

4-23-2018

Arbitration in Saudi Arabia: The Reform of Law and Practice

Saleh Mubarak Bin Abbadi

Follow this and additional works at: <https://elibrary.law.psu.edu/sjd>

 Part of the [Comparative and Foreign Law Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Abbadi, Saleh Mubarak Bin, "Arbitration in Saudi Arabia: The Reform of Law and Practice" (2018). *SJD Dissertations*. 9.
<https://elibrary.law.psu.edu/sjd/9>

This Dissertation is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in SJD Dissertations by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

The Pennsylvania State University
Penn State Law

Arbitration in Saudi Arabia: The Reform of Law and Practice

A Dissertation in Law

by

Saleh Mubarak Bin Abbadi

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Doctor of Juridical Science

April 2018

Abstract

Arbitration, as a modern Western form of dispute resolution, has become an important feature of international commercial transactions and contracts. Saudi Arabia ratified the New York Convention and enacted a new Law of Arbitration in 2012. This dissertation evaluates arbitration in Saudi Arabia, focusing on the adoption of international standards in relevant local laws and court practices. The dissertation also considers the weight of Saudi laws, traditions, and social values to gauge the extent to which arbitration as practiced internationally can be integrated into the Saudi Legal system.

The dissertation highlights the necessity of cultivating a supportive environment for arbitration in Saudi Arabia, detailing the ways in which adopting a workable and practical arbitration regime would benefit the country's legal system and economy. It compares Saudi arbitration laws and practices to those of other countries, focusing, in particular, on the issues of arbitrability and public policy. It also analyzes current laws and court decisions that are relevant to both domestic and international arbitration.

The dissertation goes on to explain the relationship between public policy and arbitration, detailing how public policy challenges to arbitration agreements and awards function internationally under the New York Convention. It then outlines how the Saudi interpretation of public policy differs from the international understanding and describes how the Saudi courts apply this notion in practice.

The dissertation concludes that Saudi Arabia needs to continue advancing its arbitration laws and practices. The courts have the tools to interpret the Arbitration Law and they should strive to make arbitration as successful as the Law allows. Fostering a successful arbitration system will require minimizing the supervisory role of competent authorities.

Table of Contest

Abstract	1
CHAPTER I	6
Saudi Arabia: The Need to Arbitrate	6
PART 1: Introduction	6
1. What Is Arbitration?	6
2. Why Arbitrate?	8
3. International Arbitration System	19
4. International Arbitration Conventions	19
5. Arbitration Centers and Institutions	25
PART 2: The Need to Arbitrate in Saudi Arabia	34
SECTION I: Saudi Legal System	34
1. Brief introduction to the Saudi Legal System	34
2. Saudi Legal System	36
3. Sharia Meaning:	38
4. Saudi Monarchy	40
5. Judicial Authority	42
• Appointment of judges	48
6. Board of Grievances	49
7. Arbitration and the Court Supervision	53
8. Judges' Qualifications	54
9. Education for judges and practitioners	55
SECTION II: The Economy of Saudi Arabia	58
1. Saudi Arabian Monetary Agency Report	60
2. Reforming the legal system to increase Foreign Investment	64
• Conclusion	64
Chapter II:.....	66
Glance of Saudi Law of Arbitration:.....	66
1. Arbitration in Pre-Islam Era	66
2. Arbitration in the Islamic Era	69
3. Arbitration in Saudi Arabia	72
4. Arbitration Law of 1983	77

5.	Arbitration Law of 2012.....	82
5.1.	International Arbitration.....	84
5.2.	The Courts' Supervision.....	85
5.3.	Arbitration Agreement	87
5.4.	Severability of Arbitration Agreement	88
5.5.	Arbitral Tribunal	89
6.	Arbitration Procedures	91
7.	Enforcement of The Award.....	98
8.	Arbitration in the Execution Law	102
•	Conclusion.....	105
CHAPTER III:.....		107
Public Policy in Arbitration		107
PART 1: Public Policy in Arbitration.....		107
1.	Introduction.....	107
2.	Public Policy in International Arbitration.....	112
3.	Domestic and International Public Policy.....	122
4.	Conclusion on Public policy in International Arbitration.....	126
PART 2: Public Policy in Saudi Arbitration		128
1.	Arbitration in Saudi Arabia.....	128
2.	Public Policy in Saudi Arabia	133
3.	Sources of Public Policy in Saudi Law.....	135
4.	What Must Be Considered To Change Public Policy Defense?	140
4.1	Enacting A Unified Code For Public Policy	140
4.2	Current Laws and Regulations.....	142
4.3	The Pro-Arbitration International Consensus	144
4.4	How Do Courts Apply Public Policy In Arbitration?	146
5.	Examples of Public Policy Applications Before Saudi Courts	150
5.1	Sub-contract Construction Agreement Case	150
5.2	Arbitrator Appointment Case	152
5.3	ICC Arbitral Award.....	156
5.4	Public Policy in the Execution Law.....	158
5.5	The Japanese Case	160
5.5.1	Insights of the Japanese Award	163

5.5.2	Non-actual Losses and Damages.....	164
5.5.3	What is Wrong with Interest?	165
5.5.4	Submission to Foreign Jurisdiction as the Applicable Law	170
5.5.5	Non-Muslim Arbitrators Panel (Arbitrator Qualifications).....	171
5.5.6	Default Award	174
6.	Conclusion On The Issue Of Public Policy	175
CHAPTER IV:		178
Arbitrability In Saudi Arbitration.....		178
PART 1: Arbitrability on the International Stage and in Saudi Arabia.....		178
1.	Introduction	178
2.	Arbitrability's Function	180
3.	Types of Inarbitrability	181
3.1	Subjective Inarbitrability.....	182
3.2	Objective Inarbitrability	183
4.	International and U.S. Arbitrability.....	185
5.	Arbitrability and Public Policy	197
6.	Statutory claims.....	200
6.1	Securities Claims	202
6.2	Antitrust Claims.....	204
6.3	Competition Claims	206
7.	Arbitrability in the New York Convention.....	207
8.	Conclusion of International Arbitrability.....	214
PART 2: Arbitrability in Saudi Arabia		217
1.	Arbitrability in the text of the Arbitration Law:.....	217
2.	Inarbitrability of Personal Affairs	219
3.	Claims Subject to Reconciliation	220
4.	Arbitrability of International Transactions	222
5.	Arbitration for Government Bodies and Agencies	225
6.	Agreement to Arbitrate	227
7.	Separability and Kompetenz-kompetenz	230
8.	Other requirements	234
8.1	Legal Capacity to Agree.....	234
8.2	In Writing.....	236

8.3	Could The Formality Requirement Be Improved?	241
9.	Subject to Sharia and Public Policy	243
10.	Conclusions Regarding Saudi Arbitrability	245
Appendices		247
APPENDIX I		248
Arbitration Law of 2012 and Its Implementing Regulations		248
APPENDIX II		280
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958).....		280
APPENDIX III		292
UNCITRAL Model Law on International Commercial Arbitration		292
APPENDIX IV		309
Arbitration Law of 1983		309
APPENDIX V		316
AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF SAUDI ARABIA AND THE GOVERNMENT OF MALAYSIA CONCERNING THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS		316
Bibliography		329
Books		330
Articles		333
Laws and Regulations		338
Saudi Laws:		338
International Conventions and Treaties:		339
Foreign Laws and Regulations:		339
Cases		341
Saudi Cases:		341
Foreign Cases:		341
Websites		344

CHAPTER I

Saudi Arabia: The Need to Arbitrate

PART 1: Introduction

Arbitration is a necessary mechanism for settling disputes in contemporary legal systems.¹ The increased globalization of world trade, cross-border commercial transactions, and foreign investment highlight the need for harmony between legal systems and alternative adjudication processes. Arbitration is the best option for settling disputes between private parties. It has long served as the primary means of adjudicating commercial and investment disputes and has become the standard for resolving consumer transaction and employment disputes in some jurisdictions.²

1. What Is Arbitration?

¹ Thomas Carbonneau, *THE LAW AND PRACTICE OF ARBITRATION*, 6th ed. Juris, p. xiii, (2018) (Carbonneau: Practice), citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (1959); *Barrentine v. Arkansas - Best Freight Sys., Inc.*, 450 U.S. 728, 746-53 (1981) (Burger, C.J., dissenting); Warren F. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

² See Carbonneau: Practice, *supra* note 1, at p. xiii.

Arbitration has many positive attributes as a private procedure for adjudicating disputes between parties.³ Parties to arbitration agree to submit their disputes to individual arbitrators or panels of arbitrators whose judgment they are prepared to trust.⁵ Each party presents its case along with facts and evidence to the arbitrator. The arbitrator listens to the parties, considers the facts and the arguments, and issues a decision, an award.⁶ That arbitrator's decision is final and binding for the parties because they have agreed to it, rather than because of the coercive power of any state.⁷

Parties to arbitration agreements exclude national courts from asserting jurisdiction over existing or potential disputes related to their contractual relationships. They agree

³ Carbonneau: Practice, *supra* note 1, at p. 1. See also Nigel Blackaby and Constantine Partasides, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 6th ed, Kluwer Law International; Oxford University Press, p. 1, (2015). (Redfern); "A process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved; esp., a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences." Black's Law Dictionary (9th ed.). See Martin Domke, Gabriel Wilner and Larry E. Edmonso, DOMKE ON COMMERCIAL ARBITRATION, 3:3.10, (ed. 2016). (Domke); Thomas Carbonneau, CASES AND MATERIALS ARBITRATION LAW AND PRACTICE, 7th ed, p. 1, (2015). (Carbonneau: Cases). "It is an extra- [or non-] judicial process. It functions as an alternative to conventional litigation. It yields binding determinations through less expensive, more efficient, expert, and [essentially] fair proceedings." *Id.*

⁴ Thomas Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. Miami L. Rev. 773 2001-2002, p. 773. (The Ballad).

⁵ Redfern, *supra* note 3, at p. 2. Scholars have defined arbitration as "... an agreement according to which two or more specific or determinable parties agree in a binding way to submit one or several existing or future disputes to an arbitral tribunal, to the exclusion of the original competence of state courts and subject to a (directly or indirectly) determinable legal system." Gary Born, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, 2nd ed, Kluwer Law International, 2015, p. 4. (Born: Law and Practice). Others have it defined as "a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right." *Id.* "Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement." Emmanuel Gaillard and John Savage, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, 1999, p. 9. (Gaillard)

⁶ Redfern, *supra* note 3, at p. 2.

⁷ *Id.*

to authorize the chosen arbitral panel, whether composed of an individual arbitrator or multiple arbitrators, to render a decision that settles the dispute and becomes binding and enforceable once rendered.

Arbitration processes are confidential,⁸ flexible, neutral,⁹ and cheaper, in general, than court litigation. Resorting to arbitration enables parties to sustain their relationships regardless of transactional disputes.¹⁰ Parties involved in arbitration processes are free to select their arbitrators, the place of arbitration, the law governing the arbitration, and the arbitration procedural rules. Parties that agree to arbitrate and submit claims to arbitrators with relevant expertise avoid local courts and inexpert judges who may impose legalistic solutions on commercial problems.¹¹ Arbitration produces binding and final decisions through reasonably fair proceedings because parties determine how arbitral panels conduct proceedings.¹²

2. Why Arbitrate?

Arbitration has become increasingly important in the global context during the last half century for several reasons.¹³ Conducting international business without functional and workable adjudication procedures is very difficult. Arbitration provides reliable

⁸ "Arbitral proceedings are not open to the public and awards generally are not published. Unless the parties to the arbitration agree to disclose information or one party does so unilaterally, or a court commands that information be divulged, business associates, competitors, and clients have no knowledge of the dispute, the proceedings, or the outcome" Carbonneau: Cases, *supra* note 3, at p. 1.

⁹ "In international business, the neutrality as to nationality of arbitral proceedings and awards is a ... factor that contributes to the "business appeal" of arbitral adjudication." *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Carbonneau: Practice, *supra* note 3, at p. 1.

¹³ Thomas E. Carbonneau, *The Revolution in Law through Arbitration*, 56 CLEV. ST. L. REV. 233, at p. 235 (2008). (Carbonneau: The Revolution).

legal solutions for business disputes, making it easier for parties to take part in international commerce.¹⁴ It establishes standards of fairness and legality in civil disputes involving, among other issues, commercial, employment, and consumer claims.¹⁵ It also provides parties with a private mechanism that features adaptability, expertise, and eventual finality and enforceability before national courts.¹⁶ These benefits have fueled a growing international consensus regarding arbitration's acceptability as a means of resolving business disputes: as of December 2017, one hundred fifty-seven countries had signed the New York Convention.¹⁷

Commercial parties have several reasons for submitting disputes to arbitration and avoiding domestic courts and laws. These reasons – prominent among them neutrality, enforceability, and confidentiality – make arbitration the preferred means of resolving commercial disputes.¹⁸

3.1 Neutrality

Parties engage in arbitration to, among other things, secure a neutral forum for dispute resolution.¹⁹ Arbitration parties generally aim avoid resorting to the courts in

¹⁴ The Ballard, *supra* note 4, at p. 773.

¹⁵ *Id.* at p. 236.

¹⁶ *Id.* at p. 266. "Arbitration [is reliable alternative to all contractual disputes] ...[f]rom sales contracts to intellectual property matters, joint ventures, share purchase arrangements or state-financed construction projects...." <https://iccwbo.org/dispute-resolution-services/arbitration/> (Accessed December 2017)

¹⁷ The New York Convention was issued in 1958 and went into force on June 7, 1959, (New York Convention OR the Convention). Appendix II (Introduction and Part 1) <http://www.newyorkconvention.org/list+of+contracting+states>

¹⁸ Born: Law Practice, *supra* note 5, at p. 10.

¹⁹ "In international business, the neutrality as to nationality of arbitral proceedings and awards is a fourth factor that contributes to the "business appeal" of arbitral adjudication. Most international business parties deem the reference to arbitration indispensable in multinational commercial ventures. It eliminates the conflicts associated with the assertion of national court jurisdiction, the choice of applicable law, and the enforcement of foreign judgments. Arbitration also tempers the juridical disparities between

their home jurisdictions. They choose neutral individual arbitrators or a panel of neutral arbitrators in a neutral place of arbitration.²⁰ Arbitration has its own rules and formalities; parties can choose to conduct proceedings based on institutional rules²¹ or to engage in ad-hoc arbitration.²²

The neutrality or impartiality of arbitration processes allows the parties to participate in selecting their arbitral tribunals. Every party to an arbitration agreement takes part in choosing the tribunal, whether it is composed of an individual arbitrator or multiple arbitrators: for individual arbitrators, parties either agree on the choice or delegate the decision to an outside institution; for multi-arbitrator tribunals, parties

different legal traditions and systems. In the context of international business transactions, arbitration functions as a *de facto* transborder legal system, providing the global commercial community with an adjudicatory process free of national bias and parochial laws and practices and able to dispense sensible commercial justice." Carbonneau: Cases, *supra* note 3, at p. 15.

²⁰ Redfern, *supra* note 3, at p. 28.

²¹ Institutional arbitration refers to situations in which the arbitrating parties choose an organization or an institution to administrate the arbitration proceedings in accordance with its rules. Tibor Varady, John J. Barcelo III, Stefan Kroll and Arthur T. von Mehren, INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE, 6th ed. West Academic, 2015, p. 48. (Varady). International Chamber of Commerce (ICC) <https://iccwbo.org/dispute-resolution-services/arbitration/>, London The London Court of International Arbitration (LCIA) http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx, American Arbitration Association (AAA) <https://www.adr.org/Arbitration>, and its international arm, International Center for Disputes resolution (ICDR) https://www.icdr.org/icdr/faces/home?_afLoop=1937107974652012&_afWindowMode=0&_afWindowId=i8hen88xa_81#%40%3F_afWindowId%3Di8hen88xa_81%26_afLoop%3D1937107974652012%26_afWindowMode%3D0%26_adf.ctrl-state%3Di8hen88xa_157, Judicial Arbitration and Mediation Services (JAMS) <https://www.jamsadr.com/arbitration>, (all accessed in December 2017) are the largest arbitration centers and institutions for commercial arbitration around the world. See generally <http://internationalarbitrationlaw.com/about-arbitration/international-arbitration/institutional-arbitration/arbitral-institutions/> (accessed December 2017).

²² Ad hoc arbitration refers to situations in which parties do not appoint any arbitration institute to administer the arbitration proceedings. They instead opt to undertake independent arbitration proceedings by drafting procedures in a contract, by referring to the UNCITRAL Arbitration Rules, or by letting the arbitral tribunal choose the procedures it deems proper after a dispute arises. See Varady, *supra* note 19, at p. 49.

choose two of the arbitrators and the chosen arbitrators designate the chair of the tribunal.²³

Arbitrators must remain impartial and neutral throughout arbitration proceedings. The UNCITRAL Model Law requires²⁴ that, upon appointment, every arbitrator, “disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence,” and “from the time of his appointment and throughout the arbitral proceedings, ... without delay disclose any such circumstances to the parties unless they have already been informed of them by him.”²⁵

Arbitral awards, as products of neutral proceedings, apply internationally, meaning they are enforceable in both the seats of arbitration and in any other state that recognizes arbitration in its legal system.²⁶

3.2 Recognition and Enforceability

Arbitration diverges from mediation, conciliation, and court litigation in terms of finality and enforceability. Parties to arbitration agreements do not have the option to

²³ Redfern, *supra* note 3, at p. 28.

²⁴ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed May 2017). Appendix iii (the UNCITRAL Model Law)

²⁵ *Id.*, Art. 12 (1). The Model Law also allows the parties to challenge the award if the impartiality of the arbitrator or arbitrators is not maintained. It states that: “[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.” Art. 12 (2). This requirement was followed in many national arbitration laws. It is in “the Netherlands Code of Civil Procedure (Art. 1033(1)), the Tunisian Arbitration Code (Art. 57), the German Arbitration Statute of December 22, 1997 (Art. 1036 of the ZPO), and the Belgian Judicial Code (Art. 1690, para. 1 (Law of May 19, 1998).” Gaillard, *supra* note 5, at p.563.

²⁶ *Id.* See also Redfern, *supra* note 3, at p. 28.

not arbitrate or enforce arbitral awards, unless they mutually agree to do so. Mediation and conciliation are amicable vehicles for resolving disputes that provide recommended solutions to disputes; the parties to such proceedings can accept or reject the outcomes of settlement agreements recorded by third parties.²⁷ Arbitral awards are, by contrast, binding decisions that do not depend on the acceptance or approval of the parties.²⁸ Court judgments also lack the finality of arbitral awards. Losing parties generally have the option of appealing trial court judgments to higher courts whereas arbitral awards are recognized and enforceable by court action without appeal.²⁹

Arbitration's international character also distinguishes it from other forms of dispute resolution. The New York Convention made the international recognition and enforcement of arbitral awards possible.³⁰ The UNCITRAL Model Law³¹ stipulates that

²⁷ Gaillard, *supra* note 5, at p. 15.

²⁸ "The presumption of the enforceability of awards under the Convention generally is respected and applied by the national courts of the ratifying states. National court judges seem to have understood well the lesson that the enforcement of arbitral awards is essential to the viability of [International Commercial Arbitration], which, in turn, makes national participation in international business possible." The Ballard, *supra* note 4, at p. 776.

²⁹ *Id.*

³⁰ *Supra* note 17. The New York Convention replaced the Geneva Protocol of 1923 (the ICC and under the auspices of the League of Nations initiated the Geneva Protocol on Arbitration Clauses of 1923, which went into effect on September 24, 1923.

<http://www.newyorkconvention.org/11165/web/files/document/1/5/15938.pdf>) and the Geneva Convention of 1927 (the Convention for the Execution of Foreign Arbitral Awards supplemented the Geneva Protocol and was signed at Geneva on September 26, 1927: League of Nations Treaty Series (1929-30), Vol. XCII, p. 302.

<http://www.newyorkconvention.org/11165/web/files/document/1/5/15939.pdf>) as the basis for supporting and facilitating arbitration between nations. See Redfern, *supra* note 2, at p. 6.

³¹ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed May 2017). The purpose of the UNCITRAL Model Law is to set up and create recommendations for lawmakers and legislatures to consider adopting as part of their domestic legislation on arbitration. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

awards become final when issued by tribunals and parties may not appeal arbitral awards before domestic courts.³²

3.3 Confidentiality

Confidentiality, or privacy, is an important feature of arbitral proceedings. Arbitral proceedings remain confidential and inaccessible to the public unless the parties opt to disclose all or some of the proceedings or award information.³³ The confidentiality of arbitration proceedings and awards, in theory, also prevents a dispute from escalating, limiting “the collateral damage of a dispute and [focusing] the parties’ energies on an amicable, business-like resolution of their disagreements.”³⁴

The confidentiality of arbitration proceedings stands in stark contrast to national court proceedings and serves as a significant attraction for businesses. Parties involved in court adjudication have little hope of confidentiality since the public, their competitors, and press representatives can access the proceedings and hearings dockets.³⁵ Arbitration proceedings information, by contrast, is not part of the public domain and arbitration outcomes remain confidential. That makes arbitration particularly appealing for companies and businesses that wish to avoid disclosing their trade secrets or competitive practices.³⁶

³² It can however be annulled and set aside according to Art. 5 of the Convention.

³³ Carbonneau, *Cases*, *supra* note 3, at p. 14.

³⁴ Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION*, Kluwer Law International, 2nd ed., at p. 89 (2014). (Born: ICA)

³⁵ *Id.*

³⁶ Redfern, *supra* note 3, at p. 30. “... [T]he principle of confidentiality is not universally applied and there is some discussion as to its legal basis. The primary purpose of the principle is the protection of business secrets. In any event, it is important to underline that confidentiality is not breached by the publication of

3.4 Brief History of Arbitration

Arbitration has roots in ancient history,³⁷ but current arbitration practice as applied between business parties and administered by arbitration institutions began after the Second World War.³⁸ It did not, however, initially succeed in every jurisdiction. Ideological differences between national jurisdictions, especially between East-West countries, delayed the development of a uniform position on international trade.³⁹ Military ruling systems caused instability in Latin America and negatively affected the growth of national economies.⁴⁰ War, regional conflicts, and the battle for ideological primacy, meanwhile, hampered economic growth in Asian countries.⁴¹

the reasons for an award on an anonymous basis. Such publication satisfies the general interests of business and legal practice, as it is legitimate that arbitration users and practitioners have access to the rules applied and the decisions reached by arbitrators." Gaillard, *supra* note 5, at p. 188.

³⁷ "The concept of arbitration is not novel; it rests in mythology when the three goddesses asked Paris to award the golden apple to the most beautiful among them. It is probable that arbitration goes back to the dawn of humanity when the first man performed "the first ethical gesture of mankind," halting his stone ax in mid-air instead of hitting his foe, to suggest that a wise man of their tribe decide who was wrong and who was right and that they abide by his decision. The first writings, several millennia after prehistory, show that arbitration was already prevalent in ancient Egypt and in Assyria, encompassing the area of the Middle East which begat the civilization referred to as the Judeo-Christian Western tradition." Domke, *supra* note 3, at § 2:1. Many nations and civilizations have used arbitration as a mean to solve disputes. See for more information about the use of arbitration in history, *Id.* At 2:1 and after.

³⁸ Thomas Carbonneau, TOWARD A NEW FEDERAL LAW ON ARBITRATION, Oxford University Press, at p. 3, 2014. (Toward A New Federal Law). "The contemporary practice of arbitration originated, in all likelihood, as an unintended benefit of WWII and the concomitant increase in North American-European relations. Military activities generated familiarity with, and an appetite for, foreign cultures and lifestyles, from which a de facto international marketplace eventually emerged." *Id.*

³⁹ The Ballad, *supra* note 4, at p. 777.

⁴⁰ *Id.*

⁴¹ *Id.*

Shifting political dynamics and diminishing overt conflict between nations⁴² led economic and commerce-related motivations to replace politics as the focus of the international community.⁴³ Developed nations began to regard emerging economies as opportunities for investment of foreign capital.

The growth of business and trade between nations made the development of a workable and effective mechanism for adjudication essential.⁴⁴ Resorting to local courts did not align well with the need for an international, non-domestic, and practical dispute resolution venue.⁴⁵ Legislatures and national courts, along with commercial lawyers and business parties, began to recognize the utility of arbitration as an alternative to judicial litigation and the inefficient outcomes it produced.⁴⁶ International Arbitration made it possible for foreign investors to benefit themselves as well as the countries in which they invested. Court litigation remained the primary venue for resolving commercial disputes, but investment growth led most countries to become increasingly hospitable to arbitration.⁴⁷

⁴² “Two events brought about a second, more advanced phase in the development of ICA: (1) the collapse of the Soviet Union and the end of the cold war (symbolized by the fall of the Berlin Wall in 1989); and (2) the eventual realization among leading international lawyers on Wall Street that transborder arbitration was a force to be reckoned with in international commerce.” *Id.* at p. 778.

⁴³ *Id.* at p. 779.

⁴⁴ One could view the international exportation of arbitration as a “part of Western efforts to export the virtues of capitalism and to maintain the unity and develop the prosperity of the free world alliance.” The Ballad, *supra* note 4, at p. 777.

⁴⁵ Toward A New Federal Law, *supra* note 30, at p. 3. “Claims of commercial breach in “anational” circumstances generally could not be effectively processed through domestic legal systems. Cultural, political, and legal diversity demanded recourse to a “truly international” adjudicatory process capable of yielding finality and providing for the conclusive enforcement of outcomes.” *Id.*

⁴⁶ *Id.*

⁴⁷ The Ballad, *supra* note 4, at p. 779.

An international consensus in favor of arbitration started to form during the second half of the 20th Century. The New York Convention and the UNCITRAL Model Law on International Commercial Arbitration⁴⁸ played significant roles in presenting arbitration as a preferable alternative to court adjudication.⁴⁹ These international arbitration instruments embodied the global consensus regarding arbitration.⁵⁰

North American and European countries steadfastly supported arbitration and engaged unrestrainedly in cross-border business.⁵¹ Western European and the United States' legal systems give greater support to arbitration than any other legal systems.⁵² Arbitration originated in Europe and it reflects the continental civilian procedural approach to adjudication.⁵³ France was the principal proponent of international arbitration during its initial modern development.⁵⁴ It ratified the New York Convention months after it opened for signatures, attesting to the importance it attached to the international arbitration process.⁵⁵ Most of Continental Europe also

⁴⁸ *Supra* note 24 and 25.

⁴⁹ *Id.*

⁵⁰ Toward A New Federal Law, *supra* note 30, at p. 3.

⁵¹ Toward A New Federal Law, *supra* note 30, at p. 4.

⁵² Being the birthplace of modern arbitration and the host of the main arbitration institutions and organizations, the status of arbitration is more advanced in Europe and the United States than other regional legal systems, such as Africa, Asia, Eastern Europe and Latin America. *Id.*

⁵³ *Id.*

⁵⁴ See Thomas E. Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA. J. INT'L & COMP. L. 143 (1988).

⁵⁵ The Ballad, *supra* note 4, at p. 781. France signed the Convention in November, 25th 1958. Its ratification was on June, 26th 1959. See

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. The history of arbitration traces much further back than the Convention ratification. Indeed, "[t]he Edict of 1560, promulgated by Francis II, made arbitration mandatory for the resolution of commercial disputes among merchants; at the same time, it declared arbitration agreements valid, even without a penalty clause Although successive French Parliaments apparently fought to restrict the binding character of commercial arbitration, the practice remained well-established until the French Revolution." Born: ICA, *supra* note 43, at p. 32.

ratified the Convention around the time of its opening, following the French example⁵⁶ regarding arbitration legislation.⁵⁷ The provisions of arbitration law contained in the Code of Civil Procedure have produced a legal framework that strongly favors international commercial arbitration.⁵⁸

The United States ratified the Convention in 1970.⁵⁹ It had enacted the U.S. Arbitration Act decades earlier,⁶⁰ setting forth a basic statutory system for arbitration with separate chapters for both domestic arbitration and international arbitration subject to the New York and Inter-American Conventions.⁶¹ U.S. Supreme Court decisions have also contributed to the United States' pro-arbitration policies. The Court has provided the necessary doctrinal announcements and political muscle to confirm the gains achieved in every phase of arbitration and to advance the process to the next level of its development.⁶² Court decisions ensured that parties could engage in arbitration to

⁵⁶ "International arbitration in France is governed by the French Code of Civil Procedure, principally as adopted in decrees promulgated on 14 May 1980, 12 May 1981 and 13 January 2011" Born: ICA, *supra* note 43, at p. 142.

⁵⁷ Germany, for example, signed the Convention on June 10th, 1958. Belgium, Netherlands, and Poland signed the Convention on the same date as Germany. *Id.* at p. 32

⁵⁸ *Id.* at p. 143.

⁵⁹ October, 9th, 1970. *Id.*

⁶⁰ Also known as the Federal Arbitration Act, FAA. *See* Toward A New Federal Law, *supra* note 30, at p. 7; Carbonneau: Cases, *supra* note 3, at p. 51. "[The FAA] was special interest legislation promoted by and benefitting commercial groups from New York. These enterprises wanted to avoid the legalistic twists and turns of judicial litigation and have customary trade-based rules resolve the disputes that emerged in their transactions". *Id.* The FAA goals were "modest-to rehabilitate arbitration for groups within the commercial community". Carbonneau: The Revolution, *supra* note 12, at p. 245.

⁶¹ Born: ICA, *supra* note 43, at p. 152.

⁶² Carbonneau: the Revolution, *supra* note 12, at p. 238. "The decisional law of the U.S. Supreme Court ... reveals that the Court believes the gate [of arbitration] opens only in one direction. The general U.S. judicial stance, as a result, is that the recourse to arbitration must be sustained in nearly all circumstances." *Id.*

resolve disputes related to consumer transactions and employment in the same manner as parties involved in conflicts about sales of goods between merchants or investments.⁶³

Arbitration has historically had a wide but uneven standing in the world community despite its contributions to the wealth-creating ambitions of the international business community and the efficiency with which it resolves disputes.⁶⁴ The creation of the New York Convention and the UNICITRAL Model Law nevertheless attests to the international recognition of arbitration's increasing importance in contractual matters that cross national boundaries.⁶⁵ Cooperation between businesses and legislatures has led 76 countries in 107 jurisdictions to adopt the UNICITRAL Model Law of Arbitration.⁶⁶

⁶³ Carbonneau: Practice, *supra* note 1. See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). BG Group v. Argentina, 134 S.Ct. 1198 (2014).

⁶⁴ The Ballard, *supra* note 4, at p. 781.

⁶⁵ Thomas Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L. J. 33 (1984), at p. 84.

⁶⁶ See Status: UNICITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

Some arbitration treaties and conventions pre-dated the NY Convention. Major trading nations under the auspices of the International Chamber of Commerce negotiated the **Geneva Protocol on Arbitration Clauses of 1923**, *supra* note 24, for example. "The Protocol was ultimately ratified by the United Kingdom, Germany, France, Japan, India, Brazil and about two dozen other nations." Born: ICA, *supra* note p. 35 at p. 63-64. The Protocol declared that: "[e]ach of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction one of the parties is subject." Art. I. The Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, *supra* note 24, was also a major step towards the modern legal practice in international commercial arbitration, despite the fact that it placed some burdens of proof in the recognition proceedings on the award-creditor. It required that the award-creditor demonstrate the existence of a valid arbitration agreement concerning an arbitrable subject matter, and prove that the arbitral proceedings had been conducted in accordance with the parties' agreement. Boren: ICA, *supra* note 43, at p. 67.

Arbitration has become the preferred means of dispute settlement in business because it works and serves the best interests of the parties.⁶⁷

3. International Arbitration System

Arbitration has become the preferred mechanism for dispute resolution, especially in international trade transactions. The fact that a complex legal regime governs it is therefore not surprising.⁶⁸ That regime includes: international treaties and conventions; national arbitration laws; parties' contracts and agreements, and the rules of arbitration institutions.⁶⁹

4. International Arbitration Conventions

States enter into international arbitration conventions and treaties to facilitate the unified multinational enforcement of arbitration agreements and awards and thereby promote the use of arbitration in international commercial transactions.⁷⁰ Such

⁶⁷ Certain industries have chosen arbitration as a means of resolving disputes between their affiliates. The Financial Industry Regulatory Authority, FINRA, for example, FINRA "operates the largest securities dispute resolution forum in the United States, and has extensive experience in providing a fair, efficient and effective venue to handle a securities-related dispute." <https://www.finra.org/arbitration-and-mediation>. In collective bargaining agreements, representatives from each side would collectively bargain relationships between employers and workers. Arbitrators who "knew and understood the mores of the industrial sector" would resolve labor claims. Carbonneau: Practice, *supra* note 1, at p. 70. The experience and knowledge of those arbitrators "permitted them to integrate the provisions of the collective bargaining agreement (CBA) into the daily operation of the industrial sector (grievance arbitration). The provisions of the CBA were negotiated by labor and management in another arbitration process (rights arbitration)." *Id.* In fact, "[l]abor arbitration was regulated by the Labor Management Relations Act of 1947. Much of what the courts decided in regard to labor arbitration would eventually be incorporated into the FAA to regulate commercial arbitration." *Id.* See generally Thomas R. Colosi and Arthur E. Berkeley, COLLECTIVE BARGAINING: HOW IT WORKS AND WHY, Juris Publishing, 2006, p. 1 and after.

⁶⁸ Born: Law Practice, *supra* note 5, at p. 18.

⁶⁹ *Id.*

⁷⁰ Born: ICA, *supra* note 35 at p. 98.

conventions and treaties have provided effective mechanisms for resolving international commercial disputes and ultimately bolstered international trade and investment.⁷¹ They have helped create a stable and effective legal regime for arbitration between international parties.

4.1 New York Convention⁷²

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 superseded the Geneva Convention,⁷³ becoming the most important piece of legislation concerning international commercial arbitration.⁷⁴ The Convention is a model of contemporary arbitration legislation. Its authority stems from the fact that it codifies the international consensus regarding arbitration.⁷⁵ The Convention does not aim to regulate all aspects of the arbitral process as the UNCITRAL Model Law does.⁷⁶ It focuses instead on two important aspects of arbitral procedure: the

⁷¹ *Id.*

⁷² *Supra* note 17.

⁷³ *Supra* note 30. The International Chamber of Commerce initiated the first draft of the Convention. "The ICC's proposed Draft Convention would have provided for a 'denationalized' form of international arbitration, with both the international arbitral process and arbitral awards contemplated to be largely detached from national laws. In particular, the ICC declared that the '[Geneva] Convention's main defect' was its 'enforcement of only those awards that are strictly in accordance with the rules of procedure laid down in the law of the country where the arbitration took place,' and concluded 'that there could be no progress without full recognition of the conception of international awards.'" Born: ICA, *supra* note 35 at p. 100.

"The first modern international commercial arbitration conventions were the 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters and the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards. The Protocol provided for the recognition of international commercial arbitration agreements, requiring contracting states to refer parties to such agreements to arbitration. The Convention, on the other hand, provided for the recognition of arbitral awards made in other contracting states (subject to a number of exceptions). In part because of the outbreak of WWII, the Protocol and Convention had limited practical impact." Born: Law Practice, *supra* note 5, at p. 18-19.

⁷⁴ *Id.* See generally Carbonneau: Cases, *supra* note 3, at p. 963 and after.

⁷⁵ Thomas E. Carbonneau and William E. Butler, CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION, 2ND ed. West, 2013, p. 775 (Carbonneau: International Litigation and Arbitration).

⁷⁶ Born: Law Practice, *supra* note 5, at p. 19.

validity of arbitration agreements and the enforcement of arbitral awards.⁷⁷ Its express principles also establish an implicit but comprehensive regulatory scheme.⁷⁸

The Convention aims to create a uniform international legal regime for the recognition and enforcement of international arbitral awards and to establish a transnational rule of law that supports the use of arbitration.⁷⁹ The text of the Convention provides a unified set of internationally applicable laws regarding both the validity of arbitration agreements and the enforcement of foreign arbitral awards in different jurisdictions.⁸⁰ It requires that, with several specified exceptions, the national courts recognize the validity of arbitration agreements and refer parties who have entered into valid arbitration agreements governed by the Convention to arbitration.⁸¹ It also requires that national courts recognize and enforce foreign arbitral awards – again, with a limited number of specified exceptions. The Convention further stipulates that national courts in contracting states must recognize arbitration agreements that satisfy the ordinary requirements of contractual validity and enforce arbitral awards rendered according to the Convention.

The New York Convention has served as the foundation for international arbitral processes.⁸² One hundred fifty-seven countries had signed the convention and accepted

⁷⁷ Carbonneau: International Litigation and Arbitration, *supra* note 73, at p. 775.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* “The systemic viability of any nonjudicial adjudicatory process is dependent both upon the legal system’s recognition of the validity of agreements to enter into such processes and its willingness to give binding effect to its determinations.” *Id.*

⁸¹ Born: Law Practice, *supra* note 5, at p. 19-20.

⁸² Marike R. P. Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International, 2016, p. 1. (Paulsson).

its grounds for the recognition and enforcement of arbitral awards as of December 2017.⁸³ It has become a juridical vehicle for the elaboration of a trans-border law for international commercial arbitration.⁸⁴ Professor Carbonneau describes the Convention's impact as follows:

“[N]ational law is no longer a constraint upon arbitration. States understand the international commercial importance of arbitration and actively promote themselves as venues for international arbitral proceedings. The “deregulatory” movement and the State acquiescence to the rise of arbitration are motivated in large measure by the desire to sell professional and infrastructure services to the international business community.”⁸⁵

4.2 Inter- American Convention ⁸⁶

The United States and a majority of American nations began negotiating and ultimately ratified the Inter-American Convention on International Commercial Arbitration – also known as the Panama Convention – in 1975.⁸⁷ The Panama Convention provides for the presumptive validity and enforceability of arbitration agreements and arbitral awards with several exceptions stated in its articles.⁸⁸ Unlike the New York Convention, it stipulates that the rules of the “Inter-American Commercial Arbitration

⁸³ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed May 2017).

⁸⁴ “The Convention’s truly international stature and law-making capacity are built upon two factors. First, its symbolic function of codifying an existing and emerging international consensus on arbitration. Second, its endorsement by national legal systems which seek to affirm and integrate the Convention’s content and underlying intent, and thereby entrench the transnational recognition of and support for arbitration.” Carbonneau: International Litigation and Arbitration, *supra* note 73, at p. 775.

⁸⁵ *Id.* At p. 778.

⁸⁶ http://www.sice.oas.org/dispute/comarb/intl_conv/caicpae.asp.

⁸⁷ Born: Law Practice, *supra* note 5, at p. 19-21.

⁸⁸ *Id.*

Commission (“IACAC”) govern cases in which parties do not agree to any institutional arbitration rules.⁸⁹

4.3 European Convention⁹⁰

The 1961 European Convention on International Commercial Arbitration went into effect in 1964.⁹¹ Most European states are party to this Convention—the United Kingdom, the Netherlands, and Finland are notable exceptions—and its signatories also include some non-EU states like Russia, Cuba, and Burkina Faso.⁹² It addresses the three principal phases of the international arbitral process—arbitration agreements, arbitral procedures, and arbitral awards.⁹³ The European Convention has had a modest impact in practice, owing to the limited number of Contracting States, all of whom are also party to the New York Convention.⁹⁴

4.4 ICSID Convention

The International Centre for Settlement of Investment Disputes Convention, also known as the Washington Convention of 1965, is a central pillar of the international investment legal foundation. The ICSID Convention, which opened for signature in 1965,

⁸⁹ *Id.*

⁹⁰ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=en.

⁹¹ Born: Law Practice, *supra* note 5, at p. 22.

⁹² *Id.*

⁹³ <file:///C:/Users/SalehAbadi/Downloads/OtherTreaties%201961-genevaconvention.pdf>.

⁹⁴ “With regard to arbitration agreements, the Convention does not expressly provide for their presumptive validity, but instead (in Articles V and VI) confirms the arbitrators’ competence-competence and the authority of national courts to consider jurisdictional objections on an interlocutory basis. With regard to the arbitral procedure, Articles III-VII of the Convention confirm the autonomy of the parties and the arbitrators (or arbitral institution) to conduct the arbitral proceedings. With regard to awards, the Convention is designed to supplement the New York Convention, dealing in Article IX only with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions (and not with other obligations of courts to recognize awards)” Born: Law Practice, *supra* note 5, at p. 22.

established “truly international” arbitration processes for investment disputes arising between foreign investors and host States.⁹⁵ One hundred fifty-three contracting states have ratified the ICSID Convention.⁹⁶

The ICSID prescribes processes for dealing with the commercial obligations of sovereign States in trans-border commercial contexts.⁹⁷ The Centre was established to achieve the following objectives:

“first, to relieve the President of the World Bank and his staff from intervening in investment disputes between States and foreign national and investors; and, second, to establish a permanent agency that would facilitate the resolution of such disputes in order to foster greater foreign investment.”⁹⁸

The ICSID is located in Washington, DC, but it does not require that arbitration proceedings take place at its headquarters.⁹⁹ The ICSID has external venue arrangements with a number of institutions and arbitration centers worldwide. These include: The Permanent Court of Arbitration at The Hague; the Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur; the Australian Centre for International Commercial Arbitration in Melbourne; the Australian Commercial Disputes Centre in Sydney; the Singapore International Arbitration Centre; and the GCC Commercial Arbitration Centre in Bahrain.¹⁰⁰

⁹⁵ Carbonneau: International Litigation and Arbitration, *supra* note 73, at p. 621.

⁹⁶ <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

The ICSID Convention does not provide an independent basis for arbitrating particular disputes. Parties cannot, however, pursue ICSID arbitration without separate consent to do so from foreign investors and a host state. Such consent usually takes the form of either an arbitration clause within an investment contract or a stipulation in a foreign investment law or in a bilateral treaty between states.¹⁰¹

5. Arbitration Centers and Institutions

Arbitration centers and institutions have helped make arbitration processes more appealing to business parties. Institutionalized arbitration enables parties to agree to arbitrate without worrying much about facilitating arbitration hearings or choosing procedural rules. Arbitration institutions typically provide facilities where arbitral hearings take place, staff to help facilitate the proceedings, and, most importantly, procedural rules that specify how the arbitration should be conducted.

Removing delays in the business realm is crucial for efficiently completing deals and settling commercial disputes. Organized forms of arbitration that take place in business organizations like chambers of commerce exchanges and trade associations help fulfill the business community's need for speed and efficiency.¹⁰² "Through their administration of commercial arbitration, these business organizations play an important role in the self-regulation of the industries and trades they represent."¹⁰³

¹⁰¹ Born: ICA, *supra* note 35 at p. 120.

¹⁰² Domke, *supra* note 3, at § 4:1.

¹⁰³ *Id.*

Institutional rules usually authorize arbitral institutions to **select arbitrators** for particular disputes, provided the parties agree to said authorization and the institutions resolve any challenges to their selections.¹⁰⁴ Institutional rules also typically designate the **place of arbitration**, establish or suggest **arbitration fees**, and require **reviews of the arbitral awards** to reduce potential challenges or the chance of unenforceability on formal grounds.¹⁰⁵

Arbitration centers and institutions also play an important role in helping arbitrators contact governmental entities, courts, or even appoint experts as the proceedings require. The institutions, moreover, aim to standardize business transactions and trade practices and to maintain the business ethics of participants.¹⁰⁶ Trade arbitration has helped create a uniform contract system that defines terms and conditions that frequently cause controversy.¹⁰⁷ Business parties submit their disputes to institutional arbitration because they recognize the value of the set rules and procedural controls the institutions' and centers' administrative measures establish.¹⁰⁸

The remainder of this section examines leading arbitration centers and institutions in more detail.

¹⁰⁴ Born: ICA, *supra* note 35 at p.169.

¹⁰⁵ *Id.* The role of arbitration centers is limited to facilitating the process of arbitration. "It is fundamental that arbitral institutions do not themselves arbitrate the merits of the parties' dispute." *Id.* The selected arbitrators must rule on the merits, address the issues in question, and render awards.

¹⁰⁶ Domke, *supra* note 3, at § 4:1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

5.1 International Chamber of Commerce International Court of Arbitration

The International Court of Arbitration was established in 1923 and has been described as the world's leading arbitral institution. Its establishment paralleled efforts by the international business community to secure widespread adoption of the Geneva Protocol.¹⁰⁹ The ICC International Court of Arbitration functions as non-governmental entity and nonprofit center that does not make formal judgments on disputed matters despite being called a court.¹¹⁰ It does, however, exercise judicial supervision over arbitration proceedings,¹¹¹ and has long helped to resolve difficulties in international commercial and business disputes and to support trade and investment.¹¹² Most ICC cases involve disputes between parties from around the world; in many recent years, more than 50% of all ICC cases have involved parties from outside Western Europe.¹¹³ The ICC occasionally revises its Arbitration Rules and Mediation Rules. ICC published the latest revision of its Rules of Arbitration in March 2017 to serve business communities around the world.¹¹⁴

¹⁰⁹ Born: ICA, *supra* note 35 at p. 175.

¹¹⁰ *Id*

¹¹¹ *Id.*

¹¹² <https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/>

¹¹³ Born: ICA, *supra* note 35 at p. 175.

¹¹⁴ <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>. "The Arbitration Rules are those of 2012, as amended in 2017. They are effective as of 1 March 2017. The most significant of the 2017 amendments is the introduction of an expedited procedure providing for a streamlined arbitration with a reduced scale of fees. This procedure is automatically applicable in cases where the amount in dispute does not exceed US\$ 2 million, unless the parties decide to opt out. It will apply only to arbitration agreements concluded after 1 March 2017." <https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/>. The ICC rules also include the ICC Rules of Optional Conciliation, the ICC Rules for Expertise, the ICC Dispute Board Rules, and the ICC Rules for a Pre-Arbitral Referee Procedure. (1211) The ICC Rules are published in English, French, Spanish, German, Arabic, Chinese, Japanese, Italian, Polish, Portuguese and Ukrainian. Born: ICA, *supra* note 35, at p. 176.

5.2 London Court of International Arbitration

A committee set up by the Court of Common Council of the City of London to develop a tribunal for the arbitration of national and trans-national commercial disputes arising within the ambit of London¹¹⁵ initiated the 1892¹¹⁶ establishment of the London Court of International Arbitration (LCIA). The modern LCIA has demonstrated a clear desire to serve as an international rather than exclusively English institution. Less than 20% of its current cases involve English parties, by way of example.¹¹⁷ It also has international branches outside the U.K. including the Dubai International Financial Centre (DIFC) established in 2008,¹¹⁸ LCIA India established in 2009¹¹⁹ and LCIA-Mauritius International Arbitration Centre (MIAC) established in 2011.¹²⁰

5.3 American Arbitration Association and International Centre for Dispute Resolution

The American Arbitration Association (AAA) was founded in 1926. It is headquartered in New York City and has more than 27 offices throughout the United States.¹²¹ It is a nonprofit organization that provides services to commercial parties and organizations who wish to resolve conflicts via arbitration.¹²² The AAA has developed procedural rules for Commercial Arbitration and Mediation, Construction Industry

¹¹⁵ *Id.*

¹¹⁶ "The Chamber was formally inaugurated on 23 November 1892, in the presence of a large and distinguished gathering, which included the then President of the Board of Trade. Considerable interest was also shown both by the press and in legal commercial circles."

<http://www.lcia.org/lcia/history.aspx>

¹¹⁷ Born: ICA, *supra* note 35 at p. 180.

¹¹⁸ <http://www.difc-lcia.org/overview.aspx>.

¹¹⁹ <http://www.lcia-india.org/>.

¹²⁰ <http://www.lcia-miac.org/>. See generally Born: ICA, *supra* note 35 at p. 180.

¹²¹ <https://www.adr.org/OfficeLocations>.

¹²² <https://www.adr.org/about>.

Arbitration and Mediation, Consumer Arbitration, Employment Arbitration and Mediation, Labor Arbitration, International Dispute Resolution, and Optional Appellate Arbitration.¹²³

The AAA also has an international presence through the International Centre for Dispute Resolution (ICDR).¹²⁴ The ICDR was established in 1996 and currently provides conflict-management services in more than 80 countries with a staff fluent in 12 languages.¹²⁵ The ICDR entered into cooperation arrangements with the Chambers of Commerce of Colombia and Peru, and with Bahrain's Ministry of Justice and Islamic Affairs to establish the Bahrain Chamber for Dispute Resolution-AAA (BCDR-AAA).¹²⁶ The ICDR's international rules, like the AAA arbitration rules, are based primarily on the UNCITRAL Arbitration Rules,¹²⁷ and aim to maximize flexibility and minimize administrative supervision.

5.4 Chinese International Economic and Trade Arbitration Center

The China International Economic and Trade Arbitration Center (CIETAC), also known as the Court of Arbitration of China Chamber of International Commerce, was established in 1956 and has a de facto monopoly on international arbitration taking place in China.¹²⁸ The number of disputes arbitrated before the CIETAC has increased

¹²³ <https://www.adr.org/Rules>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Born: ICA, *supra* note 35 at p. 183.

¹²⁷ The UNCITRAL Arbitration Rule were published in 1976 and has been revised in 2010 and 2013.

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

¹²⁸ Born: ICA, *supra* note 35 at p. 193. The CIETAC was "originally named the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade and later renamed the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International

significantly in recent years; the CIETAC's case volume now exceeds the case volumes of long-established arbitration centers, as the chart below shows.

The CIETAC publishes its arbitration rules in six official languages in addition to Chinese and English.¹²⁹ The latest revision of the CIETAC Rules went into effect in January 2015.¹³⁰ These rules enable parties to appoint either non-CIETAC arbitrators or arbitrators from CIETAC's Panel of Arbitrators.¹³¹ The rules also allow parties to agree to CIETAC arbitration outside China and to modify the CIETAC Rules and/or incorporate procedural rules from other arbitration institutions. The CIETAC Rules give arbitral tribunals enhanced powers, including the power in some cases to decide on its own jurisdiction.¹³² The current version of the Rules also gives CIETAC supervisory authority to review award drafts before their issuance.¹³³

5.5 Stockholm Chamber of Commerce Arbitration Institute

The Stockholm Chamber of Commerce Arbitration Institute (SCC) was established in 1917 as an independent part of the Stockholm Chamber of Commerce. It consists of a Board and a Secretariat and provides efficient dispute resolution services for both

Trade, concurrently uses as its name the 'Arbitration Institute of the China Chamber of International Commerce.'" <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>.

¹²⁹ <http://www.cietac.org/index.php?m=Article&a=index&id=249&l=en>.

¹³⁰ <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>.

¹³¹ Previous versions of the CIETAC rules did not include this rule. Parties who agreed to submit disputes to CIETAC arbitration could only appoint arbitrators from CIETAC's Panel of Arbitrators. Born: ICA, *supra* note 35 at p. 194.

¹³² The power to decide the arbitration's jurisdiction, *kompetenz kompetenz*, was not among the powers granted to arbitrators in previous iterations of the CIETAC rules. Born: ICA, *supra* note 35 at p. 194

¹³³ *Id.*

Swedish and international parties.¹³⁴ The SCC has added to and revised its procedural rules to make arbitrating under them more appealing. The addition of the Emergency Arbitrators Rules exemplifies this trend. Such changes have helped spur a marked increase in the number of national and international cases filed with the SCC in recent years. That the SCC focuses on investment arbitration is also notable; the center remains a preferred international institution for “Chinese state-owned entities, with China-related disputes comprising a sizeable portion of the SCC’s current caseload.”¹³⁵ The SCC claims to be the world’s second largest institution for investment disputes.¹³⁶

5.6 Singapore International Arbitration Centre

The Singapore International Arbitration Centre (SIAC) was established in 1991 as an independent, nonprofit organization, centered in Singapore.¹³⁷ The center has a court that appoints arbitrators and supervises case administration. The SIAC Court of Arbitration is comprised of highly qualified arbitration practitioners from around the world.¹³⁸ It initially focused on “disputes arising out of construction, shipping, banking and insurance contracts,”¹³⁹ but current trends indicate that the SIAC aspires to be an international arbitration hub. The fact that “80% of SIAC’s caseload is international in

¹³⁴ <http://sccinstitute.com/about-the-scc/>. “The SCC was recognized in the 1970’s by the United States and the Soviet Union as a neutral centre for the resolution of East West trade disputes. Also China recognized the SCC as a forum for resolving international disputes around the same time. The SCC has since expanded its services in international commercial arbitration and emerged as one of the most important and frequently used arbitration institutions worldwide.” *Id.*

¹³⁵ Born: ICA, *supra* note 35 at p. 191.

¹³⁶ <http://www.sccinstitute.com/about-the-scc/>.

¹³⁷ <http://www.siac.org.sg/2014-11-03-13-33-43/about-us>.

¹³⁸ *Id.*

¹³⁹ Born: ICA, *supra* note 35 at p. 192.

nature” and that “42% of the new cases filed in 2016 did not involve Singaporean parties”¹⁴⁰ evinces these trends. The SIAC rules currently include: the SIAC Arbitration Rules, last revised in August 2016; the SIAC Investment Arbitration Rules, issued in January 2017; the SIAC SGX-DC Arbitration Rules; and the SIAC SGX-DT Arbitration Rules.¹⁴¹

¹⁴⁰ <http://www.siac.org.sg/2014-11-03-13-33-43/why-siac>.

¹⁴¹ <http://www.siac.org.sg/our-rules>.

	2012	2013	2014	2015	2016
ICC (International Chamber of Commerce)	759	767	791	801	966
DIS (German Institution of Arbitration)	121	121	132	134	166
SCC (Stockholm Chamber of Commerce)	177	203	183	181	199
VIAC (Vienna International Arbitration Center)	70	56	56	40	60
SCAI (Swiss Chamber's Arbitration Institution)	92	68	105	100	81
LCIA (London Court of International Arbitration)	277	301	296	326	303
ICDR (International Center for Dispute Resolution)	996	1165	1052	1063	1050
SIAC (Singapore International Arbitration Centre)	235	259	222	271	343
CIETAC (China International Economic and Trade Arbitration Commission)	1060	1256	1610	1968	2183
HKIAC (Hong Kong International Arbitration Centre)	293	260	252	271	262
ICSID (International Centre for Settlement of Investment Disputes)	50	40	38	52	48
Total	4130	4496	4737	5207	5661

PART 2: The Need to Arbitrate in Saudi Arabia

The need for arbitration is high in Saudi Arabia. The legal system has recognized a variety of factors that make adopting a workable arbitration regime an urgent necessity. The subsequent sections of this chapter analyze the need for arbitration in both the Saudi legal system and the Saudi economy.

SECTION I: Saudi Legal System

1. Brief introduction to the Saudi Legal System

Modern Saudi Arabia was founded in 1932 when King Abdulaziz united all the provinces of Arabia.¹⁴² The current state is actually the third Saudi-governed state, after relatively brief periods of Saudi rule from 1806–1813 and 1818–1840.¹⁴³ King Abdulaziz took control of the Western Province of country in 1924, putting an end to armed

¹⁴² King Abdulaziz (Ibn Saud) died on 1953 after he ruled, as King, from 1932-1953. Abdullah F. Ansary *A Brief Overview of the Saudi Arabian Legal System*. (Ansary) http://www.nyulawglobal.org/globalex/Saudi_Arabia.html#_Toc200894567. See for more information about the history of the Kingdom: Wahbi Hariri-Rifai, Makhless Hariri-Rifai, *THE HERITAGE OF THE KINGDOM OF SAUDI ARABIA*, 26

Washington DC, GDG Publication, 1990; *A Chronology of the House of Saud*, at <http://www.pbs.org/wgbh/pages/frontline/shows/saud/cron/>.

¹⁴³ Jean Pierre Harb and Alexander G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a*, *Journal of International Arbitration*, Kluwer Law International 2013, Vol. 30 Issue 2, p. 113. (Harb) See generally Abdullahi A An-Na'im, *Islamic Family Law In A Changing World*, A Global Resource Book, Zed Books, 2002, at p. 136 and after. "Saudi Arabia was never directly colonized[,] although parts of the present-day state had come under nominal or intermittent Ottoman control since the 16th century. Turkish garrisons were at times stationed in Mecca, Medina, Jeddah and other centers, but the Ottomans only exercised limited powers[,] and local rulers had a high degree of autonomy in internal affairs. The Ottomans[] final efforts at occupying eastern Arabia in 1871[,] to forestall the growing British influence at their borders in the Arabian Gulf[,] eventually failed. The basis of the Wahhabi state of Saudi Arabia was established in 1902[,] when Abd al-Aziz al-Saud and his followers gained control of Riyadh, signaling the beginning of the third period of Saudi-Wahhabi dominance in the region. Abd al-Aziz consolidated his territorial gains over the next decade, expanding out of the surroundings of Riyadh and the eastern part of the region into the areas where the Ottomans were expelled. The Kingdom of Saudi Arabia was declared on 22nd September 1933 over those lands that had come under Abd al-Aziz[s] control by conquest and by [his] forging numerous alliances." *Id.*

conflicts and consolidating a large territory of Arabia.¹⁴⁴

The founders of the state realized that, in the process of establishing the nation, they needed to take into account the needs and aspirations of the people while assessing how to best serve the nation. The Islamic legal system proved optimal because it provided the only way to realize the people's "long-sought future, reflecting its deep significance to the culture and history of the Arabian Peninsula."¹⁴⁵ Islamic doctrine thus became an integral part of the law, public policy, justice system, and every aspect of life in the fledgling country.¹⁴⁶

The choice to govern based on Islamic doctrine belied the historical significance of Islam in the region. Makkah, a city in the Western part of Arabian Peninsula, was the birthplace of the prophet Muhammad--Peace Be Upon Him -- and where Quranic revelations began in the year 609.¹⁴⁷ The introduction of Islam dramatically changed Arab society and culture. The Prophet Muhammad established a state governed by the rules of Islam (Sharia) in Madinah, also in the Western part of the Peninsula. Islam transformed what Arabs believed and how they lived; it also changed their conceptions of the law and thus fundamentally altered their adjudication systems.

Saudi Arabia has undergone substantial legal reforms since its establishment¹⁴⁸ to

¹⁴⁴ Ansari, *supra* note 142.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Mohammad Shafi, *The Quran How It Was Revealed and Compiled*, <http://www.daralislam.org/portals/0/Publications/TheQURANHowitwasRevealedandCompiled.pdf>.

¹⁴⁸ In 1932 King Abdulaziz concurred Riyadh, the Saudi Arabia Capital. https://en.wikipedia.org/wiki/Saudi_Arabia

support its economic needs.¹⁴⁹ Those changes and reforms had taken into consideration the social and economic situation in Saudi Arabia. The country, in the last eighty years, has switched from its origin as a tribal society relying on fresh water sources to survive,¹⁵⁰ the Saudi regime, slightly after its third birth, became an oil producer and has since become the most important oil exporter in the world.¹⁵¹

2. Saudi Legal System

The founders of Saudi Arabia chose to make Sharia Law the source of the country's legal system. Article 1 of the Saudi Basic Law of Governance, which is a semi-constitution, states:

“The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic and its capital shall be the city of Riyadh)”

Some Islamic scholars contend that the Qur'an¹⁵² cannot itself be the constitution, because the Qur'an is not a code. Muslims believe that the Qur'an is the precise

¹⁴⁹ Saudi Arabia's first commercial code dates to 1931, The Commercial Court Law 1350 H, correspondent 1931. That makes it among the country's earliest laws.

¹⁵⁰ Since ancient times, the relative scarcity of fresh water resources combined with the harsh environment and desert climate that prevails throughout much of the Arabian Peninsula forced the people to live nomadic lives centered on the search for fresh water.

¹⁵¹ The oil reserve in Saudi Arabia is estimated. Aramco, the Saudi Oil Company, is government-owned and does not publicize its oil reserve, so no official numbers have been published. Experts estimate, however, that Saudi reserves account for 30% of known global reserves, Rice, *Supra*.

¹⁵² The Qur'an is defined as “The Islamic sacred book, believed to be the word of God as dictated to Muhammad by the archangel Gabriel and written down in Arabic. The Qur'an consists of 114 units of varying lengths, known as *suras*; the first *sura* is said as part of the ritual prayer. These touch upon all aspects of human existence, including matters of doctrine, social organization, and legislation.” See Oxford Dictionaries, available at http://www.oxforddictionaries.com/us/definition/american_english/Koran.

revelation sent by God, in His words; Muhammad was known to be illiterate, meaning he could not have composed such a work independently.¹⁵³ Muslims regard the Qur'an as the last revelation sent to mankind, the culmination of the evolutionary process of God's revelations,¹⁵⁴ encompassing and reforming many of the earlier revelations sent to other prophets, including the Psalms of David, the Torah of Moses, and the Bible as revealed to Jesus.¹⁵⁵ Certain scholars therefore argue that the Qur'an cannot serve as a constitution because it has a far higher function: a constitution serves as the legal foundation for a given state or jurisdiction, whereas the Qur'an is guide for living, containing "stories that teach morals that extend well beyond the constitution's purpose."¹⁵⁶

The Qur'an, nevertheless, does outline some requirements for Islamic governance; it and the Sunnah¹⁵⁷ serve as the sources of "Sharia." The Basic Law of Governance

¹⁵³ *Id*, citing: M. Lings, *Muhammad His Life Based on the Earliest Sources* (New York: Inner Traditions International Ltd., 1983).

¹⁵⁴ *Id* at 24, "Muslims believe that unlike the previous revelations sent from God, the text of the Qur'an has been preserved intact. At the time of the Prophet's death nearly 30,000 people had memorized the Qur'an (Muslims must recite the Qur'an from memory in their 5 daily prayers and other occasions). Moreover, being illiterate, the prophet had scribes write the revelations, which were compiled and distributed." *Id*; "Its grammar, syntax, idioms, literary forms -- the media of expression and the constituents of beauty - are still the same as they were in the Prophet's time." *Id*.

¹⁵⁵ Faisal Kutty *The Shari'a Factor in International Commercial Arbitration*, (April 17, 2006). Available at SSRN: <http://ssrn.com/abstract=898704>, at 23. (Kutty). "Out of the entire book, almost 500 verses address legal issues in Quran and most of these were revealed in response to legal events that were actually encountered such as personal affairs, financial problems, international relations, etc." The author disagrees with Mr. Kutty regarding the number of verses concerning legal matters. He states that the number is 350 counting the verses concerning financial matters and individual conduct. The Qur'an addresses far more legal matters than that.

¹⁵⁶ Mulhim Almulhim, *A Critique of Saudi M&A Laws*, Penn State Law eLibrary, SJD Dissertation, 2016. <http://elibrary.law.psu.edu/sjd/2/>. (Almulhim)

¹⁵⁷ The word "Sunnah" in its original usage means the accumulation of the teachings of Prophet Muhammad, including his sayings, actions, decisions, and his implicit approbation or disapproval of matters. The term is used to refer to the normative behavior, decisions, actions, and tacit approvals and disapprovals of the Prophet. The Sunnah whether it was heard, witnessed, memorized, or recorded, was, after the time of prophet, transmitted from generation to generation. They were compiled into collections

stipulates that Sharia has supremacy over all laws and regulations in Saudi Arabia.

Article 7 states: "Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State."

3. Sharia Meaning:

The belief in the supremacy of Allah results in the inescapable conclusion that His creations must serve and fulfill His will.¹⁵⁸ Muslims therefore regard Allah as the source of authority and the sole sovereign lawgiver.¹⁵⁹ The word "Sharia" refers to either a pathway or a rich source of water from which people drink and water their animals and farms.¹⁶⁰ The word is used in the Qur'an to describe any type of religion or principle followed by anyone; Allah says in the Qur'an: "Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the

of books, known as ahadith books, starting in the first century of the Hijri Calendar. Over time, six of these collections became the most authoritative, or sihan collections: Al Bukhari died in 256H, Muslim died 251H, Abu Da'ud died 275H, al Tirmidhi died 279H, AnNasa'i died 303H, and Ibn Majah died 273H, with the first two collections being the most respected and cited.

¹⁵⁸ *Id.* at p. 18. "H" refers to the Hijri Calendar which is "a lunar calendar consisting of 12 months in a year of 354 days. It is used to date events in many Muslim countries (concurrently with the Gregorian calendar), and used by Muslims everywhere to determine the proper days on which to observe annual fasting, to attend Hajj, and to celebrate other Islamic holidays and festivals. The first year in Hijri Calendar was the year 622. http://en.wikipedia.org/wiki/Islamic_calendar.

¹⁵⁹ Qur'an 12:40: "The command is for none but God. He hath commanded that ye worship none but Him."; Qur'an 7:54: "Verily, His are the creation and the command."

¹⁶⁰ Harb, *supra* note 143 at p. 115. "Shari'a, a word whose etymology evokes a 'path' or 'way', refers to a divinely commanded code of conduct for human behaviour." *Id.* See in general: Abdulrahman Baamir and Ilias Bantekas, Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice, Arbitration International, LCIA; Kluwer Law International, 2009, Volume 25 Issue 2), at 263. (Baamir: Saudi Law as Lex Arbitri). "The concept of Shari'a is broader than jurisprudence and the jurisprudence itself comes within (as do other concepts of Islam, such as Islamic creed and Quranic sciences) the umbrella of Shari'a. Arab lexicographers have treated the term and developed it to mean 'the law of water' and in time it was extended to cover all aspects of Muslim life, both spiritual and that pertaining to the exigencies of everyday life. Shari'a is best translated as the 'way of life'." *Id.* at 263-64.

inclinations of those who do not know.”¹⁶¹ Sharia, in Islamic literature, refers to the way of life prescribed by almighty Allah. The rules and the precepts set forth in the Qur’an, and the example set by the Islamic messenger Muhammad, peace be upon him, in his Sunnah¹⁶² – the traditions, actions, sayings, or the usual practice of the Prophet in his life – comprise the basic components of the Sharia. Islamic scholars developed Ijma’a and Qiyas from their interpretations and analyses of these two sources as ways of understanding the application of the Quran and Sunnah.¹⁶³ The rules in Islamic Jurisprudence that Muslim scholars use are, by and large, extracted from the text of Quran and Sunnah via the Ijma’a and Qiyas.¹⁶⁴

¹⁶¹ Qur’an 45-18.

¹⁶² Harb, *supra* note 143 at p. 115; “Sunnah is the practice of the prophet Mohammad, derived primarily from hadith, collections of his sayings and acts.” *Id.*

¹⁶³ It is important to distinguish between two significant elements of Sharia Law, faith and belief on one side, and rules and laws on the other. The former are mutual concept contained in all messages from God, and signify submission to one God. This principle, called the major jurisprudence, is shared between all the prophets, Noah, Moses, Jesus, Muhammad, etc., with no difference between them, according to Quran. The latter, also called the minor jurisprudence, differs from one religion to another and that is what Sharia Law means in this context. “A differentiation should be made between the Shari’a and Islamic jurisprudence, which is commonly called ‘fiqh,’ as many non-Muslim researchers have a tendency to use the two terms as equivalent. The former is a wider concept than the latter, which is one aspect of Shari’a law. The Shari’a can be regarded as the basis of all principles formed and expanded under fiqh, whereas Islamic jurisprudence generally consists of the scholar’s comprehension and findings derived from the primary and secondary sources of Shari’a.” Ahmad Alkhamees, *International Arbitration and Shari’a Law: Context, Scope, and Intersections*, Journal of International Arbitration, Kluwer Law International, 2011, at 255 (Alkhamees).

¹⁶⁴ Ijma’a is the consensus of the scholarly community, or uncontested approval by qualified scholars on a certain matter of Islamic jurisprudence. Ijma’a is “equivalent to the French concept of doctrine” Harb, *supra* note 143 at p. 115. See Saud Al-Ammari and A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, Arbitration International, LCIA, 2014, at 406. (Alammari) Qiyas is the process of reasoning by analogy to solve new legal problems. It refers to a methodical procedure of analogical reasoning, from an identified injunction to a new injunction, in order to determine Shari’a opinion concerning an issue not specifically addressed in the primary sources. See Kutty, *supra* note 151 at p. 26; Alkhamees, *supra* note 159 at p.256. “In Islamic law, the deduction of legal prescriptions from the Quran or Sunnah by analogic reasoning. Qiyas provided classical Muslim jurists with a method of deducing laws on matters not explicitly covered by the Quran or Sunnah without relying on unsystematic opinion (ray or hawa). According to this method, the ruling of the Quran or Sunnah may be extended to a new problem provided that the precedent (asl) and the new problem (far) share the same operative or effective cause

4. Saudi Monarchy

The sons of King Abdulaziz, the founder of Saudi Arabia, and their sons, the House of Saud, rule Saudi Arabia. The Basic Law of Governance defines the Saudi system of government as a monarchy in which the Monarch serves as the head of all branches of government. Article 5 of the Basic Law of Governance under “System of Governance” states:

- “(a) The system of governance in the Kingdom of Saudi Arabia shall be monarchical.
- (b) Governance shall be limited to the sons of the Founder King ‘Abd al-‘Aziz ibn ‘Abd ar-Rahman al-Faysal Al Sa‘ud, and the sons of his sons. Allegiance shall be pledged to the most suitable amongst them to reign on the basis of the Book of God Most High and the Sunnah of His Messenger (PBUH).
- (c) The King shall select and relieve the Crown Prince, by Royal Order.
- (d) The Crown Prince shall devote himself exclusively to the office of the Crown Prince and shall perform any other duties assigned to him by the King.
- (e) The Crown Prince shall assume the powers of the King upon his death until the pledge of allegiance is given.”

Every king, as a matter of succession practice, names a successor who will rule after

(illa). The illa is the specific set of circumstances that trigger a certain law into action” *Oxford Islamic Studies Online*, (Qiyas) <http://www.oxfordislamicstudies.com/article/opr/t125/e1936>.

In addition to Ijma‘a and Qiyas, “Ijtihad” and “Urf” are secondary sources of Sharia: the word Ijtihad means performing at the one’s full capacity. As legal parlance in the text of Sharia Law, it refers to the scholarly endeavor of a deriving law frp, evidence found in the Shari'a texts. It also refers to the process of analogically reasoning from an identified injunction to a new injunction to develop a legal opinion concerning an issue that the primary sources do not explicitly state. See Baamir: Baamir: Saudi Law as Lex Arbitri, *supra* note 161, at p. 148; Alkhamees, *supra* note 163 at p.256. Urf refers tp common sense and customs in a certain society. As a Sharia concept, Urf serves as a legal principle and source of legislation as long as it does not contradict the primary sources. Kutty, *supra* note 155, at p. 24.

his death. The Succession Commission Law of 2006 altered the process of succession outlined in the Basic Law of Governance.¹⁶⁵ Articles 6 and 7 of the Succession Commission Law state the following:

“Article 6:

Upon the King’s death, the Commission shall call for the pledge of allegiance to the Crown Prince as King of the country in accordance with this Law and the Basic Law of Governance.

Article 7:

(a) After receiving the pledge of allegiance and after consultation with members of the Commission, the King shall choose one or two or three he deems fit to be crown prince. Such choice shall be brought before the Commission, which shall exert effort to agree on one nominee to be named Crown Prince. In case the Commission does not nominate any of them, then it shall nominate whom it deems fit to be crown prince.

(b) The King may at any time ask the Commission to nominate whom it deems fit to be crown prince. In case the King disapproves the Commission’s nominee in accordance with any of paragraphs (a) and (b) of this Article, then the Commission shall vote on its nominee and another chosen by the King, and the one with the majority of votes shall be named crown prince.”

The King is the nation’s final authority. Article 44 of the Basic Law of Governance describes the division of governing authorities in Saudi Arabia:

“Authorities in the State shall consist of:

- Judicial Authority.

¹⁶⁵ Almulhim, *suora* note 153 at p. 32. Succession Commission Law issued by Royal Order No. A/135 dated 26 / 9 / 1427H corresponding to October 19th, 2006.
<https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=8&VersionID=13>

- 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.”

5. Judicial Authority

The court system in Saudi Arabia is a dual system comprised of two branches of courts; the General Courts and the Administrative Courts (Board of Grievances). The Board of Grievances stands together with the Courts System and is affiliated directly with the King.¹⁶⁶ The court systems in each branch had only two trial levels prior to 2007; the trial courts and the cassation courts (or circuits under the Board of Grievances).

The judicial system in both the General Courts and the Board of Grievances totally changed in 2007.¹⁶⁷ ¹⁶⁸ The system now has the following hierarchy: the Supreme Judicial Council,¹⁶⁹ the Supreme Court, Courts of Appeals, and First Instance Courts. Each court in this hierarchy has jurisdiction over cases brought before it as stipulated in the law. The Saudi legal system has several administrative committees in addition to the courts that have specific jurisdiction over certain civil, commercial, administrative, and criminal cases. The royal decrees establishing these committees define their

¹⁶⁶ Ansari, *supra* note 142.

¹⁶⁷ The current judicial system was created by the Royal Decree No. M/78 19 Ramadan 1428H corresponding October 1st 2007 and the Council of Ministers Resolution No. 303 dated 19 / 9 / 1428 H. The Decree included the Law of the Judiciary and the Law of the Board of Grievances (Administrative Court). <https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=131&VersionID=160>.

¹⁶⁸ The General Court system includes: The Supreme Court, Courts of appeals, and First instance courts, which are: General courts, Penal courts, Family courts, Commercial courts, Labor courts” Art. 9 *id.*

¹⁶⁹ Art. 6 *id.*

jurisdictions.¹⁷⁰ The creation of the Execution Court in 2012 has made the enforcement of judicial decisions and arbitral awards faster and even more efficient.¹⁷¹

5.1 General Courts

Judicial Law gives the General Courts “jurisdiction to decide all cases in accordance with the rules governing the jurisdiction of courts set forth in the Law of Procedure before Sharia Courts and the Law of Criminal Procedure.”¹⁷²

¹⁷⁰ Ansari, *supra* note 142. Saudi Arabia has undergone significant judicial reforms throughout its history. As Dr. Ansari put it: “In 1927, a Royal Decree inaugurated a relatively modern and sophisticated system of courts – incorporating, for example, multiple-judge courts and regular appeals ... Since that order, several Royal Orders have been issued which sought to regulate different aspects of the Shari’ah Courts. A Royal Order issued in 1931 included provisions regulating procedure before courts. In 1938, the Shari’ah Judicial Responsibility Law was enacted. ... Later, between 1956 and 1960, the jurisdiction of the court system extended to the entire country, unifying the national judicial system. More specifically, in 1957, King Saud implemented a judicial organization throughout the realm to parallel that found in Makkah, Medina, and Jeddah. In 1960, he unified the two systems under the Presidency of the Judiciary in Riyadh, which extended those regulations developed for a few cities to the entire country. ... In 1970, a Ministry of Justice was created by King Faisal to assume the administration of the country’s courts. From 1970 to 1975, a modern administrative system for the courts was created in accordance with the Law of the Judiciary adopted in 1975, which contained several sections covering various aspects of the current judicial system; this will be examined later in the present study.” *Id.*

¹⁷¹ Execution Law, enacted by Royal Decree No. 53/M dated 13/8/1433H corresponding July 2nd, 2012. <https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/001-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf> (Arabic version)

¹⁷² Art. 25 the Judicial Law, *supra* note 167. In cases involving jurisdictional conflicts between the General Courts and the Board of Grievances or any other judicial committee, “a petition shall be submitted to the Conflict of Jurisdiction Committee at the Supreme Judicial Council for designating the competent authority. This Committee shall be composed of three members: a member from the Supreme Court to be selected by the Chief Judge of the Court, a member from the Board of Grievances or from the other authority to be selected by the President of the Board of Grievances or the other authority, as the case may be, and a member from among the full-time members of the Supreme Judicial Council to be selected by the Chairman of the Council who shall head this Committee. This Committee shall also have jurisdiction to decide the dispute which arises in respect of execution of two conflicting final judgments, one of which is rendered by a court subject to this Law and the other by a court of the Board of Grievances or the other authority.” Art. 27, *id.*

5.1.1 Supreme Judicial Council

The Supreme Judicial Council was the highest authority in the pre-2007 judicial system; it does not, however, play an adjudicatory role in the new system. It acts, instead, as a supervisory and administrative authority over the General Courts.¹⁷³ In this capacity, it must:

- “(a) attend to judges’ personnel affairs such as appointment, promotion, disciplining, assignment, secondment, training, transfer, granting of leaves, termination of service [etc];
- (b) issue regulations relating to judges’ personnel affairs upon the approval of the King;
- (c) issue judicial inspection regulations;
- (d) establish courts in accordance with ... of this Law, merge or cancel them, determine their venue and subject jurisdiction ...;
- (e) supervise courts and judges and their work within the limits stated in this Law;
- (f) name chief judges of courts of appeals and their deputies from among the appeals judges and chief judges of courts of first instance and their assistants;
- (g) issue rules regulating jurisdiction and powers of chief judges of courts and their assistants;
- (h) issue rules specifying the method of selecting judges as well as procedures and restrictions pertaining to their study leaves;
- (i) regulate the work of Trainee Judges;
- (j) determine equivalent judicial work required to fill judicial ranks;
- (k) make recommendations relating to the Council’s established jurisdiction; [and]

¹⁷³ Art. 6 *id.*

(l) prepare a comprehensive report at the end of each year including achievements, obstacles and relevant recommendations, and bring the same before the King.”¹⁷⁴

The Judicial Law states that, by royal order, the Supreme Judicial Council should include a Chairman and ten judges and governmental officials. It also states that the Chairman and Council members should serve four-year, renewable terms. The Judicial Law outlines the composition of the Council as follows:

- “(a) Chief Judge of the Supreme Court;
- (b) Four full-time judges of the rank of chief judge of a court of appeals to be named by royal order;
- (c) Deputy Minister of Justice;
- (d) Chairman of the Bureau of Investigation and Public Prosecution; and
- (e) Three members satisfying the conditions required for an appeal judge to be named by royal order.”¹⁷⁵

5.1.2 The Supreme Court

The Supreme Court is the highest adjudicatory authority in the Saudi judicial system. It conducts proceedings in Saudi Arabia’s capital, Riyadh. It is constituted of a president and a sufficient number of judges, all of whom have to have the qualifications required of the Chief Appellate Judge.¹⁷⁶ Supreme Court members are appointed by Royal Order based on recommendations from the Supreme Judiciary Council. The

¹⁷⁴ Art. 6, *id.* Art. 8 of the Judicial Law, moreover, states that the Supreme Judicial Council will have “1) its own budget which shall be issued in accordance with the rules governing issuance of the State budget; 2) a General Secretariat and the Council shall select the Secretary General from among the judges; 3) a sufficient number of researchers, specialists and administrators ...”

¹⁷⁵ Art. 5, *id.*

¹⁷⁶ Art. 10 (1), *id.*

president must hold the rank of minister.¹⁷⁷

The Supreme Court judges comprise a General Panel that the Chief Judge of the Court presides over.¹⁷⁸ The General Panel plays a significant role in defining general judiciary-related principles that the lower courts must follow and in “reviewing matters assigned to it by this Law or other laws.”¹⁷⁹ The General Panel makes its decisions by majority vote of presiding members. The Chief Judge casts the deciding vote in the even of a tie. All Supreme Court decisions are final.¹⁸⁰

The Supreme Court’s jurisdiction extends beyond the powers enumerated in the Law of Procedure before Sharia Courts and the Law of Criminal Procedure. It has the jurisdiction to oversee the proper application of the provisions of Sharia Law and the laws issued by the King that do not contradict Sharia Law, and to undertake:

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

¹⁷⁷ Art. 10 (2), *id.*

¹⁷⁸ Art. 13 (1), *id.*

¹⁷⁹ Art. 13 (2), *id.*

¹⁸⁰ Art. 13 (4), *id.*

- (c) Rendering of a judgment by an incompetent court or panel.
- (d) An error in characterizing the incident or improperly describing it.”¹⁸¹

5.1.3 Courts of Appeal

Courts of Appeal are established in every province in Saudi Arabia. The courts of appeal function through specialized panels.¹⁸² Panels are composed of “three judges with the exception of ... penal panel[s] that [review] cases of criminal homicide, amputation, stoning, or qisas (lex talionis retribution) in a case of criminal homicide or lesser injuries.” Such panels must include five judges.¹⁸³ The Judicial Law outlines the requirements for courts of appeals judges and panel composition as follows: “The rank of a judge in a court of appeals shall not be lower than the rank of an appeals judge, and each panel shall have a chief judge.”¹⁸⁴

The Judicial Law divides the courts of appeals panels into: “(1) Jural panels; (2) Penal panels; (3) Family panels; (4) Commercial panels; and (5) Labor panels.”¹⁸⁵ The Chief Judge of the Court of Appeal appoints the chief judge of each panel and its members by a decision. The Chief Judge of the court or his deputy presides over panels in the absence of their chief judges.¹⁸⁶

¹⁸¹ Art. 11, *id.* Art. 13 also stipulates that: “(1) The Supreme Court shall have a general panel headed by the Chief Judge of the Court, with all its judges as members. (2) The General Panel of the Supreme Court shall undertake the following: (a) Determining general principles in issues relating to the judiciary. (b) Reviewing matters assigned to it by this Law or other laws. (3) The meeting of the General Panel shall not be valid unless attended by at least two thirds of its members, including the Chief Judge or whoever acts on his behalf. (4) The decisions of the General Panel shall be taken by majority vote of members present. In case of a tie, the Chief Judge shall have the casting vote, and its decisions shall be final.”

¹⁸² Art. 15, *id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Art. 16, *id.*

¹⁸⁶ Art. 15, *id.*

5.1.4 First instance Courts

First Instance Courts, also known as General Courts, are comprised of panels of one or three judges as decided by the Supreme Judicial Council.¹⁸⁷ The panels have jurisdiction over cases and ex parte cases that are outside the jurisdiction of other courts and notaries public. The panels also decide on “traffic accident cases and violations provided for in the Traffic Law and its Implementing Regulations.”¹⁸⁸

The First Instance Courts are divided into: a **penal court**,¹⁸⁹ a **family court**,¹⁹⁰ a **commercial court**, and a **labor court**.¹⁹¹ Counties with established general courts may establish specialized penal, commercial, labor, and family panels whenever necessary. The general courts have the powers of specialized courts where no specialized panels are established.¹⁹²

- **Appointment of judges**

The judicial Law requires that candidates for judicial appointments meet the following requirements:

“(a) He shall be of Saudi nationality by descent.

¹⁸⁷ Art. 19, *id.*

¹⁸⁸ *Id.*

¹⁸⁹ “Which shall be composed of specialized panels as follows:

- (a) Panels for qisas (lex talionis retribution) and hadd (‘Qur’anic prescribed punishment’) cases.
- (b) Panels for Ta’zir (‘discretionary punishment’) cases.
- (c) Panels for Juvenile cases.

Each panel shall be composed of three judges except for cases determined by the Supreme Judicial Council which shall be reviewed by one judge.” Art. 20, *id.*

¹⁹⁰ The family court “shall be composed of one or more panels, and each panel shall consist of one or more judges as determined by the Supreme Judicial Council and may include specialized panels as needed.” Art. 21, *id.*

¹⁹¹ The commercial and the labor court “shall be composed of specialized panels, and each panel shall consist of one or more judges as determined by the Supreme Judicial Council.” Art. 22, *id.*

¹⁹² Art 23, *id.*

- (b) He shall be of good character and conduct.
- (c) He shall be fully competent to hold the position of a judge in accordance with Sharia.
- (d) He shall hold a degree from one of the Sharia colleges in the Kingdom or any equivalent degree, provided that, in the latter case, he shall pass a special examination to be prepared by the Supreme Judicial Council.
- (e) He shall not be less than forty years of age if he is to be appointed to the rank of an appeals judge, and not less than twenty-two if he is to be appointed to any other rank in the judiciary.
- (f) He shall have not been convicted of a crime impinging on religion or honor or been the subject of a disciplinary action dismissing him from a public office, even if rehabilitated.”¹⁹³

6. Board of Grievances

The Administrative Court under the Board of Grievances adjudicates administrative disputes in Saudi Arabia.¹⁹⁴ “The Board of Grievances is an independent administrative judicial body reporting directly to the King.”¹⁹⁵ The Board of Grievances, like the

¹⁹³ Art. 31, *id.*

¹⁹⁴ “The Board of Grievances (Diwan al-Mazalem) is the administrative judiciary system of Saudi Arabia. Prior to the creation of the Board of Grievances in 1954, King Abdul-Aziz, following traditions set out by Islamic rulers, adjudicated grievances and disputes that arose before him, including those against government officials. King Abdul-Aziz made himself accessible daily to any citizen who showed up at his court with a grievance or a concern. Most effectively, he had installed next to the gate of his palace a box whose key he alone possessed. An announcement next to the box encouraged citizens to place in the box any complaints they had against an official, adding that, ‘[a]nyone who refrains from complaining of any injustice he suffers at the hands of an official, whether senior or low ranking, or any other, has no one to blame but himself.’ The declaration, however, mandated that any complaint must be reduced in writing and genuinely signed. Any false complaints would be tried and punished, while any anonymous or misnamed complaints would be ignored. As the Kingdom expanded territorially, King Abdul-Aziz required all his government officials to be as committed to this concept as he was.” Ansari, *supra* note 142.

¹⁹⁵ Law of the Board of Grievances, *supra* note 167, Art. 1.

General Courts, is comprised of three levels of adjudication: the High Administrative Court, the Administrative Courts of Appeal, and The Administrative Courts.¹⁹⁶ The Board of Grievances has jurisdiction to decide the following:

“(a) Cases relating to rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality or their heirs and their other beneficiaries.

(b) Cases for the revocation of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards as well as decisions issued by public benefit associations – and the like – relating to their activities. The administrative authority’s refusal or denial to make a decision required to be made by it in accordance with the laws and regulations shall be deemed an administrative decision.

(c) Tort cases initiated by the persons concerned against the administrative authority’s decisions or actions.

(d) Cases related to contracts to which the administrative authority is party.

(e) Disciplinary cases filed by the competent authority.

(f) Other administrative disputes.

(g) Requests for execution of foreign judgments and arbitral awards.”¹⁹⁷

6.1 Administrative Judicial Council

The Administrative Judicial Council has power and authority over the Board of Grievances to similar to the power and authority granted the Supreme Judicial Council

¹⁹⁶ Art. 8, *id.*

¹⁹⁷ Art. 13, *id.* The jurisdiction of the request to execute foreign judgments and arbitral awards have shifted from the Board of Grievances to the Execution Court in 2012. *See* note 167.

in the Law of the Judiciary. Article 5¹⁹⁸ stipulates that:

“Without prejudice to the jurisdictions of the Administrative Judicial Council provided for in this Law, the Administrative Judicial Council shall, in relation to the Board of Grievances, assume the powers of the Supreme Judicial Council provided for in the Law of the Judiciary. The Chairman of the Administrative Judicial Council shall, in relation to the Board of Grievances, have the powers of the Chairman of the Supreme Judicial Council”

6.2 The High Administrative Court

The High Administrative Court is based in Riyadh and is, by law, composed “of a chief judge and a sufficient number of judges of the rank of Chief Judge of an Appeals Court.”¹⁹⁹ The Law of the Board of Grievances stipulates the following regarding the Chief Judge: that his appointment “shall be ... by royal order; his rank shall be that of Minister; and his service may not be terminated except by royal order. He shall satisfy the requirements for the rank of Chief Judge of an Appeals Court.”²⁰⁰

The High Administrative Court has the jurisdiction to review appeals against judgments issued by administrative courts of appeals for appeals that include the following grounds:

- (a) Violation of provisions of Sharia or laws not inconsistent therewith or an error in application or interpretation thereof, including violation of a precedent established in a judgment rendered by the High Administrative Court;
- (b) Being rendered by an incompetent court;

¹⁹⁸ Law of the Board of Grievances, *supra* note 163, Art. 5.

¹⁹⁹ Art. 10, *id.*

²⁰⁰ *Id.*

- (c) Being rendered by a court not constituted in accordance with the Law;
- (d) An error characterizing the incident or in describing it;
- (e) Deciding a dispute in contradiction with another judgment previously rendered in connection with the litigants; or
- (f) Conflict of jurisdiction among the Board's courts."²⁰¹

6.3 Administrative courts of appeals

The Law of the Board of Grievances stipulates that the Administrative Courts of Appeals "shall be entrusted with reviewing appealable judgments rendered by the administrative courts and shall decide after hearing the litigants in accordance with legal procedures."²⁰²

6.4 Administrative courts

The administrative courts have jurisdiction over the following:

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

²⁰¹ Art. 11, *id.*

²⁰² Art. 12, *id.*

- (c) Tort cases initiated by the persons concerned against the administrative authority's decisions or actions.
- (d) Cases related to contracts to which the administrative authority is party.
- (e) Disciplinary cases filed by the competent authority.
- (f) Other administrative disputes.
- (g) Requests for execution of foreign judgments and arbitral awards.”²⁰³

The administrative courts cannot hear cases related to sovereign acts, or appeals against judgments rendered by courts not subject to the Law of the Board of Grievances within their jurisdiction or “against decisions issued by the Supreme Judicial Council and the Administrative Judicial Council.”²⁰⁴

7. Arbitration and the Court Supervision

The 2012 Saudi Law of Arbitration²⁰⁵ replaced the Law of Arbitration of 1983²⁰⁶ and transformed arbitration processes under the Saudi court system. The old law stipulated that parties to arbitration agreements had to obtain arbitration instruments from the Board of Grievances to conduct valid arbitration proceedings. Article 5 of the old Law states:

“Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute. The said instrument shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and

²⁰³ Art. 13, *id.*

²⁰⁴ Art. 14, *id.*

²⁰⁵ Saudi Law of Arbitration, enacted by the Royal Decree No. M/34, dated 24/5/1433H (4/16/2012), and entered force 30 days after the announcement.

²⁰⁶ Arbitration Law, enacted by the Royal Decree No. M/46 of 12/07/1403H (4/24/1983) and replaced and superseded by the new Law on 2012. An English version of the law is found in <http://www.wipo.int/wipolex/en/details.jsp?id=8502> (accessed May 2017).

it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration. Copies of the documents relevant to the dispute shall be attached.”

The new Arbitration Law does not require that parties obtain any prior consent from authorities to agree to arbitration or to arbitrate their disputes. The 2012 Law also makes the competent authority for arbitration claims the court of appeal of the court with original jurisdiction over the dispute, rather than the Board of Grievances.

The establishment of the Execution Court²⁰⁷ further bolstered the recognition and enforcement of arbitral awards. The law designates arbitral awards as final and enforceable “Writs of Execution” that the execution judge must enforce unless they contradict Sharia Law or public policy of the state.²⁰⁸

8. Judges’ Qualifications

The Law of the Judiciary requires that every judge in Saudi Arabia possess a degree in Sharia Law. Sharia Law is the main authority in the Saudi legal system, and judges must have sufficient knowledge and understanding of Sharia principles and jurisprudence to apply Sharia rules in disputes litigated before them. The Law of the Judiciary also requires all Criminal, Labor, and Commercial Court judges – as well as all

²⁰⁷ Execution Law, enacted by Royal Decree No. 53/M dated 13/8/1433H (7/2/2012).
<https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/001-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf> (Arabic version)

²⁰⁸ For more discussion of public policy and the enforceability of arbitral awards, *see* this dissertation’s Chapter: Public Policy in Saudi Arbitration.

Criminal, Labor, and Commercial Court of Appeal Circuit judges in all Provinces, Counties and Districts of the Kingdoms – to undergo at least two months of training in the Commercial, Labor, and Criminal Procedure laws and other relevant regulations.²⁰⁹

The academic requirements for Saudi judges produce well trained and qualified Sharia adjudicators, but the Sharia courses as in Saudi Arabian colleges and universities do not expose the students – potential judges – to business or commercial principles. Students in Sharia colleges learn very little about the complexities of international trades and commercial transactions. Sharia courts therefore take extended periods of time to finalize sophisticated commercial transactions.

9. Education for judges and practitioners

One way to enhance the court treatment of arbitration involves training and educating judges and law practitioners about arbitration. Carbonneau suggests that “[r]egulation could also take place in terms of mandating educational requirements for arbitrators and having them satisfy certifying obligations.”²¹⁰ Successful training programs would include instructional courses, national examinations, and practical experience, as well as training in the development of arbitrator reports and the neutrality rules for arbitrators.

Carbonneau argues that regulation of arbitration:

²⁰⁹ Ansari, *supra* note 142, citing the Implementation Mechanism of the Judiciary Law and the Board of Grievances Law, *supra* note 181, secs. 1(6)(10), 1(7)(9), & 1(8)(9).

²¹⁰ Carbonneau: *The Revolution*, *supra* note 14, at p. 268.

“must ... be modest and contained. It should apply only to necessary and abusive circumstances. The act of regulating can easily get out of hand. It should not transform or swallow up the process being regulated. Intelligence and good judgment should accompany the elaboration of any public restrictions on the individual freedom to contract. None of these modifications, however, are free of risks and dangers. They may do more to compromise the arbitral process than to strengthen and embellish it.”²¹¹

The Saudi government has recognized the need of special adjudication mechanism for business and commercial disputes. The Board of Grievances (administrative courts) had jurisdiction over commercial claims until the establishment of Commercial Courts in September 2017.²¹²

The Saudi legislature has also supported arbitration as an alternative to court proceedings. Improvements in the state’s arbitration law and efforts to give commercial

²¹¹ *Id.*

²¹² <https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT> Saudi Arabian Supreme Judiciary Council has issued circular number T/967 (the "Circular") announcing that, as of the date of the Circular, the general court system will subsume the commercial circuits under the Board of Grievances. Pursuant to the Circular: “First-instance judgments concerning claims for a principal value lesser than SAR 20,000 would be considered final and non-appealable, as a general rule. Commercial disputes concerning the Companies Law or the Commercial Agencies Law (irrespective of the claim value), as well as those concerning claims for a principal value greater than SAR 300,000 shall be heard by a circuit composed of three judges. Commercial disputes concerning claims for a principal value lesser than SAR 300,000 shall be heard by a circuit composed of a single judge. The competences of the Commercial Courts are specified in Article 35 of the Sharia Proceedings Law (enacted pursuant to Royal Decree No. M/1 dated 22/1/1435 H. (25/11/2013 G.)) and include: Primary and ancillary commercial disputes between merchants; Claims made against merchants as a result of their primary or ancillary commercial activities; Disputes between shareholders in companies; Disputes related to commercial laws, without prejudice to the jurisdiction of the Board of Grievances; Bankruptcy claims and receivership orders; and Other commercial disputes.” <http://www.mondaq.com/saudiarabia/x/631950/Contract+Law/Circular+Of+The+Saudi+Supreme+Judiciary+Council+Concerning+The+Launching+Of+The+Commercial+Courts>.

parties easier access to arbitration have made it an integral part of the Saudi legal system, as this dissertation shows. Creating legal and judicial system that give parties the freedom to solve their disputes outside the courts has become increasingly important to the courts and parties.

SECTION II: The Economy of Saudi Arabia

The kingdom of Saudi Arabia is the largest country in the Gulf Cooperation Council.²¹³ It has the largest stock market in the Middle East²¹⁴ and many distinctive features that make it unique for foreign investors. Three particular characteristics give it the advantage on the worldwide scene; economically, it has the largest proven oil reserve; politically, it leads the Islamic world and has the two holy mosques;²¹⁵ and geographically, it is surrounded by three water straights and serves as a bridge between Asia and Africa.²¹⁶

Saudi Arabia enjoys a very important role in the Arab and Muslim worlds; as the birthplace of Islam and the Holy Mosque, it remains committed to ruling according to the teachings and laws of Islam. Saudi Arabia thus clearly has considerable cultural and social importance, but it is also a very important player in the world economy. It has the largest economy among Gulf and Arab states and is the second largest oil

²¹³ The Gulf Cooperation Council is a regional intergovernmental political and economic union consisting of all Arab states of the Persian Gulf, except for Iraq. Its member states are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. https://en.wikipedia.org/wiki/Gulf_Cooperation_Council (Accessed on May 2016). The GCC was established to achieve unity among its member states based on common objectives and similar political and cultural identities rooted in Islamic beliefs. *Encyclopedia Britannica*, <http://www.britannica.com/topic/Gulf-Cooperation-Council> (accessed May 2016).

²¹⁴ The Saudi stock market has \$580 billion market capitalization (ca 1% of world's stock market), *Middle East's largest stock market set to open*, <http://persiangulffund.com/middle-east-largest-stock-market-set-to-open/> (accessed May 2016).

²¹⁵ The head of state's formal title is: The Custodian of the Holy Mosques and the King of Saudi Arabia, <http://www.alharamain.gov.sa/index.cfm?do=cms.conarticle&contentid=5941&categoryid=1023>. This title replaced the ex-formal title (His Majesty) on October 1987. *Id.*

²¹⁶ With a land area of approximately 2,150,000 km² (830,000 sq mi), Saudi Arabia is geographically the fifth-largest state in Asia and second-largest state in the Arab world (after Algeria). https://en.wikipedia.org/wiki/Saudi_Arabia. It is three times the size of Texas, or one-quarter the size of the United States. Rice, Gillian, *Doing Business in Saudi Arabia*, *Thunderbird International Business Review* 46.1 (Jan/Feb 2004): 59-84 <http://search.proquest.com/docview/202789113?accountid=13158> (Accessed May 2016), (Hereinafter: Rice)

producer in the world. Saudi Arabia's wealth of the energy resources makes it a fertile locale for foreign investment.

King Abdulaziz conquered the capital of Saudi Arabia in 1902, believing he had simply reconquered his family kingdom; he could not have predicted that the kingdom this conquest established would become one of the world's wealthiest states. Saudi Arabia became an oil exporter shortly after its founding. The nature of the Arab tribes, the region's deeply embedded religious and cultural traditions, and the lack of industrial infrastructure challenged King Abdulaziz's efforts to establish a modern state. He had to invite foreign investors to explore the state's oil resources and identify strategies for financing the state's needs. The first American geologist came searching for oil in Saudi Arabia in September 1933 and, shortly thereafter, King Abdulaziz granted California Standard Oil a concession to "explore and search for and drill and extract and manufacture and transport petroleum and kindred bituminous matter." This concession had an original duration of 60 years.²¹⁷

The discovery of oil forever transformed the economy of Saudi Arabia. Currently,

"[t]he petroleum sector accounts for about 75% of budget revenues, a third of gross domestic product (GDP), and 90% of export earnings."²¹⁸ The world's largest fully integrated, governmentally owned oil company, Saudi Aramco, produces almost all of Saudi Arabia's oil. Meanwhile, Saudi Arabia's per capita GDP²¹⁹ has dipped in recent years: "approximately \$9,000 in 2001, down from

²¹⁷ History (*website*): Standard Oil geologists arrive in Saudi Arabia. <http://www.history.com/this-day-in-history/standard-oil-geologists-arrive-in-saudi-arabia>

²¹⁸ Gillian Rice, *Doing business in Saudi Arabia*, Thunderbird International Business Review, 46(1), Jan/Feb 2004): 59-84. (Rice)

²¹⁹ Purchasing power parity. *Id.*

over \$28,000 in the mid-1980s due to population growth, economic fluctuations, and increased governmental spending on social and defense projects.”²²⁰

The Saudi government now aspires to reduce its dependence on oil and has made this aspiration a driving factor in economic policy. It has allowed an increasing number of foreign investors and capitals to enter the country and invest. The 2017 World Investment Report published by UNCTAD²²¹ ranks Saudi Arabia as the third largest FDI recipient in Western Asia, after Turkey and the United Arab Emirates.²²² Foreign Direct Investment “is seen as one of the most effective ways to diversify the economy and provide employment for younger generations.”²²³ The Saudi government has come to recognize foreign investors’ ability to transfer technology, employ and train the national workforce, foster economic development and enhance local raw materials. It has also begun allowing foreign investors to compete in the retail and wholesale sectors with 100% foreign ownership.²²⁴

1. Saudi Arabian Monetary Agency Report

Saudi Arabian Monetary Agency, SAMA, issues economic reports that show the status of the Kingdom’s economy. The latest report²²⁵ indicates that the Saudi economy

²²⁰ *Id.*

²²¹ http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf

²²² *Saudi Arabia: Foreign Investment*, <https://en.portal.santandertrade.com/establish-overseas/saudi-arabia/foreign-investment>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Issued by SAMA in 03/10/2017 <http://www.sama.gov.sa/en-US/EconomicReports/Pages/AnnualReport.aspx>. “Oil sector GDP increased by 3.8 percent to SAR 1,140 billion, while the non-oil sector GDP rose by 0.2 percent to SAR 1,428.7 billion. The growth rate of the non-oil private sector GDP was 0.1 percent, rising to SAR 1,000.3 billion, and the non-oil government sector grew by 0.6 percent to SAR 428.4 billion. Most major economic activities at constant prices grew at varied rates in 2016 (Table 2.1). Manufacturing industries (including oil refining) grew by 3.9 percent;

grew by 1.7 percent to SAR 2,589.6²²⁶ billion in 2016, compared to 4.1 percent in 2015.

Following are information taken from SAMA report to show the strength of Saudi economy to reflect on the need to have a workable arbitration system that support the country economic needs.

1.1 Domestic Supply and Demand

The total supply of goods and services for the non-oil sector at current prices recorded a decline of 7.0 percent in 2016. The non-oil sector GDP (at current prices) increased by 1.7 percent. The non-oil GDP of the government sector also rose by 2.8 percent, and that of the private sector increased by 1.2 percent. Total imports, however, declined by 23.1 percent. Total demand on goods and services for the non-oil sector at current prices decreased by 6.6 percent from 2015 to 2016. This decline stemmed from a decrease of 3.8 percent in consumption expenditures. The government sector's final consumption declined by 15.1 percent despite a 4.7 percent increase in the private sector's final consumption. Gross investment expenditure (gross capital formation) declined by 12.7 percent, and nonoil exports declined by 5.3 percent.

finance, insurance, real estate and business services and transport, storage and communications by 2.8 percent each; mining and quarrying (including oil production) by 2.7 percent; electricity, gas and water by 2.3 percent; community, social and personal services by 1.8 percent; agriculture, forestry and fishing by 0.6 percent; and the activity of the government services' producers by 0.2 percent over the preceding year. On the other hand, construction and building activity declined by 3.3 percent, while wholesale and retail trade, restaurants and hotels recorded a decline of 1.6 percent from the preceding year." *Id.*

²²⁶ The Official USD to Saudi Riyal rate is 1:3.75

1.2 Oil Market

Data from the Organization of Petroleum Exporting Countries (OPEC) show a 17.8 percent decrease in the average price of Arabian Light crude oil from \$49.85 per barrel in 2015 to \$40.96 per barrel in 2016. Data from the Ministry of Energy, Industry, and Mineral Resources indicate that Saudi Arabia's average daily production of oil rose by 2.9 percent to 10.46 million barrels in 2016 compared to 10.19 million barrels in 2015.

1.3 Domestic Stock Market

The Tadawul All Share Index (TASI) registered an annual increase of 4.3 percent to 7,210.4 at the end of 2016. Market capitalization rose by 6.5 percent to SAR 1,682 billion at the end of 2016, from SAR 1,579 billion at the end of the preceding year. The share volume increased by 2.7 percent to 67.7 billion with a value of SAR 1,157 billion.

1.4 Money Supply and Banking Activity

Broad money supply (M3) increased by 0.8 percent to SAR 1,787.4 billion in 2016 compared to an increase of 2.5 percent to SAR 1,773.3 billion in the preceding year. Currency in circulation rose by 1.1 percent, and time and savings deposits increased by 13.1 percent. Other quasi-monetary deposits, however, dropped by 22.0 percent, and demand deposits declined by 0.2 percent compared to 2015. The banking sector continued its good performance in 2016 as commercial banks' total assets rose by 2.2 percent to SAR 2,256.3 billion compared to SAR 2,208.8 billion in the preceding year. Bank deposits grew by 0.8 percent to SAR 1,617 billion. Commercial banks' capital and reserves increased by 10.3 percent to SAR 299 billion, while profits fell by 5.4 percent to

SAR 40.4 billion. Bank credit extended to the private and public sectors increased by 2.8 percent to SAR 1,400.4 billion. The average capital adequacy ratio (Basel Standard) stood at 19.5 percent at the end of 2016 compared to 18.1 percent at the end of the preceding year.

1.5 World Oil Demand

The estimates of the International Energy Agency (IEA) indicate that average world oil demand rose by 1.7 percent to 96.59 million barrels/day (b/d) in 2016, compared to 94.95 million b/d in 2015. Experts attribute the increase to a 2.4 percent rise in the average demand of nonOECD countries to 49.73 million b/d, compared to 48.57 million b/d in 2015. OECD oil demand averaged 46.86 million b/d, an increase of 1.0 percent.

1.6 World Oil Prices

OPEC data show that world oil prices declined in 2016. The price of Arab Light crude oil averaged \$40.96 per barrel, decreasing by 17.8 percent (\$8.89 per barrel), compared to an average price of \$49.85 per barrel in 2015 (Table 11.3). The price of OPEC basket averaged \$40.76 per barrel in 2016, decreasing by 17.6 percent, compared to \$49.49 per barrel in 2015. The average price of North Sea (Brent) dropped by 16.5 percent to \$43.76 per barrel in 2016 against \$52.41 per barrel during 2015. West Texas average price went down by 11.2 percent to \$43.27 a barrel in 2016 compared to \$48.74 a barrel in 2015.

2. Reforming the legal system to increase Foreign Investment

Saudi Arabia has advanced its legal framework to encourage foreign capitals to invest in state-approved foreign investment activities.²²⁷ It should, however, improve the mechanisms for resolving the legal disputes to compliment national laws for foreign investment. The 2012 Arbitration Law adopts the international standard for national arbitration laws and is an important advancement; the effectiveness with which it will be implemented, however, remains to be seen.

- **Conclusion**

Saudi Arabia has undergone substantial legal reforms to support its social and economic needs since its establishment. From its origin as a collection of tribal societies living in the desert and fighting over fresh water sources to survive, the Kingdom

²²⁷ Saudi Foreign Investment Law, issued by the Royal Decree No. (M/1) dated 5/1/1421H (Corresponding to 10/4/2000AD). The list includes a rundown of Activities Excluded from Foreign Investment that foreign investors cannot capitalize on. The exclusions include the Industrial Sector: "1. Exploring, excavating and producing petroleum products. This doesn't include mining related services that are classified internationally under the numbers 883 and 5115; 2. Manufacturing military uniforms, equipment's, and devices; 3. Manufacturing civil explosives". On the Services Sector list excludes: "1. Catering services for military sectors; 2. Investigation and security; 3. Insurance Services; 4. Real estate investment in the two Holy Cities of Makkah and Medina; 5. Tourist guidance services related to Hajj and Umra (visit to the Holy Cities); 6. Recruitment and employment services including local recruitment offices; 7. Real estate brokerage services; 8. Printing and Publishing Services; 9. Distribution services (wholesale and retail trade) including medical retail trade such as the private pharmacies classified under the numbers of 632631, and 612161136111, and (commercial agents) except Franchising Services that are classified internationally under the number 8929, provided that the foreign property percentage does not exceed 49% as well as it shall be sufficient to stipulate one condition for every area; 10. Audio and visual services; 11. Education services (primary/secondary/adult education); 12. Communication services; 13. Land and air-transport services. 14. Distribution of electricity services as part of the general network; 15. Space transport services; 16. Pipe line transport services; 17. Services rendered by mid-wives and nurses, physiotherapy services, and Para-medical services classified internationally under the number of 93191; 18. Services related to the field of fishing; 19. Services related to toxic centers, blood banks and quarantines."

emerged slightly after its third birth into unified society that eventually became one of the world's most significant oil exporters.

Saudi Arabia has realized that it needs to develop a legal system that supports both its local and international investments and that its judicial system must undergo significant reforms. It has also acknowledged that various sectors of its economy require foreign investment.

Arbitration is an important pillar of the legal system. It will help the Kingdom achieve its economic goals and ease the burdens on the court system. Parties to arbitration agreements choose their own ways of adjudicating disputes. The Law of Arbitration recognizes the parties' autonomy and freedom of contract. Arbitration contributes significantly to the effective functioning of legal systems and it plays a crucial role in international commercial transactions and foreign investment laws.

Saudi Arabia's 2012 Arbitration Law still requires some improvements when it comes to court recognition and treatment of arbitration agreements and arbitral awards. Court support for arbitration proceedings will be crucial to the development of effective arbitration in Saudi Arabia. Saudi legislators should expand court support for arbitral tribunals and limit parties' abilities to challenge awards before national courts to ensure the success of the Saudi arbitration system.

Chapter II:

Glance of Saudi Law of Arbitration:

The relative youth of Saudi Arabia's modern legal system means its arbitration laws and practice are still evolving. Arab chiefs or elderly wise persons administered tribal justice in the region long before Saudi Arabia's rich oil resources enabled it to occupy its current prominent position in the modern global economy.¹ The arrival of Islam cemented arbitration as the preferred means of adjudication. Current legal developments have made arbitration an important feature in business and investment environments. This chapter focuses on the history of arbitration and how it advanced over time. It also compares some of the features of the 2012 Law of Arbitration² to the 1983 arbitration law.³

1. Arbitration in Pre-Islam Era

The primitive nature of Arabian life prior to the emergence of Islam meant that the forms of adjudication tribal Arabs developed lacked organized judicial power.⁴ Arabs in

¹ Arabs practiced different forms of adjudication in the pre-Islam era. Examples of those forms are spread all over scholarly resources of history that era. See Aseel Al-Ramahi, *Islamic Law and Law Of The Muslim World*, Research Paper Series. http://eprints.lse.ac.uk/24598/1/WPS2008-12_Al-Ramahi.pdf (accessed October 2016) (Aseel).

² Saudi Law of Arbitration, enacted by Royal Decree No. M/34, dated 24/5/1433H (4/16/2012), and entered force 30 days after the announcement. Appendix I

³ Arbitration Law, enacted by the Royal Decree No. M/46 of 12/07/1403H (4/24/1983) replaced and superseded by the new Law in 2012. An English version of the law can be found at <http://www.wipo.int/wipolex/en/details.jsp?id=8502> (accessed May 2017).

⁴ Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries*, Kluwer Law International, 2013, at 5. (El Ahdab); [The Arabs of the Jahiliya (the time of ignorance) knew arbitration because adversaries (whether individuals or tribes) usually resorted to arbitration to settle their disputes.

the pre-Islamic era had absolute freedom when it came to choosing arbitrators – to apply modern arbitration terminology.⁵ Arbitrators had the power to accept the settlement of disputes and refuse others based on their personal interpretations of the facts, regardless of the reasons supporting their decisions.⁶ Oaths sworn during arbitral proceedings had particular importance in the settlement of disputes because participants often swore them in the name of the most important idol, “Hubal,” which was put inside the Qaaba.⁷

The notion of endless freedom – the removal of rules and regulations from the lives of individuals – was very deeply rooted in pre-Islamic Arabic culture. Old Arabs lacked, for better or worse, governments that regulated their affairs. Arbitration based on parties’ agreements was, consequently, the best (perhaps the only, apart from bloodshed) way to settle differences between tribes and individuals.⁸

Arbitration in pre-Islamic era was a voluntary procedure that could commence only if the parties mutually consented to arbitrate the dispute and agreed on a specific individual to act as an arbitrator.⁹ Arbitrators (hakams) would be appointed when

This arbitration was decided by agreements that determined the subject-matter of the disputes as well as the names of the arbitrators or the wise men in charge of settling the disputes]. *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Worshipping idols was the norm and tradition among pre-Islamic Arabs. Every tribe in the Arabian Peninsula had its god (idol) among them, placed in a very respectful place in towns. “Hubal” or “Hobal” was the highest ranked idol among all Arabs. The mission of Islam came to unite all people to worship “Allah” All mighty God. <https://en.wikipedia.org/wiki/Hubal> (accessed on October 2016).

⁸ “In the fragmented, tribal society of pre-Islamic Arabia, tahkim, unlike arbitration, was not an alternative to an established judicial system. Rather, it was the only means of dispute resolution short of war if direct negotiation and mediation failed to achieve a settlement.” George Sayen *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia* 24 U. PA. J. INT’L ECON. L. 905 (2003) at p. 923. (Sayen)

⁹ Sayen, *supra* note 8 at p. 925.

parties failed to resolve disputes regarding property, succession, or torts, by negotiation. “An hakam could be any male possessing high personal qualities who enjoyed a favorable reputation in the community and whose family was noted for their competence in dispute settlement.”¹⁰ The parties would then put up significant forms of security – property or hostages – to guarantee their compliance with the arbitrator’s decision.¹¹ Arbitrator decisions were final, but the enforcement was not. The security parties submitted at the outset thus ensured that the losing party would adhere to the arbitrators’ decisions.¹²

Arbitration also served as a mechanism for deciding winners in literature competitions in the pre-Islamic era. Hassan Bin Thabet and Alkhansaa, for example, took part in a competition at Okaz Market to determine which of them was the most eloquent and rhetorically accomplished poet. A senior and well-known poet, Alnabegha Althubyani, stayed in his leather tent as an arbitrator, the poets recited their poems before him, and he explained why, in his opinion, one poet was better than the other.¹³

¹⁰ Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT’L L. 173 (2006). (Gemmell). “Hakams, or arbitrators, were ... persons of considerable importance, although they did not hold any political power as a rule” Sayen, *supra* note 8 at p. 923. According to some commentators, “Most hakams were *kahins*, or soothsayers, whose opinions would invoke the appropriate deities and would be couched in terms indicating they were revelations from heaven” *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ For more information see:

<https://www.sahab.net/forums/index.php?app=forums&module=forums&controller=topic&id=145545>

2. Arbitration in the Islamic Era

Arbitration continued to be a common form of dispute resolution after the emergence of Islam. The Prophet Muhammad – Peace Be Upon Him – used arbitration to resolve disputes and advised others to do so as well.¹⁴ The arbitration he conducted (before his prophecy) between the branches of Quraysh tribe during the renovation of the Ka'ba played a significant role in the history of Islam and the development of Shariah.¹⁵ The dispute concerned the right to place and reinsert the Black Stone in the Kaaba after its renovation. “No clan chief wanted to relinquish this great honor to any other clan. Through his successful arbitration of that dispute, the Prophet Muhammad prevented potential war among the Quraysh tribes.”¹⁶ The parties agreed that the first person who entered the Mosque through a certain door would arbitrate the dispute regarding which tribe had the right to place the Stone. The Prophet, PBUH, entered from that door and subsequently arbitrated the dispute; he fulfilled his mandate by placing a cloak under the stone and asking representatives from each branch to lift one side of the cloak; then he placed the Black Stone himself with help of the representatives. The Prophet also initiated the signing of the first treaty signed by the Muslim community in history after he immigrated to Madinah.¹⁷ The Treaty of Medina, AD 622, or the Charter of Madinah, stipulated that Muslims resolve disputes with other

¹⁴ Saud Alammari and A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, Arbitration International, LCIA2014, Vol. 30 Issue 2, at p. 387. (Alammari).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

inhabitants of Madinah via arbitration.¹⁸ Arabs tribes, including the Aws and Khazraj tribes of Medina, chose the Prophet, PBUH, to settle disputes between them. He also arbitrated a dispute between the Bani Qurayzah, a Jewish tribe, and an Arab tribe in which both parties agreed to submit their dispute to arbitration.

The Quran allows the arbitration of family matters¹⁹ and extends approval to party-nominated arbitrators and to the arbitration of political and government matters.²⁰

Arbitration actually played a significant role in the politics of the Islamic era: the most famous arbitration proceedings in Islamic history took place in 658 to settle a political dispute between Ali Bin Abi Taleb (the Fourth Caliph) and Mu'awiyah Bin Abi Sufyan (Governor of Syria). The arbitration arose from a written agreement that included provisions regarding the nomination of arbitrators, terms of reference, applicable laws, and a time limit for rendering awards.²¹

¹⁸ "The preamble declares the document to be 'a book [*kitab*] of the prophet Muhammad to operate between the believers [*mu'minin*] and Muslims from the Quraysh tribe and from Yathrib and those who may be under them and wage war in their company" declaring them to constitute "one nation [*ummah wāhidah*] separate from all peoples.' It established the collective responsibility of nine constituent tribes for their members' actions, specifically emphasising blood money and ransom payment. The first constituent group mentioned are the Qurayshi migrants, followed by eight other tribes. Eight Jewish groups are recognized as part of the Yathrib community, and their religious separation from Muslims is established. The Jewish Banu Ash shutbah tribe is inserted as one of the Jewish groups, rather than with the nine tribes mentioned earlier in the document. The constitution also established Muhammad as the mediating authority between groups and forbids the waging of war without his authorization."

https://en.wikipedia.org/wiki/Constitution_of_Medina

¹⁹ El Ahdab, *supra* note 4 at p. 8-9. In 4:35 the Quran stipulates: "If ye fear a breach Between them twain, appoint (two) arbiters, One from his family, And the other from hers; If they wish for peace, Allah will cause Their reconciliation: For Allah has full knowledge, And is acquainted With all things." *Id*

²⁰ *Id*. See Zeyad Al Qurashi, *Arbitration Under the Islamic Sharia*, 1 Oil, Gas & Energy L. Int'l (2003) available at: www.transnational-dispute-management.com/article.asp?key=43 and Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International 2014, 2nd ed., p. 54 (Born: ICA)

²¹ El Ahdab, *supra* note 19, at p. 9.

Arbitration, in sum, has a long and rich history as a dispute resolution mechanism in the Arab world. Parties have used it to resolve commercial disputes as well as political and family differences. It served as a means of adjudicating and resolving issues where no centralized, established system of justice existed – people submitted to arbitration in both personal and tribal capacities. Arbitration in the early Arab era was a voluntary and essentially private arrangement that depended on the goodwill of the parties.²² Arbitration remained an affective mechanism for adjudication through the Islamic era to Arabs modern life. It helped solving issues successfully and practically not just in commercial differences, but also in political and personal matters disputes.

²² Born: ICA, *supra* note 20, at p. 54.

3. Arbitration in Saudi Arabia

The Saudi system of arbitration has undergone many changes since the establishment of the country. This section provides an overview of the main phases of arbitration's evolution in Saudi Arabia.

3.1 Commercial Court Law 1931

The Commercial Court Law of 1931 was the first Saudi law to mention arbitration.²³ It adopted an Ottoman law that translated and adopted French commercial and maritime legislation at the beginning of the nineteenth century.²⁴ The Commercial Court Law contained some provisions regarding arbitration in commercial transactions. Articles 493-495 and 497 of the Law read as follows:

“Article 493: If the defendant parties consider choosing a person or people as arbitrators, they shall conduct an official note ratified by notaries. This note shall list the conditions under which they agree upon whether the arbitration shall have a certain duration or the arbitrators' award shall be in force, whether by the agreement of the arbitrators or the majority, and any other points they agree upon. And then, they shall sign it and submit it to the court.

Article 494: The arbitrators shall examine the testimonies of the parties very well upon the legitimate assets. They shall also check their testimonies, papers, bonds, and the testimony of their witnesses. They may judge according to what appears to them under the terms of the arbitration note.

²³ Royal Decree No. 32 of 15 /1/1350H corresponding to June 01, 1931, issued the Law. See El Ahdab, *supra* note 19, at p. 606; and Abdulaziz Alsulayyem, LEGAL ATLAS IN SAUDI COMMERCIAL ARBITRATION FOR NINETY-FIVE YEARS 1923-2014, 2015, at p. 60. (Arabic source) (Atlas)

²⁴ El Ahdab, *supra* note 19, at p. 606.

Article 495: If it appears that the award by the two arbitrators is identical to its assets and corresponds to the arbitration note, it shall be ratified by the court and implemented. And if this award violates any of these criteria, it shall be refuted by the Commercial Court.

Article 497: The arbitrators, whether they are officers of the court or an elected committee, shall submit their award signed by them to the court. And the court shall, after checking and taking the testimony of both parties as to whether they have the right to object or not, certify it if it complies with its assets, or revoke it if it is contrary to them.”

Articles 538, 599, and 610-613 of the Law also mentioned some procedural requirements for arbitration.²⁵ Some commentators²⁶ contend that arbitration remained an option between parties that had contracts with no arbitration clauses. Any company or business party who would not respect contractual stipulations to resort to arbitration would lose much credibility within the business community.²⁷ “This loss far exceeds any profit the recalcitrant party might obtain from failing to respect its undertaking or from the non-implementation of any arbitral award.”²⁸

3.2 Saudi Chamber of Commerce

The Saudi legislature enacted the Law of the Chamber of Commerce and Industry of 1946 and the Chamber published it in its official magazine (Umm Alqura).²⁹ The Law allowed the Chamber to administer arbitration proceedings between

²⁵ Atlas, *supra* note 24 at p. 60.

²⁶ El Ahdab, *supra* note 19, at p. 607.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Issued in its 1089 issue dated 15/2/1365H corresponding 18/1/1946.

commercial and industrial parties. Article 5 of the Chamber of Commerce and Industry Law states: “The Chamber of Commerce has the authority to: ... (C) Arbitrate the disputes submitted by the parties if the parties have agreed to submit the claims to the Chamber.”

The Chambers of Commerce Law of 1980 and its Implementing Regulations outlined the Chamber’s jurisdiction over arbitration settlements.³⁰ The Chamber of Commerce Law covered institutional arbitration in addition to the ad hoc arbitration addressed by the provisions of the Commercial Court Law.³¹ The Chamber of Commerce Law authorized the Chamber of Commerce to “be an arbitrator in charge of settling commercial disputes amongst merchants should the parties thus agree and entrust it with this mission.”³² This Law’s Implementing Regulations regulated permanent institutional arbitration. They stated:

“[i]f two national merchants or manufacturers who have adhered to the same Chamber of Commerce and Industry agree to settle a dispute by arbitration, they must present a written request signed by them to the President of the Board of Directors of this Chamber ...”³³

The Implementing Regulations addressed arbitration proceedings as well. They stated:

“Article 51: Each of the parties may be represented before the Arbitral Tribunal.

³⁰ Royal order M/6 1980 enacted the Chamber of Commerce Law of 1980. Atlas, *supra* note 24 at p. 64.

³¹ El Ahdab, *supra* note 19 at p. 608.

³² Art. 3 of the Chamber of Commerce Law of 1980.

³³ Art. 49

Article 52: Should one of the arbitrators refrain from embracing his responsibilities, the arbitration is not suspended, and the President of the Chamber of Commerce must in this case appoint a replacement arbitrator.

Article 53: The time-limit for making the award is three months from the date of the first hearing.

Article 54: Foreigners and parties belonging to different Chambers of Commerce may resort to institutional arbitration which must be supervised by the President of the Council for the Chambers of Commerce and Industry. If both parties are Saudi and belong to the same Chamber of Commerce, the arbitration will then be supervised by the President of the Board of Directors of the Chamber to which they belong.”

3.3 Labor Law

Saudi Arabia enacted its first Labor Law in 1947. Article 38 of the Law made the arbitration of labor disputes possible.³⁴ The legislature revised the Labor Law in 1969.³⁵ The Law identified arbitration as an acceptable and adequate means of settling labor disputes. It stated:

“Article 183: In all cases, the disputing parties may appoint by common agreement a sole arbitrator or one or several arbitrators for each of them in order to settle the dispute, in lieu of the committees listed in this chapter. Should the parties not agree on the appointment of an arbitrator, the President of the Labor Court where business is located, shall make the appointment.

The arbitration agreement must indicate the time periods for the arbitration as well as the procedure to be followed to settle the dispute. The award will be

³⁴ Atlas, *supra* note 24 at p. 64.

³⁵ Royal Decree M/21 dated 6/9/1389H corresponding to 15/11/1969 issued the 1969 Labor Law.

given in the first instance court and is subject to appeal before the “Superior Council” under the same conditions and time periods for ordinary appeals before this Council unless the agreement stipulates otherwise, in which case the award shall be binding.

A copy of the agreement must be registered with the Secretariat of the competent Labor Court and the Arbitral Award must be registered with the same Secretariat within one week of its issuance.”³⁶

3.4 Other Laws

Several other laws and regulations briefly mention arbitration as means of resolving disputes. The Executive Regulation of the Foreign Investment Law of 2002, for example, authorizes the settlement of investment disputes between Saudi and Foreign investors by arbitration.³⁷ The Saudi Engineers Commission Law of 2002 allows the commission to receive monetary compensation for technical arbitration settlements through the Engineering Arbitration Center.³⁸ Lastly, the Mineral Investment Law of 2004 allows the Ministry of Oil and Mineral Wealth to arbitrate its dispute with mineral investors.³⁹

³⁶ El Ahdab, *supra* note 19 at p. 609-10.

³⁷ Ministerial order 1/20 dated 13/4/1423H corresponding 24/6/2002 regarding the Implementing Regulations of the Foreign Investment Law issued by Royal Decree m/1 dated 5/1/1421H corresponding 10/4/2000. *See Atlas, supra* note 24 at p. 70. Foreign investments treaties between Saudi Arabia and foreign countries are signed to increase foreign capital investment. Saudi Arabia has signed many bilateral investment treaties; Saudi Arabia’s agreement with the Czech Republic for the encouragement and reciprocal protection of investment is an example of such a treaty. Appendix V

³⁸ Articles 5 and 7 of the Implementing Regulation of the Saudi Engineers Commission Law. Royal Decree M/36 dated 26/9/1423h corresponding to 1/9/2002 issued the Law

³⁹ Art. 58 of the Mineral Investment Law issued by Royal Decree M/47 dated 20/8/1425H corresponding to 4/10/2004.

4. Arbitration Law of 1983

The Saudi legislature initially enacted the Arbitration Law of 1983 and its Implementing Regulations of 1985⁴⁰ exclusively in relation to arbitration. No law before this law dealt specifically with arbitration. The Arbitration Law established a complete set of provisions that superseded those of the Commercial Court Law.⁴¹ It was an important evolution for arbitration law and practice in Saudi Arabia.⁴² It distinguished between institutional arbitration and “ad hoc” arbitration and recognized arbitration arising from arbitration submission agreements and arbitration arising from arbitration clauses.⁴³ The Law was a big step forward in supporting arbitration as an alternative to court litigation, but it did not support arbitration to the extent that many legal jurisdictions did. The Law left many gaps and did not give parties full autonomy and discretion to arbitrate their disputes as they deemed fit. It did not, for example, articulate the requirements of the New York Convention,⁴⁴ which many countries had joined in the 1980s.

⁴⁰ Arbitration Law, enacted by the Royal Decree No. M/46 of 12/07/1403H corresponding to 4/24/1983. An English version of the law can be found at <http://www.wipo.int/wipolex/en/details.jsp?id=8502> (accessed May 2017), Council of Ministers Resolution 7/2021/M dated 8/9/1405H corresponding to 27/5/1985 issued the Implementing regulations of the Law. Appendix IV. “The purpose of the Implementing Rules was to supplement lacunae in the Act and provide guidance on particular aspects of Saudi arbitral proceedings.” Abdulrahman Baamir and Ilias Bantekas, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, *Arbitration International*, Vol. 25, Issue 2, 1 June 2009, p. 263 <https://doi.org/10.1093/arbitration/25.2.239> (Baamir & Bantekas).

⁴¹ El Ahdab, *supra* note 19 at p. 610.

⁴² *Id.*

⁴³ *Id.* at p. 612.

⁴⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (New York Convention OR the Convention) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. Appendix II

The 1983 Law did, however, advance the Saudi arbitration environment in many ways. Article 10 of the Law, for example, gave parties court support in the process of arbitration. It stated:

“Where parties fail to appoint the arbitrators, or one party abstains from appointing the arbitrator(s) ... and there is no special stipulation by the parties, the authority originally competent to hear the dispute shall appoint the arbitrator(s) ...”

The law, moreover, recognized parties’ agreements to submit to certain processes or procedures in conducting arbitral proceedings. El Ahdab contends that the “special stipulation” mentioned in the portion of the Law quoted above referred to specific arbitration rules.

The Law and its implementation rules granted the authorities with original jurisdiction⁴⁵ over disputes supervisory power over all stages of proceedings. The Law outlined the powers of said authorities as follows:⁴⁶

"the parties to the dispute must register the arbitration agreement with it;
it shall register the requests for arbitration presented to it;
the authority decides on the recognition of the arbitration agreement within
15 days and it notifies the arbitral tribunal thereof;

⁴⁵ The competent authority having jurisdiction over the claim has changed over the course of arbitration law enactments. The Law of 2012 changed the authority referenced above.

⁴⁶ Articles 5-23 of the Law of Arbitration of 1983 enumerate these powers, *supra* note 41.

the authority originally having jurisdiction may no longer look into the dispute; its power is restricted to the implementation of the Arbitration Act and the supervision of the proceedings;

the clerk of this authority makes all notifications and communications required by the Arbitration [Law]. The clerk shall also be responsible for the secretariat of the arbitral tribunal;

if the award is not made within the contractual or legal time-limit, the case is brought before the authority to decide either to rule upon the dispute or to grant an extension of the time-limit;

if the parties do not appoint the arbitrator/s or if the arbitrators fail to execute the mission, the authority originally having jurisdiction appoints the necessary arbitrators upon request of either party;

any request to challenge an arbitrator must be brought before this authority;

the arbitral award must be deposited with such authority which also has jurisdiction over any objection. The authority settles the objection and grants leave for enforcement of arbitral award.

the arbitrators' fees are deposited with such authority which settles any dispute relating thereto."⁴⁷

The Law of 1983 also allowed the parties to arbitrate specific, existing disputes or any disputes that might arise in the future as the result of the execution of specific contracts.⁴⁸ It prohibited the arbitration of matters that were not subject to conciliation⁴⁹

⁴⁷ El Ahdab, *supra* note 19 at p. 613-14.

⁴⁸ Art. 1 of Law of Arbitration of 1983, *supra* note 41.

⁴⁹ *Id.* Art. 2

and disallowed governmental entities from arbitrating except with the permission of the Prime Minister.⁵⁰

The Law required, moreover, that arbitrators possess certain qualifications. It stipulated that they have experience in the subject matter, good reputations, and full legal capacities, and that they conduct themselves well. It also stated that, in cases involving multiple arbitrators, arbitral tribunals must include an odd number of arbitrators.⁵¹

The Law of Arbitration of 1983 granted jurisdiction over arbitral proceedings to the competent authority with the supervisory authority vis-à-vis the arbitral proceedings.⁵² The supervisory authority was the authority that initially had jurisdiction over the dispute, including the authority to decide whether the dispute was arbitrable, on the basis of an arbitration agreement or clause, in the first place. The Law required that the competent authority issue a decision approving the arbitration agreement within 15 days of the agreement's submission and thereafter notify the arbitral tribunal of its decision.⁵³

This Law allowed many competent authorities to have roles over arbitration procedure. Be it as it may, the number of governmental and judicial bodies, having a

⁵⁰ *Id.* Art. 3

⁵¹ *Id.* Art.4

⁵² Article 7 of the implementing Regulations, *supra* note 41. See Baamir & Bantekas, *supra* note 41 at p. 246-47.

⁵³ *Id.*

supervision role over arbitration, in which arbitration had to go through was a problematic and a challenge in the Saudi Arbitration.⁵⁴

The competent authority in the Arbitration Law and its Implementing Regulations was not specified to which level of scrutiny the supervisory authority should apply its rules of procedure in arbitral procedures.⁵⁵ This confusion was resolved, later, in the arbitration law revision.⁵⁶

The Arbitration Law of 1983 had many defects and gaps. It was silent regarding numerous procedural questions, such as the rules relating to the delivery of arbitral awards, notifications regarding processes, communication between the parties and arbitral tribunals and between arbitral tribunals and third parties, the seat of the arbitral tribunal, etc.⁵⁷ It also lacked clarity regarding what types of disputes parties could and could not submit to arbitration.⁵⁸

The Arbitration Law of 1983 was relatively brief, somewhat ambiguous, and, as shown above, it lacked details about certain key issues related to arbitration proceedings. The Implementing Regulations for Arbitration Law of 1985 resolved some

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Some commentators have suggested that the Board of Grievances served as second degree adjudication after arbitration. "With regard to the Diwan, we consider it a second degree court after the arbitration tribunal; therefore, the Diwan should apply its own rules of procedure and the Diwan's duty is to uphold or reject the decision of the arbitration tribunal only" *Id.*

⁵⁷ *Id.* at p. 242. "the [Law] constitutes a codification of the Hanbali law of arbitration" according to "the teaching of Ibn Taymiyyah who considered the arbitral award to be of no value without prior judicial confirmation" *Id.* at p. 242 and 246.

⁵⁸ Alammari, *supra* note 15 at p. 390.

of the ambiguous issues. The Implementing Regulations were instructive and “highly influential for both arbitral tribunals and the judicial bodies overseeing arbitral processes in Saudi Arabia,”⁵⁹ however, they did not solve all the issues in Arbitration Law.

5. Arbitration Law of 2012

A first reading of the Arbitration Law of 2012⁶⁰ indicates it was an amended copy or modified version of the UNCITRAL Model Law of 1985 and its 2006 amendments and that the Saudi legislature reformed its arbitration law in many respects to align with practical international customs. Many provisions of the Law mirrored those of the Model Law, including its stipulations regarding the definition and form of arbitration agreements,⁽⁷⁾ the scope of international arbitration’s application,⁽⁸⁾ the composition of arbitral tribunals,⁽¹⁰⁾ the competence of arbitral tribunals to make jurisdictional rulings, the separability of arbitration clauses, the location of the arbitration, and the language in which the arbitration would be conducted.⁶¹

⁵⁹ Baamir & Bantekas, *supra* note 41 at p. 243.

⁶⁰ *Supra* note 2.

⁶¹ Jean-Benoit Zegers, *National Report for Saudi Arabia (2013)*. published in Jan Paulsson and Lise Bosman (eds), *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION*, Kluwer Law International 1984, Supplement No. 75, July 2013, 1 – 58, at p. 4. (The Report)

The 2012 Arbitration Law repealed the Law of Arbitration of 1983 including its Implementing Regulations of 1985.⁶² Article 57 of the Arbitration Law states: “[t]his Law shall supersede the Law of Arbitration promulgated by Royal Decree No. (M/46) dated 12/7/1403H.” The Law of 2012 represents a major advancement for arbitration in Saudi Arabian law and practice, particularly because it delimits “the pervasive supervisory role of the Saudi courts throughout the arbitration proceeding,”⁶³ circumscribing court approval of arbitration agreements, choice of arbitrators, and terms of reference, as well as ratification of arbitral awards.

The Arbitration Law, like any other law or regulation in Saudi Arabia, must comply with Sharia. An Enforcement Judge may invalidate any arbitration agreement or award that violates Sharia principles and rules, without a request from either party, as a matter of public policy. The Law of Arbitration prohibits parties or arbitral tribunals from violating Sharia rules, as discussed in Chapter III: Public Policy in Saudi Arbitration. Sharia principles and laws actually support commerce and trade between nations. Sharia Law never intended to hinder business, regardless of persistent misunderstandings in this regard.⁶⁴

⁶² *Id.*

⁶³ *Id.*

⁶⁴ “[W]e must assume the responsibility to explain and clarify to the world that the Islamic Sharia helps, and does not hinder at all, the achievement of justice. International observers have misunderstood and even demonized Islamic law and view it as mysterious and even repressive when it is not. Islam is not an unknown world with secrets and mysteries. In reality, most Saudi laws, such as the Companies Law, Labor Law, Intellectual Property Law, and E-commerce Law, are significantly similar to the laws applicable in all developed countries with only some minor differences.” Khalid Alnowaiser, *The New Arbitration Law and Its Impact on Investment in Saudi Arabia*, 29 J. INT’L ARB. 723 (2012) (Alnowaiser)

The following sections outline some highlights of the new Arbitration Law.

5.1. International Arbitration

The 2012 Law recognizes international arbitration and enforces international arbitration agreements and awards, in contrast to the 1983 Law. Saudi Arabia has followed the international trend and included domestic arbitration along with international arbitration in the new Arbitration Law.⁶⁵ Article 3 of the Law states:

“Arbitration is deemed to be international arbitration under these Regulations if the subject matter thereof relates to international trading, in the following cases:

(1) If the head office of each of the parties to arbitration is, at the time of signing the arbitration agreement, located in more than one country; accordingly, if one of the parties has several headquarters, preference shall be given to the headquarters which is most closely connected with the subject matter of the dispute; if one or both parties to arbitration have a non-definitive headquarter, preference shall be given to the place wherein he normally resides.

(2) If the headquarter of each of the parties to arbitration is located in the same country at the time of signing the arbitration agreement, and if one of the places whose particulars are mentioned hereunder exists outside this country:

(a) The place for conducting the arbitration as has been designated in the arbitration agreement, or if the manner for designating that place is specified in the arbitration agreement.

(b) The place of execution of a substantial part of the obligations underlying the commercial relationship between the two parties.

(c) The place which is most closely related to the subject matter of the dispute.

⁶⁵ Alammari, *supra* note 15 at p. 391.

(3) If the two parties have agreed to refer to an organization or a permanent arbitration tribunal or an arbitration center located outside the Kingdom.

(4) If the subject matter of the dispute covered by the arbitration agreement is related to more than one country.”

The new Law clearly allows the parties to refer their disputes to arbitration by incorporating standard form conditions into their agreements and by referencing the rules issued by arbitration organizations, institutions, permanent arbitration commissions or those agreed to by the tribunal. Articles 4 and 5 of the Law read as follows:

“Article 4: In cases where this Law allows the parties to arbitration to choose the procedure to be followed regarding a certain issue, this shall include the right of the two parties to authorize a third party to choose that procedure. A third party in this respect includes any individual, tribunal, organization, or arbitration center within the Kingdom or abroad.

Article 5: If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of said document, including those related to arbitration, shall apply, provided that they do not conflict with the provisions of Sharia.”

5.2. The Courts’ Supervision

The old arbitration Law made the courts instrumental to arbitration processes both before and after the rendering of arbitral awards. It required that the parties file requests to arbitrate (“arbitration instrument”) before the competent court specifying the subject matter of the dispute, the names of the parties, and the names of the

arbitrators, and giving their consent to have the dispute submitted to arbitration. The authority (the court) originally authorized to hear a given dispute would review the arbitration application and issue a decision approving or rejecting the arbitration instrument. The authority's clerk would then exercise control over all notifications and notices provided to parties and arbitrators under that law.⁶⁶

Arbitration thus functioned as part of the judicial system; the courts facilitated and approved arbitral processes and validated their outcomes. The competent court had to approve and authorize the arbitral instrument before the parties could select their arbitrators and begin arbitration processes.⁶⁷ The courts also had to ratify awards to make them final and enforceable. The supervising court would hear parties' objections to ascertain whether anything in the award would prevent its enforcement. It could reconsider the merits of the dispute in the course of the enforcement process, meaning a significant risk existed that the court would impose its own decision on the dispute notwithstanding the decision of the arbitral tribunal.⁶⁸ The court would then decide whether to approve the award, amend it, or even annul it and decide the dispute accordingly. Award enforceability depended on approval and finalization by the competent court.⁶⁹

⁶⁶ Art. 5, 6, and 8 of the old Law, *supra* note 3.

⁶⁷ Article 10 of the new law. See The Report, *supra* note 62 at p. 12.

⁶⁸ *Saudi Arabia Modernizes Arbitration Laws*, 2012, Saud Al-Ammari and Tim Martin, Blakes Bulletin, online source,

<http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1566>

⁶⁹ Articles 19,20, and 21.

The 2012 Arbitration Law eliminated most of the court's supervisory roles. It abolished the arbitral instrument and gave the parties the freedom to resort to arbitration based on their written contractual agreements or when disputes arise⁷⁰ without requiring court intervention.

5.3. Arbitration Agreement

The 2012 Arbitration Law defines "arbitration agreement" and distinguishes between arbitration clauses (e.g., a contractual clause in which the parties agree to submit future disputes to arbitration) and a separate arbitration agreement. Article 1 states:

"Arbitration Agreement: is an agreement between two or more parties to refer to arbitration all or certain disputes that arise or that may arise between them with respect to a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement."

Article 9 (1) of the Law gives contractual parties the right to either agree to arbitrate their disputes in agreements or to agree to arbitrate when disputes arise. It states:

"The arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract.

The arbitration agreement may also be concluded after the occurrence of a dispute, even if such dispute was the subject of an action before the

⁷⁰ Article 1-1.

competent court. In such a case, the agreement shall determine matters included in the arbitration; otherwise, the agreement shall be void.”

5.4. Severability of Arbitration Agreement

Article 21 of the Arbitration Law considers agreements to arbitrate separate agreements from main contractual agreements between parties. The concept of separability or severability aligns with internationally accepted arbitration practices. The doctrine of separability allows an arbitration agreement to survive the voidance of the main contract. It gives arbitral tribunals the authority to determine both their own jurisdiction and the validity or existence of arbitration clauses. Article 21 states:

“An arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of a contract that includes said arbitration clause shall not entail nullification of the arbitration clause therein, if such clause is valid.”

The Commercial Circuit Court under the Board of Grievances ruled regarding an arbitral proceeding between a Saudi party and a foreign party that claims parties agree to arbitrate are outside the jurisdiction of the court. The Report⁷¹ briefly describes this case as follows:

“In the highly publicized case between Jadawel International (a Saudi company specialising in purpose-built residential compounds) and Emaar Properties PJSC (a Dubai based property developer), the parties signed a conditional joint venture agreement in late 2003. In 2004, Jadawel filed a claim with the Board of Grievances alleging, inter alia, that Emaar had breached that agreement and had

⁷¹ *Supra* note 62 at p. 22.

failed to implement projects thereunder. Emaar contended that the conditions required for the further implementation of the joint venture agreement had not been met. The Board of Grievances held that it had no jurisdiction to hear the dispute, and the matter was referred to arbitration.”

5.5. Arbitral Tribunal

5.5.1 Qualifications

The old Law required that arbitrators be either Saudi citizens or non-Saudi Muslims, further stipulating that tribunal chairmen be acquainted with the legal rules and traditions of Saudi Arabia.⁷² It required that arbitrators possess the same qualifications as Saudi judges. This meant, in practice, that arbitrators had to be male and Muslim.⁷³ The old Law also stipulated that parties who agreed to apply Saudi Law in their contracts fulfill certain requirements. Saudi requirements for arbitrators under the old Law focused on the arbitrators’ faith, gender, and knowledge of Sharia laws, in contrast to the more flexible norms of international arbitration and Western laws.⁷⁴

The Arbitration Law of 2012’s arbitrator requirements are less stringent than those of the old Law. Article 14 states that arbitrators must satisfy the following conditions:

- “1. Be of full legal capacity;
2. Be of good conduct and reputation; and
3. Be a holder of at least a university degree in Sharia or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meet[s] this requirement.”

⁷² Alammari, *supra* note 15 at p. 392. See Saleh, Sameer *Commercial Arbitration in the Arab Middle East a Study in Sharia and Statute Law*, Graham & Trotman, 1984 p35. (Saleh).

⁷³ Alammari, *supra* note 15 at p. 392.

⁷⁴ Saleh, *supra* note 73.

Parties that agree to arbitrate according to the Saudi Arbitration Law ought to consider the nature of potential disputes and the sector of business. They should appoint arbitral panels with both relevant expertise in that sector and previous experience with arbitration and Saudi law.⁷⁵

5.5.2 Challenge to Arbitrators

The Law of Arbitration contains explicit provisions regarding the grounds for challenging the appointment or petitioning for the dismissal of an arbitrator in a tribunal. Article 16 limits said grounds to events involving concerns about an arbitrator's impartiality, independence, or qualifications that come to a party's knowledge after the appointment of the arbitrator.

“Article 16: (1) An arbitrator shall have no vested interest in the dispute. He shall also, from the time of his appointment and throughout the arbitration proceedings, disclose to the arbitration parties in writing any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, unless he has already informed them thereof.

(2) An arbitrator shall be barred from considering or hearing a case for the same reasons for which a judge is barred, even if neither party so requests

(3) An arbitrator shall not be dismissed except in circumstances that may raise a genuine doubt with respect to his impartiality or independence or except where he is not a holder of the qualifications agreed upon by the two parties, without prejudice to the provisions of Article 14 hereof.

⁷⁵ The Report, *supra* note 19 at p. 24. A woman became an arbitrator in Saudi Arabia for the first time. See Mulhim Almulhim, *The First Female Arbitrator in Saudi Arabia* <http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>.

(4) Neither of the two parties to arbitration shall be entitled to request that the arbitrator whom he has appointed or in who's appointment he participated be dismissed except for reasons that have become apparent subsequent to his appointment."

6. Arbitration Procedures

6.1 Decision Making

The 2012 Arbitration Law allows parties to select their own procedural rules including the rules of international arbitration institutions or ad hoc arbitration rules, as long as said rules do not contradict Sharia or the public policy of Saudi Arabia. It gives parties the power to select their own arbitration rules and institutions for domestic commercial arbitration.⁷⁶ Article 2 states: "...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..." This allows Saudi commercial parties to use the arbitration rules and institutions of their choosing in contracts with other Saudi parties for business within Saudi Arabia.⁷⁷ The Law also allows arbitral tribunals to select the procedural rules for the proceedings if the parties fail to agree.⁷⁸ Article 25 of the Law states:

"Article 25

1. The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including their

⁷⁶ Alammari, *supra* note 15 at p. 394.

⁷⁷ *Id.*

⁷⁸ *Id.*

right to subject such proceedings to effective rules of any organization, agency or arbitration center within the Kingdom or abroad, provided said rules are not in conflict with the provisions of Sharia.

2. In the absence of such an agreement, the arbitration tribunal may, subject to the provisions of Sharia and this Law, decide the arbitration proceedings as it deems fit.”

Article 25 gives the parties to arbitration the freedom to agree on the procedures the arbitral tribunal must follow, including the right to choose the procedural rules of any organization, institution or arbitration center, inside or outside Saudi Arabia, to govern the arbitration proceedings.⁷⁹ The Law sets out a thorough procedure that applies by default to all arbitral proceedings.⁸⁰ This procedure includes features such as pleadings, witness statements, expert reports, and hearings.

The Arbitration Law also grants the parties the ability to choose governing laws other than Saudi law for their contracts, whereas the old Law remained silent in this regard.⁸¹ Article 38 of the Arbitration Law allows the parties to choose the substantive law of their contract and requires the arbitrators to apply that law. It states:

“Article 38

1. Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:

a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the

⁷⁹ The Report, *supra* note 19 at p. 29.

⁸⁰ *Id.*

⁸¹ Alammari, *supra* note 15 at p. 396.

substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise.

b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute.

c. When deciding the dispute, the arbitration tribunal shall take into account the terms of the contract subject of the dispute, prevailing customs and practices applicable to the transaction as well as previous dealings between the two parties.”⁸²

The Law simply requires that arbitrators issue arbitral awards pursuant to Sharia and the “laws in force.”⁸³

The Law also requires arbitral tribunals constituted of more than one arbitrator to issue final arbitral awards by majority vote after confidential discussions. Article 39 provides more details regarding how tribunals should make their decisions. It states:

“2. If members of the arbitration tribunal fail to reach an agreement and a majority decision is not attainable, the arbitration tribunal may appoint a casting arbitrator within fifteen days. Otherwise, the competent court shall appoint a casting arbitrator.

3. Decisions regarding procedural matters may be issued by the presiding arbitrator, if so authorized by both parties in writing or by all members of the

⁸² “Shari’ah does not require that the substantive law applied in an arbitration be Shari’ah. Choosing a non-Islamic legal system where one of the disputing parties is not a Muslim is considered valid by the various Islamic schools of jurisprudence. However, provisions of the chosen substantive law, which are contrary to express stipulations of Shari’ah are unenforceable. Therefore, parties and arbitrators need to apply the chosen law in their contracts and awards in a way that does not violate the principles of Shari’ah. Failure to do so will adversely affect the enforceability of an award in Saudi Arabia.” *Id.*

⁸³ *Id.*

arbitration tribunal, unless otherwise agreed by both parties.

4. If the arbitration tribunal is authorized to settle the dispute amicably, its award shall be made unanimously.

5. The arbitration tribunal may issue provisional or partial awards, prior to making the final award ending the entire dispute, unless the parties agree otherwise.”

6.2 Time limits

The old Law required that arbitral tribunals issue their arbitral awards within ninety days of commencing arbitration, unless the parties had agreed to follow another timeframe for the proceedings in the agreement to arbitrate or the competent authority or the arbitral tribunal extended the deadline for the award’s issuance.⁸⁴ Either party was entitled to commence a separate proceeding before the competent authority if the stated period elapsed and the tribunal did not issue an award. This allowed parties to ignore arbitration processes, which, usually, rendered arbitration agreements and arbitral awards ineffective.⁸⁵

The Arbitration Law of 2012 allows the parties to establish the timeframe of arbitral proceedings in their agreements. It also allows arbitral tribunals to extend time limits up to six months without the parties’ approval. The Law states:

“Article 40

⁸⁴ Alammari, *supra* note 15 at p. 397.

⁸⁵ *Id.*

1. The arbitration tribunal shall render the final award ending the entire dispute within the period agreed upon by both parties. In the absence of agreement, the award shall be issued within twelve months from the date of commencement of arbitration proceedings.

2. In all cases, the arbitration tribunal may extend the arbitration period provided that such extension does not exceed six months, unless the parties agree on a longer period.

3. If the arbitration award is not issued within the period provided for in the preceding paragraph, either party may request the competent court to issue an order specifying an additional period or terminating the arbitration proceedings. In such event, either party may file a case with the competent court.

4. If an arbitrator is appointed in place of another in accordance with the provisions of this Law, the period set for the award shall be extended by thirty days.”

The procedural rules parties agree to determine the deadlines for rendering arbitral awards in practice. The Article quoted above applies in the absence of such agreements.⁸⁶

Article 37 of the Arbitration Law also allows tribunals to either delay or continue proceedings if a matter arises that falls outside their jurisdictions.⁸⁷ It states:

“Article 37

If, in the course of the arbitration proceedings, a matter outside the jurisdiction of the arbitration tribunal arises, or if a document submitted to it is challenged for forgery or criminal proceedings were initiated for its forgery or

⁸⁶ The Report, *supra* note 62 at p. 36.

⁸⁷ *Id.*

for any other criminal act, the arbitration tribunal may continue reviewing the subject of the dispute if it deems deciding such matter, on the forgery of the document or on the other criminal act is not necessary for deciding on the subject matter of the dispute. Otherwise, the tribunal shall stay the proceedings pending a final judgment in this regard, and such decision entails the suspension of the deadline determined for rendering the arbitration award.”

6.3 Formalities in Arbitral Awards

The Arbitration Law requires that arbitral tribunals issue arbitral awards in writing along with their reasoning and the signatures of the arbitrators. It only requires that “the majority of arbitrators,” sign awards issued by tribunals with more than one arbitrator, “provided that the reasons of the dissenting arbitrator are recorded in the case file.”⁸⁸ The Law also stipulates that arbitral awards list their issuance dates, their locations of issuance, and the names and addresses of the parties. The Law states:

“Article 42

1. The arbitration award shall be made in writing and shall be reasoned and signed by the arbitrators. In case of multiple arbitrators, the signatures of the majority of arbitrators shall be sufficient, provided that grounds for the non-signing of the minority be recorded in the minutes.
2. The arbitration award shall include the date of pronouncement and the place of issuance; names and addresses of parties to the dispute; names of the arbitrators as well as their addresses, nationalities and capacities; a summary of the arbitration agreement and of the parties' statements, pleadings and documents; a summary of the expert report (if any); and text of the award. The

⁸⁸ The Report, *supra* note 62 at p. 36.

award shall also determine arbitrators' fees, costs of arbitration and their distribution between the parties.

The 2012 Arbitration Law also departs significantly from the 1983 Arbitration Law when it comes to challenges to arbitral awards. The old Law gave parties the option of resorting to the trial court to challenge awards; the trial court could then approve, edit, or annul awards. The new Law eliminates trial court jurisdiction over arbitration-agreed contracts except regarding the enforcement of awards. The Arbitration Law gives the court of appeal of the court originally authorized to hear the dispute sole jurisdiction to set aside awards that losing parties challenge based on Article 50. The old Law also gave courts the power to review the merits of awards as they deemed fit. The new Law, by contrast, stipulates that the courts of appeal can only adjudicate claims regarding the setting aside of the awards; they cannot examine the facts or the subject matter of the cases. Courts may, however, independently annul any awards that conflict with Sharia law or public policy, that contradict prior agreements between the parties, or that relate to matters that cannot be resolved through arbitration pursuant to the new Law.⁸⁹

⁸⁹ Article 8 of the new law.

7. Enforcement of The Award

The 2012 Arbitration Law considers arbitration awards rendered in accordance with the provisions of the Law final and enforceable. It does not allow the parties to appeal such awards. Article 49 states: “[a]rbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law.” Article 52 states: “the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable.”

Actions to nullify arbitral awards must accord with Article 50 of the Law. The Article reflects the grounds for award nullification listed in Article IV of the New York Convention. Article 50 of the Law states:

“Article 50:

1. An action to nullify an arbitration award shall not be admitted except in the following cases:
 - a. If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term;
 - b. If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;
 - c. If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;
 - d. If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;
 - e. If the composition of the arbitration tribunal or the appointment of the

arbitrators is carried out in a manner violating this Law or the agreement of the parties;

f. If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration.

g. If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it.

2. The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law.

3. The arbitration agreement shall not terminate with the issuance of the competent court decision nullifying the arbitration award unless the arbitration parties agree thereon or a decision nullifying the arbitration agreement is issued.

4. The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute.”

All grounds for nullification are procedural, except for those related to the defense of public policy and violations of Sharia.⁹⁰ The Law stipulates that parties who wish to invalidate arbitral awards submit applications for nullification to the competent authorities within sixty days of receiving notification of the awards.⁹¹ Article 51 states:

⁹⁰ The issue of public policy challenge is discussed in detail in Chapter: Public Policy In Saudi Arbitration of this dissertation.

⁹¹ Alammari, *supra* note 15 at p. 400.

“Article 51

1. An action for nullification of the arbitration award shall be filed by either party within sixty days of the date of notification of said party of the award; and such action is admissible even if the party invoking nullification waives his right to do so prior to the issuance of the arbitration award.
2. If the competent court approves the arbitration award, it shall order its execution and its decision shall be non-appealable. If, however, the court decides to nullify the award, its decision shall be subject to appeal within thirty days of the date of notification of said decision.”

The Law gives the competent authority the jurisdiction to issue orders to enforce awards. The Implementing Regulations of the Arbitration Law⁹² define the competent authority as the “the court of appeal that originally considers the dispute.” The Law states:

“Article 53

The competent court, or designee, shall issue an order for enforcement of the arbitration award. The request for enforcement of the award shall be accompanied with the following:

1. The original award or an attested copy thereof.
2. A true copy of the arbitration agreement.
3. An Arabic translation of the arbitration award attested to by an accredited authority, if the award is not issued in Arabic.

⁹² The Implementing Regulations For The Arbitration Law was issued by a Council of Ministers Resolution no. 541 dated 26/08/1438H corresponding 22/05/2017. Appendix I. The Implementing Regulations are not officially translated to English. The attached translation is a courtesy of the Law Firm of Khoshaim and Associates in cooperation with Allen & Overy. The author has the approval of Mr. Zeyad Khoshaim, the managing partner, to use the translation for the publication purposes.

4. A proof of the deposit of the award with the competent court, pursuant to Article 44 of this Law.”

The Law states that the competent authority should not issue enforcement orders until it verifies that awards meet the requirements it specifies. Article 55 (2) reads as follows:

“The order to execute the arbitration award under this Law shall not be issued except upon verification of the following:

- a. The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia;
- b. The award does not violate the provisions of Sharia and public policy⁹³ in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.
- c. The party against whom the award is rendered has been properly notified of its issuance.”

⁹³ “The most commonly cited example of why a Saudi judge would refuse to enforce an arbitral award is because it contains an order to pay interest, which is strictly forbidden under *Shari'a* law. Other examples of public policy grounds for rejecting an application for the enforcement of an arbitral include: where the dispute arose under an agreement for the provision of forbidden goods or services; or contractual dealings with the State of Israel, which is the subject of a boycott by the Saudi Government. However, as we shall see, Saudi public policy concerns are not limited to these few oft-cited examples, although there is no codification in Saudi Arabia of what constitutes public morals, interests and customs” The Report, *supra* note 62 at p. 42. See Chapter: Public Policy in Saudi Arbitration for more details.

The Law stipulates that the Execution Court enforce the award and compel the losing party to abide by the award after the competent authority issues the order of enforcement.⁹⁴

Some uncertainty remains in the Arbitration Law when it comes to enforcing international arbitration awards. The Law affirms that the competent authority will give due regard to Saudi obligations under international agreements, but it includes no additional statements regarding the enforcement of international awards rendered in foreign jurisdictions. Explaining what the Law means regarding the enforcement of international awards in Saudi Arabia thus falls to the Saudi courts; a Saudi court recently adopted a very pro arbitration approach, enforcing an international arbitral award issued in Japan against a Saudi party.⁹⁵ This case should bolster international arbitration in Saudi Arabia.

8. Arbitration in the Execution Law⁹⁶

The new Arbitration Law has made the enforcement of arbitral awards similar to the enforcement of court decisions. The Law of Execution created the circuits of execution

⁹⁴ Execution Law, enacted by Royal Decree No. 53/M dated 13/8/1433H (7/2/2012).

[https://iservices.scj.gov.sa:9113/pdf/a/004-](https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/001-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf)

[%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/001-](https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/001-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf)

[%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf](https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf) (Arabic version) The Execution Law made the jurisdiction of enforcing arbitral awards to the Execution Judge. In its articles: 9, 11, 12, 13, and 14, the Execution Law requires the execution judge to enforce any applicable arbitral award in the same level of any judgment. See Atlas, *supra* note 24 at p. 74.

⁹⁵ For details of this case please refer to Chapter: Public Policy in Saudi Arbitration of this dissertation.

⁹⁶ There is not official translation of the Execution Law. Some commentators chose to name it the Enforcement Law and other chose to name it Execution Law. Regardless of the best option, the author chooses "Execution Law".

as part of the general courts.⁹⁷ The execution courts are responsible for overseeing the enforcement of judgments issued by various courts in Saudi Arabia, as well as awards issued via arbitration and by administrative tribunals.⁹⁸ Domestic and international arbitration award enforcement falls under the purview of the execution courts. Article 9(2) of the Law states: “[c]ompulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are...Arbitral awards that include enforcement orders in accordance with the Law of Arbitration.”⁹⁹ Execution judges¹⁰⁰ have the jurisdiction to decide whether to enforce enforcement orders issued by competent courts.¹⁰¹ Articles 11 and 12 of the Enforcement Law list several additional requirements. Article 11 states:

“[s]ubject to relevant treaties and conventions, an execution judge may only enforce on the basis of the principles of reciprocity and after being satisfied that:

- (i) Saudi courts do not have jurisdiction to adjudicate the dispute,
- (ii) the litigants were represented and were given the opportunity to defend themselves,
- (iii) the judgment or order is final in accordance with the law of the court that issued it,
- (iv) the judgment or order does not contradict a judgment or order issued on the same subject by a competent judicial authority in the Kingdom, and

⁹⁷ See note 95.

⁹⁸ Alammari, *supra* note 15 at p. 403.

⁹⁹ *Id.*

¹⁰⁰ “who is defined as the ‘head of the enforcement circuit and its judges, the judge of [the] enforcement circuit, or a judge with the power of an enforcement judge” Art. 1 of the Execution Law. See Alammari, *supra* note 15 at p. 403

¹⁰¹ *Id.*

(v) the judgment or order does not contain anything that contradicts Saudi public policy.”

Saudi law, as a matter of reciprocity, only requires that courts enforce foreign court decisions if the courts in the countries where the decisions originate enforce Saudi judgments. Article 11(5) of the Implementing Regulations of the Enforcement Law states: “[t]he execution judge shall ascertain by an official statement from the Ministry of Justice that the country issuing the foreign order or judgment has a reciprocal relationship with the Kingdom.”¹⁰² Execution judges must, in short, determine whether the Ministry of Justice regards a given country as a reciprocal countries on a case-by-case basis. International arbitration treaties to which the Kingdom is a party should, in theory, establish the necessary reciprocity. The law indicates that membership to a convention suffices as reciprocity, which means “arbitration awards issued by tribunals seated in countries that have ratified either of those conventions should satisfy the requirement of reciprocity since Saudi Arabia has ratified those same conventions and has acquired similar reciprocal rights.”¹⁰³ This, as Alammari points out, has not always been the case:

“There has been at least one case where the Board of Grievances demanded a specific example of an enforcement of a Saudi judgment in a U.S. court. The party seeking enforcement of its arbitral award in Saudi Arabia was not able to do so, but instead provided an opinion from the Legal Office of the U.S. State Department that U.S. courts would recognize

¹⁰² *Id.*

¹⁰³ *Id.*

and enforce Saudi judgments. The Saudi court was not satisfied by that legal opinion and refused to recognize and enforce the international arbitration award issued in the United States.”¹⁰⁴

Different execution courts actually treat the reciprocity requirement in different manners. The author visited the execution circuits in two Saudi cities, Riyadh and Jeddah, to see how the courts applied this requirement. Interviews with judges in charge of enforcing international arbitral awards made it clear that the courts do not have a unified system for authenticating reciprocity status. One of the judges wrote to the Ministry of Justice every time he faced a decision regarding the enforcement of an international arbitral award to ask about the status of the issuing country. He would even write twice if he received two awards issued in the same country. Another judge, by contrast, simply checked the status of the New York Convention and any other conventions on their official websites to ensure that the countries issuing awards were party to the same conventions as Saudi Arabia.

- **Conclusion**

The new Saudi Arbitration Law is a significant milestone; it markedly improves arbitration law and practice in the Kingdom. It uses the UNCITRAL Model Law as its framework, applying modern international practices to the Saudi system. It limits the power of the Saudi courts to intervene or supervise award making processes, requiring that the courts enforce arbitral awards issued in accordance with the Law without reviewing their merits. It likewise recognizes the legitimacy of international arbitration

¹⁰⁴ Alammari, *supra* note 15 at p. 404.

institutes and centers and allows the parties to refer to them in their arbitration agreements. Many consider the Law a great step forward in the effort to foster a better legal environment for business and investment.

The courts are responsible for ensuring the success of the Arbitration Law. They can maximize arbitration's effectiveness and success as a means of dispute resolution by limiting the requirements and restrictions they place upon it.

CHAPTER III:

Public Policy in Arbitration

PART 1: Public Policy in Arbitration

1. Introduction

Parties to international commercial agreements resort to arbitration to settle contractual disputes. Businesses cannot function properly without practical systems of adjudication.¹ They submit to arbitration and thus opt to receive final, proof-based judgments of their respective claims.² Parties involved in international commercial transactions often prefer arbitration to litigation, mediation, conciliation, and other means of dispute resolution because of arbitration's unique features and advantages. For example, arbitration is efficient and flexible,³ and the finality of arbitral awards is comparable to that of court judgments. Arbitration also enables the parties involved to avoid local courts and laws.⁴

¹ Thomas Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. Miami L. Rev. 773 2001-2002, p. 773. (The Ballad).

² Frances Kellor, *ARBITRATION IN ACTION A CODE FOR CIVIL, COMMERCIAL AND INDUSTRIAL ARBITRATION*, Harper & Brothers Publishers, New York, 1941, p. 3. (Arbitration in Action); "Parties who go to ... international arbitration do so in the expectation that... the proceedings will end with an award. They also expect that... the award will be final and binding upon them. This expectation is reflected in both international and institutional rules of arbitration". Redfern and Hunter on International Arbitration, Oxford University Press, 4th ed, at 512 (Redfern).

³ Redfern, *id.* at p. 4; Thomas E. Carbonneau, *CASES AND MATERIALS ARBITRATION LAW AND PRACTICE*, 6th ed, West 2007, p. 1. (Carbonneau: Cases); Gary B. Born, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE*, Kluwer Law International, 2012, p. 3. (Born: Law and Practice), *See generally Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, Michael H. Strub, Jr 68 Tex. L. Rev. 1031 1989-1990 (Strub). "Arbitration's most significant advantage over litigation may be that arbitration offers parties a neutral setting for dispute resolution. Parties in such settings need not rely on the law of an unfamiliar forum or fear local prejudice." *Id.*

⁴ Margaret L. Moses, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, Cambridge, 2nd ed, 2012, p. 211. (The Principle and Practice). "Parties include an arbitration clause in international contracts because of the relatively certain enforceability of the award. ... [S]o many

The international commercial community has recognized the need for practical and reasonable forms of dispute resolution in international commercial transactions. Numerous conventions, treaties, and legal frameworks have been created to facilitate dispute settlement.⁵ Many such treaties and conventions – with the exception of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – concern specific geographical jurisdictions,⁶ and this makes arbitration an ideal choice for parties engaged in commercial transactions. Arbitration, unlike traditional litigation, gives the parties involved in international commercial transactions the flexibility to create their own laws and adjudication vehicles.⁷

The United Nations adopted the New York Convention in 1958,⁸ and many countries have since signed and ratified it.⁹ The Convention succeeded the previous Geneva Convention

countries have adopted international conventions that favor enforcement – that is, they provide only narrow grounds for refusing to enforce.” *Id.*

"In many states, local courts have little experience in resolving complex international disputes and face serious challenges in reliably resolving commercial page disputes. Moreover, in some states, basic standards of judicial integrity, competence and independence are lacking." Born: Law and Practice, *supra* note 3, at p. 12-13

⁵ Examples of relevant conventions include: 1991 Mercosur Treaties, 1979 Montevideo Convention, 1975 Panama Convention, 1972 Moscow Convention, 1969 Vienna Convention, 1965 Washington Convention, 1961 Geneva Convention, 1927 Geneva Convention, 1923 Geneva Protocol;

<http://www.newyorkconvention.org/other-relevant-conventions>; 1952 Arab League Convention, 1987 Amman Convention; <http://www.kluwerarbitration.com/CommonUI/conventions.aspx>

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (New York Convention OR the Convention)

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. Appendix II

⁷ The concept of party autonomy enables the parties to international transactions to create and customize their own ways of settling disputes. Parties do not want to be subject to other parties court systems; each fears the other's "home court advantage". See The principle and Practice, *supra* note 4, at p.1.

⁸ The Convention entered into force on June 7, 1959, New York Convention Art XII.

⁹ The database for the United Nations Commission on International Trade Law (UNCITRAL) for the Convention parties shows that, as of October 2014, 152 countries had become parties to the Convention. UNCITRAL Texts & Status; Status; Convention on the Recognition and Enforcement of Foreign Arbitral Awards: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html "The Convention was designed to enhance the enforceability of international arbitration agreements and awards. It is widely regarded as having contributed to the significant increase in the use and efficacy of international commercial arbitration in recent decades" Gary B. Born, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING, Kluwer Law International, 4th edition, 2013 at p.140 (Drafting and Enforcing)

on the Execution of Foreign Arbitral Awards 1927.¹⁰ The New York Convention has some flaws, but it remains the leading arbitration convention and is widely considered the most significant vehicle for arbitration in international commercial transactions.¹¹

While the Convention contains many important features, the enforcement of foreign arbitral awards remains its cornerstone.¹² Article II of the Convention stipulates that every signatory state must recognize parties' arbitration agreements as a means for resolving disputes.¹³ Signatories to the Convention agree to recognize and enforce arbitral awards that are rendered according to the Convention.¹⁴ The Convention also limits the circumstances in which parties may seek annulment¹⁵ of international arbitral awards.¹⁶ Without a review request made by the losing party, signatory states can only refuse to enforce foreign arbitral awards in two circumstances: (1) if competent local authorities deem the subject matter inarbitrable,¹⁷ and (2) if

¹⁰ September 26, 1927, 92 L.N.T.S. 302 (Geneva Convention); Sturb, *supra* note 3, at p. 1044.

¹¹ Sturb, *id.* at p. 1032, citing Berg, *Recent Enforcement Problems Under the New York and ICSID Conventions*, 5 ARB. INT'L, 2, 2 (1989). "Nothing equivalent to the New York Convention's essentially global enforcement regime for arbitral awards yet exists with respect to national court judgments" Drafting and Enforcing, *supra* note 9, at p. 150.

¹² *Id.* at 1031, citing Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 L. & POL'Y INT'L Bus. 325, 325 (1987). The "Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought...[and] ...to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, *supra* note 6, Art. I.

¹³ New York Convention, Art II provides that "[e]ach Contracting State shall recognize an agreement ...under which the parties undertake to submit to arbitration... differences ...[that] have arisen or... may arise between them." *Id.*

¹⁴ *Id.* Art III states that ([e]ach Contracting State shall recognize arbitral awards as binding and enforce them). *Id.*

¹⁵ "The purpose of challenging an award before a national court ... is to have it modified in some... or ...to have that court declare that the award is to be disregarded... in whole or in part). The award will, then (be treated as invalid and accordingly unenforceable. Redfern, *supra* note 2, at p. 585-86

¹⁶ Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, 2nd ed., 2014. (Born: ICA); In particular, those limits are to the place where the award was made or under the law of which the award was made. *Id.* at p. 3164

¹⁷ New York Convention, *supra* note 6, Art. V (2)(a)

competent local authorities rule that enforcing the award would violate public policy.¹⁸ The public policy grounds for nullifying awards acknowledges the right of states and their courts to exercise ultimate control over the arbitral process.¹⁹

Saudi Arabia joined 93 other members of the United Nations as a signatory of the New York Convention in 1994.²⁰ Saudi lawmakers have enacted two separate arbitration laws over the course of the country's history: the Arbitration Law of 1983²¹ and the Arbitration Law of 2012.²² They enacted these laws to support the arbitration process and create a favorable environment for arbitration. The Enactment of the New Arbitration Law allowed Saudi lawmakers to create an arbitration regime that is recognized as a highly advanced practical law compared to other preceded regulations

¹⁸ *Id.* "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country". *Id.* Art V (2) b. The Principle and Practice, *supra* note 4, at p. 211. "New York Convention has contributed to the growth of international arbitration because parties in Contracting States are confident that if they prevail in an arbitration, they will obtain remedy". That is because it is the "predominant arbitration enforcement convention" *Id.* at 211-12. The Convention, in Art. V, lists the circumstances in which an award may be annulled. The award could be annulled if the moving party proves: the invalidity of the arbitration agreement, a party did not receive proper notice of the procedures, a party could not present its case, the award exceeded the scope of arbitration, the arbitral authority did not meet the standards of the agreement or the law, or the award was not binding. The Convention, *supra* note 6, Art. V (1).

¹⁹ Audley Sheppard, *Public Policy and the Enforcement of Arbitral Awards* TDM 1 (2004), www.transnational-dispute-management.com/article.asp?key=48 (Sheppard).

²⁰ Kristin Roy, *The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Nondomestic Arbitral Awards?*, 18 *Fordham Int'l L.J.* 920 1994-1995, at p. 920 (Roy). "On April 19, 1994, Saudi Arabia acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" *Id.* Saudi Arabia thus became the 94th party to the Convention. *Id.* See The listed countries to the Convention: <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>

Saudi Arabia's vast oil and natural gas resources," have increased non-domestic investor interest in the country. *Id.* at p. 921.

²¹ Royal Decree No. M/46 in 12/7/1403H enacted the old Arbitration Law (04/26/1983) and the decision of Council of Ministers of Saudi Arabia no. 7/2012/M in 8/9/1405H (05/28/1985) issued its Implementing Regulations. The mentioned laws were not the only legislatures on arbitration. Other laws and Royal Orders have also treated arbitration in a way or another.

²² Royal Decree No. M/34 in 24/5/1433H enacted the new Arbitration Law (04/16/2012) and a Board of Ministers Resolution issued its Implementing Regulations on May 22, 2017.

of arbitration. Indeed, the Saudi legislature, along with many other members of the New York Convention, has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration.

Like many other countries, Saudi Arabia has certain reservations about the Convention. A special feature of Saudi Arabia is that the country's laws are governed by Sharia Law. Saudi Arabia represents the heart of the Islamic world and is the birthplace of Islam; thus, its leaders have chosen to establish laws based on Islamic teachings and Sharia rules in every aspect of legislation. In all conventions and treaties to which Saudi Arabia is a member, the country reserves any Islamic controversy that it encounters in any convention or treaty that it signs. Sharia Law has played a major role in the development of Saudi Arabian legislation.²³ Even while ratifying the Convention and adopting the UNCITRAL Model Law, Saudi Arabia has considered Sharia Law to be synonymous with its public policy.

This chapter considers the application of public policy as a barrier to the recognition and enforcement of international arbitral awards in Saudi Arabia. It compares modern international arbitration practices to the Saudi Arbitration Law as understood in the context of Sharia principles. The chapter begins by addressing the

²³ The Islam came to place in 622 in the year of which Prophet Muhammad, Peace Be Upon Him (PBUH), received the Islam prophecy. Reservations in international treaties and conventions mean unilateral statements purporting to exclude or modify the legal effect of certain provisions of the convention or the treaties in their application to the reserving State. Vienna Convention on the law of treaties of 1969, Art. 2 (d). *See in general* Marko Milanovic and Linos-Alexander Sicilianos, *Reservations to Treaties: An Introduction*, EJIL (2013), Vol. 24 No. 4, 1055-1059.

meaning of public policy in international arbitration; it then examines public policy in Saudi Arabia, focusing on how Sharia principles inform and shape Saudi public policy.

2. Public Policy in International Arbitration

Public policy plays a decisive role in any judicial system. It provides permission or establishes constraints where statutes and laws remain silent.²⁴ Parties' agreements generally cannot alter the rules of public policy or cross the boundaries it establishes.²⁵ National courts, as guardians of public policy, may therefore relieve parties of their obligations or assign them duties based on state public policy.²⁶

Arbitration conventions, and the New York Convention in particular, aim to make arbitration as reliable a means of dispute resolution as possible. They foster uniformity and seek to eliminate obstacles to the enforcement of international arbitral awards – at least when it comes to national court supervision.²⁷

²⁴ Mark Buchanan, *Public Policy and International Arbitration*, 26 AM. BUS. L.J. 511 (1988-1989), at p. 513. (Buchanan). “[T]he concept of public policy is often used to designate “imperative” or mandatory rules, from which the parties cannot derogate” Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, Article published in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, CONGRESS SERIES, Kluwer Law International, at p. 260, (1987). (Lalive)

²⁵ Buchanan, *Id.* at p. 513

²⁶ *Id.*

²⁷ Mohamed Al-Nasair, *The Effect Of Public Policy On The Enforcement Of Foreign Arbitral Awards In Bahrain And UAE*, Sweet & Maxwell, 2013, INT. A.L.R. 2013, 16(3), p. 90. (Alnasair). The Convention leaves the possibility open for enforcement courts to define public policy widely or narrowly, although the drafters of the New York Convention preferred a narrow application. See Sheppard, *supra* note 19. Other conventions also deal with the principle of public policy. The Geneva Convention of 1927, for example, stipulates the enforceability of any award unless it runs “contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon” Art. 1(e); Inter-American Convention On Extraterritorial Validity of Foreign Judgments And Arbitral Awards (1979 Montevideo Convention of 1979) states: “The foreign... awards... shall have extraterritorial validity... if ... They are

The New York Convention assigns the challenging party the burden of establishing the initial grounds for disputing the enforcement of an arbitral award. There are two possible grounds that parties may use to argue for setting aside arbitral awards. The first is articulated in several provisions of Article V(1), including: the arbitration agreement was invalid;²⁸ the party did not receive proper notice of proceedings or could not present its case;²⁹ the rendering of the award did not accord with the parties' agreement to arbitrate;³⁰ the composition of the arbitral tribunal did not adhere to the parties' agreement or to the law of the state;³¹ or the award was not binding or final in the state in which the tribunal rendered it.³²

The second ground for arguing to reject an arbitral award is articulated in article V(2) of the Convention and depends on Court findings. The Convention allows competent authorities in signatory countries to annul arbitral awards, even without the request of the losing party to do so, in two scenarios: if the country's law defines a

not manifestly contrary to the principles and laws of the public policy (ordre public) of the State in which recognition or execution is sought." *Id.* Art. 2 (h). See, Sheppard, *id.*

The ICSID Convention of 1965 references the concept of public policy through examples. Art. 52 of the Convention establishes some grounds for annulment, including: corruption on the part of a member of the tribunal; serious departure from a fundamental rule of procedure; and failure to state the reasons on which the award is based.

<https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/ICSID%20Convention%20English.pdf> (accessed October 2016).

²⁸ Article V (1) a.

²⁹ Article V (1) b.

³⁰ Article V (1) c.

³¹ Article V (1) d.

³² Article V (1) e.

dispute as inarbitrable;³³ or if the enforcement or recognition of an award would violate the state's public policy.³⁴

National laws principally – if not entirely – define the available grounds for annulling international arbitral awards in enforcing states.³⁵ The principles of public policy remain somewhat vague and difficult to define.³⁶ The Convention, like other arbitration conventions, should be interpreted as imposing limited and implied restrictions to the invalidity of arbitration agreement or arbitral awards on the grounds that competent authorities, where the recognition or enforcement of awards is sought, may invoke public policy challenge to annul awards.³⁷ Many courts and commentators have concluded that the Convention's limitations should be interpreted narrowly, so that arbitration does not lose its function.³⁸

The public policy exception to the recognition and enforcement of arbitral awards has a negative effect on arbitration. It deprives arbitration from achieving its goal and strips it of finality and enforceability. The competent authorities can annul an arbitral award and render it unenforceable, if the award is considered to violate public

³³ Article V (2) a.

³⁴ Article V (2) b.

³⁵ Born: ICA, *supra* note 16, at p. 3166. Each State has its own concept of what is required by its 'public policy' (or *ordre public*, in the civil law terminology) Redfern, *supra* note 2, at p. 614.

³⁶ Sheppard, *supra* note 19. "This leads to uncertainty and unpredictability, which encourages the unsuccessful party in the arbitration to resist enforcement of the award on grounds of public policy" *Id.*

³⁷ *Id.* note 5 at 3164.

³⁸ Albert Jan van den Berg, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA Congress Series, Kluwer Law International, 2005. (New Horizon) The grounds for refusing to enforce an the award enumerated in Art V should thus be construed narrowly. *Id.* at p. 292; (concerning the (...) Art. V(2) to be applied..., it means that a court accepts a public policy violation in extreme cases only, thereby using the distinction between domestic and international public policy). *Id.*

policy. The public policy challenge prevents the normal application of a party's autonomy in choosing arbitration as a means for settling disputes via a method (arbitration) that would otherwise be considered an efficient alternative to litigation.³⁹

The broad application of the public policy exception enables the local competent authorities (1) to reject the application of foreign arbitration laws that would otherwise be applicable, according to the conflict rule of the forum of arbitration, and (2) to refuse the recognition of foreign acts whenever the application of such an act is found to be incompatible with the fundamental principles of the state in which the award is to be enforced.⁴⁰

The New York Convention leaves space for local courts to adopt certain principles and standards for the annulment of awards, but it does not enumerate all possible grounds for annulment.⁴¹ The variability in the application of the public policy exception stems, in part, from the varying ways in which nations define public policy.

The English House of Lords defined public policy in 1853 as:

"that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public

³⁹ Lalive, *supra* note 24, at p. 261.

⁴⁰ *Id.* "It is generally admitted that such exception only comes into play when certain conditions are fulfilled, which (in spite of a variety of formulations or technical expressions) express a very simple idea: the community concerned (here a national community, a State) must feel sufficiently concerned to impose the respect of its fundamental rules." *Id.* at p. 262.

⁴¹ Because of broad meaning of the concept of the public policy, many authors, as well as conventions, do not give precise and clear meaning of the concept. "The public policy exception is notoriously difficult to define, and creates the possibility of expansive and unpredictable grounds for resisting the enforceability of forum agreements. These vary from state to state, often depending on local traditions and concerns" Drafting and Enforcement, *supra*, at 137. Some authors choose to define it as the: "protecting the forum's own vital interests" W. Laurence Craig, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, Oceana Publications, 2000, 3rd Edition, at p. 495 (Craig ICC)

good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law."⁴²

The Swiss Federal Supreme Court has defined public policy as consisting of fundamental legal principles, a departure from which would violate the Swiss legal and economic system.⁴³ The Singapore Court of Appeal likewise reasoned that “illegality and public policy are two strands of the same principle.”⁴⁴ The Milan Court of Appeal has taken a more transnational approach; it described international public policy as a “body of universal principles shared by nations of similar civilization[s], aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.”⁴⁵ Such differing definitions of public policy have allowed different

⁴² Egerton v. Earl Brownlow, 4 H.L. Cas. 1, 196 (1853)

⁴³ Redfern, *supra* note 2, at p. 614, citing: Swiss Federal Supreme Court of 18 September 2001 (2002) Bull ASA 311.

⁴⁴ Born: ICA, *supra* note 16, at p. 3313. *AJU v. AJT*, [2011] SGCA 41, ¶20 (Singapore Ct. App.) (“any agreement to stifle the prosecution of a non-compoundable offence would be illegal (and against public policy) as such an agreement would undermine the administration of justice”). *Id.* The Indian Supreme Court, in *Oil & Natural Gas Corp. Ltd v. Saw Pipes Ltd*, [2003] INSC 236, also defined the public policy exception if (award is contrary to public policy if it is “patently illegal”) *Id.* Judgment of 20 August 2008, 9 Ob 53/08x (Austrian Oberster Gerichtshof) (award can be set aside if it amounts to ordre public violation, contrary to fundamental values of Austrian legal system); The Milan Court of Appeal, in Judgment of 29 April 2009, *CG Impianti v. Bmaab & Son Int’l Contracting Co.*, decided that (award may be annulled if it violates “fundamental principles and values of the forum’s legal system (from the constitutional ones down)”); *Id.* citing: XXXV Y.B. Comm. Arb. 415, 416-17 (Milan Corte d’Appello) (2010); In Judgment of 22 March 2006, *Uniprex SA v. Grupo Radio Blanca*, SAP M 2572/2006, Legal Ground No. 3 (Madrid Audiencia Provincial) (public policy, defined as “public, private, political, moral and even religious legal principles that are absolutely mandatory for the preservation of the societal model for a nation at a given time,” covers “arbitrary, patently unreasonable or unreasonable decisions”); *Id.* The Russian S. Arbitrazh Court Judgment of 29 September 2005 states that (award may be annulled if it violates “fundamental principles of the legal order, generally recognized principles of morality and ethics, as well as the national defense concerns”) *Id.* citing , XXXIII Y.B. Comm. Arb. 683 (Russian S. Arbitrazh Ct.) (2008); In *Apa Ins. Co. Ltd v. Chrysanthus Barnabas Okemo*, Misc. Application No. 241 of 2005 The Nairobi High Court decided that the concept of the public policy occurs when an award is (“(a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of Kenya or (c) contrary to justice or morality”). *Id.* (Nairobi High Ct. 2005).

⁴⁵ *Allsop Automatic Inc. v. Tecnoski snc*, Corte di ppello [Court of Appeal], Milan, 4 December 1992. Albert Jan van den Berg, *YEARBOOK COMMERCIAL ARBITRATION*, Vol. 22 Kluwer Law International 1997 p. 725 - 726. (Berg: Yearbook)

national courts to apply the public policy exception as grounds for the annulment of arbitral awards differently.

The U.S. judiciary has generally supported a narrow application of the public policy exception. The U.S. Eleventh Circuit Court of Appeal, for example, held in *Brown v. Rauscher Pierce*⁴⁶ that courts could refuse to enforce arbitration awards where enforcement would violate the public policy. This court⁴⁷ defined public policy as “explicit, well defined, dominant, and ascertained by reference to the laws and legal precedents principle that is not from general considerations of supposed public interests.”⁴⁸ U.S. courts typically only apply the public policy exception when the enforcement of an award compels one party to act in a way that directly conflicts with public policy.⁴⁹ The U.S. Second Circuit Court of Appeal argued for a limited application of public policy grounds in *Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L'industrie Du Papier (RAKTA) and Bank of America*.⁵⁰ In this case, it stated that: “the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”⁵¹ A more recent District of Columbia Circuit Court decision likewise

⁴⁶ *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993)

⁴⁷ 994 F.2d 775, 782 (11th Cir. 1993).

⁴⁸ Carbonneau: Cases, *supra* note 3, at p. 661.

⁴⁹ *Id.* The public policy exception cannot be applied lightly or on the basis of some diffuse judicial notion of the public interest... and must emanate from and be embedded in a statute and articulated through express statutory language. *See id.* at p. 662.

⁵⁰ 508 F.2d 969 (2nd Cir. 1974). *See generally* The Principles and Practice, *supra* note 4, at p. 228-29.

⁵¹ 508 F.2d at 974. The court states in this case: “The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards: While the Geneva Convention placed the burden of

determined that the public policy exception to arbitration award enforcement should be construed narrowly – only available when an arbitration award clearly undermines the public interest.⁵²

German courts have, on occasion, applied the public policy exception more broadly than U.S. courts. The German Court of Appeal held that an award that conflicts with fundamental notions of justice, *bonos mores*, or with principles fundamental to national or economic values, violates public policy.⁵³ A 1992⁵⁴ German Federal Supreme Court⁵⁵ ruling refused to enforce part of a U.S. court decision that provided for the recovery of punitive damages on the grounds that this recovery violated German public policy.⁵⁶ The German court has also occasionally held that award annulment based on public policy applies if the enforcement of the award involves corruption, serious competition law violations, fraud, violations of human rights, or certain insolvency issues.⁵⁷

proof on the party seeking enforcement of a foreign arbitral award and did not circumscribe the range of available defenses to those enumerated in the convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to seven set forth in Article V". *Id.* The court adds: "Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or sua sponte, if 'enforcement of the award would be contrary to the public policy of (the forum) country". *Id.*

⁵² *Enron Nigeria Power Holding v. Federal Republic of Nigeria* 844 F.3d 281 (D.C. Cir 2016).

⁵³ *Redfern, supra* note 2, at p. 612, citing the decision of the Karlsruhe Court of Appeal of 14 September 2001.

⁵⁴ *Redfern, supra* note 2, at p. 529.

⁵⁵ Bundesgerichtshof.

⁵⁶ *Id.* at p. 529, citing (Bundesgerichtshof (Neue Juristische Wochenschrift, 1992), 3096 et seq The Federal Court has affirmed this ruling in two more recent decisions: BVerfG, Beschluß vom 24.01.2007 - 2 BvR 1133/04 and BVerfG, Beschluß vom 14.06.2007 - 2 BvR 2247/06.)

⁵⁷ See Born: ICA, *supra* note 16, at p. 3324, citing many German cases, Judgment of 27 September 2005, 29 Sch 1/05 (Oberlandesgericht Hamm), Judgment of 25 October 1983, KZR 27/82 (German Bundesgerichtshof), Judgment of 2 November 2000, III ZB 55/99 (German Bundesgerichtshof).

The majority of national courts in developed jurisdictions embrace narrower applications of the public policy exception. The Canadian Superior Court of Justice of Ontario refused to set aside an award rendered by a NAFTA⁵⁸ tribunal, holding that for an award to offend public policy:

“[it] must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal.... The Applicant must establish that the awards are contrary to the essential morality of Ontario.”⁵⁹

The European Court of Justice held that the “annulment of or refusal to recognize an award should be possible only in exceptional circumstances.”⁶⁰ The Hong Kong Court of Final Appeal has likewise stated that in order to void enforcement of a New York Convention award on public policy grounds, “the award must be so fundamentally offensive to that jurisdiction's notion of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection.”⁶¹

French law has provided a similarly limited basis for annulling arbitral awards. The French courts have stated that: “a public policy argument can be accepted only when the

⁵⁸ North American Free Trade Agreement. The United States, Canada, and Mexico are the members of the Agreement.

⁵⁹ Redfern, *supra* note 2, at p. 614-15, citing: United Mexican States v Marvin Roy Feldman Karpa, Judicial review decisions Court File No 03-CV-23500, Ontario Superior Court of Justice, IIC 159 (2003), at para 87.

⁶⁰ Born: ICA, *supra* note 16, at p. 3174. (Born 2014); citing Eco Swiss China Time Ltd v. Benetton Int'l NV, [1999] Case No. C-126/97, ¶35 (E.C.J.).

⁶¹ Hebei Import & Export Corporation v. Polytek Engineering Company Limited, Court of Final Appeal of the Hong Kong Special Administrative Region, 9 February 1999. Berg: Yearbook 1999, *supra* note 46, at Vol. 24 p. 652-77.

enforcement of the award would violate in an unacceptable way our public policy, such violation having to affect in a manifest manner an essential rule of law or a principle of fundamental importance.”⁶² Courts in France have applied the public policy barrier in rare cases,⁶³ involving insolvency proceedings, mandatory investment regulations, and bribery.⁶⁴

Many courts have applied the public policy exception very narrowly, even in states that lack statutory any public policy regarding award annulment.⁶⁵ Authorities can generally invoke public policy only when recognition of a decision would “undermine the public interest, the public confidence in the administration of the law or security for individual rights”⁶⁶ or be “repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”⁶⁷

The narrow application of public policy does not exist in every state in the same way. Courts in some jurisdictions, for example, have used the nebulous nature of public policy as a license to review the merits of disputes.⁶⁸ That application, therefore, is a wide interpretation of the concept of the exception. Other jurists have developed the concept of international public policy (*ordre public international*), which (for example) the

⁶² Judgment of 18 November 2004, SA Thalès Air Défence v. GIE Euromissile, 2005 Rev. arb. 751, 757 (Paris Cour d’appel). Born: ICA, *supra* note 16, at p., at 3323.

⁶³ *Id.* Crépin, Le contrôle des sentences arbitrales par la Cour d’appel de Paris depuis les réformes de 1980 et de 1981, 1991 Rev. arb. 521, 580 “from 1981-1990, violation of international public policy was most frequently-invoked basis for setting aside awards, but only two of 46 such applications were successful.” *Id.*

⁶⁴ See Born: ICA, *supra* note 16, at p. 3323; citing Judgment of 5 February 1991, Société Almira Films v. Pierrel, 1991 Rev. arb. 625 (French Cour de cassation civ. 1e), Judgment of 5 April 1990, Courrèges Design v. André Courrèges, 1992 Rev. arb. 110 (Paris Cour d’appel), Judgment of 30 September 1993, Euro’n Gas Turbines SA v. Westman Int’l Ltd, XX Y.B. Comm. Arb. 198 (Paris Cour d’appel) (1995).

⁶⁵ United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 42 (U.S. S.Ct. 1987); Born: ICA, *supra* note 16, at p. 3313.

⁶⁶ Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986). Born: ICA, *supra* note 16, at p. 3314.

⁶⁷ Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981). Born: ICA, *supra* note 16, at p. 3314.

⁶⁸ Redfern, *supra* note 2, at p. 615.

French Code of Civil Procedure has embraced.⁶⁹ The French Code allows for the setting aside of international arbitral awards if the recognition or execution of the awards violates international public policy.⁷⁰ The application of public policy, under this approach, draws a distinction between domestic arbitration and international arbitration.

However, and in contrast, some other jurisdictions may not be willing to adopt any narrow application of public policy. They, instead, would always define the principle broadly. The Turkish Supreme Court, for example, refused in 1995 to enforce an ICC arbitral award in which the Zurich tribunal had applied Turkish substantive law and Zurich's procedural law.⁷¹ The Turkish Court held that by not applying both Turkish substantive and procedural laws, the arbitrator had violated Turkish public policy.⁷² This appeared incorrect on its face; moreover, the procedural law that the court applied did not differ significantly from Turkish procedural law.⁷³ The court applied public policy as a basis for refusing enforcement on a point of law – one that had no bearing on the ultimate decision. This instance stands as an example of the use of the

⁶⁹ French Decree Law No 81-500 of 12 May 1981, Art 1502.5.

⁷⁰ *Id.* "In this way, French law recognises the existence of two levels of public policy, the national level, which may be affected by purely domestic considerations, and the international level, which is less restrictive in its approach." *Id.* Some authors have gone even further step and enumerated the examples of public policy defense in arbitration. They give examples such: default of party (due process), lack of impartiality of arbitrator, lack of reasons in award, and irregularities in the arbitral procedure. See generally Redfern, *supra* note 2, at p. 667-68.

⁷¹ The Principles and Practice, *supra* note 4, at p. 228, citing: Michael Kerr, *Concord and Conflict in International Arbitration*, ARB. INT. (1997) at p. 140.

⁷² *Id.*

⁷³ *Id.*

public policy defense as the basis for reaching the decision that a national court desired.⁷⁴

3. Domestic and International Public Policy

The principles of public policy in domestic laws and regulations do not necessarily apply to public policy in international relations.⁷⁵ Fewer matters, generally speaking, are subject to public policy in international cases than domestic cases. The differing purposes of domestic and international relations justify this distinction.⁷⁶ The concept of international public policy encompasses a series of rules or principles concerning a variety of domains and of varying intensities, which form or express a kind of “hard core” of legal or moral values.⁷⁷

Local laws and norms can contain examples of domestic public policy that point to the immorality or unconscionability of an arbitration process or award, violations of economic policy, or unprofessional behavior.⁷⁸ The policies of different nations regarding such issues vary. International public policy, by contrast, encompasses the rules and standards of domestic laws that apply in international contexts; many states apply their respective public policies more flexibly in international commercial transactions.⁷⁹ International public policy does not concern itself with matters of form or

⁷⁴ *Id.*

⁷⁵ Berg: Yearbook 2003, *supra* note 46, at. Vol. XXVIII p. 665

⁷⁶ *Id.*

⁷⁷ Lalive, *supra* note 24, at p. 264.

⁷⁸ Buchanan, *supra* note 24, at p. 513.

⁷⁹ *Id.*

with matters of a purely domestic nature. It looks instead to the broader public interests of honesty and fair conduct.

Definitions of international public policy, however, also vary. A workable and generally applicable definition based on the principals of honesty, fair conduct, and fair trial would prevent the annulment of international arbitral awards on domestic public policy grounds.⁸⁰ The Committee on International Commercial Arbitration of the International Law Association (ILA)'s interim report on public policy as a Bar to Enforcement of International Arbitral Awards⁸¹ reviewed the development of the concept of public policy during the latter part of the twentieth century. It suggested that “‘truly international’ or ‘transnational’ public policy should be comprised of fundamental rules of natural law, principles of universal justice, *jus cogens*⁸² in public international law, and the general principles of morality accepted by what are referred to as ‘civilized nations.’”⁸³

Many court rulings have exceeded the scope of application that is defined in Art. V (2) (b) of the New York Convention, which should cite the differences between national and international public policy. The U.S. Supreme Court referenced this

⁸⁰ Redfern, *supra* note 2, at p. 616.

⁸¹ ILA Committee on International Commercial Arbitration's Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (London Conference, 2000). See Redfern, *supra* note 2, at p. 616.

⁸² A fundamental principle of international law accepted by the international community of states as a norm from which no derogation is permitted. See http://en.wikipedia.org/wiki/Peremptory_norm.

⁸³ Redfern, *supra* note 2, at p. 616. “At the beginning of the twenty-first century, the warning note sounded by an English judge almost two hundred years ago thus still resonates: ([public policy is] a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.)” *Id.* citing: Richardson v Mellish (1824) 2 Bing 229, at 252, [1824-34] All ER 258, per Burrough J.

difference when determining the arbitrability of a security transaction in *Scherk v. Alberto-Culver Co.*⁸⁴ The Court held that the U.S. should recognize this difference when evaluating the arbitrability of security transactions, regardless of any public interest involved in the claim. It determined the securities claims to be arbitrable, because the contract was international, noting that such claims would be inarbitrable for domestic contracts. The Court stated that: “[a]lthough disputes arising out of securities transactions cannot be submitted to arbitration if the contract is domestic, disputes arising out of such transactions are arbitrable if the contract is international.”⁸⁵ The U.S. Supreme Court demonstrated similar flexibility regarding the arbitrability of statutory claims in *Soler v. Mitsubishi*,⁸⁶ in which it allowed the arbitration of an antitrust claim because of the international character of the claim. The Court ruled that: “although claims relating to antitrust matters are traditionally viewed by the courts in the United States as incapable of settlement by arbitration, they can in any case be submitted to arbitration in the international context.”⁸⁷

National courts treat the public policy exception differently when considering the enforcement of awards rendered in foreign jurisdictions as opposed to those rendered in their own jurisdictions. Some countries mandate that arbitral awards

⁸⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *See Berg yearbook, supra* note 42, at p. 665.

⁸⁵ 417 U.S. 506 (1974).

⁸⁶ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) *See Redfern, supra* note 2, at p. 616. The Court added:

“Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.” *Id.* at p. 599.

⁸⁷ *Id.*

include the legal rationales upon which the tribunals issued them.⁸⁸ Courts in countries that require such rationales (Civil Law countries) may enforce awards made in countries in which such awards are valid even without such rationales (mostly Common Law countries) by applying the distinction between domestic and international public policy.⁸⁹

The French Arbitration Law highlights the essential difference between domestic and international public policy in the context of arbitration. It requires that locally rendered arbitral awards not contradict national public policy, and defines any awards that do as unenforceable.⁹⁰ National public policy has, by contrast, no impact on arbitral awards rendered internationally; the Law recognizes and enforces all such awards, unless they contradict international public policy.⁹¹ This treatment of international public policy as it relates to arbitral awards aligns with a narrow application of the exception regarding the recognition and enforcement of arbitral awards.

⁸⁸ *Id.* at 665-66. Several Common Law countries do not require tribunals to give reasons for their awards while most Civil Law countries do. *Id.*

⁸⁹ *Id.* (e.g., Court of Appeal of Florence, Italy no. 29 sub 7, reported in Volume IV pp. 289-292). *Id.*

⁹⁰ French Code of Civil Procedure, Book IV, Arbitration. Art. 1488. "No enforcement order may be granted where an award is manifestly contrary to public policy." *Id.* See. Jan Paulsson & Lise Bosman (eds), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Kluwer Law International 1984, Supplement No. 64, 2011, p. 1 - 16. (ICCA Handbook)

⁹¹ *Id.* French Arbitration Law, Art. 1514. "An arbitral award shall be recognized or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy". *Id.*

4. Conclusion on Public policy in International Arbitration

The New York Convention allows its members to vacate arbitral awards that violate their own countries' public policy, but most countries' courts have been reluctant to refuse enforcement on this ground. Courts, in fact, so rarely refuse enforcement on the grounds of public policy that some commentators have urged them to reconsider the application of Article V (2) (b)'s public policy defense. These commentators argue that courts should treat the Article more as a theoretical defense and apply it flexibly as a basis for refusing enforcement when such enforcement would condone unjust or improper results.⁹² This approach is flawed. A sufficient number of national courts have already misused the public policy defense, relying on overly broad interpretations of the exception. Making the application of the public policy exception more flexible would undermine the Convention's aim of creating a unified arbitration system among signatory states.⁹³

Shifting the focus from domestic public policy to international public policy would support the Convention's aims and facilitate parties' freedom to arbitrate. The ILA has identified various categories of international public policy, noting that the international public policy of any State should include:

⁹² The Principles and Practice, *supra*, at 228-29; "In practice, annulment of an international arbitral award is an unusual result in most developed jurisdictions...Most international arbitral awards are voluntarily complied with, (that) is confirmed by empirical studies and reports of national court decisions in cases involving international awards. Thus, reviews of annulment proceedings in (in many industrialized societies) have concluded that annulment of international awards is an exceptional occurrence." Born: ICA, *supra* note 16, at p. 3174.

⁹³ Craig ICC, *supra* note 42, at p. 684.

“(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ‘lois de police’ or ‘public policy rules’; and (iii) the duty of the State to respect its obligations towards other States or international organizations.”⁹⁴

The Convention’s parties ought to adopt the international approach to the public policy exception in enforcing international arbitral awards; doing so would enable them to achieve consensus regarding the meaning of public policy and to apply it in a unified manner. International arbitration would thus gain more credibility and become an increasingly prominent means of dispute resolution in the business community.

⁹⁴ ILA report on international commercial arbitration, The 70th Conference of the International Law Association held in New Delhi, India, 2-6 April, 2002, article 4.

PART 2: Public Policy in Saudi Arbitration

Islamic principles and Sharia law have served as the foundations of the Saudi legal system since Saudi Arabia's inception.⁹⁵ States that submit to Sharia Law must follow both the spiritual and legal regulations of Islamic Law. The requirements and principles of Sharia Law thus have had (and continue to have) a fundamental impact on all regulations in Saudi Arabia.⁹⁶ Sharia Law has defined Saudi public policy since the Commercial Court Code first recognized the legitimacy of arbitration. Saudi law regards violations of Sharia principles as violations of national public policy. This chapter focuses on the meaning of public policy in relation to arbitration in Saudi Arabia. It describes the application and impact of the requirements of Sharia on the practice of arbitration.

1. Arbitration in Saudi Arabia

The Saudi government has acknowledged the importance of arbitration as a means of dispute resolution since the country's inception. The Commercial Court Code of 1931,⁹⁷ issued roughly a year before the creation of the unified 3rd Saudi state in 1932,

⁹⁵ Sharia is the Constitution of the Land. "God's Book and the Sunna of His Prophet" are the country's constitution" Saudi Basic System of Governance, issued by Royal Order No. (A/91) 27/8/1412H, corresponding, March 1st, 1992. (the Basic System). See *A Restatement of the History of Islam and Muslims* <http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/aboutKingDom/SaudiGovernment/Pages/BasicSystemOfGovernance35297.aspx> (accessed October 2016)

⁹⁶ Many international agreements and conventions list Saudi Arabia's reservations. In the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Saudi Arabia stipulated: "In case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (accessed November 2016).

⁹⁷ The Commercial Court Law, 1931, Articles, 493, 494, 495 and 613.

clearly recognized arbitration as a means of settling disputes. The articles concerning arbitration in the 1931 Commercial Court Code allowed merchants to resort to arbitration to settle business disputes.⁹⁸ This recognition of arbitration occurred very early in Saudi legislative history compared to other codes and regulations. The cCode of 1931, however, failed to define the structure and mechanisms of how arbitration would be conducted in Saudi Arabia. Then, the negative outcome of the arbitral case between Saudi Arabia and ARAMCO in 1958 made the Saudi legislature less inclined to support arbitration, or to recognize and enforce foreign arbitral awards.⁹⁹ The 1969 Labor Code did, however, acknowledge arbitration as a means of dispute settlement between employers and employees.¹⁰⁰

Skyrocketing oil prices created an economic boom in Saudi Arabia during the 1970s and 1980s. Foreign investors flooded the Kingdom to invest in the country's infrastructure and many other state and private sector projects. The boom forced Saudi legislators to adopt a more flexible approach to arbitration and to truly recognize arbitration as a lawful alternative to domestic court proceedings for settling disputes between parties.

The Saudi legislature enacted its first stand-alone arbitration law in 1983.¹⁰¹ The law recognized the legitimacy of arbitration and gave the process the support of the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Saleh Abbadi, *The New Era of Arbitration in Saudi Arabia; Does the New Law Solve the Problems?* Unpublished paper, at 3 (Abbadi)

¹⁰¹ Arbitration Law, enacted by the Royal Decree No. M/46 of 12/07/1403H (4/24/1983) and replaced and superseded by the new Law on 2012. An English version of the law is found in <http://www.wipo.int/wipolex/en/details.jsp?id=8502> (accessed May 2017).

courts. This law included 25 articles, and the Council of Ministers issued Implementing Regulations comprising 48 articles.¹⁰² The 1983 law made a noticeable impact on dispute resolution in the Kingdom, but it left many important questions unanswered. The Saudi legislature, for example, prevented the government and governmental agencies from arbitrating their disputes with third parties unless they received approval from the prime minister.¹⁰³ Also, the law did not address many complicated questions related to arbitration, such as the minimal role of courts in the arbitration process and award enforcement, parties' freedom and autonomy, arbitrability, etc. However, the recognition of arbitration in a distinct piece of legislation was a big step forward in supporting arbitration comparing to precedent arbitration articles in 1939 Commercial Court Code.

Saudi Arabia signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1994, but it did not actually implement the provisions of the convention in state regulations until April 2012. The 2012 Saudi Arbitration Law¹⁰⁴ implemented the New York Convention and mirrored the UNCITRAL Model Law¹⁰⁵ on International Commercial Arbitration of 1985 and its 2006 amended version. This new law aimed to change arbitration laws and practices in Saudi Arabia. It included 58 articles that superseded those of the 1983 law, and it went into

¹⁰² Enacted by a Council of Ministers resolution no. 7/2021/M on 8/9/1405H 5/27/1985).

¹⁰³ *Id.* See Roy, *supra* note 20, at p. 940.

¹⁰⁴ Saudi Law of Arbitration, enacted by Royal Decree No. M/34, dated 24/5/1433H (4/16/2012), and entered force 30 days after the announcement. Appendix I

¹⁰⁵ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

effect 30 days after publication.¹⁰⁶ Saudi Arabia's implementation of the New York Convention initiated numerous public policy-related problems, as it did for some of the other states that ratified it.¹⁰⁷

The Saudi Arabian legal system's basis in the religion of Islam makes it starkly different from the legal systems of many Western jurisdictions. Islam provides a framework for law and governance, in addition to being the religion of the Saudi people.¹⁰⁸ This legal framework focuses on the enforcement of Islamic Law and of traditional cultural values.¹⁰⁹ Islamic rules – Sharia Law – concerns more than just the laws and regulation of people's transactions. It also covers spiritual and ethical aspects of life. The Saudi practice of Islamic law relies on certain criteria regarding arbitration and the application of public policy in business regulation. As a matter of public policy for arbitration, Saudi courts focus their analysis on challenges related to legal concerns.

¹⁰⁶ New Law of Arbitration, *supra* note 105, Art. 58.

¹⁰⁷ See Roy, *supra* note 3, at p. 939, "The U.S. adoption of the New York Convention, therefore, created many of the same public policy and traditional law conflicts that were recently created when Saudi Arabia acceded to the Convention." *Id.* The outcome of Aramco case impacted the Saudi Legislature. "Aramco claimed that its exclusive right to transport oil from its concession area in Saudi Arabia had been infringed by the agreement made between the Saudi Arabian Government and the late Aristotle Onassis, the Greek shipping magnate, and his company. The dispute between Aramco and the Government was a serious one; but neither party wished it to jeopardize their trading relationship, which was a continuing relationship dating back over many years." *Id.* The parties therefore agreed to refer the dispute to an ad hoc tribunal of three arbitrators sitting in Geneva. They also agreed that the award should be of declaratory effect only, with neither of the parties claiming damages for any alleged injury. The arbitral tribunal said:

"There is no objection whatsoever to Parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the Parties, the Arbitration Tribunal can only give a declaratory award. (Saudi Arabia v Arabian American Oil Company (Aramco) (1963) 27 ILR 117, at 145)" Redfern, *supra* note 2, at 534.

¹⁰⁸ Roy, *supra* note 3, at p. 942.

¹⁰⁹ *Id.*

Saudi legislators have historically rejected¹¹⁰ international arbitration models as methods for resolving international commercial disputes. The Saudi legislature has, however, generally accepted and encouraged Saudi Arabian arbitration as a means of resolving domestic disputes.¹¹¹ The difficulty of applying Sharia law to arbitration in an international context has been one of the most important factors that contribute to Saudi reluctance to fully engage with the precepts of international arbitration.

Regardless of historical reluctance or hostility toward arbitration, the Saudi Government has signed a number of bilateral investment treaties, as well as several international conventions, since the need for arbitration in Saudi Arabia was recognized. These include: the 1952 Convention of the Arab League Concerning the Enforcement of Judgments and Arbitral Awards¹¹² (the “1952 Convention”); the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), to which Saudi Arabia acceded in 1980; the Convention on Judicial Cooperation between States of the Arab League (the “Riyadh Convention”) signed in 1983; and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”), to

¹¹⁰ Roy, *supra* note 3, at p. 951. The author believes that some foreign arbitral awards were granted in Saudi Arabia; the ARAMCO case is a prominent example.

¹¹¹ *Id.*

¹¹² Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards issued in 9/14/1952. “Saudi Arabia acceded to the Arab League Convention for the Enforcement of Judgments of September 14, 1952 and the GCC Convention on Enforcement of Judgments and Judicial Representation and Notices among Members of the GCC. As a result, any final and conclusive judgment rendered in any member state of the Arab League or GCC and any final and conclusive arbitral award rendered in a GCC state will be enforceable in Saudi Arabia without re-examination of the merits of the case or re-litigation of the matters arbitrated upon, except, among other things, to ensure compliance with sharia principles and public policy.

which Saudi Arabia acceded in 1994.¹¹³ The Kingdom has not, however, fully adopted a pro-arbitration position, especially regarding international arbitration. Saudi Arabia needs to establish and enforce a legal framework that attracts foreign investors; however, Saudi law must also maintain its roots and identity and preserve its public policy, Sharia Law, from any violations.¹¹⁴

2. Public Policy in Saudi Arabia

States, as a rule, do not recognize and therefore do not enforce arbitral awards that violate their public policy. As stated above, the Convention left it to the signatory state's competent authority to set aside any award that violates or contradicts its public policy. Public policy, therefore, plays a crucial role in the award enforcement phase of international arbitration. Parties need to have valid arbitration agreements and undertake valid arbitration processes to ensure the enforceability of arbitral awards.

Every national legal system is unique, but they all seek to prevent public policy violations in their jurisdictions. The Saudi legislature emphasizes the importance of the public policy exception in all laws and regulations, specifically in the context of arbitration when courts hear cases involving the enforcement of arbitral awards. Saudi courts allow substantial consideration to the application of the public policy exception

¹¹³ Jean-Benoît Zegers, *National Report for Saudi Arabia* (2013) in Jan Paulsson (ed), *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION*, Kluwer Law International 1984, Supplement No. 75, 2013. (National Report).

¹¹⁴ The norm in Saudi Arabia is to reserve the right in every international treaty or convention not to implement any law or requirement that might violate Sharia law.

to arbitral awards, since Sharia Law generally dictates the terms of the exception.¹¹⁵

The extensive consideration that courts give to the enforcement of arbitral awards derives from the fact that Saudi courts prioritize public policy over parties' agreements or arbitral tribunal decisions. Public policy in Saudi Arabia has a significance found in very few jurisdictions – it applies in law the principles and teachings of the Islamic faith. The Execution Law¹¹⁶ Implementing Regulation states that:¹¹⁷

“[A]ll [Execution] Courts shall apply in cases before them:

1. **Sharia Law**, as [the] **Quran** and **Sunnah** explain it.
2. The decrees and orders the king issues without contradicting [the] **Quran** and **Sunnah**.

¹¹⁵ Saudi judges train to become Sharia scholars in order to apply the Sharia rules. They must possess certain qualifications, including a Sharia degree. Saudi Judiciary Law, enacted by Royal Decree No. M/78 on 19/09/1428H corresponding to 10/1/2007 (Saudi Judiciary Law). See, Abdullah Ansary, *A Brief Overview of the Saudi Arabian Legal System*, http://www.nyulawglobal.org/globalex/Saudi_Arabia.html#_Toc200894567, (Ansari: Overview). “The Law of the Judiciary requires each judicial candidate to hold a degree from one of the Shari'ah colleges in the Kingdom of Saudi Arabia. According to Saudi "ulama", education in Saudi universities has the purpose of producing "ulama" capable of relative degrees of "ijtihad". A candidate may hold an equivalent certificate, although he is required to pass a special examination prepared by the Supreme Judicial Council.” *Id*.

¹¹⁶ Execution Law, enacted by Royal Decree No. 53/M dated 13/8/1433H (7/2/2012). <https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/001-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20.pdf> (Arabic version) The Execution Law made the jurisdiction of enforcing arbitral awards to the Execution Judge. Execution Law, *id*, Art. 12, 14.

¹¹⁷ Implementing Regulations for the Execution Law, issued by Minister of Justice Order No. 13/T/4892 dated 17/4/1434H (2/27/2013). <https://iservices.scj.gov.sa:9113/pdf/a/004-%D9%86%D8%B8%D8%A7%D9%85%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%20%D9%88%20%D9%84%D8%A7%D8%A6%D8%AD%D8%AA%D9%87%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0%D9%8A%D8%A9/002-%D9%84%D8%A7%D8%A6%D8%AD%D8%A9%20%D8%A7%D9%84%D8%AA%D9%86%D9%81%D9%8A%D8%B0.pdf> (Arabic version)

The Court shall comply with this Law in all of its procedures.”¹¹⁸ Public policy in Saudi Arabia thus encompasses Sharia Law and all royal decrees and orders that do not contradict Sharia Law. Sharia Law is not a separable feature of Saudi Law that can be compromised; it is the foundation of the entire legal system.

3. Sources of Public Policy in Saudi Law

Sharia Law, as interpreted in Saudi legal practice, regulates Saudi arbitration across the globe in commercial matters and investment treaties between the Kingdom and other nations. The Saudi government, following regulations issued by the King, enacted the 2012 Arbitration Law,¹¹⁹ which adopted the UNICITRAL Model Law.¹²⁰ This Law supports arbitration procedures – from the agreement to arbitrate to the enforcement of arbitral awards. The Saudi Law’s deferral to Sharia Law, however, makes it exceptional among other nations. Many articles of the Arbitration Law highlight Sharia as their source and emphasize that no award should compromise it. Such articles include caveats such as: “[w]ithout prejudice to provisions of Sharia...” or “[s]ubject to provisions of Sharia...”. The Execution Law’s definition of Saudi public policy lists the following as the sources of any exception to the enforcement of arbitral awards: (a) Sharia Law; and (b) Royal decrees and orders drawn from Sharia that emphasize public interest according to the principle of Sharia.¹²¹ Fully understanding

¹¹⁸ *Id.* Art. 2 (1).

¹¹⁹ *Supra* note 105.

¹²⁰ *Supra* note 107.

¹²¹ Abdulrahman Baamir and Ilias Bantekas, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, *Arbitration International*, Vol. 25, Issue 2, 1 June 2009, p. 263

<https://doi.org/10.1093/arbitration/25.2.239> (Baamir & Bantekas).

Sharia Law and Saudi public policy requires an in-depth analysis of the meaning of Sharia Law.

The Prophet Muhammad PBUH brought the message of Islam to the world.¹²² The religion came to him in the Words of Allah in Arabic – the Quran. The Prophet translated and embodied the meaning of the Quran in his actions and sayings; this was his Sunnah.¹²³ Islam is a set of ethical and legal rules and principles, in addition to being the basis of a spiritual faith. The legal principles derived from these orders and prohibitions make up Sharia Law.¹²⁴ They address many aspects of commercial, social, and civil dealings and relationships. Muslim scholars apply Sharia Law in different contexts by interpreting the texts of the Quran and the Sunnah. This is called jurisprudence or “Fiqh” in Arabic.¹²⁵

Sharia Law and “Fiqh” are distinct from one another. Many commentators argue that “the term ‘Islamic Law’ did not exist “at the time of the Muslim classical scholars and only began to develop as a reaction to Western influence.”¹²⁶ The concept of a unique and new set of Islamic rules and traditions, however, dates to the time of revelation; the time when the Prophet, PBUH, received the revelation from Allah. The

¹²² The Prophet, Peace Be Upon Him, passed away in 632 in Madinah.

¹²³ Sunnah means the way or the tradition. The Sunnah thus means the way and tradition of the Prophet Muhammad, PBUH.

¹²⁴ Sharia “literally means the pathway or a way to be followed and the way that a Muslim has to walk in life. In its original usage, the term Shari'a meant the road to the watering place or path leading to the water, i.e. the way to the source of life”, Baamir & Bantekas, *Id.* at p. 263. It is, in this sense, the “way of the Muslim life”, which is wider than the mere formal rites and legal provisions.” *Id.* at p. 264.

¹²⁵ Baamir & Bantekas, *supra* note 122, at p. 263.

¹²⁶ *Id.*

early Muslims lived among Atheists, Jews, and Christians, and distinguished their laws from those of other groups. The concept of Sharia is broader than the understanding and application of Islamic jurisprudence, as jurisprudence is the umbrella of Sharia.¹²⁷ It applies the text to incidents in people's lives that lack clear rules or references. Muslim jurists use their best abilities to extract rules (Sharia opinions regarding a given matter) from General principles and similar rules mentioned clearly in the text of Quran or Sunnah.

Understanding the scope of public policy in Saudi law requires consideration of the process by which Saudi jurists apply Sharia. Muslim jurists begin by examining the text of the Quran to determine the applicable rules regarding any given matter. The second step – if the Quran neither directly nor indirectly addresses the rule in question – involves analysis of the Sunnah. The Sunnah collects the sayings and actions of the Prophet, PBUH, some of which address the rules of Sharia. The Sunnah has an application in Islamic Jurisprudence that is broader than that of the Quran. Jurists move to the third source, the consensus (Ijma) reached by all Muslim jurists at any given time after the Prophet's, PBUH, death, if neither of the first two sources addresses the issue in question.¹²⁸ The fourth source, should consensus not address the issue, is analogical

¹²⁷ *Id.*

¹²⁸ This source is hardly available in the modern times. Early Jurists accepted it as a source of Sharia when the Muslim population was relatively small. The jurists required that all the jurists had to agree on a rule in one period of time. Usually they used a "Silent Consensus"; that is when some jurists or scholars would make a rule and all other scholars hear of it and did not object to it. *See for more information Abdullah bin Hamid Ali, Scholarly consensus: Ijma': between use and misuse, Journal of Islamic Law and Culture Vol. 12, 2010 - Issue 2, p. 92.*

reasoning (Qiyas), by which jurists apply rules based on facts in the Quran or Sunnah that are similar to the issue at hand.¹²⁹

These four sources of Sharia shape public policy in Saudi Arabia. Determining which policies arbitration does and does not violate thus requires gauging the level of the Sharia source from which a given policy derives. Courts should not question rules expressly mentioned in the Quran and the Sunnah, the main sources of Sharia. Whether other sources of Sharia rules should receive treatment comparable to the way the Quran and the Sunnah are treated, however, remains an open question. Answering this question requires understanding the way that Saudi courts deal with the concept of public policy.

Neither Saudi laws nor published court cases tell the whole story of the public policy exception to the recognition and enforcement of arbitral awards.¹³⁰ What constitutes a violation of public policy remains unclear for Saudi lawyers, and not even all courts agree.¹³¹ Some court judges believe public policy includes the rules that fall under the Ijma umbrella; they contend that issues on which Muslim scholars have agreed compose uncontested public policy. Some courts also consider Sharia opinions

¹²⁹ "In Islamic law, the deduction of legal prescriptions from the Quran or Sunnah by analogic reasoning." *Oxford Islamic Studies Online*, (Qiyas) <http://www.oxfordislamicstudies.com/article/opr/t125/e1936>

¹³⁰ The author examined cases published on the Board of Grievances website. The cases published on the website, until the day of this writing, date from 1988-2015.

¹³¹ The author has interviewed four judges (from the Court of Appeal for Commercial Claims and from the Execution Court, in Riyadh and Jeddah) in seeking to answer this question. He did not get a unified answer regarding what constitutes a violation of public policy. Every judge, as Sharia Scholars and judges in general, would define public policy and apply it as they saw fit. This dissertation keeps the names of judges confidential because the author did not receive authorization to publish them.

(fatwa)¹³² given by the Council of Senior Scholars to be part of Saudi Arabian public policy.¹³³ Others identify additional considerations and sources of public policy.¹³⁴ Saudi courts have not, in short, applied the public policy exception in a unified manner, and the meaning of Sharia in the Saudi courts' application of the exception has not been definitively established.

Some commentators have suggested that public policy should be "explicit, well-defined, dominant, and ascertained by reference to the laws and legal precedents principle."¹³⁵ Can Saudi public policy adhere to such a definition? Can Saudi Arabia establish explicit and well-defined laws and principles as the foundation of its public policy? Can the Saudi courts adopt flexible approaches to Sharia and public policy that favor arbitration? The remainder of this chapter discusses these questions and proposes practical solutions that satisfy both the principles of Sharia and the goals of arbitration.

¹³² Fatwas are Sharia opinions given by Muslim scholars or jurists. They are flexible in that they change according to circumstances and conditions. A fatwa, for example prohibited women from driving, and now the fatwa changed, allowing women to drive.

<https://www.nytimes.com/2017/09/26/world/middleeast/saudi-arabia-women-drive.html>.

¹³³ This council is the highest religious body in the Kingdom of Saudi Arabia. It advises the King on religious matters. [https://en.wikipedia.org/wiki/Council_of_Senior_Scholars_\(Saudi_Arabia\)](https://en.wikipedia.org/wiki/Council_of_Senior_Scholars_(Saudi_Arabia)). King Faisal ibn Abd al-Aziz issued a royal decree establishing the Council on August 29, 1972. *Id.*

¹³⁴ Some judges would consider accepting the books and publications of the Hanbali school of thought as sources of public policy. The Hanbali school is the official school of thought in Saudi Arabia. Three additional schools of thought constitute the general Schools of thought in Sharia Law. *See* for more information <http://free-islamic-course.org/stageone/stageone-module-4/four-schools-law-islam.html>.

¹³⁵ Carbonneau: Cases, *supra* note 3, at p. 661.

4. What Must Be Considered To Change Public Policy Defense?

4.1 Enacting A Unified Code For Public Policy

Saudi's King can issue rules and codes that regulate certain aspects of the law.¹³⁶ He has the authority to enact laws and regulations, making sure that they do not violate the principles of Sharia, thereby adding to an already extensive field regulated by Sharia.¹³⁷ These laws and regulations can establish balance between Sharia rules and arbitration by maintaining the traditions and customs of Sharia Law while adapting to the demands of modern life. Foreign laws and common practices can assist in the codification of Sharia principles through Royal decrees and orders.¹³⁸ The Saudi government should therefore consider establishing a law or a Royal Order that defines public policy in detail. Such a law or order would improve the current approach to public policy, which relies on court precedents that do not constitute binding laws. Only Sharia Law and promulgated laws by the King bind judges.¹³⁹ The unclear nature of public policy, and, to some extent, of Sharia Law, means that judges must resort to applying the public policy exception to the best of their knowledge. In doing so, they are actually abusing their authority, even though they are merely trying to apply the

¹³⁶ The Basic System, *Id.* Art. 44 states that: "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." *Id.*

¹³⁷ Baamir & Bantekas, *supra* note 122, at p. 264.

¹³⁸ *Id.*

¹³⁹ "The judges are independent, and they is no authority on them except Sharia Law and enacted laws..." Art. 1 of the Saudi Judiciary Law, *supra* note 116.

law as they see it. A law that clearly defines public policy would help address these issues, but only if enacted correctly.¹⁴⁰

Laws or codes define principles – here, the principles of public policy – and limit their functions, making them comprehensible and thus, in this case, easier to apply to arbitration. Public policy’s status as a means of voiding arbitral awards under Saudi law makes the process of establishing such a definitive law quite sensitive. Legislators must make sure this change occurs in as transparent a manner as possible. Lack of transparency will either compromise the principles of public policy or render arbitration dysfunctional and useless. The law should clearly list the activities and practices that violate public policy as a matter of Sharia Law.

The language of the proposed code should explain exactly what the arbitrators and arbitration parties should or should not do to comply with the public policy of Saudi Arabia. Such language could, for example, include phrases like “it is considered against the public policy to agree to: ...” or “when rendering an award, arbitrators should avoid:” Legal clarity and predictability are crucial to the success of arbitration in any state. The Saudi legal system dictates the country’s public policy; the Saudi law defining public policy should therefore clarify the concepts of public policy and the legal barriers they may impose on the practice of arbitration. The Saudi system, in contrast to all other legal systems, regards Sharia Law as its public policy; the law

¹⁴⁰ Enacting more laws cannot be the answer for every legal problem or vague. However, sometimes it is unavoidable to enact laws, especially if the judges are divided on the matter.

should therefore codify the religious-based policy and make it simple for all Muslim and non-Muslims parties to understand.

4.2 Current Laws and Regulations

Current laws and court precedents also serve as tools for defining and articulating public policy. Different opinions and court decisions regarding similar matters lead to different outcomes. This highlights the importance of establishing unifying principles that address the challenges that parties may raise. Unpredictability hinders arbitration. The Saudi legal system has already taken some initial steps toward clarifying public policy in this regard. State laws list prohibited foreign investments,¹⁴¹ and they also provide a list of items prohibited from entering the country.¹⁴² This list

¹⁴¹ The Saudi Arabian General Investment Authority (SAGIA) has a list of businesses prohibited from making foreign investments. This list, since enacted as law, has included items prohibited under the law for the public interest. It can be accessed at:

https://www.sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory_Library/Business_not_permitted.pdf (accessed October 2017)

The list's Industrial Sector includes:

- “-Oil exploration, drilling and production. Except the services related to mining sector listed at (CPC 5115+883) in International Industrial classification codes.
- Manufacturing of military equipment, devices and uniforms.
- Manufacturing of civilian explosives.”

The Service Sector includes:

- “-Catering to military sectors.
- Security and detective services.
- Real estate investment in Makkah and Madina.
- Tourist orientation and guidance services related to Hajj and Umrah.
- Recruitment and employment services including local recruitment offices.
- Real estate brokerage.
- Printing and publishing. [with some exceptions]
- Commission agents internationally classified at (CPC 621).
- Audiovisual and media services.
- Land transportation services, excluding the intra-city passenger transport by trains
- Services provided by midwives, nurses, physical therapy services and quasi-doctoral services internationally classified at (CPC 93191).
- Fisheries.” *Id.*

¹⁴² Saudi Customs maintains two lists of prohibited import/export items.

<https://www.customs.gov.sa/sites/sc/en/CustomsGuideNew/SubHQweb02>. The lists include goods

provides clear and tangible examples of activities and items that are prohibited out of a consideration to preserve the public interest.¹⁴³ The list also codifies a public policy standard based on Sharia Law.

Almost all commercial and international treaties and conventions that Saudi Arabia has signed include Saudi's reservation about any contradiction to Saudi public policy, Sharia Law, that the treaty or convention might create. The exact and defined meaning of public policy, still, can differ depending on the subject matter of the treaty or convention. For the matter of arbitration, for example, the Saudi courts consider the arbitration of litigated cases and cases pending litigation to be a violation of public policy. The Execution Law states:

“[w]ith complying with all conventions and treaties, Execution Judge may not enforce the foreign order or award except after assuring that ... (4) the order or the award does not contradict or conflict with a competent authority order or court decision in Saudi Arabia on the same matter.”¹⁴⁴

Saudi Arabia does not recognize or enforce arbitral awards that address already adjudicated matters, *res judicata*, and produce different results than the local authorities concluded.¹⁴⁵ Arbitral tribunals should therefore avoid arbitrating *res judicata* cases, or

such as (Pork and all its products, Frog meat, Drugs in any form or types, alcohol, all food products that used animal blood in its production, gambling tools and equipment, religious symbols such as cross, Christmas trees, etc, guns and firearms.) *Id.*

¹⁴³ Baamir & Bantekas, *supra* note 122, at p. 266.

¹⁴⁴ Art. 11, Execution Law, *supra* note 117.

¹⁴⁵ Abdullah Alkhudairy, *Enforcement of Foreign Judgments in the Kingdom of Saudi Arabia*, Saudi Center for Commercial Arbitration, 2016, p. 79. (Arabic source)

at least avoid contradicting their results, in order to render enforceable awards in Saudi Arabia.

In sum, Saudi's current laws and regulations do not define the meaning of public policy as a defense against the recognition and enforcement of arbitral awards. The Saudi legislature should narrow and clarify the concepts and definition of public policy, such that arbitration will not lose its workability and efficiency.

4.3 The Pro-Arbitration International Consensus

The New York Convention seeks "to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards that support the process of arbitration between the signatories."¹⁴⁶ Saudi Arabia needs to facilitate the recognition and enforcement of arbitral awards to achieve this goal. It can accomplish this by ensuring that domestic courts respect and support arbitral tribunals. It should recognize arbitrators as fully functioning adjudicators, not as privately appointed lawyers who lack the qualifications to adjudicate legal matters. Arbitration only produces successful outcomes when it receives the respect and consideration it receives in other states' legal systems. Its practice will not survive in Saudi Arabia without the support of the domestic courts.

¹⁴⁶ New York Convention, *supra* note 6, Introduction-Objectives.

The Saudi courts should apply public policy very narrowly in the context of arbitration, but this does not mean they should avoid considering the restrictions imposed by Sharia rules and principles. The principles of Sharia Law are general and broad. They provide general aspects of guidance about various commercial and economic deals without specifying rules in every commercial matter. Sharia Law is clearly the law of the land in Saudi Arabia. This dissertation suggests, however, that the parts of Sharia Law that currently act as a barrier to the recognition and enforcement of arbitral awards should be systematically codified. Lack of codification could lead courts to invoke Sharia Law as the public policy exception in a variety of ways in the context of arbitral enforcement. A court might, for example, refuse to comply with an award, because the arbitral tribunal included a non-Muslim or a woman.¹⁴⁷ Allowing this sort of exception to stand would make arbitration effectively useless in the Kingdom.

Joining the world consensus in supporting and promoting arbitration requires that states concede some of their sovereignty in matters related to court jurisdiction. Every jurisdiction has its own unique features, but to build a functioning and workable dispute resolution mechanism, states must compromise to make the elements of arbitration complete. Saudi Arabia is not an exception to the international consensus

¹⁴⁷ Some might consider these examples of the application of Sharia extreme. They are not considered violations of public policy in current Saudi arbitration practice (since the enactment of the 2012 Arbitration Law). Leaving the door open for speculation, however, imposes potential difficulties on arbitration.

A woman became an arbitrator in Saudi Arabia for the first time. See Mulhim Almulhim, *The First Female Arbitrator in Saudi Arabia* <http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>.

about arbitration. It is a signatory to the Convention; however, Sharia shapes its public policy. Still, states that trust and support arbitration do not have to surrender their public policy; they simply need to make it possible for parties to enter into arbitration agreements and for the arbitrators to render enforceable awards consistent with the parties' agreements and related domestic and international laws.

4.4 How Do Courts Apply Public Policy In Arbitration?

What the courts consider to be arbitration-related violations of Saudi public policy remains somewhat unclear. The author of this dissertation recently asked several Saudi judges¹⁴⁸ how they understand the relationship between public policy and Sharia. One judge answered that the text of the Quran and the Sunnah, along with the consensus of Muslim scholars, Ijma, define public policy. This definition could lead to the prohibition of activities that Saudi practice has thus far allowed – for example, agreements between parties to charge interest in banking and financial sector transactions. While this particular definition is clear and obvious in theory, it may be difficult to apply in practice, especially in situations (such as the one just cited) in which standard operating procedures that have been permitted for some time become prohibited.

Other judges interviewed leaned toward broadening the application of public policy in their responses. They added the Hanbali school of thought¹⁴⁹ – and views

¹⁴⁸ See footnote 126 for more information.

¹⁴⁹ Hanbali school of thought is one of the common four schools of thought within Islamic jurisprudence. See generally <https://en.wikipedia.org/wiki/Hanbali>.

supported by the majority of Muslim scholars – to the Quran, Sunnah, and Ijma as sources of public policy. Such an approach would widen courts’ discretion to annul arbitral awards, since it would broaden the definition of Saudi public policy. Muslim scholars frequently express diverse opinions regarding individual issues. Every school of thought has its own opinion; however, scholars may disagree with the positions of their own schools and embrace the opinions of scholars from different schools. Recognizing individual scholars’ opinions as sources of public policy would not clarify or unify the definition.

Some judges expressed the belief that public policy encompasses everything contained in Sharia texts and opinions, including the fatwas (opinions) of the Council of Senior Scholars.¹⁵⁰ This would produce a rather vague definition. The fatwas (opinions) of Muslim scholars regarding all matters are context-dependent. The Council of Senior Scholars may alter current prohibitions at any time to meet the needs of changing circumstances.¹⁵¹

¹⁵⁰ See footnote 128 for more information.

¹⁵¹ The lifting of the prohibition on women driving (regardless of its relation to arbitration) in Saudi Arabia is a clear example of this change. Scholars long referred to Sharia rules to justify the prohibition. Scholars changed the fatwa in October 2017, lifting the prohibition and allowing women to drive. <http://www.binbaz.org.sa/article/399>, <http://www.aljazeera.net/news/reportsandinterviews/2017/9/27/%D9%82%D9%8A%D8%A7%D8%AF%D8%A9-%D8%A7%D9%84%D9%85%D8%B1%D8%A3%D8%A9-%D9%84%D9%84%D8%B3%D9%8A%D8%A7%D8%B1%D8%A7%D8%AA-%D8%A8%D8%A7%D9%84%D8%B3%D8%B9%D9%88%D8%AF%D9%8A%D8%A9-%D8%AD%D9%8A%D9%86-%D9%8A%D8%B5%D8%A8%D8%AD-%D8%A7%D9%84%D8%AD%D8%B1%D8%A7%D9%85-%D8%AD%D9%84%D8%A7%D9%84%D8%A7>. (Arabic sources)

Public policy should reflect the fundamental principles of a state's legal systems that are related to the justice or morality the state wishes to protect.¹⁵² The definitions of public policy expressed by the judges interviewed testify to the tenuous status of arbitration in Saudi Arabia. Public policy should have a clear and obvious definition that all courts know, understand and can apply. A definition of public policy based on speculation threatens arbitration's viability. Lack of court support for arbitration between parties involved in trans-border and domestic commercial transactions may render the entire process of arbitration unattractive to them. Business enterprises, in which such conditions prevail, either have to relinquish investments or rely on court processes to settle disputes.

Evaluations of Saudi court support for arbitration in terms of public policy must consider court rulings on the matter. Published court decisions typically provide the public a means of understanding the thinking of the courts regarding specific matters. Saudi law, however, does not require the courts to publish their cases. Accessing court records is actually very challenging in Saudi Arabia. Saudi courts – the Diwan Almazalim, in particular¹⁵³ – only recently¹⁵⁴ began to make their cases accessible to the

¹⁵² ILA report, *supra* note 96.

¹⁵³ Diwan Almazalim (Board of Grievances) was the competent authority with jurisdiction over the enforcement of arbitral awards. *See*

<https://www.bog.gov.sa/ScientificContent/JudicialSystems/CanceledRegulations/%D9%86%D8%B8%D8%A7%D9%85%20%D8%AF%D9%8A%D9%88%D8%A7%D9%86%20%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85%20%D9%88%D9%85%D8%B0%D9%83%D8%B1%D8%AA%D9%87%20%D8%A7%D9%84%D8%A5%D9%8A%D8%B6%D8%A7%D8%AD%D9%8A%D8%A9%201402%D9%87%D9%80.pdf>.

The 2007 Judicial Law changed the rule.

¹⁵⁴ The first published commercial case precedents became publically accessible in 2005. *See* <https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1408->

public. A committee of judges, administrative employees, and researchers collect cases, examine all commercial and administrative claims, categorize them, and then choose the cases that warrant public publication.¹⁵⁵ The published cases, as of the writing of these pages,¹⁵⁶ include fewer than 20 arbitration-related cases. Fewer than five of those cases deal with the meaning and application of public policy as a challenge to the recognition and enforcement of arbitral awards.

The courts and other competent authorities – the Ministry of Justice, in particular – need to publish more cases. The humble volume of cases published by the Diwan Almazalim is the only official source of court decisions. One otherwise must conduct interviews or establish personal relationships with judges or clerks to access court records. Publication of court cases would significantly improve the public’s understanding of the application of the laws among lawyers and practitioners. Large gaps for speculation in laws, particularly regarding arbitration, should be avoided. Uncertainty regarding the Saudi courts’ attitudes toward arbitration decreases the likelihood that parties will engage in arbitral agreements and that arbitrators will

[1423/Documents/%D8%A7%D9%84%D9%85%D8%AC%D9%85%D9%88%D8%B9%D8%A9%20%D9%83%D8%A7%D9%85%D9%84%D8%A9%20\(PDF\)/1%D9%80%20%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%AF%20%D8%A7%D9%84%D8%A3%D9%88%D9%84.pdf](https://www.bog.gov.sa/ScientificContent/JudicialSystems/Documents/%D9%86%D8%B8%D8%A7%D9%85%20%D8%AF%D9%8A%D9%88%D8%A7%D9%86%20%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85%201428%D9%87%D9%80.pdf)

¹⁵⁵ The Administrative Law of 2007, enacted by Royal Decree No. M/78 dated 19/9/1428H commencing to October 1st, 2007, formed the committee.

<https://www.bog.gov.sa/ScientificContent/JudicialSystems/Documents/%D9%86%D8%B8%D8%A7%D9%85%20%D8%AF%D9%8A%D9%88%D8%A7%D9%86%20%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85%201428%D9%87%D9%80.pdf>. Art. 21 of the law states: “the Diwan [Board] shall establish technical office constituted of a president, number of judges, technical, and researchers for the purposes of consulting, conducting research and studies and whatever matters conveyed to it by the Diwan President. By the end of every year, the office shall categorize and publish volumes, the Diwan cases...” *Id.*

¹⁵⁶ Summer 2017.

adjudicate according to Saudi law. Navigating legal uncertainty is difficult for lawyers and councils; pro-arbitration systems should endeavor to avoid such uncertainty.

5. Examples of Public Policy Applications Before Saudi Courts

Published public policy cases in arbitration provide some clues about how courts have defined public policy and what sorts of arbitration processes or awards may be deemed to violate Saudi public policy. The courts published these cases as the Saudi arbitration laws underwent significant changes. The section below examines these cases in order of issuance.

5.1 Sub-contract Construction Agreement Case

The Commercial Circuit of the Saudi Court of Appeal ruled¹⁵⁷ that an agreement between two Saudi parties to arbitrate outside Saudi Arabia violated Saudi public policy. The decision identified the Saudi Court as the competent authority in the matter and determined that the parties had no justification for stripping the court's jurisdiction. The parties in this case agreed, among other things, to the sale of 18,000 metric tons of iron and to the completion and supervision of a construction project. The Plaintiff in the case, the seller, claimed that he fulfilled his part of the contract and that the Defendant owed him a sum of SAR¹⁵⁸ 1,725,971. The published facts in this case do

¹⁵⁷ Case No. 422/2/G 1417H, decided by the Court of appeal on 18/3/1422H corresponding June 10th, 2001. The case is published in the series published in Diwan Almazalim website.

¹⁵⁸ Saudi Arabian Ryal, equals to \$ 460,258. The official exchange rate is \$1=SAR3.75, <http://www.sama.gov.sa/en-US/FinExc/Pages/CurrencyConverter.aspx>

not show whether the parties initiated the arbitration process or what the arbitration clause said. The facts, however, indicate that the Plaintiff provided the court with a translated copy of the contract that included “an arbitration agreement [conducted] outside Saudi Arabia.” The trial court held that the case was out of its jurisdiction and should be decided according to the terms of the arbitration agreement. The Plaintiff then appealed the case, and the Court of Appeal reversed the ruling.

The Court of Appeal deemed arbitration between two Saudi parties outside the Kingdom to be a violation of public policy. It therefore nullified the arbitration agreement. The court’s ruling in this case suggests that public policy is not a fixed and defined principle of law. The ruling frames public policy as a matter that changes based on the nationalities of the parties. The Court of Appeal thus erred and exceeded its discretion in this case. It did not preserve the parties’ autonomy to arbitrate. The parties might have agreed to comply with Sharia rules, but the published text suggests that the Court of Appeal did not test whether the arbitration agreement itself violated public policy and Sharia Law. The case’s published facts do not disclose the name of the arbitration institution selected by the parties, or the arbitration rules; the parties may have selected a Muslim country or a non-Muslim country as the venue of arbitration, and they may have used Muslim or non-Muslim arbitrators. These facts may have changed the outcome of the arbitration agreement, but the Court of Appeal did not consider them. The Court of Appeal, moreover, did not explain how the agreement violated the public interest. The parties merely agreed to submit a question of law and

facts relevant to a private commercial relationship to an arbitrator or panel of arbitrators. The claim between the parties, as the published facts show, never underwent arbitration. The Court did not wait for the finalization of the arbitration agreement or the rendering of the award to examine the validity of the agreement and nullify any potential award.

The Court of Appeal thus nullified – for violating public policy – an arbitration agreement that the Trial Court deemed valid and binding. This means that, at the very least, the Trial Court judge did not have a clear enough understanding of the meaning of public policy when he ruled that the arbitration agreement was binding. The discrepancy in understanding regarding the extent to which parties can agree to arbitrate was significant enough to prevent the parties from engaging in arbitration. This points to a serious deficiency in Saudi Law regarding arbitration. The enactment of the new Law of Arbitration¹⁵⁹ did not resolve this deficiency, although it did initiate improvements in many other areas, especially regarding the scope of court supervision.

5.2 Arbitrator Appointment Case

The Commercial Circuit of the Administrative Court of Appeal held¹⁶⁰ in a similar case that an arbitration agreement between Saudi parties seeking to arbitrate according to international arbitration principles in a venue located outside Saudi Arabia

¹⁵⁹ Enacted 2012.

¹⁶⁰ Saudi courts do not publish such cases. The Board of Ministers Resolution No. 162 17/6/1423H (August 25, 2002), however, requires the Ministry of Justice to publish certain final court cases after categorizing them, without the parties' names. See generally <https://www.moj.gov.sa/ar-sa/ministry/versions/Documents/46.pdf>

likewise violated state public policy.¹⁶¹ This case involved two Saudi parties that had established a commercial agreement. The Plaintiff petitioned the court to decide the matter under dispute. The Trial Court claimed it lacked jurisdiction, because the parties' agreement contained an arbitration clause. The clause stated:

“any dispute that cannot be amicably solved shall be submitted to an arbitral tribunal according to the rules of ICC. The language of the arbitration procedures shall be English and the seat of the arbitration shall be either in Europe or the U.S.A. as the parties might agree.”

The court referred the parties to arbitration without requiring anything of them. The Plaintiff then appointed his arbitrator and submitted a request for arbitration before the court, following Saudi arbitration rules. The Defendant refused to appoint an arbitrator, rejected the jurisdiction of Saudi arbitration rules, and demanded that the Plaintiff file the claim according to the terms of the agreement they had made.

The governing law clause of the agreement selected Saudi Law as its governing law, except in cases of conflicts of law; the Trial Court therefore deemed the arbitration agreement valid, but invalidated the use of international arbitral rules and the selection of a forum outside the country. The Court of Appeal of the Commercial Circuit affirmed this ruling. It reasoned that the forum clause contradicted Saudi public policy:

¹⁶¹ The case appears in the *Commercial Rules and Principle Collection*, published by the Board of Grievances, Year 1432H, Vol. 1, p. 110.
<https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1432/Pages/default.aspx> . Court of Appeal, Commercial Circuit case no. 702/ES/7 1432H, Date of hearing July 12, 2009.

“The dispute in this case is between two Saudi parties and the Saudi courts, therefore, have the jurisdiction over the dispute. An agreement to submit such a dispute to international arbitration rescinds jurisdiction from the competent court. This is a violation of public policy. Therefore, the arbitration agreement is valid and the forum selection is void.”

The Court thus ordered the parties to submit their dispute to Saudi arbitration within Saudi Arabia and to name their arbitrators.¹⁶²

The Court in this case deemed the Saudi parties’ submission of their dispute to an international arbitral institution or forum to be a violation of the state’s public policy. Its rationale did not raise any concerns regarding how the private parties’ agreement to settle their dispute in an international forum would impact Saudi public policy. Nor did the court indicate how it defined public policy and how parties could avoid violating it.

The 2012 Arbitration Law may have eliminated the requirement that Saudi parties submit their disputes to Saudi entities – either courts or arbitrators. However, the published cases do not address the issue of choosing international laws or rules to apply to arbitration between Saudi parties. The text of the newly enacted Law itself

¹⁶² The full text of the published judgment is accessed in the following link (Arabic)
<https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1432/Documents/%D9%85%D8%AC%D9%85%D9%88%D8%B9%D8%A9%20%D8%A7%D9%84%D8%A3%D8%AD%D9%83%D8%A7%D9%85%20%D9%88%D8%A7%D9%84%D9%85%D8%A8%D8%A7%D8%AF%D8%A6%20%D8%A7%D9%84%D8%AA%D8%AC%D8%A7%D8%B1%D9%8A%D8%A9/%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%AF%20%D8%A7%D9%84%D8%A3%D9%88%D9%84/%D8%AA%D8%AD%D9%83%D9%8A%D9%85/3%D9%80%20%D8%AA%D8%AD%D9%83%D9%8A%D9%85%20-%20%D8%B4%D8%B1%D8%B7%20%D8%A7%D9%84%D8%AA%D8%AD%D9%83%D9%8A%D9%85%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%20%D9%80%20%D8%A7%D8%AA%D9%81%D8%A7%D9%82%20%D8%B9%D9%84%D9%89%20%D8%AA%D8%AD%D9%83%D9%8A%D9%85%20%D8%AE%D8%A7%D8%B1%D8%AC%D9%8A.pdf>

does suggest, however, that the requirement may have changed. The text states that the Arbitration Law's provisions:

“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.”¹⁶³

The Law allows the parties to choose any laws or rules of arbitration to apply to their contracts. It states:

“[i]f both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, including those related to arbitration, shall apply, provided this is not in conflict with the provisions of Sharia.”¹⁶⁴

The Law does not base the applicability of this article on the parties' nationality; it stipulates that any parties, regardless of their origin or nationality, can submit their agreements to any domestic or international laws or rules. It seems unlikely that Saudi courts would consider that arbitration agreements between Saudi parties based on international laws or treaties are in violation of public policy under the current Arbitration Law. This possibility remains, however – only precedents and published court cases will establish how courts apply the new Law to parties' agreements. The Court has, as discussed below, validated an agreement between a Saudi party and a

¹⁶³ Saudi Arbitration Law, *supra* note 105, Art. 2.

¹⁶⁴ *Id.* Art. 5.

foreign party to arbitrate according to the rules of the International Chamber of Commerce.

5.3 ICC Arbitral Award

A Saudi court sanctioned an arbitration agreement based on the ICC rules and the parties' selection of Switzerland as the seat of arbitration in a case heard after the enactment of the new Arbitration Law.¹⁶⁵ These proceedings involved a dispute between a Saudi company and a German company.¹⁶⁶ The parties to the case had an agreement regarding the sale of a showroom and cooling equipment from the German party to the Saudi party; the transaction was to occur between 2004-2009. The dispute was related to payment for the equipment. The German party petitioned via court litigation for the remaining amount of the sale agreement in addition to the legal costs of the case. The Saudi party moved to dismiss the case, demanding that the parties undertake arbitration in Saudi Arabia. The Court of Appeal held, based on the Arbitration Law, that the parties' agreement to submit to arbitration in Switzerland according to the ICC rules was a valid agreement, and it therefore determined that it lacked the jurisdiction to decide the case.¹⁶⁷

¹⁶⁵ Saudi Arbitration Law, *supra* note 105.

¹⁶⁶ The case is published in the *Commercial Rules and Principle Collection*, published by the Board of Grievances, Year 1432, Vol. 1, p. 110.

<https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1434/Pages/default.aspx>. Court of Appeal, Commercial Circuit case no. 270/TG/1 1434H, Date of hearing July 14, 2013.

¹⁶⁷ The full text of the published judgment can be accessed via the following link (Arabic)

<https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1434/Documents/%D9%85%D8%AC%D9%85%D9%88%D8%B9%D8%A9%20%D8%A7%D9%84%D8%A3%D8%AD%D9%83%D8%A7%D9%85%20%D9%88%D8%A7%D9%84%D9%85%D8%A8%D8%A7%D8%AF%D8%A6%20%D8%A7%D9%84%D8%AA>

In this decision, the court applied the 2012 Law of Arbitration. The Law gives the parties to arbitration agreements considerable latitude and freedom to form agreements as they please. It allows the parties to submit arbitration agreements to any model contract, international convention, or document known by the parties, as long as the submission, or the document, does not contradict Sharia law. As stated earlier, the Law states: “[i]f ... parties ... agree to subject the relationship ... to the provisions of any document ... then the provisions of such document... shall apply, provided [that] this is not in conflict with the provisions of Sharia.”¹⁶⁸ The Law thus deems valid an agreement between parties to submit to international laws or rules. This suggests that the new Law more effectively limits the application of the public policy exception than did the 1983 Law.¹⁶⁹

[%D8%AC%D8%A7%D8%B1%D9%8A%D8%A9/%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%AF%20%D8%A7%D9%84%D8%A3%D9%88%D9%84/%D8%AA%D8%AD%D9%83%D9%8A%D9%85/06-%D8%AA%D8%AD%D9%83%D9%8A%D9%85%C2%A0-%20%D8%B4%D8%B1%D8%B7%20%D8%A7%D9%84%D8%AA%D8%AD%D9%83%D9%8A%D9%85%C2%A0-%20%D8%AA%D8%AD%D9%83%D9%8A%D9%85%20%D8%AF%D9%88%D9%84%D9%8A%C2%A0-%20%D8%A7%D9%84%D8%AA%D9%85%D8%B3%D9%83%20%D8%A8%D8%B4%D8%B1%D8%B7%20%D8%A7%D9%84%D8%AA%D8%AD%D9%83%D9%8A%D9%85.pdf](#)

¹⁶⁸ Saudi Arbitration Law, *supra* note 105, Art, 5.

¹⁶⁹ The author of this dissertation did not find any case after the enactment of the new Law where courts applied the public policy exception because both parties were Saudis and submitted their agreement to an international law or convention. Presumably the court would not apply public policy to invalidate the enforcement of an award merely because the parties agreed to use a non-Saudi law as the arbitration’s governing law. The discussion and interviews held with the judges in order to understand the application of public policy did not raise the issue of the parties’ nationalities. One can assume, however, that parties’ nationalities will play a very minimal role in decisions regarding the application of public policy to arbitration agreements.

5.4 Public Policy in the Execution Law

The Commercial Circuits under the Administrative Court adjudicated all the cases discussed above. The establishment of the Execution Court in 2012 led to a division between courts in arbitration jurisdiction; since then, the Execution Court has exercised jurisdiction over the enforcement of both domestic and international arbitral awards.¹⁷⁰ The establishment of the Execution Court helped ease the process of enforcing court judgments and arbitral awards. Courts had to supervise and enforce their own judgments prior to its creation. This was true for arbitral awards as well. Courts hearing disputes between arbitration parties were responsible for recognizing and enforcing the awards.¹⁷¹ Bringing the entire post-judgment or post-award process under the purview of the Execution Court enabled courts to focus on their jurisdictions and worry less about the execution of these judgments. The Execution Law has thus contributed significantly to the success and efficiency of Saudi's judicial system in general and to arbitration system specifically.

The Execution Law gives execution judges the power to enforce the execution of judgments and arbitral awards and supervise the process of enforcement with the competent authorities.¹⁷² It also gives execution judges both the jurisdiction to decide any dispute regarding execution, regardless of the value of the dispute, as well as the

¹⁷⁰ Execution Law, *supra* note 117.

¹⁷¹ The Board of Grievances served as the judicial body for arbitral processes and award enforcement. Its law states: "Administrative courts shall have jurisdiction to decide the following: ... (g) Requests for execution of foreign judgments and arbitral awards." Royal Decree No. M / 78 19/9/1428H, corresponding 10/1/2007, enacted the Law of The Board of Grievances.

¹⁷² Execution Law, *supra* note 117, Art. 2.

authority to enlist the police or any other relevant authorities to aid in enforcement.¹⁷³

The judges can also issue and lift travel bans and imprison and release parties against whom they have ordered the execution of judgments or awards.¹⁷⁴ The execution judge can, moreover, freeze the bank accounts of parties responsible for enforcement.

The Execution Court under the Execution Law¹⁷⁵ and the Arbitration Law of 2012¹⁷⁶ has the jurisdiction to recognize and enforce arbitral awards rendered in different jurisdictions. The Execution Law makes execution judges responsible for executing the “Writs of Execution” issued by courts, conciliation minutes approved by domestic or foreign courts, arbitral awards, and contracts that, by law, have the power of “writs,” etc.¹⁷⁷ The Arbitration Law considers arbitral awards that are issued according to its tenets to be “Writs of Execution” on which courts or judicial authorities must follow-up. It views such awards as final and enforceable. Execution judges execute “Writs of Execution” after ensuring that, among other things, they do not contradict Saudi public policy.¹⁷⁸ The Execution Law states: “... [in] compliance with treaties and conventions, the execution judge shall not execute any foreign court judgment or order except based on reciprocity. The judge shall assure that: 5. The judgment or the order do[es] not contradict the public policy of Saudi Arabia.”¹⁷⁹ The

¹⁷³ Execution Law, *supra* note 117, Art. 3.

¹⁷⁴ *Id.*

¹⁷⁵ Execution Law, *supra* note 117.

¹⁷⁶ Saudi Arbitration Law, *supra* note 105.

¹⁷⁷ *Id.* Art. 9.

¹⁷⁸ *Id.* Art, 11 (5).

¹⁷⁹ *Id.*

Implementing Regulations of the Execution Law¹⁸⁰ explain that, for the purposes of execution, Sharia Law represents Saudi public policy. It states: “[t]he meaning of the public policy is the rules of Islamic Sharia.”¹⁸¹

5.5 The Japanese Case¹⁸²

The Saudi Court has boosted the enforcement of international awards by enforcing a recent one-of-a-kind case in a pro-arbitration manner. A Japanese arbitral tribunal from the Japan Commercial Arbitration Association (JCAA) ruled¹⁸³ in favor of a Japanese party engaged in a dispute with a Saudi party. The parties had 18 sale and purchase contracts for construction equipment, forklift trucks, and spare parts. The contracts contained arbitration clauses that stated:

“[a]ll disputes, controversies, or differences arising out of or in relation to this contractor the breach thereof which cannot be settled by mutual accord without undue delay shall be settled by arbitration in Tokyo, Japan, in accordance with the rules of procedure of the Japan Commercial Arbitration Association.”¹⁸⁴

¹⁸⁰ The Implementing Regulations of the Execution Law, *supra* note 118.

¹⁸¹ *Id.* Art. 11/3.

¹⁸² The outcome of the case detailed in the next section, when finalized and published, should change Saudi law’s orientation toward arbitration. The Court has not yet completed its findings in that case. The Execution judge has indicated, however, that the award should be enforceable since its issuance adhered to the 2012 Arbitration Law. The section below explains this case and provides some insights about the pending ruling.

¹⁸³ The author accessed the records of the Jeddah Execution Court after interviewing the circuit judge in charge of executing international arbitral awards, in December 2014.

¹⁸⁴ Judicial Order No. 36251089 dated 11/09/1436H corresponding 28 June, 2015 (Jeddah Execution Court) (hereinafter the Japanese Award) issued this case. The author contacted one of the parties’ representative in this case for comment. The lawyer asked that the dissertation not disclose the names of the parties.

The Saudi party failed to appoint its arbitrator despite the JCAA's best efforts. The JCAA therefore – following the agreed-upon rules – appointed an arbitrator and formed an arbitral tribunal that ruled, by default, in favor of the Japanese party.¹⁸⁵ The tribunal ruled that the Saudi party had to pay the principal of the outstanding amount of the invoices, as well as risk management fees, export insurance expenses, and usance fees.

The Execution Court issued an order to execute the award in June 2014.¹⁸⁶ The Saudi party then invoked the public policy exception, claiming the enforcement of the award would violate Saudi Arabia's public policy. The Saudi court found, however, that the enforcement did not violate the Sharia aspect of public policy. It also found, regarding procedural fairness, that the JCAA granted the Saudi party reasonable opportunity to represent itself and make its case before the tribunal. The Court's execution order relied on Articles 46, 69, 70, and 88 of the Execution Law¹⁸⁷ and its Implementing Regulations.¹⁸⁸ These articles state:

“[i]f the execution order is not carried out within five days of issuance and service, ... the execution judge shall immediately:

1. Ban the debtor from traveling.
2. Issue an order of banning any Power of Attorney from the debtor to deal in its money.

¹⁸⁵ The arbitration process began on March 2013 and the award was rendered in March 2014.

¹⁸⁶ Judicial Order No. 36251089, *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

3. Order a disclosure of all the debtor's outstanding and future debts to carry out the order.
4. Order a disclosure of all the licenses and trade books of the debtor.
5. Share the information of the debtor of status of 'did not execute.'"¹⁸⁹

The Law provides, moreover, that:

"If the execution order became impossible to be carried out by the proper force, ..., the execution judge may fine the debtor a financial bond [that] may not exceed 10000 Saudi Riyal¹⁹⁰..."¹⁹¹ "If the execution order became impossible to be carried out by the proper force, ..., the execution judge may imprison the debtor to force him to [pay] his debt."¹⁹²

The 2012 Arbitration Law gives Saudi courts that are considering nullification claims the power to set aside awards they deem to violate public policy without a party demanding an execution order. The Law states: "[t]he 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."¹⁹³ The Saudi court in the Japanese Award proceeding rejected the Saudi party's claim that the award violated public policy, even though it was not responsible for considering the nullification claim. The Saudi party, in a separate action,¹⁹⁴ tried to block enforcement by bringing a claim of public policy

¹⁸⁹ Execution Law, *supra* note 117, Art. 46,

¹⁹⁰ Equal to \$2,666.7 of 2017 Saudi Arabian Monetary Agency (SAMA) official exchange rate.

¹⁹¹ Art. 69, the Execution Law, *Id.*

¹⁹² Execution Law, *supra* note 117, Art. 70.

¹⁹³ Saudi Arbitration Law, *supra* note 105, Art. 50 (2).

¹⁹⁴ This action was brought before the competent authority that had original jurisdiction over the claim. The author did not have an access to the file of the case.

violation before the Court of Appeal of the Commercial Circuit in Jeddah.¹⁹⁵ The enforcement or annulment of the award pended Court of Appeal review throughout the summer of 2016.¹⁹⁶ The Execution Court proceedings, however, indicate that The Court will likely enforce the award.

5.5.1 Insights of the Japanese Award

This case highlights many issues related to substantive and procedural law in international arbitration practice in Saudi Arabia. The Saudi Execution Court gave this complicated case much more efficient treatment than it would have received had it been submitted to litigation. The 2012 Arbitration Law's changes to court roles and responsibilities regarding arbitration contributed significantly to this outcome. The judiciary did not willingly abdicate its responsibilities and power over the arbitration process and arbitrators. The new Law and the legislature of Saudi Arabia initiated these changes. This case, if enforced, would have a positive impact on arbitration practice and precedent. It would reinforce the business community's reliance on arbitration as a means of dispute resolution.

¹⁹⁵ This court, according to the Implementing Regulations of the Arbitration Law, is the competent authority to decide the nullification of arbitral awards. "For the purposes of the Law [Arbitration Law] application, the Competent Court that mentioned in the Law [Arbitration Law] is the Court of Appeal of the court that originally has jurisdiction over the claim." Implementing Regulations of the Arbitration Law enacted by Council of Ministers decision no. 541 dated 26/8/1438H (5/22/2017). (Implementing Regulations of the Arbitration Law)

¹⁹⁶ The Author Could not find any court records for this case except by asking one of the execution judge's office clerks and one of the lawyers involved in the process of the case.

5.5.2 Non-actual Losses and Damages

The Execution Court approved, in the Japanese Award, the enforcement of an award that contains outstanding risk fees, usance fees, and export insurance expenses. Some Sharia scholars regard recoverable losses simply as the actual damages from a breach of contract. They do not consider any other fees when assessing compensation and damages claims; they view such fees as “Riba” and unlawful gains.¹⁹⁷ Court approval of arbitral tribunal awards regarding non-actual damages is significant. It shows that the Court trusts the arbitration process enough to apply minimum scrutiny when it comes to choosing between Sharia opinions rendered in cases involving deals and trades.

Saudi Courts typically, and perhaps exclusively, follow the opinions of the Hanbali school of thought. The Hanbali School may or may not concur with other schools, but the Court’s recognition and enforcement of the Japanese Award signals its willingness to consider some other schools’ opinions on the matter.¹⁹⁸ The Court of

¹⁹⁷ Riba refers to the excess of principal in loans or time. Many of Sharia scholars adopt a simple view of sophisticated and complicated trade contracts. They consider damages, like the ones in this case, unlawful unless the claiming party proves otherwise. The burden of proving the legality of trade contracts should be the other way around, meaning all commercial transactions should be allowed unless proven illegal and unlawful according to Sharia principles and teachings. This dissertation is not the place to discuss this matter in depth. The author believes that the topic of the application of Sharia in recent transactions requires more research, analysis, and a deeper understanding of the complicity of transactions.

¹⁹⁸ The differences between the schools of thought under the Sharia’s umbrella comes from, among other things, varied understanding and application of the Quran and Sunnah texts. Some scholars, for example, understand direct orders as mandatory obligations; Muslims must follow them and act accordingly. Others understand orders as recommendations – unless emphasized and accompanied by warnings regarding the consequences of failing to perform them.

Appeal might have reversed the judgment and remanded it for consideration had the Trial Court issued this award.

It remains undisputed, however, that awarding the interest (usury) over and above the capital, or the due amount, in arbitral awards violates the public policy of Saudi Arabia. The Courts, like many Sharia scholars, view interest in commercial deals and trades as a major and intolerable sin.¹⁹⁹ The Courts will not, at least for the foreseeable future, tolerate the awarding of interest or usury in either domestic or international arbitration awards; they must, moreover, maintain this approach if they intend to continue complying with Sharia law and principles.

5.5.3 What is Wrong with Interest?

Muslims have regarded “Riba” – “interest” or “usury” – as a significant issue since the dawn of Islam. This view, in fact, caused some to deny Islam’s message in its early days, as is explained further below.²⁰⁰ Islam contains both religious and ethical dimensions; it prohibits “Riba” on the basis of religion, because the practice represents an ethical violation. “Riba” was a common trade practice in many early nations, both

¹⁹⁹ This rule stems from the Quranic verse: “Allah has allowed the sale and prohibited the Riba.” The Riba, as discussed earlier, refers to sums in excess of the capital and principal in loans and the increasing of debt by time.

²⁰⁰ The Quranic text narrates a conversation between Muhammad, PBUH, and his people regarding his commands and prohibitions for them. It reads: “Those who devour usury will not stand except as stand one whom the Evil one by his touch hath driven to madness. That is because they say: ‘Trade is like usury,’ but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (forever)” Quran 1:275.

Arab and others.²⁰¹ Creditors in standard loan agreements charged interest on the loans they issued to debtors – a practice known as “*Riba AlFadhl*,” the interest increase.²⁰² Late payments also prompted creditors to begin and continue increasing interest charges until the debtors paid the debt in full – a practice called “*Riba Alnaseeah*,” late payment interest.²⁰³ Given the deeply-rooted nature of these practices in Arab commercial norms, successive iterations of the prophecy of Muhammad, PBUH, enacted their prohibition gradually.²⁰⁴ The prophecy first suggested that such practices represented a non-preferable way of doing business; it then defined them as prohibited practices for prior nations that existed before Islam; it subsequently prohibited Muslims from doubling interest in any transaction; and, finally, it banned interest and usury practices from all loans and transactions.²⁰⁵ This final prohibition came in a very direct verse that warned against disregarding its injunction: “If ye do it not [i.e., observe the prohibition], Take notice of war from Allah and His Messenger. But if ye turn back, ye shall have your

²⁰¹ Abdulrahman Baamir, SHARI’A LAW IN COMMERCIAL AND BANKING ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA, Ashgate Publishing, 2013, p. 163. (Baamir).

²⁰² “Riba Al Fadl actually means that excess which is taken in exchange of specific homogenous commodities and encountered in their hand-to-hand purchase & sale as explained in the famous hadith: The Prophet said, ‘Sell gold in exchange of equivalent gold, sell silver in exchange of equivalent silver, sell dates in exchange of equivalent dates, sell wheat in exchange of equivalent wheat, sell salt in exchange of equivalent salt, sell barley in exchange of equivalent barley, but if a person transacts in excess, it will be usury (Riba). However, sell gold for silver anyway you please on the condition it is hand-to-hand (spot) and sell barley for date anyway you please on the condition it is hand-to-hand (spot).’” See for more information, *Riba Al Fadl – Explained*, By IslamicBanker <https://www.islamicbanker.com/education/riba-al-fadl-explained>

²⁰³ “[R]iba al-nasi’ah arises in loan transactions (on the basis of future repayment of more than the principal) as well as sale transactions (on the basis of deferred price). An example of loan-based riba al-nasi’ah would be a loan with \$1,000 principal on which \$1,200 is to be paid next year. An example of sale-based riba al-nasi’ah is a sale of 100 kg of dates to be paid back with 120 kg six month later”. See for more information: *Investment & Finance the Financial Encyclopedia, Islamic Finance* <http://investment-and-finance.net/islamic-finance/r/riba-al-nasiah.html>

²⁰⁴ Baamir, *supra* note 201, at 163.

²⁰⁵ For detailed information about the stages of prohibition of interest and usury, see Baamir, *id.* at 163.

capital sums: Deal not unjustly, and ye shall not be dealt with unjustly.”²⁰⁶ This verse establishes a foundation for solving disputes that involve interest or usury. It informs the courts and Muslim adjudicators that, in cases involving money lending, they should only consider the principal monetary amount in their judgments or awards. Competent Saudi courts should therefore only consider the principal amount when determining the recognition and enforcement of arbitral awards related to loans or payments; they should nullify any awards that include interest, because such awards would represent violations of public policy.²⁰⁷ Courts may also apply the prohibition of interest to contracts that contain agreements to pay interest in the event of late payments. They would most likely consider such contracts null and void. The Saudi courts have adopted this approach for any contracts that include interest agreements.²⁰⁸ The Minister of Justice has ordered Saudi courts and notaries²⁰⁹ not to authenticate any banking mortgage contracts that stipulate that clients must pay interest of a certain percentage.²¹⁰ The Supreme Judicial Council approved and upheld this Ministerial decision.²¹¹

²⁰⁶ Quran 1:279.

²⁰⁷ Baamir, *id.* at 164.

²⁰⁸ *Id.*

²⁰⁹ Notaries public are a part of the Minister of Justice in Saudi Arabia, *See* the Implementing Regulations of the Notaries issued by Minister of Justice Decision No. 3740 17/5/1425H commencing July 5th, 2004 <https://iservices.scj.gov.sa:9113/pdf/a/010-%D9%84%D8%A7%D8%A6%D8%AD%D8%A9%20%D8%A7%D8%AE%D8%AA%D8%B5%D8%A7%D8%B5%D8%A7%D8%AA%20%D9%83%D8%AA%D8%A7%D8%A8%20%D8%A7%D9%84%D8%B9%D8%AF%D9%84.pdf>

²¹⁰ *See* Baamir, *supra* note 201, at 166. Numerous alternatives exist for banking deals and contracts to avoid the interest requirements in contracts. Islamic Banking and Investment is a vast and growing industry.

²¹¹ *Id.*

The status of interest in banking and commerce, however, remains rather ambiguous in Saudi laws. The Sharia courts invalidate agreements that include interest, while the government allows banks to conduct all their financial transactions using interest. Banking practices in Saudi Arabia do not identify interest as prohibited, nor does the Saudi legislature. The practice of interest in the banking industry holds a *de facto* status in Saudi Arabia. Banks also impose interest in their contracts, as long as the claims of the failure to pay interest are reviewed by competent authorities in the disputes.²¹²

The Saudi government recognizes the crucial role that interest plays in modern commercial and trade norms. It allows the practice – contradicting the Sharia prohibition – with little comment; it essentially ignores the matter.²¹³ The Saudi government has, moreover, has established a specialized court system for banking claims; it has mandated that parties submit all banking claims to the Committee for Banking Disputes under the Saudi Arabian Monetary Authority.²¹⁴ The requirements

²¹² *Id.*

²¹³ This is a real problem in Saudi Arabia. The state is reluctant to adopt a fully Western model system with which its commerce and trade norms would accord. The state, on the other hand, needs to ensure its Islamic norms and traditions remain safe and enforceable. The people of Saudi Arabia are religious and conservative and prefer Sharia and Islamic values to adopting any other way of life or economic system.

²¹⁴ Royal Order No. 8/729 dated 10/7/1407H corresponding 3/10/1987 established the Committee for Settlement of Banking Disputes. Royal Order No. 37441 dated 11/8/1433H corresponding 7/1/2012 changed the “Committee for the Settlement of Banking Disputes” into the “Committee for Banking Disputes”. *See* <http://www.aljadaan.com/files/file/SAMA%20Committee%20Restructuring%20Briefing%20Note.pdf>. “The Committee shall hear disputes based on the information and evidence provided in the claim file and the agreements entered into between the parties (reaffirming, in effect, that the Committee will continue to uphold banking agreements).” *Id.* “The Committee has wide enforcement powers, including the power to freeze a debtor’s bank accounts, restrict the debtor from dealing with the governmental bodies and banks, and issue travel bans. The competent authorities of Saudi Arabia will be required to implement the Committee’s decisions and sanctions.” <https://www.lexology.com/library/detail.aspx?g=84306b89->

and qualifications of this committee's advisors differ from those of regular judges. The law neither requires them to receive Sharia education nor does it stipulate that they train as judges in the general court system.²¹⁵ Specifying a mechanism for resolving banking disputes outside Sharia courts' jurisdiction amounts to special treatment for banking disputes; it gives the Banking Dispute's committee members more discretion to decide disputes without considering Sharia laws.

The Execution Court, in a manner similar to the banking industry's treatment of interest, recognized, in the Japanese Award, some non-actual losses that the arbitral tribunal rendered.²¹⁶ The Execution Court determined that the Saudi translation and application of Sharia prohibits contractual agreements or awards related to non-actual losses or damages. This approach may change over time, and the Execution Court may adopt a different perspective regarding the recognition and enforcement of arbitral awards.

e5a2-424d-89c2-2574e7ceeb62. The committee is responsible for developing solutions that accord with the parties' agreement. Not making Sharia law the controlling and primary law in solving disputes is rare within the judiciary. Keeping banking disputes within the jurisdiction of a "committee" instead of judicial body served as a partial solution for the Saudi legislature. The matter of interest in the banking industry is one the reasons for the Saudi government's special treatment of banking disputes.

²¹⁵ The King names the advisors. Some recent appointees to the committee do not hold Sharia degrees or education. For the names of the committee advisors, see <http://www.bfc.gov.sa/ar-sa/Aboutus/PrimaryFinancing/Pages/CommitteeMembers.aspx>.

²¹⁶ The fact that the court considered all damages and losses calculated and rendered by the tribunal as actual and real losses could contradict this conclusion. Determining the damages when breaches occur in the business transactions, however, is not easy or simple. The transaction's level of sophistication would determine the relative ease or complexity of the calculation.

5.5.4 Submission to Foreign Jurisdiction as the Applicable Law

The parties in the Japanese Award case agreed that Japanese Law would govern any potential dispute between them. The agreement between the parties included an arbitration clause,²¹⁷ which states:

“All disputes, controversies or differences arising out of or in relation to this contract or the breach thereof which can’t [sic] be settled by mutual accord with undue delay shall be settled by arbitration in Tokyo, Japan, in accordance with the rules of procedure of the Japan Commercial Arbitration Association. The award of arbitration shall be final and binding upon both parties, and judgment on such award may be entered in any court or tribunal having jurisdiction thereof. This contract shall be, in all respect, governed by and constructed in accordance with the laws of Japan.”

Submission to a non-Muslim jurisdiction arguably violates Sharia rules and requirements.²¹⁸ The Saudi legislature, however, adopted an uncommon opinion among Sharia schools of thought and made it possible for parties to arbitrate according to non-Sharia rules. The Saudi courts presumably dislike this approach, since many view it as violating Sharia laws. The Sharia theory of necessity²¹⁹ regarding modern life

²¹⁷ The contractual relation between the parties include series of 18 supply contracts.

²¹⁸ Faisal Kutty, *The Shari’a Factor in International Commercial Arbitration*, 28 Loy. L.A. Int. & Comp. L. Rev. 565 (2006), at p. 62. (Kutty).

²¹⁹ The necessity theory is a concept in Sharia Law. It suggests that certain circumstances may necessitate that illegal actions, procedures, behaviors, etc. be made legal. A Sharia scholar with expertise in Sharia Law must make this determination. Saudi Law takes this approach regarding many laws and regulations including the public policy exception in this case.

circumstances, however, suggests that the Sharia compliance requirement can be compromised in certain instances.

Sharia rules originally prohibited the enforcement of judgments issued in non-Muslim countries.²²⁰ The Execution Judge, Dr. Alkhudairy, writes:

“It is not allowed to enforce in Land of Islam any judgment made not according to Sharia rules. It may, however, be allowed to enforce such judgments based on the necessity theory and on the reciprocity under conventions or treaties. The judgments of Sharia courts also need to be enforceable on the country from which the judgment is issued.”²²¹

The Arbitration Law now allows Saudi parties to submit to foreign laws or arbitral rules, provided that the awards not violate Sharia rules.²²²

5.5.5 Non-Muslim Arbitrators Panel (Arbitrator Qualifications)

The old Law of Arbitration in Saudi Arabia²²³ stipulated that individuals must fulfill certain criteria to qualify as arbitrators. The Saudi requirements under the old law, in contrast to international arbitration practices and more flexible Western laws regarding arbitrator qualifications,²²⁴ focused on the arbitrators’ faith, gender, and

²²⁰ Alkhudairy, *supra* note 146, at p. 20.

²²¹ *Id.* Dr. Abdullah Alkhudairy is an Execution Judge. Based in Riyadh, Saudi Arabia, his office is responsible (in Winter2014) for enforcing international arbitral awards. His addition to the subject of public policy is highly considerable.

²²² For more discussion about how the Saudi courts accept the submission to foreign laws and the reasoning of this approach, *See* Alkhudairy, *supra* note 146, at p. 20 and after.

²²³ *Supra* note 104.

²²⁴ Sameer Saleh COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST A STUDY IN SHARIA AND STATUTE LAW, published by Graham & Trotman, 1984 p35. (Saleh)

knowledge of Sharia Law.²²⁵ An arbitrator had to be a Muslim male and possess knowledge of the subject matter in question. The law also required that, in cases involving multiple arbitrators, the head of the arbitration panel possess knowledge and understanding of Sharia.²²⁶

These requirements derive from Sharia schools of thought. Some Sharia scholars contend that arbitral tribunals must fulfill certain criteria to avoid any potential challenges to arbitral outcomes.²²⁷ They consider the appointment of arbitrators as crucial a matter as the appointment of judges.²²⁸ Certain Sharia scholarship²²⁹ actually argues that arbitrators must have the same qualifications as judges to render enforceable awards. The question therefore becomes: what qualifications must a Muslim judge possess? Muslim judges must, among other things, possess two distinct characteristics: they must be Muslim and male.²³⁰ Most arbitrators in international commercial arbitration undergo training and education as practitioners and lawyers in the West and therefore will not be qualified as arbitrators. This requirement ultimately stems from a notion articulated in the Quran²³¹ and promoted by some Sharia Scholars;

²²⁵ Saleh, *id.* at p. 35. "The requirements also have to be considered by the competent court to appoint arbitrator/s. Article 15/3 of the Law states that "the competent court shall observe the conditions stipulated in the arbitration agreement as well as the conditions required under this Law".

²²⁶ Implementing Regulations of the old Law of Arbitration, *supra* note 105, Art. 3.

²²⁷ Dato' Syed Ahmad Idid and Umar A Oseni, *Appointing A Non-Muslim As Arbitrator In Tahkim*

Proceedings: Polemics, Perceptions and Possibilities, Malayan Law Journal Articles 5, 2014
<https://www.researchgate.net/publication/289904848> (Idid & Oseni)

²²⁸ Idid & Oseni, *id.*

²²⁹ This opinion is not an agreed upon decision between scholars.

²³⁰ *Id.* For more details on this subject, See Baamri, *supra* note 201, at p. 78-82.

²³¹ Quran 4:141.

namely, that a non-Muslim ruler should not rule over Muslims. Scholars explain that arbitrators in arbitration agreements involving one or more Muslim party must be Muslim, so that no non-Muslims exert authority over Muslims.²³² This opinion served as the basis for the requirement in the old Saudi Law of Arbitration Implementing Regulations²³³ that arbitrators be Muslim and male.²³⁴

The Arbitration Law of 2012 changed this requirement. Parties now have more freedom and autonomy to choose among qualified arbitrators. The Arbitration Law allows parties to choose laws and arbitral rules from different jurisdictions, validating the parties' selections as long as the arbitration awards and procedures do not violate Sharia rules. Parties thus have broader discretion in selecting arbitrators, unless they choose Saudi Law as the governing law in their agreements. The Arbitration Law requirements regarding arbitrators listed below determine the constitution of the arbitral tribunals for parties that select Saudi Law. The Law states:

“An arbitrator shall satisfy the following conditions:

1. Be of full legal capacity;
2. Be of good conduct and reputation; and
3. Be a holder of at least a university degree in Sharia or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meet such requirement.”²³⁵

²³² Idid & Oseni, *supra* note 228, at p. 4.

²³³ *Supra* note 105.

²³⁴ Art. 3.

²³⁵ Saudi Arbitration Law, *supra* note 105, Art. 14,

Sharia Law does not directly stipulate that arbitrators be Muslim and male. This requirement stems from a procedural matter within the arbitration process. The Saudi Law's validation of the selection of non-Muslim arbitrators made the Saudi law's approach to arbitration more flexible and less restricted by certain Sharia procedural issues. Saudi law no longer requires arbitrators to be Muslim or male, as the Japanese Award case demonstrates. The recognition and enforcement of the Japanese Award will almost certainly have a very significant impact on Saudi arbitration practices by encouraging commercial entities to select arbitration as the mechanism for resolving their disputes.

5.5.6 Default Award

The Saudi party challenged the enforcement of the Japanese Award because the tribunal had issued it by default. The party claimed it received neither notices of proceedings nor proper representation in the hearing. These fair-hearing procedural challenges did not prevent the court from recognizing and enforcing the award. The court gave the arbitral award the faith and credit it that arbitral awards are given in many of New York Convention signatories.

The Saudi party could challenge the default award before the Court of Appeal as being contrary to public policy, since it did not receive representation or the opportunity to present its case. The Execution Court ruling that no violation of fairness and justice occurred sends a clear signal of the Court's willingness to recognize and enforce any arbitral award that meets the minimum criteria of legality and fairness. The

Execution Court in this case refused the claim made by the respondent that it did not receive proper notice of proceedings. The record indicates that the tribunal tried to reach the Saudi party through numerous communication media.²³⁶ The tribunal followed the rules when, after these efforts, it initiated the proceedings without the Saudi party.²³⁷ The tribunal also held a telephonic procedural hearing with the parties in which the Saudi party did not participate. The tribunal left the telephone line open throughout the procedural hearing. The court ruled that these measures constituted just treatment of the respondent. The court's recognition of the award indicates that the tribunal behaved in a just manner, and the respondent refused to take advantage of its measures. The court therefore had no cause to invalidate the award based on the unjust hearing claim.

6. Conclusion On The Issue Of Public Policy

The New York Convention and various domestic laws and regulations acknowledge that public policy can act as a barrier to the recognition and enforcement of arbitral awards. International consensus has moved steadily toward minimizing the

²³⁶ The facts of the award indicate the tribunal sent the arbitration notice by FedEx services to more than one of the Saudi party's addresses in Saudi Arabia on March 15th, 2013. The tribunal sent an appointment letter to the Saudi party on May 2013 and ultimately appointed an arbitrator. The tribunal informed the parties of the intent to hold a procedural hearing in June & July of 2013, in accordance with its rules. The tribunal reached out to the Saudi party and used all the addresses it had as business locations for the respondent and also used electronic means including email and fax to ensure the parties received due notice.

²³⁷ "If one or both parties fails to appear without good cause, hearings may be held in its or their absence." Rule 35 (2) of The Japan Commercial Arbitration Association Commercial Arbitration Rules as Amended and Effective on January 1, 2008. http://www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf

application of the public policy exception. National laws and court decisions indicate that developed countries do not regard public policy as a significant threat to arbitration. These countries honor parties' agreements to arbitrate, and local courts give arbitral awards full support.

Saudi Arabia, as a signatory to the New York Convention, has adopted a new pro-arbitration law and adjusted many regulations to meet its intentions. The Saudi system of arbitration, however, still requires some modifications. Public policy in the Saudi Law of Arbitration refers to Sharia Law, and the requirement to apply Sharia to arbitration can be defined in a variety of ways. Saudi legislators should more clearly and effectively define the meaning of Sharia as it relates to arbitration. The Saudi courts' varying interpretations and applications of public policy signal the need for a more stable definition.

To join the international consensus in support of arbitration, Saudi Arabia must develop, in law or through court practice, a set of rules or principles to express the essential legal and moral values of Saudi society. Sharia scholars – all Sharia scholars – must agree upon certain core principles that arbitrating parties must acknowledge in their contracts; these consensus core principles should form the basis for public policy under Sharia Law. These objectives should come from the text of the Quran and Sunnah, and they should represent a true consensus reached among the Sharia schools of thought. The public policy defense is crucial in arbitration; the definition of public

policy should therefore stem from the fundamental principles of justice, morality, and fairness that are articulated in Sharia Law.

Saudi Arabia adopted the UNICTRAL Model Law, and it should follow the intention of the New York Convention and the explicit terms of the UNCITRAL Model Law, which support the narrow application of the public policy exception. Saudi law should seek to reduce unpredictability and uncertainty by preventing broader applications of public policy. This would narrow the courts' discretion in nullifying awards based on public policy by stipulating the use of international public policy. This would also preserve Saudi Arabia's unique position as an Islamic state by listing, in the form of legislation, all the prohibited and public policy-contradicting issues that parties and arbitrators may encounter.

CHAPTER IV: Arbitrability In Saudi Arbitration

PART 1: Arbitrability on the International Stage and in Saudi Arabia

1. Introduction

Parties to arbitration agreements at both the national and international level establish contractual relations as they choose. They can freely select the substantive and procedural laws that will govern their contracts and delineate the scope of dispute resolution clauses. Arbitration is thus a product of party autonomy and involves a significant degree of self-sufficiency.¹

Legal restrictions on arbitrability, however, may impact and limit this autonomy. Arbitrability refers to whether or not disputes that arise in contractual relations between parties can be arbitrated. Parties may attempt to prevent courts and other competent authorities from interfering in the process and/or the outcome of arbitration by adhering to arbitration laws.² Questions of arbitrability may arise when jurisdictional and contractual issues that are related to arbitration overlap.³ Areas of overlap can involve the types of dispute laws or contracts that allow parties to submit to

¹ Tibor Varady, John J. Barcelo III, Stefan Kroll and Arthur T. von Mehren, *INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE*, 6th ed. West Academic, 2015, p. 322. (Varady).

² *Id.* "Courts exercise a general public authority to adjudicate, while arbitrators rule pursuant to the parties' contract and act to resolve claims that arise in the parties' transaction. Disputes are inarbitrable as a result of the subject matter of the claim or because of deficiencies in the contractual agreement to arbitrate." Thomas Carbonneau, *Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States*, published in Loukas A. Mistelis and Stavros L. Brekoulakis, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, Kluwer Law International, 2009, 143 – 163, (Carbonneau: Liberal Rules), p. 143.

³ Loukas A. Mistelis and Stavros L. Brekoulakis, *FUNDAMENTAL OBSERVATIONS AND APPLICABLE LAW*, International Arbitration Law Library, Kluwer Law International, 2009, pp. 1 – 18, p. 3-4 (Mistelis).

arbitration.⁴ State laws and regulations may deal with questions of arbitrability with wider scope of application, and others in a narrower approach, because they define the concept of arbitrability itself in different ways. International arbitration treaties and conventions treat the concept of *in*arbitrability as a barrier and a challenge to the procedures of arbitration; these international conventions generally aim to minimize the effect of *in*arbitrability application on arbitration agreement and arbitral awards. Addressing the question of arbitrability – whether a matter is arbitrable – is thus a fundamental precursor to the arbitration process.⁵

Saudi Arabia's Arbitration Law of 2012⁶ introduced the Kingdom to a new era of dispute settlement. The 2012 Law adopted the 1985 UNCITRAL Model Law and its 2006 amendments,⁷ and it deals with both substantive and procedural questions of arbitration differently than the old law.⁸ Indeed, these two laws differ significantly regarding arbitrability. This chapter examines the various meanings and applications of arbitrability in international arbitration. The chapter's overall focus is analyzing how Saudi's 2012 Arbitration Law and the New York Convention affect interpretations of

⁴ *Id.*

⁵ Varady, *supra* note 1, at p. 322.

⁶ Saudi Law of Arbitration, enacted by the Royal Decree No. M/34, dated 24/5/1433H (4/16/2012), and entered force 30 days after the announcement.

⁷ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed May 2017).

⁸ Arbitration Law, enacted by the Royal Decree No. M/46 of 12/07/1403H (4/24/1983) and replaced and superseded by the new Law on 2012. An English version of the law is found in <http://www.wipo.int/wipolex/en/details.jsp?id=8502> (accessed May 2017).

arbitrability in Saudi legal principles and in the actual practice of arbitration in the Kingdom.

2. Arbitrability's Function

The concept of arbitrability establishes a jurisdictional boundary between arbitral tribunals and public courts.⁹ It dictates which disputes can and cannot be solved by arbitration.¹⁰ The arbitrability of disputes depends on consent between parties and legal permission to arbitrate disputed matters. The concepts of contract freedom and party autonomy give arbitrating parties the freedom to establish adjudicatory mechanisms as they please. Certain national legislation and judicial systems, however, apply the notion of inarbitrability, which may restrict that freedom.¹¹ This notion is applied to prevent parties from arbitrating certain disputes and to limit the jurisdiction of arbitrators.¹²

Parties may also use claims of inarbitrability to challenge arbitral procedures and/or the recognition and enforcement of awards. The inarbitrability defense, when employed at the procedural stage, may prevent an arbitral tribunal from commencing

⁹ Mistelis, *supra* note 3, at p. 2.

¹⁰ Thomas Carbonneau, *CASES AND MATERIALS ARBITRATION LAW AND PRACTICE*, 6th ed, p. 28 (Carbonneau: Cases); "... It determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins. In effect, it establishes a dividing line between the transactional pursuit of private rights and the courts' role as custodians and interpreters of the public interest. Whenever contractual rights become intertwined with the exercise of sovereign state authority, designated juridical institutions are generally necessary to effect justice." Thomas E. Carbonneau and Francois Janson, *Cartesian Logic and Frontier Politics: French And American Concepts of Arbitrability*. TUL. J. OF INT'L & COMP. LAW (1994) 194-195. (Carbonneau: Concepts of Arbitrability).

¹¹ Carbonneau: Cases, *supra* note 10, at p. 28.

¹² Thomas Carbonneau, *The Law and Practice of Arbitration*, 5th ed. Juris, p. 52 (Carbonneau: Practice)

the arbitration process.¹³ A party may then bring the claim to a court to decide the dispute's arbitrability, or to an arbitral tribunal to decide the scope of the agreement.¹⁴ The inarbitrability defense may also disrupt a process that has already begun and prevent it from continuing.¹⁵ A claim of inarbitrability that is brought at the enforcement stage may cause a court in the state in which a party seeks award enforcement, or in which the arbitration took place, to set the award aside or refuse to recognize it.¹⁶

3. Types of Inarbitrability

Arbitrability challenges can be divided into two groups: claims based on **objective** inarbitrability and claims based on **subjective** inarbitrability.¹⁷ Laws and arbitration practices treat these two categories differently. National courts and laws differ as well; some narrow the scope of application for each type of challenge, and some widen it. Carbonneau explains the main source of the distinction between the types of inarbitrability:

¹³ *Id.* at p. 28.

¹⁴ Varady, *supra* note 1, at p. 324.

¹⁵ Carbonneau: Practice, *supra* note 12, at p. 52

¹⁶ Varady, *supra* note 1, at p. 324. "The question of arbitrability is central to the legal regulation of arbitration. Arbitrability can involve determining whether a valid arbitration agreement exists and, if so, whether it covers the dispute in question. As the [U.S. Federal] Court itself observes, the agreement's validity and scope of application establishes the boundary between judicial and arbitral jurisdiction, between public and private adjudication. The arbitral clause represents the parties' willingness to waive their legal right to judicial relief. Given the importance of the choice and its impact on basic legal rights, it would seem that courts should determine whether such a choice had been made." Carbonneau: Practice, *supra* note 12, at p. 304-305

¹⁷ See Carbonneau: Practice, *supra* note 12, at p. 52; Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International 2014, 2nd ed., p. 944 (Born: ICA)

“Regulatory statutes contain special safeguards and remedies and proscribe conduct for the good of society. Therefore, these laws should not be applied and interpreted by private tribunals and adjudicators. The litigation of statutory claims in public judicial fora and according to established procedures guarantees public debate and accountability and allows the laws to develop dynamically in response to changes in the social or political order. Statutory claims, therefore, are inarbitrable because they implicate the vital principles upon which social organization was erected.”¹⁸

3.1 Subjective Inarbitrability

Subjective inarbitrability encompasses the capacity of parties to agree to arbitrate, the existence of a contract, and the scope of arbitration.¹⁹ It deals primarily with deficiencies and questions of validity in arbitration agreements; this area of the law is referred to as “*ratione personae*”²⁰ or “contractual arbitrability.”²¹ Inarbitrability claims that fall into this category involve contract deficiencies, such as the absence of an agreement to arbitrate or limitations on the scope of arbitration.²² The failure to implement an agreement when organizing the arbitration process²³ may also serve as a rationale for subjective inarbitrability.²⁴ Parties may, for instance, restrict their arbitration agreements to cover only disputes related to the performance of contracts or

¹⁸ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 196.

¹⁹ Mistelis, *supra* note 3, at p. 5; Carbonneau: Practice, *id.* at p. 52.

²⁰ Mistelis, *supra* note 3, at p. 5.

²¹ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 195.

²² Carbonneau: Practice, *supra* note 12, at p. 54.

²³ Such as organizing the process of arbitration by requiring mediation or conciliation before the initiation of the arbitration process.

²⁴ *Id.* Under subjective arbitrability “the law of contracts and its principles of construction are at the core of determinations regarding whether the reference to arbitration exists and, if so, whether it covers the dispute in question.” Carbonneau: Concepts of Arbitrability, *id.* at p. 195.

to the delivery of payments; they may then direct all other disputes to mediation and, if necessary, to litigation before a court.²⁵ Disputes involving royalty payments or conformity with product specifications would be considered contractually inarbitrable in such instances.²⁶ Parties must specify in their arbitration agreements any disputes that they do not want to arbitrate, especially if the agreements are broad.²⁷ Subjective inarbitrability, in short, addresses the formation and valid application of arbitration agreements;²⁸ this concept does not encompass fundamental public policy or the interpretation of arbitration law.²⁹

3.2 Objective Inarbitrability

The inarbitrability exception to the recognition and enforcement of arbitral awards originally referred to **objective** arbitrability, which restricts – as a matter of law – the ability of parties to submit certain matters to arbitration.³⁰ Objective inarbitrability does not test the parties’ willingness or capacity to arbitrate; it addresses the question of the arbitrability of the disputed matter. Claims of inarbitrability in this category – also called subject-matter inarbitrability, “*ratione materiae*,”³¹ or substantive

²⁵ Carbonneau: Practice, *supra* note 12, at p. 28.

²⁶ *Id.* at p.29; “The parties, however, could submit these disagreements to arbitration by modifying their current agreement or entering into a submission agreement when a dispute arises.” *Id.*

²⁷ This includes both contractual disputes and legal or public policy related disputes. “Generally, a broad reference to arbitration encompasses contract disputes (performance, delivery, execution, conformity to specifications, frustration of purpose and impossibility, warranties, and language interpretation) and disputes involving rights established by public law regulations (rights acquired under tax, securities, bankruptcy, antitrust, or civil rights legislations).” *Id.* at p. 30.

²⁸ *Id.*

²⁹ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 195.

³⁰ *Id.*

³¹ Mistelis, *supra* note 3, at p. 5.

arbitrability³² – can invalidate the arbitration process and/or the arbitral awards on the basis of public interest that pertains to the subject matter in question.³³ Examples of subject matter inarbitrability may differ among states, based on national laws and practices.

International consideration of subject matter arbitrability holds that all claims that arise between parties are arbitrable, unless the public policy or the public interest of the state in which the arbitration takes place would be offended. This presumption of arbitrability is replacing the traditional, long-standing hostility toward arbitration in national legislations.

However, all national courts have jurisdiction over criminal cases because of their nature and connection to the public interest.³⁴ Bribery allegations and tax violations are also, in some jurisdictions, objectively inarbitrable, because the offending private commercial conduct may impact the public interest (and thus, the case should be heard in a public forum, such as a courtroom, rather than being settled privately in an arbitration proceeding).³⁵ Under the presumption of arbitrability, all claims disputed between parties are arbitrable, if the arbitration agreement is concluded correctly.³⁶

³² Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 195.

³³ *Id.* at p. 52. “To some extent, subject-matter inarbitrability overlaps with the public policy exception to arbitration. In both circumstances, public interest considerations prevent the recourse to arbitration” *Id.*

³⁴ “Some states allow recourse to mediation in the context of criminal offences” Carbonneau: Practie, *supra* note 12, at p. 52.

³⁵ *Id.*

³⁶ In the U.S. “[t]he Court creates a presumption that the arbitrability question is to be decided by the courts. To rebut the presumption, the party seeking to submit the arbitrability question to arbitration must submit persuasive evidence of the parties’ agreement to have recourse to arbitration on the question of arbitrability. “Courts should not assume that the parties agreed to arbitrate arbitrability unless there is

Meanwhile, as noted, courts, rather than arbitral tribunals, preside over criminal disputes and any other kind of inarbitrable dispute.³⁷

4. International and U.S. Arbitrability

The unique features of the U.S. legal system influence the understanding of arbitrability in the United States. The U.S. judicial system differs from the systems of many civil law societies or other common law countries. The U.S. system relies on civil juries; the awarding of punitive, treble, and hedonic damages; the development of contingency fees, and support for class action lawsuits.³⁸ Arbitration law evolved in the United States, as did (eventually) the concept of arbitrability. The evolution in each case took place across several stages, each of which responded to questions about the role of arbitration.³⁹ The enactment in the U.S. of the Federal Arbitration Act⁴⁰ in 1925 made it possible for disputing parties to agree to arbitrate, ending a longstanding legal hostility toward arbitration that had existed in the U.S. up to that point.⁴¹ The FAA made it possible for parties engaged in commercial relationships to adopt a brand of justice that

'clear and unmistakable' evidence that they did so." Carbonneau: Cases, *supra* note 10, at p. 238. A "presumption of arbitrability . . . can be overcome only if it may be said with positive assurance that the arbitral clause is not susceptible to the interpretation that it covers the asserted dispute." *Orange Cty. Choppers, Inc. v. Goen Tech. Corp.*, 374 F.Supp.2d 372 (S.D.N.Y. 2005). *See id.* at p. 56-57.

³⁷ Other inarbitrable issues differ between jurisdictions. Examples of disputes considered inarbitrable in some jurisdictions include: domestic relations and succession; trade sanctions; certain competition claims; consumer claims; labor or employment grievances; and certain intellectual property matters. Born: ICA, *supra* note 17, at p. 945.

³⁸ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 202.

³⁹ *Id.* "In United States law, for example, the Federal Arbitration Act (FAA) only recognizes contractual inarbitrability" *Id.* at p. 197.

⁴⁰ United States Arbitration Act, ch. 213, 43 Stat. 883-86 (1925) (codified at 9 U.S.C. §§ 1-16 (1993)) (FAA)

⁴¹ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 202.

was independent from judicial proceedings.⁴² The U.S. Supreme Court has since ruled in favor of the federal law that supports arbitration. It has held that arbitration is a necessary element of commercial transaction for domestic deals as well as for cross-border transactions.⁴³ These rulings have mandated the enforcement of arbitral agreements and awards.⁴⁴ In other words, supporting U.S. economic interests has justified upholding the arbitrability of international issues – including securities and antitrust matters – that may otherwise have been deemed inarbitrable under domestic law.⁴⁵

Advances in U.S. arbitration laws and practices have diminished the differences between the application of arbitrability in domestic and international settings. U.S. Supreme Court decisions related to arbitration have gradually defined arbitrability as a unified concept.⁴⁶ The Court has relinquished any reference to the differences that may exist between arbitration that is related to domestic matters and arbitration that is related to international commerce; indeed, the Court has proclaimed that what applies

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 203 citing cases of the U.S. Supreme Court, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628-32; *Scherk v. Alberto-Culver*, 417 U.S. at 516-17; *Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 9.

⁴⁶ Carbonneau: Concepts of Arbitrability, *supra* note 10, p. at 204. “The U.S. Supreme Court has founded its view of nearly universal subject-matter arbitrability on two doctrinal precepts. First, arbitration is as effective as a court proceeding in adjudicating disputes. Therefore, rights are not extinguished or diminished by the submission of claims to arbitration. Because arbitration will give full effect to rights created by statute, statutory disputes can lawfully be submitted to arbitration. Second, relatedly, each arbitration stands on its own and does not have any impact beyond the private agreement and relationship that gave rise to it. Inarbitrability as a protector of the public interest, therefore, is of little relevance in most arbitrations.” Carbonneau: Practice, *supra* note 12, at p. 55.

to international arbitration also applies to domestic arbitration.⁴⁷ The U.S.'s 1988 congressional amendments to the FAA confirmed the Court's rulings on arbitration.⁴⁸

The concept of arbitrability in the U.S. does, however, retain a slightly broader application domestically than it does internationally. The international application of arbitrability addresses whether parties may arbitrate specific subject matters and whether disputes may be settled via arbitration. It also addresses the question of the tribunal's jurisdiction to rule versus that of the court of either party, or the seat court, or the court in which parties seek enforcement of the award.⁴⁹ The domestic application in

⁴⁷ *Id.* "Accordingly, statutory claims based upon the securities acts, antitrust laws, RICO, and even civil rights legislation could be submitted to arbitration in a purely domestic setting. Substantive inarbitrability no longer was a barrier to the right to select merely another remedy or form of trial, known as arbitration." *Id.* at p. 205.

⁴⁸ "In 1988, Congress enacted § 16 of the FAA, severely limiting appeal of judicial rulings that confirm the recourse to arbitration and providing for appeal of judicial rulings that disfavor arbitration. § 16 provides:

- (a) An appeal may be taken from-
 - (1) an order-
 - (A) refusing a stay of any action under section 3 of this title,
 - (B) denying a petition under section 4 of this title to order arbitration to proceed,
 - (C) denying an application under section 206 of this title to compel arbitration,
 - (D) confirming or denying confirmation of an award or partial award, or
 - (E) modifying, correcting, or vacating an award;
 - (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
- (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order-
 - (1) granting a stay of any action under section 3 of this title;
 - (2) directing arbitration to proceed under section 4 of this title;
 - (3) compelling arbitration under section 206 of this title; or
 - (4) refusing to enjoin an arbitration that is subject to the title. 9 U.S.C. § 16." *Id.*

⁴⁹ Laurence Shore, *The United States' Perspective on "Arbitrability"*, published in Loukas A. Mistelis and Stavros L. Brekoulakis, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Kluwer Law International, 2009, p. 69 (Shore),

the U.S. addresses these areas, and also considers the question of whether courts or arbitrators should determine the arbitrability of certain disputes.⁵⁰

The U.S. courts have supported federal policy favoring arbitration in many cases, and they have ruled that arbitration is a workable and effective form of justice.⁵¹ The U.S. Supreme Court ruled that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”⁵² U.S. courts traditionally have had the power to decide the arbitrability of arbitration cases by answering three initial questions:⁵³ (1) is the arbitration agreement a valid contract?; (2) does the agreement cover the issue in question?; and (3) do public policy considerations bar the submission of the claim to arbitration? The courts must answer these questions affirmatively to validate arbitration.⁵⁴ Proponents of this approach have regarded the question of arbitrability as an issue for judicial determination, unless the parties clearly and unmistakably indicate otherwise.⁵⁵ The lack of a valid commitment to submit the question of arbitrability to arbitrators has typically stemmed from the scope of an

⁵⁰ Martin Domke, DOMKE ON COMMERCIAL ARBITRATION, 15:1 (Gabriel Wilner and Larry E. Edmonso ed. 2016) (Domke).

⁵¹ In early arbitration cases, and prior to the enactment of the FAA, U.S. arbitration law was less effective than it is today. State court opinions bound federal courts hearing state law cases only when the cases before them involved state constitutions or statutes. In other cases, the federal courts could devise their own rules for decisions independently of state courts rules. Carbonneau: Cases, *supra* note 10, at p. 126. This has since changed. For more discussion of federalism and arbitration, *see generally id.* at p. 126 and after.

⁵² Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). *See* Shore, *supra* note 49, at p. 69-70; Domke, *supra* note 50, at 15:1.

⁵³ Shore, *supra* note 49, at p. 69.

⁵⁴ *Id.*

⁵⁵ Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); Domke, *supra* note 50, at 15:12.

agreement's arbitration clause and its enforceability.⁵⁶ Ultimately, this three-question approach has presumed that the courts should decide questions of arbitrability.⁵⁷

However, the U.S. Supreme Court has modernized this approach.⁵⁸ Recent Court decisions have shifted toward granting arbitrators more autonomy in deciding the arbitrability of disputes,⁵⁹ provided that the parties involved empower them to do so. The federal policy favoring arbitration requires that ambiguities in arbitration agreements be resolved in favor of arbitration.⁶⁰ The Supreme Court has held that: "Once it is determined [by a court] that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which [sic] grow out of the dispute and bear on its final disposition should be left to the arbitrator."⁶¹ Arbitration agreements that fail to indicate who should decide the arbitrability of a dispute may lose the support of the federal policy favoring arbitration.⁶² To avoid any surprise

⁵⁶ *Id.* "The court must decide whether the parties had agreed to submit the particular disputes to arbitration. Neither the federal policy in favor of arbitration nor the ostensible broad reach of the arbitration provision in question relieves the District Court of judicial responsibility of determining the question of arbitrability, unless the arbitration provision is so unusually broad that it clearly vests the arbitrators with the power to resolve questions of arbitrability as well as the merits." *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 696 (2d Cir. 1965).; "Whether a dispute is subject to arbitration is an issue for the courts rather than the arbitrator to decide." *Beach Air Conditioning and Heating, Inc. v. Sheet Metal Workers Intern. Ass'n Local Union No. 102*, 55 F.3d 474, (9th Cir. 1995). *See id.* at footnote 4.

⁵⁷ *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48 (2d Cir. 2001); *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996).; "Issues of procedural arbitrability are to be determined by the arbitrator, not judges; the role of the court is limited to a decision as to whether the parties must submit the "subject matter" of a dispute to arbitration." *Raceway Park, Inc. v. Local 47, Service Employees Intern. Union*, 167 F.3d 953, 160 (6th Cir. 1999). *See Domke, supra* note 50, at 15:12.

⁵⁸ *Shore, supra* note 49, at p. 69.

⁵⁹ *Id.* at p. 81

⁶⁰ *Power Share, Inc. v. Syntel, Inc.*, 597 F.3d 10 (1st Cir. 2010). *Domke, supra* note 50, at 15:12.

⁶¹ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S. Ct. 909, (1964).

⁶² "Under the FAA, the parties' intention regarding who decides the question of the arbitrability of an issue carries more weight than the presumption favoring arbitrability. Silence on the part of the parties as

results regarding the agreement to arbitrate, which may affect the enforceability of an arbitral award, the parties involved should clearly and expressly agree⁶³ to allow/ or not allow the tribunal to decide the arbitrability of the dispute.⁶⁴

The U.S. Supreme Court has attempted to strike a balance between the federal policy favoring arbitration and the potential risk of forcing parties to submit to arbitration. The Court has modified the gatekeeper role of the courts in three cases – *Howsam*,⁶⁵ *Pacificare*,⁶⁶ and *Green Tree*⁶⁷ – that establish doctrine on the matter.⁶⁸ The courts remain responsible for validating arbitration agreements, verifying that the scope of the agreements covers the disputes in question, and ensuring that arbitration does not violate public policy.⁶⁹

International arbitration laws and practice have trended toward the uniform adoption of “universal arbitrability,” which follows the concept of arbitrability

to who should decide the issue of arbitrability gives rise to the presumption against arbitration of that issue.” Domke, *supra* note 50, at 15:12.

⁶³ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). In *Kaplan*, the court decided “that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.”

⁶⁴ “Courts reviewing a contract to determine whether parties have agreed to submit a particular issue for arbitration should bear in mind the federal policy favoring arbitrability, and any doubts concerning the scope of the arbitration agreement should be resolved in favor of arbitration.” *Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145, (7th Cir. 1995).

⁶⁵ *Howsam v. Dean Witter Reynolds, Inc* 537 U.S. 79, 83 (2002). The court held that the arbitrator, not the court, had jurisdiction over a question of procedural arbitrability. *Id*; Carbonneau: Cases, *supra* note 10, at p. 279.

⁶⁶ *Pacificare Health Sys., Inc. v. Book* 538 U.S. 401 (2003); *See Carbonneau: Cases, supra* note 10, at p. 288.

⁶⁷ *Green Tree Financial Corp. v. Bazzle* 539 U.S. 444 (2003). The court found that an arbitration clause, granting the right to litigation to only one of the contracting parties was enforceable under the FAA. *Id*. *See Carbonneau: Cases, supra* note 10, at p.285.

⁶⁸ *Shore, supra* note 49, at p. 81.

⁶⁹ *Id*.

developed in the U.S.⁷⁰ This has meant that claims of inarbitrability, which serve as a barrier to arbitration recognition and enforcement, have declined, and a larger number of issues of an economic nature have become arbitrable.⁷¹ Challenging the arbitrability of cases arising out of international commercial transactions has become increasingly difficult.⁷² Worldwide trends in international arbitration practice have clarified and narrowed the scope of inarbitrable issues.

The universal consensus toward arbitrability is a result of the institutional progress of international arbitration; in short, arbitration has come to be recognized as a better, more natural means of administering justice in international commercial transactions.⁷³ Achieving high standards in arbitration practice requires that arbitrators conduct themselves as judges and enforce public laws.⁷⁴ They apply mandatory norms of commerce, as well as constitutional and international norms.⁷⁵ The experience and qualities of arbitrators, moreover, enable them to deal with complex contracts and highly technical subject matter.⁷⁶ Longstanding concerns that arbitrators lack the capacity to apply public laws now no longer threaten a case's arbitrability.⁷⁷

⁷⁰ Karim Abou Youssef, *The Death of Inarbitrability*, published in Loukas A. Mistelis and Stavros L. Brekoulakis, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Kluwer Law International, 2009, pp. 47 – 68, p. 54 (Abou Youssef)

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at p. 64.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at p. 65.

⁷⁷ *Id.* at p. 64.

The U.S. federal policy favoring arbitration has, in essence, been adopted and similarly constituted at the international level. This has resulted mainly from the need at the international level for practical problem-solving mechanisms that are appropriate for commercial transactions. The increasingly unified understanding and application of international legal concepts and principles has benefited the business community by reducing legal differences and thus mediating the challenges involved in conducting business globally.

Such pro-arbitration international policies have reduced the differences among jurisdictions in decisions regarding arbitrability.⁷⁸ The degree of uniformity in the trend toward universal arbitrability differs among countries, but economic-related issues that do not involve violations of public policy tend to be arbitrable in most countries.⁷⁹ A Canadian court, for example, ruled in a copyright dispute that “parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding.”⁸⁰ This ruling suggests a general presumption that if the relevant parties have chosen to arbitrate, then their claims are arbitrable.⁸¹

⁷⁸ *Id.* at p. 55.

⁷⁹ Swiss law, for example, provides: “[a]ny dispute involving financial interests can be the subject matter of arbitration.” *Id.* at p. 59. “Swiss law also totally rejects inarbitrability by reason of the public nature of the applicable rules. [It has] refused to consider the U.N. embargo on commercial activities with Iraq, which is effective in Switzerland, a bar to the arbitrability of a dispute arising under a contract for the sale of military equipment to Iraq.” *Fincantieri-Cantieri Navali Italiani S.p.A. et Oto Melara S.p.A. v. M. et Tribunal Arbitral*, ATF 118 II 353, 355 (June 23, 1992). *Id.*

⁸⁰ *Éditions Chouette inc. v. Desputeaux*, 2003 SCC 17. *Abou Youssef*, *supra* note 70, at p. 61.

⁸¹ *Id.* “Canadian law not only allows the parties to arbitrate virtually everything, but recent legislation also makes arbitration, not the courts, the default jurisdiction with respect to some disputes. The Quebec Professional Artists Act, Section 37 reads as follows:

In the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.” *Id.*

Subject matter arbitrability remains a question of criteria in many jurisdictions; however, the evolution of national arbitration laws has led to the rapid expansion of claims that may be defined as arbitrable. On the international stage, arbitrability in and of itself is rarely an issue these days⁸²

International policies favoring arbitration have contributed to the simplification of arbitrability decisions; arbitrability prevails over inarbitrability.⁸³ For example, France's initial definition of arbitrability included restrictions that were related to public policy;⁸⁴ French courts therefore rendered inarbitrable any disputes involving the application of legislation related to public policy.⁸⁵ However, in the 1950s, French courts began ignoring the legislative text and disregarding the association between public policy and arbitrability.⁸⁶ The French legal system eventually abandoned its restrictive approach, because it was hindering the expansion of arbitration.⁸⁷ The French courts eventually took a step further and disassociated arbitrability from public policy altogether, gradually embracing the less restrictive, international definition.⁸⁸ Inarbitrable matters under French law became those "of the closest interest to international public policy."⁸⁹ French courts developed the principle of international

⁸² *Id.* at p. 54.

⁸³ *Id.* at p. 55.

⁸⁴ *Id.* at p. 58

⁸⁵ *Id.* "The arbitrability of a dispute is not excluded by the mere fact that rules pertaining to public policy are applicable to the disputed rapport." *Id.* citing: CA Paris 19 May 1993 (Arrêt Labinel) REV. ARB. 645 (1993).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* citing: CA Paris, 29 March 1991, REV. ARB. 478 (1991).

arbitration autonomy, which dictates that the validity of international arbitration agreements should be assessed independent of national laws.⁹⁰ The evolution of jurisprudence and the development of arbitrability under French law ultimately relegated inarbitrability to a residual place: personal status and criminal matters.⁹¹

Minimizing the application of the inarbitrability doctrine is crucial to the success of arbitration, especially for international arbitration transactions.⁹² Indeed, the creation of an order that demands the re-evaluation of traditional concepts and attitudes toward arbitrability may prove necessary.⁹³ Many countries have begun trusting the process and results of arbitration, despite some initial reservations.⁹⁴ Distinguishing between those areas that are not closely related to public interest and control,⁹⁵ and those areas in which public interest and control are vital,⁹⁶ allows legal systems to render the first domain arbitrable and the latter inarbitrable.⁹⁷

Definitions of arbitrability take statutory form in most countries. Civil legal systems define the arbitrability of claims and express the intent of legislation in codes, unlike common law countries, in which court-made law is mandatory. The definition of

⁹⁰ *Id.* "within the limits of the mandatory norms of French law and international public policy, by reference to the common intention of the parties, without the need to refer to a national law" Arrêt Dalico, Cass, 1ere, 20 Décembre 1993, Rev. Arb. (1994) 116. See, Abou Yousef, *supra* note 70, at 58.

⁹¹ *Id.*

⁹² Carbonneau: Concepts of Arbitrability, *supra* note 10, at p, 201.

⁹³ *Id.*

⁹⁴ Varady, *supra* note 1, at p. 322.

⁹⁵ Examples of this category could include securities and antitrust claims.

⁹⁶ Such as criminal cases.

⁹⁷ Varady, *supra* note 1, at p. 322.

arbitrability in these countries therefore usually appears in the form of articles contained within particular codes or laws.

The disposability of rights is a key factor for the arbitrability of claims in France, Italy, Portugal, and many other civil law states. The French Civil Code delimits the claims that parties can submit to arbitration as follows: “one can arbitrate with respect to all rights of which one can dispose freely.”⁹⁸ The Code also describes the nature of inarbitrable claims thusly:

“one cannot submit to arbitration questions of status and capacity of persons, questions relative to divorce and separation, or questions respecting controversies that concern public entities or public establishments and more generally any matter that concerns the public order. However, public establishment of an industrial or commercial character can by decree be authorized to arbitrate.”⁹⁹

The Italian Code of Civil Procedure states that: “the parties may have disputes that have arisen between them decided by arbitrators provided the subject matter does not concern rights that may not be disposed of, except in cases of express prohibition by law.”¹⁰⁰ The Portuguese Act of Voluntary Arbitration states that: “[a]ny dispute relating to disposable rights, which has not been exclusively submitted by a special act to a court or to compulsory arbitration, may be submitted by the parties to decision by

⁹⁸ Code Civil, 1804, Art. 2059. “French Civil Code”. Varady, *supra* note 1, at p. 324.

⁹⁹ French Civil Code, Art. 2060.

¹⁰⁰ Code of Civil Procedure of 1990 as amended in 2006, Italy, Art. 806, “Italian Civil Code”. Varady, *supra* note 1, at p. 325.

arbitrators.”¹⁰¹ This act also details the arbitration requirements for public entities by adding special legal permission to arbitrate; namely: “the State or any other public legal entities may conclude arbitration agreements if they are authorized to do so by a special act or if the subject matter of the arbitration agreement includes disputes regarding private law relationships.”¹⁰²

Other jurisdictions take varied approaches to the arbitrability of claims. Japanese law permits recourse to arbitration if the claims concern civil disputes that settlements between the parties could resolve. The law states that: “[u]nless otherwise provided by law, an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation).”¹⁰³ The Swiss Private International Law Act states the following: “1. Any dispute of financial interest may be the subject matter of arbitration. 2. A state, or an enterprise held by or an organization controlled by a state, which is a party to the arbitration agreement cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.”¹⁰⁴ The Brazilian Arbitration Act limits the arbitrability of disputes to claims of transferable

¹⁰¹ Portuguese Act on Voluntary Arbitration of 2011, Art. 1 (Arbitration Agreement), (Portuguese Arbitration Law) Varady, *supra* note 1, at p. 325.

¹⁰² Portuguese Arbitration Law, *Id.* Art. 4. Varady, *supra* note 1, at p. 325.

¹⁰³ Japan Arbitration Law No. 138 of 2003, Art. 13 (Effect of Arbitration Agreement). Varady, *supra* note 1, at p. 325.

¹⁰⁴ Swiss Private International Law Act of 1987, Chapter 12, Art. 177. Varady, *supra* note 1, at p. 325.

rights. It states that: “parties may settle disputes through arbitration as long as the subject matter relates to freely transferable rights.”¹⁰⁵

5. Arbitrability and Public Policy¹⁰⁶

Arbitrability can be linked to the defense of public policy,¹⁰⁷ and some national laws define arbitrability in terms of public policy.¹⁰⁸ The concepts of public policy and arbitrability represent different grounds for invalidating arbitration, but they overlap when it comes to determining the validity of arbitration agreements and the enforceability of arbitral awards.¹⁰⁹ Public policy exemptions that prohibit arbitration because the claims in question pertain to the public interest intersect with the subject matter of arbitrability.¹¹⁰

The widespread embrace of arbitration has attenuated public policy exemptions, much as it has limited claims of inarbitrability. Parties involved in international commerce trust arbitration, because arbitrators have become judge-like adjudicators.

¹⁰⁵ Brazilian Arbitration Act of 1996, Art. 1, Nigel Blackaby and Constantine Partasides, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 6th ed, Kluwer Law International; Oxford University Press, (2015), p. 110. (Redfern)

¹⁰⁶ This dissertation’s section on Public Policy and Arbitration in Saudi Arabia provides more details about arbitration and public policy.

¹⁰⁷ Carbonneau: Cases, *supra* note 10, at p. 28. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 lists both public policy and arbitrability as separate grounds for invalidity of arbitration. Art. V (2) a, b. *See* note 159.

¹⁰⁸ Abou Yousef, *supra* note 70, at p. 49.

¹⁰⁹ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 195.

¹¹⁰ *Id.* “(W)hen an arbitral tribunal fails to provide a party with an opportunity to be heard or present essential evidence, the resulting award would be unenforceable for reasons of procedural lapses that converge with public policy. Substantive inarbitrability does not play a role in such a challenge to an award. A dispute involving the application of currency regulations or criminal sanctions, however, usually would be deemed substantively inarbitrable because these regulations are part of mandatory law. Their violation implicates the public interest or public policy.” *Id.* footnote (7).

The arbitral domain has therefore been extended to areas of economic activity that involve significant public interest. Public policy has, as a result, become increasingly marginalized as grounds for challenging arbitration.¹¹¹ Areas of fundamental public interest that lie exclusively within the judicial domain have become fewer and more difficult to identify.¹¹²

The defense of both inarbitrability and public policy limits and restricts parties' autonomy to establish contracts and, therefore, it restricts their ability to arbitrate. Parties that fail to carefully and legally form arbitral agreements could violate the terms of arbitrability and public policy in the jurisdictions in which they seek the recognition and enforcement of arbitral awards.¹¹³ Inarbitrability and public policy defenses differ, however, in how they relate to arbitration. The application of public policy requires substantive legal rules, but it does not preempt the arbitrability of mandatory laws pertaining to those policies.¹¹⁴ Many commentators have argued that most public policy cases and defenses can in fact be settled by arbitration.¹¹⁵ Parties can validly agree to arbitrate public policy claims, unless the law of a given state precludes the claim's arbitrability.¹¹⁶ A dispute's mere involvement with public policy does not, in other words, automatically render a claim inarbitrable.¹¹⁷

¹¹¹ Abou Youssef, *supra* note 70, p. 52

¹¹² Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 197.

¹¹³ Born: ICA, *supra* note 17, at p. 949.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at p. 950.

¹¹⁷ *Id.*

The defenses for both inarbitrability and public policy are used to deny the recognition and enforcement of arbitral awards under Article V (2) of the New York Convention. The Convention allows state courts to render awards null or unenforceable if their enforcement would violate the state's public policy,¹¹⁸ or if the subject matter is considered inarbitrable by law.¹¹⁹ Courts in such cases may render awards unenforceable without a request (to do so) from any of the involved parties; this is contrary to the stipulations of other grounds for annulment.¹²⁰

This separation of the grounds that dictate inarbitrability into two subsections (public policy-related and arbitrability-related) suggests that the public policy challenge to arbitrable awards differs in practice from the challenges that may be raised by the inarbitrability doctrine.¹²¹ The public policy defense, for example, stipulates that if an arbitral award contradicts the public policy of a state, the state cannot recognize or enforce it. The inarbitrability principle, on the other hand, stipulates that arbitration, as a dispute resolution mechanism, cannot in certain events produce an effective and enforceable award.¹²² The French Court of Appeal explains the arbitrability of public policy disputes as follows:¹²³ "the impact of public policy on the arbitrability of a

¹¹⁸ New York Convention, *Id.* Art. V (2) (b).

¹¹⁹ *Id.* Art. V (2) (a).

¹²⁰ *Id.* Art. V (2). "Recognition and enforcement of an arbitral award may also be refused **if the competent authority** in the country where recognition and enforcement is sought **finds** that: (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.*

¹²¹ Born: ICA, *supra* note 17, at p. 951.

¹²² *Id.*

¹²³ Judgment of 16 February 1989, Société Almira Films v. Pierrel, 1989 Rev. arb. 711, 714-15 (Paris Cour d'appel).

dispute does not cause arbitrators to be prohibited from applying mandatory rules, but only from hearing cases which, because of their subject-matter, can only be heard by courts.”¹²⁴ In short, some cases may involve matters of public policy and remain arbitrable.

6. Statutory claims

National courts have treated the arbitrability of statutory claims in a variety of ways. Neither the New York Convention nor the UNCITRAL Model Law¹²⁵ presents specific or unified explanations of the arbitrability or inarbitrability of statutory claims. However, national court system trends arguably favor the arbitrability of statutory claims.

In some jurisdictions, it is difficult to determine the arbitrability of disputes related to government regulation of commercial activities such as securities or antitrust initiatives can prove difficult.¹²⁶ The role of lawmakers in implementing regulatory policy, and the parties’ freedom to arbitrate, both figure in the assessment of the

¹²⁴ *Id.* See Born: ICA, *supra* note 17, at p. 951.

¹²⁵ UNCITRAL Model Law on International Commercial Arbitration (1985), enacted by the United Nations Commission on International Trade Law. See

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

¹²⁶ Carbonneau: Practice, *supra* note 12, at p. 53. “The marketplace may be a private arena, but it is also a stage upon which communitarian interests appear and have a role. Bankruptcies involve both the interests of creditors and the public’s interest in the orderly dissolution of liability-ridden enterprises. The sale of securities is a private transaction done in the context of a financial market, the integrity of which is of critical importance to society at large. Commercial competition may enhance the profitability of private enterprises, but it also affects the position of consumers and the general operation of the American economic system. The public dimension of the issues raised by commercial conduct can sometimes warrant exclusive judicial jurisdiction.” Carbonneau: Cases, *supra* note 10, at p. 291-92.

arbitrability of statutory claims.¹²⁷ Arbitral tribunals face some jurisdictional limitations when dealing with statutory claims; they cannot, for example, award damages or rule on matters of criminal conduct.¹²⁸

The inarbitrability of statutory claims stems primarily from the fact that regulatory statutes contain special safeguards and remedies, and these statutes ban certain kind of conduct out of concern for the good of the public.¹²⁹ For example, allegations of predatory behavior of a party or parties to a financial or commercial transaction or rumors of conspiracies to fix market prices, are too closely related to the public interest to be submitted to private tribunals.¹³⁰ Arbitration's status as a private adjudication mechanism bolsters, in a way, the notion that only the courts should adjudicate statutory disputes.¹³¹ The litigation of statutory claims in a public court per established procedures assures public debate and accountability, and it often produces, or further develops, laws that respond to developments in the social or political order.¹³²

¹²⁷ *Id.* The U.S. Supreme Court has developed the concept of the statutory claims and changed the longstanding policy of the inarbitrability of those claims. The current position of the Court regarding the arbitrability of statutory claims is that parties can submit both domestic and international claims to arbitration. *Id.* "Courts in some European jurisdictions have followed the U.S. positions in cases involving the application of European Union regulatory law" *Id.*

¹²⁸ *Id.* Arbitration agreements should therefore include an answer to the question of whether or not the arbitral tribunal has jurisdiction over disputes related to statutory claims. *Id.*

¹²⁹ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 196.

¹³⁰ Carbonneau: Practice, *supra* note 12, at p. 28.

¹³¹ *Id.*

¹³² *Id.* "The premise of contemporary nonarbitrability analysis ... is that arbitral tribunals have the competence to consider and satisfactorily decide disputes involving "public law" claims reflecting important national and international public policies." Born: ICA, *supra* note 17, at p. 973.

Statutory rights, moreover, are fundamentally different than contractual rights. Contractual rights apply between private parties involved in agreements that rarely involve the public interest. Statutory rights, on the other hand, are protected by laws enacted for the common good¹³³ -- for or against certain groups or types of conduct. Statutory and contractual rights also have different sources. Contractual rights stem from contracts between parties, while statutory rights stem from the legal authority of the state; this gives them precedence over private contractual privileges.¹³⁴

6.1 Securities Claims

The legal system's shift toward the arbitrability of statutory claims has widened the jurisdiction of contractual agreements. The history of U.S. Supreme Court rulings regarding the arbitrability of securities disputes exemplifies this trend. The Court ruled in a 1933 dispute regarding the U.S. Securities Act¹³⁵ that securities claims are inarbitrable. The ruling held that Congress "has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights, by means of a specific statutory anti-waiver provision."¹³⁶ It therefore concluded that: "[r]ecognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale

¹³³ Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 211.

¹³⁴ *Id.*

¹³⁵ Sales of securities are private transactions that take place in the financial market, making them of importance to the market and the society at large. Carbonneau: Practice, *supra* note 12, at p. 339.

¹³⁶ *Wilko v Swan* 346 US 427 (1953). (*Wilko*) "We think that the remedy a statute provides for violation of the statutory right it creates may be sought not only in any "court of competent jurisdiction" but also in any other competent tribunal, such as arbitration, unless the right itself is of a character inappropriate for enforcement by arbitration" *Id.* 444

of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.”¹³⁷ However, the Court reversed this opinion in *Wilko*; in this decision, the Court held that international securities disputes could be arbitrated through international commercial arbitration. The Court further solidified this position in *Scherk*,¹³⁸ holding that refusal to enforce international arbitration agreements harms international business transactions. The Court stated that: “parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate the purpose of the agreement, but also damage the fabric of international commerce and trade and imperil the willingness and ability of businessmen to enter into international commercial agreements.”¹³⁹ Thus, over time, the Court has moved away from the stance it held on arbitrability in the 1930’s and come to validate the arbitrability of securities claims in U.S. arbitration.¹⁴⁰

National legal systems differ in their acceptance of the arbitrability of securities disputes, just as they differ regarding the role of statutory claims in society. Securities laws exist to protect consumers, and some European countries therefore restrict the resolution of disputes regarding securities to the national courts.¹⁴¹ German securities

¹³⁷ *Id.*

¹³⁸ *Scherk v Alberto-Culver* 417 US 506 (1974). (*Scherk*)

¹³⁹ *Id.* See *Redfern*, *supra* note 106, at p. 115.

¹⁴⁰ *Id.*

¹⁴¹ *Redfern*, *supra* note 106, at p. 115.

law, for example, restricts arbitrability to commercial cases in which both parties are established businesses or companies.¹⁴²

6.2 Antitrust Claims

Antitrust disputes play an enormous role in most national legal systems and, as with securities claims, courts have historically deemed them inarbitrable. Their importance stems from their relevance to mandatory laws and public policy. Antitrust laws aim to ensure free trade between business entities in specific markets.¹⁴³ The critical importance of antitrust issues has meant that, for many years, only competent state authorities have been authorized to rule on antitrust cases and assess the facts and commercial behavior that might affect free competition laws.¹⁴⁴ Arbitrators, even with valid arbitration agreements, were not granted jurisdiction over antitrust claims.¹⁴⁵ A 1968 U.S. Federal Court decision reinforced this position in the United States. The Court's decision held that claims that involved antitrust laws were inarbitrable, and it gave courts sole jurisdiction to resolve them.¹⁴⁶ The decision reasoned that "[a] claim

¹⁴² *Id.* at p. 115-116; German Securities Trading Act (WpHG), s. 37h.

¹⁴³ Julian D. M. Lew, *Competition Laws: Limits to Arbitrators' Authority* published in Loukas A. Mistelis and Stavros L. Brekoulakis, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Kluwer Law International, 2009, p. 241, (Lew)

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *American Safety Equipment Corporation v JP Maguire Co.* 391 F.2d 821 (2nd Cir. 1968). *See Redfern, supra* note 106, at p. 113. The expressed "... no general distrust of arbitrators or arbitration; our decisions reflect exactly the contrary point of view. . . . Moreover, we do not deal here with an agreement to arbitrate made after a controversy has already arisen. . . . We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear. In some situations Congress has allowed parties to obtain the advantages of arbitration if they "are willing to accept less certainty of legally correct adjustment," . . . but we do not think that this is one of them. In short, we conclude that the antitrust claims raised here are inappropriate for arbitration." *See Carbonneau: Cases, supra* note 10, at p. 375.

under the antitrust laws is not merely a private matter ... Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the Courts."¹⁴⁷

However, the need for a workable international mechanism to resolve business disputes changed the way that legal systems and courts viewed the arbitrability of antitrust claims. In 1985, the U.S. Supreme Court held in *Mitsubishi*,¹⁴⁸ a well-known antitrust case, that antitrust claims brought as part of international commercial disputes are arbitrable under the Federal Arbitration Act.¹⁴⁹ The Court concluded in a five-to-three decision that:

“concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.”¹⁵⁰

The ruling went on to state that:

“[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the

¹⁴⁷ *Id.*

¹⁴⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985). (*Mitsubishi*)

¹⁴⁹ Redfern, *supra* note 106, at p. 114.

¹⁵⁰ *Mitsubishi* 473 U.S. 614 (1985).

antitrust laws has been addressed. The [New York Convention] reserves to each signatory country the right to refuse enforcement of an award where the ‘recognition or enforcement of the award would be contrary to a public policy of that country.’ ”¹⁵¹

Additional U.S. Supreme Court rulings have extended the arbitrability of statutory claims under U.S. law. The Court’s ruling in *Gilmer v. Interstate/Johnson Lane Corporation*¹⁵² addressed the importance to society of statutory claims – especially those pertaining to the Age Discrimination in Employment Act – and it addressed the arbitrability of such claims. The ruling states:

“[w]e do not perceive any inherent inconsistency between these policies, however, and enforcing agreements to arbitrate age discrimination claims... The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but . . . claims under those statutes are appropriate for arbitration.”¹⁵³

6.3 Competition Claims

European countries have recognized the arbitrability of competition law disputes – another type of statutory claim. The 1993 *Mors/Labinal*¹⁵⁴ case established the arbitrability of competition law cases in France, a ruling that the Cour de Cassation reaffirmed in 1999.¹⁵⁵ The Federal Tribunal in Switzerland, moreover, recognized the

¹⁵¹ *Id.*; See Carbonneau: Practice, *supra* note 12, at p. 340; Redfern, *supra* note 106, at p. 113-114.

¹⁵² 500 U.S. 20 (1991)

¹⁵³ *Id.* The Racketeer Influenced and Corrupt Organizations Act was enacted by section 901(a) of the Organized Crime Control Act of 1970

¹⁵⁴ The Paris Cour d'Appel of 19 May 1993. See Redfern, *supra* note 106, at p. 113.

¹⁵⁵ The decision of the “Cour de Cassation” of 5 January 1999. See Redfern, *supra* note 106, at p. 113.

arbitrability of European Union competition law in 1992.¹⁵⁶ It ruled that “[n]either Article 85 of the [EU] Treaty nor Regulation 17 on its application forbids a national court or an arbitral tribunal to examine the validity of that contract.”¹⁵⁷

7. Arbitrability in the New York Convention

The International Chamber of Commerce under the umbrella of the United Nations led collective efforts to promote international business and trade by providing a workable mechanism for dispute settlements; this resulted in the creation of the New York Convention.^{158, 159} The Convention established a basis for signatory state members to recognize and enforce arbitral awards rendered in different jurisdictions. It became the foundation for the international arbitral process.¹⁶⁰ As of April 2017, 156 countries have signed the convention and accepted its grounds for the recognition and

¹⁵⁶ Decision of the Tribunal Fédéral, 28 April 1992, [1992] ASA Bulletin 368. See Redfern, *supra* note 106, at p. 113.

¹⁵⁷ *Id.* “The same court reaffirmed this position in its decision of November 13, 1998, [1999] ASA Bulletin 529 and 455” Redfern, *supra* note 106, at p. 113

¹⁵⁸ The New York Convention was issued in 1958 and went into force on June 7, 1959, (New York Convention or the Convention). Appendix II. The New York Convention replaced the Geneva Protocol of 1923 (the ICC and under the auspices of the League of Nations initiated the Geneva Protocol on Arbitration Clauses of 1923, which went into effect on September 24, 1923.

<http://www.newyorkconvention.org/11165/web/files/document/1/5/15938.pdf>) and the Geneva Convention of 1927 (the Convention for the Execution of Foreign Arbitral Awards supplemented the Geneva Protocol and was signed at Geneva on September 26, 1927: League of Nations Treaty Series (1929-30), Vol. XCII, p. 302.

<http://www.newyorkconvention.org/11165/web/files/document/1/5/15939.pdf>) as the basis for supporting and facilitating arbitration between nations. See Redfern, *supra* note 106, at p. 6.

¹⁵⁹ <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> (accessed May 2017).

¹⁶⁰ Marike R. P. Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International, 2016, p. 1. (Paulsson).

enforcement of arbitral awards.¹⁶¹ In its introduction, the Convention states that it “seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and nondomestic arbitral awards.”¹⁶² Therefore, local courts should not discriminate against international and non-domestic arbitral awards.¹⁶³

The text of the Convention does not detail the scope of arbitrable disputes. Article I of the Convention allows member states to apply the terms of the Convention to matters defined by their own national laws as being commercial in nature.¹⁶⁴ Article II recognizes any award pertaining to disputes as being “capable of settlement by arbitration.”¹⁶⁵ Member states may hold different views about what constitutes a commercial relationship and thus may disagree about which disputes may be resolved by arbitration. Indeed, the text of the Convention makes it quite likely that member states will differ in their definitions and applications of arbitrability. The Convention goes even further in its use of language that seems guaranteed to create differences in how member states observe it; namely, the Convention allows contracting states to deny recognition and enforcement of arbitral awards if “the competent authority ...

¹⁶¹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed May 2017).

¹⁶² See Appendix iii, p. 1.

¹⁶³ *Id.*

¹⁶⁴ New York Convention, Art. I (3), *Id.* “Any state ... may ... declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as **commercial** under the national law of the State making such declaration.”

¹⁶⁵ The Convention Art. II (1), *Id.* “Each Contracting State shall recognize an agreement ... under which the parties ... submit to arbitration all or any differences ... concerning a subject matter capable of settlement by arbitration.”

finds that ...[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.”¹⁶⁶

However, national courts and legislatures in many advanced legal systems and jurisdictions have tended to apply the meaning of the Convention in ways that favor arbitration. They have looked to the Convention’s drafters’ intentions to broaden the application of arbitration and narrow the scope of inarbitrability. These courts and legislatures have regarded arbitration as a contractual relationship between parties that should be enforced without extensive interference from state authorities.

The U.S. Supreme Court, for example, has given international arbitration more power than it has allowed domestic arbitration. It ruled in *Mitsubishi*¹⁶⁷ that domestic courts must “subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”¹⁶⁸ The Court also reasoned that “[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.”¹⁶⁹ This ruling indicates that a dispute’s inarbitrability in a domestic setting under national law does not, by default, translate into inarbitrability in international arbitration.¹⁷⁰ The Court’s *Mitsubishi* decision emphasized that such disputes are only inarbitrable in a domestic setting. It justified this conclusion by

¹⁶⁶ *Id.* Art. V (2) (a).

¹⁶⁷ 473 U.S. at 639, *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* footnote 21.

¹⁷⁰ Born: ICA, *supra* note 17, at p. 957.

arguing that shared international policy favoring the settlement of international commercial disputes through arbitration should moderate any national considerations of public policy and arbitrability.¹⁷¹ The Court reached a similar conclusion in *Scherk*,¹⁷² holding that “[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [the Convention’s] purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.”¹⁷³

French courts have drawn a similar distinction between arbitrability in domestic vs. international contexts. France’s Paris Cour d’appel held that: “[a]lthough it is forbidden to enter into arbitration agreements concerning disputes implicating public policy, that rule does not mean that every case which in some respect depends on regulations based on public policy will be held inarbitrable on those grounds.”¹⁷⁴ Articles 2059 and 2060 of the French Civil Code, therefore, do not apply to international arbitration transactions.¹⁷⁵ The Paris Cour d’appel also ruled that

“in international arbitration, an arbitrator...is entitled to apply the principles and rules of public policy and to grant redress in the event that those principles and rules have been disregarded....[A]s a result, except in cases where inarbitrability is a consequence of the subject-matter – in that it implicates international public policy and absolutely excludes the

¹⁷¹ *Id.*

¹⁷² 417 U.S. at 517-18, *Id.*

¹⁷³ See Born: ICA, *supra* note 17, at p. 967.

¹⁷⁴ Judgment of 21 February 1964, *Meulemans et Cie v. Robert*, 92 J.D.I. (Clunet) 113, 116. See Born: ICA, *supra* note 17, at p. 963.

¹⁷⁵ *Id.*

jurisdiction of the arbitrators because the arbitration agreement is void – an international arbitrator, whose functions include ensuring that international public policy is complied with, is entitled to sanction conduct which is contrary to the good faith required in relations between partners in international trade.”¹⁷⁶

Thus, disputes in international settings regarding illegality and violations of public policy, or the validity of contracts, may be arbitrated.¹⁷⁷ The same Court repeated this application of arbitrability to international arbitration in 1993.¹⁷⁸ It upheld the arbitrability of civil claims that had arisen under EU competition laws in the context of an international arbitration agreement.¹⁷⁹ The Court decided that

“if the character of the economic policy of Community competition law rules prohibits arbitrators from granting injunctions or levying fines, they may nonetheless assess the civil consequences of conduct held to be illegal with respect to public order rules that can be directly applied to the parties’ relations.”¹⁸⁰

The New York Convention’s text does not define every aspect of the arbitral process, nor does it control how each member state applies it. It leaves some room to accommodate the legal and cultural differences of member states. To convince states to sign and ratify the Convention,¹⁸¹ the people who drafted the document left member

¹⁷⁶ Judgment of 29 March 1991, *Ganz v. Société Nationale des Chemins de Fers Tunisiens*, 1991 (Paris Cour d’appel)

¹⁷⁷ Born: ICA, *supra* note 17, at p. 963.

¹⁷⁸ *Id.*

¹⁷⁹ Judgment of 14 October 1993, *Société Aplix v. Société Velcro*, 1994 Rev. arb. 164 (Paris Cour d’appel)

¹⁸⁰ *Id.* See Born: ICA, *supra* note 17, at p. 963.

¹⁸¹ Domenico di Pietro, *General Remarks on Arbitrability Under the New York Convention*, published in Loukas A. Mistelis and Stavros L. Brekoulakis, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Kluwer Law International, 2009, (Pietro). 88-89

states some discretion regarding the adoption of certain provisions. The Convention does, however, make an effort to highlight a common basis for agreement among countries regarding the limits and applications of arbitration.

The Convention emphasizes that claims submitted to arbitration, under the Convention, should cover disputes related to commercial activity. It states: "... When signing, ratifying or acceding to this Convention [...] any State may [...] declare that it will apply the Convention to [...] differences arising out of legal relationships [...] which are considered as commercial under the national law of the State."¹⁸² The Convention's provisions do not define the scope of commerciality, nor do they specify what members should and should not consider commercial.¹⁸³ The Convention allows member states to apply their own definitions and understandings of "commercial." Such intentional ambiguity is not unique to the New York Convention. The Geneva Protocol on Arbitration Clauses of 1923¹⁸⁴ took a similar approach.¹⁸⁵ Some members made their acceptance of the Convention contingent on the ability to limit their

¹⁸² New York Convention, *supra* note 159, Art. I (3).

¹⁸³ Pietro, *supra* note 182, at p. 87.

¹⁸⁴ *Supra* note 159, at footnote 156.

¹⁸⁵ It states: "Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in the country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its own law." See, Pietro, *supra* note 182, at p. 87-88.

obligation to recognize and enforce arbitral awards specifically (only) to agreements related to activities of a commercial nature.¹⁸⁶

The New York Convention only applies to written arbitration agreements; it stipulates that parties must put arbitration agreements in writing as a matter of contract validity, and also, therefore, of the recognition of arbitration clauses. It states that: “[e]ach Contracting State shall recognize an agreement in **writing** under which the parties undertake to submit to arbitration all or any differences...”¹⁸⁷ Article II (2) defines the meaning of “in writing” regarding arbitration agreements as follows: “the term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”¹⁸⁸ The Convention allows written agreements to take material (physical paper) or electronic forms, and provided that the parties can prove the existence of written agreements between them, it does not impose any further “writing” requirements.

The Convention requires that competent authorities of member states recognize written arbitration agreements between parties, and further requires them to refer the

¹⁸⁶ Pietro, *supra* note 182, p. 88. During the negotiation of the Convention draft, “the Lebanese delegation declared during the negotiation that it: Considers it necessary to maintain the reservation contained in Article I(2), to the effect that the Convention will apply only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State and to disputes arising out of contracts which are considered as commercial under national law.

Similarly in this regard the Mexican delegation explained that: The Mexican Government would be unable to accede this instrument without a proviso to the effect that it would be applied [...] only in respect of awards given under compromise (sic) which are regarded as commercial under Mexican law.”
Id.

¹⁸⁷ New York Convention, *supra* note 159, Art. II (1).

¹⁸⁸ *Id.* Art. II (2).

parties to arbitration. It states that: “the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”¹⁸⁹ In short, providing a written version of an arbitration clause is critical to obtaining recognition of the arbitration agreement, and also to the enforcement of the arbitral award. The written documents are proof that the parties have agreed to settle their current or future disputes by arbitration.

The **validity of arbitration agreements** under the laws of given member states is also a matter of arbitrability. The Convention allows parties against whom arbitrators have rendered awards to challenge the awards, if they can prove that their arbitral agreements are invalid under the laws they have chosen to govern them. It states that: “recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority ... proof that: (a) ... the said agreement is not valid under the law to which the parties have subjected it ...”¹⁹⁰

8. Conclusion of International Arbitrability

The application of arbitrability in international arbitral practice has increasingly favored arbitration. General international trends reflect a growing consensus among

¹⁸⁹ *Id.* Art. II (3).

¹⁹⁰ *Id.* Art. V (1).

many countries regarding the unified application of broad applicability of arbitration to commercial cases and transactions, as arbitration has become the norm in many developed legal systems. This consensus has made arbitration the favored mechanism for settling business disputes among business entities, as well as those that occur between private parties.

The desire to make arbitration an effective and powerful legal tool to resolve business transaction disputes has caused many countries' legal systems to abandon their original hostility toward the arbitrability of claims. Broadening the scope of arbitrability has forced sovereignties around the world to accept arbitration outcomes for the greater benefit of international arbitration. As a result, the scrutiny of courts has diminished in importance in terms of the arbitrability of claims, even in cases when a court does not agree with an award. Domestic barriers to arbitrability now constitute almost no threat to the procedures of arbitration or to the recognition and enforcement of awards. Arbitrability remains troublesome in some jurisdictions, but widespread ratification of the New York Convention around the world has, at least in theory, made it difficult to challenge the recognition and enforcement of international arbitral awards.

Favorable arbitrability trends have led the courts of many countries to take on more substantial roles in submitting disputes to arbitration; inarbitrability remains the exception. Some jurisdictions, however, may continue to resist arbitrability and regard certain subject matters as inarbitrable for various reasons. Statutory claims, for example, are not arbitrable in all countries. Some national laws and courts still deem securities,

bankruptcy, and even labor law disputes to be inarbitrable because of public policy considerations. Drafters of arbitration agreements must remain mindful of the different jurisdictional attitudes that still exist toward arbitrability, in order to ensure that they compose valid arbitration agreements and produce enforceable awards.

PART 2: Arbitrability in Saudi Arabia

Saudi Arabia based its Arbitration Law¹⁹¹ on the UNCITRAL Model Law of 1985 and its 2006 amendment;¹⁹² this means that Saudi Arbitration Law accedes to the universal legal code for arbitration that many jurisdictions around the world have accepted. Saudi's Arbitration Law reflects all the important provisions of the Model Law, with several adjustments.

Neither the Model Law nor Saudi's Arbitration Law defines the arbitrability of any specific subject matter. The Model Law does not identify any specific categories of disputes as being inarbitrable.¹⁹³ This suggests that legal jurisdictions in the various countries that have acceded to the Model Law have not yet agreed on any uniform or model international principles that would render certain disputes inarbitrable.¹⁹⁴ The Model Law, instead, acknowledges the differences between legal systems and allows every state to specify some categories of disputes as inarbitrable.¹⁹⁵

1. Arbitrability in the text of the Arbitration Law:

The Saudi legal system depends mainly on regulations and laws. Court decisions do not constitute binding laws or precedents, with the exception of decisions in appealed court cases that are published. Other courts treat regular court decisions as

¹⁹¹ *Supra* note 6.

¹⁹² *Supra* note 7.

¹⁹³ Born: ICA, *supra* note 17, at p. 958.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

persuasive and authoritative, but not binding.¹⁹⁶ Saudi law itself is thus the only reliable source for decisions about arbitrability in Saudi Arabia.

Saudi's Arbitration Law does not provide a list of arbitrable disputes, nor does it define the types of claims that may be arbitrated.¹⁹⁷ The Law does, however, define certain types of disputes as being inarbitrable. It states that: "[t]he provisions of this Law shall not apply to **personal status** disputes or to **matters not subject to reconciliation.**"¹⁹⁸

¹⁹⁶ The publication of courts of Appeals' judgments is intended to make some of those decisions binding precedents. The Ministry of Justice and the Administrative Court started publishing some chosen decisions in 2005. See for example [https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1408-1423/Documents/%D8%A7%D9%84%D9%85%D8%AC%D9%85%D9%88%D8%B9%D8%A9%20%D9%83%D8%A7%D9%85%D9%84%D8%A9%20\(PDF\)/1%D9%80%20%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%AF%20%D8%A7%D9%84%D8%A3%D9%88%D9%84.pdf](https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1408-1423/Documents/%D8%A7%D9%84%D9%85%D8%AC%D9%85%D9%88%D8%B9%D8%A9%20%D9%83%D8%A7%D9%85%D9%84%D8%A9%20(PDF)/1%D9%80%20%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%AF%20%D8%A7%D9%84%D8%A3%D9%88%D9%84.pdf). Diwan Almazalim (Board of Grievances) served as the competent authority with jurisdiction over the arbitral awards enforcement until the formation of the Execution Law of 2012. See <https://www.bog.gov.sa/ScientificContent/JudicialSystems/CanceledRegulations/%D9%86%D8%B8%D8%A7%D9%85%20%D8%AF%D9%8A%D9%88%D8%A7%D9%86%20%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85%20%D9%88%D9%85%D8%B0%D9%83%D8%B1%D8%AA%D9%87%20%D8%A7%D9%84%D8%A5%D9%8A%D8%B6%D8%A7%D8%AD%D9%8A%D8%A9%201402%D9%87%D9%80.pdf>.

The 2007 Judicial Law changed that rule. This dissertation's chapter "The Need to Arbitrate" discusses this law in depth

¹⁹⁶ The Administrative Law of 2007, enacted by Royal Decree No. M/78 dated 19/9/1428H and commencing to October 1st, 2007 formed this committee.

<https://www.bog.gov.sa/ScientificContent/JudicialSystems/Documents/%D9%86%D8%B8%D8%A7%D9%85%20%D8%AF%D9%8A%D9%88%D8%A7%D9%86%20%D8%A7%D9%84%D9%85%D8%B8%D8%A7%D9%84%D9%85%201428%D9%87%D9%80.pdf>. Art. 21 of the law states: "the Diwan [Board] shall establish technical office constituted of a president, number of judges, technical, and researchers for the purposes of consulting, conducting research and studies and whatever matters conveyed to it by the Diwan President. By the end of every year, the office shall categorize and publish in volumes, the Diwan cases..." *Id.*

¹⁹⁶ Summer 2017.

¹⁹⁷ The list in Art. 1 (the definition article) includes some definitions that the law must follow. Examples of these definitions include: Arbitration Agreement, Arbitration Tribunal, and Competent Court.

¹⁹⁸ Saudi Arbitration Law, *supra* note 6, Art. 2.

2. Inarbitrability of Personal Affairs

The Saudi Arbitration Law defines claims involving personal status as inarbitrable because of the nature of such claims. Parties involved in personal affairs are usually members of the same family, in contrast to the parties typically involved in commercial transactions.¹⁹⁹ The Law, therefore, considers personal status claims to be matters of public policy and prohibits parties from submitting them to arbitral tribunals. Neither arbitrators nor courts may apply the Arbitration Law to personal affairs, and parties cannot use the law to arbitrate such claims.²⁰⁰

The Arbitration Law excludes personal affairs-related disputes from arbitration; this could mean that subject matter that is related to personal status – such as marriage disputes, custody of minors, patrimony or adoption, and will and trust disputes – may be subjected to a type of arbitration that is different from the arbitration defined by the Arbitration Law, but rather under the general principles of Sharia law.²⁰¹ Sharia Law, in fact, indicates that parties may use amicable solutions, conciliation, and arbitration to

¹⁹⁹ The personal affairs claims include disputes of marriage, divorce, inheritance, nationality, descentance etc. Sukkar, M Marc, *ARBITRATION IN LEBANON, THE CIVIL LAW PRACTICE*, Wildy, Simmonds & Hill Publishing, 2013, p. 75. (Arbitration in Lebanon)

²⁰⁰ Abdul Hamid El Ahdab and Jalal El-Ahdab *Arbitration in Saudi Arabia*, published in *ARBITRATION WITH THE ARAB COUNTRIES*, Kluwer Law International, 2011, p. 593 – 671, (El Ahdab) “As a general rule, any dispute is arbitrable unless it is “in a field in which no compromise is possible, such as divorce for adultery by the woman and matters relating to public policy.” *Id.* p. 633, citing Eid Massud Al-Juhani, *The Journal of Riyadh Chamber of Commerce*, “Tijarat-al-Riyadh” No. 263, 23rd year, November 1983.

²⁰¹ Some Islamic jurists may, following Sharia Law, cite the following passage from the Quran to indicate real arbitration, including submission to the outcome of the procedures before initiating the process: “If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things.” *See* (in Arabic) Albaghawi Commentary (*Tafseer Albaghawi*).

http://library.islamweb.net/newlibrary/display_book.php?idfrom=305&idto=305&bk_no=51&ID=292

resolve family disputes that occur between husbands and wives.²⁰²

Arbitrators/conciliators should include family members from both sides.²⁰³ This approach to arbitrating family disputes is not unheard of in international arbitration. Judicial Arbitration and Mediation Services (JAMS), for example,²⁰⁴ has a special practice group for family law disputes. Saudi Law does not apply the requirements of the Arbitration Law to family dispute conciliation and arbitration. It does, however, make such disputes arbitrable under Sharia law and in domestic courts.²⁰⁵

3. Claims Subject to Reconciliation

The Arbitration Law predicates the arbitrability of claims based on their reconcilability. The law does not provide specifications or criteria for this exception. The old law,²⁰⁶ however, sheds light on reconciliation of claims meaning. The Implementing Regulations of the old law²⁰⁷ state that: “[a]rbitration is not allowed for disputes where

²⁰² See Laura Ashworth, ISLAMIC ARBITRATION OF FAMILY LAW DISPUTES IN NEW ZEALAND, A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws with Honours at the University of Otago, Dunedin, New Zealand October 2010.

<http://www.otago.ac.nz/law/research/journals/otago036320.pdf>. “The Islamic Institute of Civil Justice (IICJ) announced its intention to establish an arbitral body that would conduct binding family law arbitrations in accordance with Islamic law” *id.* See <http://muslimcanada.org/justice.html>.

²⁰³ Arbitration in personal affairs is a well-established concept under the Sharia Law. The text of the Quranic verse states that the conciliators should be two wise and sane members from each family.

²⁰⁴ <https://www.jamsadr.com/family>. See for more discussion on arbitration in family disputes; Wendy Kennett, *It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution*, International Journal of Law, Policy and the Family, Vol. 30, Issue 1, 1 April 2016, Pages 1-31, <https://doi.org/10.1093/lawfam/ebv017>.

²⁰⁵ Saudi Arabia does not have a law or code for family law dispute conciliation and arbitration. The personal affairs courts deal with these matters and provide social consultation, and, if needed, can administer the process of conciliation. See Larry Resnick, *Family Dispute Arbitration and Sharia Law*, <https://bccla.org/wp-content/uploads/2012/04/2007-BCCLA-Sharia-law.pdf>.

Similar to the Saudi Arbitration Law, Art. 2060 of the French Civil Code, *supra* note 99, states: “[o]ne may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation...” Act no 75-596 of 9 July 1975.

²⁰⁶ *Supra* note 8.

²⁰⁷ Enacted by a Council of Ministers resolution no. 7/2021/M on 8/9/1405H (May 27, 1985)-

reconciliation is not allowed, such as **criminal matter** punishments, (certain situations involving the ending of a marriage), and all **public policy** matters.” The new law supersedes the old law regarding arbitration, but the definitions of arbitrable subject matter have not changed. Courts continue to apply the test of reconciliation to the arbitrability of disputes in cases in which the parties disagree regarding arbitrability. The law defines matters of criminal liability as inarbitrable because of their nature and relationship to the public interest.²⁰⁸ Saudi courts have exclusive jurisdiction over such matters.²⁰⁹

The Saudi Arbitration Law considers purely **commercial matters** to be subject to reconciliation. Parties to commercial transactions may arbitrate their disputes, since they have the ability to compromise and freely dispose of their economic and commercial rights. The term ‘commercial’ should be interpreted broadly to include matters arising from all relationships that have an economic nature.²¹⁰ Examples of

²⁰⁸ Carbonneau: Practice, *supra* note 12, at p. 52.

²⁰⁹ Examples of criminal acts in commercial transactions include bribery, tax violations, or organized crimes. *Id.*

²¹⁰ Redfern, *supra* note 106, p. 11. Some Civil Law arbitration codes state that the only commercial disputes are arbitrable. German securities law restricts the availability of arbitration to commercial cases in which both parties operate or own businesses or companies. German Securities Trading Act (WpHG), s. 37h. *See* Redfern, *supra* note 106, p. 116-117. “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.” Emmanuel Gaillard and John Savage, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, 1999, p. 36. (Gaillard)

Commercial transactions include: transactions related to the supply or exchange of goods or services; distribution agreements; commercial representation or agency contracts; the manufacture of goods; construction and sub-construction agreements; joint ventures and other forms of industrial or business co-operation; and the transportation of goods or passengers.²¹¹ The Saudi Law generally regards disputes involving such transactions as reconcilable and, therefore, arbitrable.

4. Arbitrability of International Transactions

The Saudi Arbitration Law of 2012 favors the arbitrability of disputes related to international transactions. The law's articles, unlike those of the old arbitration law, recognize the arbitrability of international commercial transactions.²¹² The law acknowledges that the international conventions and treaties to which Saudi Arabia is party are legal documents and laws that parties may not contradict. It states the following:

“[w]ithout prejudice to provisions of Sharia and international conventions to which the Kingdom is party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international

²¹¹ *Id.*

²¹² The Law mentions the term “international” in Articles: 2, 3, 5, 8, and 9. Saudi Arbitration Law, *supra* note 6. Art. 4 of the Law allows parties to delegate some of their arbitration responsibilities to third parties, either in Saudi Arabia or in different countries. It states: “In cases where this Law allows the parties to arbitration to choose the procedure to be followed in a certain issue, this shall include the right of the two parties to authorize a third party to choose that procedure. A third party in this respect includes any **individual, tribunal, organization, or arbitration center** within the Kingdom or abroad.” Emphasis added.

commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.”²¹³

The new law’s regard for international conventions indicates that Saudi Arabia is moving toward the international consensus favoring arbitration. The article quoted above seeks to reconcile the country’s core legal principles, Sharia Law, and the requirements of the international conventions that Saudi Arabia has joined or will join in the future.

The new (2012) law also defines international arbitration in legal transactions and agreements by linking it to cases that involve international commerce.²¹⁴ The law considers an arbitration agreement international if “the parties to [the] agreement have their head office in more than one country at the time of [the] conclusion of the arbitration agreement.”²¹⁵ The law further stipulates that, for agreements in which parties have “multiple places of business, consideration shall be given to the place of business most connected to the subject matter of the dispute.”²¹⁶ For arbitration agreements involving one or more parties that “have no specific place of business, consideration [of international arbitration] shall be given to their place of residence.”²¹⁷

²¹³ *Id.* at Art. 2.

²¹⁴ *Id.* at Art. 3. “Under this Law, arbitration shall be international if the dispute is related to international commerce”. *Id.*

²¹⁵ *Id.* at Art. 3 (1)

²¹⁶ *Id.*

²¹⁷ *Id.* The article goes on to specify in more depth the meaning of international arbitration. It regards an arbitral proceeding as international arbitration 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;

The Arbitration Law's favorable treatment of international arbitration does not explicitly differ from its treatment of domestic arbitration. The Law requires, however, that the parties comply with certain requirements when they apply it to their arbitral proceedings. The issues covered by these requirements include arbitrator quality and the process of appointing arbitrators,²¹⁸ proceeding times, the court rules used in the proceedings, and the language of the arbitration.²¹⁹

The Arbitration Law allows parties to subject their relationships to "the provisions of any document (model contract, international convention, etc.)"²²⁰ and to make these provisions applicable to their contracts. The Law therefore regards such agreements as valid and enforceable and stipulates that: "... the provisions of such

-
- 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.*

²¹⁸ As discussed below.

²¹⁹ Article 15 exemplifies some of the requirements in the appointment process between parties that choose Saudi Arbitration Law. The article states:

- "1- The ... parties ... shall agree on appointment of arbitrators. If they fail ..., the following shall apply:
- a. If the arbitration tribunal is composed of one arbitrator, the *competent court* shall appoint that arbitrator.
 - b. If the arbitration tribunal is composed of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the umpire. If a party fails to appoint his arbitrator within fifteen (15) days from receipt of a petition ..., or if the two appointed arbitrators fail to agree on ... the umpire within fifteen (15) days from date of appointment of the last arbitrator, the *competent court*, ..., shall appoint the umpire within fifteen (15) days from date of submission of the petition....
- 2- If the ... parties ... fail to agree on the procedures for appointment of arbitrators ... the *competent court* shall ... take the necessary measure or action unless the agreement provides for other means for completing such measure or action.
- 3- In appointing an arbitrator, the *competent court* shall observe the conditions stipulated in the arbitration agreement [and] the conditions required under this Law, and shall issue its decision appointing the arbitrator within thirty (30) days from the petition submission date." This article is clear example of domestic arbitration to which the parties will not be require adhere unless they apply the Saudi Arbitration Law to their agreement.

²²⁰ Saudi Arbitration Law, *supra* note 6, Art. 5.

document[s], including those related to arbitration, shall apply.”²²¹ The Arbitration Law thus allows the courts, in the case of a challenge, to apply to the dispute the requirements of the parties’ agreement along with any other applicable laws. It also allows the courts, in case of arbitrability of claims challenge, to declare the dispute arbitrable, provided the claim meets the law’s arbitrability requirements.

5. Arbitration for Government Bodies and Agencies

The Saudi Arbitration Law prohibits the government and its agencies from engaging in arbitration without the approval of the Saudi Prime Minister.²²² The law states that: “[g]overnment bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law.”²²³ The old law and its Implementing Regulations also included this requirement. The old law stated that: “government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This provision may be amended by a Resolution of the Council of Ministers.”²²⁴ The old law’s Implementing Regulations further stipulated that “if a government entity chooses to resort to arbitration, it has to prepare a memo in this regard detailing the dispute, its causes, reasons, and the opponent parties, and to

²²¹ *Id.*

²²² “In post-colonial Arab eyes (following deceiving arbitration experiences in government contracts relating to the exploration of natural resources) recourse of public entities to arbitration was not perceived to be in the public interest. As a result, Arab laws have widely prohibited arbitration in administrative or State contracts with foreign parties.” Abou Youssef, *supra* note 70, at p. 61.

²²³ Saudi Arbitration Law, *supra* note 6, Art. 10 (2).

²²⁴ Saudi Old Arbitration Law, *supra* note 8, Art. 3.

report the memo to the Prime Minister for approval. The Prime Minister might preapprove the submission to arbitration before a dispute arises.”²²⁵

The Saudi legislature has identified disputes involving public or governmental entities as public policy concerns important to the national interest. The submission of disputes involving government bodies must therefore undergo executive scrutiny before receiving approval. The text of the law does not specify the Prime Minister’s role in either approving or prohibiting the arbitration, but it does make clear that the arbitration outcome must not violate or otherwise jeopardize the public interest.

Some commentators have suggested that the restriction on the involvement of governmental bodies and agents in arbitration reflects the Saudi reaction to the outcome of *Saudi Arabia v. Aramco*.²²⁶ This case involved a disagreement between Saudi Arabia and Aramco (then a foreign investor) over right of transport oil as to which Aramco was

²²⁵ Implementing Regulations for the Old Saudi Arbitration Law, *supra* note 206, Art. 8.

²²⁶ Abdulrahman Baamir, SHARI’A LAW IN COMMERCIAL AND BANKING ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA, Ashgate Publishing, 2013, p. 107 and after. (Baamir). The author asserts that the Council of Ministers issued its resolution no. 58 of 1963 as a response to outcome of the case. The resolution states as: “No government agency shall conclude a contract with any individual, company or private organization that include a clause subjecting the government agency to any foreign court of law or any judicial body. “

- Except in concessions granted by the government, no government agency shall accept arbitration as a means of settling disputes that may arise between it and any individual, company or private organization.
- The most important principle of private international law is the principle of application of the law of the place of performance; government agencies may therefore not choose any foreign law to govern their relationship with any individual, company or private organization.
- The above provisions shall apply to contracts concluded after the issuance of this resolution.” Resolution no. 58 of 1963, *See* Baamir, *id.* p. 107.

“[C]ontrary to common misconception, this prohibition (on the governmental entities from arbitration) was not technically implemented by excluding the arbitrability of these contracts, but by limiting or totally depriving State entities and public bodies from the legal capacity to enter into international arbitration agreements” Abou Youssef, *supra* note 70, at p. 61-62.

given an exclusive right.²²⁷ The original concession agreement between Saudi Arabia and Aramco included arbitration as a means of solving disputes between the parties,²²⁸ and the arbitrators in this case decided in favor of Aramco. This led Saudi legislators to enact Resolution no. 58,²²⁹ which restricted arbitration by governmental agencies to the approval of Prime Minister.²³⁰ The arbitrators in the Aramco case, per the parties' agreement, did not apply the Sharia concept of arbitration, because the Sharia did not contain rules and principles that could be related to the complexity of oil concessions.²³¹ Some commentators believe, however, that the arbitrators' award would have been the same even if the arbitrators had applied Sharia rules to the case.²³²

6. Agreement to Arbitrate

Arbitration agreements between parties give arbitration proceedings their legal standing.²³³ These agreements remain the cornerstone for the validation of arbitration processes in national laws and international treaties.²³⁴ Agreements to arbitrate can take

²²⁷ See generally Baamir, *id.* at 100; Aramco Award (1963) 27 Int. L. Rep. 117 (Aramco Award); https://www.trans-lex.org/260800/_/aramco-award-ilr-1963-at-117-et-seq/#head_5 (accessed June 2017)

²²⁸ *Id.*

²²⁹ The Council of Ministers Resolution no. 58 of 1963 dated 17/1/1383 H. corresponding to 9 June 1963. See Baamir, *supra* note 227, at 107.

²³⁰ The Aramco case, *supra* note 225, was of a great importance to the Saudi legislature for various reasons. State shortages and desire for economic stability were among the reasons Saudis agreed to the concession. The kingdom was formed in 1931 and it signed the concession in 1933. See for more information Baamir, *supra* note 227, at p. 100 and after.

²³¹ The arbitral award states: "the regime of mining concession, and, consequently, also of oil concessions, has remained embryonic in Moslem law and is not the same in different schools. The principles of one School [Hanbali school] cannot be introduced into another, unless this is done by the act of authority. Hanbali law contains no precise rule about mining concessions and [is] *a foriori* about oil concessions." Aramco Award, *supra* note 228, at 162-163; Baamir, *supra* note 227, at 103.

²³² Redfern, *supra* note 106, at 215, citing: Fadlallah, *Arbitration facing conflicts of culture: The 2008 Freshfields Lecture*, 25 Arb Intl 303 (2009).

²³³ See Redfern, *supra* note 106, at p. 11-12.

²³⁴ *Id.*

the form of arbitral clauses when parties establish relationships, or of submissions when differences arise between them.²³⁵

Arbitral clauses (*clause compromissoire*) in legal relationship agreements demonstrate that parties have agreed to arbitrate differences that arise from, or in connection to, the contract.²³⁶ Parties hope their business deals will not generate any disputes and, in these arbitral clauses, they agree to avoid courts and submit any future disputes to arbitration in brief and to-the-point text.²³⁷ Arbitral clauses contained in larger contracts are the most common form of arbitration agreement.²³⁸ Parties generally draft such clauses in a simple and standard language, providing for the resolution of disputes by arbitration. A clause might read as follows: “Any dispute arising under this contract shall be submitted to arbitration under the rules of [a chosen arbitral institution].”²³⁹ Arbitration clauses also, on occasion, take the form of separate agreements, rather than being a part/s of the main contract/s between the parties.²⁴⁰

²³⁵ Carbonneau: Practice, *supra* note 12, at p. 50.

²³⁶ Redfern, *supra* note 106, at p. 12.

²³⁷ *Id.* at p. 14. “Institutions such as the ICC and the LCIA have their own recommended forms of arbitration clause, set out in their books of rules. The UNCITRAL Rules offer a simple ‘Model Arbitration Clause’, which states that: ‘Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.’” *Id.* The Saudi Center for Commercial Arbitration also suggests a general clause for parties to include in their contract. It recommends this text: “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration administered by the Saudi Center for Commercial Arbitration (SCCA) in accordance with its Arbitration Rules.” <https://www.sadr.org/ADRService-model-ADR-clauses-model-clauses?lang=en>.

²³⁸ Carbonneau: Practice, *supra* note 12, at p. 50.

²³⁹ *Id.*

²⁴⁰ *Id.* “Ordinarily, the arbitral clause is a provision within a larger contract; it, however, can be a physically separate agreement. In such instances, the main contract should provide for the incorporation of the arbitration agreement and the latter, likewise, should contain an unambiguous declaration that it applies to the main contract” *Id.*

The law regards arbitral clauses, regardless of the form they take, as separate agreements from the main contracts.²⁴¹

The second form of arbitration agreement involves the submission to arbitration when disputes arise between parties.²⁴² Submissions to arbitration are usually more complex and nuanced than the arbitration clauses found in the primary contracts.²⁴³ This complexity results from the presence of disputes with which the parties are already familiar. The parties' knowledge of disputes they wish to resolve enables them to design their arbitration with clearer intentions about the nomination of tribunals, the issues to be submitted to the arbitrators, and the manner in which the parties propose to deal with the issues.²⁴⁴

The arbitration agreement in the case of an investment arbitration – a special type of arbitration agreement -- can serve as a bilateral treaty between the investor's state and the state hosting the investment.²⁴⁵ "A feature of such treaties is that each state party to the treaty agrees to submit to international arbitration any dispute that might arise in the future between itself and an 'investor.'"²⁴⁶

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Redfern, *supra*, footnote 106, at p. 12.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* "This 'investor' is not a party to the treaty. Indeed, the investor's identity will be unknown at the time when the treaty is made. Hence this 'agreement to arbitrate' in effect constitutes a 'standing offer' by the state concerned to resolve any 'investment' disputes by arbitration. It is an offer of which many 'investors' have been quick to take advantage." *Id.*

7. Separability and Kompetenz-kompetenz

Arbitration agreements concluded according to the Arbitration Law legally bind the parties to arbitrate their disputes. Arbitration agreements are stand-alone agreements that are separate from principal contracts, even in cases involving invalid or illegal contracts between parties.²⁴⁷ The separability or severability of arbitration agreements is a doctrine recognized by international and national (domestic) arbitration that gives arbitration agreements a special status – it allows these agreements to be treated as different and separable from other content contained in the contracts in which they appear.²⁴⁸ Therefore, any potential nullity or invalidity of principal contracts that establish relationships between parties will not invalidate agreements to arbitrate.²⁴⁹

²⁴⁷ Carbonneau: Practice, *supra* note 12, at p. 50. “In any event, in terms of legal theory, the arbitral clause is always distinct from the main contract. Under the separability doctrine, the arbitral clause has an autonomous legal identity. The nullity of the main contract, therefore, does not invalidate the agreement to arbitrate, unless the moving party establishes – to the satisfaction of the arbitrators or a court – that the nullity also affects the arbitration provision.” Carbonneau: Cases, *supra* note 10, at p. 26

²⁴⁸ Born: ICA, *supra*, footnote 17 at p. 349. The doctrine of separability along with the concept of *Kompetenz-Kompetenz* protects the autonomy of the arbitral process by maintaining the arbitral tribunal’s power to rule in its jurisdiction. Carbonneau: Practice, *supra* note 10 at p. 56. In the U.S. and “[p]rior to the incorporation of [separability and *Kompetenz-Kompetenz* concepts] into the law of arbitration around 1960, a party bent on delay would allege that the principal contract was unenforceable – usually, because it violated a public policy regulation.” *Id.*

²⁴⁹ Carbonneau: Practice, *supra* note 12, at p. 50-51. “The moving party must establish that the alleged flaw also affects the provision for arbitration or that the latter has its own flaw(s)” *Id.* “The characteristics of an arbitration agreement...are in one sense independent of the underlying or substantive contract [and] have often led to the characterization of an arbitration agreement as a ‘separate contract.’ [An arbitration agreement] is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract.” Born: ICA, *supra*, footnote 17, at p. 349, citing *Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.* [1998] 4 All ER 570 (QB) (English High Ct.).

The Saudi Arbitration Law follows the approach implicitly mandated by the New York Convention²⁵⁰ and applies the doctrine of separability to arbitration agreements. The Law states:

“An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of the contract which includes said arbitration clause shall not entail nullification of the arbitration clause therein, if such clause is valid.”²⁵¹

The Arbitration Law, moreover, permits parties to arbitrate according to documents such as model contracts, international conventions,²⁵² rules of arbitration institutions, etc. Competent authorities will enforce any separability requirement that the applicable documents or arbitration rules contain.

The separability doctrine enables arbitral tribunals to rule on their own jurisdiction – a practice known as *kompetenz-kompetenz*.²⁵³ Separability, in reality,

²⁵⁰ New York Convention does not impose or require application of separability in its article. It assumes, however, that arbitration agreements are separable from the parties' main contracts and implicitly treats them as such. Born: ICA, *supra* note 17 at p. 354. “In so doing, the Convention reflects the general understanding and expectations of parties to international arbitration agreements that such agreements are separable, but does not mandate such an understanding.” *Id.*

²⁵¹ Saudi Arbitration Law of 2012, *supra*, footnote 6 Art. 21.

²⁵² *Id.* Art. 5.

²⁵³ Carbonneau: Practice, *supra* note 12 at p. 56. “The U.S. Supreme Court, In *Buckeye Checking, Inc. v. Cardegna*, 546 US 440 (2006) upheld the separability doctrine and noted that the issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded.” See Shore, *supra* note 49 at p. 72. The Court has made clear that the concept of separability is an essential part of U.S. arbitration law, dictating practice in both state and federal courts. Carbonneau: Cases, *supra* note 10 at p. 141. “We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” *Id.* The Court, moreover, answered the question of separability in favor of arbitration. “[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. . . . [U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first

triggers the application of *kompetenz-kompetenz* in arbitration processes.²⁵⁴ The concept of *kompetenz-kompetenz* stipulates that the arbitrators have the authority to rule on the validity or scope of arbitration agreements.²⁵⁵ Arbitral tribunals can therefore rule on allegations that certain contractual deficiencies included in main contracts affect arbitration agreements; they can also decide certain claims regarding whether a given dispute exceeds the scope of the arbitration agreements.²⁵⁶

Saudi's Old Arbitration Law stipulated that the courts answer the question of arbitrability and refer the issue to arbitration if they deemed the matter arbitrable.²⁵⁷

Parties had to obtain authorization to arbitrate before commencing arbitration. This

instance. . . . [T]his arbitration law applies in state as well as federal courts." See Carbonneau: Cases, *supra* note 10 at p. 141. "We simply reject[] the proposition that the enforceability of the arbitration agreement turn[s] on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action." *Id.*

²⁵⁴ *Id.* The arbitrators' decision on the question of jurisdiction can be subject to the court review.

Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 200 "The effectiveness of this procedure would depend on the existence of a like-mindedness among arbitral tribunals and the supervising courts. Such a cooperative alliance is not uncharacteristic of the current international arbitral process.' Functioning properly, this procedure would have the benefits of sustaining the role of arbitrability in the international process and having the application of the concept established by a mutuality of perspectives among arbitral tribunals and national courts." *Id.*

²⁵⁵ Carbonneau: Cases, *supra* note 10 at p. 141.

²⁵⁶ *Id.* "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. Under U.S. law, arbitrator rulings on jurisdiction are, like arbitrator rulings on the merits, subject to deferential judicial review. For all intents and purposes, under these doctrines, the arbitral tribunal decides questions pertaining to the validity and scope of its adjudicatory authority." *Id.* at p. 57. In contrast, the separability may not applied in cases of fraud or illegality. "The principle of nonseparability is still accepted, in the case of an illegal contract such as a usurious agreement. The illegality of the contract may not be arbitrated, and neither may any issue arising out of the contract." Domke, *supra* note 50, at 11:1.

²⁵⁷ "Parties to a dispute shall file the arbitration *instrument* with the authority originally competent to hear the dispute.

The said *instrument* shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration." Saudi Old Arbitration Law, *supra* note 8, Art. 5.

meant that the question of arbitrability in this system was no longer a concern by the time an arbitral tribunal addressed the parties' claims.

The current Arbitration Law, by contrast, recognizes the authority of tribunals to determine their jurisdictions, allowing parties to bring the question of arbitrability to the arbitrators.²⁵⁸ The new Law states that:

“The arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject-matter in the agreement.”²⁵⁹

This means that the Saudi courts should treat arbitration clauses as agreements that are separate from the principal contracts, or submissions to arbitrate, in which they appear. Court supervision over arbitration jurisdictions and the validity of contractual agreements that contain arbitral clauses has all but disappeared. The Arbitration Law empowers arbitrators to determine the validity, scope, and potential nullification of arbitration agreements. Valid arbitration agreements thus deprive courts of the jurisdiction to rule on any matter covered by the agreements, and they thereby effectively give jurisdiction exclusively to arbitral tribunals.²⁶⁰ Courts must compel

²⁵⁸ The power given to arbitrators to decide the arbitrability of claims should make it possible for the arbitrators to “assert openly their status as a ‘shadow’ or unofficial court system for transborder contract claims” Carbonneau: Concepts of Arbitrability, *supra* note 10, at p. 200.

²⁵⁹ Saudi Arbitration Law of 2012, *supra*, footnote 6 Art. 20.

²⁶⁰ Carbonneau: Practice, *supra* note 12 at p. 51.

arbitration or enforce subpoenas for testimony or documents if parties refuse to abide by agreements.²⁶¹

8. Other requirements

The Saudi Arbitration Law predicates the validity and enforceability of arbitration agreements according to several additional requirements derived from international arbitration laws and practices. These requirements include the following: (1) parties must possess the legal capacity to agree to take part in arbitration; and (2) parties must formalize their agreement to arbitrate in writing.

8.1 Legal Capacity to Agree

The New York Convention stipulates that the lack of legal capacity to agree to, or to conclude, arbitration can invalidate arbitral proceedings.²⁶² Such a lack can also void or annul arbitral awards in Saudi Arabia. The Saudi Arbitration Law prohibits legally incapable individuals – who might not be bound by the agreements they make – from entering into arbitration agreements as a matter of subjective arbitrability. The law states that: “[a]n arbitration agreement may only be concluded by persons having legal capacity to dispose of their rights (or designees) or by corporate persons.”²⁶³ The

²⁶¹ *Id.*

²⁶² Art. V (1) (a) of the Convention states that “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes ... proof that: (a) The parties to the agreement ... were, under the law applicable to them, under some incapacity” NY Convention, *supra* note 159.

²⁶³ Saudi Arbitration Law of 2012, *supra* note 6 Art. 10 (1).

category of legal incapacity encompasses agreements involving minorities, individuals with mental illness, and coercion.

Saudi Arabia does not, in contrast to some other Arab countries, prescribe a certain age for legal capacity in commercial transactions.²⁶⁴ The lack of such a prescription stems from the legal capacity requirement contained in Sharia Law. Sharia differentiates between the age of maturity and the age of legal capacity.²⁶⁵ It stipulates that Muslims should follow Sharia practices as they reach maturity,²⁶⁶ but adds to “maturity” the condition of mental capacity as a requirement for individuals undertaking financial transactions. Dealing with money in a rational manner, meaning basic ability to calculate profits and losses, demonstrates individual legal capacity to agree to arbitration.²⁶⁷

²⁶⁴ The United Arab Emirates’s Civil Transactions Code of 1985 states that the age of legal capacity is 21 lunar years. <http://www.gcc-legal.org/LawAsPDF.aspx?country=2&LawID=3126> (accessed June 2017), and the Iraqi Civil Code, Art. 103 makes 18 the age of legal capacity,

http://www.uobabylon.edu.iq/uobColeges/ad_downloads/6_30450_50.pdf. (accessed June 2017).

²⁶⁵ <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=33965>. (accessed June 2017)

²⁶⁶ That age is 15 according to majority of Muslim scholars. *Id.*

²⁶⁷ Muslim Scholars from different schools suggest testing young people by giving them small sums of money and observing what they do with it. Individuals who spend the money wisely are considered legally capable of financial dealings. Those who spend it unwisely are considered incapable of financial transactions. See for more information <http://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/islamic-law-personal-law> (accessed June 2017). “The existence of capacity to conclude an arbitration agreement is a requirement under all international arbitration conventions and national arbitration statutes for the validity of the resulting agreement. In most commercial settings, however, issues of capacity have limited practical significance” Born: ICA, *supra* note 17, at 721.

Saudi Labor Law does, however, identify the age of 18 as the line between childhood and maturity.²⁶⁸ Employers, therefore, should consider certain legal restrictions before hiring minors. The 18-year-old age limit should serve as a protection for minors in work environments, but it does not prevent them from concluding commercial transactions. In sum, the Saudi courts would likely recognize an arbitration agreement between minors if the court deems that the contractual parties were aware and capable of agreeing to arbitrate. The age limit should not be a barrier used to invalidate arbitration agreements before the courts.

8.2 In Writing

The in-writing requirement is arguably the most significant and widely accepted arbitration agreement requirement.²⁶⁹ International treaties and conventions have long required that parties put arbitration agreements in writing.²⁷⁰ The New York Convention adopted this requirement to provide a uniform international standard, taking into consideration various individual national approaches toward arbitration.²⁷¹ Written agreements ensure that the parties agreeing to arbitrate clearly understand that the agreement represents a waiver of the right to resort to local courts or other official

²⁶⁸ Saudi Labor Law 2005, articles (2) and (173) identify the working age as 18; it labels anyone under 18 a minor. Art. (2) states: "Minor: Any person of fifteen and below eighteen years of age" and Art. 173 states: "A seaman shall satisfy the following: (1) He shall have completed eighteen years of age."

In cases of partnership and corporation, individuals signing the contract or arbitration agreement must have the legal authority to do so. The Board of Directors is the body authorized to negotiate on behalf of shareholders and enter into arbitration agreements. It also has the power to authorize the managing director or any person to do that on its behalf. See *Arbitration in Lebanon*, *supra* note 202, at p. 86.

²⁶⁹ Born: ICA, *supra* note 17, at 657.

²⁷⁰ Born: ICA, *supra* note 17, at 446.

²⁷¹ *Id.* at 660.

competent authorities for remedies or adjudication.²⁷² Some commentators rationalize this requirement as a special need. Everyone can access the courts, and waiving this right requires special formalities that ensure due notice²⁷³ – namely, that the parties put their waiver of this right, and their intent to arbitrate, in writing – that applies beyond the agreements that would normally hold between parties.

The Saudi Arbitration Law requires that parties put their arbitration agreements in writing. It states: “[t]he arbitration agreement shall be **in writing**; otherwise, it shall be void.”²⁷⁴ The New York Convention and the UNCITRAL Model Law are the sources of this requirement. The Convention explicitly requires that contracting states recognize written arbitration agreements. It reads:

“[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship ...”²⁷⁵

The UNCITRAL Model Law also suggests that the parties put the arbitration agreement in writing. It gives adopting states the option of enacting this requirement, stating: “The arbitration agreement shall be in writing.”²⁷⁶

²⁷² *Id.*

²⁷³ *Id.* “The protect[ion] of the parties concerned from entering into ill-thought-out commitments involving the renunciation of the right of access to normal courts and judges.” *Id.*

²⁷⁴ Saudi Arbitration Law of 2012, *supra* note 6 Art. 9 (2).

²⁷⁵ New York Convention, *supra* note 159 Art. II (1).

²⁷⁶ UNCITRAL Model Law, *supra* note 7 Art. 7 (2).

The Arbitration Law goes on to describe the “in-writing” requirement as including any type of written communication between parties. It specifies that an agreement to arbitrate “shall be deemed written if it is included in a document issued by the two parties or in an exchange of documented correspondence, telegrams or any other electronic or written means of communication.”²⁷⁷ The Law contains additional details about this requirement that allow the inclusion of any indirect mention or reference to arbitration. It says: “[a] reference in a contract or a mention therein of any document containing an arbitration clause shall constitute an arbitration agreement.”²⁷⁸ The Law, in fact, regards the mention of arbitration in any agreement, treaty, institutional rule, or any legal document to constitute an arbitration agreement between the parties to arbitrate, as long as they integrate the document into their agreement. The Law reads as follows: “any reference in the contract to the provisions of a model contract, international convention or any other document containing an arbitration clause shall constitute a written arbitration agreement, if the reference clearly deems the clause as part of the contract.”²⁷⁹ Saudi Arbitration Law imposes few restrictions on the in-writing requirement—unlike the arbitration laws of some other countries. It does not even regulate, for example, the font size used for the arbitration clause, or the location of the clause in the overall document, nor does the Law require that parties execute arbitration agreements separately.

²⁷⁷ Saudi Arbitration Law of 2012, *supra* note 6 Art. 9 (3).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

The Saudi Law of Arbitration arguably goes a step beyond the New York Convention's requirements in supporting arbitration. The Convention stipulates certain formalities including, for instance, that the written agreement between the parties: "... include an arbitral clause in a contract or an arbitration agreement, **signed** by the parties or **contained** in an exchange of letters or telegrams."²⁸⁰ The "signed" or "contained in an exchange of letters" requirements impose certain criteria that parties must meet to validate their agreements. These requirements also render void any oral agreement to arbitrate, any arbitration agreement that involves a tacit or other form of accepting instruments, and any unsigned written contracts.²⁸¹ The Saudi Law, by contrast, does not require that parties sign the agreement, stating simply that a "reference in a contract or a mention ... of any document containing an arbitration clause shall constitute an arbitration [agreement]."²⁸²

The Saudi Law adopted the UNCITRAL Model Law's interpretation of the in-writing requirement of the New York Convention. The Model Law (as amended in 2006) suggests that parties may meet the in-writing requirement for arbitration agreements as follows:

"(3) An arbitration agreement is in writing if its content is **recorded in any form**, ...

(4) The requirement that an arbitration agreement be in writing is met by an **electronic communication** if the information contained therein is

²⁸⁰ New York Convention, *supra* note 159 Art. II (2).

²⁸¹ Born: ICA, *supra* note 17, at 664.

²⁸² Saudi Arbitration Law of 2012, *supra* note 6 Art. 9 (3).

accessible ... any communication that the parties make by means of ...
electronic mail, telegram, telex or telecopy

(5) ...

(6) **The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.**"²⁸³

An arbitration agreement fulfills the Saudi Law's in-writing requirement if the "arbitration agreement ... is included in a **document issued** by the two parties or in an **exchange of documented correspondence, telegrams or any other electronic or written means of communication.**" The article adds: "[a] **reference in a contract** ... of ... a model contract, international convention or any other **document containing an arbitration clause** shall constitute a written arbitration agreement, if the reference clearly deems the clause as part of the contract."²⁸⁴ The language of this article does not explicitly require parties to put arbitration agreements in writing; it merely indicates that a written reference amounts to an arbitration agreement. The language of this article provides practical support for the basic objective of facilitating international arbitration agreements.²⁸⁵

The Saudi Arbitration Law's in-writing requirement parallels international policy that favors arbitration. The law makes it easier for the parties and courts to conclude that the parties have agreed to arbitrate, provided that the parties possess written,

²⁸³ UNCITRAL Model Law, *supra* note 7 Art. 7 (4 &6).

²⁸⁴ Saudi Arbitration Law of 2012, *supra* note 6 Art. 9 (3).

²⁸⁵ Born: ICA, *supra* note 17, at 691.

recorded, retrievable documentation of their agreement. The Law imposes less restrictions on the formalities of agreements made between parties. This indicates that the Saudi legislature aims to join the contracting parties of the New York Convention in supporting the venue of arbitration and, to a certain extent, the procedures for solving disputes in national and international business transactions by means of arbitration.

8.3 Could The Formality Requirement Be Improved?

No in-writing requirement exists in Saudi Arabia for agreements that are not subject to the Saudi Arbitration Law. Sharia contract law predicates contract validity solely on the contract meeting and the will of the parties.²⁸⁶ The law does not base contract validity on contract formalities. We must then ask the question of whether arbitration agreements that lack required formalities are valid.

Agreements that do not meet the formal requirements of the Saudi Arbitration Law should still be validated. The Saudi Arbitration Law does not consider unwritten arbitration agreements valid or enforceable, but future reforms or amendments to the law could change that. Even without relying on the in-writing requirement, the law could still require parties that claim the existence of an arbitration agreement to prove their case.

Some legal systems have taken a flexible approach toward the requirement of putting arbitration agreements in writing. German Law, for example, states that: “[t]he

²⁸⁶ See Abbas Husni Muhammad, *Contracts in Islamic Jurisprudence, A Comparative Study*, 1993, p. 103 and after. <http://www.alukah.net/sharia/0/22446/> (accessed June 2017).

form requirement of subsection 1 [writing the agreement] shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection [is] raised in good time – the contents of such documents are considered to be part of the contract in accordance with common usage.”²⁸⁷ The parties’ acceptance of the agreement, and the lack of any timely objections to the existence of the agreement, makes such arbitration agreements between parties valid.²⁸⁸

The 2006 revisions to the UNCITRAL Model Law changed its approach to the in-writing requirement. Option II of Article 7 of the Model Law²⁸⁹ removes all formal requirements for arbitration agreements. It states:

“‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

Article 7 allows the member states to choose between requiring an in-writing arbitration agreement, as Option I suggests, or to eliminate formal requirements, as Option II suggests.

The in-writing requirement has become less significant in some countries’ arbitration laws.²⁹⁰ The 1981 Decree in France, for example, ended all formal

²⁸⁷ German Code of Civil Procedure, §1031(2).

²⁸⁸ Born: ICA, *supra* note 17, at 705-706.

²⁸⁹ As adopted by the Commission at its thirty-ninth session, in 2006

²⁹⁰ *Id.* at p. 706. The number of countries taking this approach is small but it is increasing. *Id.* Examples of these countries are “France, New Zealand, Sweden, Scotland, Singapore and Hong Kong.” *Id.*

requirements for international arbitration agreements.²⁹¹ The 2011 revisions to the French Arbitration Law reinforced this approach, stating that: “[t]he arbitration agreement shall not be subject to any requirement as to its form.”²⁹² The French Court of Appeal recognized that the New York Convention has few formal requirements for arbitration agreements.²⁹³ New Zealand’s Arbitration Act is even more explicit, stating that: “[a]n arbitration agreement may be made orally or in writing. [...] an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”²⁹⁴

Removing procedural requirements from arbitration agreements enables state legal systems to endorse arbitration and tends to cause regimes to be more supportive of arbitration. Minimizing the formal requirements for arbitration agreements under the Saudi Arbitration Law and enabling parties to make agreements in any way they like, as long as they can prove the existence of an agreement, would strengthen the use of arbitration as a legitimate and effective method for settling disputes.

9. Subject to Sharia and Public Policy

The Saudi Arbitration Law requires that arbitrators consider Sharia Law and Saudi Arabia’s public policy.²⁹⁵ It states:

²⁹¹ Born: ICA, *supra* note 17, at 706.

²⁹² French Code of Civil Procedure, Art. 1507. *See* Born: ICA, *supra* note 17, at 706.

²⁹³ Paris Cour d’appel, applying the 1981 Decree. *See* Born: ICA, *supra* note 17, at 706.

²⁹⁴ Art. 7 (1) Ch. 2, New Zealand Arbitration Act 1996, No 99 Date of assent 2 September 1996.

<http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html>

²⁹⁵ This topic is discussed in more depth in the Chapter: Public Policy in Saudi Arbitration

“1. Subject to provisions of **Sharia** and **public policy** in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:

a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise.”²⁹⁶

The Law does not specify what it means to apply Sharia rules to arbitrability. The Saudi legislature does not base its application of Sharia Law on clearly defined principles. The application reflects individual understanding of certain Sharia principles, which change from case to case. Codifying Sharia Law is a necessity for modern commercial law.²⁹⁷ Examining the application of Sharia to other arbitration-related issues may provide some clarity.²⁹⁸

Laws and regulations must be clear and predictable for commerce and economic development to flourish. Saudi legislators should seek to eliminate the ambiguity about the meaning of Sharia and about how to apply its principles to arbitrability. Speculation and uncertainty do not favor arbitration, and this ultimately damages the business environment in Saudi Arabia.²⁹⁹

²⁹⁶ Saudi Arbitration Law of 2012, *supra* note 6 Art. 38

²⁹⁷ Some commentators have resisted the codification of Sharia Law out of respect for Sharia and its principles.. “The traditional establishment is by nature against these reforms” Caryle Murphy, *Saudi to codify Sharia 'for clarity' Resistance from conservatives expected to slow formalisation of largely unwritten laws to bring uniformity to judicial rulings*, 2010, <https://www.thenational.ae/world/mena/saudi-to-codify-sharia-for-clarity-1.518063>.

²⁹⁸ In arbitration, Sharia can apply to public policy, arbitration agreements, legality of transactions, and compatibility of awards with Sharia principles. The chapter “Arbitration in Sharia” in this dissertation includes further discussion of this point.

²⁹⁹ *See id* for more information.

10. Conclusions Regarding Saudi Arbitrability

Saudi Arabia has adopted the UNCITRAL Model Law, which can be considered the most modern example of all laws that deal with arbitration. The Model Law has supported a trend toward freeing arbitration from local challenges, and it has helped to create an international consensus about the viability and efficiency of arbitration as a method of dispute resolution. The Saudi Arbitration Law treats arbitrability claims, whether objective or subjective, favorably. It follows the international approach to the arbitrability of claims by stipulating that Saudi courts apply inarbitrability challenges narrowly. Courts should strike a balance between preserving certain areas of domestic law and honoring the autonomy of the involved parties to arbitrate and arrange their private affairs as they see fit.

It is still important and necessary for the global community to promote the use of arbitrability in international commercial arbitration. Arbitration works best when courts and legal systems support arbitrability claims and honor parties' agreements to arbitrate. International trade norms and comity require that courts treat certain types of disputes as arbitrable. Saudi courts should support arbitrability between parties, whether the dispute involves intellectual property or a security claim, as long as the proposed arbitration does not threaten the public interest. The scarcity of published court cases makes it difficult to determine whether Saudi courts may treat certain statutory claims as inarbitrable. Otherwise, however, arbitrators should have jurisdiction over all legal issues except criminal matters.

Saudi courts should accept parties' autonomy and enforce arbitration agreements. Arbitration agreements should remain valid and enforceable even in cases involving invalid contracts. Arbitral tribunals should have the authority to render judgments, so long as the parties refer to arbitration in their agreements. Arbitrators should rule on jurisdictional questions in any contractual dispute submitted to them, unless the parties stipulate otherwise.

The concept of inarbitrability should be narrowly applied. In Saudi Arabia, the shortage of court cases published by competent authorities regarding arbitrability makes the arbitrability of certain subject matters unclear, especially in cases to which Sharia Law may apply. Courts should publish more cases to clarify the ambiguity surrounding the arbitrability of claims. Saudi's national laws and courts should: (1) elaborate definitions of inarbitrable subject matter; (2) make clear the particular areas that are excluded from arbitrators' jurisdiction; and (3) support the arbitrability of all claims subject to reconciliation that parties have agreed to arbitrate.

Appendices

APPENDIX I

Arbitration Law of 2012 and Its Implementing Regulations

Law of Arbitration

Royal Decree No. M/34

Dated 24/5/1433H - 16/4/2012

Law of Arbitration

Chapter I

General Provisions

Article 1

The following phrases, wherever mentioned in this Law, shall have the meanings assigned thereto, unless otherwise required by context:

1. Arbitration Agreement: is an agreement between two or more parties to refer to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.
2. Arbitration Tribunal: a sole arbitrator or a panel of arbitrators in charge of deciding a dispute referred to arbitration.
3. Competent Court: a court having legal jurisdiction to decide disputes agreed to be referred to arbitration.

Article 2

Without prejudice to provisions of Sharia and international conventions to which the Kingdom is party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.

The provisions of this Law shall not apply to personal status disputes or to matters not subject to reconciliation.

Article 3

Under this Law, arbitration shall be international if the dispute is related to international commerce, in the following cases:

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

Article 4

In cases where this Law allows the parties to arbitration to choose the procedure to be followed in a certain issue, this shall include the right of the two parties to authorize a

third party to choose that procedure. A third party in this respect includes any individual, tribunal, organization, or arbitration center within the Kingdom or abroad.

Article 5

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

Article 6

1. Unless otherwise agreed upon by the parties to arbitration regarding notifications, the written notice shall be delivered to the addressee personally or to his designee, or to the mailing address specified in the contract subject of the dispute or in the arbitration agreement or the document governing the relationship addressed by the arbitration.
2. If the written notice cannot be delivered to the addressee according to Paragraph 1 above, it shall be deemed to have been received if it is sent by registered mail to the addressee's last-known place of business, habitual residence or to a known mailing address.
3. The provisions of this Article shall not apply to judicial notifications relating to court proceedings with regard to nullification of the arbitration award.

Article 7

It shall be deemed a waiver of his right to object, if a party to arbitration proceeds with arbitration procedures knowing that a violation of a provision that may be agreed to be violated or of a term in the arbitration agreement was committed and he fails to object

to such violation within the agreed upon period or within thirty days from his knowing of the violation in the absence of an agreement.

Article 8

1. The court of appeal originally deciding the dispute shall have jurisdiction to consider an action to nullify the arbitration award and matters referred to the competent court pursuant to this Law.
2. In case of an international commercial arbitration within the Kingdom or abroad, the court of appeal originally deciding the dispute in the city of Riyadh shall have jurisdiction, unless the two parties to arbitration agree on another court of appeal within the Kingdom.

Chapter II

Arbitration Agreement

Article 9

1. The arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract. The arbitration agreement may also be concluded after the occurrence of a dispute, even if such dispute was the subject of an action before the competent court. In such a case, the agreement shall determine matters included in the arbitration; otherwise, the agreement shall be void.
2. The arbitration agreement shall be in writing; otherwise, it shall be void.
3. An arbitration agreement shall be deemed written if it is included in a document issued by the two parties or in an exchange of documented correspondence, telegrams or any other electronic or written means of communication. A reference in a contract or a mention therein of any document containing an arbitration clause shall constitute an

arbitration agreement. Similarly, any reference in the contract to the provisions of a model contract, international convention or any other document containing an arbitration clause shall constitute a written arbitration agreement, if the reference clearly deems the clause as part of the contract.

Article 10

1. An arbitration agreement may only be concluded by persons having legal capacity to dispose of their rights (or designees) or by corporate persons.
2. Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law.

Article 11

1. A court before which a dispute, which is the subject of an arbitration agreement, is filed shall dismiss the case if the defendant raises such defense before any other claim or defense.
2. Filing the action referred to in Paragraph 1 of this Article, does not preclude the commencement or continuation of the arbitration proceedings or the rendering of the arbitration award.

Article 12

Subject to the provisions of Article 9 (Paragraph 1) of this Law, if an agreement to resort to arbitration is reached while the dispute is being considered before the competent court, said court shall refer the dispute to arbitration.

Chapter III Arbitration Tribunal

Article 13

The arbitration tribunal shall be composed of one arbitrator or more, provided the number of arbitrators is an odd number; otherwise, the arbitration shall be void.

Article 14

An arbitrator shall satisfy the following conditions:

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

Article 15

- 1- The two parties to the arbitration shall agree on appointment of arbitrators. If they fail to reach an agreement, the following shall apply:
 - a. If the arbitration tribunal is composed of one arbitrator, the competent court shall appoint that arbitrator.
 - b. If the arbitration tribunal is composed of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the umpire. If a party fails to appoint his arbitrator within fifteen (15) days from receipt of a petition to this effect from the other party, or if the two appointed arbitrators fail to agree on appointment of the umpire within fifteen (15) days from date of appointment of the last arbitrator, the competent court, pursuant to a petition filed by the party seeking to expedite the arbitration, shall appoint the umpire within fifteen (15) days from date of

submission of the petition. The umpire, whether selected by the two appointed arbitrators or appointed by the competent court, shall preside over the arbitration tribunal. These provisions shall apply to cases where the arbitration tribunal is composed of more than three arbitrators.

2- If the two parties to the arbitration fail to agree on the procedures for appointment of arbitrators, or if one party thereof fails to adhere to such procedures, or if the two appointed arbitrators fail to agree on a matter that requires their agreement, or if a third party fails to perform a function entrusted thereto under such procedure, the competent court shall, pursuant to a petition filed by the party seeking to expedite the arbitration, take the necessary measure or action unless the agreement provides for other means for completing such measure or action.

3- In appointing an arbitrator, the competent court shall observe the conditions stipulated in the arbitration agreement as well as the conditions required under this Law, and shall issue its decision appointing the arbitrator within thirty (30) days from the petition submission date.

4- Without prejudice to the provisions of Articles 49 and 50 of this Law, the decision of the competent court appointing the arbitrator shall not be independently subject to any form of appeal.

Article 16

1. An arbitrator shall have no vested interest in the dispute. He shall also, from the time of his appointment and throughout the arbitration proceedings, disclose to the arbitration parties in writing any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, unless he has already informed them thereof.

2. An arbitrator shall be barred from considering or hearing a case for the same reasons for which a judge is barred, even if neither party so requests.

3. An arbitrator may not be disqualified except in the presence of circumstances giving rise to justifiable doubts as to his impartiality or independence, or if he lacks the

qualifications agreed to by the arbitration parties, without prejudice to the provisions of Article 14 of this Law.

4. Neither arbitration party may disqualify an arbitrator appointed by him, or in whose appointment he participated, except for reasons that become known after the appointment of such arbitrator.

Article 17

1. If the two parties to arbitration fail to agree on a procedure for disqualifying an arbitrator, the party who seeks to disqualify an arbitrator shall, within five days from date of knowing of the formation of the arbitration tribunal or of any circumstances justifying such disqualification, send a written statement giving grounds for the disqualification of the arbitration tribunal. If the arbitrator sought to be disqualified fails to recuse himself or the other party rejects the petition for disqualification within five days from date of submission thereof, the arbitration tribunal shall decide on the disqualification within fifteen days from date of receipt of such petition. If the disqualification is not successful, the party seeking disqualification may petition the competent court, within thirty days, to decide on the disqualification; said court decision shall not be subject to appeal.

2. A disqualification petition may not be accepted from a party who has previously submitted a petition to disqualify the same arbitrator in the same arbitration on the same grounds.

3. Submission of a disqualification petition before an arbitration tribunal shall result in suspension of the arbitration proceedings. An appeal against the arbitration tribunal's decision rejecting the disqualification petition shall not result in suspension of the arbitration proceedings.

4. If the petition to disqualify an arbitrator is accepted, whether by the arbitration tribunal or by the competent court when considering an appeal, all previous arbitration procedures, including the arbitration award, shall be deemed null and void.

Article 18

1. If an arbitrator fails to perform his functions or ceases to do so in a manner that leads to unjustifiable delay in arbitration proceedings, and yet does not recuse himself and the two arbitration parties do not agree on dismissing him, the competent court may dismiss him pursuant to a petition by either party; said court decision shall not be subject to appeal.
2. Unless appointed by the competent court, an arbitrator may not be dismissed except by the consent of the two parties to arbitration, without prejudice to the provisions of Paragraph 1 of this Article. The dismissed arbitrator may claim compensation unless such dismissal is attributed to him.

Article 19

If the mandate of an arbitrator expires due to death, disqualification, dismissal, recusal, disability or any other reason, a replacement shall be appointed according to the procedures followed in the appointment of the arbitrator whose mandate has expired.

Article 20

1. The arbitration tribunal shall decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject-matter in the agreement.
2. Pleas of lack of jurisdiction shall be raised on dates referred to in Article 30 (Paragraph 2) of this Law.

The appointment or participation in the appointment of an arbitrator by either party shall not preclude his right to file any of such pleas. The plea that the arbitration agreement does not include matters raised by the other party while the dispute is being

reviewed must be raised immediately; otherwise, the right to raise such plea shall terminate. In all cases, the arbitration tribunal may accept a late plea if it deems the delay justified.

3. The arbitration tribunal shall decide on pleas referred to in Paragraph 1 of this Article prior to deciding on the subject of the dispute. However, it may join said pleas to the subject and decide on them both. If the arbitration tribunal decides to dismiss the plea, such plea may not be raised except through the filing of a case to nullify the arbitration award ending the entire dispute, pursuant to Article 54 of this Law.

Article 21

An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of the contract which includes said arbitration clause shall not entail nullification of the arbitration clause therein, if such clause is valid.

Article 22

1. The competent court may, upon the request of either party, order provisional or precautionary measures prior to commencing arbitration proceedings, or upon request by the arbitration tribunal during arbitration proceedings. Said measures may be revoked in the same way, unless otherwise agreed by the two parties to arbitration.
2. The competent court may, upon request by the arbitration tribunal, issue an order of judicial delegation.
3. The arbitration tribunal may, as it deems fit, seek the assistance of the competent agency in the arbitration proceedings, such as calling a witness or an expert, ordering the submission of a document or a copy thereof, reviewing said document, or any other proceeding, without prejudice to the right of the arbitration tribunal to conduct said proceeding independently.

Article 23

1. The two parties to arbitration may agree that the arbitration tribunal shall, upon the request of either party, order either party to take, as it deems fit, any provisional or precautionary measures required by the nature of the dispute. The arbitration tribunal may require the party requesting such measures to provide sufficient financial guarantee for the execution of such proceeding.

2. If the party against whom the order has been issued fails to execute such an order, the arbitration tribunal may, upon the request of the other party, authorize said party to take necessary measures for its execution, without prejudice to the right of the arbitration tribunal or the other party to request the competent agency to enforce such order.

Article 24

1. Upon appointment of an arbitrator, a separate contract shall be concluded with him specifying his fees. A copy of the contract shall be deposited with the agency specified in the Implementing Regulations of this Law.

2. In the absence of such agreement between the two parties to arbitration and arbitrators regarding arbitrators' fees, the competent court shall decide the matter pursuant to a non-appealable decision. If the arbitrators are appointed by the competent court, said court shall determine their fees.

Chapter IV

Arbitration Proceedings

Article 25

1. The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including their right to subject such proceedings to effective rules of any organization, agency or arbitration center within the Kingdom or abroad, provided said rules are not in conflict with the provisions of Sharia.
2. In the absence of such an agreement, the arbitration tribunal may, subject to the provisions of Sharia and this Law, decide the arbitration proceedings it deems fit.

Article 26

The arbitration proceedings shall commence on the day a request for arbitration made by one arbitration party is received by the other party, unless otherwise agreed by both parties.

Article 27

The two parties to arbitration shall be treated equally, allowing each party a full and equal opportunity to present his case or defense.

Article 28

The two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad. In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties. This shall not prejudice the power of the arbitration tribunal to convene at any venue it deems appropriate for deliberation; hearing of witnesses, experts or the parties to the dispute; inspection of the subject matter of the dispute; and examination of documents or review thereof.

Article 29

1. Arbitration shall be conducted in Arabic, unless the arbitration tribunal or the two parties to arbitration, agree on another language or languages. Such agreement or decision shall apply to the language of the written statements and notes, oral arguments and any decision, message or award made by the arbitration tribunal, unless otherwise agreed by both parties or decided by the arbitration tribunal.
2. The arbitration tribunal may require that all or some of the written documents submitted in the case be accompanied by a translation into the language or languages used in the arbitration. In case of multiple languages, the arbitration tribunal may limit the translation to some of them.

Article 30

1. Within the period of time agreed upon by the parties or determined by the arbitration tribunal, the plaintiff shall send to the defendant and to each arbitrator a written statement of his claim, containing his name and address, name and address of the defendant, full statement of the facts of the claim, his demands, evidence; and any other matter required by the agreement of the two parties to be mentioned in this statement.
2. Within the period of time agreed upon by the parties or determined by the arbitration tribunal, the defendant shall send to the plaintiff and to each arbitrator a written statement of his defense in response to the statement of claim. The defendant may include in his response any demands connected to the subject-matter of the dispute, or may assert any right arising therefrom for the purpose of set-off defense. This right may be asserted to the defendant even at a subsequent phase of the proceedings, if the arbitration tribunal deems such delay justified.
3. Each party may submit with the statement of claim or response thereto, as the case may be, copies of supporting documents and cite all or some of the documents as well

as the evidence he intends to submit. This shall not prejudice the arbitration tribunal's right at any phase of the case to request submission of the original documents on which either party relies, or copies thereof.

Article 31

A copy of any briefs, documents or papers submitted by either party to the arbitration tribunal shall be sent to the other party. Likewise, a copy of any expert reports, documents and any other evidence submitted to the tribunal to rely on in issuing its award shall be sent to both parties.

Article 32

Either arbitration party may amend or complete his demands or defense during the arbitration proceedings, unless the arbitration tribunal decides not to accept the same to avoid delaying adjudication of the dispute.

Article 33

1. The arbitration tribunal shall hold hearings to enable each of the two parties to present his case and submit his arguments and evidence. It may, unless the two parties to arbitration agree otherwise, deem the submission of the written briefs and documents sufficient for adjudicating the dispute.
2. The two parties to arbitration shall be given sufficient advance notice at their addresses with the arbitration tribunal of any hearing, date of award pronouncement and any meeting of the arbitration tribunal for the purpose of inspection of the subject-matter of the dispute or any other property or the examination of documents.
3. The arbitration tribunal shall record the summary of each hearing in minutes signed by witnesses, experts, attending parties or their agents, and members of the arbitration

tribunal. A copy thereof shall be delivered to each party, unless the two parties to arbitration agree otherwise.

Article 34

1. If the plaintiff, without acceptable justification, fails to submit a written statement of his claim in accordance with Article 30 (Paragraph 1) of this Law, the arbitration tribunal shall terminate the arbitration proceedings, unless otherwise agreed by the two arbitrating parties.
2. If the defendant fails to submit a written statement of his defense in accordance with Article 30 (Paragraph 2) of this Law, the arbitration tribunal shall continue the arbitration proceedings, unless otherwise agreed by the two arbitrating parties.

Article 35

If either party fails to appear at a hearing after notification or to submit required documents, the arbitration tribunal may continue the arbitration proceedings and issue an award in the dispute, based on available evidence.

Article 36

1. The arbitration tribunal may appoint one or more experts to submit a written or oral report on certain issues determined by the tribunal, and this shall be recorded in the minutes of the hearing. The arbitration tribunal shall notify both parties thereof, unless they agree otherwise;
2. Each party shall provide the expert with information relating to the dispute and enable him to examine and inspect any documents, goods or other property relating to the dispute which he requires. The arbitration tribunal shall decide any dispute that may arise between the expert and either party in this respect pursuant to a non-

appealable decision.

3. Upon receiving the expert's report, the arbitration tribunal shall provide each of the two parties with a copy of such report and allow each party to give opinion thereon.

Both parties shall have the right to review and examine documents upon which the expert relied. The expert shall submit his final report after reviewing the two parties' comments thereon.

4. Upon submission of the expert's report, the arbitration tribunal may, at its own discretion or upon request of either party, decide to hold a hearing with the expert and allow both parties to discuss the report with him.

Article 37

If, in the course of the arbitration proceedings, a matter outside the jurisdiction of the arbitration tribunal arises, or if a document submitted to it is challenged for forgery or criminal proceedings were initiated for its forgery or for any other criminal act, the arbitration tribunal may continue reviewing the subject of the dispute if it deems deciding such matter, on the forgery of the document or on the other criminal act is not necessary for deciding on the subject matter of the dispute. Otherwise, the tribunal shall stay the proceedings pending a final judgment in this regard, and such decision entails the suspension of the deadline determined for rendering the arbitration award.

Chapter V

Proceedings for Deciding Arbitration Cases

Article 38

1. Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:

a. Apply to the subject matter of the dispute rules agreed upon by the arbitration

parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise.

b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute.

c. When deciding the dispute, the arbitration tribunal shall take into account the terms of the contract subject of the dispute, prevailing customs and practices applicable to the transaction as well as previous dealings between the two parties.

2. If the two parties to arbitration expressly agree to authorize the arbitration tribunal to settle the dispute amicably, it may rule on the dispute in accordance with the rules of equity and justice.

Article 39

1. If the arbitration tribunal is composed of more than one arbitrator, its decision shall be made by majority vote of its members. Deliberation shall be in camera.

2. If members of the arbitration tribunal fail to reach an agreement and a majority decision is not attainable, the arbitration tribunal may appoint a casting arbitrator within fifteen days. Otherwise, the competent court shall appoint a casting arbitrator.

3. Decisions regarding procedural matters may be issued by the presiding arbitrator, if so authorized by both parties in writing or by all members of the arbitration tribunal, unless otherwise agreed by both parties.

4. If the arbitration tribunal is authorized to settle the dispute amicably, its award shall be made unanimously.

5. The arbitration tribunal may issue provisional or partial awards, prior to making the final award ending the entire dispute, unless the parties agree otherwise.

Article 40

1. The arbitration tribunal shall render the final award ending the entire dispute within the period agreed upon by both parties. In the absence of agreement, the award shall be issued within twelve months from the date of commencement of arbitration proceedings.
2. In all cases, the arbitration tribunal may extend the arbitration period provided that such extension does not exceed six months, unless the parties agree on a longer period.
3. If the arbitration award is not issued within the period provided for in the preceding paragraph, either party may request the competent court to issue an order specifying an additional period or terminating the arbitration proceedings. In such event, either party may file a case with the competent court.
4. If an arbitrator is appointed in place of another in accordance with the provisions of this Law, the period set for the award shall be extended by thirty days.

Article 41

1. The arbitration proceedings shall terminate by the issuance of the award ending the dispute or by the issuance of a decision by the arbitration tribunal to end the proceedings in the following cases:
 - a. If both parties agree to terminate the arbitration proceedings;
 - b. If the plaintiff abandons the arbitration case, unless the arbitration tribunal decides, upon the defendant 's request, that the latter has a genuine interest in the continuation of the arbitration proceedings until the dispute is decided;
 - c. If the arbitration tribunal deems, for any other reason, the continuation of the arbitration proceedings pointless or impossible;
 - d. The issuance of an order ending the arbitration proceedings pursuant to Article 34 (Paragraph 1) of this Law.
2. The arbitration proceedings shall not terminate upon the death of either arbitration

party or loss of his legal capacity, unless a person with capacity in the dispute agrees with the other party to terminate the arbitration. In such case, the deadline for the arbitration shall be extended for thirty days, unless the arbitration tribunal decides to extend it for a similar period or the parties to arbitration agree otherwise.

3. Subject to the provisions of Articles 49, 50 and 51 of this Law, the mandate of the arbitration tribunal shall end upon completion of the arbitration proceedings.

Article 42

1. The arbitration award shall be made in writing and shall be reasoned and signed by the arbitrators. In case of multiple arbitrators, the signatures of the majority of arbitrators shall be sufficient, provided that grounds for the non-signing of the minority be recorded in the minutes.

2. The arbitration award shall include date of pronouncement and place of issuance; names and addresses of parties to the dispute; names of the arbitrators as well as their addresses, nationalities and capacities; a summary of the arbitration agreement and of the parties' statements, pleadings and documents; a summary of the expert report (if any); and text of the award. The award shall also determine arbitrators' fees, costs of arbitration and their distribution between the parties, without prejudice to the provisions of Article 24 of this Law.

Article 43

1. The arbitration tribunal shall deliver to each arbitration party a true copy of the arbitration award within fifteen days from its date of issuance.

2. The arbitration award may not be published in whole or in part except with the written consent of the parties to arbitration.

Article 44

The arbitration tribunal shall deposit the original award or a signed copy thereof in its original language with the competent court within the period set in Article 43 (Paragraph 1) of this Law, accompanied by an Arabic translation of the award attested by an accredited body if the award is issued in a foreign language.

Article 45

If, during the arbitration proceedings, the parties agree on a settlement ending the dispute, they may request that the terms of settlement be recorded before the arbitration tribunal, which shall, in this case, issue an award which includes settlement terms and ends proceedings. Such award shall have the same force and effect as the arbitration awards.

Article 46

1. Either arbitration party may, within thirty days following the date of receipt of the arbitration award, petition the arbitration tribunal to interpret any ambiguity in the text of the award. The party requesting interpretation shall, prior to submitting the petition to the tribunal, send a copy of such petition to the other party at the address specified in the arbitration award.
2. The interpretation shall be issued in writing within thirty days following the date on which the petition for interpretation was submitted to the arbitration tribunal.
3. The decision of interpretation shall be deemed complementary to the relevant arbitration award and subject to rules applicable thereto.

Article 47

1. The arbitration tribunal shall, pursuant to its own decision or upon request by either party, rectify any material errors in its award, whether in text or in calculation. The rectification shall be carried out without pleadings within fifteen days following the date of rendering the award or of submitting the petition for rectification, as the case may be.
2. The rectification shall be issued by the arbitration tribunal in writing and shall be notified to both parties within fifteen days from the date of issuance. If the arbitration tribunal exceeds its power in rectification, the decision of the tribunal may be nullified by an action for nullification subject to the provisions of Articles 50 and 51 of this Law.

Article 48

1. Each arbitration party may, even upon expiry of the time limit for arbitration, petition, within thirty days following the date of receipt of the arbitration award, the arbitration tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the award. The other party shall be notified of such petitions on his address indicated in the arbitration award prior to its submission to the arbitration tribunal.
2. The arbitration tribunal shall issue its award within sixty days from the petition submission date, and it may, if it deems it necessary, extend such period for an additional thirty days.

Chapter VI

Nullification of Arbitration Award

Article 49

Arbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law.

Article 50

1. An action to nullify an arbitration award shall not be admitted except in the following cases:

- a. If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term;
- b. If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;
- c. If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;
- d. If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;
- e. If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;
- f. If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration.
- g. If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it.

2. The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot

be referred to arbitration under this Law.

3. The arbitration agreement shall not terminate with the issuance of the competent court decision nullifying the arbitration award unless the arbitration parties agree thereon or a decision nullifying the arbitration agreement is issued.

4. The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute.

Article 51

1. An action for nullification of the arbitration award shall be filed by either party within sixty days following the date of notification of said party of the award; and such action is admissible even if the party invoking nullification waives his right to do so prior to the issuance of the arbitration award.

2. If the competent court approves the arbitration award, it shall order its execution and its decision shall be non-appealable. If, otherwise, the court decides the nullification of the award, its decision shall be subject to appeal within thirty days following the date of notification of such decision.

Chapter VII

Authority and Enforcement of Arbitration Awards

Article 52

Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable.

Article 53

The competent court, or designee, shall issue an order for enforcement of the arbitration award. The request for enforcement of the award shall be accompanied with the following:

1. The original award or an attested copy thereof.
2. A true copy of the arbitration agreement.
3. An Arabic translation of the arbitration award attested by an accredited authority, if the award is not issued in Arabic.
4. A proof of the deposit of the award with the competent court, pursuant to Article 44 of this Law.

Article 54

Filing of a nullification action shall not stay execution of the arbitration award. Nevertheless, the competent court may order a stay of execution if the plaintiff so requests in his nullification action and if his request is based on sound grounds. The competent court shall decide the stay of execution application within fifteen days from the petition submission date. If the court decides a stay of execution, it may order that a bail or financial guarantee is provided. If the competent court orders a stay of execution, it shall decide on the nullification action within one hundred eighty days from the date of issuance of said order.

Article 55

1. A petition to execute the arbitration award shall not be admitted, unless the deadline for filing a nullification action elapses.
2. The order to execute the arbitration award under this Law shall not be issued except upon verification of the following:
 - a. The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi

Arabia;

b. The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.

c. The award is properly notified to the party against whom it is rendered.

3. An order to execute the arbitration award may not be appealed, while an order denying execution of the award may be appealed before the competent authority within thirty days from the date of its issuance.

Chapter VIII

Concluding Provisions

Article 56

The Council of Ministers shall issue the Implementing Regulations of this Law.

Article 57

This Law shall supersede the Law of Arbitration promulgated by Royal Decree No. (M/46) dated 12/7/1403H

Article 58

This Law shall enter into force thirty days from date of publication in the Official Gazette.

The Implementing Regulations of the Arbitration Law

issued by a Council of Ministers Resolution no. 541

Dated 26/08/1438H corresponding 22/05/2017

Article one:

For the purposes of implementing this Law and Regulations, the following expressions and terms shall have the meanings assigned thereto:

Law: Arbitration Law.

Regulations: Implementing Regulations of the Arbitration Law.

Article Two:

For the purposes of implementing the Law and Regulations, the competent court referred to in the Law and Regulations is the court of appeal which originally considers the dispute except the circumstances mentioned in paragraph (1) of Article (9), article (12) and the last part of paragraph (3) of Article (40) of the Law.

Article Three:

1. Subject to the provisions of the Law in relation to notifications, notification shall be valid if made by electronic means.
2. If there is no specific statement regarding this, the terms provided in the Law and Regulations shall take effect at the following day of notification unless the parties agree otherwise. If the last day of the term falls on an official holiday; at the notifier's place of residence or work, the term shall be extended to the first working day. Any other condition of holiday shall be calculated from the date scheduled.

Article Four:

The party who requests the competent court to appoint an arbitrator shall submit a copy of the arbitration request and a copy of the arbitration agreement.

Article Five:

1. The arbitrator may be recused from the claim when a party request to disqualify the arbitrator without stating his recusal. The recusal will not be considered as a declaration that the party's reasons in which he relied on to request to disqualify the arbitrator are valid.
2. The arbitrator's disqualification request will not be accepted after the closure of proceedings.

Article Six:

In case the term of the arbitrator lapsed as per the circumstances mentioned in Article (19) of the Law; except if the arbitrator was disqualified, the arbitration procedures shall be paused until the appointment of another arbitrator as per the Law.

Article Seven:

1. A copy of the arbitrator's contract shall be kept at the Saudi Centre for Arbitration - as appropriate - or at an arbitration authority, committee or centre.
2. The court may request a copy of the contracts signed with the arbitrators, if any, when their fees are determined.

Article Eight:

If the parties of the arbitration did not agree on the arbitration procedures followed by the tribunal and the tribunal has chosen the appropriate arbitration procedures as per

paragraph (2) of Article (25) of the Law, the tribunal shall notify the parties of such procedures before ten days of applying the procedures.

Article Nine:

1. The applicant's request for arbitration shall include the arbitration request as stipulated in (Article 26) of the following information:
 - A. The applicants name, the name of his representative - if applicable- , respective career of each, his nationality, homeland, address and means of communication.
 - B. The name of the other arbitration party.
 - C. A brief of the contractual relationship, arbitration agreement, subject - matter of dispute and its proceedings and circumstances that has led to the submission of the arbitration request.
 - D. A brief that includes the arbitration applicant's requests.
 - E. A proposal of appointing an arbitrator in the absence of any provision that states the appointment of the arbitral tribunal and the arbitrator was only one, or a notification of appointing the arbitrator chosen by the applicant of arbitration if the arbitral tribunal consists of three or more.
2. *The constitution of the arbitral tribunal shall not be hindered by any conflict in respect with the sufficiency of information contained in the arbitration request, which shall be resolved by the arbitral tribunal.*

Article Ten:

If the arbitral tribunal is composed of one arbitrator and the parties of arbitration have not agreed upon, the competent court shall decide to expedite it within fifteen days from

the date of application submission to the competent court, as per the request of the interested party.

Article Eleven:

If arbitrators are multiple, the proceedings shall commence from the day which one party receives the arbitration request.

Article Twelve:

1. The arbitral tribunal shall indicate its resolution regarding the appointment of the expert, his duties, the urgent measures that he is allowed to take, the specified date for filing the report, the estimate of his fees and the advanced amount to be deposited in the expert's expenses account -as appropriate- , and the entrusted party to deposit on the date specified for.
2. In case of failure of entrusted party with depositing of the advanced amount, and the other party fails to deposit, then the expert shall not be considered obliged to perform his duty. Therefore, the arbitral tribunal may proceed with the proceedings, and the entrusted party shall not be adhering by the resolution issued to appoint the expert if the arbitral tribunal finds that his failure to deposit was without an acceptable excuse.
3. The arbitral tribunal may replace the expert or take such actions as deems appropriate if he fails to file the report at the appointed time without reasonable excuse.

Article Thirteen:

The arbitral tribunal may accept engaging a third party that is not a party to arbitration only after an approval from the arbitration parties and the party intended to be engaged.

Article Fourteen:

1. The chairperson of the arbitral tribunal shall issue the award after the closure of pleadings.

2. The arbitral tribunal may reopen the pleading after the closure thereof before issuing the award by a decision that shall be communicated to the arbitration parties

Article Fifteen:

The arbitration agreement shall not be terminated by issuing a decision from the arbitral tribunal to terminate the arbitration proceedings, unless agreed otherwise.

Article Sixteen:

The provisions provided for by law regarding the arbitral award applies to the additional arbitral award except what is related to the period of issuing the additional arbitral award.

Article Seventeen:

1. The challenge of the issued award that the arbitral award is invalid which is mentioned in Paragraph no. 2 of Article no. 51 of the Law shall be before the Supreme Court.
2. The competent authority mentioned in paragraph no. 3 of Article no. 55 of the law shall be the Supreme Court.

Article Eighteen:

1. A claim of invalidity shall not be accepted from the claimant if he waives his right to file the claim of invalidity after the issuance of the arbitral award.

2. The claimant shall submit -attached with the claim- the following:

- a) The original arbitral award or a certified copy thereof.
- b) The original arbitration agreement.
- c) An Arabic translation of the arbitral award certified by an authorized entity, if issued in another language.

Article Nineteen:

These Implementing Regulations shall be published in the Official Gazette and they shall be effective from the date of publishing.

APPENDIX II

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958)

Introduction

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term “non-domestic” appears to embrace awards which, although made in the state of enforcement, are treated as “foreign” under its law because of some foreign element in the proceedings, e.g. another State’s procedural laws are applied.

The Convention’s principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Key provisions

The Convention applies to awards made in any State other than the State in which recognition and enforcement is sought. It also applies to awards “not considered as domestic awards”. When consenting to be bound by the Convention, a State may declare that it will apply the Convention (a) in respect to awards made only in the territory of another Party and (b) only to legal relationships that are considered “commercial” under its domestic law.

The Convention contains provisions on arbitration agreements. This aspect was covered in recognition of the fact that an award could be refused enforcement on the grounds that the agreement upon which it was based might not be recognized. Article II (1) provides that Parties shall recognize written arbitration agreements. In that respect, UNCITRAL adopted, at its thirty-ninth session in 2006, a Recommendation that seeks to provide guidance to Parties on the interpretation of the requirement in article II (2) that an arbitration agreement be in writing and to encourage application of article VII (1) to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The central obligation imposed upon Parties is to recognize all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the *lex fori*. Each

Party may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement.

The Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. The grounds include incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, setting aside or suspension of an award in the country in which, or under the law of which, that award was made. The Convention defines two additional grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award. Those grounds relate to arbitrability and public policy.

The Convention seeks to encourage recognition and enforcement of awards in the greatest number of cases as possible. That purpose is achieved through article VII (1) of the Convention by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while allowing the continued application of any national provisions that give special or more favourable rights to a party seeking to enforce an award. That article recognizes the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention.

Entry into force

The Convention entered into force on 7 June 1959 (article XII).

How to become a party

The Convention is closed for signature. It is subject to ratification, and is open to accession by any Member State of the United Nations, any other State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

Optional and/or mandatory declarations and notifications

When signing, ratifying or acceding to the Convention, or notifying a territorial extension under article X, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Party to the Convention. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or

not, which are considered as commercial under the national law of the State making such declaration (article I).

Denunciation/Withdrawal

Any Party may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of the receipt of the notification by the Secretary-General (article XIII).

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) The duly authenticated original award or a duly certified copy thereof;
 - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into

such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (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.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations,

or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be affected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

APPENDIX III
**UNCITRAL Model Law on International Commercial
Arbitration**

UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17,
annex I and A/61/17, annex I)

(As adopted by the United Nations Commission on
International Trade Law on 21 June 1985,
and as amended by the United Nations Commission
on International Trade Law on 7 July 2006)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

- (1) This Law applies to international commercial² arbitration, subject to any agreement in force between this State and any other State or States.
- (2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
 - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;or
 - (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
 - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
 - (b) if a party does not have a place of business, reference is to be made to his habitual residence.
- (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;

- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

- (1) Unless otherwise agreed by the parties:
- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
- (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

- (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) The arbitration agreement shall be in writing.
- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (a) a party fails to act as required under such procedure, or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as

are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES
AND PRELIMINARY ORDERS

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
- (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

- (1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

- (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
- (2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
- (3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

- (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the

preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the

arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement³

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

- (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

- (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless

otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND
TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.⁴

Article 36. Grounds for refusing recognition or enforcement

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
- or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

APPENDIX IV
Arbitration Law of 1983

The Law Of Arbitration

Enacted by the Royal Decree No. M/46 of 12/07/1403H corresponding 4/24/1983

ARTICLE 1:

It may be agreed to resort to arbitration with regard to a specific, existing dispute.

It may also be agreed beforehand to resort to arbitration in any dispute that may arise as a result of the execution of a specific contract.

ARTICLE 2:

Arbitration shall not be accepted in matters wherein conciliation is not permitted.

Agreement to resort to arbitration shall not be deemed valid except by those who have the legal capacity to act.

ARTICLE 3:

Government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers.

This provision may be amended by a Resolution of the Council of Ministers.

ARTICLE 4:

An arbitrator is required to be experienced and of good conduct and reputation and full legal capacity.

In case of multiple arbitrators, they shall be odd in number.

ARTICLE 5:

Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute.

The said instrument shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration.

Copies of the documents relevant to the dispute shall be attached.

ARTICLE 6:

The authority originally competent to hear the dispute shall record applications of arbitration submitted to it and shall issue a decision approving the arbitration instrument.

ARTICLE 7:

Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this Law.

ARTICLE 8:

The clerk of the authority originally competent to hear the dispute shall be in charge of all notifications and notices provided for in this Law.

ARTICLE 9:

The dispute shall be decided on the date specified in the arbitration instrument unless it is agreed to extend it.

If parties do not fix in the arbitration instrument a time limit for decision, arbitrators shall issue their award within ninety days from date of the decision approving the arbitration instrument; otherwise, any litigant who so desires may submit the matter to the authority originally competent to hear the dispute, which may decide either to hear the subject matter or extend the time limit for a further period.

ARTICLE 10:

Where parties fail to appoint the arbitrators or one party abstains from appointing the arbitrator(s) who are to be chosen solely by him, or where one arbitrator or more refuses to work, or withdraws, or a contingency arises which prevents him from undertaking the arbitration or if he is dismissed and there is no special stipulation by the parties, the authority originally competent to hear the dispute shall appoint the arbitrator(s) as necessary, upon request of the party interested in expediting the arbitration, in the presence of the other party or in his absence, after being summoned to a session to be held for this purpose.

The number of arbitrators appointed shall be equal or complementary to the number agreed upon among the parties.

The decision in this respect shall be final.

ARTICLE 11:

The arbitrator may not be dismissed except by the consent of the parties.

The arbitrator so dismissed may claim compensation, if he had already commenced work prior to dismissal, and as long as the dismissal is not attributable to him. An arbitrator may not be challenged from judgment save for reasons that occur or appear after filing the arbitration instrument.

ARTICLE 12:

A request to disqualify the arbitrator may be made for the same reasons for which a judge may be disqualified.

The request for disqualification shall be submitted to the authority originally competent to hear the dispute within five days from the day a party is notified of the appointment of the arbitrator or from the day the reasons for disqualification appear or occur.

A ruling on the disqualification request shall be made at a hearing specially convened for this purpose to which the parties and the arbitrator whose disqualification is requested are summoned.

ARTICLE 13:

The arbitration shall not expire with the death of one of the parties, but the time for the award shall be extended by thirty days unless the arbitrators decide to extend for a longer period.

ARTICLE 14:

Where an arbitrator is appointed in place of a dismissed or a withdrawing arbitrator, the date fixed for the award shall be extended by thirty days.

ARTICLE 15:

Arbitrators may, by the same majority required for making the award and by a decision giving the grounds for so doing, extend the period fixed for an award due to circumstances pertaining to the subject matter of the dispute.

ARTICLE 16:

The award of the arbitrators shall be made by majority opinion, and where they are authorized to settle, the award shall be issued unanimously.

ARTICLE 17:

The award document shall contain in particular the arbitration instrument, a summary of statements of the parties and supporting documents, the reasons for the award, its text, date of issue and the signature of the arbitrators.

Where one or more arbitrators refuse to sign the award, this shall be recorded in the document of the award.

ARTICLE 18:

All awards passed by the arbitrators, even though issued under an investigation procedure, shall be filed within five days with the authority originally competent to hear the dispute and the parties notified with copies thereof.

Parties may submit their objections against what is issued by arbitrators to the authority with which the award is filed, within fifteen days from the date they are notified of the arbitrators' awards; otherwise such awards shall be final.

ARTICLE 19:

Where one or more of the parties submit an objection to the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall hear the objection and decide either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon.

ARTICLE 20:

The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute.

This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the Shari'ah .

ARTICLE 21:

The award made by the arbitrators, after issuance of the order of execution in accordance with the preceding Article, shall have the same force as a judgment made by the authority which issued the execution order.

ARTICLE 22:

Arbitrators' fees shall be determined by agreement of parties. Sums not paid to arbitrators shall be deposited with the authority originally competent to hear the dispute within five days after the approval the arbitration document and shall be paid within one week from the date of the issuance of the order for the enforcement of the award.

ARTICLE 23:

Where no prior agreement exists as regards arbitrators' fees and a dispute arises, the authority originally competent to hear the dispute shall decide the matter, and its judgment shall be final.

ARTICLE 24:

Resolutions necessary for the implementation of this Law shall be issued by the President of the Council of Ministers pursuant to a recommendation by the Minister of Justice after agreement with the Minister of Commerce and the Chairman of the Board of Grievances.

ARTICLE 25:

This Law shall be published in the Official Gazette and shall be effective after thirty days from the publication thereof.

APPENDIX V

AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF SAUDI ARABIA AND THE GOVERNMENT OF MALAYSIA CONCERNING THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

**AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM
OF SAUDI ARABIA AND THE GOVERNMENT OF MALAYSIA
CONCERNING THE PROMOTION AND RECIPROCAL
PROTECTION OF INVESTMENTS**

The Government of the Kingdom of Saudi Arabia and the Government of Malaysia (herein after referred to as the “Contracting Parties”);

Desiring to intensify economic cooperation between both Countries, intending to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party;

Recognising that the reciprocal promotion and protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both Countries;

Have agreed as follows:

ARTICLE 1

Definitions

For the purpose of this Agreement:

1. The term “investment” means every kind of asset, owned or controlled by an investor of a Contracting Party in the territory of the other Contracting

Party according to its legislation and in particular, but not exclusively includes:

(a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges, usufructs and similar rights;

(b) shares, stocks and debentures of companies and other kinds of rights or interests in companies as well as securities issued by a Contracting Party or any of its investors;

(c) claims to money such as loans or to any performance having economic value associated with an investment;

(d) intellectual property rights, including but not limited to copyrights, patents, industrial designs, know-how, trademarks, trade and business secrets, trade names, good-will;

(e) any right conferred by law or under contract or any licenses, permits or concessions issued according to law.

Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment, provided that such alteration is not in conflict with the legislation of the Contracting Party and the approval, if any, granted in respect of the assets originally invested in the territory of which the investment is made.

2. The term “returns” means the amounts yielded by an investment in particular, profits, dividends, royalties, capital gains or any similar fees or payments.

3. The term “investor” means: (a) in respect of Malaysia:

(i) any natural person possessing the citizenship of Malaysia in accordance with its laws; or

(ii) any corporation, partnership, trusts, joint-venture, organization, association or enterprise incorporated or duly constituted in accordance with its applicable laws.

(b) in respect of the Kingdom of Saudi Arabia:

(i) natural persons possessing the nationality of the Kingdom of Saudi Arabia in accordance with the law of the Kingdom of Saudi Arabia;

(ii) any legal entity constituted in accordance with the laws of the Kingdom of Saudi Arabia and having its head office in its territory such as corporations, enterprises, cooperatives, companies, partnerships, offices, establishments, funds, organizations, business associations and other similar entities irrespective of whether or not they are of limited liability; or

(iii) the Government of the Kingdom of Saudi Arabia and its financial institutions and authorities such as the Saudi Arabian Monetary Agency, public funds and other similar governmental institutions existing in Saudi Arabia.

4. The term “territory” means:

(i) with respect to Malaysia, all land territory comprising the Federation of Malaysia, the territorial sea, its bed and subsoil and airspace above;

(ii) with respect to the Kingdom of Saudi Arabia, territory means in addition to the zones contained within the land boundaries, the marine and submarine zones over which the Kingdom of Saudi Arabia exercises sovereignty and sovereign or jurisdiction rights under international law.

5. The term “freely usable currency” means any currency that is widely used to make payments for international transactions and widely traded in the international principal exchange markets, as accepted by the investors.

6. The term “national policies” means policies formulated and published by the Governments from time to time.

ARTICLE 2

Promotion and Protection of Investments

1. Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its legislation and national policies.

2. Investments of investors of each Contracting Party shall at all times be accorded equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party.

3. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

ARTICLE 3

Most-Favoured Nation Provision

1. In accordance with its laws and regulations, each Contracting Party shall in its territory accord investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors, or to investments and returns of investors of any third State whichever is the more favourable.

2. Each Contracting Party shall accord the investors of the other Contracting Party in connection with the management, maintenance, use, enjoyment or disposal of investments or with the means to assure their rights to such investments like transfers and indemnification or with any other activity associated with this in its territory, treatment not less favourable than the treatment it accords to its investors or to the investors of a third State, whichever is more favourable.

3. The provisions of this Article relative to the granting of treatment not less favourable than that accorded to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs union or free trade area or a common market or similar international agreement or other forms of regional cooperation to which

either of the Contracting Parties is or may become a party; or the adoption of an agreement designed to lead to the formation or extension of such a union or area within a reasonable length of time; or

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 4

Compensation of Losses

Investors of either Contracting Party whose investments suffer losses in connection with their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of general emergency or revolt shall be accorded treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable by such other Contracting Party than that accorded by the latter Contracting Party to its own investors or to the investors of a third state.

ARTICLE 5

Expropriation

1. Investments by investors of either Contracting Party shall not be expropriated, nationalised, or subjected to any other measure, the effects of which would tantamount to expropriation or nationalisation by the other Contracting Party except for the benefit of that Contracting Party provided that these measures are:

- (i) not discriminatory;
- (ii) taken for a public purpose and under due process of law; and
- (iii) against prompt, adequate and effective compensation.

2. Such compensation shall be equivalent to the market value of the expropriated investment immediately before the date on which the expropriation, nationalisation

or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry a rate of return determined on the basis of the market prevailing rate of return until the time of payment; it shall be effectively realisable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalisation or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalisation or comparable measure and the amount of compensation shall be subject to review by due process of law.

3. Investors of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matter provided for in this Article.

ARTICLE 6

Transfers

Each Contracting Party shall guarantee to investors of the other Contracting Party, after all taxes and obligations have been met, the free transfer of payments in any freely usable currency in connection with investments and investment returns they hold in the territory of the other Contracting Party, in particular:

- (a) the principal and additional amounts to maintain or increase the investment;
- (b) the returns;
- (c) repayment of loans;
- (d) the proceeds from the liquidation or the sale of the whole or any part of the investment; and
- (e) the compensation provided for in Articles 4 and 5.

ARTICLE 7

Exchange Rates

1. Transfers under Articles 4, 5 and 6 shall be made without delay at the prevailing market rate of exchange.
2. In the absence of market rates, the rate of exchange shall correspond to the cross-rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

ARTICLE 8

More Favourable Treatment

If the treatment accorded by either Contracting Party, according to its laws and regulations, to investments or activities in connection with investments made by investors of the other Contracting Party is more favourable than that provided for in this Agreement, the more favourable treatment shall be accorded.

ARTICLE 9

Subrogation

If a Contracting Party or any designated agency makes a payment to an investor under a guarantee it has assumed in respect of an investment made by that investor in the territory of the other Contracting Party the latter Contracting Party shall recognise the transfer of any rights or claim from the investor or any of its affiliates to the former Contracting Party or any designated agency.

ARTICLE 10

Settlement of Disputes Between

The Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should as far possible be settled by the Governments of the two Contracting Parties.
2. If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitration tribunal.
3. Such arbitration tribunal shall be constituted ad hoc as follows: each Contracting Party shall appoint one member, and two members shall agree upon a national of a third state as their chairman to be appointed by the Governments of the two Contracting Parties. Such members shall be appointed within two (2) months, and such Chairman within three (3) months from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitration tribunal.
4. If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice- President should make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he, too, is prevented from discharging the said function, the member of the Court next in seniority who is not a national of either Contracting Party should make the necessary appointments.
5. The arbitration tribunal shall reach its decisions by a majority of votes. Such decisions shall be final and binding. Each Contracting Party shall bear the cost of its own member and the cost of counseling in the arbitration proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitration tribunal may make a different regulation

concerning costs. In all other respects, the arbitration tribunal shall determine its own procedures.

ARTICLE 11

Settlement of Investment Disputes Between

A Contracting Party and an Investor of the Other Contracting Party

1. Disputes concerning investments between a Contracting Party and an investor of the other Contracting Party, in connection with these investments in the territory of the former Contracting Party, should as far as possible be settled amicably.

2. If the dispute cannot be settled in the way prescribed in paragraph (1) of this Article within six (6) months from the date when the request for the settlement has been submitted, it shall be at the request of the investor filed to the competent court of law of the Contracting party in whose territory the investments was made or filed for arbitration under the Convention of 18

March 1965 on the Settlement of Investment Disputes between States and

Nationals of Other States.

3. If the dispute is submitted in accordance with paragraph (2) to the competent Court of Law of the Contracting Party, the investor cannot at the same time seek international arbitration. If the dispute is filed for arbitration the award shall be binding and shall not be subject to any appeal or remedy other than those provided for the said Convention. The award shall be enforced in accordance with domestic law.

ARTICLE 12

Application to Investments

This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its laws, regulations or national policies by investors of the other Contracting Party prior to as well as after the entry into force of this Agreement.

ARTICLE 13

Amendment

This Agreement may be amended by mutual written consent of both Contracting Parties at any time after it is in force. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement prior to the date of such alteration or modification until such rights and obligations are fully implemented.

ARTICLE 14

Entry into Force, Duration and Termination

1. This Agreement shall enter into force thirty (30) days after the later date on which the Governments of the Contracting Parties have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled. The later date shall refer to the date on which the last notification letter is sent.
2. This Agreement shall remain in force for a period of ten (10) years, and shall continue in force, unless terminated in accordance with paragraph 3 of this Article.
3. Either Contracting Party may by giving one (1) year's written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten (10) year period or anytime thereafter.

4. With respect to investments made or acquired prior to the date of termination of this Agreement, the provisions of all of the other Articles of this Agreement shall continue to be effective for a period of ten (10) years from such date of termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done at Kuala Lumpur on 28 Rajab 1421 corresponding to 25 October 2000 in the Arabic and English languages, both texts being equally authentic.

**FOR THE GOVERNMENT OF
KINGDOM OF SAUDI ARABIA**

KHALID M. ALGOSAIBI

**FOR THE GOVERNMENT OF THE
MALAYSIA**

RAFIDAH AZIZ

PROTOCOL

On signing the Agreement between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia concerning the Promotion and Reciprocal Protection of Investments, the undersigned have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Agreement:

With the respect to Article 3, paragraph (1):

In the case of investments in Malaysia, national treatment shall not be accorded to investment in the banking and insurance sectors.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto by their respective Governments, have signed this Protocol.

Done at Kuala Lumpur on 28 Rajab 1421 corresponding to 25 October 2000 in the Arabic and English languages, both texts being equally authentic.

FOR THE GOVERNMENT OF
THE KINGDOM OF SAUDI ARABIA
M. ALGOSAIBI

FOR THE GOVERNMENT OF
MALAYSIA KHALID
RAFIDAH AZIZ

Bibliography

Books

Albaghawī, Quran Commentary (*Tafseer Albaghawī*)

http://library.islamweb.net/newlibrary/display_book.php?idfrom=305&idto=305&bk_no=51&ID=292

Alkhudairy, Abdullah, ENFORCEMENT OF FOREIGN JUDGMENTS IN THE KINGDOM OF SAUDI ARABIA, Saudi Center for Commercial Arbitration, 2016

Almulhim, Mulhim, A CRITIQUE OF SAUDI M&A LAWS, Penn State Law eLibrary, SJD Dissertation, 2016. <http://elibrary.law.psu.edu/sjd/2/>

Alsulayyem, Abdulaziz, LEGAL ATLAS IN SAUDI COMMERCIAL ARBITRATION FOR NINETY-FIVE YEARS 1923-2014, (2015)

Ashworth, Laura, ISLAMIC ARBITRATION OF FAMILY LAW DISPUTES IN NEW ZEALAND, A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws with Honours at the University of Otago, Dunedin, New Zealand October 2010.

<http://www.otago.ac.nz/law/research/journals/otago036320.pdf>

Baamir, Abdulrahman Y., SHARI'A LAW IN COMMERCIAL AND BANKING ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA, Ashgate Publishing, (2013)

Berg, Albert Jan van den, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA Congress Series, Kluwer Law International, 2005

Born, Gary B., INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING, Kluwer Law International, 4th edition, (2013)

Born, Gary B., INTERNATIONAL ARBITRATION: LAW AND PRACTICE, Kluwer Law International, (2012)

Born, Gary B., INTERNATIONAL ARBITRATION: LAW AND PRACTICE, 2nd ed, Kluwer Law International, 2015

Born, Gary B., INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, 2nd ed., (2014)

Berg, Albert Jan van den, YEARBOOK COMMERCIAL ARBITRATION 1997, Vol. 22 Kluwer Law International 1997

Black's Law Dictionary (9th ed.)

Carbonneau, Thomas E. and Butler, William E., CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION, 2ND ed. West, (2013)

Carbonneau, Thomas E., CASES AND MATERIALS ARBITRATION LAW AND PRACTICE, 6th ed West (2007)

Carbonneau, Thomas E., CASES AND MATERIALS ARBITRATION LAW AND PRACTICE, 7th ed, West (2015)

Carbonneau, Thomas E., TOWARD A NEW FEDERAL LAW ON ARBITRATION, Oxford University Press, 2014

Carbonneau, Thomas E., THE LAW AND PRACTICE OF ARBITRATION, 5th ed. Juris (2014)

Carbonneau, Thomas E., THE LAW AND PRACTICE OF ARBITRATION, 6th ed. Juris, (2018)

Colosi, Thomas R. and Berkeley, Arthur E., COLLECTIVE BARGAINING: HOW IT WORKS AND WHY, Juris Publishing, (2006)

Craig, W. Laurence, International Chamber of Commerce Arbitration, Oceana Publications, (2000)

Domke, Martin, Wilner, Gabriel and Edmonso, Larry E., DOMKE ON COMMERCIAL ARBITRATION, (ed. 2016)

Encyclopedia Britannica, <http://www.britannica.com/topic/Gulf-Cooperation-Council>

El Ahdab, Abdul Hamid and El Ahdab, Jalal, ARBITRATION WITH THE ARAB COUNTRIES, Kluwer Law International, (2013)

Gaillard, Emmanuel and Savage, John, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, 1999

Hariri-Rifai, Wahbi, Hariri-Rifai, Mokhless, THE HERITAGE OF THE KINGDOM OF SAUDI ARABIA, 26 Washington DC, GDG Publication, (1990)

Mistelis, Loukas A. and Brekoulakis, Stavros L., FUNDAMENTAL OBSERVATIONS AND APPLICABLE LAW, International Arbitration Law Library, Kluwer Law International, (2009)

Moses, Margaret L., THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, Cambridge, 2nd ed, (2012)

Paulsson, Jan & Bosman, Lise (eds), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Kluwer Law International (1984)

Paulsson, Marike R. P., THE 1958 NEW YORK CONVENTION IN ACTION, Kluwer Law International, (2016)

Redfern, Alan, Blackaby, Nigel and Partasides, Constantine, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 6th ed, Kluwer Law International; Oxford University Press, (2015)

Saleh, Sameer COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST A STUDY IN SHARIA AND STATUTE LAW, Graham & Trotman, (1984)

Sukkar, M Marc, ARBITRATION IN LEBANON, THE CIVIL LAW PRACTICE, Wildy, Simmonds & Hill Publishing, (2013)

Varady, Tibor, Barcelo III, John J., Kroll, Stefan and Mehran, Arthur T. von, INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE, 6th ed. West Academic, (2015)

Articles

About Youssef, Karim, *The Death of Inarbitrability*, published in Mistelis, Loukas A. and Brekoulakis, Stavros L., *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Kluwer Law International, (2009)

Almulhim, Mulhim, *The First Female Arbitrator in Saudi Arabia*

<http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>

Alkhamees, Ahmad, *International Arbitration and Shari'a Law: Context, Scope, and Intersections*, Journal of International Arbitration, Kluwer Law International, (2011)

Alnowaiser, Khalid, *The New Arbitration Law and Its Impact on Investment in Saudi Arabia*, 29 J. INT'L ARB. 723 (2012)

Ansary, Abdullah F. *A Brief Overview of the Saudi Arabian Legal System*.

http://www.nyulawglobal.org/globalex/Saudi_Arabia.html#_Toc200894567.

Al Qurashi, Zeyad, *Arbitration Under the Islamic Sharia*, 1 Oil, Gas & Energy L. Int'l (2003) available at: www.transnational-dispute-management.com/article.asp?key=43

Al-Ammari, Saud and Martin, A. Timothy, *Arbitration in the Kingdom of Saudi Arabia*, *Arbitration International*, LCIA, (2014)

Al-Juhani, Eid Massud, *The Journal of Riyadh Chamber of Commerce*, "Tijarat-al-Riyadh" No. 263, 23rd year, November 1983

Al-Nasair, Mohamed, *The Effect of Public Policy on The Enforcement of Foreign Arbitral Awards in Bahrain and UAE*, Sweet & Maxwell, 2013, Int. A.L.R. (2013)

Al-Ramahi, Aseel, *Islamic Law and Law Of The Muslim World*, Research Paper Series.

http://eprints.lse.ac.uk/24598/1/WPS2008-12_Al-Ramahi.pdf

An-Na'im, Abdullahi A, *Islamic Family Law In A Changing World*, A Global Resource Book, Zed Books, (2002)

A Chronology of the House of Saud,

<http://www.pbs.org/wgbh/pages/frontline/shows/saud/cron/>

Baamir, Abdulrahman and Bantekas, Ilias, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, Arbitration International, LCIA; Kluwer Law International, (2009)

Berg, Albert Jan van den, *Recent Enforcement Problems Under the New York and ICSID Conventions*, 5 ARB. INT'L, 2, 2 (1989)

Buchanan, Mark, *Public Policy And International Arbitration*, 26 Am. Bus. L.J. 511 (1988-1989)

Burger, Warren F., *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982)

Carbonneau, Thomas E., *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA. J. INT'L & COMP. L. 143 (1988)

Carbonneau, Thomas E., *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L. J. 33 (1984)

Carbonneau, Thomas E. and Janson, Francois, *Cartesian Logic and Frontier Politics: French And American Concepts of Arbitrability*. Tul. J. Of Int'l & Comp. Law (1994)

Carbonneau, Thomas E., *Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States*, published in Loukas A. Mistelis and Stavros L. Brekoulakis, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, Kluwer Law International, (2009)

Carbonneau, Thomas E., *The Ballad of Transborder Arbitration*, 56 U. Miami L. Rev. 773 (2001-2002)

Carbonneau, Thomas E., *The Revolution in Law through Arbitration*, 56 CLEV. ST. L. REV. 233, at p. 235 (2008)

Fadlallah, *Arbitration facing conflicts of culture: The 2008 Freshfields Lecture*, 25 Arb Intl 303 (2009)

Gemmell, Arthur J., *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 173 (2006)

Harb, Jean Pierre and Leventhal, Alexander G., *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a*, Journal of International Arbitration, Kluwer Law International (2013)

Idid, Dato' Syed Ahmad and Oseni, Umar A, *Appointing A Non-Muslim As Arbitrator In Tahkim Proceedings: Polemics, Perceptions and Possibilities*, Malayan Law Journal Articles 5, 2014 <https://www.researchgate.net/publication/289904848>

Investment & Finance the Financial Encyclopedia, Islamic Finance <http://investment-and-finance.net/islamic-finance/r/riba-al-nasiah.html>

Kellor, Frances, *Arbitration in Action a Code for Civil, Commercial and industrial Arbitration*, Harper & Brothers Publishers, New York, (1941)

Kennett, Wendy, *It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution*, International Journal of Law, Policy and the Family, Vol. 30, Issue 1, 1 April (2016)

Kerr, Michael, CONCORD AND CONFLICT IN INTERNATIONAL ARBITRATION, Arb. Int. (1997)

Kutty, Faisal *The Shari'a Factor in International Commercial Arbitration*, (2006) <http://ssrn.com/abstract=898704>

Lalive, Pierre, *Transnational (or Truly International) Public Policy and International Arbitration*, Article published in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA Congress Series, Kluwer Law International, (1987)

Lew, Julian D. M., *Competition Laws: Limits to Arbitrators' Authority* published in Mistelis, Loukas A. and Brekoulakis, Stavros L., ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, International Arbitration Law Library, Kluwer Law International, (2009)

Lings, M., Muhammad His Life Based on the Earliest Sources (New York: Inner Traditions International Ltd., 1983)

Middle East's largest stock market set to open, <http://persiangulffund.com/middle-east-largest-stock-market-set-to-open/>

<http://www.alharamain.gov.sa/index.cfm?do=cms.conarticle&contentid=5941&categoryid=1023>

Muhammad, Abbas Husni, *Contracts in Islamic Jurisprudence, A Comparative Study*, (1993), <http://www.alukah.net/sharia/0/22446/>

Pietro, Domenico di, *General Remarks on Arbitrability Under the New York Convention*, published in Mistelis, Loukas A. and Brekoulakis, Stavros L., *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Kluwer Law International, (2009)

Resnick, Larry, *Family Dispute Arbitration and Sharia Law*, <https://bccla.org/wp-content/uploads/2012/04/2007-BCCLA-Sharia-law.pdf>

Restatement of the History of Islam and Muslims

<http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/aboutKingDom/SaudiGovernment/Pages/BasicSystemOfGovernance35297.aspx>

Rice, Gillian, *Doing Business in Saudi Arabia*, Thunderbird International Business Review 46.1 (Jan/Feb 2004): <http://search.proquest.com/docview/202789113?accountid=13158>

Roy, Kristin, *The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Nondomestic Arbitral Awards?*, 18 Fordham Int'l L.J. 920 (1994-1995)

SAMA Reports <http://www.sama.gov.sa/en-US/EconomicReports/Pages/AnnualReport.aspx>

Sayen, George, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia* 24 U. PA. J. INT'L ECON. L. 905 (2003)

Saudi Arabia: Foreign Investment, <https://en.portal.santandertrade.com/establish-overseas/saudi-arabia/foreign-investment>.

Shafi, Mohammad, *The Quran How It Was Revealed and Compiled*,

<http://www.daralislam.org/portals/0/Publications/TheQURANHowitwasRevealedandCompiled.pdf>

Sheppard, Audley, *Public Policy and the Enforcement of Arbitral Awards*, TDM 1 (2004), www.transnational-dispute-management.com/article.asp?key=48

Strub, Michael H. Jr, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 Tex. L.

Rev. 1031 (1989-1990)

Westin, David, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 L. & POL'Y INT'L Bus. (1987)

Zegers, Jean-Benoit, *National Report for Saudi Arabia (2013)*, published in Paulsson, Jan and Bosman, Lise (eds), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Kluwer Law International 1984, Supplement No. 75, July (2013)

Laws and Regulations

Saudi Laws:

Commercial Court Law, Royal Decree No. 32 of 15 /1/1350H corresponding June 01, 1931

The Council of Ministers Resolution no. 58 of 1963 dated 17/1/1383 H. corresponding to 9 June 1963

Labor Law, Royal Decree M/21 dated 6/9/1389H corresponding 15/11/1969

Chamber of Commerce Law of 1980 was enacted by Royal Order M/6 1980

Arbitration Law, enacted by the Royal Decree No. M/46 of 12/07/1403H (4/24/1983)

The Committee for the Settlement of Banking Disputes, Royal Order No. 8/729 dated 10/7/1407H corresponding March 10. 1987

Saudi Basic System of Governance, issued by Royal Order No. (A/91) 27/8/1412H, corresponding, March 1st, 1992

Saudi Foreign Investment Law, issued by the Royal Decree No. (M/1) dated 5/1/1421H (Corresponding to 10/4/2000)

Implementing Regulations of the Foreign Investment Law, Ministerial Order 1/20 dated 13/4/1423H corresponding 24/6/2002

Saudi Engineers Commission Law, Royal Decree M/36 dated 26/9/1423h corresponding 1/9/2002

Mineral Investment Law, Royal Decree M/47 dated 20/8/1425H corresponding 4/10/2004

Saudi Labor Law 2005

Succession Commission Law issued by Royal Order No. A/135 dated 26 / 9 / 1427H corresponding to October 19th 2006

Judicial Law and Administrative Law, Royal Decree No. M/78 19 Ramadan 1428H corresponding October 1st 2007

Council of Ministers Resolution No. 303 dated 19 / 9 / 1428 H corresponding October 1st 2007

Law of Arbitration, enacted by the Royal Decree No. M/34, dated 24/5/1433H April 16th 2012

Execution Law, enacted by Royal Decree No. 53/M dated 13/8/1433H corresponding July 2nd, 2012

Sharia Proceedings Law, Royal Decree No. M/1 dated 22/1/1435 H. (25/11/2013)

Implementing Regulations for The Arbitration Law was issued by a Council of Ministers Resolution no. 541 dated 26/08/1438H corresponding 22/05/2017

International Conventions and Treaties:

Geneva Protocol on Arbitration Clauses 1923

Convention for the Execution of Foreign Arbitral Awards 1927

Arab League Convention 1952

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Geneva Convention 1961

Moscow Convention 1972

Panama Convention 1975

Montevideo Convention 1979

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

Amman Convention 1987

Mercosur Treaties 1991

Foreign Laws and Regulations:

Belgian Judicial Code

Brazilian Arbitration Act of 1996

French Civil Code

French Decree Law No 81-500 of 12 May 1981

German Arbitration Statute

German Code of Civil Procedure

German Securities Trading Act

Iraqi Civil Code

Italian Code of Civil Procedure of 1990

Japanese Arbitration Law No. 138 of 2003

Netherlands Code of Civil Procedure

New Zealand Arbitration Act 1996

Portuguese Act on Voluntary Arbitration of 2011

Swiss Private International Law Act of 1987

Tunisian Arbitration Code

United Arab Emirates's Civil Transactions Code of 1985

U.S. Federal Arbitration Act (FAA)

Cases

Saudi Cases:

Case No. 422/2/G 1417H, decided on 18/3/1422H corresponding June 10th, (2001)

Case no. 702/ES/7 1432H, Date of hearing July 12, (2009)

Case no. 270/TG/1 1434H, Date of hearing July 14, (2013)

Case is issued by Judicial Order No. 36251089 dated 11/09/1436H corresponding 28 June, (2015)

Foreign Cases:

Egerton v. Earl Brownlow, 4 H.L. Cas. 1, 196 (1853)

Wilko v Swan 346 US 427 (1953)

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S. Ct. 909, (1964)

Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965)

American Safety Equipment Corporation v JP Maguire Co. 391 F.2d 821 (2nd Cir. 1968)

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (1959)

Bremen v. Zapata Off-Shore Co, 407 U.S. 1 (1972)

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)

Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L'industrie Du Papier 508 F.2d 969 (1974)

Barrentine v. Arkansas - Best Freight Sys., Inc., 450 U.S. 728, 746-53 (1981)

Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981)

Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)

Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)

Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986)

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987)

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (U.S. S.Ct. 1987)

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)

Société Almira Films v. Pierrel, (1989)

Ganz v. Société Nationale des Chemins de Fers Tunisiens, (1991)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)
Société Almira Films v. Pierrel, (1991) Rev. arb. 625
Fincantieri-Cantieri Navali Italiani S.p.A. et Oto Melara S.p.A. v. M. et Tribunal
Arbitral, ATF 118 II 353, 355 (June 23, 1992)
Allsop Automatic Inc. v. Tecnoski snc (1992)
Courrèges Design v. André Courrèges, (1992) Rev. arb. 110
Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 782 (11th Cir. 1993)
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985
(1995)
Nielsen v. Piper, Jaffray & Hopwood, Inc., 66 F.3d 145, (7th Cir. 1995)
Euro'n Gas Turbines SA v. Westman Int'l Ltd, XX Y.B. Comm. Arb. 198 (1995)
Beach Air Conditioning and Heating, Inc. v. Sheet Metal Workers Intern. Ass'n Local
Union No. 102, 55 F.3d 474, (9th Cir. 1995)
Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co. (1998)
Raceway Park, Inc. v. Local 47, Service Employees Intern. Union, 167 F.3d 953, 160 (6th
Cir. 1999)
Eco Swiss China Time Ltd v. Benetton Int'l NV, (1999)
Hebei Import & Export Corporation v. Polytek Engineering Company Limited (1999)
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)
John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48 (2^d Cir. 2001)
Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491
(2002)
PacifiCare Health Sys., Inc. v. Book 538 U.S. 401 (2003)
Green Tree Financial Corp. v. Bazzle 539 U.S. 444 (2003)
United Mexican States v Marvin Roy Feldman Karpa, IIC 159 (2003)
Éditions Chouette inc. v. Desputeaux, (2003)
Apa Ins. Co. Ltd v. Chrysanthus Barnabas Okemo, Misc. Application No. 241 (2005)
SA Thalès Air Défence v. GIE Euromissile, (2005) Rev. arb. 751, 757
Uniprex SA v. Grupo Radio Blanca, SAP M 2572/ (2006)

CG Impianti v. Bmaab & Son Int'l Contracting Co. (2009)

Power Share, Inc. v. Syntel, Inc., 597 F.3d 10 (1st Cir. 2010)

AJU v. AJT, (2011)

BG Group v. Argentina, 134 S.Ct. 1198 (2014)

Websites

<https://iccwbo.org/dispute-resolution-services/arbitration/>

http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx

<https://www.adr.org/Arbitration>

https://www.icdr.org/icdr/faces/home?_afLoop=1937107974652012&_afWindowMode=0&_afWindowId=i8hen88xa_81#%40%3F_afWindowId%3Di8hen88xa_81%26_afLoop%3D1937107974652012%26_afWindowMode%3D0%26_adf.ctrl-state%3Di8hen88xa_157

<https://www.jamsadr.com/arbitration>

<http://internationalarbitrationlaw.com/about-arbitration/international-arbitration/institutional-arbitration/arbitral-institutions/>

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

<http://www.newyorkconvention.org/11165/web/files/document/1/5/15938.pdf>

<http://www.newyorkconvention.org/11165/web/files/document/1/5/15939.pdf>

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en

<file:///C:/Users/SalehAbbad/Downloads/OtherTreaties%201961-genevaconvention.pdf>

<https://icsid.worldbank.org/en/Pages/icsidocs/ICSID-Convention.aspx>

<https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/>

<https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>

<https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/>

<http://www.lcia.org/lcia/history.aspx>
<http://www.difc-lcia.org/overview.aspx>
<http://www.lcia-india.org/>
<http://www.lcia-miac.org/>
<https://www.adr.org/about>
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rule_s.html
<http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>
<http://sccinstitute.com/about-the-scc/>
<http://www.siac.org.sg/2014-11-03-13-33-43/about-us>
http://www.oxforddictionaries.com/us/definition/american_english/Koran
<http://www.oxfordislamicstudies.com/article/opr/t125/e1936>
<https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT>
<http://www.mondaq.com/saudiarabia/x/631950/Contract+Law/Circular+Of+The+Saudi+Supreme+Judiciary+Council+Concerning+The+Launching+Of+The+Commercial+Courts>
<http://www.history.com/this-day-in-history/standard-oil-geologists-arrive-in-saudi-arabia>
<https://www.sahab.net/forums/index.php?app=forums&module=forums&controller=topic&id=145545>
<https://en.wikipedia.org>
<http://muslimcanada.org/justice.html>
<https://www.sadr.org/ADRService-model-ADR-clauses-model-clauses?lang=en>
<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf>
<https://www.nytimes.com/2017/09/26/world/middleeast/saudi-arabia-women-drive.html>

<http://free-islamic-course.org/stageone/stageone-module-4/four-schools-law-islam.html>

https://www.sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory_Library/Business_not_permitted.pdf

<https://www.customs.gov.sa/sites/sc/en/CustomsGuideNew/SubHQweb02>

<https://www.moj.gov.sa/ar-sa/ministry/versions/Documents/46.pdf>

<https://www.lexology.com/library/detail.aspx?g=84306b89-e5a2-424d-89c2-2574e7ceeb62>

<http://www.bfc.gov.sa/ar-sa/Aboutus/PrimaryFinancing/Pages/CommitteeMembers.aspx>

http://www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf