

ISLAMIC ARBITRATION AND REFORMULATING PRINCIPLES CONCERNING ROLE  
OF ARBITRATORS, APPOINTMENT OF WOMEN ARBITRATORS, AND  
ENFORCEMENT OF ARBITRAL AWARDS IN LIGHT OF MODERNITY AND CHANGE  
OF CULTURE IN ISLAMIC WORLD

By

Abdulmajed Alrajhi

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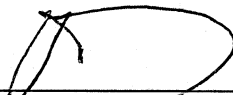
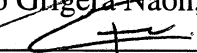
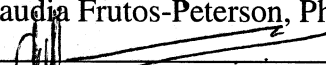
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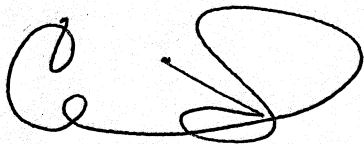
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ABSTRACT

Arbitration, as an alternative dispute resolution mechanism, was well known in the Arab region before the establishment of the Islamic religion. Islamic law continued the practice of arbitration to resolve disputes and created a new type of arbitration specific to family disputes. In fact, the first arbitration clause under Islamic law was concluded in the Medinah treaty between Muslim Arabs, Non-Muslim Arabs, and Jews in 622 A.D., which shows the historical legacy of arbitration practices in Islamic legal traditions.

Despite the profound historical precedent, there are growing concerns about arbitration practices under Islamic Law. Some of the main issues concerning modern Islamic arbitration are: (1) the roles of arbitrators; (2) the validity of appointing women arbitrators; and (3) enforceability of arbitration awards. These concerns are the result of recent demands from the Islamic world to improve Islamic arbitration practices in accordance with modern international arbitration as well as changes in cultural habits and customs. Therefore, the need to reformulate and modify Islamic arbitration appeared in light of the changes from modernity in the Islamic world.

The first issue focuses on a precise understanding of the role of arbitrators, which is a divisive issue in Islamic arbitration since scholars have different opinions on the specific role of

arbitrators. The second issue is concerned with the absence of women arbitrators in Islamic arbitration in the Kingdom of Saudi Arabia, which, along with the lack of women present in international arbitration, concerns the international arbitration community. The third issue highlights the enforcement of arbitration awards and the difficulty faced in some Muslim countries, such as Saudi Arabia, when Islamic law serves as the basis for their public policies.

The spread of globalization and diffusion of international investment and business projects on an international level has promoted international arbitration as the preferred vehicle for dispute resolution. Therefore, by analyzing some of the foreseeable issues of Islamic arbitration under Islamic law and then providing tools to overcome these obstacles, Islamic arbitration will meet international arbitration standards and will be accepted to govern and resolve disputes.

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## GLOSSARY

- Shari'a: the law of Islam that is enacted by God, which organizes the relations between God and people as well as people with each other.
- Holy Qur'an: the words of God that delivered to Prophet Muhammad by the Angel Gabriel.
- Sunnah speeches: what was issued by Prophet Muhammad by either saying, action, tacit approval, tacit disapproval, or decision.
- Ijma: the agreement of the Muslim scholars to determine a question of law after the death of Prophet Muhammad.
- Qiyas: the transfer of a decision from a situation to another where both situations have a lot in common.
- Hanafiah school: the first Islamic school of thought that was established by Abu Hanifah Alnoaman during the eighth century in Iraq.
- Malikiah school: the second Islamic school of thought that was established by Malk Ibn Anas during the eighth century in Saudi Arabia.
- Shafiah school: the third Islamic school of thought that was established by Muhammed Ibn Adrais during the ninth century in Egypt.
- Hanbaliah school: the fourth Islamic school of thought that was established by Ahmed Ibn Hanbal during the ninth century in Iraq.
- *Al-Qada*: judiciary.
- *Faqaih*: a description for someone who knows the Islamic law jurisprudence.
- *Adalah*: justice, satisfy God's orders, prevent people from engaging in prohibited or forbidden activity, and fulfill Islam's requirements.

- *Fasiq*: a person who does not follow all Islam orders and might contravene some of the prohibitions in Islamic law.
- *Fednah*: perception, a higher level of smartness and cleverness than the average individual.
- *Mujtahid*: exert effort in order to research an issue under Islamic law.
- *Muqalid*: an individual without the ability to become *Mujtahid* will copy, follow, or ask other *Mujtahids* or Islamic scholars about issues of law that he or she does not know.
- *Mufti*: a person who gives legal opinions about Islamic law issues when asked.
- *Hakam*: arbitrator.
- *Hekmah*: wisdom.
- *Qadi Al-Tanfith*: an enforcement division within the general court aims to enforce the awards.
- *Riba*: the charge of interest in any form.
- *Riba Al-Nasee'ah*: an extra charge the creditor takes from the debtor over time.
- *Riba Al-Fadl*: the exchange of two unequal quantities of the same commodities at the same time.
- *Gharar*: a speculation on the happening of a specified but unsure event in the future.

## CHAPTER 1 INTRODUCTION

With over \$2 trillion industry, Islamic finance products entered the global financial market and are desirable investment instruments due to their stability and high profit returns. One of the main reasons behind the success of Islamic financial products is that Islamic law prohibits the use of interest, or “usury,” in any form in any transaction. In addition, unlike conventional bonds based on credit ratings that represent debt obligations, Islamic bonds, or “Sukuk,” are based on the value of the assets and represent an ownership of an asset. Therefore, Sukuk investors, whether Muslims or non-Muslims, feel comfortable trading and investing in the Islamic finance field.

In addition, due to the development of business, economy, energy, and other industries as a result of the oil discovery, many international transactions are concluded in the Middle East, especially in oil producing countries. Yet, sometimes misunderstandings and conflicts arise in those transactions and each party seeks a resolution. A Muslim party may prefer to settle the conflict in accordance with Islamic law while a non-Muslim party might want a solution that is accepted in the Muslim countries where business occurs.

Therefore, there is a need for an impartial mechanism to resolve disputes arising out of or in connection with those Islamic financial products as well as the different international transactions. Arbitration, as an alternative dispute resolution mechanism, is a tool that the international community accepts to resolve international commercial and investment disputes. Yet, since the Islamic financial products are compliant with Islamic law and some of the parties in the different transactions are Muslims, the conduct of arbitration to resolve those disputes is

usually based on Islamic procedural and substantive laws and, therefore, is called Islamic arbitration.

The practices of Islamic arbitration are not limited to resolving disputes arising out of or in connection with financial products and different transactions concluded by Muslim countries; they extend to include resolving disputes for the large Muslim communities that live in non-Muslim countries. While many Muslims have migrated to non-Muslim countries, there is still a preference to settle disputes in accordance with the law of their religion rather than through the regular judicial systems in the countries where they live. Islamic arbitration is a mechanism that offers those Muslims the option to settle their disputes in accordance with the law of their religion.

However, there are some issues connected with the practice of Islamic arbitration for financial products, different international transactions, and disputes of Muslims in non-Muslim countries. Some of those issues are related to the choice of Islamic law as the applicable law while the others concern the use of Islamic law as the procedural law. Due to the variety of issues that concern Islamic arbitration, this dissertation addresses some of the problems when procedural law is based on Islamic law. This dissertation also discusses the enforcement of arbitration awards that contain payment of interest in Muslim countries, specifically Saudi Arabia.

Originally, the role of women in the legal field in Saudi Arabia was limited. Due to conservative habits and customs that opposed the presence of women in the legal field, law schools were historically not open to women in Saudi Arabia. Yet, as habits and customs changed and became more liberal, law schools across the country opened their doors to women and granted them the license to practice law and create their own law firms.

Since women have proved their ability to succeed in the legal field, women should also be entitled to participate in the arbitration field and serve as arbitrators. The role of arbitrators will be discussed to understand their functions and required qualifications as well as the enforcement in Muslim countries of awards that are rendered by women. When women are accepted to serve as arbitrators, it will open the door for them to participate in the judiciaries and serve as judges in countries such as Saudi Arabia.

The issues discussed in this dissertation not only concern Muslims who use Islamic arbitration, but also non-Muslim individuals who seek enforcement of arbitration awards in Muslim countries. Some concerns arise when non-Muslim individuals seek enforcement of arbitration awards in countries under the rule of Islamic law when those awards are decided by women arbitrators or arbitrators without the required qualifications, or when those awards contain violations of Islamic law.

Therefore, there are three main procedural issues in modern Islamic arbitration: the role of arbitrators inside the arbitral tribunals, the validity of appointing women arbitrators, and the enforceability of the arbitration awards. Those issues not only concern Islamic arbitration users, but also concern some of the non-Muslim countries that host Islamic arbitration practices.

These issues need to be reformulated in order to line up with modernity in the current era and require some reformulation in Islamic arbitration to rise it to an acceptable international level. Moreover, the demands of the open-minded culture among Muslim countries, including Saudi Arabia, entail modifying some of the issues that concern Islamic arbitration due to changes in habits and customs as well as the need to formulate current practices that line up with the new culture and modernity.



The first issue is the role of arbitrators inside the arbitral tribunals. Some Muslim scholars consider arbitrators to be the same as judges. In addition, those Muslim scholars believe that women are not entitled to be appointed as judges and, consequently, invalidate the appointment of women arbitrators. This dissertation focuses on the validity of appointing women judges relying on the role of arbitrators to demonstrate the correlation to appoint women arbitrators.

The second issue is the validity of appointing women arbitrators. Some Muslim scholars view this issue separately from the appointment of women judges and the comparison between arbitrators and judges. Yet, only a minority of those scholars validate the appointment of women arbitrators based on the differentiation between arbitrators and judges, while the majority invalidate their appointment as arbitrators for the same reasons that invalidated the appointment of women judges. This dissertation, however, relies on extensive research to validate the appointment of women arbitrators from different Islamic law perspectives.

The third issue, the enforcement of arbitration awards, has been an issue in some Muslim countries where their public policies are based on Islamic law. Although many Muslim countries are signatories to New York Convention, which governs procedure and enforcement of foreign arbitral awards, some refuse to enforce foreign arbitral awards under the public policy exception of the Convention. This is often because awards are either decided by arbitral tribunals that include women arbitrators or they violate Islamic law. This dissertation emphasizes enforcement of foreign arbitral awards due to the duty under Islamic law to comply with conventions and treaties. In addition, this dissertation provides an application to enforce arbitral awards that contain violations of Islamic law in Saudi Arabia and an application to enforce arbitral awards decided by Islamic law in United States.

Although the literature review acknowledges those issues concerning the practice of Islamic arbitration, scholars have not yet provided effective solutions to overcome these issues. As a result, this dissertation aims to help modernize the development of Islamic arbitration by advocating solutions to these three main issues. Thus, the improvement of Islamic arbitration practices will not only promote global acceptance for Islamic arbitration, but also help attract foreign investors due to the development of Islamic arbitration in some Muslim countries.

Since this dissertation conducts extensive research and analysis on these issues in Islamic arbitration, the primary sources are the main Islamic law texts along with different interpretations of the four main Islamic schools of thoughts. This dissertation discusses the issues that concern Islamic arbitration by analyzing the approaches of the four main Islamic schools of thoughts before determining the appropriate approach to promote development of modern Islamic arbitration.

While Islamic arbitration occurs in both Muslim and non-Muslim countries, this dissertation focuses on the modern Islamic arbitration practices in Saudi Arabia, as one of the most conservative Muslim countries with laws and regulations in accordance with Islamic law. The current arbitration practices in Saudi Arabia reflect a more modern understanding of arbitration under Islamic law; the new arbitration law, passed in 2012, includes many common international arbitration principles.

To that end, this dissertation provides an overview of the development of arbitration practices in Saudi Arabia. Moreover, this dissertation provides examples of Islamic arbitration in non-Muslim countries. Specifically, this dissertation explains the practices of Islamic arbitration in the United Kingdom and Canada, where independent arbitration centers host hearings and supervise the procedures of Islamic arbitration.

Recognizing these issues in Islamic law jurisprudence as well as the general rules and principles of Islamic law, this dissertation proposes the following: First, although the role of arbitrators inside the arbitral tribunals is similar to the role of judges in courtrooms, arbitrators differ from judges and should not be required to possess the same qualifications as judges. Second, the appointment of women arbitrators in Islamic arbitration is valid and acceptable. Third, foreign arbitral awards should be enforced in Muslim countries even if their public policies are based on Islamic law and regardless of the gender of the arbitrator who rendered those awards, as long as those arbitral awards do not violate general principles of Islamic law.

Chapter II provides an overview of arbitration in the pre-Islamic era and after the establishment of Islam including types of arbitration under Islamic law, Islamic law sources and schools, and a literature review of written sources on this topic. Chapter III provides an overview of Islamic arbitration including the current status of arbitration under Islamic law, specifically in Saudi Arabia, as well as Islamic arbitration in non-Muslim countries.

It is important to clarify the role of arbitrators under Islamic law to determine the precise understanding of their functions—whether they are judges, whether they require to possess the qualifications of judges, and whether there is anything prevents women from serving as arbitrators—which is discussed in Chapter IV. In addition, because some Muslim scholars view arbitrators and judges in the same light and prevent women from serving as arbitrators and judges, the validity of appointing women as judges under Islamic law will be discussed in Chapter V.

Chapter VI then provides additional legal grounds to support the appointment of women arbitrators in Islamic arbitration. In addition, the enforcement of arbitration awards in some Muslim countries, which are signatories to the New York Convention, is an issue especially

when those countries use Islamic law as their public policies. The validity to conclude conventions and treaties under Islamic law as well as the duty to fulfill these agreements will be discussed in Chapter VII.

Furthermore, since interest payments are not allowed under Islamic law—and many foreign arbitral awards contain orders for payment of interest— Chapter VIII will discuss the enforcement of those awards in Saudi Arabia. In addition, Chapter VIII examines enforcement of foreign arbitral awards decided by Islamic law in the United States. Finally, Chapter IX provides final recommendations for modernizing Islamic arbitration.

## CHAPTER 2

### BACKGROUND ON ARBITRATION HISTORY AND ISLAMIC LAW

This background chapter aims to provide the readers with basic information on the main issues of concern in Islamic arbitration, with a particular focus on procedural law. Arbitration is an alternative dispute resolution mechanism that has existed in the Arab region since before the establishment of Islam as a religion. In order to provide the readers with an overview of Islamic arbitration and law, this chapter explains the history of Islamic arbitration, as well as the basic concepts of Islamic law, including the sources and schools of thought.

This chapter begins with an overview of the arbitration practices in the Arab region before and after the establishment of Islam and the formation of Islamic law. Second, the chapter explains the sources of Islamic law as well as the four Islamic schools of thought on how to interpret these sources. Third, it provides an overview of the different types of arbitration under Islamic law. Finally, the chapter summarizes existing sources of literature that aimed to offer solutions to the issues that concern the Islamic arbitration practices.

#### 2.1. Overview on Arbitration Before and After the Establishment of Islam

This section provides an overview of arbitration as an alternative dispute resolution mechanism in the pre-Islam era in the Arab region. Arbitration was the only mechanism in the region for resolving disputes during that era, and so was of great importance. The section also provides a brief overview of arbitration practices after the establishment of Islam as a religion.

### 2.1.1. Overview on Arbitration in the Pre-Islam Era

Arbitration as a method for resolving disputes has existed in the Arab region since long before the Islamic religion was established.<sup>1</sup> In the pre-Islam era, Arab tribes in the Arab Island lacked formal judicial systems with judges and courts to decide people's disputes.<sup>2</sup> This led Arabs in that era to use arbitration to resolve their disputes.<sup>3</sup> As a result, arbitration in the pre-Islam era was the only mechanism Arabs had to settle conflicts, and was accepted by people, tribes, and societies.<sup>4</sup>

It is worth noting that arbitrating the disputes in the pre-Islam era was considered an honorable mission and most of the disputes that were settled through arbitration were decided by a sole arbitrator.<sup>5</sup> Therefore, the selection of arbitrators was either based on their honorable character and well-known qualifications (such as wisdom, bravery, and generosity), or based on their status in their tribes (as an army commander or tribe chief, for example). Sometimes selection was based on both these characteristics.<sup>6</sup>

Since Arabs in the pre-Islam era lacked the existence of formal government that could enact rules and regulations, arbitrators did not have formal written laws to use in order to resolve the disputes. Instead they applied customs, habits, traditions, and common sense to resolve disputes.<sup>7</sup> The types of disputes that arbitrators settled were limited and generally concerned

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<sup>1</sup> ALI ABDULQADIR, AL-FIQH AL-ESLAMI AL-QADA WA AL-HOSBAH [ISLAMIC LAW JURISPRUDENCE, THE JUDICIARY] [AUTHOR'S TRANSLATION] 59-60 (1st ed. 1986).

<sup>2</sup> MUHAMMAD RA'AFT OTHMAN, AL-NITHAM AL-QADA' AI FI AL-FIQH AL-ISLAMI [THE JUDICIAL SYSTEM IN ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 33, 35 (2nd ed. 1994).

<sup>3</sup> OTHMAN, *supra* note 2, at 33.

<sup>4</sup> ABDULQADIR, *supra* note 1, at 59.

<sup>5</sup> *Id.* at 59-60.

<sup>6</sup> *Id.* at 60.

<sup>7</sup> OTHMAN, *supra* note 2, at 35.

issues relating to wealth, honor, and presidency as well as disputes about the ownership of the pasture and water.<sup>8</sup>

Arbitration was also used to judge poetry competitions, which were of great importance at the time.<sup>9</sup> For example, when two or more poets wished to know whose poem was more advanced and better pronounced, those poets would appoint a well-known poet with great experience in the poetry as an arbitrator.<sup>10</sup> The selected arbitrator would then decide whose poem is best articulated and better pronounced along with providing the supported reasons for the decision.<sup>11</sup>

In addition, Prophet Muhammad was appointed as an arbitrator to decide an honorable dispute before he received the prophecy from God.<sup>12</sup> In that arbitration case, Arab tribes were disputing over the honor to reinstall the black stone to the holy place (Al-Kaaba) in Makkah city.<sup>13</sup> The disputing tribes agreed to appoint Prophet Muhammad as the sole arbitrator to resolve the issue.<sup>14</sup> Prophet Muhammad decided to put the black stone on a piece of fabric and ask each Arab tribe to hold a side of the fabric and then lift it up in unison so that Muhammad could reinstall the stone in its rightful location.<sup>15</sup> Prophet Muhammad's decision resolved the dispute between the Arab tribes, granting honor to all of them, and was accepted by all the tribes.<sup>16</sup>

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<sup>8</sup> ABDULQADIR, *supra* note 1, at 60.

<sup>9</sup> See AL-SAWSANAH, <https://www.assawsana.com> (last visited Feb. 23, 2017).

<sup>10</sup> See *Id.*

<sup>11</sup> See *Id.*

<sup>12</sup> AHMED BIN ABDULLAH BIN AHMED BIN ISHAK MOSES, DLA'EL AL-NUBWAH LI-ABI NA'IM AL-ASBHANI [EVIDENCE ON PROPHECY] [AUTHOR'S TRANSLATION] 175 (Muhammad Rawas et al. eds., 2nd ed. 1986).

<sup>13</sup> 1 ABDULMALIK BIN HISHAM BIN AYOUN ALHAMAIRI ALMOAFARI, AL-SAIRAH AL-NABAWIAH LI-EIBAN HISHAM [OVERVIEW ON PROPHET MUHAMMAD LIFE] [AUTHOR'S TRANSLATION] 196-97 (Mustafa Alsaqa et al. eds., 2nd ed. 1955).

<sup>14</sup> 1 SALEH BIN TAHA BIN ABDULWAHID, SUBUL AL-SALAM MIN SAHAIH SAIRAT KHAIR AL-ANAM ALAIH AL-SALAT WA AL-SALAM [BIOGRAPHY ON PROPHET MUHAMMAD LIFE] [AUTHOR'S TRANSLATION] 58 (Salaim Bin Aid Alhilali et al. eds., 2nd ed. 2007).

<sup>15</sup> MOSES, *supra* note 12, at 175.

<sup>16</sup> 1 ALMOAFARI, *supra* note 13, at 196-97.

In short, arbitration as a mechanism for resolving the disputes has been used by Arabs in the Arab land since before the establishment of Islam as a religion.<sup>17</sup> The practice of arbitration in the pre-Islam era was the result of a lack of formal governments and judicial systems to organized people's lives and resolve their disputes.<sup>18</sup> Although the types of disputes that were resolved by arbitration were limited, only high-qualified arbitrators were selected to arbitrate those disputes.<sup>19</sup> Arbitration in the pre-Islam era was thus similar to arbitration today, where disputes are resolved by arbitrators chosen by the disputing parties.

### 2.1.2. Overview on Arbitration After the Establishment of Islam

After the establishment of Islam as a religion, Islamic law confirmed the uses of arbitration as an alternative dispute resolution mechanism, based on the fact that it had been effective in resolving disputes in the Pre-Islam era.<sup>20</sup> Prophet Muhammad himself, after he received the prophecy from God, used arbitration to resolve some disputes, as did some of the Caliphs.<sup>21</sup> This part of this section mentions a few important arbitration disputes that were settled during the era of the Prophet Muhammad and the Caliphs, as well as the first arbitration clause concluded under Islamic law.

The first arbitration clause under Islamic law resulted in the Madinah treaty between Muslim Arabs, non-Muslim Arabs, and Jews in 622 A.C.<sup>22</sup> After prophet Muhammad moved from Makkah city to Al-Madinah Al-Munawarah city, he concluded a treaty with the people in

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<sup>17</sup> ABDULQADIR, *supra* note 1, at 59-60.

<sup>18</sup> OTHMAN, *supra* note 2, at 33.

<sup>19</sup> ABDULQADIR, *supra* note 1, at 60.

<sup>20</sup> OTHMAN, *supra* note 2, at 51.

<sup>21</sup> 17 SIRAJ ALDAIN OMAR BIN ALI BIN ADEL ALNOAMANI, AL-LIBAB FI AULOM AL-KETAB [THE SUMMERY OF THE HOLY QUR'AN'S ART] [AUTHOR'S TRANSLATION] 528 (Adel Ahmed Abdulmojob et al. eds., 1st ed. 1998); 6 MANSOUR BIN YOUNIS BIN SALAH AL-DEEN ALBUHUTI, KASHAF AL-QINA'A ALA'A MATN AL-EQNA'A [THE DISCOVERER OF THE STUDIES ON HANBALIAH SCHOOL THOUGHT] [AUTHOR'S TRANSLATION] 309 (n.d.).

<sup>22</sup> ABDULSHAFI MUHAMMAD ABDULLATAIF, AL-SAIRAH AL-NABAWAIH WA AL-TARIKH AL-ISLAMI [OVERVIEW ON PROPHECY AND ISLAMIC HISTORY] [AUTHOR'S TRANSLATION] 141-42 (1st ed., 2007).



the Al-Madinah Al-Munawarah city, who were non-Muslim Arabs and Jews, in order to ensure the safety for all the people given their diversity.<sup>23</sup> That treaty contained an arbitration clause, which required for the use of arbitration to settle disputes between different groups of people.<sup>24</sup>

This first arbitration clause was created in the early stages of Islam and did not indicate that the applicable law was Islamic law. This is likely the case for two reasons: First, Islamic law at the time was not fully completed and formed. Second, the other groups of people who consented to the arbitration clause, the non-Muslim Arabs and Jews, were not Muslims and, therefore, would not have agreed to Islamic law as the applicable law. As a result, the arbitration clause was not guided by written principles. However, it not only confirmed the use of arbitration as a mechanism for resolving the disputes, but also validated the use of arbitration for disputes with non-Muslim groups and individuals.

Another dispute that happened in the prophet Muhammad era that was resolved by arbitration was between Muslim Arabs and non-Muslim Arabs.<sup>25</sup> In that era, a conflict occurred between Prophet Muhammad and his followers and a non-Muslim tribe. The non-Muslim tribe asked Prophet Muhammad for a solution in order to resolve the conflict.<sup>26</sup> Prophet Muhammad provided arbitration as a mechanism to resolve the conflict, and both parties agreed to appoint a sole non-Muslim arbitrator to arbitrate the dispute and resolve the conflict.<sup>27</sup> That arbitration case

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<sup>23</sup> *Id.*

<sup>24</sup> Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 590-91 (2006).

<sup>25</sup> 1 ALA ALDAIN ALI BIN MUHAMMAD BIN IBRAHIM BIN OMAR ALSHEHE, LBAB AL-TAWAIL FI MA'ANI AL-TANZAIL [THE CENTER OF INTERPRETATION OF THE HOLY QUR'AN MEANINGS] [AUTHOR'S TRANSLATION] 177 (Muhammad Ali Shahain ed., 1st ed. 1994).

<sup>26</sup> 17 ALNOAMANI, *supra* note 21, at 528.

<sup>27</sup> 9 MUHAMMAD THANA'A ALLAH ALMADHARI, AL-TAFSAIR AL-MADHARI [MADHARI'S INTERPRETATION OF THE HOLY QUR'AN] AUTHOR'S TRANSLATION] 44 (Qulam Nabi Altounesi ed., 1991).

not only confirmed using arbitration to resolve disputes, but also legalized the appointment of non-Muslim arbitrators to arbitrate disputes between Muslim and non-Muslim parties.

Regarding the arbitration practices in the Caliph's era, some disputes and conflicts were resolved through arbitration. Caliph Omar was involved in one of them.<sup>28</sup> In the first arbitration dispute during the Caliph's era, Caliph Omar, the second Caliph after the death of Prophet Muhammad, became involved in an arbitration dispute with another Muslim man.<sup>29</sup> In that arbitration dispute, Caliph Omar rented a horse from a man to use it for loading and delivery.<sup>30</sup> The horse was injured and Caliph Omar complained about the incident to the horse owner, who suggested resolving the issue through arbitration.<sup>31</sup> Caliph Omar and the horse owner agreed to resolve the issue through arbitration and appointed a sole arbitrator.<sup>32</sup> The sole arbitrator's decision was in favor of the horse owner. The arbitrator deemed Caliph Omar responsible for the horse's injury since the horse was in a good shape when he rented it.<sup>33</sup>

A second dispute during the Caliph's era was also resolved through arbitration.<sup>34</sup> This dispute involved two groups of Muslim people represented by two men who had a conflict over who should be president.<sup>35</sup> The two men, Ali and Muawiyah, each had a large group of people supporting him to be appointed president.<sup>36</sup> Unfortunately Ali and Muawiyah could not resolve

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<sup>28</sup> 6 ALBUHUTI, *supra* note 21, at 309.

<sup>29</sup> MUHAMMAD BIN MUHAMMAD BIN ABDULKARAIM BIN RADWAN BIN ABDULAZIZ, HOSUN AL-SOLUK AL-HAFIZ DAWALT AL-MULUK [THE RIGHT BEHAVIOR TO PROTECT KINGDOMS] [AUTHOR'S TRANSLATION] 128 (Fwad Abdulmunaim Ahmed ed., n.d.).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 5 JAMAL ALDAIN ABU ALFARAJ ABDULRAHMAN BIN ALI BIN MUHAMMAD, AL-MUNTAZIM FI TARIKIH AL-UMAM WA AL-MULUK [HISTORY ON NATIONS] [AUTHOR'S TRANSLATION] 126-28 (Muhammad Abdulqadir Ata et al. eds., 1st ed. 1992).

<sup>35</sup> 1 EIMAD ALDAIN ISMAIL BIN ALI BIN MAHMOUD BIN MUHAMMAD, AL-MUKHTASAR FI AKHBAR AL-BASHAR [SUMMARY ON PEOPLE'S NEWS] [AUTHOR'S TRANSLATION] 177-78 (1st ed., n.d.)

<sup>36</sup> 5 MUHAMMAD, *supra* note 34, at 126-28.

their conflict by conciliation or mediation. Muawiyah therefore suggested arbitration and Ali agreed.<sup>37</sup> After they consented to arbitrate the conflict, each one of them appointed an arbitrator and the two arbitrators decided the dispute in favor of Muawiyah, who was appointed the formal president of the Arab land.<sup>38</sup>

Although these arbitration cases were not about commercial disputes, they can still be used to confirm the validity of arbitration under Islam law as a mechanism for resolving disputes. In addition, Islamic law, after it was completely formed, created rules and laws that governed arbitration practices.<sup>39</sup> Islamic law also grants arbitration parties the right to choose the procedural law that governs their disputes, as long as it does not conflict with the general rules and principles of Islamic law.<sup>40</sup> Islamic law also confirms the enforceability of arbitration awards after they have been rendered in accordance with the law chosen by the parties and do not contain violation of Islamic law.<sup>41</sup>

However, after the Caliph's era, the use of arbitration became less common and further development of arbitration as a mechanism for resolving disputes did not take place.<sup>42</sup> After the Caliph's era, the Islamic Empire expanded and judges were appointed in the regions to decide people's disputes.<sup>43</sup> In addition, disputes in that era were relatively few and uncomplicated and, therefore, did not required arbitration to resolve them.<sup>44</sup> The Islamic schools and the Muslim

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<sup>37</sup> 1 MUHAMMAD, *supra* note 35, at 177-78.

<sup>38</sup> ABU HANAIFAH AHMED BIN DAWOOD ALDINURI, AL-AKHBAR AL-TWAL [EXTENSIVE NEWS] [AUTHOR'S TRANSLATION] 197-201 (Abdulmunaim Amir et al. eds., 1st ed. 1960).

<sup>39</sup> *See* ABDULQADIR, *supra* note 1, at 26-27.

<sup>40</sup> *See* MUHAMMAD BIN ALI BIN MUHAMMAD AL-SHOKANI, AL-SAIL AL-JARAR AL-MOTADAFIQ ALA'A HADAEQ AL-AZHAR [THE FALL RAIN ON THE FLOWER GARDEN] [AUTHOR'S TRANSLATION] 835 (1st ed. n.d.).

<sup>41</sup> *See Id.*

<sup>42</sup> *See Id.* at 60, 68.

<sup>43</sup> *See Id.* at 68.

<sup>44</sup> *See Id.* at 62-63.

scholars in that era were interested instead in improving the judicial system in the expanded region and, as a result, did not put a lot of effort into developing arbitration practices.<sup>45</sup>

In addition, it is worth noting that the holy Qur'an decrees from the early stages of Islam explained dispute resolution in terms of arbitration.<sup>46</sup> Then, after Islam was fully formed, the holy Qur'an decrees begin to refer instead to judging people's disputes rather than arbitration.<sup>47</sup> This is because during the early stages of Islam there was no formal judiciary to resolve people's disputes and, therefore, Islam continued resolving people's disputes by arbitration.<sup>48</sup> After the formation of Islam, the judiciary emerged as an institution and the term judging replaced the term arbitrating.<sup>49</sup>

As a result, Islamic schools and Muslim scholars have used informal terms to describe arbitration as a mechanism for resolving disputes and arbitration proceedings, while using formal terms for judiciary and formal adjudication. These schools and scholars define arbitration as an agreement by two or more people to appoint one or more arbitrators to decide their disputes.<sup>50</sup> They refer to the judiciary meanwhile as an important authority that decides disputes by issuing enforced judgements.<sup>51</sup>

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<sup>45</sup> See *Id.* at 26.

<sup>46</sup> *Id.* at 63.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See 7 ZAID ALDAIN BIN IBRAHIM BIN MUHAMMAD ET AL., AL-BAHAR AL-RAEQ SHARH KANZ AL-DAQAEQ WA MENHAT AL-KHALEQ WA TAKMILAT AL-TOURI [ISLAMIC LAW JURISPRUDENCE ACCORDING TO HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 24 (2nd ed. n.d.); see also 4 MUHAMMED BIN AHMED BIN ARAFAH AL-DOUSUGI, HASHIAT AL-DOUSUGI ALA AL-SHARAH AL-KABEER [THE EXPLANATION OF AL-DOUSUGI ON MALIKIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 135 (n.d.).

<sup>51</sup> See MANSOUR BIN YOUNIS BIN SALAH ALDAIN ALBUHUTI, AL-RAUD AL-MURBAE SHARH ZAD AL-MOSTQNAE [THE GARDEN OF THE EXPLANATION ON AL-MOSTQNAE BRIEF] [AUTHOR'S TRANSLATION] 704 (Abdulqadus Muhammad Nathir ed., n.d.); see also 9 MAHMOUD BIN AHMED BIN MUSA, AL-BENAIHAH SHARH AL-HEDAIAH [THE EXPLANATION ON AL-HEDAIAH'S BRIEF] [AUTHOR'S TRANSLATION] 3 (1st ed. 2000).

In addition, the enforceability of the arbitration awards is different from the enforceability of the judicial judgements. Arbitration awards need to be confirmed by the judiciary before they become enforceable if one or more parties does not consent to the outcomes of the awards.<sup>52</sup> Judicial judgements meanwhile are enforced automatically regardless of whether the parties consent.<sup>53</sup> Arbitration under Islamic law thus lacks formality since it requires the consent of parties to arbitrate their disputes and judiciary confirmation of awards.

In sum, arbitration as an alternative dispute resolution was confirmed by Islamic law after the establishment of Islam as a religion. The first arbitration clause under Islamic law was concluded in 622 A.C. between Muslim Arabs, non-Muslim Arabs, and Jews in the Al-Madinah treaty. Prophet Muhammad, Caliph Omar, and other Muslim people who lived in that era used arbitration to resolve some disputes and conflicts. However, the practice of arbitration after that era has not been fully developed due to the emergence of a large judiciary as the Islamic empire expanded in the region.

## 2.2. Islamic Law Sources and Islamic Schools

Since this dissertation discusses the practices of Islamic arbitration or the conduct of arbitration under Islamic law, it is important to first define Islamic law and clarify its sources.

There are four main schools of thought when it comes to Islamic law, each with its own

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<sup>52</sup> See 2 ABU BAKR BIN ALI BIN MUHAMMED AL-HADADI, AL-JAUHARAH AL-MOUNIRAH [THE ENLIGHTENING JEWEL ON HANAFIAH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 246 (1st ed. 2001); see also 8 MUHAMMAD BIN YUSUF BIN ABI ALQASM, AL-TAJ WA AL-EKLIL LE-MUKHTASAR KHALIL [THE EXPLANATION OF THE BRIEF ON THE MUSLIM SCHOLAR KHALIL] [AUTHOR'S TRANSLATION] 99-100 (1st ed. 1994).

<sup>53</sup> See 2 MUHAMMAD BIN FARAMRZ BIN ALI, DORAR AL-HOKAM SHARH GOURAR AL-AHKAM [JUDGES' RECOMMENDATIONS ON DECIDING COMPLICATED DISPUTES] [AUTHOR'S TRANSLATION] 404 (n.d.); see also 6 SHAMS ALDAIN MUHAMMAD BIN MUHAMMAD BIN ABDULRAHMAN, MWAHIB AL-JALIL FI SHARH MUKHTASAR KHALIL [THE STUDY ON THE RESEARCH OF THE MUSLIM SCHOLAR KHALIL] [AUTHOR'S TRANSLATION] 86 (3rd ed. 1992).

understanding, application, and approach to the law. This section explains Islamic – or “Shari’a” – law and its sources, and outlines the establishment of the Islamic schools and their approaches.

### 2.2.1. Islamic Law “Shari’a” Sources

There are four main sources of Islamic law: the holy Qur’an, Sunnah speeches, Ijma, and Qiyas.<sup>54</sup> Islamic law not only governs the relations between people, but also people’s relationship with God. As a result, Islamic law differs from other regulations and laws that are regulated solely by governments.<sup>55</sup>

After the establishment of Islam as a religion in the sixth century, Islam divided into two main faiths, Sunni and Shia.<sup>56</sup> The total number of Muslims today is around one and a half billion people.<sup>57</sup> Less than ten percent of these people are Shia and the remaining ninety percent Sunni.<sup>58</sup> Although both faiths, Sunni and Shia, apply Islamic law, there are differences between them regarding the understanding of the Islamic law sources and their applications.<sup>59</sup> This dissertation focuses on the practice of Islamic arbitration based on the Sunni approach.

Shari’a means the straight path that contains the provisions, rules, principles, and regulations enacted by God and is considered holy legislation.<sup>60</sup> In other words, Shari’a means the law of Islam that is enacted by God, which organizes relations between people and between

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<sup>54</sup> 1 ABU ALHASAN SAID ALDAIN ALI BIN ABI ALI BIN MUHAMMAD, AL-IHKAM FI AUSUL AL-AHKAM [RULES OF JUDGMENTS] [AUTHOR’S TRANSLATION] 239 (Abdulraziq Afifi ed., n.d.).

<sup>55</sup> See ALI BIN JUMA’AH BIN MUHAMMAD BIN ABDULWAHAB, AL-MADKHAL ELA DIRASAT AL-MATHAHIB AL-FIGHIAH [THE INTRODUCTION ON THE STUDY OF ISLAMIC SCHOOLS OF THOUGHTS] [AUTHOR’S TRANSLATION] 305 (2nd ed. 2001).

<sup>56</sup> AL-ARABIAH MIDDLE EAST, <http://www.arabic.cnn.com> (last visited Jan. 20, 2017).

<sup>57</sup> WORLD RELIGIONS STATISTICS, <http://www.age-of-the-sage.org> (last visited Jan. 20, 2017).

<sup>58</sup> See HOW MANY SHIA ARE THERE IN THE WORLD, <http://www.islamicweb.com> (last visited Jan. 20, 2017); see also PEW RESEARCH CENTER, RELIGION & PUBLIC LIFE, <http://www.pewforum.org> (last visited Jan. 20, 2017).

<sup>59</sup> MAUDOU’A, THE DIFFERENCE BETWEEN SUNNI AND SHIA, <http://www.mawdoo3.com> (last visited Jan. 20, 2017).

<sup>60</sup> See ABDULWAHAB, *supra* note 55, at 305.

individuals and God.<sup>61</sup> As such, Islamic law differs from regular regulations and laws enacted by legislation branches of government.<sup>62</sup>

Islamic law also differs from other legislations in that it advises Muslim people on how to be righteous toward God or each other. Regular secular legislation usually focuses instead on organizing people's lives and restricting them from committing unlawful acts without interfering in their relations with God.<sup>63</sup> Moreover, Islamic law evaluates people based on their intentions and awards prizes for good intentions.<sup>64</sup> People thus abide by Islamic law not only to avoid punishment but also to receive prizes from God.<sup>65</sup>

Shari'a provides the general framework that should be taken into consideration when enacting laws, rules, or regulations based on Islamic law.<sup>66</sup> This general framework considers people's bodies, minds, religions, dignities, and funds as the top priorities that any law, rule, or regulation should be enacted to save.<sup>67</sup> For example, laws should save people's bodies by prohibiting murders and assaults, people's minds by restricting drugs, people's religions by validating the practices of their religions, people's dignities by prohibiting rape and sexual crimes, and people's funds by inhibiting robberies.<sup>68</sup>

Muslim Sunni believe that Islamic law is derived from four main sources. As mentioned above, these are, in order of priority, the holy Qur'an, Sunnah speeches, Ijma, and Qiyas.<sup>69</sup> These

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<sup>61</sup> *See Id.*

<sup>62</sup> *See Id.*

<sup>63</sup> *See Id.*

<sup>64</sup> *See Id.*

<sup>65</sup> *See Id.*

<sup>66</sup> *Id.* at 306.

<sup>67</sup> *See Id.* at 306.

<sup>68</sup> *See* NOUR ALDAIN BIN MUKHTAR ALKHADAMI, *EALM AL-MAGASID AL-SHARI'AH* [THE STUDY ON THE LEGITIMATE PURPOSES IN ISLAMIC LAW] [AUTHOR'S TRANSLATION] 31-33 (1st ed. 2001); *see also* ABDULWAHAB, *supra* note 55, at 306.

<sup>69</sup> I MUHAMMAD, *supra* note 54, at 239.

sources must always be consulted in this order, with the holy Qur'an as the primary source.<sup>70</sup> The sources are in agreement and do not conflict but rather confirm each other.<sup>71</sup> Moreover, these sources have been always in accordance with human mentality, which means they do not contradict people's mind and their common senses.<sup>72</sup>

The holy Qur'an represents the words of God as it was delivered to Prophet Muhammad by the Angel Gabriel.<sup>73</sup> The holy Qur'an consists of 114 chapters and 6348 verses.<sup>74</sup> These holy Qur'an verses contain provisions that can be organized into three main categories.<sup>75</sup> These categories are: a) provisions relating to people's faith in God and his previous prophets and messengers, b) provisions explaining the kind and poor moralities and advising Muslims of their moral obligations, and c) provisions relating to people's acts.<sup>76</sup>

As for the second source of Islamic law, the Sunnah speeches, these represent guidance provided by Prophet Muhammad through his words, actions, tacit approval, tacit disapproval, or decisions.<sup>77</sup> Prophet Muhammad's sayings, acts, and decisions were recorded during his life and after his death, and were then transmitted into written books called *Ahadith*.<sup>78</sup> These Sunnah speeches are divided into three classifications: confirmation, clarification, and legislation.<sup>79</sup> Sunnah speeches providing confirmation give support for the provisions in the holy Qur'an, while Sunnah speeches providing clarification further elaborate upon the general provisions of

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<sup>70</sup> See AL-MAGASID, *supra* note 68, at 31.

<sup>71</sup> MUHAMMAD BIN HUSAIN BIN HASAN ALJEZANI, MA'ALIM AUSUL AL-FIGAH IND AHAL AL-SOUNAH WA AL-JMA'AH [ISLAMIC JURISPRUDENCE BASED ON SUNNI FAITH] [AUTHOR'S TRANSLATION] 68 (5th ed. 2006).

<sup>72</sup> *Id.* at 97.

<sup>73</sup> *Id.* at 102.

<sup>74</sup> SECRETS OF QUR'AN MIRACLES, <http://www.kaheel7.com> (last visited Feb. 23, 2017).

<sup>75</sup> ABDULWAHAB, *supra* note 55, at 308.

<sup>76</sup> *Id.*

<sup>77</sup> 2 ABDULKARAIM BIN ALI BIN MUHAMMAD ALNAMLAH, AL-MUHATHAB FI EALM AUSUL AL-FIGAH AL-MUQARAN [THE COMPARATIVE STUDY ISLAMIC JURISPRUDENCE] [AUTHOR'S TRANSLATION] 634 (1st ed. 1999).

<sup>78</sup> See ALJEZANI, *supra* note 71, at 68-70.

<sup>79</sup> See *Id.* at 119.



the holy Qur'an.<sup>80</sup> Sunnah speeches that act as legislation enact and regulate rules and laws that organize people's lives.<sup>81</sup>

The third source of Islamic law, Ijma, represents agreements by Muslim scholars on how to interpret the holy Qur'an or the Sunnah speeches.<sup>82</sup> These agreements were made after the death of Prophet Muhammad.<sup>83</sup> In order for the Ijma to be valid as Islamic law, it must be backed by a text from the holy Qur'an or from the Sunnah speeches.<sup>84</sup> The agreement of the Muslim scholars can have been made either explicitly or tacitly.<sup>85</sup> Ijma has existed from the death of Prophet Muhammad until today, and is currently created by the board of Muslim senior scholars, which discusses and agrees on how to interpret Islamic law.<sup>86</sup>

As for the fourth source of Islamic law, Qiyas, this represents the transfer of a decision from one situation to another similar situation.<sup>87</sup> In other words, Qiyas is reasoning by analogy that aims to regulate a new issue of law that has not yet been decided by comparing it to another situation where the law is already clear.<sup>88</sup> In order to apply the Qiyas as Islamic law, four conditions must be met related to: the previously decided issue, the new undecided issue, the decision of the decided issue, and the reasoning behind that decision.<sup>89</sup>

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<sup>80</sup> ABDULWAHAB, *supra* note 55, at 309.

<sup>81</sup> *Id.*

<sup>82</sup> 2 ALNAMLAH, *supra* note 77, at 845.

<sup>83</sup> *Id.*

<sup>84</sup> ABDULWAHAB, *supra* note 55, at 310.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 310-11.

<sup>87</sup> See 3 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, KETAB AL-TALKHAIS FI AUSOL AL-FIQH [THE BRIEF ON ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 145 (Abdullah Jolim Alnabali et al. eds., n.d.).

<sup>88</sup> See 2 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, AL-BRHAN FI AUSOL AL-FIQH [THE ART OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 5-6 (Salah Bin Muhammad Bin Awidah ed., 1st ed. 1997).

<sup>89</sup> MUHAMMAD BIN ABDULLAH ABU BAKR BIN ALARABI ALESHBILI, AL-MAHSOUL FI AUSOL AL-FIQH [THE POINT OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 124 (Hussain Ali Alyadiri et al. eds., 1st ed. 1999).

For example, according to Sunnah speeches, judges are not supposed to decide disputes when they are angry and nervous due to their disturbance on the issuance of the decisions.<sup>90</sup> Yet, Sunnah speeches are silent about the validity to decide the disputes when the judges are hungry or starving. According to the Qiyas therefore, judges are not supposed to decide disputes when they are starving because both the resulting anger and hunger are disturbing and disrupting.<sup>91</sup>

### 2.2.2. Islamic Schools

After the record of the Sunnah speeches took place in the seventh century, the four main Islamic schools that interpreted Islamic law were established.<sup>92</sup> Each of these Islamic schools was established by a Muslim scholar in a different region and was accepted by the people in that region.<sup>93</sup> Sometimes there are minor differences between these Islamic schools.<sup>94</sup> Those differences are not supposed to create intolerance<sup>95</sup> but are rather supposed to introduce different approaches on the understanding of Islamic law.<sup>96</sup>

The Islamic schools were established in the Arab region during the seventh and ninth centuries.<sup>97</sup> At that time, the Islamic Empire continued to expand and there was a need to collect the Sunnah speeches and the understanding and approaches of Prophet Muhammad's friends in

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<sup>90</sup> See AL-MAGASID, *supra* note 68, at 37.

<sup>91</sup> See *Id.*

<sup>92</sup> See 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, AL-MAWSUA' H AL-FIGHIAH AL-KUWAITIAH [THE KUWAITI ENCYCLOPEDIA OF ISLAMIC JURISPRUDENCE] [AUTHOR'S TRANSLATION] 31-32 (2nd ed. 2006).

<sup>93</sup> 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, FATAWA AL-LAJNAH AL-DAIMAH – AL-MAJMOU'A AL-ULA [ADVISORY OPINIONS OF THE COUNCIL OF MUSLIM SCHOLARS] [AUTHOR'S TRANSLATION] 71-72 (Ahmed Abdulrazag ed., n.d.).

<sup>94</sup> 1 HUSAM ALDAIN BIN MOSES AFANAH, FATAWA YAS'ALOUNK [ADVISORY OPINIONS OF QUESTIONS OF ISLAMIC LAW] [AUTHOR'S TRANSLATION] 194 (1st ed. 2007).

<sup>95</sup> *Id.* at 196-97.

<sup>96</sup> *Id.* at 198.

<sup>97</sup> 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 67-71.

order to prevent the loss of those traditions, sayings, and literature.<sup>98</sup> As a result, the Caliph Omar Bin Abdulaziz ordered people to collect those Sunnah speeches, sayings, and literature and transmit them into written books.<sup>99</sup> In addition, different types of studies of sciences and arts began to take shape during that time including, for example, history, languages, literature, philosophy, and Islamic law.<sup>100</sup> Judges and Muslim scholars who specialized in Islamic law were given prestigious positions in society, which helped lead to the establishment of the Islamic schools.<sup>101</sup>

Each of the Islamic schools was established by a Muslim scholar who had outstanding characteristics and deep knowledge of the rules, laws, and general principles of Islamic law.<sup>102</sup> Each of these Muslim scholars created his own approach on interpreting and applying Islamic law, all of which continue to be accepted today.<sup>103</sup> These scholars transmitted their opinions and schools of thought into written books and volumes.<sup>104</sup> The expansion of the Islamic Empire also placed greater demand on Muslim scholars to increase their research into new matters of law.<sup>105</sup>

All of the founders of the Islamic schools lived between the seventh and ninth centuries. The first Islamic school, the Hanafiah school, was established by Abu Hanifah Alnoaman Ibn Thabit Ibn Zota Ibn Mah who was born in 699 and died in 767 in Baghdad, Iraq.<sup>106</sup> The second

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<sup>98</sup> 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, *supra* note 92, at 31.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 32.

<sup>101</sup> *Id.* at 32.

<sup>102</sup> 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 66-67.

<sup>103</sup> 1 AFANAH, *supra* note 94, at 194.

<sup>104</sup> See ABDULHAI BIN AHMED BIN MUHAMMAD ABIN ALIMAD, MUATAIAT AL-AMAN MIN HANTH AL-AIMAN [FULFILLING OATHS] [AUTHOR'S TRANSLATION] 5-6 (Abdulkaraim Alamri ed., 1st ed. 1996).

<sup>105</sup> See 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 67-69.

<sup>106</sup> 12 MAJAD ALDAIN ABU ALSA'ADAT ALMUBARK BIN MUHAMMAD, JAMA'I AL-OSUL FI AHADAITH AL-RASOUL [THE GATHERING OF PROPHET'S SPEECHES] [AUTHOR'S TRANSLATION] 952 (Abdulqadir Alarnawud et al. eds., 1st ed. 1972).

Islamic school, the Malikiyah school, was founded by Abu Abdullah Malk Ibn Anas Ibn Malk Ibn Ibi Amir Ibn Alharth who lived between 714 and 795 in Al-Madinah Al-Munawarah city, Saudi Arabia.<sup>107</sup> The third Islamic school, Shafiah school, was established by Abu Abdullah Muhammed Ibn Adrais Ibn Alabas Ibn Outhman Bin Shafi, who was born in 767 and died in 819 in Egypt.<sup>108</sup> The fourth Islamic school, Hanbaliyah school, was founded by Abu Abdullah Ahmed Ibn Muhammed Ibn Hanbal Ibn Helal Ibn Asad Ibn Adrais, who lived between 781 and 855 in Baghdad, Iraq.<sup>109</sup>

These founders of the Islamic schools were well known of their ideal character and high qualifications.<sup>110</sup> Although each one of these scholars had its own approach on understanding the sources of Islamic law and mechanisms for applying them,<sup>111</sup> they were open minded and accepted the opinions of their fellow Muslim scholars.<sup>112</sup> The scholars also provided favors to Muslim people<sup>113</sup> by interpreting Islamic law and explaining its sources, and by conducting research on the application of Islamic law.<sup>114</sup> They transmitted their knowledge into published books and, as a result, their work, knowledge, and approaches spread in Muslim countries and continue to do so today.<sup>115</sup>

Although there was a general sense of respect between the major Muslim scholars of the past, it is important to understand what created their different approaches on the understanding of

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<sup>107</sup> I MAJAD ALDAIN ABU ALSA'ADAT ALMUBARK BIN MUHAMMAD, JAMA'I AL-OSUL FI AHADAITH AL-RASOUL [THE GATHERING OF PROPHET'S SPEECHES] [AUTHOR'S TRANSLATION] 180 (Abdulqadir Alarnawud et al. eds., 1st ed. 1972).

<sup>108</sup> See 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 71.

<sup>109</sup> See *Id.*

<sup>110</sup> See *Id.* at 66-67.

<sup>111</sup> 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, *supra* note 92, at 34.

<sup>112</sup> See 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 69-70.

<sup>113</sup> *Id.* at 72-73.

<sup>114</sup> See *Id.* at 72.

<sup>115</sup> See 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, *supra* note 92, at 32-33.

Islamic law. There are two main reasons behind these different approaches.<sup>116</sup> First, some of these scholars might not have heard of some of the texts of the Sunnah speeches, and so their decisions were not in accordance with those texts.<sup>117</sup> Second, the founders might simply have understood the plain language of the holy Qur'an and the Sunnah speeches differently, which created different rulings on the same legal matters.<sup>118</sup>

There are different opinions as to whether having various approaches to Islamic law benefits people.<sup>119</sup> Opinions on this matter generally fall into three groups. The majority of Muslim scholars appear to believe that having different approaches to Islamic law is beneficial as it gives people the option to choose which interpretation to follow.<sup>120</sup> Other, more conservative, scholars though have stated that only one approach is the right one and that having different approaches on the same matter is therefore not preferable.<sup>121</sup> Finally, still other scholars believe that having different approaches is accepted as long as those approaches are based on different understandings of Islamic law, and if not, these differences are not recommended.<sup>122</sup> The last interpretation is the proper one since interpretations of Islamic law are always supposed to be supported by the legal sources.<sup>123</sup>

The existence of a variety of approaches to Islamic law raises the question as to whether Muslim people are obligated to follow all of these approaches. As a general principle, no Muslim is obligated to follow any Islamic school as long as he or she is able to understand the sources of

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<sup>116</sup> See 1 AFANAH, *supra* note 94, at 195.

<sup>117</sup> *Id.* at 195.

<sup>118</sup> *Id.* at 195.

<sup>119</sup> 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, *supra* note 92, at 295-97.

<sup>120</sup> 3 AFANAH, *supra* note 94, at 6.

<sup>121</sup> 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, *supra* note 92, at 296.

<sup>122</sup> *Id.* at 296-97.

<sup>123</sup> See 1 AFANAH, *supra* note 94, at 194-95.

Islamic law and apply them by himself or herself.<sup>124</sup> In addition, the founders of the four Islamic schools specifically mentioned that people were not obligated to follow their approaches.<sup>125</sup> Finally, limiting Muslim people to follow and apply only the four Islamic schools' approaches would not be in accordance with Islam since it is a religion that has been established for all people.<sup>126</sup> Being intolerant of different approaches to the law is not recommended as it creates intolerance between people.<sup>127</sup>

In short, the four main Islamic schools were established between the seventh and the ninth centuries by Muslim scholars who were well known for their character and high qualifications. These schools based their approaches on their own understanding of the sources of Islamic law, which resulted in some minor variations between them. Following these Islamic schools is not required and intolerance toward any of the schools is not recommended.

### 2.3. Types of Arbitration Under Islamic Law

Islamic arbitration, or conducting arbitration under Islamic law, extends to include arbitrating family disputes.<sup>128</sup> Although the types of disputes that are subject to Islamic arbitration have been subject to some discussion among Islamic schools and Muslim scholars, there is agreement that arbitrating family disputes is allowed under Islamic law.<sup>129</sup> In addition, arbitrating the commercial and investment disputes are also in the place of agreement between

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<sup>124</sup> 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 69-70.

<sup>125</sup> 1 AFANAH, *supra* note 94, at 197.

<sup>126</sup> 5 SOME MUSLIM SCHOLARS IN THE COUNCIL OF RESEARCH AND FATWAS, *supra* note 93, at 74-75.

<sup>127</sup> See 1 AFANAH, *supra* note 94, at 197-98.

<sup>128</sup> 1 MUHAMMAD BIN OMAR NAWAWI ALJAWI, MARAH LABAID LKASHF MANA AL-QUR'AN AL-MAJEED [CLARIFICATION OF THE HOLY QUR'AN MEANINGS] [AUTHOR'S TRANSLATION] 196 (Muhammad Ameen Alsanawi ed., 1st ed. 1996).

<sup>129</sup> See 2 SA'IID QUTB IBRAHIM HASAN ALSHARIBI, FI DELAL AL-QUR'AN [THE SHADOWS OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 656 (17th ed. 1991).

the Islamic schools.<sup>130</sup> As a result, two types of arbitration exist under Islamic law: commercial arbitration and family dispute arbitration.

Beyond the agreement to arbitrate family, commercial, and investment disputes, there is not universal agreement among Islamic schools and Muslim scholars as to the types of disputes that can be subject to Islamic arbitration.<sup>131</sup> Some Islamic schools put all criminal cases under the scope of dispute that can be subject to arbitration,<sup>132</sup> while others include only infraction and misdemeanor cases, not felony cases.<sup>133</sup> Still others give arbitration parties the right to arbitrate any type of dispute they face.<sup>134</sup> That said, it is better to limit the scope of Islamic arbitration to commercial, investment, and family disputes due to the limited authorities and jurisdiction of arbitrator.<sup>135</sup>

Family dispute arbitration aims to resolve family disputes by arbitration instead of the regular judicial systems.<sup>136</sup> The foundation for family arbitration is found in the holy Qur'an in chapter Al-Nisa verse 35, which reads "[a]nd if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation,

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<sup>130</sup> 8 MUHAMMED BIN AHMED BIN MUHAMMED ALAISH, MANH AL-JALEEL SHARAH MOUKHTASAR KHALIL [THE GREAT GIFT ON THE EXPLANATION OF KHALIL RESEARCH] [AUTHOR'S TRANSLATION] 255 (1989); 6 SHAMS AL-DEEN MUHAMMED BIN AHMED AL-KHATIB, MOUGNI AL-MUHTAJ ELA MAERIFAT MA'ANI ALFATH AL-MINHJ [THE SUPPLIER OF SCHOLARS TO SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 268 (1st ed. 1994).

<sup>131</sup> 6 ABDULRAHMAN, *supra* note 53, at 87; 9 MUSA, *supra* note 51, at 60; 4 ABU AL-ABAS AHMED BIN MUHAMMED AL-KHALOUTI, BELOUQAT AL-SALIK LEAGRAB AL-MASALIK [ISLAMIC LAW JURISPRUDENCE ON MALIKIAH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 198-199 (n.d.); 3 ABU ISAAC IBRAHIM BIN ALI BIN YOUSEF AL-SHIRAZI, AL-MOUHATHAB FI FIGH AL-IMAM AL-SHAFI'I [THE EDUCATOR ON SHAFI'IH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 378 (n.d.); 7 MUHAMMAD BIN MUHAMMAD BIN MAHMOUD ALROUMI ALBABARTI, AL-ENAIHAH SHARH AL-HEDAIAH [THE PRECISE EXPLANATION ON HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 318 (n.d.); 6 ABDULRAHMAN, *supra* note 53, at 87; 6 AL-KHATIB, *supra* note 130, at 268; 4 MUWAFIQ AL-DEEN ABDULLAH BIN AHMED BIN MUHAMMAD BIN QUDAMH, AL-KAFI FI FIGH AL-IMAM AHMED [ADEQUACY ON THE JURISPRUDENCE OF ISLAMIC LAW ACCORDING TO IMAM AHMED] [AUTHOR'S TRANSLATION] 224 (1st ed. 1994).

<sup>132</sup> 9 MUSA, *supra* note 51, at 60.

<sup>133</sup> 4 AL-KHALOUTI, *supra* note 131, at 198-99; 13 YAHYA BIN ABI ALKHAIR BIN SALEM ALAMRANI, AL-BAIAN FI MTHAHAB AL-IMAM AL-SHAFI'I [DECLARATION OF SHAFI SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 24 (Qasim Muhammad Alnouri ed., 1st ed. 2000).

<sup>134</sup> 3 AL-SHIRAZI, *supra* note 131, at 378; 6 ALBUHUTI, *supra* note 21, at 308.

<sup>135</sup> See OTHMAN, *supra* note 2, at 51-52.

<sup>136</sup> See 2 ALSHARIBI, *supra* note 129, at 656.

Allah will cause it between them. Indeed, Allah is ever knowing and Acquainted [with all things].”<sup>137</sup>

This holy Qur’an verse not only calls for arbitration in family disputes, but also provides the procedures that should be followed.<sup>138</sup> These procedures are simple.<sup>139</sup> When a married couple starts to have conflict, each one of them should consent to resolve the dispute through arbitration.<sup>140</sup> Once both have consented, the husband appoints an arbitrator from his family members or cousins and the wife does the same.<sup>141</sup> The two arbitrators must then come to a unanimous agreement on how to resolve the dispute and their decision is final and binding.<sup>142</sup>

In short, the types of arbitration that can be conducted under Islamic law are either family dispute arbitration or commercial arbitration. Disputes subject to commercial arbitration should be limited to commercial and investment disputes, or any dispute arising out of or in connection with them. No criminal cases should be included. As for family dispute arbitration, this should be used when the married couple chooses such an option instead of going through the regular judicial system.

#### 2.4. Literature Review on the Issues Concerning Islamic Arbitration

Since this dissertation discusses the practice of Islamic arbitration, it is important to mention some of the existing literature on the topic. This dissertation will focus particularly on: the role of arbitrators, the appointment of women arbitrators, and the enforceability of arbitral

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<sup>137</sup> The Holy Qur’an, *Al-Nisa*, Verse 35.

<sup>138</sup> See 3 MUHAMMAD SA’IID TANTAWI, *AL-TAFSAIR AL-WASAIT LL-QUR’AN AL-KARAIM* [THE CENTER OF INTERPRETATION OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 142 (1st ed. 1997).

<sup>139</sup> See *Id.*

<sup>140</sup> See 1 ALSHEHE, *supra* note 25, at 372.

<sup>141</sup> *Id.*

<sup>142</sup> See 2 NASAIR ALDAIN ABDULLAH BIN OMAR BIN MUHAMMAD ALSHIRAZI, ANWAR AL-TANZAIL WA ASRAR AL-TAWAIL [THE LIGHT OF QUR’AN AND THE ART OF INTERPRETATION] [AUTHOR’S TRANSLATION] 73 (Muhammad Bin Abdulrahman Almarashali ed., 1st ed. 1997).



awards. Some Muslim countries refuse to enforce foreign arbitral awards that are rendered in non-Muslim countries if they are decided by women arbitrators or by arbitrators who are not qualified as judges in accordance with Islamic law, which as a result affect the enforceability of arbitral awards. This effect is not only limited to Muslims who use Islamic arbitration to decide their disputes, it extends to include non-Muslim individuals who seek the enforcement of their awards in Muslim countries.

As for the role of arbitrators, this has not been thoroughly examined in the existing literature, although the topic has garnered greater attention as Muslim communities that live in non-Muslim countries have sought to make use of Islamic arbitration. The literature that does exist has focused on either the requirement under Islamic law that arbitrators should possess (the qualifications of judges including the requirement that they be male)<sup>143</sup> or the cultural and social dynamics prevented women from serving as arbitrators.<sup>144</sup>

The literature has, however, only covered those Islamic schools that considered arbitrators to be the same as judges, and therefore require arbitrators to have the same qualifications as judges.<sup>145</sup> It fails to recognize that other Islamic schools differentiate between judges and arbitrators and require different qualifications to be possessed by each group as well as discuss the issue of whether women are entitled to be appointed as judges under Islamic law.<sup>146</sup> In addition, existing research mentions the social pressure that has, in the past, prevented

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<sup>143</sup> Saad U. Rizwan, *Foreseeable Issues and Hard Questions: The Implications of U.S. Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention*, 98 CORNELL L. REV. 493, 498-99 (2013).

<sup>144</sup> Breckenridge Thomas, *International Arbitration: A History Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT'L ARB. 183, 234-35 (2006).

<sup>145</sup> Umar A. Oseni et al., *The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration*, 29 J. INT'L ARB. 519, 536-37 (2012).

<sup>146</sup> George Sayen, *Arbitration, Conciliation, and the Legal Tradition in Saudi Arabia*, 24 U. PA. J. INT'L ECON. L. 905, 932-33 (2003).

women from being appointed as arbitrators, but without recognizing the recent change in culture and habit that has led to greater acceptance of women as arbitrators.<sup>147</sup>

As for the appointment of women arbitrators, the existing literature notes the relatively low percentage of women in the arbitration field globally.<sup>148</sup> It also notes that women have faced barriers to entering the arbitration field and that they have not had the same chances as men.<sup>149</sup> Regarding the appointment of women as arbitrators in Islamic arbitration, there is disagreement in the existing literature as to whether this is allowed under Islamic law. Some researchers have pointed out this disagreement, noting that some Muslim scholars validate the appointment of women as arbitrators while others consider it invalid.<sup>150</sup> Other published articles have suggested that women arbitrators are invalid,<sup>151</sup> while still others have argued that women arbitrators should<sup>152</sup> or might<sup>153</sup> be allowed. None of the existing research provides a thorough discussions and analysis of the topic however.

As for the third issue concerning the practices of Islamic arbitration, the enforceability of foreign arbitral awards, it has become a topic of discussion when foreign arbitral awards have faced difficulty being enforced in some Muslim countries. Specifically, when some Muslim countries have refused to enforce awards rendered by women arbitrators, or when those Muslim countries have used the public policy exception to avoid enforcing foreign arbitration awards.

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<sup>147</sup> Thomas, *supra* note 144, at 235-36.

<sup>148</sup> Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C.L. REV. 1, 81-82 (2007); Cynthia Alkont, *Women Labor Arbitrators: Women Members of the National Academy of Arbitrators Speak About the Barriers of Entry into the Field*, 6 APPALACHIAN J.L. 195, 196-97 (2007); Lucy Greenwood et al., *Getting a Better Balance on International Arbitration Tribunals*, 28 ARB. INT'L. 653, 654-55 (2012).

<sup>149</sup> Alkont, *supra* note 148, at 196-97; Nicole Buonocore, *Resurrecting a Dead Horse – Arbitrator Certification as a Means to Achieve Diversity*, 76 U. DET. MERCY. L. REV. 483, 490-91 (1999).

<sup>150</sup> Jalal El Ahdab, *Arbitration News*, 3 INT'L J. ARAB. ARB. 65, 68 (2011).

<sup>151</sup> Kutty, *supra* note 24, at 606-09.

<sup>152</sup> *Id.*

<sup>153</sup> Bilal M. Choksi, *Religious Arbitration in Ontario – Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 U. PA. J. INT'L L. 791, 836-37 (2012).

Some of the published researches have clearly asserted that foreign arbitration awards that are decided by women arbitrators will not be enforced in some Muslim countries where their public policies are based on Islamic law.<sup>154</sup>

Most of the Muslim countries are signatories to the New York Convention and some countries have used the Convention's public policy exception to justify refusing to enforce foreign arbitration awards in their territories. Some existing research has tried to explain this approach.<sup>155</sup> However, this research has not recognized the importance of the concept of reciprocity in the enforcement of arbitration awards nor does it discuss the validity of concluding treaties and conventions under Islamic law and the duty to fulfill them.<sup>156</sup> Instead, this existing literature provides general statements about the relevant public policy and ways in which foreign arbitration awards contain violations of Islamic law.<sup>157</sup>

In short, the role of arbitrators, the appointment of women arbitrators, and the enforceability of foreign arbitral awards have been covered to a degree by the existing literature. However, this coverage has been somewhat superficial. It has not, for example, provided an analysis of how the different Islamic schools approach these three topics. These topics affect Islamic arbitration globally and it is therefore important clarify the proper approach and solution for each one.

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<sup>154</sup> Thomas E. Carbonneau, *International Commercial Arbitration: The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1210-11 (2003).

<sup>155</sup> Elana Levi-Tawil, *East Meets West: Introducing Shari'a into the Rules Governing International Arbitration at the BCDR-AAA*, 12 CARDOZO J. CONFLICT RESOL. 609, 624-26 (2011).

<sup>156</sup> 1 Jean-Benoit Zegers, *Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 69, 76-77 (Jan Paulsson ed., 2013).

<sup>157</sup> Aisha Nadar, *Islamic Finance and Dispute Resolution*, 23 ARAB L.Q. 1, 28-29 (2009); 75 Jean-Benoit Zegers, *National Report for Saudi Arabia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 49-50 (Jan Paulsson et al. eds., 2013).

## 2.5. Conclusion

In sum, this chapter provided readers with basic knowledge of the topics to be discussed in this dissertation. In order to emphasize the importance of arbitration under Islamic law, the chapter provided an overview of arbitration as an alternative dispute resolution mechanism in the pre-Islam era and after the establishment of Islam as a religion. It also clarified the sources of Islamic law, the Islamic law schools of thought, and the existing literature on the topic.

After Islamic law was formed, arbitration as an alternative form of dispute resolution was not fully developed by the Islamic schools and the Muslim scholars. This is the result of concentrating efforts on improving the judicial systems instead of arbitration practices. However, this does not mean that the improvement of arbitration practices today should not continue. Even though the Islamic schools did not cover Islamic arbitration in depth, academics and practitioners today should continue to improve Islamic arbitration so that it reaches international acceptance.

This dissertation aims to analyze and discuss some of the issues that concern the practice of Islamic arbitration today namely: the role of arbitrators, the appointment of women arbitrators, and the enforceability of arbitral awards. These topics are of key importance since they affect the enforceability of foreign arbitral awards, and some Muslim countries have refused to enforce awards that have been decided by women arbitrators or by arbitrators who do not possess the same qualifications as judges. This dissertation aims to improve the practice of Islamic arbitration by arguing for the validity of women as arbitrators, the use of arbitrators who do not possess the qualifications of judges, and the enforceability of foreign arbitral awards in Muslim countries.

## CHAPTER 3

### BACKGROUND ON THE PRACTICES OF ISLAMIC ARBITRATION

This chapter provides a basic framework for the current practices and issues in Islamic arbitration, examining the characteristics of Islamic arbitration and how it compares to international arbitration. In addition, this chapter clarifies the advantages and disadvantages of Islamic arbitration, particularly through the lens of Saudi Arabia. As a conservative Sunni Muslim country, Saudi Arabia offers unique insight into the development of arbitration in a country where the laws and regulations are in accordance with Islamic law.

Furthermore, this chapter clarifies how non-Muslim countries are dealing with the practices of Islamic arbitration as well as the application of Islamic law through arbitration. Due to the large number of Muslim immigrants in the United Kingdom and Canada, there is an increase in Islamic arbitration practices in the Muslim community, which prefers to resolve its disputes, when possible, through Islamic law.

#### 3.1. Current Status of Arbitration Under Islamic Law

Even though Islamic arbitration is mentioned in the holy Qur'an, only the general principles are stated with no mention of specific rules and laws.<sup>158</sup> In fact, Islamic law is not based on a specific set of rules and laws; instead, it is based on general principles that could be interpreted differently over time.<sup>159</sup> Therefore, it is the duty of Muslim scholars to create the rules and laws applied in Islamic arbitration and then modify them in accordance with the needs of the people and the nations.<sup>160</sup>

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<sup>158</sup> Zeyad Al-Qurashi, *Arbitration under the Islamic Sharia*, TDM No. 1 (2004), (Feb. 15, 2017, 2:36 PM), <http://www.transnational-dispute-management.com>.

<sup>159</sup> Levi-Tawil, *supra* note 155, at 617.

<sup>160</sup> Al-Qurashi, *supra* note 158.

However, some of the general concepts in Islamic arbitration are similar to those in international arbitration, such as the need for an arbitration agreement, the appointment of arbitrators, the scope of arbitrability, the applicable law, and the enforceability of the award. In addition, the practice of Islamic arbitration, as well as the advantages and disadvantages of this dispute resolution mechanism, are similar to international arbitration.

### 3.1.1. Main Characteristics of Islamic Arbitration

Islamic arbitration, as an alternative dispute resolution mechanism, has key features and characteristics that differentiate it from traditional litigation. These general characteristics should be applied in all Islamic arbitrations regardless of the specific laws and rules that regulate the conduct of Islamic arbitration in each country. These characteristics are the arbitration agreement, selection of arbitrators, scope of arbitrability, applicable law, and enforceability of arbitral awards.

One of the essential features of Islamic arbitration is the arbitration agreement.<sup>161</sup> The use of arbitration to resolve disputes under Islamic law is voluntary and, therefore, arbitration is only conducted with the consent of the parties.<sup>162</sup> There must be a clear agreement to arbitrate the dispute by the parties' mutual consent.<sup>163</sup> No one is compelled to arbitrate and the arbitration agreement does not extend to include third parties without clear consent to arbitration.<sup>164</sup> This guarantees that no party is deprived of their rights to use the regular judicial systems to resolve disputes.

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<sup>161</sup> Levi-Tawil, *supra* note 155, at 619.

<sup>162</sup> Sayen, *supra* note 146, at 924.

<sup>163</sup> *Id.*

<sup>164</sup> See 7 KAMAL AL-DEEN MUHAMMED BIN ABDULWAHID AL-SIWASI, FATAH AL-GADAIIR [JURISPRUDENCE OF ISLAMIC LAW GENERAL PRINCIPLES] [AUTHOR'S TRANSLATION] 317 (n.d.).

Another characteristic of Islamic arbitration is the right of the parties to select their own arbitrators. Parties appoint an arbitrator by mutual consent if they agreed to arbitrate with a sole arbitrator or each party appoints an arbitrator if they agreed to resolve their dispute with more than one arbitrator.<sup>165</sup> Enabling the parties to select their arbitrators ensures that the parties can resolve their dispute through arbitrators with better knowledge and understanding of certain subject matters in the disputes.<sup>166</sup> Although Islamic law does not discuss instances where the parties fail to agree on a single arbitrator or fail to select their own arbitrators, it also does not require a competent authority appoint an arbitrator or arbitrators.<sup>167</sup>

Arbitrability—the disputes that are subject to Islamic arbitration—is another characteristic of Islamic arbitration. Although the scope of Islamic arbitration is a source of debate between Muslim scholars, arbitrating commercial and investment disputes is generally agreed upon under Islamic law.<sup>168</sup> In addition, Islamic law emphasizes another type of dispute subject to Islamic arbitration—family disputes. However, Islamic law excludes any dispute that conflicts with Islamic law general principles from the scope of arbitrability,<sup>169</sup> such as disputes relating to payment for interests or payment for damages based on speculations, consequential losses, both of which are not permissible under Islamic law.<sup>170</sup>

Allowing the parties to choose the law that governs their dispute is also a characteristic of Islamic arbitration, which entitles parties to select the laws that are most appropriate to the needs of the disputes.<sup>171</sup> As a general principle, Islamic law does not require parties in Islamic

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<sup>165</sup> See Al-Qurashi, *supra* note 158.

<sup>166</sup> Sayen, *supra* note 146, at 920.

<sup>167</sup> See Al-Qurashi, *supra* note 158.

<sup>168</sup> See 6 AL-KHATIB, *supra* note 130, at 268.

<sup>169</sup> Al-Qurashi, *supra* note 158.

<sup>170</sup> See 75 Zegers, *supra* note 157, at 50; Levi-Tawil, *supra* note 155, at 632.

<sup>171</sup> Sayen, *supra* note 146, at 920.

arbitration to use certain laws and rules to govern their disputes. Instead, Islamic law gives the parties the right to choose the procedural and the substantive laws that govern and decide their disputes.<sup>172</sup> However, Islamic law only entitles the parties to this right if the selected laws do not conflict with general Islamic law principles or violate Islamic law public policy.<sup>173</sup>

Since arbitration aims to resolve disputes, the enforceability of arbitration awards rendered by Islamic arbitration is another important characteristic. The majority of Islamic schools give arbitral awards decided by Islamic law almost the same binding status as judgments from the judicial system.<sup>174</sup> As a result, the grounds to vacate arbitral awards are the same grounds to vacate judgments from the judicial system.<sup>175</sup> In addition, Islamic law grants enforceability to awards decided by Islamic arbitration even if they are not in accordance with the opinion of the judge assigned to enforce the awards, as long as they are at least in accordance with one of the Islamic schools' approaches.<sup>176</sup>

These general features are considered the framework for Islamic arbitration and should not be violated. Even though the practice of Islamic arbitration might be different from one country to another, these general characteristics should be applied to all Islamic arbitrations.

### 3.1.2. Features of Islamic Arbitration

The procedures of Islamic arbitration in different Muslim countries depend on the specific rules and laws enacted to regulate the conduct of arbitration within each country.<sup>177</sup>

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<sup>172</sup> Al-Qurashi, *supra* note 158.

<sup>173</sup> See Levi-Tawil, *supra* note 155, at 619; 75 Zegers, *supra* note 157, at 37.

<sup>174</sup> Al-Qurashi, *supra* note 158.

<sup>175</sup> See 10 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF THE KUWAITI MINISTRY OF ISLAMIC AFFAIRS, *supra* note 92, at 245-46.

<sup>176</sup> See 6 WAHBAH BIN MOSTAFA ALZUHAILI, AL-TAFSAIR AL-MOUNAIR FI AL-A'QAIIDAH WA AL-SHARIAH WA AL-MANHJ [THE ENLIGHTENING INTERPRETATION OF ISLAMIC LAW APPROACHES] [AUTHOR'S TRANSLATION] 198 (2nd ed. 1997).

<sup>177</sup> See Al-Qurashi, *supra* note 158.



However, some of the general concepts regarding Islamic arbitration practices can be found among all the different countries that host Islamic arbitration.

Islamic law grants the parties the right to choose the place where their dispute will be decided.<sup>178</sup> Since the general principles that regulate Islamic arbitration practices are silent on granting parties this right, choosing the place of arbitration falls within the parties' discretion.<sup>179</sup> In addition, appointing a specific number of arbitrators<sup>180</sup> is also a right belong to the parties. Just like the place of arbitration, the general principles that organize Islamic arbitration practices are silent and, therefore, the appointment of a specific number of arbitrators is determined by the arbitration parties.<sup>181</sup>

As for the applicable law for arbitration, the arbitrators should first apply the law chosen by the parties. Yet, if an applicable law is not provided by the parties, Islamic arbitration does not require the arbitrators apply any specific procedural or substantive laws.<sup>182</sup> Instead, arbitrators in Islamic arbitration are free to use their sense of justice and fairness to decide the dispute as long as the arbitrators do not rule against Islamic public policy or violate any general principle under Islamic law.<sup>183</sup> As a result, applying the laws of non-Muslim countries to disputes in Islamic arbitration is valid as long as those laws do not conflict with Islamic law general principles and public policy.<sup>184</sup>

Foreign arbitral awards should be enforced in Muslim countries, as long as arbitrators provide the reasons for their decision and both parties have a chance to present their arguments

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<sup>178</sup> *See Id.* at 6.

<sup>179</sup> *See Id.*

<sup>180</sup> *See Id.*

<sup>181</sup> *See Id.*

<sup>182</sup> Levi-Tawil, *supra* note 155, at 619.

<sup>183</sup> *Id.*

<sup>184</sup> *See Al-Qurashi, supra* note 158.

in front of each other.<sup>185</sup> According to Islamic law, arbitration awards are enforceable and binding since they have judicial characteristics.<sup>186</sup> However, any arbitral award that contains orders of payment for interests or payment for damages that are calculated upon speculation—such as consequential losses—are most likely not going to be enforced in Muslim countries due to the violation of Islamic law and public policy since both are not allowed under Islamic law.<sup>187</sup>

Although Islamic law does not require judges to review the merits of arbitration awards, some judges may review the merits of a dispute<sup>188</sup> for two reasons. First, the scope of reviewing the arbitration awards by the competent authorities lacks definition as well as a set of regulating rules.<sup>189</sup> Second, since public policy under Islamic law is not precisely defined, different Muslim countries might extend the scope of review for awards to include the merits of the disputes to ensure that the outcome of the arbitration does not violate Islamic law general principles.<sup>190</sup> However, the scope of judicial review under Islamic law, should be limited to the existence of the arbitration agreement, whether the award covers the different subject matters of the dispute, and other formal considerations.<sup>191</sup>

Although Islamic law does not provide specific laws to regulate Islamic arbitration practices—it only requires that general principles are applied to organize the process—some general concepts for the conduct of Islamic arbitration exist are identical among the different Muslim countries. The seat of the arbitration, appointing arbitrators, number of arbitrators, and the applicable law are rights belong to the arbitration parties and fall within their discretion. Yet,

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<sup>185</sup> Levi-Tawil, *supra* note 155, at 619-20.

<sup>186</sup> Al-Qurashi, *supra* note 158.

<sup>187</sup> Kutty, *supra* note 24, at 604-06.

<sup>188</sup> 1 Zegers, *supra* note 156, at 81.

<sup>189</sup> Sayen, *supra* note 146, at 941-42.

<sup>190</sup> *See Id.*

<sup>191</sup> Al-Qurashi, *supra* note 158.

the enforcement of foreign arbitral awards has faced some difficulties and, therefore, the scope of judicial review should be not review the merits of the awards.

### 3.1.3. Advantages and Disadvantages of Islamic Arbitration

Islamic arbitration, as an alternative mechanism for resolving disputes, has both advantages and disadvantages, although some advantages might be considered disadvantages depending on the observer. For example, not ruling on payment of interest or payment based on speculation might be considered advantages or disadvantages depending on the parties in Islamic arbitration. Yet, dispute resolution in accordance with faith-based principles is generally considered an advantage of Islamic arbitration, while the lack of supervision for arbitration proceedings and the potential stalemate from the appointment of an even number of arbitrators are generally considered disadvantages of Islamic arbitration.

One advantage of Islamic arbitration is that some Muslims use this mechanism to resolve disputes in accordance with their faith.<sup>192</sup> Although Islamic law grants parties in arbitration the right to choose substantive and procedural laws, as long as they are in accordance with Islamic law general principles, many Muslim parties prefer to use Islamic arbitration to resolve disputes since it is in accordance with their religion.<sup>193</sup> As for non-Muslim parties who use Islamic arbitration with Muslim parties, Islamic arbitration facilitates the enforceability of their arbitration awards in Muslim countries since those awards do not conflict with Islamic law.

The appointment of arbitrators is often considered an advantage of Islamic arbitration since parties are entitled to appoint arbitrators with a better understanding of the nature of the dispute. For instance, parties may appoint arbitrators knowledgeable on international customs of

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<sup>192</sup> See Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L. J. 108, 111-12 (2011).

<sup>193</sup> See *Id.*

business and investment or that are well-informed about certain aspects in specific disputes.<sup>194</sup> In addition, Muslim parties that live in non-Muslim countries have the option to appoint arbitrators with the necessary knowledge of Islamic law and religious duties if those parties choose to resolve disputes in accordance with their religion.<sup>195</sup>

Islamic arbitration offers other advantages as well, which are also shared with international commercial arbitration. Similar to international commercial arbitration, Islamic arbitration is private and all documents relating to the dispute are usually confidential.<sup>196</sup> Moreover, since arbitration grants parties some control over their disputes—such as choice for the seat of arbitration as well as procedural and substantive laws—arbitration reduces formality in the proceedings,<sup>197</sup> which results in a low-stress environment during the hearing.<sup>198</sup> Furthermore, even though some of the disputes are large and complex, arbitration tends to resolve disputes faster than the regular judicial systems.<sup>199</sup>

One of the disadvantages is that appointing arbitrators by supervising institutions is a matter that is not mentioned in Islamic law<sup>200</sup> and, therefore, is determined by the procedural laws that govern arbitration. Moreover, while appointing an even number of arbitrators is a valid option under Islamic law,<sup>201</sup> it may lead to uncertainty in the resolution of disputes if half of the arbitrators favor one party while the other half favor the other party.

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<sup>194</sup> Sayen, *supra* note 146, at 920.

<sup>195</sup> Rafeeq, *supra* note 192, at 115.

<sup>196</sup> *Id.*

<sup>197</sup> Sayen, *supra* note 146, at 920.

<sup>198</sup> Rafeeq, *supra* note 192, at 115.

<sup>199</sup> *See* Sayen, *supra* note 146, at 941-42.

<sup>200</sup> Al-Qurashi, *supra* note 158.

<sup>201</sup> 2 MUHAMMED BIN FRAMIRAZ BIN ALI AL-SHIHRI, DURAR AL-HUKAM SHARH QURAR AL-AHKAM [JUDGES' RECOMMENDATIONS ON DECIDING COMPLICATED DISPUTES] [AUTHOR'S TRANSLATION] 411 (n.d.); 2 MALIK BIN ANAS BIN MALIK BIN AMER AL-ASBAHI, AL-MUDAWANH [THE VOLUME OF MALIKIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 266-67 (1st ed. 1994); 5 SULEIMAN BIN UMAR BIN MANSOUR AL-UJAILI, FUTUHAT AL-WAHAB BITAWDAIH SHARAH MANHAJ AL-TULAB [ISLAMIC LAW JURISPRUDENCE BASED ON SHAFI' IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 339 (n.d.); 4 BIN QUDAMH, *supra* note 131, at 130.

Islamic arbitration invalidates any payment for interest or payment for damages calculated based on speculation, such as the consequential losses, in any form.<sup>202</sup> Therefore, depending on the parties in an Islamic arbitration, invalidating payments for interest and damages based on speculation might be advantageous for some and disadvantageous for others. For Muslims, the illegal ruling of payment for interest and damages calculated on speculation is considered an advantage<sup>203</sup> since it is in accordance with their religious duties. Yet, for non-Muslims, these restrictions could be disadvantageous<sup>204</sup> since receiving this kind of payment is accepted in other cultures and religions.

As with any mechanism to resolve disputes, Islamic arbitration has advantages and disadvantages. Resolving disputes with a faith-based mechanism that involves appointing expert arbitrators in different areas of laws through a private alternative dispute resolution mechanism that is less formal than the judicial system and occurs in a low-stress environment are advantages of Islamic arbitration. Yet, the appointment of an even number of arbitrators is a disadvantage of Islamic arbitration. However, invalidating payments for interest and damages based on speculations are either considered advantages or disadvantages depending on the users of Islamic arbitration.

### 3.2. Overview on Arbitration in Saudi Arabia

This section summarizes the development of arbitration in Saudi Arabia. This section first clarifies the initial arbitration award rendered against the government of Saudi Arabia and then it explores Saudi Arabia's first arbitration law, enacted in 1983. After that, it explains the new arbitration law passed in 2012. Finally, this section discusses different international

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<sup>202</sup> See 75 Zegers, *supra* note 157, at 49.

<sup>203</sup> See Kutty, *supra* note 24, at 604-06.

<sup>204</sup> See *Id.*

conventions that Saudi Arabia ratified to regulate the practices of domestic arbitration and enforce arbitration awards as well as bilateral investment treaties.

### 3.2.1. The First Arbitration Award Against the Government of Saudi Arabia

In the 1958 dispute between Saudi Arabia and the Arabian American Oil Company (ARAMCO), the arbitral tribunal ruled against the government of Saudi Arabia.<sup>205</sup> In 1954, the government of Saudi Arabia signed an agreement with A.S. Onassis, which gave Onassis priority to transport Saudi Arabian oil for thirty years.<sup>206</sup> Over twenty years earlier—in 1933—however, the government of Saudi Arabia concluded a concession agreement with the Standard Oil Company of California, which later it changed its name to Arabian American Oil Company (ARAMCO).<sup>207</sup>

In that agreement, the government of Saudi Arabia granted ARAMCO “[t]he exclusive right, for a period of sixty years from the effective date hereof to explore, prospect, drill for, extract, treat, manufacture, transport, deal with, carry away, and export petroleum.”<sup>208</sup> In addition, the arbitration clause provided that the governing law would be Islamic law, specifically articles IV states;

The Arbitration Tribunal shall decide this dispute

(a) In accordance with the Saudi Arabian law, as hereinafter defined, in so far as matters within the jurisdiction of Saudi Arabia are concerned;

(b) In accordance with the law deemed by the arbitration tribunal to be applicable in so far as matters beyond the jurisdiction of Saudi Arabia are concerned.

Saudi Arabian law, as used herein, is the Moslem law

(a) As taught by the school of Imam Ahmed ibn Hanbal;

(b) As applied in Saudi Arabia.<sup>209</sup>

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<sup>205</sup> Saudi Arabia v. Saudi Arabian American Oil Company (ARAMCO), 27 I.L.R. 117 (1958).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

The main point submitted to the arbitral tribunal was whether the agreement Saudi Arabia signed with Onassis in 1954 for the transport of Saudi Arabian oil violated the concession agreement that was concluded with ARAMCO in 1933.<sup>210</sup> Specifically, the dispute was about the interpretation of the “exclusive right” provision in the concession agreement between Saudi Arabia and ARAMCO and whether the agreement with Onassis violated the rights conferred to ARAMCO.<sup>211</sup>

Even though the arbitration clause referred to Islamic law as the governing law, the arbitral tribunal decided that Islamic law was not sophisticated enough to decide the dispute.<sup>212</sup> The arbitral tribunal stated, “[a]lthough the concession agreement is connected with the Hanbali school of Muslim law, as applied in Saudi Arabia—from which it derives its validity and effectiveness—the interpretation of this agreement should not be based on that law alone.”<sup>213</sup> The arbitral tribunal stated, “[l]aw must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business, and by the notions of pure jurisprudence.”<sup>214</sup>

In addition, the arbitral tribunal had to decide the law that should be applied on the matters that are not regulated by the law chosen by the parties pursuant to article IV (b) of the arbitration agreement.<sup>215</sup> Then the tribunal stated;

The Tribunal adopts the following solution. Influenced by the most progressive teachings in that part of private international law which deals with the autonomy of the will, the Tribunal decides to follow the solutions prevailing in British and Swiss practice and to apply the law which corresponds best to the nature of the legal

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

relationship between the parties, without looking for the tacit or presumed intention of the contracting parties.<sup>216</sup>

The outcome of the arbitration was in favor of ARAMCO since the tribunal found the 1954 agreement between Saudi Arabia and Onassis a violation of the 1933 concession agreement granted to ARAMCO by Saudi Arabia.<sup>217</sup> Despite the government of Saudi Arabia's disappointment with the outcome of the dispute, the government accepted the arbitration award and continued performing the concession agreement with ARAMCO.<sup>218</sup>

The government then renegotiated the concession agreement with ARAMCO, which resulted in purchasing ARAMCO's operations and assets gradually until ARAMCO was fully purchased by Saudi Arabia in 1980.<sup>219</sup> Due to the outcome of this arbitration award, the government of Saudi Arabia passed a law prohibiting all government agencies from consenting to arbitration or signing arbitration clauses without the approval of the Council of Ministers.<sup>220</sup>

### 3.2.2. The 1983 Arbitration Law

After the arbitral tribunal ruled in favor of ARAMCO in the 1958 dispute between Saudi Arabia and the Arabian American Oil Company (ARAMCO),<sup>221</sup> the government of Saudi Arabia reconsidered its approach toward arbitration. To organize arbitration practices in Saudi Arabia, the government passed the first arbitration law in 1983<sup>222</sup> and its implementing regulations in 1985.<sup>223</sup> Yet, since it was the first attempt to regulate arbitration in the country, the law was not

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Saud Al-Ammari & Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, 30 *ARB. INT'L.* 387, 389 (2014).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Saudi Arabia v. Saudi Arabian American Oil Company (ARAMCO)*, 27 *I.L.R.* 117 (1958).

<sup>222</sup> Law No. M/46 of 1983 (Law of Arbitration), *Jaridat Um-Alqura*, 24 April 1983 (Saudi Arabia).

<sup>223</sup> Law No. M/2021/7 of 1985 (Implemented Regulations on Law of Arbitration), *Jaridat Um-Alqura*, 10 Oct. 1985 (Saudi Arabia).



modern enough nor fully developed, to line up with the needs of the business and investment communities.<sup>224</sup>

Therefore, some general concepts of international arbitration were not found in Saudi Arabia's original arbitration law. In addition, the arbitration law included some conservative measures and empowered the competent authority in the country to supervise the arbitration practices.<sup>225</sup> The competent authority intervened in the arbitration process and required parties to obtain approval before arbitration started.<sup>226</sup>

The autonomy of the arbitration agreement was not a confirmed principle under that law. That arbitration law did not stipulate any written requirement for arbitration clauses and, therefore, it was the competent authority's responsibility to approve the arbitration.<sup>227</sup> The original law only required that persons that consent to arbitration should have the full legal capacity to do so.<sup>228</sup> As a result, approving arbitration as a mechanism for resolving disputes was at the discretion of the competent authority and parties were required to obtain approval before arbitration proceedings were initiated.<sup>229</sup>

Moreover, the original arbitration law required that arbitration proceedings in Saudi Arabia be conducted in Arabic.<sup>230</sup> The appointment of arbitrators as well as their qualifications were also under the supervision of the competent authority and, if parties could not agree on the arbitrator or arbitrators, the competent authority appointed the arbitrators.<sup>231</sup> The 1983 law

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<sup>224</sup> See 30 Al-Ammari & Martin, *supra* note 218, at 389.

<sup>225</sup> Mohammed Al-Ghamdi & John C. Boehm, *New Saudi Arbitration Law: A Positive Step, But Practical Questions Remain*, NORTON ROSE FULBRIGHT (Dec. 21, 2016, 6:36 PM), <http://www.nortonrosefulbright.com>

<sup>226</sup> 30 Al-Ammari & Martin, *supra* note 218, at 391.

<sup>227</sup> Al-Ghamdi & Boehm, *supra* note 225.

<sup>228</sup> 30 Al-Ammari & Martin, *supra* note 218, at 392.

<sup>229</sup> *Id.*

<sup>230</sup> Al-Ghamdi & Boehm, *supra* note 225.

<sup>231</sup> 30 Al-Ammari & Martin, *supra* note 218, 393.

required arbitrators meet certain qualifications, such as full legal capacity, experience, as well as good conduct and reputation.<sup>232</sup> In addition, the implementing regulations stipulated that arbitrators must be Muslim and, if the arbitral tribunal was composed of more than one arbitrator, the chairman must be knowledgeable in Islamic law, business practices, and the customs and traditions of Saudi Arabia.<sup>233</sup>

Furthermore, since the government was still dealing with the ARAMCO arbitration award, the arbitration law did not limit the scope of judicial review on arbitration awards.<sup>234</sup> As a result, arbitration awards, either domestic or international, were reviewed extensively by the competent authority before enforcement—even on the merits of the dispute—to ensure that the award did not violate Saudi Arabian public policy.<sup>235</sup> The original arbitration law was not in accordance with international arbitration practices, it did not permit modern arbitration practices in the country, and it conflicted with the New York Convention, specifically the enforcement process for foreign arbitral awards.<sup>236</sup>

### 3.2.3. The 2012 Arbitration Law

The government passed a new arbitration law in 2012 in an attempt to improve arbitration practices in Saudi Arabia.<sup>237</sup> The new arbitration law, partly based on the UNCITRAL model law for international commercial arbitration, reflects more modern arbitration practices.<sup>238</sup> The new law provides clarity on some provisions that organize arbitration proceedings and limits the

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<sup>232</sup> Law of Arbitration 1983, *supra* note 222, at art. 4.

<sup>233</sup> Implemented Regulations on Law of Arbitration 1985, *supra* note 223, at art. 3

<sup>234</sup> See Al-Ghamdi & Boehm, *supra* note 225.

<sup>235</sup> See Mark Raymont & Rachel Issa, *Arbitration in Saudi Arabia: How Is It changing?* THOMSON REUTERS (Dec. 21, 2016, 6:34 PM), <http://www.arbitrationblog.practicallaw.com>

<sup>236</sup> *Id.*

<sup>237</sup> Law No. M/34 of 2012 (Law of Arbitration), *Jaridat Um-Alqura*, 16 April 2012 (Saudi Arabia).

<sup>238</sup> See 30 Al-Ammari & Martin, *supra* note 218, 390.

competent authority's supervision obligations.<sup>239</sup> In addition, the new arbitration law confirms with some general concepts of international arbitration, such as autonomy of the arbitration agreement, arbitrability, and competence-competence.<sup>240</sup> It also covers both international commercial arbitration and domestic arbitration.<sup>241</sup>

The autonomy of the arbitration agreement—“separability”—is a principle in modern international arbitration found in Saudi Arabia's new arbitration law.<sup>242</sup> The new arbitration law considers an arbitration agreement, even when included in a contract, as separate from the rest of the contract terms.<sup>243</sup> If the contract is terminated, this termination does not extend to the arbitration clause, as long as it is valid.<sup>244</sup> Yet, the new arbitration law requires the arbitration clause to be in writing and entitles the parties to consent to arbitration before or after the dispute arises.<sup>245</sup>

The new arbitration law does not limit or restrict disputes that are subject to arbitration; instead, the new law grants the parties discretion to choose the disputes that are subject to arbitration.<sup>246</sup> However, the new law mentions the framework that regulates disputes subject to arbitration and states that “[t]he provisions of this Law shall not apply to personal status disputes or matters not subject to reconciliation.”<sup>247</sup> Criminal disputes, as a result, are not subject to arbitration according to the new law.<sup>248</sup>

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<sup>239</sup> See Al-Ghamdi & Boehm, *supra* note 225.

<sup>240</sup> See 30 Al-Ammari & Martin, *supra* note 218, at 390.

<sup>241</sup> *Id.* at 391.

<sup>242</sup> *Id.* at 392.

<sup>243</sup> Law of Arbitration 2012, *supra* note 237, at art. 21.

<sup>244</sup> *Id.* at art. 21.

<sup>245</sup> *Id.* at art. 9.

<sup>246</sup> See *Id.* at art. 2.

<sup>247</sup> *Id.* at art. 2.

<sup>248</sup> 30 Al-Ammari & Martin, *supra* note 218, at 390.

The new arbitration law also entitles the arbitral tribunal to decide the validity of the arbitration agreement in accordance with the competence-competence principle<sup>249</sup> and authorizes the arbitral tribunal to decide its own jurisdiction, which is a recognized principle in international commercial arbitration.<sup>250</sup> Article 20 of the new arbitration law states, “[t]he 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.”<sup>251</sup> As a result, the arbitral tribunals are not required to consult with the competent court in order to validate their jurisdiction.<sup>252</sup>

In addition, the new law limits intervention by the competent authority in arbitration proceedings and no longer requires parties to obtain approval to start arbitration proceedings.<sup>253</sup> Unlike the old arbitration law—where arbitration proceedings must be conducted in Arabic—the new law entitles parties to choose any language to conduct the arbitration while stipulating that the default language is Arabic if no agreement is made.<sup>254</sup> The new law also entitles the arbitration parties to choose other procedural and substantive laws to govern their disputes as long as these laws do not violate Islamic law.<sup>255</sup>

Moreover, unlike the old arbitration law, where the appointment of arbitrators had to be confirmed by the competent authority, the new law entitles the parties to select arbitrators without intervention by the competent authority.<sup>256</sup> However, the new law stipulates certain

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<sup>249</sup> Law of Arbitration 2012, *supra* note 237, at art. 20.

<sup>250</sup> 30 Al-Ammari & Martin, *supra* note 218, at 393.

<sup>251</sup> Law of Arbitration 2012, *supra* note 237, at art. 20.

<sup>252</sup> 30 Al-Ammari & Martin, *supra* note 218, at 393.

<sup>253</sup> *See Id.*

<sup>254</sup> Law of Arbitration 2012, *supra* note 237, at art. 29.

<sup>255</sup> *Id.* at art. 5, 25, 38.

<sup>256</sup> *See* 30 Al-Ammari & Martin, *supra* note 218, at 393.

qualifications for arbitrators such as full legal capacity as well as good conduct and reputation.<sup>257</sup> In addition, the new law stipulates an additional qualification for the sole arbitrator (if the arbitral tribunal is composed of one arbitrator) or for the chairman (if the arbitral tribunal is composed of more than one arbitrator); the arbitrator or chairman must hold at least a bachelor's degree in Sharia or civil law.<sup>258</sup>

Furthermore, the new arbitration law intends to facilitate the enforceability of arbitration awards whether they are domestic or international. Unlike the old arbitration law, where the arbitration award had to be confirmed by the competent authority before it was enforceable,<sup>259</sup> the new arbitration law grants immediate enforcement of arbitration awards with the same legal status as regular judicial decisions.<sup>260</sup> On top of that, the new arbitration law limits the competent authority's review before enforcement of the arbitration award and, therefore, the merits and facts of the dispute are out of the competent authority's scope of review.<sup>261</sup>

### 3.3. The Conventions and the BITs that the Government of Saudi Arabia Has Ratified

This section discusses the international conventions ratified by the government of Saudi Arabia to organize the enforceability of arbitration awards. These include the Arab League Convention, the Riyadh Convention, the ICSID Convention, and the New York Convention. In addition, this section also discusses bilateral investment treaties (BITs) that the Saudi Arabian government signed with different nations.

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<sup>257</sup> Law of Arbitration 2012, *supra* note 237, at art. 14.

<sup>258</sup> *Id.*

<sup>259</sup> 30 Al-Ammari & Martin, *supra* note 218, at 402.

<sup>260</sup> Law of Arbitration 2012, *supra* note 237, at art. 52.

<sup>261</sup> Raymont & Issa, *supra* note 235.

### 3.3.1. The 1952 Arab League Convention

In 1952, Saudi Arabia and seven other Arab countries ratified the Arab League Convention on the enforceability of judicial judgments and arbitral awards.<sup>262</sup> The other members of this convention are Egypt, Iraq, Jordan, Kuwait, Libya, Syria, and the United Arab Emirates.<sup>263</sup> This convention guarantees the enforcement of judicial decisions and arbitration awards among the member states.<sup>264</sup> In addition, Article 3 notes that the competent authorities in the member countries should not review the merits of these foreign judicial decisions and arbitration awards as well as mentions the grounds for refusal of enforcement.<sup>265</sup> Article 3 states:

With due consideration to Article 1 of this agreement, the authorities who are requested to enforce execution are not entitled to reconsider the verdict of arbitrators which have been given in any of the States of the League. Request of execution may be refused in the following instances:

- a. If the laws of the requested State do not admit the solution of litigation by means of Arbitrations.
- b. If the verdict passed was not in pursuance of a conditional Arbitration Agreement.
- c. If the Arbitrators were not qualified to act in pursuance of a conditional agreement of Arbitration or in accordance with the provisions of the law under which the sentence was passed.
- d. If the parties were not properly served with Summons to appear.
- e. If the Arbitrators' decision includes anything considered to be against general order or public morals in the State requested to carry out execution. The requested State shall decide whether the case is to be considered as such and may refuse execution.
- f. If the Arbitrators' decision is not final in the State in which it is given.<sup>266</sup>

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<sup>262</sup> ABDULLAH BIN IBRAHIM ALKHODAIRI, TANFAITH AL-AHKAM AL-AJNABIAH FI AL-MAMLAKH AL-ARABIAH AL-SAUDIAH [The Enforcement of Foreign Judgments and Awards in the Kingdom of Saudi Arabia] [Author's Translation], 52 (1st ed. 2016).

<sup>263</sup> 75 Zegers, *supra* note 157, at 43.

<sup>264</sup> ALKHODAIRI, *supra* note 262, at 52.

<sup>265</sup> Arab League Convention, Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards, art. 3, Sep. 14, 1952, available at <http://www.aia-adr.com/blank-c10t5>.

<sup>266</sup> *Id.*

### 3.3.2. The 1983 Riyadh Convention on Judicial Cooperation

In 1983, the government of Saudi Arabia and fifteen other countries ratified the Riyadh Convention on Judicial Cooperation (The Riyadh Convention),<sup>267</sup> which replaced the 1952 Arab League Convention.<sup>268</sup> The signatories of this convention are Saudi Arabia, Algeria, Bahrain, Iraq, Jordan, Libya, Morocco, Mauritania, Oman, Palestine, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.<sup>269</sup> This convention facilitates the recognition and enforcement of judicial decisions and arbitral awards among the member states.<sup>270</sup>

The Riyadh Convention emphasizes the enforcement of arbitration awards among the signatories without reviewing the merits of disputes and mentions the grounds to refuse enforcement.<sup>271</sup> Article 37 of this convention states:

Without prejudice to the provisions of Articles 28 and 30 of this Agreement adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this Part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgement except in the following cases:

(a) If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration.

(b) If the adjudication of the arbitrators is made in execution of a condition or arbitration contract that is void or has not become final.

(c) If the arbitrators are non-competent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made.

(d) If the litigants have not been served subpoenas in the proper manner.

(e) If any part of the adjudication be in contradiction with the provisions of Islamic Shari'a, the public order or the rules of conduct of the requested party.

The authority requesting recognition of the adjudication of arbitrators and the execution thereof shall submit a certified copy of the adjudication accompanied by a certificate issued by the said authority stating that the adjudication has executive force.

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<sup>267</sup> Kilian Balz & Aouni Shahoud Almousa, *The recognition and Enforcement of Foreign Judgments and Arbitral Awards Under the Riyadh Convention*, 4 INT'L J. PROC. L. 273, 276 (2014).

<sup>268</sup> 75 Zegers, *supra* note 157, at 44-45.

<sup>269</sup> 4 Balz & Almousa, *supra* note 267, at 276.

<sup>270</sup> ALKHODAIRI, *supra* note 262, at 59.

<sup>271</sup> League of Arab States, Riyadh Arab Agreement for Judicial Cooperation, art. 37, Apr. 6, 1983, available at <http://www.refworld.org/docid/3ae6b38d8.html>.

If there be a proper, written agreement under which the parties had consented to submit to the competence of the arbitrators in settling a certain dispute or whatever other disputes arising between the two parties in respect of a certain legal relationship, a certified copy of such agreement must be submitted.<sup>272</sup>

### 3.3.3. The ICSID Convention

In 1979, Saudi Arabia ratified the International Center for Settlement of Investment Disputes (ICSID) Convention, which then entered into force in 1980.<sup>273</sup> The ICSID Convention provides that disputes between state governments and investors of other contracting states should be settled by conciliation or arbitration.<sup>274</sup> Even though the government of Saudi Arabia ratified the convention, it filed a reservation against submitting oil disputes to ICSID.<sup>275</sup> The reservation states that, “[t]he Kingdom reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the International Centre for the Settlement of Investment Disputes whether by way of conciliation or arbitration.”<sup>276</sup>

### 3.3.4. The New York Convention

In 1994, the government of Saudi Arabia ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>277</sup> The New York Convention is the main international convention that organizes enforceability of arbitral awards and requires signatories to enforce arbitration awards rendered in other contracting states.<sup>278</sup> Although Saudi Arabia ratified this convention, it filed a reservation against applying this convention to arbitral awards that are rendered by non-signatories to the convention.<sup>279</sup> This reservation reads, “[o]n

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<sup>272</sup> *Id.*

<sup>273</sup> THE WORLD BANK GROUP, <https://www.icsid.worldbank.org> (last visited Jan. 3, 2017).

<sup>274</sup> *Id.*

<sup>275</sup> 75 Zegers, *supra* note 157, at 55-56.

<sup>276</sup> THE WORLD BANK GROUP, *supra* note 273.

<sup>277</sup> NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org> (last visited Jan. 3, 2017).

<sup>278</sup> Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Award?* 18 FORDHAM INT’L. L. J. 920, 925 (1995).

<sup>279</sup> NEW YORK ARBITRATION CONVENTION, *supra* note 277.



the basis of reciprocity, the Kingdom declares that it shall restrict the application of the Convention to the recognition and enforcement of arbitral awards made in the territory of a Contracting State.”<sup>280</sup>

### 3.3.5. The BITs Ratified by the Government of Saudi Arabia

The government of Saudi Arabia does not have a model text for the bilateral investment treaties (BITs) that it ratifies and, therefore, the text of each BIT differs between countries.<sup>281</sup>

These BITs not only refer disputes between investors and governments, after the exhaustion of local remedies, to arbitration, but also refers disputes between contracting states over the interpretation of the BIT to arbitration.<sup>282</sup> The government of Saudi Arabia has signed twenty-three BITs with different countries; seventeen are in force while six are signed but not in force yet.<sup>283</sup> These are the BITs currently in existence in Saudi Arabia:

Austria, signed 06/30/2001, enforced 07/25/2003.  
Azerbaijan, signed 03/09/2005, not in force.  
Belarus, signed 07/20/2009, enforced 08/07/2010.  
Belgium, signed 04/22/2001, enforced 06/11/2004.  
China, signed 02/29/1996, enforced 05/01/1997.  
Czech Republic, signed 11/18/2009, enforced 03/13/2011.  
France, signed 06/26/2002, enforced 03/18/2004.  
Germany, signed 10/29/1996, enforced 01/08/1999.  
India, signed 01/25/2006, enforced 05/20/2008.  
Indonesia, signed 09/15/2003, enforced 07/05/2004.  
Italy, signed 09/10/1996, enforced 05/22/1998.  
Japan, signed 04/30/2013, not in force.  
Republic of Korea, signed 04/04/2002, enforced 02/19/2003.  
Malaysia, signed 10/25/2000, enforced 08/14/2001.  
Philippines, signed 10/17/1994, enforced 11/11/1996.

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<sup>280</sup> *Id.*

<sup>281</sup> 75 Zegers, *supra* note 157, at 57.

<sup>282</sup> See Agreement Between the People's Republic of China and the Kingdom of Saudi Arabia on the Reciprocal Promotion and Protection of Investments, May. 1, 1997, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3361>.

<sup>283</sup> INVESTMENT POLICY, <http://www.investmentpolicyhub.unctad.org> (last visited Dec. 21, 2016).

Singapore, signed 04/10/2006, enforced 10/05/2007.  
Spain, signed 04/09/2006, not in force.  
Sweden, signed 03/11/2008, enforced 10/01/2009.  
Switzerland, signed 04/01/2006, enforced 08/09/2008.  
Taiwan, signed 10/31/2000, not in force.  
Turkey, signed 08/08/2006, enforced 02/05/2010.  
Ukraine, signed 04/09/2008, not in force.  
Uzbekistan, signed 06/06/2011, not in force.

### 3.4. Realization of Islamic Arbitration Practices in Non-Muslim Countries

Islamic arbitration is not only limited to Muslim countries; it also extends to non-Muslim countries with large Muslim communities. Therefore, this section focuses on case studies in the United Kingdom and Canada, where quasi-independent Islamic arbitration centers were created to meet the demands of the Muslim communities within their jurisdiction. Although Islamic arbitrations are governed by the jurisdictional rules of these countries, it provides many positive insights on the future development and discourse for the arbitration practices in Islamic jurisdictions.

#### 3.4.1. United Kingdom

While the United Kingdom is not a Muslim country, Islamic arbitration is often conducted within its borders.<sup>284</sup> This is because the United Kingdom has a large Muslim community that prefers to settle disputes in accordance with Islamic law rather than domestic judicial proceedings, when possible.<sup>285</sup> The only method for the Muslim community to resolve their disputes in accordance with the law of their religion is arbitration.<sup>286</sup> While there are some

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<sup>284</sup> Michael J. Broyed et al., *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Din of America and Muslim Arbitration Tribunals Experience*, 30 HARV. J. RACIAL & ETHNIC JUST. 33, 52-54 (2014).

<sup>285</sup> Rebecca E. Maret, *Mind the Gap: The Equality Bill and Shari'a Arbitration in the United Kingdom*, 36 B.C. INT'L & COMP. L. REV. 255, 257-59 (2013).

<sup>286</sup> *Id.* at 259-60.

informal Islamic tribunals in the United Kingdom, the Muslim Arbitration Tribunal (MAT), established in 2007, is the premier independent arbitration center for dispute settlement in accordance with Islamic law that meets the increasing demands of the Muslim community in the United Kingdom.<sup>287</sup> The MAT, as an independent arbitration center, is supported by the Muslim community as well as Muslim justices and scholars.<sup>288</sup>

The MAT was established by Faiz Siddiqi and is based on the 1996 arbitration law in the United Kingdom, which gives people the right to resolve disputes by impartial tribunals that arbitrate in accordance with the agreement of the parties.<sup>289</sup> The Court of Appeal in England and Wales confirmed the arbitration of disputes, by agreement of the parties, through faith-based arbitral tribunals.<sup>290</sup> In *Halpern v. Halpern*, Lord Justice Waller stated, “[a]rbitral tribunals can and indeed should decide disputes in accordance with the law chosen by the parties.”<sup>291</sup> In addition, the United Kingdom confirmed the specific use of Islamic law when chosen by the parties in contracts and agreements and confirmed the use of Islamic law in Islamic arbitration as the procedural and substantive law.<sup>292</sup> As a result, MAT arbitration decisions are enforced under British law, subject to judicial review.

In *Uddin v. Choudhury*, the Court of Appeal for England and Wales affirmed the lower court’s decision on the application of Islamic law to a marriage agreement.<sup>293</sup> The case involved two Muslim parties and a marriage agreement concluded in accordance with Islamic law. The ex-wife applied to the Islamic Sharia council for a divorce, which was granted in 2004.<sup>294</sup> In

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<sup>287</sup> *Id.* at 263.

<sup>288</sup> Choksi, *supra* note 153, at 812-13.

<sup>289</sup> *Id.*

<sup>290</sup> Maret, *supra* note 285, at 263-64.

<sup>291</sup> Maret, *supra* note 285, at 263-64; *Halpern v. Halpern*, [2007] EWCA (Civ) 291 (Eng.).

<sup>292</sup> *See* Maret, *supra* note 285, at 263-64.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

2005, the ex-husband filed in an English court demanding compensation of twenty-five thousand Euros for gifts that he gave to the ex-wife; the ex-wife counterclaimed, demanding fifteen thousand Euros from the ex-husband for her dowry, which was included in the marriage contract.<sup>295</sup>

The trial court appointed an Islamic law expert to consider his opinion the marriage contract since it was based on Islamic law.<sup>296</sup> The Islamic law expert testified that the ex-wife's evidence was stronger than the ex-husband's evidence.<sup>297</sup> The trial court judge accepted the expert's testimony and decided that the twenty-five thousand Euros the ex-husband gave the ex-wife was not part of the marriage agreement nor part of the dowry; it was made in the form of gifts and, therefore, it was absolute.<sup>298</sup> However, the judge determined that the fifteen thousand Euros requested by the ex-wife, which was in the form of dowry, was enforceable since it was included in the marriage agreement as a valid clause.<sup>299</sup>

The Court of Appeal confirmed the decision of the trial court and concluded that Islamic law general principles were correctly applied to the marriage agreement and the dowry since the agreement was valid.<sup>300</sup> The Court of Appeal stated that, “[a]s a matter of Sharia law in the circumstances of this marriage and its dissolution, the gifts were absolute, not returnable, not deductible from the dowry, and the dowry was payable notwithstanding the failure of the marriage.”<sup>301</sup>

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<sup>295</sup> Uddin v. Choudhury, [2009] EWAC (Civ) 1205 (Eng.).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

Although *Uddin v. Choudhury* was not about Islamic arbitration nor about the choice of Islamic law in arbitration, it validates the use of Islamic law in contracts and agreements in the United Kingdom and incorporates general principles of Islamic law into the English legal system.<sup>302</sup> Based on this case, the English legal system accepts the use of Islamic arbitration in the United Kingdom including the enforceability of the arbitration awards decided in accordance with Islamic law.

In 2011, however, the practices of Islamic arbitration faced some concerns.<sup>303</sup> Specifically, the practices of the Islamic arbitration tribunals in the country shifted from deciding solely commercial disputes to also deciding civil disputes.<sup>304</sup> Another concern targeted the status of women in Islamic arbitration practices, suggesting that women might face possible discrimination or be socially coerced to use Islamic arbitration if they lack understanding of their civil rights in the United Kingdom.<sup>305</sup>

#### 3.4.2. Canada

Just like the development of Islamic arbitration practices in the United Kingdom, Islamic arbitration was introduced in Canada due to a growing Muslim community that preferred to resolve disputes in accordance with Islamic law.<sup>306</sup> Not only Muslims are able to choose religious law to resolve disputes in Canada; Christians and Jews are also entitled to choose their religious laws to govern disputes under the Canadian arbitration law.<sup>307</sup> In 2003, the Islamic Institute of Civil Justice (IICJ) was established by Syed Mumtaz Ali to satisfy the needs and

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<sup>302</sup> Maret, *supra* note 285, at 263.

<sup>303</sup> *Id.* at 268-69.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 268.

<sup>306</sup> Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a – Based Arbitration*, 32 N.C.J. INT'L L. & COM. REG. 495, 510-14 (2007).

<sup>307</sup> Joel A. Nichols, *Religious and Legal Pluralism in Global Comparative Perspective: Religion, Marriage, and Pluralism*, 25 EMORY INT'L L. REV. 967, 973-74 (2011).

demands of the Canadian Muslim community that prefer dispute resolution under Islamic law rather than Canadian law.<sup>308</sup> The IICJ provides the Muslim community with the option to use arbitration and mediation in accordance with Islamic law to resolve their disputes.<sup>309</sup>

As with the Islamic arbitration practices in the United Kingdom, the IICJ practices invoke some concerns; one of the top concerns is that the use of Islamic law in arbitration might enhance inequity between men and women since, in most religious contexts, this results in imbalanced power during arbitration hearings.<sup>310</sup> Another concern is that women might experience social pressure to use Islamic arbitration.<sup>311</sup> In addition, women might not be aware of their civil rights through regular judicial proceedings under Canadian law and, therefore, submit their disputes to Islamic arbitration, which might be less protective of their rights.<sup>312</sup>

Based on concerns raised by some human rights organizations, specifically women's rights activists, on the discrimination against women under Islamic law,<sup>313</sup> the Canadian government requested the former attorney general, women's rights advocate Marion Boyd, examine the credibility and effectiveness of religious laws in the family dispute arbitration.<sup>314</sup> Marion Boyd prepared a report and concluded that, "[t]he arbitration act should continue to allow disputes to be arbitrated using religious laws."<sup>315</sup> In addition, the report provides specific recommendations, such as ensuring that parties understand that arbitration is voluntarily, as well

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<sup>308</sup> Faisal Kutty, *The Myth and Reality of "Shari'a Courts" in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. ST. THOMAS L.J. 559, 562-63 (2010).

<sup>309</sup> *Id.*

<sup>310</sup> Choksi, *supra* note 153, at 802-03.

<sup>311</sup> Jehan Aslam, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U. J. INT'L L. & POL. 841, 875-76 (2006).

<sup>312</sup> Choksi, *supra* note 153, at 806.

<sup>313</sup> *Id.* at 795-96.

<sup>314</sup> Kutty, *supra* note 308, at 564.

<sup>315</sup> *Id.*

as empowering the competent authority with greater supervision to set aside arbitral awards if the parties were not aware of the consequences of an arbitration agreement.<sup>316</sup>

Yet, even though the report recommended the continuance of religious laws in family dispute arbitration, some women's rights organizations and interest groups pressured the Canadian government to pass a law restricting the arbitral tribunals from using religious laws.<sup>317</sup> In 2005, Ontario premier Dalton MaGuinty announced that, "[t]here will be no Sharia law in Ontario, there will be no religious arbitration in Ontario, and there will be one law for all Ontarians."<sup>318</sup> As a result, in 2006, the legislature in Ontario amended its family law in the province to apply only Ontario law as the substantive law in family dispute arbitration unless the parties agree to apply another Canadian province's law as the substantive law.<sup>319</sup>

Based on the amended family law, family dispute arbitration is restricted from using religious laws or other countries' laws as the substantive law in Ontario. However, Islamic arbitration for commercial and investment disputes in Ontario is still valid since the Canadian arbitration law entitles parties the right to choose the law that governs their dispute in these circumstances.<sup>320</sup> The restriction on Islamic law application only applies to family dispute arbitration in Ontario.

Nevertheless, opponents of the use of religious law in family dispute arbitration do not possess case law nor judicial precedent to support their claim that religious law, specifically Sharia, discriminates against women.<sup>321</sup> On top of that, the report prepared by Marion Boyd

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<sup>316</sup> *Id.* at 564-56.

<sup>317</sup> Choksi, *supra* note 153, at 796.

<sup>318</sup> Nichols, *supra* note 307, at 974.

<sup>319</sup> *Id.* at 974-75.

<sup>320</sup> *See* Choksi, *supra* note 153, at 793-97.

<sup>321</sup> Aslam, *supra* note 311, at 849.

confirmed that religious freedom is a constitutional right and that multiculturalism and equal protection under the law ensure that international obligations are met by the provinces.<sup>322</sup>

### 3.4.3. Addressing the Concerns of Islamic Arbitration Practices in United Kingdom and Canada

Although there are challenges and concerns regarding the practice of Islamic arbitration through either the MAT in the United Kingdom or the IICJ in Canada, these mechanisms are prepared to protect parties. First, detailed procedure laws in both the MAT and the IICJ require disputes for arbitration to include written consent from all parties that confirms parties are aware of their rights.<sup>323</sup> Second, the awards rendered in the MAT and the IICJ are subject to judicial review, which protect the arbitration users from unfair and biased awards.<sup>324</sup> Third, the arbitral tribunals are usually constituted by legal experts and Muslim scholars that are aware of the social pressure that some women might face in deciding to arbitrate a dispute.<sup>325</sup>

Regardless of the concerns and challenges with the practice of Islamic arbitration in the United Kingdom and Canada, the use of Islamic arbitration is growing globally and is not limited to Muslim countries. Despite the concerns for women understanding their civil rights and feeling social pressure to submit disputes to Islamic arbitration, Muslim women are typically educated and have the knowledge to choose the proper mechanism to resolve their disputes. However, Islamic arbitration practices continue to face some challenges and, therefore, the conduct of Islamic arbitration should be improved to gain global acceptance for Islamic arbitration.

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<sup>322</sup> Kutty, *supra* note 308, at 565-66.

<sup>323</sup> Choksi, *supra* note 153, at 829.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 831.



### 3.5. Conclusion

Islamic arbitration is not regulated by strict rules and laws that must be applied to all its practices. Instead, Islamic law provides general principles and concepts that serve as a framework for arbitration; the laws and rules applied in Islamic arbitrations should not breach or exceed this general framework. In addition, as will be discussed in Chapter Six, habits and customs during different eras are taken into consideration when enacting laws and rules. As habits and customs change over time due to development and globalization, the enacted laws and rules should be modified to line up with new habits and customs.

While Saudi Arabia's first arbitration law entitled the competent authority to supervise arbitration proceedings due to conservative habits and customs as well as the isolated business and investment community at the time, as habits and customs developed and the business and investment community globalized, the government passed a new arbitration law to reflect these changes. This new arbitration law reflects modern arbitration practices and includes some international arbitration principles due to the development of habits and customs as well as the modernization of the business and investment community.

As a result, the practices of Islamic arbitration globally should be improved to line up with international arbitration practices in the developed era. Particularly, detailed procedural laws that do not conflict with Islamic law should be enacted by either governments or independent arbitration institutions that are the host of Islamic arbitration. Those procedural laws should also satisfy the needs of the arbitration users and the demands of the developed era as well as reflect modernity that fits into the recent time.

## CHAPTER 4

### ROLE OF ARBITRATORS

#### 4.1. Introduction

For some Islamic schools, the qualifications that arbitrators should possess to validate their appointments depends on a precise understanding of the role of arbitrators inside the tribunals. In addition, concerns regarding the functions and objectives of arbitrators, along with procedural issues, rely on understanding the role of arbitrators inside the tribunals.

The four Sunni Islamic schools—Hanafiah, Malikiah, Shafi'ih, and Hanbaliyah—each take different approaches regarding the role of arbitrators. In addition, each Islamic school stipulates some qualifications that arbitrators should possess depending on the approach it takes regarding the role of arbitrators. Moreover, the Islamic arbitration procedure might vary from one Islamic school to another based on each Islamic school's approach regarding the role of the arbitrator. This chapter discusses the different approaches taken by Islamic schools regarding the role of arbitrators as well as other concerns relating to Islamic arbitration procedures and the objectives and functions of the arbitrators.

Section two of this chapter provides an overview on the role of arbitrators during the development of Islamic law while section three defines “arbitration” and “arbitrator” through the lens of Islamic law and the Arabic language. After that, section four discusses the functions of arbitrators inside the arbitral tribunals and section five clarifies the required qualifications arbitrators should possess to validate their appointments. Section six differentiates the qualifications required for arbitrators from those required for judges, while section seven discusses the number of arbitrators as well as the types of disputes subject to Islamic arbitration.

Section eight explains the applicable law that governs arbitration as well as clarifies the means for proof and other types of evidence accepted in arbitration. Then, section nine explores the individuals that are not allowed to sign an arbitration clause without permission and the individuals banned from being appointed as arbitrators. Section ten discusses situations where parties can withdraw from arbitration as well as situations where the parties are entitled to dismiss and challenge the arbitrators. Finally, section eleven concludes that although arbitrators decide specific disputes for specific people, arbitrators are not the same as judges and are not required to possess the same qualifications as judges due to their limited authority and jurisdiction.

#### 4.2. Overview on the Role of Arbitrators During the Development of Islamic Law

The role of the arbitrator inside the tribunals was originally discussed by Islamic schools and Muslim scholars during the development of Islamic law.<sup>326</sup> Yet, a precise understanding of the role of arbitrators under Islamic law was not delineated due to the overlap between the functions of arbitrators and judges.<sup>327</sup> Therefore, there are different opinions on the role of

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<sup>326</sup> See 16 MUHAMMED BIN AHMED BIN ABI SAHIL AL-SARKHSI, AL-MABSOUT [THE PLANE OF HANAFIAH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 111 (1993); see also 7 ALBABARTI, *supra* note 131, at 315; see also 7 MUHAMMED BIN ABDULLAH AL-KHORASHI AL-MALIKI, SHARAH MOUKHTASAR KHALIL LLKHORASHI [THE EXPLANATION OF KHALIL'S RESEARCH] [AUTHOR'S TRANSLATION] 138 (n.d.); see also 4 AL-KHALOUTI, *supra* note 131, at 198-199; see also 9 ALI BIN MUHAMMAD BIN MUHAMMAD BIN HABIB ALBSRI, AL-HAWI AL-KABAIR FI FIQH MATHHAB AL-IMAM AL-SHAFI'I [THE GREAT VOLUME OF THE JURISPRUDENCE OF ISLAMIC LAW ACCORDING TO SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 604 (Ali Muhammad Muawad et al. eds., 1st ed. 1999); see also 12 ALAMRANI, *supra* note 133, at 165; see also 4 BIN QUDAMH, *supra* note 131, at 130; see also 4 MOUSA BIN AHMED BIN MOUSA BIN SALEM AL-MQGDISI, AL-EQNA'A FI FIQH AL-IMAM AHMED BIN HANBAL [THE PERSUASION OF HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 377 (Abdullataif Muhammad Alsabki ed., n.d.).

<sup>327</sup> See 16 AL-SARKHSI, *supra* note 326, at 111; see also 10 ABU AL-ABAS SHIHAB AL-DEEN AHMED BIN EDRAIS BIN ABDULRAHMAN, AL-THAKHAIRAH [EXPLANATION ON MALIKIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 35-36 (Muhammad Bu Khabzah ed., 1st ed. 1994).

arbitrators, often comparing arbitrators to judges, agents, and even mediators.<sup>328</sup> Therefore, there is no uniform approach to the function of arbitrators under Islamic law.<sup>329</sup>

Before the establishment of Islam, arbitration was the only mechanism Arabs used to formally resolve their disputes.<sup>330</sup> At that time, arbitrating disputes was considered an honorable mission and, as a result, arbitrators were usually selected due to their specific character—such as generosity, bravery, or wisdom—or due to their position in society—such as tribal chief or army commander.<sup>331</sup> The purpose of arbitration was to deliver solutions and it was often conducted by a sole arbitrator, appointed by both parties.<sup>332</sup>

Islamic law incorporated the tradition of arbitration as a mechanism to resolve disputes and as an alternative to the judicial system.<sup>333</sup> However, Islamic law did not clarify the precise role of arbitrators inside the tribunals and, therefore, Islamic schools and Muslim scholars continue to debate the specific function of arbitrators.<sup>334</sup> In addition, the small number of arbitration cases as well as the smaller size of societies in the early stages of Islam did not motivate Muslim scholars to improve the understanding of the role of arbitrators.<sup>335</sup>

In the middle ages of Islam, during the eighth to tenth centuries, Islamic schools and Muslim scholars did not pay significant attention to the role of arbitrators; instead, they were

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<sup>328</sup> 9 ALBSRI, *supra* note 326, at 604; 12 ALAMRANI, *supra* note 133, at 165.

<sup>329</sup> See 16 AL-SARKHSI, *supra* note 326, at 111; see also 7 ALBABARTI, *supra* note 131, at 315; see also 7 AL-MALIKI, *supra* note 326, at 138; see also 4 AL-KHALOUTI, *supra* note 131, at 198-99; see also 9 ALBSRI, *supra* note 326, at 604; see also 12 ALAMRANI, *supra* note 133, at 165; see also 4 BIN QUDAMH, *supra* note 131, at 130; see also 4 AL-MQGDISI, *supra* note 326, at 377.

<sup>330</sup> ABDULQADIR, *supra* note 1, at 59-60.

<sup>331</sup> *Id.* at 60.

<sup>332</sup> See OTHMAN, *supra* note 2, at 35,51.

<sup>333</sup> See *Id.* 51-53.

<sup>334</sup> See 16 AL-SARKHSI, *supra* note 326, at 111; see also 7 ALBABARTI, *supra* note 131, at 315; see also 7 AL-MALIKI, *supra* note 326, at 138; see also 4 AL-KHALOUTI, *supra* note 131, at 198-99; see also 9 ALBSRI, *supra* note 326, at 604; see also 12 ALAMRANI, *supra* note 133, at 165; see also 4 BIN QUDAMH, *supra* note 131, at 130; see also 4 AL-MQGDISI, *supra* note 326, at 377.

<sup>335</sup> See ABDULQADIR, *supra* note 1, at 60-63.

interested in organizing and improving the newly established judicial system.<sup>336</sup> The expansion of the Islamic Empire during the middle ages of Islam led the Caliphs to appoint judges all around the regions to resolve disputes.<sup>337</sup> Moreover, there were not many types of disputes subject to arbitration at that time and, therefore, there was no need to improve arbitration or clarify the role of arbitrators.<sup>338</sup>

Islamic arbitration practices and an understanding of the role of arbitrators were slightly improved by enacting new arbitration laws and creating new arbitration centers across Muslim countries.<sup>339</sup> Yet, a precise understanding of the role of arbitrators in Islamic arbitration has not been fully addressed; therefore, some modern scholars consider arbitrators similar to judges, while others consider arbitrators to be agents or mediators.<sup>340</sup>

Neither the pre-Islamic ages, the early and middle ages of Islam, nor current Islamic arbitration practices provide a precise understanding of the role of arbitrators in Islamic arbitration.<sup>341</sup> Since the role of arbitrators under Islamic law has not been finalized, there are a few different opinions on the role of arbitrators.<sup>342</sup> However, uniform understanding of the role

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<sup>336</sup> ABDULQADIR, *supra* note 1, at 26.

<sup>337</sup> *Id.* at 68.

<sup>338</sup> See ABDULQADIR, *supra* note 1, at 62-63; see also OTHMAN, *supra* note 2, at 57-62.

<sup>339</sup> See KHALED BIN ABDULLAH AL-KHUDAIR, HOKAM SHART AL-ISLAM FI AL-MOHAKIM FI AL-MONAZA'AT AL-TAHKIMIAH [THE RELIGIOUS OF ARBITRATORS IN THE ARBITRATION INSTITUTIONS] [AUTHOR'S TRANSLATION] 22 (4th ed. 2011).

<sup>340</sup> See AL-KHUDAIR, *supra* note 339, at 23-35; see also MUHAMMAD BIN SALEH BIN MUHAMMAD AL-OTHIMAIN, AL-SHARAH AL-MOMTA'A ALA'A ZAD AL-MOSTAQNA'A [THE PERSUASIVE EXPLANATION ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 285-86 (1st ed. 2007).

<sup>341</sup> See ABDULQADIR, *supra* note 1, at 26, 59-60; see also 16 AL-SARKHSI, *supra* note 326, at 111; see also 7 AL-MALIKI, *supra* note 326, at 138; see also AL-KHUDAIR, *supra* note 339, at 23-35; see also 15 AL-OTHIMAIN, *supra* note 340, at 285-286.

<sup>342</sup> See 16 AL-SARKHSI, *supra* note 326, at 111; see also 7 ALBABARTI, *supra* note 131, at 315; see also 7 AL-MALIKI, *supra* note 326, at 138; see also 4 AL-KHALOUTI, *supra* note 131, at 198-99; see also 9 ALBSRI, *supra* note 326, at 604; see also 12 ALAMRANI, *supra* note 133, at 165; see also BIN QUDAMH, *supra* note 131, at 130; see also 4 AL-MQGDISI, *supra* note 326, at 377.

of arbitrators under Islamic law is important to reach a proper understanding of the role of arbitrators in Islamic arbitration.

#### 4.3. Definitions of Arbitrator and Arbitration

Islamic schools and Muslim scholars do not provided a clear definition of “arbitrator.” Each Islamic school provides its own definition for arbitration; however, almost all schools adopted similar definitions.<sup>343</sup> The Hanafiah school defines arbitration as “[t]he appointment of an arbitrator by the litigants to arbitrate their dispute,”<sup>344</sup> while the Malikiah school defines arbitration as “[t]he employment of an arbitrator through the consent of the litigants to decide their dispute.”<sup>345</sup>

The Shafi’ih school defines arbitration as “[t]he appointment of a qualified person by two people to judge their dispute,”<sup>346</sup> while the Hanbaliah school defines arbitration as “[t]he employment of a person who has the qualifications of a judge by two people to arbitrate their dispute.”<sup>347</sup> All affirm the same purpose of arbitration: resolving disputes.<sup>348</sup> Through a combination of these definitions, a uniform definition of arbitration under Islamic law is, “the appointment of a qualified person by the consent of litigants to decide their dispute.”

Since the language of Islamic law is Arabic, the words “arbitrator” and “arbitration” must be defined according to the Arabic language. While the word *Muhakem* (arbitrator)<sup>349</sup> derives

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<sup>343</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 24; 4 AL-DOUSUGI, *supra* note 50, at 135; 3 AL-SHIRAZI, *supra* note 131, at 378; 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>344</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 24.

<sup>345</sup> 4 AL-DOUSUGI, *supra* note 50, at 135.

<sup>346</sup> 3 AL-SHIRAZI, *supra* note 131, at 378.

<sup>347</sup> 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>348</sup> See 1 AHMED BIN MUHAMMED BIN ALI AL-FAIYOMI, AL-MESBAH AL-MUNAIR FI QAREEB AL-SHARAH AL-KABAIR [THE LIGHTING LAMP OF ARABIC LANGUAGE] [AUTHOR’S TRANSLATION] 145 (n.d.)

<sup>349</sup> 4 MUHAMMED BIN AHMED BIN AL-AZHARI AL-HARAWI, TAHTHAIB AL-LUQAH [THE EDUCATOR OF LANGUAGE] [AUTHOR’S TRANSLATION] 71 (Muhammed Awad Mureab ed., 1st ed. 2001).

from the word *Tahkaim* (arbitration),<sup>350</sup> the root of the word *Tahkaim* comes from the basic form *Hkm*, which roughly translates to “prevention,” “return,” or “separation.”<sup>351</sup> This applies to the role of arbitrators when they are arbitrating disputes as well as to arbitration as a mechanism for resolving disputes.<sup>352</sup> Arbitrators and arbitration *prevent* injustice, *return* rights to their owners, and *separate* between legality and illegality.

Essentially, the definitions of arbitrator and arbitration through Islamic law and the Arabic language are almost the same.<sup>353</sup> The proper definition of “arbitration” under Islamic law is based on a combination of the definitions provided by the Islamic schools: “the appointment of a qualified person by the consent of litigants to decide their dispute.” Although “arbitrator” is not formally defined in Islamic law, based on the definition of “arbitration” under Islamic law, an “arbitrator” is “someone who rules on a disputed issue.”<sup>354</sup>

#### 4.4. Functions of Arbitrators Inside Arbitral Tribunals

During the development of the Islamic schools, Islamic arbitration was not often used due to the rise of the judicial system<sup>355</sup> and, therefore, the practices of Islamic arbitration were not well developed in the schools of thought. As a result, there are different approaches to the role of

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<sup>350</sup> GASIM BIN ABDULLAH BIN AMAIR ALI AL-GAUNAWAI, INNIS AL-FOGAHA FI TA'ARIFAT AL-ALFATH AL-MUTADAWALH BINA AL-FOGAHA [THE ENTERTAINING OF MUSLIM SCHOLARS ON THE DEFINITIONS OF THE TERMINOLOGIES USED BETWEEN THEM] [AUTHOR'S TRANSLATION] 86 (Yahya Hasn Murad ed., 2004); 4 AL-HARAWI, *supra* note 349, at 71.

<sup>351</sup> See 3 ABU ABDULRAHMAN AL-KHALIL BIN AHMED BIN AMRU BIN TAMIM, KETAB AL-AIN [THE BOOK OF A] [AUTHOR'S TRANSLATION] 66-67 (Mahdi Almakzomi et al. ed., n.d.); see also 12 MUHAMMED BIN MAKRAM BIN ALI ABU AL-FADAL, LISAN AL-ARAB [TONGUE OF ARAB] [AUTHOR'S TRANSLATION] 140-43 (3rd ed. 1993).

<sup>352</sup> See AL-GAUNAWAI, *supra* note 350, at 86; see also 4 AL-HARAWI, *supra* note 349, at 71.

<sup>353</sup> See AL-GAUNAWAI, *supra* note 350, at 86; 7 MUHAMMAD ET AL., *supra* note 50, at 24; 4 AL-DOUSUGI, *supra* note 50, at 135; 3 AL-SHIRAZI, *supra* note 131, at 378; 4 BIN QUDAMH, *supra* note 131, at 224; 4 AL-HARAWI, *supra* note 349, at 71.

<sup>354</sup> See AL-GAUNAWAI, *supra* note 350, at 86.

<sup>355</sup> See ABDULQADIR, *supra* note 1, at 26.

arbitrators due to overlap in the functions between the role of arbitrators inside the arbitral tribunal and the role of judges inside the courtroom.<sup>356</sup>

Authority and jurisdiction are the main factors behind the different approaches to the role of arbitrators under Islamic law.<sup>357</sup> Arbitrators only derive their authority to resolve disputes from the clear consent of the parties since parties are not compelled to arbitrate disputes.<sup>358</sup> Arbitrators do not have authority over parties who have not consented to arbitration.<sup>359</sup> However, the authority of judges is not similarly limited since judges do not need the consent of all parties to resolve the dispute.<sup>360</sup> The initiation of judicial proceedings by the claimant is enough to compel the defendant, and any other party involved, to the courtroom.

Arbitrators also have limited jurisdiction under Islamic law and are not entitled to resolve certain disputes, such as criminal disputes.<sup>361</sup> However, judges do not have similar jurisdictional restrictions<sup>362</sup> and are entitled to decide any type of dispute without limitation.<sup>363</sup> To reconcile these differences, there are a couple of approaches on understanding the role of arbitrators under Islamic law.

Under Islamic law, the function of arbitrators or the role of arbitrators raises discussion between the Islamic schools.<sup>364</sup> Some Islamic schools consider the role of arbitrators inside tribunals to be the same as the role of judges inside courtrooms since arbitrators and judges have similar objectives: to resolve disputes.<sup>365</sup> Yet, other Islamic schools consider the role of

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<sup>356</sup> See 9 ALBSRI, *supra* note 326, at 604.

<sup>357</sup> See 15 AL-OTHIMAIN, *supra* note 340, at 285.

<sup>358</sup> See 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>359</sup> See 7 AL-MALIKI, *supra* note 326, at 138.

<sup>360</sup> See 15 AL-OTHIMAIN, *supra* note 340, at 285.

<sup>361</sup> See 7 AL-MALIKI, *supra* note 326, at 138.

<sup>362</sup> See 15 AL-OTHIMAIN, *supra* note 340, at 285.

<sup>363</sup> See 7 AL-MALIKI, *supra* note 326, at 138.

<sup>364</sup> 16 AL-SARKHSI, *supra* note 326, at 111; 7 AL-MALIKI, *supra* note 326, at 138; 9 ALBSRI, *supra* note 326, at 604; 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>365</sup> 16 AL-SARKHSI, *supra* note 326, at 111; 10 ABDULRAHMAN, *supra* note 327, at 35-36.



arbitrators similar to the role of mediators,<sup>366</sup> since people are not compelled to use arbitration nor mediation. However, although arbitrators decide specific disputes for specific people, arbitrators are not the same as judges due to their limited authorities and jurisdictions.<sup>367</sup>

The Hanafiah school's approach to the role of arbitrators is not clear. Some Hanafiah scholars consider arbitrators similar to judges.<sup>368</sup> Yet, those scholars also believe that arbitrators are lower than judges since arbitrators only decide disputes with the consent of all parties.<sup>369</sup> Other Hanafiah scholars, however, consider arbitrators more like mediators and regard arbitration is more like mediation because it lacks an enforceability mechanism.<sup>370</sup>

The Malikiah school also does not provide a clear approach to the role of arbitrators. On the one hand, some scholars in the Malikiah school consider arbitrators similar to judges since the parties are bound by the award.<sup>371</sup> On the other hand, some Malikiah scholars suggest that even though the arbitration parties are bound by the award, arbitrators are not similar enough to judges due to their limited authority and jurisdiction.<sup>372</sup>

Nor have Shafi'ih scholars provided a clear approach to the role of arbitrators. While some scholars believe that arbitrators are similar to mediators and, therefore, are not required to possess the qualifications of judges,<sup>373</sup> other scholars state that arbitrators are more similar to

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<sup>366</sup> 9 ALBSRI, *supra* note 326, at 604; 12 ALAMRANI, *supra* note 133, at 165.

<sup>367</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>368</sup> 16 AL-SARKHSI, *supra* note 326, at 111.

<sup>369</sup> 7 ALBABARTI, *supra* note 131, at 315.

<sup>370</sup> 4 OTHMAN BIN ALI BIN MUHJIN ALBARAE & AHMED BIN MUHAMMAD BIN AHMED AL-SHALABI, TABIEEN AL-HAQAIQ SHARH KANZ AL-DAQAIQ WA HASHIAT AL-SHALABI [FACTS' CLARIFICATION ON HANAFIAH SCHOOL OF THOUGHT'S JURISPRUDENCE] [AUTHOR'S TRANSLATION] 132 (1st ed. n.d.); 2 AL-SHIHRI, *supra* note 201, at 411.

<sup>371</sup> 10 ABDULRAHMAN, *supra* note 327, at 35-36.

<sup>372</sup> 7 AL-MALIKI, *supra* note 326, at 138.

<sup>373</sup> See 9 ALBSRI, *supra* note 326, at 604-605.

judges<sup>374</sup> and, therefore, are required to possess the qualifications of judges.<sup>375</sup> In addition, this school of thought considers the appointment of arbitrators valid only when judges are not available.<sup>376</sup>

The Hanbaliah school, just like the other Islamic schools, also does not provide a clear approach to the role of arbitrators. Some Hanbaliah scholars consider arbitrators judges and, therefore, require them to possess the qualifications of judges.<sup>377</sup> Other scholars state that, although arbitrators decide specific disputes for specific people, arbitrators are not judges and, therefore, are not required to possess the qualifications of judges due to their limited authority and jurisdiction.<sup>378</sup>

Although no Islamic school has a clear approach to the role of arbitrators,<sup>379</sup> it is roughly divided into three approaches. Some Islamic schools consider the role of arbitrators to be the same as the role of judges and require arbitrators to possess the same qualifications as judges,<sup>380</sup> while other Islamic schools consider the role of arbitrators to be the same as the role of mediators.<sup>381</sup> However, this dissertation considers the role of arbitrators is to decide specific disputes for specific people without requiring them to possess the qualifications of judges due to their limited authority and jurisdiction.<sup>382</sup>

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<sup>374</sup> See *Id.* at 604.

<sup>375</sup> 11 MOUHYEY AL-DEEN YAHYA BIN SHARAF AL-NAWAWI, ROUDAT AL-TALIBEEN WA AUMDAT AL-MUFTAIN [THE GARDEN OF STUDENTS AND THE LEADER OF SCHOLARS] [AUTHOR'S TRANSLATION] 122 (Zuhair Alshawish ed., 3rd ed. 1991)

<sup>376</sup> 18 ABDULMALIK BIN ABDULLAH BIN YUSUF BIN MUHAMMAD ALJWAINI, NEHAIAH AL-MATLAB FI DERAIAT AL-MATHHAB [THE CONCLUSION OF THE DEMANDS ON THE UNDERSTANDING OF SHAFI SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 582-83 (Abdulazim Mahmoud Aldaib ed., 1st ed. 2007).

<sup>377</sup> See 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>378</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-286.

<sup>379</sup> 16 AL-SARKHSI, *supra* note 326, at 111; 10 ABDULRAHMAN, *supra* note 327, at 35-36; 4 ALBARAE & AL-SHALABI, *supra* note 370, at 132; 9 ALBSRI, *supra* note 326, at 604; 12 ALAMRANI, *supra* note 133, at 165.

<sup>380</sup> 16 AL-SARKHSI, *supra* note 326, at 111; 10 ABDULRAHMAN, *supra* note 327, at 35-36.

<sup>381</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 132; 9 ALBSRI, *supra* note 326, at 604; 12 ALAMRANI, *supra* note 133, at 165.

<sup>382</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

#### 4.5. Qualifications of Arbitrators

The required qualifications for arbitrators under Islamic law clearly raise debate among Islamic schools and Muslim scholars.<sup>383</sup> What qualifications should arbitrators possess to validate their appointments as arbitrators under Islamic law? Due to the variety of approaches on the role of arbitrators, the qualifications for arbitrators depends on the role of arbitrators adopted by each Islamic school.<sup>384</sup>

The Hanafiah school approach requires arbitrators to possess the qualifications of judges to validate their appointments as arbitrators:<sup>385</sup> the arbitrator must be a Muslim adult of sound mind.<sup>386</sup> In addition, arbitrators must possess these qualifications regardless of the precise understanding of their roles inside the arbitral tribunals.<sup>387</sup> However, if an arbitrator lacks one of those qualifications, that arbitrator will become a mediator instead of an arbitrator.<sup>388</sup>

The Malikiah school qualifications for arbitrators are the same as the qualifications for judges.<sup>389</sup> Although the Malikiah school has not adopted a specific approach on the role of arbitrators, it considers arbitrators to be similar to judges and, therefore, requires arbitrators to possess the same qualifications as judges.<sup>390</sup> In addition to being a Muslim adult of sound mind,

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<sup>383</sup> 2 ABDULLAH BIN MAHMOUD BIN MAUDUD AL-MOUSALI, AL-EKHTIAR LETALLIL AL-MUKHTAR [THE CHOICES OF HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 94 (Mahmoud Abu Daqaiqah ed., 1937); 10 ABDULRAHMAN, *supra* note 327, at 35-37; 12 ALAMRANI, *supra* note 133, at 165; 4 BIN QUDAMH, *supra* note 131, at 130; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>384</sup> 16 AL-SARKHSI, *supra* note 326, at 111; 7 AL-MALIKI, *supra* note 326, at 138; 9 ALBSRI, *supra* note 326, at 604; 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>385</sup> 2 AL-MOUSALI, *supra* note 383, at 94; 7 ALBABARTI, *supra* note 131, at 316.

<sup>386</sup> 7 ALA'A ALDAIN ABU BAKR BIN MASAUD ALKILANI, BDA'A AL-SNA'A FI TARTEEB AL-SHRA'A [THE CREATOR OF ORGANIZING THE LEGISLATIONS] [AUTHOR'S TRANSLATION] 3 (2nd ed. 1986).

<sup>387</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 132.

<sup>388</sup> 16 AL-SARKHSI, *supra* note 326, at 111.

<sup>389</sup> 6 ABDULRAHMAN, *supra* note 53, at 112.

<sup>390</sup> 10 ABDULRAHMAN, *supra* note 327, at 35-37.

an arbitrator must be male and possess senses of justice and perception, and knowledge of Islamic law and rules.<sup>391</sup> An arbitrator appointed without those qualifications is invalid.<sup>392</sup>

The Shafi'iah school requires arbitrators to possess the qualifications of judges.<sup>393</sup> These qualifications are: Muslim, adult, male, sound mind, justice, knowledge of the Islamic law and rules, perception, and diligence.<sup>394</sup> In addition, the arbitrator must possess those qualifications to validate their appointments.<sup>395</sup> A person who does not possess these qualifications is ineligible to be appointed as an arbitrator.<sup>396</sup>

The qualifications for arbitrators raise internal discussion between scholars from the Hanbaliyah school.<sup>397</sup> Some of the scholars require arbitrators to possess the qualifications of judges—Muslim, adult, male, sound mind, justice, diligence, and knowledge of Islamic law and rules<sup>398</sup>—while other scholars do not require arbitrators to possess these qualifications.<sup>399</sup>

Muhammad Bin Al-Othimain, who is a Muslim scholar and a follower to Hanbaliyah school says:

Arbitrators decide specific disputes for specific people and their authorities and jurisdictions are limited. Therefore, arbitrators are not required to possess the qualifications of judges. Yet, judges who are appointed by governments have jurisdictions and authorities to decide people disputes whether they consent or not and, therefore, they are required to possess the qualifications of judges. As a result, why arbitrators are required to possess the qualifications of arbitrators?<sup>400</sup>

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<sup>391</sup> 2 AL-KHALOUTI, *supra* note 131, at 513-15.

<sup>392</sup> 6 ABDULRAHMAN, *supra* note 53, at 112-13.

<sup>393</sup> 10 AHMED BIN MUHAMMED BIN ALI BIN HIJAR AL-HITIMI, TUHFAT AL-MOUHTAJ FI SHARAH AL-MINHAJ [THE GUIDANCE OF SCHOLARS TO SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 118 (1983).

<sup>394</sup> 12 ALAMRANI, *supra* note 133, at 165.

<sup>395</sup> 4 ZAKARIA BIN MUHAMMED BIN AHMED BIN ZAKARIA AL-ANSARI, ASNA AL-MATALIB FI SHARAH RAWD AL-TALIB [THE GUIDANCE OF SCHOLARS TO SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 288 (n.d.).

<sup>396</sup> 14 ALBSRI, *supra* note 326, at 280.

<sup>397</sup> 4 BIN QUDAMH, *supra* note 131, at 130; 4 AL-MQGDISI, *supra* note 326, at 377.

<sup>398</sup> 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>399</sup> 4 AL-MQGDISI, *supra* note 326, at 377.

<sup>400</sup> 15 AL-OTHIMAIN, *supra* note 340, at 285.

The qualifications for arbitrators depends on each Islamic school's approach to the role of arbitrators inside the tribunals.<sup>401</sup> While some Islamic schools require arbitrators to possess the qualifications of judges,<sup>402</sup> other Islamic schools do not require arbitrators to possess the qualifications of judges.<sup>403</sup> However, the qualifications of arbitrators should not be limited to certain standards or the qualifications of judges. Instead, parties should have full discretion to select arbitrators with the qualifications appropriate to resolve a specific dispute without requiring those arbitrators to possess the qualifications of judges. This dissertation recognizes that arbitrators are not required to possess the qualifications of judges.<sup>404</sup>

#### 4.6. Qualifications of Judges Versus Qualifications of Arbitrators

This section differentiates the qualifications and requirements for judges from the qualifications and requirements for arbitrators. Judges must possess certain requirements to validate their appointments as judges, while arbitrators should only be required to possess a minimum standard of requirements to validate their appointment as arbitrators.

The judiciary is a necessary institution<sup>405</sup> to bring justice to people and its use is considered a right of people.<sup>406</sup> In addition, some people are compelled to resolve disputes through the judiciary, such as defendants when the claimants bring lawsuits against them.<sup>407</sup>

Because of their authority, judges must possess certain qualifications to ensure that disputes are

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<sup>401</sup> 7 ALBABARTI, *supra* note 131, at 315; 4 AL-KHALOUTI, *supra* note 131, at 198-99; 12 ALAMRANI, *supra* note 133, at 165; 4 AL-MQGDISI, *supra* note 326, at 377.

<sup>402</sup> 2 AL-MOUSALI, *supra* note 383, at 94; 10 ABDULRAHMAN, *supra* note 327, at 35-37; 12 ALAMRANI, *supra* note 133, at 165; 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>403</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>404</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>405</sup> See 11 ABDULRAHMAN BIN MUHAMMAD BIN AHMED BIN QUDAMH ALMAGDISI, AL-SHARH AL-KABIR ALA MTN AL-MUQNAE [THE GREAT EXPLANATION ON AL-MOQNAE BRIEF] [AUTHOR'S TRANSLATION] 373 (Muhammad Rashid Reda ed. n.d.).

<sup>406</sup> See 2 ALI BIN AHMED BIN MKRAM ALSAEDI ALADAWI, HASHIAT AL-ADAWI ALA SHARH KEFAIAT AL-TALIB AL-RABANI [THE EXPLANATION OF AL-ADAWI ON ISLAMIC LAW] [AUTHOR'S TRANSLATION] 338 (Yusuf Muhammad Albiquae ed. 1994).

<sup>407</sup> See 18 ALJWAINI, *supra* note 376, at 458; see also 11 ALMAGDISI, *supra* note 405, at 373.

resolved by highly competent judges. A judge must be a Muslim adult of sound mind, with senses of hearing and sight, the ability to speak, and knowledge of the Islamic law and rules,<sup>408</sup> as well as just,<sup>409</sup> diligent,<sup>410</sup> and perceptive.<sup>411</sup>

Meanwhile, Islamic arbitration is an alternative dispute resolution mechanism to the judicial system and people are not compelled to resolve their disputes through arbitration without clear consent of all involved parties.<sup>412</sup> Since arbitration is an optional mechanism for dispute resolution, the parties should have the right to select their own arbitrators.<sup>413</sup> In addition, some disputes are complex and require high-qualified arbitrators to decide them. Therefore, parties should have the right to select arbitrators with the specific qualifications necessary to resolve such a complex dispute without requiring those arbitrators to possess the same qualifications of judges.

However, entitling arbitration parties to select their arbitrators, without requiring the arbitrators to possess certain qualifications, should not be absolute. Otherwise, the parties might select arbitrators who lack sufficient knowledge of law, which could affect the arbitration proceedings and the enforceability of the awards if the law is not applied correctly or the award does not satisfy the formality requirements. Therefore, there should be a balance between the

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<sup>408</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76; ABDULRAHMAN BIN MUHAMMAD BIN AUSKAR ALBAQDADI, ERSHAD AL-SALIK ELA ASHRAF AL-MASALIK FI FIQH AL-IMAM MALIK [GUIDING THE DILIGENCES TO THE JURISPRUDENCE OF ISLAMIC LAW BASED ON MALIKIAH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 117 (Ibrahim Hasan ed., 3rd ed. n.d.); IBRAHIM BIN ALI BIN YUSUF ALSHIRAZI, AL-TANBAIH FI AL-FIQH AL-SHAFI'I [ATTENTION TO THE ISLAMIC LAW JURISPRUDENCE ACCORDING TO THE SHAFI SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 251 (1st ed. 1983); MUFAQ ALDAIN ABDULLAH BIN AHMED BIN MUHAMMAD BIN QUDAMH, UMDAT AL-FIQH [MAYOR OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 147 (Ahmed Muhammad Azuz ed., 2004).

<sup>409</sup> See 3 MAHMOUD BIN AHMED BIN ABDULAZIZ, AL-MOHAIH AL-BURHANI FI AL-FIQH AL-NOUMANI [ISLAMIC LAW JURISPRUDENCE ACCORDING TO THE HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 5-6 (Abdulkarim Sami Aljoundi ed., 1st ed. 2004).

<sup>410</sup> ALBAQDADI, *supra* note 408, at 117.

<sup>411</sup> 8 ALQASM, *supra* note 52, at 66.

<sup>412</sup> See 4 AL-DOUSUGI, *supra* note 50, at 135.

<sup>413</sup> See *Id.*

right of the parties to select arbitrators who possess qualifications specific to their disputes as well as the necessity to resolve disputes with arbitrators capable of applying the correct laws, maintaining the proceedings, and satisfying the formalities.

The new Saudi Arabian arbitration law provides a balanced approach regarding the minimum standard of requirements for arbitrators and the right of the parties to select arbitrators with specific qualifications. Article 14 states that, “[a]n arbitrator shall satisfy the following conditions: 1) [B]e of full legal capacity; 2) [B]e of good conduct and reputation; and 3) [B]e 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.”<sup>414</sup> This article provides three elements on the requirements for arbitrators.

First, arbitrators are not required to possess the qualifications of judges; instead, arbitrators are only required to possess a minimum standard necessary to resolve disputes, which is full legal capacity as well as good conduct and reputation. Second, arbitration parties have the right to select arbitrators with the desired qualifications that fit deciding the different matters of their disputes. Third, arbitrators must apply the applicable laws, maintain the arbitration proceedings, and satisfy the formalities of the awards by requiring the sole arbitrator or the chairman to possess a law degree.

This third requirement ensures the legitimacy of arbitration awards by guaranteeing there is at least one arbitrator in the tribunal with a law background to apply the relevant laws and maintain the arbitration proceedings as well as obtain the formalities of awards to ensure enforceability. This stipulation does not restrict the parties from appointing all arbitrators with a

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<sup>414</sup> Law of Arbitration 2012, *supra* note 237, at art. 14.

law background, however, it entitles the arbitration parties to appoint arbitrators with either a law background or another relevant background.

For instance, in a dispute about damaged or deactivated machines in a technology transfer transaction from a corporation to a consumer, parties might prefer to appoint at least one engineer as an arbitrator since the dispute is about technical aspects and the performance of the deactivated machines. If the arbitral tribunal is composed of three arbitrators and both parties appoint an engineer as an arbitrator, the two engineer arbitrators need to select a chairman with a law background to review the contracts, apply the relevant laws, maintain the proceedings, and obtain the formalities of the arbitration award.

However, if the parties desire to resolve their dispute by a sole arbitrator, the parties should not agree to appoint an engineer as their arbitrator. Even though the nature of their dispute is about determining the performance of the deactivated machines and an engineer is capable of making this determination, an engineer might lack knowledge of the relevant laws and the formalities of arbitration awards. Therefore, the parties should appoint an arbitrator with a law background to ensure that their dispute is resolved by the applicable law and satisfies the formalities of the arbitration awards. To supplement the technical knowledge required in this instance, the sole arbitrator is entitled to appoint an engineer as an expert to deliver an opinion on the performance of the deactivated machines.

The Saudi Arabian arbitration law requirements on the qualifications for arbitrators is the proper solution for modern Islamic arbitrations. It entitles the arbitration parties to select their arbitrators with the desired qualifications appropriate to the nature of their dispute. It also grants legitimacy to the arbitration awards by including arbitrators with a law background to maintain the proceedings and satisfy the formalities of the awards, which guarantees enforcement.



#### 4.7. Number of Arbitrator and Disputes that Are Subject to Islamic Arbitration

This section discusses issues related to procedure in Islamic arbitration. Specifically, this section clarifies the number of arbitrators that can be appointed in Islamic arbitration and explains the disputes that are subject to arbitration as well as the scope of Islamic arbitration.

##### 4.7.1 Number of Arbitrators

Islamic arbitration can be conducted either by an odd number or by an even number of arbitrators.<sup>415</sup> Islamic law also permits resolution by a sole arbitrator.<sup>416</sup> If the dispute is decided by an even number of arbitrators, the decision should be reached by consensus of the arbitrators.<sup>417</sup> If the dispute is arbitrated by an odd number of arbitrators, the decision should be reached by a majority of the arbitrators, however, Islamic schools have not discussed whether consensus of the arbitrators is required when by an odd number of arbitrators.<sup>418</sup>

Islamic schools have also not addressed the maximum number of arbitrators that parties can appoint.<sup>419</sup> Instead, Islamic schools permit parties to choose the number of arbitrators without limits.<sup>420</sup> As a result, parties to arbitration are entitled to agree on appointing any number of arbitrators, whether an even or odd number of arbitrators.

Most arbitrations during the early development of Islamic law were conducted by sole arbitrators, while a few were conducted by two arbitrators. In their researches, Muslim scholars

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<sup>415</sup> 2 AL-SHIHRI, *supra* note 201, at 411; 2 AL-ASBAHI, *supra* note 201, at 266-67; 5 AL-UJAILI, *supra* note 201, at 339; 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>416</sup> 9 MUSA, *supra* note 51, at 58; 2 AL-ASBAHI, *supra* note 201, at 267; 4 ABU BAKAR BIN MUHAMMED SHATA AL-DIMYATI, EA'ANAT AL-TALIBEEN ALA HAL ALFATH FATAH AL-MUAIN [THE SUPPORTER OF STUDENTS ON UNDERSTANDING THE SHAFI' IH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 253 (1st ed. 1997); 15 AL-OTHIMAIN, *supra* note 340, at 284.

<sup>417</sup> 2 AL-SHIHRI, *supra* note 201, at 411; 9 MUSA, *supra* note 51, at 63.

<sup>418</sup> See 4 SULEIMAN BIN MUHAMMED BIN UMAR AL-BAJIRAMI, TOUHFAT AL-HABIB ALA SHARAH AL-KHATAIB [JURISPRUDENCE OF ISLAMIC LAW ACCORDING TO SHAFI' IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 385 (1995); see also MUHAMMED BIN UMAR NAWAWY AL-JAWI, NEHAIAAT AL-ZAIN FI ERSHAD AL-MUBTADI'EN [THE GUIDANCE OF BEGINNERS TO SHAFI' IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 367 (1st ed. n.d.).

<sup>419</sup> See 5 AL-UJAILI, *supra* note 201, at 339; see also 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>420</sup> See 4 BIN QUDAMH, *supra* note 131, at 130.

found that arbitration for dispute resolution was, historically, a valid option when the litigants agreed to appoint an arbitrator to resolve their dispute.<sup>421</sup> In addition, Muslim scholars noted that litigants were entitled to appoint two or more arbitrators to hear their dispute.<sup>422</sup> However, resolving disputes with three arbitrators did not occur often during the development of Islamic law.

Although Islamic schools confirmed that parties could agree to use three arbitrators, Islamic schools have not mentioned who is entitled to appoint the third arbitrator.<sup>423</sup> If there are three parties to a dispute, each party could select an arbitrator; if there are two parties to a dispute, both parties could appoint the third arbitrator together. Yet, the appointment of a third arbitrator by the other two arbitrators has not been discussed by the Islamic schools.

As a result, Islamic schools have not mentioned a rule for seniority among the three arbitrators. None of those three arbitrators has an additional authority over the others. However, this dissertation recommends applying the international commercial arbitration custom into the appointment of the third arbitrator and the issuance of the decision. The two selected arbitrators should appoint the third arbitrator (Chairman) where the decision is going to be determined by the agreement of the majority of the arbitrators.

Islamic arbitration allows parties to appoint either a sole arbitrator, an even number of arbitrators, or an odd number of arbitrators<sup>424</sup> without a limit on the total number of arbitrators.<sup>425</sup> Islamic schools require an even number of arbitrators reach a consensus,<sup>426</sup>

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<sup>421</sup> See 2 AL-ASBAHI, *supra* note 201, at 267-68.

<sup>422</sup> 5 AL-UJAILI, *supra* note 201, at 339; 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>423</sup> See 2 AL-SHIHRI, *supra* note 201, at 411; see also AL-JAWI, *supra* note 418, at 367.

<sup>424</sup> 8 ALQASM, *supra* note 52, at 100; MUHAMMED AL-ZAHIRI AL-QAMRAWI, AL-SERAJ AL-WAHAJ ALA MATIN AL-MENHAJ [ISLAMIC LAW JURISPRUDENCE IN ACCORDANCE WITH SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 367 (n.d.).

<sup>425</sup> See 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>426</sup> 2 AL-SHIHRI, *supra* note 201, at 411; 9 MUSA, *supra* note 51, at 63.

however, consent by the majority of an odd number of arbitrators in an arbitral tribunal should be enough to issue the decision.

#### 4.7.2. Disputes Subject to Islamic Arbitration

The Islamic schools have addressed disputes that are subject to Islamic arbitration and the scope of arbitration under Islamic law.<sup>427</sup> Some Islamic schools provide parties the right to arbitrate any kind of dispute, including criminal disputes, without restriction.<sup>428</sup> Other Islamic schools limit the types of disputes subject to arbitration to commercial and investment disputes and disputes arising out of or in connection with commercial or investment interests.<sup>429</sup> This dissertation advocates excluding the criminal disputes from scope of Islamic arbitration.<sup>430</sup>

Scholars from the Hanafiah school are divided into two opinions.<sup>431</sup> Some of the Hanafiah school scholars state that the scope of Islamic arbitration excludes criminal disputes because individuals do not possess the ownership over their bodies and, therefore, are not entitled to arbitrate criminal disputes.<sup>432</sup> Other Hanafiah school scholars suggest that the scope of Islamic arbitration includes criminal disputes because resolving criminal conflict is an individual's right.<sup>433</sup>

According to the Malikiyah school approach, the scope of Islamic arbitration includes commercial and investment disputes as well as any dispute arising out of or in connection with

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<sup>427</sup> 9 MUSA, *supra* note 51, at 60; 8 ALAISH, *supra* note 130, at 255; 13 ALAMRANI, *supra* note 133, at 24; 11 MUHAMMED BIN MUFLIAH BIN MUHAMMED BIN MUFARAJ, KETAB AL-FURU'A WA MA' AHO TASHAIH AL-FURU'A LEALA AL-DEEN [THE VOLUME OF STUDIES ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 129 (Abdullah Abdulmuhsin Alturki ed., 1st ed. 2003).

<sup>428</sup> 20 MOUHYEY AL-DEEN YAHYA BIN SHARAF AL-NAWAWI, AL-MAJMOU SHARAH AL-MOUHATHAB [THE VOLUME OF THE EXPLANATION ON SHAFI' IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 127 (n.d.); 6 ALBUHUTI, *supra* note 21, at 308.

<sup>429</sup> 8 ALAISH, *supra* note 130, at 255; 6 AL-KHATIB, *supra* note 130, at 268.

<sup>430</sup> 7 ALBABARTI, *supra* note 131, at 318; 8 ALAISH, *supra* note 130, at 255; 16 ALBSRI, *supra* note 326, at 325; 11 MUFARAJ, *supra* note 427, at 129.

<sup>431</sup> 7 ALBABARTI, *supra* note 131, at 318; 9 MUSA, *supra* note 51, at 60.

<sup>432</sup> 7 ALBABARTI, *supra* note 131, at 318.

<sup>433</sup> 9 MUSA, *supra* note 51, at 60.

commercial or investment issues.<sup>434</sup> In addition, the Malikiyah school does not exclude all criminal disputes from the scope of Islamic arbitration.<sup>435</sup> Instead, the Malikiyah school extends the scope of Islamic arbitration to include infraction and misdemeanor cases,<sup>436</sup> yet, it excludes felonies from the scope of the Islamic arbitration due to the limited authority and jurisdiction of the arbitrators.<sup>437</sup>

The Shafi'iah school approach to the scope of Islamic arbitration, however, is less clear. Scholars in the Shafi'iah school are divided into three different categories on this issue.<sup>438</sup> Some scholars state that the scope of Islamic arbitration is only limited to commercial and investment disputes as well as any dispute arising out of or in connection with these areas.<sup>439</sup> Other scholars suggest that the scope of Islamic arbitration includes all disputes people want to arbitrate.<sup>440</sup> However, a third group of scholars considers the scope of Islamic arbitration to include commercial and investment disputes, any dispute arising out of or in connection with commercial or investment issues, as well as infraction and misdemeanor cases.<sup>441</sup>

The Hanbaliyah school approach is divided into two different opinions.<sup>442</sup> Some of the Hanbaliyah school scholars limit the types of disputes subject to Islamic arbitration to commercial and investment disputes as well as any dispute arising out of or in connection with these issues.<sup>443</sup> Other scholars extend the scope of Islamic arbitration to include all types of disputes individuals face and provide the right to resolve these issues through arbitration.<sup>444</sup> Those

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<sup>434</sup> 6 ABDULRAHMAN, *supra* note 53, at 87.

<sup>435</sup> 4 AL-DOUSUGI, *supra* note 50, at 136.

<sup>436</sup> 4 AL-KHALOUTI, *supra* note 131, at 198-99.

<sup>437</sup> *Id.*

<sup>438</sup> 6 AL-KHATIB, *supra* note 130, at 268; 3 AL-SHIRAZI, *supra* note 131, at 378; 13 ALAMRANI, *supra* note 133, at 24.

<sup>439</sup> 6 AL-KHATIB, *supra* note 130, at 268.

<sup>440</sup> 3 AL-SHIRAZI, *supra* note 131, at 378.

<sup>441</sup> 13 ALAMRANI, *supra* note 133, at 24.

<sup>442</sup> 4 BIN QUDAMH, *supra* note 131, at 224; 6 ALBUHUTI, *supra* note 21, at 308.

<sup>443</sup> 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>444</sup> 6 ALBUHUTI, *supra* note 21, at 308.

scholars consider arbitrators similar to judges and, therefore, give arbitrators the option to resolve any dispute parties submit to arbitration.<sup>445</sup>

There are two reasons there is no consensus among Islamic schools and Muslim scholars on disputes subject to Islamic arbitration. First, some Islamic schools include criminal disputes within the scope of Islamic arbitration because arbitrators, according to those schools, are the same as judges and, therefore, are entitled to decide any type of dispute.<sup>446</sup> Second, the types of disputes during the initial development of Islamic law lacked diversity.<sup>447</sup> However, regardless of divergent opinions on the scope of Islamic arbitration, Islamic law should adopt limits on the scope of arbitration and prevent any type of criminal dispute from arbitration due to the limited authority and jurisdiction of arbitrators.<sup>448</sup>

#### 4.8. Applicable Law and Means of Proof

This section discusses concerns related to procedure in Islamic arbitration. The focus is on the applicable law that should be used by arbitrators as well as the means of proof—acceptable types of evidence in Islamic arbitration—that are approved by the Islamic schools.

##### 4.8.1. Applicable Law

Since there are four main schools of thoughts under Islamic law, entitling parties the option to choose an Islamic school of thought as the only law that governs their dispute is a concern under Islamic law.<sup>449</sup> In addition, this concern has not been properly addressed by the Islamic schools and, therefore, some Islamic schools mention the rights of the arbitration parties

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<sup>445</sup> 15 AL-OTHIMAIN, *supra* note 340, at 286-88.

<sup>446</sup> 16 AL-SARKHSI, *supra* note 326, at 111; 10 ABDULRAHMAN, *supra* note 327, at 35-36.

<sup>447</sup> *See* ABDULQADIR, *supra* note 1, at 60.

<sup>448</sup> *See* OTHMAN, *supra* note 2, at 51-52.

<sup>449</sup> *See* IBRAHIM BIN MUHAMMAD BIN IBRAHIM, MUJAMA AL-ANHUR FI SHARH MULTAQQA AL-ABHUR [JURISPRUDENCE OF ISLAMIC LAW BASED ON HANAFIAH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 241 (Khalil Imran Almansour ed., 1st ed. 1998); *see also* 10 ABDULRAHMAN, *supra* note 327, at 35.

to choose a specific Islamic school of thought as the applicable law through the enforceability of the arbitration awards after they are rendered.<sup>450</sup>

In other words, if the parties follow the Maliki school, yet agree the Hanafi school approach will govern their arbitration, is this stipulation valid under Islamic law? Some Islamic schools explicitly address this situation while other Islamic schools refer to this situation by discussing the discretion that judges possess over the enforceability of the arbitration awards. For example, some Islamic schools permit a judge to vacate arbitration awards decided by an Islamic school approach that differs from the approach the judge follows.<sup>451</sup> The schools that grant judges this discretion invalidate the choice of the parties to resolve their dispute by a specific Islamic school approach.

Yet, other Islamic schools do not grant their judges this kind of discretion and state that judges do not have the right to vacate arbitration awards decided by different Islamic school approaches.<sup>452</sup> Those Islamic schools grant parties the right to choose a specific Islamic school approach as the applicable law that governs their arbitration.

The Hanafi school provides some general rules regarding the law that governs arbitration; arbitrators must not render awards that conflict with judicial precedent<sup>453</sup> and arbitration awards are not enforced if they conflict with all Islamic school approaches.<sup>454</sup>

However, some Hanafi scholars state that judges are entitled to vacate the arbitration awards if

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<sup>450</sup> See 7 ALBABARTI, *supra* note 131, at 317; see also 10 ABDULRAHMAN, *supra* note 327, at 35.

<sup>451</sup> See 2 ABDULRAHMAN BIN MUHAMMED BIN SULEIMAN, *MUJAM' A AL-ANHUR FI SHARH MULTAGA AL-ABHUR [ISLAMIC LAW JURISPRUDENCE BASED ON HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION]* 174 (n.d.).

<sup>452</sup> 2 SHAMS AL-DEEN MUHAMMED BIN AHMED BIN ALI BIN ABDULKHALIG, *JWAHIR AL-AUGUD WA MUIN AL-GUDAT WA AL-MWAGAIN WA AL-SHOUHUD [VALUE OF CONTRACTS, GUIDANCE OF JUDGES AND WITNESSES] [AUTHOR'S TRANSLATION]* 292 (Musad Abdulhamid Muhammed ed., 1st ed. 1996); see 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>453</sup> See 8 ABDULAZIZ, *supra* note 409, at 119-20.

<sup>454</sup> See 8 ALAISH, *supra* note 130, at 283.

they are decided by a different Islamic school approach than the judge follows.<sup>455</sup> For example, if an arbitration dispute was decided in accordance with the Malikiyah school approach, a judge who follows the Hanafiah school approach is entitled to vacate that award because it conflicts with the approach that he follows.<sup>456</sup> According to these scholars, parties to arbitration are not entitled to choose a different Islamic school approach to govern their disputes.

The Malikiyah school approach to the applicable law in arbitration is not clear. Some scholars state that when the arbitration parties follow the Malikiyah school, the arbitrators must also use the Malikiyah school approach as the applicable law.<sup>457</sup> If the arbitrators do not use the Malikiyah school approach, the arbitration award will not be enforced.<sup>458</sup> However, other Malikiyah scholars recognize that the applicable law is what the arbitrators decide to use and the arbitration awards should be enforced even if they are not based on the same Islamic school used by the judge enforcing the arbitration award.<sup>459</sup> As a result, the right of arbitration parties to choose the approach to govern their disputes is divided in the Malikiyah school.

The approach of the Shafi'ih and Hanbaliyah schools is almost the same. Both schools do not entitle judges to vacate arbitration awards decided in accordance with a different Islamic school's approach.<sup>460</sup> In addition, both schools, as a general principle, only allow arbitration awards to be vacated on the same grounds for vacating judicial judgments.<sup>461</sup> Both schools

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<sup>455</sup> See 2 SULEIMAN, *supra* note 451, at 174.

<sup>456</sup> See 5 MUHAMMED AMEEN BIN UMAR BIN ABDULAZIZ BIN ABIDEEN, RAD AL-MUHTAR ALA AL-DOUR AL-MUKHTAR [THE EXPLANATION OF ISLAMIC LAW IN ACCORDANCE WITH HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 431 (2nd ed. 1992).

<sup>457</sup> 10 ABDULRAHMAN, *supra* note 327, at 36.

<sup>458</sup> 6 ABDULRAHMAN, *supra* note 53, at 112.

<sup>459</sup> See 8 ALQASM, *supra* note 52, at 100; see also 8 ALAISH, *supra* note 130, at 283.

<sup>460</sup> 2 ABDULKHALIG, *supra* note 452, at 292; see 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>461</sup> 5 AL-UJAILI, *supra* note 201, at 340; 6 ALBUHUTI, *supra* note 21, at 309.

essentially permit their adherents to choose the Islamic school approach that governs their arbitrations.

The different approaches of Islamic schools are particularly relevant due to the applicable law actually governing the arbitration. Parties should have the right to choose the law of any country as the applicable law for arbitration as long as that law is in accordance with one of the Islamic school approaches. For example, parties in Islamic arbitration should be entitled to choose the law of other Muslim countries, such as the United Arab Emirates, Qatar, or Saudi Arabia, as the applicable law for their arbitration since the laws of those countries are in accordance with one of the Islamic schools. In addition, parties in Islamic arbitration should also be entitled to choose the law of a non-Muslim country if that law does not conflict with all Islamic schools' approaches. Parties could then choose English law as the governing law for their arbitration in specific contracts as long as English law does not conflict with all approaches of Islamic schools.

Unfortunately, this idea is not mentioned by the Islamic schools since applying the laws of another state to arbitration was less relevant during the development of Islamic law. Although Islamic schools do not discuss the right of the parties to choose the laws of other states to govern their disputes, parties in Islamic arbitration should be entitled to choose the applicable law in their disputes as long as that law is in accordance with one of the Islamic schools' approaches.

Essentially, Islamic schools have not clearly clarified the law that governs arbitration, as well as the parties' right to choose the law that decides their disputes.<sup>462</sup> While some Islamic schools prohibit the use of a different Islamic school's approach to arbitration,<sup>463</sup> other Islamic

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<sup>462</sup> See 8 ABDULAZIZ, *supra* note 409, at 119; see also 6 ABDULRAHMAN, *supra* note 53, at 112.

<sup>463</sup> See 2 SULEIMAN, *supra* note 451, at 174; see also 6 ABDULRAHMAN, *supra* note 53, at 112.



schools permit their followers to choose a different Islamic school's approach.<sup>464</sup> A modern approach to Islamic arbitration should grant parties the right to choose the law of any country as the applicable law as long as that law does not conflict with all the Islamic schools.

#### 4.8.2. Means of Proof

Islamic schools have briefly mentioned the means of proof or types of evidence accepted in Islamic arbitration, but without extensive details.<sup>465</sup> The general principle is that the types of evidence accepted in arbitration are the same types of evidence accepted in the judicial system.<sup>466</sup> Evidence should reveal the relevant facts and demonstrate the rights at issue.<sup>467</sup>

Only the Hanafiah and Shafi'ih schools, however, officially recognize this general principle. Both schools state that the types of evidence accepted in arbitration disputes are the same types of evidence accepted in the judicial system.<sup>468</sup> Evidence presented during an arbitration must adhere to the same requirements for evidence in the judicial system.<sup>469</sup> Essentially, anything that reveals relevant facts is admissible evidence during arbitration.<sup>470</sup> In addition, both schools note that arbitrators cannot resolve disputes without considering evidence presented by the parties.<sup>471</sup>

Overall, Islamic law recognizes that the choice of law that governs arbitrations is a right that belongs to the parties provided it is in accordance with one of the Islamic school's

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<sup>464</sup> 2 ABDULKHALIG, *supra* note 452, at 292; *see* 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>465</sup> *See* 7 MUHAMMAD ET AL., *supra* note 50, at 25-26; 4 AL-ANSARI, *supra* note 395, at 288.

<sup>466</sup> *See* 2 AL-MOUSALI, *supra* note 383, at 94.

<sup>467</sup> *See* AL-REASAH AL-AMAH LLBUHUTH AL-ALMIAH WA AL-IFTA, <http://www.alifta.net> (last visited Jan. 31, 2017).

<sup>468</sup> *See* 7 MUHAMMAD ET AL., *supra* note 50, at 25-26; *see also* 4 AL-DIMYATI, *supra* note 416, at 253-55.

<sup>469</sup> *See* 2 AL-MOUSALI, *supra* note 383, at 94.

<sup>470</sup> *See* AL-REASAH AL-AMAH, *supra* note 467.

<sup>471</sup> *See* 7 MUHAMMAD ET AL., *supra* note 50, at 25-26; 4 AL-ANSARI, *supra* note 395, at 288.

approaches.<sup>472</sup> In addition, the types of evidence accepted in arbitration are the same types of evidence accepted in the judicial system.<sup>473</sup>

#### 4.9. Restrictions on Signing Arbitration Clauses and Appointment of Arbitrators

This section discusses issues related to Islamic arbitration procedure, particularly authorization requirements for arbitration clauses and prohibitions for the appointment of certain individuals as arbitrators.

##### 4.9.1. Authorization Required for Arbitration Clauses

Consent to arbitration for dispute resolution deprives parties the right to use the judicial system to resolve disputes, therefore, some Islamic schools recognize certain parties who are not entitled to consent to arbitration without authorization. This secures the right to use the judiciary for dispute resolution since consent to arbitration might not be in favor of some people due to its high cost and lack of appeal process.

Under Islamic law, individuals acting on behalf of others do not have full legal capacity to sign an arbitration clause for others without prior authorization.<sup>474</sup> Furthermore, the Shafi'ih school specifically mentions certain people who are not entitled to sign arbitration clauses on behalf of others without acquiring their permission, such as individuals in bankruptcy proceedings and agents of others.<sup>475</sup>

According to the Shafi'ih school, agents acting and working on behalf of clients are not allowed to sign arbitration clauses nor consent to arbitration on behalf of their clients without

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<sup>472</sup> See 8 ABDULAZIZ, *supra* note 409, at 119; see also 10 ABDULRAHMAN, *supra* note 327, at 36.

<sup>473</sup> See 2 AL-MOUSALI, *supra* note 383, at 94.

<sup>474</sup> 8 SHAMS AL-DEEN MUHAMMED BIN ABI AL-ABAS AHMED BIN HAMZAH, NEHAJAT AL-MUHTAJ ELA SHARAH AL-MINHAIJ [THE SATISFACTION OF STUDENT ON SHAFI' IH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 242 (1984).

<sup>475</sup> 10 AL-HITIMI, *supra* note 393, at 118.

receiving permission from their clients.<sup>476</sup> In addition, individuals working with partners are not entitled to sign arbitration clauses or consent to arbitration without obtaining authorization from their partners.<sup>477</sup> The Shafi'ih school requires authorization to consent to arbitration on behalf of clients or partners since arbitration might not be in favor of the clients or partners.<sup>478</sup>

The Shafi'ih school also does not permit those in bankruptcy proceedings or minors to consent to arbitration without advance permission.<sup>479</sup> Individuals undergoing bankruptcy are not entitled to sign arbitration clauses without obtaining permission from their creditors because arbitration might not be in favor of the creditors.<sup>480</sup> In addition, since minors have limited authority to work and conduct business, they are not allowed to consent to arbitration without permission from their sponsors to avoid depriving minors of their right to use the judicial system for dispute resolution.<sup>481</sup>

#### 4.9.2. People Banned from Appointment as Arbitrators

There are limits on selecting arbitrators in Islamic arbitration. Although parties have the right to select their own arbitrators, parties are not entitled to select certain types of people as arbitrators.<sup>482</sup> For instance, some individuals cannot be appointed as arbitrators due to their relationships with the parties.<sup>483</sup> Some Islamic schools specifically mention types of people that are not allowed to act as arbitrators, such as the mentally incapacitated and minors,<sup>484</sup> while other Islamic schools are silent.

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<sup>476</sup> 6 AL-KHATIB, *supra* note 130, at 267-68.

<sup>477</sup> 8 HAMZAH, *supra* note 474, at 242.

<sup>478</sup> 6 AL-KHATIB, *supra* note 130, at 267-68.

<sup>479</sup> 8 HAMZAH, *supra* note 474, at 242; *see* 6 AL-KHATIB, *supra* note 130, at 267-68.

<sup>480</sup> 8 HAMZAH, *supra* note 474, at 242.

<sup>481</sup> *See* 6 AL-KHATIB, *supra* note 130, at 267-68.

<sup>482</sup> 8 ALQASM, *supra* note 52, at 100-02.

<sup>483</sup> 6 AL-KHATIB, *supra* note 130, at 269.

<sup>484</sup> 7 AL-MALIKI, *supra* note 326, at 145.

As a general principle, mentally incapacitated individuals and minors are not allowed to act as arbitrators.<sup>485</sup> Parties to arbitration are not allowed to appoint minors and mentally incapacitated individuals because they are under the custody and control of others and do not possess independent legal capacity.<sup>486</sup> Therefore, the appointment of those individuals is invalid since they lack the knowledge and ability to arbitrate disputes.

In addition, parties to arbitration are not entitled to appoint individuals who lack knowledge of the laws or the ability to understand the rules and effectively arbitrate disputes. This principle avoids the risk and danger of issuing unreasonable or unfair decisions.<sup>487</sup> For example, individuals without education or with basic education are not supposed to act as arbitrators due to their lack of knowledge about the arbitration mechanism and their inability to effectively resolve disputes.<sup>488</sup>

Moreover, the Shafi'ih school also discusses situations where individuals are either allowed or not allowed to act as arbitrators due to their connections with the parties.<sup>489</sup> For example, some scholars do not permit parties to appoint their parents, sons, daughters, or relatives as arbitrators.<sup>490</sup> Those scholars compare arbitrators to judges and prohibit the appointment of arbitrators who are related to any of the parties since judges are prohibited from adjudicating disputes if they are related to the litigants.<sup>491</sup> Other scholars validate this type of appointment as long as the other parties consent and do not challenge the appointment.<sup>492</sup>

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<sup>485</sup> 4 AL-DOUSUGI, *supra* note 50, at 135-36.

<sup>486</sup> See 8 IBRAHIM BIN MUHAMMAD BIN ABDULLAH BIN MUHAMMAD BIN MUFLEH, AL-MUBDAE FI SHARH AL-MUQNAE [THE CREATOR OF THE EXPLANATION ON AL-MUQNAE BRIEF] [AUTHOR'S TRANSLATION] 153 (1st ed. 1997); see also ALBUHUTI, *supra* note 51, at 705.

<sup>487</sup> 8 ALAISH, *supra* note 130, at 284.

<sup>488</sup> See 7 AL-MALIKI, *supra* note 326, at 145.

<sup>489</sup> 6 AL-KHATIB, *supra* note 130, at 269; 4 AL-ANSARI, *supra* note 395, at 288.

<sup>490</sup> 6 AL-KHATIB, *supra* note 130, at 269.

<sup>491</sup> *Id.*

<sup>492</sup> 4 AL-ANSARI, *supra* note 395, at 288.

However, in general, the appointment of an arbitrator who is connected with any party should be invalid to retain neutrality of the arbitration.

Overall, agents, partners, individuals in bankruptcy, and minors are not allowed to sign arbitration clauses without permission from their clients, partners, creditors, or sponsors. In addition, the appointment of mentally incapacitated, minors, and persons without education as arbitrators is invalid as is the appointment of any person connected or related to any of the parties.

#### 4.10. Withdrawal from Arbitration and Dismissing and Challenging Arbitrators

This section examines additional procedural concerns in Islamic arbitration. First, this section discusses the right of the parties to withdraw from the arbitration or reverse on arbitration, and whether this is a right that belongs to the parties individually or jointly. Second, this section clarifies situations where arbitrators can be challenged or dismissed from their role as arbitrators.

##### 4.10.1. Withdrawal from Arbitration

Whether the arbitration parties have right to withdraw from the arbitration, is an issue discussed by the Islamic schools.<sup>493</sup> Some Islamic schools grant each party the right to withdraw from arbitration before the issuance of the arbitration award,<sup>494</sup> while other Islamic schools prohibit parties from withdrawing from the arbitration after the conclusion of the hearings but

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<sup>493</sup> 9 MUSA, *supra* note 51, at 59; 5 ZAKARIA BIN MUHAMMED BIN AHMED BIN ZAKARIA AL-ANSARI, AL-QURAR AL-BAHIAH FI SHARAH AL-BAHJAH AL-WARDIAH [EXPLANATION ON SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 241 (n.d.); 4 AL-DOUSUGI, *supra* note 50, at 140-41; 11 ABDULRAHMAN BIN MUHAMMED BIN AHMED BIN GUDAMAH AL-MAGDISI, AL-SHARAH AL-KABAIR ALA MATIN AL-MUGNAE [THE GREAT EXPLANATION ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 393 (n.d.).

<sup>494</sup> 2 AL-HADADI, *supra* note 52, at 246; 10 AL-HITIMI, *supra* note 393, at 119.

before the award is issued.<sup>495</sup> However, the arbitration parties should not have the right to individually withdraw from arbitration, yet, the request to withdraw should be granted if the parties agree to withdraw together.<sup>496</sup>

Both the Hanafiah and Shafi'ih schools give parties the right to individually withdraw before the issuance of the arbitration award.<sup>497</sup> Specifically, the Hanafiah school states that each party is entitled to withdraw from arbitration provided the arbitrators have not issued the award,<sup>498</sup> while the Shafi'ih school states that when one party withdraws before the issuance of the arbitration award, arbitrating the dispute is invalid.<sup>499</sup> Consequently, if each party is entitled to individually withdraw from the arbitration, both parties have the right to withdraw jointly as well.<sup>500</sup>

Conflict between the Malikiah school scholars results in three different viewpoints.<sup>501</sup> The first viewpoint does not grant the arbitration parties the right to individually withdraw from the arbitration at any stage of the process, but grants the right to withdraw if all the parties agree to withdraw.<sup>502</sup> The second viewpoint grants each party the right to withdraw from the arbitration before presenting evidence in the hearings.<sup>503</sup> The third viewpoint allows each party the right to withdraw from the arbitration before the issuance of the arbitration award.<sup>504</sup>

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<sup>495</sup> 10 ABDULRAHMAN, *supra* note 327, at 37; *see* 11 ALA AL-DEEN ABU AL-HASAN ALI BIN SULEIMAN AL-MRDAWY, AL-ENSAF FI MA'ARIFAT AL-RAJIAH MIN AL-KHILAF [THE CENTER OF KNOWLEDGE ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 199 (2nd ed. n.d.).

<sup>496</sup> 4 AL-DOUSUGI, *supra* note 50, at 140-41.

<sup>497</sup> 9 MUSA, *supra* note 51, at 59; 5 AL-ANSARI, *supra* note 493, at 241.

<sup>498</sup> 2 AL-HADADI, *supra* note 52, at 246.

<sup>499</sup> 10 AL-HITIMI, *supra* note 393, at 119.

<sup>500</sup> 5 BIN ABIDEEN, *supra* note 456, at 429.

<sup>501</sup> 4 AL-DOUSUGI, *supra* note 50, at 140-41; 10 ABDULRAHMAN, *supra* note 327, at 37; 8 ALAISH, *supra* note 130, at 301.

<sup>502</sup> 4 AL-DOUSUGI, *supra* note 50, at 140-41.

<sup>503</sup> 10 ABDULRAHMAN, *supra* note 327, at 37.

<sup>504</sup> 8 ALAISH, *supra* note 130, at 301.

The Hanbaliah school scholars are also divided into three different viewpoints.<sup>505</sup> Some scholars state that each party has the right to withdraw from the arbitration before the closing of the dispute hearings.<sup>506</sup> Other scholars state that each party has the right to withdraw from the arbitration *after* the closing of the dispute hearings but *before* the issuance of the arbitration award.<sup>507</sup> And still other scholars state that when the arbitrators start the process of issuing the award after the end of the hearings, no party has the right to withdraw from the arbitration,<sup>508</sup> however, all parties are still entitled to jointly withdraw from the arbitration at any stage of the process.<sup>509</sup>

The Islamic schools provide more specific guidance on the right of the parties to individually withdraw from arbitration.<sup>510</sup> Some Islamic schools do not allow individual withdrawal from the arbitration at any stage,<sup>511</sup> while other Islamic schools give the parties the right to withdraw from arbitration either before the end of the hearings<sup>512</sup> or after the end hearings but before the issuance of the award.<sup>513</sup>

However, arbitration parties should not have the right to individually withdraw from the arbitration at any stage of the process<sup>514</sup> for two reasons. First, individually withdrawing from the arbitration disables the other parties' interests in resolving their dispute through arbitration.<sup>515</sup>

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<sup>505</sup> See 11 AL-MRDAWY, *supra* note 495, at 199; see also 11 AL-MAGDISI, *supra* note 493, at 393; see also 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>506</sup> See 11 AL-MRDAWY, *supra* note 495, at 199.

<sup>507</sup> 11 AL-MAGDISI, *supra* note 493, at 393.

<sup>508</sup> 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>509</sup> See 11 AL-MRDAWY, *supra* note 495, at 199; see also 11 AL-MAGDISI, *supra* note 493, at 393; see also 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>510</sup> 9 MUSA, *supra* note 51, at 59; 5 AL-ANSARI, *supra* note 493, at 241; 4 AL-DOUSUGI, *supra* note 50, at 140-41; 11 AL-MAGDISI, *supra* note 493, at 393.

<sup>511</sup> 4 AL-DOUSUGI, *supra* note 50, at 140-41.

<sup>512</sup> See 11 AL-MRDAWY, *supra* note 495, at 199.

<sup>513</sup> 8 ALAISH, *supra* note 130, at 301.

<sup>514</sup> 4 AL-DOUSUGI, *supra* note 50, at 140-41; AL-SHOKANI, *supra* note 40, at 835.

<sup>515</sup> See 13 ALAMRANI, *supra* note 133, at 24.

Second, validating individually withdrawal from the arbitration during any stage permits parties to participate until they sense from the reactions and talks of the arbitrators that the outcome will not be in their favor, which will affect the arbitration purpose.<sup>516</sup>

#### 4.10.2. Dismissing and Challenging Arbitrators

Dismissing or challenging arbitrators after appointment is an issue not properly discussed in Islamic law.<sup>517</sup> Islamic schools do not distinguish arbitrator dismissal from withdrawal from arbitration. In addition, Islamic schools have not clarified whether parties can challenge the appointment of arbitrators,<sup>518</sup> however, some Islamic schools recognize situations where arbitrators can be dismissed either automatically during the arbitration or by the choice of the parties.<sup>519</sup> Moreover, some Islamic schools imply that arbitrators can be challenged by some of the parties if those arbitrators have relationships or connections with the other parties.<sup>520</sup>

There are three common situations where arbitrators can be dismissed: when the parties jointly decide to dismiss the arbitrators; when the time for arbitration expires if the arbitration parties set a time limit in their initial agreement; and when an arbitrator loses one or more of the required qualifications.<sup>521</sup> In the first situation, some Islamic schools recognize that the right to dismiss arbitrators belongs to the parties individually and, therefore, each party can dismiss their appointed arbitrator without the consent of the other parties.<sup>522</sup> Other Islamic schools, however,

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<sup>516</sup> 4 BIN QUDAMH, *supra* note 131, at 224; 15 AL-OTHIMAIN, *supra* note 340, at 286.

<sup>517</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 194; see also 8 ABDULAZIZ, *supra* note 409, at 120; see also 7 MUHAMMAD ET AL., *supra* note 50, at 28; see also 6 AL-KHATIB, *supra* note 130, at 169.

<sup>518</sup> See 2 AL-SHIHRI, *supra* note 201, at 411; see also 5 BIN ABIDEEN, *supra* note 456, at 431; see also 6 AL-KHATIB, *supra* note 130, at 169.

<sup>519</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 194; 8 ABDULAZIZ, *supra* note 409, at 120.

<sup>520</sup> See 2 AL-SHIHRI, *supra* note 201, at 411; see also 6 AL-KHATIB, *supra* note 130, at 169.

<sup>521</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 194; 8 ABDULAZIZ, *supra* note 409, at 120.

<sup>522</sup> 10 ABDULRAHMAN, *supra* note 327, at 37; 10 AL-HITIMI, *supra* note 393, at 119; 7 AL-SIWASI, *supra* note 164, at 317.



consider arbitrator dismissal a joint right of all parties and, therefore, the decision of dismissing the arbitrators requires the consent of all parties.<sup>523</sup>

In addition, some Muslim scholars consider specific times when parties can dismiss the appointed arbitrators.<sup>524</sup> Some scholars allow arbitrators to be dismissed by the parties any time before the issuance of the arbitration award, even if the arbitrators are dismissed after evidence is presented and the hearings are closed.<sup>525</sup> Other scholars only validate dismissal of the arbitrators before the hearings and presentation of evidence have taken place.<sup>526</sup>

Moreover, the number of arbitrators is not an issue when one of the parties or all the parties decide to dismiss the arbitrators.<sup>527</sup> For example, if the arbitral tribunal is constituted by a sole arbitrator and one of the parties dismisses that arbitrator, the arbitration cannot be conducted because the arbitrator does not have consent to arbitrate the dispute from all involved parties.<sup>528</sup> If the arbitral tribunal is constituted by an even or odd number of arbitrators and one of the parties dismisses one of the arbitrators, the rest of the arbitrators are no longer entitled to arbitrate the dispute due to the lack of consent to arbitration from all parties so the arbitration cannot be conducted.<sup>529</sup>

In the second situation, arbitrators are dismissed automatically if the parties set a time period for any arbitration and time expires before the dispute is resolved.<sup>530</sup> In the third situation, arbitrators are also dismissed automatically if they lose one or more of their required

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<sup>523</sup> See 8 ABDULAZIZ, *supra* note 409, at 121; see also 1 IBRAHIM BIN ALI BIN MUHAMMED AL-YAMARI, TABSIRAT AL-HUKAM FI OSUL AL-AGDIAH WA MANAHIJ AL-HUKAM [THE GUIDANCE OF JUDGES ON THE PRINCIPLES OF JUDGMENTS AND THEIR APPLICATIONS] [AUTHOR'S TRANSLATION] 63 (1st ed. 1986).

<sup>524</sup> 11 AL-NAWAWI, *supra* note 375, at 122; 10 ABDULRAHMAN, *supra* note 327, at 37.

<sup>525</sup> 11 AL-NAWAWI, *supra* note 375, at 122; 5 AL-UJAILI, *supra* note 201, at 340.

<sup>526</sup> 10 ABDULRAHMAN, *supra* note 327, at 37; 1 AL-YAMARI, *supra* note 523, at 63.

<sup>527</sup> See 8 ABDULAZIZ, *supra* note 409, at 121; 5 AL-UJAILI, *supra* note 201, at 340.

<sup>528</sup> See 8 ABDULAZIZ, *supra* note 409, at 121.

<sup>529</sup> See 5 AL-UJAILI, *supra* note 201, at 340.

<sup>530</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 194.

qualifications during the time of the arbitration.<sup>531</sup> For example, if an arbitrator is involved in an accident and becomes blind during the arbitration, that arbitrator is dismissed automatically regardless of the consent of the parties, since the arbitrator no longer retains a necessary sense to examine evidence.<sup>532</sup>

Ideally, however, parties to arbitration should not be entitled to individually dismiss arbitrators after the arbitral tribunal is constituted.<sup>533</sup> By allowing parties to individually dismiss arbitrators, the interests of the other parties are compromised.<sup>534</sup> In addition, this would prevent parties who recognize that the outcome might not be in their favor from dismissing arbitrators and jeopardizing proper resolution of the dispute.<sup>535</sup>

When parties have the right to jointly dismiss the arbitrators, arbitrators also have the right to step down from their appointments and leave the arbitration.<sup>536</sup> While it is not desirable for arbitrators to step down from their appointments before the dispute is resolved, there are two situations where arbitrators are permitted to step down from their appointments.<sup>537</sup> The first is when an arbitrator cannot identify the ideal solution due to the complexities of the dispute; the second is when an arbitrator doubts or becomes confused on the ideal resolution of the dispute.<sup>538</sup>

Islamic schools have not separately discussed challenging arbitrators, yet an interpretation according to some Islamic schools can be inferred from the prohibition on parties appointing their parents, sons, daughters, or other relatives as arbitrators.<sup>539</sup> Since some Islamic

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<sup>531</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 28.

<sup>532</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 194.

<sup>533</sup> See 8 ABDULAZIZ, *supra* note 409, at 121; see also 1 AL-YAMARI, *supra* note 523, at 63.

<sup>534</sup> See 13 ALAMRANI, *supra* note 133, at 24.

<sup>535</sup> See 4 BIN QUDAMH, *supra* note 131, at 224.

<sup>536</sup> 9 ALBSRI, *supra* note 326, at 605.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

<sup>539</sup> See 2 AL-SHIHRI, *supra* note 201, at 411; see also 5 BIN ABIDEEN, *supra* note 456, at 431; see also 6 AL-KHATIB, *supra* note 130, at 169.

schools invalidate the arbitrator appointments of individuals connected or related to the parties,<sup>540</sup> if one of the parties appoints an arbitrator from this category, that arbitrator can be challenged by the other parties.

Dismissing arbitrators is a joint right of the parties if they decide to use it after the arbitral tribunal is constituted.<sup>541</sup> That means none of the parties should be entitled to dismiss any arbitrator without the consent of the other parties.<sup>542</sup> In addition, parties are entitled to challenge arbitrators if there is a connections or relationship between those arbitrators and other parties.<sup>543</sup>

All in all, withdrawing from the arbitration should be a joint right that belongs to the parties together and, therefore, parties are not entitled to individually withdraw from arbitration. In addition, dismissing the arbitrators follows the same rules as withdrawing from the arbitration. As a result, none of the arbitration parties has the right to individually dismiss the arbitrators, yet they have the right to jointly dismiss.

#### 4.11. Conclusion

After discussing and clarifying all the sections in this chapter, this chapter recognizes that arbitrators are not judges and, therefore, should not be required to possess the same qualifications as judges. Arbitrators decide specific disputes for specific parties willingly bound by the arbitral awards. In addition, arbitrators differ from judges due to their limited authority and jurisdiction, which are also derived from the will of the parties. Moreover, many of the Muslim scholars who considered arbitrators to be the same as judges lived when arbitration was not a common dispute resolution mechanism, which led those Muslim scholars to view arbitrators as judges.

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<sup>540</sup> See 7 MUHAMMAD ET AL., *supra* note 50, at 28; see also 6 AL-KHATIB, *supra* note 130, at 169.

<sup>541</sup> See 8 ABDULAZIZ, *supra* note 409, at 121.

<sup>542</sup> See *Id.*

<sup>543</sup> See 7 MUHAMMAD ET AL., *supra* note 50, at 28; see also 6 AL-KHATIB, *supra* note 130, at 169.

To promote consistency in Islamic arbitration, the Saudi Arabian arbitration law approach to the requirements and qualifications of arbitrators should be uniformly adopted. The Saudi Arabian arbitration law does not require arbitrators to possess the qualifications of judges but instead balances the right of the arbitration parties to select arbitrators with the desired qualifications to ensure adherence to the proceedings and formalities of arbitration awards by requiring at least one arbitrator with a law background in each arbitral tribunal. As a result, this chapter recommends considering the requirements and qualifications of arbitrators provided by the Saudi Arabian arbitration law as a uniformly modern standard of Islamic arbitration.

In addition, this chapter reaches the conclusion that there is no specific restriction prevents women from the appointment as arbitrators. Since women are capable to rule on a disputed issue and separate between legality and illegality, women are entitled to serve as arbitrators without limitations. Furthermore, since parties are entitled to appoint arbitrators with the desired qualifications that fit deciding their disputes, parties can appoint women as their arbitrators. As a result, this chapter recognizes the right of women to serve as arbitrators whether in a sole arbitrator tribunal or in three-arbitrator tribunal.

## CHAPTER 5

### VALIDITY OF APPOINTING WOMEN AS JUDGES IN COURTS

#### 5.1. Introduction

For some Islamic scholars, whether Islamic law permits women to serve as judges determines whether women are permitted to serve as arbitrators.<sup>544</sup> Although this dissertation focuses on arbitration, it is necessary to analyze whether Islamic law allows women to serve as judges to establish the legitimacy of women arbitrators under Islamic law. This chapter concludes that the appointment of women judges is valid, countering scholars who contend the appointment of women judges is invalid, so their appointment as arbitrators is invalid.

Islamic scholars offer significantly different opinions on whether Islamic law permits women to serve as judges.<sup>545</sup> Some scholars believe that Islamic law does not permit women to serve as judges or arbitrators.<sup>546</sup> Others believe women are allowed to serve as both judges and arbitrators.<sup>547</sup> Although opinions diverge, there are essentially three different schools of thoughts regarding the validity of appointing women judges: (1) women are never allowed to serve as judges; (2) women are allowed to be appointed as judges, except in criminal cases; and (3) women are allowed to serve as judges and hear all types of cases.

This chapter analyzes and discusses the Islamic law perspective on this subject. Section two explains the origin of the judiciary in Islamic antiquity while section three defines the judiciary under Islamic jurisprudence through the lens of the Arabic language. Then, section four discusses the importance and legitimacy of the judiciary under Islamic law.

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<sup>544</sup> JAMEAT AL-EMAN, <http://www.jameataleman.org> (last visited Jan. 31, 2017).

<sup>545</sup> AL-MAKTABAH AL-SUNNIAH, <http://www.sunnaonline.org> (last visited Jan. 31, 2017).

<sup>546</sup> AL-SHARRQ, <http://www.alsharq.net.sa> (last visited Jan. 31, 2017).

<sup>547</sup> ASHARQ AL-AWSAT, <http://www.classic.aawsat.com> (last visited Jan. 31, 2017).

Building on these fundamentals, section five explains the qualifications judges must possess under Islamic law organized in three classifications: (1) qualifications required by all the Islamic schools; (2) qualifications required by some of the Islamic schools; and (3) qualifications suggested by some of the Islamic schools. Then, section six provides additional legal grounds to enhance the validity of appointing women judges. Finally, section seven concludes that women under Islamic law are allowed to serve as judges and, as a result, argues against scholars who invalidate the appointment of women judges and the appointment of women arbitrators.

## 5.2. The Origin of Judiciary in Antiquity

An important fundamental question is whether the judiciary is considered a holy institution for prophets and messengers or an entity independent from the missions of prophets and messengers.<sup>548</sup> Some Islamic scholars believe that the judiciary is intricately related to the mission of the prophets and messengers, arguing that women cannot serve as judges because the prophets and messengers were all men.<sup>549</sup> If the judiciary is an institutional arm of the religion, then women are not allowed to serve as judges according to these scholars.<sup>550</sup>

Other Islamic scholars argue that although the judiciary was historically related to the work of the prophets and messengers, the modern judiciary is an independent entity.<sup>551</sup> Women, according to this view, are allowed to serve as judges.<sup>552</sup> While, historically, the judiciary was first an instrument of God,<sup>553</sup> then of the prophets and messengers,<sup>554</sup> then of the caliphs or

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<sup>548</sup> MARKAZ AL-FATAWA, <http://www.fatwa.islamweb.net> (last visited Jan. 31, 2017).

<sup>549</sup> *See Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *See Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *See* The Holy Qur'an, *Ghafir*, Verse 20.

<sup>554</sup> *See* The Holy Qur'an, *Sad*, Verse 26, *Al-Ma'idah*, Verse 46-47, *Al-Nisa'*, Verse 105.

kings,<sup>555</sup> the modern judiciary is a separate entity available to those who possess the required qualifications.<sup>556</sup>

Under Islamic law, the judiciary, deciding people's disputes, is a feature of God that God promises to apply in the judgment day since God is going to be the only judge.<sup>557</sup> God sent prophets and messengers to the people during the ancient ages; almost all prophets and messengers participated in the judiciary.<sup>558</sup> For this reason, the judiciary is considered by some to be a holy institution because of its connection to God, the prophets, and the messengers.<sup>559</sup>

That the judiciary has been considered an institution of God is evident in the holy Qur'an itself, which contains a number of declarations where God states that he has judged between people fairly.<sup>560</sup> For example, Chapter Ghafir verse 20 of the holy Qur'an states "[a]nd Allah judges with truth, while those they invoke besides him judge not with anything. Indeed, Allah – he is the hearing, the seeing."<sup>561</sup> In addition, Chapter Al-Namal verse 78 of the holy Qur'an states, "[i]ndeed, your lord will judge between them by his [wise] judgment. And he is the exalted in might, the knowing."<sup>562</sup> Moreover, Chapter Yunus verse 54 of the holy Qur'an states, "[a]nd they will be judged in justice, and they will not be wronged."<sup>563</sup>

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<sup>555</sup> See The Holy Qur'an, *Al-Ma'idah*, Verse 45.

<sup>556</sup> See 10 MUAFAQ ALDAIN ABDULLAH BIN AHMED BIN MUHAMMAD BIN QUDAMH, AL-MUQNI [JURISPRUDENCE OF ISLAMIC LAW BASED ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 33-34 (1968).

<sup>557</sup> See 2 ABU ALWALEED MUHAMMAD BIN AHMED BIN RASHID ALQURTUBI, AL-MUQADIMAT AL-MUMAHIDAT [THE INTRODUCTION TO ISLAMIC LAW BASED ON MALIKIAH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 253 (1st ed. 1988).

<sup>558</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54; see also 2 ABDULRAHMAN BIN MUHAMMAD BIN SOLIMAN, MUJAMA AL-ANHUR FI SHARH MULTAQA AL-ABHUR [THE STUDY ON ISLAMIC LAW BASED ON HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 150-51 (n.d.).

<sup>559</sup> See 10 BIN QUDAMH, *supra* note 556, at 32.

<sup>560</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54.

<sup>561</sup> The Holy Qur'an, *Ghafir*, Verse 20.

<sup>562</sup> The Holy Qur'an, *Al-Namal*, Verse 78.

<sup>563</sup> The Holy Qur'an, *Yunus*, Verse 54.

Furthermore, in some of the holy Qur'an declarations, God promises that he will judge people fairly on the judgment day.<sup>564</sup> For instance, Chapter Yunus verse 93 of the holy Qur'an states, "[i]ndeed, your lord will judge between them on the day of resurrection concerning that over which they used to differ."<sup>565</sup> Another example, Chapter Al-Anbiya' verse 47 of the holy Qur'an, states, "[a]nd we place the scales of justice for the day of resurrection, so no soul will be treated unjustly at all. And if there is [even] the weight of a mustard seed, we will bring it forth. And sufficient are we as accountant."<sup>566</sup>

The holy Qur'an also indicates that the judiciary was an institution of the prophets and messengers to ensure that there was justice for the people in their societies.<sup>567</sup> In addition, it contains declarations where prophets such as David, Jesus, and Mohammad were asked to take the lead of the judiciary and judge people fairly.<sup>568</sup>

God ordered Prophet David to judge the people he was sent to, fairly and equally.<sup>569</sup>

Chapter Sad verse 26 of the holy Qur'an states:

O David, indeed we have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah. Indeed, those who go astray from the way of Allah will have a severe punishment for having forgotten the Day of Account.<sup>570</sup>

God also ordered the prophets sent to the Jews to judge people in accordance with the Torah.<sup>571</sup> Chapter Al-Ma'idah verse 44 of the holy Qur'an states:

Indeed, we sent down the Torah, in which was guidance and light. The prophets who submitted [to Allah] judges by it for the Jews, as did the rabbis and scholars by that with which they were entrusted of the Scripture of Allah, and they were

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<sup>564</sup> See 2 ALQURTUBI, *supra* note 557, at 253.

<sup>565</sup> The Holy Qur'an, *Yunus*, Verse 93.

<sup>566</sup> The Holy Qur'an, *Al-Anbiya'*, Verse 47.

<sup>567</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54; see also 2 SOLIMAN, *supra* note 558, at 150-51.

<sup>568</sup> See The Holy Qur'an, *Sad*, Verse 26; *Al-Ma'idah*, Verse 46-47; *Al-Nisa'*, Verse 105.

<sup>569</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54.

<sup>570</sup> The Holy Qur'an, *Sad*, Verse 26.

<sup>571</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54.



witnesses thereto. So, do not fear the people but fear me, and do not exchange my verses for a small price. And whoever does not judge by what Allah has revealed – then it is those who are the disbelievers.<sup>572</sup>

God then ordered Jesus, as well as his people, to be judged and guided by the Gospel.<sup>573</sup>

Chapter Al-Ma'idah verse 46-47 of the holy Qur'an states:

And we sent, following in their footsteps, Jesus, the son of Mary, confirming that which came before him in the Torah; and we gave him the Gospel, in which was guidance and light and confirming that which preceded it of the Torah as guidance and instruction for the righteous. And let the people of the Gospel judge by what Allah has revealed therein. And whoever does not judge by what Allah has revealed - then it is those who are the defiantly disobedient.<sup>574</sup>

Finally, God sent Prophet Muhammad to the people and ordered him to judge them in accordance with the holy Qur'an.<sup>575</sup> Chapter Al-Nisa' verse 105 of the holy Qur'an states, "[i]ndeed, we have revealed to you, [O Muhammad], the book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate."<sup>576</sup> Moreover, God asked Prophet Muhammad to decide fairly, saying, "[a]nd if you judge, judge between them with justice. Indeed, Allah loves those who act justly."<sup>577</sup>

The holy Qur'an provides some general declarations where people are asked by the holy Qur'an to judge fairly and in accordance with God's statements.<sup>578</sup> Caliphs, kings, leaders and others relied upon these passages in their use of the judiciary. For example, Chapter Al-Ma'idah verse 45 of the holy Qur'an states, "[a]nd whoever does not judge by what Allah has revealed –

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<sup>572</sup> The Holy Qur'an, *Al-Ma'idah*, Verse 44.

<sup>573</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54.

<sup>574</sup> The Holy Qur'an, *Al-Ma'idah*, Verse 46-47.

<sup>575</sup> See 2 ALQURTUBI, *supra* note 557, at 253-55.

<sup>576</sup> The Holy Qur'an, *Al-Nisa'*, Verse 105.

<sup>577</sup> The Holy Qur'an, *Al-Ma'idah*, Verse 42.

<sup>578</sup> See 2 SOLIMAN, *supra* note 558, at 150-51.

then it is those who are the wrongdoers.”<sup>579</sup> In addition, Chapter Al-Nisa’ verse 135 of the holy Qur’an states:

O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted.<sup>580</sup>

The Qur’anic origin of the judiciary<sup>581</sup> made it an institution of almost all the prophets and messengers sent to advise people.<sup>582</sup> In light of its history, the judiciary must be considered a holy institution that provides justice.<sup>583</sup> However, use of the judiciary is no longer exclusively limited to the prophets, caliphs, kings, and leaders.<sup>584</sup>

First, almost all the prophets and messengers used the judiciary because they were ordered by God to judge people fairly.<sup>585</sup> Second, prophets and messengers used the judiciary because of their features, including honesty, justice, and wisdom.<sup>586</sup> These features ensured that justice was present in society.<sup>587</sup> Third, the kings, caliphs, and leaders used the judiciary due to the small number of cases they received and the small size of the territories they controlled.<sup>588</sup>

The judiciary continued to be a great institution after the death of the last prophet, Prophet Mohammad, by the caliphs, kings, and leaders that followed him.<sup>589</sup> Now, however, the world is divided into separate countries where powers are generally separated among different

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<sup>579</sup> The Holy Qur’an, *Al-Ma’idah*, Verse 45.

<sup>580</sup> The Holy Qur’an, *Al-Nisa’*, Verse 135.

<sup>581</sup> See 2 ALQURTUBI, *supra* note 557, at 253.

<sup>582</sup> See 11 ALMAGDISI, *supra* note 405, at 373; see also The Holy Qur’an, *Ghafir*, Verse 20; *Yunus*, Verse 93; *Sad*, Verse 26; *Al-Ma’idah*, Verse 46-47; *Al-Nisa’*, Verse 105.

<sup>583</sup> MARKAZ AL-FATAWA, *supra* note 548.

<sup>584</sup> *Id.*

<sup>585</sup> See The Holy Qur’an, *Sad*, Verse 26; *Al-Ma’idah*, Verse 46-47; *Al-Nisa’*, Verse 105.

<sup>586</sup> See 2 ALQURTUBI, *supra* note 557, at 253-55.

<sup>587</sup> See *Id.*

<sup>588</sup> See MARKAZ AL-FATAWA, *supra* note 548.

<sup>589</sup> See 2 ALQURTUBI, *supra* note 557, at 253-54.

branches of government and the judiciary has independent authority.<sup>590</sup> Today, although the prophets and messengers are gone, the need still exists for a judicial system. As a result, the judiciary is now run by normal people, instead of prophets or kings,<sup>591</sup> which raises question about the qualifications necessary to serve as a judge. A person that possesses these qualifications should be appointed to the judiciary to help resolve disputes.<sup>592</sup>

Under Islamic law, the modern judiciary is an independent entity that acts impartially and derives its authority from the government of each respective country.<sup>593</sup> In addition, although the judiciary was first an instrument of God, and then of the prophets and messengers, the judiciary is no longer an institution exclusively for these men. Instead, it runs by common people where individuals who possess the required qualifications are part of it.<sup>594</sup>

### 5.3. The Definition of Judiciary Under Islamic Law

Because the language of the region during the establishment of Islam was Arabic,<sup>595</sup> Islamic law is based on the Arabic language, which now serves as the official language of Islam.<sup>596</sup> Therefore, “judiciary” in Islamic law must be defined according to the Arabic language through an English transliteration. Furthermore, “judiciary,” as a separate entity and mechanism to resolve disputes, must be defined according to the four Islamic schools.

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<sup>590</sup> See MARKAZ AL-FATAWA, *supra* note 548.

<sup>591</sup> See 2 ALQURTUBI, *supra* note 557, at 253, 255-58.

<sup>592</sup> See 7 MUHAMMAD BIN MUHAMMAD ALGAZALI ALTOUSI, AL-WASAIT FI AL-MTHAHAB [THE MEDIATOR OF SHAFI’IH SCHOOL OF THOUGHT] [AUTHOR’S TRANSLATION] 291 (Ahmed Mahmoud Ibrahim et al eds., 1st ed. 1996).

<sup>593</sup> See 10 BIN QUDAMH, *supra* note 556, at 32-34.

<sup>594</sup> See 10 BIN QUDAMH, *supra* note 556, at 32-34; see also 2 SOLIMAN, *supra* note 558, at 150-51.

<sup>595</sup> See PIMSLEUR APPROACH, <http://www.pimsleurapproach.com> (last visited Jan. 31, 2017); see also MIZOBUTAMIA BILAD AL-NAHRAIN, <http://www.mesopot.com> (last visited Jan. 31, 2017).

<sup>596</sup> See 11 AL-NAWAWI, *supra* note 375, at 95; see also ABOUT RELIGION, <http://www.islam.about.com> (last visited Jan. 31, 2017).

The Arabic term for judiciary is “*Al-Qada*.” *Al-Qada*, has several meanings that confirm the judiciary’s idea and purpose;<sup>597</sup> the most common and well-known meaning though is “judgment.”<sup>598</sup> In addition, *Al-Qada*, as a noun, also means “ending,” “termination,” “execution,” “decree,” “determination,” or “separation.”<sup>599</sup>

Moreover, *Al-Qada* can be converted to a verb through a simple change.<sup>600</sup> For example, *Qada* means “decide,” “promise,” “perform,” “conclude,” “die,” “create,” and “estimate.”<sup>601</sup> *Qadah*, which is also a verb, means “to perfect the work” or “return what he or she must return.”<sup>602</sup> The verb *Enqada* means “elapse” and “establish.”<sup>603</sup>

These multiple meanings, either as nouns or verbs, confirm the idea and purpose of the judiciary, which is to ensure justice by separating legality and illegality as well as ending and

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<sup>597</sup> See 15 MUHAMMAD BIN MAKRAM BIN ALI JAMAL ALDAIN ALAFRIQI, *LESAN AL-ARAB* [TONGUE OF ARAB] [AUTHOR’S TRANSLATION] 186-88 (3rd ed. 1993).

<sup>598</sup> 6 ISMAIL BIN HAMAD ALJOUHARI ALFARABI, *AL-SEHAH TAJ AL-LUGAH WA SEHAH AL-ARABIAH* [THE CROWN OF ARABIC LANGUAGE] [AUTHOR’S TRANSLATION] 2463 (Ahmed Abdulghafour Atar ed., 4th ed. 1987); 5 AHMED BIN FARIS BIN ZAKARIA ALRAZI, *MOUJAM MAQIES AL-LUGAH* [THE DICTIONARY OF ARABIC GAUGE] [AUTHOR’S TRANSLATION] 99 (Abdulsalam Muhammad Haroun ed., 1979); 6 ALI BIN ISMAIL BIN SIDAH ALMORSI, *AL-MUHKAM WA AL-MUHAIT AL-UZAM* [THE GREAT FENCE] [AUTHOR’S TRANSLATION] 482 (Abdulhamid Hndawi ed., 1st ed. 2000).

<sup>599</sup> 6 ALFARABI, *supra* note 598, at 2463-64; 6 ALMORSI, *supra* note 598, at 482-84; 4 MAJD ALDAIN ABU ALSADAT ALMUBARK BIN MUHAMMAD, *AL-NEHAIAH FI GHARIB AL-HADITH WA AL-ATHAR* [THE END OF FOREIGN SPEECHES] [AUTHOR’S TRANSLATION] 78 (Taher Ahmed Alzawi et al eds., 1979).

<sup>600</sup> See 15 ALAFRIQI, *supra* note 597, at 186-88.

<sup>601</sup> 3 ALI BIN JAFAR BIN ALI AL-SAAD, *KETAB AL-AFAAL* [THE BOOK OF VERBS] [AUTHOR’S TRANSLATION] 61 (1st ed. 1983); MAJD ALDAIN ABU TAHIR MUHAMMAD BIN YAAGUB, *AL-QAMOUS AL-MUHIT* [THE CIRCUMFERENCE DICTIONARY] [AUTHOR’S TRANSLATION] 1325 (Muhammad Naayam Alargusi ed., 8th ed. 2005); AYOUB BIN MUSA ALHOUSINI ALQARIMI ALKOUFI, *AL-KULIAT MUJAM FI AL-MUSTLAHAT WA AL-FURUQ AL-LOGHWIAH* [THE DICTIONARY OF TERMINOLOGIES AND LANGUAGE DIFFERENCES] [AUTHOR’S TRANSLATION] 705 (Adnan Drwish et al eds., n. d.).

<sup>602</sup> See, MUHAMMAD BIN ABI BAKAR BIN ABDULQADIR ALRAZI, *MUKHTAR ALSEHAH* [THE RIGHT CHOICES] [AUTHOR’S TRANSLATION] 255 (Yusuf Alshikh Muhammad ed., 5th ed. 1999); see also 3 ALQADI ABDULNABI ABDULRSOUL ALAHMED NKRI, DOUSTOR AL-ULAMA = JAMEA AL-ULUM FI ESTILAHAT AL-FUNOUN [THE CONSTITUTION OF LINGUISTS] [AUTHOR’S TRANSLATION] 53 (Hasan Hani Fahs ed., 1st ed. 2000); see also 39 MUHAMMAD BIN MUHAMMAD BIN ABDULRAZAK ALHOUSINI, *TAJ AL-AROUS MIN JAWAHIR AL-QAMOUS* [THE BRIDE CROWN OF DICTIONARY] [AUTHOR’S TRANSLATION] 312-13, 316 (n. d.).

<sup>603</sup> See 2 MAHMOUD BIN AMRU BIN AHMED ALZAMKSHARI, *OSUS AL-BLAGAH* [THE BASIS OF ELOQUENCE] [AUTHOR’S TRANSLATION] 86 (Muhammad Basil Auyun ed., 1st ed. 1998).

terminating disputes.<sup>604</sup> In addition, the judiciary's purpose is to create fairness by rendering decisions that consider the rights of the parties.<sup>605</sup>

Different schools of thought define "judiciary" more precisely and in accordance with their ideological views. The Hanafiah school, for instance, defines the judiciary as an institution that resolves disputes through compulsion of the competent authority.<sup>606</sup> It defines the judicial process as the enforcement of a judgment against one or more persons through evidence and confession.<sup>607</sup> The Malikiah school defines the judicial process as an order issued by a judge in the form of a judgment that must be enforced<sup>608</sup> and considers a judicial act to be the announcement of a judgment on a disputed issue and its enforcement.<sup>609</sup>

Meanwhile, the Shafi'ih school defines the judicial process as one where a decision on a disputed issue is rendered and enforced.<sup>610</sup> The Shafi'ih school considers the role of the judiciary as dispute resolution between two people by issuing the right decision.<sup>611</sup> Finally, the Hanbaliah school defines the judicial process as the resolution of a dispute, the issuance of the right judgment, and enforcement.<sup>612</sup> The Hanbaliah school believes it is the judiciary's task to examine the dispute and enforce the right judgment to resolve that dispute.<sup>613</sup>

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<sup>604</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175; see also 9 MUSA, *supra* note 51, at 3.

<sup>605</sup> See 6 ABDULRAHMAN, *supra* note 53, at 86; see also 2 ABDULSALAM BIN ABDULLAH BIN ALKHODUR BIN MUHAMMAD BIN TIMIAH, AL-MUHARAR FI AL-FIQH ALA MTHAHAB AL-IMAM AHMED BIN HANBAL [THE EDITOR OF IMAM AHMED SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 203 (2nd ed. 1984).

<sup>606</sup> See 9 MUSA, *supra* note 51, at 3.

<sup>607</sup> See 2 ALI, *supra* note 53, at 404.

<sup>608</sup> See 6 ABDULRAHMAN, *supra* note 53, at 86.

<sup>609</sup> See 10 ABU ALABAS SHIHAB ALDAIN AHMED BIN EDRAIS BIN ABDULRAHMAN, AL-THAKHAIRAH [ISLAMIC LAW JURISPRUDENCE IN ACCORDANCE WITH MALIKIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 5 (Muhammad Bu Khabzah ed., 1st ed. 1994); see also 2 ALADAWI, *supra* note 406, at 338.

<sup>610</sup> See 10 AHMED BIN MUHAMMAD BIN ALI BIN HAJAR ALHITAMI, TOHFAT AL-MUHTAJ FI SHARH AL-MENHAJ [THE EXPLANATION OF SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 101 (1983).

<sup>611</sup> See 6 SHAMS ALDAIN MUHAMMAD BIN AHMED ALKHATIB ALSHARBINI, MUQNI AL-MUHTAJ ELA MAARIFT MAANI ALFAZ AL-MENHAJ [THE EXPLANATION OF THE SHAFI'IH SCHOOL APPROACH] [AUTHOR'S TRANSLATION] 257 (1st ed. 1994).

<sup>612</sup> ALBUHUTI, *supra* note 51, at 704.

<sup>613</sup> 8 MUFLEH, *supra* note 486, at 139.

After reviewing the Islamic school approaches to define the judiciary under Islamic law, it seems that these definitions are rather similar with only minor differences.<sup>614</sup> Therefore, this discussion supports a definition of the institution that combines these different definitions to recognize that the Islamic judiciary must, essentially, resolve disputes between people by issuing judgments from competent authorities and enforcing them.<sup>615</sup>

#### 5.4. The Importance and Legitimacy of Judiciary Under Islamic Law

Under Islamic law, the judiciary is a necessary institution.<sup>616</sup> It is considered one of the most important services in the Islamic world; it must exist so that disputes are resolved and settled justly.<sup>617</sup> As such, there must be enough qualified judges to serve in the judiciary to resolve disputes.<sup>618</sup>

The four Islamic schools agree that when there are enough qualified people to serve—that is, when there are enough judges to keep the judiciary effective—other qualified people are not obligated to serve as judges.<sup>619</sup> However, when not enough qualified people are willing to serve in the judiciary, some highly-qualified people will be compelled to serve as judges to ensure justice.<sup>620</sup>

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<sup>614</sup> See 9 MUSA, *supra* note 51, at 3; see also 2 ALI, *supra* note 53, at 404; see also 6 ABDULRAHMAN, *supra* note 53, at 86; see also 10 ABDULRAHMAN, *supra* note 609, at 5; see also 10 ALHITAMI, *supra* note 610, at 101; see also 6 ALSHARBINI, *supra* note 611, at 257; see also ALBUHUTI, *supra* note 51, at 704; see also 8 MUFLEH, *supra* note 486, at 139.

<sup>615</sup> See 9 MUSA, *supra* note 51, at 3; see also 2 ALI, *supra* note 53, at 404; see also 6 ABDULRAHMAN, *supra* note 53, at 86; see also 10 ABDULRAHMAN, *supra* note 609, at 5; see also 10 ALHITAMI, *supra* note 610, at 101; see also 6 ALSHARBINI, *supra* note 611, at 257; see also ALBUHUTI, *supra* note 51, at 704; see also 8 MUFLEH, *supra* note 486, at 139.

<sup>616</sup> See 11 ALMAGDISI, *supra* note 405, at 373. (The judiciary is also considered as “*Fard Kefaiyah*” which means collective obligation that people’s lives cannot stand without it). See 11 ALMAGDISI, *supra* note 405, at 373.

<sup>617</sup> See IBRAHIM, *supra* note 449, at 210.

<sup>618</sup> See 8 ALQASM, *supra* note 52, at 83; see also 4 BIN QUDAMH, *supra* note 131, at 221.

<sup>619</sup> See IBRAHIM, *supra* note 449, at 216-217; 8 ALQASM, *supra* note 52, at 83; 3 IBRAHIM BIN ALI BIN YUSUF ALSHIRAZI, AL-MUHATHAB FI FIQH AL-IMAM AL-SHAFI’I [THE EDUCATOR OF SHAFI SCHOOL OF THOUGHT] [AUTHOR’S TRANSLATION] 376 (Zakaria Umirat ed., 1st ed. 1995); 4 BIN QUDAMH, *supra* note 131, at 221.

<sup>620</sup> See 11 AL-NAWAWI, *supra* note 375, at 92.

It is inappropriate to request the appointment to be a judge under Islamic law according to all four Islamic schools.<sup>621</sup> However, under some circumstances, requesting appointment as a judge may be desirable.<sup>622</sup> For example, if an individual is qualified to be a judge and knows that individual rights will be sacrificed if he does not serve in the judiciary, that person should request judicial appointment.<sup>623</sup>

Because the judiciary is an important institution, the quality of lives are compromised without a judiciary that aims to achieve justice in society.<sup>624</sup> People are often competitive, which tends to lead to arguments and conflicts between individuals, which require resolution.<sup>625</sup> In addition, people need a judiciary that protects individual rights, stops and punishes wrongdoers, and resolves disputes.<sup>626</sup>

However, although people serving in the judiciary enjoy the prestige of the institution, serving in the judiciary also includes some risks.<sup>627</sup> For example, failure to recognize valid evidence in a commercial dispute—leading to an unfair ruling in favor of one party—is considered a risk must be avoided. In addition, because judges decide issues related to individual lives, freedoms, and funds, intentionally rendering unfair decisions is considered one of the

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<sup>621</sup> See 3 ALI BIN ABI BAKR BIN ABDULJALIL, AL-HEDIAH FI SHARH BEDAIAT AL-MUBTADI [THE GUIDANCE ON THE EXPLANATION OF JURISPRUDENCE FOR BEGINNERS] [AUTHOR'S TRANSLATION] 102 (Talal Yusuf ed., n.d.); see also 2 ALQURTUBI, *supra* note 557, at 257; see also 11 AL-NAWAWI, *supra* note 375, at 92-93; see also ALBUHUTI, *supra* note 51, at 704.

<sup>622</sup> See 4 BIN QUDAMH, *supra* note 131, at 221.

<sup>623</sup> See 8 ALQASM, *supra* note 52, at 83; see also ALBUHUTI, *supra* note 51, at 704.

<sup>624</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175; see also 2 ALADAWI, *supra* note 406, at 338; see also 18 ALJWAINI, *supra* note 376, at 458; see also ALBUHUTI, *supra* note 51, at 704.

<sup>625</sup> 16 ALBSRI, *supra* note 326, at 7; see 4 BIN QUDAMH, *supra* note 131, at 221.

<sup>626</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175; 18 ALJWAINI, *supra* note 376, at 458; 11 ALMAGDISI, *supra* note 405, at 373.

<sup>627</sup> 2 ALADAWI, *supra* note 406, at 338-39.

biggest sins, which must be avoided.<sup>628</sup> Judges, under Islamic law, must be unimpeachable in their integrity and honesty.<sup>629</sup>

Essentially, the judiciary is a necessary institution that requires enough qualified judges to properly adjudicate disputes.<sup>630</sup> Moreover, the judiciary is an important service that must be provided to promote and protect justice in society.<sup>631</sup> Finally, serving in the judiciary includes some risks, such as ruling errors that might affect individual rights and funds, which must be avoided.<sup>632</sup>

### 5.5. The Requirements and Qualifications that Judges Should Possess

Under Islamic law, the requirements for judges to validate their appointment depends on the particular Islamic school approach; each Islamic school requires its judges to possess certain qualifications. While some qualifications are required by certain Islamic schools, other schools merely consider these qualifications preferable. There are three primary sets of qualifications under Islamic law to serve as judges.<sup>633</sup> These are: (1) mandatory qualifications required by all Islamic schools; (2) necessary qualifications required by some Islamic schools; and (3) recommended qualifications required by some Islamic schools.<sup>634</sup>

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<sup>628</sup> See 2 ALQURTUBI, *supra* note 557, at 256-58; see also 10 ABDULRAHMAN, *supra* note 609, at 6-7.

<sup>629</sup> 2 ALQURTUBI, *supra* note 557, at 256-58; 10 ABDULRAHMAN, *supra* note 609, at 6-7; 2 ALADAWI, *supra* note 406, at 339.

<sup>630</sup> See IBRAHIM, *supra* note 449, at 216-17; 8 ALQASM, *supra* note 52, at 83; 3 ALSHIRAZI, *supra* note 619, at 376; 4 BIN QUDAMH, *supra* note 131, at 221.

<sup>631</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175; see also 2 ALADAWI, *supra* note 406, at 338-39.

<sup>632</sup> See 2 ALADAWI, *supra* note 406, at 338-39; see also 10 ABDULRAHMAN, *supra* note 609, at 6-7.

<sup>633</sup> See 9 MUSA, *supra* note 51, at 4-6; JAMAL ALDAIN BIN UMAR ABIN ALHAJIB ALMALIKI, JAMAE AL-UMAHAT [THE GATHERING OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 462 (Abu Abdulrahman Alakhdar ed., 2nd ed. 2000); 13 ALAMRANI, *supra* note 133, at 11-12; see also 11 MUHAMMAD BIN MUFLEH BIN MUHAMMAD BIN MOFRIJ ALMGDISI, KETAB AL-FUROAE WA MAAH TSAHIH AL-FUROAE [THE BOOK OF FUROAE ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 102-03 (Abdullah Bin Abdulmuhsin Alturki ed., 1st ed. 2003).

<sup>634</sup> See 9 MUSA, *supra* note 51, at 4-6; ALMALIKI, *supra* note 633, at 462; 13 ALAMRANI, *supra* note 133, at 11-12; see also 11 ALMGDISI, *supra* note 633, at 102-03.



### 5.5.1. Mandatory Qualifications Required by the Four Islamic Schools

All four Islamic schools agree on some requirements that qualified individuals must possess before they are appointed as judges.<sup>635</sup> Specifically, they all require that judges are Muslim adults of sound mind, with their basic senses of hearing, sight, and speech, as well as knowledge of Islamic law and rules.<sup>636</sup> These requirements are relatively uncontroversial.

All Islamic schools require that judges rendering decisions under Islamic law must be Muslim<sup>637</sup> for two reasons. First, witnesses who testify in the Islamic judicial systems must be Muslims in order for testimony to be valid and, *a fortiori*, judges must be Muslim to hear valid testimony.<sup>638</sup> Second, judges determining disputes using Islamic law must have knowledge of Islamic law, Islamic general rules, and Islamic principles.<sup>639</sup> As a result, judges must be Muslims in order to understand the Islamic law and, in turn, decide cases.<sup>640</sup>

All the Islamic schools also require that judges are adults possessing sound minds.<sup>641</sup> Minors and mentally incapacitated individuals are generally under the custody and control of other adults; given that these individuals do not exercise complete freedom in their decisions, they lack the capacity to serve as judges.<sup>642</sup> Second, minors and the mentally incapacitated are

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<sup>635</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76; ALBAQDADI, *supra* note 408, at 117; ALSHIRAZI, *supra* note 408, at 251; BIN QUDAMH, *supra* note 408, at 147.

<sup>636</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76; ALBAQDADI, *supra* note 408, at 117; ALSHIRAZI, *supra* note 408, at 251; BIN QUDAMH, *supra* note 408, at 147.

<sup>637</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 283; 4 ABU ALWALEED MUHAMMAD BIN AHMED BIN MUHAMMAD, BEDAIAT AL-MUJTAHID WA NEHAIAI AL-MUQTASID [THE BEGINNING OF DILIGENCE AND THE END OF IGNORANCE] [AUTHOR'S TRANSLATION] 243 (2004); 3 ALSHIRAZI, *supra* note 619, at 377; UMAR BIN ALHOUSIN BIN ABDULLAH ALKHERAQI, MTN AL-KHERAQI ALA MTHAHAB ABI ABDULLAH AHMED BIN HANBAL AL-SHIBANI [THE BRIEF OF KHERAQI ON THE EXPLANATION OF IMAM AHMED SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 154 (1993).

<sup>638</sup> 3 ALSHIRAZI, *supra* note 619, at 377; 20 MOHEI ALDAIN YAHYA BIN SHARAF ALNAWAWAI, AL-MAJMUAE SHARH AL-MUHATHAB [THE SUM OF ISLAMIC LAW BASED ON SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 126-27 (n. d.).

<sup>639</sup> See 13 ALAMRANI, *supra* note 133, at 17-20.

<sup>640</sup> See *Id.*

<sup>641</sup> 9 MUSA, *supra* note 51, at 4; ALMALIKI, *supra* note 633, at 462; AHMED BIN ALHOUSIN BIN AHMED ALESFHANI, MTN ABI SHOJAE AL-MUSMMA AL-GAIAH WA AL-TAGRAIB [THE BRIEF OF ABI SHOJAE ON SHAFI'IH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 45 (n. d.); 4 BIN QUDAMH, *supra* note 131, at 222.

<sup>642</sup> See 8 MUFLEH, *supra* note 486, at 153; see also ALBUHUTI, *supra* note 51, at 705.

generally not considered reliable witnesses and, as a result, cannot serve as judges.<sup>643</sup> Third, judges wield a great deal of power in deciding cases, which is a large responsibility; minors and the mentally incapacitated cannot assume such a responsibility.<sup>644</sup>

While it is generally accepted that qualified judges must possess a sense of hearing,<sup>645</sup> some Islamic schools—such as the Hanafiah and Malikhah schools—merely mention this requirement as an obvious qualification without additional explanation.<sup>646</sup> However, other Islamic schools—such as the Shafi’ih and Hanbaliyah schools—provide reasons for this requirement, such as ensuring judges are able to hear arguments and testimonies; deaf people are unable to fulfill this requirement.<sup>647</sup>

Nearly all four Islamic schools also state that judges must have the sense of sight.<sup>648</sup> Just like the previous requirement, however, some Islamic schools—such as the Hanafiah and Malikhah schools—mention this requirement briefly but without explanation.<sup>649</sup> Other Islamic schools—the Shafi’ih and Hanbaliyah schools—state that judges must be able to distinguish the claimants, defendants, witnesses, and confessors from each other, which may not happen without the sense of sight.<sup>650</sup>

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<sup>643</sup> See 3 ALSHIRAZI, *supra* note 619, at 377.

<sup>644</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175; see also 6 MUHAMMAD ET AL., *supra* note 50, at 283.

<sup>645</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 283; ALMALIKI, *supra* note 633, at 462; 11 AL-NAWAWI, *supra* note 375, at 97; 8 MUFLEH, *supra* note 486, at 154.

<sup>646</sup> See 6 MUHAMMAD ET AL., *supra* note 50, at 283; see also 2 ALQURTUBI, *supra* note 557, at 258-59.

<sup>647</sup> See 11 AL-NAWAWI, *supra* note 375, at 97; see also ABDULRAHMAN BIN IBRAHIM BIN AHMED AL-MAQDISI, AL-UDAH SHARH AL-UMDAH [THE EXPLANATION OF ISLAMIC LAW JURISPRUDENCE BASED ON HANBALIAH SCHOOL OF THOUGHT] [AUTHOR’S TRANSLATION] 660 (2003).

<sup>648</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 283; ALBAQDADI, *supra* note 408, at 117; 7 ALTOUSI, *supra* note 592, at 289; ALBUHUTI, *supra* note 51, at 706.

<sup>649</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 283; 2 ALQURTUBI, *supra* note 557, at 259.

<sup>650</sup> See 11 AL-NAWAWI, *supra* note 375, at 96; see also AL-MAQDISI, *supra* note 647, at 660.

All Islamic schools also stipulate that judges must have the ability to speak, although none provide specific details on this requirement.<sup>651</sup> This lack of explanation is likely due to the obvious importance of this ability.<sup>652</sup> In fact, some Islamic scholars state that judges must announce their decisions after the hearing, which requires that judges be able to speak.<sup>653</sup> In addition, some Islamic scholars note that not every person understands the sign language if the judge is deaf and tries to announce the decision.<sup>654</sup>

Finally, all Islamic schools stipulate that judges must possess a minimum standard of knowledge about Islamic jurisprudence.<sup>655</sup> Although requiring this qualification is obvious, since judges must know the governing law for the disputes they are deciding, some Islamic scholars limit the minimum standard of Islamic jurisprudence knowledge to knowing the general Islamic law rules and principles derived from the holy Qur'an and the Sunni Speeches.<sup>656</sup> In addition, Islamic schools specifically request that a judge should be *Faqaih*, which is someone who knows Islamic jurisprudence.<sup>657</sup>

In sum, all Islamic schools require that judges possess the aforementioned qualifications.<sup>658</sup> In addition, after qualified individuals are appointed as judges, they must

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<sup>651</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 283; ALMALIKI, *supra* note 633, at 462; 11 AL-NAWAWI, *supra* note 375, at 97; 8 MUFLEH, *supra* note 486, at 154.

<sup>652</sup> See 6 MUHAMMAD ET AL., *supra* note 50, at 283; see also ALMALIKI, *supra* note 633, at 462.

<sup>653</sup> 4 BIN QUDAMH, *supra* note 131, at 222; AL-MAQDISI, *supra* note 647, at 660.

<sup>654</sup> 11 AL-NAWAWI, *supra* note 375, at 97; 8 MUFLEH, *supra* note 486, at 154.

<sup>655</sup> See 3 ABDULAZIZ, *supra* note 409, at 5; see also 2 ABU MUHAMMAD ABDULWAHAB BIN ALI BIN NSAR, AL-TALQAIN FI AL-FIQH AL-MALIKI [THE INITIATION OF ISLAMIC LAW JURISPRUDENCE ACCORDING TO MALIKIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 209 (Muhammad Bu Khabzah ed., 1st ed. 2004); see also 13 ALAMRANI, *supra* note 133, at 17-19; see also 10 BIN QUDAMH, *supra* note 556, at 33-34.

<sup>656</sup> See 3 ABDULAZIZ, *supra* note 409, at 5; see also ALI BIN MUHAMMAD BIN MUHAMMAD BIN HABIB ALBSRI, AL-EQNAE FI AL-FIQH AL-SHAFI'I [PERSUASION ON SHAFI'IIH SCHOOL JURISPRUDENCE] [AUTHOR'S TRANSLATION] 193-94 (Khotar Bin Muhammad Bin Khotar ed., 1st ed. 1999).

<sup>657</sup> 2 BIN NSAR, *supra* note 655, at 209; 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>658</sup> See 2 SOLIMAN, *supra* note 558, at 151; ALBAQDADI, *supra* note 408, at 117; 11 AL-NAWAWI, *supra* note 375, at 95-97; AL-MAQDISI, *supra* note 647, at 660.

continue to possess these qualifications from the duration of their appointments until resignation or retirement.<sup>659</sup> A judge will be removed from the bench if these qualifications are not met.<sup>660</sup>

### 5.5.2. Necessary Qualifications Required by Some Islamic Schools

There is a secondary set of requirements that some, but not all, Islamic schools require of their judges.<sup>661</sup> In other words, for some Islamic schools, judges must possess additional four requirements in order to validate their appointment as judges, while other Islamic schools considered those additional requirements as preferable qualifications and, therefore, judges are not required to possess them. Specifically, some Islamic schools require that judges possess qualifications of (*Adalah*) justice, (*Fednah*) perception, and (*Mujtahid*) diligence, as well as be male (*Thakar*).<sup>662</sup>

#### 5.5.2.1. First Qualification: (*Adalah*) Justice

*Adalah*, or justice, means to satisfy God's orders, prevent people from engaging in prohibited or forbidden activity, and fulfill Islam's requirements.<sup>663</sup> Stipulating that *Adalah* is a required qualification, though, is debatable<sup>664</sup> since it is difficult to demonstrate that a candidate possess *Adalah*; still, the majority of Islamic schools require that qualified judges possess *Adalah*.<sup>665</sup>

The Hanafiah school considers the *Adalah* qualification to be a priority, or at least a highly desirable condition for a judge.<sup>666</sup> The other schools—Malikiah, Shafi'ih, and

<sup>659</sup> See 6 ABDULRAHMAN, *supra* note 53, at 87.

<sup>660</sup> See 2 ALQURTUBI, *supra* note 557, at 258-259; see also 8 ALQASM, *supra* note 52, at 63.

<sup>661</sup> See 9 MUSA, *supra* note 51, at 4; 4 MUHAMMAD, *supra* note 637, at 243; ALBSRI, *supra* note 656, at 193; ALKHERAQI, *supra* note 637, at 154.

<sup>662</sup> 4 MUHAMMAD, *supra* note 637, at 243; ALMALIKI, *supra* note 633, at 462.

<sup>663</sup> See AL-DURAR AL-SUNNIAH, <http://www.dorar.net> (last visited Jan. 31, 2017).

<sup>664</sup> 3 ABDULAZIZ, *supra* note 409, at 5-6; 2 ALQURTUBI, *supra* note 557, at 258-259.

<sup>665</sup> 8 ALQASM, *supra* note 52, at 63; 11 AL-NAWAWI, *supra* note 375, at 96; 11 ALMAGDISI, *supra* note 405, at 376.

<sup>666</sup> See 3 ABDULJALIL, *supra* note 621, at 101; 3 ABDULAZIZ, *supra* note 409, at 5-6.

Hanbaliah—take a stricter view and consider *Adalah* mandatory for a judge.<sup>667</sup> According to these schools, *Adalah* is a required qualification and, if no qualified people possesses *Adalah*, none of them will be appointed as a judge.<sup>668</sup>

Under the Hanafiah approach, the qualifications and requirements for judges are the same as the qualifications and requirements for witnesses;<sup>669</sup> *Adalah* is not a requirement. However, the Hanafiah school considers *Adalah* to be a priority condition.<sup>670</sup> If there are two qualified individuals and only one possesses *Adalah*, the one who possesses *Adalah* should be appointed.<sup>671</sup> If no qualified individuals possess *Adalah*, however, it is valid to appoint a judge lacking *Adalah* under the Hanafiah school approach.<sup>672</sup>

The Hanafiah school also considers three issues related to *Adalah* that address a *Fasiq*, which is a person who does not follow all Islam orders and might contravene some of the prohibitions in Islamic law.<sup>673</sup> These issues are: (1) the validity of appointing a *Fasiq* as a judge;<sup>674</sup> (2) the validity of decisions made by a judge who was not considered a *Fasiq* originally;<sup>675</sup> and (3) whether the conversion from possessing *Adalah* to being a *Fasiq* is a valid reason to dismiss the judge.<sup>676</sup>

For the Hanafiah school, the appointment of a judge who is a *Fasiq* is valid as long as that judge's testimony is accepted in courts.<sup>677</sup> The decisions of a judge who was not a *Fasiq*

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<sup>667</sup> 2 ALQURTUBI, *supra* note 557, at 258-59; ALBSRI, *supra* note 656, at 193; AL-MAQDISI, *supra* note 647, at 660.

<sup>668</sup> See 8 ALQASM, *supra* note 52, at 63; see also 11 AL-NAWAWI, *supra* note 375, at 96-97; see also 8 MUFLEH, *supra* note 486, at 154.

<sup>669</sup> See 2 ALI, *supra* note 53, at 404; see also IBRAHIM, *supra* note 449, at 210-11.

<sup>670</sup> See 3 ABDULAZIZ, *supra* note 409, at 5.

<sup>671</sup> See *Id.*

<sup>672</sup> See 2 SOLIMAN, *supra* note 558, at 151.

<sup>673</sup> See 6 MUHAMMAD ET AL., *supra* note 50, at 284.

<sup>674</sup> See 3 ABDULJALIL, *supra* note 621, at 101.

<sup>675</sup> See 6 MUHAMMAD ET AL., *supra* note 50, at 284.

<sup>676</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175.

<sup>677</sup> 9 MUSA, *supra* note 51, at 5-6.

when appointed but was later revealed as a *Fasiq* are still accepted and valid.<sup>678</sup> Lastly, a judge converts from possessing *Adalah* to be a *Fasiq* does not result in enough reason to dismiss that judge, unless provided for in the judicial appointment.<sup>679</sup>

The other Islamic schools—Malikiah,<sup>680</sup> Shafi'ih,<sup>681</sup> and Hanbaliah<sup>682</sup>—stipulate that judges must possess *Adalah*. For those schools, *Adalah* is akin to the other essential judicial requirements, such as being an adult Muslim.<sup>683</sup> In addition, those schools do not accept the appointment of a *Fasiq* as a judge because, according to those schools, *Fasiq* testimony is not accepted in courts and, as a result, a *Fasiq* cannot serve as a judge.<sup>684</sup> Moreover, a judge will be dismissed if the judge originally possesses the *Adalah* qualification but then somehow loses the *Adalah* qualification.<sup>685</sup>

The Malikiah school also considers whether decisions made by a judge who possessed *Adalah* at the time of the ruling but then lost it and became a *Fasiq* remain valid.<sup>686</sup> The scholars of Malikiah school on the validity of those decisions are divided into three different opinions:<sup>687</sup> (1) those decisions lost their legitimacy and are not valid anymore;<sup>688</sup> (2) those decisions are still

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<sup>678</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 284.

<sup>679</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76.

<sup>680</sup> 2 ALQURTUBI, *supra* note 557, at 258-59.

<sup>681</sup> 13 ALAMRANI, *supra* note 133, at 20.

<sup>682</sup> 4 BIN QUDAMH, *supra* note 131, at 222.

<sup>683</sup> 2 ALQURTUBI, *supra* note 557, at 258-59; 13 ALAMRANI, *supra* note 133, at 20; 4 BIN QUDAMH, *supra* note 131, at 222.

<sup>684</sup> See 6 ABDULRAHMAN, *supra* note 53, at 87; see also 11 AL-NAWAWI, *supra* note 375, at 96-97; see also 8 MUFLEH, *supra* note 486, at 154.

<sup>685</sup> See 6 ABDULRAHMAN, *supra* note 53, at 87; see also 11 AL-NAWAWI, *supra* note 375, at 94-97; see also AL-MAQDISI, *supra* note 647, at 660.

<sup>686</sup> See 2 ALQURTUBI, *supra* note 557, at 259.

<sup>687</sup> 8 ALQASM, *supra* note 52, at 63; 4 MUHAMMAD, *supra* note 637, at 243; 6 ABDULRAHMAN, *supra* note 53, at 87.

<sup>688</sup> 8 ALQASM, *supra* note 52, at 63.

valid, even if the deciding judge became a *Fasiq*,<sup>689</sup> and (3) those decisions will be reviewed by other authorized judges to determine whether each decision is valid or set aside.<sup>690</sup>

All in all, whether judges must possess *Adalah* is debated among the Islamic schools.<sup>691</sup> The main argument between Islamic schools is over the Hanafiah school validation of the judges who do not possess the *Adalah* qualification.<sup>692</sup> The other schools simply do not validate the appointment of a judge who does not possess the *Adalah* qualification.<sup>693</sup>

However, it seems that the proper approach here is the Hanafiah school approach for two reasons. First, it is hard to find someone who possesses all the qualifications of a judge, specifically *Adalah*.<sup>694</sup> Second, there is pragmatic necessity in appointing judges even if they do not possess *Adalah*, specifically, to benefit public interest by providing enough judges to resolve disputes.<sup>695</sup>

#### 5.5.2.2. Second Qualification: (*Fednah*) Perception

The second qualification that some Islamic schools require is *Fednah*, or perception,<sup>696</sup> which basically means having a higher level of smartness and cleverness than the average individual.<sup>697</sup> In the author's view, *Fednah* is a necessary requirement for judges.<sup>698</sup>

The Malikiah and Shafi'ih schools require that judges possess *Fednah*.<sup>699</sup> The Hanbaliah school does not mention *Fednah* as a separate requirement, though, it requires judges to possess

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<sup>689</sup> See 4 MUHAMMAD, *supra* note 637, at 243.

<sup>690</sup> See 6 ABDULRAHMAN, *supra* note 53, at 87.

<sup>691</sup> 3 ABDULAZIZ, *supra* note 409, at 5-6; 2 ALQURTUBI, *supra* note 557, at 258-59.

<sup>692</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76.

<sup>693</sup> See 8 ALQASM, *supra* note 52, at 63; see also ALBSRI, *supra* note 656, at 193; see also 4 BIN QUDAMH, *supra* note 131, at 222.

<sup>694</sup> See 7 ALTOUSI, *supra* note 592, at 291.

<sup>695</sup> See 11 AL-NAWAWI, *supra* note 375, at 97.

<sup>696</sup> 6 ABDULRAHMAN, *supra* note 53, at 88; see 3 ALSHIRAZI, *supra* note 619, at 377.

<sup>697</sup> See 8 ALQASM, *supra* note 52, at 66; see also 6 ABDULRAHMAN, *supra* note 53, at 88.

<sup>698</sup> 8 ALQASM, *supra* note 52, at 66; see also 20 ALNAWAWAI, *supra* note 638, at 127.

<sup>699</sup> 8 ALQASM, *supra* note 52, at 66; see 3 ALSHIRAZI, *supra* note 619, at 377.

*Mujtahid*, and *Fednah* is one of the conditions for *Mujtahid*.<sup>700</sup> However, the Hanafiah school does not consider *Fednah* a necessary qualification because, once again, the Hanafiah school bases its view of judicial qualifications on the qualifications for witnesses.<sup>701</sup> Since witnesses need not possess *Fednah*, judges should also not need to possess *Fednah*.<sup>702</sup>

Although the Malikiah school requires judges to possess *Fednah*, it is an open question as to how much *Fednah* judges must possess.<sup>703</sup> In the view of some Malikiah scholars, judges must possess a higher standard of mindfulness and understanding than the average person possesses in order to avoid potential tricks committed by litigants or witnesses.<sup>704</sup> Other Malikiah scholars conclude that the required level of *Fednah* is a very high standard of smartness and perception so that whoever possesses that standard should be famous for being smart and perceptive.<sup>705</sup> The first approach seems to be more reasonable due to the difficulty of finding people who possess the uncommon standard mentioned in the second approach.<sup>706</sup>

Although the *Fednah* qualification is disputed among Islamic schools,<sup>707</sup> requiring judges to possess the *Fednah* qualification should be the proper approach.<sup>708</sup> This is based on the same reasoning provided by the Malikiah school, which is the importance of appointing qualified judges who can avoid potential tricks committed by litigants or witnesses.<sup>709</sup> In addition, due to the necessity of appointing judges to determine disputes<sup>710</sup> and the importance of those judges

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<sup>700</sup> See AL-MAQDISI, *supra* note 647, at 660; see also 2 BIN TIMIAH, *supra* note 605, at 203.

<sup>701</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175.

<sup>702</sup> See *Id.*

<sup>703</sup> 8 ALQASM, *supra* note 52, at 66; 6 ABDULRAHMAN, *supra* note 53, at 88.

<sup>704</sup> 6 ABDULRAHMAN, *supra* note 53, at 88.

<sup>705</sup> 8 ALQASM, *supra* note 52, at 66.

<sup>706</sup> See 7 ALTOUSI, *supra* note 592, at 291.

<sup>707</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175; 6 ABDULRAHMAN, *supra* note 53, at 88; 20 ALNAWAWAI, *supra* note 638, at 127; AL-MAQDISI, *supra* note 647, at 660.

<sup>708</sup> 6 ABDULRAHMAN, *supra* note 53, at 88; 20 ALNAWAWAI, *supra* note 638, at 127.

<sup>709</sup> See 6 ABDULRAHMAN, *supra* note 53, at 88.

<sup>710</sup> See 11 AL-NAWAWI, *supra* note 375, at 97.



possessing the *Fednah* qualification,<sup>711</sup> the required level of *Fednah* qualification should be a higher standard of mindfulness and understanding than what normal people possess.<sup>712</sup>

### 5.5.2.3. Third Qualification: (*Mujtahid*) Diligence

The third qualification that some,<sup>713</sup> not all,<sup>714</sup> Islamic schools require is *Mujtahid* or diligence. *Mujtahid* is an adjective and a noun derived from the term *Ejtihad*, which means to exert effort in order to research an issue under Islamic law.<sup>715</sup> In the author's view, being *Mujtahid* is requirement for judges unless none of the otherwise qualified individuals possesses this trait.<sup>716</sup>

The Islamic schools' approaches regarding the *Mujtahid* qualification diverge widely.<sup>717</sup> The generally pragmatic Hanafiah school holds that *Mujtahid* is a priority condition but not a requirement.<sup>718</sup> On the opposite end of the spectrum, the Shafi'ih and Hanbalian schools note that *Mujtahid* is mandatory for judges; if none of the otherwise qualified people possesses the *Mujtahid* qualification, none of them will be appointed as a judge.<sup>719</sup> The middle approach is recommended by the Maliki school, which considers *Mujtahid* as a requirement unless no qualified individuals possess this requirement; then, the most qualified person who possesses the other mandatory qualifications will be appointed as a judge.<sup>720</sup>

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<sup>711</sup> See 6 ABDULRAHMAN, *supra* note 53, at 88.

<sup>712</sup> See 6 ABDULRAHMAN, *supra* note 53, at 88; see also 8 ALQASM, *supra* note 52, at 66.

<sup>713</sup> ALSHIRAZI, *supra* note 408, at 251; ALKHERAQI, *supra* note 637, at 154.

<sup>714</sup> IBRAHIM, *supra* note 449, at 215.

<sup>715</sup> See AL-MAKTABAH AL-ISLAMIAH, <http://www.library.islamweb.net> (last visited Jan. 31, 2017).

<sup>716</sup> ALBAQDADI, *supra* note 408, at 117.

<sup>717</sup> IBRAHIM, *supra* note 449, at 215; ALBAQDADI, *supra* note 408, at 117; ALSHIRAZI, *supra* note 408, at 251; ALKHERAQI, *supra* note 637, at 154.

<sup>718</sup> IBRAHIM, *supra* note 449, at 215.

<sup>719</sup> See 11 AL-NAWAWI, *supra* note 375, at 95; see also 10 BIN QUDAMH, *supra* note 556, at 37.

<sup>720</sup> See 8 ALQASM, *supra* note 52, at 66-67; see also 6 ABDULRAHMAN, *supra* note 53, at 88.

Both the Hanafiah and Malikiyah schools believe that judges should be *Muqalids* if none of the qualified individuals is *Mujtahid*.<sup>721</sup> *Muqalid*, which is a noun, derives from the word *Taqalaid*, which, in the Arabic language, means “[t]o put something around the neck to surround it, like a necklace.”<sup>722</sup> *Muqalid*, specifically, means that an individual without the ability to become *Mujtahid* will copy, follow, or ask other *Mujtahids* or Islamic scholars about issues of law that he or she does not know.<sup>723</sup>

The Hanafiah school considers *Mujtahid* a priority condition but not a requirement.<sup>724</sup> For Hanafiah scholars, as long as a person possesses the other required traits and is at least *Muqalid*, that person may be appointed as a judge.<sup>725</sup> Again, Hanafiah scholars reason that if witnesses who testify in courts are not required to be *Mujtahid*, judges should not be required to be *Mujtahid*.<sup>726</sup> Additionally, the purpose of the judiciary is to protect individual rights, which *Muqalid* judges are certainly capable of doing.<sup>727</sup> Finally, the Hanafiah point to an occasion where Prophet Muhammad sent a man named Ali, who was not *Mujtahid* to Yemen as a judge, supporting the Hanafiah reasoning that *Mujtahid* is not a requirement for judges.<sup>728</sup>

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<sup>721</sup> 9 MUSA, *supra* note 51, at 4; ALBAQDADI, *supra* note 408, at 117.

<sup>722</sup> MARKAZ AL-FATAWA, <http://www.audio.islamweb.net> (last visited Jan. 31, 2017).

<sup>723</sup> *Id.*

<sup>724</sup> 3 ABDULJALIL, *supra* note 621, at 101. (It is important to mention that not all the Islamic scholars in the Hanafiah school considered the *Ejtihad* qualification as a priority condition. Some of the Islamic scholars in the Hanafiah school stated that the *Ejtihad* qualification is a mandatory requirement that must be possessed by judges. However, because the majority of the Islamic scholars in the Hanafiah school believed that the *Ejtihad* qualification is priority condition, the Hanafiah approach in this case is pro considering the *Ejtihad* qualification as a priority condition). See 9 MUSA, *supra* note 51, at 4-5.

<sup>725</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76; 3 ABDULJALIL, *supra* note 621, at 101; 9 MUSA, *supra* note 51, at 4-5.

<sup>726</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76.

<sup>727</sup> 3 ABDULJALIL, *supra* note 621, at 101.

<sup>728</sup> 9 MUSA, *supra* note 51, at 4-5. (The story in details, “Ali says, when prophet Muhammad sent me to Yemen as a judge, I asked him and said, you send me to Yemen to become a judge even though I am still young and do not know how to decide disputes? Then Prophet Muhammad said, God will guide you, prove your tongue, and when the litigants set next to you, do not decide until you listen from the second one as much as you listen from the first one and if you do so, that will help you to decide the dispute wisely. Then Ali said, I am still a judge and never doubt the decisions I made.”). See 9 MUSA, *supra* note 51, at 4-5.

The approach of the Shafi'ih and Hanbaliah schools are almost the same.<sup>729</sup> Both schools consider *Mujtahid* a mandatory requirement that judges must possess.<sup>730</sup> Again, if none of the otherwise qualified people possess the *Mujtahid* qualification, none of those qualified people shall be appointed as a judge.<sup>731</sup> Those schools state two reasons for their approach.

First, both schools interpret one of Prophet Muhammad's speeches to indicate *Mujtahid* as a requirement for judges.<sup>732</sup> Prophet Muhammad says:

Two judges are in hell and one judge is in heaven, the one in heaven is the judge who knows the right decision and rules in accordance to it. The two judges in hell are; the judge who knows the right decision but does not rule in accordance with it and the judge who does not know the right decision and rules people's disputes ignorantly.<sup>733</sup>

Both schools interpret this to support the *Mujtahid* qualification in order to prevent judges from ignorantly deciding disputes.<sup>734</sup>

Second, both schools compare judges to *Muftis* and state that judges must possess all the requirements of the *Muftis*, including *Mujtahid*.<sup>735</sup> A *Mufti* is a person who gives legal opinions about Islamic law issues when asked; however, *Muftis* lack an enforceability mechanism.<sup>736</sup> As a result, both schools state that if *Muftis* provide legal opinions and must possess the *Mujtahid* qualification, judges who give legal opinions and enforce them are *a fortiori* to possess the *Mujtahid* qualification.<sup>737</sup>

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<sup>729</sup> 11 AL-NAWAWI, *supra* note 375, at 95; 4 BIN QUDAMH, *supra* note 131, at 223.

<sup>730</sup> 11 AL-NAWAWI, *supra* note 375, at 95; 4 BIN QUDAMH, *supra* note 131, at 223.

<sup>731</sup> See ALESFHANI, *supra* note 641, at 45; see also 8 MUFLEH, *supra* note 486, at 154.

<sup>732</sup> See 20 ALNAWAWAI, *supra* note 638, at 127; see also AL-MAQDISI, *supra* note 647, at 660.

<sup>733</sup> See 20 ALNAWAWAI, *supra* note 638, at 127; see also AL-MAQDISI, *supra* note 647, at 660.

<sup>734</sup> See 20 ALNAWAWAI, *supra* note 638, at 127; see also AL-MAQDISI, *supra* note 647, at 660.

<sup>735</sup> 20 ALNAWAWAI, *supra* note 638, at 127; 10 BIN QUDAMH, *supra* note 556, at 38.

<sup>736</sup> See AL-REASAH AL-AMAH, *supra* note 467.

<sup>737</sup> 20 ALNAWAWAI, *supra* note 638, at 127; 4 BIN QUDAMH, *supra* note 131, at 223.

In addition, both schools require judges besides being *Mujtahids* is to possess a certain level of knowledge of different types of sciences in order to qualify as judges.<sup>738</sup> Both schools note that judges should know the provisions and rules under Islamic law that are related to the judiciary and the mechanism of dispute resolution in the following areas: the holy Qur'an, Sunni speeches, reasoning by analogy, cases with consensuses among Islamic scholars, cases with different opinions among Islamic scholars, and knowledge of the Arabic language.<sup>739</sup>

The approach taken by the Malikiyah school considers *Mujtahid* a qualification that must be possessed by judges unless none of the qualified individuals possess *Mujtahid*.<sup>740</sup> This approach is described as the middle approach because, while the Hanafiah school does not require judges to be *Mujtahid*,<sup>741</sup> the Shafi'ih and Hanbaliyah schools do not allow individuals who are not *Mujtahid* to be judges, even if none of the qualified individuals possess the *Mujtahid* qualification.<sup>742</sup> The Malikiyah school provides two reasons to support their middle-ground approach.

First, dispute resolution requires judges with the ability to research new issues and cases in order to reach the right decisions.<sup>743</sup> Requiring that judges possess this characteristic ensures that judges will be thorough and careful in their work.<sup>744</sup> Second, sometimes judges review and revise decisions from other judges and, therefore, must possess the *Mujtahid* qualification.<sup>745</sup>

However, if none of the qualified individuals for a judicial appointment possesses the *Mujtahid*

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<sup>738</sup> ALESFHANI, *supra* note 641, at 45; 2 BIN TIMIAH, *supra* note 605, at 203.

<sup>739</sup> See 13 ALAMRANI, *supra* note 133, at 17-19; see also 10 BIN QUDAMH, *supra* note 556, at 38-39.

<sup>740</sup> 6 ABDULRAHMAN, *supra* note 53, at 88-89; KHALIL BIN ESHAQ BIN MUSA, MUKHTASAR AL-ALAMAH KHALIL [THE BRIEF ON THE MUSLIM SCHOLAR KHALIL] [AUTHOR'S TRANSLATION] 218 (Ahmed Jad ed., 1st ed. 2005).

<sup>741</sup> 4 ALBARAE & AL-SHALABI, *supra* note 370, at 176.

<sup>742</sup> See ALESFHANI, *supra* note 641, at 45; see also 8 MUFLEH, *supra* note 486, at 154.

<sup>743</sup> See 2 BIN NSAR, *supra* note 655, at 209.

<sup>744</sup> See *Id.*

<sup>745</sup> See *Id.*

qualification, the ideal *Muqalid* who possesses all other qualifications should serve as a judge to satisfy the need for a competent judiciary.<sup>746</sup>

After examining the different Islamic school approaches to the *Mujtahid* requirement for judges, the Malikiah school approach is the reasonable approach for two reasons.<sup>747</sup> First, unlike the Hanafiah school, which does not require judges possess the *Mujtahid* qualification,<sup>748</sup> the Malikiah school recognizes that the *Mujtahid* qualification ensures a judiciary capable of researching new cases in order to make fair decisions.<sup>749</sup> Second, unlike the Shafi'ih and Hanbaliah schools, which do not accept the appointment of *Muqalids* even if no otherwise qualified individuals possess the *Mujtahid* qualification,<sup>750</sup> the Malikiah school accepts the appointment of *Muqalids*.<sup>751</sup> This practical approach recognizes that it can be difficult to identify individuals with all the qualifications of judges<sup>752</sup> and, since judges are necessary, this is a reasonable process to ensure the continued effectiveness of the judiciary.<sup>753</sup>

In the end, whether judges must possess the *Mujtahid* qualification is debated amongst the Islamic schools.<sup>754</sup> On the one hand, the Hanafiah school does not consider *Mujtahid* a requirement,<sup>755</sup> which provides a rather large pool of potential judges; on the other hand, the Shafi'ih and Hanbaliah schools stipulate that *Mujtahid* is a mandatory qualification, which limits the pool of potential judges.<sup>756</sup> However, the ideal approach is the Malikiah school approach,

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<sup>746</sup> See 8 ALQASM, *supra* note 52, at 66-67; see also 6 ABDULRAHMAN, *supra* note 53, at 88-89.

<sup>747</sup> See 2 BIN NSAR, *supra* note 655, at 209; see also BIN MUSA, *supra* note 740, at 218.

<sup>748</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 288.

<sup>749</sup> See 2 BIN NSAR, *supra* note 655, at 209.

<sup>750</sup> See 11 AL-NAWAWI, *supra* note 375, at 95; see also 4 BIN QUDAMH, *supra* note 131, at 223.

<sup>751</sup> See BIN MUSA, *supra* note 740, at 218.

<sup>752</sup> See 8 ALQASM, *supra* note 52, at 66-67.

<sup>753</sup> See 7 ALTOUSI, *supra* note 592, at 291.

<sup>754</sup> IBRAHIM, *supra* note 449, at 215; ALBAQDADI, *supra* note 408, at 117; ALSHIRAZI, *supra* note 408, at 251; ALKHERAQLI, *supra* note 637, at 154.

<sup>755</sup> 6 MUHAMMAD ET AL., *supra* note 50, at 288.

<sup>756</sup> See ALESFHANI, *supra* note 641, at 45; see also 8 MUFLEH, *supra* note 486, at 154.

which considers *Mujtahid* a requirement,<sup>757</sup> unless none of the qualified individuals possesses *Mujtahid*, in which case the ideal individual who possesses the other mandatory qualifications will be appointed as a judge.<sup>758</sup>

#### 5.5.2.4. Fourth Qualification: (*Thakar*) Male

Whether women are entitled to judicial appointment depends on each Islamic school's requirements for judges. In this light, some of the Islamic schools explicitly require that judges be *Thakar* or male.<sup>759</sup> The Malikiyah,<sup>760</sup> Shafi'ih,<sup>761</sup> and Hanbaliyah<sup>762</sup> schools require that judges be men, while the Hanafiah school believes that women can be appointed as judges, except in criminal cases.<sup>763</sup> Other unaffiliated Muslim scholars believe that women can be appointed as judges in any case without limitations.<sup>764</sup>

The Malikiyah, Shafi'ih, and Hanbaliyah schools believe that only men can be appointed as judges—and that women can never be appointed as judges.<sup>765</sup> For these schools, any woman appointed as a judge should be dismissed.<sup>766</sup> The Malikiyah school does not state many reasons for this position. Instead, the school simply mentions in its sources either that women cannot be appointed as judges,<sup>767</sup> judges must be men,<sup>768</sup> or that there are different schools of thoughts regarding this requirement.<sup>769</sup>

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<sup>757</sup> ALBAQDADI, *supra* note 408, at 117.

<sup>758</sup> See 8 ALQASM, *supra* note 52, at 66-67; see also 6 ABDULRAHMAN, *supra* note 53, at 88-89.

<sup>759</sup> IBRAHIM, *supra* note 449, at 234.

<sup>760</sup> ALMALIKI, *supra* note 633, at 462.

<sup>761</sup> ALSHIRAZI, *supra* note 408, at 251.

<sup>762</sup> 2 BIN TIMIAH, *supra* note 605, at 203.

<sup>763</sup> IBRAHIM, *supra* note 449, at 234.

<sup>764</sup> See 2 ALQURTUBI, *supra* note 557, at 258.

<sup>765</sup> 8 ALQASM, *supra* note 52, at 63; 7 ALTOUSI, *supra* note 592, at 289; BIN QUDAMH, *supra* note 408, at 147.

<sup>766</sup> 8 ALQASM, *supra* note 52, at 63; 7 ALTOUSI, *supra* note 592, at 289; BIN QUDAMH, *supra* note 408, at 147.

<sup>767</sup> 2 BIN NSAR, *supra* note 655, at 209.

<sup>768</sup> 6 ABDULRAHMAN, *supra* note 53, at 87.

<sup>769</sup> 4 MUHAMMAD, *supra* note 637, at 243.

The Shafi'ih and Hanbaliah schools state almost the same reasons for not allowing women to be appointed as judges but provide a bit more detail.<sup>770</sup> Specifically, the schools state that when Prophet Muhammad was told of a woman leader in Persia, he said, “[a] nation will not succeed when the president is a woman,” or in other words, “[w]omen cannot take leadership positions.”<sup>771</sup> As a result, these schools interpret this to mean that women cannot be appointed as judges since a judge is a leadership position that women are forbidden from taking.<sup>772</sup>

Additionally, women are often prevented from being in the presence of other men; however, being a judge requires sitting in the judicial council and courtrooms, with litigants, witnesses, experts, and other men.<sup>773</sup> Therefore, according to these schools, women cannot be appointed as judges because women are not supposed to be in the presence of other men.<sup>774</sup> Finally, in Prophet Muhammad's era, as well as the era of the caliphs, women were not appointed as judges.<sup>775</sup> Neither Prophet Muhammad nor the caliphs appointed women judges, which these schools suggest indicates that women are not allowed to serve as judges.<sup>776</sup>

The Hanafiah school approach holds that the appointment of women judges is valid, except in criminal cases.<sup>777</sup> Since the Hanafiah school uses the requirements for witnesses to determine the requirements for judges, it notes that witnesses are not required to be men.<sup>778</sup> However, the Hanafiah school does not accept testimonies from women in criminal cases.<sup>779</sup> As

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<sup>770</sup> 3 ALSHIRAZI, *supra* note 619, at 378; 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>771</sup> 20 ALNAWAWAI, *supra* note 638, at 127; 11 ALMAGDISI, *supra* note 405, at 386.

<sup>772</sup> 3 ALSHIRAZI, *supra* note 619, at 378; 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>773</sup> 3 ALSHIRAZI, *supra* note 619, at 378; 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>774</sup> 3 ALSHIRAZI, *supra* note 619, at 378; 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>775</sup> 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>776</sup> *Id.*

<sup>777</sup> IBRAHIM, *supra* note 449, at 234.

<sup>778</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76.

<sup>779</sup> See 3 ABDULJALIL, *supra* note 621, at 106.

a result, the Hanafiah school approach permits the appointment of women judges only in cases where women can provide testimony.<sup>780</sup>

The third approach, observed by some Islamic scholars,<sup>781</sup> permits the appointment of women judges in any type of case<sup>782</sup> for two reasons. First, women are allowed to become *Muftis* and provide legal opinions about any issue under Islamic law and, therefore, they should be allowed to be appointed as judges in any type of case, without exception.<sup>783</sup> Second, the basic role of the judiciary is to correctly resolve disputes; the appointment of a judge is valid, regardless of gender, if the individuals demonstrate they can correctly resolve disputes.<sup>784</sup>

After examining the different Islamic school approaches to gender requirements for judges,<sup>785</sup> it seems that the third approach is ideal—where women are entitled to be appointed as judges in all types of cases. Restricting women from judicial appointment is unreasonable since women have proven abilities of working and taking responsibility in leadership positions. It is also unreasonable to prevent women from deciding criminal cases; in addition, women judges can declare if they are willing to hear criminal disputes in the process of their appointment.

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<sup>780</sup> *See Id.* at 101.

<sup>781</sup> (Those scholars are: Muhammad Bin Al-Hasan and Muhammad Bin Jareer Al-Tabari). 2 ALQURTUBI, *supra* note 557, at 258.

<sup>782</sup> 4 MUHAMMAD, *supra* note 637, at 243; 2 ALQURTUBI, *supra* note 557, at 258.

<sup>783</sup> 13 ALAMRANI, *supra* note 133, at 20.

<sup>784</sup> *See* 4 MUHAMMAD, *supra* note 637, at 243.

<sup>785</sup> ALMALIKI, *supra* note 633, at 462; ALSHIRAZI, *supra* note 408, at 251; 2 BIN TIMIAH, *supra* note 605, at 203; IBRAHIM, *supra* note 449, at 234; 2 ALQURTUBI, *supra* note 557, at 258.



Moreover, Caliph Omar's<sup>786</sup> appointment of a woman to supervise the market<sup>787</sup> in Al-Medina city,<sup>788</sup> what is now Al-Madinah Al-Munawwarah in Saudi Arabia,<sup>789</sup> confirms the validity of appointing women as judges. Caliph Omar appointed a woman named Al-Shefa Bint Abdullah<sup>790</sup> to supervise the market and ensure that the deals and transactions concluded in the market were in accordance with Islamic law.<sup>791</sup> Some Islamic scholars use this example to validate the appointment of women judges based on analogy. If women were allowed to serve in a leadership role as market supervisor, women should also be allowed to serve in a leadership role as judges.<sup>792</sup> Moreover, because Islamic law was applied literally during Caliph Omar's era, the appointment of women to supervise the market is valid under Islamic law and, therefore, the appointment of women as judges should be valid as well.<sup>793</sup>

As a result, Muslim women are now appointed as judges in Muslim countries such as Malaysia, Indonesia, Pakistan, Turkey, Jordan, Iraq, and Egypt, among others. Those Muslim countries adopt a liberal approach in Islamic law that grants women the right to serve as judges. However, other Muslim countries, such as Saudi Arabia and Oman, adopt a conservative approach under Islamic law and, therefore, invalidated the appointment of women judges.

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<sup>786</sup> (Caliph Omar full name is Omar Bin Alkhatib Bin Nafil Bin Abdulouza Bin Reiah Bin Abdullah and was the second Caliph after Prophet Muhammad death). 3 MUHAMMAD BIN SAAD BIN MANAIA ALHASHIMI, AL-TABAGAT AL-KOBRA [THE GREAT FLOORS ON BIOGRAPHY OF IMPORTANT CHARACTERS] [AUTHOR'S TRANSLATION] 201, 207-08 (Muhammad Abdulqadir Ata ed., 1st ed. 1990).

<sup>787</sup> 8 ALI BIN AHMED BIN SAEID BIN HAZEM ALQURTUBI, AL-MUHALA BAL-ATHAR [BIOGRAPHY OF MUSLIM SCHOLARS] [AUTHOR'S TRANSLATION] 527-28 (n.d.).

<sup>788</sup> See ALI BIN MUHAMMAD BIN AHMED BIN MUSA ABIN MASOUD, TAKHRAIJ AL-DALALAT AL-SAMIAH ALA MAKAN FI AHD RASOUL ALLAH MIN AL-HERAF WA AL-SENAAT WA AL-AMALAT AL-SHARIAH [OVERVIEW ON PEOPLE'S HABITS AND CUSTOMS DURING PROPHET MUHAMMAD ERA] [AUTHOR'S TRANSLATION] 87 (Ehsan Abase ed., 2nd ed. 1998).

<sup>789</sup> SAUDI ARABIA TOURISM, <http://www.sauditourism.sa> (last visited Jan. 31, 2017).

<sup>790</sup> (Al-Shefa full name is Al-Shefa Bint Abdullah Bin Abdushams Bin Khalaf Bin Sadad. She met Prophet Muhammad before he died and Caliph Omar was consulting with her and assigning her some missions to do). See ABIN MASOUD, *supra* note 788, at 87.

<sup>791</sup> See OTHMAN, *supra* note 2, at 147.

<sup>792</sup> See *Id.*

<sup>793</sup> See 8 ALQURTUBI, *supra* note 787, at 527-28.

Permitting only men to serve as judges remains a debated issue in Islamic law.<sup>794</sup> Three of the Islamic schools—Malikiah, Shafi’ih, and Hanbaliah—require judges to be men and invalidate the appointment of women judges,<sup>795</sup> while the Hanafiah school approach validates women judges except in criminal cases.<sup>796</sup> However, the proper approach is taken by the Islamic scholars who accept the appointment of women judges for any type of case.<sup>797</sup>

### 5.5.3. Desirable Qualifications Recommended by Some of the Islamic Schools

This part mentions the last type of judicial qualifications—those that are desirable for judges to possess. These qualifications are not the type of requirements that all Islamic schools require judges to possess,<sup>798</sup> nor are they the requirements that some Islamic schools require judges to possess.<sup>799</sup> Instead, these qualifications are mentioned by two Islamic schools and simply desirable traits for all highly-qualified judges to possess.<sup>800</sup>

The Malikiah school recommends that judges be devout, financially comfortable, patient, not in need or debt, devoid of any criminal convictions, consultative to ensure correct decision-making, and confident.<sup>801</sup> The Shafi’ih school recommends that judges be careful, mindful, and dignified—not greedy, not spiteful, and not hateful.<sup>802</sup> In addition, the Shafi’ih school notes that judges are not supposed to be extremely powerful, as that might adversely impact the ability of

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<sup>794</sup> ALMALIKI, *supra* note 633, at 462; ALSHIRAZI, *supra* note 408, at 251; 2 BIN TIMIAH, *supra* note 605, at 203; IBRAHIM, *supra* note 449, at 234; 2 ALQURTUBI, *supra* note 557, at 258.

<sup>795</sup> 8 ALQASM, *supra* note 52, at 63; 7 ALTOUSI, *supra* note 592, at 289; BIN QUDAMH, *supra* note 408, at 147.

<sup>796</sup> See 2 ABDULLAH BIN MAHMOUD BIN MUDOUD, AL-EKHTIAR LETAELIL AL-MUKHTAR [CLARIFICATION ON THE JURISPRUDENCE OF ISLAMIC LAW] [AUTHOR’S TRANSLATION] 84 (Mahmoud Abu Daqaeqah ed., 1937).

<sup>797</sup> 4 MUHAMMAD, *supra* note 637, at 243; 2 ALQURTUBI, *supra* note 557, at 258.

<sup>798</sup> See 4 ALBARAE & AL-SHALABI, *supra* note 370, at 175-76; ALBAQDADI, *supra* note 408, at 117; ALSHIRAZI, *supra* note 408, at 251; BIN QUDAMH, *supra* note 408, at 147.

<sup>799</sup> See 9 MUSA, *supra* note 51, at 4; 4 MUHAMMAD, *supra* note 637, at 243; ALBSRI, *supra* note 656, at 193; ALKHERAQI, *supra* note 637, at 154.

<sup>800</sup> ALMALIKI, *supra* note 633, at 462; 2 ALQURTUBI, *supra* note 557, at 259; 11 AL-NAWAWI, *supra* note 375, at 97.

<sup>801</sup> ALMALIKI, *supra* note 633, at 462; 2 ALQURTUBI, *supra* note 557, at 259.

<sup>802</sup> 11 AL-NAWAWI, *supra* note 375, at 97.

litigants to deliver clear arguments, but that judges should also not be weak, as that may lead litigants to not take them seriously.<sup>803</sup>

## 5.6. The Proper Approach Regarding the Appointment of Women as Judges

This section enhances the validity of appointing women judges in Islamic law. In doing so, this section responds to arguments often used to invalidate the appointment of women judges. Then, this section provides additional legal grounds to support the appointment of women judges before exploring the current status of women judges in different Muslim countries.

### 5.6.1. Invalidating Arguments that Restrict Women from Appointment as Judges

Opponents to the appointment of women judges provide three different arguments to support their position. First, they assert that women are not supposed to take leadership positions based on Prophet Muhammad's speech (referenced earlier) and that a judge is considered a leadership position.<sup>804</sup> Second, they argue that women are not supposed to be in places where men are present because interaction between men and women is not allowed under Islamic law.<sup>805</sup> Third, they point to the fact that neither Prophet Muhammad nor the caliphs appointed women judges in their time.<sup>806</sup>

Prophet Muhammad's speech, where he stated, "[a] nation will not succeed when the president is a woman," was a special occasion in a specific era. In that era, taking leadership positions required physical capacity in addition to mental capacity since leaders were also expected to be in the front lines during battle. Yet, in the recent era, not all leadership roles require a physical component; therefore, women are capable of taking leadership positions where

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<sup>803</sup> *Id.*

<sup>804</sup> 20 ALNAWAWAI, *supra* note 638, at 127; 3 ALSHIRAZI, *supra* note 619, at 378.

<sup>805</sup> See 10 BIN QUDAMH, *supra* note 556, at 36.

<sup>806</sup> *Id.*

only mental capacity is required. Serving as a judge now only requires the mental capacity to deliver fair solutions for the disputes and separate between legality and illegality. Women are capable of serving this purpose.

Furthermore, although intermixing between men and women in the work place has led to some conflict among the Islamic schools,<sup>807</sup> the intermixing of genders in the work place should be permissible under Islamic law. In the era of the Prophet Muhammad, women were present on the battlefield to prepare food, deliver water, and heal injured men,<sup>808</sup> which led to the intermixing between women and men. Under modern Islamic law, women are entitled to serve as witnesses and deliver testimony in courts when needed,<sup>809</sup> which results in women intermixing with men in the courtroom. As a result, even though serving as a judge leads to intermixing between men and women, the appointment of women judges is valid since intermixing between men and women is permissible.

While opponents argue that neither the Prophet Muhammad nor caliphs appointed women as leaders, Caliph Omar, who was the second caliph after the death of Prophet Muhammad, appointed a woman to supervise a market in the city and resolve disputes between sellers and buyers in a leadership role.<sup>810</sup> In addition, even if a woman was not appointed to

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<sup>807</sup> See 33 THE KUWAITI MINISTRY OF ENDOWMENTS AND ISLAMIC AFFAIRS, AL-MOUSU'AH AL-FIQHIAH AL-KUWAITIAH [THE KUWAITI ENCYCLOPEDIA OF ISLAMIC JURISPRUDENCE] [AUTHOR'S TRANSLATION] 294 (1st ed. 2006); see also MUHAMMAD BIN SALEH BIN MUHAMMAD AL-UTHAIMAIN, RISALT AL-HIJAB [THE STUDY ON HIJAB] [AUTHOR'S TRANSLATION] 24-26 (n.d.); 7 KAMAL ALDAIN MUHAMMAD BIN ABDULWAHID ALSYWASI, FATAH AL-QADAIR [THE INTERPRETATION OF THE HOLY QUR'AN AND ISLAMIC LAW] [AUTHOR'S TRANSLATION] 297-98 (n.d.).

<sup>808</sup> 2 MUHAMMAD ABDULHAY BIN ABDULKABAIR BIN MUHAMMAD ALHASANI, AL-TARATYAB AL-EDARYAH WA AL-AMALAT WA AL-SINA'AT WA AL-MTAJIR WA AL-HALAH AL-ALMI'AH AL-LATI KANAT ALA AHD TA'SAIS AL-MADINAH AL-ESLAMYAH FI AL-MADINAH AL-MONAWARAH AL-ALMI'AH [OVERVIEW ON COMMERCE AND EDUCATION LEVEL DURING THE ESTABLISHMENT OF THE ISLAMIC CITY IN AL-MADINAH AL-MONAWARH] [AUTHOR'S TRANSLATION] 74-75 (Abdullah Alkhalydi ed., 2nd ed. n.d.).

<sup>809</sup> 5 AHMED BIN ALI BIN HAJAR ABU ALFADAL ALASQLANI, FATAH AL-BARI SHARAH SAHAIH AL-BOKHARI [THE EXPLANATION OF THE SUNNI SPEECHES] [AUTHOR'S TRANSLATION] 266 (Muhammad Fuwad Abdulbaqi et al. eds., 1959).

<sup>810</sup> See OTHMAN, *supra* note 2, at 147.

supervise the market, that does not mean the appointment of women judges is invalid. During the era of the Prophet and caliphs, serving as a judge required walking around the market to supervise deals and transactions as well as traveling to other cities to decide disputes that involved large numbers of people. This made serving as a judge during that era harder for women than men since traveling was difficult and required great physical capacity. Yet, modern judges are not usually required to leave the courtroom to resolve disputes, placing less of a burden on modern judges and making the job easier for women.

#### 5.6.2. Additional Legal Grounds to Support the Validity of Appointing Women as Judges

There are also additional legal grounds to enhance the validity of women judges. These include general principles that are a framework for the rules and the regulations under Islamic law. Although these general principles are explained in greater details in the following chapter, it is important to briefly mention these principles to support the legality in appointing women judges under modern Islamic law.

The first general principle that enhances the validity of appointing women judges is that “the origin in everything is permissible until proven otherwise.”<sup>811</sup> Based on this general principle, every legal act is valid and permissible unless it is proven by clear evidence that act or that thing is illegal and prohibited.<sup>812</sup> Appointing women judges is a legal act issued by a competent authority, which fits under this general principle. In order to invalidate the appointment of women judges, there should be clear evidence against this act. Yet, the

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<sup>811</sup> 8 BDR ALDAIN MUHAMMAD BIN ABDULLAH ALZARKSHI, AL-BAHAR AL-MOHAI T FI AUSOL AL-FIQH [ISLAMIC LAW JURISPRUDENCE] [AUTHOR’S TRANSLATION] 10 (1st ed. 1994); ABDULRAHMAN BIN ABI BAKR JALAL ALDAIN ALSWAITI, AL-ASHBAH WA AL-NATHAER [RESEMBLANCE AND MATCH] [AUTHOR’S TRANSLATION] 60 (1st ed. 1990).

<sup>812</sup> See ABDULWAHAB KHALAF, ELM AUSOL AL-FIQH [THE ART OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR’S TRANSLATION] 91 (8th ed. n.d.).

arguments against these appointments do not provide enough evidence to invalidate the appointment of women judges.

The second general principle, undeniably modifying regulations due to the change of time, also enhances the validity of appointing women judges.<sup>813</sup> This general principle aims to modify the regulations and rules enacted during previous eras if those rules and regulations no longer fit due to societal development and change over time.<sup>814</sup> It ensures that Islamic law does not obligate people to be governed by rules and regulations that do not fit modern circumstances.<sup>815</sup> This general principle also argues against opponents to women judges in Islamic law by essentially invalidating the evidence against the appointment of women judges, since that evidence should not be valid under modern Islamic law. As a result, the modern appointment of women judges should be valid due to cultural developments over time and the lack of evidence to prove otherwise.

The third general principle recognizes the importance of permitting custom and habits to decide conflicts in the law, which confirms the validity of modifying the rules and regulations due to the changes in customs and habits over time.<sup>816</sup> This general principle aims to use habits and customs during different times as sources of law to enact or modify the rules and regulations.<sup>817</sup> This general principle can be applied to demonstrate the validity of appointing women judges due to changes in habits and customs over time.

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<sup>813</sup> AHMED BIN ALSHAIKH MUHAMMAD ALZARQA, SHARAH AL-QWA'ID AL-FIGHIAH [THE EXPLANATION OF ISLAMIC LAW GENERAL PRINCIPLES] [AUTHOR'S TRANSLATION] 227 (Mostafa Ahmed Alzarqa ed., 2nd ed. 1989).

<sup>814</sup> I MUHAMMAD MOSTAFA ALZOHAILI, AL-QUA'ID AL-FIGHIAH WA TADBIGATUHA FI AL-MTHAHIB AL-ARBA'AH [ISLAMIC LAW GENERAL RULES AND THEIR APPLICATION ACCORDING TO THE FOUR ISLAMIC SCHOOL OF THOUGHTS] [AUTHOR'S TRANSLATION] 353-54 (1st ed. 2006).

<sup>815</sup> *Id.* at 353.

<sup>816</sup> ALZARQA, *supra* note 813, at 219.

<sup>817</sup> *See* I ABDULRAHMAN BIN SALEH AL-ABDULLATAIF, AL-QWA'ID WA AL-THWABIT AL-FIGHIAH AL-MUTATHAMINAH LL-TAISEER [THE GENERAL PRINCIPLES OF THE JURISPRUDENCE OF ISLAMIC LAW] [AUTHOR'S TRANSLATION] 298-99 (1st ed. 2003).

Unlike previous eras, where jobs for women were limited due to restrictions from the current habits and customs, modern women have been appointed to important positions such as ministers, prosecutors, and judges. In addition, modern habits and customs are more liberal and accept the presence of women in different jobs and in different fields. As a result, even if habits and customs previously restricted women from serving as judges, the modern appointment of women judges should be valid based on changes in habits and customs.

### 5.6.3. Current Status on the Appointment of Women as Judges in Muslim Countries

The majority of modern Muslim countries have adopted a liberal approach to the appointment of women judges. Women in a majority of Muslim countries are eligible to serve as judges; women are serving as judges in Kuwait, the United Arab Emirates, Qatar, Bahrain, Malaysia, Indonesia, Pakistan, Afghanistan, Turkey, Jordan, Iraq, Yemen, Egypt, Syria, Morocco, and Algeria. However, other Muslim countries, such as Saudi Arabia and Oman,<sup>818</sup> adopt a conservative approach and, therefore, limit the appointment of judges to men only. Then, there are special cases, such as the Islamic Republic of Iran, where women can serve as judges, yet decisions made by those women judges need to be approved by men judges.<sup>819</sup>

### 5.7. Conclusion

After discussing and analyzing the history and law concerning women judges in Islam, the appropriate approach is to accept the validity of appointing women judges to hear all types of cases under Islamic law. Women may possess all the mandatory qualifications for judges required by the Islamic schools: being adult Muslims of sound mind, possessing the senses of hearing and sight, having the ability to speak, and knowledge of Islamic law and rules.

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<sup>818</sup> STATUS OF GIRLS AND WOMEN IN THE MIDDLE EAST AND NORTH AFRICA, <https://www.unicef.org> (last visited Dec. 29, 2016).

<sup>819</sup> IRAN PRESS NEWS, <http://www.iranpressnews.com> (last visited Dec. 29, 2016).

In addition, women are also capable of possessing most of the other qualifications that Islamic schools might require of their judges: (*Adalah*) justice, (*Fednah*) perception, and (*Mujtahid*) diligence. Moreover, after analyzing and discussing the perspectives of Islamic schools on the origin of the judiciary, the definition of the judiciary, and the importance and legitimacy of the judiciary, nothing specifically prevents or prohibits women from serving as judges. A judge's main mission is to resolve disputes and separate legality from illegality; women are perfectly capable of accepting this mission.

Moreover, the Islamic schools that permit only men judges provide reasons that do not fit under modern Islamic jurisprudence. These schools also conflict with the current appointment of women judges in many Muslim majority countries. Furthermore, as habits and customs changed, the presence of women in the public and the private sectors is now an accepted norm. Modern women are not only appointed as judges, but also as ministers, prosecutors, executives, etc.

Finally, women under Islamic law are entitled to serve as judges in all types of cases. This conclusion is confirmed by Caliph Omar's appointment of a woman to supervise the market and general principles under Islamic law that grant people the right to modify the rules and regulations as habits and customs change. This chapter demonstrates that the appointment of women as judges is valid and, therefore, the appointment of women as arbitrators should be valid as a result, which is discussed in greater details in the next chapter.



## CHAPTER 6

### VALIDITY OF APPOINTING WOMEN ARBITRATORS

#### 6.1. Introduction

This chapter discusses the validity of appointing women arbitrators under Islamic law, which is a source of conflict in Islamic law. The argument is for acceptance, not only for the appointment of women arbitrators but also for the right of women to work. This chapter clarifies the legal grounds that validate the appointment of women arbitrators and confirms the legality of women participating in the field of arbitration.

While the appointment of women arbitrators is legal according to the Hanafiah school and some Malikiyah school scholars,<sup>820</sup> the Shafi'iah and the Hanbaliyah schools, as well as the other Malikiyah scholars, invalidate the appointment of women arbitrators.<sup>821</sup> Understanding these differences provides a foundation for further discussion to unite Islamic law on the appointment of women arbitrators.

In addition, this chapter argues against those who would invalidate the appointment of women arbitrators because their reasons for not accepting women arbitrators are not valid in modern arbitration. This chapter concludes that Islamic law grants women the right to work in every occupation as long as there is no specific prohibition against women working in a certain occupation and that, since the appointment of women arbitrators is valid for family dispute arbitration, it should also be considered valid in other types of Islamic arbitration.

To enhance the legality of appointing women arbitrators in Islamic arbitration, section two of this chapter provides and then responds to arguments against women arbitrators. Section

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<sup>820</sup> 8 ABDULAZIZ, *supra* note 409, at 118; 7 AL-MALIKI, *supra* note 326, at 146.

<sup>821</sup> 4 AHMED SLAMAH AL-GALYAWI & AHMED AL-BARSLI UM AIRAH, HASHIATA GALYAWI WA UM AIRAH [NOTES ON SHAFI'IIH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 299 (1995); 11 AL-MAGDISI, *supra* note 493, at 392; 8 ALAISH, *supra* note 130, at 285.

four clarifies the right for women to work under Islamic law through examples in the holy Qur'an and provides occasions where women, before and during the era of the caliphs, worked as *Muftis*, merchants, and supervisors in the markets, which supports modern recognition of the right for women to work.

Section five discusses a particular type of arbitration under Islamic law—family dispute arbitration—where the appointment of women arbitrators is accepted, further supporting the argument in favor of women arbitrators in all types of Islamic arbitration. Section six applies general principles of Islamic law to challenge arguments of some Muslim scholars invalidating the appointment of women arbitrators. In addition, these general principles confirm the validity of appointing women arbitrators due to changes habits and customs, which requires modifying some existing rules and regulations, as well as recognizing the need for women to participate in the field of arbitration.

Then, section seven provides an example for the appointment of women arbitrators based on changes in habits and customs while section eight provides an overview on the status of women arbitrators generally along with the percentage of women arbitrators. Finally, section nine concludes that women under Islamic law have the right to work in every occupation and receive equal wages, which includes serving as arbitrators in the field of arbitration.

## 6.2. Arguments to Support the Validity of Appointing Women Arbitrators

This section builds on the previous chapters to support legitimacy in appointing women arbitrators based on the role of women judges in Islamic Law. Moreover, this section recognizes that intermixing between men and women in the workplace is permissible under Islamic law,<sup>822</sup>

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<sup>822</sup> See 5 ALASQLANI, *supra* note 809, at 266; see also 1 MAHMOUD BIN AHMED MIN MUSA BIN AHMED BIN HUSSIN ALGHYTABI, SHARAH SONAN ABI DAUD [THE EXPLANATION OF DAVID'S BRIEF ON THE SUNNI SPEECHES]

to argue against the opponents who invalidate the appointment of women arbitrators in the arbitration field due to the intermixing between men and women. Finally, this section explores the appointment of women arbitrators during the era of the caliphs.<sup>823</sup>

### 6.2.1. Applying the Validity of Appointing Women Judges

The previous chapter explored the legitimate appointment of women arbitrators in certain Islamic schools,<sup>824</sup> which provided a great discussion on the validity of appointing women judges and concluded that the appointment of women judges is valid.<sup>825</sup> The main argument against the validity of women arbitrators is the comparison between arbitrators and judges, particularly since some Islamic schools do not permit women to serve as judges.<sup>826</sup> However, the previous chapter concluded that the appointment of women judges *is* valid under Islamic law.<sup>827</sup> Furthermore, the previous chapter argued that even if arbitrators are the same as judges, women are entitled to participate in the arbitration field and serve as arbitrators in the Islamic arbitration because many recognize that women are entitled to serve as judges.<sup>828</sup> Chapter V concluded that appointing women judges is permissible under Islamic law and, therefore, an attempt to invalidate the appointment of women judges<sup>829</sup> is unenforceable.

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[AUTHOR'S TRANSLATION] 225-27 (Khalid Ibrahim Almasri ed., 1st ed. 1999); *see also* 2 ALHASANI, *supra* note 808, at 74-75.

<sup>823</sup> 8 ABDULAZIZ, *supra* note 409, at 118; 7 AL-MALIKI, *supra* note 326, at 146; 7 ALSYWASI, *supra* note 807, at 316.

<sup>824</sup> *See* 7 AL-MALIKI, *supra* note 326, at 146; *see also* 12 ALAMRANI, *supra* note 133, at 165; *see also* 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>825</sup> *See* 2 AL-MOUSALI, *supra* note 383, at 84; 4 MUHAMMAD, *supra* note 637, at 243; 2 ALQURTUBI, *supra* note 557, at 258.

<sup>826</sup> *See* 7 AL-MALIKI, *supra* note 326, at 146; *see also* 12 ALAMRANI, *supra* note 133, at 165; *see also* 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>827</sup> *See* 2 AL-MOUSALI, *supra* note 383, at 84; 4 MUHAMMAD, *supra* note 637, at 243; 2 ALQURTUBI, *supra* note 557, at 258.

<sup>828</sup> *See* 2 AL-MOUSALI, *supra* note 383, at 84; 4 MUHAMMAD, *supra* note 637, at 243; 2 ALQURTUBI, *supra* note 557, at 258.

<sup>829</sup> *See* 7 AL-MALIKI, *supra* note 326, at 146; *see also* 12 ALAMRANI, *supra* note 133, at 165; *see also* 4 BIN QUDAMH, *supra* note 131, at 130.

## 6.2.2. Employing the Role of Arbitrators

After discussing and analyzing the role of arbitrators from the four Islamic school perspectives, nothing indicates that women should be prohibited from serving as arbitrators. In addition, Chapter IV concluded that the functions and qualifications of arbitrators are applicable to both men and women arbitrators so that women should not be banned from appointment as arbitrators.

Some Islamic schools and Muslim scholars consider the functions of arbitrators inside the tribunal the same as the functions of judges inside the courtroom and, therefore, women should not be arbitrators because women are not allowed to be judges.<sup>830</sup> However, Chapter IV concluded that although arbitrators decide specific disputes for specific people, arbitrators are not the same as judges due to their limited authority and jurisdiction based on the will of the parties.<sup>831</sup> In addition, while some Islamic schools and Muslim scholars require arbitrators to possess the same qualifications as judges, including being male,<sup>832</sup> Chapter IV concludes that, since arbitrators are not the same as judges,<sup>833</sup> the male requirement does not apply and therefore women can serve as arbitrators.

There are some individuals that are banned from serving as arbitrators under Islamic law,<sup>834</sup> including the mentally incapacitated and minors.<sup>835</sup> However, women are not one in this group of people banned from serving as arbitrators and, therefore, women can serve as

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<sup>830</sup> See 16 AL-SARKHSI, *supra* note 326, at 111; *see also* 10 ABDULRAHMAN, *supra* note 327, at 35-36; *see also* 8 ALQASM, *supra* note 52, at 100-101; *see also* 18 ALJWAINI, *supra* note 376, at 583; *see also* 11 AL-MRDAWY, *supra* note 495, at 197-98.

<sup>831</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>832</sup> See 10 ABDULRAHMAN, *supra* note 327, at 35-37; *see also* 2 AL-KHALOUTI, *supra* note 131, at 513-15; *see also* 12 ALAMRANI, *supra* note 133, at 165; *see also* 4 BIN QUDAMH, *supra* note 131, at 130.

<sup>833</sup> 4 AL-MQGDISI, *supra* note 326, at 377; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>834</sup> 8 ALQASM, *supra* note 52, at 100-02.

<sup>835</sup> 7 AL-MALIKI, *supra* note 326, at 145.

arbitrators. Essentially, the functions and the qualifications of arbitrators under Islamic law are gender neutral and are applicable to both men and women arbitrators.<sup>836</sup>

### 6.2.3. Intermixing Between Men and Women in the Workplace is Permissible under Islamic Law

Another argument made against women arbitrators, is that working in the arbitration field leads to the intermixing between men and women, which they believe is not permissible under Islamic law.<sup>837</sup> Yet, there are a few different reasons to recognize that intermixing between men and women in the workplace is permissible under Islamic law.<sup>838</sup>

First, women under Islamic law are entitled to serve as witnesses and deliver testimony, including for commercial transactions and civil contracts.<sup>839</sup> This basic right is derived from the holy Qur'an when God called on people to appoint male or female witnesses when concluding transactions, especially debt contracts.<sup>840</sup> When women are asked to be witnesses for transactions or contracts, it leads women to intermix with men, which, as a result, grants women permission to intermix with men.

Second, during the era of Prophet Muhammad, both men and women washed their faces, hands, and feet at the same place to prepare for prayers,<sup>841</sup> validating gender intermixing. Also during this time, women participated in battles with men by preparing food, delivering water, as

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<sup>836</sup> See 4 AL-MQGDISI, *supra* note 326, at 377; see also 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>837</sup> See 33 THE KUWAITI MINISTRY OF ENDOWMENTS AND ISLAMIC AFFAIRS, *supra* note 807, at 294; see also AL-UTHAIMAIN, *supra* note 807, at 24-26; 7 ALSYWASI, *supra* note 807, at 297-98.

<sup>838</sup> See 5 ALASQLANI, *supra* note 809, at 266; see also 1 ALGHYTABI, *supra* note 822, at 225-27; see also 2 ALHASANI, *supra* note 808, at 74-75.

<sup>839</sup> 5 ALASQLANI, *supra* note 809, at 266; 13 ALGHYTABI, *supra* note 839, at 202.

<sup>840</sup> The Holy Qur'an, *Al-Baqarah*, Verse 282.

<sup>841</sup> 1 ALGHYTABI, *supra* note 822, at 225-27; 1 MUHAMMAD BIN ALI BIN MUHAMMAD BIN ABDULLAH ALSHOKANI, NAIL AL-AOTAR [SATISFYING THE NEEDS OF THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 43 (Isam Aldain Alsbabiti ed., 1st ed. 1993).

well as curing and treating injured men,<sup>842</sup> again validating gender intermixing as permissible under Islamic law.

Third, when the arbitration parties are women and the arbitrators are men, what is the appropriate solution regarding the intermixing of genders? According to those who invalidate the appointment of women arbitrators, the appointment of men arbitrators when the arbitration parties are women is not considered intermixing, while women arbitrators for arbitration parties that are men is considered intermixing. According to those who validate the appointment of women arbitrators, however, both situations—when the arbitrators are men and the parties are women or when the arbitrators are women and the parties are men—are permissible. It does not make a sense for the opponents to consider the appointment of women arbitrators to be intermixed with men.

In short, intermixing between men and women in the workplace is valid under Islamic law.<sup>843</sup> This validity derives from the right to appoint female witnesses,<sup>844</sup> the participation of women in battles during the time of Prophet Muhammad,<sup>845</sup> and the refutation of the irrational idea that male arbitrators and female parties is not intermixing while female arbitrators and male parties is intermixing. Even if arbitration leads to intermixing between men and women, it is not a valid reason to invalidate the appointment of women arbitrators while permitting intermixing in other arbitration scenarios. Moreover, intermixing between men and women in the workplace is valid under Islamic law and the appointment of women arbitrators has been accepted by some of the Muslim scholars from the era of the caliphs.

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<sup>842</sup> 2 ALHASANI, *supra* note 808, at 74-75.

<sup>843</sup> See 5 ALASQLANI, *supra* note 809, at 266; see also 1 ALGHYTABI, *supra* note 822, at 225-27; see also 2 ALHASANI, *supra* note 808, at 74-75.

<sup>844</sup> 5 ALASQLANI, *supra* note 809, at 266; 13 ALGHYTABI, *supra* note 839, at 202.

<sup>845</sup> 2 ALHASANI, *supra* note 808, at 74-75.

This all demonstrates the validity in appointing women arbitrators in Islamic arbitration. Women are entitled to be appointed as judges in courts argue against the opponents who consider arbitrators to be the same as judges and invalidate women's appointments as judges, which renders their appointment as arbitrators invalid. In addition, Islamic law does not restrict women from appointment as arbitrators and women are capable of possessing the qualifications of arbitrators under Islamic law.

### 6.3. Women's Rights to Work

The legal grounds in Islamic law for the appointment of women arbitrators are divided into two parts. First, verses in the holy Qur'an grant women the right to work as well as confirm equality between men and women for types of work and wages. Second, during the era of the caliphs women worked as *Muftis* providing advisory opinions on issues according to Islamic law, as merchants concluding commercial transactions, and as supervisors in the market.

#### 6.3.1. Holy Qur'an Verses that Grant Women the Right to Work and Confirm Equality Between Men and Women

The holy Qur'an, which is the main source of Islamic law,<sup>846</sup> is rich with verses that guarantee the rights of women to work as long as there is no specific prohibition against women working in a certain occupation.<sup>847</sup> In addition, some holy Qur'an verses affirm equality between men and women regarding the right to work, includes job title and wages.<sup>848</sup>

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<sup>846</sup> See 11 MUHAMMAD RASHID BIN ALI RIDA BIN MUHAMMAD SHAMS ALDAIN, TAFSAIR AL-QUR'AN AL-HAKAIM [THE WISE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 234 (1990); see also 1 ABDULLAH BIN AHMED BIN MAHMOUD HAFITH ALDAIN ALNAFASI, MADARIK AL-TANZAIL WA HAQAEQ AL-TAWAIL [THE PERCEPTION OF QUR'AN AND THE PRECISE INTERPRETATION] [AUTHOR'S TRANSLATION] 300 (Yousef Ali Badawi et al. eds., 1st ed. 1998).

<sup>847</sup> See The Holy Qur'an, *Al-Tawbah*, Verses 71, *Al-Nahl*, Verse 97, *Al-Imran*, Verse 195, *Al-Nisa*, Verse 32.

<sup>848</sup> See 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, AL-TAFSAIR AL-WASAIT LL-QUR'AN AL-KARAIM [THE CENTER OF THE EXPLANATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 733 (1st ed. 1993); see also 1 ALI BIN AHMED BIN MUHAMMAD BIN ALI ALWAHIDI ALNAISABORI, AL-WASAIT FI TAFSAIR AL-QUR'AN AL-MAJEED [THE INTERPRETATION CENTER OF THE HOLY QUR'AN] [AUTHOR'S

One of the general principles that establishes equality between men and women is found in Chapter Al-A'raf verse 189, which reads, “[i]t is he who created you from one soul and created from it its mate that he might dwell in security with her.”<sup>849</sup> The majority of Muslim scholars interpret this verse to indicate that “one soul” means Adam and “its mate” means Eve.<sup>850</sup> Other scholars interpret this verse to mean that God created every single person from his or her parent.<sup>851</sup> However, both interpretations confirm equality between all men and women as a general principle.

Another general principle that endorses equality between men and women is derived from Chapter Al-Tawbah verses 71, which reads, “[t]he believers, men and women, are supporters of one another; they enjoin good, and forbid evil.”<sup>852</sup> Some Muslim scholars consider this verse a general principle that confirms equality between men and women because God calls both men and women to support each other.<sup>853</sup> In addition, God asks both men and women to watch out for each other by supporting useful work and preventing unlawful work, which also confirms the right of women to work.<sup>854</sup>

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TRANSLATION] 535 (Adel Ahmed Abdulmawjoud et al. eds., 1st ed. 1994); *see also* ABDULRAHMAN BIN NASSIR BIN ABDULLAH BIN NASSIR ALSA'DI, TISAIR AL-KARAIM AL-RAHMAN FI TAFSAIR KLAM AL-MANAN [THE INTERPRETATION OF GOD'S WORDS] [AUTHOR'S TRANSLATION] 176 (Abdulrahman Bin Muala Al-Iwaihiq ed., 1st ed. 2000).

<sup>849</sup> The Holy Qur'an, *Al-A'raf, Verse 189*.

<sup>850</sup> 2 ALNAISABORI, *supra* note 848, at 434; 3 ABU MUHAMMAD ALHUSSIN BIN MASUD ALBAGHAWI, MA'LIM AL-TANZAIL FI TAFSAIR AL-QUR'AN [THE EXPLANATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 311 (Muhammad Abdullah Alnamir et al. eds., 4th ed. 1997); 2 ABU ALQASIM MAHMOUD BIN AMROU BIN AHMAD ALZAMKHASHARI, AL-KASHAF AN HAQAEQ GHWAMID AL-TANZAIL [THE PROSPECTOR OF THE FACTS OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 186 (3rd ed. 1986); 2 ABDULHAQ BIN GHALIB BIN ABDULRAHMAN BIN TAMMAM, AL-MUHARAR AL-WAJAIZ FI TAFSAIR AL-KETAB AL-AZIZ [THE EDITED BRIEF OF THE INTERPRETATION OF HOLY QUR'AN] [AUTHOR'S TRANSLATION] 486 (Abdulsalam Abdulshafi Muhammad ed., 1st ed. 2001).

<sup>851</sup> 2 MANSOUR BIN MUHAMMAD BIN ABDULJBAR BIN AHMED ALMARWAZI, TAFSAIR AL-QUR'AN [THE HOLY QUR'AN INTERPRETATION] [AUTHOR'S TRANSLATION] 240 (Yassir Bin Ibrahim et al. eds., 1st ed. 1997).

<sup>852</sup> The Holy Qur'an, *Al-Tawbah, Verses 71*.

<sup>853</sup> *See* 3 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 1731.

<sup>854</sup> *See Id.*



In addition, God promises that he will grant people good lives, both men and women, as reward for doing the right work.<sup>855</sup> This general principle is founded in Chapter Al-Nahl verse 97, which reads, “[w]hoever does righteous deeds—whether male or female—while he (or she) is a believer; then we will certainly give them a good life, and we will certainly grant them their rewards in proportion to the best of what they used to do.”<sup>856</sup> As a result, this general principle ensures equality between men and women regarding work and righteous deeds as well as grants women the right to work.<sup>857</sup>

Moreover, God also promises that he will never lose the righteous deeds of any person, either male or female.<sup>858</sup> This promise is founded in Chapter Al-Imran verse 195, which reads, “[a]nd their lord responded to them; never will I allow to be lost the work of [any] worker among you, whether male or female; you are of one another.”<sup>859</sup> Based on this holy Qur’an verse, Muslim scholars provide some general rules; the source of all the human beings is the same, which is Adam and Eve,<sup>860</sup> there is no difference between men and women approaching God by performing righteous deeds,<sup>861</sup> and equality in work requires equality in reward.<sup>862</sup>

Furthermore, God confirms the right of women to work and of equality between men and women regarding their work and their wages.<sup>863</sup> This is found in Chapter Al-Nisa verse 32, which reads, “[a]nd do not wish for that by which Allah has made some of you exceed others.

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<sup>855</sup> See 3 MUHAMMAD ALMAKI ALNASIRI, AL-TAISEER FI AHADITH AL-TAFSAIR [THE SUNNI SPEECHES ON THE INTERPRETATION OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 356 (1st ed. 1985).

<sup>856</sup> Holy Qur’an, *Al-Nahl*, Verse 97.

<sup>857</sup> See 2 MUHAMMAD MAHMOUD ALHEJAZI, AL-TAFSAIR AL-WADAH [THE OBVIOUS INTERPRETATION OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 337 (10th ed. 1992).

<sup>858</sup> 1 ALNASIRI, *supra* note 855, at 300.

<sup>859</sup> The Holy Qur’an, *Al-Imran*, Verse 195.

<sup>860</sup> 1 ALZAMKHASHARI, *supra* note 850, at 456.

<sup>861</sup> 1 ALNAISABORI, *supra* note 848, at 535.

<sup>862</sup> 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 733.

<sup>863</sup> See 11 SHAMS ALDAIN, *supra* note 846, at 234.

For men is a share of what they have earned and for women is a share of what they have earned.”<sup>864</sup> Some scholars mention that this verse was directed to men who wished to have double wages,<sup>865</sup> while other scholars note that it was directed to some men who were depriving women from inheritance and possessive rights.<sup>866</sup> However, this verse confirms the right to work for both men and women and the right to have equal wages for the work.<sup>867</sup>

The aforementioned holy Qur’an verses establish and confirm the right for women to work and to have equal treatment with men regarding their work and wages.<sup>868</sup> As a general principle established by the holy Qur’an, women have the right to work and receive wages that are equal to the type of work that they provide.<sup>869</sup> In addition, all human beings, men and women, are created from the same source, Adam and Eve, which also endorses equality between men and women in everything including the right to work and receive wages.<sup>870</sup>

### 6.3.2. Women Worked in Different Fields Without Restriction During the Caliph’s Era

This part of this section clarifies some occasions where women were working in different fields without being banned, before and during the caliph’s era, to support women’s right to work. Some women in the era of the caliphs worked as *Muftis*,<sup>871</sup> some women worked as

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<sup>864</sup> The Holy Qur’an, *Al-Nisa*, Verse 32.

<sup>865</sup> 1 ALNAFASI, *supra* note 846, at 353.

<sup>866</sup> 11 SHAMS ALDAIN, *supra* note 846, at 234.

<sup>867</sup> See 2 ISMAIL BIN OMAR BIN KATHAIR ALQURASHI ALBASARI, TAFSAIR AL-QUR’AN AL-AZIM [THE INTERPRETATION OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 287 (Sami Muhammad Salameh ed., 2nd ed. 1999); see also ALSA’DI, *supra* note 848, at 176.

<sup>868</sup> See The Holy Qur’an, *Al-Tawbah*, Verses 71, *Al-Nahl*, Verse 97, *Al-Imran*, Verse 195, *Al-Nisa*, Verse 32.

<sup>869</sup> See 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 733; see also ALSA’DI, *supra* note 848, at 176.

<sup>870</sup> See 1 ALZAMKHASHARI, *supra* note 850, at 456; see also 1 ALNASIRI, *supra* note 855, at 300.

<sup>871</sup> See 2 ABDULRAHMAN BIN ABI BAKR JALAL ALDAIN ALSEWAITI, TADRAIB AL-RAWI FI SHARH TAQREEB AL-NWAWI [THE TRAINING OF SCHOLARS AND TELLERS] [AUTHOR’S TRANSLATION] 678, 679 (Nathar Muhammad Alfaryabi ed., n.d.).

merchants and concluded commercial transactions,<sup>872</sup> while other women were appointed to supervise the markets.<sup>873</sup>

Some women acted as *Mufti*,<sup>874</sup> providing advisory opinions on some legal issues according to Islamic law.<sup>875</sup> Aisha Bint Abi Bakar<sup>876</sup> and Um Salamah, were *Muftis* providing advisory opinions about matters under Islamic law when they were asked.<sup>877</sup> Yet, a *Mufti* does not have an enforceability mechanism to apply the legal opinions that he or she provides.<sup>878</sup> Even without the enforceability mechanism,<sup>879</sup> *Muftis* are considered honorable. However, this lack of the enforceability mechanism is a central difference between *Muftis* and judges.<sup>880</sup> While judges, like *Muftis*, issue legal opinions, judges also possess a mechanism to enforce the opinions that they issue.<sup>881</sup>

Even before the era of the caliphs, women worked in the business field as merchants.<sup>882</sup> Before the establishment of Islam, Khadija Bint Khuwaylid was a successful business woman who concluded commercial transactions inside and outside the region.<sup>883</sup> She was also from an

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<sup>872</sup> See 1 ABDULMALIK BIN HISHAM BIN AYOUB ALHAMAIRI ALMOUAFRI, AL-SAIRAH AL-NABAWAIAH LE-IBN HISHAM [THE BIOGRAPHY ON PROPHET MUHAMMAD] [AUTHOR'S TRANSLATION] 187-88 (Mostafa Alsaqa et al. eds., 2nd ed. 1955).

<sup>873</sup> ABIN MASOUD, *supra* note 788, at 12; 1 MUHAMMAD ABDULHAIY BIN ABDULKABIR ABIN MUHAMMAD ALHOUSINI, AL-TRTIBAT AL-EDARIAH WA AL-AMALAT WA AL-SENAAT WA AL-MATAJER WA AL-HALAH AL-ELMIAH ALTI KANT ALA AHD TAASIS AL-MADINA [OVERVIEW ON COMMERCE AND EDUCATION LEVEL DURING THE ESTABLISHMENT OF THE ISLAMIC CITY IN AL-MADINAH AL-MONAWARH] [AUTHOR'S TRANSLATION] 240 (Abdullah Alkhalidi ed., 2nd ed. n.d.)

<sup>874</sup> See 2 ALSEWAITI, *supra* note 871, at 678-79.

<sup>875</sup> See AL-REASAH AL-AMAH LLBUHUTH AL-ALMIAH WA AL-IFTA, *supra* note 467.

<sup>876</sup> 1 MUHAMMAD BIN IBRAHIM BIN ABDULLATAIF ALSHAIKH, FATAWA WA RASA'L SAMAHAT AL-SHAIKH MUHAMMAD BIN IBRAHIM [THE STUDIES AND THE RESEARCHES OF THE IMAM MUHAMMAD BIN IBRAHIM] [AUTHOR'S TRANSLATION] 252 (Muhammad Abdulrahman Qasim ed., 1st ed. 1978).

<sup>877</sup> See 2 ALSEWAITI, *supra* note 871, at 678-79.

<sup>878</sup> See AL-REASAH AL-AMAH LLBUHUTH AL-ALMIAH WA AL-IFTA, *supra* note 467.

<sup>879</sup> See 20 ALNAWAWAI, *supra* note 638, at 127.

<sup>880</sup> See 4 BIN QUDAMH, *supra* note 131, at 223.

<sup>881</sup> See 13 ALAMRANI, *supra* note 133, at 20.

<sup>882</sup> See 1 ALMOUAFRI, *supra* note 872, at 187-88.

<sup>883</sup> 2 ABU ALQASIM ABDULRAHMAN BIN ABDULLAH BIN AHMED ALSYHAILI, AL-ROUTH AL-ANF FI SHARAH AL-SAIRAH AL-NABAWAIAH LE-IBN HISHAM [THE EXPLANATION OF THE BIOGRAPHY ON PROPHET MUHAMMAD] [AUTHOR'S TRANSLATION] 152 (Omar Abdulsalam Alsalami ed., 1st ed. 2000).

important and well-known family.<sup>884</sup> Khadija was one of the most important merchants and was known to be one of the richest people before the era of the caliphs.<sup>885</sup>

Khadija Bint Khuwaylid hired some men to work with her—to either transfer, bring, or deliver her goods.<sup>886</sup> In addition, sometimes she appointed men as her agents to conclude business deals on her behalf.<sup>887</sup> Khadija Bint Khuwaylid heard of the Prophet Muhammad, when he was twenty-five years old, before he received the prophecy from God. She knew that he possessed ideal characteristics and was known to be an honest, truthful, and trusted person.<sup>888</sup>

Khadija Bint Khuwaylid then appointed the young Prophet Muhammad, to trade her goods and conclude business deals on her behalf.<sup>889</sup> Prophet Muhammad worked for her as her agent until they got married; Khadija was his first wife.<sup>890</sup> Even after Prophet Muhammad received the prophecy, Khadija continued her business concluding commercial transactions and appointing men to make deals on her behalf.<sup>891</sup>

During that era, women were also working as supervisors in the markets.<sup>892</sup> This kind of job was created by the second caliph, Omar, who had appointed some women to supervise the market.<sup>893</sup> A supervisor in the market at that time was a semi-judiciary position.<sup>894</sup> One of the main duties of the market supervisor was to resolve disputes between people in the market, such as claims for fraud or cheating between buyers and sellers.<sup>895</sup>

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<sup>884</sup> 1 ALMOUAFRI, *supra* note 872, at 189.

<sup>885</sup> MUHAMMAD HUSSIN HIKAL, HAYAT MUHAMMAD SALA ALLAH ALAYH WA SLLAM [THE LIFE OF PROPHET MUHAMMAD] [AUTHOR'S TRANSLATION] 86 (n.d.)

<sup>886</sup> HIKAL, *supra* note 885, at 86.

<sup>887</sup> 2 ALSYHAILI, *supra* note 883, at 152.

<sup>888</sup> 1 ALMOUAFRI, *supra* note 872, at 187-88.

<sup>889</sup> HIKAL, *supra* note 885, at 86.

<sup>890</sup> See 2 ALSYHAILI, *supra* note 883, at 151-53.

<sup>891</sup> See HIKAL, *supra* note 885, at 86-87.

<sup>892</sup> ABIN MASOUD, *supra* note 788, at 12.

<sup>893</sup> 1 ALHOUSINI, *supra* note 873, at 241.

<sup>894</sup> See OTHMAN, *supra* note 2, at 147.

<sup>895</sup> *Id.*

Two women performed this work in Caliph's Omar era: Al-Shefa Bint Abdullah<sup>896</sup> and Smra' Bint Nahik Al-Asadyah.<sup>897</sup> Al-Shefa was appointed by Caliph Omar to supervise the market<sup>898</sup> while Smra' supervised the market voluntarily.<sup>899</sup> Al-Shefa was not only a supervisor in the market; she was also a consultant to Caliph Omar who took her advice and opinions into consideration due to her wisdom.<sup>900</sup>

However, some Muslim scholars mention some concerns on the appointment of Al-Shefa as a supervisor in the market.<sup>901</sup> Some consider the appointment of Al-Shefa as a rare occasion and, therefore, do not consider it as valid ground to grant the appointment of women supervisors in the markets anymore.<sup>902</sup> Yet, other scholars consider this occasion to be as a valid legal ground that support the appointment of women as judges due to similarities between market supervisors and judges,<sup>903</sup> while still others consider market supervisors the same as judges.<sup>904</sup>

This section confirms the validity of appointing women arbitrators in Islamic arbitration. Verses from the holy Qur'an approve the right for women to work and confirm equality between men and women. Moreover, this section also approves women arbitrators by mentioning occasions where women worked in different fields before and during the era of the caliphs. Women worked as *Muftis*, merchants, and market supervisors at a time where Islamic law was applied literally and completely. As a result, if women provided advisory opinions, concluded

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<sup>896</sup> ABIN MASOUD, *supra* note 788, at 12.

<sup>897</sup> 1 ALHOUSINI, *supra* note 873, at 240.

<sup>898</sup> OTHMAN, *supra* note 2, at 147.

<sup>899</sup> *See* 1 ALHOUSINI, *supra* note 873, at 240.

<sup>900</sup> ABIN MASOUD, *supra* note 788, at 87.

<sup>901</sup> 1 ALHOUSINI, *supra* note 873, at 240; OTHMAN, *supra* note 2, at 147-48.

<sup>902</sup> *See* 1 ALHOUSINI, *supra* note 873, at 240.

<sup>903</sup> OTHMAN, *supra* note 2, at 147.

<sup>904</sup> *Id.* at 148.

commercial transactions, and supervised the markets, women have the right to work in arbitration and serve as arbitrators.

#### 6.4. Family Dispute Arbitration

Islamic arbitration is not limited to commercial and investment disputes; it also extends to family disputes. This section explains this type of arbitration and the valid appointment of women arbitrators in family dispute arbitration, which supports validating their appointment as arbitrators in the other types of Islamic arbitration. This section first clarifies the foundation, procedure, and terminologies used to describe family dispute arbitration; second, it discusses some Muslim scholars' concerns on the procedure of family dispute arbitration; third, it explains the Muslim scholars' approaches on types of arbitrators, their qualifications, and terminologies used to describe their qualifications.

##### 6.4.1. The Foundation, Procedure, and Terminology of Family Dispute Arbitration

This part explains the foundation of family dispute arbitration under Islamic law as well as the mechanism and procedure. In addition, it clarifies the Arabic language to understand how the terminologies used in the holy Qur'an describe the procedure of family dispute arbitration.

Family dispute arbitration aims to resolve disputes and issues between married couples.<sup>905</sup> The foundation and mechanism of family dispute arbitration originated in the holy Qur'an in Chapter Al-Nisa verse 35, which reads, “[a]nd if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire

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<sup>905</sup> 3 MUHAMMAD BIN YOUSEF BIN ALI BIN YOUSEF BIN HAYAN ALANDALUSI, AL-BAHAR AL-MOUHAIT FI AL-TAFSAIR [THE SURROUNDING SEA OF THE HOLY QUR'AN INTERPRETATION] [AUTHOR'S TRANSLATION] 629 (Sadiqi Muhammad Jamail ed., 1999); 1 ALJAWI, *supra* note 128, at 196.

reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and Acquainted [with all things].”<sup>906</sup>

Family dispute arbitration resolves these issues without using the regular judicial process<sup>907</sup> but instead using the procedure for family dispute arbitration directly mentioned in the holy Qur’an.<sup>908</sup> When a couple starts to face issues in their marriage and agrees to resolve these issues through family dispute arbitration, the husband appoints an arbitrator from his immediate family or from his cousins and the wife appoints an arbitrator from her immediate family or her cousins.<sup>909</sup> Then, those two arbitrators hear the issues and resolve the dispute.<sup>910</sup>

The Arabic word used by the holy Qur’an in family dispute arbitration to refer to an arbitrator is “*Hakam*,” which can be applied to both men and women.<sup>911</sup> For Arabic linguists, the word “*Hakam*” originated from the word “*Hekmah*” which means “wisdom,”<sup>912</sup> a characteristic both men and women can possess. In addition, some Arabic linguists use the word “*Hakam*” to describe both men and women as arbitrators.<sup>913</sup>

Family dispute arbitration originated from Islamic law<sup>914</sup> and aims to resolve family disputes without using the regular judicial process.<sup>915</sup> Moreover, the terminology “*Hakam*” that

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<sup>906</sup> The Holy Qur’an, *Al-Nisa*, Verse 35.

<sup>907</sup> See 2 ALSHARIBI, *supra* note 129, at 656.

<sup>908</sup> See 3 TANTAWI, *supra* note 138, at 142.

<sup>909</sup> 1 ALSHEHE, *supra* note 25, at 372.

<sup>910</sup> See 2 ALSHIRAZI, *supra* note 142, at 73.

<sup>911</sup> See 4 MUHAMMAD BIN AHMED BIN ALAZHARI ALHARAWI, TAHATHYAB AL-LOGHAH [THE EDUCATOR OF LANGUAGE] [AUTHOR’S TRANSLATION] 70 (Muhammad Awad Mureab ed., 1st ed. 2001); see also 5 ALFARABI, *supra* note 598, at 1902.

<sup>912</sup> 1 ABU BKAR MUHAMMAD BIN ALHASAN BIN DORAID ALAZDI, JAMHARAT AL-LOGHAH [THE AUDIENCE OF LANGUAGE] [AUTHOR’S TRANSLATION] 564 (Ramzi Munair Balbaki ed., 1st ed. 1987).

<sup>913</sup> See 3 ABU ALHASAN ALI BIN ISMAIL BIN SYDAH ALMORSI, AL-MUKHASAS, AL-GHARAIB WA AL-MA’AJIM WA LUGHAT AL-FIGH [THE LANGUAGE OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR’S TRANSLATION] 422 (Khalil Ibrahim Jafal ed., 1st ed. 1996); see also 4 ALHARAWI, *supra* note 911, at 70; see also 5 ALFARABI, *supra* note 598, at 1902.

<sup>914</sup> The Holy Qur’an, *Al-Nisa*, Verse 35.

<sup>915</sup> See 2 ALSHARIBI, *supra* note 129, at 656.

is used in the holy Qur'an to refer to the arbitrator, according to the Arabic linguists, can be used to describe both men and women arbitrators.<sup>916</sup>

#### 6.4.2. Concerns Regarding Family Dispute Arbitration Procedure

Some Muslim scholars continue to debate concerns regarding family dispute arbitration procedure. These concerns revolve around who has the right to initiate the arbitration proceedings,<sup>917</sup> whether the arbitrators should be from the parties' immediate family or cousins,<sup>918</sup> and the authority of the arbitrators.<sup>919</sup>

First, some scholars believe that judges and governors with authority from the state are entitled to initiate family dispute arbitration proceedings,<sup>920</sup> while other scholars believe that any reasonable person who lives in the same community has the right to initiate arbitration proceedings.<sup>921</sup> There are also some scholars who think that only the husband or the wife are entitled to initiate their own arbitration proceedings.<sup>922</sup> However, the proper modern approach should be that only judges initiate arbitration proceedings with consent from the married couple to supervise the arbitration proceedings and avoid error in applying the procedure.<sup>923</sup>

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<sup>916</sup> See 4 ALHARAWI, *supra* note 911, at 70; see also 5 ALFARABI, *supra* note 598, at 1902.

<sup>917</sup> See 1 MUHAMMAD BIN AHMED BIN MUHAMMAD BIN ABDULLAH ALGHRNATI, AL-TASAHAIL LAULOM AL-TANZAIL [The Introduction to the Art of Qur'an] [AUTHOR'S TRANSLATION] 191 (Abdullah Alkhalidi ed., 1st ed. 1995); see also 3 ALANDALUSI, *supra* note 905, at 629.

<sup>918</sup> 2 ABU ALSAUD ALAMADI MUHAMMAD BIN MUHAMMAD BIN MOSTAFA, ERSHAD AL-AQAL AL-SALAIM ELA MAZAIA AL-KETAB AL-KARAIM [THE GUIDANCE OF THE SOUND MINDS TO THE FEATURES OF QUR'AN] [AUTHOR'S TRANSLATION] 174 (n.d.)

<sup>919</sup> See 2 ALBASARI, *supra* note 867, at 296; see also 1 MUHAMMAD BIN ALI BIN MUHAMMAD BIN ABDULLAH ALSHUKANI, FATAH AL-QADAI [THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 534 (1st ed. 1993).

<sup>920</sup> See 1 ALNAFASI, *supra* note 846, at 356; see also 2 ALBASARI, *supra* note 867, at 259.

<sup>921</sup> 1 ALSHEHE, *supra* note 25, at 372; 3 ALANDALUSI, *supra* note 905, at 629; 1 ALHEJAZI, *supra* note 857, at 371.

<sup>922</sup> 2 ALSHIRAZI, *supra* note 142, at 73; 1 ALGHRNATI, *supra* note 917, at 191.

<sup>923</sup> See 1 ALNAFASI, *supra* note 846, at 356; see also 1 ALSHEHE, *supra* note 25, at 372; see also 5 ALZUHAILI, *supra* note 167, at 53.



The second concern considers whether arbitrators should be from the parties' immediate family or extended family. Some scholars state that arbitrators should be selected first from the parties' immediate family or cousins.<sup>924</sup> Yet, if none of these potential arbitrators has the required qualifications to serve as an arbitrator, the parties can select unrelated individuals to serve as arbitrators.<sup>925</sup> Other scholars mention that selecting arbitrators from the parties' immediate family or cousins is preferred but not required, which means unrelated individuals can serve as arbitrators even if there are qualified individuals in the parties' family.<sup>926</sup>

The main reason behind this debate relates to Qur'anic interpretation and whether the decree "Send an arbitrator from his people and an arbitrator from her people" is a mandatory requirement or a preferable condition.<sup>927</sup> This chapter recognizes that arbitrators should be selected first from the parties' family unless none of the immediate family members or cousins possesses the required qualifications to serve as an arbitrator.<sup>928</sup> Selecting arbitrators from the parties' family should be considered a mandatory requirement for two reasons.<sup>929</sup> First, the explicit language of the holy Qur'an states that arbitrators are from the people of the husband and wife.<sup>930</sup> Second, immediate family members and cousins likely know more about the married

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<sup>924</sup> 2 HIKMAT BIN BASHAIR BIN YASSIN, MAWSUAT AL-SAHEEH AL-MABSOUR MIN AL-TAFSAIR BAL-MA'THOOR [THE RIGHT ENCYCLOPEDIA OF THE HOLY QUR'AN INTERPRETATION] [AUTHOR'S TRANSLATION] 46 (1st ed. 1999); 1 ABDULLAH BIN AHMED BIN ALI AL-ZAID, MUKHTASAR TAFSAIR AL-BAGHAWI [THE SUMMERY OF BAGHAWI'S INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 386 (7th ed. 1981).

<sup>925</sup> 1 ALSHUKANI, *supra* note 919, at 534; 1 ALJAWI, *supra* note 128, at 196.

<sup>926</sup> 2 ALSHIRAZI, *supra* note 142, at 73; 1 ALGHRNATI, *supra* note 917, at 191.

<sup>927</sup> 2 ALSHIRAZI, *supra* note 142, at 73; 2 YASSIN, *supra* note 924, at 46.

<sup>928</sup> 5 MUHAMMAD ALTAHIR BIN MUHAMMAD BIN MUHAMMAD ALTAHIR ALTUNISI, TAHRIR AL-MA'NA AL-SADDED WA TANWAIR AL-A'QAL AL-JADAID MIN TAFSAIR AL-KETAB AL-MAJEED [THE PRECISE MEANINGS AND THE THINKING GUIDANCE OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 46 (1984).

<sup>929</sup> See 1 ALNAFASI, *supra* note 846, at 356; 2 YASSIN, *supra* note 924, at 46; 1 ALSHEHE, *supra* note 25, at 372; 2 MOSTAFA, *supra* note 918, at 174.

<sup>930</sup> See 1 ALNAFASI, *supra* note 846, at 356; 2 YASSIN, *supra* note 924, at 46.

couple and their dispute and are more willing to resolve these disputes than unaffiliated individuals.<sup>931</sup>

The third concern addresses the limitation of the arbitrator's authority and whether the selected arbitrators in family dispute arbitration can rule on divorce.<sup>932</sup> Some scholars, who consider arbitrators similar to judges, permit arbitrators to rule on divorce without prior consent from the parties.<sup>933</sup> Other scholars, who consider arbitrators to be agents of the parties, do not allow arbitrators to rule on divorce without prior consent from the parties.<sup>934</sup> However, the ideal approach does not permit arbitrators to rule on divorce without prior consent from the parties because, according to the holy Qur'an, "[i]f they both desire reconciliation," and agree to arbitration than divorce is not an option.<sup>935</sup>

Some Muslim scholars continue to express concerns regarding the procedure of family dispute arbitration. The approach that most closely mirrors Islamic law and modern circumstances, however, follows three different guidelines. First, only judges are allowed to initiate arbitration proceedings with the consent of the married couple.<sup>936</sup> Second, arbitrators should be selected first from the family of the parties unless none of their family members has the required qualifications.<sup>937</sup> Third, arbitrators do not have the authority to rule on divorce without prior consent from the arbitration parties.<sup>938</sup>

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<sup>931</sup> 1 ALSHEHE, *supra* note 25, at 372; 2 MOSTAFA, *supra* note 918, at 174.

<sup>932</sup> 1 ALSHEHE, *supra* note 25, at 372.

<sup>933</sup> 1 ALSHUKANI, *supra* note 919, at 534; 5 ALTUNISI, *supra* note 928, at 46.

<sup>934</sup> 5 ALZUHAILI, *supra* note 167, at 53; *see* 2 ALBASARI, *supra* note 867, at 260.

<sup>935</sup> 2 ALBASARI, *supra* note 867, at 297; 1 MUHAMMAD ALI ALSABOUNI, MUKHTASAR TAFSAIR IBIN KATHAIR [THE BRIEF OF IBIN KATHAIR'S INTERPRETATION] [AUTHOR'S TRANSLATION] 387 (7th ed. 1981).

<sup>936</sup> *See* 1 ALNAFASI, *supra* note 846, at 356; 1 ALSHEHE, *supra* note 25, at 372; 5 ALZUHAILI, *supra* note 167, at 53.

<sup>937</sup> 5 ALTUNISI, *supra* note 928, at 46.

<sup>938</sup> 2 ALBASARI, *supra* note 867, at 297; 1 ALSABOUNI, *supra* note 935, at 387.

### 6.4.3. Types of Arbitrators, Qualifications, and Terminology Used to Describe Their Qualifications

Some Muslim scholars explore the types of arbitrators that should be appointed to arbitrate family dispute arbitration.<sup>939</sup> In addition, some scholars provide general qualifications that family dispute arbitrators should possess to validate their appointment as arbitrators.<sup>940</sup> Some of those scholars use gender-neutral language to describe the required qualifications of the arbitrators<sup>941</sup> while others use terminology that only describes the qualifications for men arbitrators.<sup>942</sup>

Through examining the literature on family dispute arbitration, some Muslim scholars note that the selected arbitrators in family dispute arbitration merely need to be reasonable people,<sup>943</sup> while other scholars require arbitrators to be highly-qualified people.<sup>944</sup> Another group of scholars have taken a middle approach and state that the selected arbitrators are not required to be highly-qualified but they should also not be reasonable people without knowledge.<sup>945</sup> This middle approach accepts the appointment of trusted and reasonable people with experience in resolving family disputes and knowledge about reconciliation.<sup>946</sup> This middle approach is considered the proper modern approach due to the difficulty in finding highly-qualified

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<sup>939</sup> 3 ALANDALUSI, *supra* note 905, at 629.

<sup>940</sup> ALSA'DI, *supra* note 848, at 177; 3 TANTAWI, *supra* note 138, at 142.

<sup>941</sup> 2 ALBASARI, *supra* note 867, at 296; 2 ALBASARI, *supra* note 867, at 259.

<sup>942</sup> 1 ALSHEHE, *supra* note 25, at 372; 1 ABDULRAHMAN BIN NASSIR BIN ABDULLAH BIN NASSIR ALSA'DI, TAISEER AL-LATAIF AL-MANAN FI KHLASAT TAFSAIR AL-QUR'AN [THE SUMMERY OF THE QUR'AN INTERPRETATION] [AUTHOR'S TRANSLATION] 139 (1st ed. 2001).

<sup>943</sup> 1 ALJAWI, *supra* note 128, at 196.

<sup>944</sup> 3 ALANDALUSI, *supra* note 905, at 629; ALSA'DI, *supra* note 848, at 177.

<sup>945</sup> See 1 ALSA'DI, *supra* note 942, at 139.

<sup>946</sup> See 1 ALSA'DI, *supra* note 942, at 139; see also 3 TANTAWI, *supra* note 138, at 142.

arbitrators for family disputes<sup>947</sup> and to avoid the risk of people without knowledge arbitrating family disputes.<sup>948</sup>

Some Muslim scholars require the selected arbitrators in family dispute arbitration to possess certain qualifications, however, they are not the same qualifications that some Islamic schools require judges to possess.<sup>949</sup> Instead, these qualifications can be possessed by reasonable people with a certain level of knowledge about common family disputes and reconciliation.<sup>950</sup> These qualifications are: Muslim, adult, wise, possessing full legal capacity, knowledge of the marriage and divorce rules, and the capability to reconcile and resolve family disputes.<sup>951</sup> These qualifications are not difficult requirements for many; instead, they are important characteristics that reasonable people, either men or women, are capable of possessing.<sup>952</sup>

While some scholars use gender-neutral terminology to describe the required qualifications, creating opportunities for arbitrators to be either men or women,<sup>953</sup> others use language that only describes qualifications for men arbitrators.<sup>954</sup> However, although those scholars use male-specific language to describe the required qualifications, the appointment of women arbitrators is not necessary invalid.<sup>955</sup>

Those scholars did not expressly restrict women from appointment as arbitrators in family dispute arbitration. As a result, some judges in the caliph's era, when they heard about family issues, sent women as arbitrators.<sup>956</sup> However, some Muslim scholars challenge this

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<sup>947</sup> See 3 ALANDALUSI, *supra* note 905, at 629.

<sup>948</sup> See 1 ALSA'DI, *supra* note 942, at 139.

<sup>949</sup> See ALSA'DI, *supra* note 848, at 177; 15 AL-OTHIMAIN, *supra* note 340, at 285-86.

<sup>950</sup> 2 ALSHIRAZI, *supra* note 142, at 73; 1 ALNAFASI, *supra* note 846, at 356.

<sup>951</sup> ALSA'DI, *supra* note 848, at 177; 3 TANTAWI, *supra* note 138, at 142.

<sup>952</sup> See 15 AL-OTHIMAIN, *supra* note 340, at 284.

<sup>953</sup> 2 ALBASARI, *supra* note 867, at 259, 296.

<sup>954</sup> 1 ALSHEHE, *supra* note 25, at 372; 1 ALSA'DI, *supra* note 942, at 139.

<sup>955</sup> See 1 ALGHRNATI, *supra* note 917, at 191.

<sup>956</sup> See *Id.*

because the women judges sent to the married couples were not arbitrators; they were mediators<sup>957</sup> while other conservative scholars consider those judges' actions to be unlawful.<sup>958</sup> Despite these challenges, some women in the caliph's era were appointed as arbitrators in the family dispute arbitration.<sup>959</sup>

In short, Islamic law neither requires appointing highly-qualified arbitrators nor accepts appointing arbitrators lack knowledge of family disputes.<sup>960</sup> As a result, it is permissible for trusted and reasonable people, with knowledge of Islamic law and experience resolving disputes, to serve as arbitrators in family dispute arbitration.<sup>961</sup> Moreover, many of the required qualifications mentioned by Muslim scholars can be possessed by either men or women, which validates the appointment of women arbitrators in family dispute arbitration.<sup>962</sup>

Overall, family dispute arbitration validates the appointment of women arbitrators, which should, in turn, validate their appointment as arbitrators in the other types of Islamic arbitration. The language that describes the procedure of family dispute arbitration in the holy Qur'an is typically gender-neutral terminology that can be applied to both men and women, which validates the appointment of women arbitrators. By validating the appointment of women arbitrators for family disputes, the appointment of women arbitrators in the other types of Islamic arbitration are validated as well.

#### 6.5. Applying Some Islamic Law General Principles

This section discusses general principles derived from Islamic law to validate appointing women arbitrators. These general principles also validate revising some historic Islamic law

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<sup>957</sup> See *Id.*

<sup>958</sup> *Id.*

<sup>959</sup> *Id.*

<sup>960</sup> See 1 ALSA'DI, *supra* note 942, at 139.

<sup>961</sup> ALSA'DI, *supra* note 848, at 177; 3 TANTAWI, *supra* note 138, at 142.

<sup>962</sup> See 15 AL-OTHIMAIN, *supra* note 340, at 284.

regulations and rules due to changes in customs and habits. They include undeniable modification of regulations due to the passage of time, permitting changes in custom to decide changes in rules, and people's needs are in the place of necessity that should be satisfied.

#### 6.5.1. Undeniable Modification of Regulations Due to the Passage of Time

Under Islamic law, modifying the regulations and rules enacted in previous eras due to the passage of time and societal development is permissible.<sup>963</sup> This grants people the right to modify their own rules and regulations to avoid being bound by rules and regulations established under different circumstances.<sup>964</sup> This general principle supports the appointment of women arbitrators by refuting some of the opposition's arguments intended to invalidate the appointment of women arbitrators.

Needs, habits, and customs of people change over time and, therefore, rules and regulations should change as well.<sup>965</sup> When rules and regulations enacted in a certain era are based on habits and customs of that era, those regulations and rules should be modified if habits and customs change and those rules and regulations no longer fit.<sup>966</sup> Therefore, this general principle facilitates and mitigates these rules to ensure people are not obligated or bound by regulations and rules enacted in different eras in accordance with different habits and customs.<sup>967</sup>

However, not every rule, regulation, or decision from a different era can be modified.<sup>968</sup> Only rules and the regulations enacted based on culture can be modified as culture changes; the

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<sup>963</sup> ALZARQA, *supra* note 813, at 227.

<sup>964</sup> *See* 1 ALZOHAILI, *supra* note 814, at 355.

<sup>965</sup> MUHAMMAD SUDQI BIN AHMED BIN MUHAMMAD AL-BURNO, AL-WAJAIZ FI EYDAH QUA'ID AL-FIGH AL-KOLIAH [THE BRIEF OF THE EXPLANATION OF ISLAMIC LAW GENERAL RULES] [AUTHOR'S TRANSLATION] 310 (4th ed. 1996).

<sup>966</sup> 1 ALZOHAILI, *supra* note 814, at 353-54.

<sup>967</sup> *Id.* at 353.

<sup>968</sup> AL-BURNO, *supra* note 965, at 311.

main rules and regulations in Islamic law cannot be modified even as culture changes.<sup>969</sup> For example, prohibiting injustice, inequality, and usury, or obligating individuals to repay their debts, are considered essential rules under Islamic law that are not based on habits and customs and, therefore, cannot be modified due to the passage of time.<sup>970</sup>

Yet, other rules enacted in previous eras and based on habits and customs, such as only appointing conservative judges or only accepting testimony from conservative people, have been modified due to changes in habits and customs.<sup>971</sup> Now, the appointment of non-conservative judges is valid and testimony from non-conservative people is accepted.<sup>972</sup>

This general principle can also be used to validate the appointment of women arbitrators in Islamic arbitration. It argues against Muslim scholars who attempt to invalidate the appointment of women arbitrators through historic context, by demonstrating that, as habits and customs change, rules can change as well.<sup>973</sup> As a result, attempts to invalidate the appointment of women arbitrators based on historic habits and customs, such as gender intermixing or women's incapacity to assume leadership positions,<sup>974</sup> should be erased due to modern changes in habits and customs<sup>975</sup> where intermixing between men and women in the workplace is permissible and women can assume leadership roles.<sup>976</sup>

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<sup>969</sup> ALZOHAILI, *supra* note 814, at 355.

<sup>970</sup> *Id.*

<sup>971</sup> See ALZARQA, *supra* note 813, at 228-29.

<sup>972</sup> See *Id.*

<sup>973</sup> See AL-BURNO, *supra* note 965, at 311-12.

<sup>974</sup> 7 ALSYWASI, *supra* note 807, at 297-98.

<sup>975</sup> See ABDULLAH BIN YOUSEF BIN ISA BIN YACCOUB ALYACCOUB, TAISEER E' ALM OSUL AL-FIGAH [FACILITATION THE ART OF THE BASIS OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR'S TRANSLATION] 213 (1st ed. 1997).

<sup>976</sup> See 5 ALASQLANI, *supra* note 809, at 266; see also 1 ALGHYTABI, *supra* note 822, at 225-27; see also 2 ALHASANI, *supra* note 808, at 74-75.

Islamic law permits modification of rules as habits and customs change.<sup>977</sup> As a result, the appointment of women arbitrators today should be valid under Islamic law due to changes in habits and customs<sup>978</sup> that validate intermixing between men and women in the workplace and the appointment of women to leadership roles.<sup>979</sup>

#### 6.5.2. People's Customs and Habits Decide

This general principle supports the first general principle, modifying the regulations and the rules due to the change of time is undeniable,<sup>980</sup> and confirms that habits and customs play an important part in developing the regulations and rules that govern societies.<sup>981</sup> This general principle allows people to develop their own rules and regulations by permitting customs and habits to serve as sources of law.<sup>982</sup> This general principle validates the modern appointment of women arbitrators due to changes in habits and customs,<sup>983</sup> which now accept women in the arbitration field.

This general principle applies people's customs and habits whether they are public or particular.<sup>984</sup> Public habits and customs exist in societies and tend to extend across a majority of a region while particular habits and customs exist only in smaller areas.<sup>985</sup> However, for habits and customs to be sources to develop or enact rules and regulations, they must be repeated and

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<sup>977</sup> 1 ALZOHAILI, *supra* note 814, at 353-54.

<sup>978</sup> ALYACOUB, *supra* note 975, at 213-14.

<sup>979</sup> See 5 ALASQLANI, *supra* note 809, at 266; see also 1 ALGHYTABI, *supra* note 822, at 225-27; see also 2 ALHASANI, *supra* note 808, at 74-75.

<sup>980</sup> AL-BURNO, *supra* note 965, at 27.

<sup>981</sup> ALZARQA, *supra* note 813, at 219.

<sup>982</sup> See 1 AL-ABDULLATAIF, *supra* note 817, at 298-99.

<sup>983</sup> See ALYACOUB, *supra* note 975, at 213-14.

<sup>984</sup> ALZARQA, *supra* note 813, at 219-20.

<sup>985</sup> 1 ALZOHAILI, *supra* note 814, at 300.



frequented around the region and accepted by reasonable people in the region, regardless of whether habits and customs are public or particular.<sup>986</sup>

Since this is considered one of the main principles under Islamic law, other rules to coordinate societies have been enacted based on this general principle.<sup>987</sup> One of the rules created by this general principle is that “[t]he use and the conduct of people are considered as proofs that are taken into consideration.”<sup>988</sup> Another rule established by this general principle is that “[t]he well-known things by people’s habits and customs are considered as conditions.”<sup>989</sup> In addition, this general principle is responsible for rules such as the requirement that a seller has to make the offer verbally and the buyer has to accept the offer verbally to conclude the sale contract.<sup>990</sup> Yet, as habits and customs change, the sale contract requirements change too; now a sale contract can be concluded by any common signals between the seller and the buyer based on this general principle that applies to modified habits and customs.<sup>991</sup>

This general principle can also be used to argue that habits and customs that existed previously, such as not appointing women to leadership positions or not permitting intermixing between men and women in the workplace, have changed over time.<sup>992</sup> Now, women can be appointed to leadership roles and intermixing between men and women in the workplace is generally accepted. This confirms the validity of appointing women arbitrators in Islamic arbitration by restricting the use of previous habits and customs and instead applying new habits and customs.<sup>993</sup>

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<sup>986</sup> ALZARQA, *supra* note 813, at 219.

<sup>987</sup> 1 AL-ABDULLATAIF, *supra* note 817, at 298; *see* 1 ALZOHAILI, *supra* note 814, at 315.

<sup>988</sup> 1 AL-ABDULLATAIF, *supra* note 817, at 298.

<sup>989</sup> *Id.*

<sup>990</sup> *See* 1 ALZOHAILI, *supra* note 814, at 315.

<sup>991</sup> *See Id.*

<sup>992</sup> *See* ALYACOUB, *supra* note 975, at 213-14.

<sup>993</sup> *See Id.*

The purpose of this general principle is to use habits and customs, whether public or particular, as sources to develop and improve societies.<sup>994</sup> In addition to supporting the general principle allowing modification of regulations due to the change of time, this general principle plays an important role in developing existing rules and enacting new rules.<sup>995</sup>

### 6.5.3. People's Needs Are in the Place of Necessity Whether They Are Public or Particular

Unlike the first and the second general principles—which both use habits and customs as sources to enact, modify, or develop some rules<sup>996</sup>—this general principle uses needs as a source to validate some acts that are generally prohibited under Islamic law.<sup>997</sup> This general principle uses the needs of individuals as grounds to validate some Islamic law restrictions and prohibitions.<sup>998</sup> As a result, this general principle proves that, even if the appointment of women arbitrators is invalid under Islamic law, it should be valid based on this general principle since one of the modern women's need is to participate in the arbitration field.

This general principle considers the needs of individuals as priorities that should be satisfied.<sup>999</sup> People's needs, according to this general principle, are defined as some uncomfortable situations that occur on people's lives, which if they are not resolved, will leave people's lives out of the facilitations and mitigations that are granted by Islamic law.<sup>1000</sup>

<sup>994</sup> ALZARQA, *supra* note 813, at 219-20.

<sup>995</sup> See ZAIN ALDAIN BIN IBRAHIM BIN MUHAMMAD, AL-ASHBAH WA AL-NATHA'ER ALA MATHAHAB ABI HANAFIAH AL-NO'AMAN [RESEMBLANCE AND MATCH BASED ON HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 79 (Zakaria Umirat ed., 1st ed. 1999).

<sup>996</sup> 1 ALZOHAILI, *supra* note 814, at 353-54; ALZARQA, *supra* note 813, at 219.

<sup>997</sup> ALZARQA, *supra* note 813, at 209.

<sup>998</sup> 1 AL-ABDULLATAIF, *supra* note 817, at 245-46.

<sup>999</sup> AL-BURNO, *supra* note 965, at 242.

<sup>1000</sup> 1 ALZOHAILI, *supra* note 814, at 288-89.

Facilitation and mitigation are the fulfillment of requirements of Islamic law with minimal effort,<sup>1001</sup> or applying Islamic requirements moderately.<sup>1002</sup> In addition, facilitation and mitigation affirm the influence of habits and customs on the development of Islamic law.<sup>1003</sup> In other words, newly enacted regulations and rules should be in accordance with reasonable capabilities of Muslims and are not supposed to require to expend too much effort to adhere to these rules.<sup>1004</sup>

Necessity, based on this general principle, means an imperative requirement for a person, which if it is not satisfied, results in damage or harm to that person's life.<sup>1005</sup> Public needs are the same uncomfortable situations occurring for a majority of people while particular needs are uncomfortable situations happening to a particular region or a particular type of people.<sup>1006</sup>

This principle is derived from another main principle in Islamic law, which is “[n]ecessities permit prohibitions,” and aims to make lives, either individually or as groups, easier and flexible.<sup>1007</sup> For instance, under Islamic law, usury and interest are not allowed to be traded or included in any contracts.<sup>1008</sup> Yet, based on this general principle, some Muslim scholars validate buying stocks from corporations that borrow capital from usury loan contracts or corporations that leave some of their profits in usury bank accounts, as long as the main purpose of those corporations does not conflict with Islamic law.<sup>1009</sup> The validity of buying those

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<sup>1001</sup> ISLAM WEB, <http://www.articles.islamweb.net> (last visited Mar. 10, 2017).

<sup>1002</sup> AL-MAKTABAH AL-SHAMILAH, <http://www.shamela.ws> (last visited Mar. 10, 2017).

<sup>1003</sup> AL-SAKINAH, <http://www.assakina.com> (last visited Mar. 10, 2017).

<sup>1004</sup> *Id.*

<sup>1005</sup> 1 AL-ABDULLATAIF, *supra* note 817, at 242-43.

<sup>1006</sup> 1 ALZOHAILI, *supra* note 814, at 289.

<sup>1007</sup> 1 AL-ABDULLATAIF, *supra* note 817, at 242-43.

<sup>1008</sup> THE ECONOMIST, <http://www.economist.com> (last visited July. 2, 2015).

<sup>1009</sup> 1 ALZOHAILI, *supra* note 814, at 295.

kind of stocks is based on the need for individuals who lack investment experience, to invest their funds in corporations where their main business does not conflict with Islamic law.<sup>1010</sup>

Even if the appointment of women arbitrators is invalid under Islamic law, this principle notes that the work of modern women arbitrators fulfills a need.<sup>1011</sup> This general principle can be applied for women that need to work as arbitrators even if those needs only belongs to certain type of people.<sup>1012</sup> This general principle opposes some Muslim scholars who invalidate the appointment of women arbitrators by proving that the need for women to work as arbitrators is necessary now and, therefore, should be valid.

This general principle considers needs, whether attached to a majority of people or attached to smaller minority of certain people in a specific region, as priorities that should be satisfied to obtain the facilitations and mitigations for people granted by Islamic law.<sup>1013</sup> This general principle validates the appointment of women arbitrators and opposes Muslim scholars who attempt to invalidate the appointment of women arbitrators, by recognizing that even if the appointment of women arbitrators is invalid under Islamic law, this general principle validates their appointment due to the modern need for women to participate in the arbitration field.

Applying these general principles that are derived from Islamic law, validates the appointment of women arbitrators in Islamic arbitration. These general principles use habits and customs as sources to enact new rules and modify or develop existing rules due to changes in habits and customs. These general principles consider people's needs in the place of necessity,

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<sup>1010</sup> *Id.*

<sup>1011</sup> See 1 AL-ABDULLATAIF, *supra* note 817, at 256; see also ALYACOUB, *supra* note 975, at 213-14.

<sup>1012</sup> See 1 AL-ABDULLATAIF, *supra* note 817, at 245.

<sup>1013</sup> 1 ALZOHAILI, *supra* note 814, at 288-89.

which should be satisfied to grant the facilitations and mitigations for people that are provided by Islamic law.

#### 6.6. The Appointment of Women Arbitrators Based on Changes in Habits and Customs

Islamic law general principles consider habits and customs as a framework for the enacted rules and laws. A perfect example of modifying the rules due to changes in habits and customs is the development of Saudi Arabian arbitration practices where the appointment of women arbitrators was validated recently due to changes in habits and customs as well as modifications to the arbitration law.

Historically, the role of women in the legal field in Saudi Arabia, either as an attorney or an arbitrator, was limited.<sup>1014</sup> Until recently, due to habits and customs that did not accept the presence of women in the legal field, women in Saudi Arabia were not allowed to participate in the legal field and, therefore, law schools were not open to women.<sup>1015</sup> The 1983 arbitration law and its 1985 implemented regulations adhered to this idea and prohibited women from serving as arbitrators.<sup>1016</sup>

Yet, as habits and customs changed and became more liberal, law schools across the country opened their doors to women.<sup>1017</sup> Now, women in the legal field have license to practice law and create their own law firms.<sup>1018</sup> In addition, the 2012 arbitration law, which replaces the 1983 arbitration law, lines up not only with international arbitration practices, but also with

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<sup>1014</sup> See ASHARQ AL-AWSAT, *supra* note 547.

<sup>1015</sup> *See Id.*

<sup>1016</sup> See 30 Jean Pierre Harb & Alexander G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Sharia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 113, 125 (Maxi Scherer ed., 2013).

<sup>1017</sup> AL-RIYADH, <http://www.alriyadh.com> (last visited Jan. 3, 2017).

<sup>1018</sup> GUIDEBOOK ON ARAB ATTORNEYS, <http://www.mohamoon-daleel.com> (last visited Jan. 3, 2017).

liberal habits and customs across the country. As a result, the new arbitration law does not require arbitrators to be Muslim or men.<sup>1019</sup>

Pursuant to the new arbitration law, as well as the changing habits and customs in the country that accept the presence of women in the legal field, the first appointment of a woman arbitrator in Saudi Arabia took a place recently.<sup>1020</sup> In early 2016, the court of appeal in the eastern province of Saudi Arabia confirmed the appointment of a woman arbitrator.<sup>1021</sup> While one of the parties challenged the original selection of a woman arbitrator, since women were not appointed arbitrators before,<sup>1022</sup> the court of appeal confirmed the appointment of a woman arbitrator pursuant to the new arbitration law and the growing liberal habits and customs in the country.

#### 6.7. Overview on the Status of Women Arbitrators in the Arbitration Field

Although this dissertation discusses certain issues regarding the procedure of Islamic arbitration, the appointment of women arbitrators also concerns international arbitration practices.<sup>1023</sup> The number of women arbitrators either in investment arbitration or commercial arbitration is small compared to the number of men's arbitrators.<sup>1024</sup> Some reports have considered this a diversity issue<sup>1025</sup> while others considered it a gender issue.<sup>1026</sup> Regardless, the participation of women arbitrators is still very small.

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<sup>1019</sup> Law of Arbitration 2012, *supra* note 237, at art. 14.

<sup>1020</sup> ARAB NEWS, <http://www.arabnews.com> (last visited Jan. 3, 2017).

<sup>1021</sup> AUYOUN AL-KHALAJ, <http://www.gulfeyes.net> (last visited Jan. 3, 2017).

<sup>1022</sup> *Id.*

<sup>1023</sup> 2 Samaa A.F. Haridi, *Towards Greater Gender and Ethnic Diversity in International Arbitration*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 305, 305 (Nassib Ziade ed., 2015).

<sup>1024</sup> 18 Darius J. Khambata, *Tensions Between Party Autonomy and Diversity*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 612, 632 (Albert Jan Berg ed., 2015).

<sup>1025</sup> 18 Jacomijn J. van Haersolte-Van Hof, *Diversity in Diversity*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 638, 639 (Albert Jan Berg ed., 2015).

<sup>1026</sup> 18 Khambata, *supra* note 1024, at 632.

It is difficult to identify the exact percentage of women arbitrators due to the lack of statistics caused by the confidentiality of the arbitration process.<sup>1027</sup> Therefore, while some statistics indicate that the percentage of women arbitrators is between six to ten percent,<sup>1028</sup> other statistics estimate a lower percentage for the participation of women arbitrators—between five to six percent.<sup>1029</sup> Although the percentage of women arbitrators is still small, it is an improvement since the number of women arbitrators was way lower three decades ago.<sup>1030</sup>

Having said that, the appointment of women arbitrators in Islamic arbitration is extremely low where some practitioners and academics thought it was not allowed.<sup>1031</sup> For example, in Saudi Arabia, where the procedural and substantive laws in the Islamic arbitration must not conflict with Islamic law, the appointment of women arbitrators have only taken place in the recent time.<sup>1032</sup> Since the appointment of a woman arbitrator was recently confirmed by the competent authority in Saudi Arabia, it will open the door for increased women's participation in the arbitration field.

The lack of women's participation in the arbitration field does not only concern Islamic arbitration practices, but also international commercial arbitration and investment arbitration. Although the validity of women arbitrators in Islamic arbitration was recently confirmed, it is considered a significant step forward in the development of Islamic arbitration practices. Yet, the number of women arbitrators, either in international arbitration or in Islamic arbitration, should increase to obtain the gender balance in the selection of arbitrators.

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<sup>1027</sup> 18 Haersolte-Van Hof, *supra* note 1025, at 648.

<sup>1028</sup> 18 Ricardo Dalmaso Marques, "To Diversify or Not to Diversify"? *Report on the Session Who Are the Arbitrators?*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 579, 584 (Albert Jan Berg ed., 2015).

<sup>1029</sup> 18 Khambata, *supra* note 1024, at 633.

<sup>1030</sup> 2 Haridi, *supra* note 1023, at 306.

<sup>1031</sup> 18 Khambata, *supra* note 1024, at 634.

<sup>1032</sup> ARAB NEWS, *supra* note 1020.

## 6.8. Conclusion

As this chapter shows, the appointment of women arbitrators is valid because women are entitled under Islamic law to participate in the arbitration field and serve as arbitrators in all types of Islamic arbitration. This approach is confirmed by granting the right of women to work in every occupation as long as there is no specific prohibition. In addition, this chapter indicates that the opponents who invalidate the appointment of women arbitrators provide reasons do not fit in the recent era.

Moreover, since the validity of appointing women arbitrators in family dispute arbitration is granted under Islamic law, the appointment of women arbitrators in the other types of Islamic arbitration should be valid as well. Furthermore, some of the general principles of Islamic law modify previous conservative approaches that invalidated the appointment of women arbitrators due to habits and customs at that time. These general principles grant the validity of appointing women arbitrators in the modern era due to changes in habits and customs as well as the needs of individuals granted under Islamic law.

This validation was recently confirmed by Islamic arbitration practices in Saudi Arabia where the competent authority confirmed the appointment of a woman arbitrator. Despite the challenges against that appointment, women in Saudi Arabia are now eligible to serve as arbitrators due to changes in habits and customs. Even though this confirmation took place recently, it drives Islamic arbitration practices toward further development. Appointing women arbitrators not only emphasizes diversity on the arbitrators' bench, but also encourages women to participate in the arbitration field.



## CHAPTER 7

### TREATIES AND CONVENTIONS UNDER ISLAMIC LAW AND THEIR APPLICATION

#### 7.1. Introduction

Since arbitration aims to resolve commercial and investment disputes, enforcing the outcomes of those awards is an important factor in the arbitration field. Although enforcing foreign arbitration awards in different countries can be regulated by Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is considered the main source for rules to organize the enforceability of awards.

New York convention respects the sovereignty of its members and, therefore, allows signatories to refuse the enforcement of the awards in their territories if they conflict with their public policies. Yet, some countries that ratify the Convention might abuse their right to refuse the enforcement of the awards due to conflicts with their public policies and laws. This chapter discusses the validity of concluding treaties with other Muslim and non-Muslim countries and nations under Islamic law as well as mechanisms for fulfilling those treaties and conventions. Moreover, this chapter clarifies the Islamic law approach on reciprocity included in the New York Convention.

Section two of this chapter provides an Arabic language definition for treaties and conventions as well as the ratification of treaties and conventions during the establishment of Islam while providing some examples of treaties concluded during the sixth century—in the early stages of Islam. Then, section three provides an application of treaties and conventions under Islamic law, which includes the types, conditions, and obligations of these international

instruments as well as situations where Islamic law permits a Muslim nation to renounce those treaties and conventions.

After that, section four provides clarification on the reciprocity concept under Islamic law and its application as well as the reciprocity principle in the New York Convention. Finally, section five concludes that conventions and treaties are important tools to organize relations between different nations and, therefore, fulfilling them is a religious duty. As a result, foreign arbitral awards should be enforced in different countries that ratified the New York Convention, even if some of those awards may conflict with their public policies and laws, which ensures the reliability and effectiveness of international arbitration.

## 7.2. Overview on Conventions and Treaties in Pre-Islamic and Early Islamic Eras

This section first clarifies the definition of treaties and conventions as well as provides a brief overview of the treaties and conventions in the pre-Islamic era. Then, this section explains how the concept of treaties and conventions changed after the establishment of Islam as well as the validity of concluding them under Islamic law. After that, this section explores some of the important treaties and conventions concluded between Muslim and non-Muslim nations.

### 7.2.1. Definition of Conventions and Treaties in the Pre-Islamic Era

To explain the Islamic law perspective on conventions and treaties concluded between nations, it is important first to define these instruments according to the Arabic language. In addition, for a better understanding on those conventions and treaties, it is useful to provide a brief overview on the treaties and conventions concluded in the pre-Islamic era.

According to Arabic linguists, the pre-Islamic “agreements,” “conventions,” “treaties,” “conciliations,” “alliances,” and “truces” almost have the same general meaning and, therefore,

their definitions are similar.<sup>1033</sup> Unlike modern conventions and treaties that focus on arbitration, business, and human rights, historic conventions and treaties centered mostly on truces, conciliations, and alliances.<sup>1034</sup> As a result, Arabic linguists defined treaties and conventions the same as alliances and truces.<sup>1035</sup>

Therefore, conventions and treaties, historically, were defined as contracts between people, tribes, or societies that center on peace, security, or stopping war for a period of time and require announcement and consent from all parties.<sup>1036</sup> This definition is still useful to understand modern conventions and treaties due to their similarities; it is an announcement of consent to an agreement that benefits the public interest of all parties.<sup>1037</sup>

A majority of treaties in the pre-Islamic era—most of which were conciliations, alliances, and truces<sup>1038</sup>—were concluded to bring peace and security to societies.<sup>1039</sup> There was a need to obtain security and peace between the tribes and societies to ensure the conclusion and safety of fair business and commercial transactions.<sup>1040</sup>

In addition, those pre-Islamic alliances and truces centered on mutual public interests and benefits between the parties.<sup>1041</sup> Some truces were concluded to stop war or fighting between two or more tribes, while other agreements were alliances formed to invade other tribes.<sup>1042</sup> These

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<sup>1033</sup> See MUHAMMAD BIN QASIM ALANSARI ALRASA’A ALTOUNISI, AL-HEDAIAH AL-KAFIAH AL-SHAFIAH LIBIAN HAGAEG AL-IMAM IBN ARAFAH AL-WAFIAH [THE ADEQUATE GUIDANCE ON CLARIFYING IBN ARAFAH’S STUDIES] [AUTHOR’S TRANSLATION] 144 (1st ed. 1931).

<sup>1034</sup> See 4 ALMORSI, *supra* note 913, at 70-71.

<sup>1035</sup> See 1 BIN TAMIM, *supra* note 351, at 102; see also 2 ALAZDI, *supra* note 912, at 668.

<sup>1036</sup> See ALTOUNISI, *supra* note 1033.

<sup>1037</sup> See 7 SOME MUSLIM SCHOLARS, FATAWA WA ISTISHARAT MAWGI’A AL-ISLAM AL-YOUM [ADVISORY OPINIONS AND CONSULTANCIES OF ISLAMIC LAW] [AUTHOR’S TRANSLATION] 72 (n.d.).

<sup>1038</sup> See 7 JAWAD BIN ALI, AL-MUFASAL FI TARAIKH AL-ARAB GABIL AL-ISLAM [THE SEPARATOR OF ARAB HISTORY BEFORE ISLAM] [AUTHOR’S TRANSLATION] 372-73 (4th ed. 2001).

<sup>1039</sup> See *Id.*

<sup>1040</sup> See *Id.*

<sup>1041</sup> See *Id.*

<sup>1042</sup> See *Id.*

agreements were often finalized in special ceremonies followed by celebrations.<sup>1043</sup> Moreover, to conclude those truces and alliances, parties had to deliver oaths on the terms and conditions of the agreement and, in good faith, affirm these terms.<sup>1044</sup>

The Arabic definition for treaties and conventions is to obtain peace and security between societies through announcing consent to apply the terms and conditions of the agreement.<sup>1045</sup> In addition, in the pre-Islamic era, most of the treaties and conventions were conciliations, truces, or alliances due to the need for peace and security between the societies.<sup>1046</sup>

### 7.2.2. Overview on Conventions and Treaties After the Establishment of Islam

Since conventions and treaties existed before the establishment of Islam as a religion,<sup>1047</sup> Islamic law affirmed the importance of concluding similar conventions and treaties between nations regardless of their religion.<sup>1048</sup> Islamic law approves conventions and treaties with non-Muslim nations as long as those agreements are fair and benefit the public interest of the Muslim nation.<sup>1049</sup> Islamic law also demands Muslims fulfill any convention or treaty formed with any other nation,<sup>1050</sup> which is considered the basis of building relations with non-Muslim nations.<sup>1051</sup>

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<sup>1043</sup> *See Id.*

<sup>1044</sup> *See Id.*

<sup>1045</sup> *See* MUHAMMAD BIN QASIM ALANSARI ALRASA' A ALTOUNISI, AL-HEDAIAH AL-KAFIAH AL-SHAFIAH LIBIAN HAGAEG AL-IMAM IBN ARAFAH AL-WAFIAH [THE ADEQUATE GUIDANCE ON CLARIFYING IBN ARAFAH'S STUDIES] [AUTHOR'S TRANSLATION] 144 (1st ed. 1931); *see also* 2 ALAZDI, *supra* note 912, at 668; *see also* 4 ALMORSI, *supra* note 913, at 70-71.

<sup>1046</sup> *See* ALI, *supra* note 1038, at 372-73.

<sup>1047</sup> *See Id.*

<sup>1048</sup> NADIAH SHARRIF ALAMRY, ADWA' A ALA AL-THAGAFAH AL-ISLAMIAH [LIGHTS ON ISLAM KNOWLEDGE AND CULTURE] [AUTHOR'S TRANSLATION] 329-30 (9th ed. 2001); 7 SOME MUSLIM SCHOLARS, *supra* note 1037, at 374.

<sup>1049</sup> 7 SOME MUSLIM SCHOLARS, *supra* note 1037, at 72.

<sup>1050</sup> 2 SEID SABIG, FIGH AL-SONAH [THE JURISPRUDENCE OF SUNNI SPEECHES] [AUTHOR'S TRANSLATION] 699 (3rd ed. 1977); MAHMOUD SHAIT KHATAB, AL-RASOUL AL-GA'AD [THE LEADER PROPHET] [AUTHOR'S TRANSLATION] 54 (6th ed. 2001).

<sup>1051</sup> ABDULSHAFI BIN MUHAMMAD BIN ABDULLATAIF, AL-SAIRAH AL-NABAWIAH WA AL-TARAIKH AL-ESLAMI [PROPHECY'S BIOGRAPHY AND ISLAM HISTORY] [AUTHOR'S TRANSLATION] 181 (1st ed. 2007).

In addition, the holy Qur'an mentions the existence of conventions and treaties in several verses, validates these agreements,<sup>1052</sup> decrees fulfillment of these treaties,<sup>1053</sup> and prevents breach.<sup>1054</sup>

The holy Qur'an verses that mention these types of agreements either decree fulfillment, prohibit breach, or describe their importance. For instance, Chapter Al-Ma'idah verse 1 states, "[y]ou who have believed, fulfill [all] contracts."<sup>1055</sup> Some Muslim scholars interpret this verse as a decree from God that people complete all contracts,<sup>1056</sup> including conventions and treaties, regardless of whether the agreement was concluded with Muslims or non-Muslims.<sup>1057</sup>

In addition, God asks for loyalty by ensuring adherents complete what they obligate themselves to fulfill, such as contracts and agreements.<sup>1058</sup> Chapter Al-Isra' verse 34 of the holy Qur'an states, "[a]nd fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned."<sup>1059</sup> According to some Muslim scholars, this verse requires

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<sup>1052</sup> 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 1003-04; 2 YASSIN, *supra* note 924, at 145.

<sup>1053</sup> 3 ALI BIN MUHAMMAD BIN MUHAMMAD BIN HABIB ALBASRI, TAFSAIR AL-MAWARDI; AL-NKT WA AL-AUYUN [THE AL-MAWARDI'S INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 241-42 (Alsaid Bin Abdulmaqsod Bin Abdulrahaim ed., n.d.); 5 MOSTAFA, *supra* note 918, at 171.

<sup>1054</sup> See 3 ALBASRI, *supra* note 1053, at 209-10; 3 MUHAMMAD BIN ALI BIN MUHAMMAD BIN ABDULLAH ALSHWKANI, FATAH AL-QADAI [THE HOLY QUR'AN EXPLANATION] [AUTHOR'S TRANSLATION] 227 (1st ed. 1993).

<sup>1055</sup> The Holy Qur'an, *Al-Ma'idah*, Verse 1.

<sup>1056</sup> 2 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 1003-04; 4 AHMED BIN MUHAMMAD BIN IBRAHIM ALTHA'LABI, AL-KASHF WA AL-BAIAN AEN TAFSAIR AL-QUR'AN [THE DISCLOSURE AND THE DECLARATION ON THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 6 (Nathair Alsaedi et al. eds., 1st ed. 2002); 2 BIN TAMMAM, *supra* note 850, at 144.

<sup>1057</sup> 2 YASSIN, *supra* note 924, at 145; 2 ALBASRI, *supra* note 1053, at 5-6; 2 ALNAISABORI, *supra* note 848, at 147-48.

<sup>1058</sup> 5 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 755; see 2 MUHAMMAD BIN AHMED ALKHATAIB ALSHARBINI, AL-SIRAJ AL-MOUNAIR FI AL-EA'ANAH ALA MA'RIFAT BA'D MA'ANI KALAM RABINA AL-KHABAIR [THE ENLIGHTENING LAMP OF THE GUIDANCE ON THE KNOWLEDGE OF THE MEANINGS OF GOD'S WORDS] [AUTHOR'S TRANSLATION] 365 (1965).

<sup>1059</sup> The Holy Qur'an, *Al-Isra'*, Verse 34.

people to fulfill all commitments, either between them and God or between them and other people,<sup>1060</sup> which includes conventions and treaties.<sup>1061</sup>

Moreover, God demands people accomplish all commitments with him as well as all contracts and agreements they conclude with others, either Muslims or non-Muslims, to satisfy God's orders.<sup>1062</sup> Chapter Al-An'am verse 152 states, "[a]nd the covenant of Allah fulfill. This has He instructed you that you may remember."<sup>1063</sup> Some Muslim scholars interpret this verse as requiring Muslims to fulfill all contracts, agreements, and any other obligations with either Muslims or non-Muslims, including conventions and treaties.<sup>1064</sup>

Furthermore, God demands Muslims fulfill the agreements they conclude with non-Muslims until the end.<sup>1065</sup> Chapter Al-Tawbah verse 4 states, "[e]xcepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear him]."<sup>1066</sup> Some Muslim scholars interpret this to mean that Muslims must perform and conduct the treaties they have concluded with non-

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<sup>1060</sup> 3 ALBASRI, *supra* note 1053, at 241-42; 5 MOSTAFA, *supra* note 918, at 171.

<sup>1061</sup> See 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 270-71; see also 3 AHMED BIN MUHAMMAD BIN ALMAHDI, AL-BAHAR AL-MADAID FI TAFSAIR AL-QUR'AN AL-MAJEED [THE EXTENDED SEA ON THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 197-98 (Ahmed Abdullah Alqurashi ed., 1998).

<sup>1062</sup> See 2 BIN TAMMAM, *supra* note 850, at 363; see also 2 ABDULRAHMAN BIN ALI BIN MUHAMMAD ALJAWZI, ZAD AL-MUSAIR FI AELM AL-TAFSAIR [THE SUPPLIER OF THE KNOWLEDGE ON THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 92 (Abdulrazag Almahdi ed., 1st ed. 2001); see also 7 MUHAMMAD BIN AHMED BIN ABI BAKAR BIN FARAH ALANSARI, TAFSAIR AL-QURTUBI; AL-JAM'A LI-AHKAM AL-QUR'AN 137 (Ahmed Albardouni et al eds., 2nd ed. 1964).

<sup>1063</sup> The Holy Qur'an, *Al-An'am*, Verse 152.

<sup>1064</sup> See 1 AIZ ALDAIN ABDULAZIZ BIN ABDULSALAM BIN ABI ALGASIM, TAFSAIR AL-QUR'AN; EKHTISAR LI-TAFSAIR AL-MAWARDI [THE SUMMERY OF AL-MAWARDI'S INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 470 (Abdullah Ibrahim Alwahbi ed., 1st ed. 1996); see also 3 ISMAIL HAQI BIN MUSTAFA ALESTANBOULI, ROUH AL-BAIAN [THE SOUL OF DECLARATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 119-20 (n.d.); see also 2 ALSHWKANI, *supra* note 1054, at 202.

<sup>1065</sup> 2 ALNASIRI, *supra* note 855, at 359-60; 3 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 1659.

<sup>1066</sup> The Holy Qur'an, *Al-Tawbah*, Verse 4.

Muslims until the agreement ends.<sup>1067</sup> Yet, those treaties are no longer effective if the non-Muslims breach those treaties or support others against the Muslim signatories.<sup>1068</sup>

God also requires people not to break covenants, oaths, and promises they have made.<sup>1069</sup> Chapter Al-Nahl verse 91 of the holy Qur'an states, "[a]nd fulfill the covenant of Allah when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allah, over you, a witness. Indeed, Allah knows what you do."<sup>1070</sup> Some Muslim scholars interpret the covenant mentioned in this verse to include agreements between people, societies, and nations.<sup>1071</sup> In addition, God prohibits people from breaking any covenant they conclude, especially if people delivered an oath on those covenants.<sup>1072</sup>

God also considers fulfillment of conventions and treaties to be righteous work and rewards those that fulfill their commitments.<sup>1073</sup> Chapter Al-Ra'd verses 20-23 of the holy Qur'an states, "[t]hose who fulfill the covenants of Allah and do not break the contract ... Those will have the good consequences of this [home] ... Gardens of perpetual residence; they will enter them with whoever were righteous among their fathers, their spouses, and their descendants."<sup>1074</sup> Many Muslim scholars interpret this verse and the phrase "covenants" to

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<sup>1067</sup> 1 MUHAMMAD BIN ALI ALSABOUNY, *SAFWAT AL-TAFSAIR [THE ELITE OF THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION]* 485 (1st ed. 1997); 4 AL-ZAID, *supra* note 924, at 364.

<sup>1068</sup> 2 ABU MUHAMMAD ALHOUSAIN BIN MASOUD BIN MUHAMMAD ALBAQAWI, *TAFSAIR AL-BAQAWI; MA'ALIM AL-TANZAIL FI TAFSAIR AL-QUR'AN [AL-BAQAWI'S INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION]* 318 (Abdulrazag Almahdai ed., 1st ed. 1999); 10 ALZUHAILI, *supra* note 167, at 104; 2 JABIR BIN MUSA BIN ABDULGADIR BIN JABIR ALJZAERI, *AYSAR AL-TAFASAIR LI-KALAM AL-ALI AL-KABAIR [THE SIMPLE INTERPRETATION OF GOD'S WORDS] [AUTHOR'S TRANSLATION]* 336 (5th ed. 2003).

<sup>1069</sup> See 3 ALBASRI, *supra* note 1053, at 209-10; 3 ALSHWKANI, *supra* note 1054, at 227.

<sup>1070</sup> The Holy Qur'an, *Al-Nahl, Verse 91*.

<sup>1071</sup> 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 64; see 20 MUHAMMAD BIN OMAR BIN ALHASAN BIN ALHUSSIN ALTAMIMI ALRAZI, *MAFATAIH AL-GHIB AL-TAFSAIR AL-KABAIR [THE GREAT INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION]* 263 (3rd ed. 1999).

<sup>1072</sup> 3 ALNASIRI, *supra* note 855, at 354; 14 ALZUHAILI, *supra* note 167, at 219.

<sup>1073</sup> See 3 ALNASIRI, *supra* note 855, at 234-35; see also 4 ABDULRAHMAN BIN ABI BAKR JALAL ALDAIN ALSWAI, *AL-DOUR AL-MANTHOUR FI AL-TAFSAIR BALMATHOUR [THE HOLY QUR'AN INTERPRETATION] [AUTHOR'S TRANSLATION]* 636 (n.d.); see also 4 ALSHARIBI, *supra* note 129, at 2057.

<sup>1074</sup> The Holy Qur'an, *Al-Ra'd, Verse 20-23*.

include any commitment with God or with others, including contracts, conventions, and treaties.<sup>1075</sup>

In addition, God honors Muslims who fulfill their commitments or promises and describes them as honest and righteous people.<sup>1076</sup> This can be found in Chapter Al-Baqarah verse 177, which reads, “[Those who] fulfill their promise when they promise ... those are the ones who have been true, and it is those who are the righteous.”<sup>1077</sup> Some Muslim scholars consider those promises to be any type of commitment, either between people and God or between people with each other, including contracts, agreements, conventions, and treaties.<sup>1078</sup>

These verses from the holy Qur’an clearly affirm the ability to conclude treaties and sign conventions with other societies and nations regardless of their religious affiliation.<sup>1079</sup> Islamic law demands Muslims fulfill all commitments and promises including contracts, agreements, treaties, and conventions.<sup>1080</sup> Islamic law also prohibits Muslims from breaching any commitments to others, including non-Muslims.<sup>1081</sup> Lastly, Islamic law considers accomplishing and fulfilling commitments to be righteous work done by honorable characters.<sup>1082</sup>

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<sup>1075</sup> 3 ALSHWKANI, *supra* note 1054, at 94; 1 ALJAWI, *supra* note 128, at 558; 13 AHMED BIN MOSTAFA ALMARAGHI, TAFSAIR AL-MARAGHI [MARAGHI’S INTERPRETATION OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 93 (1st ed. 1946); ABDULRAHMAN BIN NASSIR BIN ABDULLAH BIN NASSIR ALSA’DI, TISAIR AL-KARAIM AL-RAHMAN FI TAFSAIR KLAM AL-MANAN [THE INTERPRETATION OF GOD’S WORDS] [AUTHOR’S TRANSLATION] 416 (Abdulrahman Mua’la Alluwihigi ed., 1st ed. 2000); *see* 13 ALZUHAILI, *supra* note 167, at 151-53.

<sup>1076</sup> *See* 4 MUHAMMAD ALAMAIN BIN MUHAMMAD ALMUKHTAR BIN ABDULQADIR, ADWA AL-BAIAN FI EIDAH AL-QUR’AN BL-QUR’AN [THE LIGHT OF DECLARATION ON THE EXPLANATION OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 218-19 (1995); *see also* 2 MUHAMMAD BIN SALEH BIN MUHAMMAD AL-UTHAIMEEN, TAFSAIR AL-FATIHAH WA AL-BAGARAH [THE INTERPRETATION OF THE FIRST TWO CHAPTERS OF THE HOLY QUR’AN] [AUTHOR’S TRANSLATION] 291-92 (1st ed. 2002).

<sup>1077</sup> The Holy Qur’an, *Al-Baqarah*, Verse 177.

<sup>1078</sup> 1 ALNAISABORI, *supra* note 848, at 262; 5 ALRAZI, *supra* note 1071, at 218-19.

<sup>1079</sup> *See* 1 ALGASIM, *supra* note 1064, at 470; *see also* 1 ALSABOUNY, *supra* note 1067, at 485; *see also* 2 ALNASIRI, *supra* note 855, at 359-60.

<sup>1080</sup> 3 ALSHWKANI, *supra* note 1054, at 94; 1 SOME MUSLIM SCHOLARS UNDER THE SUPERVISION OF AL-AZHAR RESEARCH CENTER, *supra* note 848, at 64.

<sup>1081</sup> *See* 3 ALBASRI, *supra* note 1053, at 209-10; 3 ALNASIRI, *supra* note 855, at 354.

<sup>1082</sup> *See* 4 ABDULQADIR, *supra* note 1076, at 218-19; *see also* 2 AL-UTHAIMEEN, *supra* note 1076, at 291-92.



### 7.2.3. Treaties Concluded Between Muslims and Non-Muslims During the Early Stages of Islam

After summarizing conventions and treaties in the pre-Islamic era, as well as clarifying the Islamic law perspective on their validity, it makes sense to examine some of the treaties concluded during the era of Prophet Muhammad. Three important treaties were concluded by Prophet Muhammad in the sixth century with non-Muslim nations including Jews,<sup>1083</sup> non-Muslim Arabs,<sup>1084</sup> and Christians.<sup>1085</sup>

One treaty Prophet Muhammad concluded was with the Jews in 623 A.C.<sup>1086</sup> That treaty grants both parties, Muslims and Jews, the same treatment for the right to possess funds and the right for security.<sup>1087</sup> In addition, that treaty stipulated that Jews should not invade Muslim territory nor support others to invade Muslim territory, while Muslims should not invade Jewish territory nor support others to invade them.<sup>1088</sup> Moreover, that treaty stated that Muslims would stand by Jews if other nations invaded and Jews would stand by Muslims if other nations invaded.<sup>1089</sup> That treaty was fair to both parties and supported peace between Muslims and Jews.

Another important treaty concluded by Prophet Muhammad was between Muslim Arabs and non-Muslim Arabs in 627 A.C.<sup>1090</sup> One of the main purposes of that treaty was to stop the

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<sup>1083</sup> MUHAMMAD BIN HAMAID ALLAH ALHAIDAR, MAJMUWAT AL-WTHAIG AL-SIASIAH LL'AHAD AL-NABAWAI WA AL-KHILAFAH AL-RASHIDAH [THE COLLECTION OF POLITICAL DOCUMENTS DURING THE CALIPH'S ERA] [AUTHOR'S TRANSLATION] 267 (6th ed. 1987).

<sup>1084</sup> ABDULAZAIM BIN IBRAHIM BIN MUHAMMAD ALMATANI, SMAHAT AL-ISLAM FI AL-DA'WAH ELA ALLAH WA AL-ALAGAT AL-INSANIAH [THE FORGIVENESS OF ISLAM AND THE ORGANIZATION OF HUMAN'S RELATIONS] [AUTHOR'S TRANSLATION] 134-35 (1st ed. 1993).

<sup>1085</sup> See 3 MUHAMMAD BIN AHMED BIN MUSTAFA BIN AHMED, KHATAM AL-NABI'IAN SUALA ALLAH ALAIH WA ALIH WA SALLM [THE LAST PROPHET PEACE UPON HIM] [AUTHOR'S TRANSLATION] 825 (2004).

<sup>1086</sup> ALHAIDAR, *supra* note 1083, at 267.

<sup>1087</sup> 1 TAWFFIG BIN ABDULAZIZ ALSSIDARI, AL-ISLAM WA AL-DISTOUR [ISLAM AND CONSTITUTION] [AUTHOR'S TRANSLATION] 130 (1st ed. 2004).

<sup>1088</sup> ALHAIDAR, *supra* note 1083, at 267.

<sup>1089</sup> 1 ALSSIDARI, *supra* note 1087, at 130.

<sup>1090</sup> ALMATANI, *supra* note 1084, at 134-35.

ongoing war between Muslim Arabs and non-Muslim Arabs, which had continued for ten years.<sup>1091</sup> At that time, Prophet Muhammad and his followers were located in Al-Madinah Al-Monawarh and the non-Muslim Arabs were located in Makkah.<sup>1092</sup> The conclusion of that treaty permitted Muslim Arabs to travel to Makkah, which is the holy city for Muslims, and perform prayers.<sup>1093</sup>

Another significant treaty concluded by Prophet Muhammad was between Muslims and Christians in 631 A.C.<sup>1094</sup> In that treaty, both parties agreed to the right to practice their religion as well as the right to possess and control their funds in the same territory.<sup>1095</sup> In addition, that treaty provided safety for both parties and guaranteed that no party would invade the other,<sup>1096</sup> while stipulating that neither Christian churches, nor any holy place belonging to them, would be destroyed.<sup>1097</sup> Furthermore, that treaty required that both parties treat each other fairly and apply the terms and conditions of the treaty with good faith.<sup>1098</sup>

Conventions and treaties were concluded between nations before the establishment of Islam as a religion. Islamic law affirms agreements with other nations—whether Jewish, Christian, or non-religious nations—as long as those treaties and conventions benefit public interest. The holy Qur’an demands Muslims fulfill their treaty obligations and prohibits Muslims from breaching these agreements. Although the treaties and conventions concluded in the pre-

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<sup>1091</sup> *Id.* at 136.

<sup>1092</sup> 1 SA’AID BIN ALI BIN WHEB ALQAHTANI, FIGH AL-DA’WAH FI SAHAIH AL-IMAM AL-BUKHARI [ISLAMIC LAW JURISPRUDENCE BASED ON BUKHARI’S STUDIES] [AUTHOR’S TRANSLATION] 1068 (1st ed. 2000).

<sup>1093</sup> *Id.*

<sup>1094</sup> See 3 AHMED, *supra* note 1085, at 825.

<sup>1095</sup> ALHAIDAR, *supra* note 1083, at 176.

<sup>1096</sup> 2 SABIG, *supra* note 1050, at 669.

<sup>1097</sup> ALHAIDAR, *supra* note 1083, at 176.

<sup>1098</sup> 3 AHMED, *supra* note 1085, at 826.

Islamic and early Islamic era were about conciliations, alliances, and truces, they are still valid examples of treaties and conventions that benefit public interest.

### 7.3. Application on Conventions and Treaties Under Islamic Law

The application of conventions and treaties under Islamic law requires an understanding of the conditions necessary to finalize treaties and conventions as well as the obligation to fulfill those treaties and conventions. This section also explains certain situations that lead to denouncing treaties and conventions.

#### 7.3.1. Types, Conditions, and Obligations of Treaties and Conventions

Islamic law permits concluding treaties and conventions as long as those agreements are fair and benefit the public interest.<sup>1099</sup> However, Islamic law also imposes some conditions for concluding appropriate treaties and conventions with either Muslims or non-Muslims.<sup>1100</sup> In addition, after these agreements are in place, Islamic law requires Muslims to fulfill these treaty obligations and considers execution of the agreement a religion duty.<sup>1101</sup>

There are three different types of treaties and conventions under Islamic law: (1) agreements with non-Muslim countries;<sup>1102</sup> (2) agreements with Muslim countries;<sup>1103</sup> (3) agreements with certain groups of people.<sup>1104</sup> Agreements between Muslim countries or between Muslim and non-Muslim countries are permissible when they are fair and benefit the public interests of each country.<sup>1105</sup>

<sup>1099</sup> 2 ALJZAERI, *supra* note 1068, at 338; 7 SOME MUSLIM SCHOLARS, *supra* note 1037, at 374.

<sup>1100</sup> 2 SABIG, *supra* note 1050, at 702; 2 ALJZAERI, *supra* note 1068, at 338.

<sup>1101</sup> KHATAB, *supra* note 1050, at 54; 2 SABIG, *supra* note 1050, at 699.

<sup>1102</sup> 3 AHMED, *supra* note 1085, at 874.

<sup>1103</sup> MUHAMMAD BIN ISA BIN MUHAMMAD BIN ASBAGH AL-QURTUBI, AL-ENJAD FI ABWAB AL-JIHAD WA TAFSSIL FRAIDUH WA SUNANIH [THE HELPER IN INTERNATIONAL RELATIONS AND ITS PRINCIPLES] [AUTHOR'S TRANSLATION] 320 (Mshahour Bin Hasan Alsalman et al. eds., n.d.).

<sup>1104</sup> 3 AHMED, *supra* note 1085, at 874.

<sup>1105</sup> See AL-QURTUBI, *supra* note 1103, at 320.

Islamic law also validates agreements between certain groups of people.<sup>1106</sup> This type of agreement usually relates to freedom of religion and can be concluded between countries or between countries and certain groups of people.<sup>1107</sup> For example, a Muslim country can conclude a treaty with a non-Muslim country, which stipulates that people from these two countries have the right to practice their religion in either country without restrictions.<sup>1108</sup> Another example is when a Muslim country concludes a treaty with a certain group of Christian people, who live in the Muslim country, that grants Christians the right to practice their religion in the country.<sup>1109</sup>

However, in order for any treaty or convention to be valid under Islamic law, four conditions must be met. First, treaties and conventions cannot violate general principles and rules of Islamic law.<sup>1110</sup> Second, these agreements must be formed with the consent of all parties; parties cannot be compelled to agree.<sup>1111</sup> Third, the treaties and conventions must be obvious and understandable with a clear purpose.<sup>1112</sup> Fourth, the treaties and conventions should benefit the public interests of each party.<sup>1113</sup> The treaty or convention is valid under Islamic law if all these conditions are met.<sup>1114</sup>

Islamic law requires Muslims to fulfill the obligations of any convention or treaty concluded in accordance with Islamic law.<sup>1115</sup> In addition, Islamic law considers fulfilment of

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<sup>1106</sup> See 3 AHMED, *supra* note 1085, at 874.

<sup>1107</sup> See *Id.*

<sup>1108</sup> See AHMED BIN ABDULHALLIM BIN ABDULSALAM BIN ABDULLAH ALDIMASHQI, AL-SARIM AL-MASLOL ALA SHATIM AL-RASOUL [RESPONSES TOWARD PROPHET MUHAMMAD'S HATERS] [AUTHOR'S TRANSLATION] 244-45 (Muhammad Muhi Aldain Abdulhamaid ed., n.d.).

<sup>1109</sup> See 3 AHMED, *supra* note 1085, at 874.

<sup>1110</sup> 2 SABIG, *supra* note 1050, at 702.

<sup>1111</sup> ALAMRY, *supra* note 1048, at 331.

<sup>1112</sup> 2 SABIG, *supra* note 1050, at 702.

<sup>1113</sup> 2 ALJZAERI, *supra* note 1068, at 338; 7 SOME MUSLIM SCHOLARS, *supra* note 1037, at 374.

<sup>1114</sup> 2 SABIG, *supra* note 1050, at 702; ALAMRY, *supra* note 1048, at 331; 2 ALJZAERI, *supra* note 1068, at 338.

<sup>1115</sup> KHATAB, *supra* note 1050, at 54; 2 SABIG, *supra* note 1050, at 702.

treaties and conventions a religious duty similar to fulfilling God's orders and decrees.<sup>1116</sup>

Moreover, some Muslim scholars consider accomplishing treaties and conventions as a feature and a character should be possessed by Muslims.<sup>1117</sup>

Furthermore, some Muslim scholars mention that Islamic law builds its relations with other non-Muslim nations by fulfilling the treaties and the conventions between them, which is a foundation for international relations.<sup>1118</sup> Islamic law decrees that Muslims fulfill their agreements due to the mission to improve relations between countries, separate issues, and resolve disputes.<sup>1119</sup> Additionally, Islamic law requires fulfillment of conventions and treaties regardless of the other countries' religion and restricts Muslims from demanding anything more than what the conventions and treaties state.<sup>1120</sup> For instance, if a treaty imposes a specific percentage to be paid by the non-Muslim merchants, Islamic law restricts Muslims from demanding those merchants to pay more than what the treaty imposes.

As long as treaties and conventions meet the requirements of Islamic law, agreements concluded between Muslim countries or between Muslim and non-Muslim countries should be respected.<sup>1121</sup> Moreover, Islamic law demands that Muslims fulfill the obligations of the agreements they conclude and considers fulfillment a religion duty.<sup>1122</sup> Furthermore, Islamic law

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<sup>1116</sup> 2 SABIG, *supra* note 1050, at 699; 1 MUHAMMAD BIN ALI BIN MUHAMMAD ALASBAHI, BDA'EA AL-SALK FI TABAI'E AL-MOLK [THE GREAT FOLLOWERS OF LEADERS' HABITS] [AUTHOR'S TRANSLATION] 483 (Ali Sami Alnashar ed., 1st ed., n.d.).

<sup>1117</sup> MUHAMMAD BIN AHMED BIN ABI SAHAL ALSARKHISI, SHARAH AL-SAIR AL-KABAIR [INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 1215 (1971).

<sup>1118</sup> ABDULLATAIF, *supra* note 1051, at 299.

<sup>1119</sup> 2 SABIG, *supra* note 1050, at 699.

<sup>1120</sup> 2 FAISAL BIN ABDULAZIZ BIN FAISAL BIN HAMAD AL-MUBARAK, BOSTAN AL-AHBAR MUKHTASAR NAIL AL-AWDAR [THE GARDEN OF SCHOLARS, BRIEF ON THE INTERPRETATION OF THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 490, 501 (1st ed. 1998).

<sup>1121</sup> 2 SABIG, *supra* note 1050, at 702; 2 ALJZAERI, *supra* note 1068, at 338.

<sup>1122</sup> KHATAB, *supra* note 1050, at 54; 2 SABIG, *supra* note 1050, at 699.

considers fulfilling the conventions and treaties as the basis to build effective international relations between the countries.<sup>1123</sup>

### 7.3.2. Situations Lead to Renouncing Treaties and Conventions

Islamic law favors fulfillment of treaties and conventions due to the important role of these agreements in improving international relations between nations.<sup>1124</sup> The burden to fulfill treaties and conventions falls on the leaders of the countries that are party to the agreement, typically presidents or kings,<sup>1125</sup> or, in modern international relations, the state department. However, Islamic law also details certain situations where denouncing conventions and treaties is mandatory.<sup>1126</sup>

Islamic law prohibits Muslims from breaching any treaty or convention they ratify, even if the implementation of these agreements may slightly harm a Muslim country such as conflicts with its public policy, as long as the other signatories are fulfilling their obligations.<sup>1127</sup> Islamic law considers fulfillment more important than rejecting these agreements after they are in force.<sup>1128</sup> The harm of losing trust between nations after renunciation of conventions or treaties is considered greater than any slight harm caused to Muslim countries by fulfillment.<sup>1129</sup>

However, there are situations where Islamic law permits renunciation of the ratified conventions and treaties as either necessary or mandatory.<sup>1130</sup> For instance, Islamic law mandates Muslims renounce ratified conventions or treaties if the other signatories breach those

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<sup>1123</sup> ABDULLATAIF, *supra* note 1051, at 299.

<sup>1124</sup> 2 SABIG, *supra* note 1050, at 699.

<sup>1125</sup> 11 MUHAMMAD BIN IBRAHIM BIN ALMOUNTHAIR ALNAISABURI, AL-AWSAT FI AL-SUNAN WA AL-EJMA' A WA AL-EKHTILAF [THE MIDDLE OF SUNNI SPEECHES, AGREEMENT, AND DISAGREEMENT] [AUTHOR'S TRANSLATION] 323 (Ahmed Muhammad Hanaif ed., 1st ed. 1985); *see* 1 ALASBAHI, *supra* note 1116, at 484.

<sup>1126</sup> 2 SABIG, *supra* note 1050, at 702; 2 AL-UTHAIMEEN, *supra* note 1076, at 292.

<sup>1127</sup> ABDULLATAIF, *supra* note 1051, at 299.

<sup>1128</sup> *Id.*

<sup>1129</sup> *Id.*

<sup>1130</sup> 2 SABIG, *supra* note 1050, at 703; 2 AL-UTHAIMEEN, *supra* note 1076, at 292.

agreements.<sup>1131</sup> In addition, Islamic law permits Muslims to renounce conventions and treaties when other signatories intend to breach or not fulfill the agreements.<sup>1132</sup> Yet, Islamic law requires clear announcement be given by the Muslim nation before renouncing the conventions or treaties.<sup>1133</sup>

In general, Islamic law requires Muslims to fulfill any ratified convention and treaty and prohibits breach or renunciation, as long as those treaties and conventions are concluded in accordance with Islamic law and benefit public interest. This is true even if the agreements slightly harm Muslim countries, as long as the other parties fulfill the agreements as well.<sup>1134</sup> Yet, conventions and treaties can be renounced if the other signatories breach or intend to breach.<sup>1135</sup>

#### 7.4. The Reciprocity Concept Under Islamic Law and New York Convention

The reciprocity concept under Islamic law and the New York Convention is an important piece of international arbitration agreements. This section first explains the reciprocity concept and how it applies to treaties and conventions under Islamic law, particularly for agreements between Muslim states and non-Muslim states. Then, this section clarifies the reciprocity principle under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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<sup>1131</sup> 2 SABIG, *supra* note 1050, at 703.

<sup>1132</sup> 2 AL-UTHAIMEEN, *supra* note 1076, at 292.

<sup>1133</sup> 2 ALJZAERI, *supra* note 1068, at 338.

<sup>1134</sup> *See* ABDULLATAIF, *supra* note 1051, at 299.

<sup>1135</sup> 2 SABIG, *supra* note 1050, at 703; 2 AL-UTHAIMEEN, *supra* note 1076, at 292.

#### 7.4.1. The Reciprocity Principle Under Islamic Law

Reciprocity, as a principle, is mentioned by Islamic law and is considered an important element for justice,<sup>1136</sup> which means a promise a country makes to treat another country's citizens, diplomats, and commerce the same treatment as the other country does.<sup>1137</sup> Yet, applying the reciprocity principle is undesirable if it violates general principles and rules of Islamic law.<sup>1138</sup> In this case, Islamic law recommends applying the morality principle instead of the reciprocity principle,<sup>1139</sup> which calls to adhere to Islamic law obligations if the reciprocity violates them.<sup>1140</sup>

Islamic law applies the reciprocity principle to all treaties and conventions that Muslim states conclude with either Muslim or non-Muslim states.<sup>1141</sup> The reciprocity principle is applied when Islamic law requires Muslims to renounce treaties and conventions if the other signatories breach or intend to breach these agreements.<sup>1142</sup> Islamic law also applies the reciprocity principle

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<sup>1136</sup> MUHAMMAD BIN AHMED BIN MUSTAFA BIN AHMED, AL-MU'AGIZAH AL-KUBRA AL-QUR'AN [THE GREATEST MIRACLE, THE HOLY QUR'AN] [AUTHOR'S TRANSLATION] 367-68 (n.d.)

<sup>1137</sup> AL-MARJEA AL-ELAKTRONY, <http://www.almerja.net> (last visited Mar. 11, 2017).

<sup>1138</sup> 2 AHMED, *supra* note 1085, at 518-19.

<sup>1139</sup> *Id.*

<sup>1140</sup> AHMED, *supra* note 1136, at 368.

<sup>1141</sup> *See* 11 ALNAISABURI, *supra* note 1125, at 323; *see also* 2 AL-MUBARAK, *supra* note 1120, at 490.

<sup>1142</sup> 2 SABIG, *supra* note 1050, at 702-03.



to international law<sup>1143</sup> and international relations.<sup>1144</sup> Reciprocity is specifically applied in the law of war<sup>1145</sup> and in commercial relations between Muslim and non-Muslim nations.<sup>1146</sup>

For example, the reciprocity principle applies to hostages and prisoners during war between Muslims and non-Muslims.<sup>1147</sup> The way the non-Muslim country treats its Muslim hostages and prisoners is the same way the Muslim country will treat the non-Muslim hostages and prisoners.<sup>1148</sup> As a result, if the non-Muslim country releases Muslim hostages and prisoners or offers to exchange for non-Muslim hostages and prisoners, the Muslim country is going to act in kind, based on the reciprocity principle.<sup>1149</sup>

Islamic law also applies the reciprocity principle in the commercial relations between Muslim and non-Muslim nations.<sup>1150</sup> For example, during Caliph's Omar era, non-Muslim countries charged Muslim merchants a ten percent tax to trade goods or make commercial transactions in their territories.<sup>1151</sup> As a result, Caliph Omar imposed a ten percent tax on non-Muslim merchants concluding business deals in Muslim territories.<sup>1152</sup>

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<sup>1143</sup> See 2 AHMED, *supra* note 1085, at 518-19.

<sup>1144</sup> See AKRAM BIN DEIA'A ALAMRAY, ASIR AL-KHILAFAH AL-RASHIDAH [THE ERA OF CALIPHS] [AUTHOR'S TRANSLATION] 217 (n.d.).

<sup>1145</sup> See 2 AHMED, *supra* note 1085, at 518-19; see also AHMED BIN AHMED BIN QALOUSH, AL-SAIRAH AL-NABAWIAH WA AL-DA'WAH FI AL-AHAD AL-MADANI [BIOGRAPHY OF PROPHET MUHAMMAD DURING THE CIVILIZATION] [AUTHOR'S TRANSLATION] 501 (1st ed. 2004); see also BRAIK BIN MUHAMMAD BIN BRAIK ALAMRAY, AL-SARAYA WA AL-BOU'AUTH AL-NABAWIAH HAWLA AL-MADINAH WA MAKKAH [DELEGATIONS AND MISSIONS OF PROPHECY AROUND MAKKAH AND MADINAH] [AUTHOR'S TRANSLATION] 76 (Akram Deia'a Alamray ed., 1st ed. 1996); see also ABDULRAHMAN BIN HASSAN HABNAKAH ALMYDANI, AJNIHAT AL-MAKAR AL-THLATHAH WA KHAWFIHA; AL-TABSHAIR, AL-ESTISHRAG, AL-ESTA'MAR [THE THREE WINGS OF CUNNINGS, PREACHING, ORIENTALISM, AND COLONIALISM] [AUTHOR'S TRANSLATION] 669-70 (8th ed. 2000).

<sup>1146</sup> See ALAMRAY, *supra* note 1144, at 217; see also ABDULKRIM ZAIDAN, AUSUL AL-DA'WAH [CONVENING PRINCIPLES] [AUTHOR'S TRANSLATION] 265 (9th ed. 2001).

<sup>1147</sup> ALMYDANI, *supra* note 1145, at 669-70.

<sup>1148</sup> 2 AHMED, *supra* note 1085, at 518-19.

<sup>1149</sup> ALMYDANI, *supra* note 1145, at 669-70.

<sup>1150</sup> ZAIDAN, *supra* note 1146, at 265.

<sup>1151</sup> ALAMRAY, *supra* note 1144, at 217.

<sup>1152</sup> *Id.*

However, when applying the reciprocity principle conflicts with the morality principle, Islamic law demands Muslims apply the morality principle instead of the reciprocity principle.<sup>1153</sup> The morality principle requires Muslims to adhere to Islamic law, including the general rules and principles.<sup>1154</sup> If applying the reciprocity principle leads Muslims to violate Islamic law, Muslims should not apply the reciprocity principle and instead apply the morality principle.<sup>1155</sup>

For instance, during war between a Muslim nation and a non-Muslim nation, if the non-Muslim nation tortured Muslim hostages and prisoners, the Muslim nation is prohibited from responding similarly and torturing the non-Muslim hostages and prisoners.<sup>1156</sup> Islamic law prohibits torturing any person, regardless of his or her religion.<sup>1157</sup> As a result, applying the reciprocity principle would conflict with the morality principle; Islamic law then demands Muslim nations apply the morality principle instead of the reciprocity principle.<sup>1158</sup>

In short, the reciprocity principle is an important element of Islamic Law.<sup>1159</sup> Islamic law demands Muslims apply the reciprocity principle in treaties and conventions with other nations<sup>1160</sup> as well as in international relations.<sup>1161</sup> However, Muslims cannot apply the reciprocity principle when it conflicts with the morality principle; morality supersedes reciprocity according to Islamic law.<sup>1162</sup>

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<sup>1153</sup> 2 AHMED, *supra* note 1085, at 518-19.

<sup>1154</sup> AHMED, *supra* note 1136, at 368.

<sup>1155</sup> 2 AHMED, *supra* note 1085, at 518-19.

<sup>1156</sup> *See Id.*

<sup>1157</sup> AHMED, *supra* note 1136, at 368.

<sup>1158</sup> 2 AHMED, *supra* note 1085, at 518-19.

<sup>1159</sup> AHMED, *supra* note 1136, at 367-68.

<sup>1160</sup> *See* 11 ALNAISABURI, *supra* note 1125, at 323; *see also* 2 AL-MUBARAK, *supra* note 1120, at 490.

<sup>1161</sup> *See* ALAMRAY, *supra* note 1144, at 217; *see* 2 AHMED, *supra* note 1085, at 518-19.

<sup>1162</sup> 2 AHMED, *supra* note 1085, at 518-19.

#### 7.4.2. The Reciprocity Principle According to New York Convention

Regardless of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) between the nations, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is the main source for organizing the enforceability of foreign arbitration awards.<sup>1163</sup> With 156 signatories,<sup>1164</sup> enforcement of foreign arbitral awards has become smoother and easier due to the high number of signatories to the New York Convention. In addition, the New York Convention respects the sovereignty of member states and, therefore, emphasizes application of the reciprocity principle between member states.<sup>1165</sup>

The New York Convention emphasizes reciprocity in two different articles to ensure sovereignty is respected where all signatories receive fair treatment.<sup>1166</sup> Article I (3) of New York Convention states:

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.<sup>1167</sup>

This article highlights the importance of the reciprocity principle<sup>1168</sup> and considers it basic treatment for the international relations between member states. Any state, after signing the Convention, has the right to exercise the reciprocity principle and only enforce arbitration awards issued in other states that are signatories to the convention.<sup>1169</sup> Moreover, this article applies the

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<sup>1163</sup> See NEW YORK ARBITRATION CONVENTION, *supra* note 277.

<sup>1164</sup> *Id.*

<sup>1165</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I (3), Jun. 10, 1958, 330 U.N.T.S. 3, available at <http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>

<sup>1166</sup> *See Id.*

<sup>1167</sup> *Id.*

<sup>1168</sup> *Id.*

<sup>1169</sup> *Id.*

sovereignty principle to all member states by recognizing their national laws as references to determine commercial disputes that are covered by the Convention.<sup>1170</sup>

While Article I (3) is the only article in the Convention that uses the term “reciprocity,” Article XIV implies the importance of the reciprocity principle.<sup>1171</sup> Article XIV of the Convention states that, “[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.”<sup>1172</sup>

This article clearly implies the use of the reciprocity principle between member states.<sup>1173</sup> Unlike Article I (3), which only refers to the reciprocity principle for enforcement of arbitration awards in member states, article XIV applies the reciprocity principle to the entire Convention.<sup>1174</sup> In other words, member states are not supposed to take advantage of applying the Convention to a certain extent in the territories of other signatories, unless those member states apply the convention to that extent in their territories.<sup>1175</sup>

In short, since the New York Convention is considered the primary instrument for the enforcement of foreign arbitral awards, its emphasis on reciprocity is also important. The reciprocity principle is not only about the exchange of similar treatment between states, but also about respecting the sovereignty of states.

The reciprocity concept is important under both Islamic law and international law. Islamic law validates the use of the reciprocity principle as long as it does not conflict with Islamic law. If application of reciprocity would lead to a violation of Islamic law, the morality

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<sup>1170</sup> *Id.*

<sup>1171</sup> *See Id.* at art. XIV.

<sup>1172</sup> *See Id.*

<sup>1173</sup> *See Id.*

<sup>1174</sup> *See Id.*

<sup>1175</sup> *See Id.*

principle must be applied instead. The reciprocity principle is also included in two different articles of the New York Convention to ensure fair treatment between signatories and confirms the importance of reciprocity in international conventions and treaties.

#### 7.5. Conclusion

Conventions and treaties are important tools that organize and strengthen the different types of relations between nations. Islamic law permits formalized agreements—like treaties and conventions—with other nations, whether Muslims or non-Muslims, as long as the agreements benefit public interests. In addition, Islamic law requires Muslim citizens and leaders to fulfill any convention and treaty as a religion duty, as long as the other signatories are fulfilling their obligations as well. However, Islamic law demands renouncing treaties and conventions if other signatories start to breach or intend to breach the agreement.

Furthermore, Islamic law considers reciprocity an element of justice and supports its use unless it conflicts with general rules and principles of Islamic law. However, since the New York Convention is an international treaty that benefits public interests by enforcing foreign arbitral awards, fulfilling the New York Convention should be a duty for Muslim signatories. As a result, Muslim countries that are signatories to the New York Convention should enforce foreign arbitral awards in their territories—even if those awards may slightly conflict with their public policies and laws—as long as the other signatories enforce the awards in their territories.

CHAPTER 8  
REMEDIES AGAINST ARBITRAL AWARDS AND APPLICATION ON THEIR  
ENFORCEMENT

8.1. Introduction

Since arbitration, as an alternative dispute resolution mechanism, aims to resolve disputes, an important feature is the enforcement of arbitral awards. Yet, arbitration parties might need remedies for arbitral awards decided against them to ensure that disputes are decided fairly and justly. This chapter explores the remedies available for arbitral awards under Islamic law as well as the rights of parties to appeal or vacate arbitral awards. Specific focus is on the remedies available to parties under Saudi Arabian law, since all laws in Saudi Arabia are in accordance with Islamic law. The New York Convention also provides specific rules on enforcement of foreign arbitral awards. Furthermore, it is important to clarify the common legal grounds in non-Muslim countries to refuse the enforcement of arbitral awards rendered in Muslim countries or to refuse enforcement in Muslim countries of awards rendered in non-Muslim countries.

Section two of this chapter explains the options for arbitration parties to appeal or vacate awards under Islamic law as well as the remedies against arbitration awards available in Saudi Arabia. Section three then explores the general concept of enforcement of arbitral awards according to the New York Convention as well as the public policy exception that different countries use to refuse enforcement of certain arbitral awards. Then, section four clarifies the best practices to apply the New York Convention to the enforcement of foreign arbitral awards in Muslim countries.

After that, section five examines the recent changes to the Saudi Arabian rules on enforcement of foreign arbitral awards. In addition, this section discusses common grounds to

refuse enforcement of arbitral awards—specifically, foreign awards decided by women arbitrators and foreign awards with orders for payment of interest. Then, section six mentions the enforcement in non-Muslim countries of arbitral awards rendered in Muslim countries, specifically the approach in the United States to enforcement of arbitral awards decided under Islamic law. Finally, section seven draws the conclusion of this chapter.

## 8.2. Explanation of Arbitration Awards

To understand enforcement of foreign arbitral awards under Islamic law, it is necessary to first understand how arbitration awards are issued through Islamic arbitration as well as the options arbitration defendants possess before enforcement of an award and the requirements to enforce arbitration awards. This section explains the process for appealing arbitration awards, vacating arbitration awards, and enforcing arbitration awards.

### 8.2.1. Appealing Arbitration Awards

Under Islamic law, requests to appeal arbitration awards can be made to either other arbitral tribunals or the regular judicial system.<sup>1176</sup> This section first covers appeals through other arbitral tribunals, then appeals through the regular judicial system. It also discusses appeals under the current arbitration practices in Saudi Arabia.

Of all the Islamic schools, only the Hanafiah school gives parties the right to appeal arbitration awards directly to other arbitral tribunals before enforcement.<sup>1177</sup> However, the Hanafiah scholars do not clearly discuss whether appealing awards through other arbitral tribunals can be sought by the request of only one of the arbitration parties.<sup>1178</sup> Yet, some

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<sup>1176</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 27.

<sup>1177</sup> 21 AL-SARKHSI, *supra* note 326, at 63.

<sup>1178</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 27.

Hanafiah scholars suggest that appeal through other arbitral tribunals can only be conducted after the consent of all arbitration parties.<sup>1179</sup>

Hanafiah scholars suggest two different options to appeal arbitration awards through other arbitral tribunals.<sup>1180</sup> Under the first option, both parties agree to submit the dispute to a second arbitral tribunal that is unaware of the decision made in the first arbitral tribunal.<sup>1181</sup> If the second tribunal issues a different decision than the first tribunal, either party can then seek an additional appeal from the courts.<sup>1182</sup> Whatever award the court confirms will be enforced.<sup>1183</sup>

The second options allows both parties to agree to submit the dispute to a second arbitral tribunal that knows about the decision from the first arbitral tribunal.<sup>1184</sup> In this situation, the other arbitral tribunal examines the previous decision rather than the entire case.<sup>1185</sup> If the second arbitral tribunal affirms the previous decision, the original award will be enforced.<sup>1186</sup> Yet, if the second tribunal revises the award made by the first arbitral tribunal, the revised award will be enforced instead.<sup>1187</sup>

In addition, all four Islamic schools, including the Hanafiah, provide arbitration parties the right to appeal arbitration awards to the courts before enforcement occurs.<sup>1188</sup> However, Islamic schools do not clarify whether appeals can be requested by only one of the parties.<sup>1189</sup> In

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<sup>1179</sup> 8 ABDULAZIZ, *supra* note 409, at 124.

<sup>1180</sup> 21 AL-SARKHSI, *supra* note 326, at 63; 8 ABDULAZIZ, *supra* note 409, at 124.

<sup>1181</sup> 21 AL-SARKHSI, *supra* note 326, at 63.

<sup>1182</sup> *See Id.*

<sup>1183</sup> *See Id.*

<sup>1184</sup> 8 ABDULAZIZ, *supra* note 409, at 124.

<sup>1185</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 27.

<sup>1186</sup> *Id.*

<sup>1187</sup> *See Id.*

<sup>1188</sup> *See* 2 AL-HADADI, *supra* note 52, at 246; *see also* 8 ALQASM, *supra* note 52, at 99-100; *see also* 2 ABDULKHALIG, *supra* note 452, at 292-93; *see also* 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>1189</sup> *See* 8 ALQASM, *supra* note 52, at 99-100.



addition, all four Islamic schools require parties to obtain enforcement of the appealed arbitration awards from the court of appeal.<sup>1190</sup>

Islamic law does not provide specific grounds for appealing arbitration awards either through arbitral tribunals or the regular judicial system.<sup>1191</sup> Yet, Islamic law gives arbitration awards the same binding nature as regular judicial decisions and, therefore, any legal ground to appeal a decision from a trial court is a valid legal ground to appeal an arbitration award.<sup>1192</sup> Furthermore, since the applicable legal grounds for appealing decisions of trial courts are not limited under Islamic law, the grounds for appealing arbitration awards are not limited either.

Saudi Arabian civil procedure law states that, “[a]ll the decisions that are issued by the trial courts are subject to appeal except the small claims that are limited by the supreme council of the judiciary.”<sup>1193</sup> As a result, the grounds for appealing decisions of the trial courts are not limited since all decisions are subject to appeal. However, Saudi Arabian arbitration law does not allow appeals for arbitration awards,<sup>1194</sup> since restricting the appeal has been a custom in the practices of international arbitrations globally. Article 49 of the arbitration law states, “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.”<sup>1195</sup>

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<sup>1190</sup> See 2 AL-HADADI, *supra* note 52, at 246; see also 8 ALQASM, *supra* note 52, at 99-100; see also 2 ABDULKHALIG, *supra* note 452, at 292-93; see also 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>1191</sup> See 7 ALBABARTI, *supra* note 131, at 317; see also 8 ALAISH, *supra* note 130, at 283; see also 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1192</sup> See 2 AL-HADADI, *supra* note 52, at 246; see also 8 ALAISH, *supra* note 130, at 283.

<sup>1193</sup> Law No. M/1 of 2013 (Civil Procedure Law) *Jaridat Um-Alqura*, art. 185, 25 November 2013 (Saudi Arabia).

<sup>1194</sup> Law of Arbitration 2012, *supra* note 237, at art. 49.

<sup>1195</sup> *Id.*

In short, Islamic law grants parties the right to appeal arbitration awards if both parties agree.<sup>1196</sup> All the Islamic schools grant arbitration parties the right to appeal arbitration awards in court with consent,<sup>1197</sup> recognizing that the legal grounds to appeal arbitration awards are the same grounds to appeal decisions and judgments of the trial courts.<sup>1198</sup> However, more recently, appealing arbitration awards is not preferred since it effects the efficiency of arbitration and is not permitted in the practices of international arbitration.

### 8.2.2. Nullifying Arbitration Awards

While Islamic law uses the same grounds to nullify arbitration awards as decisions or judgments of the courts,<sup>1199</sup> some Muslim scholars provide judges an additional opportunity to nullify arbitration awards. Some schools agree that, if the awards are decided by a different Islamic school approach than the one used by the judge, the award is subject to nullification.<sup>1200</sup> However, not all Islamic schools consider this a valid ground to nullify arbitration awards.<sup>1201</sup>

All Islamic schools, however, recognize certain reasons for arbitration parties to nullify arbitration awards before enforcement.<sup>1202</sup> Reasons to nullify arbitration awards include: (1) if one or more of the arbitrators who issued the award lacks the required qualifications to serve as arbitrator; (2) if one or more of the arbitrators is found to be corrupt; (3) if the award violates the

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<sup>1196</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 27.

<sup>1197</sup> See 2 AL-HADADI, *supra* note 52, at 246; see also 8 ALQASM, *supra* note 52, at 99-100; see also 2 ABDULKHALIG, *supra* note 452, at 292-93; see also 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>1198</sup> See 7 ALBABARTI, *supra* note 131, at 317; see also 8 ALAISH, *supra* note 130, at 283; see also 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1199</sup> See 2 SULEIMAN, *supra* note 451, at 174; see also 8 ALAISH, *supra* note 130, at 283; 8 HAMZAH, *supra* note 474, at 243; 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>1200</sup> 2 YOUSEF BIN MOUSA BIN MUHAMMED, AL-MOUTASER MIN AL-MOUKHTASER MIN MUSHKIL AL-ATHAR [JURISPRUDENCE ACCORDING TO HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 13-14 (n.d.); see 2 ABDULKHALIG, *supra* note 452, at 292-93.

<sup>1201</sup> 8 ALQASM, *supra* note 52, at 99-100; see 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1202</sup> See 2 SULEIMAN, *supra* note 451, at 174; see also 8 ALAISH, *supra* note 130, at 283; 8 HAMZAH, *supra* note 474, at 243; 4 AL-MQGDISI, *supra* note 326, at 376.

general principles or rules of Islamic law; and (4) if the award disregards the applicable law.<sup>1203</sup>

For instance, if an arbitral tribunal rules in favor of the claimant because the tribunal did not accept testimony or evidence provided by the defendant, the award can be nullified<sup>1204</sup> since the refusal of evidence violates an Islamic law general principle and, therefore, is a valid legal reason to nullify the judgment.<sup>1205</sup>

In addition, some Muslim scholars believe that a judge has the right to nullify arbitration awards decided by an Islamic school approach that differs from the approach used by the judge.<sup>1206</sup> For example, if the arbitration award is decided in accordance with the Shafi'ih school approach and the judge who received the request to nullify the arbitration award is a follower of the Hanafiah school, that judge, according to some Muslim scholars, has the right to nullify the arbitration award because it did not apply the Islamic approach followed by the judge.<sup>1207</sup>

The Hanafiah school<sup>1208</sup> as well as a minority of the Shafi'ih school scholars<sup>1209</sup> follow this approach, while the Malikiah,<sup>1210</sup> Hanbaliah,<sup>1211</sup> and a majority of the Shafi'ih<sup>1212</sup> school scholars do not permit judges to nullify arbitration awards solely because they were decided by different Islamic school approaches. This second perspective is the proper approach because it limits the grounds to nullify arbitration awards to the same grounds used to nullify court

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<sup>1203</sup> OTHMAN, *supra* note 2, at 562-64.

<sup>1204</sup> See 8 ABDULAZIZ, *supra* note 409, at 124.

<sup>1205</sup> See *Id.*

<sup>1206</sup> 2 MUHAMMED, *supra* note 1200, at 13-14; 8 ALQASM, *supra* note 52, at 99-100.

<sup>1207</sup> See IBRAHIM, *supra* note 449, at 241.

<sup>1208</sup> 2 MUHAMMED, *supra* note 1200, at 13-14.

<sup>1209</sup> See 2 ABDULKHALIG, *supra* note 452, at 292-93.

<sup>1210</sup> 8 ALQASM, *supra* note 52, at 99-100.

<sup>1211</sup> See 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1212</sup> See 2 ABDULKHALIG, *supra* note 452, at 292-93.

judgments.<sup>1213</sup> Since court judgments cannot be nullified due to the use of a different Islamic school approaches, arbitration awards should not be nullified on these grounds either.<sup>1214</sup>

Some Malikiyah school scholars express an additional caveat to the nullification grounds because of a concern regarding the law applied by arbitrators in the arbitral tribunals.<sup>1215</sup> According to these scholars, if the arbitrators and arbitration parties are all followers of the Malikiyah school, arbitrators are required to apply the Malikiyah school approach as the applicable law.<sup>1216</sup> If the arbitrators do not apply the Malikiyah school approach in that circumstance, the award should be nullified.<sup>1217</sup> This is manifest disregard for the applicable law because if the parties and the arbitrators are all followers of the Malikiyah school, the parties should expect to have their dispute decided according to the Malikiyah school approach.<sup>1218</sup>

As for the legal grounds to nullify awards in the current practices of Islamic arbitration, the Saudi Arabian arbitration law provides several specific reasons to nullify arbitration awards in addition to those provided by the Islamic schools.<sup>1219</sup> Article 50 considers the absence of the arbitration agreement, as well as the lack of the legal capacity to conclude the agreement, valid legal grounds to nullify an arbitration award.<sup>1220</sup> In addition, it considers nullification of the award valid if the parties were unable to attend and deliver their defense or if the tribunal decides matters that are not included in the arbitration agreement.<sup>1221</sup>

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<sup>1213</sup> See 2 SULEIMAN, *supra* note 451, at 174; *see also* 8 ALAISH, *supra* note 130, at 283; 8 HAMZAH, *supra* note 474, at 243; 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>1214</sup> See OTHMAN, *supra* note 2, at 562-64.

<sup>1215</sup> 6 ABDULRAHMAN, *supra* note 53, at 112.

<sup>1216</sup> See 10 ABDULRAHMAN, *supra* note 327, at 36.

<sup>1217</sup> See 6 ABDULRAHMAN, *supra* note 53, at 112.

<sup>1218</sup> 10 ABDULRAHMAN, *supra* note 327, at 36.

<sup>1219</sup> Law of Arbitration 2012, *supra* note 237, at art. 50

<sup>1220</sup> *Id.*

<sup>1221</sup> *Id.* The text of the article, “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;

In sum, arbitration parties have the right to nullify arbitration awards under Islamic law.<sup>1222</sup> In general, the four Islamic schools indicate that the reasons to nullify arbitration awards are the same reasons to nullify court decisions.<sup>1223</sup> However, generally, a judge should not be entitled to nullify arbitration awards decided in accordance with a different Islamic school approach than the one followed by the judge.<sup>1224</sup>

### 8.2.3. Enforcing Arbitration Awards

After the parties exhaust their right to appeal or vacate the arbitration award, it is time to enforce the arbitration awards. Unfortunately, the majority of Islamic schools do not clearly discuss the formal steps to enforce arbitration awards. Ideally, the initial consent of the parties to

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- 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.”

<sup>1222</sup> See 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1223</sup> See 2 SULEIMAN, *supra* note 451, at 174; see also 8 ALAISH, *supra* note 130, at 283; 8 HAMZAH, *supra* note 474, at 243; 4 AL-MQGDISI, *supra* note 326, at 376.

<sup>1224</sup> 8 ALQASM, *supra* note 52, at 99-100; see 6 ALBUHUTI, *supra* note 21, at 309; see also 2 ABDULKHALIG, *supra* note 452, at 292-93.

arbitrate the dispute is enough to enforce the arbitration award without requiring additional consent to the actual decision of the arbitral tribunal.<sup>1225</sup>

The agreement of the parties to resolve their disputes through arbitration is enough to initiate the arbitration proceedings and should be enough to enforce the arbitration award without the need for additional consent from the parties for enforcement.<sup>1226</sup> In fact, the Hanafiah and Hanbaliah schools expect arbitration awards to be enforced regardless of whether the parties consent to the actual decision.<sup>1227</sup> The agreement to resolve disputes through arbitration empowers the arbitrators to make decisions<sup>1228</sup> and, therefore, those decisions should be enforced.

A majority of scholars from the Malikiah and Shafi'ih schools do not require additional consent from the parties to enforce awards.<sup>1229</sup> Yet, some scholars think that consent of the parties for enforcement of the award is required because, since consent to arbitrate is required to initiate proceedings, consent on the outcomes should be required to enforce the awards.<sup>1230</sup> However, ideally, arbitration awards should be enforced without requiring additional consent of the parties to enhance the credibility of arbitration as an alternative dispute resolution mechanism.<sup>1231</sup>

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<sup>1225</sup> See 4 ABDULQANI BIN TALIB BIN HAMADAH BIN IBRAHIM, AL-LEBAB FI SHARAH AL-KETAB [CLARIFICATION ON HANAFIAH SCHOOL OF THOUGHT] [AUTHOR'S TRANSLATION] 89 (Muhammed Muhyey Aldeen ed., n.d.); see also 6 ALBUHUTI, *supra* note 21, at 309; see also 2 AL-KHALOUTI, *supra* note 131, at 515; see also 4 AL-ANSARI, *supra* note 395, at 288.

<sup>1226</sup> See 3 ABDULJALIL, *supra* note 621, at 108.

<sup>1227</sup> See 4 IBRAHIM, *supra* note 1225, at 89; see also 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1228</sup> See 3 ABDULJALIL, *supra* note 621, at 108.

<sup>1229</sup> 2 AL-KHALOUTI, *supra* note 131, at 515; 4 AL-ANSARI, *supra* note 395, at 288.

<sup>1230</sup> 13 ALAMRANI, *supra* note 133, at 23-24.

<sup>1231</sup> See 4 BIN QUDAMH, *supra* note 131, at 224.

All four Islamic schools require the consent of the parties to resolve their disputes through arbitration for arbitration awards to be enforced.<sup>1232</sup> As a result, a third party who did not consent to arbitration is not obligated to abide by the arbitration awards even if that person is somehow connected to the dispute.<sup>1233</sup> For example, if a sale contract contains an arbitration clause and the buyer finds that the purchased item is not in ideal condition, the buyer has the right to initiate arbitration proceedings against the seller.<sup>1234</sup> Then, if the arbitration outcome is that the buyer returns the item to the seller and receives a refund of the initial payment, the seller cannot make another party refund the buyer,<sup>1235</sup> such as the person or the place where the seller acquired the item. This is because arbitration awards are not enforced against parties that have not consented to arbitration.<sup>1236</sup>

However, the Hanafiah school provides an exception to enforce an arbitration award against a person that did not consent to arbitration—if one of the parties is a partner in a partnership.<sup>1237</sup> Specifically, if a person in a partnership agrees to arbitration without consent from the other partner,<sup>1238</sup> and the arbitration award is against the partner who agreed to arbitrate, the other partner is still bound by the award even without consent to arbitrate.<sup>1239</sup>

The desired approach to enforce arbitration awards does not require additional consent from the parties.<sup>1240</sup> Agreement to arbitrate should be enough to enforce awards issued from the

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<sup>1232</sup> See 4 IBRAHIM, *supra* note 1225, at 88-89; see also 2 AL-KHALOUTI, *supra* note 131, at 515; see also 2 ABDULKHALIG, *supra* note 452, at 292-93; see also 6 ALBUHUTI, *supra* note 21, at 309.

<sup>1233</sup> 8 ABDULAZIZ, *supra* note 409, at 120; 18 ALJWAINI, *supra* note 376, at 583.

<sup>1234</sup> See 9 MUSA, *supra* note 51, at 58.

<sup>1235</sup> See *Id.*

<sup>1236</sup> See 9 MUSA, *supra* note 51, at 58; see also 8 ABDULAZIZ, *supra* note 409, at 120.

<sup>1237</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 28.

<sup>1238</sup> *Id.*

<sup>1239</sup> *Id.*

<sup>1240</sup> See 4 IBRAHIM, *supra* note 1225, at 89; see also 6 ALBUHUTI, *supra* note 21, at 309; see also 2 AL-KHALOUTI, *supra* note 131, at 515; see also 4 AL-ANSARI, *supra* note 395, at 288.

arbitration.<sup>1241</sup> However, award enforcement does not extend to people who do not consent to arbitration,<sup>1242</sup> unless one partner agrees to arbitrate without the knowledge of the other partner.<sup>1243</sup>

### 8.3. Enforcement of Arbitral Awards According to New York Convention

The enforcement of arbitration awards is an important factor in arbitration.<sup>1244</sup> New York Convention was created to recognize foreign arbitral awards and enhance their enforcement in the territory of member states.<sup>1245</sup> However, New York Convention does not ignore the sovereignty of member states nor interfere with their policies and laws; New York Convention gives member states the right to refuse enforcement of foreign arbitral awards in two different situations.<sup>1246</sup>

Article V (2) of the New York Convention, which states:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (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.<sup>1247</sup>

This article indicates respect for the sovereignty of the Convention signatories and empowers the competent authority in each member state the right to refuse enforcement of foreign arbitral awards in its territory if those awards conflict with its public policies and laws. However, some Muslim signatory states abuse this article and refuse to enforce foreign arbitral

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<sup>1241</sup> See 4 AL-GALYAWI & UMAIRAH, *supra* note 821, at 299.

<sup>1242</sup> 8 ABDULAZIZ, *supra* note 409, at 120; 18 ALJWAINI, *supra* note 376, at 583.

<sup>1243</sup> 7 MUHAMMAD ET AL., *supra* note 50, at 28.

<sup>1244</sup> See Roy, *supra* note 278, at 920.

<sup>1245</sup> See *Id.*

<sup>1246</sup> Rizwan, *supra* note 143, at 495-99.

<sup>1247</sup> New York Convention, *supra* note 1165, at art. V (2).



awards in their territories due to the violation of their public policies, especially when the public policies of those Muslim countries are based on Islamic law<sup>1248</sup>

In addition, some non-Muslim countries use Article V (2) to refuse enforcement of foreign arbitral awards rendered in Muslim countries. In fact, some non-Muslim countries have enacted rules to restrict enforcement of foreign arbitral awards decided in accordance with Islamic law.<sup>1249</sup> Some practitioners and academics have cautioned that enforcement of foreign arbitral awards decided in accordance with Islamic law might even be unconstitutional in some states.<sup>1250</sup> Enforcement of foreign arbitral awards is not only a concern in Muslim countries, but also in non-Muslim countries.

Excessive invocation of this article to prevent parties from obtaining enforcement reduces the effectiveness and efficiency of New York Convention,<sup>1251</sup> which results in decreased trust in arbitration as an alternative dispute resolution mechanism. In addition, this effect increases the application of the reciprocity principle to avoid enforcement of foreign arbitral awards from the member states.<sup>1252</sup>

Even though Article V (2) (b) of the Convention gives signatories the right to refuse enforcement of arbitration awards contrary to public policy or law, countries that ratify the Convention should enforce most foreign arbitral awards. In particular, Muslim states with Islamic law-based public policy should apply Article V (2) narrowly and enforce foreign arbitral awards,<sup>1253</sup> even if some of those awards conflict with their public policies. This enforcement is

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<sup>1248</sup> See Levi-Tawil, *supra* note 155, at 609.

<sup>1249</sup> See Cristina Puglia, *Will Parties Take to Tahkim? The Use of Islamic Law and Arbitration in the United States*, CHI.-KENT J. INT'L & COMP. L. 151, 158-59 (2013).

<sup>1250</sup> Julio C. Colon, *Choice of Law and Islamic Finance*, 46 TEX. INT'L. L. J. 411, 427 (2010).

<sup>1251</sup> See Roy, *supra* note 278, at 920.

<sup>1252</sup> See *Id.*

<sup>1253</sup> See Levi-Tawil, *supra* note 155, at 609.

supported by obligations under Islamic law and international law to adhere to convention and treaties to improve relations between nations.

#### 8.4. Enforcement of Foreign Arbitral Awards in Muslim Countries that Are Signatories to New York Convention

The New York Convention benefits the public interests of its member states, and supports the right to use international arbitration to resolve international commercial disputes. Since New York Convention is the main international agreement for enforcement of foreign arbitral awards,<sup>1254</sup> the mechanism to fulfill this Convention under Islamic law is essential. This enhances the enforcement of foreign arbitral awards in Muslim countries that are signatories to New York Convention.

Treaties and conventions are important tools to organize relations between nations, and were used even before Islam was established as a religion.<sup>1255</sup> Those treaties and conventions not only improve relations between nations, but also avoid conflicts and develop interstate commerce.<sup>1256</sup> Because of their importance, Islamic law affirms enforcement of foreign arbitral awards even if they are not in accordance with Islamic law general principles and rules.<sup>1257</sup>

When Muslims use arbitration, they should know the consequences of this dispute resolution mechanism, which includes potential awards that are not in accordance with Islamic law. People who consent to arbitration should take full responsibility for their choice and execute awards issued against them voluntarily, even if they conflict with Islamic law. Therefore, awards

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<sup>1254</sup> See Roy, *supra* note 278, at 920.

<sup>1255</sup> See 7 ALL, *supra* note 1038, at 370, 372-73.

<sup>1256</sup> See 2 SABIG, *supra* note 1050, at 699.

<sup>1257</sup> See ABDULLATAIF, *supra* note 1051, at 299.

rendered in signatory states should be enforced in Muslim countries even if they are not in accordance with Islamic law.<sup>1258</sup>

Moreover, governments of Muslim states that are signatories to the Convention should not support citizens who consent to arbitration and then attempt to avoid execution of awards issued against them. If arbitration awards are issued against nationals of a Muslim country that ratified the Convention, the competent authority of that country should enforce those awards, even if they are not in accordance with Islamic law, due to the consent of the parties to arbitrate.

Since Islamic law requires adherence to conventions and treaties as a religious duty, Muslim countries that are signatories to the New York Convention should enforce foreign arbitral awards in their territories. Enforcing foreign arbitral awards in Muslim countries not only adheres to Islamic law requirements, but also enhances international relations while developing interstate commerce.

#### 8.5. Enforcement of Foreign Arbitral Awards in Saudi Arabia

Enforcement of foreign arbitral awards in Saudi Arabia has had two different phases, the old law phase and the new law phase. The first arbitration law was enacted in 1983 and granted the competent authority—The Board of Grievances—discretion to enforce awards whether domestic or international.<sup>1259</sup> In addition, the competent authority reviewed the merits of arbitral awards to ensure full compliance with Islamic law since<sup>1260</sup> article 20 considered arbitral awards to be final only after authorized by the Board of Grievances.<sup>1261</sup>

Article 19 of the old law stated:

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<sup>1258</sup> See Rizwan, *supra* note 143, at 495-99.

<sup>1259</sup> See Raymont & Issa, *supra* note 235.

<sup>1260</sup> See *Id.*

<sup>1261</sup> 30 Al-Ammari & Martin, *supra* note 218, at 402.

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.<sup>1262</sup>

In addition, article 20 of the old law stated;

The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the Sharia.<sup>1263</sup>

These articles entitled the competent authority to object to awards when applicable as well as to review the merits of the disputes to ensure that the awards did not conflict with Islamic law. Due to the great discretion given to the competent authority, enforcement of arbitration awards—whether domestic or international—was difficult in Saudi Arabia.<sup>1264</sup> This enforcement challenge not only impacted the country’s ability to attract foreign investments, but also affected foreign trade relations.<sup>1265</sup>

In the *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (United Arab Emirates)* arbitration dispute, the competent authority reviewed the merits of the dispute upon Jadawel’s objection and reversed the outcome of the award.<sup>1266</sup> In 2003, Jadawel, a Saudi Arabian company specializing in purpose-built residential communities, entered into a joint venture construction project located in Saudi Arabia with Emaar, a Dubai development company.<sup>1267</sup> In 2006, Jadawel initiated arbitration proceedings claiming \$1.2 billion in losses

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<sup>1262</sup> Law of Arbitration 1983, *supra* note 222, at art. 19.

<sup>1263</sup> *Id.* at art. 20.

<sup>1264</sup> See 30 Al-Ammari & Martin, *supra* note 218, at 402.

<sup>1265</sup> Kutty, *supra* note 24, at 618.

<sup>1266</sup> Abdulhamid El-Ahdab & Jalal El-Ahdab, *Arbitration in Saudi Arabia*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 593, 636-37 (Albert Jan Berg ed., 2011).

<sup>1267</sup> *Id.*

due to a breach of contract by Emaar, which had formed a partnership with another company.<sup>1268</sup> The arbitration followed the International Chamber of Commerce (ICC) arbitration rules with a three-arbitrator tribunal, which consisted of three Saudi Arabian arbitrators sitting in the Riyadh Chamber of Commerce.<sup>1269</sup> After two years, the arbitral tribunal dismissed Jadawel's claims by a majority vote and ordered Jadawel to pay arbitration costs and legal fees.<sup>1270</sup> Jadawel challenged the award and the Board of Grievances re-examined the merits of the case.<sup>1271</sup> In 2009, the Board of Grievances reversed the arbitration award and ordered Emaar to pay Jadawel more than \$250 million, including arbitration and litigation costs; Emaar appealed but the decision of the Board of Grievances was affirmed.<sup>1272</sup>

Due to the confidentiality of both arbitral awards and orders issued by the Board of Grievances, only a summary of the case is available to explain the merits of the dispute. That arbitration dispute clarified that the competent authority has great discretion to review arbitral awards before issuing orders for enforcement. In addition, that dispute indicated that arbitral awards—whether domestic, international, decided by Islamic law, or by Muslim arbitrators—are subject to extensive review by the competent authority before enforcement occurs. Although the arbitration was decided by Islamic law and three Muslim arbitrators, the competent authority interfered and reversed the outcome of the award due to its authority under the old arbitration law.

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<sup>1268</sup> Edouard Bertrand & Christian Leathley, *International Commercial Arbitration in the Desert of Arabia*, ASSOCIATION FOR INTERNATIONAL ARBITRATION (Feb. 15, 2017, 2:24 PM), <http://www.arbitration-adr.org>.

<sup>1269</sup> *Id.*

<sup>1270</sup> El-Ahdab & El-Ahdab, *supra* note 1266, at 636-37.

<sup>1271</sup> *Id.*

<sup>1272</sup> Bertrand & Leathley, *supra* note 1268.

However, in 2012 Saudi Arabia enacted a new arbitration law, which considers arbitral awards to be final without confirmation from the competent authority.<sup>1273</sup> Article 52 of the new arbitration law states that, “[s]ubject 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.”<sup>1274</sup> In addition, Article 55 permits enforcement of arbitral awards if the awards do not conflict with decisions made by competent authorities in the country, the awards do not violate the public policy of the country, and the parties were notified about the dispute and the award.<sup>1275</sup>

The new arbitration law also permits foreign arbitral awards to be divided; the parts of the award that violate public policy will not be enforced while the parts in accordance with public policy will be enforced.<sup>1276</sup> This is an improvement over the old law, which did not accept or enforce an arbitral award in its entirety if any part of the award violated the public policy. Yet, only time will demonstrate the effectiveness of the new arbitration law as more arbitral awards are enforced in the country.

In 2012, Saudi Arabia also created an enforcement division within the general court—the “*qadi al-tanfith*” —as well as a new execution law.<sup>1277</sup> Article 11 and 12 of the new execution

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<sup>1273</sup> 30 Al-Ammari & Martin, *supra* note 218, at 402.

<sup>1274</sup> Law of Arbitration 2012, *supra* note 237, at art. 52.

<sup>1275</sup> *Id.* at art. 55. The text of the article, “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.”

<sup>1276</sup> Law of Arbitration 2012, *supra* note 237, at art. 55 2 (b).

<sup>1277</sup> 1 Zegers, *supra* note 156, at 77.

law deal with the enforcement of foreign judgements and foreign arbitral awards. While Article 12 indicates that the requirements to enforce foreign judgments apply to foreign arbitral awards,<sup>1278</sup> Article 11 specifically mentions requirements that must be met to enforce foreign judgements. In addition to reciprocity and equal treatment, it is required that the courts in the country are not the competent authorities to hear the disputes, the parties were notified and presented their defenses, the foreign judgements are final, they do not conflict with judgments or orders issued in the country, and they do not contain violations of public policy.<sup>1279</sup>

As a result, the Board of Grievances is no longer the competent authority to enforce arbitral awards since this article indicates that the competent authority is the enforcement division within the general courts. These articles indicate that Saudi Arabia's main concern with enforcement of foreign arbitral awards is reciprocity. Saudi Arabia will not enforce foreign arbitral awards from states that are not signatories to the New York Convention and will only enforce foreign arbitral awards from Convention signatories on the basis of reciprocal treatment.<sup>1280</sup> In addition, Saudi Arabia is highly concerned with public policy and, therefore, does not enforce any foreign arbitral award that conflicts with its public policy.

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<sup>1278</sup> Law No. M/53 of 2012 (Execution Law) *Jaridat Um-Alqura*, art. 12, 30 August 2012 (Saudi Arabia). The text of the article, "The provisions of the preceding Article shall be applicable to the awards issued by arbitrators in any foreign country."

<sup>1279</sup> *Id.* at art. 11. The text of the article, "Notwithstanding the provisions of treaties and conventions, the execution judge may not enforce any court judgments and orders passed in any foreign country except in cases of equal treatment and after verifying the following:

1. That the Saudi courts are not competent to hear the case in respect of which the court judgment or order was passed and that the foreign courts which passed it are competent in accordance with the international rules of jurisdiction set down in the laws thereof.
2. That the litigants to the case in respect of which the judgment was issued were duly summoned, properly represented and enabled to defend themselves.
3. That the court judgment or order has become final in accordance with the law of the court that passed it.
4. That the court judgment is in no way inconsistent with any judgment or order previously passed by the Saudi courts.
5. That the judgment does not provide for anything which constitutes a breach of Saudi public order or ethics."

<sup>1280</sup> 75 Zegers, *supra* note 157, at 49.

Even though both the new execution law and the new arbitration law mention the public policy consideration for foreign arbitral awards and judgements, Saudi Arabia has not issued a set of rules explaining its public policy.<sup>1281</sup> In addition, Saudi Arabia has not limited the scope of review by the competent authority for the public policy consideration<sup>1282</sup> and, therefore, the merits of foreign arbitral awards might still be reviewed by the competent authority before enforcement.<sup>1283</sup> This ensures that foreign arbitral awards and judgements do not conflict with Saudi Arabian public policy, which is based on Islamic law.

However, the international arbitration community is concerned with two main issues regarding enforcement of foreign arbitral awards in Saudi Arabia. The first concern is the status of foreign arbitral awards decided by arbitral tribunals with women arbitrators. The second concern is the status of foreign arbitral awards that contain orders of interest payment. Although the grounds to refuse enforcement of foreign arbitral awards are not limited, these two particular issues concern those who seek enforcement of awards in Saudi Arabia.

#### 8.5.1. Foreign Arbitral Awards Decided by Women Arbitrators

Foreign arbitration awards rendered in Muslim or non-Muslim countries that are signatories to the New York Convention, by arbitral tribunals with women arbitrators, should be enforced in Muslim countries that are signatories to the New York Convention. As already noted, the appointment of women arbitrators complies with Islamic law and, therefore, awards rendered by women arbitrators are valid in Muslim countries that are signatories to the Convention.

Saudi Arabia recently approved the appointment of women arbitrators. The competent authority in the eastern province in Saudi Arabia approved the appointment of a woman as an

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<sup>1281</sup> 1 Zegers, *supra* note 156, at 81.

<sup>1282</sup> Sayen, *supra* note 146, at 918.

<sup>1283</sup> 1 Zegers, *supra* note 156, at 81.



arbitrator<sup>1284</sup> after one of the parties challenged her appointment.<sup>1285</sup> As a result, foreign arbitral awards rendered by women arbitrators in Muslim countries should be enforced in Muslim countries.

Moreover, foreign arbitral awards rendered by women arbitrators in non-Muslim countries that are signatories to New York Convention, are also valid and should be enforced in Saudi Arabia. Since New York Convention aims to increase enforcement of foreign arbitral awards to improve international arbitration as a mechanism for dispute resolution, Saudi Arabia has a public interest—as well as a religious duty—to adhere to the terms of the Convention.<sup>1286</sup> In addition, the new laws in Saudi Arabia are more flexible on the enforcement of foreign arbitral awards, whether decided by men or women arbitrators, as long as the awards do not conflict with the country public policy.

In short, foreign arbitral awards decided by arbitral tribunals with women arbitrators, whether rendered in Muslim or non-Muslim countries, should be enforced in Saudi Arabia. First, the appointment of women arbitrators is valid under Islamic law and, therefore, awards rendered by women arbitrators should be enforced. Second, since New York Convention benefits the public interest of its signatories, the enforcement of awards decided by women arbitrators should be valid to fulfill the Convention's purpose.

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<sup>1284</sup> ARAB NEWS, *supra* note 1020.

<sup>1285</sup> AUYOUN AL-KHALAJ, *supra* note 1021.

<sup>1286</sup> See Rizwan, *supra* note 143, at 495-99.

### 8.5.2. Foreign Arbitral Awards Containing Orders of Interest Payment

Interest or “usury” is an element of many foreign arbitral awards. Yet, Islamic law prohibits usury or interest.<sup>1287</sup> Therefore, parties who seek enforcement of arbitration awards that contain orders to pay interest face difficulty enforcing their awards in Saudi Arabia.<sup>1288</sup> This is because the laws enacted in Saudi Arabia must be in accordance with Islamic law and charging interest is a violation of a general principle under Islamic law.

Usury is the charge of interest in any form<sup>1289</sup> and is typically divided into two different types under Islamic law—*Riba Al-Nasee’ah* and *Riba Al-Fadl*.<sup>1290</sup> *Riba Al-Nasee’ah* is an extra charge the creditor takes from the debtor over time;<sup>1291</sup> for example, lending someone \$1,000 but receiving \$1,200 when it is paid back next year.<sup>1292</sup> *Riba Al-Fadl* is the exchange of two unequal quantities of the same commodities at the same time;<sup>1293</sup> for instance, exchanging 100 grams of engraved gold for 120 grams of engraved gold at the same time.<sup>1294</sup>

Nowadays, usury also takes other forms such as extra charges for late payment on bank loans or credit cards.<sup>1295</sup> It is often said that, “the prohibition of *Riba* implies that any contract that charges an unusually high interest rate or builds in an excessive profit margin will be void as unconscionable, oppressive, and exploitative.”<sup>1296</sup> In other words, Islamic law restricts any type

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<sup>1287</sup> 2 ABDULRAHMAN BIN MUHAMMAD BIN AWAD ALJAZEERI, AL-FIGH ALA AL-MTHAHIB AL-ARBA’AH [ISLAMIC LAW JURISPRUDENCE ACCORDING TO THE FOUR ISLAMIC SCHOOL OF THOUGHTS] [AUTHOR’S TRANSLATION] 221-22 (2nd ed. 2003).

<sup>1288</sup> See 1 Zegers, *supra* note 156, at 79-80.

<sup>1289</sup> See 2 ALJAZEERI, *supra* note 1287, at 221.

<sup>1290</sup> 3 SABIG, *supra* note 1050, at 135.

<sup>1291</sup> See 1 SOME MUSLIM SCHOLARS, AL-FIGH AL-MUYASER FI DAWA’A AL-KITAB WA AL-SONNAH [ISLAMIC LAW JURISPRUDENCE BASED ON THE HOLY QUR’AN AND THE SUNNI SPEECHES] [AUTHOR’S TRANSLATION] 222 (2005).

<sup>1292</sup> *Id.* at 224.

<sup>1293</sup> See *Id.* at 222.

<sup>1294</sup> 2 ALJAZEERI, *supra* note 1287, at 224.

<sup>1295</sup> 2 SALEH BIN FOUZAN BIN ABDULLAH ALFOUZAN, AL-MULAKHAS AL-FIGHI [THE SUMMERY OF ISLAMIC LAW JURISPRUDENCE] [AUTHOR’S TRANSLATION] 42 (1st ed. 2002).

<sup>1296</sup> Roy, *supra* note 278, at 946.

of extra payment made to a party over time as “interest.”<sup>1297</sup> Islamic law considers usury a tool that harms people in need and, therefore, restricts its use to ensure mercy among people in need.<sup>1298</sup>

In addition, Islamic law also prohibits other types of charges in the investment and business fields—such as consequential losses—under the concept of risk or “*Gharar*.”<sup>1299</sup> According to Islamic law, “[*G*]harar prohibits gambling.<sup>1300</sup> Any contract that contains speculation, or contract clause that turns on the happening of a specified but unsure event, is void under the principle of *Gharar*.”<sup>1301</sup> In other words, any contractual clause that contains a payment for damages based on speculation is void under Islamic law as *Gharar*.

A Muslim scholar, Ibn Taimiah, explained the purpose of prohibiting *Riba* and *Gharar* under Islamic law by comparing them to gambling, which is also prohibited under Islamic law.

Ibn Taimiah says:

The prohibition of usury is more important than the prohibition of gambling because the creditor in the usury contract is going to take guaranteed benefit from the debtor who is in need, while the gambler might or might not receive benefit. Therefore, usury is injustice since the rich person takes advantages from the poor person while in gambling, the poor gambler might take advantages from the rich gambler or maybe both gamblers are financially equal. Yet, even if the prohibition of gambling is based on the unjustified way of taking money, gambling does not abuse and effect people with need like what the usury does and it is well-known that abusing people with need is a greater sin than abusing people without need.<sup>1302</sup>

Since Saudi Arabia is one of the most conservative Muslim countries—all laws enacted within the country must be in accordance with Islamic law—an order of payment for usury or

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<sup>1297</sup> See 1 SOME MUSLIM SCHOLARS, *supra* note 1291, at 222-23.

<sup>1298</sup> 2 ALJAZEERI, *supra* note 1287, at 222; 3 SABIG, *supra* note 1050, at 137.

<sup>1299</sup> 1 Zegers, *supra* note 156, at 82.

<sup>1300</sup> Roy, *supra* note 278, at 946.

<sup>1301</sup> *Id.*

<sup>1302</sup> 2 ALFOUZAN, *supra* note 1295, at 35.

damages based on speculation in a foreign arbitral award will not be enforced.<sup>1303</sup> This includes any order of payment for interests or consequential losses in a foreign arbitral award.<sup>1304</sup>

In addition, since Saudi Arabia clearly emphasizes the reciprocity principle in its new execution law, the competent authority has the discretion to go beyond a basic review of the merits of foreign arbitral awards. The competent authority might instruct foreign parties who seek enforcement to prove that their country would recognize and enforce awards rendered in Saudi Arabia pursuant to the reciprocity principle.<sup>1305</sup> Regardless of the legality of such a requirement under international law, foreign arbitral awards face difficulty in enforcement in Saudi Arabia due to reciprocity principle.<sup>1306</sup>

In an arbitration dispute in 2004, between a Saudi party and a German party, an award was issued in favor of the German party and the Saudi party was ordered to pay the cost of arbitration along with interest.<sup>1307</sup> When the German party sought enforcement in Saudi Arabia based on the New York Convention, the competent authority rejected the application since the German party could not confirm that the competent authority in Germany would recognize and enforce awards from Saudi Arabia based on the reciprocity principle.<sup>1308</sup> The German party appealed the competent authority's decision to the Court of Appeal, which granted the German party appeal and returned the decision to the trial court for further deliberation.<sup>1309</sup> However, the trial court again rejected the application to enforce the award, this time due to the order for payment of interest, a violation of Saudi Arabian public policy.<sup>1310</sup>

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<sup>1303</sup> See 1 Zegers, *supra* note 156, at 82.

<sup>1304</sup> *Id.*

<sup>1305</sup> *Id.*

<sup>1306</sup> *Id.* at 79-80.

<sup>1307</sup> 75 Zegers, *supra* note 157, at 51.

<sup>1308</sup> *Id.*

<sup>1309</sup> *Id.*

<sup>1310</sup> *Id.*

Two important elements of this case, which contributed to the development of arbitration and enforcement, should be clarified. First, the Saudi trial court mistakenly applied the reciprocity principle in the New York Convention. Upon appeal, the Court of Appeal indicated that foreign parties are not required to confirm that their country will recognize and enforce awards from Saudi Arabia on the basis of reciprocity. Second, enforcement of this award was sought in 2004 when the old arbitration law was applied; enforcement of the award was rejected in its entirety because the order to pay interest violated the country public policy. Yet, under the new Saudi arbitration law, if the award can be divided, only the parts that violate public policy are rejected while the rest of the award is enforced.<sup>1311</sup> If the application for enforcement took place when the new arbitration law was in effect, the competent authority would have granted the order to pay the arbitration costs but refused the order to pay interest.

In short, Islamic law does not accept interest or “usury” in any form nor accept any compensation for damages that are calculated based on speculation. Since Saudi Arabia laws are in accordance with Islamic law, any foreign arbitral award that contains orders for payment of interest or consequential losses faces enforcement challenges due to the public policy exception in New York Convention. Yet, according to the new arbitration law, if an arbitral award can be divided into parts, only the parts that violate public policy will not be enforced while the rest of the award will be enforced.

#### 8.6. Enforcement of Foreign Arbitral Awards from Muslim Countries in Non-Muslim Countries

This section examines whether non-Muslim countries enforce foreign arbitral awards rendered in Muslim country and decided under Islamic law. Specifically, this section examines the approach of the United States to enforce foreign arbitral awards decided under Islamic law

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<sup>1311</sup> Law of Arbitration 2012, *supra* note 237, at art. 55 2 (b).

since the United States has the largest economy, possesses strong business relations with many Muslim countries, and is the location for many assets in Islamic finance and banking.<sup>1312</sup>

Due to the confidentiality of arbitration and the lack of arbitration disputes rendered in Muslim countries under Islamic law seeking enforcement in the United States, it is not clear how the United States approaches enforcement.<sup>1313</sup> While some states in the United States accept Islamic law as the governing law either in arbitration or in commercial and civil contracts,<sup>1314</sup> some states do not permit Islamic law to govern arbitration or contracts in any form.<sup>1315</sup> The issue centers on whether Islamic law, when chosen by the parties as the applicable law, is a valid law to govern arbitration in the United States.

Some opponents to the use of Islamic law describe Islamic law as unsophisticated enough for modern contracts,<sup>1316</sup> while others view Islamic law as obscure since there are various interpretations of Islamic law under the four Islamic schools.<sup>1317</sup> A particularly conservative opposition even suggested that application of Islamic law might violate the First Amendment Establishment Clause.<sup>1318</sup> Another extreme approach considered the use of Islamic law is unconstitutional.<sup>1319</sup>

In 2010, Oklahoma amended Article 7 of the state constitution to eliminate the use of Islamic law—“Sharia”—in any form.<sup>1320</sup> The amended article states:

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<sup>1312</sup> See Rizwan, *supra* note 143, at 503.

<sup>1313</sup> See Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 635-37, 638-39 (2006).

<sup>1314</sup> See Trumbull, *supra* note 1313, at 635-37; see also Whitney Hampton, *Foreigners Beware? Exploring the Tension Between Saudi Arabia and Western International Commercial Arbitration Practices*, J. DISP. RESOL. 431, 431-34 (2011).

<sup>1315</sup> See Trumbull, *supra* note 1313, at 638-39; see also Puglia, *supra* note 1249, at 158-60.

<sup>1316</sup> See Levi-Tawil, *supra* note 155, at 633-34.

<sup>1317</sup> See Trumbull, *supra* note 1313, at 638.

<sup>1318</sup> Puglia, *supra* note 1249, at 169-70.

<sup>1319</sup> *Id.* at 158-59.

<sup>1320</sup> *Id.*

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, the federal regulation promulgated pursuant thereto, established common law, the Oklahoma Status and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include *Sharia* Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law of *Sharia* Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.<sup>1321</sup>

Accordingly, any contract containing a clause that refers to Islamic law as the governing law, including the choice of Islamic law in arbitration clauses, might not be valid in Oklahoma's jurisdiction. As a result, foreign arbitral awards rendered in Muslim countries and decided under Islamic law might not be enforced in Oklahoma due to the violation of the state constitution.

In addition, a California court ignored a parties' prenuptial agreement, as well as their marriage contract, which were both signed in Egypt and governed by Islamic law.<sup>1322</sup> Although both parties signed the prenuptial agreement, which did not entitle the wife to claim any of the husband's property, the court disregarded the agreement, divided the property according to California property law, and considered the prenuptial agreement and the marriage contract as certificates.<sup>1323</sup> The court stated that the parties did not present a valid marriage contract because the contract terms were too vague and any expert examining the parties' rights under Islamic law would have to speculate as to which of the four Islamic schools would apply and govern the interpretation of the contract.<sup>1324</sup>

This suggests Islamic law is too obscure to govern contracts since Islamic law is subject to interpretation by four different schools of thoughts.<sup>1325</sup> Even though this case is not about

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<sup>1321</sup> See Okla. CONST. art. VII (1).

<sup>1322</sup> See *Marriage of Shaban v. Shaban*, 105 Cal. Rptr. 2d 863 (App. 4th Dist. 2001).

<sup>1323</sup> See *Id.*

<sup>1324</sup> See *Id.*

<sup>1325</sup> Trumbull, *supra* note 1313, at 633-34.

arbitration or enforcement of a foreign arbitral award decided under Islamic law, it is useful in predicting the United States' approach on the enforcement of arbitration awards rendered in Muslim countries by Islamic law.

However, other scholars and practitioners take a liberal approach and accept Islamic law as the applicable law when chosen by the parties,<sup>1326</sup> which supports the parties' freedom and right to choose the law that governs their contracts and arbitration. For example, DynCorp International LLC (DynCorp), an American company, entered into a contract with Aramco Service Company (Aramco), a Saudi Arabian company, to transport and install an advanced computer system in Aramco's facilities.<sup>1327</sup> In 2008, DynCorp brought suit against Aramco in a Texas trial court alleging payment issues related to the contract between them.<sup>1328</sup>

Aramco then filed a motion to compel DynCorp to arbitration since the contract called for arbitration to resolve disputes arising out of or in connection with the contract under Saudi Arabian arbitration rules.<sup>1329</sup> In addition, the arbitration clause indicated that the arbitral tribunal could be composed of either a sole arbitrator or three arbitrators; if the parties failed to agree on a sole arbitrator, each party would appoint an arbitrator and then the two arbitrators would select the third arbitrator.<sup>1330</sup> Under Saudi Arabian arbitration rules, if parties fail to select their own arbitrators in a three arbitrator tribunal, the competent authority will select the arbitrators.<sup>1331</sup> Moreover, since the arbitration clause referred to the Saudi Arabian arbitration rules, the applicable law was Islamic law.<sup>1332</sup>

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<sup>1326</sup> *See Id.* at 635-37.

<sup>1327</sup> *Aramco Servs. Co. v. DynCorp Int'l*, WL 1241525 (Tex. App. 1st Dist. 2010).

<sup>1328</sup> *Id.*

<sup>1329</sup> *Id.*

<sup>1330</sup> *Id.*

<sup>1331</sup> *Id.*

<sup>1332</sup> *Id.*



The trial court in Texas granted Aramco's motion to compel to arbitration, yet both companies failed to select the sole arbitrator and, according to the arbitration clause, each company was then required to appoint an arbitrator and the two arbitrators would select the third arbitrator.<sup>1333</sup> The trial court determined that the court was the competent authority to order the parties to select their arbitrators,<sup>1334</sup> yet, DynCorp selected an arbitrator who was not in accordance with Saudi Arabian arbitration rules.<sup>1335</sup> Aramco objected but the trial court granted the selection.<sup>1336</sup> Aramco then filed a petition in the Texas Court of Appeal to challenge the trial court's confirmation of DynCorp's selected arbitrator, alleging that the competent authority under Saudi Arabian arbitration rules was not the trial court.<sup>1337</sup> The Court of Appeal granted Aramco's petition and stated that the competent authority was a Saudi Arabian court.<sup>1338</sup>

Although this case is also not about enforcement of a foreign arbitral award decided under Islamic law, it is an example of a United States court ordering an American company to use Islamic arbitration to resolve its dispute. This case supports the liberal approach, which accepts the use of Islamic law as the procedural and substantive law in arbitration. This judicial precedent suggests that Islamic law is accepted as the procedural and substantive law in the United States if chosen by the parties in arbitration.

In another interesting case, a United States judge took the role of a Muslim judge to decide a dispute in accordance with Islamic law.<sup>1339</sup> In *National Group for Communication & Computers (NGC) v. Lucent Technologies International (LTI)*,<sup>1340</sup> NGC, a Saudi Arabian

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<sup>1333</sup> *Id.*

<sup>1334</sup> *Id.*

<sup>1335</sup> *Id.*

<sup>1336</sup> *Id.*

<sup>1337</sup> *Id.*

<sup>1338</sup> *Id.*

<sup>1339</sup> See Trumbull, *supra* note 1313, at 635-37.

<sup>1340</sup> *National Group for Commc'ns & Computers v. Lucent Techs. Int'l*, 331 F. Supp. 2d 290, 292 (D.N.J 2004).

company, entered into a telecommunications contract with LTI, an American company.<sup>1341</sup> In that contract, NGC agreed to deliver engineering services and install pay phones and emergency telephones on the highways in Saudi Arabia to assist LTI with the completion of its project for the government of Saudi Arabia.<sup>1342</sup>

However, LTI later terminated the telecommunications contract and NGC sued LTI in a U.S. District Court for breach of contract, claiming actual and expected damages since NGC had to liquidate its project department established to perform the telecommunications contract.<sup>1343</sup> During the hearing, NGC and LTI agreed that Saudi Arabian law was the applicable law under the terms of the contract and the court affirmed.<sup>1344</sup> Then, the court stated that its approach in deciding the dispute was to determine how a judge in Saudi Arabia would decide the dispute if the case had been filed in a Saudi Arabian court.<sup>1345</sup> The court first concluded that LTI breached the contract with NGC, and then the court looked to Islamic law to decide LTI's liability on the expected damages NGC claimed.<sup>1346</sup> However, because the court discovered that Islamic law does not award expected damages—under the principle of *Gharar*—and only awards direct and actual damages,<sup>1347</sup> the court only awarded NGC the direct and actual damages.<sup>1348</sup>

This rare case allowed a U.S. judge to assume the role of a Saudi Arabian judge to resolve a dispute under Islamic law between a Saudi Arabian company and an American company.<sup>1349</sup> Even though this judicial precedent is not about arbitration, nor about the

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<sup>1341</sup> *Id.*

<sup>1342</sup> *Id.*

<sup>1343</sup> *Id.*

<sup>1344</sup> *Id.*

<sup>1345</sup> *Id.*

<sup>1346</sup> *Id.*

<sup>1347</sup> *Id.*

<sup>1348</sup> *Id.*

<sup>1349</sup> See Trumbull, *supra* note 1313, at 635-37.

enforcement of an arbitration award rendered in a Muslim country and decided by Islamic law, it serves as valid ground to support a liberal approach for enforcement of arbitral awards decided in accordance with Islamic law.

In sum, if the United States does not accept the use of Islamic law in arbitration and does not enforce awards decided under Islamic law, Muslim countries are not going to enforce awards from the United States due to the reciprocity principle in the New York Convention.

Furthermore, Muslim countries might not feel comfortable enforcing arbitration awards rendered in the United States or decided under U.S law since some states in the United States do not accept the use of Islamic law. This treatment for enforcement of foreign arbitral awards might not only impact foreign parties, but also might affect international relations between nations.

In addition, since arbitration is an alternative dispute resolution mechanism that grants parties the right to choose the procedural and substantive laws that govern their dispute, judicial systems should not deprive parties of their rights or restrict parties from using specific laws. Instead, judicial systems should grant people the right to govern their arbitration in the way that they desire and should then enforce arbitration awards. As a result, this will not only affirm people's rights, but also strengthen confidence in arbitration as an effective mechanism for dispute resolution.

The approach for enforcement of foreign arbitral awards rendered in Muslim countries and decided under Islamic law depends on the particular state in the United States and its recognition of the legitimacy of Islamic law to govern contracts.<sup>1350</sup> Consequently, the enforcement of foreign arbitral awards decided under Islamic law in the United States varies and

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<sup>1350</sup> See *Id.* at 638-39.

causes instability for foreign parties who seek enforcement of their award.<sup>1351</sup> As a result, a foreign party might not be able to enforce an arbitration award decided by Islamic law in Oklahoma,<sup>1352</sup> while the same party would be able to enforce the same arbitration award in Texas.<sup>1353</sup>

### 8.7. Conclusion

Even though Islamic law gives arbitration parties the option to appeal arbitration awards, modern Islamic arbitration, specifically in Saudi Arabia, restricts these appeals. However, that does not mean arbitration parties do not have other valid options to ensure that awards are fair and just. Instead, Islamic law grants arbitration parties the right to vacate arbitration awards decided against them under some circumstances. In fact, the Saudi Arabian arbitration law permits arbitration parties to vacate an arbitration award when certain legal requirements are met to ensure that disputes are resolved justly.

In addition, enforcement in Saudi Arabia for foreign arbitral awards decided by women arbitrators should be valid under a liberal interpretation of the new Saudi Arabian arbitration law. However, enforcement in Saudi Arabia of foreign arbitral awards that contain orders for payment of interest or damages based on speculation is not permissible since this violates Islamic law and public policy. Moreover, non-Muslim countries should enforce arbitral awards decided by Islamic law, specifically the United States, due to its economic and investment relations with many Muslim countries as well as its role in Islamic investments and banking assets.

Furthermore, enforcing foreign arbitral awards not only fulfills obligations under New York Convention, but also strengthens international relations between member states and avoids

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<sup>1351</sup> See Rizwan, *supra* note 143, at 498.

<sup>1352</sup> See Puglia, *supra* note 1249, at 158-59.

<sup>1353</sup> See Hampton, *supra* note 1314, at 431-34.

conflicts. When Muslim countries enforce foreign arbitral awards in their territories, non-Muslim countries will enforce awards in their territories, which will strengthen international relations and develop interstate commerce. In addition, enforcement of foreign arbitral awards might also avoid conflict between countries by reducing negative use of the reciprocity principle.

## CHAPTER 9 CONCLUSION

Certain issues that concern the practice of Islamic arbitration need to be modified. This dissertation aims to upgrade Islamic arbitration practices, especially procedural issues, to raise the standard of Islamic arbitration and obtain global acceptance. As discussed throughout this dissertation, the role of arbitrators inside the arbitral tribunals, the validity of appointing women arbitrators, and the enforcement of foreign arbitral awards are some of the main issues in modern Islamic arbitration practices. To overcome those issues and improve Islamic arbitration, this dissertation advocates actually applying, in practice, the modern approaches of the new law in Saudi Arabia to serve as a model for Islamic arbitration around the world.

These issues with Islamic arbitration are the result of different approaches on the understanding of Islamic law sources. Muslim scholars who attempt to invalidate the appointment of either women arbitrators or arbitrators without the qualifications to serve as judges, and resist enforcement of foreign arbitral awards decided by those types of arbitrators, base their approach on reasons that belong to the era of the Caliphs. These conservative approaches do not fit modern arbitration practices where habits and customs have changed; these conservative approaches should change as well.

Although arbitrators decide specific disputes for certain people, arbitrators are different from judges due to their limited authority and jurisdiction. While some Islamic school approaches require arbitrators to possess the same qualifications as judges, Chapter IV shows that arbitrators are not judges and should not be required to possess these same qualifications.

Those same Muslim scholars that view arbitrators and judges as identical, often invalidate the appointment of women arbitrators. According to these scholars, if arbitrators are

the same as judges, and women are not entitled to serve as judges, women cannot serve as arbitrators. However, Chapter V demonstrates the validity of appointing women judges under Islamic law and concludes that the appointment of women judges is valid under Islamic law. When women are accepted as judges there are still two different approaches regarding their appointment—women are entitled to be appointed as judges except in criminal cases and women are entitled to be appointed as judges in all types of cases. However, Chapter V verifies the ability of women to serve as judges for any type of case under Islamic law.

Furthermore, since women are entitled, under Islamic law, to serve as judges, women are also allowed to serve as arbitrators. First, Islamic law grants women the right to work in every occupation as long as there is no specific prohibition for a certain occupation. Second, general principles of Islamic law recognize the ability to modify previous rules and regulations due to changes in habits and customs over time. In addition, women are not explicitly banned from serving as arbitrators, providing additional support for their appointment. As a result, the rules and regulations that prevent women from serving as arbitrators should be modified.

The appointment of arbitrators is a right that belongs to the arbitration parties and, therefore, parties should be entitled to appoint arbitrators that are best able to resolve their dispute, either arbitrators who do not possess the qualifications of judges or women arbitrators. Enforcement in Muslim countries of foreign arbitral awards rendered by women arbitrators or by arbitrators who do not possess the qualifications of judges should be granted, especially when those Muslim countries are signatories to New York Convention.

In addition, foreign arbitral awards should be enforced in Muslim countries that are signatories to New York Convention even if those awards contain slight violations of Islamic law or public policy. Under Islamic law, Muslim countries must fulfill the conventions and treaties

ratified with other nations, even if fulfillment may slightly violate Islamic law, as long as those conventions and treaties benefit the public interests of Muslim countries. Enforcement of foreign arbitral awards in Muslim countries not only fulfills obligations under Islamic law and the New York Convention, but also strengthens relations between nations and avoids conflicts from the reciprocity principle.

In addition, Chapter VIII concludes that arbitral awards should have the same legal binding status as regular judicial decisions under Islamic law. However, enforcement of arbitral awards that contain orders for payment of interest or damages based on speculation in Saudi Arabia is not an available option since these types of payment violate general principles under Islamic law. Foreign arbitral awards decided by either women arbitrators or arbitrators who lack the qualifications of judges should be enforced in Saudi Arabia pursuant to the new arbitration law and changes in habits and customs.

As one of the most conservative Muslim Sunni countries with a robust new arbitration law, applying the propositions of this dissertation in Saudi Arabia will modernize Islamic arbitration practices. In doing so, it will open the door for other Muslim countries to copy the modernized practices of Islamic arbitration in Saudi Arabia and apply them in their territories.

For instance, as provided by the new Saudi Arabian arbitration law, arbitrators are not required to possess the qualifications of judges; arbitrators are only required to have full legal capacity and possess good conduct and reputation to validate their appointments. These requirements reflect a development in the practices of Islamic arbitration in Saudi Arabia, especially when the arbitration parties have wide discretion to select arbitrators with the desired qualifications. Unfortunately, under the current practices of arbitration in Saudi Arabia, it is still common to appoint arbitrators with experience in the judiciary who possess the qualifications of



judges, such as former or retired judges. While this has been the custom in Saudi Arabia, this dissertation recommends arbitration parties appoint arbitrators who possess the knowledge and qualifications necessary to resolve their dispute without requiring the same qualifications as judges.

In addition, the validity of appointing women arbitrators was recently affirmed in Saudi Arabia, although the percentage of women in arbitration is still low. Habits and customs have changed, yet the presence of women in Islamic arbitration remains minimal. This dissertation encourages arbitration parties to appoint women arbitrators, in accordance with Saudi law, and eventually increase the number of women practicing in this field.

This dissertation also recommends arbitration centers that supervise Islamic arbitration to appoint women arbitrators when parties fail to appoint their arbitrators. This is will further increase the presence of women in Islamic arbitration, which reflects modernization and equal opportunity. Moreover, since women in Saudi Arabia cannot serve as judges, increasing the number of women arbitrators will help them contribute to the judiciary field. As more women are appointed as arbitrators, the door will open for women in the future to serve as judges.

Furthermore, foreign arbitral awards should be enforced in Saudi Arabia even if some of these awards contain slight violations of Islamic law. This enforcement should occur as long as both countries are signatories to New York Convention and fulfill the obligations of New York Convention, which benefits the public interest of its signatories. In addition, this dissertation recommends that the competent authority in Saudi Arabia identify the public policy objectives in order to enhance enforcement of awards based on the New York Convention. Although there are some attempts to define the public policy based on Islamic law general principles and rules from

the four Islamic schools, a set of provisions or rules explaining public policy will enhance the enforcement of the awards.

However, if foreign arbitral awards violate general principles of Islamic law, such as orders of payment for interest or damages based on speculation (consequential losses), the new Saudi Arabian trend for enforcement of this kind of award should be applied. The Saudi Arabian trend looks into the orders of the foreign arbitral award and enforces the orders as long as there is no violation of any general principles of Islamic law. If an order of the award does violate a general principle of Islamic law, however, that order is merely separated and not enforced while the rest of the orders are enforced. This dissertation recommends arbitral tribunals adopt this process and separate orders for payment when issuing arbitral awards, especially if one of the parties is from a Muslim country. The orders for payment that violate Islamic law general principles or the public policies of the Muslim country will not be enforced while the other orders will be enforced.

Applying the propositions of this dissertation in Saudi Arabian arbitration practices will modernize the practice of Islamic arbitration, especially since the new arbitration law includes many common international arbitration principles. As a result, the practices of Islamic arbitration in Saudi Arabia will serve as a perfect model for conducting arbitration under Islamic law. Other Muslim countries will adopt the Saudi Arabian arbitration law along with the practices to modernize Islamic arbitration practices around the world.

In addition, Muslim arbitration users may begin to use Saudi Arabian arbitration law as the procedure law that governs their disputes, opening the country as a host of modern Islamic arbitration. This will obtain the goal of this dissertation—to modernize and develop Islamic arbitration practices to a standard that fits the modern era.

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## APPENDIX A

### LAW OF ARBITRATION, LAW NO. M/46, APRIL 24, 1983, KINGDOM OF SAUDI

#### ARABIA

##### 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 B

### LAW OF ARBITRATION, LAW NO. M/34, APRIL 16, 2012, KINGDOM OF SAUDI

#### ARABIA

##### CHAPTER ONE GENERAL PROVISION

###### ARTICLE 1

The following phrases, wherever mentioned in this Law, shall have the meanings assigned thereto, unless otherwise required by context:

1. Arbitration Agreement: it 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 non-contractual. 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 Islamic Sharia and international conventions to which the Kingdom is a party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.

The provisions of this Law shall not apply to personal status disputes or matters not subject to reconciliation.

###### 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 TWO

#### 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 THREE

#### 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 FOUR 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 FIVE 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 SIX

#### 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 SEVEN

#### 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 EIGHT 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.