistency. Thus unilateral authority is now without limits in KSA as being widely defined and broadly applied to considerations ranging from sovereign immunity to legitimate expectations of parties. This thesis has asked and examined what the limits are for exercise of unilateral authority; presenting comparisons from jurisdictions like Egypt and France. At the domestic level it is a public policy and contractual matter, and at the international level it is one of sovereignty and internationalised administrative contracts. The duty of the Board and the KSA governing bodies is to balance the unilateral rights of a public entity in carrying out public interest with the inherent rights of a private party. The lesson learned is that the application of *Shariah* law and international law can both be a means of accountability for corrupt uses of immunity to unilateral authority and abuse of power.

6.3 Lessons from *Shariah*: Legality and Legitimacy of Unilateral Authority

Unilateral authority is normally defined within public policy interests; but in KSA this power to act can only find genuine legality and legitimacy in *Shariah* law. *Shariah* law has taught us principles of fairness, good faith, honour, and justice in the context of contractual relationships. Unilateral acts, such as modification, rescission, annulment, or submission to arbitration, are judged for their authenticity to these principles. Consent, for instance, is closely related to issues of justice and fairness, from the perspective of both public law and *Shariah*, and provides a rich resource for lessons on unilateral authority. It is doubtful, that parties can give genuine consent to unilateral actions, particularly those which breach contractual commitments on which parties justifiably

rely.⁷¹² Contracts are agreements based on mutuality and benefit. Under *Shariah* law as well as administrative civil law or common law systems, consent at one stage or another must be obtained for a contract or arbitration to be lawful.

As discussed in chapter 3, both the *Quran* and the *Sunnah* specify a man to give his consent for use or disposal of his property, privilege, or obligation. Fairness and good faith require that parties understand what they are agreeing to and how such agreement may directly affect their contractual obligations or benefits; or impact legitimate expectations of contractual rights. A party has a legitimate right to know the weight of what they have agreed to. To do otherwise, would invoke legal questions of undue influence, bad faith, estoppel, and waiver.

Many disputes occur where one party was “surprised” by an unexpected change of rights, status, or obligations; or phrased another way it is not what they understood to have consented to when entering the contract [chapter 3 and 5]. It is also here that the lesson of legitimization of unilateral acts under an examination by *Shariah* law is strengthened and the pathway to reform is set. Previous chapters demonstrated how instances of changed circumstances, (re)classification, or retroactive effects from unilateral actions can be unexpected and contrary to understandings of one or both parties. Such situations

⁷¹² See the following cases for a consideration capacity: *TOPCO/CALASIATIC v. Libya* (53 I.L.R. 389/1979; Award of 19 January 1977), *BP v. Libya* (53 I.L.R. 297/1979; Award of 1 August 1974), *LIAMCO v. Libya* (62 I.L.R. 141/1982; Award of 12 April 1977), *AGIP v. The Congo* (21 I.L.M. 726/1982; Award of 30 November 1979), *Revere Copper v. OPIC* (56 I.L.R. 258/1980; Award of 24 August 1978), *Elf v. NIOC* (Yearbook Commercial Arbitration 1986, 97; Award of 14 January 1982), *Kuwait v. Aminoil* (21 I.L.M. 976/1982; Award of 30 November 1979), *S.P.P. v. Egypt* (22 I.L.M. 752/1983; Award of 11 March 1983), *Deutsche Schachtbau v. R'As Al Kaimah and Shell* (1990 App.Cas. 295/1987, 2 All E.R. 769 and Yearbook Commercial Arbitration 1988, 522 and 1989, 737), *Wintershall v. Qatar* (28 I.L.M. 795/1989; Partial Award of 5 February 1988), *AMOCO v. EGPC* (ICC Case No. 5331 Award of 18 January 1988, not published), *MOD Iran v. Westinghouse* (ICC Case No. 7375, Preliminary Award of 5 June 1996, fully published in Mealey's International Arbitration Report, December 1996)

shift the entire nature of the contract, as a party cannot consent to a unilateral authority or nature of a contract which has not been disclosed. This violates the spirit of *Shariah* law principles of good faith, fairness, and consent within contractual matters. By supplementing analysis in chapter 5, one concludes that the Board in Saudi Arabia does not always have a legitimate ‘right’ to reclassify a contract, nor can other civil law jurisdictions, such as Mexico or France, use sovereign immunity and unilateral authority to retroactively apply legislative authority or contractual terms. Such actions seem to transgress legitimate expectations, guaranteed rights, and *Shariah* law requirements that all material terms of a contract are agreed to simultaneous to offer and acceptance.

The lesson therefore is that acquiescence to unilateral authority, whether through consent or sovereign immunity, is not a malleable concept, but that all parties should be clear and unambiguous in their intent, understanding, and consent, as per notions of legitimate expectations and good faith. It is only then that the unilateral authority finds legality and legitimacy through *Shariah* law, thereby setting the true gauge of authenticity in administrative contracts and arbitration.

6.4 A Lesson about the Limits of Absolute Sovereignty

As has been presented throughout this study, a contract can be between two parties, public or private, with freedom to establish terms and conditions. In the case of administrative contract, it creates a primarily regulatory contract by which a claim may be made against a State, by a private party, concerning or arising out of a dispute or act related to a public interest; thus an alleged act of sovereignty and immunity. This is a critical point in arbitration and in any suggested reform for Saudi Arabia, because the

sovereignty and regulatory nature of the agreement mandates the application of public law, not private law, therefore suggesting that all contractual matters are serviced by public law. But as has been discussed, there is not usually a clear distinction in the nature of a contract, nor a reflection of legitimate expectations of the rights of parties in resolving disputes.

For instance, what if even the possibility of arbitration, or other avenues for obtaining effective justice, are denied to the other party at the level of municipal law? Given the expressed intent behind Res. 58 and Article 10(12), discussed in chapter 3, one can easily imagine a ‘new *ARAMCO*’ scenario in which the Saudi government will seek to deny rights that may be ordinarily available to the private contractor under the express terms of oil concession agreements (or the applicable foreign law of the contract), on the grounds that the dispute in question concerns a public contract and therefore falls within the exclusive sovereign competence of Saudi Arabia’s domestic law. In this scenario the Saudi government retains for itself exclusive authority to determine the nature and character of a contract. Yet this is the scenario that has been argued against in this study, one of absolute sovereign control and action by the state.

The current research emphasizes the importance of having administrative contracts subject to arbitration in serving as a precedent for States to nullify certain powers within their sovereignty for the sake of international cooperation and participation, without full relinquishment of their sovereignty, i.e. as explored in France, Egypt, and even Spain. In other words, compromise and harmonisation are possible where KSA retains its sovereign identity. For example, SAL 2012 articles discussed in chapter 4, including exemptions for certain ministries from Article 10(2), and case law to be presented in this Chapter, prove

that KSA already functions by subjecting certain regulatory, administrative contracts to arbitration, despite its restrictions from Res. 58 and Article 10(2) of SAL 2012. In effect they are beginning to strike a tenuous balance between exercising their sovereign powers and submitting to international custom by consenting to the possible use of arbitration in public matters. From this lesson, Res. 58 and Article 10(2) are open ended provisions, not absolute prohibitions; and the ultimate challenge becomes the conciliation of *Shariah* principles, KSA domestic designations, and international law.

6.5 Lessons from the Exclusivity of State Law

This thesis has elucidated that practices of exclusivity in State law by KSA have created detrimental side-effects in reputation and means of resolving disputes to internationalised administrative contracts. What Saudi Arabia designates as an administrative contract under its own substantive law, may, to another legal system, have the character of an ordinary contract. At the same time, nevertheless, an international economic agreement involving a state may well design and apply national laws, including contract law principles and regulation, in order to further its own self-interested ends, under the pretext of ‘public policy’ or concern for the public interest. These rules may well result in the unfair or discriminatory treatment of foreign nationals with whom the state has undertaken contractual commitments or dealings.

As case law discussed in chapters 4 and 5 illustrated, a private contractor may seek to enforce a different ‘choice-of-law’ in the courts of another jurisdiction. Similar to the Board, as discussed in chapter 2, international tribunals may auto-determine their own competence and capacity to decide issues they deem to fall within the scope of the

agreement and their own powers of review.⁷¹³ The tests developed in *Maffezini I* and II and *Salini*⁷¹⁴ discussed in chapter 5 may provide a genuine path by which international tribunals can begin to establish a link between contractual breaches and abusive exercises of governmental power, both in respect of domestic administrative contracts and in the international form of state contracts. Tribunals in particular are better positioned to will to comparative jurisprudence, appealing to principles of international law, and in the judicial decisions of domestic courts, especially when the applicable law is the law of the domestic courts' forum state.⁷¹⁵

Yet as has been presented in this thesis, there is no guarantee that Saudi authorities will respect the decision of an international arbitral body even if they have given consent to arbitration. Instead, they may refuse enforcement despite being a signatory to international agreements. Indeed, as has historically been the case, the Saudi government would likely make ready use of the Article V safe harbour clauses of the New York Convention that provide defences to non-enforcement on the grounds that foreign award or judgements infringes the enforcing state's mandatory law or public policy; or of the commercial exception in sovereignty cited in case law from chapter 5.⁷¹⁶

Saudi Arabia is no different from most jurisdictions in this scenario, including Egypt, France or Syria, in that it can simply refuse to permit arbitration or enforce a parties' choice of law if it explicitly contradicts the will of the legislator; or where ambiguities

⁷¹³ For comparative cases of applicable law based on venue and subject matter, see (n 1), See also *In Re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996); *Al-Sharq Petrochemical v. The National Cooperative Insurance Company [NCCI]* (1997) (Ministry of Commerce);

⁷¹⁴ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4

⁷¹⁵ *EnCana v. Ecuador* (UNCITRAL), Award, 3 February 2006, 12 ICSID Reports 427, para. 194.

⁷¹⁶ Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal' 74 (2005) 74 *Nordic J Int'l L* 297, 298

exist over the power of tribunals to determine not just the applicable law, but equally the applicable rules of law.⁷¹⁷ As discussed in chapter 4, in KSA, Res. 58 restricts choice of law, while Article 2 of SAL 2012 permits it.⁷¹⁸ Does this mean that the private contractor's options are exhausted or can local courts be asked to decide a dispute, notwithstanding the absence of an arbitration clause, or to otherwise request the grant of provisional measures in aid of arbitration? Can such courts be situated in other countries, or is the power reserved to administrative courts? The lesson and answer is that *Shariah* law, like international law, can be the great equalizer in situations where exclusivity of state law is invoked or abused.

As has been contemplated in this thesis, *Shariah* law does not necessarily provide justification for sovereignty related arbitrability or public policy defences, particularly when regulatory, administrative or political power is abused or unconstrained by considerations of justice, legality and good faith. Indeed, *Shariah* law may be compatible with international standards even when notions of sovereignty or public policy are not. Therefore, an 'exclusive' approach to choice of law in KSA has a dramatically different undertone when it accommodates the supremacy of *Shariah* law, and in congruence with international law. By granting arbitrators' broad freedom to determine the applicable rules of law, of a more inclusive nature, a correct and just result can be reached.

⁷¹⁷ Lord Saville, 'The Arbitration Act 1996 and Its Effects on International Arbitration in England' (May 1997) *Arbitration* Vol. 63 No. 2, 104

⁷¹⁸ Article 2, Saudi Arbitration Law (SAL 2012) issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers; See Muddassir Siddiqui, 'Arbitration under the *Shariah*: With Case Study of Saudi Arabia' *International Dispute Resolution Committee of District of Columbia Bar*, 11 January 2004; See also Council of Ministers Resolution No. 58 dated 17/1/1383 H. (9 June 1963)

Further, in consideration of the internationalised administrative contract, exclusivity seems to no longer be accepted where such commonly accepted principles of international and administrative law (“denial of justice” or “due process”) are violated, thereby creating a transnational accountability between national courts and international tribunals. KSA has been exposed to comparative jurisprudence, decisions, and principles, which are shaping attitudes on the limits of unilateral authority, sovereignty and immunity. As discussed, countries like KSA remain reticent but not absolutely prohibitive of these developments, thus presenting opportunities for national reform and alignment with international standards.

6.6 Lessons in the Role of Public Policy

The role of public policy becomes the binding thread throughout this thesis. Governments and national courts are entitled to employ public policy arguments in exercising their sovereign autonomy, the autonomy and integrity of their legal system’ and to do so in the public interest, at the domestic or international level. But state acts or unilateral administrative actions taken to protect matters of public policy do not escape legal constraint or judicial review.

Courts in other jurisdictions permit the annulment of contracts, or arbitral awards, on public policy grounds but they set a high bar. Thus if national courts are entitled to annul and invalidate that which violates natural justice or key issues of public policy, the actions of a state entity should be held to the same standard. Thus, public policy considerations may provide justification for a state to modify their contractual commitment or frustrate an arbitration agreement without liability, only if reasonably

justified, and balanced against considerations of the rights and interests of the other party to contract. More importantly, this action must be traced to some original statutory warrant in the state context, and made subject to requirements of such as reasonableness, non-discrimination and proportionality.

Moreover, the private party should at the very least to be able to challenge the decision or seek compensation before an independent court, that provides reasoned justification for its decision. This is entirely consistent with *Shariah*. The conflict rather is with the unbounded sovereign power of the political branches of the KSA government. But political exercises of power, sovereign or administrative, in or beyond the state, can be tempered by the “higher” principles of both international or *Shariah* without unduly encroaching upon the sovereign rights of the state, or the regulatory powers and functions of the administration.

6.7 Prospects for Reform: A Discussion and Final Analysis

The lessons above are closely intertwined, yet each offers individualised opportunities for reform. A small reform in one area, such as publishing decisions of the Board, may instil more credibility in KSA’s system, or alternatively, a large statement such as abolishment of Res. 58 may catapult KSA into the internationally recognized regional leader in arbitration that it strives to be. The prospects for reform in KSA are ripe but unpredictable. Generally speaking, reform should be focused on the attributes of strength in *Shariah* law. *Shariah* law is compatible with international law, and unlike jurisdictions such as France and Egypt, KSA’s extreme reverence and reliance on *Shariah* law should

provide parties with more assurance than not in contractual matters. If properly applied and understood, *Shariah* law is a legal compass of morality, fairness, and justice.

Prospects for reform are best directed to the inclusion of *Shariah* law experts in arbitration as well as a campaign to educate legal professionals on *Shariah* law. An ultimate suggestion is also the abolishment of Res. 58, or alternatively, a softening of Article 10(2) to include more ministerial exemptions and clear categorizations as well as procedures for administrative contracts that can be arbitrated. Finally, reforms should be directed to revise understanding of public policy and limits to sovereignty. Better integration of *Shariah* law is the most surmountable reform. Reforms related to Res. 58, are admittedly more controversial, both procedurally and substantively.⁷¹⁹

Based on Resolution No. 58, all arbitration proceedings and awards involving a dispute arising under an administrative contract must apply Saudi law, but as has been suggested, this does not mean that KSA domestic law and *Shariah* law are indivisible, and to be treated as one-in-the-same. Nor do any choice of law questions have to presume that application of *Shariah* law is non-negotiable, while Saudi legislative law has a certain flexibility. As discussed in Chapters 3 and 4, *Shariah* law does not distinguish between private or administrative contracts or parties, and instead endorses a mutual decision for every contractual provision by the parties themselves. Therefore, it would not endorse a restriction imposed by one party upon the other that an alternative set of laws may be the

⁷¹⁹ For comparative cases of applicable law based on venue and subject matter, see (n 1), See also *In Re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996); *Al-Sharq Petrochemical v. The National Cooperative Insurance Company [NCCI]* (1997) (Ministry of Commerce); See also for comparison of public policy considerations in civil law jurisdiction, case holdings in *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013)

chosen law. Alternatively, however, it would not allow for the abolition of *Shariah* law within the contract because that is the word and guidance of Allah.

In addition to oversight of *Shariah*, Res. 58 provisions fail to take into account, the rise of the internationalised administrative contract as discussed in Chapter 5. Such contracts have encouraged a “softening” of KSA’s grip on choice of law and venue provisions, within Res. 58 and Art. 10(2) of SAL 2012. Despite the vulnerability of its sovereignty within these contracts, KSA is now prolifically using these public, commercial “hybrid” contracts for public works and concession projects. The nature of these contracts inherently involve international elements, which in turn, requires considerations of international customs, norms, treaties, private concepts, etc.; in *addition* to adherence to *Shariah* law. Reliance on foreign expertise and resources, and its weakened domestic economy are placing KSA in a position where it has to clarify expectations of parties and rule of law in order to persuade foreign parties to agree to such contracts. In other words, KSA cannot evade international standards through hard-line limitations on arbitrability or overprotective use of sovereignty, and still participate in international economic expansion.

The following discussions build on these concepts and the lessons above to offer procedural and substantive means of reform to the limitations on arbitrability of administrative contracts in KSA.

6.7.1 Consent Requirements as Obstacles: Overcoming Res 58 and Article 10(2) of SAL 2012

The researcher proposes the following reforms in *Shariah trained arbitrator, promulgate necessary procedures for arbitration submission and an alignment of international legal concepts to Shariah principles, and educate parties, lawyers, and jurists on those mutual standards.*

As previously described, SAL 2012 has ushered in a modern wave of arbitration norms for the Saudi arbitration regime. This wave seems to be gathering acceptance and momentum, and is indicative of the ‘softening’ occurring not only in judicial settings, but in legislative reforms such as SAL 2012.⁷²⁰ For instance, Article 2 of SAL 2012 recognizes that international conventions might rightly allow the parties to select a domestic or foreign venue that applies the provisions of other, international laws.⁷²¹ Further, although Res. 58 facially does not allow for arbitration unless pre-approved by the Prime Minister, its substantive application, as evident in the below-mentioned 1979 arbitration case or Ministerial examples, is not a foregone conclusion.

As analysed throughout this thesis, current debates often focus on whether or not arbitration should be an acceptable practice, whether the practice can be confluent with *Shariah* law, and whether KSA is beginning to see a future of conciliation into

⁷²⁰ For a general discussion, see Sheikh, Ismet Abdullah, *Arbitration in the International Character of Administrative Contracts* (2000) (1ed. Arab Renaissance Publishing House, Cairo); See also Anwar Ouazzani, Gillian Carr, James Bremen, Nasser Al-Hamdan, Christopher Humby and Mohammed Altammami ‘Construction Arbitration 2016’ (18 July 2016) Herbert Smith Freehills (Saudi Arabia: Global Arbitration Review Online) <http://globalarbitrationreview.com/jurisdiction/1000241/saudi-arabia>

⁷²¹ Article 2, Saudi Arbitration Law (SAL 2012) issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers; See also Muddassir Siddiqui, ‘Arbitration under the *Shariah*: With Case Study of Saudi Arabia’ International Dispute Resolution Committee of District of Columbia Bar.

administrative contracts. Consent requirements can be overcome through abolishment of Res. 58, a relaxing of Art. 10(2), or a more strategic and predictable use of *Shariah* law. Case law illustrates that a softening in KSA's rigid approach to arbitration is already slowly occurring.⁷²² Similar to paths being forged by Egypt and France, these cases are an integral foresight into prospective reform.

In a rare occasion, in 1979, Saudi Arabia and a Swiss company proceeded to arbitration concerning a dispute over a Public Works Administrative Contract. The arbitration panel was headed by a Muslim arbitrator and Swiss law was applied.⁷²³ The award was in KSA's favour and enforcement of the award was readily obtained. KSA attributed the success of the arbitration, in-part, to the participation of a Muslim arbitrator who understood the sensitivities of *Shariah* law. Thus, demonstrating integration of *Shariah* law into international arbitration proceedings and supporting a key reform: *the use of Shariah trained arbitrators should be a procedural mandate in international arbitration of administrative contracts involving KSA.*

As chapters 4 and 5 suggested, the rise of the internationalised administrative contract not only provides for cohesive use of both *Shariah* law and international law in resolving a disputes; but certain Ministries have been allowed to participate in arbitration of these types of contracts despite the otherwise prohibitive legislative provisions. Post-Res 58

⁷²² See for example the Agreement between Saudi Arabia and The Japan Petroleum Trading Co. Dec. 10 1957, art. 55 (Gov't. Press 2nd ed. 1964) (disputes to be resolved finally by a panel of five arbitrators sitting in Saudi Arabia); Agreement between Saudi Arabia and Pacific West Oil Corp. Feb 20, 1949, art.45 (Gov't Press 4th ed. 1964) (disputes to be finally resolved by three arbitrator panel); Agreement between Saudi Arabia and Trans-Arabian Pipe Line Co. July 11, 1947 art.23 (Gov't Press 2nd ed. 1965) (providing for three-arbitrator panel sitting in Jeddah)

⁷²³ The case given here is an example from the book *Saudi Business and Labour Law* by Lerrick and Main. The names of the parties were not mentioned in the book nor can they be found in other sources and therefore, they have been mentioned as examples, without references, and therefore not included in the Table of Cases. A Lerrick and Q.J. Main "Saudi Business and Labor Law: Its Interpretation and Application" (Graham & Trotman Ltd. 1982, 273)

Ministerial regulatory examples of the “waiving” of Prime Minister approval provide more contemporary precedent. The wording of these provisions, well after the establishment of Res 58, suggests an intentional and purposeful bypass of the permissions construct.⁷²⁴ It also endorses arbitration as a procedural matter, not as a threshold or capacity issue; establishing an argument that individual Ministries have found arbitration to be a useful tool in administrative contracts.

For example is seen in Royal Decree No M/56 of 22/11/2005, which excluded obligation of preliminary consent for arbitration in the Saudi Arabian electricity regulation. Article 13, paragraph 8 reads: “It is permissible to agree on settling any dispute or conflict arising between licensee and the authority through arbitration, according to the provisions of the Arbitration Regulation.”⁷²⁵ This could be considered a “blanket” authority for arbitration that does not specify the individual contract or license holders, but is an open authority for a specific category of contracts. This is reflective of the approach taken by France discussed in chapter 4. Certain categories of administrative contracts could be prime for arbitration proceedings, without the wholly restrictive tendencies of Res 58 or Article 10(2) of SAL 2012, which is the basis for another key reform: *Continue to allow arbitration through individual Ministries, and clearly categorize not only the types of contracts that may be submitted to arbitration but promulgate necessary procedures.*

The most revealing potential precedent for bypassing or relaxing an approval requirement is found in a recent, and one of the few, published cases in Saudi Arabia between a Saudi

⁷²⁴ In 2004, the Mining Investment System promulgated Royal Decree No M/47 of 4/Oct/2004, article 58, pertaining to concession agreements, which provides “[i]t is permissible to agree on settling any dispute or conflict arising between a licensee and the Ministry through arbitration, according to the provisions of the Saudi Arbitration Regulation.”

⁷²⁵ Royal Decree No M/56 of 22/11/2005, Article 13

public entity and a western company who arbitrated a dispute over a procurement contract.⁷²⁶ The Board enforced an arbitral award in the foreign party's favour despite defences being raised regarding violations of public policy because of one of the arbitrators being a non-Muslim and the failure of the governmental authority to obtain prior approval for arbitration. The Board rejected the defences, ordering the Saudi authority to pay SR 1.28.018.95 in favour of the claimant.⁷²⁷ The court held:

[I]t stands to reason that justice entails the following; first, the subject matter of the dispute requires arbitrators to be experts in the subject matter of the dispute. Second, the Board of Grievances should subject the tribunal's decision to general principles, these principles are the sanctity of contract and that the general consensus among Muslim scholars that an arbitral tribunal's decision is binding.⁷²⁸

The holding in this matter indicates a genuine understanding of respect of choice of law, fairness, and an open-mindedness to weighing all the facts of a matter to find the best outcome, rather than narrow-mindedly restricting all recognition and enforcement based on the lack of capacity via an approval requirement. Further, it shows a weighing or balancing of what principles of *Shariah* law or of the arbitration laws regard as the most important and reasonable on a case-by-case basis, i.e. despite the presence of a non-Muslim arbitrator, the Board honored the decision of the panel, and re-enforced it with *Shariah* principles of justice and fairness, e.g. reflective of international contractual doctrines of 'sanctity of contract', and the binding effect of arbitration. It encapsulates the

⁷²⁶ Board of Grievances Case No. 235/2/Qhaf/1416 H Saudi Arabia

⁷²⁷ Ibid.

⁷²⁸ Ibid.

effective application of *Shariah* principles in international contractual matters and how they may come to the same or similar result as international law. It also inspires another key reform: *Align international legal concepts to Shariah principles, and educate parties, lawyers, and jurists on those mutual standards.*

Finally, in light of the research thus far, and as supported by analysis in chapters 4 and 5 of Res. 58 and Art. 10(2) of SAL 2012, the researcher urges the procedural application of the doctrines of waiver, estoppel and justifiable reliance in any scenario where the Saudi government has agreed to arbitration, whether the Prime Minister has given *ex ante* consent.⁷²⁹

6.7.2 Public Policy As Obstacle To Substantive Reforms – Reframe KSA’s perception of public policy, allow harmonisation with international standards with a more mature, transparent, and precedent based system of administrative law

Beyond procedural reforms are the more complex substantive reforms. As learned from “Lessons” above, public policy is not a pretext for abuse of power or denial of justice. Substantive reform has two aspects: one is rights of parties, specifically the right to procedural due process and, possibly, a substantive legitimate expectation that a contract will be performed, or that a remedy for breach or unlawful unilateral action is accessible, e.g. arbitration and consent issues. The other is how far these rights should be balanced against public policy interests and protected by sovereign immunity. While private parties in administrative contracts have to accept that states have responsibilities to the public,

⁷²⁹ Article 7, Saudi Arbitration Law (SAL 2012) issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers

unilateral authority is only justified on public policy grounds providing it does not constitute an abuse of those power, judged by tests of *Shariah*, e.g. compensation and no contractual conditions which are excessively burdensome, even if state has right to modify contract due to change of circumstance [chapters 3, 4 and 5]. Therefore any prospective reforms pertaining to public policy must deal with protecting the rights of private parties against the interests of the state.

As briefly discussed in chapters 4, examples of enforcement in arbitration matters serve well as a platform for analysis of public policy based reforms. In addition to protecting rights of both private and public parties, enforcement engages doctrines of mutual jurisdictional respect, accountability for immunity, and reasonable limits to needless intervention. The prospective reforms to substantive public policy issues in this section are not, therefore specific acts such as passage of legislative provisions, but comparative reflections of ways that KSA can reframe its own perception of public policy and how it can create new general, governmental practices and ideas.

By drawing on the experience of other countries, one can reflect on the possible ways in which local laws may frustrate the arbitral process and undermine the legitimate expectations of arbitrating parties, including where, with relevance to the Saudi focus, local laws do not recognise the final authority of a validly constituted tribunal to determine its own jurisdiction or competence, e.g. *ARAMCO* and cases presented in chapters 4 and 5.⁷³⁰ However, in public policy considerations of outcomes in the choice

⁷³⁰ See Horacio A. Grigera-Naón, ‘Arbitration in Latin America: Overcoming Traditional Hostility’ (1989) 5(2) *Arb Int* 137; See the following for a discussion of these debate in Germany, see Pieter Sanders, ‘The Introduction of UNCITRAL’s Model Law on International Arbitration into German Legislation’ (1990) *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 121–130; Interestingly, the German Act, under sections 1025 (2) and 1050 expressly provide for assistance by national courts even for foreign based or not yet

of national or international laws in deciding on the arbitrability of an administrative contract as well as the nature of an arbitral award, international case law introduces a way to delicately handle the rights of parties; and whether or not to give deference to a primary jurisdiction's authority to supervise and enforce or not enforce an arbitrated award. Many jurisdictions have set a high bar for the use of public policy arguments and defences. As discussed in chapter 3, in France, for example, a Paris Court held in an arbitral award matter that the threshold for establishing a public policy breach should be set high, namely that the breach should be of a "flagrant, effective and concrete" character.⁷³¹ In short, suggesting that any challenge to final arbitral award should be rejected unless grounds for a grave and serious breach of public policy can be established.

The U.S. has several examples of giving deference to primary jurisdictions to a contract, while simultaneously considering public policy implications under the light of multiple applicable laws, i.e. international standards, the law of the contract, and public policy comparisons to the U.S.'s own system. In each case the U.S. was serving as a secondary jurisdiction to the dispute. For example, in *Baker Marine (Nigeria) Ltd v. Chevron (Nigeria) Ltd* the U.S. court acknowledged the primary jurisdictions power to annul arbitral awards.⁷³² The US court, as secondary jurisdiction, rejected hearing the matter because there was nothing about the Nigerian judgment that conflicted with US public policy and there were appellate remedies available to *Baker Marine*.⁷³³ In other words,

seated arbitrations (including where parties have not selected the applicable rules in addition to the applicable law).

⁷³¹ Horacio A. Grigera-Naón, 'Arbitration in Latin America: Overcoming Traditional Hostility' (1989) 5(2) Arb Int 137

⁷³² *Baker Marine (Nigeria) Ltd v. Chevron (Nigeria) Ltd*, 191 F.3d 194 (2d Cir 1999)

⁷³³ Ibid.

the U.S. court applied the facts and findings of the Nigerian court under Nigerian law to U.S. law. This would not be dissimilar to KSA reviewing an arbitral award through a lens of conciliation under *Shariah* law.

Likewise, in the matter *TermoRio SA Esp v. Electranta SP*, the Court ruled that where the decision “tends clearly to undermine the public interest, the public confidence in the administration of law, or security for individual rights for personal liberty or of private property,” the secondary jurisdiction may involve itself, but if it does not, then the court should not meddle in the decision of the primary jurisdiction.⁷³⁴

TermoRio, *Baker Marine*, and *Pemex* establish a perspective on how enforcement of arbitral awards, internationally will play out and what KSA could not only anticipate but prepare for in any reforms. As seen in the case law, decisions by primary domestic courts, which violate basic principles of rights of parties, legitimate expectations, and administration of justice, concern the international community. In contrast, decisions consistent with such notions may be upheld by secondary jurisdictions. This would mean that provided *Shariah* law and KSA domestic principles were consistently, transparently applied to international norms, there would not, in-fact be a conflict of interest between KSA sovereignty and international standards in the arbitration of administrative contracts. It also means that situations like *ARAMCO* can be averted, without the use of Res. 58 or Article 10(2). Most importantly, private parties deciding to enter into a contract or deciding whether to arbitrate, can look into the law and make an informed decision on whether to contract and the risks that may be associated with the contract.

⁷³⁴ *TermoRio SA Esp v. Electranta SP*, 487 F.3d 928 (DC Cir 2007)

Admittedly, and notwithstanding the above-cited cases, KSA's approach to sovereignty and its governing system is not without precedent. Other examples of anti-cooperative sovereign behaviour, beyond *ARAMCO* and *Pemex* exist that simultaneously legitimizes KSA's fears in relinquishment of sovereign control and its own protective behaviour [chapters 4 and 5]. In *Fougerolle SA (France) v. Ministry of Defense of Syrian Arab Republic*, an administrative tribunal in Syria refused to enforce two internationally granted arbitration awards because, they argued, no preliminary advice on the referral of the dispute to arbitration had been obtained from the competent committee of the Council of State, as required by Syrian law; thereby rendering the awards void because they violated Syrian law.⁷³⁵ Thus Syria post-imposed domestic law on an international arbitration or the laws of another jurisdiction. This is, the type of scenario that KSA both practices to its benefit and avoids to its detriment, leading to its overzealous reputation in anti-arbitration, interventionist behaviour.

Case law demonstrates the Board's inclination to overrule or intervene in the will of the parties, or to substitute its own appreciation of *Shariah* on an arbitrary and inconsistent basis, e.g. lack of consistent standards of review and a discretionary mode of justice.⁷³⁶ For instance, in the KSA case of *Tohoma Construction Co Ltd. v. Hondi Construction Co. Ltd*, involving an administrative contract for construction of a state Hospital.⁷³⁷ In *Tohoma*, the Board of Grievance not only reversed an award for compensation to the

⁷³⁵ *Fougerolle SA (France) v. Ministry of Defense of Syrian Arab Republic* (1990 ICC)

⁷³⁶ *Al Hoshan Ltd. V. Al Farhan Ltd.* (1995) (Board of Grievances) Case No. 51/D/TG/ 1416H

⁷³⁷ *Tohoma Construction Co Ltd. v. Hondi Construction Co. Ltd* (Board of Grievances) Case No. 35/T4/1415H

other party based on public policy, they denied partial enforcement on the grounds that certain portions of the award violated *riba*.⁷³⁸

Similar to the University case previously cited, the Board held steadfast to principles of *Shariah* law and subjective public policy. But, *Shariah* law would seemingly contradict the behaviour of the Board in this case because the parties in question autonomously agreed to the arbitration results, therefore honouring principles of *Shariah* law that the parties reach conciliation; but the Board unilaterally ignored the choice of the parties. This type of anti-*Shariah* decision-making can be altered through reform of the delegation of the Board's authority, clear laws delineating review authority, and increased cooperation with international tribunals in establishing not only matters of public policy but in educating arbitrators on *Shariah* law.

All of the above cases demonstrate that the courts of other jurisdictions seem to exercise any "meddling" or intervention with an arbitral award with great caution and great reservation, even when it seems that an international individual private party would be at a significant disadvantage. Instead they look for bright line violations of international and public policy standards. The reason is a mutual transnational respect for sovereignty, public policy, and the responsibility of a state to its people; and how such practices have a purpose that at times can be prioritized over individual rights.

In contrast, what can be gleaned from the sparse precedential proof in KSA is that the Board historically sees the arbitral tribunal as a sort of inferior court, and is determined to intervene in any rendered decision and exercise its authority and review as *Tohoma*

⁷³⁸ Ibid.

demonstrated. However, case law also suggests that the source of the interventions in KSA most has to do with concerns of sovereignty, public policy, and *Shariah* law [chapters 3,4,5]. But, as has been presented in this study, public policy is subjective, therefore flexible; sovereignty is an accepted international principle but can be exercised in ways to accomplish maintaining a state's identity without full relinquishment of control; and *Shariah* law is not only compatible with international law but can be an effective means of overcoming self-interested acts of immunity in unilateral authority.

Parties seeking to arbitrate an administrative contract within KSA still have a steep but not wholly insurmountable path to success. While KSA's grip seems to be 'softening' on recognition and enforcement of arbitral awards from foreign jurisdictions; patterns of success can be readily seen where principles of *Shariah* law have been applied or where matters of an internationalised administrative contract are complicated enough to warrant the involvement of an international tribunal. Additionally, certain Ministries have been given leave to pursue arbitration in SAL 2012, certain provisions indicate openness to foreign law, and the new enforcement judge means a concerted effort to improve administrative justice. The new economic and policy path set forth for the Kingdom also gives hope in this respect.

Suggested reforms in KSA, therefore, are not designed to dilute its sovereignty, public policy, or adherence to *Shariah* law; but instead to suggest more of a harmonisation to international standards, enshrouded in a more mature, transparent, and precedent based system of administrative law. The ultimate demonstration of discretion and sovereign strength in KSA will then be to acknowledge cooperation with other states in

internationalised administrative contracts, not just co-existence; as well as the true value of a cohesive governing structure.

6.8 Reconciling *Shariah* Law with International Law

Beyond public policy as a substantive reform, the reconciliation of *Shariah* law with international law is not only feasible, but results in shared moral and contractual principles equating to a robust system of administrative justice, and sovereignty tempered to economic cooperation to the benefit of all parties. Challenges to reconciliation, however, exist both on the side of KSA as well as their foreign partners; but can largely be attributed to a mistaken understanding *Shariah* law juxtaposed against a suspicion of anti-religious and cultural motivations [Chapters 4 and 5]. Reforms to any part of arbitrability of administrative contracts in KSA will *only* be successful if this reconciliation occurs.

For example, the Western model of international arbitration, as we found in *ARAMCO*, is not always well suited to Islamic legal systems and principle.⁷³⁹ Additionally, the final arbitral award in *Pemex* includes a significantly large amount of interest, which similar to other KSA cases discussed in this thesis, may have violated *Shariah* principles of “riba” and “gharar”, thereby rendering the award unenforceable despite the appeal to choice of law.⁷⁴⁰ Adaptation of procedure and training on substantive application of *Shariah* law would rectify these types of situations.

⁷³⁹ The “closest connection” test has been adopted in Article 4 of the 1980 Rome Convention, in the USA Second Restatement, in Article 187 (1) of the Swiss Arbitration Act (PIL) and, most recently, in Article 1051 (2) of the new German Arbitration Act 1997/98 (X. Book of the Code of Civil Procedure).

⁷⁴⁰ “The 2nd U.S. Circuit Court of Appeals in New York let stand a decision confirming a \$300 million arbitration award for KBR’s COMMISA unit in Mexico even though a Mexican court had nullified it, and

Alternatively, we have now seen in the resolution of both *ARAMCO* and *Pemex* that a domestic court may try to leverage retroactivity in ways that are counter to international principles of law; such as due process right to appeal for a private party or legitimate expectations of dispute resolution to either an administrative court or an arbitration tribunal. In *Pemex*, a Court of secondary jurisdiction found an abuse of power, by applying the law of the primary jurisdiction thereby legitimizing the accountability role an arbitration tribunal may have on overcoming immunity for unlawful unilateral actions. Additionally, the *Pyramids* case illustrated that with the proper understanding, *Shariah* law can be effectively applied in compliance with international principles.⁷⁴¹

One published case⁷⁴² within KSA between a non-Muslim investor and the Saudi Government, before the Board provides a glimmer of ‘what could be’ through progressive reform.⁷⁴³ There, the Board upheld enforcement of an arbitration award based on an understanding of “the doctrine of necessity”, surprisingly, approving an award in favour of a foreign party despite finding that the award was inconsistent with public policy within the KSA. The Board gave a wide interpretation for public policy without being limited by domestic public policy. Similar to the U.S. examples above, the Board demonstrated a deep understanding of multi-jurisdictional public policy interests. *Shariah* law principles would have supported this decision, including aversion to undue hardship

upheld a lower court ruling that added \$106 million to the judgment. The judgment also includes \$59 million of interest, court papers show.” Nate Raymond ‘Pemex loses U.S. appeal of \$465 million arbitration judgment’ (2 August 2016) Reuters Commodities online, accessed 23 Feb 2017 <http://www.reuters.com/article/us-pemex-lawsuit-idUSKCN10D1K1>. See also *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Produccion*, 2nd U.S. Court of Appeals, No. 13-4022

⁷⁴¹ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, (ICSID Award) YCA 1994, 51 et seq. (also published in: ICSID Rev.-FILJ 1993, 328 et seq.; ICSID Rep. 1995, 189 et seq.; ILM 1993, 933 et seq.; Clunet 1994, 121 et seq.)

⁷⁴² *Ibid.*

⁷⁴³ Board of Grievances Case No. 235/2/Qhaf/1416 H Saudi Arabia

or unduly burdensome obligations and Islamic law's own understandings of "necessity" warranting change in action.⁷⁴⁴ This sets a strong precedent for the possibility of harmonisation of sovereignty and policy diversity in arbitration matters.

6.9 Forecast for Institutional Reform of the Saudi Legal System: Balancing Rights and *Shariah*

As has been suggested, Saudi Arabia's origins and grounding in *Shariah* law, is not inherently problematic, nor is its administrative civil law system. In fact tenets of *Shariah* law are similar in spirit and function to international contractual standards, and therefore applicable to even internationalised administrative contracts. The reputational and functional problems arise for Saudi Arabia in the legal spaces between these elements. Saudi Arabia lacks a system of transparency, predictability, clear separation of powers, record-keeping, precedent, and institutional access for foreign partners. What this thesis has suggested is that Saudi Arabia does not have to relinquish its identity in sovereignty and *Shariah* law to better participate in arbitration practices; and that without reservation the researcher believes Saudi Arabia's economic future is utterly dependent on its ability to do so. It must constructively deal with the inhibitions of Prime Minister's approval and issues of consent; it must enforce its own record-keeping practices including publication of cases and access for the public at large; and it must innovatively create a consistent and clear judicial system for administrative arbitration. The

⁷⁴⁴ The Permitting of Haram (necessity permits a prohibited); See for general discussion Dr. Hussein Mutawi 'Necessity Removes Restriction' (2016) Sunnah Online Library <http://sunnahonline.com/library/fiqh-and-sunnah/105-necessity-removes-restriction>, accessed 23 Feb 2017; See also discussion on *Shariah* law "Changed Circumstances" in Chapter 3 of this thesis.

effectuated result would be a system that strategically wields international and domestic law, with the ultimate strength of *Shariah* law.

This researcher concludes that the general treatment and classification of internationalised administrative contract often obscures the nature of the rights of the parties to the contract. However, traditional notions of unilateral authority, fairness, mutuality, and consent in both *Shariah* and international law support unambiguosness and full disclosure in contractual arrangements, thereby suggesting that the path forward in KSA to resolving these questions would be a more fully developed administrative structure and transparent definition as well as clear doctrines on the delegation of administrative authority. Strategically designed reforms would help to advance the credibility, predictability, and success of KSA's administrative law and system of arbitration.

Specifically, reforms such as: 1) a dual judicial tract modelled after France, where there is clear separation of powers, published case law, and delegated authority; 2) use of an impartial and properly trained outside review tribunal who could marry *lex mercatoria* beginnings, transnational ideals, and substantive harmonization into a standing review tribunal that fully integrates substantive *Shariah* law; and 3) transparency.

Due to KSA's governing structure, including religious hierarchy, emphasis on independent judicial reasoning, intentional lack of codification and un-delegated governmental authority, transparency is the general reform that KSA will continue to grapple with the most in the near future. Transparency shall only occur when Saudi Arabia makes a conscious decision to not only establish procedures for publishing laws

and case law, but in enforcing such provisions. Currently, the Board has directive from the Council to publish their decisions, but religious reticence and communal emphasis on *ijtihad* reasoning on a case-by-case basis are overwhelming dissuading factors.⁷⁴⁵ Creating a system of *stare decisis* or published judicial reasoning does not inherently have a binding effect, but promotes a cooperative process with which parties can better anticipate how to properly form a contract or avoid an unnecessary dispute. Chapter 2 taught that Egypt and France provide such examples through their legislative and judicial structures and processes. Saudi Arabia may not be as comprehensive, but it can still provide an opaque to transparent system that is more inviting to participants.⁷⁴⁶ This would strengthen its credibility and lend itself to a more profound regional and international reputation, even for its newly created Commercial Arbitration Centre.⁷⁴⁷

6.10 Conclusion

The objective of this thesis is to contribute to the growth and development of arbitration of administrative contracts in Saudi Arabia, by investigating the tensions of legitimate expectations of parties through the tenets of *Shariah* law and the normative practices of administrative law. The preceding chapters have navigated us through this subject by discussing constitutionality, separation of powers, duties of the Board, the importance of *Shariah* law, the legitimate expectations of parties, and how they intersect to suggestions of where to go next in the legal progression of such issues. What has become clear is that the theatre in which economic vitality and diversification of industry can occur for KSA

⁷⁴⁵ See article Nathan J. Brown “Why won’t Saudi Arabia write down its laws?” (Foreign Policy Journal) (January 23, 2012)

⁷⁴⁶ See generally associated LCIA (Legal Technologies) seminar “21st Century Technology in International Commercial Arbitration”, pertaining to technological aides in transparency.

⁷⁴⁷ See website for information about the Saudi Arabian Commercial Center for Arbitration. <http://sadr.org/en/>

is one which entertains the growing practice of hybrid agreements such as PPPs, and commercial cooperation; and provides a welcoming environment for contractual partners.

Primarily, this author would propose Saudi Arabia to foster accommodation, harmonisation and mutual recognition between different legal systems and arbitral frameworks. In other words it must continue to “soften its grip” on both domestic and foreign arbitral proceedings and awards involving administrative contracts, through learning, education, transfer of legal concepts, the spread of administrative rule of law or international administrative law. But this relationship of trust cannot be built in a silo. It requires the full participation of the international partners.

To achieve international cooperation or secure individual rights of parties, one sees that for law to be effective, and enforceable, it must be perceived as legitimate by those states who consent to be bound to it. This is a fundamental premise of the contractual model of international law, which is based on the formal equality of states. This idea can be replicated at level of administration and administrative adjudication of a public contract: public authority can only be exercised in the public interest if it is exercised lawfully, but also binds the authority to fulfil an expectation on which there is justifiable reliance, in accordance with the private law concepts of mutuality and equity, values deeply engrained in the traditions of Islamic law. In this sense, international and local laws, or foreign arbitration and domestic enforcement, should not be seen as in conflict with the other. Rather arbitral tribunals and national courts, across and between legal systems, can be seen to interact through a process of judicial dialogue, competition and mutual recognition.

Saudi Arabia has to move from so called procedural rules “blind” to local laws and customs, to a more pluralistic idea of arbitration as one able to accommodate religious and cultural diversity. If Saudi Arabia is to bind itself to harmonised choice of law, conflict rules, and international principles; thereby preventing repudiation through adherence to administrative fairness, and non-retroactivity, it must do so *not* by waiver of consent via Resolution 58 or Article 10(2), or by use of over-reaching sovereignty; but through a positive decision to participate in arbitration in accordance with principles of procedural and substantive fairness. Only then shall the international arbitration frameworks and tribunals have to accord greater respect and recognition to the sovereign authority of Saudi institutions and the constitutional supremacy of *Shariah* under its national law. If it continues in its efforts, Saudi Arabia will then not only succeed in diversifying its economy, it may also emerge as a regional leader in arbitration.

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