4-2019

Alternative Dispute Resolution: Toward a Clear, Reliable and Effective Dispute Resolution System in Saudi Arabia

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ALTERNATIVE DISPUTE RESOLUTION:

TOWARD A CLEAR, RELIABLE AND EFFECTIVE DISPUTE RESOLUTION SYSTEM IN SAUDI ARABIA

A Thesis in

Law

by

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Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Doctor of judicial Science (S.J.D)

March 2019

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ABSTRACT

Saudi Arabia has declared its post-oil economic plan: Vision 2030 seeks to make the Kingdom "a global investment powerhouse" and disentangle national economic growth from oil revenues. This dissertation argues that jurisdictions like Saudi Arabia that hope to foster hospitable environments for foreign investment and efficient trade systems must establish effective dispute resolution systems that all business parties can trust. Alternative Dispute Resolution (ADR) mechanisms fit perfectly in this context. ADR has become increasingly prevalent and popular around the world; indeed, arbitration and other means of ADR have become universal methods for resolving disputes in international commerce.

Determining whether the current ADR system in Saudi Arabia can support Vision 2030 goals thus requires comprehensive investigation and analysis. This dissertation thoroughly examines the reasons that many continue to perceive the Kingdom as inhospitable to ADR, identifying the root causes and analyzing their consequences. It also emphasizes the need for creating an effective ADR system in the Saudi jurisdiction. It evaluates the current status of ADR in the Kingdom by comparatively and critically analyzing the reality of ADR processes in the Saudi legal system and identifies possible strategies for expanding and improving ADR practices within that system. It offers multiple levels of analysis, comparing the Saudi system and experience to those of some leading jurisdictions around the world. The dissertation argues that, at the national level, implementing a clear and effective ADR system will benefit the public system of justice in many ways. The use of ADR in traditional courts via specialized public agencies as well as in other private bodies, if implemented within in a clear legal framework, will, for instance, positively contribute to efforts to improve the justice system by reducing court caseloads and enhancing

"access to justice." The dissertation examines and answers the following research questions: (1) What is the current status of the Saudi dispute resolution system? (2) Does the dispute resolution system in Saudi Arabia need to find, "a better way"? (3) If so, can ADR contribute positively to the system's reform? (4) What are the benefits of creating a clear ADR legal framework? (4) Should ADR be a part of the many legal reform initiatives concerning the justice system in Saudi Arabia? (5) What law and practice reforms will enhance the functionality of ADR instruments? (6) What lessons do the experiences of some of the world's leading jurisdictions in the field of ADR provide? (7) What role can education play in the development of ADR in Saudi Arabia? (8) How can institutionalization contribute to the growth of ADR in the Saudi jurisdiction? (9) What aims should the Kingdom establish in this area and how should it endeavor to accomplish them?

This dissertation fills the gap in the current scholarly literature by accomplishing several objectives. It highlights, for example, the importance of having a clear ADR framework, addressing the benefits of structuring and regulating ADR methods in the Kingdom. It also emphasizes that implementing an effective and efficient ADR legal framework will require reforms in many areas.

The dissertation consists of seven chapters. Chapter 1 serves as in introduction; it provides general background information regarding the subject of the dissertation, stating the central problem it addresses and specifying its aims. Chapter 2 contextualizes the dissertation's subject and examines the history and development of ADR in both the Saudi jurisdiction and several leading jurisdictions. It also explains the concept of justice in Islamic law, which is crucial to understanding the evolution of the Saudi system of justice and comparing current practice to its root. Chapter 3 provides a comprehensive critical analysis of arbitration-related law and practice in the Saudi legal system. Chapter 4 derives several valuable lessons from arbitration laws and

practices in the United Kingdom and the United States. Chapter 5 comprehensively examines the role of education in the development of ADR in Saudi Arabia and discusses the findings of a survey conducted on ADR instruction in Saudi law schools. Chapter 6 analyzes the benefits of institutionalizing ADR in the Saudi legal system, outlining the improvements required to ensure effective implementation, explaining why and how the Kingdom should take the steps in question, and identifying what it should seek to reinforce, alter, and avoid. Chapter 7 concludes the dissertation and makes recommendations.

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GLOSSARY OF ABBREVIATIONS

AAA	American Arbitration Association
AALS	The American Association of Law Schools
ABA	American Bar Association
ACUS	Administrative Conference of the United States
ADR	Alternative Dispute Resolution
ADRA	Administrative Dispute Resolution Act
APA	Administrative Procedure Act
ARAMCO	Arabian American Oil Company
Aramco Case	*Saudi Arabia v. Arabian American Oil Company*
BAC	Beijing Arbitration Commission
CAADRS	Center for Analysis of Alternative Dispute Resolution Systems
CBA	Collective bargaining agreement
CJRA	Civil Justice Reform Act
CMC	Civil Mediation Council
CPR	The International Institute for Conflict Prevention & Resolution
DAC	Departmental Advisory Committee on Arbitration Law
FAA	Federal Arbitration Act

FJC	Federal Judicial Center
FMC	Family Mediation Council
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1985)
ODR	Online Dispute Resolution
Riyadh Convention	Convention on Judicial Co-operation between the States of the Arab League (1983)
SATCO	Saudi Arabia Maritime Tankers
SOCAL	Standard Oil Company of California
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)

GLOSSARY OF ARABIC TERMS AND WORDS

Adl	Justice
Fiqh	Jurisprudence
Hadith	The saying of Prophet Mohammad
Hakam	Arbitrator
Halal	Lawful or permissible
Hanafi	A school of thought named after Abu Hanifah
Hanbali	A school of thought named after Ahmad ibn Hanbal
Haram	Illicit or prohibited
Ibadat	Worships
Ijtihad	The practice by which scholars or judges shape opinions on legal issues
Madhabs	Schools of law or thought
Makruh	Detested or discouraged
Maliki	A school of thought named after Malik ibn Anas
Maslaha	Public interest
Mu'amalat	Transactions
Musalaha	Reconciliation
Qadi	Judge
Qist	Equity or fairness

Salam	Peace
Shafi'i	A school of thought named after Mohammad ibn Idris Al-Shafi'i
Sharia	Islamic Law
Sulh	Amicable settlement
Sunna	Words, pursuits, and habits of the Prophet Mohammed. Sunna is the second primary source of Sharia after the Holy Quran
Tahkim	Islamic arbitration
Ulama	Religious scholars
Wajib	Compulsion or obligatory

CHAPTER ONE: INTRODUCTION

"My Primary goal is to be an exemplary and leading nation in all aspect, and I will work with you in achieving this endeavor…"

-King Salman Bin Abdul-Aziz Al-Saud

1. Overview

Saudi Arabia, the world's largest oil exporter, has become a global leader in efforts to reduce fossil fuel-dependence by declaring its post-oil economic plan. The Kingdom unveiled Vision 2030 in early 2016, establishing a roadmap for gradually mitigating its dependence on oil.[1] Vision 2030 aims to prepare Saudi Arabia for the post-oil era by implementing initiatives to continue to achieve sustainable growth, maintain national gains, and ensure that the Kingdom retains its global economic standing. It thus outlines the way forward for the Saudi economy and creates a clear framework for future growth free from oil and the reliance on its revenues.

Investment is the key mechanism of this plan for the Kingdom's future growth and development. Attracting international investment is thus among the country's current objectives for achieving the desired economic results by the year 2030. His Royal Highness the Crown Prince of Saudi Arabia Mohammed Bin Salman has stated the following:

> … The second pillar of our vision is our determination to become a global investment powerhouse. Our nation holds strong investment capabilities, which we will harness to stimulate our economy and diversify our revenues.[2]

Vision 2030 embraces the Crown Prince's representation of the country's endeavors regarding the utilization of its resources and capabilities. It specifies, for example, that the Kingdom aims to

[1] Saudi Vision 2030, *available a*t: https://vision2030.gov.sa/en (last visited Dec 10, 2018).

[2] The full text of the Forward by His Royal Highness Prince Mohammed Bin Salman is *available at*: https://vision2030.gov.sa/en/foreword (last visited Dec 17, 2018).

create a diversified economy, enhancing its worldwide competitiveness and boosting its capacity as "an integral driver of international trade."[3] Saudi Arabia is no stranger to international trade and investment, but its newly professed objectives require a serious and comprehensive evaluation focused on identifying necessary reforms in all relevant sectors so that the Kingdom can successfully and confidently proceed with its future plan. Such an evaluation will facilitate the accomplishment of the objectives mentioned above. The Saudi dispute resolution system, which, of course, involves both the public and private justice systems in the Kingdom, is among the areas in need of examination; its ability to efficiently support the achievement of Vision 2030 goals must undergo careful and thorough analysis.

The complexities of the contemporary business environment and the current boom in international trade have led parties involved in international commerce and business transactions to resolve contractual disputes privately via methods of alternative dispute resolution (ADR).[4] The increased use of ADR in resolving commercial disputes has arguably also contributed substantially to the ongoing acceleration and expansion of international trade.[5] The top global corporations have shown a significant tendency toward the use of ADR to resolve various disputes in recent decades.[6] Some scholars have argued that certain economic-related motives have fueled this tendency as companies search for time- and cost-efficient ways to resolve business conflicts.[7] The fact that

[3] Saudi Vision 2030, *supra* note 1.

[4] *See e.g.*, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (Alan Redfern, Martin Hunter, & Nigel Blackaby eds., 4. ed, 2004).

[5] Michael F. Hoellering, *Alternative Dispute Resolution and International Trade*, - N. Y. UNIV. REV. LAW SOC. CHANGE 785.

[6] *See generally* DAVID B. LIPSKY, RONALD LEROY SEEBER & RICHARD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (1st ed. 2003); Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIR. LEG. STUD. 843 (2004); Thomas J. - Stipanowich & J. Ryan - Lamare, - *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, - HARV. NEGOT. LAW REV. 1.

[7] David B Lipsky & Ronald L Seeber, *The appropriate resolution of corporate disputes: A report on the growing use of ADR by US corporations* (1998).

ADR techniques offer disputing parties more control over dispute resolution processes has also helped popularize the use of these techniques among international corporations.[8] Scholars have identified various additional motives for the increased use of ADR. Michael Hoellering, for example, writes:

> Why are alternatives to the courts so important to the resolution of international trade disputes? Primarily because ADR provides a neutral ground for parties of mixed nationalities, with different ethnic and legal systems, to resolve their controversies without fear of subjectivity by the court system of the forum state. Many disputants also find important the privacy and confidentiality associated with most ADR mechanisms. ADR has the further advantage over litigation of resolving disputes with less damage to ongoing business relations.[9]

Countries seeking to attract international foreign investment by fostering hospitable environments and successful trade systems must recognize the importance of establishing effective dispute resolution systems that all business parties can trust. ADR mechanisms fit perfectly in this context. Arbitration, for example, has become the popular consensually agreed-to means of resolving contractual disputes between parties involved in international commerce.[10] Professor Thomas Carbonneau once remarked that the current significance of arbitration for international trade stems primarily from the fact that "business transactions cannot take place without a functional system of adjudication."[11] This suggests that arbitration enables and facilitates cross-border and overseas trade for two main reasons. First, it provides a private neutral method that allows parties to choose applicable laws and forums, a feature that helps contracting parties overcome fears related to many issues such as vagueness and ambiguity in unfamiliar foreign laws, foreign public policy, or foreign legal systems on the one hand, and the potential biases or

[8] *Id.*
[9] Hoellering, *supra* note 5.
[10] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION xiii–xiv, 593–98 (5th ed. 2014).
[11] *Id.* at 593.

prejudices of foreign courts on the other.[12] Second, it gives parties an effective and efficient method for resolving potential contract-related disputes, which enables them to continue their contractual relationships and to recommence the efficient fulfillment of their obligations. It thus minimizes the risks associated with the international business activities.[13]

Other alternative means of dispute resolution—including mediation and conciliation, which have recently received increasing attention from and become popular among leading international corporations—provide comparable benefits.[14] More than 4000 U.S. companies, for instance, have subscribed to the 1984 initiative of the International Institute for Conflict Prevention & Resolution (CPR),[15] known as (CPR Corporate Pledge); the signatories of the CPR Corporate Pledge have all expressed their willingness to consider alternatives to litigation to resolve disputes arising between them prior to filing lawsuits.[16] This amicable commitment to genuinely attempt to

[12] *Id.* at 593–98; Also *see generally* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (2nd ed. 2001).

[13] CARBONNEAU, *supra* note 10 at 593–98; ("The conduct of business across national boundaries already involves a high level of risk: Compliance with customs regulations, obtaining government permissions and licenses, the hazards of international transport, the different labor law regimes in foreign countries, and the variability and complexity of national import-export regulation. It is unlikely, therefore, that transborder commerce would take place at all if there were no effective adjudicatory mechanism for resolving the basic problems of commercial contracts (defining breach, assessing performance, enforcing timely delivery, measuring the impact of exculpatory allegations and yet other considerations).") *Id.* at 594.

[14] *See generally* GERALD H. POINTON, ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES (2011).

[15] CPR International Institute for Conflict Prevention & Resolution, *available at*: http://www.cpradr.org/index (last visited Feb 3, 2019). *See also* POINTON, *supra* note 14 at 10–19. ("Corporations today increasingly make ADR part of their corporate governance. For example, more than 4,000 United States companies and 1,500 United States law firms have subscribed to the CPR Corporate Policy Statement on Alternatives to Litigation (the CPR 'Pledge'), expressing a readiness to consider resorting to ADR when disputes arise with other existing or future signatories. The CPR Pledge, and the fact that so many companies in so many different industries have signed it, shows the growing significance and permanence of ADR practice. This continued interest in ADR ensures that it is more than a passing fad, even though ADR is still not used uniformly, since it depends on the view of individual corporate decision maker. Lawyers and law firms are key drivers of ADR culture and are in the best position to set consistent ADR standards that provide the most effective use of this tool. …ADR offers the international business community and their legal advisers a possibility to resolve disputes through commercial settlements that are more relevant to a company's operations than obtaining justice as defined and provided by law.") *Id.* at 17.

[16] A full list of the signatories to the CPR Corporate Pledge is *available at*: https://www.cpradr.org/resource-center/adr-pledges/corporate-policystatement/_res/id=Attachments/index=1/CPR%20Corporate%20Pledge%20Signatories.09.28.18.F.pdf (last visited Dec 25, 2018).

resolve contractual disputes by means other than litigation[17] represents the contemporary spirit of commerce and reflects new trends in business-to-business relationships.[18] The use of ADR means, such as mediation, has become a regular business practice. Steven J. Ware describes this trend as follows:

> Mediation of disputes among businesses seems to be growing. The variety of business contexts generating these disputes is endless: sales of goods and services, licenses of technology and intellectual property, real estate development and construction, franchising, financing through loans or securities, and so on. More and more business contracts include "two-step" ADR clauses, providing that the parties shall mediate any dispute that may arise and, if mediation fails to result in a settlement, the parties shall arbitrate the dispute.[19]

The trends described above indicate that parties involved in international commerce now generally prefer to use arbitration and other alternative techniques to resolve contractual conflicts.

Parties involved in other types of disputes have likewise begun using ADR methods. Examples of areas where ADR has proved effective both within and outside court systems include labor, family, neighbor, civil, and criminal disputes and cases.[20] ADR methods have, in other words, proved beneficial and advantageous not only to disputants, but also to the system of justice itself, as subsequent chapters will explain in detail.

2. Problem Description

ADR has become increasingly relied-upon and popular throughout the world. Its various methods have become business-universal means of resolving international commerce-related disputes, comparable in a sense to the English language, which now serves as the universal

[17] POINTON, *supra* note 14 at 10–19.
[18] *See Id.* ("Modern commercial expectation is that it is better to build for the future than to dwell on the past. In addition deals, as well as the results of dispute resolution, are considered particularly successful when the success is shared and everybody can bring something home for their own respective benefit.") *Id.* at 10.
[19] STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 307 (2nd ed. 2007).
[20] *See generally* WARE, *supra* note 19.

language of business.[21] The absence of clear and effective dispute resolution systems makes success in international business and trade highly unlikely. ADR is not alien to Muslim or Saudi practice. Saudi Arabia must, however, modernize its ADR system to align with international standards. This highlights the critical importance of evaluating the Kingdom's current ADR system to identify the reforms necessary to make the country more business-friendly and help it attract international investors and leading global corporations to explore the promising opportunities it has to offer and thereby achieve the Vision 2030 goals. This dissertation therefore undertakes a thorough examination of the issues that currently make the Kingdom a less than hospitable jurisdiction for ADR, identifying these issues and analyzing their consequences. It thus emphasizes the need for creating a clear ADR system in the Kingdom. It also analyzes the current status of ADR in the Kingdom by undertaking a comparative and critical analysis of the reality of these processes in the Saudi legal system, ultimately producing recommendations for expanding and improving ADR practice. It offers multiple levels of analysis of the subject in question. To begin with, it comprehensively evaluates the Saudi ADR system based on the international scale of assessment. This involves comparing law and practice in the Saudi jurisdiction to other leading jurisdictions. A broad-based awareness of ADR mechanisms, their roles, and their effectiveness in the field, provides valuable lessons. This dissertation, therefore, reviews ADR methods, describing their emergence, importance, and current functions in leading jurisdictions such as the United States, the United Kingdom, and elsewhere. Secondly, the dissertation includes two additional levels of comparison in its evaluation of the Kingdom's current ADR system: it provides a comprehensive overview of ADR in the Kingdom, explaining its historical origins, emergence, and development, which serves as the basis for the dissertations critical analysis of contemporary

[21] *See e.g.* Global Business Speaks English, *available at*: https://hbr.org/2012/05/global-business-speaks-english (last visited Dec 29, 2018).

law and practice; and it compares the Kingdom's current ADR system to its origins in old Islamic practice.

The dissertation emphasizes that, at the national level, implementing a clear and effective ADR system will benefit the Saudi public system of justice in many ways. The use of ADR within a clear legal framework in traditional courts, specialized public agencies, and other private bodies will, for instance, help improve the justice system by reducing court caseloads and enhancing "access to justice" in general. One of the major issues this dissertation considers whether the Kingdom can modernize its ADR system to align with international standards and global practices in accordance with both Islamic law and Saudi national laws.

3. Aims and Motivations of the Research

This dissertation fills the gap in current scholarship by accomplishing the following aims. First, it emphasizes the importance of having a clear ADR framework, outlining the benefits of structuring and regulating these methods in Saudi Arabia. Second, it emphasizes that implementing an effective and efficient ADR legal framework will require reforms in many areas. Third, it analyzes the effectiveness, efficiency, and appeal to foreign investors and parties to international trade of the Kingdom's current ADR system. Fourth, it examines the Saudi investment climate from a legal prospective, illuminating how ADR methods can play a major role in improving the country's standard business practices. Finally, it proposes numerous practical legal solutions and makes recommendations that will help the Kingdom overcome the problems it currently faces, enhance the status of its dispute resolution system, boost its global business status, and aid significantly in making the Saudi jurisdiction one of the most popular destinations for international business and trade.

4. Research Questions

This dissertation proposes and answers the following research questions:

- What is the current status of the Saudi dispute resolution system?
- Does the dispute resolution system in Saudi Arabia need to find, "a better way"?
- If so, can ADR contribute positively to the system's reform?
- What are the benefits of creating a clear ADR legal framework?
- Should the many legal reform initiatives concerning the justice system in Saudi Arabia include ADR as a central issue?
- What law and practice reforms will enhance the functionality of ADR instruments?
- What lessons do the experiences of some of the world's leading jurisdictions in the field of ADR provide?
- What similarities and dissimilarities exist between modern principles of arbitration and the Islamic approach to dispute resolution?
- How can Saudi Arabia boost its position in the field of arbitration and other ADR processes?
- What role can education play in the development of ADR in Saudi Arabia?
- What is the status quo of ADR instruction in Saudi law schools?
- How can institutionalization contribute to the growth of ADR in the Saudi jurisdiction?

- What is the current status of ADR institutionalization in the Kingdom?
- What aims should the Kingdom establish in this area and how should it endeavor to accomplish them?

5. Organization of the Dissertation

The dissertation consists of seven chapters. Chapter 1 sets the scene by providing a general overview of the subject of the dissertation, discussing its background, and stating the problem it focuses on. It then explains the aims of the study and describes its research questions. Subsequent chapters of this dissertation are organized as follows.

Chapter 2 offers general background regarding ADR in the Saudi jurisdiction and traces the historical growth of ADR in some of the world's leading jurisdictions. It contextualizes the subject in question by highlighting contemporary discussions regarding many central issues that subsequent chapters discuss in more detail. It discusses, moreover, the history and reality of ADR as well as the concept of justice under the Islamic law.

Chapter 3 provides a comprehensive critical analysis of arbitration-related law and practice in the Saudi legal system. It examines arbitration's historical development in the Kingdom and carefully analyzes the current legal framework. It distinguishes, moreover, between the modern principles of arbitration and similar approaches that developed in the Islamic system of dispute resolution. This comparison helps identify the methods implemented and practiced in the Saudi legal system under the recently enacted law of arbitration. Chapter 3 also discusses the reasons that the Saudi jurisdiction remains inhospitable to arbitration. It, in short, investigates the causes of current problems and provides legal recommendations to overcome said problems.

Chapter 4 derives several important lessons from the law and practice of arbitration in some of the world's leading jurisdictions including the United Kingdom and the United States. It aims to elucidate how parties have practiced ADR methods in these top legal systems. The fundamental lessons extracted from the experiences of these countries will significantly improve the efficiency of arbitration in the kingdom.

Chapter 5 investigates the role of education in the evolution of ADR in Saudi Arabia. This chapter discusses the results of a survey conducted on ADR instruction in Saudi law schools. It provides a detailed discussion and careful analysis of the survey's findings. The survey aimed to inspire future efforts to comprehensively examine and analyze the field of ADR in the Kingdom with special focus in the effectiveness of role played by Saudi law in contributing to the development of legal education in the country. This chapter also compares ADR instruction in Saudi law schools to ADR instruction in American law schools.

Chapter 6 addresses the institutionalization of ADR. It emphasizes that institutionalization efforts in the Kingdom have, thus far, proceeded too slowly and remain insufficient. It also highlights the growing significance of ADR institutionalization and the successful and favorable outcomes institutionalization has yielded in several other jurisdictions. The chapter thus highlights the need to take serious steps toward utilizing and institutionalizing ADR in Saudi Arabia's public, administrative, and private sectors. It outlines the goals and improvements necessary to ensure effective implementation and explains why and how the Kingdom should take the steps in question and what it should seek to reinforce, alter, or avoid.

Chapter 7, the final chapter, restates the dissertation's main arguments, summarizes the content, main points, and key findings of previous chapters, draws conclusions, and makes recommendations.

CHAPTER TWO: CONTEXTUALIZING ADR IN SAUDI ARABIA

1. Introduction

Humankind has needed to resolve differences and mediate conflicts since first establishing cities and engaging in trade with neighbors. Population growth and business expansion make disputes, both resolved and unresolved, more frequent.[1] Such new conflicts can prove difficult to resolve because their emergence coincides with the complications surrounding their nature.[2] Disputes in recent years not only concern relationship problems between humans interacting in proximity; they also stem from virtual connections between people on both national and international levels.[3] Different social values, cultural identities, or other distinguishing factors make the nature of such disputes, their severity, and the suitable means of resolving them vary between different groups, even within individual societies.[4]

Enlightenment philosopher Adam Ferguson defined *societatis civilis* as a peaceful society governed by laws.[5] A civilized society thus gives the state a monopoly on the legitimate use of force and relies on the rule of law to minimize violent conflict between parties with disagreements. The state can intervene when civilians infringe on the rights of other civilians.[6] Societal evolution fueled the emergence of courts as the primary means by which people resolve disputes, beginning in America and much of Europe. State control over dispute resolution gradually increased in popularity around that world, as states responded to growing demand by offering citizens access

[1] GLOBAL PERSPECTIVES ON ADR, 4 (Carlos Esplugues Mota & Silvia Barona Vilar eds., 2014).
[2] *Id.*
[3] *Id.* ("From disputes arising from face-to-face relationships between parties, we are now increasingly seeing disputes between parties whose relationships are based upon electric communication rather than personal contact. Whereas in the past disputes commonly involved an international element. The object of these disputes has also changed, with an increasing number of them focusing on intangible rights").
[4] SIMON ROBERT & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING 1 (2d ed. 2005); *see generally* OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEM IN CROSS-CULTURAL CONTEXT (2005).
[5] *An Essay on the History of Civil Society - Online Library of Liberty*, *available at:* http://oll.libertyfund.org/titles/1428 (last visited Mar. 16, 2015).
[6] MARY KALDOR, GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR (Cambridge, Polity Press, 2003).

to courts and judicial procedures as instruments for resolving conflicts.[7] Some societies, however, have experienced judicial system failures in recent years. The causes appear to vary based on time and place and to be influenced by structural and cultural norms. Some courts have worked to decrease case backlogs, while others have criticized these efforts as insufficient and lacking serious resolve.[8] Justice Felix Frankfurter rightly remarked that "Justice must satisfy the appearance of justice,"[9] and, in this spirit, even small improvements serve some purpose.

This chapter provides a comprehensive overview of alternative dispute resolution in Saudi Arabia, covering its origins, emergence, and historical development. Effectively explaining this history also requires careful examination of the broader picture of alternative dispute resolution at both national and international levels. This chapter is structured as follows: section 2 introduces the "Access to Justice" movements that have arisen in several countries in recent decades, linking these movements to the growth and development of alternative dispute resolution; section 3 addresses the various definitions of alternative dispute resolution – the varying criteria of which lead to the inclusion or exclusion of certain alternative methods; section 4 provides a brief introduction to Islamic law; section 5 discusses the concept of justice from an Islamic perspective; section 6 asserts the Islamic roots of alternative dispute resolution, shedding light on the history of such practices in Islam; section 7 explains the dispute resolution system in Saudi Arabia; section 8 describes alternative dispute resolution justice in the contemporary Saudi legal system; and the final section concludes by summarizing the chapter's central points.

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[7] *See* GLOBAL PERSPECTIVES ON ADR, *supra* note 2 at 3. ("The response of the state to this challenge has usually been twofold. On the one hand it broadens the legal system in order to cope with new realities and provide them with legal answers. This has fueled the growing juridisdictionalisation of life. The law and the legislator aim to cover all aspects of society and social life and this entails as a corollary an overwhelming resort to State legislation and State courts. The only solution for every single dispute is to be taken to court and to be solved in accordance with the law designed by the legislator. On the other hand, this situation has given rise to a budgetary effort of the State over several decades to ensure an efficient and available State court system of justice").

[8] *Id.* at 4,5; *see generally* PALMER, *supra* note 5 at 45.

[9] *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 at 825 (1986).

2. Access to Justice and the Development of Alternative Dispute Resolution

Responses to the delays and increasingly high costs of litigation in the U.S. legal system during the 1960s and 1970s exemplify the type of criticism court systems have historically faced.[10] These issues gave rise to the 'access to justice' movement[11] whose proponents aimed to increase the pace of justice and lower the costs of litigation.[12]

People and the law require that judicial systems produce a certain degree of justice. Systemic judicial failures necessitate the development of appropriate solutions. In *"Arbitration in Three Dimensions,"* J. Paulsson states: "When the legal order provided by a state proves unsatisfactory to particular segments of society, alternative methods are devised."[13] This suggestion remains valid when traditional court systems cannot justly and efficiently resolve the issues brought before them.

Increasing awareness of the importance of alternative mechanisms for resolving disputes led such mechanisms to be deemed central to the substantial improvements in American law that followed the rise of the "access to justice" movement.[14] Other jurisdictions also undertook serious reforms. The UK, for example, implemented the Civil Procedure Rules in 1999.[15] These efforts went hand-in-hand with the constant search for more effective means of protecting the rights of all citizens in efficient and cost-effective manners.[16]

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[10] *See* Palmer, *supra* note 5, at 45-46

[11] *Id* .The "access to justice" movement in the U.S has developed through different stages, known as conversations. The first conversation aimed to make judgment accessible, fast, and achievable at the lowest possible cost for all people; meanwhile, the second conversation focused on the criticisms surrounding judgments themselves in order to highlight the benefits of settlements; finally, the third conversation advocated alternative mechanisms of dispute resolution over the adjudication. *Id.*

[12] *Id*.

[13] Jan Paulsson, *ARBITRATION IN THREE DIMENSIONS*, 60 INT. COMP. LAW Q. 291–323 (2011).

[14] DISPUTE RESOLUTION AND LAWYERS, 13 (Leonard L. Riskin ed., 4th ed. 2009).

[15] In 1977, the UK enacted The Civil Procedure Act 1997 (c. 12) granting the authority to create civil procedure rules and establishing the Civil Justice Council, whose job is to assess the civil justice system. The Civil Procedure Rules (CPR) were passed on 10 December 1998 and became effective on 26 April 1999.

[16] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 5, 8.

Time and money have not been the only issues that have produced criticism of court systems; parties have also criticized outcomes. Some have noted, in fact, that the results (or the lack thereof) that emerge from ADR methods are more appealing than those produced via litigation.[17] Warren Burger, former Chief Justice of the U.S. Supreme Court, was an ADR enthusiast known for his biting criticism of the efficiency of the U.S. judicial system and of the litigation system's failure to facilitate the creation of a more equitable society.[18] In a speech to the American Bar Association in 1984, Justice Burger stated:

> Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.[19]

Justice Sandra Day O'Connor describes her vision of the future of dispute settlement similarly: "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."[20]

Many credit the Roscoe Pound Conference, held in Minnesota in 1976, with spreading awareness of ADR procedures in the United States. A large group of legal scholars and law professors attended the conference, many of whom subsequently contributed to the growth of ADR.[21] Professor Frank Sander presented his paper, *"Varieties of Disputes Processing,"* which

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[17] Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUSTICE SYST. J. 420–444 (1982).

[18] THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 1 (Urbana, University of Illinois Press, 1989) ("Without referring to statistical appraisals, a number of telling examples illustrate the seriousness of the current discontent. With former Chief Justice Warren Burger, the United States Supreme Court criticized the professional ability and competence of attorneys. This criticism also indicated an acute concern for the threat that the volume of litigation poses to the general availability of justice in American society.").

[19] AMERICAN BAR ASSOCIATION, ABA JOURNAL (1984).

[20] Sandra Day O'Connor Quotes, *available at:*http://womenshistory.about.com/od/quotes/a/s_d_oconnor.htm (last visited Mar. 16, 2015).

[21] J. Clifford Wallace, *Judicial Reform and the Pound Conference of 1976*, 80 MICH. LAW REV. 592–596 (1982); *See also* CARBONNEAU, *supra* note 19 at 1; *see* PALMER, *supra* note 5 at 45.46 ("Auerbach identifies the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference) as 'the decisive moment in the legalization of informal alternatives'").

greatly inspired developments in ADR, in particular, and the American legal system, in general. Many specialists in the field of ADR regard his seminal paper as a sacred text.[22] Professor Sander calls for a multi-door courthouse, also known as a dispute resolution center.[23] He identifies the nature of the dispute, the relationship between disputants, the disputed amount, and the time and cost of resolution as important factors in determining the best means of settling any given dispute.[24]

Professor Sander envisions dispute resolution centers that benefit the entire dispute settlement system and function more efficiently than the basic court structure. The first step of the intake process he proposes involves a clerk tasked with screening disputes who directs disputants to one of six rooms based on the nature of each dispute (*i.e.*, Mediation, Arbitration, Fact Finding, Malpractice Screening Panel, Superior Court, and, finally, the Ombudsman).[25] He describes his proposal as follows:

> What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combination of processes), according to some of the criteria previously mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature; that in effect is what was done by the Massachusetts legislature for malpractice cases. Alternatively one might envision by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.[26]

Access to justice has also been a concern in the UK. In a 1978 article, Sir I. H. Jacob, Q. C. identifies litigation costs and the time consumed in a legal proceedings as among the main impediments to access in England. He maintains that access to justice should be considered a

[22] Online Guide to Mediation: 30 Years after the Historic Pound Conference, a Reflection on ADR and Justice in the 21st Century, *available at*: http://mediationblog.blogspot.com/2006/04/30-years-after-historic-pound.html (last visited Jan. 18, 2015).
[23] DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, 23 (Carrie Menkel-Meadow ed., 2d ed. 2011).
[24] *Id.* at 27-29.
[25] *Id.* at 29.
[26] *Id.*

remedy rather than a malady. He views access as an instrument that reinforces societal values.[27] Lord Woolf argues, in a report published years later, that access to justice would be assured if the system were to meet basic principles of civil justice, such as offering appropriate procedures at reasonable costs, dealing with cases at a reasonable speed, and becoming responsive to the needs of those who use the system.[28] His work also focuses on achieving early settlements of disputes. In *"Access to Justice Final Report,"* he identifies early achievement of dispute settlement as crucial.[29] He indicates, moreover, that court proceedings should serve as the final step when ADR proves unsuccessful.[30] Lord Woolf's report led the CPR in the UK to require parties to reasonably avail themselves of ADR methods before filing cases, even though ADR remains non-obligatory. The CPR also gives courts the right to ask parties to provide proof that they have done as it requires.[31] Simon Roberts and Michael Palmer explain Lord Woolf's report as follows:

> Lord Woolf … characterized the primary objective of civil justice as the sponsorship of settlement, with judgment reduced to the solution of last resort. Introducing the cultural change he wanted to bring about, he spoke entirely unselfconsciously of settlement as justice, leaving behind foundational image formed in the classical world and subsequently sustained over millennia in the Judeo-Christian-Islamic traditions. Virtually without fuss or protest. The Civil Procedure Rules 1998 now realise this novel vision. So settlement is now civil justice, just as 'command' has retreated behind 'inducement.'[32]

[27] I. H. Jacob, *Access to Justice in England* in ACCESS TO JUSTICE, VOL. 1: A WORLD SURVEY 432-78, 417-78 (M. Cappelletti and B. Garth, 1978).
[28] Department for Constitutional Affairs, *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, available at:* http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/interfr.htm (last visited Feb. 16, 2015).
[29] Communications Directorate Department for Constitutional Affairs, *Department for Constitutional Affairs, available at:*http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm (last visited Feb. 16, 2015).
[30] REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS, 141 (Felix Steffek et al. eds., 2013).
[31] *Id.* at 142.
[32] Palmer, *supra* note 5, at 359.

Concerns about access to justice are not limited to the U.S. and the UK. Other countries have witnessed similar efforts to ensure justice.[33] Many countries have, moreover, attempted to examine alternative means to enhance access to justice. Awareness of ADR and the trend toward using it has become nearly universal in recent years.[34] This has inspired a new understanding of the idea of access to justice, as people choose between several venues to settle disputes.[35] They can now decide whether one or more ADR mechanisms will enable them to settle their disputes, while continuing to consider litigation as a valid backup.[36] Access to justice is no longer limited to formal court-administered justice.[37] Professor Thomas E. Carbonneau likens the early status of ADR to "… a wheel spinning in the void, unable to catch a groove that allows it to channel its energy into the larger mechanism of society,"[38] but that has changed dramatically and ADR methods now effectively compete with the courts in this field. The 1990 Civil Justice Reform Act asks federal district courts across jurisdictions to embrace ADR programs.[39] The Alternative Dispute Resolution Act of 1998, in (1) and (2) of Sec. 2, states that increasing parties'

[33] *See generally* M. CAPPELLETTI AND B. GARTH, ACCESS TO JUSTICE, VOL. 1: A WORLD SURVEY (1978) ("The words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second it must lead to results that are individually and socially just.") *Id.* at 6.

[34] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 6-9.

[35] *Id ("*Overworked State courts are unable to offer a valid, specialized and quick response to increasingly complex disputes. More and more they need help from experts and other actors, and this not only increases the duration and cost of access to justice, it also generates a growing dissatisfaction among citizens with the response provided: justice delayed usually means justice denied. …This [dissatisfaction] has led to a situation in which citizens are more aware of and willing to exercise their rights, irrespective of the financial value or economic or social relevance of their claims. These factors could not have been predicted by the State when the paradigm of access to justice as access to State courts was elaborated".) *Id.* at 7.

[36] *Id.*

[37] *Id ("*The awareness of [State courts] failure has forced national legislators to try to find other systems and mechanisms, both within and outside State courts, to raise in modern societies. … Outside State courts, the ADR movement has growing support as a valid way to solve all sorts of disputes.") *Id.* at 8.

[38] Carbonneau, *supra* note 19, at 247 ("There is an evident need to expand the scope of consideration and to the present the ADR humanism to a larger public. Dealing with the modification of professional attitudes is only part of the effort. Such an approach is likely to have little impact–a trickle effect–upon those whose attitude matters perhaps the most–the actual beneficiaries of adjudicatory service").

[39] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 9.

contentment, providing advanced means of settling disputes, and enhancing attainment of solutions with competence are great examples of what ADR should offer, if supported by judges and lawyers, and when employing highly qualified neutrals in programs managed by courts. It also states that ADR methods such as mediation, voluntary arbitration, and others can help decrease the accumulation of cases in Federal courts and thereby increase levels of efficiency.[40]

In his review of related research, Thomas J. Stipanowich severely criticizes the growth and impact of ADR.[41] He first identifies the vast extent of behaviors grouped under the ADR umbrella as highly problematic.[42] He argues that such an expansive definition makes the broad generalizations asserted in various studies suspect. He recommends that, at the very least, scholars should distinguish between the growth and impact of mediation methods and arbitration procedures.[43] The second problem he highlights is a scarcity of data with any reliable utility for research purposes, given that courts and ADR programs rarely track more than the volume of filed and resolved matters. Statistics showing that the number of court-tried cases remained steady after the institution of ADR could simply indicate that the number of disputes generally increased during that period, and ADR subsequently handled the overflow. Concluding that ADR failed to reduce the number of court-tried cases, as some have, would be incorrect. He thus calls for better statistics combined with qualitative analysis of outcomes.

Despite these limitations, Stipanowich's review determines that ADR has not become a substitute for public trials. He finds instead that it has developed into an intervention stratagem fostering outcomes litigation was never meant to achieve. He contends that ADR generally

[40] Alternative Dispute Resolution Act of 1998.
[41] Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIR. LEG. STUD. 843 (2004).
[42] For further clarification, *see* the "Alternative Dispute Resolution Definition" section that follows.
[43] Stipanowich, *supra* note 42.

produces faster and less expensive solutions, molded for particular disputants, while assisting business aims, cultivating relationships, improving the quality of human interface, and making the dispute resolution process accessible to a wider population.[44]

The Center for Analysis of Alternative Dispute Resolution Systems (CAADRS) provided an extensive bibliography with annotations in 2002, summarizing sixty-two studies of mediation across more than one hundred ADR court programs. The research methodologies vary greatly, but many of the studies utilize control groups comprised of cases that did not involve mediation. Some studies find that gender, race, and culture correlate with satisfaction rates, but the results generally support the effectiveness of mediation. Disputants highlight the reduced cost, the fairness and speed of the processes, and the outcomes and compliance, among other positives, as sources of satisfaction.[45] The release of CAADRS in an expanded Second Edition in 2007 further supported these findings.[46]

Many view arbitration less favorably than other ADR methods when it comes to speed, cost, outcomes, and the capacity to maintain relationships.[47] The cost of arbitration has increased over time as a result of legal fees, the complexities of arbitration processes, and the more adversarial role lawyers take when advocating for their clients, especially when the clients attend arbitration proceedings. Arbitration nevertheless remains an important alternative to litigation.[48]

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[44] *Id.*

[45] *Id.*

[46] *See* Jennifer E. Shack, *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs* (Center for Analysis of Alternative Dispute Resolution Systems, 2nd ed, 2007).

[47] *But see* David K.Taylor, Esq. *Road to Resolution*, *75*(2) *Journal of Property Management*, 30-32 (2010). Taylor claims that mediation and conciliation are only a waste of time with regard to their outcomes when compared to arbitration, which provides disputants with binding resolutions. He states: "A trying, 10-hour-long mediation where the parties are close to resolution can be thrown away when one party representative says he or she has to 'make a call' to obtain final settlement authority. … In [binding arbitration] resolutions can't be thrown away. When parties place an arbitration clause in a contract, they forego enforcing their legal rights in court, choosing to rely instead upon the arbitrator's sense of fair play." *Id.*

[48] *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (Cornell/PERC Inst. on Conflict Resol., 1998).

CHAPTER TWO: CONTEXTUALIZING ADR IN SAUDI ARABIA

The increasingly commonplace nature of ADR has prompted attorneys to adopt more and more innovative strategies aimed at bolstering efficiency, reducing cost, and increasing satisfaction with outcomes.[49] ADR's positive contributions have forced the doors of justice open.[50] Many scholars regard ADR not as a scheme to replace the formal judicial system, but as a supplement to what the courts can offer.[51] The vision detailed by Frank Sander materialized in less than twenty years. Four decades have now passed since his seminal paper and the fact that reactions to ADR shifted from initial disinterest to a degree of hostility and resistance to, finally, widespread acceptance of its significance as a mode of dispute resolution is noteworthy.[52] A great deal of evidence – not least, current developments in many European countries – supports the contention that ADR has received widespread acceptance. Judicial systems have been rebuilt (literally) to reflect the idea of the multi-roomed courthouse and judicial building replacing the ordinary court. These reformed courts now aim to provide citizens with different methods of accessing justice, empowering them to select the instruments they believe will best accommodate their various disputes.[53] ADR now complements state courts and no longer acts as their substitute.[54]

The new dimensions added to ADR as it evolved warrant attention. These dimensions testify to the enormous developments the field has undergone. ADR has engendered achievements in court reform and successes in new areas, reflecting its growing acceptance among members of society both in and outside the field of law. The progression and influence of ADR has gone beyond state and federal courts to impact communities, employees/employers, consumers,

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[49] Stipanowich, *supra* note 42.
[50] Professor Frank Sander used the term "multi-door courthouse" in an attempt to show that disputes can be resolved in numerous ways, both in and outside established courts.
[51] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 9–11.
[52] DISPUTE RESOLUTION AND LAWYERS, *supra* note 15, at 41–42.
[53] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 10.
[54] *Id.* at 11.

investors/brokers, businesses, and other areas in which the principles of dispute resolution apply broadly.[55] Qualitative and quantitative studies indicate that many organizations have systematically employed, monitored, and adjusted effective ADR programs, while others have remained reactive and, thus, less effective.[56] Organizations could not achieve these results if they did not value ADR methods. These successes have fueled the worldwide distribution of ADR procedures. Many U.S. institutions have contributed to the design and implementation of ADR, and both governmental and non-governmental organizations have engaged in efforts to advance the use of ADR.[57] Countries around the world have subsequently begun encouraging the use of the ADR, enhancing access to justice through court reform. These methods, naturally, had to be applied successfully at the national level before being implemented across borders.

ADR methods also include On-Line Dispute Resolution (ODR).[58] ODR provides more convenient ways of settling disputes. It has contributed to the expansion of ADR, helping to overcome the linguistic, temporal, and geographical barriers between parties by offering effective resolution to disputants all over the world using the same means as ADR but in an online context.[59]

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[55] Stipanowich, *supra* note 42.

[56] *Id*.

[57] JEROME T. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 239–42 (1d ed. 2004).

[58] *See generally* GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION CHALLENGES FOR CONTEMPORARY JUSTICE (2004); M. ETHAN KATSH AND JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE (2001); *see also* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, (Mohamed Said Abdel-Wahab ed., 2012).

[59] Barrett, *supra* note 57, at 261 ("In the late 1990s, ADR on-line got a name: on-line dispute resolution (ODR). At a minimum, ODR can overcome time and geography by applying ADR on-line among disputants and a neutral dispersed throughout the world, with parties participating at times most convenient to their schedule. Disputes with large amount of data are particularly good candidates for ODR, as well as disputes where several languages are spoken.") *Id*.; *but see* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* BYU L. Rev. 1305 at 1308 (1998) ("Many mediators believe the online setting presents straightforward challenges that can be readily surmounted. I disagree. At this stage of the Internet's development, it is still too soon to mediate disputes online because mediators cannot adequately address many difficult issues. Electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation. Given the profession's current orientation to listening and processing oral information, mediators would find it largely impossible to translate their skills to the online setting. The predominantly written character of the online mediation proceeding would create communication break downs; this is ironic, as mediators claim disputant s' inability to communicate is precisely why mediation is necessary in the first instance."). *Id.* at 1308.

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ADR has proved its ability to resolve disputes and prevent the escalation of countless situations into more complex and obdurate problems. It has steadily developed throughout the world to provide a flexible means of resolving more and increasingly complex disputes. Carlos Esplugues and Silvia Barona argue:

> In this new context the evolution of the principle of access to justice has been particularly relevant and profound and has been tailored to provide a valid and sound response to the complex social, economic and political world in which we are currently living. New situations require new solutions, perfectly fitted to them, even if some of these 'new' solutions have long existed in legal systems.[60]

The ADR framework clearly allows disputants to bring greater creativity to the settlement process, thereby enabling them to achieve their agreed-upon targets in accordance with their priorities and likely leading to greater satisfaction.[61] Ensuring that all parties receive these benefits can be a key element in the settlement process. Disputants must learn that the best access to justice can be achieved through a form of "self-reliance" now provided by cooperative ADR approaches.[62]

The emergence and development of ADR has arguably redefined the concept of justice, facilitating its evolution toward a focus on obtaining reasonable outcomes as quickly and cost-effectively as possible while putting the least strain on participants. Former U.S. Supreme Court Chief Justice Burger envisioned this evolution: "Concepts of justice must have hands and feet... to carry out justice in every case in the shortest possible time and the lowest possible cost. This is the challenge to every lawyer and judge in America."[63] The progress achieved in the ADR field in some countries has not only redefined justice, but also engineered a quantum leap forward in how legal systems understand the need for access to justice. Scholars in some societies have expanded

[60] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 10.
[61] Carbonneau, *supra* note 19, at 8.
[62] *Id.* at 10.
[63] Chief Justice Warren E. Burger [Speech to the American Bar Association, October 1, 1972].

the meaning of this essential prerogative, claiming access must also include access to fair dispute resolution; they assert that the state and its law must ensure access to both adjudication and ADR, and that disputants have the right to select the dispute resolution instruments they prefer.[64]

3. Overview of the Definition of Alternative Dispute Resolution (ADR)

The definition of ADR, as a general concept, varies. Legislators, scholars, and practitioners hold diverging views of the concept. Some definitions include all longstanding methods of settling disputes out of court. Others exclude well-known ADR methods because of certain standards or, sometimes, encompass functions unrelated to said methods. Some of these standards, moreover, rearrange the methods in terms of their importance and effectiveness. Other definitions divide the methods into several categories according to their functions and purposes. Expected outcomes may also split these methods based on the extent of the compulsion that such decisions may impose, as later sections of this chapter detail.

Many agree that traditional courts serve as the primary venue for dispute resolution. ADR methods, from this perspective, serve the purpose of solving conflicts outside the courtroom, all under one wide tent.[65] Out-of-court settlement thus involves the use of one or more ADR method. Defining ADR in this way positions it as the opposite of the formal justice process. The term alternative refers to methods that substitute for ordinary litigation. ADR may include negotiation, arbitration, mediation, conciliation, and all other methods discussed in this section.[66]

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[64] Isaak Meier, *Regulation of Dispute Resolution in Switzerland: Mediation, Conciliation, and Other Forms of ADR in Switzerland* in REGULATING DISPUTE RESOLUTION DISPUTE ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 410, 363-418 (Felix Steffek and Hannes Unberath, eds., 2013).

[65] *Id.* at 415.

[66] Simon Davis, *ADR: What Is It and What Are the Pros and Cons?* in ADR AND COMMERCIAL DISPUTES 1, 1-11 (Russell Caller, ed., 2002).

The role of third parties in the process could also lead to different definitions of ADR. The Alternative Dispute Resolution Act of 1998 defines ADR as a process that "[i]ncludes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration."[67] Some definitions of ADR, however, describe it as an instrument used by third parties to settle disagreements between disputants with no mandatory outcomes. ADR techniques, according to this view, do not necessarily produce final and binding outcomes. Such definitions do not include arbitration as an ADR method.[68]

Arbitration can be described as a process in which disputants agree in advance to abide by an impartial individual's determination after hearing both sides of the dispute.[69] Many courts refer specific classes of cases to arbitration; however, arbitration without a prior agreement that renders the award binding or in which the parties forfeit the right to seek relief in court has no teeth.[70] Some scholars also cite the unique manner in which arbitration functions to distinguish it from other alternative methods. Some argue, in fact, that arbitration's specific value and unique legal framework separate it from other means (*i.e.*, S. BARONA VILAR claims that 'arbitration is arbitration').[71]

The view of arbitration as "[a] speedy and informal alternative to litigation [that] resolves disputes without confinement to many of the procedural and evidentiary structures that protect the

[67] Alternative Dispute Resolution Act of 1998.
[68] Davis *supra* note 67, at 1.
[69] Black's Law Dictionary 96 (5th ed. 1979). For an extended discussion of definitional issues under the Federal Arbitration Act, *see* Ian R. Macneil, Richard Speidel & Thomas J. Stipanowich, *Federal Arbitration Law: Agreements*, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT 2:7 (1994); *see also* ALBERT FIADJOE, ALTERNATIVE DISPUTE RESOLUTION A DEVELOPING WORLD PERSPECTIVE (2004).
[70] Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. LAW REV. 831 (2001).
[71] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 17–18.

integrity of formal trail" once prevailed.[72] Ongoing changes have complicated this view, however; increasingly widespread acknowledgment of the prolonged, costly nature of the process has negatively impacted its popularity as an ADR technique.[73] Some, indeed, view other instruments of ADR as alternatives, not only to litigation, but also to arbitration.[74]Mediation is one such instrument, typically defined as a "[p]rocess that calls for parties to work together with the aid of a neutral facilitator ... who assists them in reaching a settlement [but in which] resolution of the dispute rests with the parties themselves."[75]

Some scholars divide the most important dispute resolution instruments (both formal and informal) into three main categories according to the nature of methods they involve: "adjudicative processes," of which arbitration is the most common; "consensual processes," which include negotiation, mediation, and conciliation; and "mixed processes" such as mediation-arbitration, arbitration-mediation, mini-trial, etc.[76]

ADR techniques are designed to function at different levels and at different phases of dispute resolution processes. First, they can play a major role in attempts to avoid disputes. Second, they give parties new approaches to address disputes that circumstances make inevitable or that have already occurred, enabling them to reach settlements and minimize their losses.[77] Differentiating among the various ADR methods requires good definitions based on specific criteria. ADR can refer to negotiated settlement processes in which disputants work together to

[72] *Forsythe Intl. S.A v. Gibbs Oil Co.*, 915, F2nd 1017, 1022 (5th Cir. 1990).
[73] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 13 (2001).
[74] *Id.*
[75] American Arb. Ass'n, DEFINITIONS—INTRODUCTION TO THE TERMINOLOGY OF DISPUTE AVOIDANCE AND RESOLUTION 1 (1998).
[76] DISPUTE RESOLUTION AND LAWYERS, *supra* note 15, at 15–19.
[77] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 10.

achieve settlements without third party help. It can also refer to processes that involve the assistance of third parties – typically mediation or conciliation. Arbitration, meanwhile, involves processes in which third parties make decisions that bind the disputants.[78] Other definitions do not distinguish between these three ADR methods (*i.e.*, mediation, conciliation, or arbitration). They simply highlight the participation of third parties in settlement processes to distinguish between said methods and party negotiation, which requires no external involvement. The roles third parties play in settlement processes and the nature of the solutions they provide to disputants, however, distinguish mediation and conciliation from arbitration as explained earlier in this chapter.[79] The roles of mediators and conciliators, nonetheless, are similar. Mediators try to shorten the distance between the parties and overcome obstacles, but they do not propose settlements; conciliators, meanwhile, suggest solutions after giving both parties time to explain their views and carefully analyzing the nature of the dispute. The extent of disputant participation in settlement processes also varies between mediation and conciliation. Parties involved in mediation must work together to reach a resolution they believe will best work. Parties involved in conciliation may act in a similarly collaborative fashion, but they tend to participate less than parties involved in mediation.[80]

The above-mentioned arguments and definitions should make the term ADR clearer, but the topic requires further elaboration. Developments in the field have led some to question the literal meaning of ADR. Many argue that, rather than alternative dispute resolution, ADR should stand for appropriate dispute resolution.[81] Others contend that it should stand for adequate dispute

[78] *Id.* at 11.
[79] *Id.* at 12.
[80] *Id.* at 41–42.
[81] Barrett, *supra* note 57 at 256–57 ("As ADR developed and expanded, practitioners began to change how they looked at it, even questioning its name. For some practitioners, the courts are really the alternative dispute

resolution.[82] These developments reflect the continuous pursuit of a better means of accessing justice – the impetus for ADR in the first place.[83] ADR developed as a substitute for ordinary methods of resolving disputes. Some now recognize that ADR provides different means for resolving disputes, both from inside the court and in exterior forums.[84] Certain scholars argue, in fact, that ADR offers suitable techniques for preventing disputes and developing acceptable resolutions when conflicts occur for both individuals and entire nations.[85]

4. Brief Introduction of Islamic Law

The world has known many different systems of law. Current leading systems include civil law, common law, and Islamic law.[86] A large number of countries, both Muslim and non-Muslim, utilize Islamic law.[87] Islamic law's name makes its derivation from the religious doctrines of Islam obvious.[88] Religion and law have much in common for Muslims. Many Muslims believe, in fact, that religion and law are two sides of the same coin; Islam is the religion and *Sharia* is the law.[89]

Knut S. Vikor points out, however, that *Sharia* has a more expansive meaning. He writes:

> … the Shari'a's span is far wider than "law" in Western understandings, as God's code of morality covers every aspect of life. This is recognized by Islamic jurisprudence, which distinguishes between "worship", or man's relation to God (*ibadat*), and "acts", man's relation to man (*mu'amalat*). They roughly coincide with rules of religious ritual (prayer, pilgrimage, etc.) against matters that we would consider legal, although the division is not precise: certain crimes considered to have their punishment specified in the revealed texts (the five

settlement process, suggesting that "ADR" represents the usual conflict resolution processes. Others have suggested that the "A" in ADR should stand for *appropriate*, since in ADR the parties choose the process they feel is most appropriate for their needs and interests. Still others say *conflict resolution* (CR) should replace ADR. Others offer *collaborative problem solving* (CPR) as the better term."). *Id.*

[82] GLOBAL PERSPECTIVES ON ADR, *supra* note 2, at 10.

[83] *Id.*

[84] *Id.* at 13–14.

[85] *Id.* at 11.

[86] ANN BLACK, MODERN PERSPECTIVES ON ISLAMIC LAW 1 (2013).

[87] *Id.*

[88] Black, *supra* note 87, at 4.

[89] Lars Gule, *Ibn Khaldun: Law and Justice in the Science of Civilisation* in PHILOSOPHY OF JUSTICE, CONTEMPORARY PHILOSOPHY: A NEW SURVEY- Vol.12, 119, 119-38 (Guttorm Floistad, ed. 2015).

> *hudud* crimes) are part of *ibadat*, as they are for that reason crimes against God, not against men.[90]

The works of certain Muslim philosophers reveal the close links in the Islamic tradition between justice as a principle, on the one hand, and the religious laws on the other.[91] Ibn Khaldun,[92] for example, claims that because *Sharia* addresses many aspects of life during times of crises and prosperity, societies completely governed by *Sharia* are greater than other societies controlled by the laws of civilization.[93]

This section explains the most important norms of *Sharia*, defining some of its main principles, concepts, and elements to provide a clearer view of Islamic legal systems and their foundations. The section then explores the definition of the term justice within the Islamic tradition.

Sharia has two main sources. The first is the Quran or book of Allah (God). The second is the Sunna or words, pursuits, and habits of the Prophet Mohammed.[94] Muslims consider law the command of God. The acknowledged function of Muslim jurisprudence has been, from the beginning, simply the discovery of the terms of that command.[95] *Fiqh* refers to the process by which individuals, generally scholars, comprehend the sacred law.[96] Lars Gule defines *fiqh* as

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[90] Knut S. Vikor, *Inscrutable Divinity or Social Welfare? The Basis of Islamic Law* in PHILOSOPHY OF JUSTICE, CONTEMPORARY PHILOSOPHY: A NEW SURVEY- Vol.12, 143, 139-55 (Guttorm Floistad, ed. 2015).

[91] *Id.*

[92] *See generally Id*; Wali al-Din 'Abd al-Rahman ibn Muhammad ibn Muhammad ibn Abi Bakr Muhammad ibn al-Hasan ibn Khaldun (1332-1406) was a Muslim historian and sociologist who worked as a teacher and judge at the school of jurisprudence in Egypt. He was one of the greatest theorists and philosophers of all time. Many consider his work, al-Muqaddima, to be among the most accomplished in the field of philosophy and social science. Its theory describing the details of civilization in general and Islamic civilization in particular has had an immeasurable impact; *see also* ALLEN JAMES FROMHERZ, IBN KHALDUN, LIFE AND TIMES (2011); ABD-AR-RAHMAN IBN-MUHAMMAD IBN-HALDÛN & N. J. DAWOOD, THE MUQADDIMAH AN INTRODUCTION TO HISTORY ; transl. form the Arabic by Franz Rosenthal (1980).

[93] GUTTORM FLOISTAD, PHILOSOPHY OF JUSTICE, CONTEMPORARY PHILOSOPHY: A NEW SURVEY- Vol.12 7–8 (2015).

[94] FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 4 (2000).

[95] NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 75 (1964).

[96] *Id.*

follows: "Jurisprudence in Islam— *fiqh* —is the study of these sources, principles and established precedents, and the legal rules and decisions that can be made on this Basis."[97] Coulson elaborates on this definition, writing: "Since law can only be the pre-ordained system of God's commands or Shari'a, jurisprudence is the science of *fiqh*, or 'understanding' and ascertaining that law; and the classical legal theory consists of the formulation and analysis of the principles by which such comprehension is to be achieved."[98]

Ibn Khaldun describes *fiqh* as a science derived from several sources of *Sharia* (the Quran and Sunna) that categorizes the sacred laws by distinguishing between the provisions of different Muslim behaviors. *Fiqh* defines, for example, *wajib* (compulsion), *halal* (lawful), *makruh* (detested), *haram* (prohibited or unlawful), or other behavioral categories.[99] Professor Frank E. Vogel rightly points out, however, that "[t]he law is perfect but humans are not."[100] This view proves very useful when distinguishing between divine law or *Sharia* and human jurisprudence or *fiqh*.[101]

The varying interpretations of Islamic law stem primarily from divisions among Muslims.[102] The rift between Sunnis and Shi'a divided the Muslim world. This rift resulted from failed arbitration between the Muslim Khalif (Ali) and the Muslim ruler of Syria (Mu'awiya) in 658 AD.[103] The features and views of the two branches of Islam overlap and diverge. Similarities and differences also exist between the approaches of the various schools of law within each branch.[104] Escalations in the Sunni-Shia split have, however, concealed more critical issues.

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[97] Gule, *supra* note 90, at 133.
[98] Coulson, *supra* note 96, at 75.
[99] *Id.*
[100] Vogel, *supra* note 95, at 4.
[101] Vikor, *supra* note 91, at 143.
[102] MOHAMED M. KESHAVJEE, ISLAM, SHARIA AND ALTERNATIVE DISPUTE RESOLUTION: MECHANISMS FOR LEGAL REDRESS IN THE MUSLIM COMMUNITY 59 (2013).
[103] RALPH H. SALMI, ISLAM AND CONFLICT RESOLUTION: THEORIES AND PRACTICES 27 (1998).
[104] Keshavjee, *supra* note 103, at 59

Certain commentators maintain that political motivations now exacerbate this division.[105] Some argue that, despite all the major and minor religious differences between Sunnis and Shia, recent conflicts between them have not risen to the level of what occurred during the Thirty Years War.[106] This underscores the major role of politics in shaping the split between Muslims.[107]

Interpretations of Islamic law (jurisprudence) also differ among the various schools of law (*madhabs*) within the Sunni sect.[108] These schools include *Hanbali*, *Hanafi*, *Maliki*, and *Shafi'i*. Each one developed its own effective functioning framework for Islamic law.[109] The divisions within the Sunni sect are noteworthy with respect to some relatively inconsequential minutiae and juristic selection, but the sects all share a fundamental belief in the Quran and Sunna as the two main sources of Islamic legislation.[110]

Ijtihad is the practice by which scholars or judges shape opinions on legal issues.[111] It fills gaps by providing opinions on issues not clearly covered by stanzas in the Quran or Sunna.[112] One of the Prophet Muhammad's sayings (*hadith*) provides a good explanation of this exercise. Prior to assigning Muadh Ibn Jabal to Yemen as a judge, the Prophet asked him, "According to what will you judge?" Muadh replied, "According to the Book of Allah." The Prophet inquired further, "And if you find nothing therein?" Muadh replied, "According to the Sunnah of the Prophet of Allah." The Prophet again inquired further, "And if you find nothing therein?" Muadh replied,

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[105] *Id.*
[106] This war is known as one of the largest wars in European history in the 16th century. Historians regard the war of 1618 as religiously motivated because it involved almost all of the main religious groups in Europe. *See* THE THIRTY YEARS' WAR, (Geoffrey Parker & Simon Adams eds., 2. ed., reprinted ed. 1998); C. V. WEDGWOOD, THE THIRTY YEARS WAR (2005).
[107] The Economist explains: *What is the difference between Sunni and Shia Muslims?* | The Economist, *available at*: http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-19 (last visited Feb 20, 2015).
[108] Vogel, *supra* note 95, at 9.
[109] Vikor, *supra* note 91, at 140.
[110] Salmi, *supra* note 104, at 56.
[111] *Id.* at 53.
[112] *Id.*

"Then I will exert myself to form my own judgment." Pleased, the Prophet responded: "Praise be to Allah who has guided the messenger of the Prophet to that which pleases the Prophet."[113]

The different Sunni schools of law engaged in *ijtihad* for many years before its gates finally closed.[114] The substantial progress made in the field eventually led the schools to determine that scholars and judges could no longer shape the law with their opinions.[115] Coulson clarifies the motivation behind this conclusion, writing: "[It] was probably the result not of external pressures but of internal causes. The point had been reached where the material sources of the divine will—their content now finally determined—had fully been exploited."[116]

The varying interpretations and applications of *Sharia* by the multitude of Muslim sects remain a challenge for Islamic law today.[117] Many Muslims nevertheless regard such variations as the result of great accomplishments made by scholars and imams – inspired by a sincere desire to achieve the interests of Muslim society – in discovering the proper meanings of the divine law.[118]

Some argue that contemporary legal frameworks in many parts of the Islamic world have become increasingly secular and westernized, but Islamic law and its practice remain important in some areas of these legal systems.[119] *Sharia* still governs personal status laws in certain areas, but many jurisdictions have implemented western codes, especially for civil and criminal cases.[120] The Quran's rules of ethics and morality can, however, reinforce contemporary legal frameworks. These principles have the ability to produce disparate satisfying interpretations and fulfill current human and societal needs. They can thus perpetuate a viable, modernist paradigm that reflects the

[113] Keshavjee, *supra* note 103, at 65–66.
[114] Salmi, *supra* note 104, at 55.
[115] *Id.*
[116] Coulson, *supra* note 96, at 81.
[117] Vikor, *supra* note 91, at 139.
[118] Salmi, *supra* note 104, at 56.
[119] Vikor, *supra* note 91, at 142.
[120] Coulson, *supra* note 96, at 218.

ultimate and inimitable lifestyle modeled by Islamic jurisprudence in accordance with the orders of Allah (God).[121] Coulson writes:

> Radical though the break with past tradition which such an approach involves might be, it is nevertheless a break with a particular construction of the religious law and not with its essence. This, at any rate, would seem to be the only realistic basis for future development and the only alternative to a complete abandonment of the nation of a law based on a religion. Law, to be a living force, must reflect the soul of a society, and the soul of present Muslim society is reflected neither in any form of outright secularism not in the doctrine of the mediaeval text books.[122]

Professor Knut S. Vikor argues that divisions exist within current Islamic parties in Muslim countries including Egypt, Tunisia, Libya, and Morocco. He claims that any expansion in *Sharia*'s juridical role in these countries will generate further debates regarding the degree to which they can integrate Islamic principles into mostly westernized and non-religious legal systems. Vikor anticipates that, if such developments occur, examining critical issues, such as the need to distinguish divine law from *fiqh*, the implications for future reinterpretation of *ijtihad*, and potential shifts in recognizing sacred principles as the result of a current public interests or desires of humans well-being (*maslaha*) as opposed to implementation of the Islamic Jurisprudence's rigid precepts will prove crucial. He goes on to stress the potential consequences of such transformation, stating: "This may change fundamentally what we mean by Shari'a, or it may cause social conflicts in these countries between those who reach opposite conclusions on these legal and methodological issues."[123]

[121] *Id.* at 225.
[122] *Id.*
[123] Vikor, *supra* note 91, at 155.

5. Justice as an Islamic Concept

The Quran states: "We have already sent Our messengers with clear evidence and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice..."[124] Islamic law and justice are inseparable from a Muslim point of view.[125] Justice is a *qur'anic* concept; various *surah* (chapters) in the Quran mention its synonyms *adl* and *qist* (fairness and equity) multiple times.[126] The Quran contains almost one hundred different terms that substantiate the concept of justice, as well as more than two hundred warnings regarding injustice.[127] Examples include: "God commands justice and fair dealing... [128] [and] O you who believe, be upright for God, and (be) bearers of witness with justice."[129]

Muslims believe that God, who has full sovereignty over people and society, serves as the source of their laws. They trust, moreover, that divine laws are uniquely capable of addressing and fulfilling their desires and needs.[130] The Prophet Mohammed instructed his companions in the concept of justice and its meaning in Islam. He handled all matters that he encountered in a just, honest, and egalitarian manner.[131] He introduced Muslims to important moral ideas and principles to prevent them from treating one another with meanness and severity. The Quran and Sunna regularly enjoin Muslims from acts of prejudice, inequity, and unfairness. It also reminds them that they must first satisfy their obligations to justice to accomplish all other duties required of

[124] (Quran 57:25).
[125] Gule, *supra* note 90, at 119.
[126] *Id.* at 132.
[127] MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 10 (1984).
[128] (Quran 16:90).
[129] (Quran 5:8).
[130] Khadduri, *supra* note 128, at 3.
[131] *Id.* at 9.

them as Muslims.[132] Allah says in the Quran, "Among those whom We have created there are people who guide with truth and do justice thereby." The Prophet elaborates:

> Behold! the Dispensers of justice will be seated on the pulpits of light beside God, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. (The Dispensers of justice are) those who do justice in their rules, in matters relating to their families and in all that they undertake to do.[133]

The Islamic conception of justice dictates that the settlement of any dispute should be fair, equitable, and impartial; in this vein, the Quran notes: "Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice."[134] The following *hadith* of the Prophet Mohammed sums up the importance of justice in Islam:

> Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell.[135]

This *hadith* embodies an important principle of Islamic justice, emphasizing that beyond court justice, in every aspect of life, God always carries out a higher level of justice.[136] Judges must issue fair judgments to properly observe the principles of Islamic law; this assures that courts in Muslim countries protect justice. Some call this view into question, maintaining that the decisions of biased judges can still perpetuate severe injustices.[137] Angela Tang addresses such human imperfections,

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[132] *Id.* at 10.
[133] Hadith - The Book on Government - Sahih Muslim - Sunnah.com - *Sayings and Teachings of Prophet Muhammad*, *available at*: http://sunnah.com/muslim/33/21 (last visited Mar 31, 2015).
[134] (Quran 4:58).
[135] Hadith - The Office of the Judge (Kitab Al-Aqdiyah) - Sunan Abi Dawud - Sunnah.com - *Sayings and Teachings of Prophet Muhammad*, *available at:* http://sunnah.com/abudawud/25/3 (last visited Mar. 1, 2015).
[136] *See* Angela Tang, *Comparative analysis of certain criminal procedure topics in Islamic, Asian, and Common law systems, available at:* https://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/AnalysisofCertainCrimnal.pdf (last visited Mar. 1, 2015).
[137] *Id.*

stating: "If justice is not meted out in the *Shari'ah* courts, God will mete out the ultimate justice."[138]

Some argue that Islamic law represents truth, justice, and the Will of God from which Muslims derive it. They maintain that it serves to codify the ethical obligations and notions of justice within Muslim communities by emphasizing religious principles.[139] Ibn Khaldun contends that divine laws assure justice, if implemented properly, without corruption or partiality.[140] He divides attempts to maintain the balance of justice into three categories. The first category includes instances in which religion and laws preserve the balance of justice in accordance with the general social norms and moral values of the origin state. These norms and moral values fundamentally come from God's divine creative inspiration. The second category contains man-made laws that attempt to preserve the balance of justice in accordance with fundamentally rational beliefs that Ibn Khaldun finds deficient and imprecise. The third category encompasses efforts that combine the divine and the nonreligious approaches (the first two categories) to maintain the balance of justice; this may prove imperfect or irrational, but it gives priority to the public interest.[141] State leaders under this understanding rule according to divine law theoretically, but in reality leaders' wills and the needs of the people and the state greatly impact the formation and longevity of regimes.[142] The implementation of secular pursuits and regulations in contemporary Islamic societies reflects the great influence of Western law on Islamic legal systems.[143] Professor Khadduri claims: "In the absence of guidance from the classical doctrines, Muslim states felt

[138] *Id.*
[139] *See* Omid Safa, *In Search of Harmony: The Alternative Dispute Resolution Traditions of Talmudic, Islamic, and Chinese Law***,** *available at***:** http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/Safacomparativelawpaper.doc (last visited Apr. 8, 2015)
[140] Gule, *supra* note 90, at 137.
[141] Khadduri, *supra* note 128, at 187.
[142] *Id.* at 187.
[143] *Id.* at 230.

compelled to draw on the experience of Western nations for the improvement of their system of the administration of justice."[144] He concludes: "The historical experiences of Islam—indeed the historical experience of all mankind—demonstrate that any system of law and justice on the national as well as the international plane would lose its meaning were it divorced completely from moral principles."[145]

The author believes that any attempt to examine the level of justice in any Muslim society should take into consideration all the elements mentioned above – derived from divine Islamic law as well as from some important modern concepts – that shape contemporary practices of justice.

6. Alternative Dispute Resolution in Islam

ADR has deep roots in the leading Abrahamic religions including Islam.[146] The practices of these religions assure the benefits of various informal dispute resolution methods, including arbitration, mediation, and negotiation. Religious motivations induce people of certain religions to make good use of these techniques, either inside or outside courts when conflicts arise between them.[147] Courts play major roles in these processes, guided by the aim to maintain strong and smooth interpersonal relationships among those who believe in the religion that produced them.[148]

Muslim societies utilize many methods of dispute resolution beyond traditional court litigation.[149] The Quran states: "And if you fear a breach between the two, appoint an arbiter from his relatives and an arbiter from her relatives. If they both desire reconciliation Allah will affect harmony between them. Verily Allah has full knowledge, and is aware of everything."[150] Some

[144] *Id.*
[145] *Id.*
[146] BARRETT, *supra* note 57 at 9.
[147] *Id.*
[148] *Id.*
[149] Black, *supra* note 89, at 154.
[150] (Quran 4:35).

scholars claim, in fact, that the extensive history of informal dispute resolution in Muslim societies inspired the rise of ADR in the West or, at the very least, that Western countries absorbed the Islamic approach in this regard.[151]

Processes of peaceful settlement in Islam include *sulh*, comparable to mediation or conciliation, and *tahkim*, equivalent to arbitration.[152] The Quran states: "No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah - then We are going to give him a great reward."[153] Expanding utilization of *sulh* (mediation or conciliation) and *tahkim* as peaceful means of dispute resolution testifies to the increasingly widespread recognition that these processes enhance justice. This recognition stems, in part, from the positive impact of ADR, and the increased progress in understanding its function.[154]

Sahar Maranlou points out that many fundamental religious norms found in the Quran, such as *adl* (justice), *sulh* (negotiated settlement), *musalaha* (reconciliation), *tahkim* (arbitration), and *salam* (peace), serve as the basis for the Islamic dispute resolution system.[155] The story of the rebuilding of the Kaaba in Makkah serves as excellent example of the use of ADR in Islam.[156] Many tribes participated in the renovation of the Kaaba and, after they completed the work, each tribe claimed the right to replace the sacred black stones in the Kaaba. They called on Prophet Muhammad to settle the dispute that arose and the Prophet offered a settlement that all the clans agreed upon. He placed the stones on a piece of cloth; he called for a representative from each

[151] Black, *supra* note 89, at 154.
[152] *Id.*
[153] (Quran 4:114).
[154] Black, *supra* note 89, at 154.
[155] SAHAR MARANLOU, ACCESS TO JUSTICE IN IRAN: WOMEN, PERCEPTIONS, AND REALITY 41 (2015).
[156] Barrett, *supra* note 57, at 13.

tribe to raise a corner of it; then he placed all the stones in their correct positions himself.[157] This settlement prevented war from breaking out between the tribes.[158]

Informal dispute resolution practices have proved effective in delivering restitution, even in criminal disputes. *Sulh* has, for example, contributed significantly to the maintenance of justice in Islamic societies. It has served as a useful alternative mechanism in repairing the harm done to crime victims and their families and in preventing possible retaliation.[159] *Sulh* functions both as a means of dispute settlement and as the final product of the settlement process, which takes the form of a contract by which the parties must abide. The Majelle, the Ottoman Code, unsurprisingly devotes an entire chapter to *sulh*.[160] Article 1531 of the Majelle recognizes the two main forms of *sulh*, describing it as "[a] contract concluded by offer and acceptance, and consists of settling a dispute by mutual consent."[161] Parties must meet certain conditions, however, to render *sulh* lawful and ensure its recognition by Muslims. First, the settlement process, including its final result, must proceed in accordance with *Sharia* law and its rules.[162] Caliph Omar reportedly once said: "Compromise (*sulh*) is permissible between people, except a compromise which would make licit (*halal*) that which is illicit (*haram*) or make illicit that which is licit."[163] Second, the *sulh* process must produce a fair and just outcome.[164] The Quran states: "The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy."[165]

[157] *Id.*
[158] *Id.*
[159] Barrett, *supra* note 57, at 14.
[160] Black, *supra* note 89, at 159.
[161] *Id.* at 157.
[162] *Id.* at 158.
[163] *Id.*
[164] *Id.*
[165] (Quran 49:10).

Tahkim has long enjoyed recognition and acceptance as a method of dispute settlement in Islamic tradition and practice.[166] Sunni schools of Islamic Jurisprudence have different opinions regarding the outcome of the *tahkim* process.[167] The *Hanafi* and *Shafi'i* schools regard *tahkim* as similar to *sulh*; they contend that arbitral awards are binding only if the parties intended as much.[168] The *Maliki* and *Hanbali* schools assert, by contrast, that all arbitral awards are binding unless they contain egregious oppression or unfairness.[169] An awards binds the parties, in practice, if a *qadi* (judge) concludes in court that it contains no defects.[170] Islamic law recognizes foreign arbitral awards as long as they do not conflict with its provisions; only if such conflicts arise do *qadis* have the right to ignore the awards.[171]

Many countries, both Islamic and non-Islamic, currently regard arbitration as a suitable mechanism for resolving disputes.[172] Mohamed Keshavjee, the author of *Islam, Sharia and Alternative Dispute Resolution*, draws the following conclusion:

> Arbitration seems to have greater traction in Muslim communities than mediation. Mediation field training that I have carried out in a number of countries between 2000 and 2010 indicates that the resolution of conflict is conceptualised very differently in certain non-Western cultures than in the West. In countries such as Syria and Pakistan, for example, 'mediators' tend to utilize a more 'directive' approach to dispute resolution and often play the role of adjudication. Also, reconciliation features very prominently in the dispute resolution trajectory. Societies in transition could gain a great deal more by allowing the contesting parties more autonomy to resolve their own disputes, but that would need to be done gradually through an evolutionary process. It is in this context that a hybrid tool such as Med-Arb (Mediation-Arbitration) could prove valuable.[173]

[166] Keshavjee, *supra* note 103, at 67.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Keshavjee, *supra* note 103, at 68.
[172] Black, *supra* note 89, at 164.
[173] Keshavjee, *supra* note 103, at 69.

Sulh has likewise gained increasing recognition in many contemporary Muslim societies. Professor Sahar Maranlou states:

> Islamic legal tradition did include use of alternative dispute resolution mechanisms. During the Ottoman Empire, all judges were facilitating *sulh* (meaning peace/compromise/dispute resolution) between parties... In our time, most Muslim countries practice dispute settlement mechanisms based on Quran and Sunnah, as primary sources of Sharia. … In Saudi Arabia, as an example of a Muslim–Sunni society, the legal system principally settles most civil cases in reconciliation, following the Quranic verse "*sulh* is best."[174]

Many scholars thus emphasize that, since Islam's emergence, Muslim societies have utilized both formal court-based methods and informal approaches – fully recognized in Islamic law and practice, including *sulh* and *tahkim* – to resolve disputes.[175] Fully comprehending Saudi law requires a recognition of the fundamental role Islam and Islamic law play for the Saudi Arabia government and its people.[176] Countries in the Western world embrace secularism and clearly segregate government from all religious institutions[177]; by contrast, in Saudi Arabia, Islam controls all aspects of Muslims' lives.[178]

7. Dispute Resolution System in Saudi Arabia

Vogel claims that the version of Islamic *Sharia* that serves as the constitution of Saudi Arabia makes its legal system more conservative than any other Islamic legal system.[179] A plurality of Saudis maintain deep respect for Islam, deem it a fundamental component of life, and strive to enforce Islamic law and ethics in all aspects of life.[180] Vogel argues that Saudi Arabia surpasses

[174] Maranlou, *supra* note 156, at 40.
[175] Black, *supra* note 89, at 168.
[176] Whitney Hampton, *Foreigners Beware: Exploring the Tension between Saudi Arabian and Western International Commercial Arbitration Practices: In re Aramco Services Co.*, J DISP RESOL 431 (2011).
[177] Hampton, *supra* note 177.
[178] *Id.*
[179] Vogel, *supra* note 95, at xiv.
[180] *Id.*

many earlier Muslim nations in its broad implementation and successful practice of the doctrines of the old Islamic school of law.[181] He points out, however, that:

> … this is not to claim that Saudi Arabia's legal system is the ideal Islamic law or legal system. Saudi Arabia no doubt does not perfectly apply Islamic law, and indeed according to the views of some (and as a non-Muslim I make no judgment), does not apply true Islamic law at all. It is indisputable, however, that it does apply at least a traditionalist Islamic law in many spheres; and it does this, again, with certain notable successes relative to Islamic antecedents. Even the most forward-looking Muslim cannot disown entirely the past to which Saudi Arabia is heir.[182]

Vogel also observes that, like other aspects of Saudi society, the field of law in Saudi Arabia has undergone an enormous transition in recent years as a result of an array of factors, both internal and external.[183] The enactment of new laws and the establishment of certain specialized courts and tribunals separate from traditional *Sharia* courts to deal primarily with commercial and labor disputes exemplifies this progress.[184]

Some believe that such developments signal a promising transformation towards more efficient standards in the Saudi legal system.[185] Hossein Esmaeili notes:

> The nature of modern legal institutions, including the court system, is substantially different from the traditional tribal structures and Shari'ah principles. Indeed, the establishment of such institutions and the introduction of modem legal principles alongside Shari'ah could positively affect both the tribal structure and the traditional Shari'ah system in moving towards the establishment of the rule of law.[186]

Many considered the 1992 enactment of the Basic Law of Governance[187] a step forward, but more reform remains necessary.[188] The 1992 law defines Saudi Arabia as an Arab and Islamic

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[181] *Id.*
[182] *Id.* at xv.
[183] Vogel, *supra* note 95 at xiv.
[184] *Id.*
[185] Hossein, Esmaeili, *On A Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System, available at:* http://ajicl.org/AJICL2009/Esmaeili.pdf (last visited Mar. 10, 2015).
[186] *Id.*
[187] Enacted by the Royal Order no. (A/90) 27 Sha'ban 1412H – 1 March 1992.
[188] Esmaeili, *supra* note 186.

state and establishes Islam as the state religion and Islamic law as the nation's governing law. Article 1 states: "The Kingdom of Saudi Arabia is a sovereign Arab and Islamic State. Its religion is Islam and its constitution is the Quran and the Sunnah (Traditions) of Prophet Muhammad…"[189] The state's duties include the application of *Sharia* and the defense of Islamic doctrine. Article 23 states: "The State shall protect the Islamic creed, [and] apply *Sharia*…"[190] The law also mandates that the kingdom's governing principles, derived from the Quran and Sunna, must stem from supreme principles of justice and equality consistent with *Sharia* standards.[191] It stipulates, moreover, that the Quran and Sunna hold sway over all Saudi laws, including the Basic Law of Governance; this means that the formulation and legislative application of all Saudi laws must accord with *Sharia*.[192] Saudi Arabia is an absolute monarchy[193] and the king has ultimate supremacy as he rules over all the kingdom's authorities. Article 44 states:

> Authorities in the State shall consist of:
> - Judicial Authority.
> - Executive Authority.
> - Regulatory Authority.
>
> These authorities shall cooperate in the discharge of their functions in accordance with this Law and other laws. The King shall be their final authority.[194]

The 1992 law also dictates that the Saudi judicial system follow *Sharia* and its principles and that the courts apply Islamic law in all cases.[195] It requires, moreover, that the courts apply national legislation and regulations that accord with the sources of *Sharia*.[196]

> **Article 48:** The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunna, and according

[189] THE BASIC LAW OF GOVERNANCE, Article 1.
[190] *Id.* Article 23.
[191] *Id.* Article 7 and 8.
[192] *Id.* Article 7.
[193] *Id.* Article 5-a.
[194] *Id.* Article 44.
[195] *Id.* Article 48.
[196] *Id.*

> to laws, which are decreed by the ruler in agreement with the Holy Qur'an and the Sunna.[197]

The kingdom has long subscribed to the *Hanbali madhab*, Islamic School of Law.[198] Saudi courts and judges do not technically have to implement the specific beliefs of any of the Islamic law schools, but they tend to rely on the legal opinions of the *Hanbali* School in making their rulings and judgments.[199] Judges can also, if necessary, apply interpretations that do not stem from any specific schools, as long as they align with *Sharia* rules.[200]

Vogel's observations of Saudi judges (*qadis*) and the inner workings of Saudi *Sharia* courts lead him to assert that judges often play major roles in helping disputing parties reach informal settlements (*sulh*); he points out, moreover that such settlements typically end disputes rather than necessitating additional rulings or judgments.[201] He writes:

> In Saudi shari'a courts, I was often told, "the great majority" or "99 percent" of all civil cases end in reconciliation. I was often quoted the legal maxim, "*sulh* is best." It comes from a verse of the Qur'an that suggests amicable divorce when a wife fears ill-treatment:
> [I]t shall not be wrong for the two to set things peacefully to rights between them: for *sulh* is best (*al-sulh khayr*) [4:128][202]

Some Muslim scholars argue that judges should only issue formal rulings,[203] but Vogel claims that judges in Saudi courts often function both as adjudicators and as practitioners of alternative dispute resolution methods during the adjudicatory process. These methods include mediation and conciliation; Vogel claims that the judges actually tend to have high levels of expertise in applying these method, often producing the required amicable settlements between the

[197] *Id.*
[198] Vogel, *supra* note 95, at 10.
[199] *Id.*
[200] *Id.*
[201] Vogel, *supra* note 95, at 153.
[202] *Id.* at 154.
[203] Black, *supra* note 89, at 158.

disputing parties.[204] Judges in the West certainly do not engage in such practices, even when the law or the request of a judicial body makes the use of particular alternative methods obligatory.[205] Claimants in Saudi courts simply cease litigation once they reach *sulh* before the court. Settlements can also receive court certification if the parties so desire.[206] The words of the second Khalif in Islam Umar – "Turn away the litigants, in order that they reach *sulh*, because judgment creates feelings of spite among a people"[207] – further motivate *qadis* to help disputants settle their disputes informally.

The Saudi court system has also contributed to legal development and reform in Saudi Arabia. The 2007 implementation of the new Law of the Judiciary and the new Law of the Board of Grievances exemplify recent legal reforms.[208] The new Law of the Judiciary establishes the following hierarchical structure for the court system:

> 1- The Supreme Court.
> 2- Courts of Appeals.
> 3- First instance courts, which consist of: General Courts, Penal Courts, Family Courts, Commercial Courts and Labor Courts.[209]

Article 8 of the new Law of the Board of Grievances, moreover, specifies the following structure for the courts of the board:

> (1) The High Administrative Court.
> (2) The Administrative Courts of Appeal.
> (3) The Administrative Courts.[210]

[204] Vogel, *supra* note 95, at 155.
[205] Black, *supra* note 89, at 158.
[206] *Id.*
[207] *Id.* at 154-55.
[208] Enacted by the Royal Decree No. (M/78) on 19 /9/1428H (October 1st, 2007).
[209] The Law of the Judiciary, Article 9.
[210] Law of the Board of the Grievances, Article 8.

The Implementation Mechanisms of the Judiciary Law and the Board of Grievances Law[211] abolish the jurisdiction of the Administrative Judiciary (the Board of Grievances) to hear commercial and penal cases which had existed prior to the enactment of the new laws. This followed the enactment of reforms to the Ordinary Judiciary – specifically to the commercial and penal courts – regarding the jurisdiction of the courts specified by law. The Implementation Mechanisms also mandate the transfer of the civil, commercial, and criminal quasi-judicial committees' jurisdictions to the public judiciary, with exceptions for committees that deal with banks, financial markets, and customs cases. The Mechanisms state, moreover, that the Supreme Judicial Council will conduct a comprehensive study on the status of the excluded committees and suggest appropriate actions.[212]

These judiciary system reforms may, at first glance, seem perfect and comparable in sophistication to other jurisdictions around the world. The judiciary has not, however, fully implemented the new laws, meaning that many provisions remain unenforced and predicting the timing of their complete and effective enactment remains difficult.[213] Such progress is crucial nonetheless; the complete implementation of the new judiciary system laws will establish a clear and strong system for dispute resolution in the kingdom.

Alternative dispute resolution should play a role in any future reform to the Saudi judicial system and the dispute resolution system in general. Vogel's observation regarding the possible misuse of the *sulh* process in the Saudi courts warrants attention in this regard:

> Broad discretion to encourage *sulh* can cover abuses such as a *qadi's* ineptitude, laziness, or dilatoriness, especially since case terminations by *sulh* are not

[211] The Implementation Mechanism of the Judiciary Law and the Board of Grievances Law was enacted by the Royal Decree No. (M/78) on 19/9/1428H, (October 1st, 2007). *See* O.G. Umm al-Qura No. 4170 (30/9/1428H, Oct. 12, 2007).
[212] *Id.*
[213] Mohammed Al-Ghamdi ET AL, *Saudi Arabia* in THE DISPUTE RESOLUTION REVIEW, 664, 661-78 (Richard Clark, 4th ed. 2012).

> appealable. With the parties facing a choice between either *sulh* or long delays and unpredictable judgment, litigation can become mere ad hoc tests of will. *Sulh* can shield the reintroduction of tribal or customary law which the Saudi regime has long opposed. Perhaps worst of all, *sulh* lessens the pressure on the system and on individual *qadis* to undertake *ijtihad* in difficult and novel cases, perpetuating the present vacuum of law, substantive and procedural, on many matters relating to modern conditions.[214]

8. Alternative Dispute Resolution in the Contemporary Saudi Legal System

The Saudi legal system contains no specific laws regarding mediation, conciliation, or any other alternative methods except Arbitration.[215] *Sulh*, as noted earlier, nonetheless exists as an alternative dispute resolution method in Saudi legal practice even though the practice of *sulh* stems from religious roles not legal requirements.[216] *Sulh* in Saudi *Sharia* courts is a stable practice that well-trained *Sharia* judges have administered for decades, especially for cases related to family issues.[217]

The Saudi legal system has legislated arbitration as an alternative dispute resolution method for decades, unlike *sulh*. The new Saudi law of *tahkim* (arbitration) abolished the provisions of the 1983 law.[218] Some view this law as a step forward. Others go beyond this point to distinguish between the genuine meaning of *tahkim*, as an Islamic concept practiced in some Islamic jurisdictions such as Saudi Arabia, and the Western concept of arbitration. George Sayen, for instance, distinguishes *tahkim* from arbitration by defining it as a part of the adjudication and reconciliation process that cannot function independently.[219] He also argues that Muslims have

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[214] Vogel, *supra* note 95, at 157.
[215] The new Law of Arbitration was enacted by the Royal Decree No. (M/34) on 24/5/1433H (March 16th 2012).
[216] Vogel, *supra* note 95, at 153-55; Black, *supra* note 89, at 158.
[217] *Id.*
[218] The new Law of Arbitration will be discussed further in another chapter, but the enactment of this law warrants attention here as a sign of progress in the field of alternative dispute resolution in Saudi Arabia.
[219] George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 J. Int'l L. 905 (2014), *available at*: http://scholarship.law.upenn.edu/jil/vol24/iss4/3 (last visited Mar. 15, 2015).

difficulty accepting the idea that states can maintain or improve the administration of justice via means other than Islamic law or laws derived from its sources.[220]

Few Saudi laws provide for the use of alternative dispute resolution, but some laws and regulations contain provisions that encourage recourse to amicable settlement mechanisms when resolving conflicts.[221] Article 13 of the Law of Foreign Investment, for example, states that, in disputes between foreign investors and other parties (either the Saudi Government or any Saudi partner) linked to investors' legal investments, the parties must pursue alternative dispute resolution mechanisms; the law does not permit the resolution of such disputes via any other means unless informal resolution proves unreachable.[222]

Some specialized commissions and committees also practice alternative methods, as required by certain legislation. The Labor Law, for example, makes attempted amicable settlement a procedural requirement before the Preliminary Commission for Settlement of Labor Disputes can hear cases. Article 220 of the Labor Law in Saudi Arabia states the following: "… Prior to referring the dispute to the Commission, the labor office shall take the necessary measures to settle the dispute amicably".[223]

The fact that Saudi Arabia has joined many international dispute resolution conventions and agreements warrants mention when addressing its legal framework for dispute resolution. It has, for example, joined the New York Convention, which aims to ensure the acceptance of all international arbitration clauses or agreements as well as the enforcement of foreign awards within member states.[224] The flexibility that this convention grants its member states, particularly

[220] *Id.*
[221] Nancy B. Turck, *Dispute Resolution in Saudi Arabia*, 22 INT. LAWYER ABA 415 (1988).
[222] The Law of Foreign Investment was enacted by Royal Decree No. (M/1) on 5/1/1421H. (April 10th, 2000).
[223] Labor Law was enacted by Royal Decree No. (M/51) on 23/8/1426H. (September 27th, 2005).
[224] Hampton, *supra* note 177.

regarding the right to reject foreign arbitration awards that violate their own laws arguably enabled Saudi Arabia to join it without relinquishing its national laws or *Sharia* provisions.[225]

Saudi Arabia is also a member of the 1983 Convention on Judicial Co-operation between the States of the Arab League (known as the Riyadh Convention). This convention mandates the full recognition and enforcement of arbitral awards issued in any of its member states, unless they fall under any of the exceptions stated in Article 37. This article entitles member parties to, for example, reject and refuse to implement awards that violate *Sharia* or their own public policy.[226] Saudi Arabia has signed many other conventions, including the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[227]

Descriptions of these promising developments in the Saudi dispute resolution system must come with a note of caution:

> Dispute resolution in Saudi Arabia continues to develop. A prospering economy and an increase in foreign investment in recent years has prompted Saudi Arabia to take steps towards modernising the way disputes are resolved in Saudi Arabia. However, the implementation of changes generally is slow and Saudi Arabia remains a unique jurisdiction with respect to dispute resolution.[228]

9. Conclusion

Understanding the various stages through which ADR techniques have developed in different countries requires consideration of international practices in the field of alternative dispute resolution. Examining the recent progress of the concept of justice and the significant global growth of ADR reveals the tools necessary for evaluating the effectiveness of ADR at the national level and identifying the main related concerns. Such examinations can also improve the

[225] *Id.*
[226] Al-Ghamdi, *supra* note 215.
[227] RICHARD CLARK & LTD LAW BUSINESS RESEARCH, THE DISPUTE RESOLUTION REVIEW (2012).
[228] *Id.*

practice of these methods on the national level. Leading countries such as the United States and the United Kingdom provide valuable lessons in this regard.

Explaining dispute resolution's deep roots in Islamic history is vital in the Saudi context, given Islam's status as the kingdom's official religion. This involves describing the concept of justice from the Islamic perspective and demonstrating the links between this notion and alternative dispute resolution methods. It also involves highlighting some of the related key elements in the Islamic legal system. Examining alternative dispute resolution in the Islamic context clarifies current ADR practices in the Saudi legal system and engenders comparisons between the Islamic origins of *ADR* and contemporary practices in some Muslim societies like Saudi Arabia.

This chapter therefore emphasizes the necessity of including the effective use of alternative dispute resolution in any future reform initiatives or in any attempts to improve the dispute resolution system in Saudi Arabia. Legislators and scholars should view ADR methods not simply as alternatives, but as ideal and appropriate means. Efficiently resolving various contemporary disputes requires recognition of the global meaning of ADR and acknowledgment of what the new global order necessitates when it comes to implementing these mechanisms.

CHAPTER THREE: SAUDI ARBITRATION: ITS HISTORY AND EVOLUTION

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1. Introduction

Arbitration is a form of adjudication that takes place out of court and leads to binding resolutions of disputed issues.[1] It is frequently a less costly and more effective method of dispute resolution than formal litigation.[2] Disputes cannot be arbitrated unless all parties consent. Agreements between contractual parties to submit disputes to arbitrators in lieu of filing lawsuits sufficiently justify the authorization of an arbitrator to resolve those disputes and rescind that authority from the courts.[3] Recent years have seen an increase in arbitration's popularity in many parts of the world. Belief in the efficaciousness of arbitration has, for example, made it the foremost means of resolving workplace conflicts and business-related disputes in the United States.[4]

Arbitration has been around since antiquity. Aristotle, for example, compared the philosophy of arbitration and the role of an arbitrator to the philosophy of litigation and the role of a judge.[5] He believed – and this belief held sway for more than a thousand years – the main function

[1] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 1–7 (5th ed. 2014).
[2] *Id.*
[3] *Id.*; *see also* MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING 221–35 (2nd ed. 2005); ("The simplest case we might imagine is that where two parties in dispute agree to approach a non- aligned third – the "neutral stranger" – and ask her to make a determination for them. A whole range of attributes might give the decision-maker legitimacy in a particular case. The parties might trust her: because she has no stake in the issue; because of her reputation as a wise and fair decision- maker; because of her professional background and training. ….") *Id.*
[4] CARBONNEAU, *supra* note 1 at xiii–xiv.
[5] ARISTOTLE, RHETORIC. Translated by W. Rhys Roberts 50 (Dover thrift Eds 2004); ("It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation – for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity.") *Id.; see also* David C. Mirhady, *Aristotle and the Law Courts*, 23 POLIS J. ANC. GREEK POLIT. THOUGHT 302–318 (2006), the article describes the reason why Arbitration was invented by explaining the role of the arbitrator as follows: "the arbitrator looks at equity (to epieikes), but the dicast looks (only) at the law, and the reason why an [arbitrator] was invented was that equity might prevail" *Id.*; The English arbitration system witnessed a historical split between notions of law and equity. English courts subsequently focused on insuring that arbitral awards were based on law and no longer only on equity. Courts judged awards rendered by arbitrators legally insufficient if they were based only on arbitrators' comprehension of fairness without regard for what the law has to say in that particular matter. BUILDING THE CIVILIZATION OF ARBITRATION, 338–39 (Thomas E. Carbonneau & Angelica M. Sinopole Eds., 2010); ("The court reasoning emphasized the importance of achieving adjudicatory results through the proper application of law and the essential role the courts played in realizing that

of arbitrators was to mediate disputes to arrive at a satisfactory result for the disputants and strengthen the relationships between them or at least prevent hostility. Arbitrators sought the middle ground between disputants and arrived at settlements based on mutual concessions.[6] Arbitration in England, for example, supplemented the formal legal process, as follows:

> Litigation was a risky and expensive business; if pursued to its conclusion it produced a clear-cut winner-and loser. Arbitration was a much safer alternative because its primary function remained the achievement of a compromise acceptable to both sides… The function of arbitration, therefore, was complementary to that of the legal system. In this respect it should be seen as one of a number of equitable resorts to which disputants had [recourse] in the late middle ages.[7]

Zephaniah Swift, in his late eighteenth century text *A System of the Laws of the State of Connecticut*, similarly defined arbitration as "an amicable and neighbourly mode of settling personal controversies."[8] This definition is consistent with Aristotle's,[9] and, together, these examples indicate that arbitration has long been perceived as a non-binding and amicable means of settling disputes out of court. Such historical extra-judicial proceedings, however, lacked the power arbitration enjoys today. Growing recognition of arbitration's effectiveness in recent years

objective. Similarly, contracting parties could not authorize arbitrators to rule in equity instead of law. Given the division between law and equity and the nature of equity, courts were unable to supervise arbitral awards rendered on the basis of arbitrator perceptions of fairness") *Id.*

[6] Michael John Mustill, *Arbitration: History and background*, 6 J INTL ARB 43 (1989); Edward Powell, *Settlement of disputes by arbitration in fifteenth-century England*, 2 LAW HIST. REV. 21–43 (1984); ("The history of arbitration procedures and extra-judicial forms of dispute settlement in medieval England remains largely unwritten. This neglect is no doubt attributable to the precocious development of the common law, which has monopolized the attention of English legal historians and left them little time to consider alternative forms of dispute resolution. Their main preoccupation, epitomized in the work of great scholars such as Maitland, Holdsworth and Plucknett, has been to trace the evolution of legal institutions, procedures and doctrine. Consideration of arbitration has at best been regarded as peripheral to this central task.") *Id*.

[7] Powell, *supra* note 6.

[8] Z. SWIFT, 2 A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 7 (1795); BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 101 (1987); Mann explained that in the past people used many techniques to resolve their disagreements with others. Some of the methods he described were "neighborly," in that they would end disputes in a peaceful way between the parties. Un-neighborly methods, however, were those that brought nothing but divisions to the disputants. *Id.* at 162-69.

[9] *See supra* note 5 and accompanying text.

has, in fact, made it an increasingly important and powerful method of dispute resolution in many parts of the world.

Arbitration has acquired great popularity, especially for resolving commercial disputes, in the Kingdom of Saudi Arabia. The principles of modern arbitration were introduced to the Saudi jurisdiction gradually. The Saudi government took several actions in the past two decades to reform its legal system and improve the dispute resolution framework within the Kingdom.[10] The Law of Arbitration, enacted in 2012, was a milestone in this regard.[11] This law aligns with the UNCITRAL Model Law, but several issues in the Saudi jurisdiction, including the considerable extent of court intervention and the enforcement of international arbitral awards, still warrant criticism.[12]

This chapter examines, analyzes, and critiques Saudi arbitration law and practice. It describes the historical evolution of the Saudi experience with arbitration, and evaluates the current Law of Arbitration in comparison to the previous legal framework. It also highlights the differences between the Islamic approach to dispute resolution, known as "*tahkim",* and Western arbitration to show how the Saudi jurisdiction has shifted from *tahkim* to arbitration over the past decades. Modern principles of arbitration have been gradually introduced during these years. This chapter argues, however, that practical issues with the current legal framework prevent Saudi Arabia from being considered an arbitration-friendly jurisdiction; it identifies and analyzes these problems and proposes solutions and recommendations for future reforms. The chapter ultimately

[10] *See generally* JOSEPH A. KECHICHIAN, LEGAL AND POLITICAL REFORMS IN SA'UDI ARABIA (2013).
[11] *See infra* note 246 and accompanying text.
[12] For more information about the enforcement of international arbitral awards in Saudi Arabia under the current law, *see* Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, 30 ARBITR. INT. 387–408 (2014).

contends that if Saudi Arabia wishes to boost its reputation in the field of arbitration, actual practice should match the strong statutory support for arbitration reflected in the 2012 Law of Arbitration.

2. Early History and Practice of Arbitration in the Islamic World

2.1 The pre-Islamic period

The Kingdom of Saudi Arabia, founded in 1932, is currently the largest country in the Arabian Peninsula. The early history of arbitration in this region resembles that of other parts of the world. Members of ancient tribal societies submitted their disputes to third parties, usually the heads of tribes, sages, or priests.[13] Pre-Islamic Arabian clans were not subject to a unified or dominant authority, so they relied on their own rules and traditions to settle disputes between clan members.[14] Settling conflicts between individuals and/or groups was an amicable and voluntary process; settlements, therefore, did not bind the parties.[15] Disputants in such instances did, however, pledge assets to ensure implementation and enforcement of decisions prior to deciding matters.[16] Such processes were known generally as *"Tahkim"*, the Arabic term for arbitration ("*hakam"* means arbitrator).[17] *Tahkim* served as the only peaceful means in pre-Islamic times for

[13] JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 6–9 (1982); ("The absence of an organized political authority in Arab society … implied the absence of an organized judicial system. ... [I]f protracted negotiation between the parties led to no result, recourse was normally 'had to an arbitrator (hakam)") *Id.* at 8; 'ABD AL-ḤAMĪD AḤDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 5, 6 (3rd rev. and expanded ed. 2011).

[14] *Id.;* SCHACHT, *supra* note 13 at 6–9. *See also* NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 9, 10 (1964).

[15] SCHACHT, *supra* note 13 at 6–9.*;* AḤDAB AND EL-AHDAB, *supra* note 13 at 5,6.

[16] *Id.;* SCHACHT, *supra* note 13 at 6–9. ("… [E]ach party had to provide a security, either property or hostages, as a guarantee that they would abide by his decision. The decision of the *hakam*, which was final, was not an enforceable judgment … but rather a statement of right on a disputed point.") *Id.* at 8.

[17] ANN BLACK, MODERN PERSPECTIVES ON ISLAMIC LAW 161 (2013); Individuals did not have to meet specific requirements or qualifications to become *hakams.* Disputants could freely choose any person, usually the head of the clan, to decide the matter. Parties did, however, take into consideration a person's, or the person's family's, skills and experience in settling conflicts when selecting *hakams*. SCHACHT, *supra* note 13 at 7, 8.

disputing parties to resolve their disputes;[18] it did not emerge as an alternative approach to any other method in the Arab world.[19] Unsuccessful *tahkim*, in some circumstances, resulted in war.[20]

2.2 Early Islamic practice

The birth of Islam in the Arabian Peninsula both reinforced and substantively altered traditional dispute resolution. The Prophet Mohammed and his companions acknowledged the prevailing peaceful method of settling disputes between parties.[21] People continued settling their disputes using traditional methods after the Prophet established the new Muslim society.[22] The rules for deciding disputes, however, did change. Muslims were now obligated to apply the Islamic principles and rules proclaimed by Allah and taught to the people by his Prophet.[23] The Quran states: "O believers! Obey Allah and obey the Messenger, and those in authority among you. Should you disagree on anything, then refer it to Allah and His Messenger, if you 'truly' believe in Allah and the Last Day. That is the best and fairest resolution."[24] Coulson writes: "The principle that God was the only lawgiver and that his command was to have supreme control over all aspects of life was clearly established."[25]

Muslims considered the Prophet the *qadi* (judge) and/or the *hakam* to whom disputants had recourse.[26] The Prophet therefore exercised the roles of a *hakam* and a *qadi* in the new Muslim

[18] George Sayen, *Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia*, 24 U PA J INTL ECON L 905 (2003).
[19] *Id.*
[20] *Id.*
[21] AḤDAB AND EL-AHDAB, *supra* note 13 at 5–10.
[22] *Id.* at 6, 7; Aida Othman, *"And Amicable Settlement Is Best": Sulh and Dispute Resolution in Islamic Law*, 21 ARAB LAW Q. 64–90 (2007).
[23] Id.; Sayen, *supra* note 18.
[24] (Quran 4:59).
[25] COULSON, *supra* note 14 at 20.
[26] *Id.* at 21.; SCHACHT, *supra* note 13 at 10, 11.; *see also* V. M. LEBEDEV ET AL., JUSTICE IN THE MODERN WORLD 106, 107 (2014).

society.[27] He oversaw the administration of justice and was the supreme *qadi*.[28] The Quran, arguably, distinguishes between *qadis and hakams*. Words derived from *hakam* generally refer to the Prophet's judicial acts while words derived from *qadi* denote supreme decrees or orders from God and/or his Prophet.[29] One Qur'anic verse, however, combines derivatives from both words:

> But no, by thy Lord, they will not (really) believe until they make thee an arbitrator (*yuhakkimuk*) of what is in dispute between them and find within themselves no dislike of that which thou decidest (*qadayt*), and submit with (full) submission.[30]

The derivation of the word *hakam* denotes the *tahkim* activity of the Prophet, while the word *qadayt*, which originated from *qada*, asserts the new characteristics of the Prophet's ruling.[31] All Muslims must recognize this ruling as official, final and binding.[32] This verse suggests that Muslims not only must resort to the Prophet to resolve conflicts between them, but that they must also completely accept his decisions. The verse thus introduced a new framework for dispute resolution and justice in the Islamic era.[33]

2.3 Dispute resolution under the Khalifs

The Prophet's Khalifs (successors) took on the role of deciding all disputes among Muslims after the Prophet's death.[34] They continued to acknowledge the newly reformed Islamic system of

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[27] SCHACHT, *supra* note 13 at 10–12.
[28] LEBEDEV ET AL., *supra* note 26 at 101.; ("The Prophet administrated justice, settling many disputes, resolving conflicts, and his decisions served thereafter as a model when considering analogous judicial cases.") *Id*. at 101; COULSON, *supra* note 14 at 22.
[29] SCHACHT, *supra* note 13 at 10, 11.
[30] (Quran 4:65); There are several similar translations of the Arabic version of this verse, but this one is *available at*: SCHACHT, *supra* note 13 at 10. Another translation of the same verse reads as follows: "But no! By your Lord, they will never be 'true' believers until they accept you 'O Prophet' as the judge in their disputes, and find no resistance within themselves against your decision and submit wholeheartedly."
[31] *Id.* at 15, 16.
[32] *Id.*
[33] *Id.; see also* LEBEDEV ET AL., *supra* note 26 at 106, 07.
[34] *Id.* at 106; COULSON, *supra* note 14 at 25, 26.

tahkim.[35] Qualified Muslim individuals chosen, as in pre-Islamic times, by disputants decided disputes by applying Sharia provisions.

Tahkim in the Islamic era covered a variety of areas, including individual rights and family issues.[36] Its scope extended to political conflicts, as in the famous disagreement between Ali Ibn Abi Talib and Mu'awiya in 658 AD.[37] This dispute stemmed from the refusal of Mu'awiya, who ruled Syria, to recognize Ali as the Khalif of all Muslims after the death of the third Islamic Khalif (Othman Ibn Affan).[38] Mu'awiya requested that the conflict be resolved by *tahkim*, and Ali, after consulting with his companions, agreed. Each party then appointed an arbitrator (*hakam*).[39] The two *hakams* wrote down the *tahkim* agreement outlined by the parties.[40] The *tahkim* agreement read: "This is what was agreed [upon by] Ali Ben Abi Taleb and Muawiyat Ben Abi Sufiane."[41] It stated that the *hakams* would decide the matter first in accordance with the Quran: "The [*hakams*] shall apply what they find applicable among the provisions of the Book." The agreement went on to assert a second source of law the *hakams* should apply: "If the matter in dispute is not resolved in the Book, [they] shall apply the *Sunna*, i.e., the rules unanimously agreed upon."[42] The

[35] SCHACHT, *supra* note 13 at 15–17.
[36] AḤDAB AND EL-AHDAB, *supra* note 13 at 5–10.
[37] *Id*.; *see also* RALPH H. SALMI, ISLAM AND CONFLICT RESOLUTION: THEORIES AND PRACTICES 29 (1998); *see generally* TAYEB EL-HIBRI, PARABLE AND POLITICS IN EARLY ISLAMIC HISTORY: THE RASHIDUN CALIPHS (2010).
[38] AḤDAB AND EL-AHDAB, *supra* note 13 at 5–11.
[39] *Id*.; A particular group of people later disagreed with Khalif Ali's decision to proceed with *tahkim* in this matter. The dispute continued between Ali and these people, who came to be known as "Khawarej," and led to violence as the Khawarej were accused of killing almost everyone who supported Ali's decision to resort to *tahkim*. Id. at 11.
[40] *Id*. at 5-11.
[41] *Id*. at 10.
[42] Note that the drafting here is unclear regarding whether the word *Sunna* refers to the Prophet's words and deeds or something else – especially since the phrase "the rules unanimously agreed upon" follows the word *Sunna* in the agreement. The clause, whether purposefully or not, did not specify that the *hakams should apply the* Sunna of the Prophet, if they found no applicable provision in the Quran. Martin Hinds has argued that the broad drafting and the ambiguity of this clause could expand the *hakams*' authority: "What was this? Its presence in the text shows that the following of *kitab allah* [Quran] was not thought likely to provide any basis for a solution. It carries with it no specification of whose *sunna* is meant; indeed it could mean any *sunna* …" Martin Hinds, *The Siffin Arbitration Agreement*, 17 J. SEMIT. STUD. 93-129 (1972). (" The central issue of *sunna* to which recourse was to be had must of course be connected with the development of the meaning of the word *sunna* from the broader "way of proceeding" and "generally agreed practice" in pre-Islamic and earliest Islamic times to the later and

agreement also affirmed that the award, once rendered, would be final and binding: "[The] decision is binding upon the believers. Peace and justice shall surround them, and they may not be threatened by arms; this agreement is binding upon them, their families, chattels, those present and those absent."[43] This clause replaced the old approach of ensuring the enforcement of the *tahkim* award by requiring the parties to pledge assets as security.[44]

The agreement included other provisions to govern the process itself. For example:

> [*Hakams*] may not be dismissed due to war or segregation, unless they fail to fulfill their mission. [The] dispute must be examined in a time period expiring [on] the month of Ramadan unless the [*hakams*] desire to settle the dispute later, they should agree in this regard. If one of the [*hakams*] dies, the chief of the community shall replace him and shall be chosen [from] amongst the wise and just. The place of [*tahkim*] shall be located between Kufa and Damascus.[45]

The early form of a *tahkim* (arbitration) agreement between two Muslim parties thus resembled present day arbitration agreements.[46] It included many of the basic concepts of modern arbitration, such as freedom of contract, party autonomy, enforcement of the award, the choice of arbitrators, and arbitral immunity.[47] The Ali Ibn Abi Talib and Mu'awiya *tahkim* marked the first time in Islamic history that parties used *takhim* to resolve a political dispute.[48] The agreement did not, however, clearly specify the disputes that the parties agreed to have settled through *tahkim.*[49] That could partially explain why the *tahkim* process proved unsuccessful in this case,[50] even

narrower meaning of " precedents set by the Prophet." *Id.;* note also that, upon Muawiyat's request, the agreement did not contain any reference to Ali's title as a Khalif of Muslims. *Id*. Such incidents reinforce the view that, in the drafting agreements, every word counts.

[43] AḤDAB AND EL-AHDAB, *supra* note 13 at 10.
[44] *See* SCHACHT, *supra* note 13 at 8, 11, 12.
[45] AḤDAB AND EL-AHDAB, *supra* note 13 at 10.
[46] *Id*. at 9-11.
[47] For basic concepts and principles of arbitration *see* CARBONNEAU, *supra* note 1 at 49–123.
[48] AḤDAB AND EL-AHDAB, *supra* note 13 at 9–11.
[49] *Id*.
[50] *See generally* Sayen, *supra* note 18.

though the *tahkim* agreement included many principles known today in the regulation of arbitration.[51]

2.4 *Tahkim* and the early judges

History suggests that *tahkim* was a valid and an acceptable means to settle disputes between Arabs in the pre-Islamic period. The rise of Islam brought the first reform to the ordinary process of *tahkim*. The Prophet Mohammed and his successors determined that the practice of *tahkim* and all its results should comply with the two sources of Islamic *Sharia* at that time, the Quran and the *Sunna* of the Prophet.[52] This practice coincided with judicial activity. The Prophet himself initially performed both practices.[53] The broadening of the State in later years led to the appointment of judges (known as *qadis*), during both the time of the Prophet and that of his successors. It should be noted, however, that at the time there were no judicial bodies such as courts.[54]

Muslim *hakams* and *qadis* (judges) both drew from the same sources of law, but differences persisted between the two positions. First, the Prophet and his successors appointed *qadis*, while disputants themselves selected *hakams*.[55] Parties that failed to agree on one *hakam* would select

[51] *See generally* SALMI, *supra* note 37; Hinds, *supra* note 42. M. Hinds describes the matter by his word as follows: "The whole affair bears every sign of having been a skillfully organized divisive manoeuvre, which successfully wrecked 'Ali's coalition. … The arbitration itself was a farce best summed up by Khalifa in one sentence 'the arbiters agreed on nothing'." *Id*.

[52] BLACK, *supra* note 17 at 160–64. The Quran and the *Sunna* of the Prophet are the two main sources of Islamic law. One of the most recognized scholars in Islamic law in Russia explains these sources by drawing a distinction between *sharia* and *fiqh*. "L.R. Syukiyainen, noted that Sharia includes the prescriptions of the Quran and *Sunna* as God's revelation, establishing the general framework for modes of thinking and acting of the true believer, whereas *Fiqh* contains specific rules of consensus worked out on the basis thereof." He also distinguished between the two sources of *fiqh* that are the secondary sources of Islamic law: "The norms of *Fiqh* are the products of the consensus opinion of companions of the Prophet and are the most authoritative Islamic jurists (Ijma) or theoretical constructions formed by analogy (Qiyas)."*V. M. LEBEDEV ET AL., JUSTICE IN THE MODERN WORLD 98 (2014); see also* COULSON, *supra* note 14 at 75–85.

[53] SCHACHT, *supra* note 13 at 10, 11.

[54] LEBEDEV ET AL., *supra* note 26 at 102.

[55] *Id.* at 107.

their own *hakams* and the two *hakams* would decide the dispute together.[56] Second, the both *qadis* and *hakams* represented the person who appointed them and acted on that person's behalf; a *qadi* therefore represented the leader of the State while a *hakam* acted on behalf of the parties to the *tahkim* agreement.[57] Finally, a *hakam* derived his power from the parties' agreement, whereas the State or its leader granted and restricted the authority of a *qadi*.[58] Outcomes in both systems, and under Islamic *Sharia* law provisions, were binding.

2.5 The Umayyad era (661-750): The rise of hostility toward *tahkim*

Mu'awiya became Khalif of the Umayyad dynasty in 661 A.D and his regime purposefully weakened the *tahkim* system. This had never happened before in Arab and Muslim societies. The Umayyads' governors mandated that officially appointed judges would resolve disputes.[59] They applied and granted the doctrine of mandatory jurisdiction to *qadis*, thus replacing traditional *tahkim* methods with the Islamic judiciary system.[60] Schacht describes the shift in these societies as follows:

> The Umayyads, or rather their governors, also took the important step of appointing' Islamic judges or *kadis*. The office of *kadi* was created in and for the new Islamic society, which came into being, under the new conditions resulting from the Arab conquest, in the urban centres of the Arab Kingdom. For this new society, the arbitration of pre-Islamic Arabia and of the earliest period of Islam was no longer adequate, and the Arab *hakam* was supplanted by the Islamic *kadi*.[61]

The character of the *tahkim* changed dramatically at this stage – it effectively lost its significance.[62] The dynasty gave its full support to the alternative method of resolving disputes

[56] Sayen, *supra* note 18. The previously illustrated case of the dispute between Khalif Ali and Mu'awiya exemplifies this technique of selecting *hakams*.
[57] LEBEDEV ET AL., *supra* note 26 at 107.
[58] *Id.*; *see also* SCHACHT, *supra* note 13 at 23–27.
[59] BLACK, *supra* note 17 at 160, 161; SCHACHT, *supra* note 13 at 23–25; COULSON, *supra* note 14 at 28, 29; Sayen, *supra* note 18.
[60] COULSON, *supra* note 14 at 27, 28; BLACK, *supra* note 17 at 160, 161.
[61] SCHACHT, *supra* note 13 at 24.
[62] BLACK, *supra* note 17 at 160, 161.

(*qada*) and reinforced the system like never before.[63] Judicial authority thus became the new official system.[64] *Tahkim* did not vanish entirely after the emergence of the formal system, though it suffered a great deal,[65] and the Umayyads required judicial review of any *tahkim* decision.[66] Enforcing a *tahkim* decision became difficult, if not impossible, because of the hostility powerful official authorities and the *qadis* harbored for *tahkim.*[67] The old method of settling disputes through *takhim* nevertheless persisted, if in a diminished state.

The era of the Umayyad dynasty thus witnessed the first instance of official hostility toward *tahkim* in Arab and Muslim history. It also witnessed a change in the character of *tahkim*; the rise of the *qadis* not only caused *tahkim* to function differently than in the past, but also caused it to function differently than arbitration in other parts of the world.[68] The term *tahkim* continued to refer to the process, disregarding its new "voluntary nature". The initiation of agreements after disputes had arisen, however, remained a typical characteristic of the institution of *tahkim*. The *tahkim* process thus remained unable to resolve potential future conflicts.[69]

2.6 *Tahkim* and Islamic jurisprudence schools: Abbasid dynasty (750-1258)

The Abbasid era followed the Umayyads and *qadis* continued to enjoy support from the rulers.[70] The *qadis* actually received more support because they no longer had to abide by the rules of the Khalif.[71] The Abbasids guaranteed the independence of the judiciary and Islamic law

[63] *Id.* at 160, 161; Sayen, *supra* note 18.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] SCHACHT, *supra* note 13 at 49–53.
[71] *Id.*

became the sole basis for decisions by *qadis*.[72] The *qadis thus* grew in status,[73] further diminishing the role of the *hakam* and the practice of *tahkim* in Muslim societies. Being a *qadi* also required expertise in Sharia.[74] This development affected the appointment of *hakams* later in Islamic history.[75]

The four Islamic schools of *fiqh* (jurisprudence) also date to the Abbasid era.[76] Each school of *fiqh* – *Shafi'i*, *Maliki*, *Hanbali*, and *Hanafi* – carried the name of its founder.[77] The dynasty's geographical expansion led the Schools to spread throughout the Kingdom. Each main region followed its School, and the Schools reflected the prevailing thought of their particular geographical areas.[78] *Tahkim* continued to receive some degree of official recognition. All the Islamic schools of *fiqh* acknowledged it, though they held different positions concerning its procedures. [79] Coulson contends that the schools were ultimately less different than they appeared. He writes:

> Yet, however distinct the four schools might appear from the standpoint of both their doctrine and the conduct of legal practice generally, they were fused and blended together by Islamic legal philosophy as inseparable manifestations of the same single essence.[80]

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[72] *Id.;* During the Umayyad dynasty, rulers had a superior power over *qadis* and their decisions. Such authority meant *qadis'* decisions depended on the ruler. The ruler's satisfaction, or lack thereof, would determine the fate of such decisions as well as their enforcement. COULSON, *supra* note 14 at 120, 121.

[73] *Id.* at 121.

[74] SCHACHT, *supra* note 13 at 50.

[75] *Id.* at 189.

[76] *Id.* at 69–75.

[77] *Id.* at 69–75.; COULSON, *supra* note 14 at 86–102; LEBEDEV ET AL., *supra* note 26 at 104. *See generally*,BLACK, *supra* note 17. *See also* MOHAMED M. KESHAVJEE, ISLAM, SHARIA AND ALTERNATIVE DISPUTE RESOLUTION: MECHANISMS FOR LEGAL REDRESS IN THE MUSLIM COMMUNITY 62, 63 (2013); SADAKAT KADRI, HEAVEN ON EARTH: A JOURNEY THROUGH SHARI'A LAW FROM THE DESERTS OF ANCIENT ARABIA TO THE STREETS OF THE MODERN MUSLIM WORLD 53–70 (1st American ed. 2012); Schacht identified the significant contribution of the Abbasid era to Islamic law and the substantial accomplishment of the four law schools at that time: "… Islamic law, which until the early 'Abbasid period had been adaptable and growing, from then onwards became increasingly rigid and set in its final mould. This essential rigidity of Islamic law helped it to maintain its stability over the centuries which saw the decay of the political institutions of Islam." SCHACHT, *supra* note 13 at 75.

[78] *Id.* at 57–68.

[79] AḤDAB AND EL-AHDAB, *supra* note 13 at 11–13.

[80] COULSON, *supra* note 14 at 102.; he also noted that: "Islamic jurisprudence succinctly expresses the very same notion in the alleged words of the Prophet: 'Differences of opinion among my community is a sign of the bounty of God.'" *Id.*; some antagonism, however, existed between the four schools of fiqh in the early history of their

The schools nevertheless disagreed regarding *tahkim*. Some believed that *tahkim* should be a binding process of dispute resolution; they argued the arbitrators should be granted the authority to decide matters, and that their decisions should be enforced once rendered.[81] This view of *tahkim* to some extent resembles contemporary practices of arbitration in many Western countries and other parts of the world. Other schools perceived *tahkim* as a friendly, voluntary and peacemaking approach to settling disputes.[82] Those who held such views believed awards, should be based on equity rather than the law.[83]

The diverse views of the Islamic schools of *fiqh* regarding *tahkim* highlight its unique characteristics in the Islamic world.[84] The Hanafi School endorsed *tahkim* and its simplicity but deemed it similar to reconciliation.[85] The Shafi'i School also recognized t*ahkim,* but saw appointed arbitrators as possessing less power than official *qadis,* since the parties could discharge them.[86] Shafi'i scholars also perceived *Tahkim* as the best alternative to the court during extended periods of judicial misconduct or when corruption was suspected in the court system.[87] These two Schools thus regarded *tahkim* as similar to reconciliation and neither viewed the decisions of *hakams* as binding unless the parties had agreed they should be so.[88] The Maliki School held that the *hakams'*

formation. A concord occurred among them later on, which positively contributed to the field of Islamic law. On that subject, Coulson writes: "Once the hostility between the schools had disappeared and they had settled down to a state of peaceful co-existance, the development of doctrine naturally displayed traces influences between them. But although this process of interaction often resulted in a superficial assimilation of the details of the law, it rarely affected the basic characteristics of the different systems." Id. at 93; later in the history of the Islamic schools of fiqh, the four schools succeeded in coming to terms with each other and settling their differences. This success resulted from ijma (consensus) SCHACHT, *supra* note 13 at 67, 68.

[81] AḤDAB AND EL-AHDAB, *supra* note 13 at 11–13.

[82] *Id*.

[83] *Id*.; *see also* KESHAVJEE, *supra* note 77 at 67.

[84] AḤDAB AND EL-AHDAB, *supra* note 13 at 13.

[85] *Id.* at 13–15.

[86] *Id*.

[87] *Id*.

[88] KESHAVJEE, *supra* note 77 at 67.

awards were final and binding, unless based on blatant legal errors or blatantly unfair.[89] Maliki scholars assigned *qadis* had the power to review awards to determine the existence of such legal errors or "flagrant injustices."[90] The Hanbali School viewed the awards of *hakams* as binding and of comparable power to the judgments of the *qadis.* Assigning similar authority to the awards of *hakams* and the judgments of *qadis* affected the appointment of arbitrators under the Hanbali School; arbitrators appointed by the parties had to meet all the qualifications met by *qadis.*[91] Hanbali scholars also predicated the binding nature of any *hakam's* award on the absence of any "flagrant injustice" in said award.[92]

This review of the status of *tahkim* before and during the time of the Islamic schools of *fiqh* prompts several observations. First, hostility toward the institution of *tahkim* during these years did not cause the practice to recede completely from view.[93] It survived through the golden era of the Islamic schools of *fiqh* and continued to be recognized in Islamic law.[94] Second, the fact that *tahkim* in Arabic translates to arbitration does not indicate that the terms are interchangeable in practice; each term refers to a different institution and background, and each is applied

[89] AḤDAB AND EL-AHDAB, *supra* note 13 at 13–15.
[90] *Id.*
[91] *Id.*
[92] KESHAVJEE, *supra* note 77 at 67; these various forms of *tahkim* should be distinguished from other forms of arbitration known in some parts of the world today: "… [The different concepts of *tahkim*] shall not be assimilated to modern concepts of arbitration, that is, arbitration in law and arbitration in equity. It is also wrong to assimilate them to the socialist arbitration concept. Indeed, the two concepts known in the Shari'a have features which do not coincide with those of the two concepts known through the rest of the world. If arbitration based on an attempt at conciliation, which is not binding upon the parties, may be close to equity arbitration (amiable composition) as known in the Western world, it does not correspond quite exactly to this kind of arbitration which was conceived by the modern liberal school. The same holds true for arbitration which award rendered therein is binding."AḤDAB AND EL-AHDAB, *supra* note 13 at 13; Arbitration statutes in civil law jurisdictions clearly recognize both forms of arbitration (law or equity arbitration) and parties are free to choose which type of arbitration their dispute is to be decided upon. Determining whether such a division exists in common law jurisdictions, by contrast, is quite difficult. Courts in many cases, however, do understand that the parties always assume that the arbitrators will conduct the process of arbitration in a different manner than the procedures followed by formal judges. Sayen, *supra* note 23; RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE (1985).
[93] Sayen, *supra* note 18. BLACK, *supra* note 17 at 160, 161.
[94] *See supra* notes 76-80 and accompanying text.

differently.[95] Similarities existed between the two systems, but the distinctions are clear.[96] Third, the Islamic schools of *fiqh* divided *tahkim* into two forms based on the outcome of the process. The question of the resolution's binding effect determined the nature of each form: *tahkim* had either an "amiable composition" or a binding character.[97] A combination of the two formulas was also conceivable.[98] The application of these different mechanisms varied based on geographic region and the school that held sway in a given area. Finally, at least one of the Schools (the Shafi'i) saw *tahkim*, for the first time in the history of Islamic law, as an alternative means of resolving disputes between Muslim parties when the judicial system suffered from corruption.[99]

2.7 *Takhim* under the Ottoman Code

Tahkim continued to evolve as Islamic law developed over the centuries,[100] Jurists drove the modernization of Islamic law throughout its history. Schacht characterizes their efforts as follows:

> Islamic jurisprudence did not grow out of an existing law, it itself created it; and once again, it has been the modernist jurists who prepared, provoked, and guided a new legislation. It had been the task of the early specialists to impose Islamic standards on law and society; the real task which confronts the contemporary jurists, beyond their immediate aim of adapting traditional Islamic law to modern conditions, is to evaluate modern social life and modern legal thought from an Islamic angle, to determine which elements in traditional Islamic doctrine represent, in their view, the essential Islamic standards.[101]

The enactment of the Majelle, or Ottoman Code, during the Ottoman Empire proved an important step in the modernization of Islamic law.[102] The Majelle, which drew on the Hanafi School doctrine

[95] AḤDAB AND EL-AHDAB, note 13 at 13; Sayen, *supra* note 18. *see also* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST 61 (2nd ed. 2006).
[96] *Id*.
[97] *See supra* notes 81-92 and accompanying text.
[98] *See generally* KESHAVJEE, *supra* note 77; BLACK, *supra* note 17; Sayen, *supra* note 18.
[99] *See supra* notes 87 and accompanying text.
[100] *See generally* SCHACHT, *supra* note 13.
[101] *Id*. at 110, 111.
[102] *Id*. at 92, 93, 100.

and bore the imprint of Western values, marked the first attempt to codify Islamic law in writing.[103] It consisted of 16 books, each of which dealt with a different subject[104] and contained, in contrast to all previous codes, written provisions for *tahkim*.[105] The last book, entitled "The Judiciary," included an entire chapter dedicated to *tahkim*, which contained several articles covering various aspects of the process.[106]

The Majelle contained a *tahkim*–related rule that resembled the concept of arbitrability, a concept recognized in contemporary arbitration law. The rule stipulated that only matters related to individual rights to possessions could be submitted to *tahkim*.[107] This doctrine made any dispute arising in connection with these rights *arbitrable*, enabling parties to resort to *tahkim*; it deemed disputes that did not fall within the given scope as non-arbitrable.[108] The Majelle also governed the appointment of *hakams* (arbitrators). One or more *hakams* could conduct the process, and if parties chose to use multiple *hakams*, each side could select his own *hakam*.[109] The decision to have more than one *hakam* needed to be unanimous.[110] *Hakams* had jurisdiction to rule over submitted disputes within the period of time specified and agreed upon by the parties; their authority expired at the end of that period.[111] The provisions of the Majelle recognized the parties'

[103] *Id.*; LEBEDEV ET AL., *supra* note 26 at 110–12; AḤDAB AND EL-AHDAB, *supra* note 13 at 16–18.
[104] LEBEDEV ET AL., *supra* note 26 at 111; THE MEJELLE: BEING AN ENGLISH TRANSLATION OF MAJALLAH EL-AHKAM-I-ADLIYA AND A COMPLETE CODE ON ISLAMIC CIVIL LAW, (C. R. Tyser ed., Repr ed. 2003).
[105] *Id.*
[106] *Id.*
[107] C. A. Hooper, *The Mejelle: Book XVI: Administration of Justice by the Court*, ARAB LAW Q. 305–311 (1990); Article 1841 of the Majelle states: "Actions relating to rights concerning property may be settled by arbitration." *Id.*
[108] *Id.*
[109] *Id.;* Article 1843 declares: "More than one arbitrator may be appointed, that is to say, two or more persons may be appointed to give a decision in respect to one matter. Both plaintiff and defendant may each validly appoint an arbitrator."
[110] *Id.;* Article 1844 asserts: "In the event of several arbitrators being appointed as above, their decision must be unanimous. One alone may not give a decision."
[111] *Id.*; According to article 1846: "If the arbitration is limited as to time it ceases to be of effect after the expiration of such time.
Example:

agreement, specifying that the *hakams* only had jurisdiction to rule on the disputes the parties agreed to submit to *tahkim*.[112] The hakams' decisions were binding and enforceable only on the parties to the agreement and only concerning the submitted dispute.[113] Such a decision had no *binding effect* on non-parties due to the *hakams'* lack of authority or jurisdiction.[114] Either party could dismiss *hakams* after their appointment except in two cases: 1. A court with proper jurisdiction had approved the selection; or 2. The *tahkim* had been completed and the submitted disputes decided.[115]

The Majelle granted the power of judicial review to the courts: courts had the jurisdiction to set aside any decision made by *hakams* that contravened the law[116]and they had to approve the *hakams'* decisions in the absence of any such violations.[117] These rules governed a form of *tahkim* that required the *hakams* to conduct and complete the process in accordance with the law, and lawful decisions bound the parties. Article 1850, however, identified a second form of *tahkim*, namely *tahkim* by *sulh* (settlement)[118] where the parties had authorized the *hakam*s to conclude the dispute by making *sulh* between the parties.[119] The appointed *hakams* did, however, have to reach

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An arbitrator appointed to decide a matter within a period of one month from a certain date, may only decide such matter within that period. He cannot give a decision after the expiration of that month. If he does so, the judgment will not be executory."

[112] *Id.*; article 1848 affirms the following: "All decisions by arbitrators as regards the persons and matters in respect to which they have been appointed are binding and executory to the same extent as the decisions by the Courts concerning persons within their jurisdiction. Consequently, a decision validly given by the arbitrators in accordance with the rules of law is binding on all parties."

[113] *Id.*

[114] AḤDAB AND EL-AḤDAB, *supra* note 13 at 16–18. Article 1851, however, states that: "Should unauthorized person act as arbitrator in a dispute and give a decision and the parties later agree to adopt his decision, such decision is executory." Hooper, *supra* note 107 at 305–311.

[115] *Id.*; article 1847 states: "Either of the parties may dismiss the arbitrator before he has given his decision. If the parties have appointed an arbitrator, however, and such appointment has been confirmed by a Court duly authorized thereunto, the arbitrator is considered to be a representative of the Court and cannot be dismissed."

[116] *Id.*; According to article 1849: "A decision by an arbitrator, upon submission to a properly constituted Court, shall be accepted and confirmed, if given in accordance with law. Otherwise, it shall not be so confirmed."

[117] *Id.*

[118] *See supra* notes 81, 82, 88-98 and accompanying text.

[119] Hooper, *supra* note 107.

the *sulh* in accordance with the Majelle's book of *sulh*.[120] Final decisions in *tahkim* by *sulh* were, crucially, no different than *tahkim* by law; both forms bound the parties.[121] The dissimilarity between the two forms thus stemmed fundamentally from the procedural rules by which the *hakams* conducted them.

The process of *tahkim* continued as an alternative method to the court system under the Ottomans, albeit subordinated in power and official favor to the judiciary.[122] The presence of a valid *tahkim* agreement between the parties did not prevent courts from exercising their jurisdiction to decide cases brought by any of the parties disregarding the agreement.[123] *Tahkim* of future disputes remained unrecognized under the Islamic *fiqh*, since the Majelle did not codify it; agreements regarding such disputes were therefore deemed invalid.[124]

The Ottomans enacted the Majelle in the late nineteenth century. The enactment of codified laws similar to Western legislation but based on Islamic law has persisted throughout Islamic countries ever since.[125] Several regions of the Arabian Peninsula that would become parts of Saudi Arabia were subject to the Majelle until its partial revocation around 1915.[126] *Tahkim* and its provisions in the Majelle remained a part of twentieth century legal reforms and continued to be enforced in some jurisdictions.[127] Some Arab countries, however, replaced such provisions by

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[120] *Id.; see also* C. A. Hooper, *The Mejelle: Book XII: Settlement and Release*, ARAB LAW Q. 326–331 (1989).

[121] Article 1850 asserts: "The parties appointing the arbitrators may authorize the arbitrators, if they think fit, to make a settlement, and such arbitrators may then make a valid settlement.

Thus, if each of the parties appoint a person to act as arbitrator with power to dispose of the matter in dispute by way of settlement, and such arbitrators duly arrive at a settlement in conformity with the terms of the Book on Settlements, such settlement and arrangement is binding on both parties." Hooper, *supra* note 107.

[122] AḤDAB AND EL-AHDAB, *supra* note 13 at 16–18.

[123] *Id*.

[124] *Id.* at 19; ("The "Medjella" recognized the validity of arbitration submission agreements subject to the following four condition:

(a) The dispute must already have arisen and be clearly defined. …") *Id.*

[125] SCHACHT, *supra* note 13 at 89–93, 100–111.

[126] T. E LAWRENCE & ANGUS CALDER, SEVEN PILLARS OF WISDOM 49–60 (1997); *see also* FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 83–85 (2000); *Id.* at 284 n.11.

[127] *See generally* AḤDAB AND EL-AHDAB, *supra* note 13.

enacting new *tahkim* laws; the Majelle influenced a considerable number of these.[128] Other countries had no laws regarding *tahkim* until the latter part of the twentieth century. The principles of the Hanbali School controlled the process in Qatar, for example, before the 1972 drafting of the Code of Civil and Commercial Procedure.[129]

3. Saudi Jurisdiction: Arbitration Law, Practice and Reform

3.1 Early history of *tahkim* in the Saudi legal system

3.1.1 The Commercial Court Law of 1931

Saudi Arabian law recognized the validity of *tahkim* as a means of resolving disputes as early as the 1930s, although no separate law codified *tahkim* specifically. Several provisions of The Commercial Court Law, enacted in 1931, addressed procedural aspects of the *tahkim* process.[130] The law stated that an arbitration agreement must be put in writing, then signed by the parties and notarized.[131] It also required that the agreement contain all the terms the parties had agreed on, including the necessary quorum for the *hakams'* decision and the deadline for concluding the *tahkim*.[132] The parties could select one or more *hakams* and once the court

[128] For example: the Iraqi arbitration experience, *Id*. at 225–57, the Jordanian experience, *Id.* at 259–304, and Sudanese experience, *Id*. at 673–698.
[129] *Id.* at 571.
[130] These provisions, however, only applied to cases of a commercial nature as title "The law of the Commercial Court" indicates. Royal Decree No. 32 on 15/1/1350H (June 2nd, 1931) enacted this law and a new law in 1970 replaced it. The provisions related to *tahkim*, among other issues, remained the same in the 1970 law. The text of the 1970 Law of the Commercial Court in Saudi Arabia can be accessed at: Saudi Arabia: The Law of Commercial Courts (promulgated by Royal Decree No. (M/2) on 15/1/1390H (March 23rd, 1970)), http://www.wipo.int/wipolex/en/details.jsp?id=14595 (last visited Feb 7, 2017); note that King Abdu Aziz was known as the King of Hijaz and Najd in 1926. He issued a decree in 1927 that contained this proviso: "rules of the Ottoman *qanun* continue to be applied until now, because we have not issued our Will abrogating them." Before he became the King of Saudi Arabia in 1932, King Abdul Aziz started to release new codified laws. The law of Commercial Court was one of the very earliest acts issued by the King at that time. The Drafted provisions of this law drew from the earlier Ottoman laws including the Majelle. VOGEL, *supra* note 126 at 284, 285; *see also* A. M. VASIL′EV, THE HISTORY OF SAUDI ARABIA 302, 303 (2000).
[131] Article 493, the law of the Commercial Court, Royal Decree No. 32/1350H (1931).
[132] *Id.*

confirmed the selection, the parties could not dismiss the *hakams* before they decided the dispute.[133] This law made it possible for any parties to a *tahkim* agreement to appeal the decisions of the *hakams* to the Commercial Court. A third party could not challenge such a decision since only the parties to the agreement could enforce or be bound by such decisions.[134] The *hakams* who decided a dispute would submit it to the court for review. Each party would then provide a statement regarding the decision that would include any objections they might have. The court then would either confirm or set aside the decision.[135]

Critics of these *tahkim* provisions highlighted several specific shortcomings.[136] First, additional provisions would be necessary to comprehensively cover the *tahkim* process.[137] Second, the law specified no procedure for case where parties failed or refused to choose a *hakam;* it did not even grant the court jurisdiction to choose a *hakam* in such circumstances.[138] Third, the enforcement of decisions required judicial review.[139] Finally, the law covered neither arbitration clauses nor agreements to resort to *tahkim* in future conflicts.[140]

3.1.2 Arbitration clauses in international agreements and oil concessions

Agreements between parties to resolve future disputes remained unrecognized and therefore invalid in the Islamic *fiqh* well into the twentieth century. This, however, did not prevent the founder of Saudi Arabia, King Abdulaziz ibn Saud, from signing concession agreements that included arbitration clauses for future disputes with several Western oil companies in the early

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[133] Articles 493, 496. *Id.*
[134] Articles 496, 538. *Id*.
[135] Articles 495, 497. *Id.*
[136] *See* for example, Sayen, *supra* note 18 at n.18.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] *Id*.; Some scholars contend that, in the past, Islamic law simply disregarded clauses or agreements regarding future disputes rather than totally forbidding them. The complicity of contracts today as well as the development *of business interests, for example, led to the subsequent recognition of such clauses and agreements in many Islamic jurisdictions.* AḤDAB AND EL-AHDAB, *supra* note 13 at 20–24.

decades of the twentieth century.[141] The king issued a royal decree ratifying the oil concession agreement reached between Saudi Arabia and the Standard Oil Company of California (SOCAL) on July 7, 1933.[142] The agreement stipulated that all potential future disputes or disagreements between the parties, out of or in connection with their agreement, would be submitted to arbitration if not settled by other extra-judicial means.[143] The Saudi government's approval of an agreement containing an arbitration clause constituted a recognition of arbitration clauses, even though the

[141] *A. M. VASIL'EV, THE HISTORY OF SAUDI ARABIA 312–20 (2000);* in 1923, King Abdul Aziz signed an agreement with Major Frank Holmes who represented the Eastern and General Syndicate Ltd., that granted the British company an oil concession in AL-Ahsa in the eastern region of Saudi Arabia. *Id*. at 314; the parties agreed to arbitrate all future disputes in that agreement. *See* Confidential D 107 86/5-I Eastern and General Syndicate Ltd. - Saudi Arabia, [110v] at 187,188, Qatar Digital Library, *available at*: http://www.qdl.qa/en/archive/81055/vdc_100025704696.0x00001a (last visited Feb 6, 2017); *see generally* HARRY ST JOHN BRIDGER PHILBY, ARABIAN OIL VENTURES (1964); FOUAD FARSY, MODERNITY AND TRADITION: THE SAUDI EQUATION (1990).

[142] Royal Decree No. (M/1135) on 14/3/1352H (July 7th, 1933).

[143] *Id.* Article 31; The agreement is also known as The Original Concession Agreement, *see* UNITED STATES CONGRESS SENATE COMMITTEE ON FOREIGN RELATIONS SUBCOMMITTEE ON MULTINATIONAL CORPORATIONS, V.6, PART 8 MULTINATIONAL CORPORATIONS AND UNITED STATES FOREIGN POLICY. HEARINGS, NINETY-THIRD CONGRESS [NINETY-FOURTH CONGRESS, SECOND SESSION] 356–67 (1975). The clause clearly stated a number of essential elements such as the parties' intention to arbitrate any dispute between them, but the agreement did not specify other governing rules, such as the governing law, the means of substituting the arbitrators, the language of the arbitration and the time limit of the process. The parties' failure to address such issues in the agreement caused ambiguity; this highlights the poor drafting of the clause. The award of a well-known case *Saudi Arabia v. Aramco*, which related to a dispute that arose later out of this agreement, addressed some of these concerns. *See infra* note 153 and accompanying text. Article 31 of the agreement reads: "If any doubt, difference or dispute shall arise between the government and the Company concerning the interpretation or execution of this contract, or anything herein contained or in connection herewith, or the rights and liabilities of the parties hereunder, it shall, failing any agreement to settle it in another way, be referred to two arbitrators, one of whom shall be chosen by each party, and a referee who shall be chosen by the arbitrators before proceeding to arbitration. Each party shall nominate its arbitrator within thirty days of being requested in writing by the other party to do so. In the event of the arbitrators failing to agree upon a referee, the government and the Company shall, in agreement, appoint a referee, and in the event of their failing to agree they shall request the President of the Permanent Court of International Justice to appoint a referee. The decision of the arbitrators, or in the case of a difference of opinion between them, the decision of the referee, shall be final. The place of arbitration shall be such as may be agreed upon by the parties, and in default of agreement shall be The Hague, Holland." *Id.* at 365,366; this article is subject to various possible interpretations, especially the part that governs the tribunal decision-making process. The term did not clearly specify the method of this process. It also did not specify whether the third arbitrator (the referee) should act like a chairman or an umpire. Each position would grant the referee different authorities – for example, if the referee should decide the case solely or simply possess a casting vote. The various possible scenarios left unaddressed for this term contributed to the article's vagueness, as illustrated above. Most of these concerns, however, were obviated in the arbitration agreement signed by the parties, as this a later section of this chapter shows A few years later, the parties agreed to add some supplementary provisions to the Concession agreement and to amend some of the existing ones; this has become known as the Supplemental Agreement of 1939. *See Id.* at 367–72; on January 31st, 1944 the name of the Company was changed to Arabian American Oil Company (Aramco). *Id*. at 367.

1931 commercial law had no provisions for regulating agreements to resolve future disputes.[144] The Saudi government understood that, should any conflict arise, the Western companies agreed to resort to arbitration as practiced by Western countries – a different method than *tahkim*.

The Saudi government may have chosen to sign agreements with arbitration clauses even though Saudi law did not cover such clauses because of the unequal bargaining power between the two parties. Speculation about the magnitude and location of petroleum resources on the Arabian Peninsula accompanied the negotiations between Saudi Arabia and SOCAL. Western companies had greater bargaining power in negotiating agreements with Saudi Arabia before the drilling of major oil wells in 1938 brought recognition of the true economic importance the Saudi oil reserves. The newly-created Kingdom lacked the financial resources to exploit its resources and looked to Western companies to fund economic development.[145]

The steps taken by the Saudi government to implicitly recognize such clauses stemmed from one of the latest developments in Islamic *fiqh* as expounded by the Hanbali School, the favored teaching in Saudi Arabia at that time.[146] Al-Sanhuri once argued: "Perhaps the most remarked evolution in Islamic Law with respect to the 'clause' associated with a contract is that which characterizes the doctrine of Ahmad Ben Hanbal especially if it is completed by the teaching of Ibn Taimiyya."[147] The distinguished Hanbali scholar Ibn Taimiyya claimed that contracts are

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[144] *See supra* note 140 and accompanying text.

[145] VASIL′EV, *supra* note 130 at 317–20; one of the agreements signed by the Saudi government at that time has been described as follows: ("The terms of the agreement were undoubtedly extremely advantageous to the company and disadvantageous to Saudi Arabia, but they reflected the balance of forces between the partners. At the time that the Saudi government signed the agreement, it had no experience in oil affairs and badly needed money. The government's main efforts were directed towards obtaining financial advantages in the form of royalties and loans.") *Id.* at 317; *see also* R. Narayanan, *United States and Saudi Arabia, 1933-1960*, INFLIBNET, 17–44 (1970), *available at*: http://shodhganga.inflibnet.ac.in:8080/jspui/handle/10603/20100 (last visited Feb 9, 2017).

[146] VOGEL, *supra* note 126 at 10, 94, 95; ("most Saudis now follow [the Hanbali] school. Saudi judges ordinarily adhere to Hanball legal positions, but …they are free to adopt views from other schools, or even from outside the four schools altogether, as long as they base their view, following proper interpretive procedures, on the Qur'an and sunna.") *Id*. at 10.

[147] AḤDAB AND EL-AHDAB, *supra* note 13 at 23; his name is Abdul Razzaq Al-Sanhuri, an Egyptian scholar of contemporary jurisprudence known for his legal work, especially his contribution to the revised Civil Law of

binding if they require no action prohibited by Islam, and do not conflict with public policy.[148] The renewed Hanbali doctrine invalidated clauses only as an exception to the general rule; it deemed any clause as valid unless it contradicted the contract, public policy or ethics, or unless Islamic law prohibited it.[149] Some scholars have argued for the validity of arbitration clauses that ignore Islamic law (and practice) for various reasons including the growing interest and need for such clauses in contemporary commercial transactions.[150]

The foregoing discussion illustrates the progress made by Islamic jurisprudence (*fiqh*) in facilitating the acceptance and approval of arbitration clauses in agreements signed between the Saudi government and foreign oil companies in the early decades of the twentieth century. This does not mean, however, that Saudi Arabia has viewed arbitration (or even *tahkim*) favorably as a means to resolve domestic disputes. Western companies initially proposed arbitration clauses as preconditions to any agreements.[151] The government's attitude toward arbitration remained clear at that point, as no dispute requiring judicial attention had yet arisen The approval of arbitration clauses to resolve future disputes regarding oil concessions with foreign companies, and the

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Egypt in 1948. *See* Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971*, 3 ARAB LAW Q. 33–64 (1988).

[148] AḤDAB AND EL-AHDAB, *supra* note 13 at 23.

[149] *Id*. Al- Al-Sanhuri concluded: "With the renewal brought by Ibn Taimmiyya, the Hanbali doctrine made a great step forward on the way of evolution. It has rejected the principle of the transaction's unity and restricted the scope of invalid clauses. …Therefore, the Hanbali doctrine has come quite close to the Western doctrine …" *Id*.

[150] *Id*. at 24; *but see* SALEH, *supra* note 95 at 39, 40, 61–64.

[151] The texts of the drafted clauses contained in several signed agreements at that time support this conclusion. *See supra* notes 146-150 and accompanying text; the foreign companies clearly always intended to apply arbitration as practiced in some Western jurisdictions and not *tahkim*. The fact that these companies aimed to overcome the country's law (Sharia) and courts testifies to this intention – *tahkim*, as an Islamic way of settling disputes, was thus one of the processes they sought to avoid. Some scholars point out: "… the classic concession agreement granted foreign oil companies largely unrestrained access to, and control over, states' petroleum supplies for fifty years or more, prescribed and then 'froze' extant law through so-called stabilization clauses, and required arbitration of any disputes that might arise. Thus the concessionaires secured their investments during the lifetime of the concessions. The decisive characteristic of each of the resulting arbitrations was the negation of domestic Islamic law, resulting in the elevation of "general principles of law" that were firmly rooted in the laws of Western jurisdictions (typically to the benefit of the foreign claimants)." Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT. LAW 643–656 (2003).

absence of similar provisions for other contracts in Saudi law arguably highlight the distinction between *tahkim* and arbitration in the Saudi legal system at that time.

3.2 Onassis agreement and Aramco case

Hostility to arbitration in Saudi Arabia emerged due to the famous Aramco case.[152] In 1954 The Saudi government signed the so-called "Onassis agreement" in 1954, granting the shipping magnate Aristotle Onassis the privilege to start a new corporation known as Saudi Arabia Maritime Tankers (SATCO) to transport oil from Saudi Arabia to anywhere in the world.[153] Aramco (a successor to SOCAL) alleged that the privilege granted to SATCO contradicted its contractual rights set forth in the 1933 concession agreement signed by the Saudi government. The terms of that agreement granted Aramco the right to freely choose the oil's conveyance.[154] Aramco rejected the government's request to comply with the Onassis agreement and the Saudi government stood its ground regarding rights granted to Onassis.[155]

This dispute was referred to arbitration in 1955 as the 1933 concession agreement stipulated.[156] Aramco alleged that the terms of the Onassis agreement diminished Aramco's "exclusive right" to transport the oil it produced, and therefore the Saudi government had breached

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[152] *See generally* ARBITRATION TRIBUNAL (LUCERNE), SAUDI ARABIA & ARABIAN AMERICAN OIL COMPANY, ARBITRAL AWARD GIVEN ON 23 AUGUST 1958: CORRESPONDING TO 8 SAFAR 1378 : IN THE ARBITRATION BETWEEN THE STATE OF SAUDI ARABIA AND THE ARABIAN AMERICAN OIL COMPANY (1958); IRVINE H. ANDERSON JR, ARAMCO, THE UNITED STATES, AND SAUDI ARABIA: A STUDY OF THE DYNAMICS OF FOREIGN OIL POLICY, 1933-1950 (2014); LAUTERPACHT, INTERNATIONAL LAW REPORTS, VOLUME 27 (1963); Narayanan, *supra* note 145 at 148–71.

[153] *Saudi Arabia v. Arabian American Oil Company. (Aramco),* 27 ILR 117, (1963).

[154] *Id.*

[155] *Id.*

[156] *Id.;* the disputants in this case signed the arbitration agreement on February 23rd, 1955 after failing to reach an agreement to solve their dispute by other means. This agreement stipulated that two arbitrators, one appointed by each party, should conduct the arbitration. It required that the arbitrators meet within seven days of the date of their appointment, and choose a referee within thirty days of the date of the first session. Should the appointed arbitrators fail to agree in this regard, each party of the dispute would then choose another person to fulfill this specific task expeditiously. The provisions of the agreement addressed many procedural issues including replacement of the arbitrators, arbitral decision-making requirements, and the final and binding effect of the award. *Id.* at 229-33; *see also* AḤDAB AND EL-AHDAB, *supra* note 13 at 617–20.

its contract with Aramco.[157] The government confirmed that Article 1 of the concession agreement granted Aramco's exclusive right but noted the dissimilarity between the terms "exclusive" and "absolute." The government maintained that the term "exclusive," on which Aramco based its claim, did not specify that Aramco had the "absolute" right to transport its oil by sea to other countries; it thus asserted the right to interpret Aramco's right restrictively.[158]

The government claimed its rights as a sovereign country applying the principle of public service in the 1933 concession agreement to support its position. It relied on French law, which subjected any company running a public service to government supervision; this included the right to administer, or even to adjust, the operational system the company used for this purpose. The government asserted that a sovereign state has the right to establish regulations and, in so doing, it only exercised one of its rights, without violating its obligations under the 1933 concession agreement.[159] Aramco demanded enforcement of what it deemed an absolute and exclusive right, with no restrictions on the transportation and exportation of the oil produced on the land designated in the concession agreement.[160]

3.2.1 Tribunal's work and decision

The tribunal recognized that the parties' agreement restricted its jurisdiction and aimed therefore to issue "a declaratory award" that would provide clear legal answers to the questions submitted by each party. It saw the need to legally interpret some articles in 1933 agreement and related agreements that were drafted in two languages, with no indication of which language would

[157] The arbitration agreement between the two parties stated the following: "an agreement was signed between the government and Aramco's assignor [in 1933]. Subsequently other agreements were made between the government and Aramco from time to time; and any reference, therefore, to the "Aramco Concession Agreement" herein shall include all agreements." *Saudi Arabia v. Aramco, supra* note 153 at 229.
[158] *Saudi Arabia v. Aramco, supra* note 153.
[159] *Id*.
[160] *Id*.

prevail in disputes.[161] The arbitrators began by identifying the applicable law. They observed that Saudi law at that time derived from Islamic Sharia and, except for the Law of the Commercial Court, had not been codified. They eventually decided to apply Saudi law and the international customary rules recognized in the petroleum industry. They relied on international principles and rules established by legal precedents to address any apparent gaps in Saudi law. The tribunal carefully examined many legal concepts and fundamental principles related to the claims and legal questions raised by both parties.[162]

The tribunal successfully clarified the position of Islamic law in some instances. It found, for example, that even though Islamic law, and the Hanbali teaching specifically, did not regulate oil concession, such agreements resembled other contracts governed by Islamic law and the Hanbali school of thought. These other contracts relied on two principles: first, freedom of contract – parties could agree upon contractual conditions if the subjects and the terms adhered to the Islamic legal framework; and second, lawful contracts of all types were binding. The tribunal confirmed the binding nature in Islamic law of all different types of agreements, whether public contracts, administrative contracts, or private contracts.[163]

The tribunal ruled in favor of Aramco and the award confirmed that the concession granted the company exclusive rights with no restrictions, including the transport of oil by sea from Saudi Arabia to other markets in the world.[164] The award declared that the contractual nature of the concession agreement – not legally characterized as a public service – meant the government could make no change to any right that the concession agreement granted the company without the company's approval. The tribunal asserted that the government had no power to compel Aramco

[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] *Id*.

to comply with an agreement granting a third party the rights a prior agreement exclusively granted to Aramco.[165] The tribunal further found that the government's agreement with Onassis conflicted with the 1933 concession agreement with Aramco, and therefore Aramco did not have to comply with the terms of the Onassis agreement.[166] The Saudi government thus lost the first arbitration case in history decided on the basis Saudi law.

3.2.2 Consequences of Aramco case: State hostility

The Saudi government enforced the arbitral award in the Aramco case, but the award's consequences fueled official hostility toward the arbitration system in the Kingdom.[167] Arbitration fell into disfavor and the state actually forbade government bodies from engaging in the practice.[168] This hostility resulted from the Aramco decision, testifying to the government's disappointment with the arbitral award.[169] The government only banned its agencies from resorting to arbitration,

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[165] *Id*.

[166] *Id.*; *see also* S. M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW: FURTHER SELECTED WRITINGS 255–69 (2011); R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY 1263–65 (2005); AḤDAB AND EL-AHDAB, *supra* note 13 at 617–21.

[167] Stephen M. Schwebel, *The kingdom of Saudi Arabia and Aramco arbitrate the Onassis agreement*, 3 J. WORLD ENERGY LAW BUS. 245–256 (2010); Judge Stephen Schwebel was a member of Aramco's legal team in this case. He later became the President of the International Court of Justice. He described the reaction of the Saudi government to the arbitral award in his article as follows: "To its great credit, the [G]overnment of the Kingdom of Saudi Arabia acted in compliance with the Award. It made no further attempt to enforce the Onassis Agreement. It abstained from international arbitration for decades thereafter. But it permitted Aramco to maintain and expand its operations to their immense mutual benefit." *Id.*

[168] *Id.; see also* Sayen, *supra* note 18. For further analysis regarding the government resolution No. 58 of 1963 that prohibited public authorities and its bodies from resorting to arbitration *see* A. LERRICK & Q. J. MIAN, SAUDI BUSINESS AND LABOR LAW: ITS INTERPRETATION AND APPLICATION 176–81 (1982).

[169] Scholars have argued that additional factors beyond the arbitral award may have fueled the government's disappointment. One scholar suggests: "The dissatisfaction can perhaps be better explained by more general Saudi concerns over the ability and willingness of foreign arbitrators to apply Saudi law to disputes involving Saudi Arabia's most important natural resource." Sayen, *supra* note 18. The same could be true regarding other participants in this case. The lack of qualified Saudi attorneys and legal experts in the country at that time forced the government to hire an esteemed legal team consisting of Yale Law School Professor Myres McDougal, Professor Roberto Ago, and the British lawyer Sir Lionel Heald. *See* Schwebel, *supra* note 167. Determining whether the team had sufficient knowledge of the main sources of Saudi law, namely Islamic law and Hanbali teaching is difficult. Such knowledge, if attained by the team members themselves, would certainly have enhanced their ability to effectively handle the case; it would also have helped better address the government's claims and connect them to Saudi law, which may or may not have affected the final result of the arbitration.

but the ban had a far wider effect than intended; many perceived it as an absolute prohibition of arbitration in the Kingdom.[170]

The Saudi government's failure to understand the difference between arbitration and *tahkim* may explain why it lost the case. Arbitration was an established practice in many Western jurisdictions at the time of the dispute, but Saudi Arabia had no previous or relevant experience with the practice. The Saudi government's inexperience was apparent on numerous occasions during the proceedings. The government requested, for example, that the tribunal reconcile the conflicting provisions of the two disputed agreements in order to make them both workable. The *tahkim* system would have allowed such a practice, but it ran contrary to the process of arbitration and the way it had evolved over time in many Western jurisdictions.[171] The tribunal, therefore, replied that its task was to issue an award based on the law, and that it lacked the authorization to reconcile the two provisions.[172]

3.3 Judicial hostility toward *tahkim* and arbitration

3.3.1 Absence of a statutory framework

The continued hostility to arbitration had many causes, including the absence of a statutory framework. Neither arbitration nor *tahkim* were codified in Saudi Arabia for several decades after its founding. Some laws related to the private sector (such as labor law), however, did recognize alternate methods of dispute resolution.[173] These laws, which focused on foreign parties, encouraged economic development in the country by enabling foreign investors or skilled workers

[170] AḤDAB AND EL-AHDAB, *supra* note 13 at 621. A controversy arose regarding the interpretation and the extent of the government ban on arbitration. For example *see* LERRICK AND MIAN, *supra* note 168 at 177–80.
[171] *See generally* Sayen, *supra* note 18.
[172] *Saudi Arabia v. Aramco*, *supra* note 153; *see also* SCHWEBEL, *supra* note 166.
[173] LERRICK AND MIAN, *supra* note 168 at 176–98.

to settle disputes by means other than the traditional courts.[174] The enforceability of decisions obtained through these methods, however, remained questionable. No law stripped Sharia courts of jurisdiction over cases decided by means other than litigation,[175] and Sharia courts often refused to recognize or enforce these decisions.

The combination of hostility, judicial jealousy, and the absence of clear laws regulating these procedures explain the Sharia courts' actions. Saudi religious scholars, known as *ulama*, wanted to control both Sharia courts and the law applied in these courts. They opposed any codified legislation because it would limit their power. The Saudi king, however, saw the courts as the responsibility of the state.[176] Frank Vogel explains: "Because codification epitomizes macrocosmic, particularly rule-law, forms, it directly threatens *fiqh's* microcosmic, particularly instance law, predilections. It arouses competition between '*ulama'* and ruler over who is to control legislation and adjudication, …"[177] Vogel goes on to describe the *ulama's* position, arguing that "… the crucial doctrinal issue to them [was] when, or even whether, the ruler [had] the power to dictate the law his *qadis* [applied]."[178] Most of the *ulama* opposed the codification of laws. They believed the *qadis* should decide each case separately and uniquely based on their understanding of *fiqh*; certain laws or rules other than the Sharia provisions should not restrict the *qadis*. The *ulama* perceived codified laws as inappropriate, even degrading mechanisms, inimical to Sharia courts.[179] Judges in Sharia courts were hostile to codified laws and declined to enforce them, basing

[174] *Id.*
[175] *Id.*
[176] VOGEL, *supra* note 126 at 289, 336.
[177] *Id.*
[178] *Id. at 336.*
[179] *Id.* at 342.

their judgments solely on *fiqh*. Judges could, however, dismiss cases they believed should be decided according to a statute; another legal body would then apply the relevant law.[180]

The *ulama* and Sharia courts' hostility to codification led the king to establish several legal, but non-judicial panels. The first such legal body, the Commercial Court, dates to 1931. The formation of similar panels continued in the following decades; the Labor Commission, established by the Labor Law of 1969, is one example.[181] Laws establishing panels had to specify jurisdictions authorizing each panel to enforce the relevant laws and decide disputes arising under their provisions rather than send the matter to Sharia courts.[182]

The *ulama* opposed the establishment of such panels because the panels decreased their authority.[183] Two incidents show the *ulama's* attitude toward codification. The Saudi king asked senior *ulama* to describe their views on codified laws in the early 1970s; they took almost two decades to express their opposition to codification.[184] The *ulama* likewise strongly resisted the government's special codification of the rules of Civil Procedure in 1987, leading the government to abandon the attempt after just one year.[185]

Saudi Arabia's struggles to enact modern legislation and the traditional Sharia courts hostility to such laws highlight the difficulty of establishing laws that introduced new adjudicatory means like arbitration. Arbitration had evolved to occupy a legal position parallel to traditional courts in other jurisdictions, but nothing of the sort had developed in Saudi Arabia; moreover,

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[180] *Id.* at 175,176.
[181] *Id.*; Also *see generally* Joseph L. Brand, *Aspects of Saudi Arabian Law and Practice*, 9 BC INTL COMP REV 1 (1986).
[182] VOGEL, *supra* note 126 at 176.
[183] *Id.*
[184] *Id.* at 288; the majority of senior *ulama* rejected the idea of codification in resolution No. 8 and illustrated their great fears of the consequences of such actions. *See* The Council of Senior Scholars (Majlis Hay'at Kibar al-'Ulama) Resolution No. 8, *available at:* http://www.alifta.net/Fatawa/FatawaChapters.aspx?languagename=ar&View=Page&PageID=297&PageNo=1&BookID=1 (last visited Feb 22, 2017).
[185] VOGEL, *supra* note 126 at 289.

resorting to Saudi courts to enforce rulings from alternate systems remained difficult. The absence of a statutory framework in the Saudi jurisdiction has contributed to the long-lasting judicial hostility towards alternate methods of dispute resolution, and decreased the status of all such methods.

3.4 State hostility to commercial arbitration

The Saudi Arabian government continued to accept arbitration clauses in agreements with foreign parties with greater bargaining power, even after the Aramco decision, to promote economic growth and development.[186] This was an exception to the ban on arbitration clauses in domestic contractual agreements that followed the Aramco case.[187] State hostility to arbitration also manifested in new ways that augmented this ban.[188]

A 1979 resolution of the Ministry of Commerce forbidding the inclusion of arbitration clauses in corporate charters unless the charter designated Saudi Arabia as the venue increased private sector hostility to arbitration as well. The Ministry would not register a corporation if its corporate charter assigned a foreign country as the seat of arbitration or specified that arbitration would not be conducted under Saudi law. Hearings involving at least one Saudi party (either the

[186] Concession agreements and contracts signed with The U.S Army Corps of Engineers exemplify such exceptions. *See* LERRICK AND MIAN, *supra* note 168 at 176–79.

[187] *Id.* at 176–79.

[188] For example, Saudi Arabia joined the 1965 Convention on the Settlement of Investment Disputes between States and nationals of Other States (known as ICSID Convention). *Id.* at 181. This occurred almost a decade and a half after the convention went into force. The ratification of the convention, however, called attention to two main issues. First, the Saudi government reserved the right to exclude any dispute related to State sovereignty or Oil, meaning that the ICSID would handle neither arbitration nor conciliation *Id.* The connection between the Saudi government's reservations and the Aramco case is clear. Second, the Saudi government ratified the convention, but never published it in the official gazette. Many jurisdictions, including Saudi Arabia, require publication of certain legal documents issued by the State in the official gazette to make them legally enforceable and operative. *Id.* at 181 n.34; *see also* Sayen, *supra* note 18 at n.17; *but see* AḤDAB AND EL-AHDAB, *supra* note 13 at 624. Saudi Arabia also did not accede to the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) at the time. It nevertheless served as one of the parties of the 1952 Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards. *Id.* some have argued, however, that, "This latter convention has only six signatories and has not been utilized much in practice." *Id.*

company itself or one of its associates) had to take place inside the Kingdom. The Ministry also applied the resolution to all agreements requiring registration – a very broad application.[189] This actually highlights how broadly the ministry interpreted the resolution to cover issues not specified by its provisions. Corporate parties involved in the technology industry could, however, submit disputes to arbitration even if the hearings took place outside of Saudi Arabia, provided the relevant corporate charters contained arbitration clauses. [190]

3.5 Progress and improvement of the legal framework

3.5.1 First Law of Arbitration

Economic development, especially in the private sector, contributed to arbitration's growing importance in the Kingdom in the latter decades of the twentieth century.[191] It helped initiate a slight change of direction in the Saudi jurisdiction, represented by the enactment of the first independent statutory law on arbitration in 1983[192] and the implementation of regulations issued in 1985.[193] Some well-respected *ulama* participated in the drafting of this law, together with other legal advisors and experts.[194] Lawmakers thus paved the way for the law's smooth enactment and enforcement by Saudi Sharia courts.[195]

3.5.1.1 An overview of the law

[189] LERRICK AND MIAN, *supra* note 168 at 187–89.
[190] *Id.*
[191] *Id.* at 176.
[192] The process under the 1983 Law combined the two models – *tahkim* and arbitration. The law introduced some new provisions to the practice of *tahkim*. This dissertation will therefore refer to the process from now on as arbitration, not *tahkim.*
[193] *Id.* at 176–79; Royal Decree No. 46 enacted the first Law of Arbitration in Saudi Arabia on 12/7/1403H (April 24th, 1983) [hereinafter THE 1983 LAW]. The law's regulations went into effect about two years after its enactment as a result of order No. 7 on 8/9/1405H. (May 27th, 1985) [hereinafter THE IMPLEMENTING REGULATIONS OF 1985].
[194] VOGEL, *supra* note 126 at 307, 308.
[195] *Id.*

The 1983 Law dealt with issues and principles similar to arbitration laws in other countries. It regulated subjects including the scope of arbitration, formalities of arbitration agreements, the legal capacity of disputants and appointed arbitrators, arbitrability, the proceedings, the arbitral award, and enforcement of the award. The Saudi law and its regulations, however, addressed these matters in somewhat different ways.

The 1983 Law recognized arbitration agreements and arbitration clauses as permissible for the first time in Saudi history.[196] It limited arbitrable disputes, however, to those suitable for conciliation.[197] Article 3, which gave administrative entities recourse to arbitration to resolve any dispute with other parties (upon approval by the Prime Minister), exemplifies the government's change in the attitude.[198] This provision effectively repealed (based on the principle of "The Hierarchy of Laws") the 1963 prohibition in government resolution No. 58.[199]

One issue, above all others, warrants attention: the implementing regulations contained new provisions that had no basis in the 1983 law and others that conflicted with the original statutory provisions. Article 4 of the law, for example, states: "An arbitrator is required to be experienced and of good conduct and reputation and full legal capacity. In case of multiple arbitrators, they shall be odd in number."[200] The law set forth no additional legal requirements and qualifications for arbitrators. Article 3 of the regulations, however, stipulated that only Saudis or Muslim non-nationals could serve as arbitrators.[201] Such disparity between the law (the superior)

[196] THE 1983 LAW, Article 1.
[197] *Id.* Article 2.
[198] *Id.* Article 3; THE IMPLEMENTING REGULATIONS OF 1985, Article 8.
[199] *See supra* notes 168 and accompanying text.
[200] THE 1983 LAW, Article 4.
[201] THE IMPLEMENTING REGULATIONS OF 1985, Article 3.

and the regulations (the inferior) clearly conflicts with civil-law principle of "The Hierarchy of Laws."[202]

3.5.1.2 A Brief Critical Evaluation of the 1983 Law

Numerous provisions in the 1983 law indicate a movement away from *tahkim* as previously practiced under Islamic law and toward arbitration as practiced in Western jurisdictions. A comparison of the 1983 Law to the provisions of *tahkim* under the Majelle makes this especially clear.[203] The provisions of the 1983 Law were, nevertheless, not identical to those in modern Western legislation; distinct differences persisted.[204]

Several specific features of modern arbitration laws remained unavailable in the Saudi jurisdiction.[205] The 1983 Law and its regulations, for instance, contained unnecessary procedural provisions that greatly expanded judicial supervision and intervention.[206] These provisions distinguished Saudi arbitration from arbitration laws in other countries. Such procedures could

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[202] Civil law has significantly impacted the development of the Saudi legal system in many ways. *See generally* Brand, *supra* note 181. For more information about the principle of The Hierarchy of Laws in the civil law, *see generally* J. H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (1985).

[203] *See* THE 1983 LAW, Article 1; the 1983 Law, for example, recognized both arbitration agreements and arbitration clauses. *Id.;* under the provisions of the Majelle, meanwhile, courts had the authority to hear cases even if an arbitration agreement existed between the parties. And arbitration clauses were not valid under the Majelle.

[204] Sayen, *supra* note 18.

[205] Professor Carbonneau lays out the fundamental characteristics of modern arbitration statutes as follows:

1-These laws recognize the validity of both arbitration agreements and clauses.

2-Unless otherwise agreed by the parties, courts under modern provisions have no jurisdiction to hear any case that pertains to a dispute in which the disputants have previously agreed to submit to arbitration.

3-The court's supporting role, by which courts seek to assist and reinforce the arbitral process, in arbitration is stated clearly in many provisions in contemporary legislation.

4-Courts have restricted grounds, under modern laws, upon which any judiciary body may set aside, modify, or correct an arbitral award, as specified by the governing law in each case.

5-Current laws recognize "anational" arbitration in cases and disputes pertaining to international commerce, by which the arbitration process, and the outcomes thereof, receive more flexible treatment in order to support the arbitral process by lessening, if not preventing, any possible limitation or intervention caused by national laws at any stage of the process.

CARBONNEAU, *supra* note 1 at 123,124; for more information about the principle of "anational arbitration", *see generally* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME REV 263 (1988).

[206] *See* THE 1983 LAW, Articles 5, 6, 9, 17, 18, 19, 20, and 23.

cause the process to function inefficiently, which would eventually result in the failure of arbitration.[207] The Saudi law also failed to state the grounds for vacating arbitral awards.[208] Some have argued that the vagueness caused by some of the statutory provisions in this law would enhance the tendency toward procrastination, which could delay the process.[209] Enforcement of domestic and international arbitral awards under the 1983 Law also remained questionable.[210] The law failed to clarify, for example, the fate of international awards rendered by non-Muslims.[211] Some scholars have also argued that the Saudi court would not enforce or recognize all arbitration awards issued outside the Saudi jurisdiction, especially those that favored non-national parties; the court would, so the argument went, most likely review the merits of the case.[212]

The 1983 Law thus did not give arbitration the status it holds elsewhere; nor did it achieve the objectives of arbitration in other jurisdictions. Professor Carbonneau writes: "By eradicating judicial hostility to arbitration, modern statutes give arbitration systemic autonomy. They command that courts respect, assist, and refrain from trespassing on arbitral operations."[213]

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[207] *See generally* Sayen, *supra* note 18.

[208] *Id.*

[209] *Id.;* as an example of the aspects of the ambiguity caused by the 1983 Law, the provisions did not specify the grounds for setting aside an arbitral award. The law also did not specify which court had the jurisdiction to hear any claim in this regard. *see* AḤDAB AND EL-AHDAB, *supra* note 13 at 670.

[210] Sayen, *supra* note 18; AḤDAB AND EL-AHDAB, *supra* note 13 at 665–67.

[211] *Id*.

[212] *Id*.

[213] CARBONNEAU, *supra* note 1 at 124; Two additional points regarding the earlier Saudi law of *tahkim* warrant attention. First, the language of several articles in the 1983 Law and its regulations does not allow the law to meet these objectives or some of the features of recent arbitration laws as illustrated above. Article 1 of the 1983 Law, for instance, states the following: "It may be agreed to resort to arbitration with regard to a specific, existing dispute. It may also be agreed beforehand to resort to arbitration in any dispute that may arise as a result of the execution of a specific contract." Article 7 also asserts: "Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this Law." THE 1983 LAW, Article 1, 7. A comparison of these articles to a similar provision found in the FAA, for example, makes the distinction clear. Section 2 of the FAA reads: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act, 9 U.S.C. § 2 (1925); for more commentary about Section 2 of the FAA, *see*

The 1983 Law provided, despite its shortcomings, the first statutory framework for the arbitration process in Saudi Arabia, leading to many advantages. The enactment of the 1983 Law, first of all, narrowed the gap between the Saudi legal system and other jurisdictions. Some argued that it "… provides a comprehensive, uniform set of rules which are accessible to foreign businesspersons and their legal counsel. [It] is designed to allay their fears over the previous lack of judicial and legislative support for commercial arbitration."[214] Second, it responded, to a degree, to the societal needs at that time.[215] Third, it contributed in to the development of Saudi arbitration law by paving the way for future reforms and opening the door for society to more readily accept future progress. The 1983 Law benefitted the legal system, too; it created a legal framework that helped dissipate years of judicial hostility toward codified laws and tribunal awards.

This achievement (i.e. the 1983 Law), given the complexity of the Saudi system at the time, marked a huge step forward in building a legal framework for arbitration; it brought the Saudi legal system closer to the practices, based on universally-recognized principles, embraced in other countries.[216] One could also argue that Saudi lawmakers realized that no shift occurs all at once; a

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CARBONNEAU, *supra* note 1 at 149-65. Second, while it was assumed that the regulations would provide more procedural details in regard to the implementation of these provisions in a way that would promote the arbitration agreement and arbitration clauses and the enforcement thereof, the regulations provided little, if any, explanation of these articles. They contained, instead, an ambiguous new provision not explicitly stated in the law that does not allow recourse to arbitration in matters pertaining to public policy. *See THE* IMPLEMENTING REGULATIONS OF 1985, Article 1; *see also* the United Kingdom Arbitration Act 1996, Sections 5, 6 and 9, *availble at*: http://www.legislation.gov.uk/ukpga/1996/23/section/2 (last visited Feb 10, 2016). for more commentary about these Sections of the 1996 Act, *see* ROBERT MERKIN & LOUIS FLANNERY, ARBITRATION ACT 1996 1–4 (5th ed. 2014).

[214] Sayen, *supra* note 18. Goerge Sayen, however, in suggesting some possible scenarios that the practice of the 1983 Law would reveal, concludes:

"[The 1983 Law] will be a success if those who utilize its procedures do not try to make it into a vehicle for wholesale change. Awards that pay only lip service to the Shari'a will likely be overturned by judicial authorities, resulting in a great deal of frustration on all sides. Skillful arbitrators and parties perceptive enough to choose the appropriate procedure (and the appropriate arbitrator) for the case, can play an important role in the slow process of discovering a workable application of the Shari'a to the commercial realities of the twentieth century." *Id.*

[215] LERRICK AND MIAN, *supra* note 168 at 176.

[216] For more information about the complications that surrounded the Saudi legal system in its early history, *see generally* VOGEL, *supra* note 126.

legislative approach characterized by the notion that "less can be more" may therefore prove more effective because of potential fears and resistance toward the codified law and its provisions. Assessments of the 1983 Law ultimately must consider two main points. First, the enactment of the law – though inadequate without additional provisions – was a necessary step to establish a sufficient legal framework for arbitration. Second, the enactment of the 1983 Law did not mean Saudi Arabia and its system had become an arbitration-friendly country.[217] That would require further steps and advancements.

3.5.2 Accession to the New York Convention

The absence of a governing legal framework at both domestic and international levels meant that, before acceding to the New York Convention, Saudi Arabia did not enforce arbitral awards, especially those not in favor of the Saudi government.[218] This led several foreign courts to grant investors Mareva injunctions[219] to freeze Saudi assets.[220] Such incidents, however, did not renew the Saudi government's hostility toward arbitration, as in the past.[221] Saudi Arabia unexpectedly acceded to the 1958 New York Convention in 1993,[222] signaling a dramatic rise in the status of arbitration in the Saudi jurisdiction.[223]

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[217] *See* AḤDAB AND EL-AHDAB, *supra* note 13 at 670, 671; "Saudi Arabia… is far from being one where arbitration is either the preferred or the most practical method of dispute resolution. Heavy State intervention in accordance with the Arbitration Act means that the arbitration process is duplicative and far from the ideals exhibited elsewhere in the world." *Id.*

[218] Abdul Hamid El-Ahdab, *Saudi Arabia Accedes to the New York Convention*, 11 J. INT. ARBITR. 87 (1994).

[219] The Mareva injunction is a court order that supports the process of International Arbitration by freezing a country's assets located abroad. *See generally* Lars E. Johansson, *The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant*, 31 UC DAVIS REV 1091 (1997).

[220] El-Ahdab, *supra* note 218.

[221] *Id.*

[222] Royal Decree No. (M/11) on 16/7/1414H (December 29th, 1993); the following was an observation by one of the scholars in regard to Saudi Arabia's accession to the New York Convention: "It should be noted that the Kingdom made no reservation—as was done by other countries—concerning the nature of the dispute subject-matter of the award as it did not require that this dispute be a "commercial" dispute." *Id.*; The full text of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, can be accessed at: 1958 New York Convention Guide, *available at*: http://newyorkconvention1958.org/?opac_view=-1 (last visited Mar 8, 2017).

[223] It can be also seen as an example of the willingness of the Saudi government to move toward the Western model of the process rather than the Islamic approach.

Commitment to economic growth, once again, motivated the Kingdom's decision.[224]Saudi Arabia received substantial benefits as a result of acceding to the New York Convention, as do all member states.[225] The desired economic growth was one obvious benefit; the Kingdom's accession motivated foreign businessmen and investors to do business in Saudi Arabia. Accession to the convention also meant that other member states would recognize and enforce arbitral awards rendered in Saudi Arabia.[226] The Kingdom thus acquired the right to enforce any award rendered inside its jurisdiction and issued in its favor in any other jurisdiction, pursuant to the provisions of the Convention.[227]

Many scholars viewed the accession to the New York Convention by an Arab Muslim country as progress;[228] others, however, perceived this development differently. They argued that despite its accession to the New York Convention, Saudi Arabia had not changed its hostile attitude toward international arbitration.[229] Article V(2) (b) of the New York Convention did not oblige

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[224] El-Ahdab, *supra* note 218; "The National Committee of the ICC, issue of the Council of Chambers of Commerce and Industry in Saudi Arabia, had an important role in the preparation of the Kingdom's accession to the New York Convention. It convinced the competent authorities of the interest of this accession in order to encourage international commercial trade with the Kingdom of Saudi Arabia." *Id.*

[225] *See* Brower and Sharpe, *supra* note 151. This article effectively explains many of these gains; it illustrates the progress that many Muslim States have achieved after acceding to the New York Convention. The same could be said about many other member States. For more general information regarding how developing countries benefit from acceding to international arbitration conventions, *see generally* Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID REV. 19–65 (1987).

[226] 1958 New York Convention, *supra* note 222.

[227] *Id.;* Kuwait, for example, was unable to enforce an award in the United Kingdom issued in 1973 within its jurisdiction against a British company because both countries were non-signatory to the New York Convention at that time. Many years later, however, both countries became members of the convention, which enabled Kuwait to enforce the award in the United Kingdom. *Id.*; *Kuwait v. Sir Frederick Snow*, 1 ALL E.R. 733 (HOUSE OF LORDS 1984); *see also* Albert Jan van den Berg, *Does the New York Arbitration Convention of 1958 apply retroactively: decision of the House of Lords in Government of Kuwait v. Sir Frederic Snow and others*, 1 ARBITR. INT. 103–107 (1985).

[228] Brower and Sharpe, *supra* note 151.

[229] Kristin T. Roy, *New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards, The*, 18 FORDHAM INTL LJ 920 (1994); *see also* Whitney Hampton, *Foreigners Beware:Exploring the Tension between Saudi Arabian and Western International Commercial Arbitration Practices: In re Aramco Services Co.*, J DISP RESOL 431 (2011). ("Saudi Arabia finally acceded to the NYC in 1994. The NYC allows its signatory countries the option of refusing to recognize any foreign arbitration award that goes against their public policy. This has allowed Saudi Arabia the ability to align itself more closely to international dispute resolution standards without having to abandon its public policy or religious beliefs. … Remember that the New York Convention, ratified by Saudi Arabia, was designed to ensure

Saudi Arabia either to recognize or enforce any foreign arbitration award that conflicted with its public policy.[230] Some scholars regarded this as a major issue for foreign investments and investors in Saudi Arabia.[231] They argued that if the ratification of the New York Convention indicated Saudi Arabia's readiness to improve the situation regarding the recognition and enforcement of arbitral awards issued in other member States, article V (2) (b) of the convention undermined the promise.[232] Proponents of this school of thought believed Saudi Arabia's decision to join the New York Convention would not increase the number of foreign awards enforced in the Saudi jurisdiction. It would not therefore improve the situation. Kristin T. Roy writes:

> The New York Convention provides a vehicle for the recognition of international commercial arbitral awards, thus accomplishing Saudi Arabia's goal of modernizing its international dispute resolution methods. At the same time, Article V (2) (b) of the New York Convention provides a safe harbor wherein Saudi Arabia does not have to recognize a non-Saudi Arabian arbitral award that is contrary to its public policy. Article V (2) (b) allows Saudi Arabia to embrace the international community and its rules for international dispute resolution and enforcement, without rejecting its own history and public policy. [233]

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the enforcement of foreign awards. The problem, however, is that the Convention allows judicial bodies to refuse recognition of a foreign award if it goes against their public policy. Some nations have interpreted this provision narrowly, finding that an arbitration award can be refused only if it violates international policy**.** However, Saudi Arabia seems to have adopted a much broader interpretation, allowing it to deny any arbitration award that does not comport with its own national policy. This is particularly relevant here because Saudi Arabia's laws and public policies, which are so heavily based on a strict interpretation of the Shari'a, stand in stark contrast to those of many member states.") *Id.*

[230] 1958 New York Convention, *supra* note 222. Article V(2)(b) reads: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country." *Id.;* scholars have concluded that, based on the flexibility granted by this article and the convention as a whole, by joining this convention, Saudi Arabia managed to "accomplish both of its current needs: (1) the need to modernize in the international community; and (2) the need to maintain its history and religious beliefs." Roy, *supra* note 229. The convention, in other words, gave Saudi Arabia "the ability to align itself more closely to international dispute resolution standards without having to abandon its public policy or religious beliefs." Hampton, *supra* note 229.

[231] Roy, *supra* note 229.

[232] *Id.*

[233] *Id.*; *see also* Mark Wakim, *Public policy concerns regarding enforcement of foreign international arbitral awards in the Middle East*, 21 N. Y. INT. LAW REV. (2008).

Article V (2) (b), however, applied to all member states and therefore, in reality, all member states could benefit from the provision's exception. Those who believe the provision fails to promote the status of international arbitration should criticize the article itself, or the Convention, rather than individual member States.[234] Saudi Arabia aimed to modernize its international system of dispute resolution by adopting an international instrument available to all sovereign States. Such criticism would only be justified had Saudi Arabia continued to abstain from the convention, which represents the modern trend in international arbitration.[235] The Kingdom's efforts to preserve its values, traditions (both religious and cultural), and legacy while continuing to modernize stem, moreover, from the legitimate right to reject what it deems contrary to its fundamental principles. Contemporary constitutions and national laws in several jurisdictions have protected such rights.[236]

This chapter has shown on several occasions that modernization efforts in Islamic legal systems, including the Saudi legal system, went hand-in-hand with the preservation of Islamic

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[234] Many articles have been written in this respect. For example *see* Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA J INTL COMP L 25 (2009); *see also* V. V. Veeder, *Is there a Need to Revise the New York Convention?*, 1 J. INT. DISPUTE SETTL. 499–506 (2010); *but see* Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, VAN DEN BERG 689–696; Emmanuel Gaillard, *Is There a Need to Revise the New York Convention*, 2 DISP RESOL INTL 187 (2008).

[235] The New York Convention is viewed as "the cornerstone of the international arbitration system" and among the most significant international instruments which regulates international trade. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW & SECRETARIAT, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) 1 (2016).

[236] *See* for example, THOMAS E. CARBONNEAU & WILLIAM ELLIOTT BUTLER, INTERNATIONAL LITIGATION AND ARBITRATION: CASES AND MATERIALS 565–69 (2nd ed. 2013). Section 328 of the Civil Procedure Code in Germany states that Germany will not recognize any foreign judgment that conflicts with any national law particularly the principles of the German constitutional law. *Id.* at 566; The full text of the German Code of Civil Procedure (as amended up to Act of August 31, 2013) can be accessed at: http://www.wipo.int/wipolex/en/text.jsp?file_id=324362 (last visited Mar 11, 2017). The United States is another example. Section 3 of the "Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act)" forbids domestic courts from recognizing or enforcing a foreign libel judgment in several cases. For example, libel laws applied by foreign courts that do not provide the same protection for freedom of expression granted by the First Amendment to the Constitution and by the Constitution and state law – the domestic court, in such cases, will base its decision regarding the defendant's accountability for libel on the First Amendment to the Constitution and the Constitution and law of the defendant's state. The full text of the 2010 SPEECH Act can be accessed *at:* H.R.2765-111TH CONGRESS (2009-2010): SPEECH ACT (2010), *available at:* https://www.congress.gov/bill/111th-congress/house-bill/2765/text (last visited Mar 10, 2017).

principles. The Saudi system has historically taken steps toward modernization in response to existing needs of the moment, and *fiqh* has driven these reforming processes.[237] Understanding this mechanism is essential; it will fuel and foster any further advancement in the Saudi legal system.

3.6 Arbitration Law of 2012

Scholars have noted that acceding to the 1958 New York Convention and implementing the UNCITRAL Model Law indicate "a State's formal endorsement of, and commitment to, arbitration."[238] The Saudi jurisdiction did not fully complete these steps until the second decade of the twenty-first century. The ratification of the New York Convention by many Muslim and Arab countries led to these jurisdictions to pass new arbitration laws.[239] The UNCITRAL Model Law inspired and influenced these new laws.[240] This advancement in international arbitration aimed to foster a global practice of arbitration based on the Model Law that would apply at the domestic level and be reflected in the national laws.[241] It also "provide[d] an excellent statutory framework for arbitral proceedings and thus a hospitable legal climate for such proceedings in any State adopting it."[242]

One of the most important aspects of the UNCITRAL Model Law warrants particular attention: specialists in Islamic law and from different cultural and legal backgrounds actively

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[237] *See generally* VOGEL, *supra* note 126. This chapter explains how Islamic *fiqh* played a significant role in the evolution of *tahkim*. It also describes how parties conducted the practice in, for example, the famous case between Ali and Mu'awiya under Islamic Sharia with some of the highest standards known in the practice of arbitration today.

[238] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 5 at 335.

[239] Brower and Sharpe, *supra* note 151. Some of these countries are Egypt, Turkey, Azerbaijan and Bahrain … etc.

[240] *Id.;* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: 1985 ; WITH AMENDMENTS AS ADOPTED IN 2006, (Vereinte Nationen ed., 2008); *see generally* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989).

[241] Paulsson, *supra* note 225.

[242] *See* Carl-August Fleischhauer, Foreword to HOLTZMANN AND NEUHAUS, *supra* note 240 at V.

contributed to the process of drafting the Model Law.[243] This suggests that the adoption of the Western approach to arbitration need not conflict with Islamic principles. A middle ground exists between the two systems. Some Arab scholars argue:

> [T]he evolution of the concept of Islamic arbitration and the adaptation thereof to the spirit of the century is not a derogation from, or a betrayal of Islamic law, but it is a return to its sources. … Any step accomplished by the Shari'a in order to keep in step with the spirit of the century is neither a betrayal of Islamic Fiqh, nor an imitation or copy of other laws, as long as it respects the principles contained in its sources. One should not forget that Islamic law contains a rule according to which "*any difficulty must be made easier*," …[244]

3.6.1 An overview of the law

Saudi Arabia embraced the "wave of modernization"[245] by enacting a new Law of Arbitration in 2012, nearly two decades after joining the New York Convention. The UNCITRAL Model Law served as an important source of inspiration for this new law.[246] It recognizes, like the 1983 Law, arbitration clauses and agreements, according to which parties can submit both existing and future disputes to arbitration.[247] Article 2 deals with the scope of arbitrability. It asserts that the 2012 Arbitration Law applies to all types of disputes conducted domestically, but only to international commercial disputes conducted outside Saudi Arabia in which the disputants agree to abide by Saudi law.[248]

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[243] Paulsson, *supra* note 225; Brower and Sharpe, *supra* note 151.
[244] AḤDAB AND EL-AHDAB, *supra* note 13 at 16.
[245] Brower and Sharpe, *supra* note 151.
[246] The Saudi Law of Arbitration was enacted by Royal Decree No. M/34 on 24/5/1433H (April 16th, 2012) [hereinafter, THE 2012 ARBITRATION LAW], which replaced the 1983 Law.
[247] THE 2012 ARBITRATION LAW, Articles (1-1), 9.
[248] *Id*. Article 2; Article 2 of the 2012 Arbitration Law reads: "Without prejudice to provisions of Islamic Sharia and international conventions to which the Kingdom is a party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.
The provisions of this Law shall not apply to personal status disputes or matters not subject to reconciliation." *Id.*

Article 2 also defines as non-arbitrable "personal status disputes" and "matters not subject to reconciliation."[249] Articles 2 and 3 explicitly state that the 2012 Arbitration Law does not cover international arbitration related to subject matters other than international trade.[250] The law distinguishes between national and international arbitration and thereby limits the scope of international arbitration related to commercial disputes to four types of cases that Article 3 specifies.[251] Note, however, that in the Model Law, which influenced the 2012 Arbitration Law, the word "commercial" encompasses any issue arising from commercial relations and transactions, contractual or non-contractual.[252]

The 2012 Arbitration Law promotes the concept of party autonomy unlike the implementing regulations of the 1983 Law; it allows disputants to freely choose the applicable law by which their dispute should be decided, as long as that law does not conflict with the Islamic Sharia.[253] The parties, therefore, may include a "choice of law" clause in the original contract or

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[249] *Id*.

[250] *Id*. Articles 2, 3.

[251] *Id*. Article 3; Article 3 states: "Under this Law, arbitration shall be international if the dispute is related to international commerce, in the following cases:

1. If the parties to an arbitration agreement have their head office in more than one country at the time of conclusion of the arbitration agreement. If a party has multiple places of business, consideration shall be given to the place of business most connected to the subject matter of the dispute. If either or both parties have no specific place of business, consideration shall be given to their place of residence.
2. If the two parties to arbitration have their head office in the same country at the time of conclusion of the arbitration agreement, and one of the following places is located outside said country:

a. The venue of arbitration as determined by or pursuant to the arbitration agreement;
b. Any place where a substantial part of the obligations of the commercial relationship between the two parties is executed;
c. The place most connected to the subject matter of the dispute;

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

[252] Such as "any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road." UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: 1985 ; WITH AMENDMENTS AS ADOPTED IN 2006, 1 n.2. (Vereinte Nationen ed., 2008).

[253] THE 2012 ARBITRATION LAW, Article 5.

in their arbitration agreement. Several other provisions of the law, which prescribe general rules and procedures for parties to follow unless they agree otherwise, also reinforce party autonomy.[254]

The 2012 Arbitration Law constituted a major step forward; it granted robust support for the arbitration process and indicated a trend toward favoring arbitration in the Kingdom. One aspect of this support relates to enforceability, as the law empowers both parties and courts to uphold arbitration agreements and arbitration clauses. Article 11, for example, instructs the court to dismiss any case if the parties have agreed to arbitrate the disputed matter and the defendant requests an enforcement of the arbitration provisions.[255] The law, however, requires that such a request must precede any other statement or plea submitted by the defendant to the court.[256] A defendant's participation in the court proceedings without requesting enforcement of the arbitration agreement denotes his intention to give up the right to arbitrate. This provision makes clear that, unlike the FAA in the U.S. and the 1996 Arbitration Act in the UK, the 2012 Arbitration Law, like laws in many other civil law jurisdictions, prefers case dismissals to stays of judicial proceedings when parties have made arbitration agreements regarding the disputed matters.[257]

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[254] *See Id.* Articles (6-1), (8-2), (15-2), (22-1), 26, (29-1), (33-1), (33-3), (34-1), (34-2), 36, 38, (39-3), (39-5), 40, (50-3).

[255] *Id*. Article 11; Article 11 also asserts that lawsuits filed in court should not interrupt any stage of arbitral proceedings or the rendering of arbitral awards.

[256] *Id*.

[257] In this regard, *see generally* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009); *see also* Gary Born, INTERPRETING SECTION 9(1) OF THE ARBITRATION ACT 1996: LOMBARD V GATX KLUWER ARBITRATION BLOG (2012), *available at*: http://kluwerarbitrationblog.com/2012/05/24/interpreting-section-91-of-the-arbitration-act-1996-lombard-v-gatx/ (last visited Mar 21, 2017); "Generally speaking, all major common law systems … expressly provide for a stay of litigation brought in violation of a valid arbitration agreement, whereas courts in civil law jurisdictions do not merely stay pending litigations, but dismiss them entirely." *Id.;* the issue of whether to stay the proceeding or dismiss the case has been the subject of lively debate among scholars. For example, suggesting that staying the judicial proceeding would benefit the arbitration process as well as the parties of the arbitration agreement under the provisions of the FAA, one scholar has concluded that "Other than removing the proceedings from the court's docket and from the judicial sphere, a dismissal can stifle proceedings, increase litigation costs, and create an undue delay—precisely what the FAA was meant to combat." Jesse Ransom, *United States Federal Circuit Court Practice: Stay versus Dismissal on Motions to Dismiss and Compel Arbitration*, 2 ARB BRIEF v (2012); *see also*, Angelina M. Petti, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3*, 34 HOFSTRA REV 565 (2005); *but see* Richard A. Bales; Melanie A. Goff, *An Analysis of an Order to Compel Arbitration: To Dismiss or Stay*, 115 Penn St. L. Rev. 539, 560 (2011).

Article 12 further demonstrates the 2012 Arbitration Law's favorable approach to arbitration, Article 12 instructs courts to refer disputes to arbitration if the disputants agree to arbitrate the disputes. Parties must, however, clearly specify in their agreements the disputes they intend to resolve via arbitration to make their agreements legally valid.[258] Articles 11 and 12 generally express strong support for the arbitral process and demonstrate the positive trend in Saudi law toward ensuring enforceability of arbitration agreements and arbitral clauses.

The separability doctrine is another aspect of the 2012 Arbitration Law's support for arbitration. Separability protects arbitration clauses or arbitration agreements from any challenge to the validity of original contracts between parties by making the former separate from the latter.[259] "The nullity of the main contract, therefore, does not—*ipso facto*—invalidate the agreement to arbitrate. The moving party must establish that the alleged flaw also affects the provision for arbitration."[260] Such doctrines decrease the chance that any parties will procrastinate, which in turn supports the arbitral process and the enforceability of arbitration agreements.[261] Article 21 of the 2012 Arbitration Law expresses the separability doctrine, stipulating that any arbitration provision included in a contract should stand independently from all other provisions. The annulment of the main contract does not therefore necessarily lead to the annulment of the arbitration provision, unless the arbitral tribunal identifies the arbitration provision itself as invalid.[262]

The doctrine of separability does not operate alone; it parallels the concept of *Kompetenz-Kompetenz* within the systematic framework of arbitration.[263] "In fact, separability has no practical

[258] THE 2012 ARBITRATION LAW, Article 12.
[259] CARBONNEAU, *supra* note 1 at 56, 57.
[260] *Id.* at 50, 51.
[261] *Id.* at 51.
[262] THE 2012 ARBITRATION LAW, Article 21.
[263] CARBONNEAU, *supra* note 1 at 56, 57.

function other than to trigger the application of *Kompetenz-Kompetenz.*"[264] The latter principle requires that the arbitration tribunal decide all claims brought by any party to invalidate the arbitration clause or any claim regarding the arbitral clause's scope of application.[265] It supplements the provision of Article 21 in the 2012 Arbitration Law by preventing the national court from exercising or claiming any jurisdiction over such pleas.

Article 20 clearly asserts the principle of *Kompetenz-Kompetenz*. It grants arbitration tribunals exclusive jurisdiction over jurisdictional allegations, including but not limited to any challenges to agreements to arbitrate on the grounds of the non-existence of such agreements, their invalidity, or claims regarding whether the agreements to arbitrate encompass certain disputes or not.[266] Professor Carbonneau notes the significance of the doctrines of separability and *Kompetenz-Kompetenz*, emphasizing the following:

> The separability and *Kompetenz-Kompetenz* doctrines reinforce the autonomy of the arbitral process. They give arbitrators judge-like authority and are likely to dissuade parties from engaging in perfunctory challenges to arbitrator jurisdiction. Court supervision of the arbitrator's determination of such issues is likely to be lax and delayed until the final award is rendered. For all intents and purposes, under these doctrines, the arbitral tribunal decides questions pertaining to the validity and scope of its adjudicatory authority. [267]

The 2012 Arbitration Law also protects the parties from any harmful error of law or unfair consequences that may result from the arbitration. Article 38-2 permits disputants to give the tribunal the power to make an amicable settlement to resolve their dispute.[268] It allows the tribunal, therefore, to decide the dispute in conformity with the "the rules of equity and justice."[269] The law does not specify these rules; the phrase only indicates that the tribunal should seek to settle such

[264] *Id.* at 56.
[265] *Id.* at 56.
[266] THE 2012 ARBITRATION LAW, Article 20.
[267] CARBONNEAU, *supra* note 1 at 57.
[268] THE 2012 ARBITRATION LAW, Article (38-2).
[269] *Id.*

disputes in a friendly way – in a way that prioritizes the satisfaction of both parties over accordance with the law.[270] The law grants this device as a "safety valve" for the parties of arbitration.[271]

The 2012 Arbitration Law also contains several provisions pertaining to the enforcement of arbitral awards. It restricts the right to appeal to a request to vacate the arbitral award by one of the parties.[272] It also limits the possibility of challenging awards by specifying the grounds for an award's revocation.[273] The law, moreover, limits the court's oversight of arbitral awards by not granting the court the jurisdiction to review awards on the merits.[274] The law gives the court hearing an appeal the authority to set aside any arbitral award if it conflicts with Islamic Sharia law, Saudi public policy, or agreements the parties have made. Courts can also set an award aside if the dispute does not fall within the scope of arbitrable issues defined by the 2012 Arbitration Law.[275]

3.6.2 The practice and the 2012 Arbitration Law: catching up with legislative modernization

The 2012 Arbitration Law introduced several important concepts for the first time into the Saudi legal system, especially in the field of arbitration. Enacting this law thus narrowed the gap between Saudi law and other jurisdictions in the field of alternative dispute resolution, at least in theory. Its enactment demonstrates that arbitration in the Kingdom has evolved in such a way as to achieve a modern perspective while at the same time maintaining its religious and traditional values. This surely proves that *fiqh* remains, as always, the heart of development in this area.

[270] CARBONNEAU, *supra* note 1 at 57–60.
[271] *Id.* at 59.
[272] THE 2012 ARBITRATION LAW, Article 49.
[273] *Id.* Article (50-1).
[274] *Id.* Article (50-4).
[275] *Id.* Article (50-2).

The 2012 Arbitration Law has yet to be thoroughly tested due to the short period of time since its enactment.[276] Actual practice must emulate the progressive trend by enacting the legal principles established by the 2012 Arbitration Law. The bench, for its part, should demonstrate acceptance of this reform and willingly participate and support the process by enforcing valid arbitration agreements and awards to the fullest possible extent, supporting the arbitral proceedings pursuant to the provisions of the law, and limiting the exercise of their supervisory power, thus reducing judicial oversight to a minimum.[277]

True and effective change requires that a tangible shift in practice follow the qualitative transformation represented by this new legislation. This will help ensure that this reform in the Saudi arbitration system remains in place, and that the system does not regress to its earlier state. The enactment of the 2012 Arbitration Law, in other words, is promising and represents significant progress,[278] but to be considered a success it must shape and guide actual practice. The law, for example, provides significant support for the arbitral process in governing the relationship between courts and tribunals. It minimizes court intervention and supervision, and includes many provisions protecting the parties' autonomy and the arbitrators' competence.[279] Future dialogue between courts and tribunals will reveal whether the new legislation has ended court hostility to arbitration and curbed judicial intervention and supervision. The 2012 Arbitration Law should reshape this dialogue to reflect both the great support the law grants to the tribunal and the arbitral

[276] *See generally* Faris Nesheiwat & Ali Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 ST. CLARA J INTL L 443 (2015).

[277] For more information about the judicial supervision of arbitration and court intervention in the arbitral process, *see generally* CARBONNEAU, *supra* note 1; Frances T. Freeman Jalet, *Judicial Review of Arbitration the Judicial Attitude*, 45 CORNELL LQ 519 (1959); Okezie Chukwumerije, *Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996*, 15 ARBITR. INT. 171–191 (1999); W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 TEX INTL LJ 699 (2015).

[278] Jean-Pierre Harb & Alexander G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a*, 30 J. INT. ARBITR. 113–130 (2013).

[279] For example *see* THE 2012 ARBITRATION LAW, Articles (11-1), (11-2), 12, (15-1-A), (15-1-B), (15-2), (15-3), (17-1), (18-1), 22, (24-2), 50.

process in general and the fundamental concepts of arbitration as recognized internationally. Enactment of the 2012 Arbitration Law in Saudi Arabia may, in short, have set the wheels of arbitration in motion, but whether the new device will keep the wheels turning effectively remains an open question.[280]

3.6.2.1 Legal education: the role of law schools

Shaping a robust arbitration practice in Saudi Arabia will require a better understanding of the importance of the newly introduced principles of arbitration and all the doctrines involved in the 2012 Arbitration Law. Law schools in the Kingdom should serve as a primary avenue to accomplish this objective. The present education system must reform to keep up with the evolution of the legal system. A brief examination of the current curricula of ten Saudi Arabian law schools[281] shows they teach subjects including labor law, corporate law, commercial contracts and banking, commercial transactions and the recently enacted Law of Enforcement. None, however, offer courses in arbitration.[282] Only one out of the ten has begun moving in this direction; its updated curriculum for the academic year 2017-2018 includes a two-credit general ADR course.[283] Exclusion of arbitration law from law school curricula stems from Saudi Arabia's historical hostility to arbitration; it runs counter to the current trend toward supporting the practice, and will

[280] I borrowed this metaphor and example from Professor Carbonneau's description of the status of ADR in the last decades of the twentieth century in the United States. *See* THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 247 (1989).

[281] This brief examination of both well established and more recent law schools in different parts of the country takes into account the geographic dimension. It considers law schools from the following universities: King Abdulaziz University, King Saud University, Umm Al-Qura University, Tabuk University, Princess Nourah bint Abdulrahman University, Majmaah University, Taibah University, King Faisal University, King Khalid University, and Shaqra University. The findings are based on information made available in the law schools' websites.

[282] *See* for example, The Curriculum Plan, Taibah University Law School, *available at*: https://www.taibahu.edu.sa/Pages/AR/DownloadCenter.aspx?SiteId=6226f67e-43b3-41d8-b9d1-985c416db80e&FileId=010c8fa1-2a71-4fe9-a5e9-c5ab84413182 (last visited Aug 3, 2017).

[283] The new law school curriculum plan, Princess Nourah University *available at*: http://www.pnu.edu.sa/en/Faculties/Management/systems/Pages/planofstudy.aspx (last visited Aug 3, 2017).

not help boost the status of arbitration in the country. Saudi law schools must update the current curriculum to better prepare students to respond to the demands of both society and the labor market.

Teaching arbitration as an independent subject in law schools would significantly shape the future of this process. Prospective lawyers, legal consultants, judges and arbitrators should be aware of the importance of this method, as well as the manner in which it should function, in order to ensure its effectiveness and success.[284] Scholars should design several well-planned core modules in arbitration. The proposed curriculum should cover the various steps of arbitration including arbitration clauses, arbitration agreements, arbitral proceedings, arbitral awards, and enforcement. It should also incorporate crucial topics and skills such as:

(1) The definition of arbitration and its distinguishing features.

(2) A comprehensive explanation of its fundamental concepts and doctrines.

(3) An overview of the history of arbitration as well as a discussion of its increasing popularity.

(4) An explanation the various types of arbitration.

(5) An examination of the aspects of the contemporary practice.

(6) The national and international legal frameworks for arbitration, including examples from best practices around the world.

The proposed modules should take into consideration "learning by interaction" techniques to maximize effectiveness. Simulations and mock arbitration would help students develop such essential skills as party representation and drafting arbitration clauses and agreements.[285]

[284] *See generally* T. Carbonneau, *Resource, Teaching Arbitration in US Law Schools*, 12 WORLD ARBITR. MEDIAT. REP. 227 (2001); Stephen J. Ware, *Teaching Arbitration Law*, (2003).

[285] *See generally* Carbonneau, *supra* note 284.

Simulations would also build students' self-confidence and help them develop the skills they will need to become successful arbitrators.

Legal education institutions can also help promote arbitration and its status by offering continuing education programs to practicing arbitrators, lawyers, and judges. Schools need to develop new continuing education programs and review and reassess currently offered courses to ensure they serve their purpose and contribute to the objective. This would require a collaborative effort between courts, law schools, governmental entities (like the Ministry of Justice), public institutions (such as the Saudi Bar Association) and other private organizations.

3.6.3 Analysis of potential problems

3.6.3.1 Statutory time limits

Several practical issues related to the 2012 Arbitration Law may cause problems. The 2012 Arbitration Law only allows parties sixty days after the notice of an arbitral award, for example, to file an action to set aside that award.[286] The UNCITRAL Model Law, meanwhile, gives the parties three months.[287] Saudi law stipulates that, if the arbitration agreement includes special appeal procedures before an appeal tribunal—an increasingly a common practice in the international arena—parties and the appeal tribunal will face a tight time frame.[288]

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[286] THE 2012 ARBITRATION LAW, Articles 51.

[287] *See* Article 34 of the UNCITRAL Model Law, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 252; UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AND SECRETARIAT, *supra* note 235.

[288] Arbitration appellate tribunals have been the subject of recent debate. *See* William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM REV INTL ARB 531–607 (2000); Yilei Zhou, *Breaking the ice in the international commercial arbitration: from the finality of arbitral award to the arbitral appeal mechanism*, 3 CHINA-EU LAW J. 289–299 (2014); *see also* David A. Gantz, *An appellate mechanism for review of arbitral decisions in investor-state disputes: prospects and challenges*, 39 VAND J TRANSNATL L 39 (2006); Eric Van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP DISP RESOL LJ 157 (2002); *see also* Ian Laird & Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System*, 7 J APP PR. PROCESS 285 (2005).

3.6.3.2 Overlapping and conflicting laws

The Law of Enforcement, enacted in Saudi Arabia about two months after the enactment of the 2012 Law of Arbitration, presented another issue.[289] It supplemented the latter with new provisions pertaining to the enforcement of national and international arbitral awards. Any party seeking to enforce an arbitral award thus must go through a lengthy process governed by the Law of Arbitration and the Law of Enforcement.

The 2012 Law of Arbitration stipulates that parties can appeal arbitral awards before the assigned courts and parties can also appeal arbitral awards vacated by those court.[290] The party favored in an award, in such a case, will most likely seek to enforce the award by filing a petition before the enforcement judge under the Law of Enforcement.[291] The Law of Enforcement also allowed parties to appeal a judge's ruling of a lack of jurisdiction, refusal to enforce the award, or postponement.[292] Parties can also appeal a judge of enforcement's ruling to validate or enforce the award.[293]

The Law of Enforcement also gives the enforcement court the authority to set aside any award that violates Sharia or Saudi public policy.[294] This provision duplicates a procedure carried out by another court under the Law of Arbitration.[295] Such provisions increase judicial supervision

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[289] Royal Decree No. (M/53) on 13/8/1433H (June 20th, 2012) [hereinafter THE ENFORCEMENT LAW]. Almost eight months later, following the enactment of the law of enforcement, ministerial order No. 9892 issued and put into force the implementing regulations on 17/4/1434H. (February 27th, 2013) [hereinafter THE ENFORCEMENT IMPLEMENTING REGULATIONS].

[290] THE 2012 ARBITRATION LAW, Articles 50, 51.

[291] THE LAW OF ENFORCEMENT, Articles 2, 8, 9.

[292] *Id*. Article 6; THE ENFORCEMENT IMPLEMENTING REGULATIONS, Articles (6-4), (6-5).

[293] THE LAW OF ENFORCEMENT, Articles 1, 3, 6, 9; THE ENFORCEMENT IMPLEMENTING REGULATIONS, Articles (3-1), (6-4), (6-5), (9-1).

[294] THE LAW OF ENFORCEMENT, Article (11-5); THE ENFORCEMENT IMPLEMENTING REGULATIONS, Articles (9-1), (11-3).

[295] Article (50-2) of the 2012 Arbitration Law states the following: "The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law." THE 2012 ARBITRATION LAW, Article (50-2).

by making the arbitral awards subject to multiple levels of review exercised by different types of courts. The absence of a clear statutory definition of the Saudi legal system's fundamental principles, moreover, makes determining if a conflict exists a matter of judicial discretion. This increases the risk that an award will be set aside. The wide exercise of judicial discretion could also result in abuse; it makes the fate of arbitral awards unpredictable and vague.[296]

The 2012 Law of Arbitration also does not draw clear distinctions between provisions of Islamic Sharia law and public policy. Article (50-2) states: "The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom …"[297] This article indicates that the Law of Arbitration distinguishes between the two terms; the word "and" introduces an additional matter that the award should not violate, namely "public policy in the Kingdom." The Law of Enforcement, however, defines "public policy" as the provisions of Islamic Sharia, which means no such distinction exists between the two terms.[298]

The 2012 Law of Arbitration also governs arbitration related to administrative disputes. It allows governmental bodies to arbitrate disputes with the prime minister's approval, like the 1983 Law.[299] The 2012 Law of Arbitration, however, does not legally require the prime minister's approval if a special provision of the law permits submission to arbitration.[300] The Law of Enforcement, however, excludes any judgment or resolution regarding administrative cases from the jurisdiction granted to the judge of enforcement.[301] A legal vacuum clearly exists in such cases,

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[296] For more information about judicial discretion in the Islamic system and under the Saudi legal system, *see generally* VOGEL, *supra* note 126.
[297] THE 2012 ARBITRATION LAW, Article (50-2).
[298] THE LAW OF ENFORCEMENT, Article 11; THE ENFORCEMENT IMPLEMENTING REGULATIONS, Article (11-3).
[299] THE 2012 LAW, Article (10-2).
[300] *Id.*
[301] THE LAW OF ENFORCEMENT, Article 2.

since no other legal instrument governs the enforcement of arbitral awards issued in cases related to administrative disputes. The 2012 Law of Arbitration has not eliminated this ambiguity; both it and its implementation regulations, which took effect on June 8, 2017, are silent in this area[302] The prime minister attempted to fill this legal void on July 27, 2017, ordering that the governor of each province would enforce all administrative judgments and resolutions.[303]

Determining the effectiveness of the new procedure will require more time, but several concerns and relevant points warrant attention. First, the new procedure does not provide the same legal guarantees for administrative arbitral awards that the Law of Enforcement provides for other types of awards. Privileges granted by the Law of Enforcement but excluded from administrative arbitral awards include compulsory enforcement, direct enforcement, protective measures such as provisional and enforced attachment, and sanctions.[304] Both individuals and governmental bodies who receive favorable arbitral awards will not, as a result, benefit from all of the means of enforcement specified in the Law of Enforcement. Second, the procedures for enforcement of foreign awards specified by the Law of Enforcement, especially in Articles 11, 12, 13 and 14, do not govern administrative arbitral awards issued outside Saudi Arabia.[305] The absence of similar provisions governing administrative arbitral awards could create a double standard with regard to enforcing arbitral awards. Third, giving governors of provinces such authority could cause confusion and uncertainty and may conflict with the principle of judiciary independence. The current legal framework does not grant jurisdiction to any judicial body to hear cases and disputes related to enforcement of administrative court decisions. Assigning a judicial body to perform

[302] Several years after the enactment of the 2012 Arbitration Law, order No. 541 issued its implementing regulations on 26/8/1438H. (May 22nd, 2017) [hereinafter THE IMPLEMENTING REGULATIONS OF 2017].
[303] Order No. 49256 on 26/10/1438H (July 27th, 2017)
[304] *See* THE LAW OF ENFORCEMENT, Articles 7, 9, 23-92, 95.
[305] *Id*. Articles 11-14.

these tasks would therefore guarantee the protection of rights for all persons in society without distinction of any kind, and ensure equality before the law. These issues highlight the need to establish a new judicial body in the administrative courts system with the jurisdiction to enforce administrative court decisions and arbitral awards.

The problems listed above could seriously undermine the efficiency of the arbitral process and the Saudi jurisdiction's reputation for hospitality to arbitration. Gathering all arbitration-related provisions in one statutory framework would have better served the laws and the process of arbitration than dividing them into scattered parts, especially considering the short interval between the enactments of the two laws. Adopting such an approach would eliminate legal vacuums, overlapping laws, and conflicts between the two laws – making arbitration and the enforcement of arbitral awards more effective.

3.7 Recent developments in international practice

The Kingdom's adoption of the UNCITRAL Model Law in 2012 reduced its antagonism toward international arbitration. Other jurisdictions criticized Saudi Arabia prior to the enactment of the 2012 Law of Arbitration for not taking such a step. Many therefore expected that enacting this law would bridge the gap between the Kingdom and other jurisdictions regarding arbitration.[306] Numerous countries, however, have recently passed new laws that prohibit the use of foreign laws, especially Islamic Sharia.[307] Such prohibitions include the designation of Islamic Sharia as the law of choice in parties' agreements in national or international arbitration.[308] These

[306] Hampton, *supra* note 229.
[307] *Id.*
[308] Intense debate has surrounded the Islamic Sharia ban in many jurisdictions, such as Canada, England and Wales, as well as several states in the U.S. *see Id.*; Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe-An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM REV 427 (2006); *see also* Maryam Razavy, *Canadian Responses to Islamic Law: The Faith-based Arbitration Debates*, 32 RELIG. STUD. THEOL. (2013), *available at*:

jurisdictions will not, therefore, enforce arbitral awards based on agreements between parties in which the parties bind themselves by Saudi law or Islamic Sharia.[309] Saudi corporations must bear in mind such new international developments.[310]

Islamic Sharia bans apparently violate the principles of party autonomy and freedom of contract. Putting restrictions on these principles in any jurisdiction will negatively affect hospitality to arbitration and will increase hostility toward arbitration, thus decreasing the efficiency of the process. The New York Convention, moreover, grants reciprocal treatment.[311] Countries affected by such bans, including Saudi Arabia, could therefore hold firm to their rights of reciprocity regarding enforcement of foreign arbitral awards;[312] Saudi Arabia could, in other words, refuse to enforce arbitral awards rendered in any of the banning countries. International arbitration will bear the burden and suffer the consequences if such a standoff occurs.

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http://www.equinoxpub.com/journals/index.php/RST/article/view/19197 (last visited Mar 31, 2017); Sherene H. Razack, *The "Sharia law debate"in Ontario: The modernity/premodernity distinction in legal efforts to protect women from culture*, 15 FEM. LEG. STUD. 3–32 (2007); Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J. LAW RELIG. 379–414 (2009); Erin Sisson, *The Future of Sharia Law in American Arbitration*, 48 VAND J TRANSNATL L 891 (2015); SALIM FARRAR & GHENA KRAYEM, ACCOMMODATING MUSLIMS UNDER COMMON LAW: A COMPARATIVE ANALYSIS (2016); Rebecca E. Maret, *Mind the gap: the equality bill and Sharia arbitration in the United Kingdom*, 36 BC INTL COMP REV 255 (2013); *see also* Legislation tries to bar foreign influence - News - GoUpstate - Spartanburg, SC, *available at*: http://www.goupstate.com/news/20110204/legislation-tries-to-bar-foreign-influence (last visited Mar 31, 2017); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, COLUMBIA LAW REV. 169–209 (2007); Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice*, 28 WIS INTL LJ 108 (2010); *see also* Albert D. Spalding & Eun-Jung Katherine Kim, *Should Western Corporations Ban the Use of Shari'a Arbitration Clauses in their Commercial Contracts?*, 132 J. BUS. ETHICS 613–626 (2015).

[309] Hampton, *supra* note 229.

[310] *Id*.

[311] 1958 New York Convention, Article 1.

[312] Reciprocal treatment is also one of the legal requirements for enforcing international awards in Saudi Arabia under the provisions of the Law of Enforcement *See* THE LAW OF ENFORCEMENT, Article 11; THE ENFORCEMENT IMPLEMENTING REGULATIONS, Article (11-5); *but see* Geoffrey Fisher, *Sharia Law and Choice of Law Clauses in International Contracts*, LAWASIA J 69 (2005); for more information about the right of reciprocity under the New York convention, *see generally* Young-Joon Mok, *The principle of reciprocity in the United Nations Convention on the recognition and enforcement of foreign arbitral awards of 1958*, 21 CASE W RES J INTL L 123 (1989).

4. Conclusion

Arbitration has evolved over time from a friendly, non-binding method of settling disputes that maintained the parties' relationship to an effective, binding method of adjudication. Disputants today resort to arbitration in order to obtain clear-cut rulings that end their disputes. This chapter demonstrated that *tahkim* and arbitration are two different institutions. They have resembled one another at various times in history, but the two processes evolved in different ways. *Tahkim* reached its peak in the early days of Islam; it faced great hostility after the era of the Prophet and his successors due to allocation of power issues. The role of the process, therefore, decreased in many Islamic jurisdictions at that time, and its popularity weakened, but it continued to exist. This chapter showed that *tahkim* became a subject of debate between different Islamic schools of thought. The differences between these schools regarding the nature of *tahkim* and its final products, however, did not prevent *fiqh* from supporting the practice – keeping it alive through a long period of hostility.

The modern manifestation of *fiqh* has helped introduce principles of arbitration into many Islamic countries. It played a crucial role in the development of the 2012 Law of Arbitration in Saudi Arabia, which established many modern arbitration doctrines in the Kingdom. One could characterize the Saudi experience with arbitration as follows: whenever legislators demonstrated the will, *fiqh* helped them lead the way.

The adoption of internationally recognized principles of arbitration via the enactment of the 2012 Law of Arbitration proves that these principles do not conflict with the country's constitution or Islamic Sharia; Articles 1 and 67 of the Basic Law of Governance would have

prevented its enactment if they did.[313] Arbitration, its principles, and awards should therefore receive full enforcement and support in order to encourage arbitration in Saudi Arabia and to help boost its reputation on the international stage. Adopting such principles also demonstrates the Saudi system's movement toward arbitration as practiced in many Western jurisdictions today, rather than toward *tahkim*. This movement demonstrates an evolutionary stage in which a Muslim country has finally come "full circle" in this area.[314]

This progress does not, however, mean that the Saudi jurisdiction has become hospitable to arbitration, particularly to international arbitration. Saudi Arabia has taken many steps to foster international arbitration, and the 2012 Law of Arbitration is a significant milestone. It bodes well for the future of the Saudi jurisdiction, and the environment may well become more hospitable to arbitration in years to come. The door, however, is not yet wide open.[315] Enactment of a one-size-fits-all method in arbitration law, in other words, ensures modernity in the legal system, but it does

[313] The Basic Law of Governance in Saudi Arabia was enacted by Royal Decree No. A/90 on 27/8/1412H (March 1st, 1992). Article 1 states: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH)." Article 67 states: "The Regulatory Authority shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the State's affairs, according to Sharia. …" *Id.*

[314] Brower and Sharpe, *supra* note 151. ("No one argues that international arbitration is without its pitfalls, or that misguided national courts have ceased to threaten the efficacy of international arbitration. But when one views the current strength and vibrancy of international dispute resolution in the Islamic world against arbitration's troubled history there during the past half-century, one cannot fail to see progress at every level. A prominent Arab commentator has argued that 'the evolution of the concept of Moslem arbitration and the adaptation thereof to the spirit of the century is not a derogation from, or a betrayal of Moslem law, but is a return to its sources.' The third phase of its modern relationship to international arbitration thus appears to have brought the Islamic world full circle.") *Id.*; the main aspects of the third phase of the relationship between international arbitration and Muslim countries are: (1) Joining the New York convention. (2) Adopting the UNCITRAL Model Law. (3) Opening up to institutional arbitration by domestic and international levels. *Id.* The upcoming chapter will discuss the latter requirement, which Saudi Arabia has also fulfilled.

[315] One development under the reforms represented by the 2012 Arbitration Law, as well as the Law of Enforcement in Saudi Arabia, is the recent decision of the Court of Enforcement in Riyadh, which will enforce an US$18.5 million arbitral award in Saudi Arabia. The award was issued outside the country, in London, pursuant to the rules of the ICC. Hosam ibn Ghaith, SAUDI ENFORCEMENT COURT CONFIRMS THAT IT WOULD ENFORCE A LONDON ICC AWARD KLUWER ARBITRATION BLOG (2016), *available at*: http://kluwerarbitrationblog.com/2016/07/13/saudi-enforcement-court-confirms-that-it-would-enforce-a-london-icc-award/ (last visited Apr 1, 2017). One could view this as advancement, if a sluggish one. It is, after all, only one step forward.

not necessarily indicate that the particular system has become an arbitration-friendly jurisdiction.[316]

Commercial arbitration currently lacks the status to be an effective means of resolving disputes in Saudi Arabia; parties face lengthy and unpredictable enforcement processes after arbitral tribunals render awards. The cumbersome enforcement process makes the Saudi jurisdiction unappealing to international investors. Legislative and judicial recognition of the need for arbitration in resolving disputes will enhance the enforcement of both domestic and international arbitral awards. This will have a significant impact on the effectiveness of arbitration and the country's hospitability toward the practice.[317]

A thorough assessment of the current framework of dispute resolution and access to justice could lead to the requisite judicial and legislative recognition. Such an evaluation would identify all issues leading to ineffectiveness in the system before proposing any remedies, such as alternative dispute resolution methods.[318] The legislative and executive branches should collaborate to evaluate the effectiveness of all proposed mechanisms in resolving the identified issues and then implement the mechanisms that prove appropriate. They should not conduct these assessments in isolation from other concerns addressed at the international level. They should consider all contemporary problems and trends in the international practice of arbitration, since Saudi Arabia is not immune to these issues.[319]

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[316] CARBONNEAU, *supra* note 1 at 115–23.
[317] *Id.* at 117–19.
[318] *See generally* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, (Samuel Estreicher & Joy Radice eds., 2016).
[319] *See generally* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, (Julian D. M. Lew ed., 1987); ANNUAL FORDHAM LAW SCHOOL CONFERENCE ON INTERNATIONAL ARBITRATION AND MEDIATION, ARTHUR W ROVINE & MARTINUS NIJHOFF PUBLISHERS, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION THE FORDHAM PAPERS (2013) (2015); *see also* Thomas Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, (2014); Thomas Stipanowich, *Arbitration: The New Litigation*, 2010 UNIV. ILL. LAW REV. 1 (2010); Thomas Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, (2011). Several recent

Legal education could also help bolster legislative and judicial recognition of arbitration's importance in the Saudi jurisdiction. Curriculum reform in all law schools in the country should reflect the progress made in the legal system in general, and in the area of arbitration in particular. Such reform would ensure that prospective legislators, lawyers, judges, and arbitrators acquire the updated knowledge and skills they need for their professions. Reform should lead to improved understanding of the need for arbitration, and help bridge the gap between law and practice.

The above-mentioned steps will lead to an informed vision regarding all potentially necessary reforms for promoting progress and efficiency in the dispute-resolution framework. The arbitration system in Saudi Arabia needs further improvement, both domestically and internationally, to achieve two ultimate goals; increasing access to justice at the national level and becoming internationally recognized as a jurisdiction hospitable to arbitration. Learning from the experience of other legal systems will help Saudi Arabia achieve these objectives faster. The next chapter elucidates this approach.

studies have observed new trends in arbitration. For example *see* Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, (2014). This empirical study found that disputants prefer the other dispute resolution methods – for example, mediation and court trial – it studied over both binding and non-binding arbitration. *Id.* Disputants preferred mediation over all methods of adjudication, except for court trial, and the study findings suggest that disputants preferred mediation because they want an extended role in the decision-making process – one that includes their presence and greater involvement during the process. *Id.*; *see generally* GLOBAL PERSPECTIVES ON ADR, (Carlos Esplugues Mota & Silvia Barona Vilar eds., 2014).

CHAPTER FOUR: CREATING A STRONG ENABLING ENVIRONMENT FOR ARBITRATION: LEARNING FROM OTHER LEGAL SYSTEMS

CHAPTER FOUR: CREATING A STRONG ENABLING ENVIRONMENT FOR ARBITRATION: LEARNING FROM OTHER LEGAL SYSTEMS

1. Introduction

The last chapter highlighted the newness of the legal framework and practice of arbitration in the Saudi jurisdiction. The current arbitration law was enacted in 2012; it superseded and repealed rarely used provisions of the country's first arbitration law, which was enacted in 1983.[1] The relative novelty of the Saudi arbitration system explains the *immaturity* and simplicity of arbitration practice in Saudi Arabia.

The development of arbitration law and practice is a continuous process that countries can foster in a variety of ways. Saudi Arabia would benefit from examining and applying the lessons of its own history with arbitration (covered in the previous chapter). It would also gain valuable lessons and insights from exploring the history of the practice in other jurisdictions (this chapter's focus).

Arbitration has become an increasingly sophisticated and effective process for resolving various types of disputes in many countries around the world. The United Kingdom and the United States are among the leading jurisdictions in establishing and maintaining successful arbitration practices. The success of arbitration in both jurisdictions resulted from prolonged evolution processes.

Examining the history of those evolution processes can benefit Saudi Arabia in many ways. First, it will improve Saudi understanding of the nature and origins of the principles that the 2012 arbitration law implemented. These principles were derived from and inspired by the UNCITRAL Model Law; by adopting them, the Saudi legal system has made itself current with the latest trends in international practice. Second, studying the evolution of arbitration in the U.S. and the U.K. will

[1] The Saudi law of arbitration was enacted by the Royal Decree No. M/34 on 24/5/1433H (April 16th, 2012).

also produce valuable insights, since legislators, judges, lawyers, and practitioners in these countries have long discussed and debated the process and enforcement of its principles, and thereby made substantial progress in creating effective arbitration systems.

The short period since the enactment of the 2012 Saudi arbitration law reinforces the importance of learning from the rich experience of countries with strong arbitration systems; doing so will make practice under the current law more effective and successful. It will also help overcome potential problems, barriers, and difficulties that the new practice may face or cause, since these jurisdictions may have experienced and successfully addressed similar issues. In addition, this approach may provide guidance when looking ahead and initiating future reforms in this field.

This chapter identifies several valuable lessons from the history of arbitration in the U.K. and the U.S.; it seeks to better understand the process and the various principles it relies on in order to ensure the functionality and effectiveness of arbitration practice in the Saudi jurisdiction. The remainder of this chapter is organized as follows: Section 2 examines the arbitration legal system in the UK. Section 3 explores the American experience and the law and practice of arbitration in the United States. These two sections provide overviews of the evolution of arbitration practice and how it has progressed over time in both jurisdictions. They also derive key lessons from the main stages of these processes. Section 4 concludes this chapter.

2. The English Perspective and Experience

2.1 The history of the legal framework for arbitration

2.1.1 Early developments

In "Arbitration: History and Background," former Lord Justice of Appeal, Sir Michael J Mustill[2] summarized the main difficulties arbitration faced during its early emergence in England in the late seventeenth century: arbitration agreements were rescindable and unenforceable, and the system lacked efficient mechanisms to enforce arbitral awards.[3]

English lawmakers passed the first Arbitration Act in 1698 to address these problems.[4] The 1698 Act stipulated that arbitration agreements were enforceable and irrevocable only after a obtaining a court ruling mandating enforcement.[5] The Act also authorized courts to impose sanctions on parties who rescinded arbitration agreements; this did not, however, stop parties from revoking arbitration agreements.[6]

After the 1698 Act, the status of arbitration in England did not change significantly until the nineteenth century. The 1833 Statute specified that once a court ratified an arbitration agreement, arbitrators could continue arbitration proceedings to render an award unless otherwise

[2] Michael John Mustill, *Arbitration: History and background*, 6 J INTL ARB 43 (1989); He was appointed in 1985 as Lord Justice of Appeal in England. He went on to hold a position of Judge on the Appellate Committee of the House of Lords in 1992, and was appointed Lord of Appeal in Ordinary. Subsequently, he became a life peer, as Lord Mustill of Pateley Bridge in North Yorkshire. He died in 2015.
[3] *Id.*
[4] *Id*.
[5] 9 WM. III, C. 15. (1698); *see also* Paul L. Sayre, *Development of commercial arbitration law*, 37 YALE LAW J. 595–617 (1928).
[6] Ernest G. Lorenzen, *Commercial Arbitration. International and Interstate Aspects*, 43 YALE LAW J. 716–765 (1934).

ordered by the court.[7] Arbitration agreements, however, could still be revoked prior to court ratification, since English courts continued to uphold the principle of "common law revocability."[8]

In 1854, English lawmakers enacted the Common Law Procedure Act[9] to regulate procedural and enforcement issues associated with the implementation of arbitration agreements. This Act gave courts the authority to order parties to arbitrate complicated disputes while retaining full control over cases with the right to intervene to prevent and/or resolve any maladministration during the arbitration process.[10] The 1854 Act initiated three basic developments in English arbitration: 1) it granted judges the authority to enforce arbitration agreements by postponing court hearings; 2) it framed and established rules regarding appointment of arbitrators to resolve any potential problems, especially if a party failed to appoint an arbitrator in the manner specified by the agreement; and 3) it gave judges control of cases involving arbitration, including the authority to remand cases to arbitrators for further clarification.[11]

2.1.2 The Arbitration Act (1889)

Many of the concepts that arbitration relies on today, including freedom of contract and the enforceability of arbitral agreements and awards, evolved during the nineteenth century. Legislators began devoting more attention to issues related to the recognition and enforcement of such principles. These legislative efforts coincided with the industrial revolution in England,

[7] 3 & 4 WM. IV, C. 42. (1833); Sayre, *supra* note 5; Lorenzen, *supra* note 6.
[8] Sayre, *supra* note 5.; for more information about the common-law revocability, *see generally* Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN REV 819 (1961).
[9] 17 & 18 VXCR. C. 125. (1854)*; see also* H. T. HOLLAND, T. CHANDLER & C. E. POLLOCK, THE COMMON LAW PROCEDURE ACT, 1854: WITH TREATISES ON INJUNCTION AND RELIEF, ALSO A TREATISE ON INSPECTION AND DISCOVERY (1854).
[10] Mustill, *supra* note 2.
[11] KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, U.S., GERMAN AND FRENCH LAW 11–12 (2010).

indicating that legislators recognized the role of arbitration in economic growth.[12] The 1889 Arbitration Act,[13] for example, maintained, reinforced, and strengthened the 1854 Common Law Procedure Act's arbitration provisions.[14] Section 1 states: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or judge, and shall have the same effect in all respects as if it had been made an order of Court."[15] The 1889 Act also governed all arbitration agreements—applying to both current and future disputes, whereas previous statutes only applied to specific arbitration-related disputes.[16]

Arbitration in the English jurisdiction thus progressed throughout the seventeenth and eighteenth centuries, as legislators passed statutes to support the process. Adherence to certain outdated principles and traditional judiciary practices (including the doctrine of common-law revocability), however, inhibited more substantial progress.

Legislative steps taken in the nineteenth century brought more significant development as the law began to recognize and enforce arbitration agreements of all types.[17] The expanding role of the courts in supervising the arbitration process, however, ran contrary to this progress.[18]

The early history of arbitration practice in England suggests that any legislative efforts that acknowledge arbitration's role in fostering economic growth and therefore seek to strengthen and support the practice should include measures limiting court intervention. Legislators should aim

[12] Mustill, *supra* note 2.
[13] 52 & 53 VICT. C. 49. (1889).
[14] Sayre, *supra* note 5; Lorenzen, *supra* note 6.
[15] 52 & 53 VICT. C. 49. (1889), § 1.
[16] *Id.*
[17] *See* for example, Lorenzen, *supra* note 6; Sayre, *supra* note 5.
[18] *See* for example, 52 & 53 VICT. C. 49 (1889), § § 1&5; GREAT BRITAIN & W. O. CREWE, THE LAW OF ARBITRATION: BEING THE ARBITRATION ACT, 1889 : WITH NOTES OF STATUTES, RULES OF COURT, FORMS AND CASES, AND AN INDEX (1898).

to ensure arbitral autonomy by restricting court involvement and the broad judiciary supervision; otherwise, such progress would not be sufficient and its objectives will not be achieved as planned.

2.2 Cause-effect relationship between courts and arbitral tribunals

The relationship between traditional courts and arbitration tribunals has ebbed and flowed for centuries.[19] Assertive actions carried out by one entity led to reactions from the other.[20] Both courts and arbitrators have sought to sway the allocation of power in their favor.[21] Legislation has played a decisive role in shifting the balance of power from one side to the other.[22] The law initially supported the courts completely, but that support gradually began to shift toward arbitration.

This struggle for power has positively influenced the shape of new laws governing the relationship between courts and arbitrators.[23] Arbitration award appeals were, for instance, submitted to traditional courts in England during the eighteenth century.[24] Parties could appeal the

[19] BUILDING THE CIVILIZATION OF ARBITRATION, 337–42 (Thomas E. Carbonneau & Angelica M. Sinopole eds., 2010). Professor Carbonneau observes that the English long regarded arbitration as a lower class venue compared to litigation. He describes the relationship between traditional the courts and arbitration as follows: "The relationship between arbitration and the courts had all the trapping of a Cinderella story or a Dickens novel. Arbitral tribunals were thought of as the step-children of the legal process, and it was believed that they should recognize their disabilities and lowly status and allow courts to supply the lawful conclusion to litigation." *Id*. at 337,339.

[20] *Id*. at 337-42.

[21] For more information about "Allocation of Power between courts and arbitrators" *see generally* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (2nd ed. 2001); *See also* Aaron-Andrew P. Bruhl, *Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, The*, 83 N.Y.U. L. Rev. 1420, 1490 (2008).

[22] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 337–42.

[23] *But see* Claude Reymond, *The Channel Tunnel {Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd., {1992} 2 All E.R. 609} case and the law of international arbitration.*, 109 LAW Q. REV. 337–342 (1993); Professor Reymond states the following: "Over the last 20 years or so the development of law and international arbitration has been marked by an obvious tendency to limit the possibilities of court intervention in the course of an arbitration. Thus England abolished the special case and curtailed the powers of the courts even in support of an arbitration. ... It may be that the tide is now turning: it is increasingly realized in international arbitration circles that the intervention of the courts is not necessarily disruptive of the arbitration. It may equally be definitely supportive, in the best English tradition' *Id.*; *see also* D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection–Is the Tide about to Turn*, 30 Tex. Int'l L. J. 71, 88 (1995); *see also* William Wang, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 Brook. J. Int'l L. 1059, 1100 (2002-2003).

[24] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 337–339.

truth-finding process, the accuracy of an arbitrator's determinations, and the tribunal's legal outcomes. Court review of these matters resulted in the revocation of many appealed awards.[25]

Arbitrators began excluding rationales for the awards they rendered to block further judicial intervention.[26] The 1854 Common Law Procedure Act explicitly limited such behavior by arbitrators. It established the "case-stated procedure", which gave parties and/or the tribunal the right to seek legal opinions in the form of court decisions regarding points of law at any stage during the arbitration process.[27] This development reinforced the courts' judicial oversight authority over arbitral proceedings and awards. Subsequent statutes made no major changes limiting the courts' power of intervention. The 1889, 1934, and 1950 Arbitration Acts actually expanded the statutory basis for the stated case procedure.[28] In fact, the 1950 Act prevented parties from agreeing not to resort to such procedures, which the 1889 Act had still allowed.[29]

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[25] *Id.*

[26] *Id.* at 338–39.

[27] 17 & 18 VXCR. C. 125 (1854), § 5; THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 125 n.2 (5th ed. 2014). BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 338–339.

[28] B. J. Conrick, *Where the Kings Writ Does Not Run: The Origins and Effect of the Arbitration Act of 1979*, 1 QLD. INST TECH LJ 1 (1985); § 19 of the 1889 Act introduced the consultative stated case and the 1934 Act authorized the assigning of interim awards through the case-stated procedure. *Id*. The practice persisted under the 1950 Act as § 21 addressed the stated case. *Id;* 14 GEO. 6 C. 27 (1950).

[29] Conrick, *supra* note 28; ("The 1889 Act had allowed the parties to contract out of the possibility of having an award stated as a special case. Section 7 of that Act ran, so far as relevant:

'The arbitrators or umpire acting under a submission shall, *unless the submission expresses a contrary intention*, have power...

(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court ...' (emphasis added)

Importantly the proviso in italics was dropped from s. 21 in 1950 with the result that the parties could not contract out of any of the forms of stated case.") *Id.*

Legislators apparently enacted this procedure to prevent arbitrators from rendering unreasonable awards.[30] Professor Carbonneau describes the reality of arbitration under the former statutes as follows: [31]

> Obviously, the foregoing developments reinforced the judicial power to oversee the determinations reached by arbitrators. The public interest in law application and adjudication demanded that courts have the authority to revisit all aspects of adjudication achieved through arbitration. The arbitral process, therefore, had little integrity and was, for all intents and purposes, devoid of real autonomy and independence. The integrity of law was seen as the primary and overriding value.

Some legal commentators have argued that the case-stated procedure contributed to the development of law, especially Maritime and Commercial law. They suggest it brought constancy to the practice of arbitration and compelled arbitrators to decide cases in accordance with law.[32] Commentators have also argued that despite the lasting recognition and adoption of this procedure throughout English jurisdiction, England remained a popular place for arbitration in the world.[33]

These arguments can be challenged on various grounds. First, the case-stated procedure made arbitration time consuming. Both the proper use and the misuse of the procedure triggered factors that led to significant delays in the process.[34] 1) By following the case-stated procedure's provisions like preparing the question of law or taking other actions stipulated by the Act, arbitrators unavoidably slowed the arbitration process. 2) Delays also resulted from parties' misuse of the procedure.[35] Parties resorted to the case-stated procedure to impede the process, its

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[30] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 338–39. ("The procedure was intended to quell arbitrator apprehensions about judicial supervision and, yet, assures that courts continued to be the exclusive oracles of the law. Whether a legal question should be referred to the courts was within the arbitrator's discretion—at least, at this stage in the evolution of the process.") *Id*. at 338.

[31] *Id*. at 339.

[32] MARK LITTMAN, *England Reconsiders "The Stated Case,"* 13 INT. LAWYER 253–259 (1979).

[33] *Id.*

[34] William W. Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV INTL LJ 87 (1980).

[35] *Id.*

conclusion, or the enforcement of the arbitral award. This slowed the arbitration process and hampered its effectiveness.[36]

Second, although many accepted or tolerated the foregoing factors at the national level, international practice in the twentieth century had evolved in a different direction. Successful and effective arbitration practice relies on several criteria: 1) acceleration of the process to ensure its effectiveness and efficiency in ending disputes in the manner to which the parties agreed; 2) protection of the autonomy of the parties and tribunals; 3) limiting the factors that may impede the dispute resolution process and adversely affect the conduct of the proceedings or the finality of the arbitral award; 4) reducing judicial review and court intervention in the arbitral process.[37]

The case-stated procedure not only made domestic arbitration ineffective, but also discouraged parties involved in international trade from arbitrating in England.[38] Acknowledging the issues that prevented England from maintaining its globally-recognized, arbitration-friendly reputation accelerated the actions taken to address them and to remove such obstacles.[39]

English legislators, therefore, initiated statutory reform that resulted in the exclusion of all types of case-stated procedure from the Arbitration Act of 1979.[40] The Act granted parties involved

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[36] *Id.*

[37] *Id.*; David W. Shenton & Gordon K. Toland, *London as a Venue for International Arbitration: The Arbitration Act, 1979*, 12 LAW POL INTL BUS 643 (1980); for more information regarding the modern principles of arbitration *see* CARBONNEAU, *supra* note 27 at 49–124.

[38] Park, *supra* note 34; Shenton and Toland, *supra* note 37; CARBONNEAU, *supra* note 27 at 125–26; Conrick, *supra* note 28.

[39] Shenton and Toland, *supra* note 37. The Commercial Court Committee in its report in 1978 acknowledged several drawbacks of the stated case and the rendering of awards without reasoning. *Id.;* REPORT OF THE COMMERCIAL COURT COMMITTEES, CMMD. NO. 7284 (1978). The report was widely perceived as the main reason for subsequent reform in the English jurisdiction: it included some suggestions and proposals for such improvements. It called for the abolition of the case-stated procedure and for placing limitations on appeals in certain cases. If the parties choose a governing law other than English law, the report also called for the enforcement of the parties' agreement and the prevention of court supervision if such prevention aligned with the parties' intentions. The committee ended the report by recommending reform and warning that "England can retain its position as the international leader in commercial law and arbitration only if it provides the services that its customers need." Shenton and Toland, *supra* note 37; *see also* Peter S. Smedresman, *Arbitration Act, 1979*, 11 J MAR COM 319 (1979).

[40] ARBITRATION ACT, C. 42. (1979).

in arbitration a new restricted appeal procedure to the High Court.[41] It also allowed parties to exclude the right to appeal from their cases by entering into an "Exclusion agreement" as specified by the Act.[42]

Many perceived this statutory development as a step forward. The 1979 Act enhanced the autonomy of arbitration parties and arbitral tribunals. It aimed to ensure the conclusiveness of arbitral awards and to decrease judicial review.[43]

Legal commentators and legislators deemed case-stated procedure a direct impediment to arbitration in England.[44] They predicted serious economic losses if tradesmen continued to refrain from choosing London as the seat of arbitration.[45] The need for reform in the English jurisdiction was therefore quite urgent. The enactment of the 1979 Act demonstrated legislators' sensitivity to business needs. The Act modernized the statutory framework for arbitration with the aim of helping arbitration address problems created by previous legislation.[46]

Some criticized the 1979 Act for the ambiguity and overly broad nature of several of its provisions, especially those related to judicial review and the new appeal process, which, they argued, could increase the discretion of the courts;[47] however, this statutory reform—particularly its elimination of the case-stated procedure—was an essential step toward modernizing the English jurisdiction's arbitration system. The enactment of the 1979 Act showed legislators' willingness

[41] *Id.* § § 1, 2. The Act allowed parties to appeal to the High Court only after obtaining permission from the court or the approval of all other parties. *Id.*

[42] *Id.* § § 3, 4; *see also* Shenton and Toland, *supra* note 37; parties may enter into an exclusion agreement after the beginning of arbitration proceedings in all national arbitration cases and in international arbitration involving claims subject to the admiralty jurisdiction of the High Court, or involving insurance, or commodities. For international arbitration related to all other claims, parties are free to exclude the right to appeal at any stage of their contracting relationships. Exclusion agreements in such cases may cover both existing and future disputes. *Id.*

[43] Shenton and Toland, *supra* note 37.

[44] Smedresman, *supra* note 39; Conrick, *supra* note 28.

[45] *Id.*

[46] Conrick, *supra* note 28. Shenton and Toland, *supra* note 37.

[47] *See* for example, Smedresman, *supra* note 39; Park, *supra* note 34.

to make the amendments necessary to meet modern requirements and keep pace with contemporary arbitration practice as it evolved internationally.

Arbitration law in England has evolved continuously since its inception in the seventeenth century. Legislators, laws, and the courts were the main players in this process until the early decades of the nineteenth century when arbitrators began taking on more prominent roles in the system's development. Legislators increasingly recognized the role and autonomy of arbitrators and the statutory framework of arbitration from the second half of the nineteenth century onward reflects this recognition.

The case stated procedure exemplified one important aspect of the relationship between the bench and arbitrators that legislators observed for many decades. These legislators realized that any statutory procedure threatened the autonomy of arbitral parties or the arbitration process itself would damage the effectiveness that process and make the jurisdiction unappealing to the international eye. This realization led them to abolish the case stated procedure in order to promote arbitration and achieve the desired economic objectives.

The English experience demonstrates that increased judicial supervision in any jurisdiction will discourage foreign investors from arbitrating in that jurisdiction, which will result in significant economic loss. The legislative branch should therefore closely observe the allocation of power between courts and arbitral tribunals to identify the statutory reforms necessary to ensure arbitration's continuing effectiveness and attractiveness.

2.3 Regulating court intervention via case law

The 1979 Act represented a new national trend toward promoting arbitration and reinforcing its effectiveness. This trend later found its way into English case law, especially after the 1993 House of Lords' in the well-known Channel Tunnel case.[48]

The English and French governments signed a construction agreement in the late 1980s to build a tunnel linking their countries under the English Channel. The main agreement stated that the two parties agreed to submit any dispute between them to arbitration under the Rules of the International Chamber of Commerce, and it designated Belgium as the seat of arbitration. A dispute arose between the concessionaires and the contractors soon after construction began. The contract between the two parties authorized arbitrators to enforce "principles common to both English and French law." Absent such shared principles, it required arbitrators to apply the "general principles of international trade law as have been applied by national and international tribunals."[49]

This clause made the resolution of any contractual conflict difficult. Arbitrators often struggled to identify or address the considerable number of shared principles, and the parties and their representatives frequently disagreed about which principles qualified as "common principles."[50] These difficulties highlight the vagueness and impracticality of the choice of law clause in the Channel Tunnel case, which impeded every attempt to proceed with the arbitration.[51]

A contractual dispute was brought before the English High Court in November of 1991. The court ruled that, notwithstanding the arbitration clause, it would order the interim injunction

[48] *Channel Group v Balfour Beatty Ltd.* [1993] Adj. L.R. 01/21.
[49] *Id.*
[50] LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 106-07 (Alan Redfern, Martin Hunter, & Nigel Blackaby Eds., 4th ed., 2004).
[51] *Id.*

requested by the plaintiff since the defendant had chosen not to perform its contractual obligations.[52] The court also refused to grant the defendant's motion to stay proceedings pending arbitration.[53]

In January 1992, the Court of Appeal reversed the High Court's decision and enforced the arbitration agreement, ruling that the High Court had no jurisdiction to issue the injunction.[54] The House of Lords dismissed the second appeal in January 1993, handling by essentially splitting the difference. The ruling gave the High Court jurisdiction to grant an interim injunction but explained that ordering an injunction in an attempt to forestall the authority of the arbitral tribunal and its decision would be improper.[55] The House of Lords' ruling, written by Lord Mustill,[56] noted the sophisticated, well-considered drafting of the arbitration clause and the agreed upon dispute resolution framework, which reflected rigorous discussion and thoughtful consideration between the parties. The ruling therefore asserted that the parties must accept it in its entirety and bind themselves to the system they freely chose. The ruling also confirmed the court's right to intervene

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[52] *Id.*

[53] *Channel Group v Balfour Beatty Ltd.*, *supra* note 48.

[54] *Id.*

[55] *Id.*; *see also* AMERICAN ARBITRATION ASSOCIATION, HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR. 79–99 (2010).

[56] Before explaining the judgment, Lord Mustill addressed the following areas of disagreement: "1. Should the action brought by the appellants against the respondents be stayed? I consider that the action can and should be stayed pursuant to the inherent jurisdiction of the court to inhibit proceedings brought in breach of an agreed method of resolving disputes. I thus arrive at the same conclusion as the Court of Appeal, but by a different route. It is therefore unnecessary to decide whether, as held by the Court of Appeal, the court would also have power to stay the action under section 1 of the Arbitration Act 1975. I nevertheless briefly state reasons for concluding, with some hesitation, that such a power does exist in the circumstances of the present case. 2. Is there in fact any dispute between the parties with regard to the subject matter of the action? In common with the Court of Appeal I conclude that this question should be answered in the affirmative. 3. Does the court have power to grant an injunction to prevent the respondents from ceasing work under an agreement dated 13 August 1986 (″the construction contract″)? The Court of Appeal held that no such power is conferred by section 12(6) (h) of the Arbitration Act 1950, and I agree. The Court of Appeal also held that the court had no power to grant the injunction under section 37(1) of the Supreme Court Act 1981. As I understand it the Court of Appeal would in any event have declined to uphold the grant of an injunction. For my part I consider that such a power does exist, but that it should not be exercised in the circumstances of the present case. Again, therefore, I reach the same conclusion as the Court of Appeal but by a different route." .

"in the right case" to reinforce arbitration proceedings by ordering interim relief, but denied such a right in this case for the reason explained above. The judgment concluded that granting the requested injunction would certainly contradict "the general tenor of the construction contract and […] the spirit of international arbitration."[57] The highest court of appeal in England thus denied the request for an injunction that would have prevented the arbitrators from deciding the matter freely and conclusively.

The *Channel Group v Balfour Beatty Ltd.* judgment clearly demonstrated significant judicial support for arbitral processes—enforcing the arbitration clause and reinforcing the tribunal's autonomy. Subsequent developments in case law, nonetheless, added to the vagueness surrounding arbitration's statutory framework. The House of Lords' ruling in the Channel Tunnel case did not, for instance, define what sort of cases would require court intervention to assist the arbitral process by granting an injunctive relief.[58] The ruling thus failed to precisely define the framework of the relationship between courts and arbitral tribunals in this regard.[59]

The final judgment in the Channel Tunnel case, in other words, showed judicial support for arbitration based on the court's understanding of the fundamental principles of the international practice of the arbitration process, which necessitates protecting party autonomy by upholding arbitration clauses. The absence of clear and decisive statutory provisions that enforce arbitration agreements and arbitral clauses, however, would put the fate of the arbitral process in the hands of the judiciary, enabling it to determine the appropriateness of court intervention on a case-by-case basis.

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[57] *Id.*
[58] AMERICAN ARBITRATION ASSOCIATION, *supra* note 55 at 98.
[59] *Id.* at 99.

The history of Channel Tunnel case demonstrates that the wide exercise of judicial discretion will invite uncertainty and unpredictability in any jurisdiction due to the lack of clarity in legal frameworks. It will also result in disagreements between courts, which will lead to varied practices. Extensive judicial discretion over arbitration does not attract investment in any part of the world; nor does it make a jurisdiction an ideal place for arbitration.

2.4 Arbitration Act of 1996

The gradual progress of the statutory framework of arbitration in England, especially during the twentieth century, and the ongoing development of case law in this area have made English arbitration statutes quite sophisticated.[60] The Arbitration Act of 1996[61] has been described as "the closest thing to a definitive code of arbitration law that had ever been enacted in England."[62]

The Model Law on International Commercial Arbitration introduced by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 influenced the 1996 Act. England

[60] NOUSSIA, *supra* note 11 at 13.; ("Since 1900, the general position has been that a commercial dispute can be speedily and efficiently determined in the courts as well as by arbitration, depending on its nature and what common practice in the particular sector requires, and that the two systems ought indeed to be properly regarded as coordinate rather than rival. The Arbitration Acts 1950, 1975, 1979 and 1996 all encapsulate the need for party autonomy as opposed to the previous tradition of judicial intervention.") *Id*.

[61] ARBITRATION ACT, C. 23. (1996).

[62] ROBERT MERKIN & LOUIS FLANNERY, ARBITRATION ACT 1996 1 (5th ed. 2014). Also of importance is the fact that The Arbitration Act was drafted under the supervision of the Departmental Advisory Committee (DAC). Justice Saville was the chairman of DAC at that time while Lord Mustill was the first appointed Chairman for the committee when it was founded in 1985. The legislature enacted the Act in 1996 and most of the provisions of the Act went into effect in 1997. In this short period of time, DAC released its report about the enacted legislation and the supplementary report came out after that. Both reports proved essential in demonstrating the need for the new bill; they underlined its purposes and provided a comprehensive illustration of the Act's provisions. *Id*. at 1, 432; MARY ARDEN, COMMON LAW AND MODERN SOCIETY: KEEPING PACE WITH CHANGE 203 (2015). *See also* M. J. Mustill, *The Mustill Departmental Advisory Committee on English Arbitration*, 4 ARBITR. INT. 160–161 (1988); *see also* Lord Justice Saville, *Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill*, 13 ARBITR. INT. 275–316 (1997); *see also* Justice Saville, *1997 Supplementary Report on the Arbitration Act 1996*, 13 ARBITR. INT. 317–330 (1997)*; see generally* Lord Justice Mustill, *A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law*, 6 ARBITR. INT. 3–62 (1990).

did not adopt the model law in full as many other jurisdictions did. Justice Mary Arden describes the relationship between the 1996 Act and the UNCITRAL Model Law as follows:

> [T]he 1996 Act alters arbitration law by introducing some of the provisions of the UNCITRAL Model Law, for example it enables a party to agree to apply 'equity clauses' to the substance of their dispute.
>
> The Arbitration Act 1996 is expressed in clear terms. The purpose of the Act was to update and modernize arbitration law and at the same time to make London an attractive venue for international arbitration.[63]

2.4.1 Overview of the 1996 Act

The 1996 Act requires that arbitration agreements between parties be made in writing.[64] It stipulates that only parties to the agreement are bound by its terms and that arbitration agreements cannot be enforced against non-signatories.[65] The 1996 Act also gives courts the authority to eliminate arbitrators if they demonstrate bias or if anything appears to challenge their competence or credentials.[66] In addition, it protects party autonomy by allowing disputants and the arbitrators to organize and conduct the arbitration process (i.e. laying down the rules they wish to apply) according to their own preferences.[67] Another significant feature of the 1996 Act is its recognition of the enforcement of arbitral awards.[68] It distinguishes between domestic and foreign arbitral decisions in terms of enforceability, court intervention, and the grounds for challenging arbitral awards.[69]

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[63] ARDEN, *supra* note 62 at 203.

[64] ARBITRATION ACT, C. 23. (1996), § 5.

[65] REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS, 154–56 (Felix Steffek *et al.* Eds., 2013).

[66] *Id.*; ARBITRATION ACT, C. 23. (1996), § 24.

[67] REGULATING DISPUTE RESOLUTION, *supra* note 65 at 154–56.

[68] Section 66 of the 1996 Act states that courts must grant approval before parties proceed with measures to enforce an arbitral award within the United Kingdom. ARBITRATION ACT, C. 23. (1996), § 66.

[69] REGULATING DISPUTE RESOLUTION, *supra* note 65 at 156. Under the provisions of the Act, Local arbitral awards are enforced by the same enforcement procedures as traditional court decisions. The Act provides several grounds under which local arbitral awards can be challenged. It shows the difficulty of challenging awards made outside of England and Wales by applying the criteria of the New York Conventions (Article 5) in this regard—proving the difficulty of challenging an international award in the UK. The Act also stipulates that courts have no jurisdiction to intervene in the enforcement of arbitral awards that fall under Geneva Convention of 1927, unless otherwise authorized by the Act. *Id*.

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The 1996 Act grants courts the authority to intervene during arbitration whenever they deem such intervention necessary to reinforce the arbitral process.[70] This shows that English courts still enjoy a certain degree of authority to intervene in the arbitration process.[71] Such interference, however, whether authorized by legislation or established by the courts themselves, was more prevalent in the past.[72] Professor Carbonneau described the effect of the 1996 Act as follows:

> The recent legislation replaced an entire section of the 1950 Act and abolished the High Court's common law jurisdiction to vacate an award for manifest error of fact or law. Moreover, it replaced the stated-case procedure with a limited right of appeal to the High Court.[73]

The 1996 Act allows parties to appeal to the High Court only after obtaining permission to do so. The Act, however, makes it difficult to gain such approval, stipulating that it be granted case-by-case and only "for truly significant or highly controversial legal questions."[74] The Act also

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[70] Sections 42-45 are titled: "Powers of court in relation to arbitral proceedings". Section 42 addresses the issue of Court enforcement of a tribunal's peremptory orders. Section 43 governs securing the attendance of witnesses. Section 44 sets forth Court authority and power granted to be exercised in support of arbitral proceedings. Section 45 contains provisions relating to determination of preliminary points of law. ARBITRATION ACT, C. 23. (1996), § § 42-45; The text of the 1996 Arbitration Act can be accessed at: http://www.legislation.gov.uk/ukpga/1996/23/data.pdf (last visited Nov 5, 2016).

[71] The ongoing relationship between courts and arbitration in English history is demonstrated by Lord Steyn's observation: "The supervisory jurisdiction of English courts over arbitration is more extensive than in most countries, notably because of the limited appeal on question of law and the power to remit. …it is certainly more extensive than the supervisory jurisdiction contemplated by the Model Law" Johan Steyn, *England's Response to the UNCITRAL Model Law of Arbitration*, 10 ARBITR. INT. 1–16 (1994); He also emphasized Lord Wilberforce's earlier statement regarding court oversight by quoting the following passage from the *Lesotho Highlands Development Authority v. Impregilo SpA and others* ruling: "Other countries adopt a different attitude and so does the UNCITRAL model law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here. …It has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors."
House of Lords Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others (Appellants), *available at*: http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050630/leso-1.htm (last visited Jan 31, 2016); For more information about *Lesotho Highlands Authority v Impregilo*, *see* MERKIN AND FLANNERY, *supra* note 62 at 215–16. For more details on Judicial oversight and English arbitration, *see generally* Okezie Chukwumerije, *Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996*, 15 ARBITR. INT. 171–191 (1999).

[72] REGULATING DISPUTE RESOLUTION, *supra* note 65 at 154–56.; BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 341–42. CARBONNEAU, *supra* note 27 at 125,125 n.2.

[73] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 341.

[74] CARBONNEAU, *supra* note 27 at 125–125 n.2.; BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 341–42.

ensures the jurisdiction's wide appeal by permitting international agreements to include provisions waiving the right to appeal to English courts.[75]

The legislative history that led to the Arbitration Act of 1996 in England is a tale of significant development made over centuries.[76] The modern provisions and all the features of the Act have made English arbitration more sophisticated and attractive to foreign businesses and trade.[77] Gathering all the provisions pertaining to arbitration in one statutory framework was one of the1996 Act's central contributions.[78]

Many countries have recently adopted the principles of the Model Law in full, but have struggled to enact its provisions in their practices and, therefore, have not yet proved themselves arbitration-friendly.[79] The 1996 Act, on the other hand, did not fully embrace the UNCITRAL Model Law; however, it conforms to modern principles of arbitration and aligns English arbitration practice with contemporary international practice by protecting both arbitral and party autonomy.[80] These protections, as the Act recognizes, necessitate reducing the supervisory role of the judiciary especially for international arbitration. The recognition of the importance of such principles and

[75] *Id*.; CARBONNEAU, *supra* note 27 at 125,125 n.2.

[76] Lord Steyn highlights the importance of "the radical nature" of the of the new features of the 1996 Act, quoting the following statement made by Lord Mustill and Stewart Boyd QC Commercial Arbitration (2001 Companion Volume to the Second Edition, preface): "The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities . . . have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature." House of Lords Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others (Appellants), *supra* note 71.

[77] CARBONNEAU, *supra* note 27 at 125–125 n.2.*;* BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 341–42.; GLOBAL PERSPECTIVES ON ADR, 119–20 (Carlos Esplugues Mota & Silvia Barona Vilar eds., 2014). Recent reports deem the 1996 Act efficient and make no recommendations for any amendments. They also reveal that corporations would rather refer their disputes to arbitration than to litigation for various reasons. *Id*.

[78] BORN, *supra* note 21 at 31, 32.

[79] CARBONNEAU, *supra* note 27 at 113–23.

[80] *See generally* BORN, *supra* note 21; BRUCE HARRIS, ROWAN PLANTEROSE & JONATHAN TECKS, THE ARBITRATION ACT 1996: A COMMENTARY (2014); MERKIN AND FLANNERY, *supra* note 62.

their positive impact on economic growth has helped transform London from an arbitration-unfriendly venue to a "hospitable-to-arbitration" jurisdiction.[81]

The success of the 1996 Act suggests that any country can draft a one-of-a-kind arbitration law to suit its own needs and to reflect its heritage and established practices as long as the law embraces the principles and doctrines of international arbitration practice. Confidence in the effectiveness of arbitration in resolving disputes and contributing to economic growth will help create a robust framework for such processes.

Certain jurisdictions could certainly achieve the same result by implementing the UNCERTAL Model Law, but the progress made by only a nominal adoption of the Model Law will remain slight and superficial. Implementation of the Model Law will not make a jurisdiction arbitration-friendly unless a strong belief in the necessity of arbitration and all the newly imported principles being introduced into the national law accompanies its implementation. Such an approach will ensure the wide acceptance of these principles, the full enforcement of the law, and strong support for arbitration. The UNCERTAL Model Law should therefore be seen as a means not an end in this regard.

[81] *Id.*; Professor Carbonneau has argued that the English jurisdiction was "less appealing" to arbitration before the enactment of the 1996 Act due to the continual existence of the stated case procedure in some former legislations. CARBONNEAU, *supra* note 27 at 125, 125 n.2.; BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 335., J Kodwo Bentil, *Making England a More Attractive Venue for International Commercial Arbitration by Less Judicial Oversight*, 5 J. Int'l Arb. 49, 66 (1988).

3. The Evolution of Law and Practice in the United States

3.1 Historical Background: early legal framework and practice

American arbitration has developed in several phases. During the seventeenth century, some Americans considered arbitration a peacemaking process and a community matter.[82] Bruce H. Mann argues that, in the past, Americans did not recognize the reality of arbitration and all of its features because they viewed it as a mean of community peacekeeping.[83] This conception diminished the role of arbitration.[84] Mann also argues that sociological changes over the years influenced the popularity and the development of arbitration.[85] Informal forms of arbitration proved the most effective means of settling disputes in close-knit communities, because they sustained community ties and relationships.[86] The American arbitration system only developed its current level of sophistication as a result of failures in community structures. People began to recognize the potential of arbitration as an alternative to cumbersome litigation.[87] The transformation of communities gave arbitration a new face and character.[88]

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[82] BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 101–21 (1987).He wrote: ("Unlike litigation, arbitration was inexpensive, expeditious, and private. Above all, it was, as [Zephaniah] Swift recognized, "neighbourly"—uniquely tied to and shaped by the communities in which it existed. The community ties were an essential part of arbitration. Without them, arbitration would not have been the popular and effective alternative to formal legal process that it was.") *Id.* at 101.

[83] *Id.* at 117–120; ("People tried arbitration 'for the avoiding of future [trouble] and lawsuits,' 'to settle peace between the parties,' 'for the friendly ending and appeasing of difference and [controversies],' 'to the end that justice may be done … and that [controversy] may be prevented,' 'hoping and [expecting] the difference [would] in love and utmost friendship be settled,' to prevent cost and [trouble] in the law.' They wanted an end to disputing, not simply a resolution of a particular dispute.") *Id*. at 118.

[84] *Id*. at 117-120.

[85] MANN, *supra* note 82 at 101.

[86] *Id;* ("… the absence of evidentiary structure, the power of the parties to define the scope of the inquiry, the spirit of compromise implicit in the submission, the ability of the parties to choose their arbitrators, the mutuality of awards, the privacy of the process, the discretion of the arbitrators—all made arbitration useful in preserving the interdependent relations that contributed to the stability of insular communities.") *Id.* at 134-35).

[87] *Id.*

[88] *Id.,* ("As the bonds of community weakened, the legal system appropriated arbitration to itself and turned it into a formal process that differed little from legal adjudication.") *Id.*

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> [A]rbitration in seventeenth-century Connecticut was a uniquely community-based form of handling disputes and was well suited to the needs of the communities it served. Communities were not static, however. They grew and changed, often to the dismay of their inhabitants. When communities changed, as they inevitably did, arbitration changed, also. It was too closely identified with community not to.[89]

The rudimentary nature of arbitration and the lack of a clear legal framework at that time meant that the process was easily confused with other methods of amicable settlement,[90] such as mediation and conciliation.[91] Some scholars have suggested, however, that the historical confusion about arbitration was intentional. They contend that the judiciary had a vested interest in weakening this alternative and resisting its anticipated popularity by creating ambiguity regarding its purpose and its ability to function properly and operate as a reliable form of adjudication.[92]

The enforceability of arbitration progressed significantly during the eighteenth century. In 1753, legislators in the colony of Connecticut passed "An Act for the more Easy and Effective Finishing of Controversies by the Use of Arbitration," which introduced a new legal structure for arbitration.[93] The desire for enforceability was one of the key factors behind the 1753 legislation. Arbitral awards became enforceable through legal procedures that prevented disputants who refused to accept the outcome of the arbitration process from ignoring awards.[94] Enforceability changed the whole process of arbitration and brought it closer to the adjudication process in that part of the country. Arbitration's new procedures resembled court procedures, and arbitral awards became similar to court judgments. The legislative actions taken in colonial Connecticut started a new chapter in the development of the American arbitration system:

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[89] MANN, *supra* note 82 at 109.
[90] FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 3–6 (1st ed. 1984).
[91] *Id.*
[92] *Id.*; ("As disputants became more involved in litigation, they neglected to exercise their own powers of self-regulation. Due to the absence of any contemporaneously organized arbitration machinery or established rules of procedure, it became far easier for parties in dispute to litigate than to arbitrate.") Id. at 5.
[93] MANN, *supra* note 82 at 134–36.
[94] *Id.* at 131–36.

> The process still went by the name arbitration, but it was no longer what the name once implied. In the course of becoming legally enforceable, a community-bound form of handling disputes lost its simplicity, and thus its uniqueness.[95]

Connecticut thus made considerable legislative progress regarding enforceability, but arbitration continued to suffer in many other parts of the country during the eighteenth and the nineteenth century. Numerous obstacles hindered its progress and, among other factors, judicial hostility as well as a lack of public confidence in the process and those overseeing it created a negative atmosphere for development.[96]

The early legal framework and practice of arbitration show the gradual, centuries-long shift and development made in the American jurisdiction. Arbitration was the first alternative means of dispute resolution to be legislated in the U.S. legal system. Legislative progress, however, was made at the state level and only in certain parts of the country. This resulted in varied practices nationwide regarding the enforceability granted to arbitration agreements and arbitral awards.

The evolution of arbitration over time necessitated wider recognition of more sophisticated principles to ensure the effectiveness of advanced methods. Federal authorities had to embrace fundamental doctrines such as the enforceability of arbitration agreements and the binding character of awards. This was important to counter continuing judicial hostility that seriously threatened arbitration over the centuries in the American jurisdiction.

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[95] *Id.* at 132; ("Arbitration changed because the communities that shaped it changed. Once severed from the communities it had served, arbitration, at least insofar as it rested on rules of court or pledged executions, differed little from formal legal adjudication. It no longer occupied a niche in the legal structure.") *Id.;* ("[Arbitration] was, as Zephaniah Swift later wrote, 'a court created, constituted, and appointed by the parties.'") *Id.* at 136.

[96] *Id.*; BORN, *supra* note 21 at 156.; CARBONNEAU, *supra* note 27 at 125–26.; *see also* NOUSSIA, *supra* note 11.; *see also* ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 141 (2nd ed. 2002); ("In the United States, arbitration historically was not well regarded by the courts. They felt that arbitration was a form of judicial ouster. In addition, it allows forum shopping through a choice of decision-maker, and it allows circumvention of the protections provided by the courts. The courts were concerned that the parties would lose the protections designed into the Constitution by choosing arbitration"). *Id.*; *see also* GLOBAL PERSPECTIVES ON ADR, *supra* note 77 at 490.

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The early history of arbitration in the American jurisdiction demonstrates that an inadequate legislative framework and a lack of judicial support together significantly diminish arbitration's applicability and efficiency. Judicial hostility will decrease the population's reliance on arbitration and hamper its effectiveness in resolving disputes unless countered with a statutory framework that ensures the enforcement of arbitration agreements and arbitral awards.

3.2 The FAA and the modern era of arbitration

The American Bar Association (ABA) eventually recognized the importance of federal support for arbitration and, during a 1920 meeting in St. Louis, directed three of its committees to draft a proposed Federal Arbitration Act.[97] The enactment of the FAA in 1925 marked a turning point in the history of arbitration in the United States. Courts were no longer the only legally recognized forums for resolving disputes. The FAA also declared the end of the era of animosity between arbitration and traditional courts by creating a powerful "national policy favoring arbitration."[98]

3.2.1 Aspects of legislative support

Many perceived the FAA as more comprehensive and effective in its content and provisions than other arbitration laws.[99] The Act legitimized arbitration agreements and explicitly

[97] Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE LAW J. 147–160 (1921). The first bill was drafted in 1921 by the following ABA Committees: The Committee on Commerce, The Committee on Trade and, The Committee on Commercial Law. *Id.*

[98] *Southland Corp. v. Keating*, 465 U.S. 1 (1984), JUSTIA LAW, *available at*: https://supreme.justia.com/cases/federal/us/465/1/case.html (last visited Aug 15, 2016); ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration") *Id.*; *see also* CARBONNEAU, *supra* note 27 at 125–30, 170–79, 505–22.

[99] *Id.* at 127.

limited court supervision of arbitral awards.[100] The FAA aimed to validate arbitration as an adjudication method and, to promote efficiency, it granted the method full independence.[101]

The FAA enforces both agreements to arbitrate and arbitral awards by outlining the required legal mechanisms and procedural rules.[102] Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[103]

The FAA restrained states from passing laws at the state level disfavoring arbitration or preventing the enforcement of arbitration agreements or arbitral awards by the state courts. It therefore preempted all possible state or judicial body attempts to act against the declared federal policy favoring arbitration or justify such conduct.[104]

3.2.2 Judicial support under the FAA

The success and growth of arbitration in the United States cannot be attributed only to the legislative support provided by the FAA and its provisions. Courts also contributed significantly

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[100] *Id.*

[101] *Id.*

[102] *Id.* at 128; *see also* ORDOVER AND DONEFF, *supra* note 98 at 139–43. It is also worth mentioning that in some cases not only did the FAA enforce the recourse to arbitration, but also, some traditional courts in the U.S. granted other ADR techniques the same privilege. CARBONNEAU, *supra* note 27 at 200-09. The case of *Fisher V. GE Medical System* serves as a good example of the broad interpretation of the FAA provisions used by the court to enforce the mediation agreement between the disputants in this case. *Id.* According to Professor Carbonneau "This carefree approach is not only silly, but dangerous. The liberal insouciance can have a serious effect on legal rights." *Id.* at 200. The case of *AMF V. Brunswick Corp.* similarly involves a court ruling that if the dispute parties agree to submit their dispute to a third party, the court considers the agreement in this regard an arbitration agreement. *Id.* The court reached this conclusion based on absence of a clear definition for the word "Arbitration" in the FAA Act. *Id.* Well-established practice in a large number of the U.S. courts, however, still demonstrates that all ADR methods do not fall within the scope of application of the FAA—the main objective of which was to establish a framework to regulate arbitration as an adjudicatory means to resolve disputes. *Id.* at 207-09. Any agreement between parties to mediate disputes or achieve consensual settlements through one of the ADR methods are not, based on this perspective, governed by the provisions of the FAA. *Id.*

[103] 9 U.S.C, § 2.

[104] GLOBAL PERSPECTIVES ON ADR, *supra* note 77 at 488–90.

to the success of arbitration practice in the modern era after the enactment of the FAA.[105] Many U.S. courts moved from extreme hostility toward arbitration to full support.[106] The U.S. Supreme Court led judicial support for arbitration as a sophisticated and effective dispute-resolution venue.[107] Scholars have argued in fact that the court created the federal judicial policy that supports arbitration.[108]

The federal courts' judicious application of section 10 of the FAA testifies to the judiciary's support for the arbitral process. Section 10 states:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2)where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is

[105] *Id.* at 490–95; BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 348–58.

[106] *Id.*; Prior to the enactment of the FAA, courts in the U.S. had created a hostile judicial policy against arbitration that allows any party to revoke the arbitration clause independently without the consent of the other party at any time before rendering the award. CARBONNEAU, *supra* note 27 at 125, 26.

[107] *See Id*. at 127 n.6.; GLOBAL PERSPECTIVES ON ADR, *supra* note 77 at 495.

[108] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 350–51.; ("In point of fact, the courts, under the leadership of the U.S. Supreme Court, have anchored the statutory law in a "strong federal policy" unequivocally supportive of arbitration in all circumstances. Moreover, courts, again, especially the U.S. Supreme Court, have purged the statutory text of its limitations on the recourse to arbitration and added content that enables the process to operate. The federal judicial policy favoring arbitration was the Court's invention. Neither the statute nor its legislative history gave an inkling of—let alone identified—such a phrase or policy.") *Id.*

> adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.[109]

This section outlines the specific statutory grounds on which the U.S. court in a district where an arbitral award was made can vacate all or part of that award. It "implicitly eliminates the review of awards on the merits by not authorizing the supervision of awards on that basis."[110] Section 10 again highlights the federal policy favoring arbitration by limiting the bases for vacating or challenging arbitral awards.[111] This section demonstrates the FAA's support for arbitration, but its application by the courts also testifies to the increase in judicial support for the arbitration process after the enactment of the FAA. Judicial practice, in other words, reveals the courts' growing acceptance of statutory limitations.[112] Such acceptance bolstered the arbitration process and protected the enforceability of arbitral awards from potential statutory or judiciary obstacles.[113] Broad application of Section 10, or the misinterpretation of any of its provisions by the courts, could have weakened the FAA, but that did not happen. The evidence shows that, on the contrary, U.S. courts have supported the arbitral process by enforcing arbitration agreements and awards and by making the vacation of arbitration awards an exception rarely granted.[114] Professor Carbonneau describes the judicial supervision of arbitration under the FAA as follows:

> The courts have acquiesced to the restriction of their supervisory authority in arbitration. Any one of the four grounds in Section Ten could have become a significant barrier to the enforcement of awards. Courts could have attributed a broad meaning and aggressively applied the words "undue means," "evident partiality," "misconduct," or "imperfect execution of powers" to the conduct of arbitrators and engaged in a rigorous scrutiny of awards. In point of fact, the federal courts ordinarily engage in a modest, sometimes perfunctory, review of awards.

[109] 9 U.S.C. § 10.
[110] CARBONNEAU, *supra* note 27 at 183; "Moreover, Section Ten does not refer to the subject-matter inarbitrability defense or the public policy exception to the enforcement of arbitral awards. There is therefore, no statutory basis for challenging awards on those grounds." *Id.*
[111] BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 394–53; CARBONNEAU, *supra* note 27 at 181–85.
[112] *Id.*
[113] *Id.*
[114] *Id.*

> The federal case law is guided by a nearly irrebuttable presumption that arbitral awards, once rendered, are enforceable. The vacatur of an award is a relatively rare event.[115]

Arbitration in the American jurisdiction thus received significant legislative and judicial support in the early decades of the twentieth century. The enactment of the FAA helped unify judicial practice and the judiciary, in turn, reinforced the FAA by upholding its principles and addressing deficiencies arising from improper applications or overly broad interpretations of its provisions.

These developments highlight the crucial and complementary roles the law and judicial practice play in supporting the process and effectiveness of arbitration in any jurisdiction. Legislation provides the statuary framework for the process and judicial practice should accept and protect the law's restrictions on judicial review and enforce other statutory provisions to the fullest possible extent. Legislative and judicial cooperation is essential to ensure any jurisdiction's hospitality to arbitration. The law and the judiciary are both important elements of the success equation.

3.3 Contemporary Issues of Arbitration

3.3.1 Non-statutory grounds for vacating awards

The American jurisdiction recognizes several common law grounds for challenging arbitral awards besides the grounds specified in the FAA. This recognition expands judicial review of arbitral awards.[116] The non-statutory grounds exceed statutory grounds by permitting judicial review of the merits of arbitral awards.[117] They deem arbitral awards unenforceable if: (1) the

[115] CARBONNEAU, *supra* note 27 at 181–82.
[116] *Id.* at 62, 63, 110, 111, 183-85, 515-20, 524-26.
[117] *Id.*

arbitrators manifestly disregarded the law, (2) the arbitral award, or enforcement of the award, would cause a breach of public policy or, (3) the arbitral award reflects irrationality or is arbitrary.[118] This practice conflicts with federal policies supporting arbitration. The FAA strengthened arbitration by including no provisions authorizing judicial review on the merits; however, this recognition of common law-based challenges to arbitral awards seriously threatens the arbitral process. It extends the judicial supervision and limits arbitral autonomy.[119]

The history of arbitration in common law legal systems provides some insight about the origins of common law grounds for judicial review. Some scholars suggest that, for example, the history of manifest disregard of the law as grounds for judicial interference started in nineteenth century England[120] and eventually spread to other common law jurisdictions.[121] American courts

[118] *Id.*

[119] *Id.* at 110, 111.

[120] Michael H. LeRoy, *Are Arbitrators above the Law - The Manifest Disregard of the Law Standard*, 52 BOSTON COLL. LAW REV. 137–188 (2011). In 1836, a business brought the *Symes v. Goodfellow* case before the court of appeal in England, petitioning the court to vacate an arbitral award on the grounds of manifest disregard of the law. The English Court of Common Pleas decided the case. *Id.,* n.73*;* THE ENGLISH REPORTS: COMMON PLEAS, 208 (1912). The court found that the award was based on legal error but decided not to intervene as the disputants had agreed to submit their dispute to the arbitrator and they "must take his law for better and for worse." *Id*. One of the judges stated that "An award is final on the merits of everything within the scope of the arbitrator's authority; but the reference of this cause gave the arbitrator no authority to inquire into anything beyond the existence of the contract. He could not inquire into the fact of adultery unless it were pleaded." *Id*. Justice Tindal C. J. disagreed and expressed his disagreement as follows: "Put it as you please, it is only that an inadmissible witness has been called. His admissibility was a question of law, which has been decided by the arbitrator; you must take his law for better and for worse." The court, therefore, dismissed the case. *Id*.; LeRoy, *supra* note 120. The court held that courts did not have jurisdiction to review an arbitral award on the merits even if legal error contaminated the award. Years later, however, court interference gradually appeared in other cases *Id.*

Hodgkinson v. Fernie case was decided in 1857 and the court set aside the arbitral award on the grounds of a mistake of law. THE ENGLISH REPORTS, 712–18 (1913). Some judges stated that: "it is only where misconduct is imputable to the arbitrator, or some obvious mistake of law appears upon the face of the award, that the court can interfere." *Id*. Other judges in the same case went further and determined that the court should always have jurisdiction to insure that arbitrators attained justice through proper application of the law; the lack of proper application justified interference. *Id;* they asserted: ("It is a mistake to suppose that the rule is limited, as suggested, to cases of misconduct on the part of the arbitrator, or to defects apparent on the face of the award; the court will always interfere to prevent injustice, where the arbitrator, intending to act according to law, has decided contrary to law.") *Id.*

[121] LeRoy, *supra* note 120.

thus came to recognize arbitrators' legal mistakes as grounds for arbitral award vacation.[122] The court in *Anderson v. Taylor*[123] nevertheless affirmed the following:

> … [A]rbitrators are the judges of the law … and that the award is final and conclusive between the parties, unless attacked in the manner pointed out by the statute, for fraud, -accident, mistake, or illegality, and that the Court in hearing the objections will not enter into the merits of the award.[124]

It concluded in 1870 that an arbitrator's legal mistake should be "gross and palpable" for the award to be vacated.[125] The court's ruling in this case demonstrates that American courts at first supported arbitration by limiting the likelihood of setting aside an arbitral award.[126] Some have argued that the term "manifest disregard of the law" corresponds to court's definition of "illegality" because they both "[require] more than the arbitrator's error in deciding a question of law." [127]

An 1874 case, *United States v. Farragut,* signaled a change in judicial attitudes toward arbitral awards. The government asked a court with proper jurisdiction to revoke a previously rendered arbitral award. The court rejected this request and confirmed the arbitral award.[128] On

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[122] *Id.*

[123] *Anderson v. Taylor*, 41 Ga. 10, 21 (1870).

[124] *Id*.

[125] *Id.*

[126] The ruling in *Anderson v. Taylor* makes clear that arbitration enjoyed substantial judicial support even when the process involved some mistakes resulting from an arbitrator's failure to comply with certain statutory requirements. *Id.* It reads: "We are satisfied that the failure of the arbitrators to furnish the party who objects to the award with a copy, as directed by Section 4183 of the Revised Code, is not a sufficient cause for setting it aside." The court decided here that the arbitrator's mistake did not prevent any of the parties from submitting their objection within the time specified by the law due to, for example, unawareness of award's issuance or existence. The court, thus, ruled that not every legal mistake made by arbitrators qualified as grounds for attacking an arbitral award. Likewise, the court determined that in arbitration "arbitrators are the judges" and their awards are "final and conclusive" unless challenged on the specific statutory grounds of "fraud, accident, mistake, or illegality". The court also clarified the terms "mistake" and "illegality": "By mistake, we do not understand that the statute means a mere error in the judgment of the arbitrators. Nor do we understand by illegality, that an award may be set aside because the arbitrators erred in deciding a question of law which arose in the case. If they have been guilty of partiality or corruption, or have referred any matter to chance or lot, or have made a palpable mistake of law … it will vitiate the award. But mistakes must be gross and palpable, and of a character which controlled their decision, or the award will not, on that account, be set aside." *Id.*; *see also* GEORGIA SUPREME COURT, REPORTS OF CASES IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF GEORGIA, IN THE YEAR ... 11–22 (1918).

[127] LeRoy, *supra* note 120.

[128] *United States v. Farragut* 89 U.S. 406 (1874), JUSTIA LAW, *available at*: https://supreme.justia.com/cases/federal/us/89/406/case.html (last visited Oct 10, 2016);

appeal, the U.S. Supreme Court held that a court of any level could nullify an arbitral award based on the doctrine of manifest mistake of law.[129] It concluded that neither the Supreme Court nor any lower courts should enforce arbitral awards if appellants could prove that arbitrators based the awards on manifest mistakes of law.[130] The Supreme Court decided in this particular case that a part of the arbitrator's judgment was unjust and violated the law.[131] *United States v. Farragut* validated manifest mistakes of law along with fraud, and excess of authority as grounds for setting aside arbitral awards.[132]

This history demonstrates that the emergence of non-statutory grounds for vacating arbitral awards preceded the enactment of the FAA in the American jurisdiction. Section 10 of the FAA does not include any of these common law grounds,[133] but U.S. courts have continued to recognize them over the years. Some scholars have linked that recognition to the 1953 ruling in *Wilko v Swan*.[134] Other scholars have argued that labor arbitration, specifically collective bargaining

[129] *Id.*

[130] *Id.*; "… The award was also liable, like any other award, to be set aside in the court below for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery. … and unless it can be shown that in making this award [arbitrators] have acted upon a manifest mistake of law, the award must be upheld.", *Id.*

[131] *Id.*

[132] LeRoy, *supra* note 120.

[133] Why Section 10 of the FAA does not include manifest disregard of the law remains unclear. Some scholars say that the statutory standards in this section came from a statement proposed to the legislators by W.W. Nichols, president of the American Manufacturers Export Association. *Id.* They suggest that the FAA did not include manifest disregard of the law because Nichols's report did not explicitly identify it as it did all other statutory grounds. *Id*. Whether Nichols was referring to manifest disregard of the law when he claimed that an arbitral award should be revoked if it contains a "defect so inherently vicious" that appears to contradict common morality also remains unclear. Some scholars have argued that "Manifest disregard for the law fits naturally in this expression." *Id.*

[134] 346 U.S. 427 (1953); *see* LeRoy, *supra* note 120; the court in this case concisely addressed one of the common law grounds. The Supreme Court ruling did not vacate an arbitral award on the basis of any of non-statutory grounds, but lower courts have applied manifest disregard of the law since this ruling. It has been recognized along with other statutory grounds as a valid basis for reviewing arbitral awards. *Id.*; *But see* CARBONNEAU, *supra* note 27 at 329.; ("Manifest disregard, like other two common law grounds, in fact, has little to do with *Wilko*. The opinion makes only an incidental (perhaps accidental) reference to the phrase. The actual doctrine is more likely to arise from the special status of the collective bargaining agreement in labor arbitration." *Id.*

agreements (CBA), gave rise to the application of common law grounds.[135] Courts did not initially decide cases related to CBAs and labor arbitration under FAA provisions because the courts acknowledged the difference between the two forms of arbitration and their governing laws. Those who applied common law grounds in labor arbitration intended to fill a legal vacuum in labor arbitration by granting jurisdiction to courts to review rendered arbitral awards on the merits.[136] Court supervision in labor law cases and CBAs aimed to maintain the proper application of the related statutes and to prevent arbitrator misinterpretations. The years have narrowed the gap and decreased, if not eliminated, the differences and special characteristics recognized by the bench between arbitration under the FAA and labor arbitration. Common law grounds are now applied similarly in both forms of arbitration.[137]

The courts added common law grounds to the statutory grounds stated in Section 10 of the FAA, but judicial practice varies considerably across jurisdictions in the United States. Circuit courts adopt different approaches and attitudes in applying these grounds.[138] Several appellate courts have conceded the application of common law grounds in the nullification of arbitral awards, but other courts at the same level accept only a limited number of these grounds. Some argue that, despite the split among circuit courts, judicial precedents show no great negative impact on the enforcement of arbitral awards. The application of one or another of the common law grounds by some circuits has not resulted in the vacation of a substantial number of arbitral

[135] *Id.* at 329, 516–20, 526.
[136] *Id*
[137] *Id.*
[138] *Id.* at 329, 516-20.

awards.[139] Court-created grounds have thus proven judicially ineffective because judicial policy favors the enforceability of arbitration awards.[140]

Common law grounds, however, have made the confirmation process of arbitral awards lengthy, costly, fatiguing, and difficult.[141] Fallacious definitions and significant functional overlap between these grounds and Section 10 statutes have also added to the confusion surrounding common law grounds.[142] Professor Carbonneau acknowledges this ambiguity and, without encouraging more controversy about non-statutory grounds, offers a realistic assessment of standard practice and the potential consequences of departing from it:[143]

> While analytical problems can loom large in theory, the basic judicial disposition is to defer to the arbitrator by engaging in perfunctory supervision. There are occasional accidents that can emanate from otherwise hospitable courts. The standard practice, however, is to give true meaning and effect to the adage that there is no appeal in arbitration. Every departure from that practice attests to the cost and futility of protracted adjudicatory proceedings.

Recent judicial practice, for example in the Supreme Court's 2008 *Hall Street Assocs., LLC v. Mattel, Inc.,* seems to preserve the ambiguity of common law grounds. The court ruled that the grounds in Section 10 and Section 11 of the FAA for vacating and/or modifying an arbitral award are "exclusive."[144] The court also determined that other grounds, including but not limited to

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[139] *Id.* at 516–20, 526.
[140] *Id.*
[141] *Id.*; Marcus Mungioli, *Manifest Disregard of the Law Standard: A Vehicles for Modernization of the Federal Arbitration Act, The*, 31 MARYS LJ 1079 (1999).
[142] CARBONNEAU, *supra* note 27 at 525, 531–32.
[143] *Id.* at 526.
[144] *Id.;* The Supreme Court concludes: "In holding that §§10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards." 552 U.S. 576 (2008); *see also Hall Street Associates, L. L. C.* v. *Mattel, Inc., available at*: https://www.supremecourt.gov/opinions/07pdf/06-989.pdf (last visited Oct 16, 2016); it should be noted here regarding this part of the ruling that the Supreme Court mentions non-statutory and state law only as examples of grounds that allow courts to review arbitral awards. The language of the ruling here is not firm; it leaves open the

common law grounds and grounds specified by state laws, are also valid for reviewing an arbitral award.[145]

The court's ruling in *Hall Stree*t reads as follows: "Maybe the term 'manifest disregard' named a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them. … Or, as some courts have thought, 'manifest disregard' may have been shorthand for §10(a) (3) or §10(a) (4) …"[146] This opinion created more doubt about common law grounds and led to an increase in controversial and contradictory judicial rulings, reflecting an even larger split between courts in different U.S. jurisdictions.[147]

Common law grounds continue to exist and remain viable justification for courts to review and vacate arbitral awards in the United States. Their continued use, however, runs contrary to two fundamental realities of U.S. arbitration history: first, the statutory framework for arbitration in the U.S. does not permit any review of arbitral awards on the merits; and second, arbitration has enjoyed judicial support in this jurisdiction, represented by the judicial policy favoring arbitration, since the enactment of the FAA.

The confusion created by the *Hall Street* ruling suggests that expanding the possibilities for attacking arbitral awards in any jurisdiction, either by applying or misapplying statutory and

possibility of additional valid grounds and encourages courts to consider them for this purpose. Professor Carbonneau notes, "In *Hall Street Associates, LLC*, the U.S. Supreme Court declared that the FAA statutory grounds were the "exclusive" means of challenging the enforceability of arbitral award. … It also implied that the merits review of awards could be achieved through other legal means–a claim that continues to baffle most, if not all, commentators." CARBONNEAU, *supra* note 27 at 579.

[145] 552 U.S. 576 (2008); *see also* CARBONNEAU, *supra* note 27 at 540–41.*see generally* Paul Bennett Marrow, *A Practical Approach for Expanding the Review of Commercial Arbitration Awards: Using an Appellate Arbitrator.*, AVAILABLE SSRN (2016).

[146] 3/25/08 06-989 *Hall Street Associates, L. L. C. v. Mattel*, Inc., *supra* note 144.

[147] CARBONNEAU, *supra* note 27 at 541; ("The ambivalent ruling has led courts to reach contradistinctive conclusions. For example, several courts asserted that *Hall Street Associates, LLC* eliminated manifest disregard as a basis for the judicial supervision of awards, while an equal number of other courts see it as unaffected by the ruling. For the later, it remains a viable basis by which to vacate awards.") *Id.*

non-statutory grounds, can increase the possibility of attacks on more fundamental principles of arbitration. Such a trend would eventually have an adverse impact on arbitration as an effective and trusted venue for people to resolve their disputes, especially in commercial scenarios.

3.3.2 The risk of extended judicial review

Extending judicial supervision by allowing courts to apply state laws or non-statutory grounds in reviewing and vacating arbitral awards will decrease arbitral autonomy and thus seriously threaten the finality of arbitral awards. The finality of arbitrator determinations, in fact, distinguishes arbitration from other forms of alternative dispute resolution (ADR).[148] It makes arbitration more appealing to disputants than other dispute resolution means.[149] Scholars reference this principle in describing arbitration as "a double-edged sword"[150]: the process resolves conflicts expeditiously and inexpensively compared to traditional courts; however, parties risk having no recourse if they find the arbitrator's decision incorrect or unjust.[151]

Parties seeking to hasten the resolution of potential disputes by entering into arbitration agreements implicitly agree to the risk inherent in accepting the finality of arbitral awards.[152] Disputants who submit to arbitration choose the finality offered by the process over protecting their procedural rights through traditional litigation.[153] Court sanctioned expansion of the number of challenged or set-aside awards will adversely impact the feature of finality in arbitration.[154]

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[148] *Id*. at 26-38.
[149] *Id*.
[150] Marrow, *supra* note 145.
[151] *Id*.
[152] CARBONNEAU, *supra* note 27 at 7; it is said that arbitration is "the choice of parties who want access, neutrality, expertise, and a resolutory mechanism that is less intrusive and more effective." *Id.* at 29.
[153] *Id.* at 4.
[154] Arbitration parties can overcome this dilemma by designing their own appeal procedures and appointing an appeal tribunal, which may consist of one or more arbitrators, to hear the appeal if submitted by any parties after the rendering of the award per their agreement. This method is effective for many reasons: first, it accords with the basic principles of arbitration; second, it provides a venue through which the tribunal can rectify legal errors found in arbitral awards rather than forcing a party to resort to court nullification; and third, it frees arbitration parties to

Court appeals of arbitral awards may also increase the number of judges' orders to arbitrators to clarify their awards.[155] Such an increase would further undermine arbitration's finality.[156] The efficiency of arbitration and the finality of outcomes thus exist in an inverse relationship with the power of judicial review.[157] Extension of judicial supervision and over-aggressive review by the courts will erode the finality of arbitral awards and the efficiency of arbitration.[158] Such judicial overreach will also impair enforcement.[159] Arbitration will thus bear the costly burden of inappropriate judicial interference.

Judicial review also poses a risk to the principle of confidentiality in arbitration. Professor Carbonneau explains:[160]

> A point about vacatur that has never been made with sufficient conviction is that such actions breach the confidentiality of the arbitral process. No matter what ground serves as the basis of the action, vacatur generally entails the development of a full judicial record regarding the underlying arbitration. Any of the statutory or common law grounds for vacatur can generate an extensive adversarial confrontation about whether the constituent elements are established by the evidence. Moreover, the parties can engage in a definitional contest about the exact meaning of the ground and debate the impact of that result upon the specific circumstances of the case. In effect, many vacatur proceedings result in a complete reenactment of the arbitral proceedings on a public record before a court of law.

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fashion the procedures they deem helpful for achieving their desired results as they rely on the quickness and the effectiveness of arbitration instead of a court trial. Although, including appeal procedures in arbitration agreements may narrow the distinction between arbitration and court trials, maintaining all the other advantages of arbitration makes such an approach worth the sacrifice. Marrow, *supra* note 145.

[155] These court orders may serve several purposes: first, they allow arbitrators to correct legal errors by giving them a second chance to do so instead of vacating the arbitral awards; second, they remove any ambiguity surrounding awards in order to avoid unjust court judgments that lack full legal certainty, which can impose huge financial burdens parties. Judicial practice, however, did not succeed in achieving these aims. CARBONNEAU, *supra* note 27 at 584. The action to clarify an arbitral award contradicts the maxim of *functus officio,* which some believe impedes acts by an arbitrator subsequent to the rendering of the award because the lack of jurisdiction in the absence of an agreement allows such an action. An arbitrator's job, according to this principle, ends once the decision is made. *Id*. at 515; the. Carbonneau explains the importance of this maxim as follows: "*Functus officio*, as seen from the perspective of modern arbitration law, is neither obscure nor irrelevant; it, in effect, defines and maintains material elements of the parties' bargain for arbitration. It fosters justice, efficiency, and finality." *Id*. at xxxiii, 592.

[156] *Id*. at 579-592.

[157] *Id*. at 580.

[158] *Id.*

[159] *Id.*

[160] CARBONNEAU, *supra* note 27 at 568–69.

> Once the court ruling is reported, the arbitration has been completely exposed. An attempt to vacate the award will, therefore, result in destroying the confidentiality of arbitral proceedings, a major business advantage of arbitration.

Arbitration and its principles can be described as a string of beads: if one bead falls off the string, the rest will follow. Ensuring the protection of arbitration's fundamental principles will guarantee the effectiveness and success of the process; failing to do so will guarantee the reverse. Extended judicial supervision in any jurisdiction will, moreover, increase the anxiety businesses feel regarding the practice.[161] The ability of arbitration parties to challenge an arbitral award in court under vague circumstances undermines arbitration's "commercial appeal"[162] because it means that disputes related to business transactions are no longer determined "in-house."[163]

3.3.3 The need for modernization and the role of legal scholars

Recent court rulings reveal increasing efforts on the part of the judiciary to control the arbitration process by expanding supervision and determining the rules by which arbitration should be conducted rather than fully enforcing arbitrator's decisions and the procedures agreed upon by the parties.[164] Courts no longer promote arbitral autonomy and have become "decisive and controlling."[165]

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[161] *See generally* BUILDING THE CIVILIZATION OF ARBITRATION, *supra* note 19 at 357.

[162] CARBONNEAU, *supra* note 27 at 2–4.

[163] *Id.;* Once again, arbitration parties should create an appeal tribunal and agree on procedures for conducting appeals to reduce anxieties regarding arbitration confidentiality. Marrow, *supra* note 145.

[164] Thomas E. Carbonneau, *Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates, The*, 14 CARDOZO J CONFL. RESOL 593 (2012); the influence of the *Hall Street* ruling has become clearer in many later cases. Scholars believe the court's holdings in *Rent-A-Center* and *Stolt-Nielsen*, for example, have contributed to increased judicial supervision of arbitration. *Id.; see Rent-A-Center, West, Inc. v. Jackson* (06/21/10) - 09-497, *available at*: https://www.supremecourt.gov/opinions/09pdf/09-497.pdf (last visited Oct 31, 2016); *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.* (04/27/2010) - 08-1198, *available at*: https://www.supremecourt.gov/opinions/09pdf/08-1198.pdf (last visited Oct 31, 2016).

[165] Carbonneau, *supra* note 164.; *see also* THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW ON ARBITRATION 63 (2014).

CHAPTER FOUR: CREATING A STRONG ENABLING ENVIRONMENT FOR ARBITRATION: LEARNING FROM OTHER LEGAL SYSTEMS

The FAA, which has endured since its enactment in 1925,[166] has recently received considerable attention and criticism.[167] Recent judicial practice, whether supportive or antagonistic to arbitration, highlights the necessity for modernization of the FAA.[168] Contemporary discussions of the FAA focus on issues including: its limited scope—it covers a minimal number of subjects; the perception of the statute as obsolete; and the notoriously poor drafting of certain sections.[169] Such criticisms apply to both domestic and international arbitration.[170] These flaws are especially obvious when one compares the FAA to modern arbitration statutes in other countries.[171]

Scholars agree about the need to update FAA provisions and many have proposed different approaches[172] for adding new sections or amending provisions to make the existing statute responsive to current circumstances.[173]

In a recent publication, Professor Carbonneau asserts the need for a new arbitration law in the United States, emphasizing that it must have a coherent structure and include a provision that

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[166] GLOBAL PERSPECTIVES ON ADR, *supra* note 77 at 497.

[167] *See* BORN, *supra* note 21 at 36–41.; *see generally* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT, (Edward J. Brunet ed., 2006); *See also* Timothy J. Heinsz, *Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law, The*, J DISP RESOL 1 (2001).

[168] CARBONNEAU, *supra* note 27 at 572.

[169] BORN, *supra* note 21 at 36–39; ("Unfortunately, the domestic FAA is not a model of drafting clarity. Its sixteen sections are couched in rambling prose and contain a disorganized mix of substantive, jurisdictional, procedural, and remedial provisions whose reach and meaning is poorly articulated. As a consequence, U.S. courts have struggled with the FAA, particularly in cases involving the enforcement of arbitration agreements.") *Id.* at 333; CARBONNEAU, *supra* note 168 at 95; (" The FAA cannot remain an archaic statement of law, completely dependent upon court interpretation for its contemporary doctrinal meaning. A variety of factors demands that it be remodeled into a comprehensive, self-contained statute.") *Id.*; *see also* GLOBAL PERSPECTIVES ON ADR, *supra* note 77 at 497; ARBITRATION LAW IN AMERICA, *supra* note 167 at 202.

[170] CARBONNEAU, *supra* note 165 at 88. BORN, *supra* note 21 at 331–407. ARBITRATION LAW IN AMERICA, *supra* note 167 at 200-07.

[171] *Id.*

[172] *See* Mungioli, *supra* note 141 at 191; ARBITRATION LAW IN AMERICA, *supra* note 167 at 207-09;.Griffin Toronjo Pivateau, *Reconsidering Arbitration: Evaluating the Future of the Manifest Disregard Doctrine*, 21 SOUTH. LAW J. 41 (2011).

[173] *Id.*

explicitly states the federal policy favoring arbitration.[174] He proposes a new version of the FAA[175] that confirms the fundamental principles of arbitration well-established by judicial practice. Professor Carbonneau argues that the revised law should aim to: decrease the injustice of mandatory arbitration; limit judicial review of the arbitral process and its consequences; and confirm the "Breyer admonition", which validates agreements to arbitrate and arbitrators' determinations as final, binding, and enforceable, thereby strengthening freedom of contract and narrowing the court's oversight role.[176] Professor Carbonneau's proposed new version of the FAA would include multiple newly devised features to make it compatible with the universal exercise of arbitration.[177] The proposed Act would, likewise, reflect the accomplishments of the American practice and its influence on the development of arbitration.[178] The proposed Act would enable the United States to maintain its role as one of the most hospitable jurisdictions for arbitration.

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[174] CARBONNEAU, *supra* note 165 at 95.

[175] In addition to the Preamble, the proposed Act consists of eight chapters each of which contains several Sections deal with various substances related to the Act's subject. *Id.* at 99–131; the preamble explains the purpose of the proposed Act, clarifies its objectives, and lays down the main principles and the main structure. It underlines the two main principles which governs the legal framework of arbitration in the United States, the freedom of contract and arbitral autonomy, which make U.S. arbitration fully compatible with the global standards of arbitration. Furthermore, it emphasizes the importance of the federal policy favoring arbitration. Then, it puts emphasis on arbitration agreement as a legal instrument by which parties can exercise their right to recourse to arbitration. It, also, demonstrates the purposes and the benefits of the submission to arbitration. The preamble then deals with another vital issue which is the judicial supervision. It asserts that courts should encourage the recourse to arbitration by enforcing arbitration agreements as mutually agreed upon by the parties. Hence, it states that Court's review on arbitral process should be restricted, narrowed and for the purpose of preventing the injustice by taking the necessary measures , for example, to insure the procedural fairness, or to protect the arbitral process from any misconduct that may affect its impartiality. The preamble of the new proposed law is one of the features which distinguishes between its provisions and the existing legislation. Moreover, it characterizes the identity, aims and principles of the proposed statutes. *Id.* at 100; the need for a new law of arbitration in the United States is well explained in the following statement: "Arbitration has undergone a substantial evolution since 1925. The Court's decisional law has updated the existing statute in many significant respects. Arbitration's essential role, internationally and domestically, in the adjudication of contract and commercial disputes makes an updated and revamped statute an absolute necessity." *Id.* at 139.

[176] *Id.* at 96–98.

[177] *Id.* at 97; Professor Carbonneau has enumerated nineteen "innovative features" for the new Act. To name a few, 'it creates a national policy favoring arbitration," "establishes exclusive federal question jurisdiction in arbitration," commands courts to implement arbitration agreements despite the existence of preconditions to enforcement," and it "expressly incorporates the separability and *kompetenz-kompetenz* doctrines into the regulatory framework." … *Id.*

[178] *Id.*

Academics make essential contributions to the evolution of arbitration. Recent scholarly publications have recognized the need to modernize the legal framework for arbitration in the United States. This recognition results from thorough observation of the law and practice through which recent changes in the judicial attitude toward, and enforcement of, arbitration have been closely monitored. Scholars have proposed several reforms and new legal devices to remedy the situation and renew legislative and judicial support for arbitration.

Legal scholars, law professors, and Academic researchers are neutral players in the evolution of arbitration in any jurisdiction. Their contributions are therefore valuable and deserve recognition from legislators, judges, and practitioners. Academic involvement, moreover, should extend beyond the publication of commentaries after the enactment new legislation. Additional scholarly roles in this context include: assessing current laws and practices, diagnosing problems, underlining concerns that might affect processes, and suggesting effective means of addressing the issues that arise. Recent academic discussions and publications regarding the FAA in the United State provide valuable lessons to academics in jurisdictions like Saudi Arabia where new arbitration laws have been enacted. Saudi academics should observe the current legal framework and closely monitor arbitration practice so that they can suggest amendments and reforms when necessary.

4. Conclusion

Understanding how and why the arbitration has evolved over time in different jurisdictions requires close observation of international arbitration practice. Such observation provides useful dimensions for comparison that can be used to evaluate the current national legal framework and practice. The experiences of other leading countries serve as instructive examples for countries

like Saudi Arabia that have limited arbitration experience. Learning from these examples can substantially improve the practice at the national level, and may lead to new reforms.

Learning form the experience of leading arbitration countries like the United Kingdom and the United States will prevent Saudi Arabia from having to reinvent the wheel and significantly benefit the Saudi arbitration system. This chapter has sought to facilitate this process by identifying valuable lessons from the successful English and American jurisdictions. Ensuring effective support for arbitration in the Saudi jurisdiction will require careful consideration and comprehension of these lessons.

Implementing these lessons will genuinely improve both the legal framework and practice of arbitration in the Saudi jurisdiction, and raise its status domestically and internationally. This will help create an enabling environment for the process throughout the country, which will elevate the country's standing on the global scale, improve its reputation in this field, and significantly boost economic growth.

CHAPTER FIVE: ADR INSTRUCTION IN SAUDI LAW SCHOOLS

1. Introduction

ADR have become the best and preferred means of resolving various types of disputes around the world. Lawyers and disputants trust these processes to be both efficient and cost-effective.[1] Courts have, likewise, encouraged, ordered, and adopted ADR processes in many cases due to the effectiveness with which these processes resolve different types of disputes.[2] The recent expansion of ADR in many leading jurisdictions can be partially attributed to the fact that law schools now teach its various mechanisms.[3]

Chapter 3 used the findings of a brief study of information retrieved from the websites of a sampling of Saudi Arabian law schools to stress that Saudi law schools should play an instrumental role in shaping the practice of arbitration in Saudi Arabia. The results of that examination showed that law schools should reform their existing curricula to teach law students the ADR-related knowledge and skills required in contemporary legal practice. This examination called attention to the need for a larger study that could provide a more comprehensive view of ADR instruction in Saudi Arabia and engender realistic insights regarding the current situation. The survey described in this chapter was designed to achieve that goal.

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[1] *See generally* GLOBAL PERSPECTIVES ON ADR, (Carlos Esplugues Mota & Silvia Barona Vilar eds., 2014); JEROME T. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (1st ed. 2004); GERALD H. POINTON, ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES (2011); Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, J. EMPIR. LEG. STUD. 843.

[2] *See generally* MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING (2nd ed. 2005); GLOBAL PERSPECTIVES ON ADR, *supra* note 1; Stipanowich, *supra* note 1; Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS REV 253 (1984); Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE LAW J. 1445–1473 (1997); Louise Phipps Senft & Cynthia A. Savage, *ADR in the courts: Progress, problems, and possibilities*, 108 PENN ST REV 327 (2003); Alternative Dispute Resolution in the United States District Courts | Federal Judicial Center, *available at*: https://www.fjc.gov/content/alternative-dispute-resolution-united-states-district-courts-english-original (last visited May 4, 2017); *see also* Wayne D. Brazil, *Court ADR 25 years after Pound: Have we found a better way*, 18 OHIO ST J DISP RESOL 93 (2002); DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, (Carrie Menkel-Meadow ed., 2nd ed. 2011); J. Clifford Wallace, *Judicial Reform and the Pound Conference of 1976*, 80 MICH. LAW REV. 592–596 (1982).

[3] *See infra* note 19-21 and accompanying text.

CHAPTER FIVE: ADR INSTRUCTION IN SAUDI LAW SCHOOLS

This chapter analyzes the status quo of ADR instruction in Saudi law schools by providing a clear picture of the reality in this field; it highlights deficiencies, discusses their causes, and recommends ways to overcome them, aiming to facilitate development and growth in this area. It also compares ADR instruction in Saudi Arabia to ADR instruction in the United States where many law schools have long histories of teaching ADR. This comparison is necessary to effectively gauge the Saudi jurisdiction's development in this area and to determine what improvements it must make to enhance its position.

This chapter is organized into five sections. Section two explores the history of ADR instruction in the United States throughout the decades and derives useful lessons from this experience. Section three explains the survey and its findings. Section four discusses and undertakes additional analyses of the findings, and section five concludes the chapter.

2. ADR Instruction in American Law Schools

A review of the literature related to ADR in the United States indicates that ADR instruction in American law schools has gone through manifold stages. Its development can, for the sake of analysis, be divided into three phases. The first phase traces back to the years following the famous 1976 Pound Conference.[4] Legal education had long emphasized instruction in adversarial approaches to conflict resolution, but the early 1980s witnessed the blossoming of a new era as some elite law schools, including Harvard University and George Mason University, responded to the early development of ADR by designing courses focused on this subject.[5] The first phase concluded in 1983 by which time one-quarter of U.S. law schools offered at least one

[4] For more details about the 1976 Pound Conference *see generally* Warren E. Burger, *Isn't There a Better Way*, 68 AM. BAR ASSOC. J. 274 (1982); Brian Farkas & Lara Traum, *The History and Legacy of the Pound Conferences*, (2017).

[5] BARRETT, *supra* note 1 at 209–15.

program in ADR[6] – a significant accomplishment that attracted the attention of the remaining law schools and fueled even greater success in the subsequent phases. The number of ADR programs and courses offered in U.S. law schools has dramatically increased since then, especially after the expansion of the use of ADR in the United States and many other parts of the world.[7] The first phase can thus be described as a short, one-time phenomenon that had an enormous impact.

The second phase in the development of ADR instruction began in the late 1980s and continued through the 1990s; the vast majority of law schools designed and made available ADR programs during this time.[8] Professor Lela Porter Love observed "phenomenal growth" in ADR instruction during this second phase,[9] noting huge increases in: 1- the number of law schools teaching ADR; 2- the number of ADR courses and programs offered; 3- the number of ADR lecturers and instructors. Professor Lela found: "830 courses and programs [were] offered by 182 law schools with sixty-two schools offering dispute resolution-related clinics. … [And] more than 500 law professors identify themselves as teaching ADR."[10] The interest of law schools in ADR has had an unquestionably positively impact on the U.S. legal profession.[11]

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[6] *See* AM BAR ASS'N SPECIAL COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, LAW SCHOOL DIRECTORY OF DISPUTE RESOLUTION PROGRAMS (1983); according to this report, forty three law schools in the United States were teaching ADR courses at the time of the report's release. *Id.*

[7] BARRETT, *supra* note 1 at 209–11. ("The 1980s witnessed the start of major academic interest in conflict resolution. The two most prominent examples began at Harvard University and George Mason University in Virginia." *Id* at 211

[8] *Id.* at 214. "U.S. law schools began offering courses on ADR in the 1980s. … By 1986, a majority of law schools offered courses or clinics on ADR. By 1998, law school accrediting standards began recommending that ADR be covered in curricula, and today ADR is a standard law school topic. Some schools even include ADR in all basic first year courses." *Id;* "By the year 2000, there would be more than a hundred higher education programs offering degrees, concentrations or certificates in dispute resolution."). *Id* at 211; *see also* Sidney S. Sachs, *ADR is Bigger than you Think ADR Report*, EXP. 14. ("Law schools have added dispute-resolution courses to the curriculum. As of 1989, 164 of 174 ABA-accredited law schools offer at least one course in ADR. Many schools have clinical programs and some, such as George Mason University, offer entire ADR programs. *Id. See also* ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS: ANALYSIS & CASE STUDIES, 4, 5 (Otto J. Hetzel, Steven Gonzales, & American Bar Association eds., 2015).

[9] Lela Porter Love, *Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators*, OHIO STATE J. DISP. RESOL. 597.

[10] *Id.*

[11] *See generally* Karen A. Burch, *ADR in the Law Firm: A Practical Viewpoint*, MO J DISP RESOL 149 (1987); Sachs, *supra* note 7; Frank EA Sander, *Professional Responsibility-Should There Be a Duty to Advise of ADR Options*, 76

The third phase began in the early years of the twenty-first century and continues to this day. Two main elements characterize this phase. First, the phase witnessed slow and steady growth in ADR instruction.[12] Michael Moffitt has attributed the steady development of ADR to the fact that ADR reached maturity and stability during this phase.[13] He pointed out that data made available by the American Association of Law Schools Directory (the AALS) for the years 1997-1998, 2002-2003 and 2007-2008 indicates that ADR ranked among the top 25 out of 96 different legal fields of studies. He concluded that ADR has become similar in size to many other fields including administrative Law, Tax Law, Civil Rights Law, Environmental Law, and Intellectual Property Law.[14]

The second element of this phase in ADR development is a shift of focus from quantity to quality. Law schools began devoting more attention to the quality and effectiveness of ADR curricula than to the quantity of ADR courses. Many scholars have called for reviews and evaluations of the courses and programs offered by law schools to respond to labor market needs.[15] The preceding phases were, in short, characterized by a focus on expanding law schools' ADR course offerings, but demand has shifted over the decades and the current phase prioritizes assessments of ADR instruction's responsiveness to the practice's needs with the aim of ensuring that future lawyers possess the skills required in the changing labor market. Those driving this

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ABAJ 50 (1990); John Haynes, *Mediators and the legal profession: An overview*, 1989 CONFL. RESOLUT. Q. 5–12 (1989); *see also* Roselle L. Wissler, *When Does Familiarity Breed Content--A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, PEPPERDINE DISPUTE RESOLUT. LAW J. 199.

[12] Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST J DISP RESOL 25 (2010).

[13] *Id.*; ("Over the past ten years, the ranks of ADR teachers in law schools has grown at a slow, steady pace of about 2.25%. This suggests that whatever explosive growth the field may have enjoyed at one point, the field is in a more mature, stable phase now. The rate of growth in the ranks of ADR teachers is about half of the rate of growth in the ranks of members of the ABA Section on Dispute Resolution.") *Id.*

[14] *Id.*; *see also* Nancy H. Rogers, *The Next Phase for Dispute Resolution in Law Schools: Less Growth, More Change Teaching and Technology: Teaching ADR and the Future of Dispute System Design*, OHIO STATE J. DISPUTE RESOLUT. 1.

[15] Rogers, *supra* note 14.

shift aim to prepare prospective lawyers and practitioners to perform their career tasks adequately and effectively. Nancy H. Rogers noted this shift in focus among some academics in the early twenty-first century: "Their focus seems to be change, even more than continued growth. Some teaching changes stem from modifications in dispute resolution practice…"[16] She also found an increasing tendency toward skills-based learning rather than knowledge-based education. She claimed that many academics currently favor an educational approach that enables law students to build, develop, and sharpen the essential skills and techniques they will need to undertake successful legal careers, as opposed to memorizing laws, policies and regulations. Rogers concluded that in the field of ADR teaching "faculty will debate less about bigger and more about better."[17] This analysis makes clear that new efforts in ADR instruction aim to bridge the gap between legal education and legal practice in the ADR realm.[18]

The three phases described above share a common theme: significant scholarly contributions drove advancement, development, and growth in the area of ADR instruction across the decades. Scholarly contributions spurred similar – if varying in degree – growth and development in ADR instruction in other countries.[19] The work of scholars has moreover yielded

[16] *Id.*

[17] *Id.*; *see also* Michael T. Jr. Colatrella, *A Lawyer for All Seasons: The Lawyer as Conflict Manager*, SAN DIEGO LAW REV. 93; *see generally* C. Michael Bryce, *ADR education from a litigator/educator perspective*, 81 JOHNS REV 337 (2007); *see also* Susan Sturm & Lani - Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity 2007 Symposium on the Future of Legal Education*, VANDERBILT LAW REV. 515.

[18] Many scholars have written about the impact of legal education on the profession and practice. *See e.g.* THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 248–52 (1989). *See also* Frank E. A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles Alternative Dispute Resolution in the Law Curriculum*, J. LEG. EDUC. 229; Harry T Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEG. EDUC. 285–293 (1988).

[19] Similar stories of success in this area have been witnessed in many other jurisdictions, including the United Kingdom, Canada and Australia. *See e.g.* WILLIAM M SULLIVAN ET AL., 2 EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); Julie Macfarlane, *The challenge of ADR and alternative paradigms of dispute resolution: How should the law schools respond?*, 31 LAW TEACH. 13–29 (1997); Tania Sourdin, *Not teaching ADR in law schools? Implications for law students, clients and the ADR field*, IT TAUGHT IT MORE LIKELY BE TAUGHT ELECT. RATHER MANDAT. CORE SUBJ. NATL. ALTERN. DISPUTE RESOLUT. ADVIS. COUNC. NADRAC IN (2011).

substantial results and benefits in the field of ADR in general, and contributed greatly to the growth of ADR and the use of its various mechanisms.[20] Justice reform initiatives in many jurisdictions, for example, stemmed mainly from decisions to embrace ADR – a development that many respected academics have long demanded.[21]

The growth of ADR instruction in the United States and the phases of development outlined above serve as a model for other jurisdictions, especially for developing countries with less experience in the area of ADR. Law schools in such jurisdictions must play their roles in the development process by offering ADR courses and regularly evaluating curricula to ensure their effectiveness in shaping the profession and practice. Academics consider surveys useful assessment tools for evaluating progress in this field. Scholars in the U.S. have, for example, designed, developed and analyzed many surveys measuring the success of ADR instruction, and monitoring and evaluating its progress.[22]

3. The Survey

This study's survey covered the twenty-one Saudi State Universities that have law schools or law departments.[23] The author sent it as an attachment to an email that described the nature and purpose of the study to all target participants. This email included instructions for returning completed surveys and contact information in case participants had questions or concerns

[20] *See generally* Stipanowich, *supra* note 1.

[21] *See e.g.*, Frank E. A. Sander, *The Multi-Door Courthouse*, BARRISTER 18; *see generally* Treyor C.W. Farrow, *Dispute Resolution, Access to Civil Justice and Legal Education Special Issue - Civil Justice and Civil Justice Reform*, ALTA. LAW REV. 741.

[22] *See e.g.* T. Carbonneau, *Resource, Teaching Arbitration in US Law Schools*, 12 WORLD ARB. MED. REP. 227 (2001); for more collected data and information in this regard *see* Moffitt, *supra* note 12.; *see also* Stephen J Ware, *Teaching Arbitration Law*, (2003).

[23] The Saudi ministry of education has indicated that the Kingdom has twenty-six State Universities. Only twenty-one of these have law schools or law departments under different names or titles [hereinafter law schools]. For a list of public Saudi Universities *see* State Universities in Saudi Arabia, *available at*: https://www.moe.gov.sa/en/HigherEducation/governmenthighereducation/StateUniversities/Pages/default.aspx (last visited Apr 22, 2018).

regarding the survey. The author made several follow-up calls and sent reminder emails to all the initial participants. Only fifteen of the twenty-one law schools responded directly to the survey. The remaining six law schools have not responded to emails or to any other communications regarding the survey. The author did, however, retrieve information pertaining to these six non-responding law schools from the internet regarding some of the surveyed topics and issues.

3.1 The questions

The author designed the survey to facilitate the collection of as much detailed data about the surveyed topics from the participating law schools as possible. It therefore included open-ended, close-ended, and multiple-choice questions. Several of the multiple-choice questions also gave respondents the opportunity to provide their own input in addition to answering the questions. The author used the funnel approach in structuring the survey and designing the questions. This technique involves moving from the general to the specific. The author sequenced questions so as to initially elicit broad observations and progress to more detailed responses regarding the surveyed topic and subtopics.

The author also carefully considered the wording of the survey questions, aiming to ensure that the participants would interpret them as intended, produce accurate data, and thereby facilitate a precise analysis. The survey questions can be divided into four main categories: first, general opening questions intended for all participants (questions 1 and 2); second, questions designed for schools that offer ADR course(s) only (questions 3, 4, 5, 6, 7, 8, 9 and 10); third, a shared question intended for all participating schools (question 11); and, finally, questions designed for schools that do not offer any ADR course(s) only (questions 12, 13 and 14).

The survey contained the following questions:

1) How many total credit hours are allocated for each specialized areas of law in the Study Plan for the Bachelor of laws?
2) Do any of these specialized courses cover ADR methods generally?

   If NO, please answer the following questions (11, 12, 13 and 14) only.

   If YES, please answer the following questions (3, 4, 5, 6, 7, 8, 9, 10 and 11) only.
3) Is ADR taught in/as:
   a) A general course? If so, please specify the title of the offered course and its credit hours.
   b) Multiple separate courses? E.g. an arbitration course, a meditation course … etc. If so, please specify the title of each offered course and its credit hours.
   c) A part of other offerings? If so, please specify the title of each course and its credit hours.
4) When did your school begin teaching such course(s)?
5) Are ADR course(s) taught as: (more than one answer is possible)
   a) Formal academic lectures?
   b) Seminars?
   c) Interactive discussions: practical training and simulations?
   d) All the above?
6) Are the lecturers assigned to teach ADR course(s) specialized in ADR or in a specific area of the field?
7) If YES, are they:
   a) Saudi citizens?
   b) Non-Saudis?

8) If NO, please specify the fields in which the lecturers assigned to teach ADR course(s) are specialized.

9) Is arbitration offered in any of the courses mentioned in question No. (3) of this survey?

10) If so:

a) Is arbitration taught as a general subject? Or

b) Is it taught in specialized courses on different subject areas of arbitration? E.g. commercial arbitration, arbitration in civil cases, labor arbitration …etc. Please specify these courses and their credit hours.

11) Does your school organize conferences, seminars, discussion groups or specialized workshops in ADR and invite speakers and participants and take part in them?

12) Why does your school not offer a specialized course(s) in ADR? (More than one answer is possible)

a) The paucity of specialized academics in the field.

b) The absence of labor market demand at present.

c) We give priority to more important courses.

d) Limited credit hours assigned for specialized courses required to complete the degree.

e) We currently see no need to teach such courses.

f) Other, please specify.

13) Will ADR or any of its subject areas be added to your bachelor's degree plan of study in the upcoming years?

14) If NO, Please specify one or more reasons.

3.2 The presumptions

Prior to conducting the survey, the author assumed that Saudi law schools do not give ADR instruction the attention it deserves since only a few schools include such offerings in their curricula. The author also assumed that the few offered courses are unsophisticated, inadequate, and asynchronous, providing only a rudimentary knowledge of the curriculum subject areas. The author thus believed Saudi law schools need to modernize their offerings to reflect progress in the field of ADR and ensure their effectiveness. The author assumed, moreover, that the lecturers who teach ADR offerings are non-Saudis who neither specialize in ADR nor in any of the field's specific areas. Finally, the author assumed that the ADR course(s) Saudi law schools offer provide only basic knowledge of arbitration. This limitation results in the exclusion of other ADR processes from the subject areas they teach. The survey served as an opportunity to examine the validity of these expectations and other important areas of interest.

3.3 The First Category

This category contained two questions (questions 1 and 2). The major characteristic of the questions in this category was their generality. The survey's opening questions established a foundation that the subsequent categories and questions built on.

3.3.1 Question one:

This question required each school to reveal the total number of credit hours allocated for all law offerings, excluding credit hours for non-law modules such as language courses, and administration- or business-related subjects, etc. This question was intended to determine whether or not law schools have assigned appropriate credit hours to law courses. Participant responses, in other words, enabled the author to determine if law schools allocate sufficient credit hours to law courses. Insufficient law credit hours could explain the absence of ADR courses at any of the

participant schools while sufficient law credit hours in schools that still do not teach ADR could indicate that the schools in question do not give ADR attention it deserves.

Five of the twenty-one participating law schools stated that they require their students to complete fewer than eighty credit hours of law modules to receive their law degrees. The other sixteen reported that they require their students to complete more than eighty credit hours of law courses to graduate. Law schools in the United States – as a point of reference – must require a minimum of 83 credit hours to receive approval from the American Bar Association.[24] Figure 1 (below) summarizes responses to the first question. The discussion of the responses to the subsequent question will elaborate on these results.

Figure 1: Responses to Question One: "How many total credit hours are allocated for each specialized areas of law in the Study Plan for the Bachelor of Law?"

Less than 80 credit hours	More than 80 credit hours
5	16

[24] Standards and Rules of Procedure for Approval of Law Schools 2017-2018 states: "A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction." ABA Standards and Rules of Procedure for Approval of Law Schools 2017-2018, *available at*:https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf (last visited Mar 22, 2018).

3.3.2 Question two:

Question two was designed, first of all, to generate a broad overview of the reality of ADR instruction in Saudi Law Schools. It asked participants whether or not they offer any ADR courses to their students. It solicited "Yes" or "No" responses to obtain definitive and clear answers from the respondents. The question was also designed to divide the participants into two main groups based on their responses. The first group consisted of participants who answered "No" to question two. The survey directed these participants to answer only the third category of survey questions (11, 12, 13 and 14). The second group consisted of participants who answered "Yes." The survey directed them to answer only the second category of survey questions (3, 4, 5, 6, 7, 8, 9, 10 and 11).

Nine of the twenty-one surveyed Saudi law schools stated that they teach ADR in general. This, however, does not mean all these schools offer stand-alone courses in this subject area. The responses to the second category questions will clarify these results, since those questions require participants to elucidate the manner in which their schools teach ADR. Twelve of the surveyed law schools reported that they do not teach ADR in any fashion; unfortunately, these twelve include the oldest three law schools in Saudi Arabia. The answers to this question indicate that nearly sixty percent of Saudi law schools do not offer ADR-related courses. The remaining forty-plus percent that do offer ADR-related courses will be examined in more detail later. The figures derived from the survey show that the majority of Saudi law schools have, to this point, failed to recognize the importance of and growing global demand for ADR. Such figures are discouraging, but they also serve as a timely reminder of the importance of integrating ADR into law school curricula sooner rather than later and of the steps Saudi law schools must take to achieve that objective.

CHAPTER FIVE: ADR INSTRUCTION IN SAUDI LAW SCHOOLS

ADR skills are essential in the contemporary legal profession and all potential lawyers and practitioners should acquire them. The Hon. Dorothy W. Nelson once observed:

> With regard to legal education, it is clear that good lawyers bring more to bear on a problem than legal knowledge and language skills. They bring creativity, practical wisdom and good judgment. A real challenge for the law schools is to help law students to develop broader problem-solving skills. The curriculum should not end with doctrinal analysis, but should include other skills such as counseling, planning and negotiation. Unfortunately too few elite schools see this as their mission.[25]

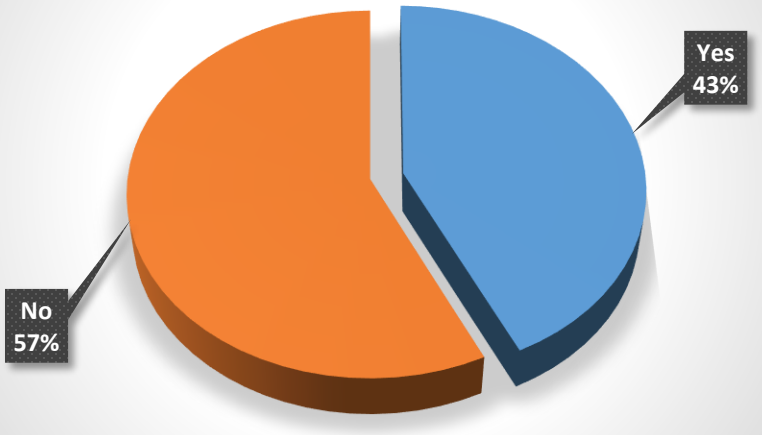
The absence of ADR courses in Saudi law schools will unquestionably result in a lack of skilled lawyers and specialists in the field and exacerbate the skills gap in the labor market. Figures 2 and 3 show the results of the second survey question.

Figure 2: Responses to Question Two: "Do any of these specialized courses cover ADR methods generally?"

Yes	No
9	12

[25] Dorothy W Nelson, *Overview-ADR in the 21st Century: Opportunities and Challenges*, 6 DISP RESOL MAG 3 (1999); *see also* Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW CONTEMP. PROBL. 5–17 (1995).

Figure 3: Responses to Question Two: "Do any of these specialized courses cover ADR methods generally?"



The first category questions yield two additional insights. First, none of the schools that allocate fewer than 80 credit hours for the various subject areas of law offer any ADR courses. Second, only fifty percent of the law schools that assign more than 80 credit hours to law modules teach ADR. These findings prove that both assumed causes for not teaching ADR in law schools stated above are true and valid. This survey highlights the need for some schools to increase the number of credit hours assigned to law courses in order to add subject areas such as ADR to their curricula; it also reveals that a significant number of schools with sufficient allocated law credit hours do not give ADR the attention it deserves.

3.4 The Second Category

The questions in this category were directed to the schools that offer ADR courses to their students. The author designed them to obtain details regarding the types of courses these schools

offer and how they teach them, aiming to measure the effectiveness and quality of the courses offered in each school. Obtaining more details from the schools also clarifies how seriously they take offering ADR courses to their students and giving them the knowledge and skills they need to effectively practice law. This category contained nine questions (questions 3-11) all of which were structured to elicit specific, rather than general, information about the surveyed topics.

3.4.1 Question three:

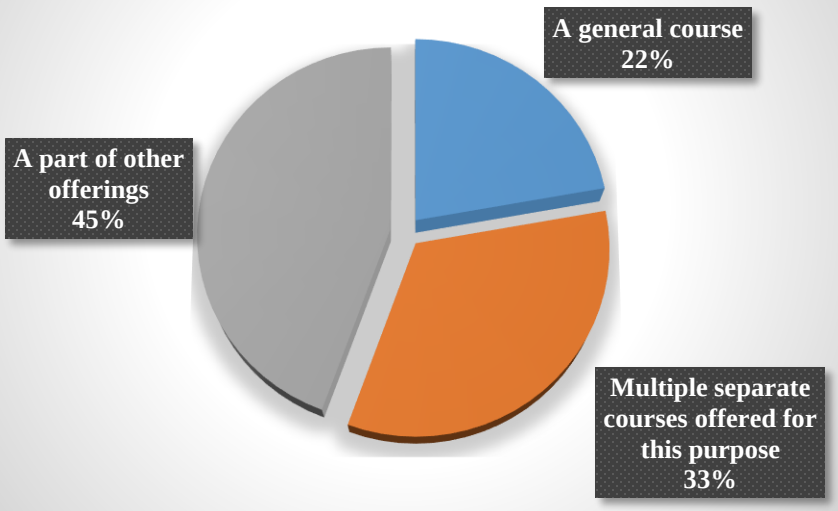
This question was designed to move from the general answers participant schools provided to question two to more details about the ways in which they teach ADR. The survey directed respondents to choose one of the provided multiple choice answers for the sake of accuracy. Respondents had to select one of the following descriptions of their ADR offerings: a) ADR is taught as a general course; b) The school offers multiple separate courses for this purpose, e.g. an arbitration course, a meditation course … etc.; and finally c) ADR is taught as a part of other offerings? Each choice asked respondents to specify the title of the offered course(s) and the number of assigned credit hours to maximize the elicited information.

The majority of law schools that teach ADR to their students stated that they do not offer stand-alone courses in this subject. The forty-five percent of Saudi law schools that teach ADR reported that they do so as a part of other general offerings. The syllabi of several courses in these schools – e.g., Introduction to the Study of Law, The Law of Procedure before *Sharia* Courts, and Commercial Law – include ADR lessons. Three law schools reported, moreover, that they offer 2-3 credit hour stand-alone courses on the subject of arbitration, among all ADR subject areas. These three schools constitute less than thirty-three percent of Saudi law schools that teach ADR. Only twenty-two percent of these law schools (two out of nine) offer 2 credit hour courses covering

ADR in general. These percentages suggest that ADR and its various subjects are unpopular even in law schools that claim to offer such courses to their students.

These findings reflect a lack of interest in the field of ADR on the part of Saudi law schools. They speak, in fact, to the unwillingness of some schools to provide instruction in ADR subjects and thus testify to an imbalance that requires reform. The attempts of schools that claim to teach ADR are too inadequate to contribute to the development of the field or to provide students with the skills they need. The survey's findings to this point highlight the troublingly low status of ADR instruction in the Kingdom. Figure 4 (below) shows the responses to question three of the survey.

Figure 4: Responses to Question Three: "Is ADR Taught in/as: A general Course, Multiple Seperate Courses, or A Part of Other Offerings?"



3.4.2 Question four:

Question four was intended to reveal the extent of each law school's experience in ADR instruction. It asked each participant school to list the year it began offering the ADR course(s) to

its students. Five out of nine participating law schools either provided irrelevant answers or did not respond to this question. The responses of the other four schools fit into three categories: five or fewer years, between five and ten years, and ten or more years. None of the four respondents' claimed to have ten-plus years of experience teaching ADR. Three participating law schools reported that their experience ranges between five and ten years. Only one surveyed law school indicated that it has offered an ADR course for five or fewer years.

The survey shows that most law schools in Saudi Arabia have little or no experience in teaching ADR. A few law schools have recently set the wheels in motion by offering a limited number of course. The effectiveness of such courses, however, remains unclear and the current lack of quantifiable information makes it difficult to measure. This lack of experience, or even lack of interest, will yield continued sub-par legal education outcomes if schools do not take steps to improve the situation. Figure 5 (below) displays the responses to survey question four.

Figure 5: Responses to Question Four: "When did your school begin teaching such course(s)?"

Since five years or less	For more than five but less than ten years	Since ten years or more	No or irrelevant answers
1	3	0	5

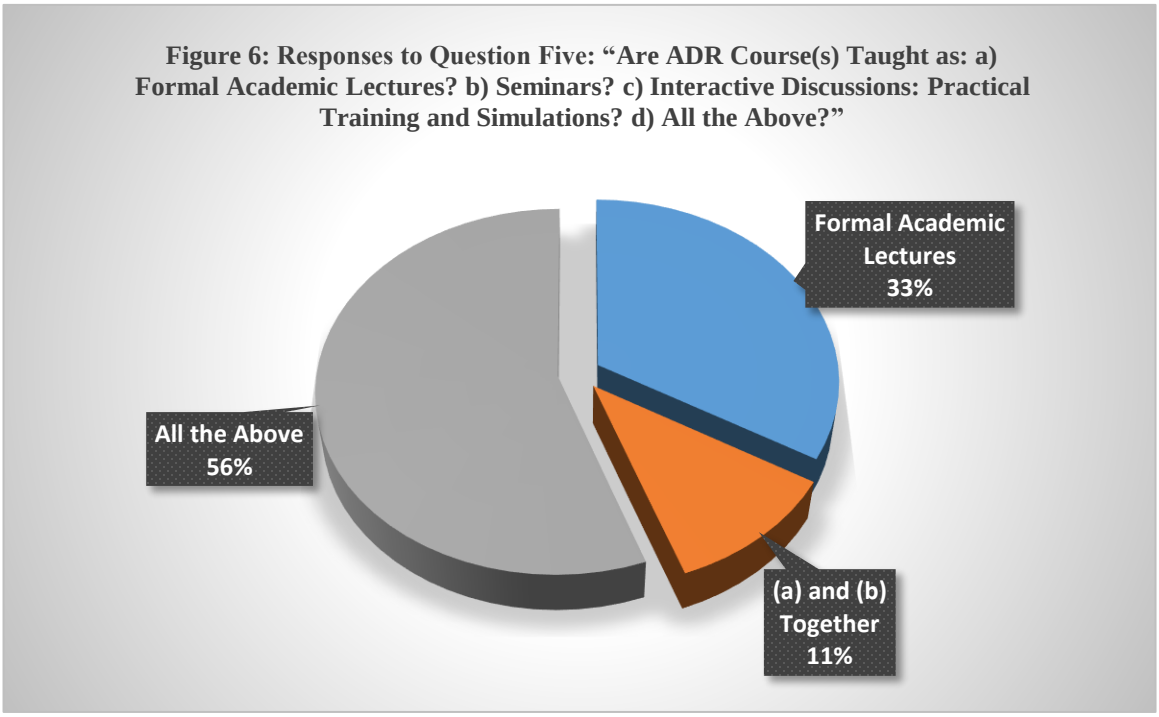
3.4.3 Question five:

This question was designed to explore and analyze the teaching approaches and methods used by law schools that offer ADR courses to their students. It asked respondents to pick any of the responses from the following list that apply to their schools: formal academic lectures, seminars, interactive discussions, practical training and simulations, or all the above. About fifty-six percent of the respondents indicated that they use all the listed methods and approaches in teaching ADR courses in their schools. Thirty-three percent of the respondents stated that their instructors use the classical approach in the offered courses and the most common teaching method is the formal lecture. Eleven percent of respondents selected the first and the second options together (formal academic lectures, and seminars) as valid answers.

The information provided in responses to question five raises the possibility of response bias, which is always present in surveys and is difficult to gauge or predict. The question of feasibility seems particularly pertinent. The majority of respondents indicated that their instructors teach ADR modules using all the provided teaching methods, but can the lecturers and tutors in these schools truly accomplish all this work given the limited number of assigned credit hours and course offerings? Instructors in such circumstances must face substantial pressure to address all aspects of their various curricula in such a short period of time; this undoubtedly has a negative impact on the learning process.

These findings yield several important conclusions. First, Saudi law schools need to embrace new ADR teaching methods rather than relying solely on old-fashioned lectures. Second, these schools need to design and offer separate clinical law courses for ADR subject areas. Doing so will enable law schools to offer to their students skills-based learning opportunities that will allow them to interact in a hands-on educational setting. This will foster a richer and more effective learning environment. Figure 6 (below) displays the responses to survey question five.

Figure 6: Responses to Question Five: "Are ADR Course(s) Taught as: a) Formal Academic Lectures? b) Seminars? c) Interactive Discussions: Practical Training and Simulations? d) All the Above?"



3.4.4 Questions six, seven, and eight:

This section analyzes responses to questions six, seven, and eight together because they relate to each other and serve the same purpose. Question six asked participant schools to specify whether or not the lecturers teaching their ADR courses specialize in ADR. Question seven asked participants who responded "Yes" to question six to indicate whether or not the specialized

lecturers are Saudis or non-Saudis; question eight asked participants who responded "No" to state the fields of law in which the ADR lecturers specialized. These three questions were designed to determine whether or not specialized faculty teach the ADR courses in these law schools and to gauge the extent of the shortage of faculty members in this field.

The survey shows that unspecialized faculty who lack direct expertise in ADR teach the ADR classes in almost fifty-six percent of the respondent law schools. A minority of Saudi law schools indicated that lecturers with specialties in ADR teach their ADR courses. One school (accounting for about seventeen percent of the sample for this question) among those with ADR-specialized instructors reported that only Saudi faculty teach its ADR courses. Fifty percent of the remaining respondent schools stated that both Saudi and non-Saudi faculty teach their ADR courses, while thirty-three percent indicated that only non-Saudis lecture such courses. Seventy-five percent of the question six "No" respondents reported in question eight that ADR instructors in their schools specialize in private law in general or in one of its areas of expertise. Respondent schools reporting that their ADR lecturers specialize in Islamic *Sharia* constituted the remaining twenty-five percent of the "No" sample.

These data verify several presumptions. First, the shortage of ADR faculty members in general looms as a serious problem for Saudi law schools. This shortage, if unaddressed, will undoubtedly have a negative effect on the quality of ADR instruction in all law schools, which will translate into poor outcomes for students. Second, the shortage of Saudi instructors in most of the law schools proves that schools have done little to alleviate or overcome this problem. Third, the problems this survey highlights stem from a presumed failure to recognize the importance of ADR and ADR instruction. Law schools in Saudi Arabia, in other words, underestimate the great value and the significance of ADR and fail to recognize the potential consequences of so doing;

this lack of awareness is the root cause of the problems identified above. The following figures show the data gathered from survey questions six, seven, and eight.

Figure 7: Responses to Question Six: "Are the lecturers assigned to teach ADR course(s) specialized in ADR or in a specific area of the field?"

Yes	No
4	5

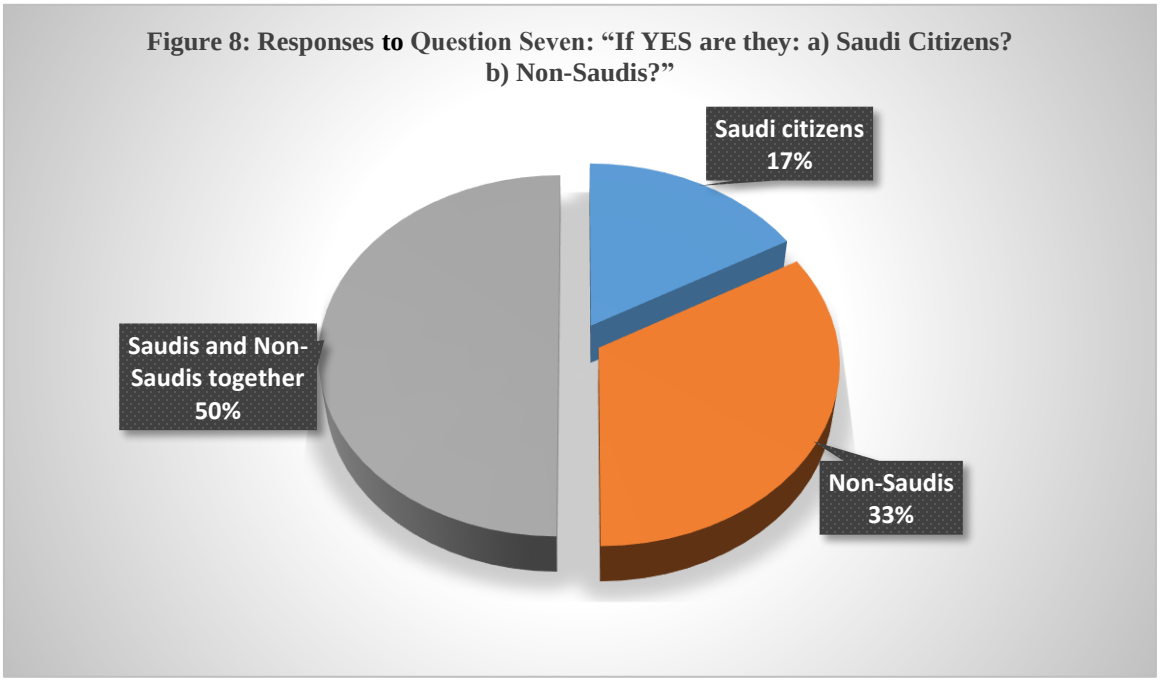


Figure 9: Responses to Question Eight: "If NO, please specify the fields in which the lecturers assigned to teach ADR course(s) are specialized."

Private Law	Islamic *Sharia*
3	1

3.4.5 Question nine:

The survey's disappointing results to this point might generate a great deal of pessimism, but the responses to question nine provide a glimmer of hope. The question asked participant schools if they offer instruction in arbitration in any of the forms mentioned in question three (general course, a stand-alone curriculum, or as a part of other offerings). The question was designed to elicit a clear and comprehensive picture of the reality of instruction in arbitration – the most effective and the globally recognized method of resolving disputes.

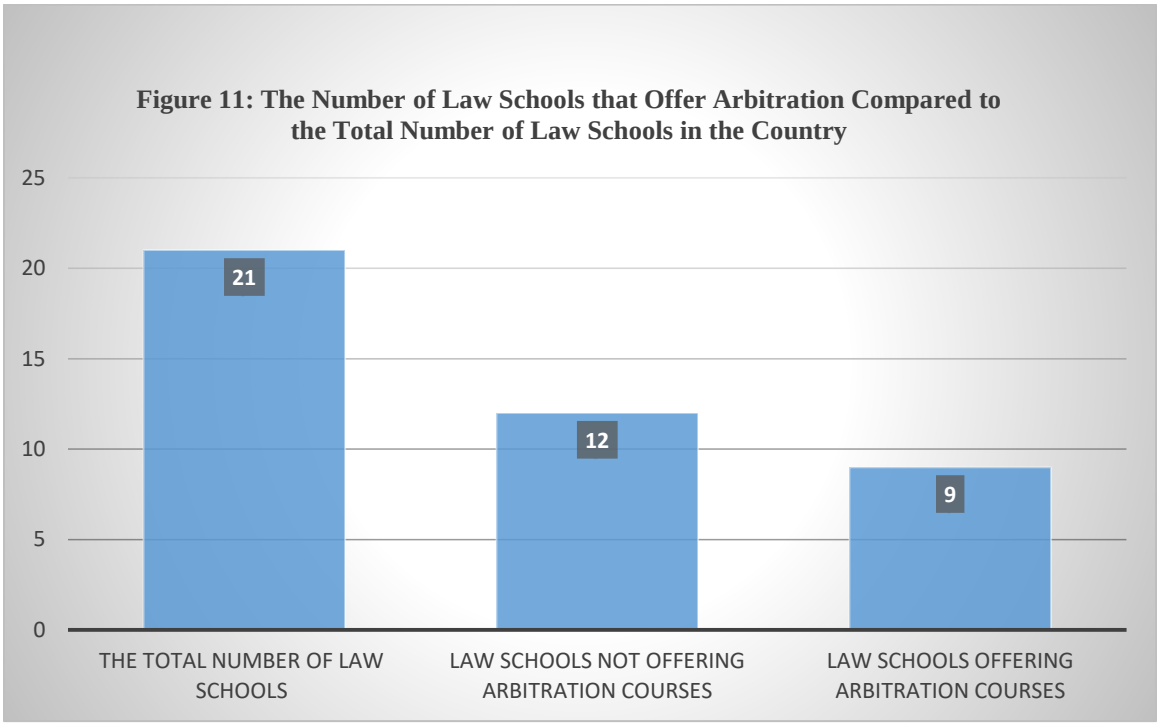
The survey shows that all law schools that offer ADR courses teach arbitration. All nine respondent law schools confirmed that they offer arbitration courses to their students. This is certainly an encouraging sign, signaling that these schools have a positive attitude toward teaching arbitration. This is not, however, the whole story; only the schools that offer ADR course(s) responded to this question. They represent only forty-three percent of all Saudi law schools, which means that the majority of law schools in Saudi Arabia still do not offer instruction in arbitration.

The content of each offered course and the manner in which these law schools teach arbitration is, moreover, a matter that still requires examination.

The next question addressed some of these issues, but the results of this survey highlight that a comprehensive understanding of the reality of ADR instruction in general and arbitration in particular will require additional surveys and careful studies. Figure 10 shows responses to survey question nine, and figure 11 displays responses to survey questions two and nine together – providing a comparison between the number of law schools offering and not offering arbitration courses and the total number of law schools in the Kingdom.

Figure 10: Responses to Question Nine: "Is Arbitration Offered in Any of the Courses Mentioned in Question No. (3) Of this Survey?"

Yes	No
9	-



3.4.6 Questions ten:

This was designed question to gain insight into current approaches to arbitration instruction in the Saudi law schools that offer such courses. The information the question elicited makes it easy to compare the survey responses to global trends in arbitration education.[26] The question was also intended to facilitate some degree of evaluation of the ways these law schools can improve in this field. The author designed the question to achieve these aims by asking responding schools to clarify whether they offer arbitration classes that provide general instruction in this subject area

[26] In the United States, for example, a survey conducted by Professor Thomas Carbonneau and the Tulane Arbitration Institute showed that arbitration is taught in law schools in several manners. Stand-alone courses in the subject of arbitration are offered by the majority of the U.S. law schools. While some of them offer general courses on the subject, a substantial number of law schools offer specialized courses which cover the following areas of arbitration law: (labor arbitration, International commercial arbitration, commercial arbitration, securities arbitration, environmental arbitration, and public-sector bargaining). The survey also showed that arbitration is taught in some other law school through a combination of general and specialized courses together. Another trend in which arbitration is offered in the U.S. law schools is by offering stand-alone courses (specialized and non-specialized) on ADR and arbitration. Carbonneau, *supra* note 22.

and cover arbitration broadly without focusing in any of its specific areas, or if they offer specialized courses that focus on individual subject areas of arbitration such as commercial arbitration and labor arbitration …etc. It also asked participants who responded affirmatively to the latter sub-question to provide course titles and the number of designated credit hours for each offered course.

Six out of nine schools reported that they do not offer specialized courses in specific areas of arbitration, meaning sixty-seven percent of responding schools teach arbitration only as a general offering. The remaining respondents stated that they offer one course that focuses in one specialized area of arbitration: twenty-two percent of the responding law schools reported that they teach specialized courses in commercial arbitration and eleven percent reported that they teach specialized courses in judicial arbitration as part of the Judiciary's jurisprudence course.

The majority of the responding law schools that offer arbitration courses indicated that they provide only basic instruction in general offerings. The survey also shows that no law school offers more than one course in arbitration, either a specialized or a general offering. Taking into consideration the small number of credit hours assigned to the specialized courses (two), this suggests that the few specialized courses offered in some of the law schools also provide only superficial instruction in arbitration rather than thorough knowledge. In-depth specialized courses are of great significance; they deepen student understanding of the subject area, broaden their horizons, and sharpen their skills. These types of courses provide students with a depth of learning that will help them build the capabilities they need to succeed in the legal profession. The responses to this question clearly show that Saudi law schools need to broaden their ADR offerings in general and their arbitration course offerings in particular. Offering multiple specialized courses in the different areas of arbitration law is crucial to prepare future lawyers to practice law. Doing so will

enable law schools in Saudi Arabia to keep up with global trends in this field[27] and open doors for further improvements that will meet the demands of a constantly changing labor market. Figure 11 (below) displays the responses to survey question ten.

Figure 11: Responses to Question Ten: "a) Is arbitration taught as a general course? Or b) Is it taught in specialized courses on different subject areas of arbitration? E.g. commercial arbitration, arbitration in civil cases, labor arbitration, etc. Please specify these courses and their credit hours"

General Course	Specialized Courses
6	3

3.5 The Third Category

This category contained a shared question directed to all participating law schools.

3.5.1 Question eleven:

This question addressed an issue that preceding questions and categories did not touch on. The author – believing Saudi law schools should organize conferences and other types of meetings on ADR and recognizing the profound beneficial impact of so doing on law students, law schools,

[27] *See supra* note 22 and accompanying text.

and the learning process in general – designed this question to identify and closely observe the respondents' position on this matter. The question asked participating law schools to state whether or not they host or organize any form of educational meetings on the subject of ADR such as conferences, seminars, discussion groups, or specialized workshops, and whether they invite distinguished speakers and participants to take part in such events.

This analysis only considers the responses received directly from the schools that participated in the survey; it excludes information retrieved from the internet concerning six of the Saudi law schools. The majority of the fifteen responding law schools (eight out of fifteen or fifty-three percent) reported that they do not host conferences or any form of the listed events on ADR. The responses to question two indicate that seven of these schools offer ADR courses (out the nine total that do so). The analysis of the responses shows, in other words, that about seventy-eight percent of the law schools that teach ADR do not host any meetings for educational purposes on that subject. The provided information also reveals that seven out of the fifteen responding schools (about forty seven percent) host conferences, seminars, discussion groups, or specialized workshops on ADR. Interestingly, five of these schools (over seventy-one percent) do not teach ADR at all based on their responses to question two. The majority of the law schools that host ADR conferences or similar meetings, in other words, do not offer ADR courses to their students. This group includes the three oldest law schools in the country. Only two law schools that teach ADR claimed that they host such educational events. The effectiveness of the organized meetings, however, remains unclear, requiring further additional research and analysis.

The responses to question ten, discussed above, can be divided into two main categories. The first category contains the disappointing findings that both the majority of responding law schools and the majority of the law schools that teach ADR in general do not host ADR

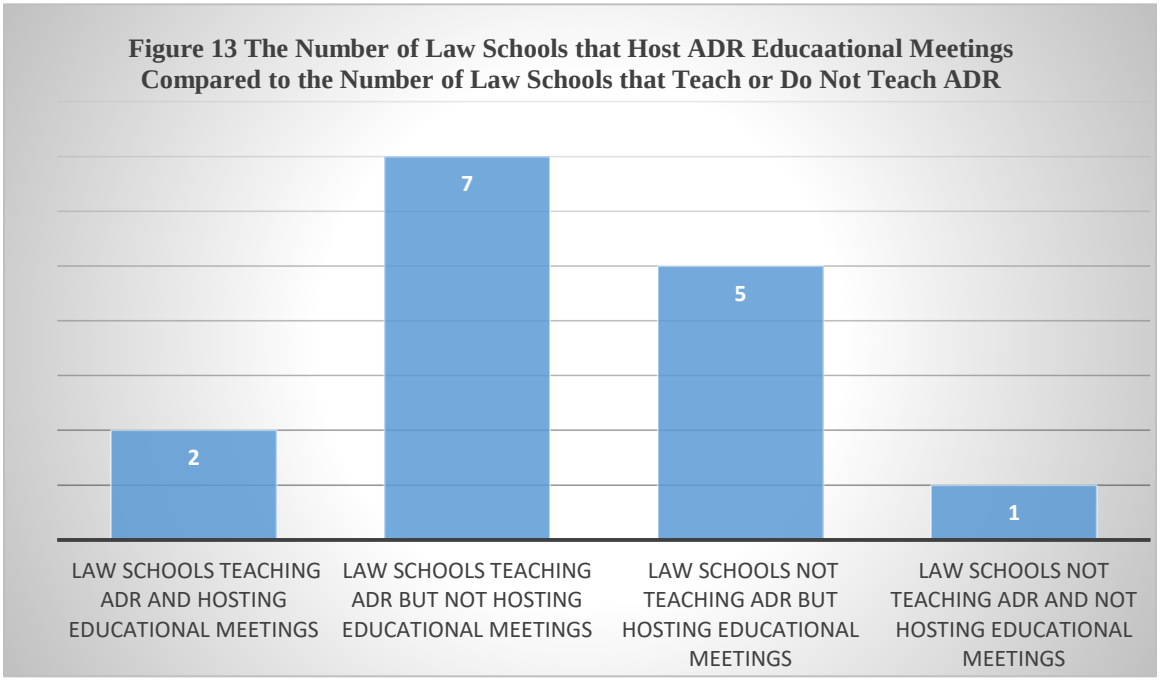
conferences or any type of related meetings. This indicates that these schools either fail to recognize or simply ignore the significance of such educational gatherings in enhancing ADR education. The second category includes the unexpected finding that the majority of law schools that claim to host ADR events do not (based on their responses to previous survey questions) offer ADR courses to their students. This finding suggests that these schools may still be examining the importance and the effectiveness of ADR courses, limiting their involvement to hosting such educational meetings without teaching ADR or any of its subject areas. Taking such steps may or may not lead these law schools to offer ADR courses in the future. This assumption raises several questions, however. How, for example, do the schools that do not teach ADR aim to benefit their faculty and students by offering such platforms? What can these schools do to ensure the success and effectiveness of such conferences, seminars, and workshops? Who is the target audience for these events – assuming students' lack of exposure to ADR-related topics translates into a lack of interest? All of these considerations suggest one thing above all: hosting ADR-related educational activities will not necessarily directly enhance the quality of ADR learning or teaching in schools that do not offer ADR courses to their students. The rewards will certainly be greater for schools that do offer such courses.

Hosting ADR conferences and other ADR-related educational meetings can serve many purposes for law schools. Such events can, for example, increase student awareness of and knowledge about ADR, and enable interested students to find channels for sharing, exchanging, and discussing their knowledge and ideas. Finally, adopting this approach can encourage new studies of ADR instruction and thus promote ADR in general throughout Saudi Arabia. Law schools, therefore, should take the lead in this effort. Indeed, the findings of this survey highlight the importance of law schools organizing various types of educational platforms and inviting

distinguished speakers and experts in the field to the events they host. The findings also emphasize the importance of faculty, student, and invited guest participation in such effective and valuable gatherings, since such participation will generate long term and cumulative educational benefits. Figures 12 and 13 (below) show the analysis of the question eleven responses and relevant results from earlier in the survey.

Figure 12: Responses to Question Eleven: "Does your school organize conferences, seminars, discussion groups or specialized workshops in ADR and invite speakers and participants and take part in them?"

Yes	No
7	8



3.6 The Fourth Category

The questions in this category were intended for schools that do not offer ADR course(s) to their students. They were designed to acquire additional information about the exclusion of ADR subject areas from these schools' curricula, to identify the circumstances that produced these exclusions, and to acquire insight regarding the possible future development of ADR instruction. This category contained three questions (questions 12, 13, and 14).

3.6.1 Question twelve:

This question was intended to identify the main factors and causes that have led schools in this category of the survey not to offer ADR courses. Question twelve, a multiple-choice, close-ended question, reads: "Why does your school not offer a specialized course(s) in ADR?" The survey asked respondents to select one of the following six answers: a) The paucity of specialized

academics in the field; b) The absence of labor market demand at present; c) We give priority to more important courses; d) Limited credit hours assigned for specialized courses required to complete the degree; e) We currently see no need to teach such courses; f) Other, please specify.

The websites of the six law schools that did not respond to the survey gave no hints as to their possible responses to this question, so the author excluded them from survey question twelve. The remaining six law schools that do not teach ADR course(s) responded as follows: the first law school selected c) ("We give priority to more important courses"); the second selected d) ("Limited credit hours assigned for specialized courses required to complete the degree"); the third selected both c) and d); the fourth law school selected c), d), and e) ("We currently see no need to teach such course"); and the fifth and sixth schools both selected f), preferring to provide reasons other than those listed. The first of these schools explained that a lack of conviction regarding the importance of teaching ADR in the past drove the decision to exclude such courses when the school created its plan of study; the other stated that it does not offer ADR instruction because of its plan of study – offering no further clarification, but stating that it is in the process of adding such courses to its curriculum.

Taking into consideration that some of the responding schools select more than one of the provided answers, an analysis of the relative frequency of each selected response provides insight into these results. Figure 14 (below) shows a choice selection frequency table for all the listed responses to question twelve; the six responding law schools only selected four of the listed choices. They made these selections (c, d, e and f) nine times in total. Respondents selected the listed choices c) ("We give priority to more important courses") and d) ("Limited credit hours assigned for specialized courses required to complete the degree") three times (about thirty-three and a third percent for each choice). Choices (c) and (d) were thus the most selected responses.

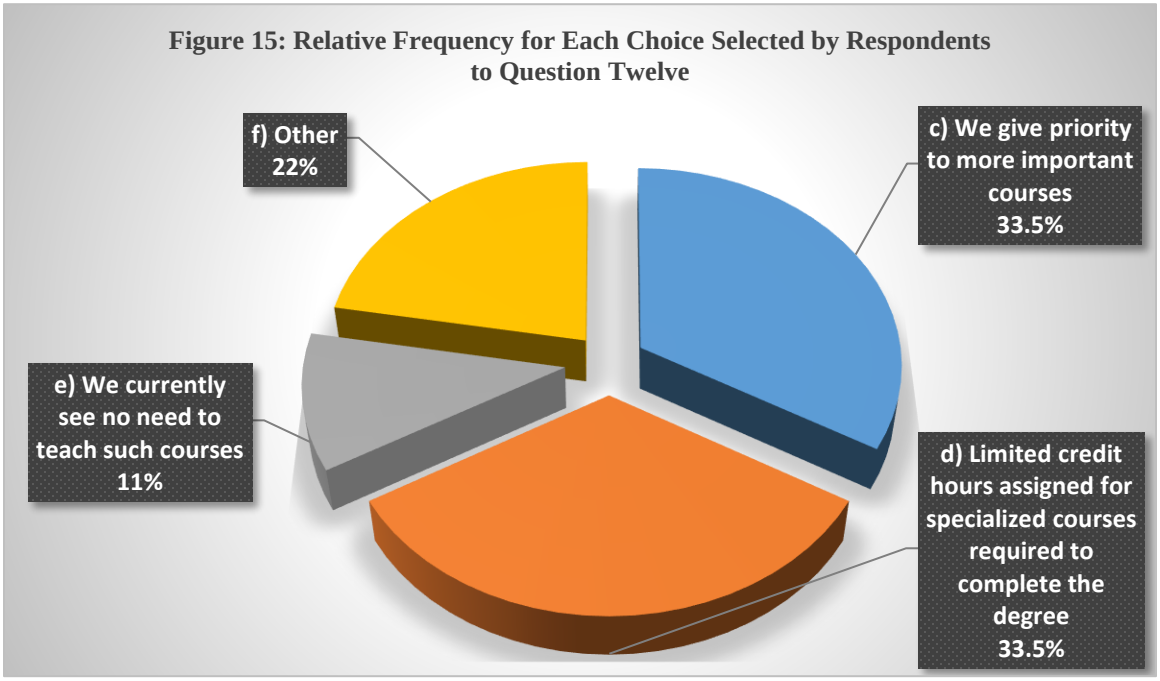
Respondents selected f) (other) two times (about twenty-two percent) and e) ("We currently see no need to teach such course") only once (about eleven percent).

The responses to question twelve provide more in-depth insight into Saudi law schools' rationales for not offering ADR courses. Schools offer more specific reasons in their responses to question twelve than in their earlier general responses. These responses confirm the initial interpretation of survey question two – that many Saudi law schools have ignored the growth of ADR and the expanding applications of its various processes. School responses that they do not offer ADR courses because they currently see no need or because they give priority to other subject areas make this point readily apparent. The responses to question twelve confirm two additional facts. First, some law schools need to increase the total number of required credit units to expand their curricula to include ADR courses and offer them to law students. Second, the survey indicates that some law schools still question the importance of offering ADR courses; although they assign sufficient credit hours to law subject areas, these courses do not yet include ADR. The next question was primarily to obtain more details from those schools about their future plans in this regard. Figures 14 and 15 illustrate the analytical points outlined above.

Figure 14: Frequency of Choice Selections in Responses to Question Twelve

Choices	Number of Selections
The paucity of specialized academics in the field	**0**
The absence of labor market demand at present	**0**
We give priority to more important courses	**3**
Limited credit hours assigned for specialized courses required to complete the degree	**3**
We currently see no need to teach such courses	**1**
Other	**2**

Figure 15: Relative Frequency for Each Choice Selected by Respondents to Question Twelve



3.6.2 Questions thirteen and fourteen:

The survey's final two questions were designed to facilitate analysis of another dimension of the surveyed issues: the status of ADR instruction. The author sought to use these two questions to predict the future of this field. The results of the survey to this point shed light on the reality of the studied field, reveal the number of law schools that have chosen not to teach ADR to their students, and identify several causes for the exclusion of ADR from Saudi law school curricula; these final questions take the survey to a new level, looking toward the future of ADR instruction. The author designed both questions to explore changes the law schools in question could initiate as well as the challenges they could face. Analysis of the responses to these two questions illuminates the direction of future trends in this field.

Question thirteen asked the responding law schools to indicate whether or not they plan to add new courses in ADR or any of its subject areas to their bachelor degree plans of study in the upcoming years. The survey directed only the "No" respondents to proceed to question fourteen, which asked them to list any obstacles, barriers, or reasons preventing them from doing so. Five of the six question thirteen respondents (about eighty percent) reported that they plan to expand their curricula to include ADR courses. This is an indisputably positive step, signaling approaching changes that will have a profound impact in the field. Achieving such goals, however, will require additional effort and commitment from the law schools since they still have a long way to go. The majority of the responses to question thirteen, in other words, provide a glimpse of a possible future path for development in legal education. The next objective for law schools in this regard should be to learn from the experience of other law schools in the country that teach ADR and to observe global ADR instruction trends and thereby benefit from the long histories and considerable successes of other law schools in this area. Doing so will help each law school identify the proper direction to pursue to ensure qualitative results and accomplishments.

Only one question thirteen respondent reported that it does not intend to include ADR courses in its plan of study in the near future. This law school specified in its response to the subsequent question that the limited number of credit hours allocated for law courses is the source of its reluctance to add such offerings to its curriculum, which includes both law and *sharia* specializations. This is, for many reasons, an insufficient rationale for not teaching ADR. First, the term *sharia* law has largely the same meaning as the word law, as interpreted in many western

jurisdictions.[28] The dissimilarity between the two terms mainly concerns their respective sources.[29] ADR instruction thus has a place in both institutions as Chapter 2 illustrated.[30] Second, many law schools in Saudi Arabia now teach *sharia* modules and law courses to their students. Many newly opened schools in Saudi Arabia are actually called "school of *sharia* and law" and, as this survey shows, this has not prevented some of these schools from offering ADR courses. Third, the school's claim that its reluctance to add ADR courses to its curriculum stems from credit hour limitations is inadequate, since, as the survey illustrates, other law schools have the same concerns but still demonstrate a desire to offer such courses in the future. This school's resistance thus proves that teaching ADR in law schools requires genuine willingness, ability, and commitment to take serious steps toward improving legal education. Law schools that lack such dedication will struggle to overcome any obstacle or difficulty they may encounter in this regard. Providing future lawyers courses in ADR has become a fundamental obligation for law schools; such courses enable students to acquire the knowledge and skills that they will need to practice law effectively. The results of the survey show, in short, that ADR is more important than some law schools believe.[31] Figure 16 (below) displays participant responses to survey question thirteen.

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[28] *See e.g.* Issam Saliba, WHAT IS SHARIA LAW?, LAW LIBRARY OF CONGRESS (2011), *available at*: www.loc.gov/law/help/sharia-law.php (last visited Apr 22, 2018); *see also* JAN MICHIEL OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY (2008); SHAHBAL DIZAYEE, A COMPARISON STUDY BETWEEN SHARIA AND LAW (2003).

[29] *Id.*

[30] Also *see generally* NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (1964); Alternative Dispute Resolution & Islam, ALTERNATIVE DISPUTE RESOLUTION & ISLAM, *available at*: https://islamadr.wordpress.com/ (last visited Feb 17, 2015); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1982); 'ABD AL-ḤAMĪD AḤDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES (3rd rev. and expanded ed. 2011); George Sayen, *Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia*, 24 U PA J INTL ECON L 905 (2003); RALPH H. SALMI, ISLAM AND CONFLICT RESOLUTION: THEORIES AND PRACTICES (1998); MOHAMED M. KESHAVJEE, ISLAM, SHARIA AND ALTERNATIVE DISPUTE RESOLUTION: MECHANISMS FOR LEGAL REDRESS IN THE MUSLIM COMMUNITY (2013); FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA (2000).

[31] This meaning is borrowed from an article written by Sidney S. Sachs: *"ADR is bigger than you think", see* Sachs, *supra* note 8.

Figure 16: Responses to Question Thirteen: "Will ADR or any of its subject areas be added to your bachelor's degree plan of study in the upcoming years?"

Yes	No
5	1

4. Discussion

A general glimpse at the current curriculum of the majority of Saudi law schools indicates that they mainly focus on teaching litigation and its related subject areas. Previous chapters discussed the shortcomings of litigation, asserting the importance of ADR processes.[32] This assertion should not be interpreted as an argument against teaching litigation; it aims to highlight the importance of strengthening the legal education system, especially in the field of dispute resolution, by not solely teaching litigation to law students, but also offering contemporary ADR modules in which students can acquire the knowledge and skills needed in contemporary legal practice.[33] As professor Carbonneau noted:

> The consideration of other dispute resolution methods needs to supplement the interdisciplinary study of disputes and the exposure to the ethic of legal adjudication. Having gained an understanding of how disputes arise and what they imply in human and social terms, law students should be introduced to the panoply of possible remedies—of which adversarial litigation should be only one possible remedy.[34]

[32] *See generally* Burger, *supra* note 4; Jon O. Newman, *Rethinking fairness: Perspectives on the litigation process*, 94 YALE LAW J. 1643–1659 (1985); Jethro K. Lieberman & James F. Henry, *Lessons from the alternative dispute resolution movement*, 53 UNIV. CHIC. LAW REV. 424–439 (1986).

[33] John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST J DISP RESOL 247 (2010). ("Law schools should not merely make sure that all law graduates understand the differences between negotiation, mediation, arbitration, and litigation (though this is surely desirable), but should also do a better job of enhancing all the knowledge and skills that attorneys need to be effective. For example, law schools should teach students such insights as: facts are often contested, some disputes are not best resolved through litigation, not all disputes boil down to money, emotions should not necessarily be ignored, and other disciplines can be very helpful to attorneys. Lawyers must be able to understand parties' interests, communicate effectively, and develop options that may be acceptable to disputing parties. Moreover, the curriculum should teach these lessons not only in a few elective skills courses but also as an integral part of core doctrinal courses. In other words, law schools should generally convey a broader and more realistic conception of what it means to "think like a lawyer"—"and act like a lawyer"—in practice. ADR instruction, explicitly or implicitly, raises fundamental issues about lawyers' identity and roles. Thus, ADR instruction is an important corrective to a legal curriculum which routinely conveys erroneous assumptions about what it means to be a lawyer when virtually the only dispute resolution process considered is litigation.") *Id.*

[34] CARBONNEAU, *supra* note 18 at 249.

Saudi law schools should take this perspective into account, as it will help them reshape the Kingdom's legal education and reform its law school curricula to respond effectively to the needs of contemporary legal practice.

ADR instruction in the United States has undergone multiple stages of development and each phase resulted from earlier progress.[35] Considerable work and dedication, in other words, drove the great achievements and accomplishments of U.S law schools in this field.[36] Progress in the U.S. came in response to the need to close the gap between the theories taught in law schools and legal practice in the real world. It took several years to bridge this gap, but U.S. law schools finally managed to reach the desired result whereupon they set new objectives and targets to ensure they sustained the progress they had made and continued to develop.[37] Many lessons can be derived from the experience of U.S. law schools in this area. The scholarly contributions and the "pioneering" efforts that fueled gradual growth in that jurisdiction are among the main headlines of this trailblazing experience.[38] This chapter also highlights the importance of assessing the quality of achieved outcomes through research and empirical studies.[39]

Analysis of the survey results makes it clear that Saudi law schools do not fit into any of the developmental phases of ADR instruction in the United States. The current status of ADR instruction in Saudi law schools arguably resembles the first phase of progress made in the United States, since, as the survey shows, several law schools have started to introduce these subjects.[40] The fact that the ADR movement in the United States was a well-planned effort resulting from

[35] *See supra* notes 4-22 and accompanying texts.
[36] *Id.*
[37] *Id.*
[38] *Id*; *see also* Sander, *supra* note 18; Love, *supra* note 9.
[39] *See e.g.* Carbonneau, *supra* note 22; Steve Toben, *A Funder's View-ADR in the Year 2010: Reflections on a Decade of Progress*, 6 DISP RESOL MAG 6 (1999).
[40] *See supra* notes 4-7 and accompanying texts.

great scholarly contributions and academic support that fueled huge accomplishments that impacted the development of ADR instruction in law schools throughout all three developmental phases counters the contention. The movement's progress was, in short, notable from early attempts to teach ADR during the first phase.[41] These attempts increased the likelihood that the number of law schools including ADR subjects to their curricula would increase. The status of ADR instruction in Saudi law schools clearly diverges from the U.S. model. The lack of genuine recognition among Saudi law schools and academics of the significance of ADR and competence in dispute resolution in contemporary legal practice and of the necessity of teaching this subject to the future lawyers to arm them with the skills they need to practice law sharply distinguishes the early stage of the U.S's historical development and the current status of ADR instruction in Saudi Arabia. The current status of ADR instruction in Saudi law schools, moreover, provides little evidence of a possible rising trend in ADR instruction that would signal a movement comparable to that of the United States.

Saudis have devoted considerable effort for more decades to promoting and enhancing the capabilities of the court system.[42] Many remedies have been proposed to address justice system defects such as court delays and the excessive caseloads.[43] Two central points warrant attention here. First, introducing ADR processes into the court system will quickly and efficiently facilitate the achievement of the desired improvements in the court system. Those spearheading ongoing efforts to improve the country's judicial system, however, have yet to demonstrate a genuine willingness and desire to include ADR among the recommended reforms. Second, law schools should recognize that teaching ADR to their students does not conflict in any way with government

[41] *Id.*
[42] *See e.g.* Richard Dekmejian, *The liberal impulse in Saudi Arabia*, MIDDLE EAST J. 400–413 (2003); *see also* Rashed Aba-Namay, *The recent constitutional reforms in Saudi Arabia*, 42 INT. COMP. LAW Q. 295–331 (1993).
[43] *Id.*

initiatives to reform the justice system. ADR provides the dispute resolution system, which should include adjudicatory and non-adjudicatory processes, more possible venues. Teaching ADR will make the shift to the use of these methods easier in the event that litigation is deemed insufficient in the future as has been the case in some other parts of the world.[44]

5. Conclusion

It has been said that "the best way to predict the future is to create it."[45] This maxim rings true in the suggestion that legal education should play a leading role in promoting ADR in general and enhancing its various processes in Saudi Arabia. The Kingdom can undoubtedly build a strong dispute resolution system through a robust and effective legal education. Law schools in Saudi Arabia, therefore, should recognize the significance of teaching ADR subject areas and skills. This survey suggests that Saudi law schools should reform their curricula to eliminate ADR illiteracy. It highlights the need for reforms addressing an array of issues; examples include the expansion of curricula to integrate multiple ADR courses and the need for a thorough evaluation of the few current ADR courses to ensure their effectiveness and success. This survey also emphasizes the need for additional studies to ensure continued growth and improvement in this field.

A final analysis of this chapter's findings – especially in the light of the fact that the survey's negative results overweigh the positive – yields two additional observations. A pessimistic view, on the one hand, would suggest that law schools have failed so far to give ADR the attention it deserve. This interpretation supports the earlier statement that ADR is of greater significance than many Saudi law schools realize.[46] An optimistic view, on the other hand, would

[44] *See supra* note 32 and accompanying text.
[45] This quote has been credited to many authors with different but similar versions, *see e.g.* FRED R. SHAPIRO, THE YALE BOOK OF QUOTATIONS 415 (2006); *see also* Quote Investigator, *available at*: https://quoteinvestigator.com/2012/09/27/invent-the-future/ (last visited Apr 29, 2018).
[46] *See supra* note 31 and accompanying text.

regard ADR as still a fertile virgin area in the country that should attract law schools since it promises huge success should they invest in it. Perhaps it is not too optimistic to hope that this survey will serve as a departure point for bigger future projects on the subject of ADR instruction that either thoroughly investigate the ways ADR is offered in each law school or that examine the subject in a broader sense with the aim of providing a careful evaluation of legal education in general in Saudi Arabia.

CHAPTER SIX: INSTITUTIONLIZATION OF ADR

1. Introduction

The initial success of ADR (largely ad-hoc in its early history) and growing worldwide demand resulting from the recognition of ADR's promise in resolving disputes eventually generated a modernization movement. Modernization efforts initially focused on promoting ADR and facilitating access to its various mechanisms. The spread of terms such as "institutionalization," "mainstreaming," and other fashionable phrases around the world in the late decades of the twentieth century marked a new phase in ADR's development.[1] This phase led innovators to propose a whole new generation of ADR in which systematic and more efficient approaches to dispute resolution would replace older ad-hoc forms.[2]

Modernizers sought to institutionalize ADR for various reasons. They sought, for example, to attract more people, including skeptics, to use its various techniques.[3] Such efforts also sustained ADR's growth and helped the ADR movement pursue its objectives.[4] Efforts to institutionalize ADR focused on relieving caseload pileup and alleviating case congestion in courts, promoting ADR and the use of its various mechanisms, enhancing "access to justice," and offering additional efficient ways to resolve disputes.[5] The success of institutionalization efforts thus, arguably, depended on the achievement of the abovementioned objectives.[6]

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[1] Harry N. Mazadoorian, *Institutionalizing ADR: Few risks, many benefits: Some guidelines for system design*, 12 ALTERN. HIGH COST LITIG. 45–46 *(*1994).

[2] *Id*; ("Initial successes in the ADR movement came from ad hoc efforts at creative problem-solving. Further experimentation led to new successes and the development of even more innovative procedures.
After many publicized early successes with ADR, innovators tried to design 'systems' to increase ADR use. Their goal was to facilitate ADR use by interested parties and to counteract resistance by opponents. Buzzwords such as 'mainstreaming,' 'institutionalizing' and 'systems design' came to represent the next generation of ADR initiatives.") *Id.*

[3] *Id.*

[4] Frank EA Sander, *Alternative methods of dispute resolution: an overview*, 37 U FLA REV 1 (1985).

[5] *Id.*

[6] *See generally* Bruce Monroe, *Institutionalization of Alternative Dispute Resolution by the State of California*, 14 PEPP REV 943 (1986); ("One of the leaders of the movement, Frank Sander, has set forth four major goals of the ADR movement: '1) to relieve court congestion, as well as undue cost and delay; 2) to enhance community

CHAPTER SIX: INSTITUTIONLIZATION OF ADR

Many scholars in the United States have closely observed the development of ADR in U.S. jurisdictions. Frank E Sander asserts that institutionalization symbolizes the last of the three distinct stages in the development of ADR.[7] The initiation of this third stage (institutionalization) has enabled scholars to contribute to ADR's growth by identifying emerging issues, examining potential developments, and providing insight regarding the future of the field to address any potential difficulties or challenges.[8]

The institutionalization of ADR in Saudi Arabia, by contrast, requires additional attention and development. The Saudi legal system has institutionalized ADR at a markedly slow pace and, despite the recent establishment of the Saudi Center for Commercial Arbitration, its progress remains insufficient compared to the advances made in other successful jurisdictions in recent decades.[9] The growing importance of institutionalization and its success in many parts of the world makes clear that legislators, the government, and public and private bodies in Saudi Arabia must take more serious steps in this regard.

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involvement in the dispute resolution process; 3) to facilitate access to justice; 4) to provide more 'effective' dispute resolution.'") *Id.*

[7] Frank EA Sander, *The Future of ADR-The Earl F. Nelson Memorial Lecture*, J DISP RESOL 3 (2000); Sander asserts that ADR has gone through three main stages of development in its modern history. The first stage, which he calls "[l]et a thousand flowers bloom," took place between 1975 and 1982. The second stage, "[c]autions and caveats," was characterized by expressions of hesitation and worry and lasted from 1982 until 1990. The third and final stage, "institutionalization," thus started around 1990. *Id*; *see also* Frank EA Sander, *Ways of handling conflict: What we have learned, what problems remain*, 25 NEGOT. J. 533–537 (2009); ("In an earlier article … I identified three periods of ADR development since the seminal 1976 Pound Conference in St. Paul, Minnesota… The first period was one of wide-ranging experimentation ("Let a Thousand Flowers Bloom"). … Following this exploratory period involving new applications of familiar processes as well as the invention of new processes, there came a second period characterized by cautions and criticisms. Perhaps the best known of these was Professor Owen Fiss's 'Against Settlement,' ... We are now in the third period whose theme is institutionalization …" *Id.*

[8] *See e.g.* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES (6th ed. 2012); Monroe, *supra* note 6; F Sander, *ADR: expansion, perfection and institutionalization*, 26 ABA DISPUTE RESOLUT. 1ff (1990).

[9] *See* Saudi Center for Commercial Arbitration, *available at*: https://www.sadr.org/ (last visited Nov 2, 2018); "The SCCA was founded in 2014 by Cabinet Resolution 257 (2014) "to administer arbitration procedures in civil and commercial disputes." *Id.*

This chapter presents a thorough analysis of successful institutionalization efforts in leading jurisdictions. It provides clear insights regarding the aims Saudi Arabia should set and how it should endeavor to achieve them. The remainder of this chapter is organized as follows: Section 2 defines the institutionalization of ADR; Section 3 analyzes institutionalization-related phenomena in the public sector; Section 4 examines examples of institutionalization efforts that aim to promote and develop ADR; Section 5 focuses on administrative ADR; Section 6 analyzes the institutionalization of ADR in the private sector; and Section 7 concludes the chapter.

2. Institutionalization of ADR Defined

The institutionalization of ADR has advanced steadily in public systems of justice and in the private arena over the past few decades.[10] Both governmental and non-governmental efforts have driven this advancement.[11] Institutionalization can, however, take many forms and its implementation often varies from one area to another;[12] in fact, the past three decades have witnessed the introduction of several approaches to institutionalization around the world.[13] The definition of the term "institutionalization" thus varies depending on its context, use, function, and

[10] DISPUTE RESOLUTION AND LAWYERS, 26 (Leonard L. Riskin ed., 4th ed. 2009).

[11] Sander, *supra* note 7; ("We are now in the third period whose theme is institutionalization: making those innovations that turned out to be viable a regular part of the dispute resolution machinery in businesses, law firms, and the courts. Some examples of this effort have been:
- the creation of the International Institute of Conflict Prevention and Resolution, a major player on the ADR scene involving some Fortune 500 companies and leading law firms devoted to the task of exploring methods of dispute settlement other than litigation;
- extensive state and federal legislation mandating, or at least encouraging, the use of various nonbinding court-annexed dispute processes (such as arbitration and mediation) as a preliminary to litigation;
- creation of the Dispute Resolution Section of the American Bar Association, which now comprises more than 17,000 members and sponsors a well-attended conference each spring that brings together ADR practitioners from various sectors, and publishes a leading quarterly, *Dispute Resolution Magazine*; and
- extensive developments in the academic realm, evidenced by one or more ADR courses at most law and many other professional schools, as well as the emergence of a vast literature on all aspects of dispute resolution… ") *Id.*

[12] DISPUTE RESOLUTION AND LAWYERS, *supra* note 10 at 26–33; Bruce Monroe, *Institutionalization of Alternative Dispute Resolution by the State of California*, 14 PEPPERDINE LAW REV. 16 (2013).

[13] *See generally* DISPUTE RESOLUTION AND LAWYERS, *supra* note 10.

the purpose it serves. A review of relevant literature reveals that each available ADR-related definition of "institutionalization" deals with the phenomenon from a specific angle that either explains one aspect of institutionalization or limits the word's application to one of the various methods of ADR. The definitions in both cases provide a proper understanding of the term in particular senses or contexts. They do not, however, encompass the term's full meaning, providing limited, partial, and context-specific definitions. One definition, for example, describes institutionalization as "[t]he process of integrating ADR processes into a community's formal, public system of justice,"[14] clearly excluding many possible means of institutionalization.

These varied definitions highlight the absence of a comprehensive understanding of "institutionalization." Defining the term in a manner that encompasses all its basic and fundamental elements is essential to analyzing it coherently. The author of this dissertation therefore proposes the following definition: any effort, in the public, private or administrative sectors, led by governmental or non-governmental bodies, whether service-providing or not, that aims to streamline, regulate, formalize, supervise, or promote ADR, and/or to administrate or facilitate the use of any of its various mechanisms, or to provide support, advice, training or specialized expertise in the field, in any form or fashion that conforms with ADR objectives and serves its purposes.

3. Public Institutionalization of ADR:

Institutionalization in the public sphere refers to "[t]he process of making alternative forms of dispute resolution … part of a community's formal, public system of resolving disputes."[15]

[14] Monroe, *supra* note 6.

[15] Monroe, *supra* note 10; Institutionalization in the public system of justice can also be defined as the process of "[b]uilding systems within the court structure or through an outside but affiliated agency, that '[r]egularize the process by which ADR services are made available, or through which court personnel & potential users are asked

The inability of courts to reduce caseloads and address other issues—including delays and the high cost of litigation—that impact the effectiveness of traditional systems of justice has forced legislative branches in many countries to find alternate ways to help judiciary systems cope with these concerns.[16] Legislators have prompted national courts at different levels in many jurisdictions to design and implement various ADR programs for this purpose.[17] The multi-door courthouse model proposed by Professor Frank E. A. Sander is an exemplary approach to the integration of ADR methods into formal court system structures, as pointed out in Chapter 2 of this dissertation. The implementation of Sander's model would give disputants more dispute resolution options and improve the timeliness and cost-effectiveness of administering civil justice.[18] It would also help courts effectively reduce caseloads, which, in turn, would improve access to justice.[19]

Recent decades have witnessed a substantial increase in the use of ADR as governments in many countries have begun funding court-implemented ADR programs.[20] This innovation unfolded in the United States in several stages during the late decades of the twentieth century, but the most substantial progress followed the enactment of the 1990 Civil Justice Reform Act (CJRA).[21] This Act allocated government funding to federal district courts and encouraged them

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to consider using ADR processes.'" F. E. A. SANDER ET AL., EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 97 (1991).

[16] GLOBAL PERSPECTIVES ON ADR, 7–9 (Carlos Esplugues Mota & Silvia Barona Vilar eds., 2014).

[17] DISPUTE RESOLUTION AND LAWYERS, *supra* note 10 at 26, 27; REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS, (Felix Steffek et al. eds., 2013); DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, 577–79 (Carrie Menkel-Meadow ed., 2nd ed. 2011); GLOBAL PERSPECTIVES ON ADR, *supra* note 16 at 1–9.

[18] Sander, *supra* note 4; Monroe, *supra* note 12.

[19] Monroe, *supra* note 12; Sander, *supra* note 4.

[20] DISPUTE RESOLUTION, *supra* note 17 at 577–79; Sander, *supra* note 4; Monroe, *supra* note 12.

[21] ADR in the Federal District Courts: An Initial Report | Federal Judicial Center, *available at*: https://www.fjc.gov/content/adr-federal-district-courts-initial-report-0 (last visited Apr 27, 2017).

to take all necessary steps to reduce litigation time and expenses by adopting ADR methods.[22] U.S. law did not, however, require that courts offer ADR until the enactment of the Alternative Dispute Resolution Act in 1998.[23]

The provisions of the 1998 ADR Act stipulate that all federal district courts must allow the use of ADR methods in all civil lawsuits.[24] The Act thus requires every court to formulate and execute ADR programs that foster, support, and facilitate the resort to ADR in its jurisdiction.[25] The Act also mandated that all existing court-connected ADR programs in federal district courts should, at the time of the enactment of the Act, undergo evaluation to gauge their efficiency and identify any changes necessary to align them with the law's objectives.[26]

The 1998 ADR Act clearly sought to promote the use of ADR within the court system, but the broad drafting of its provisions gave rise to several issues. First, the Act empowers courts to freely design and conduct their ADR programs as they deem proper and appropriate, providing no clear directions regarding how courts should plan and execute such programs. Second, the Act provides no framework for the evaluation process it mandates for programs that existed prior to its

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[22] *Id.*

[23] *Id.*; Alternative Dispute Resolution Act of 1998; Section 2 of the Act reads: "Congress finds that--

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, mini trials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs." *Id.*; *see also* REGULATING DISPUTE RESOLUTION, *supra* note 17 at 434–38.

[24] Alternative Dispute Resolution Act of 1998, § 3.

[25] *Id.*; for more information regarding the ADR rules of all federal district courts, *see* Compendium of Federal District Courts' Local ADR Rules | OLP | Department of Justice, *available at*: https://www.justice.gov/olp/compendium-federal-district-courts-local-adr-rules (last visited May 2, 2017); *see also* ADR in the Federal District Courts-District-by-District Summaries, *available at*: https://www.justice.gov/olp/file/827536/download (last visited May 2, 2017).

[26] Alternative Dispute Resolution Act of 1998, § 3.

passage. Courts could therefore use different assessment methods, making it difficult to determine the success or failure of a given program. Finally, these varied evaluation methods could yield unclear results regarding the country's best models and practices and the standards for program or practice efficiency and effectiveness. Such imprecise outcomes surely will not help accomplish the statutory objectives.

The 1998 Act thus grants courts broad authority in fulfilling the obligations it specifies. Some might view this pliability as one of the Act's advantages, but the potential variations in practices produced by courts' contrasting interpretations of the Act's provisions could create problems. It could result in some successful practices in some jurisdictions and unsuccessful practices in others.

A recent study shows that mediation and arbitration are the most used and preferred alternatives to litigation in a number of courts.[27] The court-connected mediation and arbitration programs in Florida state courts—designed, implemented, and made accessible to parties beginning in 1988—are great examples of effective U.S. court ADR programs.[28] Courts refer cases

[27] ADR in the Federal District Courts: An Initial Report | Federal Judicial Center, *supra* note 22; the study shows that: "… ADR is now an established part of many districts', or many judges', regular case management practices. Even so, of course, ADR use varies from district to district." *Id.* The study also finds that "Although … no district courts authorize only arbitration … twenty-three districts, or nearly a quarter, include it among other forms of authorized ADR. Among these twenty-three districts are seven of the ten that were authorized in 1988 to mandate use of arbitration and seven of the ten that were authorized to offer voluntary use of arbitration; nine additional courts authorize use of this procedure. Today only three of the ten mandatory arbitration districts continue to require use of arbitration for the full portion of their caseload that meets the statutory requirements; four others have made arbitration an ADR option, and three no longer authorize this procedure." *Id.* It also reveals that: "For each of the three distinct types of ADR—mediation, arbitration, and ENE—the majority of districts authorize some degree of required use, either by giving judges the authority to refer cases on their own initiative without party consent or by mandating referral for some or all civil cases. This approach is especially apparent for mediation, where fifty-eight districts authorize required use of mediation, including twelve districts that mandate use (that is, referral is automatic for all or a specified set of cases). Judges have authority to order ADR in half the districts that authorize ENE as well, and in half of those that provide general authorization to use ADR." *Id.*; *see generally* ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS: ANALYSIS & CASE STUDIES, (Otto J. Hetzel, Steven Gonzales, & American Bar Association eds., 2015).

[28] Recommendations for Alternative Dispute Resolution Services in Florida's Trial Courts, (2008), http://www.flcourts.org/publications-reports-stats/publications/ (last visited Apr 29, 2017). For more examples

to ADR in conformity with Section 44 of the Florida Statutes, which authorize judges to divert disputes into mediation and arbitration.[29] This legislation has enabled court-connected ADR programs to prosper to the degree that all parties involved in these processes, including the bench and the bar and the disputants themselves, now agree to first attempt to resolve cases using ADR methods, and only set hearing dates if those methods prove ineffective.[30] Data suggests that court-based ADR programs have succeeded in Florida: the number of cases diverted into ADR increased from 103,494 in 2006-2007[31] to 121,938 in 2009-2010,[32] and has continued to increase steadily ever since.[33]

Available data and empirical studies indicate that ADR programs have succeeded in many U.S. courts of different levels.[34] The following remarks, nonetheless, warrant attention:

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about court-connected ADR programs, *see generally* ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS, *supra* note 27.

[29] *Id.*; the full text of the Florida Statutes can be accessed at: https://www.flsenate.gov/Laws/Statutes (last visited Apr 29, 2017).

[30] Recommendations for Alternative Dispute Resolution Services in Florida's Trial Courts, *supra* note 28.

[31] *Id.*

[32] Uniform Data Reporting Alternative Dispute Resolution Programs: Cases Ordered Fiscal Year 2009-10, *available at*: http://www.flcourts.org/core/fileparse.php/250/urlt/UDRMediationFY09-10.pdf (last visited Apr 29, 2017).

[33] More recent statistics and data regarding case referral to ADR in Florida courts are *available at*: Uniform Data Reporting, *available at*: http://www.flcourts.org/publications-reports-stats/statistics/uniform-data-reporting.stml#ADR (last visited Apr 29, 2017); some scholars have raised concerns regarding court-linked ADR program practices in the U.S. *see* for example, Louise Phipps Senft & Cynthia A. Savage, *ADR in the courts: Progress, problems, and possibilities*, 108 PENN ST REV 327 (2003).

[34] *See* for example, Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, (2006); *see also* Recommendations for Alternative Dispute Resolution Services in Florida's Trial Courts, *supra* note 28.; court-connected ADR has been an established practice in Florida state for many decades. The main progress in this regard occurred after the implementation of the amendments to Section 44 of the Florida Statutes, which granted judges the power of case referral to ADR. *Id.* The court-based mediation program in the state of Florida has become one of the best programs nationwide. *Id.*; *but see* Wayne D. Brazil, *Court ADR 25 years after Pound: Have we found a better way*, 18 OHIO ST J DISP RESOL 93 (2002); Lisa Bernstein, *Understanding the limits of court-connected ADR: a critique of federal court-annexed arbitration programs*, 141 UNIV. PA. LAW REV. 2169–2259 (1993); *but see* Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR The Future of Court ADR: Mediation and Beyond*, 95 MARQUETTE LAW REV. 873–886 (2011); ("Court ADR is no longer an innovation and has existed long enough to develop its own bureaucracy. Over the past ten years, however, court administrators and scholars have repeatedly reported that all was not well. They detailed significant reductions in court ADR staffing and in the amount of time parties are expected to spend in mediation, threats to cut ADR programs unless they could justify themselves as 'core' to the mission of the courts, and pressures to produce high settlement rates. Some proponents of family-court ADR have urged a move away from mediation and toward hybrid

> [T]he State of California has now established a significant base in the institutionalization of ADR, but several key challenges remain. Will legislators and other State officials be able to expand upon this base in a manner that will be at once reasonable, politically acceptable, and salutary for the resolution of a large number of conflicts? Can we avoid making ADR a second-class system of justice for the [nonaffluent]? And finally, as institutionalization of ADR advances, will it survive its success, or will it join the court system it supplements in "suffer[ing] from the woes common to other heavily used institutions—increasing costs and delays, bureaucratization, and perfunctory performance?"[35]

These questions remain valid and worthy of consideration; however, the positive findings of many studies and related periodic assessments have continued to strengthen support for the institutionalization of ADR in the U.S., providing clear justification for its importance and effectiveness and highlighting the increasing demand for court-instituted ADR.[36]

Traditional courts in England and Wales began designing and implementing ADR between the last decade of the twentieth century and the early years of the twenty first century.[37] The Central London County Court, for example, launched the first court-instituted mediation program in 1996, and other courts subsequently established similar platforms.[38] These programs were initially non-mandatory; the government later encouraged their development, supplied funding, and subjected them to assessments with the aim of fostering the use of ADR and making it workable within the formal system of justice.[39] The Central London County Court established a one-year program for

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ADR processes that pair strongly evaluative or adjudicative functions with facilitative or mediative functions, in order to assure finality. Obviously, such developments could threaten the primacy of, and courts' support for, mediation.") *Id.*; *see also* Yishai Boyarin, *COURT-CONNECTED ADR—A TIME OF CRISIS, A TIME OF CHANGE*, 50 FAM. COURT REV. 377–404 (2012).

[35] Monroe, *supra* note 6; *see also* GOLDBERG ET AL., *supra* note 8 at 46–50.

[36] Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, (2006); for more information about ADR in the U.S. courts, *see* Alternative Dispute Resolution in the United States District Courts | Federal Judicial Center, *available at*: https://www.fjc.gov/content/alternative-dispute-resolution-united-states-district-courts-english-original (last visited May 4, 2017).

[37] REGULATING DISPUTE RESOLUTION, *supra* note 17 at 141–44.

[38] *Id.* at 141–44.

[39] *Id.* at 144–48.; Hazel Genn et al., *Twisting arms: court referred and court linked mediation under judicial pressure*, 1 MINIST. JUSTICE RES. SER. (2007).

obligatory court-instituted mediation in 2004 that diverted disputes directly into mediation.[40] Disputants could oppose these referrals, but unjustifiable objections would result in the imposition of monetary penalties against objectors.[41] This initiative did not, unfortunately, have the expected outcome; data at the time showed major opposition to the mandatory diversion to mediation, and, as evidence of its lack of success, this proved sufficient justification for terminating the program.[42]

A report evaluating voluntary and mandatory ADR schemes in the Central London County Court shows that these practices generated many valuable lessons that can aid in designing future programs.[43] First, disputant readiness and enthusiasm for settling disputes can significantly impact the accomplishment of desired dispute resolution objectives in mediation.[44] Parties should be encouraged to use mediation and assisted in doing so without feeling unduly pressured.[45] Second, lawyers have clearly made great progress over the years in understanding mediation, but many remain unpersuaded of mediation's effectiveness in resolving various conflicts.[46] Third, courts need to develop new and more creative ways to communicate with the disputants to promote the use of ADR.[47] Finally, cultivating interest and desire in using ADR processes is crucial to the success of court-instituted ADR; courts can accomplish this via educational and motivational initiatives and by facilitating the use of ADR.[48]

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[40] REGULATING DISPUTE RESOLUTION, *supra* note 17 at 144–48.
[41] *Id.*
[42] *Id.*
[43] Genn et al., *supra* note 39.
[44] *Id.*
[45] *Id.*; *see also* REGULATING DISPUTE RESOLUTION, *supra* note 17 at 147, 148. ("*Put simply, cases are more likely to settle* at mediation if the parties enter the process voluntarily rather than being pressured into the process, and increased pressure to mediate depresses settlement rates.") *Id.* at 148.
[46] Genn et al., *supra* note 39.
[47] *Id.*
[48] *Id.*; The report also emphasizes the following: "The evidence of this report suggests that an effective mediation-promotion policy might combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some

The findings of this report support the contentions of certain scholars that all parties involved in disputes—from legislators to governmental authorities to judges and lawyers to neutral third parties and, of course, the disputants themselves—play significant roles in court instituted ADR.[49] [50] Their combined efforts contribute to the success of the process—achieving the desired results. This will eventually improve access to justice considerably; confidence in court-instituted ADR will increase as disputants become more aware of the efficiency of these techniques, which will increase demand for these procedures and programs. Education and training are essential to ensure the effective operation of implemented programs. The provision of funds for court-based ADR programs also contributes significantly to their success, as Frank Sander emphasizes and other scholars recognize.[51] Wayne D. Brazil asserts the following:

> In this area, institutionalization should mean, among other things, building in, from the outset, structural support (financial and administrative) that will fully meet the needs of the program and that is not dependent on the energy and interest of any one human being or small group of human beings.[52]

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assessment of contraindications for a positive outcome. A critical policy challenge is to identify and articulate the incentives for legal advisers to embrace mediation on behalf of their clients." *Id.*

[49] Bobbi McAdoo, Nancy A. Welsh & Roselle L. Wissler, *Institutionalization: What do empirical studies tell us about court mediation*, 21 GPSOLO 34 (2004).

[50] *Id.*; this article provides, for example, comprehensive recommendations regarding how future court ADR programs should be structured or designed and how to enhance current programs. It asserts that "… mediation programs that obtain the input and support of the bench and the bar and that involve mandatory consideration or mandatory referral are more likely to be successfully institutionalized." *Id.* It also concludes that third parties should encourage disputants and their representatives to cooperatively participate in the process. *Id.* The article then explains the role of the bar in making the process successful. *Id.* It also provides some recommendations for enhancing recourse to court instituted ADR programs such as urging the judges and lawyers in each society to design programs that reflect their traditional practices of law. *Id.*; Another study concludes that "… successful resolutions are more often in court-sponsored ADR programs in which the court commits to overseeing the program." Waters and Sweikar, *supra* note 36. Brian Dorini, *Institutionalizing ADR: Wagshal v. Foster and Mediator Immunity*, 1 HARV NEGOT REV 185 (1996). For more information regarding the importance of the role of legislators and legislation in the development of the institutionalization of ADR, *see generally* ADR in the Federal District Courts: An Initial Report | Federal Judicial Center, *supra* note 21. *see also* Monroe, *supra* note 12. *see also* Senft and Savage, *supra* note 33.

[51] SANDER ET AL., *supra* note 16 at 106; Steven Gonzales draws the following conclusion from his observations of different examples of ADR programs: "The real lesson may simply be that ADR programs will stall and fail to progress until sufficient funding is secured. They simply cannot grow beyond a certain level based solely on volunteer labor, no matter how well intentioned that support may be." ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS, *supra* note 27 at 98.

[52] *Id.* at 57, 58.

This assertion acknowledges the importance of both administrative and financial support in any practice. The lack of both efficient administration and adequate financial sources will obviously result in the failure of any court-based ADR program.[53] The crucial importance of administrative preparations for potential challenges and obstacles resulting from the implementation of ADR programs in securing successful institutionalization warrants mention alongside the monetary support provided by governments.[54]

4. Institutionalization for ADR Promotion and Development:

Many governments have supported and promoted ADR in recent decades. They have sought to implement statutes encouraging and promoting the use of ADR generally in their countries or specifically within their public systems of justice. Governments have sought to accomplish these aims by, for example, establishing new governmental bodies or assigning existing institutions to facilitate the expansion of ADR. They have also participated in creating new quasi-governmental or independent bodies whose functions they then recognize and support in various ways. These nonprofit institutions generally do not provide ADR services to private

[53] *Id.*

[54] In this context, *see Id.* at 89–92.; Frank Sander highlights the importance of considering concerns and possible consequences of ADR institutionalization within the court system as follows: "In designing our programs we should strive to identify as many of the negative effects of institutionalization as possible, then build in a measures to prevent or correct them." *Id.* at 90. He also explains that institutionalization can have major impacts as it can expose many parties to consequences beyond the ADR programs themselves: "Institutionalizing ADR programs could have negative effects on courts, on lawyers and litigants, on the neutrals, and on the ADR processes themselves. For example, once an ADR program is institutionalized for certain kinds of cases, judges might be tempted to shift their energy and attention away from those cases and toward other matters. In some circumstances, that loss of judicial attention could result in serious harm to the efficiency and fairness of the pretrial process. It also could result in second-class judicial service for entire categories of cases." *Id.* He therefore proposes the following administrative measures to protect the process of institutionalizing ADR and all involved parties: "To avoid these pitfalls, ADR program designers should plan periodic reviews of the ways the cases assigned to the program are handled in the formal adjudicatory process. *Id.* He concludes with the following remarks: "… Just as we are recognizing that 'institutionalization' is essential to realizing the full potential of ADR, we must also recognize that it could threaten the spirit that has been so central to the innovation in this movement." Id. at 92.

persons; they primarily provide support, expertise, counseling, and training to service-providing bodies.

4.1 The Federal Judicial Center of the United States

The ADR Act of 1998 entitled The Federal Judicial Center (FJC) and the Administrative Office of the United States Courts to support the U.S. federal district courts in achieving optimal results in fulfilling their statutory obligations by creating and developing ADR programs.[55] The Federal Judicial Center was founded in 1967 to advance progress in implementing enhanced judicial management in the U.S. courts.[56] The law authorizes it to, for example, to conduct research regarding the courts' functionality and to design and offer trainings to all persons involved in the public system of justice, including neutral third parties conducting ADR processes.[57] The Center thus serves as an educational and research arm of the judicial branch of the U.S. government.[58]

The Center drafted and publicized a procedural handbook on ADR in 2001 to provide the courts guidance regarding proper procedures for referring cases to ADR and managing said cases.[59] The "Guide to Judicial Management of Cases in ADR" provides detailed explanations of matters related to court-ordered ADR processes and offers solutions and answers to several

[55] Alternative Dispute Resolution Act of 1998, § 3 (f).
[56] 28 U.S.C. § 620.
[57] *Id.*
[58] The Administrative Office of the U.S. Courts was created in 1939 to supervise the administrative affairs of judicial bodies; however, special body, the FJC, conducted research and education tasks to avoid overloading the AO with other new functions that might hamper its performance of its core tasks. This separation would also protect the funds allocated to carry out these functions from being diverted to other spending channels. *See* The Federal Judicial Center, Education and Research For The U.S. Federal Court, *available at*: https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf (last visited May 5, 2017); *see also* Federal Judicial Center, *available at*: https://www.fjc.gov/ (last visited May 5, 2017).
[59] Guide to Judicial Management of Cases in ADR (2001), *available at*: https://www.fjc.gov/sites/default/files/2012/ADRGuide.pdf (last visited May 5, 2017); *see also* Federal Judicial Center, *supra* note 58.

potential questions and problems that may arise prior to or during ADR processes.[60] The Center also completed a cost-effectiveness analysis of court-based ADR programs in federal district courts in 2015,[61] at the request of two Judicial Conference of the United States committees[62]—the Committee on Court Administration and Case Management and the Judicial Resources Committee.[63] The study involved extensive data collection and analyses of numerous U.S. court cases, as well as interviews with judges, judicial officers, lawyers, and ADR practitioners.[64] Note that the center has no regulatory role and functions primarily to provide precise, impartial input and information, and to scrutinize various aspects of the judicial system including its performance, strategies, programs, and processes.[65]

The Federal Judicial Center thus plays a vital and unique role in the process of implementing court-annexed ADR schemes. It provides essential logistical support to help courts achieve the statutory goals of improving the court system in general and increasing access to justice. Other jurisdictions including Saudi Arabia should seriously consider following in the footsteps of the United States by creating bodies similar to the Federal Judicial Center for many reasons. First, such institutions can facilitate comprehensive evaluation and assessment of court ADR programs by collecting and analyzing relevant data to gauge their success and efficiency.

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[60] Guide to Judicial Management of Cases in ADR (2001), *supra* note 59.

[61] Federal Judicial Center Annual Report 2015, *available at*: https://www.fjc.gov/sites/default/files/materials/2017/Annual-Report-2015.pdf (last visited May 6, 2017).

[62] "The Judicial Conference of the United States is the national policy-making body for the federal courts." *See* Governance & the Judicial Conference, UNITED STATES COURTS, *available at*: http://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited May 6, 2017).

[63] Federal Judicial Center Annual Report 2015, *supra* note 61.

[64] *Id.*

[65] The center receives a budget from the government to cover its expenses. The center's 2016 budget was about $28 million. *See* Federal Judicial Center Annual Report 2016, *available at*: https://www.fjc.gov/sites/default/files/FJC-Annual-Report-2016.pdf (last visited May 6, 2017); For more information about the role of this center and its tasks, *see* Federal Judicial Center, *supra* note 58.; *see also* The Federal Judicial Center, Education and Research For The U.S. Federal Court, *supra* note 58.

Second, they can use these assessments to outline visions for the future of court ADR programs. This includes identifying strengths to be maximized, difficulties to be surmounted, and weaknesses to be overcome or rectified, as well as suggesting needed improvements. Finally, assigning the abovementioned tasks to bodies other than the courts can enable the courts to focus more fully on effectively running the implemented ADR programs.

4.2 The Civil Mediation Council of England and Wales

The English have also undertaken institutionalization efforts that aim to promote and develop ADR. A joint effort by the government and other parties, including practitioners, yield*ed* a positive result—the establishment of The Civil Mediation Council (CMC) in 2003.[66] The CMC has received recognition as a national authority for the mediation of all type of disputes except for family-related matters since its establishment.[67] The Board of Members, including an official of the Ministry of Justice who represents the government body as a member of the Council, supervises the Council's activities.[68] The CMC's constitution outlines the following objectives: to promote ADR, to advance improvements in the legal system, and to enhance the system of justice by fostering competence and ensuring accessibility.[69] It also aims to "create a culture of good practice

[66] FIONA COWNIE, ANTHONY BRADNEY & MANDY BURTON, ENGLISH LEGAL SYSTEM IN CONTEXT 197 (6th ed. 2013).
[67] Civil Mediation Council, *available at:* http://www.civilmediation.org/ (last visited May 7, 2017); REGULATING DISPUTE RESOLUTION, *supra* note 18 at 168–71.GLOBAL TRENDS IN MEDIATION, 173, 174 (Nadja Marie Alexander ed., 2nd ed. 2006); The Family Mediation Council in England and Wales (FMC) serves as the coordinating body for all family mediation for service-providing members. "It publishes a code of practice, provides initial training and continuing professional development." *Id.* at 171; *see also* FAMILY MEDIATION COUNCIL, *available at*: https://www.familymediationcouncil.org.uk/ (last visited May 7, 2017). The government supports the role of the FMC in many ways, including by providing the council with financial support and public funding to ensure it functions properly and achieves its objectives. The FMC annual report for 2016 states that the council receives £ 150.000 from the government every year after the agreement signed between the FMC and the Ministry of Justice in 2014. *See* FMC & FMSB Annual Reports and FMC Accounts 2016, FAMILY MEDIATION COUNCIL (2017), *available at*: https://www.familymediationcouncil.org.uk/2017/08/11/fmc-fmsb-annual-reports-fmc-accounts-2016/ (last visited Sep 9, 2017).
[68] The CMC Constitution, *available at*: civilmediation.org/downloads-get?id=357 (last visited May 7, 2017).
[69] *Id.*

by encouraging research, continuing education and quality standards in the field; by issuing codes of good practice; and by conducting accreditation of mediation providers and through them individual mediators."[70] The CMC also strives to provide reliable provenance information about ADR to those interested, including government bodies.[71] It works to accomplish these objectives by building bridges of communication with governmental bodies, practitioners, and ADR service providers.[72] The CMC does not play a supervisory role, but many believe its membership regulations have greatly contributed to making the ADR practices of its members more uniform.[73]

Two examples of the government support for the CMC are particularly noteworthy. The first is the launching of an online service called the Civil Mediation Directory by the Ministry of Justice. The creation of this useful directory—listing all practitioner members by region and available to anyone searching for service providers at reasonable fixed costs throughout the country—testifies to the government's commitment to promoting the use of ADR.[74] The government further demonstrates its support for the CMC by requiring that all service providers in this directory receive CMC accreditation.[75] The second example of government support is the presence of government representation on the CMC's Board of Members, discussed above.[76]

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[70] *Id.*; *see also* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE, 371 (Klaus J. Hopt & Felix Steffek eds., 1st ed. 2013); ("[The CMC] carries out a level of voluntary private regulation by issuing guidance notes for practitioners, maintaining a list of accredited mediation providers, and running a complaints resolution service.") *Id.*

[71] The CMC Constitution, *supra* note 68.

[72] *Id.*

[73] PENNY BROOKER, MEDIATION LAW: JOURNEY THROUGH INSTITUTIONALISM TO JURIDIFICATION 183 (2013); *see also* REGULATING DISPUTE RESOLUTION, *supra* note 18 at 168–171; ("The CMC … provide[s] accreditation schemes for mediation providers which require the providers to demonstrate that their schemes meet the requirements regarding adequate training and insurance, supervision and mentoring, efficient administration and allocation of mediators, and the adoption of a code of conduct. Thus the CMC takes on a quasi-regulatory role.") *Id.* at 169.

[74] *See* the Civil Mediation Directory, *available at*: http://civilmediation.justice.gov.uk/

[75] *Id.*; *see also* COWNIE, BRADNEY, AND BURTON, *supra* note 66 at 197.

[76] *See supra* note 68 and accompanying text.

Several issues warrant emphasis here. First, the government's recognition of the role played by ADR authorities in promoting the use of the various ADR techniques is very significant. Such recognition, for example, facilitated the establishment of the CMC and other similar bodies in the UK, as previously pointed out. Second, established ADR-related entities must acquire all possible means of governmental support to successfully perform their tasks. The UK Ministry of Justice's requirement that all providers receive CMC accreditation exemplifies how government support boosts the authority of such entities by reflecting the government's confidence in their criteria. Finally, enhancing the justice system in any jurisdiction by promoting ADR and its use requires collaboration between governments and entities committed to promoting ADR and its continued development. Such collaboration will indeed produce significant consequences—better results in a shorter time.

5. Administrative Institutionalization of ADR:

Government efforts to institutionalize ADR in official bodies are another dimension of governmental support for ADR. A large number of government-involved cases stem from various types of administrative disputes, including contractual consumer disputes, employment-related cases, and other disputes with private persons.[77] Resolving government-involved disputes in the courts, as with other types of cases, is time consuming, costly, and increases government

[77] DISPUTE RESOLUTION AND LAWYERS, *supra* note 10 at 817, 818. ("ADR has seen explosive growth in administrative agencies. … One reason might be the extraordinary number and range of disputes with which administrative agencies get involved. One class of disputes includes those that arise during the course of the fulfillment of their statutory regulatory obligations. … However, agencies are also involved in disputes in their capacity as employers, and most federal agencies now have alternative dispute resolution programs for the handling of such claims. Finally, administrative agencies are involved in disputes in their capacity as consumers of good and services, and have made extensive use of ADR to resolve public contract disputes.") *Id* at 817.

expenditures; parties should therefore seek to avoid court adjudication in such cases.[78] These issues have fueled efforts to institutionalize ADR in the administrative sector. Such efforts, in many jurisdictions around the world, thus aim to improve administrative justice and to enhance accessibility to it under the umbrella of administrative law. The achievement of these objectives will have significant positive impacts for both public and private sectors.

The United States, again, provides an illuminating example. The large number of cases related to administrative disputes compared to the number of other cases filed in federal courts led the Administrative Conference of the United States (ACUS) to recognize in one of its 1986 recommendations that government agencies needed to adopt ADR, which had proved effective in the private arena.[79] The absence of a legislative umbrella, however, prevented the government from mandating the use of ADR, especially if its use conflicted with an agency's statutory framework.[80] The lack of such a mandate contributed to a continual increase in the number of cases filed in court involving the government or any of its bodies. The government, for instance, was

[78] 142 Cong. Rec. (Bound) - Volume 142, Part 10 (June 10, 1996 to June 21, 1996); JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 1–10 (1st ed. 2004).

[79] 1986 ACUS Rec. 86-3; Recommendation 86-3/A states: "1- Administrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods … 2- Congress and the courts should not inhibit agency uses of the ADR techniques mentioned herein by requiring formality where it is inappropriate." *Id.*; the full text of 1986 ACUS report can be accessed at: *ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, (*1986), *available a*t: http://archive.org/details/gov.acus.1986.rec (last visited Oct 8, 2017). For a brief history of the administrative dispute resolution system, *see* Henry H. Perritt Jr, *Administrative alternative dispute resolution: the development of negotiated rulemaking and other processes*, 14 PEPP REV 863 (1986). The author notes the following regarding the necessity of ADR institutionalization in the administrative sphere: "A built-in conflict exists in the search for meaningful administrative ADR. On the one hand, meaningful simplification of procedure is unlikely to extend very far unless it is institutionalized to facilitate the transfer of information about what works well, and to reduce the transaction costs of setting up a rule negotiation or an adjudicatory ADR technique. Such institutionalization is consistent with the maxim that the government should be "of laws, not of men." Many of the advantages of ADR, however, depend on the personal skills of a mediator, the sensitivity of a policy maker to the real needs of interest groups, and the creativity of an administrative lawyer in structuring a process that serves the spirit of the APA and the substantive statute. Too much institutionalization makes it difficult to bring these inherently personal traits to bear on particular problems." *Id.*

[80] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 79.

named as a party in about twenty five percent of all cases filed in federal courts during the last years of the 1980s.[81] Senator Carl Levin once noted:

> It's a fact of life that many people have disputes with the Federal Government. In the late 1980's, of the 220,000 civil cases filed on Federal court, more than 55,000 involved the Federal Government in one way or another. Resolving these disputes costs taxpayers billions of dollars.[82]

The failure to deal with such issues in an effective and timely manner can cost governments dearly and cause harm to both administrative systems and national economies, which the potential consequences of disregarding such dangers and warnings can seriously affect.[83] Legislators have therefore proposed using ADR in government agencies to resolve all administrative disputes and avoid these dilemmas.[84] Government agencies' use of ADR to resolve administrative disputes thus served as a tool of legal reform in this area, where ADR has expanded significantly in recent years.[85] Government authorities seeking to identify the most cost-effective and efficient ways to resolve such disputes have, over time, come to recognize the suitability of ADR for resolving "appropriate cases"[86] of administrative disputes.[87]

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[81] 142 Cong. Rec. (Bound) Volume 142, Part 10 (June 10, 1996 to June 21, 1996), *supra* note 79.
[82] *Id.*
[83] *See generally Id.*
[84] *Id.*; Senator Levin suggests: "Resolving [Government-involved disputes] before they become courtroom dramas is one way to make a dent in this billion-dollar drain on taxpayer funds. Mediation, arbitration, mini-trials, and other methods offer cheaper, faster alternatives to courtroom battles." *Id.*
[85] SENGER, *supra* note 78 at 1–10.
[86] On January 9, 2017, the Attorney General issued a report titled: "2016 *Report on Significant Developments in Federal Alternative Dispute Resolution*" which was an update to the report which was submitted in 2007. *See* 2007 *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government: Giving the American People Better Results and More Value*, *available at*: https://www.adr.gov/pdf/iadrsc_press_report_final.pdf (last visited Apr 27, 2018) [hereinafter, *the 2007 Report*]. The updated report concludes that despite the fact that ADR has proved an efficient means of dispute resolution in many cases, resorting to ADR may not be appropriate in certain cases. The report explains: "Since the interests of the United States often are unique and may involve many interested parties, federal officials must resolve cases in ways that will not undermine important positions, jurisdictional defenses, or policy interests. However, federal agencies are finding that, in appropriate cases, alternative dispute resolution is a cost-effective and time-efficient option which can give parties control over the outcome and involve stakeholders in decisions that affect them." *See* 2016 *Report on Significant Developments in Federal Alternative Dispute Resolution*, *available at*: https://www.adr.gov/pdf/2016-adr-rpt.pdf (last visited Apr 27, 2018) [hereinafter, *the 2016 Report*].
[87] *Id.*

The ADR legal framework for administrative disputes in the U.S. consists of three main elements: first, the legislation that authorizes governmental agencies to use ADR to resolve administrative disputes (the legislative step); second, the assigned governmental authority tasked with promoting the use of ADR in the administrative arena (the promoting body); and third, the supervision and assessment of the use of ADR by the concerned governmental bodies (supervision and evaluation process). Accomplishing the latter may, for example, involve periodically evaluating the designed ADR programs and the effectiveness of their implementation as well as closely monitoring any progress made in this area.

5.1 The Legislative Steps:

The U.S Congress enacted several laws to promote the use of ADR in the administrative sector in the last decade of the twentieth century.[88] These included the Administrative Dispute Resolution Act of 1990 (ADRA of 1990)[89] and the amended Administrative Dispute Resolution Act of 1996 (ADRA of 1996).[90] Legislators enacted these laws to promote ADR in the administrative sector with the aim of ensuring the sector's optimal performance, success, and growth. They also sought to ensure the successful use of ADR and the effectiveness of the various ADR methods within the administrative law system.

Analysis of the legislative history of ADR in the U.S. administrative sector yields several noteworthy points. First of all, legislators attempting to achieve the objectives mentioned above adopted a gradual legislative approach from the outset—beginning with the enactment of the first legislation in this area. Second, this gradual approach proved effective in progressively introducing

[88] *See 2007 Report supra* note 87.
[89] *See Infra* note 91-103 and accompanying text.
[90] *See Infra* note 104-11 and accompanying text.

major reforms to the administrative sector. The shift from complete reliance on litigation to the effective use of ADR represents a fundamental transformation of the field that legislators accomplished in a smooth and efficient manner. Finally, the gradual transition from legislatively encouraging ADR to making it a legal requirement served many purposes; it ensured, for example, that all federal agencies accepted and implemented the new methods of dispute resolution without any resistance.

5.1.1 The Administrative Dispute Resolution Act of 1990

The Administrative Dispute Resolution Act (ADRA) of 1990 was the first legislative step permitting governmental agencies to use various means of ADR in resolving disputes with the consent of the parties.[91] The enactment of this Act resulted from congressional recognition of the inefficiency of administrative litigation resulting from the great complexity and increasing costs and durations of trials. Congress recognized the effectiveness of the ADR and its success in the private sphere and, therefore, aimed to improve government performance by encouraging government agencies to benefit from ADR methods.[92] Section 3 of the ADRA of 1990 sought to

[91] ADRA of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. §§ 571-583 (1994)) [hereinafter, ADRA of 1990].

[92] *Id.* § 2; Section 2 states: "The Congress finds that—
(1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
(2) administrative proceedings have become increasingly
formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
(4) such alternative means can lead to more creative, efficient, and sensible outcomes;
(5) such alternative means may be used advantageously in a wide variety of administrative programs;
(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;
(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of
such techniques; and

accomplish this aim by requiring all federal agencies to perform several tasks. First, it required that each agency implement an ADR policy declaring and clarifying the use of its various techniques.[93] Second, the section sought to ensure the proper implementation of ADR policies by requiring all federal agencies to create a new role titled Dispute Resolution Specialist and assign a "senior official" to that position to oversee the proper application of both the ADRA of 1990 and the agency's ADR policy.[94] Third, Section 3 stipulated that each federal agency should regularly offer and implement ADR training programs for employees to improve their performance and sharpen their skills in the field. The section indicated that the agencies should design these training programs for dispute resolution specialists and other employees involved with ADR policy and encourage these individuals to participate.[95] Finally, the section required all federal agencies to revise their standard form contracts and make all the necessary amendments to reflect the agency's newly implemented ADR policy by authorizing and encouraging disputing parties to resort to ADR.[96]

Section 4 of the ADRA of 1990 amended the Administrative Procedure Act,[97] adding definitions for several terms including alternative dispute resolution.[98] It also gave all federal agencies the authority to use its means for resolving disputes.[99] It conditioned this authorization

(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public." *Id.*

[93] *Id.* § 3.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] 5 U.S.C. §551 (1994).
[98] *Id.* §581. The Act contains various ADR-related terms and definitions, including the following definition of ADR: "any procedure that is used, in lieu of an adjudication … to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials, and arbitration, or any combination thereof." *Id.* § 581.
[99] *Id.* §582.

on the consent of the disputing parties, however, and also specified certain cases in which federal agencies could not utilize ADR.[100] The Act also authorized the use of arbitration to resolve disputes of administrative nature if all parties agreed to arbitrate the disputed matter.[101]

The most distinctive feature of the ADRA of 1990 was its voluntary nature, granting federal agencies broad discretion in fulfilling their statutory tasks. The language used in drafting the Act's provisions granted federal agencies flexibility in exploring, testing, using and even developing the various techniques of ADR specified by the Act. Section 582, for example, states: "c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques."[102] Such language clearly indicates that the legislators passed the Act to test the waters rather than fully committing to using ADR in the administrative law system at this initial stage. This gradual approach, as pointed out earlier, ensured that concerned agencies properly implemented the new dispute resolution system and monitored their practices and performance under the newly enacted legislation. Legislators also designed the Act as a means of observing the effectiveness of ADR

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[100] *Id.*; Section 582 Section reads: "(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.
(b) An agency shall consider not using a dispute resolution proceeding if—
(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
(4) the matter significantly affects persons or organizations who are not parties to the proceeding;
(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.
(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques." *Id.*

[101] *Id.* §585.

[102] *Id.* §582.

methods in tackling administrative disputes, and thus as a basis for determining the future direction of the practice. The sunset provision in Section 11, which specified a date on which the legislation would expire, testifies to the law's experimental function.[103] The most important function of the ADRA of 1990 was, in short, that it lay the groundwork for new developments and additional reforms in the administrative dispute resolution system.

5.1.2 The Administrative Dispute Resolution Act of 1996

The second legislative step in the field came a few years after the enactment of the experimental legislation of 1990. Legislators enacted the Administrative Dispute Resolution Act (ADRA) of 1996[104] to achieve various aims. First, the enactment of this new legislation, following the successful implementation of ADR methods by many federal agencies, revealed the intention of both the legislature and the government to continue using these techniques to resolve disputes in the administrative sphere. The elimination of the sunset provision in the new Act evinces this intention.[105] Second, legislators enacted the ADRA of 1996 to amend provisions in the 1990

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[103] For more information about sunset provisions and experimental legislation, *see generally* SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE (2014). Section 11 of the ADRA of 1990 states: "The authority of agencies to use dispute resolution proceedings under this Act and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate." ADRA of 1990, § 11.

104 ADRA of 1996, Pub.L. No. 101-320 (codified at 5 USC 571, et seq.) [hereinafter, ADRA of 1996].

[105] In this context, *see* H. Rept. 104-597 - ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996, *available at*: https://www.congress.gov/congressional-report/104th-congress/house-report/597/1 (last visited Sep 18, 2018). The report, for example, states the following: "The Administrative Conference of the United States (ACUS), which was given responsibility under the Act to survey and facilitate its use, has reported that several ADR techniques have been promising. It indicated that partnering, for example, was responsible for a dramatic decline in the volume of contract claims and appeals experienced by the Army Corps of Engineers (from 1,079 claims in 1988 to 314 in 1994, and from 742 appeals in 1991 to 365 in 1994). The Air Force successfully resolved over 100 Equal Employment Opportunity disputes through mediation in 1992 and 1993, saving more than $4 million in complaint processing costs. The Federal Deposit Insurance Corporation and Resolution Trust Corporation have reported that mediation of claims and disputes among failed financial institutions they control has resulted in savings of $13 million in legal costs over three years for the FDIC and more than $115 million over four years for the RTC." *Id.*; *see generally* Robin J. Evans, *The administrative dispute resolution act of 1996: improving federal agency use of alternative dispute resolution processes*, ADM. LAW REV. 217–233 (1998); *but see* Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How do we evaluate its success?*, 6 J. PUBLIC ADM. RES. THEORY 383–414 (1996).

legislation, aiming to overcome its shortcomings and facilitate the effective and efficient achievement of its statutory objectives.

The ADRA of 1996 permanently reauthorized the use of ADR in the executive branch.[106] It also contains several amendments that introduce major improvements to the Act's main subjects.[107] Amended areas in the 1996 legislation concern, for example, confidentiality, arbitral awards, and neutrals.[108] The amended Act, for instance, "clarifies and enhances confidentiality protections," "authorizes, for the first time, 'true' binding arbitration for all federal agencies," "broadens the Act's coverage," and "encourages greater use of negotiated rulemaking."[109] Legislators made these adjustments to support ADR and the recourse to its various methods by federal agencies; the protections the new Act grants to governmental bodies by enhancing the confidentiality of the dispute resolution process support this view. Charles L. Howard explains the amendment pertaining to the confidentiality provisions of the Act as follows:

> [T]he 1996 act added a new provision that provided that ADRA confidentiality trumped disclosure required by the [Freedom of Information Act] FOIA. … [the ADRA of 1996] provides the general rule that a neutral in a dispute resolution proceeding should not voluntarily disclose or be compelled to disclose any dispute resolution communication or any communication provided in confidence to the neutral unless certain conditions are met. … The inclusion of this high standard

[106] DOUGLAS H. YARN, GEORGIA ALTERNATIVE DISPUTE RESOLUTION 499–519 (2014 ed.).
[107] *Id.*
[108] *See generally* Evans, *supra* note 106; Federal Government's Alternative Dispute Resolution Working Group, *available at*: https://www.adr.gov/adrguide/04-statutes.html (last visited Sep 23, 2018).
[109] H. YARN, *supra* note 106 at 500–01.; ("The 1996 Act improves upon the 1990 Legislation and by addressing problems which arose during implementation of ADR under the 1990 statute. The 1996 Act: (1) clarifies and enhances confidentiality protections by explicitly exempting most communications made in resolution proceedings from disclosure under the Freedom of Information Act; (2) authorizes, for the first time, 'true' binding arbitration for all federal agencies across the board, by eliminating a one-sided provision in the 1990 Act that had allowed agency heads (but not parties) to overturn arbitral awards; (3) broadens the Act's coverage by eliminating exceptions that had previously caused uncertainty as to its applicability to many workplace-related conflicts and to certain specific dispute resolution mechanisms, like ombudsmen; (4) takes steps that should make it easier for agencies expeditiously to acquire the services of mediators and neutrals; (5) directs the president to find a new home in the federal government for some of the coordinating, consulting, and other functions that had been performed by the Administrative Conference of the United States before its elimination by Congress in October, 1995; (6) encourages greater use of negotiated rulemaking by promoting actions to simplify the procedures that agencies must follow in establishing the negotiation committees that craft the substance of proposed regulations.") *Id.*

> underscores the importance of preserving the confidentiality of … ADR communications to the extent possible.[110]

The establishment of a new governmental body (discussed below) tasked with enhancing ADR and encouraging its use among all federal agencies also exemplifies the 1996 Act's support for ADR.[111]

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[110] CHARLES L. HOWARD, THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS: A LEGAL GUIDE 265–67 (2010); H. YARN, *supra* note 106 at 519. Section 3 of the ADRA of 1996 states: "(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless -

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to –

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless –

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to –

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made. …" ADRA of 1996 §3.

[111] *See Infra* note 112-21 and accompanying text.

5.2 The Promoting Body:

The ADRA of 1996 authorized the establishment or designation of a new agency or interagency committee to promote ADR in the administrative sector. The Act gives this promoting body authority over facilitating and encouraging federal agencies to use ADR.[112] It also charges the body with creating new ways that allow governmental authorities to quickly and efficiently benefit from services provided by skilled neutrals.[113] Legislators established the Interagency ADR Working Group in 1998 during the Act's implementation to achieve the Act's statutory objectives. The Working Group, led by the Attorney General, works closely with all concerned federal agencies to accomplish its obligations and to meet the objectives mentioned above.[114] It plays a significant role in facilitating exchanges of data, visions, and ideas regarding ADR and its implementation between federal agencies.[115] It has served since its establishment "as a resource for developing ADR programs and sharing information to support the use of ADR."[116] It promotes ADR by coordinating "multi-agency initiatives," promoting "best practices and programs," and diffusing "policy and guidance."[117] The Working Group performs these tasks through its various

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[112] *Id.* §4. Section 4 of the ADRA of 1996 reads: "(a) PROMOTION OF ADMINISTRATIVE DISPUTE RESOLUTIONS.—

Section 3(a)(1) of the Administrative Dispute Resolution Act (5 U.S.C.571 note; Public Law 101-552; 104 Stat. 2736) is amended to read as follows:

"(1) consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and"…" *Id.*; Section 573 of title 5 states: "… (c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall –

(1) encourage and facilitate agency use of alternative means of dispute resolution; and

(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

[113] *Id.*

[114] *See* Federal Government's Alternative Dispute Resolution Working Group, *supra* note 109.

[115] *Id.*

[116] *Id.*

[117] *Id.*

departments, which include Workplace Conflict Management, Contracts and Procurement, Administrative Enforcement and Regulatory Process, and Litigation.[118] It contains several subcommittees as well that specialize in various subjects such as Arbitration, Ethics, Collaborative Governance, and Environmental ADR.[119] The Working Group provides federal agencies considerable assistance through its various departments by hosting regular meetings and seminars with federal agency officials to exchange knowledge and share experiences, best practices, and solutions regarding the implementation of ADR and related difficulties and concerns.[120] It also organizes training sessions for governmental employees in charge of ADR and its implementation in their workplaces, aiming to ensure their development and enhance the quality of their work.[121]

These functions highlight the important roles promoting bodies like the Working Group play in the institutionalization of ADR in administrative areas in any jurisdiction. The absence of such a body would clearly create a great vacuum whose negative impacts would eventually impede institutionalization efforts. Simply establishing a comparable body, however, will not ensure the accomplishment of statutory objectives; full recognition of their importance and support for their significant roles by the government must accompany the creation of such bodies. Governmental

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* The Working Group hosted "a kick-off meeting hosted by the Attorney General …" during its first year of operation. "More than one hundred high-level representatives from nearly sixty federal agencies attended this meeting." Jeffrey M. Senger, *Turning the Ship of State Symposium*, J. DISPUTE RESOLUT. 79. "Also present were the 20 top ADR experts within the federal government who would play a vital role in the activities of the Working Group. Many of these experts already had established successful dispute resolution programs at their own agencies, and the leadership of the attorney general provided them with the long-sought opportunity to make ADR a government-wide movement." Peter R. Jr. - Steenland, *The Government Federal Agencies Implementing Reno's Vision for Dispute Resolution*, DISPUTE RESOLUT. MAG. 23. The Working Group has also organized "more than fifty training sessions, meetings, and colloquia on all aspects of ADR" in which "more than five hundred representatives from across the government have been participating. Topics have included 'Incentives for Federal Employees to Use ADR,' 'Finding Quality Neutrals,' 'Designing an ADR Training Program,' 'Dispute Systems Design,' 'Evaluation of ADR Programs and Outcomes,' 'Obtaining Resources for ADR Programs,' 'Overcoming Barriers to ADR,' 'Ethics, Confidentiality, and Conflicts of Interest,' and 'Conflict Assessment/Case Selection.'" Senger, *supra* note.

funding is one crucial form of recognition that will enable such institutions to effectively carry out their tasks and aid in the promotion of ADR.

5.3 Supervision and Evaluation Processes:

The third component of the legal framework for the institutionalization of ADR in the U.S. administrative sector is supervision and evaluation. Legislators established processes to assess all efforts to institutionalize ADR in all concerned federal agencies and periodically measure and evaluate the effectiveness of the implemented methods and all programs designed for these purposes. The Interagency ADR Working Group is, in part, responsible for monitoring progress in these areas in the U.S. jurisdiction. This supervisory role gives the work of the Group a new dimension. The Working Group has submitted several reports to the U.S. president regarding the success of federal agencies in fulfilling their statutory obligations pertaining to the use of ADR in administrative dispute resolution. The president thus clearly plays a higher supervisory role in this process. The U.S. jurisdiction, in other words, features a two-stage supervision and review process regarding efforts to institutionalize ADR in the executive branch.

5.3.1 The 2000 Report:

The Interagency ADR Working Group submitted its first report to the president at the end of its first year of operation, explaining the progress it made through the year and the goals it had achieved.[122] The 2000 Report confirmed the growing number of implemented ADR programs throughout the administrative sector.[123] It also made clear that the Working Group had succeeded in developing good relationships with federal agencies and establishing open dialogue channels

[122] *Report to the President on the Interagency Alternative Dispute Resolution Working Group, May 2000, available at*: https://www.adr.gov/presi-report.htm (last visited Sep 30, 2018) [hereinafter, *the 2000 Report*].
[123] *Id.*

among them to pursue its tasks successfully. The Report indicated that governmental bodies had used these channels to effectively enhance the use of ADR in administrative-related disputes.[124] The Working Group also outlined its future vision and established new objectives for the upcoming years in the 2000 Report. These objectives included offering more meetings and workshops to all federal agencies and their officials, focusing on working closely with all federal agencies to design new ADR programs or to develop currently implemented schemes to enhance their effectiveness, and finally deploying ADR experts and highly skilled specialists to offer guidance and assistance to federal agencies.[125]

The Working Group's accomplishments in its first year of operation thus proved reasonably satisfactory and efficient. The Group demonstrated the importance of its role and its competence and full readiness to fulfill its obligations. Its acceptance by federal agencies was also quite significant. Such acceptance—testified to by the integration and engagement of the agencies detailed in the report—was essential, helping to facilitate the success of the Working Group and expedite its pursuit of statutory goals and all other desired objectives.

5.3.2 The 2007 Report

The Working Group submitted another evaluation report to the president about ten years after the enactment of the ADRA of 1996. The Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government: Giving the American People Better Results and More Value[126] confirmed the increasing acceptance and recognition of ADR and detailed the use of its techniques in many cases, including labor and

[124] *Id.*
[125] *Id.*
[126] The 2007 Report, *supra* note 87.

employment conflicts, where ADR had become "part of standard practice."[127] The 2007 Report also acknowledged the great progress that ADR had continued to make in other cases, including disputes related to claims against the government.[128] It detailed developments in the use of ADR in federal agencies, confirmed several achievements and advantages of ADR in the administrative sphere such as "promoting a citizen-centered government, managing the costs of government, and supporting the strategic management of government resources," and previewed the future use of ADR by addressing various problems and difficulties that arose during the report period and discussing potential development in these areas.[129] The 2007 Report concluded with the following optimistic remark: "Today, ADR is an important part of our work, and tomorrow the promise of ADR will be an integral part of our government, business and society. …Tomorrow will bring ever-expanding uses of appropriate dispute resolution."[130] This statement sums up the Working Group's positive evaluation of the use of ADR and the promising benefits of implementing ADR programs throughout the administrative sector, which the Group had observed since the enactment of the ADRA of 1996.

This evaluation of the first decade following the enactment of the ADRA of 1996 produced one significant outcome. The Report provided evidence that federal agencies had achieved many of the Act's statutory goals regarding the use of ADR and the implementation of ADR programs during this ten-year period. It also indicated, however, that many additional objectives remained to be met in subsequent years. The 2007 Report thus served as a reliable instrument for evaluating the effectiveness of this important piece of legislation.

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*

5.3.3 The 2016 Report

The Working Group continued to work closely with all federal agencies during the ten years following the submission of the 2007 Report, monitoring the progress of the use of ADR in the executive branch over that period of time. It submitted an updated report titled, 2016 Report on Significant Developments in Federal Alternative Dispute Resolution[131] in 2017. The 2016 Report identified four new developments. First, it indicated that federal agencies had begun using ADR to prevent disputes rather than resolve them. This increasingly early application of ADR highlights the agencies' growing recognition of the advantages, especially those related to cost and efficiency, of using ADR as early as possible. Second, the 2016 Report documented a dramatic expansion of ADR programs and the use of ADR methods in general within the administrative system during the period it covered. It also recognized that this expansion had made federal agencies unprecedentedly competent in resolving various administrative disputes.[132] The 2016 Report states:

> In addition to expanding the types of ADR processes used, agencies have expanded the application of ADR to cover broader ground. Agencies have expanded their use of ADR beyond specific disputes involving individually impacted parties and are incorporating ADR methods as tools for achieving their mission. Agencies are using a variety of consensual and collaborative processes to engage multiple and varied constituents in open dialog about policy and regulation using techniques such as focus groups, surveys and consensus building through stakeholder discussions.[133]

Third, the Report highlighted a substantial increase in federal ombuds offices and in the variety of implemented ombuds programs. Finally, it indicated that the increasing use of technology had proved effective and useful in providing and supporting ADR within federal agencies.[134] The 2016

[131] The 2016 Report, *supra* note 87.
[132] *Id.*
[133] *Id.*
[134] *Id.*

Report concluded by emphasizing the great importance of ADR and the benefits of implementing ADR programs within administrative systems. It stated that the use of ADR in the administrative sector had increased the reactiveness, efficiency, collaboration, and transparency of government; improved the productivity and satisfaction of federal employees; and created an effective dispute resolution system. It asserted that these accomplishments undoubtedly boosted "the functioning and accessibility of government" and greatly benefitted the nation and society."[135]

The results of the three evaluation reports discussed above indicate that these reports functioned as an effective basis for development and further advancement. They documented the progress made by governmental bodies and the work these bodies completed to meet statutory goals. They also carefully evaluated the expansion of ADR in the administrative sector. The effectiveness of these reports highlights the critical importance of establishing supervision and evaluation processes in institutionalizing ADR in the administrative sector. These processes have produced neutral and trustworthy assessments during the past several decades in the U.S. jurisdiction, evaluating the effectiveness with which all federal agencies have fulfilled their statutory obligations. Achieving such encouraging results so efficiently, moreover, would have proved difficult without presidential supervision and the Working Group's effective monitoring of the advancement of the dispute resolution system in federal agencies.

6. Private Institutionalization of ADR:

Parties can undertake ad hoc ADR processes (non-institutional ADR) or engage the services of specialized institutions that supervise dispute resolution (institutional ADR).[136] Arbitral

[135] *Id.*

[136] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 7–16 (5 ed. 2014); C. Mark Baker & Arif Hyder Ali, *A cross-comparison of institutional mediation rules*, 57 DISPUTE RESOLUT. J. 72 (2002).

institutions currently provide the most popular recognized form of institutional ADR.[137] They offer professional forums and sophisticated platforms to which parties can resort to resolve their disputes through arbitration and other ADR means.[138] The rules and procedures introduced and applied by these institution are widely recognized as workable, coherent, and examined.[139] They are also recognized as effective in helping parties navigate their way toward reasonable outcomes.[140]

Private arbitral institutions have three distinguishing characteristics:[141] 1) their permanence, which applies to both their existence and physical locations, and distinguishes such institutions from other impermanent ADR-related bodies, such as the appointed tribunals that conduct arbitration proceedings; 2) their competence in designing and implementing arbitration and other ADR rules (some institutions have developed their own arbitration and mediation rules, while others have implemented model rules like the UNCITRAL Arbitration Rules or the newly introduced Paris Arbitration Rules);[142] and 3) their methods of service, including the selection of channels through which parties can select dispute resolution techniques, and the institutions' supervision over dispute resolution processes until their resolution.[143]

Institutional ADR has become increasingly popular and sought-after in the international

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[137] *See generally* PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (1999); the many leading arbitral institutions currently operating around the world include the American Arbitration Association (AAA), *see* https://www.adr.org, the London Court of International Arbitration (LCIA), *see* http://www.lcia.org, and the International Chamber of Commerce (ICC), *see* https://iccwbo.org. for more examples *see generally* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (2nd ed. 2001).

[138] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 93–106 (5 ed. 2014).

[139] Baker and Ali, *supra* note 136.

[140] REMY GERBAY, THE FUNCTIONS OF ARBITRAL INSTITUTIONS (2016).

[141] *Id.* at 5–27.

Few years ago, Paris Place d'Arbitrage has presented a new set of rules called "The Paris Arbitration rules" to replace the complicated rules of the UNCITRAL. For more details about the Paris Arbitration Rules, *see* The Paris Arbitration Rules: A New Generation of Rules? Kluwer Arbitration Blog, *available at*: http://arbitrationblog.kluwerarbitration.com/2013/04/26/the-paris-arbitration-rules-a-new-generation-of-rules/ (last visited Oct 10, 2018).

[143] GERBAY, *supra* note 140.

trade arena in recent decades. John-Tieder identifies several reasons for the reliance of international businesses on arbitral institutions to resolve business and commercial disputes: first, the use of "settled and often-tested arbitration rules;" second, the capability of such institutions to either appoint highly skilled arbitrators capable of efficiently conducting the dispute resolution process or at least provide the disputants a list of experienced neutrals to choose from; and, finally, the "long experience" and "proven integrity" of arbitral institutions in administering arbitration and other ADR processes.[144]

6.1 Functions of Private Arbitral Institutions:

The fact that service-providing ADR institutions such as arbitral institutions do not conduct dispute resolution processes themselves and therefore do not play any direct role in making final decisions regarding disputed matters warrants emphasis.[145] The neutrals (e.g., the arbitrators or mediators) appointed by disputants in their agreements perform this function.[146] ADR institutions, based on their implemented roles, will appoint neutrals on the parties' behalves absent such agreements between the disputing parties.[147] That does not mean, however, that arbitral institutions have limited or circumscribed roles. Arbitral institutions today contribute significantly to supporting and promoting ADR and ensuring the efficiency, effectiveness, and proper functionality of its various techniques.[148] Such institutions, for example, manage and supervise the process of dispute resolution to help parties to effectively resolve their disputes. They do so by fostering and expediting the resolution-making process and by providing the parties with all the

[144] AMERICAN ARBITRATION ASSOCIATION, HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 95–100 (Thomas E. Carbonneau, Jeanette Jaeggi, & Sandra K. Partridge eds., 2006).
[145] BORN, *supra* note 137 at 11–19.
[146] *Id.*
[147] *Id.*
[148] THE LIABILITY OF ARBITRAL INSTITUTIONS: LEGITIMACY CHALLENGES AND FUNCTIONAL RESPONSES, 23 (2016).

assistance and support they need.[149] They carry out other vital functions as well, providing several additional important services to the disputing parties. These services include: designing effective procedural rules for dispute resolution processes; enhancing capacities related to arbitration and other ADR methods and thereby encouraging the use of these methods; urging the modernization of current national and international laws related to the various ADR methods;[150] contributing to soft-law considerably by drafting and laying out all necessary guidelines and ethical codes to ensure the success of the practice;[151] and finally, raising public awareness, spreading knowledge, and enhancing education related to arbitration and other ADR methods, in theory and in actual practice, among natural persons, lawyers and non-lawyers alike, and all concerned legal entities.[152]

Note that expansion and development have led some arbitral institutions to recently undertake new roles and functions. A subsequent section in this chapter will discuss the impact of some of these new roles.[153]

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[149] JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 31–48 (2003); BORN, *supra* note 137 at 11–13; Baker and Ali, *supra* note 136.

[150] AMERICAN ARBITRATION ASSOCIATION, *supra* note 144 at 54. Michael F. Hoellering describes the significance of the institutional role played by arbitral institutions as follows: "Institutional support often plays a vital role in ensuring an effective arbitration process. … When the three elements—the parties, the administering procedure, and the rules—function in tandem, the result reflects fairness and efficiency." *Id.* at 53. He explains that "[t]he present-day vitality of international commercial arbitration owes a great deal to institutional efforts in promoting full recognition of the consensual agreement to arbitrate. Throughout much of this century, leading arbitral institutions have devoted their energies to promoting the use of arbitration, encouraging the enactment of modern arbitration legislation, providing education on arbitration law and practice, and developing procedures for the conduct of arbitral proceedings." *Id.* at 54. He concludes that the "discretion" of institution management "is generally guided by party agreement and institutional rules of procedures. In exercising this discretion, arbitration, arbitrators, and the institution are seeking to foster efficiency, fairness, and due process." *Id.* at 66.

[151] GLOBAL PERSPECTIVES ON ADR, *supra* note 16 at 501–03.

[152] AMERICAN ARBITRATION ASSOCIATION, *supra* note 145 at 54; THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 149 at 28-48.: *See generally* KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION (2003).

[153] *See Infra* note 165-95 and accompanying text.

6.2 Distinguishing between Institutional and Non-institutional ADR:

Institutional ADR differs qualitatively from ad hoc ADR. The advantages of ad hoc ADR include flexibility and cost-effectiveness,[154] but most believe the advantages of institutional ADR outweigh these potential benefits.[155] The latter has proved preferable, more convenient, and advantageous for international businesses for many reasons.[156] Gary Born argues, for example, that "… many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an *ad hoc* approach."[157] This section aims to clarify the distinction between institutional and ad hoc ADR services by summarizing the benefits parties can acquire by resorting to institution-based ADR services. First, institutional ADR gives disputants access to multiple ADR techniques to resolve their disputes; the availability of the various ADR techniques in one place can save parties time and expedite the resolution process.[158] Second, arbitral institutions ensure that specialized and impartial third parties administer all the ADR methods they offer; acquiring such benefits from

[154] BORN, *supra* note 137 at 11–19. ("Both institutional and ad hoc arbitration have strengths… *ad hoc* arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration.") *Id.* at 12; *but see* LEW, MISTELIS, AND KRÖLL, *supra* note 149 at 35. ("A perceived but not necessarily correct advantage of *ad hoc* arbitration is that, because the parties control the process, it can be less expensive than institutional arbitration. In fact this depends, in each case and on how the institution charges for its arbitration services.") *Id.*

[155] For more details about ad hoc institution and its advantages, *see* LEW, MISTELIS, AND KRÖLL, *supra* note 149 at 33–36.

[156] *See Infra* note 158-64 and accompanying text.

[157] BORN, *supra* note 137 at 12–13.

[158] *See generally* THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 148. ("Most arbitration rules of the leading arbitral institutions regulate the context in which the award by consent can be rendered following the settlement between the parties. More interestingly, however, some arbitration rules facilitate settlement by means of encouraging parties to mediate their dispute (either prior the commencement of arbitration proceedings or in parallel to the proceedings that have already started). As already noted, most arbitral institutions include provisions regulating mediation in their sets of arbitration rules. Certainly, the recent increased popularity of mediation and other ADR services, supported by legal regulations at national and regional levels, allowed most prominent arbitral institutions to feel the momentum for new means of competition in this field.") *Id.* at 60-61.

ad hoc ADR can be difficult, time-consuming, and costly compared to the services offered by the institutional-based service providers.[159] Third, arbitral institutions tend to offer administrative services and support for ADR processes in general with professional employees who ensure the processes run efficiently, effectively, and in accordance with institutional rules.[160] Fourth, institutional supervision over dispute resolution processes helps reduce, if not prevent, potential unethical behavior or misconduct by the impartial third parties involved in resolving disputes because institutions implement rigorous ethical codes.[161] Fifth, one study shows the chances of enforcement for institutional ADR outcomes (e.g. arbitral awards), are higher than for the outcomes of ad hoc processes.[162] The courts will, in other words, expedite and facilitate outcomes produced by well-known and respected arbitral institutions because the well-established practices of these institutions have earned them trust and recognition from traditional courts.[163] This proves advantageous particularly for the enforcement of awards in less sophisticated jurisdictions known to be less hospitable or completely inhospitable to arbitration.[164]

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[159] Institutional ADR Today: The Comprehensive, Cost-Effective Alternative, The Metropolitan Corporate Counsel, *available at*: http://www.metrocorpcounsel.com/articles/15038/institutional-adr-today-comprehensive-cost-effective-alternative (last visited Apr 25, 2017).

[160] Sundra Rajoo, *Institutional and Ad hoc Arbitrations: Advantages and Disadvantages*, LAW REV. 548 (2010).

[161] Institutional ADR Today: The Comprehensive, Cost-Effective Alternative, The Metropolitan Corporate Counsel, *supra* note 150.

[162] *Id.*; GRACE FARRELL ROEMER, MELISSA MILLER & MARTHA KOVAC, RECENT PRACTICE/FUTURE POSSIBILITIES: A SURVEY OF PRACTITIONERS IN INTERNATIONAL COMMERCIAL ARBITRATION (2005).

[163] Gordon Blanke, *Institutional versus Ad Hoc Arbitration: A European Perspective*, 9 ERA FORUM 275–282 (2008); LEW, MISTELIS, AND KRÖLL, *supra* note 149 at 35–37.

[164] *Id;* ("A strongly perceived advantage of institutional arbitration is the cachet behind the name of the institution. Accordingly, especially in countries where there is political interference or where the courts and law are not always arbitration-friendly, parties consider it beneficial when seeking to enforce an award which was issued by, or which carries the name of, an internationally respected institution. Whilst there are doubts as to the value of such cachet, *i.e.* ultimately being able to have an arbitration award issued under the name of that institution, it is still often considered to be helpful.") *Id.* at 36, 37.

6.3 Challenges and Concerns:

Arbitral institutions have encountered numerous challenges and concerns as institutional arbitration has expanded. The following subsections provide examples of some of the issues encountered in the current international arbitration system, especially in institutional arbitration.

6.3.1 The Evolving Competition among Arbitral Institutions

The growing number of service providers and increasing global demand for institutional arbitration has generated significant competition among arbitral institutions in recent years. This increasing competition has led some institutions to take on more responsibilities and implement functions that have introduced new characteristic features to the profession.[165] Some arbitral institutions have, for example, begun assuming new "public" roles that run counter to their traditionally private natures.[166] These institutions have apparently taken on these roles without obtaining consent from their clients (the disputants).[167] Many believe such steps have the potential to negatively impact the future of arbitral institution practices and that they will pose new challenges to growth in this area. Barbara Warwas describes these new developments as follows:

> This is in contrast with the principle of party autonomy and therefore may invite public criticism regarding the increasing functions of arbitration (and arbitral institutions). … not only have arbitral institutions developed new procedural functions that often limit party autonomy in traditional, commercial arbitration proceedings, but also, mostly due to the universalization and formalization of institutional arbitration rules, arbitral institutions have begun to adapt their rules to new types of disputes involving public entities or non-commercial parties by compromising the traditional commercial model of arbitration procedure. This, in turn, questions the traditional understanding of private institutional arbitration as a process of solely private dimension, hence limiting to the resolution of individual disputes with no impact on third parties. Notably, these changes have occurred with either express or tacit support from the broader arbitration community and/or public authorities such as policy-makers in the field of arbitration and legislators.[168]

[165] *See generally* THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 148.
[166] *Id.* at 67–110.
[167] *Id.*
[168] *Id.*

Several new trends in current practices thus exemplify the new "public function" of arbitral institutions. First, the "universalization" and "formalization" of arbitration rules in response to increasing competition has narrowed the gap between arbitral and formal judicial processes.[169] Arbitral institutions have, for instance, begun demanding greater authority and expanded supervisory roles to support the interests of disputants by ensuring the enforcement of arbitral awards in the absence of parties' consent. They have attempted this in a number of ways, including by widening interpretations of the term "administrative tasks" to encompass such responsibilities.[170] This practice certainly endangers the fundamental principle of party autonomy. It also marks a major change in arbitration practice that, if continued, will impact arbitration in general and especially the capacity of arbitral institutions to serve as a trusted venues for resolving disputes among commercial parties.[171] Second, the expansion of services itself has become another area of competition among arbitral institutions. Some institutions have, for example, recently attracted non-commercial public cases and disputes.[172]

Competition among arbitral institutions has, in short, evolved over the past decades. It has led to the identification of new areas for competition and the recent introduction of elements beyond cost efficiency and expedited resolution processes.[173] Understanding the causes of these recent shifts in arbitral institution practices is crucial. The new practices provide evidence that

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[169] *Id.*

[170] *Id.*

[171] *Id.* ("The distinction between traditional commercial function and the emerging public function of arbitral institutions pointed out the following issues: (1) the evolving profile of arbitration users of particular arbitration regimes from traditional commercial arbitration parties to public actors including States and/or State-like entities; (2) the expanding category of institutional arbitration 'services'; that (3) contributes to the development of the new types of disputes administered by arbitral institutions and vis-à-vis new public actors which surpasses classical understanding of arbitral institutions as private service providers; and finally (4) the declining efficiency of the traditional commercial function of institutional arbitration in view of the changing legitimacy of traditional institutional regimes.") *Id.* at 108.

[172] *Id.* at 67–110.

[173] *Id.*

these institutions may have begun to fall short of meeting the needs of commercial disputants, failing to offer and deliver the expected outstanding results in a cost-effective and timely manner.[174] This diversification of services also indicates, however, that these institutions have started responding to increasing "public interest." These institutions' recent amendments to their rules and procedures reflect this objective.[175] The "commercial function" of arbitral institutions has, consequently, decreased and the new "public function" has become a key element of the rivalries among them.[176]

These developments have clearly generated new challenges for arbitral institutions. Such competition can, of course, have a positive impact on the growth of arbitral institutions. Arbitral institutions' openness to new areas of expertise and business is not the core of the problem. It could actually serve as a sign of growth and expansion, which could lead to greater results in the future. It could, moreover, reshape the practices of these institutions in ways that contribute to the growth of ADR and to the promotion of its use in different types of disputes including those (e.g., public or administrative disputes) that have not experienced the levels of professionalism, efficiency, and impartiality arbitral institutions offer. This would bolster efforts to enhance access to justice and support the systems of justice in any jurisdiction. Commercial parties will also benefit from such developments since they regularly conduct business with public bodies and government entities. These changes could, in short, signal positive progress for arbitral institutions under two conditions: 1) if arbitral institutions manage to maintain balance between their offered services for

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[174] *Id.*; NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS: WITH INTERNATIONAL ARBITRATION CONGRESS, HAMBURG, JUNE 7 - 11, 1982, 82–85 (Pieter Sanders, International Arbitration Congress, & International Council for Commercial Arbitration eds., 1983). ("The number of arbitration cases has increased at alarming rate and the very purpose of arbitration (to save time) is being defeated in a number of cases. …") *Id.* at 84.

[175] THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 148 at 67–110.

[176] *Id.*

all their clients, of all types, and the quality and efficiency of the outcomes; and 2) if the new growth does not detract from other areas of practice by, for example, hampering the main functions of these institutions.

The current competition among arbitral institutions, however, appears increasingly unhealthy, introducing significant risks that may negatively influence the future success of these institutions. These risks will increase if arbitral institutions remain fixated on besting their competitors as opposed to delivering the high quality services their clients expect and resolving disputes as efficiently as possible. The new competition-fueled arbitral practices will also have a wider impact on arbitration itself and its capacity as a trusted long-standing venue for resolving disputes, if these institutions continue to neglect the fundamental principles of arbitration.

6.3.2 Governmental Intervention

Many States have embraced arbitration and arbitral institutions to achieve economic benefits and expand international trade. These States restrict the supervisory roles of traditional courts over arbitration processes and arbitral awards, signaling their willingness to surrender some amount of sovereignty.[177] Some States have, however, found new ways to reassert control over such processes. Many countries, like China for instance, have begun creating national arbitral institutions in their jurisdictions.[178] These institutions are ostensibly private but the extensive support they receive from governments makes their private natures questionable.[179]

[177] LYNCH, *supra* note 152 at 119–23.
[178] *Id.*
[179] KUN FAN, ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS 133–36 (2013).; ("The private nature of arbitration requires that the restructured or newly established local arbitration institutions are (i) independent in terms of organization and personal constituents, and free from administrative interference, and (ii) financially independent from government control.") *Id.* at 133.

CHAPTER SIX: INSTITUTIONLIZATION OF ADR

Government involvement in creating or supporting new arbitral institutions, though marred by potential pitfalls, may prove necessary in some circumstances.[180] The need for such involvement becomes more apparent in the early stages of the establishment of new private institutions or in cases where extant institutions face difficulties due, for instance, to financial problems.[181] The absence of other support channels and resources in such cases may necessitate governmental interference, but only until these institutions regain the confidence to carry on their functions independently, or until they have become financially independent.[182] The fact that, in many jurisdictions, governmental interference and participation in such processes continues indefinitely or becomes permanent is a significant problem.[183] Government intervention in some jurisdictions appears intended to help these institutions "run the whole course" instead of simply enabling them to "get on the horse." [184]

Current government involvement in arbitration institutions and arbitral processes raises an important question: given the existence of traditional court systems, what motivates governments to establish "private" arbitral institutions in their jurisdictions? Various factors have contributed to this growing tendency. First, the elevated status and reputation of arbitral institutions as forums for international trade parties to resolve commercial disputes has made them a preferred alternative to court systems. This preference corresponds to the pressure governments feel to support economic growth. Second, countries seeking to bolster their positions in economic rankings by meeting certain criteria and satisfying conditions set by international organizations such as the World Bank, which tracks global indicators in this regard, has also driven government efforts to

[180] *Id.* at 133–36.
[181] *Id.*
[182] FAN, *supra* note 179.
[183] *Id.*
[184] *Id.* at 134.

support arbitration institutions. The Arbitrating and Mediating Disputes indicators, for instance, aim to evaluate alternative dispute resolution systems for commercial disputes (arbitration and other ADR methods), focusing specifically on the simplicity of said systems.[185] The evaluation process covers all stages of disputes from the initial steps through the rendering of arbitral awards or settlements between the parties and the enforcement thereof.[186] Evaluators use these indicators to assess around 100 jurisdictions, and investors rely heavily on these assessments when making decisions about future investments.[187] Many countries therefore attempt to improve their ranking on these indicators to attract more international investors. Creating arbitral institutions is among the fastest and most effective ways for governments to improve their dispute resolution systems, enabling them to nominally meet the requirements of such indicators and, thus, improve their rankings. Third, governments also establish arbitral institutions and provide them with varying degrees of support to bolster their own interests and, in a wider sense, protect national interests.[188]

The trend toward governmental intervention in arbitral institutions is increasing. A Beijing Arbitration Commission / Beijing International Arbitration Center (the BAC) study[189] shows, for example, that in China less than 14 percent of the 80 surveyed institutions regard themselves as purely private bodies.[190] The rest have acknowledged varying degrees of governmental interference.[191] The establishment of such institutions also stemmed from "administrative needs"

[185] Sophie Pouget, *Arbitrating and mediating disputes: benchmarking arbitration and mediation regimes for commercial disputes related to foreign direct investment*, BROWS. (2013).
[186] *Id.*
[187] *Id.*
[188] FAN, *supra* note 179 at 133–36.
[189] Beijing Arbitration Commission (BAC), *available at*: http://www.bjac.org.cn/english/ (last visited Oct 17, 2018).
[190] FAN, *supra* note 179 at 134–35.
[191] *Id.* at 134–35.

and not efforts to meet commercial demand.[192] The following remarks demonstrate the Chinese experience in this regard:

> [D]espite legislative attempts to respect institutional independence and restore the private nature of arbitration, their goal of achieving full independence of Chinese arbitration institutions at the national and at the local levels has not been achieved in reality. The difficulties come from government control and intervention …[193]

This undoubtedly represents a challenge to arbitral institutions as the Chinese government could gradually strip away the initial commercial functions and competence of these institutions. The continued expansion of arbitral institution authority and power through state mechanisms as opposed to their own rules and procedures will deplete and weaken their commercial functions.[194] Arbitral institutions will, consequently, struggle to put food on the table, which will lead to expanded governmental intervention in the name of financial assistance and support.[195] Commercial parties will, in other words, look for new dispute resolution methods or alternate investment locations, once they recognize the potential impact of government involvement on the impartiality of these institutions. This constitutes a major challenge and threat not only to arbitral institutions, but also to the economies of the countries in which they operate.

6.3.3 Liability in Institutional Arbitration

Human error is inevitable—an assumed risk associated with any work done by human beings. Humans must therefore accept and pardon to a certain extent unintentional or minor mistakes resulting from simple human, or institutional, failures.[196] Such failures, however, have

[192] *Id.* at 134–35.
[193] *Id.* at 136.
[194] LYNCH, *supra* note 152 at 119–23.
[195] FAN, *supra* note 179 at 133–36.
[196] VV Veeder, *Arbitrators and Arbitral Institutions: Legal Risks for Product Liability*, 5 AM U BUS REV 335 (2015).

major repercussions in institutional arbitration systems.[197] An increasing number of arbitral institution clients have begun suing the institutions and the arbitrators who conduct arbitration processes under their rules for liability.[198] The parties who file such actions have varying motivations. One-time users of arbitral institution services have contributed to the growing number of liability cases against arbitral institutions, as one scholar explains:

> Today, given the increasingly aggressive tactics deployed by one-off users of international arbitration with no interest in the arbitral system beyond winning (or not losing) their case, there is clearly a growing problem with regard to the potential legal liability of an arbitral institution for its product, namely impartial arbitrators deciding a dispute with a valid award.[199]

Actions brought by repeat users, mainly commercial parties, also highlight an enormous growing discontent among commercial disputants with many service providers and an increasing lack of trust between the two sides.[200] The parties involved in institutional arbitration have begun questioning arbitral institutions' abilities to effectively and efficiently perform their roles in dispute resolution processes.[201] This trend has, unfortunately, steadily worsened recently;[202] its potential impacts include the serious possibility that commercial parties will begin to have second thoughts about resolving their disputes institutionally. This development thus poses significant challenges regarding both one-time and repeat users for all arbitral institutions and the international arbitration system in general—challenges that require immediate attention before the damage becomes irreversible.[203]Arbitral institutions have sought to protect themselves against liability

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[197] *Id*.
[198] Eric Robine, *The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law*, 5 ARBITR. INT. 323–332 (1989); *see generally* THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 149.
[199] Veeder, *supra* note 196.
[200] THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 148 at 9–12.
[201] *Id*.
[202] *Id*.
[203] Veeder, *supra* note 197; THE LIABILITY OF ARBITRAL INSTITUTIONS, *supra* note 149; Eric Robine, *The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law*, 5 ARBITR. INT. 323–332 (1989); Jennifer Yapp, *The liability of arbitral institutions*, 13 ASIAN DISPUTE REV. 114–116 (2011); Robine, *supra*

actions by modifying their rules to include new provisions that grant them immunity from liability.[204]

6.3.3.1 The French Experience

The statuary framework in the French legal system offers meager protections to arbitral institutions.[205] Arbitrators do not receive the same immunity as judges, but they enjoy more protection than arbitral institutions.[206] The International Chamber of Commerce (ICC) is a leading arbitral institution in the world today. It was, for many years, a party in numerous liability cases brought before French courts. It amended its rules to include a "liability exclusion" provision in 1998. Article 34 of the 1998 International Chamber of Commerce rules states:

> Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.[207]

The broad drafting of this provision extends absolute immunity from any sort of liability not only to the ICC, but also to the arbitrators, the International Court of Arbitration, and all the individual

note; Dario Alessi, *Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability*, 31 J. INT. ARBITR. 735–784 (2014); the risks in the international arbitration system today have expanded because parties can sue arbitrators on numerous grounds including if the parties find that they have not remained independent nor impartial. Several legal systems allow the annulment of arbitral awards if parties successfully bring claims against any of the appointed arbitrators after they render awards. Claims with pending status, moreover, can force opposing parties to settle against their wills to avoid delays that such actions may cause. Such claims may result in Staying Arbitration Proceedings in other legal systems until courts rule on the claims, which can become time-consuming and costly. Many traditional courts in jurisdictions well known for their hospitality to arbitration such as the United States (New York), England (London) and Sweden (Stockholm) have held an unprecedentedly vast number of arbitrators accountable and ordered some of them to provide sworn testimony in court. This clearly indicates that the "functional immunity" in arbitration system has begun declining, if not been entirely eliminated. Veeder, *supra* note 196.

[204] V. V. Veeder, *Is there a Need to Revise the New York Convention?* 1 J. INT. DISPUTE SETTL. 499–506 (2010).

[205] Matthew Rasmussen, *Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France*, 26 FORDHAM INTL LJ 1824 (2002).

[206] *Id.*

[207] International Chamber of Commerce Arbitration Rules, art. 34 (1998), [hereinafter "1998 ICC Rules"] Full text of the 1998 ICC Rules is *available at:* http://library.iccwbo.org/content/dr/RULES/RULE_ARB_All_EN.htm?l1=Rules (last visited Oct 21, 2018).

administrative workers and other staff and professionals of the two organizations for the services they provide or work they perform.

The judiciary responded to this development in a somewhat expected way, however.[208] The courts confirmed in many cases the liability of arbitral institutions, widening the scope of their liability in direct contrast to the extensive liability protections in the regulatory framework the ICC had established. A court held, for example, in the famous 2001 case *Cubic v. ICC*[209] that the commitments and responsibilities created or established by contracts between parties prevent the exclusion of arbitral institution liability.[210] The court in this case asserted that, although providing ideal arbitration hearings does not fall within the obligations of arbitral institution, the liability of such institutions stems from their commitment to ensuring the efficiency of arbitration and taking all the necessary measures to provide effective services.[211] This ruling established the important notion that courts can hold arbitral institutions liable for any damage caused by their failures to responsibly administer arbitration and provide the best possible services in ways that serve their clients' best interests. This ruling thus established a new legal framework for the liability of arbitral institutions.

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[208] Domitille Baizeau, *Liability of arbitral institutions: increased scrutiny by the courts of the seat?* 27 ASA BULL. 383–386 (2009).

[209] *Société Cubic Defense Systems Inc. v. Chambre de Commerce international*, Cour de cassation 1ère ch civ: 20 (Feb. 2001); *see also* T. Clay note in *Rev. arb.* 2001.511; T. CLAY, P. PINSOLLE & T. VOISIN, FRENCH INTERNATIONAL ARBITRATION LAW REPORTS: 1963-2007 403–05 (2014).

[210] Rasmussen, *supra* note 206; for more details about disputant contracts as a ground for liability claims, *see* Robine, *supra* note 198.

[211] Rasmussen, *supra* note 206; CLAY, PINSOLLE, AND VOISIN, *supra* note 209 at 403–05.; ("The standards of independence and impartiality for arbitrators can be reviewed by a Court examining the award; the arbitration centre could only, with regard to guaranteeing of this essential attribute of the arbitrators, contract an obligation of means for which it could be liable. The Court of Appeal noted that the rules of arbitration of the ICC distinguish between organizing an arbitration, notably through the intermediary of the 'International Court of Arbitration', and jurisdictional role, devoted entirely to the arbitrators as the 'court' has no jurisdictional power. In this regard, the Court of Appeal rightly held that the communication of the draft award to the International arbitration court did not amount to any interference in the arbitrators' jurisdictional mission, but merely served to ensure that the arbitration was effective. Thus, the Court of Appeal rightly held, based on these concerns, that the contract for the organization of the arbitration was complaint with international public policy requirements.") *Id.*

Article 34 of the 1998 ICC rules remained the same until 2009 when the Paris Court of Appeals issues its ruling in *SNF SAS v. ICC*.[212] The court found that despite the liability exclusions in Article 34 of the 1998 ICC rules, parties could bring court actions related to liability claims against the ICC regarding any breaches of contract or failures to fulfill contractual obligations.[213] The court, thus, ruled against the legality and legitimacy of Article 34 in the French legal system.[214] This ruling led the ICC to publish its revised rules in 2012[215] in which Article 40 amended and replaced Article 34.[216] The revised rules, first of all, changed the name of this provision from "Exclusion of Liability" to "Limitation of Liability."[217] They also changed the language of the provision slightly, adding the following phrase at the end: "except to the extent such limitation of liability is prohibited by applicable law."[218] Some perceive this addition as the remedy proposed by the ICC in the light of its ruling in the 2009 SNF case.[219] The revision aims to eliminate exclusions, or limitations, of liability granted by the ICC rules deemed unlawful under the applied law. Professor V. Veeder questions the usefulness of the liability exclusions in the ICC rules in the first place as well as the effectiveness of this alteration, noting:

> There were, of course, a number of "I told you so's." But, "I told you" is never a solution. …Will this exclusion work any better than the old wording? Only time will tell. It will not be a benevolent arbitrator who will so decide, but a state court and not necessarily a court in France.[220]

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[212] *SNF v. ICC*, Court of Appeal of Paris, Jan. 22, (2009).
[213] *Id.*
[214] *Id.*; Veeder, *supra* note 196; Baizeau, *supra* note 208; Alessi, *supra* note 203.
[215] The 2012 International Chamber of Commerce Rules of Arbitration, INTERNATIONAL ARBITRATION, [hereinafter "2012 ICC Rules"] Full text of the rules *available at*: http://internationalarbitrationlaw.com/about-arbitration/international-arbitration-rules/2012-icc-arbitration rules (last visited Oct 27, 2018).
[216] Veeder, *supra* note 196.
[217] 2012 ICC Rule, art. 40.
[218] *Id.* Veeder, *supra* note 196.
[219] *Id.*
[220] *Id.*

The refusal of the judiciary to authorize any arbitration centers' liability exclusions or limitations has its own advantages.[221] This practice, on the one hand, sends the message to these institutions that the courts have supervisory authority over them as service providers since competent courts regularly scrutinize the services they deliver and the tasks they perform.[222] The practice, on the other hand, has the potential to seriously impact both arbitral institutions and the international arbitration system in general. First, the courts did not hold the ICC liable in either the Cubic or SNF cases, but the practice still has the potential to reignite judicial hostility to arbitration, which ought be avoided and reversed. Reopening the door to such hostility will jeopardize arbitration and its effectiveness and efficiency. It will, moreover, potentially harm arbitration and the reputations of arbitration centers as reliable venues for resolving disputes. Such developments will undoubtedly occur aggressively and rapidly in jurisdictions known for their unfriendliness toward arbitration. The courts thus appear to hold the fate of arbitration in their hands and whether they support or undermine arbitral processes and awards will play a crucial role in the development of the practice. Second, the supervisory role of the courts over the arbitral institutions constitutes a major challenge to one of the most fundamental concepts upon which international arbitration has long relied. Court supervision can necessitate public disclosures of documents related to arbitral proceedings or court review of arbitral awards, which can lead to violations of the confidentiality of arbitration. Such supervisory measures run directly counter to the private nature of the international arbitration system and to the motives behind the growing demand for arbitration among businesses. [223] The Court of Appeals in Paris ordered the disclosure of classified

[221] Baizeau, *supra* note 208.
[222] *Id.*
[223] Veeder, *supra* note 196; Rasmussen, *supra* note 205; Baizeau, *supra* note 208.; *but see* CARBONNEAU, *supra* note 136 at 2–7. ("A recent ICC survey, however, indicated that business parties are not necessarily motivated to select arbitration because it proffers confidentiality.") *Id.* at 2.

information and documents related to the arbitral proceedings and to the award-rendering process in the 2009 case, for example.[224] The court ruling, moreover, directed unprecedented public criticism toward the ICC for its hesitation to submit the requested documents.[225] "It was a bad omen."[226] The court eventually ruled in favor of the ICC, finding that it was not liable after reviewing the submitted confidential documents, but the breach of confidentiality was irrefutable.

Recent developments in the international arbitration system have resulted in challenges to arbitral awards before traditional courts and lawsuits against arbitral institutions in their capacities as service providers. These trends highlight the increasing risk of liability these institutions face in performing their work. This applies to the employees and professionals in these institutions as well; they have become increasingly vulnerable to risks and exposure that lead to greater potential liability and increased chances that parties will bring liability cases against arbitral institutions. This will definitely affect the arbitration system in general and spread uncertainty and concerns about its competence and effectiveness in resolving disputes.

These issues are sources of serious concern for the international arbitration system; identifying ways arbitral institutions can overcome them and forestall the snowball effect they could cause necessitates immediate attention and the collaborative effort of everyone involved or interested in the field of arbitration. Arbitral institutions, moreover, should take the lead in efforts to develop useful solutions, put them to the test, and review them periodically or as needed. Some have proposed liability insurance as a possible solution. Advocates of such an approach contend that, in many legal systems where the law grants little or no immunity to arbitrators and arbitral institutions, liability coverage and insurance are the most efficacious, if not the only, option for

[224] Veeder, *supra* note 196.
[225] *Id*.
[226] *Id*.

protecting arbitrators and arbitral institutions from the increasing number of liability lawsuits.[227] Caution is warranted here, however, since the existence of such coverage and awareness thereof could yield rapid increases in liability actions against arbitral institutions.[228]

Additional methods for controlling the liability of arbitral institutions and their professionals and mitigating associated risks do exist. Arbitral institutions should tackle this issue with multi-level approaches. First, they should begin to design and implement liability-avoidance programs. Such programs should pursue the following goals: 1) anticipating any potential liability risks and promptly reporting any identified issues to competent officials or departments to facilitate necessary measures in the earliest stage possible; 2) providing comprehensive assessments of the risk associated with each reported case; 3) offering recommendations regarding the mitigation of risks or losses in general until the resolution of the issues in question; and 4) monitoring and managing the risks and all potential liability cases as they advance, recede, or decline.

The second means of minimizing the liability losses of arbitral institutions concerns the creation of litigation-avoidance systems in arbitral institutions. Arbitral institutions can achieve this by developing and implementing alternative dispute resolution programs exclusively designed for parties who appear likely to sue the institutions for liability. Arbitral institutions should address any disputes between them and arbitration parties, including those related to arbitration fees or administrative services, via settlement processes. They can accomplish this by either including ADR clauses in the institutional arbitration agreements signed with the parties prior to the

[227] *Id.* ("Where contractual and statutory immunities are insufficient under English and French law, could such legal liability insurance be the Holy Grail as the only safe and certain solution for arbitrators and arbitral institutions? It seems to me that we are only left with professional indemnity insurance as the most effective practical solution to the potential liabilities of arbitrators and arbitral institutions.") *Id.*; *see also* Robine, *supra* note 198; Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA REV 151 (2004); Bernardo M. Cremades, *Should Arbitrators Be Immune from Liability*, 10 INTL FIN REV 32 (1991).

[228] Robine, *supra* note 198.

occurrence of any such dispute, or by making ADR processes available after such disputes arise and endeavoring via all possible means to obtain aggrieved parties' consent to resolve the matters amicably. Offering such processes at no cost will increase the likelihood that parties will accept them.

Resolving liability-related disputes internally will help arbitral institutions mitigate liability costs and other potential negative consequences; it will also benefit institutional arbitration parties by enabling them to maintain and protect the confidentiality of arbitrated cases and all related confidential documents from any possible public disclosure that might occur during litigation. Many parties, especially commercial businesses, prioritize and highly value the maintenance of confidentiality; it is, in fact, one of the most important reasons for the popularity of arbitration.

Finally, arbitral institutions should expand their educational efforts in various areas. They should, for example, organize training sessions for arbitrators and their staff members and experts, and host conferences, forums, workshops, and seminars on the subjects of liability or arbitrators and arbitral institutions. They should design these efforts to spread knowledge and awareness of the importance of these issues and their development. Such educational initiatives would serve as great opportunities for arbitral institutions to share the information and knowledge they have gleaned from relevant experiences.

7. Conclusion

The institutionalization of ADR modernizes ADR by accomplishing several specific objectives. Institutionalization efforts seek to improve the effectiveness of ADR techniques and to promote its use in various fields. These efforts also aim to improve traditional justice systems and

enhance access to justice. Many areas in any legal system can benefit from efforts to institutionalize ADR. The institutionalization of ADR has proven successful and effective in the public, administrative, and private spheres. Challenges remain, however, and institutionalization advocates must find ways to overcome them to achieve all desired outcomes. The problems that arise in the institutionalization process should not, however, dissuade institutionalization efforts; no jurisdiction should disregard or miss out on the promised opportunities of such progress. This chapter's analysis indicates that many significant areas for development and growth remain open for exploration in the field of ADR in Saudi Arabia. Providing foreign investors a reliable, effective, and strong dispute resolution system is a significant step the country needs to consider in pursuing its goal of economic growth. The institutionalization of ADR will enhance the dispute resolution system and accelerate the achievement of the Kingdom's aims. This chapter outlines the goals and improvements necessary to obtain the desired results and ensure effective implementation, and explains why and how the Kingdom should take the steps in question and what it should seek to reinforce or alter or avoid.

CHAPTER SEVEN: CONCLUSION

1. Concluding Thoughts

Efforts have been underway since the announcement of the Saudi 2030 Vision to modernize the country and undertake reform that will contribute effectively in achieving the desired objectives of the Saudi vision. This dissertation provide a reform plan form a legal perspective for one vital area in the Saudi legal system. One of the aims of this dissertation is to support the efforts of achieving the goals for the vision 2030 especially the ones that concerning building a strong economy away from the reliance on oil revenues by inviting international businesses and merchants to invest in the country. One of the arguments this dissertation makes is that attracting foreign investment requires building a strong and clear dispute resolution that international investors can understand and rely on. This constitutes an indispensable need for many parties of international trade. From history to modern times, practice tells us that international trade parties tend to resort to means other than litigation in order to resolve their disputes.[1] This is due to various reasons such as high cost, slowness of litigation or fear of uncertainty or biased decisions by the public system of justice in any jurisdiction.[2] These concerns become greater when they deal with a foreign party or when it comes to resorting to a foreign legal system or laws to decide commercial disputes, no matter how sophisticated that system was. Traders have always preferred to use their own method of dispute resolution to decide such matters.[3] This dissertation argues that if Saudi Arabia is heading toward opening its doors to foreign investments to seek economic in the post oil era then, there are two significant issues that needs to be taken into consecration in this regard: 1- understanding "the fabric of international commerce and trade"[4] and 2- establishing a

[1] *See e.g.* Earl S Wolaver, *The historical background of commercial arbitration*, 83 UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER 132–146 (1934).
[2] *Id.*
[3] *Id.*
[4] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)

strong legal protection to prevent any risk or damage to international investment that may discourage foreign investors from engaging in commercial activities in the country.[5] Doing so will ensure achieving the desire results and benefits successfully. It illustrate and analyze that this what some of the leading jurisdictions in the world have realized decades ago when they recognized the importance of endorsing party autonomy and enforcing the parties agreement by which they freely agree upon the method they deem most appropriate for them to resolve any dispute when arise between them. In shows how the FAA in the U.S. for example, establishes and embodies a strong public policy favoring arbitration. Also it proves how the case law gives a full support to such policy and to the aims of the arbitration Act. Since the enactment of the FAA, the Supreme Court have always realized the significance of arbitration and its role in promoting economic growth and development in country by encouraging international trade in the country. Such judicial practice has been upheld through the history by the Supreme Court.[6] The most recent opinion of the court in *Henry Schein, Inc., v. Archer & White Sales, Inc.*[7] case gives a great evidence of such argument. The court decision in this case, which was delivered by Justice Kavanaugh states the following: "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."[8] By such decision the court continues to protect all the fundamental principles of modern arbitration and that, clearly, what makes the U.S. a hospitable jurisdiction to arbitration. The same is also the

[5] *Id.*
[6] *See e.g. Id.* ; *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972), in this case the supreme court ruled: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id*.; *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *see generally* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION (5 ed. 2014).
[7] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. (2019)
[8] *Id.*

case in the English jurisdiction as it has been illustrated and analyzed in Chapter 2 and 4 in this dissertation.[9]

The aims of this dissertation have been to understand the reality of the current legal framework of ADR in Saudi Arabia, examine its performance, effectiveness and its appeal to foreign investors and parties of international trade. It stresses, as a result, the importance of creating a clear and effective ADR legal framework and the need for a major reforms in many relative areas. The suggested reform shall help the Saudi jurisdiction in overcoming many of the faced issues effecting the public system of justice and those that have been the reasons behind distancing the country from been considered as a hospitable jurisdiction to ADR means. Such reform, hence, aims to enhance the effectiveness of not only the traditional courts in the country, but the whole dispute resolution system in the country.

The international experiences and practices as have been analyzed and illustrated in this dissertation tell us that ADR has been used recently for many purposes. Several jurisdictions have implemented ADR and support its use to: 1- enhance the performance, the effectiveness, and the accessibility of the traditional court system, 2- achieve great economic gains and growth through international trade and commerce. On this basis, the dissertation has emphasized the need for a clear, strong and effective dispute resolution in the Kingdom in order to create an attractive environment for foreign direct investments. This dispute resolution system, thus, should include the various alternative to litigation techniques such as arbitration mediation...etc. The dissertation, therefor, has provided a thorough examination to various critical issues such as the rent status of ADR in the Saudi legal system and the reasons behind classifying the Saudi jurisdiction as non-hospitable to arbitration or other means of ADR. This dissertation, has provided a multilevel

[9] Michael John Mustill, *Arbitration: History and background*, 6 J. INT'L ARB. 43 (1989).

comparative analysis as follow: 1- it has investigated the origin, history, evolution of the dispute resolution system in the country compared to its modern position and current status, 2- another level of comparison has been introduced by analyzing the contemporary system to its root as can be found in the Islamic history. 3- The Saudi current law and practice has also been compared to some of the best practices and leading jurisdiction in order to critically evaluate the effectiveness of such system and propose the possible remedies to enhance its efficiency.

The dissertation has, furthermore, proved that not only the use of ADR will be fruitful in creating an enabling atmosphere and environment for international foreign investors, but also the public system of justice in general will benefit from these efforts. The dissertation has explored and analyzed all the possible channels through which ADR means can be implemented and effectively used at the national level, either outside or within the court system. The dissertation has thoroughly investigated and proved that the efforts to modernize the ADR law and practice in the kingdom in order to match the international standards and the global practice can be achieved in accordance with both Islamic law and Saudi national laws. By doing so, the dissertation has emphasized that the Saudi jurisdiction will be able to find "a better way" through which it can build a strong dispute system that will have many benefits at the national level and will also help in achieving the economy objectives that the country seeks in the future.

In the final analysis, the dissertation does not seek or intend to achieve any quick wins, but rather to help in building a national strategic long term plan that will benefit the country in the long run and to aid the efforts, from a legal perspective, that aim to accomplish many legitimate and valuable economic goals in years to come and to maintain the country's gains. It provides a solid basis on which progress can be made and advanced in the field of ADR toward a clear and effective dispute resolution system in the kingdom.

2. Chapters Summary

2.1 Chapter One:

This chapter sets the scene as it provides a brief background introduction followed by a clear description of the problem of the research. The aims and objectives of the research are also clearly stated in this chapter. Research questions are, then, given and finally the structure and organization of the dissertation is outlined.

2.2 Chapter Two:

This chapter studies the development of ADR in the contemporary legal system in Saudi Arabia. Along with explaining the history of the ADR in the country and its growth up to the present time, the chapter also explains the many stages through which ADR has evolved in the international practices and examines the recent progress of the concept of justice that has taken place in different parts of the world today. This is essential for the purpose of evaluating the efficiency of the ADR framework at the national level and finding the areas where reform and improvements are needed to increase the capacity of the ADR system in the country. It clarifies the movements of "Access to Justice" which have impacted the advancement of ADR in different parts of the world. It gives, furthermore, a background introduction to Islamic law, confers the concept of justice from an Islamic perspective and shows the origin of ADR in the Islamic practice. In sum, this chapter underlines the significance of use of ADR and the importance of such means for the purpose of improving the dispute resolution system in the country.

2.3 Chapter Three:

This chapter provides a thorough and critical analysis of arbitration in Saudi in terms of the law and the practice. It demonstrates the history of such institution in Saudi jurisdiction and

provides a careful assessment of the current Law of Arbitration and compares it to the preceding laws. It also distinguish between *tahkim* and arbitration as globally practiced today. It, then, shows how the shift was gradually made in the Saudi legal system from *tahkim* to arbitration. It discusses in depth the reasons that distance the Saudi jurisdiction from being considered a hospitable to arbitration. This is followed by offering recommendations for the needed reforms.

This chapter, moreover, provides an in depth analysis of the most recent enacted law of arbitration in the kingdom and highlights many potential problems that may occur in the practice. Finally, it underlines some significant and recent developments in the international practice of arbitration.

2.4 Chapter Four:

This chapter is titled: "Creating a strong enabling environment for arbitration: Learning from other legal systems." It explores the history of arbitration in two leading jurisdictions; the U.K. and the U.S. It, then, draws valuable lessons both experiences in order to lead to a better understanding of such process and its principles in order to ensure the functionality and effectiveness of arbitration practice in the Saudi jurisdiction. The implementation of the identified key lessons will contribute to the improvement of the arbitration law and practice in the Saudi jurisdiction and enhance its effectiveness in the national level and will help to boost the country's position at the international level in this regard. All of which will eventually aid the efforts of creating an enabling environment for arbitration in the kingdom and, hence, will impact the economic growth for the country and will lead to achieve many desired objectives.

2.5 Chapter Five:

This chapter is designated to the survey that was conducted to respond to the need for a clear picture of the reality of ADR instruction in Saudi Arabia. The survey in Chapter 2 was designed to accomplish that objective. It highlights many issues that are faced in this field and offers ways of improvements and reform that will contribute to the growth of ADR in Saudi jurisdiction. This chapter also provides a useful comparison between ADR instruction in Saudi Arabia and in the United States. It discusses the history of ADR instruction in the United States throughout the decades and derives useful lessons from this experience. This chapter, then, explains the survey and discusses and analyzes the findings. Chapter 2 emphasizes the need for additional studies and a bigger project in the subject of ADR instruction in the Saudi jurisdiction or concerning the legal education in the country in general in order to indicate the necessary reform in this area.

2.6 Chapter Six:

Another critical issue is presented and analyzed in this chapter. Institutionalization of ADR is proposed as a remedy and a modernizing step that is yet to be taken seriously by the Saudi legal system. This chapter has argued that the Saudi legal system has witnessed a slow and insufficient effort to institutionalize ADR means and, thus, it urges more serious efforts in this regard due to the success and the rising popularity of the institutionalized ADR worldwide. This chapter discusses, through analysis and comparison, several effective examples of institutionalization in some of the leading jurisdictions and experiences. It sets clearly what goals Saudi Arabia should pursue and how they can be achieved successfully. A comprehensive definition of the institutionalization of ADR is proposed in this chapter. This is followed by a thorough and critical analysis of ADR institutionalization in public, administrative and private sectors and offers several

recommendations to overcome some of the outlined issues that are being faced by the international practice today. Chapter 2 shows that many areas of improvement and progress in this field is yet to be explored in the Saudi jurisdiction. It argues, moreover, that institutionalization of ADR can accelerate the reform steps that need to be taken in the Saudi legal system in order to provide a clear and effective dispute resolution system on which foreign investors can rely on and trust which will help the country greatly in accomplishing all its economic objectives. This chapter, in sum, underlines the aims and reform needed to achieve the desired outcomes and to ensure successful application. It clarifies, furthermore, why and how the Kingdom should take the identified measurements and what it should pursue or avoid.

2.7 Chapter Seven:

This chapter concludes the dissertation by summarizing the main arguments and summarizing the previous chapters. Finally, the analysis also leads to proposing several recommendations.

3. Recommendations:

In order to help in achieving the aims and objectives stated in this dissertation, several recommendations are proposed as follow:

1- ADR should be promoted and supported and the use of its various techniques should be encouraged in all possible areas of application throughout the kingdom. Government and its all concerned executive bodies should, therefore, aim to find the best ways to promote ADR. They should, moreover, aim to spread awareness, knowledge and understanding regarding the effectiveness of ADR and the benefits of the resort to such means not only for resolving disputes, but also in reducing the possibilities of their

occurrence.

2- The legislative branch in the kingdom should take serious steps toward supporting ADR and the use of its various techniques by creating a clear statutory framework for ADR. This can be achieved through enacting a new law of ADR in the kingdom for that purpose.

3- The proposed Law of ADR should declare its purposes, acknowledge the importance of ADR, and address its main potential benefits for all targeted individuals, groups or bodies. It should, furthermore, authorize the use of ADR, by traditional courts for example, define each of the different forms ADR, and distinguish between them. In this sense the main purpose of the proposed law should be to serve as a wide umbrella for an array of other new laws, each one of them deals with a specific form of ADR means, which are to be enacted in the future as needed. One of the advantages of having a clear statutory framework for ADR in the Saudi legal system is that it will decrease the judicial hostility towards ADR means and will reduce the wide exercise of judicial discretion in many cases, which will enhance the status of such ADR means as a result.

4- The topic of ADR, its role and significance should be at the forefront of discussions at the legislative level in the kingdom. This will lead to exploring its effectiveness, examining the benefits of implementing ADR means, and determining all the possible ways to support their use at the national level. Deep and intense discussions among legislators will result in a strong drafting of the proposed law (in recommendation No.1) which will reflect the legislative intent in supporting ADR and will consequently lead to an effective implementation of the law.

5- The dispute resolution system in the kingdom should be evaluated periodically to assess its efficiency and to determine all the needed reform or improvements to any area that requires attention. It is of a great significant, hence, to track the global progress in the field of ADR and the development of the concept of justice generally. This will be the tool by which the evaluation process of the national system will be easier, faster and more effective. This will, consequently, help to improve the practice of ADR in the country.

6- The use of ADR should be included in any future reform initiatives concerning the justice system in the kingdom. In this sense, ADR should not be seen as alternatives only, they must be regarded as the ideal and appropriate remedy. This requires a genuine belief in the capacity of ADR and its effectiveness in resolving various types of disputes by everyone involves in the decision-making process and in the process of dispute resolution.

7- Resolving various contemporary disputes in an efficient way requires recognition and full understanding of the global meaning of ADR. The Saudi legal system, therefore, should take into consideration what the new global order necessitates when it comes to implementing ADR in the Saudi jurisdiction.

8- The recent legislative modernization wave that took place in the Saudi jurisdiction and signified by the enactment of the 2012 Arbitration Law should have a great positive impact that should improve the practice accordingly. The practice of arbitration must match the recently enacted law and resembles and uphold its modern provisions. The new law of arbitration, hence, should shape and guide the modern practice of arbitration in the Saudi jurisdiction.

9- Judges should show their full support to the law and to the arbitral proceedings. They should, moreover, show their willingness to enforce arbitration agreements and arbitral awards, limit their supervision role, and reduce the judicial oversight over arbitration.

10- One effective way through which the judicial support can be achieved is through constantly engaging Saudi judges in intensive training programs in the subject of international arbitration. Such programs should help the judges to understand the reality of the arbitration process and all its fundamental principles. Supporting the arbitral process and upholding the international principles of arbitration by the bench are some examples of what could be resulting from effective training courses directed to the judges.

11- Several legal issues have been identified in Chapter 3 of this dissertation pertaining the 2012 law of arbitration such as the statutory time limits, legal vacuums, and overlapping and conflicting laws …etc. These issues warrant attention and correction as it could affect the efficiency and the implementation of the law. The proposed approach to overcome these issues calls for a revised law based on a careful study of all the identified legal problems as well as other issues which might have stemmed from practice since the law's entry into force. The revised law should, moreover, contain all the provisions that govern arbitration which are found in other law such as the law of enforcement. This is necessary to enhance the unity of the provisions of the law of arbitration and will result in improving the clarity of the arbitration legal framework in the kingdom.

12- In order for the kingdom to boost its position internationally in the field of arbitration and to be considered as an arbitration friendly jurisdiction, the principles of arbitration,

arbitral process and awards should be enforced and supported to the fullest possible extent by the law and the practice. The international practice of arbitration offers many lessons in this regard which are to be learned, and then implemented or avoid. Learning from the experiences of the leading jurisdictions in the world will definitely yield significant consequences that will contribute to the development of this field in the kingdom.

13- The development of arbitration law and practice is a continuous process. Many issues pertaining the international practice of arbitration and other forms of ADR have been identified throughout the dissertation. Legal remedies have been also proposed and examined. The Saudi jurisdiction is not immune to these issues. That is to say, there should be an initiative that calls for a collaborative efforts from legislative and executive authorities in the kingdom to examine all the contemporary problems, trends and issues that surrounds the international practice of arbitration today, evaluate the efficiency of all proposed solutions, and then implement the mechanisms that prove most appropriate. This approach will encourage, allow, and ensure the continuation of the progress in this field and of the development of practice in the Saudi jurisdiction. It may also lead to new reforms.

14- The enactment and the implementation of modern laws alone should not be considered as enough if the goal was to build a hospitable jurisdiction for arbitration and other ADR means. Creating an enabling environment for ADR will help greatly in achieving the desired economic growth in the country. This requires further efforts and steps in order to create such enabling and appealing environment. Efforts should aim, for example, to increase the awareness of the necessity such methods, and build the

confidence in their efficiency in resolving disputes among legislators, judges, lawyers, practitioners and disputants. This will ensure a wide acceptance of all the principles contained in the implemented laws which come in line with the international principles and practice. Such acceptance will result in full enforcement of these laws, and strong support for ADR processes at all levels.

15- Building a clear, effective and strong dispute resolution system in the kingdom can be achieved through a robust and effective legal education in the country. The analysis in this dissertation has led to conclude that reform is due in law schools in the kingdom as schools have failed so far to give ADR the attention it deserve. The weak status of ADR instruction in these schools has stemmed from the lack of genuine recognition among them and academics of the significance of ADR in dispute resolution in contemporary legal practice. Since there has been an enormous success in other jurisdictions in this area, law schools should invest heavily in the field of ADR and instruction thereof. The reform needed in the curricula should, therefore, reflect the necessity of teaching this subject to the future judges and lawyers to arm them with the skills they need to be successful in the legal practice. It should also aim at reforming the curricula in order to abolish ADR illiteracy.

16- Law schools should take serious steps to overcome the apparent lack of faculty specialized in ADR. Offering fully funded study-abroad scholarships for faculty members in the subject of ADR is one way through which law schools can reduce and solve the ADR faculty shortage.

17- Another area in which law schools can contribute to the growth and development of ADR in the country is through hosting and organizing ADR conferences and

workshops periodically. They should also encourage the participation of the faculty, experts and specialists, and students. This will eventually result in generating huge cumulative educational benefits over time.

18- Law school should also play a major role in monitoring the growth and development of ADR in the kingdom by encouraging and funding research in this subject. Supporting the academic and scholarly contribution is essential in order to track and assess the progress made in the field and to ensure the accomplishment of the statutory objectives (after they are set) and to propose recommendations for reform if deemed necessary.

19- The survey conducted by the author of this dissertation and all its findings and results, as illustrated and analyzed in Chapter 5, should be carefully reviewed by all law schools in the country, any person or body who is, or will be, in charge of reforming legal education in the kingdom, and any person or body who is interested in the development or the reform of the legal education.

20- One of the aims of the conducted survey was to inspire future works on the subject of ADR instruction in the kingdom. Two prospect works are recommended in this regard; first, the structure of the survey and the questions should be conducted every five to ten years in order to measure and evaluate the change and progress made in this area. Secondly, the survey should be reassessed, redesigned, or updated as needed to better achieve the desired results in the future.

21- This work should also motivate additional efforts to comprehensively examine the reality of the legal education and law schools in the kingdom to provide a thorough assessment of this subject and propose the appropriate reform. This is necessary to

narrow the gap between education and practice or work, and to improve the profession as a whole in the kingdom. The proposed work can be accomplished by the law schools or the ministry of education in coordination with the relative bodies such as the Ministry of Justice and the Saudi Bar Association.

22- Indeed, institutionalization of ADR in the kingdom is an area that needs additional attention and improvement. The efforts toward institutionalizing ADR in the Saudi jurisdiction are believed to be slow and insufficient compared to many other legal systems in the world where institutionalization has proved successful. The success of such approach, hence, necessitates collaborative efforts among legislators, executives, judiciary and lawyers to identify all the possible channels through which institutionalization can be implemented and adopted in the public, administrative or private sectors.

23- Administrative and financial supports by the government should be granted and provided for efforts aims to institutionalize ADR especially in the public and administrative areas to achieve the desired successful result. A similar support may be deemed necessary for some of the private bodies at the early stage of their establishment.

24- Court-Annexed ADR pilots and programs should be funded and supported by the government to promote the use of ADR within the court system. Courts should be, hence, authorized and encouraged to design and adopt such programs. The designed pilots should be, furthermore, put under trial for a sufficient period of time. The completion of such period should be followed by a thorough evaluation based on which

the efficiency of the implemented programs and court performance should be measured and recommendations to improve the practice should be offered.

25- To better achieve the best results from implementing court-annexed ADR programs within the public system of justice in the kingdom, the Ministry of Justice and the Supreme Council of Magistracy, each according to their purview, should establish a supervisory body for the following purposes: 1- To assist courts in designing effective ADR programs. 2- To monitor, plan, coordinate and oversee the implementation process of the applied ADR programs and schemes. 3- To provide the needed training and support for the judges, court experts and staff involved in the process. 4- To recognize and endorse the best practices among courts.

26- Private arbitration or ADR bodies (service providers and non-service providers) should receive the recognition and support they need to perform their tasks and achieve their objectives. The government, therefore, should provide all means of recognition, for example by requiring lawyers and practitioners to complete certain accreditation requirements as set by one of the established private entities. This will certainly boost their authority and will also reflect the government's confidence in their work, by which their role will be effectively enforced.

27- Leading arbitral institutions in the world such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) should be encouraged to set up a Saudi-based offices. Taking such step will promote and foster international trade and commerce in the country and will attract international investors to invest in the kingdom as parties of international commerce have strong belief in the efficiency of these institutions. Doing so will, furthermore, facilitate and accelerate the

accomplishment of the desired economic objectives and will contribute to the growth of the country's economy. Learning from the experiences of other jurisdictions in the region in this matter, such as the United Arab Emirates and Singapore, is of utmost importance as it can greatly help in making this step a success.

28- The observation and analyzation of the contemporary international practice and trends regarding the institutionalization of ADR and the practice of some of the leading arbitral institutions yield many valuable lessons pertaining several challenges and concerns that are encountered today by the international arbitration system as well as other forms of ADR.

29- Several concerns and challenges have been addressed and analyzed in Chapter 6 of this dissertation. Solutions have also been proposed. The results of the analysis included therein should, hence, serve as a useful guide for any future work or study in this field and should be considered as the basis for any progress toward institutionalizing ADR in the private sphere.

30- Enhancing the justice system in any jurisdiction by promoting ADR and its use requires collaboration between governments and entities committed to promoting ADR and its continued development. Such collaboration will indeed yield significant consequences—better results in a shorter time. All concerning bodies could benefit from carefully examining all the identified risks in this dissertation as this will save time and efforts which can be used elsewhere for further progress and development in this area.

APPENDICES

Appendix A: Survey Questionnaire

الجامعة: ----------

الكلية: ----------

القسم: ----------

1) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟

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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم □ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

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4) في أي سنة بدأ تدريس هذه المقررات لديكم؟

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5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

_____

_____

9) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟ أو
ب) □ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

_____

_____

11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

_____

_____

13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

Appendix B: English Translation of Survey Questionnaire

UNIVERSITY: ……

SCHOOL: …….

Department: ……..

15) How many total credit hours are allocated for each specialized areas of law in the Study Plan for the Bachelor of laws?

_____

16) Do any of these specialized courses cover ADR methods generally?

□ YES □ NO

If NO, please answer the following questions (11, 12, 13 and 14) only.
If YES, please answer the following questions (3, 4, 5, 6, 7, 8, 9, 10 and 11) only.

17) Is ADR taught in/as:

d) □ A general course? If so, please specify the title of the offered course and its credit hours.

_____

_____

e) □ Multiple separate courses? E.g. an arbitration course, a meditation course … etc. If so, please specify the title of each offered course and its credit hours.

_____

f) □ A part of other offerings? If so, please specify the title of each course and its credit hours.

_____

_____

18) When did your school begin teaching such course(s)?

_____

_____

19) Are ADR course(s) taught as: (more than one answer is possible)

e) □ Formal academic lectures?

f) □ Seminars?

g) □ Interactive discussions: practical training and simulations?

h) □ All the above?

20) Are the lecturers assigned to teach ADR course(s) specialized in ADR or in a specific area of the field?

□ YES □ NO

21) If YES, are they:

c) □ Saudi citizens?

d) □ Non-Saudis?

22) If NO, please specify the fields in which the lecturers assigned to teach ADR course(s) are specialized.

_____

_____

23) Is arbitration offered in any of the courses mentioned in question No. (3) of this survey?

□ YES □ NO

24) If so:

c) □ Is arbitration taught as a general subject? Or

d) □ Is it taught in specialized courses on different subject areas of arbitration? E.g. commercial arbitration, arbitration in civil cases, labor arbitration …etc. Please specify these courses and their credit hours.

_____

_____

25) Does your school organize conferences, seminars, discussion groups or specialized workshops in ADR and invite speakers and participants and take part in them?

□ YES □ NO

26) Why does your school not offer a specialized course(s) in ADR? (More than one answer is possible)

g) □ The paucity of specialized academics in the field.

h) □ The absence of labor market demand at present.

i) □ We give priority to more important courses.

j) □ Limited credit hours assigned for specialized courses required to complete the degree.

k) □ We currently see no need to teach such courses.

l) □ Other, please specify.

_____

_____

27) Will ADR or any of its subject areas be added to your bachelor's degree plan of study in the upcoming years?

□ YES □ NO

28) If NO, Please specify one or more reasons.

_____

_____

Appendix C: Survey Responses

١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟

(٢٤) وحدة تدريسية

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟

☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:

أ) ☐ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) ☐ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) ☑ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها

النظام التجاري (ساعتان) - فقه القضاء (ساعتان)

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟

في السنة الرابعة والاخيرة.

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)

أ) ☑ محاضرات أكاديمية.
ب) ☐ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☐ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟

☐ نعم ☑ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:

أ) ☐ مواطنون سعوديون.
ب) ☐ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

تخصص الفقه - تخصص القانون - تخصص السياسة الشرعية

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم □ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☑ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

فقه المضاربة (ساعتان)

١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
□ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
□ نعم □ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
٩٠ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☑ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.
☑ التحكيم التجاري (٣) ساعات

ب) ☐ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) ☑ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟
المستوى الخامس

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☑ محاضرات أكاديمية.
ب) ☑ حلقات نقاش دراسية.
ج) ☑ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☑ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☑ نعم ☐ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) ☑ مواطنون سعوديون.
ب) ☐ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.
القانون التجاري

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☑ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☑ نعم ☐ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☐ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها:

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
١٢٤ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☐ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.
لا يخصص لها مقرر دراسي مستقل

ب) ☐ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.
غير متطبق

ج) ☐ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.
(١) المدخل لدراسة القانون (٣) ساعات
(٢) المرافعات الشرعية (٣) ساعات (٣) القانون التجاري (٣) ساعات

٤) في أي سنة يدأ تدريس هذه المقررات لديكم؟
في بداية التدريس من السنة الأولى كمقدمة.

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☑ محاضرات أكاديمية.
ب) ☑ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☐ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☑ نعم ☐ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) ☐ مواطنون سعوديون.
ب) ☑ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☐ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

يدرس التحكيم بشكل عام

١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☐ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☐ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☑ أسباب أخرى، يرجى ذكرها:
هضور في حقه التدريس ، ولديتا مقرح لتعديل بكفه
وبه مادة التحكيم مادة مستقلة وضمن ضمن الاتفاقية اتفاقيات

١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
٦ ساعات

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم ☑ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
□ نعم □ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟ أو
ب) □ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
□ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☑ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
□ نعم ☑ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك: المقررات التي يدرسها قسم الأنظمة ضمن خطة برنامج الماجستير (في كلية الشريعة) فالبرنامج ليس متخصصاً في الأنظمة فقط، ومن ثم فعدد الساعات المخصصة لقسم الأنظمة محدود جداً.

1) كم عدد الساعات الدراسية لمواد القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المواد التخصصية؟
□ نعم □√ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات:

أ) □ على شكل منهج عام لمادة واحدة؟
ب) □ أم أنها مقسمة لأكثر من مادة يتم تدريس كل منها على نحو مستقل؟ مثال: مادة التحكيم، مادة الوساطة ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

ج) □ أم يتم تدريسها كجزء من المناهج الخاصة لمواد أخرى؟ يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعاتها.

4) في أي سنة بدأ تدريس هذه المواد لديكم؟

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المواد من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد.

9) هل يتم تدريس التحكيم ضمن أي من المناهج أو المسارات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟

ب) □ أم يتم تدريس أكثر من مادة متخصصة عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

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11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟

□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المواد التخصصية لديكم:

(يمكن اختيار أكثر من إجابة)

أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.

ب) □ عدم حاجة سوق العمل في الوقت الراهن.

ج) □ إعطاء الأولوية لمواد أخرى أكثر أهمية.

د) □ محدودية عدد الساعات الأكاديمية للمواد التخصصية المعتمدة للحصول على المؤهل.

ه) □ عدم الحاجة إلى تدريس هذه المواد حالياً.

و) □ أسباب أخرى، يرجى ذكرها:

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للمنهج الأكاديمي المعتمد لديكم في السنوات القريبة القادمة؟

□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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_____

1) كم عدد الساعات الدراسية لمواد القانون التخصصية في الخطة الدراسية لمرحلة البكالوريس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المواد التخصصية؟
□ نعم √□ لا

إذا كانت الإجابة بـ (لا): فضلاً الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلاً الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات:

أ) □ على شكل منهج عام لمادة واحدة؟
ب) □ أم أنها مقسمة لأكثر من مادة يتم تدريس كل منها على نحو مستقل؟ مثال: مادة التحكيم، مادة الوساطة ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

ج) □ أم يتم تدريسها كجزء من المناهج الخاصة لمواد أخرى؟ يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعاتها.

4) في أي سنة يبدأ تدريس هذه المواد لديكم؟

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المواد من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد.

9) هل يتم تدريس التحكيم ضمن أي من المناهج أو المسارات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟

ب) □ أم يتم تدريس أكثر من مادة متخصصة عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

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11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟

□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المواد التخصصية لديكم:

(يمكن اختيار أكثر من إجابة)

أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمواد أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمواد التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المواد حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للمنهج الأكاديمي المعتمد لديكم في السنوات القريبة القادمة؟

□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
١٤٠ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم ☒ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
□ نعم □ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟ أو
ب) □ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☑ نعم □ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) □ أسباب أخرى، يرجى ذكرها:
بسبب الخطة الدراسية حالياً لا أدرّس هذه المقررات

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم □ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟

١٣٠ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم ☒ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة يدأ تدريس هذه المقررات لديكم؟

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☐ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☐ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☑ نعم ☐ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☑ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☑ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها.

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟

٩٦ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم □ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
□ نعم □ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟ أو
ب) □ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☑ نعم □ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☑ أسباب أخرى، يرجى ذكرها:

عدم الكفاءة، سابقاً يتدرس مثل هذه المقررات
لاشتراط بناء الخطة الدراسية.

١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم □ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
٧٧ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم ☑ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
□ نعم □ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟ أو
ب) □ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☑ نعم □ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☑ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☑ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☑ أسباب أخرى، يرجى ذكرها:
يكتفى بتدريسها في مرحلة الماجستير

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم □ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟ ١٤٠ ساعة
(١١٠) إجبارية (١٨) اختيارية - متطلبات التخرج الكمال

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
□ نعم ☑ لا

إذا كانت الإجابة بـ (لا): فضلاً الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلاً الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

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ب) □ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

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ج) □ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

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٤) في أي سنة يبدأ تدريس هذه المقررات لديكم؟

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٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

٨) إذا كانت الاجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

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٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☐ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☐ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ. نرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☑ نعم ☐ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☑ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
هـ) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها:

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
٨٦ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☐ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.
الوسائل البديلة لفض المنازعات
(٤) ساعة معتمدة في الأسبوع

ب) ☐ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) ☐ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟
خطة ١٤٣٣هـ - ١٤٣٤هـ

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☐ محاضرات أكاديمية.
ب) ☐ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☑ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☑ نعم ☐ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) ☑ مواطنون سعوديون.
ب) ☐ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم ☒ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☑ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☐ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☐ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها:

١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☐ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

1) كم عدد الساعات الدراسية لمواد القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المواد التخصصية؟
□ نعم □√ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات:

أ) □ على شكل منهج عام لمادة واحدة؟
ب) □ أم أنها مقسمة لأكثر من مادة يتم تدريس كل منها على نحو مستقل؟ مثال: مادة التحكيم، مادة الوساطة ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

ج) □ أم يتم تدريسها كجزء من المناهج الخاصة لمواد أخرى؟ يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعاتها.

4) في أي سنة بدأ تدريس هذه المواد لديكم؟

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المواد من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد.

9) هل يتم تدريس التحكيم ضمن أي من المناهج أو المسارات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟

ب) □ أم يتم تدريس أكثر من مادة متخصصة عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

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11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟

□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المواد التخصصية لديكم:

(يمكن اختيار أكثر من إجابة)

أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمواد أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمواد التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المواد حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للمنهج الأكاديمي المعتمد لديكم في السنوات القريبة القادمة؟

□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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1) كم عدد الساعات الدراسية لمواد القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المواد التخصصية؟
□ نعم □ √ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات:

أ) □ على شكل منهج عام لمادة واحدة؟
ب) □ أم أنها مقسمة لأكثر من مادة يتم تدريس كل منها على نحو مستقل؟ مثال: مادة التحكيم، مادة الوساطة ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

ج) □ أم يتم تدريسها كجزء من المناهج الخاصة لمواد أخرى؟ يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعاتها.

4) في أي سنة بدأ تدريس هذه المواد لديكم؟

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المواد من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد.

9) هل يتم تدريس التحكيم ضمن أي من المناهج أو المسارات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟
ب) □ أم يتم تدريس أكثر من مادة متخصصة عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

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11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المواد التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمواد أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمواد التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المواد حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للمنهج الأكاديمي المعتمد لديكم في السنوات القريبة القادمة؟
□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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1) كم عدد الساعات الدراسية لمواد القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
100

2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المواد التخصصية؟
□ نعم □ √ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات:

أ) □ على شكل منهج عام لمادة واحدة؟
ب) □ أم أنها مقسمة لأكثر من مادة يتم تدريس كل منها على نحو مستقل؟ مثال: مادة التحكيم، مادة الوساطة ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

ج) □ أم يتم تدريسها كجزء من المناهج الخاصة لمواد أخرى؟ يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعاتها.

4) في أي سنة بدأ تدريس هذه المواد لديكم؟

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المواد من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد.

9) هل يتم تدريس التحكيم ضمن أي من المناهج أو المسارات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟

ب) □ أم يتم تدريس أكثر من مادة متخصصة عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

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11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟

□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المواد التخصصية لديكم:

(يمكن اختيار أكثر من إجابة)

أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) □ عدم حاجة سوق العمل في الوقت الراهن.
ج) □ إعطاء الأولوية لمواد أخرى أكثر أهمية.
د) □ محدودية عدد الساعات الأكاديمية للمواد التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المواد حالياً.
و) □ أسباب أخرى، يرجى ذكرها:

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للمنهج الأكاديمي المعتمد لديكم في السنوات القريبة القادمة؟

□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟ (١٠٢) ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☑ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.
اسم المقرر [الوسائل البديلة لفض المنازعات] عدد الساعات [٢] ساعة

ب) ☒ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) ☒ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟
بدأ تدريس هذا المقرر منذ العام الدراسي [١٤٢٢-١٤٢٣] هـ

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☐ محاضرات أكاديمية.
ب) ☐ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☑ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☐ نعم ☑ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) ☐ مواطنون سعوديون.
ب) ☑ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.
المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس المقرر [نظام المرافعات الشرعية - النظام التجاري - النظام المدني]

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☑ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☒ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☐ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☐ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها:

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☐ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
٩٠ تقريبا

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☐ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) ☐ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.

ج) ☑ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

٤) في أي سنة بدأ تدريس هذه المقررات لديكم؟
١٤٢٤هـ

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☐ محاضرات أكاديمية.
ب) ☐ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☑ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☑ نعم ☐ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) ☐ مواطنون سعوديون.
ب) ☐ غير سعوديين.
حسب المتاح تارة سعوديون وتارة غير سعوديين

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☑ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☐ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☑ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☑ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☑ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها:

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١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☐ نعم ☑ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:
لأنها مندرجة في مواد ذات صلة مثل القضاء والإثبات وإجراءات التقاضي
والتحكيم وإفرادها بمقرر مستقل قد لا يجد كثيراً، وربما تضاف كمادة اختيارية فقط.

1) كم عدد الساعات الدراسية لمقّررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقّررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☐ تخصيص مقّرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقّرر وعدد ساعاته.
نعم هنا مقرر دراسي باسم التحكيم التجاري (4100 قان) وعدد ساعاته ثلاث ساعات.

ب) ☐ أم تخصيص أكثر من مقّرر دراسي لهذا الغرض؟ مثال: مقّرر التحكيم، مقّرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقّررات وعدد ساعات كل منها.

ج) ☐ أم تناولها كجزء من مفردات مقّررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.

4) في أي سنة بدأ تدريس هذه المقّررات لديكم؟
منذ تأسيس القسم عام 1430 هـ

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☑ ☐ محاضرات أكاديمية.
ب) ☐ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☐ جميع ما سبق.

6) هل تدرّس هذه المقّررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☐ نعم ☑ ☐ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقّررات:
أ) ☐ مواطنون سعوديون.
ب) ☑ ☐ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقّررات.
القانون الخاص بصفة عامة

9) هل يتم تدريس التحكيم ضمن أي من المقّررات المذكورة في السؤال رقم (3) من هذا الاستبيان؟

☑ نعم ☐ لا

10) إذا كانت الإجابة بـ (نعم):
أ) ☐ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☐ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.
التحكيم التجاري فقط

11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☐ نعم ☑ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☐ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☑ أسباب أخرى، يرجى ذكرها:
القسم يعد من الأقسام الجديدة وتم نقله مؤخراً لكلية إدارة الأعمال والعمل جاري على تحديث خطة شمولية للقسم

13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☑ نعم ☐ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

١) كم عدد الساعات الدراسية لمقررات القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
١٠٤ ساعة

٢) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقررات التخصصية؟
☑ نعم ☐ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (١١، ١٢، ١٣، ١٤) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (٣، ٤، ٥، ٦، ٧، ٨، ٩، ١٠، ١١) فقط.

٣) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) ☐ تخصيص مقرر دراسي عام لها. يرجى في هذه الحالة ذكر اسم المقرر وعدد ساعاته.

ب) ☑ أم تخصيص أكثر من مقرر دراسي لهذا الغرض؟ مثال: مقرر التحكيم، مقرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقررات وعدد ساعات كل منها.
١. التحكيم التجاري (ساعتين) +

ج) ☑ أم تناولها كجزء من مفردات مقررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.
قانون التجارة البحرية (ساعتين) + قانون العمل (ساعتين) + عقد التأمين (ساعتين)

٤) في أي سنة يبدأ تدريس هذه المقررات لديكم؟
يبدأ الطالب بدراسة هذه المقررات من المستوى السادس حسب الخطة الدراسية.

٥) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) ☑ محاضرات أكاديمية.
ب) ☐ حلقات نقاش دراسية.
ج) ☐ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) ☐ جميع ما سبق.

٦) هل تدرّس هذه المقررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
☑ نعم ☐ لا

٧) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات:
أ) ☐ مواطنون سعوديون.
ب) ☑ غير سعوديين.

٨) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقررات.

٩) هل يتم تدريس التحكيم ضمن أي من المقررات المذكورة في السؤال رقم (٣) من هذا الاستبيان؟
☑ نعم ☐ لا

١٠) إذا كانت الإجابة بـ (نعم):
أ) ☐ هل يدرّس التحكيم بشكل عام؟ أو
ب) ☑ يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

التحكيم التجاري (٣ ساعات)

١١) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
☐ نعم ☑ لا

١٢) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) ☐ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.
ب) ☐ عدم حاجة سوق العمل في الوقت الراهن.
ج) ☐ إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) ☐ محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) ☐ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) ☐ أسباب أخرى، يرجى ذكرها:

١٣) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
☐ نعم ☐ لا

١٤) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

1) كم عدد الساعات الدراسية لمواد القانون التخصصية في الخطة الدراسية لمرحلة البكالوريوس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المواد التخصصية؟
□ نعم □ لا√

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات:

أ) □ على شكل منهج عام لمادة واحدة؟
ب) □ أم أنها مقسمة لأكثر من مادة يتم تدريس كل منها على نحو مستقل؟ مثال: مادة التحكيم، مادة الوساطة ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

ج) □ أم يتم تدريسها كجزء من المناهج الخاصة لمواد أخرى؟ يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعاتها.

4) في أي سنة بدأ تدريس هذه المواد لديكم؟

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □ محاضرات أكاديمية.
ب) □ حلقات نقاش دراسية.
ج) □ محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) □ جميع ما سبق.

6) هل تدرّس هذه المواد من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم □ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد:
أ) □ مواطنون سعوديون.
ب) □ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المواد.

9) هل يتم تدريس التحكيم ضمن أي من المناهج أو المسارات المذكورة في السؤال رقم (3) من هذا الاستبيان؟
□ نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □ هل يدرّس التحكيم بشكل عام؟

ب) □ أم يتم تدريس أكثر من مادة متخصصة عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المواد وعدد ساعات كل مادة منها.

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11) هل تقومون بتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟

□ نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المواد التخصصية لديكم:

(يمكن اختيار أكثر من إجابة)

أ) □ ندرة المتخصصين من الأكاديميين المؤهلين في هذا المجال.

ب) □ عدم حاجة سوق العمل في الوقت الراهن.

ج) □ إعطاء الأولوية لمواد أخرى أكثر أهمية.

د) □ محدودية عدد الساعات الأكاديمية للمواد التخصصية المعتمدة للحصول على المؤهل.

ه) □ عدم الحاجة إلى تدريس هذه المواد حالياً.

و) □ أسباب أخرى، يرجى ذكرها:

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للمنهج الأكاديمي المعتمد لديكم في السنوات القريبة القادمة؟

□ نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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1) كم عدد الساعات الدراسية لمقّررات القانون التخصصية في الخطة الدراسيةلمرحلةالبكالوريوس؟
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2) هل يتم تدريس أي من الوسائل البديلة لفض المنازعات بصفة عامة ضمن تلك المقّررات التخصصية؟
√□ نعم □ لا

إذا كانت الإجابة بـ (لا): فضلا الإجابة مباشرة على الأسئلة رقم (11، 12، 13، 14) فقط.
إذا كانت الإجابة بـ (نعم): فضلا الإجابة على الأسئلة رقم (3، 4، 5، 6، 7، 8، 9، 10، 11) فقط.

3) هل يتم تدريس الوسائل البديلة لفض المنازعات من خلال:
أ) □تخصيص مقّرر دراسي عام لها.يرجى في هذه الحالة ذكر اسم المقّرر وعدد ساعاته.

ب) □أم تخصيص أكثر من مقّرر دراسي لهذا الغرض؟ مثال: مقّرر التحكيم، مقّرر الوساطة ... الخ، يرجى في هذه الحالة ذكر أسماء تلك المقّررات وعدد ساعات كل منها.

ج) □أم تناولها كجزء من مفردات مقّررات دراسية مختلفة أخرى؟ يرجى في هذه الحالة ذكر أسماء تلك المواد وعدد ساعاتها.
د) يتم تدريسها من خلال مقّرر نظام التحكيم – نظام المرافعات – إجراءات التنفيذ القضائي

4) في أي سنة بدأ تدريس هذه المقّررات لديكم؟
السنة الثالثة والرابعة

5) هل يتم تدريسها على هيئة: (يمكن اختيار أكثر من إجابة)
أ) □محاضرات أكاديمية.
ب) □حلقات نقاش دراسية.
ج) □محاور تفاعلية: تدريبات عملية، قضايا افتراضية.
د) √□جميع ما سبق.

6) هل تدرّس هذه المقّررات من قبل أعضاء هيئة تدريس متخصصين في الوسائل البديلة لتسوية المنازعات أو أي من مجالاتها؟
□ نعم √□ لا

7) إذا كانت الإجابة بـ (نعم): هل أعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقّررات:
أ) √□ مواطنون سعوديون.
ب) √□ غير سعوديين.

8) إذا كانت الإجابة بـ (لا): يرجى تحديد المجالات التخصصية لأعضاء هيئة التدريس الموكل إليهم تدريس أي من هذه المقّررات.
تخصصهم قانون مدني

9) هل يتم تدريس التحكيم ضمن أي من المقّررات المذكورة في السؤال رقم (3) من هذا الاستبيان؟

□نعم □ لا

10) إذا كانت الإجابة بـ (نعم):
أ) □هل يدرّس التحكيم بشكل عام؟ أو
ب) □يتم تدريس أكثر من مقرر متخصص عن التحكيم؟ مثال: التحكيم التجاري، التحكيم في القضايا المدنية، التحكيم العمالي ... الخ، يرجى في هذه الحالة ذكر مسميات تلك المقررات وعدد ساعات كل منها.

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11) هل تقومونبتنظيم مؤتمرات، ندوات، حلقات نقاش، أو ورش عمل متخصصة عن الوسائل البديلة لتسوية المنازعات والدعوة لحضورها والمشاركة فيها؟
□نعم □ لا

12) ما هو السبب في عدم تدريس أي من الوسائل البديلة لفض المنازعات كأحد المقررات التخصصية لديكم:
(يمكن اختيار أكثر من إجابة)
أ) □ندرة المتخصصين من الأكاديميينالمؤهلين في هذا المجال.
ب) □عدم حاجة سوق العمل في الوقت الراهن.
ج) □إعطاء الأولوية لمقررات أخرى أكثر أهمية.
د) □محدودية عدد الساعات الأكاديمية للمقررات التخصصية المعتمدة للحصول على المؤهل.
ه) □ عدم الحاجة إلى تدريس هذه المقررات حالياً.
و) □ أسباب أخرى، يرجى ذكرها:
بالاضافة إلى أنه يتم تغطية جانب الوسائل البديلة لفض المنازعات في اكثر من مقرر وربما يحتاج هذا التخصص الدقيق طالب الدراسات العليا

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13) هل سيتم إضافة الوسائل البديلة أو أي من فروعها للخطة الدراسية المعتمد لديكم في السنوات القريبة القادمة؟
□نعم □ لا

14) إذا كانت الإجابة بـ (لا): يرجى ذكر سبب أو أكثر لذلك:

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