

Reconsidering Dispute Resolution in Saudi Arabia:
A Comparative Study of Consumer Arbitration and Class Action's Mechanism

By

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Abstract

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Consumer arbitration can act as a vehicle for bringing justice against corporate misconduct. There is a proliferating global trend toward confirming an unprejudiced system of collective redress. In the context of consumer arbitration, class action is a prime example of a legal mechanism that supports the weaker party by giving a group of people an option to present their claims in front of an arbitral tribunal. Enabling consumers to use this mechanism can cultivate a just system with a healthy balance between businesses and consumers. The purpose of this paper is to define an adequate device that can be fair to consumers while also protecting the interests of businesses. The ultimate goal is for such a framework to be incorporated in Saudi Arabia.

The current framework is not as effective as consumers in Saudi prefer to use social media as an outlet instead of adjudicating disputes. Through a comparative analysis methodology, this paper conducts a search for a compromise that can protect consumers' rights while also acting as an incentive to attract foreign investment. There are two distinct paradigmatic approaches to the areas of consumer arbitration and collective action. Some jurisdictions' practices could be viewed as favoring businesses at the expense of consumers by focusing on enforcing a pre-dispute arbitration clause. Moreover, such contracts mostly exclude the use of class action. On the other end of the spectrum, other jurisdictions concentrate on the protection of consumers from the misuse of contracts of adhesion by businesses, and they even consider arbitration unfair if the clause was not negotiated after the dispute. In view of these points, the best choice is seemingly to default to arbitration with an opt-out option in addition to an implemented class-action mechanism. These objectives are proposed to further economic and legal development in Saudi Arabia.

Dedication

To my Partner, Mohammed, and my Parents, Dalal and Abdulaziz.

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Table of Contents

ABSTRACT	1
DEDICATION	I
ACKNOWLEDGEMENTS	II
LIST OF FIGURES	V
INTRODUCTION	VI
CHAPTER 1	1
THE POLITICAL AND ECONOMIC SYSTEMS IN SAUDI ARABIA	1
I. CURRENT ECONOMIC ASSESSMENT OF SAUDI ARABIA	1
A. CONSUMER COMPOSITION	5
B. NATURAL RESOURCES	6
C. PLANS FOR ECONOMIC REFORM	8
II. POLITICS IN THE KINGDOM	18
III. ROLE OF RELIGION	21
A. INTERRELATION OF LAW AND RELIGION	23
B. ISLAMIC FINANCE	30
CHAPTER 2	33
THE LEGAL SYSTEM IN SAUDI ARABIA	33
I. THE CURRENT STATE OF SAUDI COURTS	33
II. THE IMPORTANCE OF A STABLE LEGAL SYSTEM	37
III. DEFINING CONSUMER ARBITRATION	40
A. EXAMPLES FROM THE MIDDLE EAST	43
B. HISTORICAL BACKGROUND	45
C. BEYOND CONSUMERS, TO BUSINESS-TO-BUSINESS	47
IV. ATTITUDE TOWARD DISPUTE RESOLUTIONS IN SAUDI ARABIA TODAY	50
A. SOCIAL MEDIA AS AN OUTLET	50
B. CONSUMER SURVEY	52
CHAPTER 3	59
DIFFERENT APPROACHES TO CLASS ACTION AND CONSUMER ARBITRATION	59
I. THE CONSERVATIVE APPROACH	61
A. THE US MODEL	61
II. THE LIBERAL APPROACH	65
A. THE EUROPEAN AND COMPARABLE MODELS	65
CHAPTER 4	68
HOW DOES CLASS ACTION FIT IN?	68

I. STATUS QUO OF CONSUMER ARBITRATION AND CLASS ACTION IN SAUDI ARABIA	69
CHAPTER 5	76
THE CASE AGAINST CONSUMER ARBITRATION AND CLASS ACTION	76
I. CONTRACT THEORY	76
II. PUBLIC POLICY DEFENSE	79
III. A COMPARATIVE PERSPECTIVE	82
IV. MORAL HAZARD	83
V. UNCONSCIONABILITY	85
CHAPTER 6	89
THE CASE FOR CONSUMER ARBITRATION AND CLASS ACTION	89
I. FREEDOM OF CONTRACT	92
II. CONSUMERS RIGHTS	93
III. ACCESS TO JUSTICE	94
IV. OVERCOMING THE HINDRANCE OF FINE PRINT	98
V. OPTING OUT ALONGSIDE DUE PROCESS	101
A. OPT-OUT IN AN ARBITRATION CONTEXT	101
B. OPT-OUT IN A CLASS ACTION CONTEXT	103
CONCLUSION	105
BIBLIOGRAPHY	109

List of Figures

Figure 1, Estimates based on sources and methods. Adapted from "The Changing Wealth of Nations: Measuring Sustainable Development in the New Millennium", The World Bank (2011.)	4
Figure 2, FDA net inflows 2016-2018 in Saudi Arabia. Adapted from Trading Economies.	14
Figure 3, oil and gas exports as a percentage of total exports. Adapted from Brookings, Future Development, It's hard to diversify when you're swimming in oil, Farrukh Iqbal, March 31, 2015.	17
Figure 4, Information on the stages of consumer to business dispute resolution.	35
Figure 5, Alhanouf Alsolami, (2019), Survey, Do you read the terms of use when getting a new service?	53
Figure 6, Alhanouf Alsolami, (2019), Survey, Evaluating the likelihood of one's actions when experiencing harm from a business.	54
Figure 7, Alhanouf Alsolami, (2019), Survey, Relationship between choosing courts as a forum and gender.	55
Figure 8, Alhanouf Alsolami, (2019), Survey, Assessing the importance of several factors.	56
Figure 9, Alhanouf Alsolami, (2019), Survey, Relationship between procedures' flexibility and gender.	57
Figure 10, Alhanouf Alsolami, (2019), Survey, Relationship between disputes' short duration and gender.	58
Figure 11, Alhanouf Alsolami, (2019), Survey, Relationship between cost of the dispute and age.	58
Figure 12, Individuals using the Internet (% of population), (2016) The World Bank.	75
Figure 13, Proposed circle of consumer dispute resolution.	94

Introduction

One of the pillars of the 2030 vision is to attract foreign investment to simulate economic development. To this end, from a legal perspective, a solid legal foundation is crucial to resolve disputes. This paper focuses on the consumer to business disputes and their chain reaction over the economy. While parties may not expect to encounter a dispute, the knowledge that a reliable mechanism is in place could ease the process. The ultimate goal should be to create an arbitration-friendly jurisdiction that protects both parties. However, this objective is not an easy one to accomplish. The Saudi judicial system is traditionally governed by Sharia' principles. While this framework is not problematic in itself, the application of outdated interpretations of Islamic jurisprudence have manifested into an inflexible attitude toward codified laws.¹ A result has been reluctance on the part of businesses to enter the Saudi economy.

Leveling power relations in consumer-to-business transactions should be a focal point for several reasons, including to attract investment to Saudi Arabia. To gain more answers about the correlation between these points, it is necessary to understand the disparity between consumers and businesses. In this context, consumers are the weaker party who have little input in their contracts with corporates. For cases in which a dispute arises, there is no reliable dispute resolution system in place, which makes social media the only outlet available to apply pressure to address business wrongdoings. The lack of a reliable dispute resolution system not only hinders consumers but also affects businesses.

The spread of social media in the Kingdom of Saudi Arabia revealed space for complaints, as consumers quickly realized that businesses value their image; therefore, the most effective way to resolve disputes is to expose them to the public. While it is not wrong for a consumer to seek justice through any viable forum, it raises a question that establishes the foundation of this research: why would consumers opt for social media, as opposed to courts, as a dispute resolution mechanism? The problem of Saudi consumers legitimately using social media as an outlet to seek justice is a symptom of the disorder that showcases the non-practicality of the current legal structure.

The main research question attempts to answer how can the dispute resolution system of Saudi Arabia benefit from the incorporation of consumer arbitration and class action mechanisms to protect consumers while also attracting investors? It might cause uncertainty as to how does a country promote economic development without a reliable judicial infrastructure, a system that many investors expressed cautious stances. A practicable resolution for now might be to avoid the public judicial courts for consumers disputes and shift to private justice whereby arbitration can acclimate to parties' preferences. Still, the Saudi government has exhibited signs of distrust toward arbitration, as government agencies are not allowed to settle on arbitration without the express approval of the Council of Ministers.² Incorporating an arbitration-friendly environment In Saudi Arabia can cultivate a safe haven for timid businesses and act as an incentive to strengthen the economy. As for consumers, adding an extra layer of protection, such as class action, can allow consumers to have arbitrators who have obtained a legal education, which is immediately advantageous.

As for the methodology, this paper includes an exploration of various applications of consumer arbitration and, in particular, the existence or lack of a class action mechanism

¹ Ahmed Basrawi, The Development of the Judicial System in Saudi Arabia under Vision 2030, Altamimi & Co (2018), <https://www.tamimi.com/law-update-articles/the-development-of-the-judicial-system-in-saudi-arabia-under-vision-2030/>.

² Arbitration Law, Article 10 / (2), Royal Decree No. M / 34 dated 24 / 5 / 1433

therein. Through a comparative analysis of the multiple approaches, the paper highlights the systematic differences as well as the preeminent model to use. In addition, this paper conducted a survey among Saudi consumers in order to analyze their behaviors and practices in navigating contracts and escalating complaints. The results reflect that consumers in Saudi Arabia in fact seek redress by utilizing social media channels. Based on these findings, there were several areas for improvement. These insights can support the implementation of a class action mechanism in Saudi Arabia in addition to promoting arbitration as the most suitable model of consumer disputes.

This paper is divided into several parts. First, Chapter 1 establishes the context and explores the people and land of Saudi Arabia, which is the geographical location of this study. This discussion includes the Kingdom's demography, the purchasing power of its consumers, and the natural resources in the ground. It also discusses the plans of Crown Prince Mohammed bin Salman in his ambitious 2030 vision. Subsequently, Chapter 1 considers the role of religion and its relation to laws in Saudi Arabia. It also makes connections between religious views of consumer disputes and the involvement of Islamic finance in the case.

Chapter 2 gives an overview of the current state of Saudi courts and scrutinize to identify the weaknesses that repel both consumers and businesses. This analysis assesses the Saudi judicial system and how parties have reacted to it. The chapter also offers an extensive elaboration of the significance of a stable judicial structure, especially for supporting the economy. It considers how instituting an established framework, such as arbitration, can improve stability and motivate foreign investment as well as economic growth. Although this paper centers on consumer arbitration, business-to-business arbitration is also relevant. Chapter 2 additionally construes consumer arbitration in view of the lack of popularity of arbitration as a dispute resolution method in Saudi Arabia. In fact, consumer arbitration is not a familiar term even in legal academia in the Kingdom. The discussion then continues with an analysis of the current de facto situation of consumer disputes in Saudi Arabia. This part examines the statutes, international treaties, and the ideologies behind arbitration. The dialogue moves to the role that social media played into consumers' disputes. Additionally, survey data comes along to confirm and reveal some interesting results.

Chapter 3 explores both conservative and liberal approaches to consumer arbitration. The chapter examines the conservative attitude by studying the US system that values businesses over consumers. For the liberal perspective, the paper investigates the reverse approach, which stresses consumer protection. For example, Europe emphasizes consumers' rights, as the main objective of its laws is the protection of the contractual freedom of consumers. The key point of difference between the European approach and that of the US is the strong consumer protection policies of the former.³ Nevertheless, these two models are not the only that address consumer arbitration, so it is also essential for Chapter 3 to explore other comparative perspectives.

In Chapter 4, the paper continues by explaining the importance of a collective action mechanism and its potential benefits for consumers and businesses. Since this paper argues for the use of a collective action mechanism, it also recounts its history in the context of arbitration, as a chronological approach can clarify class action as a concept. These measures are proposed for the long-term purpose of guaranteeing access to justice. Chapter 4 also outlines the status quo of class action in Saudi Arabia and why consumers could benefit from this mechanism. The previous survey data reveal that consumers actually prefer criticizing

³ Maud Piers, *Consumer Arbitration and European Private Law: A Seminal Consumer Arbitration Model Law for Europe*, *European Review of Private Law* 247–288 (2013).

businesses on social media over filing a class action, which definitely adds a noteworthy perspective to the subject matter.

Chapter 5 follows by assessing the issue from an anti-arbitration's viewpoint. To this end, it examines why consumer arbitration would not be favorable. Nonetheless, this paper does not neglect these valid opinions. Rather, it claims that even though these arguments are acceptable, there are several procedural mechanisms to ensure that the proposed mechanism is optimal for both consumers and businesses.

From another perspective, Chapter 6 considers ways in which arbitration might benefit both parties. For example, it could expand the limits on forums that are available to Saudi consumers for disputing consumer-related matters. Consumers might disfavor the local Sharia' courts because of the limitations that are set forth for disputing consumer-related issues. There are no specialized consumer courts, and instead, there are several committees that deal with electricity, telecommunication, and bank sector complaints. This can lead to more extended periods of adjudicating, which will in return make accessing justice harder for consumers. Such arguments support the need for seeking a different platform, such as arbitration, and to make it more receptive to the needs of the consumer.

The paper concludes by suggesting the inclusion of an arbitration clause in consumer disputes under two conditions. The first condition is to enable class-action as a mechanism, while the second is to provide an opt-out option for consumers. The latter precludes an unconscionability argument, as consumers would then have the right to opt out of both class action and the arbitration clause.

Chapter 1

The Political and Economic Systems in Saudi Arabia

This chapter engages with both the political and economic settings of the Kingdom. A study of an optimal legal framework must be attentive to other key elements that construct a society. Therefore, this chapter details the current standing of Saudi Arabia's economy. In addition, it briefly outlines the Kingdom's demography and consumer purchasing power. Then, it describes oil as a main financial resource and assesses it as a blessing or a curse. In addition, it explains both current and future economic reforms in the Kingdom. The political part considers the governance structure alongside the sturdy association that connects law and religion.

I. Current Economic Assessment of Saudi Arabia

For Saudi Arabia to retain its geopolitically dominant position in the Middle East, it must exercise economic power. Given the fluctuations in oil prices, it is critical to create measures to make Saudi Arabia a more attractive venue for investment. In this regard, Mohammed bin Salman has appeared in global headlines for his understanding of the value of investment.⁴ The top investment ranking for Saudi Arabia, which is allocated by country, currently positions the UK in first place followed by the US, South Korea, and China.⁵ These countries are mainly dependent on the rule of law, so they can presumably expect an adequate legal environment that protects their investments.

Saudi Arabia's economic evaluation is moderate at best, as the latest IMF data suggest that the Kingdom's determined attempt to support economic progression is still reliant on oil prices.⁶ Oil revenue is responsible for approximately 87% of budget incomes and about 42% of gross domestic product (GDP).⁷ The GDP per capita is calculated by dividing the country's GDP, as adjusted by purchasing power parity (PPP), by the total population.⁸ The GDP per capita in Saudi Arabia is expected to be 49,268.13 USD by the end of this quarter. In addition, the Saudi Arabia GDP per capita PPP is estimated to be approximately 49,388.16 USD in 2020.⁹ The main problem is that the Saudi economy is still

⁴ Tom DiChristopher, *Saudi crown prince and Softbank chief are hunting for investments in New York*, CNBC, March 26, 2018, <https://www.cnbc.com/2018/03/26/saudi-crown-prince-talks-investments-with-softbank-chief-in-new-york.html>.

⁵ Saudi Arabian General Investment Authority, SAGIA, <https://sagia.gov.sa/en/>.

⁶ IMF says Saudi Arabia's economic transformation is still an oil story, *The Business Times*, May 3, 2018, <https://www.businesstimes.com.sg/government-economy/imf-says-saudi-arabias-economic-transformation-is-still-an-oil-story>.

⁷ Saudi Arabia, *Forbes*, <https://www.forbes.com/places/saudi-arabia/>.

⁸ Saudi Arabia GDP per capita PPP, *Trading Economics*, <https://tradingeconomics.com/saudi-arabia/gdp-per-capita-ppp>. These numbers are according to *Trading Economics* global macro models and analysts' expectations.

⁹ *Ibid.*

dependent on state spending. Data reveal that about two-thirds of Saudis are employed by the state. In contrast, about 90% of expatriates fulfill private sector jobs.¹⁰

In this context, it is also relevant to consider social reforms and their effect on the economy. For example, after being banned for decades, women finally became allowed to drive as of June 24, 2018.¹¹ Some experts have predicted that these social changes will have a heavier impact on businesses and may even exceed the ambitious investment plans. One reason might be that the vision has already been announced for two years, so there is not a lot to show off, and the new non-oil industries have barely made an impact. In reality, the removal of the driving ban and other small changes did make a difference.¹² Altering revenue resources is not an expedited process, so it needs time to develop. Thus, the reform program may work, as there has already been some positive progress, even if it has not been superlative. The recent introduction of the Value-Added Tax (VAT) and the steps toward increasing women's participation in the economy are positive advancements in the right direction.¹³

Several features of the current Saudi system disincentives economic investment. According to the Doing Business 2018 Report, the Kingdom's overall ranking was 92 (where the ease of doing business ranking ranges from 1 to 190).¹⁴ Its ranking was the same in the 2019 report, while its neighbor, the United Arab Emirates (UAE), was well positioned at number 11.¹⁵ In addition, the Global Competitiveness Index Report from 2017-2018 ranked Saudi Arabia in 30th place, which reflects a downgrade by one step from the previous year.¹⁶ This demotion suggests that substantial progress remains to achieve extensive economic and legal reforms to advance the economy.

Mohammed bin Salman is the engine behind the modernization of Saudi Arabia. By 2018, some of the ideas from his plan had already transformed into tangible accomplishments,¹⁷ and investors are optimistic about the positive changes underway in the

¹⁰ Ahmed Al Omran, *Saudi Arabia raises the alarm over rising unemployment*, Financial Times, April 24, 2018, <https://www.ft.com/content/df579534-47c3-11e8-8ae9-4b5ddcca99b3>.

¹¹ Women in Saudi Arabia will be Allowed to Drive Cars from June 2018, NBC News, March 16, 2018, <https://www.nbcnews.com/video/women-in-saudi-arabia-will-be-allowed-to-drive-cars-from-june-2018-1187859011959>.

¹² Andrew Torchia, *Social reform is rare bright spot in Saudi economic gloom*, Reuters, May 28, 2018, <https://www.reuters.com/article/us-saudi-economy-social/social-reform-is-rare-bright-spot-in-saudi-economic-gloom-idUSKCN1IU0HD?feedType=RSS&>.

¹³ Press Release No. 18/106, IMF (2018), <http://www.imf.org/en/News/Articles/2018/03/23/pr18106-the-statement-by-md-on-meeting-with-crown-prince-mohammed-bin-salman>. The statement by IMF Managing Director Christine Lagarde on Meeting with Saudi Arabia's Crown Prince Mohammed bin Salman

¹⁴ Doing Business 2018's Report, The World Bank, <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Profiles/Country/S/AU.pdf>.

¹⁵ Doing Business 2019's Report, The World Bank, <http://www.doingbusiness.org/en/data/exploreconomies/saudi-arabia>.

¹⁶ The Global Competitiveness Report 2017-2018, World Economic Forum, www.weforum.org/reports/the-global-competitiveness-report-2017-2018.

¹⁷ To name one: Ellen R. Wald, *CNBC, Saudi crown prince woos Amazon, Lockheed and others to build a tech hub*, CNBC, April 13, 2018, <https://www.cnbc.com/2018/04/13/saudi-crown-prince-woos-amazon-lockheed-and-others-to-build-a-tech-hub.html>.

country.¹⁸ The executive chairman of Investcorp, a company with more than \$22.2 billion in assets, stated that if even half of the 2030 vision came into reality, Saudi Arabia will in fact experience a fantastic change.¹⁹

Saudi Arabia is also a part of the Group of Twenty (G20), whose members account for 86% of the world economy.²⁰ The Saudi stock market is considered the largest stock market in the Middle East, with all included companies totaling an overall value of roughly \$570 billion. Moreover, one of the changes in 2015 was that foreign investors are officially allowed to enter the Saudi market.²¹ The IMF has recently published a World Economic Outlook update that showcases Saudi Arabia's growth. Its position changed from -0.9% in 2017 to 2.3% in 2018 and is estimated to be 1.8% this year.²² Figure 1 demonstrates oil rent, which refers to the difference between the value of crude oil production at world prices and total costs of production.

¹⁸ "The authorities are continuing to make good progress in implementing their ambitious reform agenda." See, *Supra* note at 13.

¹⁹ Yen Nee Lee, *Saudi Arabia could be 'fantastically changed' even if only half of its reform plans happen, investor says*, CNBC, April 19, 2018, <https://www.cnbc.com/2018/04/19/investcorp-on-crown-prince-mohammed-bin-salmans-plans-to-reform-saudi-arabia.html>.

²⁰ The G20, Australian Government, Department of Foreign Affairs and Trade, <https://dfat.gov.au/trade/organisations/g20/Pages/g20.aspx>.

²¹ Alanna Petroff, *The Saudi Arabian Stock Market Officially Opened up to Foreign Investors*, CNN, June 15, 2015, <http://money.cnn.com/2015/06/15/investing/saudi-arabia-market-open/>.

²² Challenges to Steady Growth, World Economic Outlook (WEO) (2018), <https://www.imf.org/en/Publications/WEO/Issues/2018/09/24/world-economic-outlook-october-2018>.



Figure 1, Estimates based on sources and methods. Adapted from "The Changing Wealth of Nations: Measuring Sustainable Development in the New Millennium", The World Bank (2011.)²³

For economies in which the actual structure is changing, governments usually do not strategize plans to accommodate consumer needs because there are much more urgent issues to address. If the legal system fails to fulfill its function, consequences will likely arise. Nevertheless, the legal system does not exist in a vacuum, so some of its characteristics might affect the behavior of economic actors, which can in turn influence investment decisions. In fact, both the legal and judicial systems play a notable role in the economy, as regulations influence economic behavior. Therefore, there is a need to shape them both to incentive economic growth.²⁴

²³ Oil rents (% of GDP), The World Bank, <http://data.worldbank.org/indicator/NY.GDP.PETR.RT.ZS?contextual=default&locations=SA>.

²⁴ Marilene Lorizioa & Antonia Rosa Gurrieria, *Efficiency of Justice and Economic Systems*, *Procedia Economics and Finance* 17(2014), <https://pdfs.semanticscholar.org/fbeb/9c5940e64c4b221f12b46e8a64f5340776.pdf>.
Innovation and Society 2013 Conference, IES 2013

a. Consumer Composition

The total population of the Kingdom is around 33 million.²⁵ The third quarter of 2018 revealed that consumer spending reached 279,296 million SAR.²⁶ Consumer confidence is also positive despite the introduction of VAT.²⁷ Yet, the first quarter of 2018 reported the highest-ever unemployment rate among Saudi citizens. The General Authority for Statistics has released data indicating that the unemployment rate rose steeply to 12.9%. The female Saudi unemployment rate was about 33%, and Saudi women comprised approximately 85% of job seekers.²⁸

Saudi consumer behavior trends in the realm of legal action is a largely neglected subject. According to a study from 1990, 95% of Saudi consumers reported that they would neither return a defective purchase nor pursue any legal action in response to the defect. The researcher's conclusion attributed this behavior to having a high income.²⁹ It would be interesting to consider the same question among a similar group, especially given that the financial situation has changed. Newer data can reveal more insight, as previewed in one of the upcoming chapters. The consumer market is constantly expanding in the Kingdom.³⁰ Retail e-commerce is frequently improving, and about 71.9% of the total population of Saudi Arabia is estimated to shop online by 2020.³¹ Since the purchasing power of consumers is considerably robust, attainable consumer protection laws are a necessity.

Massive businesses, such as Amazon, will likely have a major role in determining the future level of economic justice for Saudi consumers. In fact, Amazon and Apple are making progress toward establishing their businesses in the Kingdom.³² Since these companies

²⁵ General Authority for Statistics, Saudi Arabia, Population Estimates, <https://www.stats.gov.sa/ar/43>.

²⁶ Saudi Arabia Consumer Spending, Trading Economics, <https://tradingeconomics.com/saudi-arabia/consumer-spending>.

²⁷ Saudi Arabia Consumer Outlook: On Track for Consumption Rebound In 2019, Fitch Solutions (2019), <https://www.fitchsolutions.com/corporates/retail-consumer/saudi-arabia-consumer-outlook-track-consumption-rebound-2019-30-01-2019>.

²⁸ Unemployment Rate, General Authority for Statistics, Kingdom of Saudi Arabia, <https://www.stats.gov.sa/ar/820>.

²⁹ Ameen M. R., *Consumer Protection in Islam*, PhD Thesis. Al Azhar University, Egypt. (1990). As cited in David Morris & Maha Al-Dabbagh, *The Development of Consumer Protection in Saudi Arabia*, 28 International Journal of Consumer Studies (2004).

³⁰ In 2021, retail e-commerce sales are estimated to reach 4,479 billion dollars in the United States. eMarketer, Retail e-commerce sales worldwide from 2014 to 2021 (in billion U.S. dollars, Statista, <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>.

³¹ "Digital services have radically shaped Saudi consumer behaviours as 86% Saudis go online every day and own 2.3 connected devices on average. The number of online shoppers was estimated to have grown to 12.5 million in 2017 and is forecast to reach 17.1 million by 2020 (71.9% of the total population)." Saudi Arabia: Rethinking the Saudi Consumer, Santander, https://en.portal.santandertrade.com/analyse-markets/saudi-arabia/reaching-the-consumers?&actualiser_id_banque=oui&id_banque=18&memoriser_choix=memoriser.

³² "Both Apple and Amazon are in talks to invest in Saudi Arabia, sources told Reuters, part of Crown Prince Mohammed bin Salman's push to give the conservative kingdom a high-tech look. Both companies already sell products in Saudi Arabia via third parties but they and other global tech giants have yet to establish a direct presence."

operates in the US, one can consider how these companies treat their US customers. To predict the dynamic in Saudi Arabia, it could be helpful to examine the practices of both companies in terms of how they handle consumer disputes. However, the odds do not favor consumers, as Amazon's terms of service in the US explicitly emphasize that consumer disputes are resolved under binding arbitration. In addition, there is a prohibition on the use of a class action mechanism.³³

b. Natural Resources

There is an abundance of research on the topic of natural resources and whether they are an advantage or disadvantage. The analysis below considers the respective position of Saudi Arabia. To evaluate the economic situation of a country that depends heavily on its natural resources, Luiz Carlos Bresser-Pereira has suggested,

If the country already has a significant production and export of natural resources which allowed it to accumulate capital and to have a significant entrepreneurial class, but doesn't have a tradable industry, this is a sign that it is affected by severe Dutch disease. Saudi Arabia or Venezuela are good examples of this case.³⁴

Yet, the literature has been divided on this matter. On the one hand, researchers have argued that there is a positive correlation between natural resources and growth rates³⁵; the resource-based economy of the UAE is a prime example of a Gulf Cooperation Council (GCC) country that defends this theory.³⁶ On the other hand, Venezuela's current economic state demonstrates that there are negative associations.³⁷ Neither of these opinions amounts completely. Therefore, this paper aligns with a third opinion: that natural resources can influence economic growth in both positive and negative ways. In addition, a country could

Apple and Amazon in talks to set up in Saudi Arabia, New York Post, December 28, 2017, <https://nypost.com/2017/12/28/apple-and-amazon-in-talks-to-set-up-in-saudi-arabia/>.

³³ "Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. And "We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action."

Conditions of Use, Amazon (2018),

<https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>.

³⁴ Luiz Carlos Bresser-Pereira, *The Dutch disease and its neutralization: a Ricardian approach*, 28 *Revista de Economia Política* 47–71 (2008).

³⁵ Christa N. Brunnschweiler, *Cursing the Blessings? Natural Resource Abundance, Institutions, and Economic Growth*, 36 *World Development* (2008).

³⁶ Raimundo Soto et al., *Has the UAE Escaped the Oil Curse?*, *Understanding and Avoiding the Oil Curse in Resource-rich Arab Economies* 373–420 (2012).

³⁷ Carlos A. Rossi, *Oil Wealth and the Resource Curse in Venezuela*, *International Association for Energy Economics* (2011).

benefit from its resources if it were permitted a learning curve to determine the most effective methods for managing its natural assets.³⁸

Even under the presumption that oil as a natural resource is a blessing, there is likely to be a real threat to its actual value in the future. Renewable and alternative energy is fiercely competing in the market with traditional methods, such as fossil fuel.³⁹ For instance, Germany has advanced in this area and invested a substantial amount of money in renewable energy.⁴⁰ Although this strategy is expensive, many countries have begun following suit. China has set a goal of reaching 27% renewable resource use in the next four years.⁴¹ While such new dependence on clean energy resources might benefit the environment, it may cause Saudi Arabia to lose its comparative advantage as an oil exporter.⁴² Thus, if the country cannot rely on a substance other than natural resources, its economy might be at risk of collapsing.

There is solid empirical evidence of the “Dutch disease”⁴³ and its effect. For instance, countries are likely to register a 75-cent decrease in non-resource exports for each added dollar of resource revenues, and mineral-based economies can be a curse that eventually causes harm to the country.⁴⁴ Nevertheless, there is some evidence that a few countries have managed to escape the Dutch disease. Norway is a prime example of a country whose oil resources did not ultimately have a negative effect on growth. Many factors have led Norway to its position, including lower spending, limits to general wage increases, and a transparent democracy. Although these factors are important, this paper explores one in particular in more depth: the fact that a strong judicial system helped Norway from getting the curse.⁴⁵ This notion emphasizes the importance of the rule of law as well as its utmost relevance to economic development.

Some scholars have suggested that countries move within a “product space” where they can develop goods that resemble those that they produce. Since these countries develop by upgrading the products that they already make and export, technology and skills that are

³⁸ Jean-Philippe C. Stijns, *Natural Resource Abundance and Economic Growth Revisited*, 30 *Resources Policy* 107–130 (2005), <http://www.sciencedirect.com/science/article/pii/S0301420705000176>.

³⁹ Tom Randall, *Wind and Solar Are Crushing Fossil Fuels*, Bloomberg, April 6, 2016, <https://www.bloomberg.com/news/articles/2016-04-06/wind-and-solar-are-crushing-fossil-fuels>.

⁴⁰ Jeffrey Ball, *Germany’s High-Priced Energy Revolution* *Fortune*, Fortune, March 14, 2017, <http://fortune.com/2017/03/14/germany-renewable-clean-energy-solar/>.

⁴¹ James Taylor, *Five Secrets to China’s Renewable Energy Success*, Forbes, December 29, 2016, <https://www.forbes.com/sites/jamestaylor/2016/12/29/five-secrets-to-chinas-renewable-energy-success/#9424eb220a68>.

⁴² Sajjad M. Jasimuddin, *Analyzing the competitive advantages of Saudi Arabia with Porter’s model*, 16 *Journal of Business & Industrial Marketing* 59–68 (2001).

⁴³ See, “This economic paradox has since been recognized as the situation in which a booming sector adversely affects the performance of other sectors of an economy, and in particular, the non-booming tradable sector.” Hernandez, Ignacio. “The ‘Dutch Disease’: Theory and Evidence.” *The World Bank, Growth and Crisis Blog*, 2006, <blogs.worldbank.org/growth/dutch-disease-theory-and-evidence>.

⁴⁴ Torfinn Harding & Anthony J. Venables, *The Implications of Natural Resource Exports for Non-Resource Trade* (2013), <https://ideas.repec.org/p/oxf/oxcrwp/103.html>.

⁴⁵ Erling Roed Larsen, *Escaping the Resource Curse and the Dutch Disease? When and Why Norway Caught Up with and Forged Ahead of Its Neighbors*, 65 *American Journal of Economics and Sociology* 605–640 (2006).

needed to develop new products can be adapted from similar ones.⁴⁶ However, this approach can be especially complicated for countries that have an oil-based economy because oil is harder to diversify given the dearth of products that involve comparable skills.

c. Plans for Economic Reform

Notably, in a list of best countries for business, Forbes has ranked Saudi Arabia in 80th place, which is not an appealing position for investors.⁴⁷ According to the World Bank, Saudi Arabia ranked 19th in the world for GDP in 2017.⁴⁸ The 2030 vision strategy and National Transformation Program prioritizes economic diversification. In addition, it aims for more reliance on the private sector and higher job creation, especially to increase female participation in the workforce.⁴⁹ These are advantageous goals, and they might be challenging to transform into reality.

Middle Eastern countries with autocratic institutions and fragile rule of law are not fortunate, according to Ahmadov.⁵⁰ Empirical studies have reported that oil wealth is linked to less diversification, whereas an economy that is based on non-fuel minerals and forest resources is connected with higher diversification.⁵¹ While oil-based economies are not doomed, the difficulties are clear. Investing in human capital can develop labor efficiency and lower manufacturing costs, which would contribute to a sturdier non-oil sector. Recent numbers for the third quarter of 2018 are promising, as non-oil revenue soared 48% compared to the equivalent period last year.⁵² Plus, improving economic diversification requires a focus on conducting regulatory reforms and decreasing legal and administrative costs, especially for small businesses.⁵³ A recent study has reported that diversification is sought, yet the data do not reveal the most imperative features of diversification. In addition, the conditions for which it is appropriate depend on each country's environment.⁵⁴

⁴⁶ C. A. Hidalgo et al., *The Product Space Conditions the Development of Nations*, 317 Science 482–487 (2007), <https://science.sciencemag.org/content/317/5837/482>.

⁴⁷ Best Countries for Business, Forbes, <https://www.forbes.com/best-countries-for-business/list/2/#tab:overall>.

⁴⁸ Gross domestic product 2017, World Bank, <http://databank.worldbank.org/data/download/GDP.pdf>.

⁴⁹ Opportunity for All, Promoting Growth and Inclusiveness in the Middle East and North Africa, No. 18/11, IMF (2018), <https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2018/07/10/Opportunity-for-All-Promoting-Growth-and-Inclusiveness-in-the-Middle-East-and-North-Africa-45981>.

⁵⁰ Anar K. Ahmadov, *Oil, Democracy, and Context, A Meta-Analysis* (2013), <https://doi.org/10.1177/0010414013495358>.

⁵¹ Michael L. Ross, *What Do We Know About Economic Diversification in Oil-Producing Countries?* SSRN Electronic Journal (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048585.

⁵² Saudi Arabia third-quarter non-oil revenue up 48 percent: finance minister, Reuters, October 25, 2018, <https://www.reuters.com/article/us-saudi-investment-economy/saudi-arabia-third-quarter-non-oil-revenue-up-48-percent-finance-minister-idUSKCN1MZ0PQ>.

⁵³ Reda Cherif, Fuad Hasanov & Min Zho, *Breaking the oil spell: The path to diversification*, (2016), <https://voxeu.org/article/breaking-oil-spell-path-diversification>.

⁵⁴ See *supra* note at 53.

A few years ago, in an effort to reform and overcome the obstacles that came from oil prices' fluctuation, the salaries of Saudi ministers were cut by 20%, while Shura members of the Consultative Assembly of Saudi Arabia received a 15% reduction. State workers faced the most substantial losses, as the government eliminated their yearly bonuses and curbed allowances.⁵⁵ Farouk Soussa, the Chief Middle East Economist for Citigroup Inc. in London, said, "[t]he Saudi government can't continue to be the employer of first resort, it can't continue to drive economic growth through the big infrastructure projects and it can't keep lavishing on subsidies and social spending."⁵⁶ The government is taking measures to rely more on the private sector, and arbitration could fit into the plan. Arbitration as a form of private justice does not need financial support from the government. Rather than dreaming about re-evaluating the current judicial system, it is easier and more efficient to use the existing arbitration system.

The IMF has complimented the progress of advancing the business environment in Saudi Arabia as well as the attention of the latest efforts on necessary improvements to the legal system and business regulations, as "reforms should focus on removing structural impediments that may dissuade financial institutions from entering these markets."⁵⁷ Therefore, the rule of law is not only momentous in the legal world but also equally prevailing over the economy. When defining the term "rule of law," some scholars build their definition which focuses on democracy. Yet, the most prevailing proclamation is that laws should stipulate stability.⁵⁸ Since property rights are one of the 10 measurements of a country's economic freedom that are used by The Heritage Foundation's Index of Economic Freedom, the rule of law then includes property rights as well as freedom from corruption, both of which are usually associated with high levels of per capita GDP.⁵⁹

There is a strong relationship between improvements to economic freedom and levels of economic growth per capita, which proves a consistent relationship between positive changes in economic freedom and rates of economic growth.⁶⁰ According to the 2018 Index of Economic Freedom, Saudi Arabia had an economic freedom score of 59.6, which positioned its economy as the 98th freest in 2018.⁶¹ The following year's score has declined

⁵⁵ Glen Carey & Vivian Nereim, *Saudi King Cuts Once Untouchable Wage Bill to Save Money*, Bloomberg, September 26, 2016, <http://www.bloomberg.com/news/articles/2016-09-26/saudi-arabia-cancels-bonus-payment-for-state-employees-spa-says>.

⁵⁶ Vivian Nereim & Donna Abu-Nasr, *How Much Longer Can Saudi Arabia's Economy Hold Out Against Cheap Oil? Saudi Arabia got lucky when the oil price fell in 1998. What about now?*, Bloomberg, August 21, 2015, <https://www.bloomberg.com/news/articles/2015-08-21/how-much-longer-can-saudi-arabia-s-economy-hold-out-against-cheap-oil->>.

⁵⁷ IMF Staff Completes 2018 Article IV Mission to Saudi Arabia, IMF (2018), <http://www.imf.org/en/News/Articles/2018/05/22/pr18190-imf-staff-completes-2018-article-iv-mission-to-saudi-arabia>.

⁵⁸ Economics and the rule of law, Order in the jungle, The rule of law has become a big idea in economics. But it has had its difficulties, *The Economist*, March 13, 2008, <https://www.economist.com/briefing/2008/03/13/order-in-the-jungle>.

⁵⁹ Index of Economic Freedom 2019, The Heritage Foundation, <https://www.heritage.org/index/>.

⁶⁰ Key Findings, The Heritage Foundation, <https://www.heritage.org/index/book/keyfindings>.

⁶¹ Also, see "The Index of Economic Freedom provides unambiguous confirmation of the importance of the rule of law to economic growth and prosperity. Both of the rule-of-law indicators in the Index demonstrate a high degree of predictive power with respect to per

by 4.8 points compared to the score in 2017; unsurprisingly, one of the main reasons for the decrease was judicial effectiveness, which was scored at 60.2 out of 100. The index claims that “slow and nontransparent judiciary is not independent, and there is significant collusion between the executive branch and judges.”⁶² With such a low score in the rule of law, the index advises reflection on issues of corruption, judicial effectiveness, and the protection of property rights. Such foci might yield immediate benefits for economic freedom.⁶³ By juxtaposition, the score for the judicial effectiveness of the UAE is 83.4, which reveals significant variation.⁶⁴

For comparison purposes, the latest Economic Freedom of the World 2018 Annual Report from the Fraser Institute Economic Freedom ranked Saudi Arabia in 103rd place – the third quartile. Meanwhile, the UAE held its position at number 37 with a “most free” title. Fraser has defined economic freedom as having “(1) personal choice, (2) voluntary exchange coordinated by markets, (3) freedom to enter and compete in markets, and (4) protection of persons and their property from aggression by others.”⁶⁵ The UAE has excelled the most in rankings of legal system and property rights, freedom to trade internationally, and regulations,⁶⁶ which could hint to area of developments that Saudi Arabia must follow to continue improving.

The executive directors of the IMF have foreseen many challenges that Saudi Arabia could encounter if it will no longer depend on oil. The directors have welcomed the government’s new strategy with regard to its stronger focus on the private sector and improvements to the business environment.⁶⁷ It is also worth mentioning that in developing

capita incomes... the rule-of-law indicators are highly predictive of per capita GDP, irrespective of other factors or the overall level of economic freedom.”

David John Marotta, *The Effective Rule of Law Propels Prosperity* (2013),

<https://www.marottaonmoney.com/the-effective-rule-of-law-propels-prosperity/>.

⁶² 2018 Index of Economic Freedom, Saudi Arabia, The Heritage Foundation, <https://www.heritage.org/index/country/saudi-arabia>.

⁶³ *Ibid.*

⁶⁴ The index defined judicial effectiveness as “Well-functioning legal frameworks protect the rights of all citizens against infringement of the law by others, including by governments and powerful parties. As an essential component of the rule of law, judicial effectiveness requires efficient and fair judicial systems to ensure that laws are fully respected, with appropriate legal actions taken against violations. Judicial effectiveness, especially for developing countries, may be the area of economic freedom that is most important in laying the foundations for economic growth.”

Chapter 1: The Index of Economic Freedom at 25, *Index of Economic Freedom*, <https://www.heritage.org/index/book/chapter-1>.

⁶⁵ *Economic Freedom of the World: 2018 Annual Report*, Fraser Institute (2018), <https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2018-annual-report>.

⁶⁶ Also, on another note and in a sharp contrast, Saudi Arabia’s neighbor, The United Arab Emirates, made it to the 10th freest country in the world with an economic freedom score of 77.6. And even with a high score like that, one of the recommendation was to try to improve the legal framework to make it more effective and independent.

United Arab Emirates, 2018 Index of Economic Freedom, <https://www.heritage.org/index/country/united-arab-emirates>.

⁶⁷ Press Release No. 16/368, IMF Executive Board Concludes 2016 Article IV Consultation with Saudi Arabia, IMF (2016), <https://www.imf.org/en/News/Articles/2016/07/28/15/54/PR16368-Saudi-Arabia-IMF-Executive-Board-Concludes-2016-Article-IV-Consultation>.

countries and emerging economies in particular, FDI is perceived as source of economic development and renovation. As a consequence of this view, more countries are liberalizing their FDI systems and enacting more policies to attract investment.⁶⁸

By the same token, trade is among the most significant areas for Saudi Arabia's economy. The country is the 34th-largest importer and the 26th-largest exporter in the world.⁶⁹ The index compiler MSCI Inc., which has more than \$1.9 trillion in assets, has announced its intention to re-classify Saudi Arabia starting in June 2019. This news indicates that the Kingdom will receive a place in the index alongside a group of emerging markets. This development occurred after MSCI added Saudi Arabia to its "watch list" for considering a potential upgrade, and the country's efforts to renovate its stock market and attract massive investments made an affirmative impact.

Considering that Saudi Arabia's stock market is one of the largest in the Middle East and Africa, some analysts have posited that the MSCI's decision will lure in billions of dollars to the market. However, certain investors have expressed concern over the initiative to eliminate corruption, which has resulted in the detainment of princes and officials. A lack of transparency and concerns about corporate governance are among the reasons that such investors cited for their wariness of the Saudi stock market.⁷⁰

Mohammed El-Kuwaiz, the Chairman of Saudi Arabia's Capital Markets Authority (CMA), has described that as a real-time barometer for investors' views of investment desirability. In regard to the corruption crackdown, he admitted that there was a slight decline, but the numbers returned to the norm after only a few months.⁷¹ Furthermore, even with only 5% total foreign ownership of Saudi stock, foreign buyers have entering slowly.⁷² More major news emerged from FTSE Russell when it announced the classification of Saudi Arabia as a secondary emerging market within the FTSE Global Equity Index Series (GEIS) on March 28, 2018.⁷³ The index has met a nine-point FTSE evaluation process as a secondary emerging market. The applied standards are designed to meet the needs of global investors. According to the FTSE Saudi Arabia Inclusion Index Series, Saudi Arabia accounts for 2.7% of the FTSE Emerging Index. This position ranks the country amid the 10 largest emerging stock markets.⁷⁴

Health and education are among the sectors in which Saudi Arabia has allowed foreign investors to capture 100% ownership of the companies. Having a Saudi partner is not a requirement for most investment license types,⁷⁵ with the exception of a couple activities

⁶⁸ Foreign Direct Investment for Development: Maximizing benefits, Minimizing costs, OECD (2002), <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf>.

⁶⁹ The Observatory of Economic Complexity, Saudi Arabia, OEC, <https://atlas.media.mit.edu/en/profile/country/sau/>.

⁷⁰ Natasha Turak, *Inclusion in MSCI index is a 'big milestone' for Saudi market, stock exchange boss says*, CNBC, June 21, 2018, <https://www.cnbc.com/2018/06/21/inclusion-in-msci-index-is-a-big-milestone-for-saudi-market.html>.

⁷¹ *Ibid.*

⁷² Filipe Pacheco & Matthew Martin, *Saudi Arabia Wins Coveted Emerging-Market Status in MSCI Upgrade*, Bloomberg, June 20, 2018, <https://www.bloomberg.com/news/articles/2018-06-20/saudi-arabia-wins-coveted-emerging-market-status-in-msci-upgrade>.

⁷³ Saudi Arabia Reclassification, Executive summary: Saudi equities take to the global stage, FTSE Russell, <http://www.ftserussell.com/files/research/saudi-arabia-reclassification>.

⁷⁴ *Ibid.*

⁷⁵ SAGIA

regarding, for instance, insurance and telecommunications. Ibrahim al-Omar, the Governor of the Saudi Arabian General Investment Authority (SAGIA), has stated that these new developments will generate \$180 billion in investment opportunities in the health sector over the next five years.⁷⁶ The Director of Investment Regulations Development and Procedures, Ayedh Al-Otaibi, has explained that the government is working constantly to invite additional investment in the private sector. In addition, he has asserted that the current business regulations reflect the Kingdom's position in supporting an open market.⁷⁷

Many countries have made concrete efforts to attract more and foreign direct investment (FDI),⁷⁸ mainly to pursue its positive effects. Some of the sought-after effects are “productivity gains, technology transfers, the introduction of new processes, managerial skills, and know-how in the domestic market, employee training, international production networks, and access to markets.”⁷⁹ Even a small country such as Rwanda has tackled its economic development issues by focusing on the implementation of pro-investment policies that can increase the country's FDI. These policies were proven effective by the current high rankings in the World Bank's Ease of Doing Business Index.⁸⁰

The Saudi Arabian government highlighted the attraction of FDI as an imperative element of its 2030 vision to diversify its economy. Foreign investment stimulates economic development, which should in turn allocate foreign capability and technology for the country. It can also generate jobs opportunities for Saudis and, most importantly, increase Saudi Arabia's non-oil exports.⁸¹ Yet, FDI flows to Saudi Arabia over the past few years indicate a downward inclination.⁸² Saudi Arabia's FDI net inflow in the first quarter of 2018 was

<https://sagia.gov.sa/media/1012/faq.pdf>

⁷⁶ Katie Paul & Reem Shamseddine, *Saudi to open health, education sectors to full foreign ownership*, Reuters, August 24, 2017, <https://www.reuters.com/article/us-saudi-privatisation/saudi-to-open-health-education-sectors-to-full-foreign-ownership-idUSKCN1B41IZ>.

⁷⁷ 100% foreign ownership in most sectors: SAGIA, Arab News, March 13, 2015, <http://www.arabnews.com/featured/news/717656>.

⁷⁸ FDI here refers to this definition: “a type of investment that involves the injection of foreign funds into an enterprise that operates in a different country of origin from the investor. Investors are granted management and voting rights if the level of ownership is greater than or equal to 10% of ordinary shares. Shares ownership amounting to less than the stated amount is termed portfolio investment and is not categorized as FDI.”

Definition of Foreign Direct Investment (FDI), Economy Watch, <http://www.economywatch.com/foreign-direct-investment/definition.html>.

⁷⁹ Grossman and Helpman (1991, 1995), Barro and Sala-i-Martin (1995, 1997) As cited in: Laura Alfaro et al., *FDI and Economic Growth: The Role of Local Financial Markets*, 64 *Journal of International Economics* (2004).

⁸⁰ 2017 Investment Climate Statements, Bureau of Economic and Business Affairs (2017), <https://www.state.gov/e/eb/rls/othr/ics/2017/af/269769.htm>.

⁸¹ Saudi Arabia Country Commercial Guide, Saudi Arabia - 1-Openness to and Restriction on Foreign Investment, Export (2017), <https://www.export.gov/article?id=Saudi-Arabia-openness-to-foreign-investment>.

⁸² See, “According to the 2017 World Investment Report published by UNCTAD, the country is the third largest FDI recipient in Western Asia, after Turkey and the United Arab Emirates. In 2016, FDI inflows fell by 8.5% compared to the previous year, reaching USD 7.45 billion, the lowest since 2014.”

Saudi Arabia: Investing in Saudi Arabia, Nordea, <https://www.nordeatrade.com/en/explore-new-market/saudi-arabia/investment>.

838.00 Million USD, while the most recent report on FDI in the UAE indicates a net inflow of around 38000.00 AED Million (and equivalent to about 10345 USD Million.)⁸³

Furthermore, Saudi officials hope that selling 5% of Saudi Aramco will help raise \$300 billion to build Neom, which refers to the “place for the dreamers for the world,” according to Mohammed bin Salman.⁸⁴ The city will be a business and industrial region that extends into both Egypt and Jordan and covers 10,230 square miles. Renewable energy will be the sole energy provider for Neom. In addition, the area will center around non-oil industries, such as biotechnology, food, advanced manufacturing, and entertainment.⁸⁵

Still, some critics do not agree that building an extravagant city will achieve enough improvement in the economy. Supporters of economic liberalization contend that easing the limits on foreign ownership in addition to labor mobility might be more productive in the long term. Thus, structural transformations are much more desirable to fuel the non-oil sector. Critics also contend that promising economic reforms do not go far enough.⁸⁶

Saudi Arabia adopts a generally hospitable strategy toward foreign investment. Though that does not appear to have a substantial effect, as foreign investment is banned in several subdivisions in the industrial and service sectors, in particular audiovisual services, land-transportation service industries (excluding intra-city rail transport), and upstream petroleum.⁸⁷ An inviting investment in the Saudi market should not target foreigner investors only. Private businesses have conservatively locked up their money; some of them have even pursued any means necessary to shift their funds outside of the country. These behaviors undermine efforts to provide a healthy investment environment. Nevertheless, the finance minister seemed optimistic in stating that “the anticipated participation of more international investors will significantly contribute to the growth, sophistication and maturity of the market.”⁸⁸

There is a connection between international financial liberalization and improvements to the functioning of domestic financial markets and banks. These two elements could collectively accelerate economic growth through international financial integration, which might foster such growth by boosting developments in domestic financial structure.⁸⁹ These

⁸³ Foreign Direct Investment, Asia, Trading Economics, <https://tradingeconomics.com/country-list/foreign-direct-investment?continent=asia>.

⁸⁴ Leanna Garfield, *Saudi Arabia is building a \$500 billion mega-city that's 33 times the size of New York City*, Business Insider, February 22, 2018, <https://www.businessinsider.com/saudi-arabia-mega-city-jordan-egypt-oil-2017-10>.

⁸⁵ Andrew Torchia, *Saudi Arabia seeks new economy with \$500 billion business zone with Jordan, Egypt*, Reuters, October 23, 2017, <https://www.reuters.com/article/us-saudi-economy/saudis-set-500-billion-plan-to-develop-zone-linked-with-jordan-and-egypt-idUSKBN1CS2PL?il=0>.

⁸⁶ Mark Townsend, *Can Saudi Reforms Revive FDI? Enticing foreign investors is urgent for the suddenly reformist Saudi government. But will it push economic reform far enough, fast enough?* Global Finance Magazine, <https://www.gfmag.com/magazine/julyaugust-2018/can-saudi-reforms-revive-fdi> (last visited Jul 17, 2017).

⁸⁷ *Supra* note at 83.

⁸⁸ Andrew England, *Wealthy Saudis Sit on Cash as Purge Casts Shadow Over Investment*, Financial Times, July 23, 2018, <https://www.ft.com/content/03db6c94-8e4d-11e8-b639-7680cedcc421>.

⁸⁹ Ross Levine, *International Financial Liberalization and Economic Growth* (2002), <https://doi.org/10.1111/1467-9396.00307>.

components are important since financial stability is key for development. Financial stability can facilitate and enrich economic processes, manage risks, and absorb shocks.⁹⁰

Despite the significance of financial stability and its need for inclusion in an effective resolution mechanism, many countries do not sustain it. For businesses, a critical, reassuring policy entails a working mechanism that ensures that international judgements and awards that were issued in a jurisdiction are granted validity in a different jurisdiction. This factor further emphasizes the importance of a functioning legal framework for a thriving economy.⁹¹



SOURCE: TRADINGECONOMICS.COM | SAUDI ARABIAN MONETARY AGENCY

Figure 2, FDA net inflows 2016-2018 in Saudi Arabia. Adapted from Trading Economics.⁹²

Figure 2 presents Saudi Arabia's FDA net inflows over the last three years. The sharp decline after 2016 was alarming and devastating, but by the third quarter of 2018, the FDI appears to have recovered and reached 779 USD million.⁹³ On the other hand, the latest UNCTAD World Investment Report estimated FDI in Saudi Arabia last year at \$1.4 billion, which reflects a massive decline from \$7.5 billion FDI the year before. This drop evidences that several smaller economies were able to attract more international investment compared to Saudi Arabia.⁹⁴

⁹⁰ Garry J. Schinasi, *Defining Financial Stability*, IMF Working Papers (2004), <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Defining-Financial-Stability-17740>.

⁹¹ Sean Hagan & Ross Leckow, *The Role of Law in Preserving Financial Stability*, IMF Blog (2016), <https://blogs.imf.org/2016/07/01/the-role-of-law-in-preserving-financial-stability/>.

⁹² Saudi Arabia Foreign Direct Investment - Net Inflows, Trading Economics, <https://tradingeconomics.com/saudi-arabia/foreign-direct-investment>.

⁹³ *Ibid.*

⁹⁴ Dominic Dudley, *Saudi Arabia Suffers Shock Collapse in Inward Investment*, Forbes, June 7, 2018, <https://www.forbes.com/sites/dominicdudley/2018/06/07/saudi-arabia-shock-collapse-investment/#671138f76e60>.

Saudi Arabia could offer robust opportunities for investors.⁹⁵ The Kingdom has made several improvements to strengthen its economy.⁹⁶ Upon reflecting on changes in recent years, Ihsan Bafakih, the CEO of MASIC, a Saudi investment firm, claimed that one cannot keep up with development since it is occurring at remarkable speed. He also predicted that the Saudi market will be drastically different in about 10 years, as it will be less reliant on oil and focus on industries.⁹⁷

Entertainment is a key factor in attracting new businesses. Saudi Arabia's first public film screening in decades was yet a new step of the 2030 vision toward diversifying economic resources. Over the next 15 years, development of the entertainment sector could produce approximately \$20 USD billion, 30,000 direct jobs, and 100,000 indirect jobs.⁹⁸ Saudi Arabia's Public Investment Fund has publicized plans to build an enormous entertainment city that will provide entertainment and sporting activities, including a Six Flags theme park and a safari park. The first stages of this scheme should be complete by 2022.⁹⁹

As for Saudi Arabia, social-based diversification is indeed apparent. After all, 2018 was a major year for movie enthusiasts, as it marked the official launch of Saudi cinema since the end of a ban on movie theaters that has been in effect since the 1970s. Plans to launch over 2,500 screens across the country by 2030 should be economically beneficial.¹⁰⁰ As for tourism, it has been difficult to obtain a visa for Saudi Arabia if one is not a worker or a Muslim seeking Hajj. However, a new electronic visa process has made it easier for tourists

⁹⁵ See, "What is it that makes it possible in one or two generations for a country to go from exporting wigs and plywood to competing in the most technologically advanced sectors? The answer is not simply 'a dynamic private sector', though that is the ultimate driver. Historical examples make it clear that the answer must include effective government policies to catalyse private-sector growth." Justin Lin & Ha-Joon Chang, *Should Industrial Policy in Developing Countries Conform to Comparative Advantage or Defy it? A Debate Between Justin Lin and Ha-Joon Chang*, 27 *Development Policy Review* 483–502 (2009).

⁹⁶ Investment Climate Statements for 2018, Bureau of Economic and Business Affairs, <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2018&lid=281681#wrapper>.

⁹⁷ Ihsan Bafakih, *The visionary reform transforming Saudi Arabia's business landscape*, World Finance, February 1, 2018, <https://www.worldfinance.com/inward-investment/middle-east-and-africa/driving-visionary-reform-across-saudi-arabias-business-landscape>.

⁹⁸ Thomas Abgrall, *Saudi Arabia to diversify economy with ambitious plan for entertainment industry*, France 24, April 22, 2018, <http://www.france24.com/en/20180422-saudi-arabia-diversify-economy-cinema-entertainment-industry-mbs-crown-prince>.

⁹⁹ Samuel Osborne, *Saudi Arabia is building an entertainment city almost as big as Las Vegas near Riyadh, Project will host safari park and Six Flags theme park*, Independent, May 9, 2017, <https://www.independent.co.uk/news/world/middle-east/saudi-arabia-entertainment-city-las-vegas-near-riyadh-capital-middle-east-public-investment-fund-a7726546.html>.

¹⁰⁰ Lisa Richwine & Stephen Kalin, *Saudi Arabia's first new cinema in decades to open April 18*, Reuters, April 4, 2018, <https://www.reuters.com/article/us-saudi-cinemas/saudi-arabias-first-new-cinema-in-decades-to-open-april-18-idUSKCN1HB2LC>.

to gain access to the Kingdom to attend concerts and sporting events. This move intended to raise total tourism spending from \$27.9 billion in 2015 to \$46.6 billion in 2020.¹⁰¹

Countries can enact legislation to attract more investment. Adverse regulatory modifications can lead to the withdrawal of investment plans. To avoid such cases, a viable and local investment framework is needed alongside good practice.¹⁰² One of the main policies that could contribute to the chances of success is diversification. Saudi Arabia's economy is by no means diverse since the dominant sector is oil, and more than 87% of the country's income comes from oil revenue.¹⁰³ Furthermore, the private sector – which should play a major role in diversifying the economy – is still reliant on government spending.¹⁰⁴ As resource-rich country, Saudi Arabia is aware that diversifying its resources is a primary goal, but it is also challenging to accomplish. Many countries around the globe could not effectively diversify their economies because of numerous obstacles, such as political interests.¹⁰⁵

Farrukh Iqbal has authored an article on the successes of some countries in diversifying their resources away from an oil-based economy. He first collected data from the past 40 years that applied to specific countries, specifically those in which the oil and gas exports averaged more than 50% of total exports from 1970 to 1980. He then considered how many of these countries are competent to accomplish significant export diversification over the next 30 years.¹⁰⁶ Out of 17 countries, only two met the standards of significant diversification: Indonesia and the UAE. In the period from 1980 to 1985, Indonesia's oil export share reached a high of 75%, but it subsequently deteriorated to less than 20% by 2005 to 2010. The share for the UAE was 93% in 1970 and 1980 and remained comparatively high over the following 20 years. However, the situation changed when the oil export share declined to about 63% in 2005 to 2010.¹⁰⁷

¹⁰¹ Saudi Arabia to offer visitor visa for special events from December, Reuters, September 25, 2018, <https://www.reuters.com/article/us-saudi-visa/saudi-arabia-to-offer-visitor-visa-for-special-events-from-december-idUSKCN1M51LD>.

¹⁰² Ivan Nimac, Can countries legislate to attract more investment? World Bank Blog (2016), <http://blogs.worldbank.org/psd/can-countries-legislate-attract-more-investment>.

¹⁰³ *Supra* note at 49.

¹⁰⁴ Bassam A. Albassam, *Economic diversification in Saudi Arabia: Myth or reality?*, 44 Resources Policy 112–117 (2015), <https://www.sciencedirect.com/science/article/pii/S0301420715000215>.

¹⁰⁵ Arne Wiig & Ivar Kolstad, *If diversification is good, why don't countries diversify more? The political economy of diversification in resource-rich countries*, 40 Energy Policy 196–203 (2012), <https://www.sciencedirect.com/science/article/pii/S0301421511007300>.

¹⁰⁶ See, the definition of the term: significant export diversification “achieving a hydrocarbon export share that was at least 20 percentage points lower on average during 2000-2010 (the ending decade) than during 1970-1980 (the starting decade.)” Farrukh Iqbal, *It's hard to diversify when you're swimming in oil*, Brookings (2015), <https://www.brookings.edu/blog/future-development/2015/03/31/its-hard-to-diversify-when-youre-swimming-in-oil/>.

¹⁰⁷ *Ibid.*

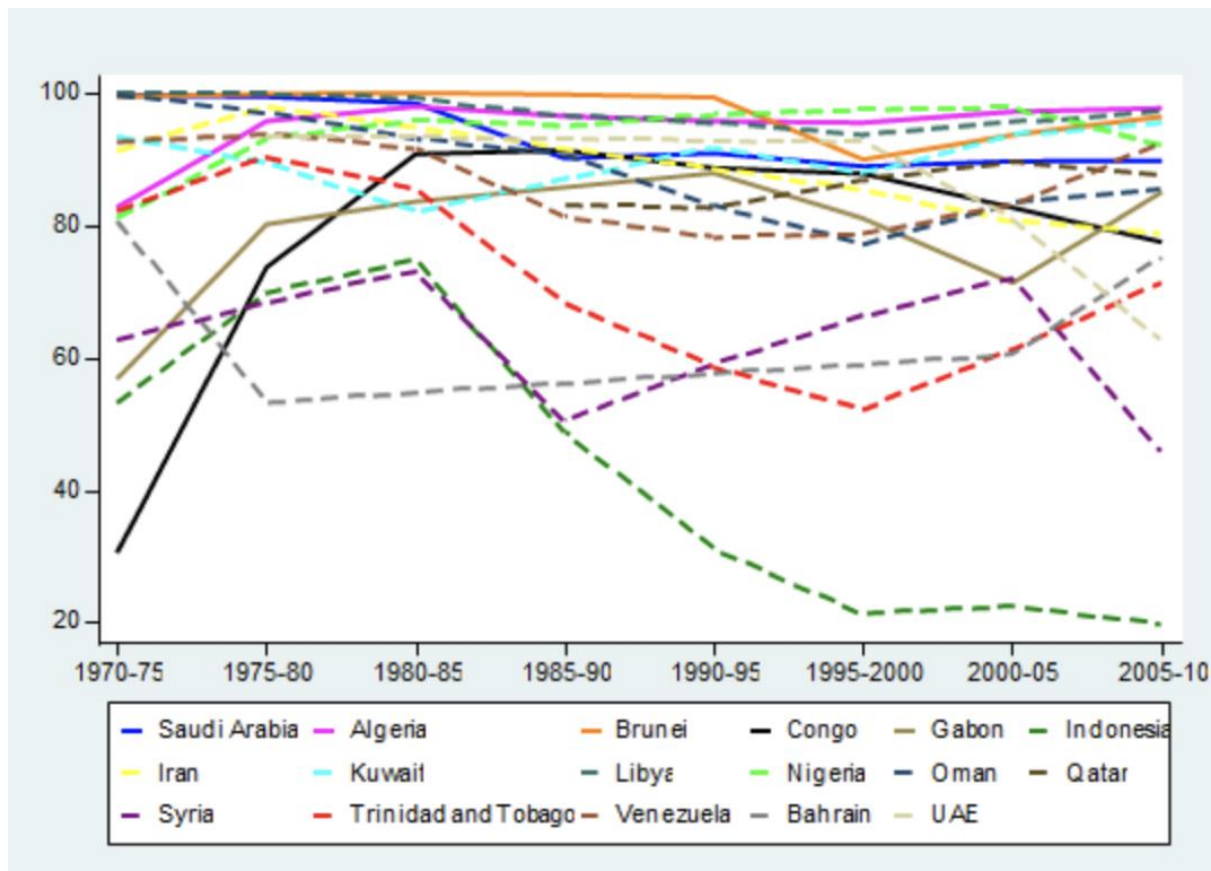


Figure 3, oil and gas exports as a percentage of total exports. Adapted from Brookings, *Future Development, It's hard to diversify when you're swimming in oil*, Farrukh Iqbal, March 31, 2015. ¹⁰⁸

So why were Indonesia and the UAE both successful in their missions? As their common feature, the two countries are significant exporters of non-oil goods and services. For Indonesia, the early 1980s marked an important policy shift toward becoming a large exporter of labor-intensive manufactures. Meanwhile, the UAE's fruitful diversification is generally attributed to their tourism and transport service exports. It is worth mentioning that Dubai, the main emirate and face of tourism for the UAE, exhausted its own oil reserves in the 1990s.¹⁰⁹ Indonesia has developed its national regulations and investment policies with the goal of giving protection and legal certainty to foreign investors¹¹⁰; nevertheless, arbitration is a favorable alternative compared to the court route in view of its flexibility and shorter time frame for settling disputes.¹¹¹ According to the Indonesian Arbitration Law, the hearings should be concluded within 180 days from the establishment of the tribunal. In addition, the award must be issued within 30 days of the end of the hearing. These limitations

¹⁰⁸ *Supra* note at 105.

¹⁰⁹ *Supra* note at 105.

¹¹⁰ Solomon D. & D. H. Mirsky, *Direct Foreign Investment in the Caribbean: A Legal and Policy Analysis*, 11 North-Western Journal of International Law and Business (1991). As cited in Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (2002).

¹¹¹ Karen Mills, *Arbitration Guide*, IBA Arbitration Committee, Indonesia (2018)

are not present in court proceedings, which lack time restrictions. Thus, arbitration offers a better venue for the timely delivery of an award.¹¹²

Based on the view that a robust legal structure promotes a thriving economy, acknowledging this point might be one of the first steps toward a prosperous future.¹¹³ The Saudi economy has been uncertain for investors; therefore, a solid rule of law is essential to promote economic growth. An example that illustrates the uncertainty occurred only a couple of years ago in 2016, when Saudi Arabia planned to invest about \$45 billion with SoftBank.¹¹⁴ A year later, SoftBank intended to invest up to \$25 billion in Saudi Arabia.¹¹⁵ A couple of years made a massive difference in the status of the Kingdom's economy because the Crown Prince is determined to make radical changes.¹¹⁶ While the change was positive in this case, a considerable shift can indicate an unpredictable environment.

II. Politics in the Kingdom

As for the current political structure of the country, Saudi Arabia is an absolute monarchy. King Salman bin Abdulaziz Al-Saud holds all political power¹¹⁷ and is both the King and Prime Minister.¹¹⁸ Thus, he possesses ultimate political control of the Kingdom. King Abdullah bin Abdulaziz Al-Saud, his predecessor, amended the constitution in 2006, where Article 5 (c) of the Basic Law of Governance stated that “[i]nvitation is made to pledge allegiance of the King, and the Crown Prince according to the Succession Commission law.” Following this amendment, King Salman nominated his son, Prince Mohammed, as the Crown Prince instead of Prince Mohammed bin Nayef.¹¹⁹

Prince Mohammed bin Salman Al-Saud, the creator of the new Saudi 2030 vision, is a prominent figure who might provoke change in the coming years.¹²⁰ The Crown Prince

¹¹² Article 48 of Law Number 30 Year 1999 (‘Arbitration Law’)

¹¹³ Guangdong Xu, *The Role of Law in Economic Growth: A Literature Review*, 28 *Journal of Economic Surveys* (2011).

¹¹⁴ Michael J. De La Merced, *SoftBank and Saudi Arabia Partner to Form Giant Investment Fund*, *The New York Times*, October 13, 2016, https://www.nytimes.com/2016/10/14/business/dealbook/softbank-and-saudi-arabia-partner-to-form-giant-investment-fund.html?_r=0.

¹¹⁵ Dinesh Nair, Ruth David & Matthew Martin, *SoftBank Plans Up to \$25 Billion in Saudi Investments*, *Bloomberg*, November 15, 2017, <https://www.bloomberg.com/news/articles/2017-11-15/softbank-is-said-to-plan-up-to-25-billion-in-saudi-investments-ja146fd5>.

¹¹⁶ Iain Millership, *We should welcome Mohammed bin Salman to the UK - his reforms in Saudi Arabia could benefit us all*, *Independent*, March 5, 2018, <https://www.independent.co.uk/voices/mohammed-bin-salman-saudi-arabia-domestic-reforms-benefit-wider-world-radical-a8237261.html>.

¹¹⁷ Saudi Arabia Country Profile, *BBC*, <http://www.bbc.com/news/world-middle-east-14702705>.

¹¹⁸ Basic Law of Governance, Royal Order No. (A/90), March 1, 1992, Article 56.

¹¹⁹ Saudi king's son Mohammed bin Salman is new crown prince, *BBC*, June 21, 2017, <https://www.bbc.com/news/world-middle-east-40351578>.

¹²⁰ Prince Mohammed bin Salman is currently the Crown Prince, Minister of Defense, Vice President of the Council of Ministers, and chairman of the Council for Economic and

graduated with a bachelor's degree in law from King Saud University.¹²¹ As a policymaker, he prescribed the latest campaign against corruption as a type of “shock therapy.”¹²² Although he faced criticism that his plan might be risky, the Crown Prince stated that the rapid changes are essential to further developments in the country.¹²³

Under the Saudi political regime, legal reforms can be attainable if the king has expressed his desire for them and made action toward achieving them. The Consultative Council, Majlis Al-Shura, can only suggest laws¹²⁴ and propose certain reforms to the Council of Ministers¹²⁵, who can pass laws after the approval of the president of the council, namely the king.¹²⁶ While a member from the Consultative Council can suggest a legal reform, no change is guaranteed without the king’s direct approval as the president of the Council of Ministers.¹²⁷

The Council of Ministers of Saudi Arabia has the authority to issue laws according to Article (2): “Subject to provisions of the Shura Council Law, laws, treaties, international agreements and concessions shall be issued and amended by Royal Decrees after being reviewed by the Council of Ministers.”¹²⁸ Accordingly, the king reserves the power to pass laws as a prime minister via a “royal decree,” but the laws must comply with Sharia’. The king also has the authority to issue royal orders without consulting the Council of Ministers or Shura Council. In addition, Article (22) states,

Each minister shall have the right to propose a draft law or regulation related to the affairs of his ministry. Each member of the Council of Ministers shall have the right to propose whatever they deem worthy of discussion in the Council after the approval of the President of the Council of Ministers.¹²⁹

Development Affairs. His Royal Highness Prince Mohammed bin Salman bin Abdulaziz Al Saud, Ministry of Defense, <https://www.mod.gov.sa/Leaders/Minister/Pages/CV.aspx>.

¹²¹ Saudi Crown Prince Mohammed bin Salman, power behind the throne, BBC, March 7, 2018, <http://www.bbc.com/news/world-middle-east-40354415>.

¹²² Mohammed bin Salman: The Campaign against Corruption is a Treatment for "Shock" Needed by Saudi Arabia, Okaz, February 28, 2018, <https://www.okaz.com.sa/article/1619319/-احتاجته-علاج-بالصدمة-احتاجته-السعودية>.

¹²³ David Ignatius, *The crown prince of Saudi Arabia is giving his country shock therapy*, Washington Post, February 27, 2018, https://www.washingtonpost.com/opinions/the-crown-prince-of-saudi-arabia-is-giving-his-country-shock-therapy/2018/02/27/fd575e2e-1bf0-11e8-9de1-147dd2df3829_story.html?utm_term=.8294ee024c34.

¹²⁴ Article (15): Law of the Shura Council, Royal Order No. A/91 dated 27 / 8 / 1412. See also, Article (23): “Any group of ten members of The Shura Council have the right to propose a new draft law or an amendment to a law already in force and submit it to the Chairman of the Council. The Chairman shall submit the proposal to the King.”

¹²⁵ Article 15 of Law of the Shura Council, Royal Order No. A/91 dated 27 / 8 / 1412.

¹²⁶ Bureau of Experts at the Council of Ministers can prepare draft laws and review and propose amendment to current laws, Bureau of Experts at the Council of Ministers, <https://www.boe.gov.sa/ViewStaticPage.aspx?lang=en&PageID=4>.

¹²⁷ Law of the Council of Ministers, Royal order No. A/13 dated 3/3/ 1414 Hijri.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

In an interview with Bloomberg, the Crown Prince approximated that the proposed reforms would generate an additional \$100 billion per year by 2020.¹³⁰ Economic improvements are key to the 2030 vision, which states,

The second pillar of our vision is our determination to become a global investment powerhouse. Our nation holds strong investment capabilities, which we will harness to stimulate our economy and diversify our revenues. The third pillar is transforming our unique strategic location into a global hub connecting three continents, Asia, Europe and Africa.¹³¹

In his capacity as the Chairman of the Council of Economic Affairs and Development, Prince Mohammed bin Salman approved the execution plan of the privatization program. The program's main goals are to promote competitiveness and to encourage both local and foreign capital to invest locally in Saudi Arabia.¹³² Since his appointment as a Crown Prince, Mohammed bin Salman has fulfilled a surprisingly decent amount of his promises. This paper argues that accomplishing the goals of the 2030 vision requires an efficient, neutral, and reliable dispute resolution mechanism and enforcement rules.

Political and economic stability are essential to a successful government. Furthermore, the state's efforts at the international level to ensure global welfare are of equal importance.¹³³ There is a robust political readiness toward constructing an investment-friendly environment in the Kingdom.¹³⁴ The 2030 vision aims to reduce Saudi Arabia's

¹³⁰ Alaa Shahine & Deema Almashabi, *Biggest Ever Saudi Overhaul Targets \$100 Billion of Revenue* Bloomberg, Bloomberg, April 4, 2016, <http://www.bloomberg.com/news/articles/2016-04-04/biggest-ever-saudi-overhaul-targets-100-billion-of-new-revenue>.

¹³¹ Kingdom of Saudi Arabia, Vision 2030, <http://vision2030.gov.sa/en>.

¹³² Chaired by the Crown Prince, The Council of Economic Affairs and Development Adopts the Privatization Program, Alriyadh, April 24, 2018, <http://www.alriyadh.com/1677260>.

¹³³ See: "Similarly, we should ask what advantages the state brings in the international system, just as Oliver Williamson asked why corporations exist in the market. Here, rather than the market, the institutional context is the international system. Rather than efficiency and economic growth, the normative goal is global welfare." John Yoo, *Fixing Failed States*, UC Berkeley Public Law Research Paper No. 1552395. (2010), <https://ssrn.com/abstract=1552395>.

And from the same id source: "Economic integration into a worldwide or regional market reduces the need to be part of a large nation-state with its own open market. The more open an international trade regime becomes, the more viable smaller states become." see Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1779-80 (2002) See also, *Constructing Norms of Humanitarian Intervention*, in *The Culture of National Security: Norms and Identity in World Politics* (Peter J. Katzenstein ed., 1996.)

¹³⁴ See "Saudi Arabia's Crown Prince Mohammed bin Salman has ordered a crackdown on corruption, the latest in a wave of frenetic changes in the kingdom over the past 2-1/2 years. Prince Mohammed says he is determined to remodel his conservative country into a modern state no longer dependent on oil.", William Maclean, *Shifting sands: What is changing in Saudi Arabia?* Reuters, Reuters, November 8, 2017,

dependence on oil and diversify its economic resources. However, the missing piece for investors is apparently that “while the country has undertaken reforms to encourage foreign investment, the legal framework in resolving commercial disputes is considered by some to be inadequate.”¹³⁵ The goals of the new vision include improvements to the business environment to be conducive to long-term investment. This initiative aspires to take advantage of the Kingdom’s comparative advantage in specific areas, such as its geopolitical and economic status. One of the main objectives of the vision is to “apply international legal and commercial regulations strictly,”¹³⁶ which correlates directly to fostering an arbitration-friendly environment.

In an interview with Time, the Crown Prince stated that about \$230 billion per year is taken outside of Saudi Arabia. Moreover, without actual change, the numbers will increase to between \$300 and \$400 billion. These figures should not be acceptable. In order to change them, the Prince is taking extra measures toward a place where half of this money is spent in Saudi Arabia. He has expended substantial effort and stated several times in the interview that he does not want to waste time, and the country is ready for a change. He emphasized that one of his concentrations is to improve the economy without depending on oil as a sole provider.¹³⁷

III. Role of Religion

Saudi Arabia is a religious country that depends comprehensively on Islam. After all, it is the home of two holy religious sites for Muslims: *Almasjid Alharam* and *Almasjid Alnabawai*.¹³⁸ Given the prominence of these places, the country’s powerful position in the Muslim world is apparent. Islamic law – Sharia’ – is the primary source of law in the Kingdom¹³⁹, so all Saudi courts and judicial tribunals are bound to apply Sharia’ principles.¹⁴⁰ Article (1) of the Basic Law of the Governance states, “The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic state. Its religion shall be Islam and its constitution shall be the book of God and the Sunnah (traditions) of his messenger.”¹⁴¹ It is evident that the character of the country relies on its religious identity. Sharia’ law is not in opposition to

<http://www.reuters.com/article/us-saudi-arrests-milestones/shifting-sands-what-is-changing-in-saudi-arabia-idUSKBN1D8181>.

¹³⁵ Country risk of Saudi Arabia: Investment, Societe Generale, <https://import-export.societegenerale.fr/en/country/saudi-arabia/country-risk-in-investment>.

¹³⁶ Thriving Economy Open for Business Saudi Vision 2030, Vision 2030, <http://vision2030.gov.sa/en/node/7>

¹³⁷ Crown Prince Mohammed bin Salman Talks to TIME About the Middle East, Saudi Arabia's Plans and President Trump, Time, April 5, 2018, <http://time.com/5228006/mohammed-bin-salman-interview-transcript-full/>.

¹³⁸ The General Presidency for the affairs of the Grand Mosque and the Prophet's Mosque, GPH, <https://www.gph.gov.sa/ar-sa/Pages/default.aspx#>

¹³⁹ The Basic Law of Governance, enacted by Royal Decree No. A/90, 27/8/1412H., corr. (Jan. 3, 1992), Art. 1 (“[The] constitution [of the Kingdom of Saudi Arabia] is Almighty God’s Book, the Holy Qur’an, and the Sunnah (traditions) of the Prophet (PBUH).”).

¹⁴⁰ *Ibid.*

¹⁴¹ Ministry of Foreign Affairs, [http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/aboutKingDom/SaudiGovernment/Pages/BasicSystemOfGovernance35297.aspxz9875431\\$2qriopo8951\\$](http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/aboutKingDom/SaudiGovernment/Pages/BasicSystemOfGovernance35297.aspxz9875431$2qriopo8951$).

economic prosperity, but Saudi law can be. Ambiguity and lack of transparency are not an equation for an effective and functional legal framework. Thus, several steps are necessary to produce tangible and constructive results.

It is also notable that any subject that critically engages with Sharia' might be perceived as taboo. Nevertheless, critical legal studies have stimulated periodical reviews of norms and standards in legal theory to challenge them.¹⁴² Such motions of criticism and analysis are doubtfully attainable at the religious level, at least in the current period. This point of view is especially bothersome when religion is the main basis of legal rules, which ultimately restricts the criticism of legal rules if they are connected with Sharia'.

Religious considerations are an especially vital component when implementing an active form of consumer arbitration in Saudi Arabia.¹⁴³ Such considerations can affect either substantive or procedural analysis, as the use of a public policy defense regulates the legitimacy of interest awards.¹⁴⁴ In return, the religious component can especially deter foreign businesses that are interested in the Saudi market.

The relevant fundamental principles of Islamic law developed between the 7th and 10th centuries, and few developments have occurred since then. There are areas of law that are not yet codified, which causes uncertainty¹⁴⁵, and the doctrine of stare decisis is omitted, which results in a system that lacks the stability that judicial precedent imparts to the legal system. Writings by older jurists in that period became influential to people writing current Islamic laws.¹⁴⁶ Consequently, there is a lack of modernity, as the laws are written based on the opinions of jurists who lived centuries ago. Combining these factors instigates instability in the current judicial system of the Kingdom, and these root complications might have propelled the whole legal system into an imbalanced state.

Although the legal system has a foundation in Islamic law and a more Hanbali school of interpretation in particular, there is still apparent instability due to numerous other aspects. For more in-depth analysis, the publication of judgments is quite limited, as it only officially started a couple of years ago and on a small scale. However, the Ministry of Justice is progressing in the right direction by expanding access to cases.¹⁴⁷ Still, these issues in combination can lead to differing interpretations even within one Hanbali school, so there is no unification of judgments. These complications have a serious effect on the willingness of businesses to become involved in Saudi economy and legal system.

¹⁴² See, "The notable characteristics of these modern critical legal theories is their aim to move beyond criticism to the construction of novel conceptions of law which demonstrate the capacity of law both to effect and regulate significant social change."

David Jabbari, *From Criticism to Construction in Modern Critical Legal Theory*, 12 Oxford Journal of Legal Studies 507–542 (1992).

¹⁴³ T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG Be Enforced When the Forum Is an Islamic State?*, 9 International Legal Perspectives (1997).

¹⁴⁴ M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT'L L.J. 289(2000).

¹⁴⁵ Nathan J. Brown, *Why won't Saudi Arabia write down its laws?*, Foreign Policy, January 23, 2012, <http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws/>.

¹⁴⁶ Saudi Arabian Law Overview, Hatem Abbas Ghazzawi & Co, http://www.saudilegal.com/saudilaw/01_law.html.

¹⁴⁷ Saudi Arabia's Ministry of Justice, SAUDI ARABIA'S MINISTRY OF JUSTICE, <https://www.moj.gov.sa/ar/SystemsAndRegulations/Pages/System1434.aspx>.

a. Interrelation of Law and Religion

The entire Saudi legal system has an Islamic foundation. The *Quran*, a religious holy book for Muslims, along with the *Sunnah*, the traditional portion of Muslim law that is based on the words and acts of the Prophet Muhammad¹⁴⁸, are the central sources of Islamic law.¹⁴⁹ The third source is *ijma'*, consensus or agreement, which cannot overturn a verse from the *Quran* or *Sunnah* but can serve as a method when there are no guidelines in the two main sources.¹⁵⁰ This particular source is somewhat difficult to follow for numerous reasons. For instance, the primary challenge is identifying the people whose opinions can be counted toward an agreement.¹⁵¹ Thus, it is not really practical nor attainable. The fourth source of Islamic jurisprudence is *qiyas*, or analogical inference or deduction¹⁵², which are critical sources of law.¹⁵³

The governing school of thought in Islamic law in Saudi Arabia is arguably the Hanbali school. The Royal Decree of 1928 confirmed that judges were obligated to apply the Hanbali school doctrines. However, since the passing of the Basic Law of Rule in 1992, courts must rely on the *Qur'an* and the *Sunna* as the bases for ruling, and it is no longer as accurate to say that the Hanbali school is the only one that is followed. Even though the law itself does not identify a certain school of Islamic law, Saudi Arabian courts are practically inclined toward the Hanbali school.¹⁵⁴

In instances where both the *Quran* and *Sunnah* fail to clarify a matter, a secondary source is consulted. *Ijtihad*, or independent reasoning¹⁵⁵, is a powerful source for several reasons. Saif Aldin Alamidi has defined the concept as the "total expenditure of effort in the search for an opinion as to any legal rule in such a manner that the individual senses (within himself) an inability to expend further effort."¹⁵⁶ Yet, after a period in which four schools existed with diverging interpretations, *ijtihad* stopped in the 10th century. Because Islamic legal systems depend on those schools, the lack of modernization caused a state of rigidity in the legal system.¹⁵⁷ It is essential to distinguish the use of "source of law" as a phrase from

¹⁴⁸ Sunnah, Dictionary, <http://www.dictionary.com/browse/sunnah>.

¹⁴⁹ Wael B. Hallaq, *An Introduction to Islamic Law* (2012).

¹⁵⁰ *Ijma*, Oxford Islamic Studies, <http://www.oxfordislamicstudies.com/article/opr/t125/e989>.

¹⁵² *Qiyas*, Merriam Webster, <https://www.merriam-webster.com/dictionary/qiyas>.

¹⁵³ "According to this method, the ruling of the *Quran* or *Sunnah* may be extended to a new problem provided that the precedent (*asl*) and the new problem (*far*) share the same operative or effective cause (*illa*)" *Qiyas*, Oxford Islamic Studies, <http://www.oxfordislamicstudies.com/article/opr/t125/e1936>.

¹⁵⁴ *Supra* note at 148.

¹⁵⁵ *Ijtihad*, Oxford Islamic Studies, <http://www.oxfordislamicstudies.com/article/opr/t125/e990>.

¹⁵⁶ Nazeem MI Goolam, *Ijtihad and Its Significant For Islamic Legal Interpretation*, 1441 Michigan State Law Review (2006).

¹⁵⁷ Anderson, *Law as a Social Force in Islamic Culture and History* > Bull. School of Oriental & African Stud. 13, 16 (1957), as cited in: Iain Ghaneum & Maren Hanson, *Outline of Islamic jurisprudence 1981, from: The Influence of French Law on the Legal Development of Saudi Arabia*, 2 Arab Law Quarterly (1987).

the view of the main sources as the law itself.¹⁵⁸ This is an indicator that the *Quran* and *Sunnah* are not expected to be inflexible but rather re-interpreted through *ijtihad* to continue the process of development.¹⁵⁹

Another important source is called *fatwa*, which refers to a non-binding judgment on a point of Islamic law as given by a recognized religious authority.¹⁶⁰ *Fatwa* comes from a person called a *mufti*, or religious scholar. In Saudi Arabia, the general *mufti* heads both The Board of Senior Ulama¹⁶¹ and the Permanent Committee for Scholarly Research and Ifta'.¹⁶² It is important to note that judges employ the *fatwa* in their reasoning, so even if it is not immediately binding, it still affects judgments to a certain degree.

Analyzing language can reveal many hidden conceptions and beliefs.¹⁶³ Law as a term – *qanoon* in Arabic – used to not have a particularly admirable reputation in Saudi Arabia. In fact, *qanoon* is associated with a Western concept of law with no religious grounds. For instance, Saudi Arabia's legal schools do not carry the name "law school" but rather another, similar term: *hoqooq*, which directly translates to rights. Some law schools prefer to use the word *nitham*, which means system. This difference in vocabulary is a clear example of the tension between religious authorities and legal scholars. The former scorn the latter as though superior to them because their education is based solely on religion, and they believe that the law should derive only from Islamic resources.¹⁶⁴

Some might argue that the problem of demeaning law is one of the past, but it has manifested in several incidents in current times. Even with numerous years of experience, Sharia' judges are not as professionally suited for the job compared to legal-based graduates. Some Sharia' judges have repeatedly sent inquiries to the Supreme Council of the Judiciary to clarify certain matters even when a statute contained a clear, codified rule. According to a doctor in Sharia', a judge with a legal background would probably understand the law in a more accurate way. This doctor proclaimed that the current designation of Sharia' judges is a "crime" against people's rights.¹⁶⁵

Statistical evidence suggests that the ideologies of judges have an effect on their outcomes.¹⁶⁶ This influence is relevant when considering the placement of law graduates in judge positions as well as how their outcomes might differ compared to those of Sharia'

¹⁵⁸ Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 THE AMERICAN JOURNAL OF COMPARATIVE LAW (1987), http://www.jstor.org/stable/839668?seq=1&cid=pdf-reference#fndtn-references_tab_contents.

¹⁵⁹ MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (2005).

¹⁶⁰ Fatwa, Dictionary, <http://www.dictionary.com/browse/fatwa>.

¹⁶¹ General Secretariat of the Council of Senior Scholars, <http://www.ssa.gov.sa/>.

¹⁶² The General Presidency of Scholarly Research and Ifta, <http://www.alifta.net/default.aspx?languagename=ar#1>.

¹⁶³ Philosophy of Linguistics, Stanford Encyclopedia of Philosophy (2015), <https://plato.stanford.edu/entries/linguistics/>.

¹⁶⁴ Waad Alturki, *An Argument in Saudi, A Judge in Saudi Accuses the country's universities Who teach Law of Disbelieving*, The Huffington Post Arabia, April 5, 2016, http://www.huffpostarabi.com/2016/04/05/story_n_9618056.html.

¹⁶⁵ Mohammed Aljadlani, *A Law Graduate Might Deserve Judicial Appointments more than a Sharia' Graduate*, Alriyadh, December 13, 2017, <http://www.alriyadh.com/1646085>. Dr. Aljadlani holds a Doctorate from Higher Judicial Institute - Sharia Policy Department And a Sharia' degree.

¹⁶⁶ Jon Hanson, *Ideology, Psychology, and Law* (2012).

graduates. It is presumably likely that someone with a purely religious education would issue a judgment that is highly dependent on a conservative religious point of view. In addition, it is possible that people with a legal education might have a different interpretation of the law.

A key point of clarification is that judges graduate from Islamic schools, and law graduates cannot be appointed as judges. To be selected as a Saudi judge, a list of conditions must apply. The most important is that the judge shall be fully competent to hold his position as a judge in accordance with Sharia'. In addition, he should acquire a degree of one of the Sharia colleges or any equivalent degree. In the latter case, the Supreme Judicial Council would conduct a special examination of the candidate.¹⁶⁷ One might think that law is an "equivalent" degree that permits law graduates to pursue a career as a judge. Yet, Articles 35 and 36 list the conditions for appointing judges to specific rankings, and there is an obvious preference for Sharia' graduates.¹⁶⁸ In 2014, the Shura Council discussed a proposal to consider law graduates as potential judges, but the proposal was not adopted.¹⁶⁹ The former judge Dr. Mohammed Aljadlani has stated,

The continuation of the appointment of judges from the graduates of Sharia schools who have never studied the law is a major crime against Sharia and law together, an offence on the Saudi judiciary, and a crime against the rights of people.¹⁷⁰

An examination of the study plan of Sharia' schools reveals that a complete lack of law classes for students to take. Moreover, even legal matters such as transactions are studied with religious methods rather than legal ones.¹⁷¹ These Islamic studies students, who have the chance to become judges, the closest course with a commercial law element in transactions is called "Jurisprudence of Treatment." In this course, Sharia' students study provisions of sales under a religious approach. The study plan of the course centers on topics regarding contract types, such as the definition of a sales contract, its form, and its terms and conditions as well as Riba, loans, mortgages, and reconciliation.¹⁷²

¹⁶⁷ Article 31 (C+D) of the Law of the Judiciary, Royal Decree No. M/78 dated 19 / 9 / 1428.

¹⁶⁸ Article 35 states conditions for a judge to hold a (B) ranking, and other than having experience for at least a year in the lower ranking there are indications of evident bias. The judge needs to either "taught the subject of Islamic jurisprudence or its principles at a college in the Kingdom for four years at least or have obtained a Master's degree from the High Judicial Institute or from a Sharia college in the Kingdom in the field of Islamic jurisprudence or its principles or have obtained the Legal Studies Diploma from the Institute of Public Administration from among holders of a degree from a Sharia college in the Kingdom with a general grade not lower than (Good) and with a grade of at least (Very Good) in Islamic jurisprudence and its principles."

The Law of the Judiciary, Royal Decree No. M/78 dated 19 / 9 / 1428.

¹⁶⁹ 4 votes short, Shura refuse to appoint law graduates as judges, Sabq, March 3, 2014, <https://sabq.org/CUSfde>.

¹⁷⁰ *Supra* note at 163.

¹⁷¹ Al-Imam Muhammad Ibn Saud Islamic University is one of the largest Islamic universities in the Kingdom. Its study plan reveals that students take these classes: Fiqh of Worship, Fiqh of Transactions, Inheritance, Family Fiqh, and a couple of criminal focused classes. Al-Imam Muhammad Ibn Saud Islamic University, https://units.imamu.edu.sa/colleges/sharia/Pages/alfeqh_historry_271214361.aspx.

¹⁷² Imam Muhammad ibn Saud Islamic University https://units.imamu.edu.sa/colleges/sharia/study_programs/Documents/feqh/new/feqh264p.pdf

In contrast, the study plan for law schools is significantly more advanced.¹⁷³ A law student at King Abdulaziz University, School of Law studies legal course such as evidence, civil contracts, commercial law, commercial contracts, bank operations, negotiable instruments, and bankruptcy. Law students are also well equipped with international law knowledge since they are required to take specialized courses in this area before graduating.¹⁷⁴ Ironically, only Sharia' judges, who have no formal education in law, are ultimately assigned to the bench to assess the enforcement process of foreign arbitration awards. Yet, Sharia' graduates are somehow regarded as adequate to be judges, while law graduates are not.

Judges do have an immense amount of control over penalties especially in criminal law. Whereas *hudud* are punishments that are fixed in the Quran and Sunnah,¹⁷⁵ *ta'zir* is a punishment for an illegal act that is left to the discretion of the judge.¹⁷⁶ And while *hudud* are composed and acknowledged, *ta'zir* is more ambiguous, as judges maintain supremacy in making the decision. Another example that is borrowed from criminal law but can still offer insight into the attitude of religious judges toward codified laws is the "judgement by suspicion" principle, which occurs when a judgment is based on a lack of conclusive evidence, and the mere accusation can lead to a verdict. This principle was effective until recently when the Ministry of Justice issued a circular that prevents judgements based on suspicion without evidence.¹⁷⁷

These tendencies are relevant to consumers because in instances where there is a broad discretion for judges to issue their judgments, there is a probability that ideology might influence the decisions, especially when there is no clearly written law. Nevertheless, it is not easy to prove this hypothesis, as no data are readily available to measure judges' ideologies. Arguably, when judges change the law, it could possibly cause loss of liberty. Thereby, the judge would favor a group of people or set of beliefs over another.¹⁷⁸ In the case of Saudi consumers, judges do have some discretion to interpret the law or lack thereof, which might not be a problem in itself; however, the loopholes that are scattered between statutes to respect Sharia' boundaries without explicitly stating the limits might render the justice process incompetent.

¹⁷³ A study plan from King Abdulaziz University, Law School demonstrated that its courses plan included: Fundamentals of Law, Administrative Law, Criminal Law, Commercial Law, Private and Public International Law, Labor Law, Administrative Contracts, Commercial Contracts, Civil Contracts, Evidence, Bankruptcy, Civil Procedures, Judiciary of Enforcement, Property, Family Law, and Figh.

King Abdulaziz University, https://law.kau.edu.sa/Default.aspx?Site_ID=152&Lng=AR.

¹⁷⁴ Faculty of Law, King Abdulaziz University, <https://law.kau.edu.sa/Pages-course-desc.aspx>.

¹⁷⁵ Hadd, Oxford Islamic Studies, <http://www.oxfordislamicstudies.com/article/opr/t125/e757>.

¹⁷⁶ Tazir, Oxford Islamic Studies, <http://www.oxfordislamicstudies.com/article/opr/t125/e2363>.

¹⁷⁷ Saudi Judiciary: No Penalty for Suspicion, Either Conviction or Innocence, Alsharq Alawsat Newspaper, January 3, 2019, <https://aawsat.com/home/article/1530716/-القضاء-السعودي-لا-عقوبة-للشبهة-إما-إدانة-أو-براءة>.

¹⁷⁸ Stephen B. Presser, *Judicial Ideology and the Survival of the Role of Law: A Field Guide to the Current Political War over the Judiciary*, 39 Loyola University Chicago Law Journal (2008), <https://lawecommons.luc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1140&context=luclj>.

In 1958, the Council of Ministers conducted an enormous initiative to introduce modern legislation by issuing more than 200 codes in numerous areas of law. These codes were written by Saudi legal scholars who graduated from schools in France, Egypt, and Lebanon, and Egyptian scholars collaborated with the Saudi team to codify these laws. The codes were influenced by the French legal system but retained a unique abidance to the rules of Sharia'.¹⁷⁹ The influence is clearly evident in the case of the Saudi Companies Law, which was derivative from the equivalent Egyptian code.¹⁸⁰ To illustrate, the types of companies in Saudi Arabia under that code resemble those under the Egyptian code. Notably, Egypt is known for its direct French legal influence.¹⁸¹

Vogel has summarized a suitable approach that reflects his views of *siyasa shar`iyya*, which refers to governance in accordance with Sharia', and its dependence on Sharia'.¹⁸² He has identified two categories of application to Islamic law. The first is Islamic jurisprudence. Law in this category is created by religious-legal scholars, and its application is conducted in religious-legal courts. The second category is influenced by authority from the political structure. In this mode, "the ruler exercises a power, termed 'siyasa' (governance) and delegated to him by Sharia' itself, to make laws to serve the public interest (*maslaha*), subject only to the requirement that these laws not contradict basic Sharia' principles."¹⁸³ In the latter category, laws are human-made, and the King issues regulations to supplement the first category. In a ranking of these categories, the first would outrank the second, and the latter would thus be exposed to checks.¹⁸⁴

Law is an essential factor in determining economic development.¹⁸⁵ The link between the two is in the hand of the government as an enforcer of both property rights and contracts.¹⁸⁶ In The Second Treatise of Civil Government, John Locke accentuated the significance of governance throughout "established standing Laws, promulgated and known

¹⁷⁹ I Ghaneum & Maren Hanson, *Outline of Islamic jurisprudence 1981, from: The Influence of French Law on the Legal Development of Saudi Arabia*, 2 Arab Law Quarterly (1987).

¹⁸⁰ Saudi Companies Law. Royal Decree No. MJ dated 22 Rabia I 1385 (21 July 1965.)

¹⁸¹ Maren Hanson, *The Influence of French Law on the Legal Development of Saudi Arabia*, 2 Arab Law Quarterly (1987),

https://www.jstor.org/stable/3381697?seq=1#metadata_info_tab_contents.

¹⁸² Frank E. Vogel, *Shari'a in the Politics of Saudi Arabia, The Review of Faith & International Affairs*, (2012).

¹⁸³ *Ibid.*

¹⁸⁴ Also, see "In fact, scholar-judges have until today declined to apply nizams where in their view the king has exceeded his constitutional powers. This problem has forced the state to include in all its more ambitious laws provision for specialized tribunals within the executive branch to apply them."

Supra note at 167.

This might point of view might also explain the abundance of specialized tribunals and the past trends of moving from courts to tribunals.

¹⁸⁵ Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 THE AMERICAN JOURNAL OF COMPARATIVE LAW (2008).

¹⁸⁶ Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, Annu. Rev. Polit. Sci. (2008).

to the People.”¹⁸⁷ Thus, using law as a tool when it is feasible should be prioritized by the Saudi Arabian government. The Kingdom should prioritize boosting growth and prosperity by utilizing legal reforms as a tool. After all, empirical evidence has adequately concluded that spending on legal developments benefits economic growth. An enforceable rule of law alongside policies that attract investors can promote and positively rebrand the country.

Still, Saudi Arabia does not necessarily need to abandon its Sharia’ standards. Rather, it can focus on developing certainty standards in the realm of legal disputes to grow into the international market.¹⁸⁸ Foreign businesses especially do not want to be involved in a non-reliable Saudi Arabian judicial system. Thus, arbitration can provide an instrument to attract investors into the Saudi market without sacrificing their need for a reliable dispute resolution mechanism. The change could be as simple as defining the country’s meaning of Sharia’-based policies. This movement would assure investors that their awards will be smoothly enforced if they follow the rules. After all, a well-defined arbitration setting would have an effect on stability in investment within the private sector.¹⁸⁹

In 2017, the judicial system witnessed the establishment of new specialized commercial courts. This initiative was intended to “promote a business climate built on trust and expedite the resolution of commercial disputes,” according to the justice minister.¹⁹⁰ However, it did not take into account that building on the trend of installing specialized courts without implementing any real change to the legal system might not yield positive results. The lack of codifications in many areas, reliance on Islamic-based graduates with little legal education, and lack of a precedence-based system might not magically allure investors to trust the judiciary.

Currently, investors who seek enforcement have no option of going to a non-Sharia’ judge, which is the only possibility. This limitation ought to change in order to establish respectable standards for the legal system. It also exemplifies that, without an arbitration mechanism in place, the only choice is to result to Sharia’ judges as adjudicators. Meanwhile, arbitration in Saudi Arabia presents an opportunity to select legal-based arbitrators. For some,

¹⁸⁷ John Locke, *The Second Treatise of Civil Government* (1689), As cited in: *The Rule of Law*, Stanford Encyclopedia of Philosophy (2016), <https://plato.stanford.edu/entries/rule-of-law/#JohnLock>.

¹⁸⁸ “With respect to commercial law, the aggregate evidence on the economic significance of the availability of formal enforcement mechanisms for long-term contacts suggests that both a well-developed body of formal contract law and an effective civil court system may be important determinants of growth.” Kevin Davis & Michael J. Trebilcock, *What Role do Legal Institutions Play in Development?* (1999). What this suggests is plain and simple; in order to achieve an advancement and make a positive impact in economic there is a need to develop contract law alongside a sturdy court system. What this paper is suggesting is that in circumstances where the development process is a complicated one should look at alternative dispute mechanisms such as arbitration to lift the structure of the legal system.

¹⁸⁹ Arieta Vakasukawaqa, *Suva, International Arbitration Bill Ensures Stability, Says Tuiketeti*, Fiji Sun (2017), <http://fijisun.com.fj/2017/07/27/international-arbitration-bill-ensures-stability-says-tuiketeti/>.

¹⁹⁰ Saudi Arabia Sets up Commercial Courts to Expedite Investment, Reuters, October 16, 2017, <https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT>.

compared to going in front of a Sharia' judge to enforce an award, arbitration will be the lesser of two undesirable options until legal graduates can be appointed as judges.

The lack of extensive secular legal training requirements for judges who review commercial and investment disputes may be a disincentive for businesses that are interested in entering the Saudi market. Judgeships are available exclusively to male judges who are Sharia' graduates. Commercial judges are required to undergo "legal" training that continues for "at least" two months that is conducted by judges and experts.¹⁹¹ There are no indications of the type of training that judges undergo, but it might be safe to assume that one cannot attain a high level of legal knowledge in two months. After all, Sharia' graduates do not even study the constitution let alone advanced legal theories.¹⁹² Besides, the application of Sharia' courts usually conveys redress for actual damages and does not account for speculative losses.¹⁹³ These practices mark the courts as less attractive; thus, arbitration offers a superior alternative.

Relying on religious principles in law is not necessarily problematic, but the unique law system of the Kingdom could be dissuading for foreign investors. Article 2 of the Saudi Judiciary Law provides that judges are autonomous in their ruling and are only required to follow laws¹⁹⁴ and Sharia'.¹⁹⁵ Stating the word "Sharia'" without specifying a definition can induce confusion and wariness among investors. For example, *Riba*, which is charged interest,¹⁹⁶ is prohibited in Islam; thus, it should be forbidden under Sharia'. There is a high probability that a case that contains *Riba* in an arbitration forum would not be upheld or enforced, as it might contradict Sharia' and, thus, public policy.¹⁹⁷

¹⁹¹ See, The Implementation Mechanism of the Judiciary Law and the Board of Grievances Law, Article 6 (10), Article 7 (9), Article 8 (9).

¹⁹² Osama Alqahtani, *Shoura Council and the Discussion of Appointing Judges with Legal Based Education*, Aleqtessadiya, December 6, 2017, http://www.aleqt.com/2017/12/06/article_1294221.html.

¹⁹³ UK, Foreign & Commonwealth Office, Guidance, Overseas Business Risk - Saudi Arabia, Updated 12 March 2017 <https://www.gov.uk/government/publications/overseas-business-risk-saudi-arabia/overseas-business-risk-saudi-arabia>

¹⁹⁴ There is a scholarly discussion in Saudi that distinguish between the law and *Shria'*. By using the term "law", it refers to human-made system of rules, while Sharia' refers to God's rules.

¹⁹⁵ Law of the Judiciary, Bureau of Experts at the Council of Ministers, <https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=131&VersionID=160>.

¹⁹⁶ Will Kenton, *Riba*, Investopedia (2018), <https://www.investopedia.com/terms/r/riba.asp>.

¹⁹⁷ "That any increase or interest on the debt that has been resolved and the inability of the debtor to meet it in exchange for postponement as well as the increase or interest on the loan since the beginning of the contract these images *riba* is forbidden by Sharia'. Accordingly, the claimant shall only have capital restitution." Appeal Court number. 626/ES/7 on 29/06/1432 Hijri.

b. Islamic Finance

Understanding Islamic finance is crucial to studying money-related topics in an Islamic country. Since consumers buy goods or services using money, Islamic finance directly concerns these substances. The capital of Islamic banks is projected to rise to \$4 trillion in the 2020s.¹⁹⁸ To better assess foreign investors' understanding of Islamic finance, there is a need to refine some barriers. Sharia' prohibits investment in industries that engage with *haram*, or forbidden, products, such as alcohol, drugs, pork-related goods, and pornography. Thus, establishing a guide could support investors in determining the least risky way to securely invest in Saudi Arabia.¹⁹⁹

The ICC Financial Institutions and International Arbitration, ICC Arbitration ADR Commission Report has proposed the creation a global legal framework for Islamic finance.²⁰⁰ However, the multiplicity of Islamic schools of thoughts might make it challenging to implement the proposal. If Saudi Arabia manages to codify its own interpretation of Sharia' compliance regulations in finance – which would in itself be a major achievement – there is at least a slight chance of its implementation at the regional level.

There is a general prohibition on *riba* and *gharar* in Islam, as those two areas are believed to cause injustice in society.²⁰¹ Dr. Abdel-Rahman Yousri Ahmad has defined *riba* as "an unjustified increment in borrowing or lending money, paid in kind or in money above the amount of loan, as a condition imposed by the lender or voluntarily by the borrower."²⁰² The primary source of the prohibition of *riba* is in the *Quran*:

Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest.²⁰³

Based on that prohibition, Saudi Arabia classifies any kind of interest as *riba*, and it is therefore illegal.

As for alternatives to *riba*, Investopedia has suggested the following:

Murabaha is an Islamic financing structure in which an intermediary buys a property with free and clear title.

Murabaha is not an interest-bearing loan, which is considered *riba*, and is an acceptable form of credit sale under Sharia'.

¹⁹⁸ Riyadh Mohammed, *Hot trend in 2017: Rise of Islamic banks on Main St. USA*, CNBC, December 2, 2016, <http://www.cnbc.com/2016/12/02/under-the-radar-islamic-banks-rise-in-th.html>.

¹⁹⁹ Arz El Murr, *Islamic Finance and Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)* (2016), <https://www.imf.org/external/pubs/cat/longres.aspx?sk=43754.0>.

²⁰⁰ Financial Institutions and International Arbitration – ICC Arbitration & ADR Commission Report, ICC (2016), <https://iccwbo.org/publication/financial-institutions-international-arbitration-icc-arbitration-adr-commission-report/>.

²⁰¹ What is Gharar?, Islamic Finance, http://www.islamic-finance.com/item160_f.htm. Abridged from *The Problem with Interest*, 3rd edition, 2010.

²⁰² Abdel-Rahman Yousri Ahmad, *Riba, Its Economic Rationale and Implications*, Institute of Islamic Banking and Insurance, http://www.islamic-banking.com/iarticles_8.aspx.

²⁰³ Quran, Surat Al-baqarah, 2/275

Another issue in Islamic finance is *gharar*, or deceptive uncertainty, which is prohibited in Islam.²¹¹ The term is used to describe derivate contracts. There are four conditions that must be presented to indicate *gharar*: it must be of a major scale, affect a financial contract, target the primary components of the contract, and be critical to meeting the needs.²¹² If a contract possesses all of those factors, then *gharar* could render the contract non-enforceable in Saudi Arabia. In this case, the use of public policy under Sharia' is attainable.

A crucial, unique aspect of commercial transactions in an Islamic-based country is the prohibition on *jahala* in Sharia'. *Jahala* refers to a state of ignorance that, when pertaining to sales, allows buyers to raise a *jahala* argument to void the transaction.²¹³ This prohibition is due to the unfair advantage whereby one party possesses more information compared to the other.²¹⁴

Overcoming the potential problems of *riba* and *jahala* requires more in-depth Sharia' examination. For this paper, the key concern is that foreign investors might have their financial transactions rendered void in a country that strictly applies Sharia' without defining it in legal terms. Granting the power to interpret the law to local judges, who have no advanced legal training, does not reflect professionalism to investors. Therefore, the government ought to set well-defined standards to safeguard its people and economy.

²¹¹ Ibn Taymiyyah writes that *gharar* exists in a contract when risk-taking is combined with the devouring of the property of one party by the other

Kamali M. H., *Islamic Commercial Law* (2000). As cited at *supra* note at 199.

²¹² Mahmoud A. El-Gamal, *An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence*, The 4th International Conference on Islamic Economics (2001).

²¹³ Wahbah Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence* §1 (El-Gamal M.A trans., Dar al-Fikr, (2003)

²¹⁴ Sherin Kunhibava & Shanthly Rachagan, *Shariah and Law in Relation to Islamic Banking and Finance*, *Banking & Finance Law Review* (2011).

Chapter 2

The Legal System in Saudi Arabia

This chapter explores the status quo of the formal Saudi courts as well as their judges. In addition, it compares these factors to those of arbitration. It then examines the importance of a stable and predictable legal system for both the people and the economy. The chapter will move on to the businesses' part of the equation to analyze the effect of arbitration on them. In the end, data survey will reveal consumers attitude toward arbitration, class action, and social media as outlets for justice.

I. The Current State of Saudi Courts

In 2018, courts in Saudi Arabia reviewed about 31,259 commercial cases that were distributed among its regions. The main category, sales, counted more than 9,000 cases. Meanwhile, with only 87 cases, arbitration one of the lowest categories.²¹⁵ On the other hand, only 11 arbitral awards were issued in the Kingdom in November 2017, which evidences a lack of support for arbitration.²¹⁶ They probably did not include a single consumer arbitration case, as it is not yet a typical practice.

Stare decisis promotes numerous aspects that endorse an established legal environment. Examples include stability and certainty as well as reliability, uniformity, and convenience.²¹⁷ This principle is not applied in the Saudi courts' judicial system. The closest comparison is a judicial blog that publishes cases; nonetheless, judges are advised to use these cases as guides rather than mandatory standards.²¹⁸

The Saudi Minister of Justice has identified arbitration as the optimal route for dispute resolution in the business sector in particular.²¹⁹ This speech implied a belief that an arbitration forum, as opposed to the courts, is more adequately equipped to address advanced legal subjects. At the 2018 International Arbitration Conference in Riyadh, he expressed that the expansion of commercial arbitration can accelerate the process of dispute resolution in addition to raising quality. Moreover, he stated that the ministry wanted to make arbitration as autonomous from government supervision as possible. The minister's speech noticeably favored arbitration in certain areas because of its superiority over other forms of dispute resolutions. He emphasized that both domestic and international arbitration awards are enforced within a prompt period in accordance with international standards. He also endorsed the role of institutionalized arbitration and recommended that it expand to predominance in

²¹⁵ Ministry of Justice, https://www.moj.gov.sa/ar/opendata/bi/bijudicial/Dashboards/100_kpiDispatch/kpi100_05.aspx

²¹⁶ The Monthly Data Report of the Ministry of Justice, 02, 1439 Hijri

²¹⁷ Jeffery Commission, *Precedent in Investment Treaty Arbitration: A citation Analysis of a Developing Jurisprudence*, 24 *Journal of International Arbitration* (2007), <https://www.kluwerlawonline.com/abstract.php?area=Journals&id=JOIA2007012>.

²¹⁸ Judicial Blog, Ministry of Justice, <https://www.moj.gov.sa/ar-sa/ministry/versions/Pages/Modona.aspx>.

²¹⁹ Abdullah Almanea, 'Arbitration Helps to Settle Disputes and Expedite the Adjudication of Cases', *Al-Madinah Newspaper*, October 15, 2018, <https://www.al-madina.com/article/593352>.

commercial disputes.²²⁰ Even though it is expected that 10 arbitration centers will be licensed in 2019, there is no discourse about the inclusion of consumers in the conversation.²²¹

It is also worth mentioning that the Ministry of Commerce and Investment is progressing adequately by achieving development in a short period of time. It has established an online and application-based service to reach out to consumers and hear their complaints.²²² For consumers, the application facilitates the process of taking a picture of a commercial violation and submitting a request. Between establishing the hotline in 2012 and 2018, the service received more than 4 million calls and complaints.²²³

In regard to the decision makers within the legal system, the power of interpretation of judges can lead to endless problems in the Saudi legal system. In its journal *Alqadae' yah*, the Ministry of Justice in Saudi Arabia has directly published an article by Dr. Khaled Alkhudair, a judge in the administrative court in Riyadh. His article contains some what of distorted views. The author stated that the majority of the *fugaha'a*, Islamic scholars, in the Hanbali school of Islam expect to apply the same criteria to arbitrators as to judges. One such requirement is that judges must be Muslim, which also applies to arbitrators. Alkhudair advanced this argument by asserting that an arbitration award from a non-Muslim arbitrator should be annulled and highlighting that judges must be men, not women.²²⁴

Contrary to the Alkhudair's opinion, Saudi Arabia's judicial system has recently made the progressive decision to approve the appointment of a female arbitrator.²²⁵ This decision is significant because it challenges the views of the Hanbali school of Islam.²²⁶ Most religious scholars have opposed the appointment of women as judges on the basis of the hadith, "Never will succeed such a nation as lets their affairs carried out by a woman."²²⁷ These particular characteristics assign immense importance to the judicial ruling, as it declined the possibility of annulling an award on the basis of the appointment of a female arbitrator. As a result, foreign investors can be less concerned about defense against arbitration awards on the same grounds in the future. This movement might seem trivial, but

²²⁰ Ksamaj, The Saudi Ministry of Justice's YouTube channel, YouTube, <https://www.youtube.com/watch?v=U8e4SHe-fN0>.

²²¹ License for 10 institutional arbitration centers during 2019, Aleqtadiyah Newspaper, November 12, 2018, http://www.aleqt.com/2018/11/12/article_1487986.html.

²²² Ministry of Commerce and Investment, <https://mci.gov.sa/ServicesDirectory/Pages/CommercialCheatCase.aspx>.

Submit a Commercial Violation Notice, Apple, <https://itunes.apple.com/sa/app/-تقديم-مخالفة-تجارية/id542190070?mt=8>.

²²³ Ministry of Commerce's Reports Have Crossed the 4 Million Mark since its Start, Al-Madinah Newspaper, November 21, 2018, <https://www.al-madina.com/article/600032>.

²²⁴ Khaled Alkhudair, *The Rule of Muslim Condition in the Arbitrator in Arbitrations' Disputes*, *Alqadae' yah* (1433), <https://adlm.moj.gov.sa/alqadaeya/cat.aspx?val=9>.

²²⁵ Mulhim Hamad Almulhim, *The First Female Arbitrator in Saudi Arabia*, Kluwer Arbitration Blog (2016), <http://kluwarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>.

²²⁶ In fact, not only Hanbali's believe that women should not be appointed as judges, Maleki and Shafie' schools share the same views. Also, "And because the judge attend the forums of adversaries and men; he needs wholeness of mind and possess integrity in his opinion and intelligence. Women lacking in the mind, with few opinions are not suitable to attend the forums of men and thus her testimony is not accepted, even if she had a thousand women like her unless they are accompanying a man."

Abdullah bin Ahmed Almagdasi, 14/12 Almoghni.

²²⁷ Narrated by Bukhari (4425.)

it is a crucial resolution. The government has exhibited support for a moderate religious stance, which, in connection with the economic development focus of the 2030 vision, could suggest that the country is moving beyond its conservative interpretation of Islam. This trend might signify progress toward a more modern nation. This implication is supported by the various speeches by Crown Prince Mohammed bin Salman in recent years.²²⁸

The guiding standards for determining arbitrator fees and expenses for the arbitration centers specify a group of measures that centers can follow. These standards consider the amount involved in the dispute, the level of practical experience and academic degree in the arbitral tribunal, the complexity of the conflict, the expected effort, and the nature and speed of the process.²²⁹ According to these standards, it should apply efficiently even in consumer-to-business disputes.

The progress of complaint processing, telecommunication disputes as an example:

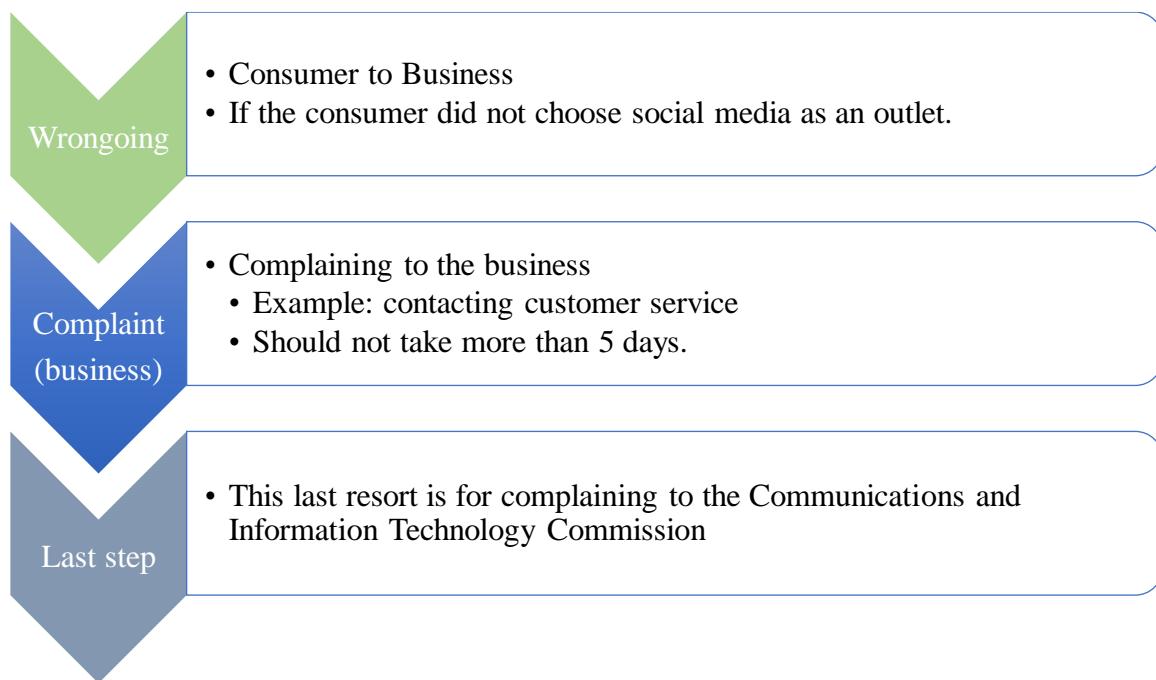


Figure 4, Information on the stages of consumer to business dispute resolution.²³⁰

Figure 4 demonstrates the progress of complaint processing in telecommunications disputes. Evidently, consumers have to file a complaint with the telecommunication provider and wait a minimum of five days before filing a complaint with Communications and

²²⁸ See, Martin Chulov, *I Will Return Saudi Arabia to Moderate Islam, Says Crown Prince, Mohammed bin Salman Tells the Guardian that Ultra-Conservative State Has been 'not normal' for Past 30 Years*, The Guardian, October 24, 2017, <https://www.theguardian.com/world/2017/oct/24/i-will-return-saudi-arabia-moderate-islam-crown-prince>. Prince Mohammed had said: “We are simply reverting to what we followed – a moderate Islam open to the world and all religions. 70% of the Saudis are younger than 30, honestly we won’t waste 30 years of our life combating extremist thoughts”.

²²⁹ List of guiding criteria for determining arbitrators' fees and expenses at the centers, Administrative decision number 1/1439 Hijri.

²³⁰ The Saudi Communications and Information Technology Commission <https://portalservices.citc.gov.sa/E-Services/Complaint/LandingScreen.aspx>

Information Technology. This Committee shall notify the defendant of the date of the hearing for the case at least 15 days in advance of the date if necessary to summon the defendant. The last condition does not require the defendant to attend the hearing. If the committee considers the defendant's attendance unnecessary, then the defendant has the opportunity to express their argument in writing.²³¹ Due process principles are not prevalent in these regulations. In fact, the Board of Grievances overturned decisions by the committee that reviewed violations of telecommunications law on the basis of failing to provide businesses with adequate time to present their defense.²³² Such a mechanism is not sufficient because consumers do not believe that they will obtain adequate relief.

Designating separate judicial committees to adjudicate disputes in insurance, telecommunication, and securities may have offered a fitting solution in the past to alleviate demands on the courts. However, even those committees are currently struggling to stay on pace with demand. The securities committee is apparently over-supplied with cases to the point of reaching the same completion rate as public courts. Investors will likely be cautious after learning that this committee takes an average of 30 months to resolve a dispute. Their decisions are also frequently adverse to those of the appellate committees, which causes inconsistency.²³³ Thus, the judicial committees that were designed to relieve the already overflowing public court system have already following suit with the courts and exhibit signs of pressure.

Court reforms are especially significant in countries with legal systems that are not up to par with satisfactory standards. Still, economic development is not necessarily secondary. Conversely, arbitration loses significance when public courts become sturdier.²³⁴ When the courts are not adequate, arbitration is positioned as a solution for parties that wish to resolve their disputes in a reliable forum. This movement toward alternative dispute resolution mechanisms could encourage courts to accelerate the development process through the incentive of competition.²³⁵

There are potential risks of foreign investment when entering such a distinctive market. The prohibition on *riba* in Sharia creates risk and uncertainty for investors. Judges do have the power to annul any unlawful act, such as *riba*. In case number 3/1622/هـ-1430 ق لعام, the plaintiff claimed that the respondent bought gold from him without paying for it. The judge discovered that the selling process was postponed and was thus conditioned as *riba almusaya'a*, a prohibited practice wherein the plaintiff delivered the gold without receiving a cash payment from the respondent at the same time. Given this information, the judge decided to disregard the case, as it violated Sharia' principles.²³⁶ In view of this, the option of

²³¹ Regulations of the Violations in the telecommunications Law, article (8)

²³² Osama Aljamaan, *The Board of Grievances Overturns the Decision of The Committee of Violating the Telecommunications System to Fine a Major Company Ten Million Riyals*, Alriyadh Newspaper, May 20, 2015, <http://www.alriyadh.com/1049591>.

²³³ Foreign Investment and the Challenges of the Judicial Environment, Maal News, June 29, 2015, <https://www.maaal.com/archives/68466>.

²³⁴ Walter Mattli & Thorsten Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (2017).

²³⁵ Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 Cornell Law Review (2008), <http://scholarship.law.cornell.edu/clr/vol94/iss1/7>.

²³⁶ Judicial Blog:

<https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1434/Documents/%20الأحكام%20مجموعة%20تكييف%20الدعوى%20-%20A0-%20C2%20والمبادئ%20التجارية/المجلد%20الثاني/بيع%20-24-بيع%20A0-%20C2%20أجور%20مصنعية%20-%20A0-%20C2%20ب%20A0-%20C2%20بطلان%20العقد%20.pdf>

having a choice of law in arbitration can be a major incentive for businesses. These types of cases evidence that arbitration offers a haven to investors by assuring beforehand that any potential future dispute will be dealt with through a specific arbitral award rather than the local courts. Therefore, the choice of law and forum carry immense importance for stabilizing the process and minimizing the risks.

Moreover, in arbitration, arbitrators are chosen based on their ability and experience, which is not the case for judges in court. Studies have indicated that parties generally believe that arbitrators comprehend the subject matter more thoroughly than judges.²³⁷ In the Kingdom's case, it is possible to assume that a specialized arbitrator could be more effective than a Sharia'-educated judge.

II. The Importance of a Stable Legal System

The term legal certainty refers directly to the predictability of judicial decisions. Accordingly, a higher predictability of judgments correlates to higher legal certainty, and vice versa. By contrast, a scholar has proposed the term "predictable unpredictability," which is present in "a tiny margin of cases where the courts will not apply the law which most specialists would reasonably expect to be applied. While the rate of unpredictable decisions is within the predictable unpredictability margin, it does not affect legal certainty."²³⁸

Numbers offer more insight than words when comparing effects on FDI in developing countries with common, civil, or Islamic legal systems. Common law countries generally report a higher growth rate in per capita GDP²³⁹ and attract more FDI²⁴⁰ compared to civil law countries. Data from 114 developing countries between 1970 and 2007 validate that common law legal systems attract more FDI. This discrepancy is due to the tendency of common law legal systems to promote the rule of law and include more efficient enforcement mechanisms in contracts.

Judiciary independence is another factor that encourages investors to trust the system. Judges in common law systems are appointed later in life compared to those in the other systems. Their appointment is a sign of validation of their achievement; thus, their opinions yield more deference from the people.²⁴¹ Certainty in the legal system is expected for

²³⁷ Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States Perceptions of Corporate Counsel*, Rand Corporation (2011), https://www.rand.org/pubs/technical_reports/TR781.html.

²³⁸ Fábio Ulhoa Coelho, *Legal certainty and Commercial Law: a comparative perspective (common law x civil law)*, 2 IALS Student Law Review (2015).

²³⁹ Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, University of Virginia School of Law, Legal Studies Working Papers Series (1999), http://papers.ssrn.com/paper.taf?abstract_id=206809.

As cited in Kevin Davis & Michael J. Trebilcock, *What Role do Legal Institutions Play in Development?*, Draft prepared for the International Monetary Fund's Conference on Second Generation Reforms(1999).

²⁴⁰ Todd J. Zywicki & Edward Peter Stringham, *Common Law and Economic Efficiency*, *ENCYCLOPEDIA OF LAW AND ECONOMICS*, Francesco Parisi, Richard Posner, eds., (2010).

²⁴¹ John Henry Merryman & Rogelio Pérez-Perdomo, *The civil law tradition: an introduction to the legal systems of Europe and Latin America* (2007).

common law judges.²⁴² In contrast, civil law judges assume their positions shortly after graduation, and they advance by dedicating their time to the job and their abilities to the work. These judges are perceived as government officials rather than as protectors of individuals and property rights.²⁴³ These judges are permitted to interpret codes according to their own understanding and free from any control by a higher judicial authority. This allowance leads to uncertainty that can obstruct the legal system. This outcome can prove the importance of legal structure and its effect on the economy.

In common law systems, judges tend to narrate justice-oriented rules and arrange it to fit the facts. On the other hand, judges in civil law systems are commanded to form the facts according to the laws without bearing in mind if there is compatibility between them. As another favorable point, common law systems deliver higher quality enforcement of contracts.²⁴⁴ Investors will likely appreciate this specific feature when selecting a forum, and they will value the lower level of government regulation in common law countries.²⁴⁵ Political stability is also an important feature to consider for investors. In Islamic law countries, where courts are subordinate to the political branches, political stability might not be achievable.²⁴⁶

Most parties will trust legal mechanisms when they offer predictability. The doctrine of stare decisis has a major influence in this phenomenon. When rules result from case law and are published, they are broadly known to the public and therefore more thoroughly understood.²⁴⁷ The lack of this practice could explain why many businesses and investors choose arbitration as a forum in Saudi Arabia.²⁴⁸ Not because arbitration necessary offers predictability, rather because the courts do not. Countries need to provide a high degree of certainty and predictability, as their developmental progress is a result of investments. Without certainty, countries will lose out on one of the most significant incentives to attract investment.²⁴⁹ The legal system's purpose has changed because of population growth and resource limitations. Such purpose is arguably to offer a vehicle for dispute resolution between parties.²⁵⁰

When considering arbitration, many Asian and Middle Eastern countries are still skeptical, and it might reach the point of hostility.²⁵¹ The effect of legal certainty is a vital

²⁴² *Ibid.*

²⁴³ Hoon Lee, Glen Biglaiser & Joseph L. Staats, *Legal System Pathways to Foreign Direct Investment in the Developing World*, 10 *Foreign Policy Analysis* 393–411 (2014).

²⁴⁴ Nathan Nunn, *Relationship-Specificity, Incomplete Contracts, and the Pattern of Trade*, *The Quarterly Journal of Economics* (2007).

²⁴⁵ Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, *Journal of Economic Surveys* 285–332 (2008), <http://www.aeaweb.org/articles.php?doi10.1257/jel.46.2.285>

²⁴⁶ *Supra* note at 232

²⁴⁷ *Ibid.*

²⁴⁸ *Supra* note at 192.

²⁴⁹ Deepu Jojo Sushama, *Appellate Structure and Need for Legal Certainty in Investment Arbitration*, *Kluwer Arbitration Blog* (2014), <http://arbitrationblog.kluwerarbitration.com/2014/05/01/appellate-structure-and-need-for-legal-certainty-in-investment-arbitration/>.

²⁵⁰ Thomas E. Carbonneau, *The Law and Practice of Arbitration* (2012).

²⁵¹ Philip J. McConaughay & Thomas B. Ginsburg, *Introduction to International Commercial Arbitration in Asia* (2006).

consideration for Saudi Arabia. Without it, investors will not understand the implications of the law and consequently lose faith in the legal system.²⁵²

It is not surprising that parties who are interested in entering the Saudi market generally avoid the local judicial system and prefer arbitration. In the 2018 Queen Mary/White & Case International Arbitration Survey, an overwhelming majority preferred to use arbitration.²⁵³ The respondents stated that one of the most valuable features of international arbitration is the ability to avoid some legal systems and national courts. Moreover, when determining a given seat, key considerations include the country's reputation and recognition, the neutrality and impartiality of its legal system, its arbitration law, and its patterns in enforcing arbitral awards.²⁵⁴ Currently, because of a lack of data, one option cannot dominate the other. Nevertheless, there has clearly been no progress in the realm of business-to-consumers' arbitration.

Regarding choice of law and its connection to legal certainty, parties in the UAE often choose the laws of England and New York, especially in international commercial contracts, for several reasons. For example, they offer an extensive body of high-level case law, which generates more legal certainty for parties.²⁵⁵

Stability of the legal environment is a major criterion for attracting investment, and Latin America's financial market is a shining example of a drastic positive change in this regard. The stability of the legal system, as evidenced by foreign companies confidently using local arbitration when disputes arose, was a key factor and reflective of the investment safety in the developing market. Businesses should feel confident in the process of investing. When a dispute occurs, they want to be assured that it will be resolved through a transparent and impartial method.²⁵⁶ This demand has led government officials in these countries to result to local arbitration. Latin American arbitration tribunals have established a reputation as fair and transparent, which has encouraged businesses to reconcile their disputes locally. This movement is reflected by figures from the International Chamber of Commerce (ICC), which reported that locally seated arbitrations in Latin America soared by 230% between 2005 and 2015.²⁵⁷

²⁵² See, "The concept of legal certainty is recognized by all legal systems in the world. For example, the concept of legal certainty is recognized as one of the general principles of European Union (EU) law by the European Court of Justice since 1960s. In the EU law context, it means that the law must be certain, it is clear and precise, and its legal implications foreseeable, especially when applied to financial obligations." Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May be Better for Capitalism and Liberalism*, 19 Public Interest Law Journal (2010), <https://www.bu.edu/pilj/files/2015/09/19-2RabanArticle.pdf>.

²⁵³ 2018 International Arbitration Survey: The Evolution of International Arbitration, Queen Mary, University of London, School of International Arbitration, White & Case <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>

²⁵⁴ *Ibid.*

²⁵⁵ John Gaffney, Choice of law and jurisdiction provisions in the UAE, Altamimi and Co. (2015), <https://www.tamimi.com/law-update-articles/choice-of-law-and-jurisdiction-provisions-in-the-uae/>.

²⁵⁶ Carlos Ortega, *Arbitration Helps Tip the Scale in Latin America's Investment Market*, FTI Journal (2017), <http://www.ftijournal.com/article/arbitration-helps-tip-the-scale-in-latin-americas-investment-market>.

²⁵⁷ *Supra* note at 254.

Combining both regulatory stability and predictability in various legal systems can accelerate trust from investors. Such steps can decrease transaction costs, which would encourage investments.²⁵⁸ In addition, attracting investors from diverse legal systems and using arbitration as a forum can contribute to the development of new norms that can refine the legal structure by connecting it to the global level.²⁵⁹

III. Defining Consumer Arbitration

The literature has extensively analyzed the advantages and shortcomings of using arbitration as an alternative dispute resolution mechanism.²⁶⁰ While arbitration presents disadvantages, the negative consequences of relying on the Saudi judicial system might be more significant. As one benefit of arbitration, parties can undertake proactive measures to preserve confidentiality; this option is not usually available when resulting to public courts.²⁶¹ Although it is perceived as a noteworthy benefit for parties, it still should not be adopted without taking proper actions.²⁶² In addition, proponents of arbitration have argued that it is much more efficient compared to litigation.²⁶³ While arbitration can be costly in some cases, parties choose it over courts in view of its many advantages, such as its flexibility, which allows them to select the applicable law and procedure for their dispute.²⁶⁴ The number of arbitrators is one of many features upon which parties can agree.

It is presumably advantageous when both parties can select arbitrators who are not necessarily from the legal field, as they could provide valuable expertise in certain instances.²⁶⁵ However, taking full advantage of the technical expertise of non-lawyers in the role of arbitrator has not been common. Most non-lawyers' arbitrators serve as co-arbitrators

²⁵⁸ Anatole Boute, *The Quest for Regulatory Stability in the EU Energy Market: An Analysis Through the Prism of Legal Certainty*, European Law Review (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193904.

²⁵⁹ Philip McConaughay, *The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles*, Peking University Transnational Law Review (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2717374.

²⁶¹ Samuel Estreicher & Steven Bennett, *The Confidentiality of Arbitration Proceedings*, 240 New York Law Journal (2008).

²⁶² "The UNCITRAL and Stockholm Chamber of Commerce (SCC) Rules have a limited role, merely providing for private hearings and confidentiality of awards." Mayank Samuel, Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing? Kluwer Arbitration Blog (2017), <http://kluwarbitrationblog.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/>.

²⁶³ Hogan Lovells, *Effective Today: Revised ICC Rules of Arbitration Lexology*, (2017), <http://www.lexology.com/library/detail.aspx?g=72d1a900-f2e9-4e7c-9002-645f872a5d55>.

²⁶⁴ Sherina Petit & Marion Edge, *The Governing Law of the Arbitration Agreement Q&A*, International Arbitration Report (2014).

²⁶⁵ James E. Meason & Alison G. Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 Northwestern Journal of International Law and Business (1991), <https://scholarlycommons.law.northwestern.edu/njilb/vol12/iss1/7>.

rather than the chair arbitrator.²⁶⁶ Courts offer a guarantee of professional judges, but this element does not imply that arbitration and arbitrators are inferior. Article 14 (3) of the Saudi Arbitration Law requires the sole arbitrator to hold a university degree in either Sharia' or law.²⁶⁷ Moreover, when the tribunal has more than one arbitrator, the chairperson must meet these requirements.²⁶⁸ Unfortunately, there are no readily available data to display the numbers of Sharia' versus law graduates who serve as arbitrators.

Contracts have historically invoked a serious feeling of moral obligation to follow through on them.²⁶⁹ In Islam, there is substantial evidence of the necessity to comply with contract terms. "O you who have believed, fulfill [all] contracts."²⁷⁰ This religious evidence validates the importance of accomplishing one's commitments. Therefore, certain religious and cultural components support strict contract enforcement.

When consumers acquire a financial product, they receive a formatted legal contract. The contract usually includes an arbitration clause, which indicates that any disputes that arise between the company and the consumer shall be governed by a specific law and an arbitral tribunal's authority. Accordingly, the consumer cannot dispute any claims in his or her preferred judicial forum.

In a situation where the claimant has no bargaining power in regard to the contract, businesses endeavor to interpret every clause in their favor. This tendency does not necessarily indicate that mandated arbitration clauses are not constructive, but it offers more perspective of the consumer's role in the proceedings. Consumers might not even comprehend that the arbitration mechanism is part of the contract; nevertheless, the contract is binding.

Arbitration is exciting because of its limitless potential for parties to make customizations according to their needs. For instance, they can include formal language, choose an ad hoc or an institutional arbitration, and select the seat for arbitration as well as the law to apply for enforceability of the award.²⁷¹ Additionally, for parties that emphasize time efficiency, there is an option to increase the timeliness of the process by agreeing on an expedited procedure. In this option, it is expected that decreasing time reduces costs for both parties.²⁷² Thus, the customization of the arbitration procedure depends entirely on the

²⁶⁶ E.E. Triantafilou, *Non-Lawyer Arbitrators and the Deliberative Balance of International Arbitral Tribunals* Transnational Dispute Management (2016), <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1645>.

²⁶⁷ Law of Arbitration, Royal Decree No. M/34 Dated 16/04/201

²⁶⁸ Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 International Organization (2003), <https://doi.org/10.1162/002081801317193646>.

²⁶⁹ Some people believe that breach of contract is considered immoral. Participants in questionnaire studies said that breach of contract must be punished with damages above expectation levels, See, Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

²⁷⁰ The Qura'n, Surat Al-Maiedah, [5:2]

²⁷¹ ISDA Memorandum; see also Richard Garnett, *A practical guide to international commercial arbitration* (2000) As cited in Irene Han, *Rethinking the Use of Arbitration Clauses by Financial Institutions*, 34 Journal of International Arbitration 207–237 (2017).

²⁷² Klaus Peter Berger, *The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions*, 3 Law and Financial Markets Review 54–63 (2009); see e.g. ICC Rules, Art. 38(1); SIAC Rules, r. 5.2(a). As cited in Irene Han, *Rethinking the Use of Arbitration Clauses by Financial Institutions*, 34 Journal of International Arbitration 207–237 (2017).

parties' agreement. In fact, they can even specify the domain for both privacy and confidentiality.²⁷³

Arbitrators can use international customs, or *lex mercatoria*, as a set of rules for regulating international trade.²⁷⁴ However, it is not the only choice, as parties will have to agree to a bundle of choices. They can pick a national law to rule over the arbitration agreement, a law that governs the proceeding, the applicable substantive law, and the law that governs the enforceability.²⁷⁵ Enabling parties to choose a preferable forum for commercial litigation might improve both quality and efficiency in the business world.²⁷⁶

As for international treaties, Saudi Arabia signed the United Nations Convention on the Use of Electronic Communications in International Contracts (UNCITRAL)²⁷⁷ on November 12, 2007. These contracts comprise the legal body of the United Nations' system in international trade law. The goal of UNCITRAL is simply to support the modernization and harmonization of rules in international business around the world.²⁷⁸ The new arbitration law is actually based on the UNCITRAL rules. So, the law should presumably be carefully written to ensure that arbitration operates efficiently; however, the practice might indicate otherwise. Thorough research via the Case Law on UNCITRAL Texts (CLOUT), a database for arbitration awards that relate to the model, unfortunately yielded no published cases in Saudi Arabia.²⁷⁹

In the matter of international consumer arbitration, Saudi Arabia ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958²⁸⁰ and made the following declaration:

On the Basis of reciprocity, the Kingdom declares that it shall restrict the application of the Convention to the recognition and

²⁷³ See, "privacy means that hearings are not open to the public ... confidentiality, on the other hand, concerns the obligation of the participants not to disclose information related to the proceedings to third persons'." Irene Han, *Rethinking the Use of Arbitration Clauses by Financial Institutions*, 34 *Journal of International Arbitration* 207–237 (2017).

²⁷⁴ Beda Wortmann, *Choice of Law by Arbitrators: The Applicable Conflict of Laws System*, 14 *Arbitration International* 97–114 (1998).

²⁷⁵ Markus A. Petsche, *Choice of Law in International Commercial Arbitration*, *Private International Law* (2017). DOI 10.1007/978-981-10-3458-9_2

²⁷⁶ Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *Cornell Law Review* (2008), <http://scholarship.law.cornell.edu/clr/vol94/iss1/7>.

²⁷⁷ See "The United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966, plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade¹ by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. Those areas include dispute resolution, international contract practices..." United Nations Commission on International Trade Law, *A Guide to UNCITRAL*, Basic facts about the United Nations Commission on International Trade Law, (2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>.

²⁷⁸ About UNCITRAL, http://www.uncitral.org/uncitral/en/about_us.html.

²⁷⁹ Case Law on UNCITRAL Texts (CLOUT), UNCITRAL, <http://www.uncitral.org/clout/index.jsp>.

²⁸⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") 1958, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

enforcement of arbitral awards made in the territory of a Contracting State. Subject to a special reservation that no foreign arbitral award will be enforced in Saudi Arabia if it is deemed contrary to the public policy of Saudi Arabia.²⁸¹

The last line of the declaration ambiguously re-states the public policy defense. This issue is explored comprehensively later in the paper. Additionally, that is not to say that arbitral awards are not enforceable in the Kingdom. In fact, Saudi Arabia has ratified many international treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the New York Convention.²⁸²

The right question to ask might not be whether Saudi Arabia signed a convention, given that the majority of countries signed it, but instead whether the New York Convention in its standing position is substantial enough to ensure smooth enforcement of arbitral awards. The answer might be negative; in fact, some scholars have argued for a newer convention, though convincing contracting states to join it could be a difficult mission.²⁸³

a. Examples from the Middle East

From a broader perspective, practitioners in the Middle East have regarded arbitration as an unusual and unique way of solving disputes. Such caution might stem from the fact that access to national courts has been the norm. In fact, the New York Convention still faces obstacles in UAE courts. On March 30, 2016, the Dubai Court of Appeal held in a decision that a foreign award's enforcement was affected by reciprocity. In the court's decision, they decided that the reciprocity requirement did not apply because the UK had not signed any convention with the UAE in regard to arbitral award enforcement. The court disregarded that the New York Convention does not oblige reciprocity. While subject to any reservations, the UAE made none when agreeing to the convention. The court also did not take into account that the UK is a signatory to the New York Convention. This decision is alarming and showcases impediments to arbitration accessibility in one of the most successful Middle Eastern countries.²⁸⁴

The UAE might be considered one of the Middle East's most productive arbitration jurisdictions. In just 10 years, the number of arbitrations associated with the UAE has increased substantially.²⁸⁵ A possible solution for some obstacles in arbitration is available not in the UAE national courts but rather in the Courts of the Dubai International Financial Centre (DIFC.) That legal developments in the UAE are thriving. The DIFC is comprised of Dubai-based courts that "seek to provide certainty through transparent, enforceable

²⁸¹ Contracting States, New York Arbitration Convention, <http://www.newyorkconvention.org/countries>.

²⁸² *Supra* note at 284.

²⁸³ Marike R. P. Paulsson, *The 1958 New York Convention from an Unusual Perspective: Moving Forward by Parting with it*, Indian Journal of Arbitration (2017).

²⁸⁴ See e.g. Dubai Court of Cassation Case No. 273 of 2006, 4 Feb. 2007.

²⁸⁵ Farhad Alain, *Two Steps Forward, One Step Back: A Report on the Development of Arbitration in the United Arab Emirates*, 35 Journal of International Arbitration 131–142 (2018).

judgments from internationally recognized judges.”²⁸⁶ These courts are drastically different from of UAE’s civil, Arabic-based law system. They offer an English-based common law system as another alternative.²⁸⁷ Moreover, the DIFC has launched an impressive initiative to establish an unprecedented “Court of the Future,” which aims to transform commercial courts. Mark Beer, the Chief Executive and Registrar General of the DIFC Courts, has explained,

we’ve got to break free from the atmosphere that we live in thinking that what we designed 200 years ago is right for today or right for tomorrow. By leading internationally, the image-conscious nation hopes to bolster its ranking in the World Justice Project (WJP) Rule of Law Index over the next four years.²⁸⁸

In 2004, the DIFC was created as an economic free zone to promote Dubai as a global financial hub. The DIFC might offer a superior option for the enforcement of awards in Dubai because it has its own arbitration law, which is based on UNCITRAL.²⁸⁹ The new arbitration law has attracted the admiration of legal scholars in the country, who believe it might incentivize investments. Arbitration experts have commended this step, as the worldwide recognition of this model allows businesses superior certainty should any disputes arise.²⁹⁰ The DIFC courts later devised a new, innovative mechanism whereby court judgments can be directly converted into arbitral awards. Accordingly, these convertible awards will be enforceable under the New York Convention.²⁹¹ Such ground-breaking methods might be welcomed by businesses and actually reinforce trust in the DIFC court system. In this way, courts could innovatively promote the market.

This plan revolutionizes court services, such as online hearings in which witnesses can attest remotely via video calls. Dubai has evidenced progress by establishing a new model of legislation, which it has advertised as the new best dispute resolution.²⁹² While arbitration is still important, other legal instruments can be used that could allow different countries to take on more risks.

²⁸⁶ Hashi Mohammed, *The Rule of Law & Business - Why Legal Certainty is Critical to Economic Prosperity*, East Africa Business Journal (2016), <http://www.eabjournal.com/development-east-africa-business-journal/536-the-rule-of-law-business-why-legal-certainty-is-critical-to-economic-prosperity.html>.

²⁸⁷ *The Courts of the Dubai International Finance Centre — A Common Law island in a Civil Law ocean*, DIFC Courts (2008), <https://www.difccourts.ae/2008/11/01/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/>.

²⁸⁸ Emad Mekay, *Dubai moves to disrupt legal culture with future courts*, International Bar Associations (2018), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=186b210f-62b1-4545-9780-de6e6009bad0>.

²⁸⁹ DIFC Law No. 1 of 2008.

²⁹⁰ *Legal experts say new UAE arbitration law will encourage investment*, Arabian Business (2018), <https://www.arabianbusiness.com/396768-legal-experts-say-new-uae-arbitration-law-will-encourage-investment>.

²⁹¹ DIFC Courts Practice Direction, Practice Direction No. 2 of 2015 entitled *Referral of Judgment Payment Disputes to Arbitration* as cited in Farhad Alain, *Two Steps Forward, One Step Back: A Report on the Development of Arbitration in the United Arab Emirates*, 35 *Journal of International Arbitration* 131–142 (2018).

²⁹² *Ibid.*

Another example from the Middle East that demonstrates hostility toward arbitration derives from Egypt. There is a level of uncertainty that comes along from both the legal Profession Law and the Arbitration Law. The first one limits the right to appear before arbitral tribunals to Egyptian nationals who are members of the Egyptian bar.²⁹³ After adopting a more liberal economic policy, there was a need for a more arbitration friendly legal system.²⁹⁴

b. Historical Background

By historically tracking collective redress in the modern era, this research encountered the “Bill of Peace,” which started with the English Chancery in the 17th century based on a need to prevent a multiplicity of litigation.²⁹⁵ This procedure required three conditions: a large number of litigants, a joint interest, and sufficient representation of the absent members by the litigants.²⁹⁶ However, the system was short lived.²⁹⁷

Arbitration is arguably the oldest form of alternative dispute resolutions.²⁹⁸ It is simple compared to other forms of litigation wherein arbitration parties submit their future disputes through a trusted arbitrator.²⁹⁹ Lex mercatoria, or “merchant law,” refers to a body of private commercial rules³⁰⁰. Medieval European private courts can offer a point of origin for the application of contemporary arbitration, as their merchant courts selected knowledgeable and experienced merchants as judges. Furthermore, merchant courts used sanctions as a tool to ensure that merchants would abide by the enforcement process.³⁰¹

²⁹³ Amr Omran, *The Appearance of Foreign Counsel in International Arbitration: The Case of Egypt*, 34 *Journal of International Arbitration* 901–920 (2017).

²⁹⁴ Hadir Helal, *Arbitration in Egypt: Myth or Reality?* Open Chance Law Firm (2016), <https://www.openchancelaw.com/Documents/Arbitration-Publication.pdf>.

²⁹⁵ William Weiner, *The Class Action, the Federal Court and the Upper Class: Is Notice, and its Consequent Cost, Really Necessary?*, 22 *California Western Law Review*(1985).

²⁹⁶ Class Action, *West's Encyclopedia of American Law* (2005), <http://www.encyclopedia.com/social-sciences-and-law/law/law/class-action>.

²⁹⁷ See: “The presumption appears to have been that if a bill of peace was proper, the equity court could either force joinder to resolve common issues one way or the other by temporarily enjoying individual damage proceedings or, in case of a finding for the claimants’ adversary on the merits, use its injunctive powers to end the entire matter. The idea of opt-outs does not seem to have come into being until much later, possibly with the revisions of Federal Rule of Civil Procedure 23 that took effect in 1966. Perhaps because the remedy afforded by a bill of peace could thus be drastic, threshold litigation was heavy and use of the bill in mass-tort situations often denied.” Thomas D. Rowe Jr., *A Distance Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 *Arizona Law Review* (1997).

²⁹⁸ Stefano Cirielli, *Financial Markets and Banking Disputes*, 14 *The American Review of International Arbitration* (2003). As cited in: William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd ed. 2012).

²⁹⁹ Han, Irene. ‘Rethinking the Use of Arbitration Clauses by Financial Institutions’. *Journal of International Arbitration* 34, no. 2 (2017): 207–238.

³⁰⁰ Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 *The Rational Design of International Institutions*159–188 (2001).

³⁰¹ *Ibid.*

In the Middle Ages, merchants in England usually did not solve their disputes in the Royal Courts. A main reason is that merchants dealt with foreigners; thus, their contracts were highly unenforceable. The nature of merchants' work required them to move to multiple locations in a short period of time, so the traditional Royal Court process did not suit their needs. Rather, to resolve disputes, merchants resorted to private tribunals, such as Courts of the Boroughs, at both domestic and international levels. The similarities between this system and that of modern arbitration are vast. Here, people with commercial knowledge were elected to be part of the tribunal. The promptness of the process eased the rigor of the procedures, which is a common feature of arbitration.³⁰²

About 13 years ago on the 60th anniversary of the ICC International Court of Arbitration, a Senegalese judge of the International Court of Justice expressed that African and Asian countries disregarded the concept of an international justice system. Specifically, they viewed arbitration as a foreign tool to inflict Western bias.³⁰³ However, over time, the attitude toward international arbitration started to change, and countries acknowledged that economic development depends on several factors. The first is a dynamic private sector alongside foreign investment. Furthermore, they realized the connection between supporting arbitration-friendly policies and attracting foreign inflows to the economy, as private justice eliminates dispute resolution from the political showground.³⁰⁴

As for the US, the first President George Washington³⁰⁵ was actually an arbitrator in a private dispute prior to the American Revolution.³⁰⁶ However, arbitration did not live up to its success long enough.³⁰⁷ The legal system was threatened by the success of arbitration and its possible impacts on the court system. Furthermore, the establishment did not trust the fairness of arbitration outcomes compared to those of the courts.³⁰⁸ A single suit could not be presented by an entire class of plaintiffs until 1963, when Congress revised Rule 23 of the Federal Rules of Civil Procedure. At that time, courts had a different understanding of class

³⁰² Kyriaki Noussia, *Confidentiality in International Commercial Arbitration A Comparative Analysis of the Position under English, US, German and French Law*, (2010).

³⁰³ International Chamber of Commerce. Court of Arbitration, International arbitration: 60 years of ICC arbitration: a look at the future (1984). As cited in Eric A. Schwartz, *The Role of International Arbitration in Economic Development*, 12 Int'l Trade & Bus. L. Rev. 127(2009).

³⁰⁴ Eric A. Schwartz, *The Role of International Arbitration in Economic Development*, 12 Int'l Trade & Bus. L. Rev. 127 (2009)

³⁰⁵ George Washington, The White House, <https://www.whitehouse.gov/about-the-white-house/presidents/george-washington/>.

³⁰⁶ Jay Folberg et al., *Resolving disputes: Theory, Practice, and Law* (2016).

³⁰⁷ Zephaniah Turner of Charles County, Maryland, wrote to President George Washington in 1789 and said:

“Our Laws are too numerous. Is it not possible that an alteration might take place for the benefit of the public? Could it not be possible to curtail the number of lawyers in the different States? Suppose each State was to have but two lawyers to be paid liberally and where a real dispute subsisted between plaintiff and defendant a reference to arbitration should be proposed, and arbitrators be indifferently chosen by both parties whose determination shall be final.” Record Group 360, National Archives, Washington, D.C. James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 Law and History Review (2013), <https://www.cambridge.org/core/journals/law-and-history-review/article/div-classtitlearbitration-in-america-the-early-historydiv/8FD97D535016DFEE03DD0CE059D46E7C>.

³⁰⁸ *Supra* note at 306.

action.³⁰⁹ They rationalized it by including the “protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.”³¹⁰

For the Kingdom, the Commercial Law (The Commercial Courts’ Law) of 1931 (1350 Hijri) was the first legal acknowledgment of arbitration. Even though the arbitral award was not final, and parties have the right to appeal it, it offered an initial indication of the government’s willingness to endorse arbitration.³¹¹ In 1946, the Law of the Chamber of Commerce and Industry granted merchants the right to choose the Chamber of Commerce and Industry as a place of institutional arbitration.³¹² Moving on, the first autonomous arbitration law was established in 1983 but received considerable criticism from academia for several reasons.³¹³ For instance, parties could not agree to choose a foreign language other than Arabic.³¹⁴ Additionally, parties needed to credence the arbitration document in front of the original court that has jurisdiction over the subject matter.³¹⁵ These conditions are no longer required in the effective arbitration law³¹⁶

c. Beyond Consumers, to Business-to-Business

A legal framework that is both trustworthy and transparent is critical. Standards for arbitration align with business expectations worldwide. However, the standards of local courts might not. Research has repeatedly illustrated a preference for arbitration over courts among businesses, especially foreign ones. While this preference does not apply in every situation, there is a trend in international contracts that reflects a frequent preference for arbitration among parties.³¹⁷ About 99% of a survey respondents endorsed international arbitration as a method of resolving disputes, especially in cross-border issues.³¹⁸ Key reasons include predictability, certainty, neutrality, and effectiveness.³¹⁹ Still, robust courts

³⁰⁹ David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 Washington University Law Review (2013),

https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6000&context=law_lawreview

³¹⁰ *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980)

³¹¹ Articles 493-497 of The Commercial Law (The Commercial Courts’ Law) of 1350 Hijri.

³¹² Ahmed Abdulfattah, *Comparisons between the new and old Saudi arbitration system*, Center of Judicial Studies Specialist (2013).

³¹³ Arbitration Law (issued by Royal Decree No. 46/M of 12/07/1403H (April 24, 1983)

³¹⁴ Article 12 of the Implementing Regulations of the Arbitration Law of 1983

³¹⁵ Article 5 of the Arbitration Law of 1983

³¹⁶ Arbitration Law, Article (3), Royal Decree No. M / 34 dated 24 / 5 / 1433

³¹⁷ Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-Dispute Arbitration Clauses: The Average Consumer’s Experience, 67 Law and Contemporary Problems (2004).

Available at: <https://scholarship.law.duke.edu/lcp/vol67/iss1/3>

As cited in: Douglas Shontz, Fred Kipperman & Vanessa Soma, Business-to-Business Arbitration in the United States, Perceptions of Corporate Counsel, The RAND Corporation (2011), https://www.rand.org/pubs/technical_reports/TR781.html.

³¹⁸ *Supra* note at 257.

³¹⁹ B. Wortmann, *Choice of Law by Arbitrators: The Applicable Conflict of Laws System*, 14 Arbitration International 97–114 (1998).

can contribute to political stability by cultivating a healthy environment that gives investors predictability.³²⁰

In a local context in Saudi Arabia, a recent example of business-to-business (b2b) arbitration occurred between the second- and third-largest telecom operators, Mobily and Zain. The award ordered Zain to pay about \$58 million to Mobily.³²¹ Though data might not be readily available, it might be safe to assume that b2b contracts could have different dispute resolution clauses compared to business to consumer contracts. There is also a guide of overseas business risk in Saudi Arabia on the website of the British Foreign and Commonwealth Office. This guide advises commitment to international arbitration tribunals instead of domestic courts.³²²

Now, why would businesses willingly support a regime that will make it easier for consumers to sue them? The answer will not diminish the possibility that yes, consumers will probably find it more accessible to sue businesses. Yet, the alternative is not appealing, as businesses will face unpredictability and will endure a longer process. Parties prefer litigation over arbitration when the governing law is sophisticated, and there is certainty in its application. With arbitration, arbitrators' expertise can result in precise outcomes which is valuable.³²³ Businesses should focus instead on a statement from the CEO of The American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR) that "arbitration continues to serve as a trusted alternative for businesses to fairly, efficiently, and cost-effectively resolve many different types of disputes." The AAA-ICDR has also provided data that prove increases particularly in commercial cases of business-to-business (b2b) dispute resolution services.³²⁴

There is evidence of wariness among companies when considering entry into the Saudi market. When analyzing the Saudi market and its compatibilities with US companies, it can be noted that "[t]he enforcement of foreign arbitration awards for private sector disputes has yet to be upheld in practice."³²⁵ This warning signifies that companies are hesitant about the enforcement mechanism of arbitral awards, which reflects minimal trust in the Saudi judicial system. Even an enforcement judgment, which is theoretically easier since Saudi Arabia is a part of UNCITRAL, demands trust in the courts. According to a study that was published in the Riyadh Chamber, 66% of investors retracted from investing in Saudi Arabia because of problems with the country's legal system. In addition, 82% of the sample believed that legal uncertainty is a significant contributing factor to the difficulty of conducting

³²⁰ *Supra* note at 232

³²¹ Alexander Cornwell, UPDATE 1-Zain Saudi told to pay rival Mobily \$58.5 mlns by arbitration panel, Reuters (2016), <https://www.reuters.com/article/zain-ksa-mobily-arbitration-idUSL8N1DE03M>.

³²² Guidance - Overseas Business Risk - Saudi Arabia, FOREIGN & COMMONWEALTH OFFICE (2017), <https://www.gov.uk/government/publications/overseas-business-risk-saudi-arabia/overseas-business-risk-saudi-arabia>.

³²³ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 51 SMU L. Rev.(2010).

³²⁴ Arbitration Remains a Trusted Venue for Resolving B2B Disputes, American Arbitration Association (2018), https://www.adr.org/sites/default/files/document_repository/180223_AAA_ICDR_Arbitration_Caseload_Data_Press_Release.pdf.

³²⁵ World Business and Investment Library, Saudi Arabia Investment and Business Guide, Volume 1 Strategic and Practical (2015).

business in Saudi Arabia.³²⁶ Though the data do not specify a particular type of case, it might be safe to presume that the fears are the same in both business-to-business and consumer-to-business contracts. The main reason for these hostile practices toward enforcement is the interpretation by judges of what is appropriate under Sharia' and what is not. This position supports the argument that arbitration in consumer disputes is still an advantage, even for businesses.

From the perspective of businesses, legal responsibility ought to be a central topic of discussion in creating consumer contracts.³²⁷ Such responsibility refers to a proactive duty and adherence to the spirit of the law. Even if the inclusion of an opt-out option for the arbitration provision and the addition of a class action mechanism can slightly hinder the process, it offers the most advantageous option for both parties.³²⁸

Perhaps another viewpoint could provide further clarification by considering the potential gains for companies when utilizing Saudi courts. The courts do not offer much predictability or stability, but at least there is a chance to find it in a professional forum. Although arbitration is not particularly strong in its transparency, current courts are problematic in this respect as well. For businesses, the choice between them could depend on which forum is most accessible and satisfactory under the circumstances.

Businesses could promote access to justice by practicing corporate social responsibility (CSR), which is a concept that can benefit consumers. Many corporations understand that one method of brand promotion is to recognize the significance of uniting their image with social causes.³²⁹ While corporates admittedly seek profit as their primary aim, it is valuable for them to devise plans that take the welfare of the society into consideration. When government regulations are not up to par with corporate standards, corporations adopt initiatives by choice. Pressure from consumers might in fact shape corporate strategic planning,³³⁰ but such hypothesis is likely not accurate unless consumers advocate cooperatively about their rights and requests. Moreover, especially in developing countries, CSR could have an effect on the status quo.

This paper acknowledges that CSR might not yield positive results because the factors that could contribute to its outcome are too numerous. Still, CSR might have a more positive effect on social and economic development when its goals serve both society and

³²⁶ The Kingdom's Investment Environment and Reality Challenges, Riyadh Economic Forum, <http://www.riyadhef.com>.

³²⁷ Corporate Social Responsibility and the Triple Bottom Line, <https://philosophia.uncg.edu/phi361-matteson/module-3-social-responsibility-professionalism-and-loyalty/corporate-social-responsibility-and-the-triple-bottom-line/>.

³²⁸ See, "That is, laws aren't boundaries that enterprises skirt and cross over if the penalty is low; instead, responsible organizations accept the rules as a social good and make good faith efforts to obey not just the letter but also the spirit of the limits." Three Theories of Corporate Social Responsibility, Chapter 13.2, <http://businessethicsworkshop.com/textbook.html>

³²⁹ D'Silva Bernadette, D'Silva Stephen & Bhuptani Roshni, Corporate Social Responsibility: An innovation to a strategic business success – An Empirical Study, http://www.academia.edu/1140195/CORPORATE_SOCIAL_RESPONSIBILITY_AN_INNOVATION_TO_A_STRATEGIC_BUSINESS_SUCCESS-AN_EMPIRICAL_STUDY.

³³⁰ Peter Utting, *Promoting Development through Corporate Social Responsibility - Does it Work?*, Global Future(2003), [http://www.unrisd.org/unrisd/website/newsview.nsf/\(httpNews\)/B163470112831808C1256DA90041ECC5](http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/B163470112831808C1256DA90041ECC5)

businesses.³³¹ Implementing an arbitration clause with an opt-out mechanism could benefit corporates just as much as consumers.

For businesses, the alternative is a slow court system with Sharia'-based judges.³³² While the lack of confidentiality could be perceived as a disadvantage of the public courts, this perception is not entirely assumed in Saudi Arabia. As the status quo, concerns regarding the disclosure of information should not be excessive, as publications of judgments are strictly limited. Opting for arbitration solely for the sake of privacy would be understandable, especially for business, but is generally not the case locally. Nevertheless, a slow court system alongside non-legal educated judges could provide adequate justification to convince businesses to employ arbitration as an alternative to courts.

IV. Attitude Toward Dispute Resolutions in Saudi Arabia Today

Currently, there are three arbitration centers: Saudi Center for Real Estate Arbitration, The Engineering Arbitration Center, and Saudi Center for Commercial Arbitration.³³³ The latter can be a suitable forum for institutionalized consumer disputes. Nonetheless, the problem relies on the fact that "consumers" as a collection of people who purchase goods and services, are not thought of as a group in the legal context.

a. Social Media as an Outlet

Social media was essentially invented for the purpose of expressing one's thoughts. However, using it continuously to express frustration with consumer-related substances can indicate a more significant problem. It is common to witness a Saudi post a YouTube video, tweet, or Instagram image to complain about an unexpected electricity bill or problem with added mobile fees.³³⁴ In fact, The Saudi Communications and Information Technology Commission revealed that 91.7% of people in Saudi Arabia use social media.³³⁵ For such affected consumers, successfully provoking public opinion is the ultimate goal. Instead of benefiting from the judicial system, which involves a judge, the consumer can reverse the

³³¹ See, "In Saudi Arabia both executives and nontraditional students appear to have a broader understanding of CSR that goes beyond charitable involvement." Abbas J. Ali & Abdulrahman Al-Aali, *Corporate Social Responsibility in Saudi Arabia*, XIX Middle East Policy Council (2012), <https://www.mepc.org/node/2128>.

³³² That is why "International arbitration is generally perceived by foreign companies to be preferable to relying on the courts in the Kingdom for resolving disputes." Arbitration in the Kingdom of Saudi Arabia, Shearman & Sterling LLP (2017), <https://www.shearman.com/~media/Files/NewsInsights/Publications/2017/01/Arbitration-in-the-Kingdom-of-Saudi-Arabia-IA-012017.pdf>.

³³³ Standing Committee for Saudi Arbitration Centers, http://www.scsac.org.sa/index.php?option=com_content&view=article&id=53&Itemid=337.

³³⁴ Awadh Alfahmi, A citizen of "Adham" Reveals the Truth of an Electricity Bill of 270 Thousand Riyals, Sabq (2017), <https://sabq.org/-/الف-بمبلغ-كهرباء-فاتورة-حقيقة-فاتورة-كهرباء-بمبلغ-الف-ريال>.

³³⁵ 91.7% of Individuals Use Social Networks in the Kingdom, Saudi Press Agency (SPA), April 3, 2019, <https://www.spa.gov.sa/1907384>.

dynamic by presenting their case in front of the public opinion to convey the guilt of a business. In the end, there is often a noticeable response from the company toward resolving any issues as quickly as possible. Even though this attempt at resolution might satisfy certain consumers, it is a risky approach because it implies a lack of trust in an adequate legal system for dispute resolution: rather than relying on such measures, it is more realistic to pursue a feasible solution. Such solution could be consumer arbitration, which can give consumers a platform to present their case to an arbitral body.

It all begins with a simple question; why would a Saudi consumer resort to using social media as an outlet to seek justice? Is there something wrong with the court system that it is enough for consumers? Even though the accessible application has simplified the process of submitting complaints for consumers,³³⁶ there is neither a clear deterrence factor for businesses nor any compensation. However, this outcome is not surprising since the dispute was not held in an appropriate forum.

A report based on research that used a Twitter hashtag tracking tool has counted 1,345 tweets in the Arabic equivalent hashtag of #cyber from November 1 to November 11, 2018, and about 864,048 of a potential number of people who saw those tweets.³³⁷ During this time, several consumers found a cyber clause in their mortgage contracts that was not sufficiently explained to them. Variable interests, or “cyber” as it is known inside consumer groups, was an unknown notion for them, as the norm for bank loans was a fixed interest rate. These consumers were compelled to file complaints because their contracts did not mention the variable interest rate indicator or index; rather, it only referenced the “agreed upon indicator” without much detail. Bank employees encouraged uninformed consumers to select this option because it was supposedly in their best interest, but it was actually not in many cases.³³⁸ A lawyer representing a group of consumer plaintiffs individually released a statement that he had performed his duty by filing individual cases in the General Court, but their cases lacked grounds for jurisdiction, and those who were affected did not reach a solution for their problem. Their individual cases are still being adjudicated by the banking disputes committee.³³⁹

The Consumer Protection Association has held several workshops and meetings to discuss the disadvantages of such a scheme that targets consumers.³⁴⁰ Evidently, social media was effective in certain cases to pressure banks to review their contracts with consumers and provide clients with the option of replacing the variable interest clause with a fixed one.³⁴¹ Still, this progress was made only after years of pressure and use of social media by consumers as an outlet to express their frustrations. Corporate social responsibility involves more than just charity, and this case offers an example of businesses that have considered consumer perspectives.

³³⁶ *Supra* note at 218.

³³⁷ Tweet Binder, <https://www.tweetbinder.com/>.

³³⁸ Saudi Banks Mislead their Customers and Hide the Cyber Index, Arabia Business, March 21, 2018, <https://arabic.arabianbusiness.com/content/335018>.

³³⁹ Mansour Al-Refaie’s Law Firm, Statement number 40/103/2789.

³⁴⁰ A team working to defend the cyber-affected in the Consumer Association, Workshop Calls for Intensified Awareness of Variable-Interest Contracts, Consumer protection Association (2017), <https://cpa.org.sa/?news=9071>.

³⁴¹ Customer satisfaction forces banks to give up cyber, Saudi Banks, Committee on Banking Information and Awareness (2018), <https://www.saudi-banks.info/ar/media-center/news/رضا-العملاء-يجبر-البنوك-على-التخلي-عن-السايبر/>.

b. Consumer Survey

The primary method of distribution was a web-based channel, as it was the most suitable for presenting complex questionnaires.³⁴² The advantages of such method include the ability to reach a larger body of target groups in a relatively short period of time. However, since the sample was gathered through the Internet, it might not represent the general population. About 80% of Saudi Arabians use the Internet, while this figure is 76% among Americans.³⁴³ This statistic might showcase that reaching out to online consumers in Saudi could yield accurate results since most of the population use the Internet. Despite some disadvantages, evidence suggests that the results of online surveys are equivalent in terms of reliability to those that are collected in hard copy.³⁴⁴ However, this survey was also distributed in paper format in public places. Specifically, it was circulated in Jeddah, which is a large city in Saudi Arabia with a population of more than 3 million people. Unsurprisingly, the response rate for the online survey was substantially higher than that for the paper survey.³⁴⁵

Berkeley Qualtrics software was used to write the questionnaires and subsequently analyze the data.³⁴⁶ The survey was conducted under the direction of the Committee for Protection of Human Subjects in the University of California, Berkeley.³⁴⁷ The survey was transcribed in both Arabic and English to allow for clear answers from non-Arabic speakers who live in the Kingdom. Notably, consumers in Saudi Arabia have likely never dealt with arbitration or class action, and some respondents might even have encountered these terms for the first time in the survey. Therefore, definitions of both arbitration and class action were provided to participants prior to answering the survey.

This section provides an overview of the survey and its key findings. A total of 549 consumers responded to the survey. Given that the Saudi population is approximately 33 million, a statistically valid sample size with a 95% confidence level and 5% margin of error would be about 385. Therefore, the sample size of the survey is well above the standard and should be sufficient.³⁴⁸

The survey yielded the following demographic data. About 73.4% of respondents were women, while 26.6% were men. In terms of age, 44.4% were between 41 and 60 years old, 38.9% were between 26 and 40 years old, and the 19-to-25 age range comprised 12.7%. The remainder of the participants were either below the age of 18 or in the category of 61 years of age and above. As for education level, the majority of respondents (70.3%) held a

³⁴² DA Dillman, *Mail and Internet surveys: the tailored design method*, 2nd ed (2000).

³⁴³ Individuals using the Internet (% of population), The World Bank, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?end=2016&locations=SA&start=2016&type=shaded&view=map>.

³⁴⁴ Alain De Beuckelaer & Filip Lievens, *Measurement Equivalence of Paper-and-Pencil and Internet Organisational Surveys: A Large Scale Examination in 16 Countries*, 58 *Applied Psychology* 336–361 (2009), <https://doi.org/10.1111/j.1464-0597.2008.00350.x>

³⁴⁵ Thanks to my J.S.D. colleague, Karen Seif, for giving me a crash-course on survey design.

³⁴⁶ Berkeley Qualtrics, <https://berkeley.ca1.qualtrics.com/ControlPanel/>.

³⁴⁷ Protocol ID: 2018-03-10923

³⁴⁸ Sample size calculator, Qualtrics, <https://www.qualtrics.com/blog/calculating-sample-size/>.

bachelor's degree. Moreover, master's degree holders and high school graduates or less each represented about 13% of the respondents, while about 2.2% consisted of doctorate graduates.

When asked if they had ever experienced a problem with a business, 55.4% answered affirmatively, while 44.6% reported that they had never encountered such issue. Out of those who had encountered a problem, 54.9% escalated the issue, whereas 45.1% remained silent. The majority of consumers who escalated the issue did so by complaining to the business or the Ministry of Commerce.

The demographic data were as followed; about 73.4% of responses came from women and 26.6% from men. 44.4% were from age 41-60 years old and about 38.9% from 26-40 years old. As for the 19-25 age range, they scored 12.7 percent. The rest of the percentage was divided between the 18 years and below and 61 years old and above. As for the level of education, the majority of respondents (70.3%) held a bachelor's degree. Moreover, both master's degree holders and High school graduates or less had each about 13% of the respondent's education level while doctorate graduates consisted of about 2.2%.

When asked about whether they ever had a problem with a business, 55.4% affirmed that while 44.6% did not encounter an issue with a business. Out of the ones that had a problem, 54.9% escalated it whereas 45.1% kept silent. The majority type of actions that consumers who escalated the issue were complaining to the business or the Ministry of Commerce.

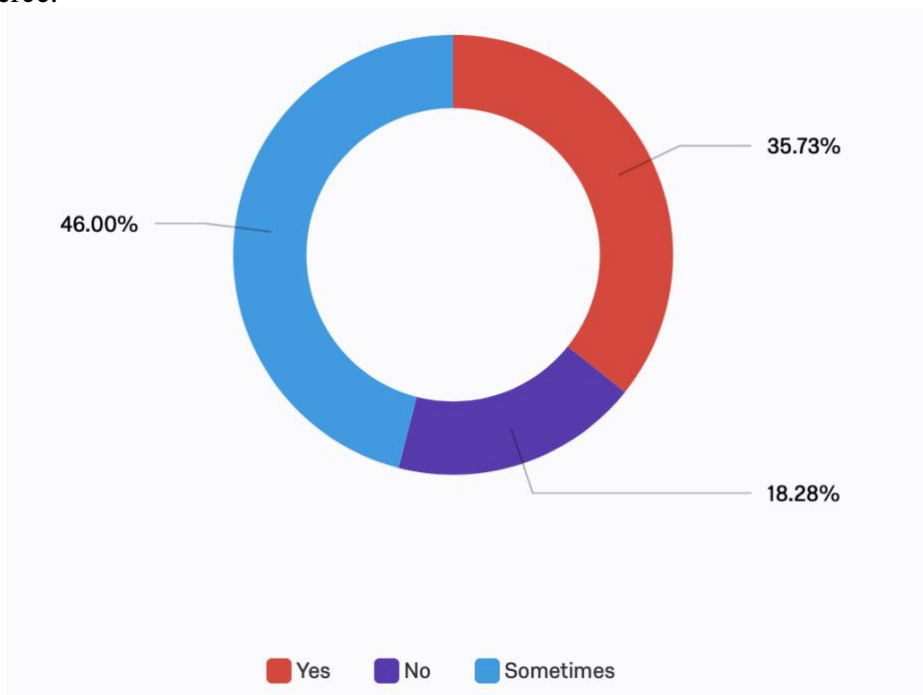


Figure 5, Alhanouf Alsolami, (2019), Survey, Do you read the terms of use when getting a new service?

Fine print is an ongoing issue in the current literature, as consumers usually do not read it. However, the results of the survey could indicate differently (see Figure 5). The largest portion of respondents (46%) stated that they sometimes read fine print. In addition, 35.7% confirmed that they do read it every time they sign up for a new service. This percentage is quite shocking, but these data can have positive applications. For instance, they support the assumption that a sizable portion of consumers in Saudi do read boilerplate conditions occasionally. While reading fine prints "sometimes" might not result in having well-informed consumers, it is better than having the majority of consumers not reading fine prints at all. Thus, when adding both arbitration and class action clauses and indicating how

to opt-out, there might be hope that some consumers will actually know the best route for them.

The table below displays responses to this question:
 (Please evaluate the likelihood of your actions below when you experience harm from a business):

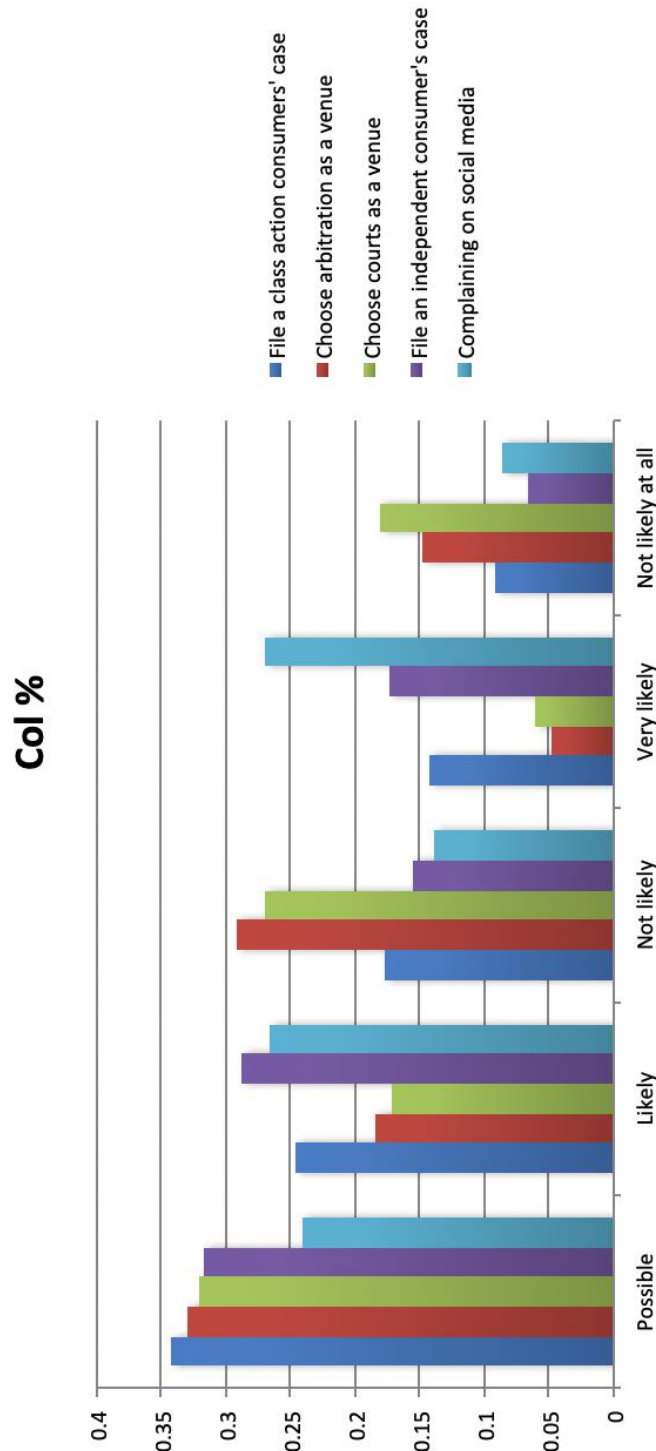


Figure 6, Alhanouf Alsolami, (2019), Survey, Evaluating the likelihood of one's actions when experiencing harm from a business.

The survey also revealed that 34.2% of respondents considered filing a class action consumer lawsuit to be a “possible” option. Meanwhile, 17.7% and 9% answered that it was

“not likely” or “not likely at all” to employ the collective action route. Figure 6 indicates that some respondents might have actually preferred to file an independent consumer case over a class action suit. Perhaps the novelty of the idea had provoked hesitation, as the class action concept is not practically implemented in the Kingdom. The same goes for choosing arbitration as a forum, as 29.1% answered it was “not likely.” However, 18.4% and 32.9% deemed it “likely” and “possible,” respectively. High scores were anticipated for the section about complaining via social media, which received the highest score for a “very likely” attitude among respondents. In addition, 26.6% and 24.1% answered “likely” and “possible” in regard to the likelihood of voicing their concerns through social media.

There is a subtle but statistically significant relationship between the choice of courts as a forum and gender (see Figure 7.) Women scored 30.6% and 19.8% in “not likely” and “not likely at all,” respectively. These figures might indicate that private forums, such as arbitration, could facilitate access to justice in conservative communities by providing a less formal option.

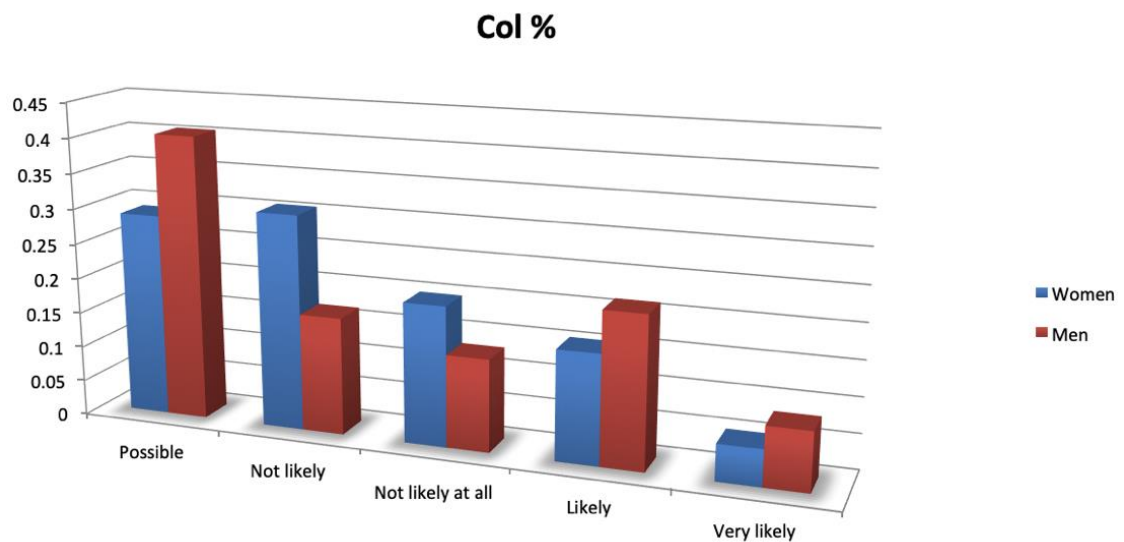


Figure 7, Alhanouf Alsolami, (2019), Survey, Relationship between choosing courts as a forum and gender.

The next question asked respondents to assess the importance of multiple factors, which are listed in Figure 8.

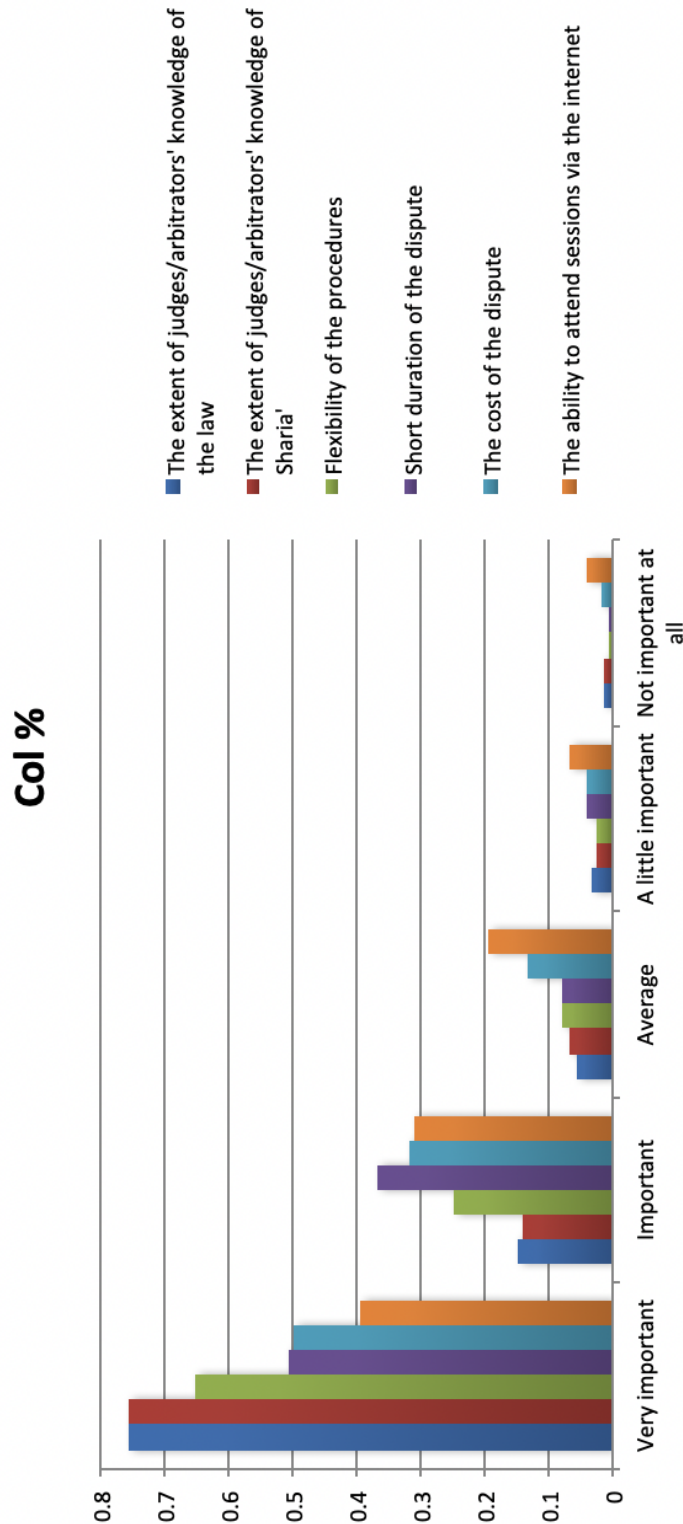


Figure 8, Alhanouf Alsolami, (2019), Survey, Assessing the importance of several factors.

As Figure 8 demonstrates, consumers in Saudi Arabia believe that knowledge of Sharia' and law among judges and arbitrators is crucial. The legal knowledge part is easily understandable, but respondents still seem to think that Sharia' comprehension is a central qualification for judges. It is possible that more contact between legally trained arbitrators and consumers could alter this trend in the future.

Both the cost and duration of disputes also have a major influence on the values of Saudi consumers. This finding was expected and could support the promotion of arbitration as a forum in these situations. Of the respondents, 39.2% and 30.7% considered the ability to attend online sessions to be “very important” and “important,” respectively.

The data reveal a subtle but nonetheless statistically significant relationship between gender and the flexibility of the procedure (see Figure 9.) Seventy-six percent of men described procedure flexibility as “very important,” while only 61.2% of women selected this option. In addition, 27.6% of women scored it as “important,” while this figure was only 16.7% among male respondents.

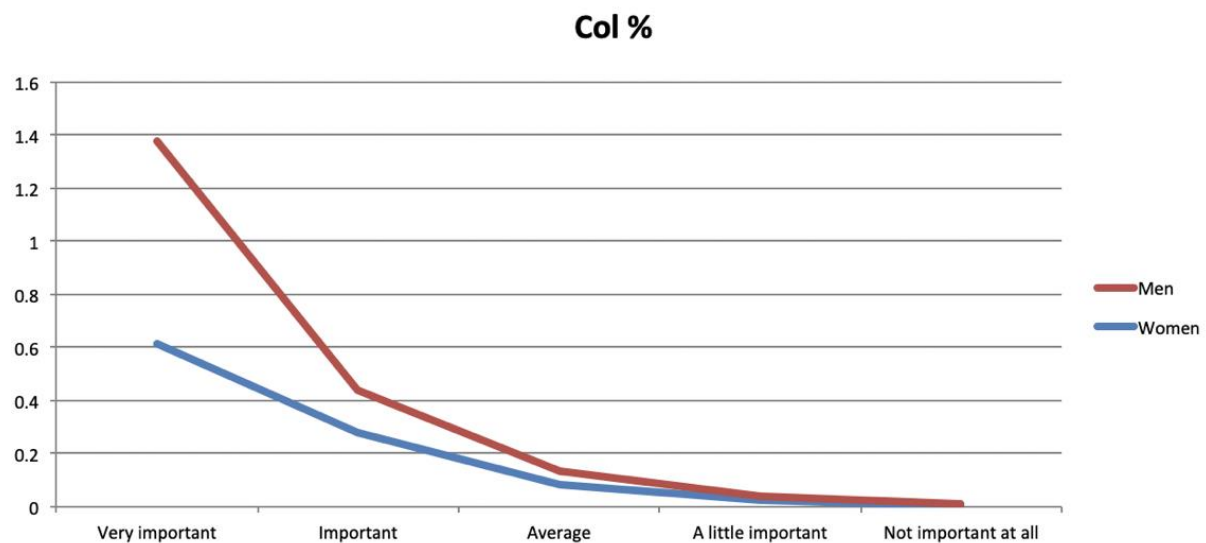


Figure 9, Alhanouf Alsolami, (2019), Survey, Relationship between procedures' flexibility and gender.

The graph below demonstrates a subtle but statistically significant relationship between short duration of disputes and gender (see Figure 10.) Specifically, 65.5% of men perceived the importance of a short duration of disputes to be “very important,” while only 45.3% of women observed it in the same way. The gender disparity decreased slightly with the ranking of “important,” as men and women selected this option at rates of 32.1% and 38.4%, respectively. However, only 10.8% of women weighted it as an average factor.

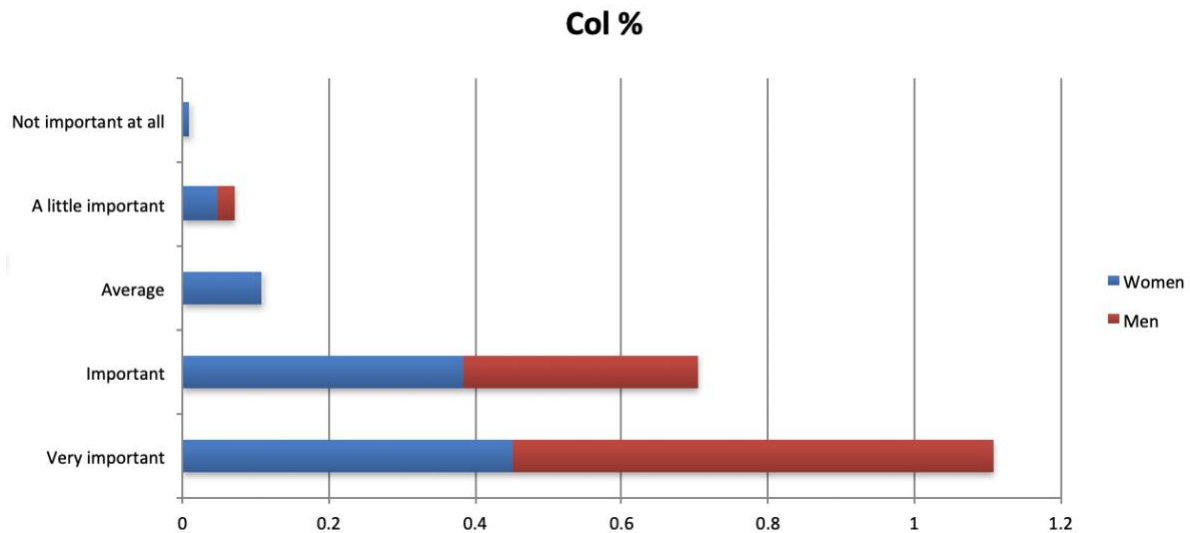


Figure 10, Alhanouf Alsolami, (2019), Survey, Relationship between disputes' short duration and gender.

Another subtle but statistically significant relationship is evident from data concerning the cost of the dispute and age (see Figure 11.) The data reveal that older respondents were more likely to express higher concern over dispute costs. By comparison, younger respondents sometimes ascribed little weight to costs as an important factor of dispute resolution.

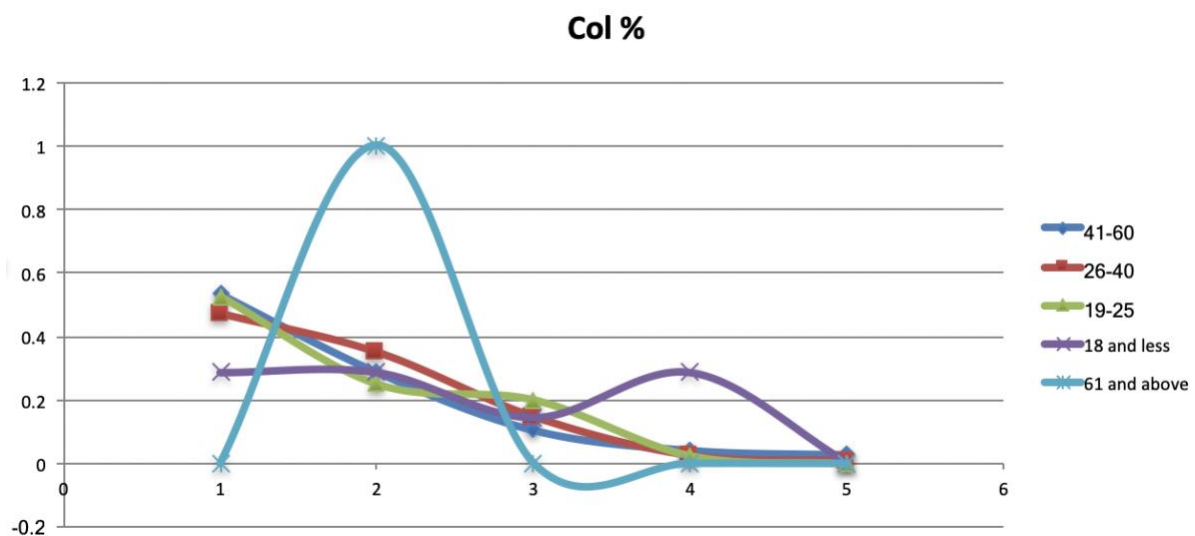


Figure 11, Alhanouf Alsolami, (2019), Survey, Relationship between cost of the dispute and age.

With: (1) very important. (2) important, (3) average, (4) not important, (5) not important at all

The survey data confirm some assumptions and disprove others. They reflect that consumers still prefer social media as an outlet over any available legal mechanism. Moreover, they offer questionable evidence as to the ability of Saudi consumers to actually read fine print. If consumers do take fine print seriously, it offers further assurance that they are well-informed consumers.

Chapter 3

Different Approaches to Class Action and Consumer Arbitration

Exploring the unique methods consumer arbitration with regard to class action is vital to this paper's objective. The methodology of employing a comparative method to analyze different legal systems can provide an instrument to improve local laws in, for example, Saudi Arabia.³⁴⁹ The comparison method is especially important in today's world, which emphasizes economic globalization.

There are many distinct features of typical formal adjudication in developed countries that do not precisely characterize that in developing countries. This chapter explores various attitudes toward arbitration in developed countries. This paper assumes a position that neither of these examples is optimal – first, because the court systems of developed countries are stronger than those of developing countries, and two, because the legal systems' structure is also distinctive.

An interesting case to consider is that of Singapore,³⁵⁰ which has moved from a low-income to a high-income economy.³⁵¹ The Singapore International Arbitration Centre (SIAC) is ranked as the most-desired arbitral institution in Asia, and it received a third-place position within the top five arbitral institutions in the world. London, Paris, and Stockholm arbitration centers were among the top establishments, but Singapore is challenging them.³⁵² The case filings of the SIAC have improved by more than 300% in the past 15 years.³⁵³ Moreover, SIAC has repeatedly produced surprising results. Lakshanthi Fernando, the Director of the Singapore law firm Holborn Law, has stated that they expected multinational corporates to rely on English law.³⁵⁴ However, Indonesian and South Korean companies are progressively using Singaporean law rather than English law in arbitration settings. Singapore's courts also exhibit an arbitration-friendly standpoint.³⁵⁵ The government and its legal system promote the country as an arbitration hub in the region as well as worldwide.³⁵⁶

The second example of a developing country, namely Indonesia, shares Islamic traditions with Saudi Arabia. An initial examination of Indonesia's constitution might suggest that it is a secular country; however, this implication is misleading. Even though Muslims

³⁴⁹ Mark Van Hoecke, *Methodology of Comparative Legal Research* (2015), <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>.

³⁵⁰ One of the reasons that makes Singapore an exciting case to study is that its legal regime support arbitration and has a very strong rule of law. In fact, Singapore scored 0.80 (on a scale of 0-1 with one being the highest) which puts the country at number 13 in the world. Rule of Law Index, World Justice Project (2019), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>.

³⁵¹ The World Bank, *The World Bank in Singapore*, Oct 10, 2018 <https://www.worldbank.org/en/country/singapore/overview>

³⁵² *Supra* note at 257.

³⁵³ Jane Croft, *Singapore is becoming a world leader in arbitration*, Financial Times, June 2, 2016, <https://www.ft.com/content/704c5458-e79a-11e5-a09b-1f8b0d268c39>.

³⁵⁴ *Ibid.*

³⁵⁵ Singapore Courts Continue to Support Arbitration, HFW (2011), <http://www.hfw.com/Singapore-Courts-continue>.

³⁵⁶ Piyush Prasad, *Arbitration in Singapore and Hong Kong*, International Immersion Program Papers (2017), http://chicagounbound.uchicago.edu/international_immersion_program_papers/57.

comprise about 87.2% of the population, the country's constitution did not state religion as a source of law.³⁵⁷ Thus, Indonesia operates a civil law legal system, which originated from Dutch colonial law.³⁵⁸ However, a recent study has revealed that more than 442 Sharia'-based ordinances have been passed in Indonesia since 1999.³⁵⁹ Some parts of the country dedicate religious courts to family law cases, but their jurisdiction is not exclusive, as parties can adjudicate in district courts.³⁶⁰

Indonesia's economic freedom score was 64.2 in the 2018 index, which positioned its economy as the 69th-freest economy. The overall score indicated an increase that reflects several improvements to business freedom, monetary freedom, and judicial effectiveness.³⁶¹ Indonesia's economic growth has been impressive; the rate rose from 5.1 to 5.2% between the third and fourth quarter of 2017,³⁶² respectively. This growth was due to investments as well as improvements in global trade, which led to stronger net exports.³⁶³ Still, it appears that foreign investors perceived the Indonesian court system to be unpredictable and inefficient in terms of time management. Since legal certainty is vital in a globalized economy, countries strive for investment opportunities by improving their legal environment, among other factors.³⁶⁴ The environment in Indonesia ultimately instigated investors to opt for arbitration over litigation because it was comprehended as a neutral forum.³⁶⁵

³⁵⁷ The World Fact Book, Indonesia, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>.

³⁵⁸ Leoni G I Silitonga et al., *Legal Systems in Indonesia: Overview*, Thomson Reuters, [https://uk.practicallaw.thomsonreuters.com/w-010-7310?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-010-7310?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

³⁵⁹ Elizabeth Pisani & Michael Buehler, *Why do Indonesian politicians promote shari'a laws? An analytic framework for Muslim-majority democracies*, 38 *Third World Quarterly* 734–752 (2016). As cited in: Jon Emont, *As Shariah Experiment Becomes a Model, Indonesia's Secular Face Slips*, *The New York Times*, January 12, 2017, <https://www.nytimes.com/2017/01/12/world/asia/indonesia-sharia-law-aceh.html>.

³⁶⁰ Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia* (2012), <https://digital.law.washington.edu/dspace-law/handle/1773.1/1091>.

³⁶¹ 2018 Index of Economic Freedom, Indonesia <https://www.heritage.org/index/country/indonesia>

³⁶² March 2018 Indonesia Economic Quarterly: Towards inclusive growth, The World Bank (2018), <http://www.worldbank.org/en/country/indonesia/publication/indonesia-economic-quarterly-march-2018>.

³⁶³ Indonesia Continues to Build on Solid Economic Growth, The World Bank (2018), <http://www.worldbank.org/en/news/press-release/2018/03/27/indonesia-continues-to-build-on-solid-economic-growth>.

³⁶⁴ *Supra* note at 242.

³⁶⁵ Koesrianti Koesrianti, *Legal Certainty as a Fundamental Principle of Private Foreign Investment Agreements in Indonesia Toward AEC*, *Information Ethics and Security* (2014).

I. The Conservative Approach

Here, the term conservative refers to the business logic, which indicates the desire to increase revenue, lowering cost, and higher productivity.³⁶⁶ To consider the conservative method of dealing with consumer arbitration, the US offers a prime example of favoring businesses over consumers. The US Supreme Court has reinforced the notion that submitting to arbitration is mainly a change of forum and not a change in rights.³⁶⁷ More specifically, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."³⁶⁸

a. The US Model

The case of *AT&T Mobility v. Concepcion* has major relevance to arbitration and class action.³⁶⁹ The majority opinion stated that class arbitration interferes with the fundamental characteristics of arbitration. Moreover, making the switch from bilateral to class arbitration can lead to slower and more expensive arbitration. Meanwhile, the dissenting opinion presented a thought-provoking question:

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court. (AAA Amicus brief 24)³⁷⁰

More than 60 million US workers cannot pursue their claims in court.³⁷¹ Even though this study focused on employment arbitration, it can be applied to suggest similar trends in consumer-related arbitration. The situation is not likely to be resolved soon given that the Supreme Court's position remains pro-businesses. This position might affect consumers who will be denied justice by the courts.

In another case, *DIRECTV, Inc. v. Imburgia*,³⁷² a group of California consumers made an agreement of service with the petitioner, DIRECTV, Inc., which included a binding arbitration provision in addition to a class-action waiver clause. DIRECTV charged early termination fees to its customers, which led Imburgia to file a class action lawsuit against the company. The contract contained a provision that the entire arbitration was unenforceable if the "law of your state" renders class-arbitration waivers unenforceable. Moreover, it was also governed by the FAA. During this period, the law of California rendered class arbitration

³⁶⁶ Shauhin A. Talesh, *Institutional and Political Sources of Legislative Change: Explaining How Private Organizations Influence the Form and Content of Consumer Protection Legislation*, 39 *Law & Social Inquiry* 973–1005 (2014).

³⁶⁷ Preserving Justice, Speed and Economy of Arbitration, *Corporate Counsel Business Journal* (2006), <https://ccbjournal.com/articles/preserving-justice-speed-and-economy-arbitration>.

³⁶⁸ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

³⁶⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)

³⁷⁰ *Ibid.*

³⁷¹ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration, Access to the Courts is Now Barred for More than 60 Million American Workers*, *Economic Policy Institute* (2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/#_note2.

³⁷² *Directv, Inc. v. Imburgia*, 136 S. Ct. 463 (2015)

waivers unenforceable.³⁷³ However, the respondents were unlucky once the Supreme Court made its decision in *AT&T Mobility LLC v. Concepcion*³⁷⁴ at the same time. In *Concepcion*, the US Supreme Court held that the FAA displaced state law, which prohibited contracts that do not permit class action arbitration. Both California's trial court and the Court of Appeal denied the petitioner's motion to move the dispute to arbitration and affirmed that "[t]he fact that the FAA pre-empted that California law did not change the result, the court said, because the parties were free to refer in the contract to California law as it would have been absent federal pre-emption."³⁷⁵

An examination of the language of the Supreme Court in discussing arbitration provisions highlights considerable controversies. The court's opinion establishes "a liberal federal policy favoring arbitration agreements."³⁷⁶ The exact use of the word "liberal" questions the intent behind using such word. A Merriam-Webster search yielded a highly specific result for the origin and etymology of this word, which derives from the Latin word *liberalis*, which means "(free)man."³⁷⁷ The court clearly associated the "free" part of the word with freedom of contract, but it neglected the de facto situation of many consumers: that their economic freedom is minimal at best when dealing with big businesses.

The court explicitly conveyed that having access to justice is not an entitlement, so it is therefore acceptable that the barrier of high costs prevents some consumers from filing individual cases. The court has intentionally disregarded that the absence of a valid class-action mechanism allows businesses to successfully construct an enormous wall of protection from liability. These positions are examples of judicial hostility³⁷⁸ toward consumer protection rather than arbitration.³⁷⁹

From a different perspective, promoting arbitration without weighing all of its risks and advantages could be disastrous. The situation of employment arbitration in the US is a living example of how courts are safeguarding the largest corporations at the expense of their employees. It is highly challenging for an employee to justify the expense of bringing a legal action against his or her employer. The main reason is the court's current standing against class action in arbitration proceedings when the contract contains such terms.³⁸⁰

In *American Express Co. v. Italian Colors Restaurant*, the respondent accepted American Express credit cards in their business. Their contract with the petitioner, American Express, contained a clause that "there shall be no right or authority for any Claims to be arbitrated on a class action basis." Nonetheless, the respondent brought a class action suit against American Express based on the claim that the latter used its monopoly power for charge cards to force Italian Color Restaurant to accept rates that were about 30% higher than

³⁷³ See, *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005)

³⁷⁴ *Supra* note at 369.

³⁷⁵ *Supra* note at 355.

³⁷⁶ *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)

³⁷⁷ Liberal, Merriam Webster, <https://www.merriam-webster.com/dictionary/liberal#h1>.

³⁷⁸ The Federal Arbitration Act was enacted because of a real judicial hostility that showed itself as refusal of enforcing pre-dispute arbitration agreement. When talking about judicial hostility in this context, it means the de facto judicial hostility toward consumer protection, which enables businesses to take cover from any legal liability.

³⁷⁹ The Federal Arbitration Act (FAA), 9 U. S. C. §1, enacted in 1925 as a response to judicial hostility to arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)

³⁸⁰ Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 Denv. U. L. Rev. (2012), https://scholarship.law.uci.edu/faculty_scholarship/50/.

those of competing companies. Accordingly, the merchant sought damages under § 4 of the Clayton Act.³⁸¹

In this case, the plaintiff's cost for individual litigation clearly far exceeded the likely recovery. In fact, an economist has estimated a cost of over \$1 million USD to conduct the expert analysis that would be essential to prove the antitrust claim. Meanwhile, the maximum recovery for the plaintiff would be around \$12,850. With a five-to-three vote, the Supreme Court reached the decision that "[t]he FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."³⁸² This judgment reinforced the court's trend of "rigorously enforcing" arbitration agreements based on their terms.³⁸³ This case illustrates that the terms of arbitration apply even when the cost of proving an individual claim in arbitration surpasses the possible recovery.

Nevertheless, the current situation in the US can be changed.³⁸⁴ Richard Cordray, the former Director of the Consumer Bureau, has stated that "[t]onight's vote is a giant setback for every consumer in this country." He was referencing to a recent failure of the Consumer Financial Protection Bureau wherein the Senate voted against a rule that would allow US citizens to sue financial institutions through class action despite the existence of an arbitration clause that prevents it.³⁸⁵

In regard to wage and hour infractions, the latest Supreme Court arbitration decision in *Epic Systems Corp. v. Lewis* upheld the enforceability of arbitration agreements that include class action waivers.³⁸⁶ Consequently, employers can preclude their employees from joining a class action,³⁸⁷ which leaves them with individual litigation as the only option.³⁸⁸ Most employees will confront a situation in which the expenses of singular litigation would likely outweigh recovery. The dissenting opinion questioned the bilaterality of the agreement since it does not seem that employees had a choice in the matter; the only two options were to either sign the agreement and waive one's rights to use collective action or to give up the job.

³⁸¹ *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013)

³⁸² *Ibid.*

³⁸³ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985)

³⁸⁴ "This holding presents a serious fairness issue. The court is concerned that one or more of the named plaintiffs in this action will not be able to afford the out-of-pocket costs to arbitrate, even under conservative cost assumptions. Indeed, several of the plaintiffs have represented that they have no income and no unencumbered assets whatsoever. While required by the FAA, this result strikes the court as manifestly unjust and, perhaps, deserving of legislative attention." *Supra* note at 383.

³⁸⁵ Jessica Silver-Greenberg, Consumer Bureau Loses Fight to Allow More Class-Action Suits, *The New York Times* (2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?_r=0.

³⁸⁶ 138 S.Ct. 1612 (2018)

³⁸⁷ Michael W. Massiatte, *Epic Systems Corp. v. Lewis*: Supreme Court affirms employers' efforts to "waive" goodbye to wage-and-hour class and collective actions, *DLA Piper* (2018), <https://www.dlapiper.com/en/us/insights/publications/2018/05/epic-systems-corp/>.

³⁸⁸ Rick Bell, *In Epic Systems Corp. v. Lewis the Supreme Court Deals a Blow to Employee Class Actions*, *Work Force* (2018), <http://www.workforce.com/2018/06/13/in-epic-systems-corp-v-lewis-the-supreme-court-deals-a-blow-to-employee-class-actions/>.

From a different stance, the so-called “death” of the class action procedure might be due to two causes.³⁸⁹ The first could be that the court repeatedly narrowed Rule 23, which permits class action.³⁹⁰ The other cause could be the rise of multidistrict litigation within states to account for about 40% of civil cases in federal courts.³⁹¹ Multidistrict litigation has evolved to fill the void that remained after the decline of class action in tort,³⁹² for which the court was responsible.³⁹³

In the US, class members do not opt in; rather, the court issues a certification order to certify the action as a class action.³⁹⁴ This mechanism indicates an assumption that putative class members are a part of the class action unless they decided to opt out. Yet, for consumer disputes, the opt-out rate is less than 2% of the class.³⁹⁵ This figure might suggest that consumers find class action to be a more appealing venue to pursue their claims. Meanwhile, members who want to opt out must submit a form to formally leave the class action.

At present, it appears that the conservative approach of protecting businesses in the US will persist. On November 1, 2017, President Trump signed a joint resolution passed by Congress that disapproved the Arbitration Agreements Rule under the Congressional Review

³⁸⁹ Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Northwestern University Law Review (2013).

³⁹⁰ See, “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.” Also “In the hands of today’s majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.” *Supra* note at 381, Justice Kagan, with whom Justice Ginsburg and Justice Breyer join, dissenting.

³⁹¹ See, “thousands of cases pending around the country that share a common question of fact can be transferred to a single district judge in any district for pretrial proceedings. The judge is chosen by a panel of judges selected by the Chief Justice of the United States called the Judicial Panel on Multidistrict Litigation (JPML). After such pretrial proceedings, the cases are to be remanded to the courts from which they came for trial, but this rarely happens—less than 3 percent of the cases ever exit the MDL court. Instead, most of the cases are either settled or resolved in the MDL proceeding.” Andrew Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165 (2017).

³⁹² Andrew D. Bradt, “*A Radical Proposal*”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831(2017).

³⁹³ See, “Courts have applied Rule 23’s restrictions, particularly the predominance requirement, in myriad ways to prevent class certification. Examples include additional factual gatekeeping at the class-certification stage, scrutiny of whether the representative can adequately represent the class (including those who may have “future claims” who are not yet members of the class.)” Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. Pa. L. Rev. 1711 (2017), https://scholarship.law.upenn.edu/penn_law_review/vol165/iss7/7.

³⁹⁴ Federal Rules of Civil Procedure, Title IV. Parties, Rule 23. Class Actions (C.)

³⁹⁵ Kenneth M Kliebard et al., *Class/collective actions in the United States: overview*, Thomson Reuters (2018), [https://1.next.westlaw.com/Document/I9dd0805b410011e598dc8b09b4f043e0/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&isplc=true&firstPage=true&bhp=1](https://1.next.westlaw.com/Document/I9dd0805b410011e598dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&isplc=true&firstPage=true&bhp=1).

Act (CRA).³⁹⁶ The rule prohibited certain businesses, when making an agreement with a consumer that specifies arbitration for any future dispute, from barring consumers from filing or participating in class action concerning the covered consumer financial product or service.³⁹⁷

II. The Liberal Approach

a. The European and Comparable Models

The European approach to consumer arbitration is more compatible with the usual definition of “liberal.” The term liberal refers to consumers’ logic, which signifies protecting individual rights, valuing due process, and preferring the court system as a venue for dispute resolution.³⁹⁸ Europe has resisted movements to make arbitration compulsory; thus, consumers are exempt from disputing their claims with businesses in arbitration settings.³⁹⁹ Although national laws, rather than EU law, govern any dispute related to consumer arbitration, general themes are still present in how European nations address arbitration. In general, there is a trend toward establishing more systems of class action models across Europe so that claimants can sue in front of national courts. A possible reason for European hesitation toward the expansion of class action could be the “abusive litigation” trend in the US.⁴⁰⁰

According to the EU Council, any unjust terms in consumer-to-business contracts invalidate the pre-dispute arbitration clauses in consumer contracts.⁴⁰¹ The justification is unequal bargaining power between the parties. Thus, any consumer can challenge the validity of arbitration provisions should it be inequitable.⁴⁰² The European Commission's Initiative on Collective Redress aspired to provide a non-binding minimum procedural standard for class action in the EU.⁴⁰³

Even though the UK has a moderately developed class action mechanism, it is fairly rare for such proceedings to occur in the UK compared to in the US. One reason is that

³⁹⁶ Jeffrey L. Hare & Adam Dubin, Financial Services Regulatory Alert, DLA Piper (2017), <https://www.dlapiper.com/en/us/insights/publications/2017/11/congress-overturns-cfpb-arbitration-rule/.dd>

³⁹⁷ Bureau of Consumer Financial Protection 12 CFR Part 1040 [Docket No. CFPB-2016-0020] RIN 3170-AA51

³⁹⁸ *Supra* note at 367.

³⁹⁹ Walter D. Kelley Jr., Mandatory Arbitration in the United States and Europe, Hausfeld (2016), https://www.hausfeld.com/news-press/mandatory-arbitration-in-the-united-state-and-europe?lang_id=1.

⁴⁰⁰ The Growth of Collective Redress in the EU, A Survey of Development in 10 Member States, U.S. Chamber, Institute for Legal Reform (2017), https://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf.

⁴⁰¹ Council of the European Union, European Union, https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en.

⁴⁰² ECJ, Case C-168/05, Mostaza Claro v. Movil, Decision 26 October 2006.

⁴⁰³ Resolve your Consumer Complaint, European Commission, http://ec.europa.eu/consumers/solving_consumer_disputes/judicial_redress/index_en.htm.

claimants in the UK bear the cost of both parties' expenses in the event of a failed claim, while the US arrangement is different. In addition, punitive damages are not permissible in the UK; therefore, in some cases, legal fees can far exceed than the amount of damages that are awarded to the claimant.⁴⁰⁴

Another issue concerns the differentiation between international and domestic consumer arbitration matters. In France, arbitration is deemed international by nature if it involves an international trade interest.⁴⁰⁵ In November 2016, a critical event occurred wherein the French Parliament altered Article 2061 of the Civil Code. This article requires that, in order to be valid, an arbitration clause must be "accepted by the party against which it is enforced, unless that party was assigned or otherwise transferred the rights and obligations of the party who initially accepted the clause."⁴⁰⁶ The previous edition of Article 2061 stated that "[s]ubject to the specific legislative provisions, the arbitration clause is valid in contracts concluded for a professional activity." Consequently, the distinction is sharp, as individuals can now agree on arbitration without professional activity. Scholars have claimed that international arbitration can benefit from a unique treatment compared to that of domestic arbitration. The former is more liberal for several reasons; for instance, domestic arbitration is required to be in writing, while international arbitration does not have any specific requirements to prove the validity of arbitration.⁴⁰⁷ France is known for its arbitration-friendly environment, so it is not surprising that the International Chamber of Commerce (ICC) seat is in this country.⁴⁰⁸

Some countries strongly value economic freedom and consider it essential to individual rights. In Sweden, consumer-related arbitration clauses are banned in contracts regarding the sale of goods or services whose main purpose is for private use. However, if a dispute arises, the consumer has an option to opt in to arbitration.⁴⁰⁹ As another example, Germany does not enforce a consumer arbitration clause unless it is contained in a separate, signed document or part of a fully notarized contract. When juxtaposed with *Carnival Cruise*⁴¹⁰, there is a clear contrast between the approaches of the two developed legal systems

⁴⁰⁴ Baker McKenzie, *On the Cusp of US-Style Class Action? European Commission Gathers Evidence for the Future of Collective Redress* Lexology (2017), <https://www.lexology.com/library/detail.aspx?g=e6285776-c826-4af1-92c0-81e696eb683f>.

⁴⁰⁵ (Article 1504, CC). "What matters is that the underlying economic transaction operates a transfer of goods, services or funds across national borders" (*Paris Court of Appeal, 5 Apr 1990, 1992 Rev Arb 110*). As cited in: Alexandre Bailly, Xavier Haranger & Morgan Lewis, *Arbitration Procedures and Practice in France: Overview*, Thomson Reuters (2018), [https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

⁴⁰⁶ Alexandre Bailly, Xavier Haranger & Morgan Lewis, *Arbitration Procedures and Practice in France: Overview*, Thomson Reuters (2018), [https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

⁴⁰⁷ Maxime Desplats & Audrey Grisolle, *France*, DLA Piper (2018), <https://www.dlapiper.com/en/uk/insights/publications/2018/07/france/>.

⁴⁰⁸ *Supra* note at 387.

⁴⁰⁹ GAR Know how: *Commercial Arbitration: Sweden*, Global Arbitration Review, <http://globalarbitrationreview.com/jurisdiction/1003163/sweden>.

⁴¹⁰ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)

to confronting this problem. One jurisdiction emphasized the importance of consumer awareness and full consent to the terms, while the other disregarded consumers' rights.

The most distinctive feature of class action in Sweden compared to in other countries is the opt-in mechanism. Because of this feature, class members are not bound by the settlement without prior approval by the court. There is also a "risk agreement" whereby plaintiffs can set an hourly rate for fees with the lawyer, but if the action is successful, the rate will be doubled; if not, it will be reduced to a certain number.⁴¹¹

Another unique system is present in Spain wherein an independent entity, namely the Consumer Arbitration Board, oversees consumer arbitration. The arbitral institution monitors the capacity and independence of arbitrators. Generally, in cases of a single arbitrator, the arbitrator must be a jurist except when parties have agreed otherwise.⁴¹²

Nevertheless, Europe does not have the only model that protect consumers. Another example is the model of South Korea. In this system, the term "consumer damage" refers to any "damage caused to a consumer's life, body, property or mental state by flawed or defective products or by a breach of contract or an illegal act on the part of a business during the use of a product or service purchased from that business."⁴¹³ When consumer damage occurs, consumers are recommended to undergo negotiation as a first resort rather than utilizing the courts, as the former route is faster and more efficient. However, if both parties do not resolve the issue at stake, then mediation follows under the Consumer Dispute Settlement Commission. The decision, if accepted by both parties, has some judicial effect.⁴¹⁴

There are also several pro-consumer policies, one of which is the Consumer Counseling Center, which is operated by the Korea Fair Trade Commission. This center provides services such as legal information for consumers.⁴¹⁵ It is important to note that there is no class action mechanism; rather, every individual needs to file a claim separately.⁴¹⁶ In regard to shifting fees, the lack of reliance on an arbitration rule suggests that, in practice, the loser pays for legal fees and costs, which is similar to the norm in the courts.⁴¹⁷

⁴¹¹ Jules Stuyck, *Class Actions in Europe: To Opt-in or to Opt-out, That Is the Question*, 20 Eur. Bus. L. Rev. (2009).

⁴¹² "Perhaps the most innovative approach to large-scale arbitration that has yet been identified comes out of Spain. Several years ago, the Spanish legislature adopted a statute on collective consumer arbitration which authorizes regulatory bodies known as Consumer Arbitration Boards to organize and oversee arbitration involving consumers. The statute creates a unique, non-representative collective procedure that addresses many of the concerns commonly enunciated by respondents, particularly with respect to the issue of consent. As a result, the Spanish model may be acceptable to other jurisdictions seeking to identify a way to allow large-scale disputes to go to arbitration."

S.I. Strong, *The Future of Class, Mass, and Collective Arbitration*, Kluwer Arbitration Blog (2014), <http://arbitrationblog.kluwerarbitration.com/2014/05/22/the-future-of-class-mass-and-collective-arbitration/>.

⁴¹³ Consumer Protection, (2018), <http://www.korea4expats.com/article-consumer-protection-in-korea.html>.

⁴¹⁴ *Ibid.*

⁴¹⁵ See *supra* note 394.

⁴¹⁶ Jin Yeong Chung, Sungjean Seo & Kim & Chang, *Litigation and enforcement in South Korea: overview*, Thomson Reuters (2018), [https://content.next.westlaw.com/Document/I2ef12a921ed511e38578f7ccc38dcbee/View/FulIText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I2ef12a921ed511e38578f7ccc38dcbee/View/FulIText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1).

⁴¹⁷ Sae Youn Kim, Andrew White & Yulchon LLC, *Arbitration Procedures and Practice in South Korea: Overview*, Thomson Reuters, Practical Law (2018),

Chapter 4

How Does Class Action fit in?

Arbitration and class action are related subjects not because of their legal complexity but rather through their direct impact on consumers' lives. Anyone with a Snapchat account has complied with its terms of service, wherein Snap, Inc. has implemented an arbitration clause. Uber is one of many more examples of companies that enforce mandatory arbitration and forbid consumers from accessing public courts.⁴¹⁸ In addition, users waive their right to any class-wide arbitration so any kind of collective action mechanism is prohibited.⁴¹⁹

Due to practical constraints and the lack of a class action mechanism, this paper cannot provide a comprehensive review of class action in the Kingdom. Many claims are considered too minor to bring individually in view of, for example, the high cost of adjudicating a small claim when the damages are unsubstantial. A consumer who sues an electric company for \$500 in response to an alleged wrongdoing still bears the entire cost of litigation and lawyer fees. With a viable collective action mechanism, this consumer could congregate with other consumers who have the same claim against the specific electric company.⁴²⁰ Their claims can then be aggregated into one class action case. Additionally, their claim is likely to have more merit in this form, as they are reinforcing the same statement.

In terms of finances, the cost per each member is lower in a class action case, as they are bound together in one case and divide the legal cost between all of the members. This arrangement can presumably allow more affected consumers to join a class action suit and demand their rights. On the other hand, banning class action would obstruct access to justice. When permitting, collective action can promote efficiency by aggregating small claims into one action. This advantage is especially important for countries that experience a shortage of resources in the legal system.⁴²¹

The average Saudi is not likely to sue or pursue a legal action when the amount of money at stake is less than the cost of litigating. One should not give a lot of evidence to convince that a multiple-party proceeding, such as class action, is much more efficient than a single proceeding. The alternative is not hundreds of different proceedings but rather none. Consider the example of a consumer in Saudi Arabia who was illicitly charged \$200 by his or her Internet provider. This consumer will probably not follow up beyond a complaint, as any further action is not financially justifiable. In this way, legal systems force people away from pursuing their own rights. This trend could change if this consumer were to gather with other consumers with the same complaint and file a class action suit against the Internet provider. Through this channel, there is a higher likelihood that they will follow through, as the financial burden is divided among the class members.

[https://uk.practicallaw.thomsonreuters.com/8-381-2907?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/8-381-2907?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk).

⁴¹⁸ Terms of Service, Uber, <https://www.uber.com/legal/terms/us/>.

⁴¹⁹ Terms of Service, Snap (2017), <https://www.snap.com/en-US/terms/>.

⁴²⁰ Because “No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.”
Supra note at 381, Justice Kagan, with whom Justice Ginsburg and Justice Breyer join, dissenting.

⁴²¹ Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 *The Journal of Legal Studies* (1975).

Compared to commercial arbitration, statistics from the AAA suggest that class arbitration proceedings might require more time. Nevertheless, they might take less time than the average class action in court.⁴²² The link between lower single damages and high transactions cost implies that collective action is the best available medium to protect vulnerable parties.⁴²³

A more recent development emerged when the EU legal affairs committee delivered a proposal that grants EU consumers the right to seek damages as a class. However, the bill faced criticism, as it lacked some important details.⁴²⁴ Still, the proposal signifies a global trend toward safeguarding consumers by enabling access to an imperative vehicle, such as class action. Although collective redress is indeed a key aspect of protecting consumers, it is challenging even for one of the most sophisticated legal systems, namely that of the US. The situation in other less-sophisticated systems might be suffer from even more severe abuse of the system. Nevertheless, the shortcoming of the US class action mechanism is the inadequate number of safeguards. In view of this, developing countries especially need to implement mechanisms, such as an opt-out feature, to secure a viable procedure that works in the end.

I. Status Quo of Consumer Arbitration and Class Action in Saudi Arabia

Arbitration clauses are present in the terms of most credit cards, cellular phone services, and applications in the US. By contrast, consumer arbitration is not particularly popular in Saudi Arabia.⁴²⁵ An analysis of the terms and conditions of most large businesses in Saudi Arabia reveals no mention of arbitration as a dispute resolution.⁴²⁶ Rather, complaint

⁴²² “Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought.” AAA Amicus Brief 24, *AT&T MOBILITY LLC v. CONCEPCION ET UX*. Also, “But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”

Carnegie v. Household Int’l, Inc., 376 F. 3d 656, 661 (CA7 2004)

⁴²³ Nantiya Ruan, *Whats Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 Michigan State Law Review (2014), <https://digitalcommons.law.msu.edu/lr/vol2012/iss4/2/>.

⁴²⁴ Sue Reisinger, *EU Takes a Major Step Toward Allowing Class Actions; U.S Chamber Legal Arm Objects*, Corporate Counsel, December 10, 2018, <https://www.law.com/corpcounsel/2018/12/10/eu-takes-a-major-step-toward-allowing-class-actions-u-s-chamber-legal-arm-objects/?slreturn=20190229184837>.

⁴²⁵ The analysis studied the three largest telecom companies; STC, Mobily, and Zain.

⁴²⁶ In case number 16514/1/ق of The Collection of Judgements and Commercial Principles (1436 hijri), the court stated that it does not have jurisdiction in a consumer to telecommunication company’s dispute because the Saudi Telecommunications Commission have original jurisdiction over the subject matter.

is the procedural mechanism to solve problems. It appears that business-to-business agreements resort to arbitration, while consumer-to-business relations lack an alternative dispute resolution mechanism.⁴²⁷

Tahkim, or arbitration, is not a Western term that entered Saudi Arabia. In fact, arbitration has an origin as a legal dispute resolution settlement mechanism in Islam. The principle is clear in the *Quran*:

And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted with all things.⁴²⁸

In general, Islam emphasizes the importance of community values rather than the individual values that are favored by the West. Prophet Mohammed also favored mediation and resolving disputes via a private party, as this approach concludes with a compromise between parties.⁴²⁹ Furthermore, an amicable settlement is strongly advisable to maintain the collective interest of Muslim society. This phenomenon encourages an alternative dispute resolution route in lieu of litigation, as both parties express their willingness to settle.⁴³⁰

The Saudi Arbitration Law defines the arbitration agreement as an agreement between two or more parties to refer to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.⁴³¹

The law also emphasizes the severability doctrine, which dictates that any illegal parts in a contract require that the clause be treated as independent of the other terms in the contract. Thus, even if the contract is nullified, the arbitration clause remains valid.⁴³² This clarification is on par with international arbitration standards around the world.

Saudi arbitration law has continuously maintained international standards. Although the limitation of leaving Sharia' undefined might cause apprehension, there are other areas to improve. The arbitration law permits parties to agree on a set of procedural rules to be followed by the arbitral tribunal.⁴³³ As is the custom, even this permission is followed by an exception for rules that contradict Sharia'. The law also allows parties to choose a place of arbitration; if they cannot, the tribunal shall determine the venue according to the applicable

⁴²⁷ Arbitration ends Zain-Mobily dispute with 10% of claims, Alarabiya (2016), <http://www.alarabiya.net/ar/aswaq/financial-markets/2016/11/13/تحكيم-ينهي-نزاع-موبايلي-زين-ب-10-من-المطالبات.html>.

⁴²⁸ The Qur'an, Al-nisaa', 4.35

⁴²⁹ Cherine Foty, The Evolution of Arbitration in the Arab World, Kluwer Arbitration Blog (2015), <http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/>.

⁴³⁰ Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration, Islamic Law and Law of the Muslim World*, Research Paper Series at New York Law School (2008).

⁴³¹ Arbitration Law of 2012, Article 1/(1)

⁴³² Arbitration Law of 2012, 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."

⁴³³ Arbitration Law of 2012, Article 25/(1)

conditions and parties' convenience.⁴³⁴ Deciding on a set of substantive rules to govern the arbitration is also permissible according to the Saudi law.⁴³⁵

Yet, even with the positive history of arbitration in the Arab world, the application of international arbitration in the modern world did not commence positively. A group of arbitration awards in the 1950s fortified the perception that arbitration was actually a means of implementing Western laws and agendas. However, over time, Arab parties started to notice the benefits of arbitration, especially when it prevailed, as it could soften the blows toward their hostility. This viewpoint continued to improve until most Arab countries adopted national arbitration laws based on the UNCITRAL model.⁴³⁶

As for the current situation of class action in the Kingdom, on November 20, 2017, the Saudi Capital Market Authority revised its regulations and added a class action mechanism to securities disputes.⁴³⁷ The board chairman of the Capital Market Authority stated that the activation of class action as a procedural device would impart a sense of protection for investors, especially in cases where a large group of plaintiffs report the same legal violation. Therefore, the principal objective in beginning this process is to cultivate the capital market in Saudi Arabia and safeguard its investors.⁴³⁸

In the choice between a series of legal disputes and one joint class action case, administrative efficiency will likely be the determining factor to support the class action option.⁴³⁹ For instance, a television company may claim that its televisions meet a specific energy efficiency standard when they actually do not.⁴⁴⁰ To react, consumers can litigate, or arbitrate, through the procedural vehicle of class action. If the company is found liable, damages are granted to the class as a whole. This example demonstrates that administrative efficiency is achieved by lowering costs for both plaintiffs and the system as a whole.

Nevertheless, there are not many valid collective redress mechanism for other types of disputes. The closest is "joinder and intervention," which entails bringing a third party into the case after the start of the dispute via either a court order or the opponent's request.⁴⁴¹ The Saudi Law of Civil Procedures in Article 81 states,

Any person with interest may intervene in the case by joining one of the litigants or by petitioning a judgment for himself on a matter related to the case. Intervention shall be pursuant to a memorandum served to the litigants before the day of the

⁴³⁴ Arbitration Law of 2012, Article 28

⁴³⁵ Arbitration Law of 2012, Article 38/1/(A)

⁴³⁶ Cherine Foty, Facebook The Evolution of Arbitration in the Arab World, Kluwer Arbitration Blog (2015), <http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/>.

⁴³⁷ Regulations of the Procedures for Adjudication of Securities Disputes, Capital Markets Authority of Saudi Arabia (2017), https://cma.org.sa/RulesRegulations/Regulations/Documents/RSDPR_ar.pdf.

⁴³⁸ The Approval of Arranging Collective Action in Securities Disputes, Capital Markets Authority of Saudi Arabia (2017), https://cma.org.sa/Market/News/pages/CMA_N_2325.aspx.

⁴³⁹ *Supra* note at 421.

⁴⁴⁰ Ashley Milano, Samsung Class Action Says Televisions Don't Meet Energy Efficiency Standards (2017), <https://topclassactions.com/lawsuit-settlements/consumer-products/464293-samsung-class-action-says-televisions-dont-meet-energy-efficiency-standards/>.

⁴⁴¹ Abdullah Al-Khaneen, Entry into the Suit at the Request of the Opponent and its Provisions (2014).

hearing in accordance with applicable case-filing procedures, or pursuant to an oral petition made during the hearing in the presence of the litigants.⁴⁴²

In addition, the Executive Regulations of the Arbitration Law dictate that “[t]he arbitral tribunal may accept the intervention of another party other than the original parties to the arbitration, after the approval by the parties to the arbitration and the party to enter it.”⁴⁴³

“Searching for a middle ground” might be an overused phrase, as legal systems should not settle for a solution that will not fit their own country and traditions. A legal transplant might entail a perfect fit in an area of law, but when no suitable solution is available, there is no need to settle just because it is a Westernized concept. Neither the liberal nor the conservative approach could work in the Saudi legal system. There is a need to foster economic prosperity and one aspect to do so is by legal reforms.

Still, there are many disadvantages of legal transplants. On the one hand, blindly copying the law can upset the legal system if such law is not compatible with the country’s traditions and values. In such cases, there is a high chance of transplant’s breakdown. On the other hand, if applied correctly, the adaptation of the transplant’s process should be easier, especially when there is a common drive between the transferor and transferee countries. However, “when the motivations diverge, a successful transplant is more likely to take place only when the host jurisdiction is equipped with adequate institutions and legal infrastructure that can accommodate the imported rules to serve their new purpose.”⁴⁴⁴

In the contracts of adhesions, and especially in consumer contracts, there is a need for an administrative government authority to give credence to those contracts, as consumers usually do not have sufficient knowledge.⁴⁴⁵ The International Islamic Fiqh Academy has proclaimed the following:

Given the potential control of the domineering party and the conditions dictated by its contracts of adherence, and its arbitrariness of harming the general public, all contracts of adhesions must be subject to state control (ie, before dealing with people) in order to establish what is fair to them, or to cancel what is wronged by the complaining party in accordance with what is required by justice by law.⁴⁴⁶

Such interpretation might obstruct the process of advancing arbitration, as the academy is a private body that governments do not directly regulate. Furthermore, it provides additional justification for governments to define a “fair” outcome even when there is a written contract between parties. This point of view is somewhat consistent with the European perspective of mandatory consumer arbitration.

The current arbitration law in Saudi Arabia is based mainly on that of UNCITRAL, which is a progressive element since the latter is accepted worldwide.⁴⁴⁷ In the past, judges

⁴⁴² Royal Decree No. dated 22 / 1 / 1435

⁴⁴³ Executive Regulations of the Arbitration Law of 1438 Hijri, article (13.)

⁴⁴⁴ Ahmad A. Alshorbagy, *On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 *Indiana International and Comparative Law Review* (2012), <https://journals.iupui.edu/index.php/iiclr/issue/download/823/201>.

⁴⁴⁵ Administrative Development, Institute of Public Administration, <https://tanmia-idaria.ipa.edu.sa/Article.aspx?Id=154>.

⁴⁴⁶ Institute of Public Administration, <https://tanmia-idaria.ipa.edu.sa/Article.aspx?Id=154>.

⁴⁴⁷ United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

The Saudi Bar Association has announced that there is one lawyer for every 6,323 people in Saudi Arabia. In comparison, in the US, there is one lawyer per 242 people.⁴⁵⁶

As for arbitration, in 2016, Saudi Arabia established the Saudi Center for Commercial Arbitration (SCCA),⁴⁵⁷ which parties can choose to administer their arbitration procedures. The center has not published any data in regard to the average time of the procedure. However, it offers an arbitration fee calculator that estimates the cost based on the amount of the dispute.⁴⁵⁸ For instance, an input of 2,000 SR (\$533 USD) yields a total of 10,864 SR, which is five times the original amount.⁴⁵⁹ However, such calculations could be misleading; given that most consumers' disputes are based on small amounts, the SCCA might actually not be favorable to consumers, as they would pay significantly more in the arbitration fees than they would receive by resolving the dispute. Still, a viable solution might be class action consumer cases, which split the threshold among the class members.

The main three advantages of arbitration are that it can be cheaper, faster, and confidential. That does not mean that these factors will be applicable in the field of consumer to business.⁴⁶⁰ In fact, arbitration might be more expensive compared to litigation in the current structure in Saudi Arabia. This is not the norms in other countries, as litigation is usually more expensive which gives arbitration the upper hand in this arena. Nonetheless, there are ways to lower the cost of consumer arbitration. For instance, picking one arbitrator instead of three to lower the expenses. Facilitating institutionalized consumer arbitration centers is another solution.

As for the second feature, Saudi law also prescribes varied and potentially daunting channels for resolving consumer issues. If a Saudi consumer wants to address an issue with a bank, then the appropriate channel to use is the Committees for Banking and Financial Disputes and Violations. As per the Royal Decree, the committee is composed of three members in addition to a substitute member.⁴⁶¹ In a country with more than 32 million people,⁴⁶² a single committee of four members is expected to adjudicate all bank-related disputes. As for mobile-related issues, consumers need to file a complaint with the mobile company. If it is not resolved, they can file a complaint with the Communications and

⁴⁵⁶ Sahar Abu Shaheen, *One Lawyer for Every 6 Thousand People in Saudi Arabia*, Makkah Newspaper, May 6, 2018,

<https://makkahnewspaper.com/article/963949/البلد-محام-واحد-لكل-6-آلاف-شخص-بالسعودية>.

⁴⁵⁷ Arbitration Rules, Saudi Center for Commercial Arbitration,

<https://www.sadr.org/ADRServices-arbitration-arbitration-rules?lang=en>.

⁴⁵⁸ These changes might be similar in nature to the ones that Singapore made in 1994, when “the Chief Justice, in his drive to improve the efficiency of the justice system introduced major changes in the civil procedural laws of Singapore to encourage litigants to settle their disputes without litigation. These changes included the imposition of court hearing fees chargeable on a daily basis and pre-trial settlement conferences. Some of these measures eventually made way for the formal introduction of mediation within the judicial system.”

Lawrence G S Boo, *The Framework and Practice of ADR in Singapore*,

https://www.aseanlawassociation.org/9GAdocs/w4_Singapore.pdf.

⁴⁵⁹ SCCA Arbitration Fees Calculator, Saudi Center for Commercial Arbitration,

<https://www.sadr.org/ADRService-fees-arbitration-calculator?lang=ar>.

⁴⁶⁰ Steve Herman, *Judge Young Explores The Myths of Arbitration*, Gravier House Press (2018), <https://gravierhouse.com/2018/12/19/judge-young-explores-the-myths-of-arbitration/>.

⁴⁶¹ Committee for Banking and Financial Disputes and Violations,

<http://www.bfc.gov.sa/ar-sa/Aboutus/BankingDisputesCommittees/Pages/default.aspx>.

⁴⁶² General Authority for Statistics, Kingdom of Saudi Arabia,

<https://www.stats.gov.sa/en/indicators/1>.

Information Technology Commission.⁴⁶³ These examples illustrate that despite the lack of consumer arbitration practices in the Kingdom, it is foreseeable for consumers to present their claims in front of an arbitral tribunal, as they are already facing a committee rather than a public court. It also emphasizes that arbitration can be more efficient and faster than litigation.⁴⁶⁴

The third feature, arbitration being more confidential, can be very similar to adjudicating in public courts. This statement is made as the Saudi legal system publish very little of its cases, and even then, there are no identifiable information for parties. This means that confidentiality for parties will not be a game changer when choosing a forum.

In fact, online arbitration could provide a suitable outlet for consumer dispute resolution, as consumers could easily attend the arbitration from virtually anywhere. Most Saudi Arabians have access to the Internet, which renders online arbitration much more convenient than courts. In 2017, more than 80% of the Saudi population used the Internet (see Figure 12), while this percentage was around 58% in the Middle East and North Africa.⁴⁶⁵

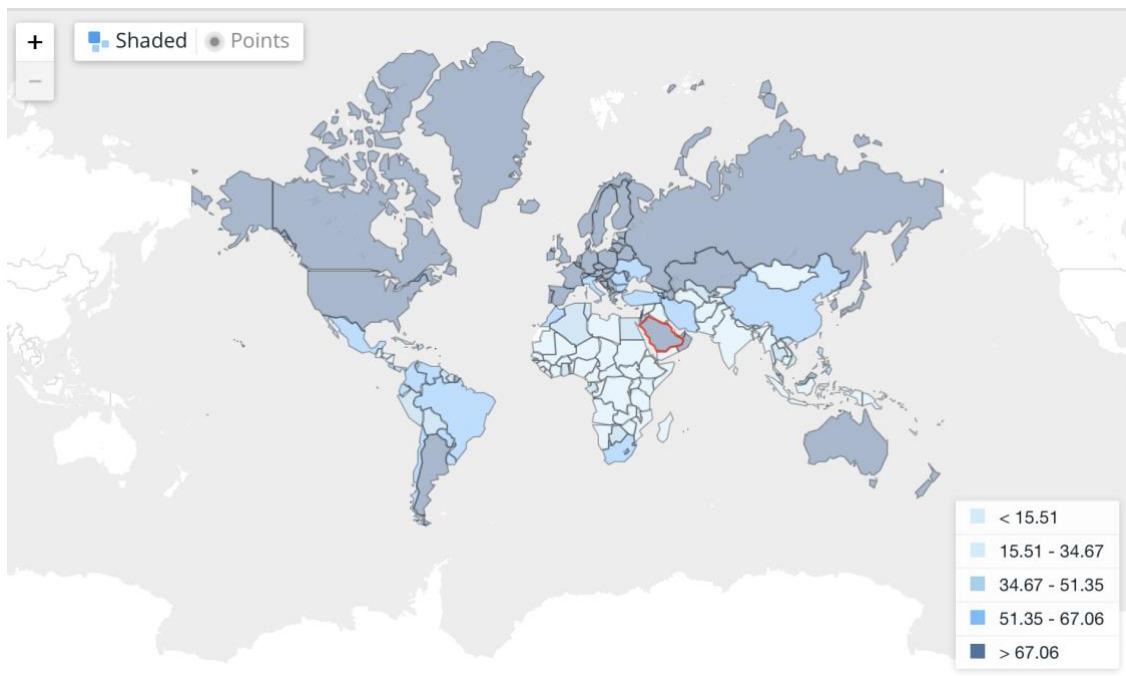


Figure 12, Individuals using the Internet (% of population), (2016) The World Bank.⁴⁶⁶

⁴⁶³ Communications and Information Technology Commission, <http://www.citc.gov.sa/ar/Pages/default.aspx>.

⁴⁶⁴ An example for efficiency in arbitration might be by constituting time limits for rendering awards. Therese Wilson, *Setting Boundaries Rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers?*, 39 Journal of Consumer Policy 349–364 (2016).

⁴⁶⁵ *Supra* note at 345.

⁴⁶⁶ *Supra* note 451.

Chapter 5

The Case Against Consumer Arbitration and Class Action

As demonstrated, the Kingdom is at a crucial moment in its economic development, and the creation of a reliable and predictable legal framework is imperative. Arbitration could contribute to an answer by offering efficiency, easy implementation, and many international acceptance rules. This chapter will explore the arguments against arbitration and proposed fixes to overcome the negatives.

I. Contract Theory

The relevant form of contract in this discussion is an adhesion contract, which is also known as a standard form contract.⁴⁶⁷ Contracts of adhesion in Saudi Arabia are permissible; they follow the principle of *pacta sunt servanda*.⁴⁶⁸ Through their strong bargaining power, businesses draft the contract without any input from the weaker party – in this case, the consumers.⁴⁶⁹ Since this type of contract can be deemed unfair to the weaker party, courts might be inclined to not enforce it, especially if there was no meaningful choice, which results in unfair bargaining power and inequitable substantive terms in the contract.⁴⁷⁰

Notably, consumer contracts might not be truly bilateral by nature. The assumed consent of consumers is not treated equally to that of businesses.⁴⁷¹ The main reason behind advocating to implement an opt-out mechanism is to protect their rights and avoid unfair surprises. Yet, portraying the opt-out mechanism as a new solution that will save arbitration might be misleading without further developments. Assuming that Saudi consumers do not know much about the opt-out process, it is essential to spread knowledge to consumers so that they can make adequate legal decisions. This notion is critical as without a proper legal knowledge to consumers, there is no meaning behind suggesting an opt-out option.

In adhesion contracts and consumer contracts especially, there is a need for an administrative government authority to credence the contract, as consumers usually lack the

⁴⁶⁷ See, “According to the theory of Transaction Cost Economics (TCE), contracts are governance structures used to minimize transaction costs, in which the costs arise from drafting the agreement between the parties; losses that arise from opportunistic behavior; and the lack of adaptation of the contracting parties. According to this theory, the transactional characteristics present in a relationship imply greater or reduced risks, which in turn would alter the costs, functions, and compositions of contracts.” Schepker, Oh, Martynov, & Poppo, 2014; Williamson, 1985. As cited in: Luciana Cardoso Siqueira Ambrozini & Dante Pinheiro Martinelli, *Formal and Relational Contracts between Organizations: Proposal of a Model for Analysis of the Transactional and Governance Structure Characteristics of Comparative Cases*, 52 *Revista de Administração* 374–391 (2017).

⁴⁶⁸ A Latin phrase for “agreements must be kept.” *Pacta Sunt Servanda* Law and Legal Definition, US Legal, <https://definitions.uslegal.com/p/pacta-sunt-servanda/>.

⁴⁶⁹ Adhesion Contract (Contract of Adhesion), Cornell Law School, Legal Information Institute, [https://www.law.cornell.edu/wex/adhesion_contract_\(contract_of_adhesion\)](https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion)).

⁴⁷⁰ Unconscionability, Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/unconscionability>.

⁴⁷¹ *Epic Systems Corp. v. Lewis*, 584 US _ (2018)

proper knowledge.⁴⁷² Consumers err not on purpose but because they possess inadequate information and imperfect rationality. These factors could lead them to make decisions that will not support their preferences.⁴⁷³

For a contract of adhesion that includes arbitrary conditions, the civil law in the neighboring Islamic country of Egypt dictates that the judge may amend these conditions or exempt the submissive party from following them.⁴⁷⁴ This law gives the judiciary the power to decide whether there was evidence of arbitrary conditions on the weaker party. Moreover, the judge has the ability to amend the conditions to achieve contractual equilibrium.

Businesses are presumably aware of the power structure within consumer-to-business contracts. It is apparent from analyzing the language of the terms and conditions that consumers have no input. The terms and conditions of the major Saudi telecommunication company Mobily state in the Legal Disclaimer and Limitations of Liability's sub-section that "[i]f you are dissatisfied with any part of the Service or with any of these Terms, your sole and exclusive remedy is to discontinue using this Service."⁴⁷⁵ Through inference, it is plausible to think that a "complaint" is the default mechanism to solve disputes and that companies are not intimidated by it, as it is not an effective instrument.⁴⁷⁶ A reference to major businesses in Saudi Arabia yielded some interesting results. Generally, most of these economic agents do not include arbitration in dealing with consumers. On the contrary, they explicitly reference Saudi courts as a forum of dispute.⁴⁷⁷ The Saudi Investment Bank has stated that, "[i]n the event of any dispute, the Bank and the Customer shall be bound by the exclusive jurisdiction of the Banking Dispute Settlement Committee of the Kingdom of Saudi Arabia."⁴⁷⁸ Though some of what of an exception appears from the United Motors "In the event of any dispute between the company and the client, it shall be referred according to the company's opinion to arbitration in the Chamber of Commerce."⁴⁷⁹ What is striking in the last clause is the phrase "according to the company's opinion" as it indicates a sole consent to arbitration.

⁴⁷² Tanmia Idaria, <https://tanmia-idaria.ipa.edu.sa/Article.aspx?Id=154>.

⁴⁷³ Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 *Minnesota Law Review* (2008).

⁴⁷⁴ Article 149 of the Egyptian Civil Law

⁴⁷⁵ Mobily, Terms of Use

http://www.mobily.com.sa/portalu/wps/portal/personal/terms-and-conditions!/ut/p/a1/hc_BCoJAEAbgZ-ngMWdMKO0mIuZGiCBmewmNbRXUIXVr6e0zb0bh3Gb4_mEGKORAU-JZ80LVoiuaT0-3V8cN_QM5IkHMLPRiP3aDiNhJbI3gMgNuhhhloZ_Gwc5KQ1zKn4F-kdkGPG0WQLIAphsmgH_KQyBAeSPK6eGL15W2w4FKdmeSSfMhx3GIVD_sDTRQa21yIXjDzJtoDfwVqcSgIJ9L6Nsc62hNy5devQGVtRz1/d15/d5/L2dBISvZ0FBIS9nQSEh/

⁴⁷⁶ In telecommunication matters, article (10) of the Telecommunications Law (1422 hijri), the Saudi Communications and Information Technology Commission is the entity that has jurisdiction to resolve any arising disputes.

⁴⁷⁷ This comment is made after looking at these businesses' terms of use in Saudi Arabia: Nissan, STC, Extra. Noon, a major e-commerce website explicitly referred to the governing law to be the applicable laws of Saudi Arabia, and that Saudi courts shall be the forum. Terms of Use, Noon, 2017, <https://www.noon.com/saudi-en/terms-of-use>.

⁴⁷⁸ The Saudi Investment Bank, <https://www.saib.com.sa/en/content/terms-and-conditions-0>.

⁴⁷⁹ UMC, Terms and Policies, <http://umc.com.sa/ar/terms-policies/>

Souq.com, an e-commerce platform owned by Amazon, targets consumers in Saudi, UAE, and Egypt. Their terms of use prescribed negotiation as an instrument to resolve disputes. This good-faith negotiation should be over a period of thirty calendar days. In cases where parties did not reach a settlement, there is a binding arbitration clause. It does not appear that there is an opt-out option for either party.⁴⁸⁰ And, the arbitration rules are under the Dubai International Financial Centre - London Court of International Arbitration.⁴⁸¹ Bearing in mind that these terms and conditions are applicable to consumers in Saudi, the terms still indicate that the seat of arbitration shall be in Dubai, UAE. These positions are an example of clauses that are used to imitate the US way of thinking of consumer arbitration. Consumers are forced to enter an agreement without an exit. The only place of solving disputes is in another country, which is not reasonable to the weaker party.

The 2015 Queen Mary and White & Case International Arbitration Survey compared the views of arbitration stakeholders regarding past and probable developments in international arbitration. “Due process paranoia” emerged as a central finding of the survey and appeared to be a rising apprehension in the field.⁴⁸² It is especially vital in arbitration because one of the requirements of due process, which refers to the ability of parties to suitably present their case, is a grounds for the annulment of an award if not done properly. Article 34(2)(a)(ii) of the UNCITRAL Model Law states the following:

An arbitral award may be set aside by the court specified in article 6 only if...the party making the application furnishes proof that ... the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.⁴⁸³

Therefore, it would be imprudent to assume that judges and arbitrators have different understandings of due process. For instance, national court judges with the judicial authority frequently reach the same type of decision.⁴⁸⁴

⁴⁸⁰ Souq.com terms of use, Souq, <https://saudi.souq.com/sa-en/terms-and-conditions/c/#26>.

⁴⁸¹ See, “The foregoing provisions of this clause are without prejudice to the right of Souq.com to seek interim relief at any time from any court of competent jurisdiction (whether or not an arbitrator has been appointed) and Souq.com shall not be deemed to have breached this arbitration agreement or infringed the powers of the arbitrator for having done so.” *Ibid.*

⁴⁸² 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, Executive Summary, Queen Mary University of London and White & Case LLP, www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf

⁴⁸³ UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(a)(ii) (1985, with amendments as adopted in 2006), www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

⁴⁸⁴ See ““One cannot exclude the possibility that this may colour their consideration of a case where an arbitral tribunal has done something similar.” Polkinghorne, Michael & Gill & Benjamin Ainsley, *Due Process Paranoia: Need We Be Cruel to Be Kind*, *Journal of International Arbitration* 34, no. 6 (2017).

II. Public Policy Defense

Since there is no central government to enforce arbitration awards, the question arises of how countries could oblige themselves to this process. Although the incorporation process translates international agreements into laws in sovereign states, the effects can be rather dull if loopholes are used.⁴⁸⁵ In the New York Convention (NYC), to which Saudi Arabia is a party, Article V 2 (b) gives a basis to courts to reject the enforcement of arbitration awards on public policy grounds. Whereas the older Geneva Convention provided a precise definition of public policy, the NYC neglects to do so, likely because a treaty needs to have softer language – and, thus, fewer restrictions – in order to be widely ratified.

Arbitration has arisen as a solution by which companies, especially foreign ones, can guarantee the conclusion of an award by choosing a particular law to govern the issue. However, this arrangement presents a loophole, as the enforcement of an arbitration award is first assessed by the enforcement court to ensure that the award does not violate any Sharia' orders. In this context, the public policy defense is again relevant. Judges reserve a broad judicial review power, and although the newest arbitration law forbids any direct review of merits, the authority to annul a judgment if it violates Sharia' is still contrary to the purpose of arbitration.⁴⁸⁶ This problem derives from the lack of written codes for specific Sharia' interpretations of every aspect.

One element of consideration for parties when agreeing to arbitration is the simplicity or lack of an enforcement process. In regard to private sector disputes, the full extent of the enforcement of international arbitration awards in Saudi Arabia is not yet clear.⁴⁸⁷ However, in about 90% of private arbitration cases, parties voluntarily complied with the awards. It seems that since the market values reputation, these awards do not advance to the point of judicial enforceability. The shadow of courts' enforcement casts an additional factor too that might fosters compliance.⁴⁸⁸

One way to challenge the validity of an award is with Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which grants contracting countries the power to not enforce arbitration awards if they contradict a country's public policy.⁴⁸⁹ The convention did not define "public policy"; hence, states have the ability to interpret the term widely. There is no indication that the convention was intended to set transnational standards for public policy.⁴⁹⁰ In addition, it is important to note that public policy interpretations should not be equal to domestic laws. The UN Conference

⁴⁸⁵ William W. William & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings Law Journal (2006).

⁴⁸⁶ Saudi Arbitration Law, Royal Decree No. M / 34 dated 24 / 5 / 1433

⁴⁸⁷ Doing Business in Saudi Arabia, 2017 Country Commercial Guide for U.S. Companies, United States of America, Department of Commerce, <https://sa.usembassy.gov/wp-content/uploads/sites/60/CCG-2017-Saudi-Arabia.pdf>.

⁴⁸⁸ Walter Mattli & Thorsten Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (2017).

⁴⁸⁹ "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country" Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

⁴⁹⁰ Alan Redfern, Martin Hunter & Murray Smith, *Law and Practice of International Commercial Arbitration* (1991).

on International Commercial Arbitration did not accept Israel and India's proposal of refusing enforcement should it violate their domestic laws.⁴⁹¹ Moreover, it is obvious that the UN Convention incorporates pro-enforcement bias.

This section now analyzes a case from a collection of commercial cases from the year 1432 Hijri (the equivalent of 2011), which is the most recently published case collection in Saudi Arabia to date. Notably, this case occurred prior to the passage of the newest arbitration and enforcement laws. In Case number 1/3050/هـ 1431 ق، the plaintiff filed a claim against the defendant, but the court ruled that it did not have jurisdiction to hear the case on the grounds of an existing arbitration clause. The court of appeal affirmed this decision. Based on these circumstances, the plaintiff appointed an arbitrator and asked the defendant to appoint her arbitrator, but she did not comply with the request. Therefore, the plaintiff filed a claim against the defendant to select an arbitrator and sign the arbitration document.

The defendant argued that Article (15/B) from the contract states, "Any conflict that cannot be solved in a friendly manner will be presented for arbitration in front of an arbitrator under ICC, and that the language of the arbitration shall be English. The arbitration should be in Europe or US of America as the parties agree." She further explained that the plaintiff presented her with an arbitration document that violates their agreement because she referred to Saudi arbitration law instead of the International Chamber of Commerce (ICC), asked for three arbitrators instead of one, and identified Riyadh as the seat of arbitration rather than Europe or the US. Therefore, the defendant concluded that these were not the original conditions and requested that the plaintiff conform to the original agreement, but she did not respond.

The plaintiff counter-argued that Article (15/A) of the contract states, "The laws of the Kingdom of Saudi Arabia shall be valid upon the establishing, application and enforcement on this agreement except for conflict of laws' provisions regarding ICC." In view of this, Article (15/B) does not restrict the general rule, as "foreign" arbitration is not included in the conflict of law provisions. The plaintiff also claimed that the defendant originally accepted the authority of the court, so she could not lawfully reject it afterward. In addition, the courts of the Kingdom of Saudi Arabia are the competent authority to hear the arbitration's dispute. The judge issued his opinion, which stated that Saudi courts reserved jurisdiction to hear the case because both parties were Saudi nationals. Moreover, he asserted that any agreement between Saudi parties to "foreign" arbitration equates to a denial of the original jurisdiction of Saudi courts, which contradicts public policy. He then declared that the arbitration clause remained effective and that the defendant ought to sign the arbitration document.⁴⁹²

The facts of the previous case do not include the location of the parties' business. The available information does include that both parties signed a contract containing an arbitration clause. The arbitrability of the case should not be subject to dispute given that the court already issued a judgment. Yet, the judge again used his power to invalidate a legal agreement for an arbitration seat established in the court's general jurisdiction. Notably, this case went to the appeal court and was affirmed. This outcome is an indication of the previous hostility of Saudi courts toward arbitration. The era following the new arbitration law should yield a different attitude toward arbitration. Without limiting the public policy defense, there

⁴⁹¹ Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, IBA Journal of Dispute resolution (2008).

⁴⁹² Judicial Blog, Court Judgments of 1432 Hijri, <http://www.bog.gov.sa/ScientificContent/JudicialBlogs/1432/Pages/default.aspx>.

is little possibility that arbitration can thrive in the Kingdom. It is also imperative to note that contract enforcement is significant for this proposal to work. Otherwise, very little will change.

If this case had occurred after the passage of the new arbitration law, it might have proceeded in an entirely different way. It is plausible that the court would take a much more arbitration-friendly attitude since the law itself has changed. Since the UNCITRAL model inspired this new law,⁴⁹³ it could represent a form of legal transplant that may or may not be successful. However, it is promising that adopting this model law could enhance certainty, as it is internationally recognized if implemented and enforced correctly.⁴⁹⁴ Additionally, in Article 3 of the new arbitration law, arbitration is judged to be international if one of the following conditions occur:

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.⁴⁹⁵

The previous Arbitration law, M/46, obliged parties to sign an arbitration document that contained the arbitrators' names, the issue, and the parties' names. This document required certification by the competent authority prior to beginning the arbitration.⁴⁹⁶ Therefore, even though the new arbitration law added into Article 50 (4) that the enforcement court does not have the power to reassess the merits and facts of the case, Article 50 (2) grants the court the power to annul an award if it is against Sharia'. This is for both international and domestic arbitration.

⁴⁹³ The New Saudi Arbitration Law, JONES DAY, http://www.jonesday.com/new_saudi_arbitration_law/.

⁴⁹⁴ On the contrary, the prior arbitration law did not specifically mention international arbitration.

⁴⁹⁵ Arbitration Law, Article (3), Royal Decree No. M / 34 dated 24 / 5 / 1433

⁴⁹⁶ Article (5) from the Arbitration law of 1403 Hijri.

III. A Comparative Perspective

To review public policy defense more broadly than in the specific context of consumers, this section examines the issue under different legal systems. To this end, it is necessary to compare and contrast other jurisdictions that exhibit similar or distinctive characteristics with Saudi Arabia: Pakistan, the US, and Korea.

Pakistan

Article 2 of The Constitution of the Islamic Republic of Pakistan of 1973 states that “Islam shall be the State religion of Pakistan.” Therefore, the Sharia’ limitation should theoretically be equivalent, at least at the foundational level, to that of Saudi Arabia. Agreements on wagering and gambling, for instance, have been deemed immoral and against the public policy in Pakistan.⁴⁹⁷ Thus, the same prohibition could be established under the public policy of Saudi Arabia, as such agreements in fact violate Sharia’ principles.

What is new in Pakistan’s case is that fairly recently in the game they enacted the 2011 Act which is based on the 1958 convention to recognize and enforce foreign arbitration agreements. Not surprisingly, the application fell short as Pakistan’s courts could not follow up with the drastic difference. This incident delayed the enforcement process, and the purpose of the 1958 convention did not cultivate. The courts did not even use the public policy defense and went as far as conducting evidence, which is beyond the Article V of the NY Convention.⁴⁹⁸ It might be safe to assume that this example should not be one to follow by Saudi Arabia.

USA

It may not seem immediately logical to compare a secular federal republic to a religion-based monarchy, but there are some valuable points of comparison. The US is perceived as an arbitration-friendly jurisdiction, while Saudi Arabia is striving to become one. In *AT&T Mobility LLC v. Concepcion*, the US Supreme Court held that “[t]he Federal Arbitration Act preempts California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts.” Consumer arbitration is a secondary topic in the US model compared to that of Europe. The US adopts an extreme stance in supporting contractual agreements and, thus, arbitration as well. Meanwhile, Europe identifies consumers as parties with weak bargaining power, and it therefore does not make arbitration

⁴⁹⁷ “Immorality and illegality of consideration of an agreement have been regarded as injurious to the public and hence have been declared to be against public policy. For example, agreements on wagering, gambling or betting were held to be immoral, illegal and against public policy, for their object and consideration were deemed unlawful.” *Anjuman Prize Bond Dealers v. Province of Punjab et al.*, (2001) 53 PLD (Lahore) 129, 133-34 (Pak.). See also *Abdul Razzak v. Karachi Dev. Authority*, (1991) 13 CLC 1591, 1598 (Pak.). As cited in: Finance and Development, *The World Development Report* (September 1997)

⁴⁹⁸ Hassan Raza, *Pakistan’s Dilemma with Foreign Arbitrations*, Kluwer Arbitration Blog (2018), <http://arbitrationblog.kluwerarbitration.com/2018/04/24/pakistans-dilemma-foreign-arbitrations/>.

mandatory for them.⁴⁹⁹ Choosing a more dynamic choice can situate the country in a leading position, which provides incentive. Foreign investors can be guaranteed that Saudi Arabia is an arbitration-friendly forum, and they will not have to engage with the domestic judicial system.

Korea

Europe puts the emphasis on consumers instead of arbitration agreements, as does Korea which is an example of a country that favor consumers. Korea's economy is a template for success that could guide Saudi Arabia toward innovatively diversifying its economy. Article 1 of the Korean Act on the Regulation of Terms and Conditions states that the purpose of the act is to establish sound order in business transactions. It aims to protect consumers and promote the balanced improvement of people's lives by precluding businesspersons from preparing unfair terms and conditions and using them in business transactions by taking unfair advantage of their bargaining position and regulating unfair terms and conditions.⁵⁰⁰ It is important to note that the term consumer refers to not only individual consumers but also companies. Thus, Article 6 (2) together with Article 14 provide grounds for a public policy defense in such cases.⁵⁰¹ However, this condition is still not the most suitable position for Saudi Arabia for several reasons. For example, fairness might be more effectively achieved through an arbitration tribunal than a Saudi court.

Focusing on fixing problems in the enforcement process of consumer arbitration in Saudi Arabia might not yield a magical solution, but it is an imperative step toward achieving a stable economy. Fulfilling the Crown Prince's vision for 2030 requires the attraction of investment to be a priority; therefore, the country must address and resolve relevant problems in order for its economy to flourish. Investors and international companies seek stability and certainty, and those elements are not attainable in Saudi Arabia. The company must diversify its economic resources while simultaneously implementing legal reforms to obtain maximum returns.

IV. Moral Hazard

Moral hazard in international dispute resolution present an interesting topic that is relevant to this subject matter and can be used as an argument against arbitration. The underlying notion of moral hazard it is that allowing parties to select their own arbitral tribunal will result in impartiality. In some cases, arbitrators have advocated for the benefits of the party that appoints them, which renders the whole procedure unfair. The following part supports this claim:

The best way to avoid such incidents is clearly to abandon the practice of unilateral appointments. This would involve a significant change in prevailing conduct and rules, because the

⁴⁹⁹ Mandatory Arbitration in the United States and Europe, Hausfeld, <http://www.hausfeld.com/news/eu/mandatory-arbitration-in-the-united-state-and-europe>.

⁵⁰⁰ Act on the Regulation of Terms and Conditions, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=38512&lang=ENG.

⁵⁰¹ Thanks to my colleague Gina Choi, a J.S.D. candidate at U.C. Berkeley, for her tremendous help of providing translation of Korean laws and presenting an overview of the Korean position regarding consumer arbitration.

fact is that arbitrations routinely begin with each side naming an arbitrator. References are occasionally made to “the fundamental right” to name one’s arbitrator, but there is no such right.⁵⁰²

Party-appointed arbitrators can create a moral hazard by engaging in unscrupulous behavior during arbitration. One solution that has been suggested in academia is for a neutral body to appoint arbitrators. To this end, they can create lists of arbitrators to prevent parties from influencing the identity of their arbitral tribunal. This process can theoretically result in a neutral arbitration procedure and eliminate moral hazard.⁵⁰³

Class action is an institutional feature that could support the position of consumers in arbitration in addition to possibly mitigating the “repeat player” problem, which derives from the repeat player theory in the sociology of law.⁵⁰⁴ Specifically, some arbitrators could side with businesses because the potential for future work relies on businesses, while consumers are one-time consumers.⁵⁰⁵ The predetermination that arbitrators will favor them encourages companies to continue using arbitration; consequently, consumers lose their right to a just hearing.

Arbitrators can side with corporations over consumers since they get more business from the stronger side, while consumers are usually a one-time thing. Marc Galanter has explored the repeat player’s behaviors.⁵⁰⁶ A variety of empirical studies have supported the integration of his theory into arbitration. Specifically, arbitrators might favor repeat players, which would in return shield businesses from liability.⁵⁰⁷ To avoid such issues, an accessible profile could be created for each arbitrator in the Saudi Center for Commercial Arbitration.⁵⁰⁸ In addition, the initial contract between all parties will govern the selection of arbitrators. A

⁵⁰² J. Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Review 339–355(2010).

⁵⁰³ Alexis Mourre, Are unilateral appointments defensible? On Jan Paulsson’s Moral Hazard in International Arbitration, Kluwer Arbitration Blog (2010), <http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/>.

⁵⁰⁴ The relation between sociology of the law and the repeat player theory is clear given that arbitrators have a strong incentive to side with businesses because there is a strong chance that they will “hire” them in the future, which is not the case for consumers.

⁵⁰⁵ “Repeat player” refers to companies and businesses that anticipates litigations, or rather in this context arbitration, and thus have adequate abilities to deal with it. While “one-shooters” means, who deal with legal issues infrequently. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Review 95 (1974).

<https://www.jstor.org/stable/pdf/3053023.pdf?refreqid=excelsior%3A0b0f0b19e8bf14f629f66cb5777036aa>.

⁵⁰⁶ “The larger the stake for any player and the lower the probability of repeat play, the less likely that he will be concerned with the rules which govern future cases of the same kind.” *Supra* note at 510.

⁵⁰⁷ David Horton & Andrea Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Georgetown Law Journal (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614773.

⁵⁰⁸ Saudi Center for Commercial Arbitration, Arbitrators, <https://www.sadr.org/>

part-time arbitrator might lessen the effect of the repeat player concept in theory, but no framework could possibly deter arbitrators from adopting it as their full-time career. Although arbitrators are de facto judges, no one would make such request of a judge given the assumption that judges should be neutral.

Certain actual practices support the repeat player theory in regard to consumer arbitration. In front of the US Senate Judiciary Committee, Elizabeth Bartholet, a Harvard Law professor and arbitrator, stated,

I concluded from this experience that the NAF process was systematically biased in favor of credit card companies and against debtors, since the process gave the companies a preemptory challenge right which they could use to systematically remove any arbitrator who ruled against a credit card company in a single case, since the companies were apparently using it in this way, since the alleged debtors were not in a position to know what was going on, and since NAF was fully aware of the practice and was either facilitating it or at a minimum tolerating it rather than doing anything to address it.⁵⁰⁹

The Public Citizen report “The Arbitration Trap: How Credit Card Companies Ensnare Consumers” has indicated that consumers may win only 4% of the time. The first finding of the report is that companies that have had more cases have dependably attained improving results from engaging with the same arbitrators. Moreover, arbitrators who favor businesses over consumers may receive more cases in the future,⁵¹⁰ which might indicate that some arbitrators might lean in favor of businesses over consumers since they generally are the ones with bigger pockets. However, assessing a person’s moral value should not depend on career choices; in theory, judges might have the same bias against consumers for different reasons. The point of this report should still be highlighted since consumers are always the weaker party. Given that only 4% of consumers win, collective action is even more prominent, as it can strengthen the position of consumers and diminish alleged favoritism among arbitrators in such cases.

V. Unconscionability

The unconscionability doctrine was intended to defend parties who receive unfair bargaining power and unfair substantive terms in their contract. Therefore, it can be used as a defense for the enforcement of contracts. Even though the US Supreme Court has refused the unconscionability argument, it is an imperative argument that warrants consideration⁵¹¹, as other jurisdictions have deemed it valid. Surprisingly, it does not seem that such unfair

⁵⁰⁹ Susan Saladoff, FAQ about Mandatory Arbitration a Corporate End Run around the Civil Justice System, Hot Coffee Movie,

http://www.hotcoffeethemovie.com/default.asp?pg=mandatory_arbitration.

⁵¹⁰ Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, SSRN Electronic Journal (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457229.

⁵¹¹ Justice Ginsburg dissenting said that this particular judgment acts to “disarm consumers, leaving them without effective access to justice.” David G. Savage, *Supreme Court says binding arbitration clauses in consumer contracts trump California law*, Los Angeles Times, 2015, <http://www.latimes.com/business/la-na-supreme-court-california-arbitration-20151214-story.html>.

treatment to one party, consumers, would result in accepting the unconscionability defense. Nevada courts “permit the enforcement of adhesion contracts where there is plain and clear notification of the terms and an understanding consent, and if it falls within the reasonable expectations of the weaker party.”⁵¹²

*Williams v. Walker-Thomas Furniture Co*⁵¹³ was a landmark case in this subject matter. In 1962, appellant Williams bought a stereo set from Walker-Thomas Furniture and paid in installments. Her payments eventually defaulted, and the appellee sought to replevy all of the items that she had purchased since 1957. The furniture store complied because they included a provision that allowed such measures. Because of the provision, a balance was due on every purchased item until the overall balance due on all items, whenever purchased, was liquidated.

The District of Columbia Court of Appeals has presented a strong argument in stating that “Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.” The court explained that unconscionability refers to an absence of meaningful choice for a party in a contract whose terms are unreasonably favorable to the other party. Essentially, a gross inequality of bargaining power cancels the meaningfulness of choice. It is reasonable to assume that a doctrine such as unconscionability would apply to cases where consumers suffer from inequitable contracts. However, this is not the case, especially in the current US system.

*Carnival Cruise Lines, Inc. v. Shute*⁵¹⁴ was not an arbitration case, but it is still significant because it set a precedent for the approach of US courts to enforcing contracts. In this particular case, the Shute’s purchased tickets for a cruise through the services of a travel agent. They paid the fare to the agent, who forwarded the payment to the petitioner, Carnival Cruise Lines. The petitioner sent the tickets to the respondents. On the corner of the ticket, there was an admonition: “Subject to conditions of contract on last pages.” The contract itself states that the acceptance of the non-refundable tickets shall be deemed as an agreement and an acceptance of all the terms and conditions and that all disputes shall be litigated before a court in the State of Florida. The Shute’s were not even aware of the forum selection clause until after the purchase. The respondents boarded the ship, and while they were there, Eulala Shute slipped on a deck mat and was injured. They filed a lawsuit against the petitioner in a court in Washington, where they resided, and claimed that Mrs. Shute’s injury was caused by the negligence of the cruise employees. The petitioner then moved for summary judgment that the forum selection clause required the Shute’s to file in a Florida court. The court actually rejected that consumers should have any bargaining power against a business. In addition, the court subjected forum selection clauses to judicial scrutiny for fundamental fairness. However, they could not find any support for a lack of fairness, which calls into question the importance of the notion of equality, especially when there is an obvious imbalance between parties.⁵¹⁵ In the US, the result has been for such clauses to be upheld routinely by courts.

The point at which both parties agree on a legal procedure is not technically visible in arbitration. Given that no actual choice is made by consumers, substantial controversy

⁵¹² Burch v. Second Judicial Dist. Court of State ex rel. Cnty. of Washoe, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002). As cited in: Zachariah Parry, Are adhesion contracts enforceable? Parry & PFAU (2014), <https://p2lawyers.com/blog/2016/1/31/are-adhesion-contracts-enforceable>.

<https://p2lawyers.com/blog/2016/1/31/are-adhesion-contracts-enforceable>

⁵¹³ *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965)

⁵¹⁴ *Supra* note at 409.

⁵¹⁵ *Ibid.*

surrounds this subject matter. However, some scholars have advocated for arbitration in view of its accessibility and perception as a form of private litigation.⁵¹⁶ This is why safe havens, such as an opt-out mechanism, are crucial to ensuring that both sides of the table have an equal opportunity.

Although the case of *Suarez v. Uber Technologies, Inc.*⁵¹⁷ entailed an employment arbitration rather than a consumer arbitration, the court gave a decision that could be applicable to consumer disputes. In *Suarez*, the plaintiffs were Uber drivers who alleged that the company had classified them as independent contractors rather than as employees. Uber compelled the arbitration based on the arbitration agreement. The clause is as follows:

IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision.⁵¹⁸

The court analyzed the unconscionability question under both procedural and substantive aspects. Given that the plaintiffs did not exercise their rights to opt out of the arbitration clause, they had no grounds for procedural unconscionability. This case can offer guidance when considering consumer arbitration, as implementing an opt-out mechanism can preclude an unconscionability argument.

Mandatory arbitration agreements are unfair to consumers, who lack sophistication in reading the fine print in contracts and, even if they do, experience an inequality in bargaining power. Generally, the contractual nature of arbitration differs for each type of arbitration. Business-to-business arbitration is an entirely different arrangement than consumer-to-business arbitration. Specifically, the former is a relation between two business that entails a somewhat equal bargaining power. Therefore, it involves an actual opt-in movement toward selecting arbitration. That is not always the case as sometimes companies might have enormous power differences, but this point is worth mentioning.

In the US, the unconscionability doctrine derives from the Uniform Commercial Code § 2-302. However, this concept is not exclusive to this jurisdiction. In Sharia', a similar notion which was explored in the paper, called "*gharar*." In transactional Islamic jurisprudence, *gharar* refers to a level of uncertainty between parties; the contract is prohibited and should be void to assure that there is no deception.⁵¹⁹ In consumer disputes, there is arguably a level of uncertainty and deception because the consumer does not have input in the contract. On the other hand, there is a term in civil law called "*Oqood Al-Itha'an*," which literally translates to "acquiescence contracts." This term refers to any contract that is structured between a party with strong bargaining power and a weaker party. The International Islamic Fiqh Academy has discussed this kind of contract ruling number 132 (6/14). They have stated that businesses have a drastic hegemony over the terms of contracts, so governments must have primary supervision to establish fair terms.⁵²⁰ An

⁵¹⁶ NAT'L INST. FOR TRIAL ADVOCACY, ARBITRATION ADVOCACY § 1.3 (1997). As cited in: Matthew Savare, *Clauses In Conflict: Can an Arbitration Provision Eviscerate a Choice-of-Law Clause?*, 53 Seton Hall Law Review.

⁵¹⁷ *Suarez v. Uber Techs., Inc.*, CASE NO: 8:16-cv-166-T-30MAP (M.D. Fla. May. 4, 2016)

⁵¹⁸ *Ibid.*

⁵¹⁹ *Supra* note at 199.

⁵²⁰ A Decision on Compliance Contracts, International Islamic Fiqh Academy (2003).

additional argument is that public interests – in this context, those of consumers – precede special interests, such as those of businesses.⁵²¹

521 *Ibid.*

Chapter 6

The Case for Consumer Arbitration and Class Action

One argument for why the Saudi government should support arbitration for consumer disputes is simply that arbitration is considered a form of privatization of the judicial system. Thus, the government would not have a financial obligation to finance the process of arbitration. This goal aligns with the 2030 vision of preserving resources, and it could be a central benefit of arbitration in the Kingdom. A switch to private dispute resolution might lessen the burden on the government, which would not have to fund the infrastructure that is usually associated with courts. At least in consumer-to-business disputes, such move can offer a win-win situation.

The SCCA has advised the commercial sector to insert an arbitration clause in their contracts. The center's duty is to spread the popularity of alternative dispute resolution mechanisms, such as arbitration. The clause states,

Any dispute, conflict or claim arising out of or relating to this contract or of its breach, termination or invalidity shall be settled by arbitration and administered by the Saudi Center for Commercial Arbitration in accordance with its arbitration rules.⁵²²

This formulation is not explicitly for consumer arbitration; thus, there is no opt-out mechanism. However, there is potential to use institutionalized arbitration to make the process more accessible and cost effective for consumers. The inclusion of such clause could also promote competitiveness in the investment environment.⁵²³ The center has followed through on its plans by joining efforts with the ICDR-AAA. Aside from the SCCA's own list of arbitrators, there is an option to access the ICDR-AAA list.⁵²⁴

In contract law, three main questions require answers. The first is whether the contract should be mandatory or contractible in nature. Should it be contractible, and what is the default?⁵²⁵ The last question is how parties make their agreement through the default. For consumer contracts, this paper suggests answering the previous questions by establishing the agreement to arbitrate as the default state and providing an exit strategy through opting out.

Arguably, litigation has been historically favored over other forms of dispute resolution, especially in the financial sector. However, a serious weakness in this argument is its neglect of a key element: the preference stems from preferring a high degree of legal certainty, which is found, for instance, in the courts of New York and England.⁵²⁶ So, while

⁵²² Model Arbitration Clause, Saudi Center for Commercial Arbitration, <https://www.sadr.org/ADRService-model-ADR-clauses-model-clauses>.

⁵²³ Mohammed Alhilali, *An Approach to Limit the Resolution of Commercial Contract Disputes within Saudi Arabia*, Aleqtadiyah Newspaper, July 15, 2017, http://www.aleqt.com/2017/07/15/article_1219441.html.

⁵²⁴ Hazem Almutairi, *Taysir and the Commercial Arbitration Center provide an investment environment*, Okaz, February 24, 2018, <https://www.okaz.com.sa/article/1618135/اقتصاد/تيسير-ومركز-التحكيم-التجاري-يهيئان-بيئة-الاستثمار>.

⁵²⁵ Ian Ayres, *Empire or Residue: Visions of the Contractual Canon*, 26 Florida State University Law Review (1999).

⁵²⁶ James Freeman, *The Use of Arbitration in the Financial Services Industry*, 16 Bus. L. Int'l. 77, 78 (2015); Inka Hanefeld, *Arbitration in Banking and Finance*, 9 NYU J. L. & Bus. 917, 918 (2013).

this argument may apply in this context, it is less accurate in the Saudi framework. Religious courts that do not make references to precedents and abide by codified laws do not exhibit legal certainty. Therefore, the question here should be taken very differently.

The problem with compulsory arbitration is essentially its deficiency of informed consent. While this issue warrants its own set of solutions, it is not a justification for rejecting the notion of arbitration altogether. Both individuals and businesses should have a right to select the best possible forum, which might be arbitration.⁵²⁷ Most of the arguments in the previous section have focused on mandatory arbitration disadvantages. It is important to bear in mind that this paper supports a default arbitration clause in consumer contracts with an opt-out procedural device. This approach provides a safeguard for consumers but is still not sufficient on its own. An additional mechanism, such as class action, would be essential to guarantee a balanced power structure between consumers and businesses⁵²⁸ as well as the ability of consumers to contribute in the forum of dispute.⁵²⁹ After all, when given the option, parties will likely choose arbitration if it could minimize the costs of their relationship.

Arbitration might also be more receptive to innovative developments in the legal field. The process has been revolutionized by legal techs, and services such as online dispute resolution can be straightforwardly implemented in arbitration venues. Additionally, the use of automation of legal services might facilitate the assembly of plaintiffs in class action cases. Further developments could provoke advances in incorporating and managing text-mining technology and the use of machine-learning technology to evaluate the prospects of winning a dispute.⁵³⁰ Other recent developments in legal tech have been numerous. Such technologies can even determine the inclinations of judges, which might be useful when appointing arbitrators.⁵³¹ These developments might be bringing hope back to the table of consumers disputes, as their awards are mostly low in value and often not worth proceeding with independently.

Digitalizing the arbitration process would also make it considerably more affordable, as using video platforms and taking advantage of electronic submissions and notifications would lower costs dramatically. Astonishingly, these reasons have led some arbitral institutions to start permitting parties to decide on an option called fast-track arbitration. This

⁵²⁷ Daniel Fisher, *Arbitration vs. Litigation: It's Not an Either-Or Proposition*, Forbes, November 8, 2015, <https://www.forbes.com/sites/danielfisher/2015/11/08/arbitration-vs-litigation-its-not-an-either-or-proposition/#500905355782>.

⁵²⁸ See, "Class action litigation serves dual functions: minimization of accident costs through prevention of unreasonable risk (deterrence) and compensation for injuries caused by reasonable risk (insurance)." David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, (2002)

⁵²⁹ "If we define the deterrence benefits (or governance benefits) to be avoided harms net of avoidance costs, we should expect contracting parties to choose the dispute resolution forum that provides the greatest difference between deterrence benefits and dispute resolution costs for every type of dispute." *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, Christopher R. Drahozal and Keith N. Hylton, *Journal of Legal Studies*, vol. 32 (June 2003)

⁵³⁰ "Machine learning (or deep learning) is a technology that allows an evidence-based program to automatically reintegrate new information in order to improve its own algorithm. Text-mining is the process of analyzing text-based documents in order to derive structured information." Gauthier Vannieuwenhuysse, *Arbitration and New Technologies: Mutual Benefits*, 35 *Journal of International Arbitration* (2018).

⁵³¹ *Ibid.*

approach can allow parties to decide on much shorter time limits.⁵³² Respondents to an arbitration survey agreed that increased use of technology could support added efficiency in the realm of arbitration.⁵³³

Automated arbitration that is based on artificial intelligence is a developing technology that might soon spread widely. A computer might be able to resolve disputes between parties and act as an arbitrator that preserves due process. In fact, automated learning systems are already employed by some major international law firms.⁵³⁴ For example, the Lex Machina learning system is already in demand by multiple law firms for purposes such as the administration of proceedings.⁵³⁵ These technologies might prominently benefit consumers by lowering the cost of procedures and accelerating dispute resolutions.⁵³⁶

To avoid dilemmas, such as moral hazard, businesses can assume CSR by abandoning the clause that prevents class action. By opting for a just arbitration clause, they can benefit indirectly from consumers by means of the ethical theory of social responsibility. Such responsibility can build an unbiased framework that benefits businesses not only by informing appropriate decisions but also in terms of consumer marketing.⁵³⁷ While not strong by any means, this argument is worth examining.

Arbitration is a more advisable venue for several reasons. For businesses, privacy is a major advantage, so they are easily convinced that arbitration is a more suitable option. As for consumers, there are many advantages to choosing arbitration, one of which is the flexibility in estimating moral damages, as arbitrators – not judges – reserve this power. The Sharia' interpretation of moral damages is difficult to navigate, as there are two views that reach utterly different conclusions. The first disagrees that there should be any compensation for damages unless there is material harm, and the judge has the ultimate power in deciding the exact amount of damages. The non-material harm is not tangible; thus, in *fiqh*, there are no monetary damages except for perceptible harm. In addition, harm to reputation and similar damages are not likely to be compensated monetarily. One example can demonstrate the application of moral damages in Saudi courts. In this case, a family traveled with Saudi Arabian Airlines, and one of the daughters sat in a dirty seat. The dirt stained her clothes and caused embarrassment and discomfort, and she had to move to a different seat, where she was separated from her family and sisters. The court stated that religious scholars agreed to permit compensation on the basis of moral damages that are attached to physical damage. Thus, the judgment designated 4,000 Saudi Riyals (SR) to each member of the family.⁵³⁸ Nevertheless, the outcome is not clear for a case of moral damage without physical damage.

⁵³² *Supra* note at 276.

⁵³³ *Supra* note at 257.

⁵³⁴ *Supra* note at 514.

⁵³⁵ See, “Lex Machina mines litigation data, revealing insights never before available about judges, lawyers, parties, and the subjects of the cases themselves, culled from millions of pages of litigation information.” Lex Machina, <https://lexmachina.com>.

⁵³⁶ See, ““Big Data, text-mining and e-discovery tools would help lawyers focus on value-added work instead of losing hours on the time-consuming task of document management.” *Supra* note at 514.

⁵³⁷ “In practice, a number of studies have been carried out to determine the correlation between CSR and corporate financial performance. Of these, an increasing number show a positive correlation between the social responsibility and financial performance of corporations in most cases.” Alex C. Michalos & Deborah C. Poff, Citation classics from the Journal of business ethics: celebrating the first thirty years of publication (2013).

⁵³⁸ Case number 2084/1/ق/1435 Hijri

Meanwhile, the second view of moral damages supports awarding damages for wrongdoings even if they did not affect a material subject.⁵³⁹ It is important to note that the Board of Grievances of the Administrative Court in Saudi Arabia issued a circular stating that judges shall reward monetary damages for non-material harm.⁵⁴⁰ However, it is not apparent if the rest of the court system will follow.

I. Freedom of Contract

Imagine having to negotiate with Netflix to assure that both parties reach an agreement based on fair terms instead of immediately consenting on the boilerplate that is included when opening an Apple account to download music. Or, alternatively, that a click on the sign-up page on Twitter and agreeing to all terms and conditions were not applicable. Rather, one would need to contact an employee from Twitter to convey the best contract terms. Or, when applying for a new credit card to cover the family's Disney trip, one needs to request an appointment with the bank for hours to reach mutual, full consent. These contract negotiations would have to fit the schedule of a typical nine-to-five modern worker. It would be difficult or even impossible to accommodate such measures. This leads us to assume, from a functional stand of point, that freedom of contract should be respected unless there is an obvious unconscionability issue.⁵⁴¹ In addition, to avoid these grounds, incorporating an opt-out clause ought to be a necessity rather than a luxury.⁵⁴² In a market-based economy, there is a need to respect the right of contract as a fundamental right.⁵⁴³

According to an economic analysis by Professor Hylton, when deterrence benefits from litigation are less considerable than the expenses that incur by disputing issues in court, parties have an incentive to sign a waiver agreement.⁵⁴⁴ When both parties assume that arbitration yields superior deterrence benefits in terms of dispute resolution costs, they are likely to enter into an arbitration agreement.⁵⁴⁵ When situating this theory in the framework of Saudi consumers, certain assumptions arise. By presuming that the courts are less capable of handling advanced legal issues between consumers and businesses as well as that there is a

⁵³⁹ Ahmed Alsalamah, Compensation for Moral Damages, Alsalamah Law Firm (2017), <https://salamahlaw.com/blog/articles/الضرر-المعنوي-النفسي>.

⁵⁴⁰ Adnan Alshabrawi, *In a Precedent for the First Time «Grievances»: Approval of Compensation for Moral Damages*, Okaz, October 10, 2015, <https://www.okaz.com.sa/article/1020814/>.

⁵⁴¹ “The entire conceptual apparatus of modern contract doctrine - rules dealing with offer and acceptance, the evidentiary function of consideration, and especially canons of interpretation arose to express this will theory of contract.” Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harvard Law Review 917 (1974).

⁵⁴² After all, and as Henry Sumner Maine said “that the movement of the progressive societies has hitherto been a movement from Status to Contract.” Henry Sumner Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas* (1959).

⁵⁴³ David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, Yale Human Rights and Development Journal: Vol. 16: Iss. 1, Article 2. (2013), <https://digitalcommons.law.yale.edu/yhrdlj/vol16/iss1/2/>.

⁵⁴⁴ Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209 (2000)

⁵⁴⁵ *Ibid.*

likelihood of encountering a Sharia'-educated judge, there is already a benefit to choosing a more stable method of alternative resolution.

II. Consumers Rights

Scholarly evidence has sufficiently demonstrated that consumers' rights can be considered human rights,⁵⁴⁶ as every person will be a consumer at some point in his or her life. In addition, they are similar to other human rights in that they protect individuals. At minimum, they are "soft human rights," as they possess the required characteristics.⁵⁴⁷ However, some legal opinions have warned that reverting to the human rights characteristic could undermine the concept of human rights.⁵⁴⁸

There is an international recognition of human rights, especially in international treaties. The UN International Covenant on Economic, Social and Cultural Rights has discussed the right of all people to an adequate standard of living for themselves and their family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.⁵⁴⁹ Consumer protection might be indirectly encompassed by this article, as the article mentions sound living conditions, which require access to justice when consumers deal with large businesses.⁵⁵⁰

The former Minister of Justice Muhammad bin Abdul Karim Al-Issa has indicated that when a party distinguishes its will from that of the other party by imposing specific conditions in the absence of negotiation, the judicial system should interfere to implement justice. This intervention might indicate fairness, which is based on religion and law. In doing so, the system should pursue principles such as removing damages and restoring a financial balance into the contract.⁵⁵¹

⁵⁴⁶ Sinai Deutch, *Are Consumer Rights Human Rights*, Osgoode Hall Law Journal vol. 32, no. 3 (1994).

⁵⁴⁷ Margus Kingisepp, *The Constitutional Approach to Basic Consumer Rights*, *Juridica International Law Review* (2012), <http://www.juridicainternational.eu/index.php?id=14974>.

⁵⁴⁸ P. Alston, *Human Rights and Basic Needs: A Critical Assessment*, *Hum. Rts. J.* 19 at 39. (1979).

⁵⁴⁹ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 11 (1), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁵⁵⁰ See, "If we define the deterrence benefits from contract enforcement as avoided harms net of avoidance costs, we should expect contracting parties to choose the dispute resolution forum that provides the greatest difference between deterrence benefits and dispute resolution costs for every type of dispute." Keith N. Hylton & Christopher R. Drahozal, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, *SSRN Electronic Journal* (2003), <https://kuscholarworks.ku.edu/handle/1808/11193>.

⁵⁵¹ Saleh Alrajeh, *Administrative Development, Compliance Contracts and the Rights of Individuals in Enterprise Contracts*, *Tannia Idaria*, <https://tanmia-idaria.ipa.edu.sa/Article.aspx?Id=154>.

III. Access to Justice

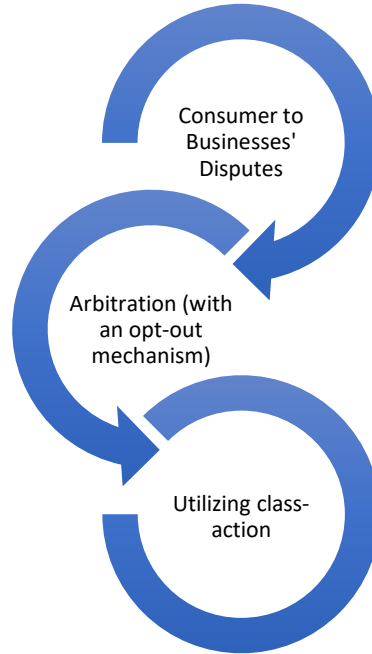


Figure 13, Proposed circle of consumer dispute resolution.

An interesting question regarding this topic is, “what about access to justice?” Or, posed differently, “what about the equal access to the justice system?”⁵⁵² Since this issue would require an in-depth analysis, this paper considers one particular angle that takes into account the position of consumers. There is a need for rule of law in most everyday activities, and the court system has failed to address it.

Arbitration probably does not violate the right of Saudi consumers to their “day in court.” Non-judicial factors can contribute to the lack of trust in the practicability of accessing justice. For instance, civil society organizations do not appear to assume an active role in advocating for consumers. In Saudi Arabia, most of these organizations are government affiliated, which might impose a restrictive environment.⁵⁵³ Subsequently, the Saudi Consumer Protection Association is directly connected to the Ministry of Commerce and Investment, which highlights a potential conflict of interest.

Up until today, access to courts was free, although parties still needed to pay attorney fees. However, the Ministry of Justice proposed a draft for judicial fees that will change the system in this regard. The proposed bill is under review by the Saudi Board of Experts. The possibility of a court fee system is not surprising given the government’s approach to mitigating expenses. The losing party will be liable to pay the court costs, which is a massive development in the grand scheme of the Saudi judicial system, although not because of its

⁵⁵² Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369 (2004).

⁵⁵³ Civic Freedom Monitor: Saudi Arabia, ICNL (2019), <http://www.icnl.org/research/monitor/saudiarabia.html>.

high cost but rather its incentivization to lower the caseload.⁵⁵⁴ There are few statistics available regarding the actual courts costs, but it might be reasonable to assume that attorney fees will have a stronger impact if used to the other party's benefit. Presumably, the volume of litigation will decrease if the law is passed. Saudi judicial experts have indicated that they expect the new proposed legislation to, when implemented, reduce the number of illegitimate cases that are adjudicated by the courts. Furthermore, it could boost the number of settlements and encourage departure from the courts to employ alternative dispute resolution mechanisms.⁵⁵⁵

Attorney fees are a major consideration when deciding on a forum for dispute. Fee-shifting can act as an effective incentive for both parties.⁵⁵⁶ Practically, claims for lawyer fees usually occur in subsequent autonomous cases. This reality makes it more difficult to benefit from such mechanism, as it requires more time to reach a resolution. Nevertheless, lawyer fees clearly cost less money in an arbitration setting because they essentially invest less time in such setting.⁵⁵⁷ This point might be advantageous for consumers who win their disputes, as court adjudication requires winners to file a separate case to recover attorney's fees. Meanwhile, if an arbitration agreement includes a provision that the prevailing party can recover fees and costs, then there is no need for a separate case. However, the attainable data in Saudi Arabia do not clearly indicate the extent to which fee-shifting will affect consumers who seek redress. It is possible that it could shift the paradigm, but without factual data to measure the exact effect, no conclusions are presumable.

From a positive perspective, having the option to withdraw from a pre-dispute agreement increases fairness for consumers. An opt-out option is necessary to counteract the imbalance in power structure between the two parties. Businesses understand that consumers make mistakes, and they tactically respond by remodeling their contracts and commodities.⁵⁵⁸ Another point that may be overlooked is that arbitration can serve as a feminist tool to promote women's rights in employment. Access to justice should include access to a diverse pool of arbitrators. Whereas consumers can only have male, Sharia'-educated judges in court, arbitration gives consumers the opportunity to engage with arbitrators who are educated in law or possess specialized knowledge in diverse fields of expertise, and it also allows for the

⁵⁵⁴ Ebrahim Jebreal, *A Judicial Project to Limit Malicious Cases and Settle Disputes in Reconciliation*, Almadinah Newspaper, July 15, 2017, <http://www.al-madina.com/article/532174?rss=1>.

⁵⁵⁵ Ahmed Basrawi, *The Development of the Judicial System in Saudi Arabia under Vision 2030*, Altamimi & Co (2018), <https://www.tamimi.com/law-update-articles/the-development-of-the-judicial-system-in-saudi-arabia-under-vision-2030/>.

⁵⁵⁶ Bruce H. Kobayashi, *The Law and Economics of Litigation*, George Mason Law & Economics Research Paper No. 15-20(2015), <https://ssrn.com/abstract=2613145> or <http://dx.doi.org/10.2139/ssrn.2613145>.

⁵⁵⁷ Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783 (2008)

⁵⁵⁸ *Supra* note at 460.

selection of female arbitrators.⁵⁵⁹ The latter aspect has expanded over the last decade with a 300% rise in appointments of female arbitrators.⁵⁶⁰

The day-to-day reality of modern contracting makes it impossible for consumers to read every single contract. In fact, behavioral scientists have argued that consumers cannot sensibly read and process fine-print disclosures.⁵⁶¹ Yet, the enforcement of a contract agreement is expected regardless of whether or not a consumer read the terms and conditions. Still, arbitration can be perceived as a more accessible forum for Saudi consumers. In the field of employment arbitration, research has indicated that a repeat player's success is the result of the employer's experience rather than the arbitrator's prejudice.⁵⁶² Some scholars have argued that "repeat appointments could be a result of an arbitrator's independence and impartiality rather than an indication of justifiable doubts about it."⁵⁶³ By this logic, the appointing party would not select the ideal arbitrator based solely on how likely the arbitrator is to decide in their favor. Rather, they would prefer to appoint an arbitrator who is impartial and independent to ensure that they are resistant to challenges. Their opinion implies that "repeat appointments are not in and of themselves proof of partiality, and a challenging party must raise 'other factors' that cumulatively impugn the arbitrator's independence and impartiality."⁵⁶⁴ Therefore, the repeat player's argument against the case of consumer arbitration might not bear scrutiny.

In the decision of Jeddah's Committee number 185 / 1430 هـ / ج, the plaintiff had early signs of kidney failure. The defendant, a health insurance company, covered some medical services and medicine but allegedly did not cover them all. As a consequence, the plaintiff's health deteriorated, and he reached a state of full kidney failure. He traveled to the Philippines for a kidney transplant and later demanded that the health insurance company pay the bill. The company refused the plaintiff's request for 205,000 SAR in addition to travel and lodging expenses. In a written memorandum, the defendant replied that, according to the Consolidated Document issued by the Cooperative Health Insurance Council,⁵⁶⁵ his condition was excluded from the insurance coverage according to Appendix 5 in Article 22. Thus, his request was denied. In addition, the plaintiff made his request one year and three months after

⁵⁵⁹ There are available tools to promote female arbitrators, see "a new arbitrator search tool has been introduced via the Equal Representation in Arbitration (ERA) Pledge website to help arbitration practitioners and parties identify qualified female arbitrators to hear their cases." Ashley Jones & Romilly Holland, *New Female Arbitrator Search Tool Launched to Promote Greater Equality in Arbitration*, Thomson Reuters, Arbitration Blog (2016), <http://arbitrationblog.practicallaw.com/new-female-arbitrator-search-tool-launched-to-promote-greater-equality-in-arbitration/>.

⁵⁶⁰ Victoria Pernt, *Women in Arbitration Are on the Rise*, Kluwer Arbitration Blog (2017), <http://arbitrationblog.kluwerarbitration.com/2017/06/04/women-arbitration-rise/>.

⁵⁶¹ Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. PUB. POL'Y & MARKETING 293(2012).

⁵⁶² David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN.L. REV. 1557, 1571 (2005).

⁵⁶³ Wilson Koh & Will Sheng, *Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges*, 34 Journal of International Arbitration (2017.)

⁵⁶⁴ *Ibid.*

⁵⁶⁵ Council of Cooperative Health Insurance, <https://www.cchi.gov.sa/AboutCCHI/Rules/Pages/document.aspx>.

the surgery date, which conflicts with the Consolidated Document, which indicates refusal of any claims beyond 60 days after the date of treatment.

The Committee for Resolution of Insurance Disputes and Violations held the first sessions, where both parties provided the same answers as in their written statement of claims. The committee decided to adjourn, and the second, third, and fourth sessions were also postponed for several reasons. In the second session, the plaintiff provided a photocopy of his medical insurance card, and that was apparently enough for a session. In the one that followed, the committee asked the plaintiff to provide medical documents to prove his condition. In the fourth, the plaintiff did not attend but provided an acceptable excuse. In the fifth session, the plaintiff provided a medical report. The following session, the representative of the plaintiff was asked about the insurance coverage in cases where the insured receives treatment outside of Saudi Arabia. They asked for an extension to provide details, and their request was granted. In the last session, the defendant started by explaining that the evacuation of emergency cases outside of the Kingdom vis SOS to the nearest medical center for treatment is only to provide emergency and unexpected evacuation service. This definition entails that the condition might lead to death or serious complications if it were to remain untreated for 42 hours and that the plaintiff's condition is unambiguously excluded in the document.

The committee decided that even though organ transplantation was excluded, the plaintiff was to be awarded 50,000 SAR, which is the maximum for emergency handling cases outside of Saudi Arabia, according to the insurance benefit schedule.⁵⁶⁶ This case showcased the waste of resources and money, and it is a prime example of the uncertainty that taints the Saudi legal system. The privatization of dispute resolution can provide advantages without compromising parties' confidence in the legal system.

This paper acknowledges the impossibility of consumers to fully consent to fine print, and it aims to construct an exit strategy for those who do not wish to be bound by arbitration. Although consumer arbitration may appear likely to benefit consumers, it is reasonable to expect that some might prefer courts. Professor Tess Wilkinson-Ryan has considered consumer consent on boilerplates to be a technically compromised form of consent.⁵⁶⁷ However, that does not align with the legal system's insistence on enforcing consumer contracts even when it is not realistic for consumers to read the fine print.⁵⁶⁸ Behavioral research has repeatedly published studies that indicate the impossibility of expecting consumers to read boilerplates, but this finding made no impact.⁵⁶⁹ The "opportunity to read" defense that supports disclosures in standard online contracting is weak⁵⁷⁰ when psychological evidence proves that consumers would probably not read the fine print; thus,

⁵⁶⁶ Committees to Adjudicate Disputes and Insurance Violations, [http://www.idc.gov.sa/ar-sa/CommitteesDecisions/Jeddah/185-1430/هـ-1430/التأمين الصحي.pdf](http://www.idc.gov.sa/ar-sa/CommitteesDecisions/Jeddah/185-1430/هـ-1430/التأمين%20الصحي.pdf).

⁵⁶⁷ Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, Penn Law: Legal Scholarship Repository (2014), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2301&context=faculty_scholarship.

⁵⁶⁸ See, "Study 1 in this Part tests the relationship between contract procedures and inferences of consent, and the results show evidence that subjects may believe that it is unreasonable to expect consumers to read terms in some forms, but that they would nonetheless hold those non-reading consumers accountable for transactional harms that occur ex post." *Ibid.*

⁵⁶⁹ *Supra* note at 558.

⁵⁷⁰ Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 105 (2011)

the “opportunity” aspect is not accessible.⁵⁷¹ To date, there is no solution to force consumers to read fine print. However, that translates into a death wish for an arbitration clause. To counter this hindrance, an opt-out mechanism ought to be implemented to provide the opportunity for consumers to evaluate their situation again if a dispute arises. This will act as an extra measure of security to protect consumers’ rights.

IV. Overcoming the Hindrance of Fine print

There is convincing evidence which indicates that consumers do not usually read fine prints in contracts. Even when isolating law students – a portion of the human population that is famous for its attentiveness to legal materials – a survey uncovered that about 4% of participants reported that they read the terms in online form contracts.⁵⁷² If only 4% of people with a legal education spare the time to read the terms, then it is likely that this percentage is even lower among the masses who lack legal knowledge. Yet, the fact that the majority of consumers do not read their contracts will not shield them from liability.

Meanwhile, in business-to-business relations, there is a lower chance of choosing mandatory arbitration.⁵⁷³ In the latter form, consumers are generally not aware of the contractual agreement to select arbitration, as the clause is most likely hidden in the fine print. This disparity indicates the need for extra measures to protect the weaker party, namely consumers. However, the counter-argument presumes that consumers are supposed to know every condition and clause in the contract; thus, there is no merit in the objections, which only reflect their obliviousness.⁵⁷⁴ Then again, this argument disregards the notion of “fine print.”

The Alliance for Justice has created a documentary entitled *Lost in the Fine Print* to promote awareness of forced arbitration.⁵⁷⁵ The alliance has advocated for people’s rights to resolve disputes through a jury trial. This approach might be beneficial when there is an option for a jury, so preventing consumers from seeking such an option could deprive them of a right. Nonetheless, it is crucial to take into account the distinctive legal systems and practices of each country. In Saudi Arabia, where the judicial system is not known for its favorability to consumers, the right to a jury trial is less relevant as it does not exist.

The prohibition on class action makes it challenging for consumers to access fair opportunities through arbitration, as they cannot individually afford the expense. The *New York Times* has published a series called “Beware the Fine Print,” wherein reporters

⁵⁷¹ See, “Psychological research suggests that it is not only that terms are difficult or time-consuming to read, but also that people have limited attentional resources and will overlook non-salient features of any transaction. The psychological approach to fine print argues that there are cognitive explanations for why consumers do not deliberate over fine-print terms, and these cognitive explanations ought to make us cautious about construing consent to those terms.” *Supra* note at 550.

⁵⁷² Robert A. Hillman, *Online Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, SSRN Electronic Journal (2005).

⁵⁷³ *Supra* note at 495.

⁵⁷⁴ Friedrich Kessler, *Contracts of Adhesion--Some Thoughts about Freedom of Contract*, 43 Columbia Law Review 629 (1943).

⁵⁷⁵ “National association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society.” About AFJ, Alliance for Justice, <https://www.afj.org/about-afj>.

illustrated the appalling current situation of US consumers who confront large companies. According to the report, some judges took the liberty of calling the class action prohibition a “get out of jail free card.” This statement highlights the impossibility of one consumer to challenge his or her case in front of a business without a valid class action mechanism.⁵⁷⁶ The report explained the development of this prohibition as follows:

More than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit card companies and retailers, according to interviews with coalition members and court records. Strategizing from law offices on Park Avenue and in Washington, members of the group came up with a plan to insulate themselves from the costly lawsuits.⁵⁷⁷

Moreover, *The New York Times* report observed from court and arbitration records that consumers dropped their claims after the class action ban because they could not afford individual arbitration.⁵⁷⁸

Conversely, arbitration can arguably be vigorous. Imre Stephen Szalai said that if low-dollar litigation “is going to get clogged up in the federal court system, it can easily flow to an alternative system.”⁵⁷⁹ Arbitration might be the perfect alternative system in consumer disputes. While opposing arbitration to preserve the right to access courts might appear admirable, this perspective might be deceptive, as such court access is not likely to be realized. Unless there is class action in courts, lawyers will probably avoid small consumer disputes because their return is generally scarce relative to the time and effort that they require.⁵⁸⁰

Empirical studies have suggested that consumers benefit more in arbitration settings than in litigation ones. A study by Ernst and Young, LLP has examined consumer arbitration data from the National Arbitration Forum and produced a couple observations. The first⁵⁸¹ that, when compared to businesses, consumers prevail more often in their disputes. In fact, 55% of arbitration was in favor of consumers. In addition, the majority of consumers who

⁵⁷⁶ Jessica Silver-Greenberg & Robert Gebeloff, *Beware the Fine Print, Part 1*, *The New York Times*, October 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?action=click&contentCollection=DealBook&module=RelatedCoverage&ion=EndOfArticle&pgtype=article>.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ “Daniel Dempsey of Tucson admits he might be both. He has spent three years and \$35,000 fighting Citibank in arbitration over a \$125 late fee on his credit card. Mr. Dempsey, who previously worked in Citi’s investment bank, said the erroneous charge ruined his credit score, and he vowed to continue until he was awarded damages.

The odds are not in his favor. Roughly two-thirds of consumers contesting credit card fraud, fees or costly loans received no monetary awards in arbitration, according to *The Times*’s date” See *supra* note at 559.

⁵⁷⁹ *Supra* note at 514.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Mary Batcher, Amy Brachio & Mridula Shrestha, *The Ernst & Young Study, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases (2005)*, <https://arbitrationlaw.com/library/ernst-young-study-outcomes-arbitration-empirical-study-consumer-lending-cases-wamr-2005-vol>.

were surveyed expressed satisfaction with arbitration.⁵⁸² Yet, accessibility to a forum might be decisive for consumers preferring a dispute resolution mechanism based on this factor.⁵⁸³

In a lecture at Berkeley Law School on March 5, 2018, Ralph Nader⁵⁸⁴ advocated for consumers' rights against corporate supremacy.⁵⁸⁵ While this paper agrees with Nader's message, it is not as applicable to the distinct concept of "justice" among Saudi consumers. Opposing mandatory arbitration clauses might make sense in the US setting, as the alternative – the court system – can provide a superior vehicle of justice. However, Saudi consumers do not have the right to a jury trial, and judges are Sharia'-educated. Meanwhile, there is at least the possibility that an arbitrator is legally educated.

As a disadvantage of arbitration, the award cannot be appealed.⁵⁸⁶ Most arbitration institutions do not have a built-in appeal mechanism. The UNCITRAL law clearly specifies that "awards shall be final and binding."⁵⁸⁷ Moreover, the ICC arbitration rules require that every award

shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.⁵⁸⁸

While not underestimating the advantages of the appeal process,⁵⁸⁹ arbitration in its current framework does strike a balance between the importance of finality and procedural

⁵⁸² *Ibid.*

⁵⁸³ See "Winning percentages for one selected group of participants are hardly the best gauge of the fairness of any dispute resolution system. A whole host of factors, alone or in combination, including a party's financial resources and representation, the specified steps of the process, the competence of the decision-maker, and indeed one hopes the facts in evidence, may have a crucial bearing on the outcome. But insofar as a comparison between employee win rates in employment arbitration and those in either court litigation or in traditional labor arbitration is any guide, it cannot be said that mandatory arbitration in actual practice is detrimental to the individual employee. For most lower-paid workers, it may in fact be their only feasible option. Most important, then, is the accessibility to a forum." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783 (2008)

⁵⁸⁴ Ralph Nader is a consumer advocate, lawyer, and author. He received an AB magna cum laude from Princeton University, and a LLB with distinction from Harvard University. Biography, Nader.org, <https://nader.org/biography/>.

⁵⁸⁵ See, The United States Courts "have been more than accepting of the move to compel arbitration, even in the face of outrage by consumer advocate groups." Bryon Allyn Rice, *Enforceable or Not: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standards*, 45 Hous. L. Rev. 215 (2008).

⁵⁸⁶ Irene Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 NYU J. Int'l L. & Pol. 1109, 1125 (2011).

⁵⁸⁷ United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (as revised in 2010), Art. 34(2) ('UNCITRAL Rules');

⁵⁸⁸ ICC Rules, Art. 35(6).

<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#top>

⁵⁸⁹ William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* 650 (2d ed., Oxford University Press 2012); Stefano Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 Am. Rev. Int'l Arb. 243, 245 (2003).

fairness.⁵⁹⁰ However, that does not imply a direct advantage when choosing courts as a forum for dispute. In fact, The Saudi Higher Judicial Council's decided that cases below 20,000 SR could not be appealed.⁵⁹¹ Because of the juxtaposition of these two positions, consumers with disputes concerning less than the stated amount will not lose their right to appeal in arbitration, as there is not an established right to appeal in courts in the first place. Thus, arbitration can provide a superior alternative in Saudi Arabia. The alternative is to rely on a "patchy"⁵⁹² system of enforcing foreign court judgments that usually depends on local laws and the jurisdiction of the enforcement location. Such cases neglect a harmonious global system of 159 states contracting to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).⁵⁹³

V. Opting out Alongside Due Process

Advocating for default arbitration in consumer disputes does not necessarily invalidate arguments against it. Because these arguments are correct to some extent, there is a need for a tactic to refuse mandatory arbitration; otherwise, there is no valid consent to this process, as mandatory arbitration cannot arguably provide due process for consumers. In view of this, an opt-out mechanism presents a legal solution for consumers who do not perceive arbitration as an advantageous forum or class action as their preferred mechanism.

a. Opt-out in an Arbitration Context

There are two main types of instruments: opt-in and opt-out mechanisms. By opting in, consumers have the option of fully choosing the arbitration route. With the latter, they have an arbitration clause by default but can elect to not participate. The opt-out option acts as a procedural right to ensure that consumers have input in selecting the type of dispute resolution mechanism. It also ensures that misinformed consumers have sufficient time to re-evaluate their position, especially when there is a structural power imbalance between the parties. Few people read fine print, and consumers are more likely to read it ex post than ex

⁵⁹⁰ See, "the framework for international arbitration provides sufficient protection of procedural fairness – the 1958 Convention on the Recognition and Enforcement of Arbitral Awards ('New York Convention') and the UNCITRAL Model Law provide an exhaustive list of procedural grounds which a party can use as a defense to resist enforcement, allowing courts to set aside the award. These include circumstances involving a 'serious breach of due process, for example, where a party was not given proper notice of the appointment of an arbitrator was otherwise unable to present its case (Art. V(1)(b) ('New York Convention.)) Han, Irene. 'Rethinking the Use of Arbitration Clauses by Financial Institutions'. *Journal of International Arbitration* 34, no. 2 (2017): 207–238.

⁵⁹¹ Mubarak Alakash, *Judiciary Council: Less than 20 Thousand Riyals Shall not be Accepted for Appeal*, <http://www.alriyadh.com/1589576>, April 28, 2017.

⁵⁹² International Swaps and Derivatives Association, *Memorandum on Use of Arbitration Under an ISDA Master Agreement* 3 [3.2] (19 Jan. 2011).

⁵⁹³ United Nations Commission on International Trade Law, *Status: Convention on the Recognition and Enforcement of Arbitral Awards (New York 1958)*, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

ante.⁵⁹⁴ These points support this paper's position that an opt-out option is more suited to consumers, as they will have a chance to read the contract after the fact and evaluate whether arbitration is compatible with their needs.

Adjudicating in public courts is generally a process of holding parties accountable to their contracts in an ex-ante period. Meanwhile, arbitration might be viewed as a channel of ex-post dispute resolution. Therefore, it presents an adequate award in the event of a disagreement.⁵⁹⁵ An opt-out mechanism is essential to ensure that both parties have the right to choose their dispute resolution method.⁵⁹⁶ In addition, such mechanism prevents obstacles to contract enforcement based on unconscionability.⁵⁹⁷

A beneficial option could be a post-dispute arbitration agreement that does not have an opt-out mechanism and instead requires perceptible consent from both parties to arbitrate. However, recent data have challenged this claim.⁵⁹⁸ Thus, a default arbitration agreement with an opt-out mechanism might yield a better outcome.

Still, the mere offering of an opt-out alternative cannot provide a safeguard for consumers without additional measures, such as initiating the role of non-profit organizations in educating consumers. The American Consumer Financial Protection Bureau has surveyed consumers and revealed that three out of four people did not know if they had signed an arbitration agreement.⁵⁹⁹ Without efforts toward educating consumers about their rights, the outcome could be similar in Saudi Arabia, as consumers could miss the time frame in which they are permitted to opt out of arbitration.

The importance of arbitration as a primary option alongside an opt-out mechanism can be demonstrated by a recent series of decisions by the Court of Appeal that was

⁵⁹⁴ Cf. Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 316(2008).

⁵⁹⁵ Jens Dammann and Henry Hansmann, *Globalizing Commercial Litigation*, 94 Cornell L. Rev. 1 (2008) Available at: <http://scholarship.law.cornell.edu/clr/vol94/iss1/7>

⁵⁹⁶ "If we define the deterrence benefits from contract enforcement to be avoided harms net of avoidance costs, we should expect contracting parties to choose the dispute resolution forum that provides the greatest difference between deterrence benefits and dispute resolution costs.", *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, Christopher R. Drahozal and Keith N. Hylton, [Journal of Legal Studies, vol. 32 (June 2003)]

⁵⁹⁷ Though "while an opt-out provision can prove helpful, it may not save an arbitration clause that is inconspicuous. In *Noble v. Samsung Electronics America Inc.*, the U.S. District Court for the District of New Jersey refused to enforce an arbitration clause in a consumer contract that contained an opt-out provision because the terms were unreasonably hidden." Brian A. Berkley, *Can Opt-Out Provisions Save Arbitration Clauses?* (2016), <https://www.foxrothschild.com/publications/can-opt-out-provisions-save-arbitration-clauses/>.

⁵⁹⁸ In the context of employment arbitration, a study examined the effect of a post-dispute arbitration agreement. It showed that a data analysis of the American Arbitration Association suggests that about 6% of employment arbitration agreements are post-dispute, which means that it is rare. And that employers have no incentives to agree on such agreements. One reason that could be applicable to consumers is that employers reluctant to agree on a post-dispute arbitration when they know that their employees cannot afford to litigate. See, Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313 (2003).

⁵⁹⁹ Megan Leonhardt, *How Companies Block Your Day in Court*, Time, June 28, 2016, <http://time.com/money/4362582/forced-arbitration/>.

published by the Ministry of Justice.⁶⁰⁰ One decision states that when the forbidden nature of a sales contract is proven to a judge, it is necessary to nullify the contract and return the merchandise to the seller.⁶⁰¹ In the context of religion, the word “forbidden” could procure a variety of meanings according to individual interpretations. Without an explicit written definition of the term “forbidden” in the sales context, there will be legal chaos. Even then, consumers will have an option to opt out of arbitration if or when they find that the courts will offer a favorable forum. Other consumers will also have the option to proceed along the default route, which is arbitration.

b. Opt-out in a Class Action Context

As pointed out repeatedly in this paper, arbitration clauses are found everywhere in modern day-to-day activities. To further explain, Instagram went with a route that compels individual arbitration except when the user opt-out. They also waive any rights to be in a class action.⁶⁰² An opt-out right is imperative for class members.⁶⁰³ Since an opt-out option might render absent parties *de facto* members of a class, the *res judicata* effect can impose serious harm.⁶⁰⁴ If Saudi Arabia implements the class action model of the US, it will violate due process principles to opt out of a class action in which consumers have neither a minimum contact with the forum nor relation with the class action lawyer.⁶⁰⁵

When considering opting-in, several issues come to the surface. Some class members might not be familiar with the legal process. They might have language or cultural barriers that prevent them from going an extra mile and opt-in.⁶⁰⁶ Most injured consumers would not initiate a class-action case, but remaining in one is more accessible than opting-in. This is why the default option ought to be to stay in the class. By collectively adjudicating, the class has a better chance to collect damages. Defaulting to class action equals a larger group of

⁶⁰⁰ Reports of the Court of Cassation in 50 Years, First Edition - Volume II

⁶⁰¹ Reports of the Court of Cassation in 50 Years, First Edition - Volume II, Number 86/ب ق/٤, Date: 16/02/1430 Hijri

⁶⁰² Instagram Terms of Use: “Arbitration notice: Except if you opt-out and except for certain types of disputes described in the arbitration section below, you agree that disputes between you and Instagram will be resolved by binding, individual arbitration and you waive your right to participate in a class action lawsuit or class-wide arbitration.”
<https://help.instagram.com/478745558852511>

⁶⁰³ In regards to class-action opt-out in litigation, see, “Opt-out rates vary by case type. Even in case categories in which the opt-out rates are highest, however, the percentage of class members who exclude themselves is quite low. ... The opt-out rate for thirty-nine consumer class action cases is less than 0.2 percent.”

Theodore Eisenberg; Geoffrey Miller, *The Role of Op-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529 (2004)

⁶⁰⁴ Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, Cornell Law Faculty Publications. 672. (2004), <https://scholarship.law.cornell.edu/facpub/672>.

⁶⁰⁵ Steven T. O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 NYU Law Review (1998).

⁶⁰⁶ Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 Colum. J. Eur. L. 409 (2009).

class members which might increase the expected recovery. Additionally, the larger union will give consumers bargaining power as businesses will probably face pressure to settle.⁶⁰⁷ Opting out in a class action context could arguably yield negative results for the injured consumer, who probably could not endure the cost of an independent lawsuit if the damages are low in value. While this argument is reasonable, class members should still have a flexible mechanism to allow for opting out, even when remaining in is more beneficial.⁶⁰⁸

⁶⁰⁷ Michael A. Perino, Class Action Chaos--The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, 46 Emory L. J. 85 (1997).

⁶⁰⁸ See, "the significant agency cost and collective action problems that can exist in class actions have led a number of scholars to suggest that opt- out rights serve important instrumental, as well as normative and symbolic, functions. Scholars have argued that opt-out rights can serve as a market check on the fairness and adequacy of class action global settlements that may limit the opportunities for class counsel to "sell out" the class for a significant fee award." Michael A. Perino, Class Action Chaos--The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, 46 Emory L. J. 85 (1997).

Conclusion

The current legal framework can be summarized as follows. Consumers choose social media as a forum to exert pressure on businesses to fix their issues, and this behavior is an indication of their lack of trust in the current legal system, as the use of Twitter or Facebook can have a stronger impact than that of court procedures. The use of social media as an outlet for consumers to complain about wrongdoing signals the inadequacy of the default system of resolving disputes in courts of quasi-judicial bodies. An implication emerged that a private and flexible judicial system might be a solution. Although arbitration is not a new invention, it is heavily underutilized in the Kingdom.

When confronting difficulties with a business, Saudi consumers have two options: to consult Sharia' judges or to escalate the issue via social media. Neither route is ideal, as ideology might influence judgments in the first option. First, judges are Sharia' graduates, so their education is based on religion rather than law. Second, concerning the latter, courts in their current conditions are not an ideal forum to solve disputes. Thus, there is a need for a forum that can grant viable remedies to injured consumers. It is not realistic to expect that the current legal scheme will be better equipped to deal with consumers, but it could use the advantage of the time to strengthen its position in the future. This approach could grant the government the necessary time to improve its legal system without putting too much pressure into fixing the current one as fast as possible. The newly proposed legal setting can likely promote consumer arbitration as the main method of dispute resolution.

The up-to-date arbitration law is not the problem. The Sharia' limitation on public policy may be complex to maneuver, but it should not obstruct arbitration. The missing piece might be class action, which is a relatively new concept in Saudi Arabia, so there is a need to amend procedural laws to allow it. It is not clear if the institutional infrastructure will accept it or reject it as in the previous example from the US. Nevertheless, if implemented correctly, class action can make it easier for consumers to have access to justice. Class action is crucial particularly because it is not economical for consumers to sue individually. Thus, it would be both beneficial and efficient to devise a procedural mechanism that would allow several members of a class to pursue their claims together.

This paper essentially investigates whether a legal solution can make a positive difference. Each country has its own unique cultural, economic, and legal differences. In Saudi Arabia specifically, one consideration is if the proposed solution could incur a damaging drain in regard to foreign exchange. To cultivate economic growth, it is also essential to design the solution without impacting the legal rights of foreign investors.⁶⁰⁹

An issue in the Saudi legal system that impacts consumers in arbitration is the lack of recognition of the word "consumer" in the litigation context. As a consequence, when searching for related cases, it is necessary to review all of the published commercial cases to determine which are consumer cases. Although consumer advocates have finally started to assume a role in the public sphere in the Kingdom, legislators are lagging. The absence of conversation about consumer arbitration as a forum might have many implications. However, because of certain factors, none of these implications is that consumers and businesses are satisfied with the court system.

A series of legal developments are necessary to make the Saudi legal system hospitable to investors and businesses without sacrificing consumers. Arbitration can

⁶⁰⁹ Lewis D. Solomon & David H. Mirsky, *Direct Foreign Investment in the Caribbean: A Legal and Policy Analysis*, 11 North-Western Journal of International Law and Business (1990). As cited in Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (2002).

undoubtedly benefit businesses in Saudi Arabia who are unfamiliar with the legal infrastructure. Nevertheless, this paper has also considered the consumer perspective. An agenda that advances the interests of businesses to convince them to invest can be a powerful tool, but it should also target access to justice for all. A robust conversation was in order since there is no viable mechanism besides complaining to administrative agencies and forums, which takes a long time. Since arbitration provides a customizable option, arbitration is automatically superior. Specifically, improving the quality of arbitration can provide businesses with the security they need to enter this market. By improving arbitration and enforcement laws as well as limiting the use of a public policy defense, Saudi Arabia can likely make it easier for companies to conduct business in the kingdom.

This paper briefly examined both consumers and businesses to determine if the status quo of the Saudi judicial system is efficient. The findings indicate that it is probably not, which could account for why businesses “elope” and resort to an arbitration clause in their contracts. In view of this inefficiency, consumers should follow suit. In *AT&T Mobility v. Concepcion*⁶¹⁰, the Supreme Court concluded that the Federal Arbitration Act (FAA) preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures. The majority opinion refused to condone a shift from bilateral to class-action arbitration. It argued that the collective-action arbitration concept contradicts the essential principles of arbitration and will therefore render the process slower and costlier. The situation is quite different in Saudi Arabia, and the country should not follow the US footsteps in this arena. Thus, amending the arbitration law to include permission for a class action mechanism should be on the agenda.

There might be a preconceived notion that consumer-to-business contracts are not bilateral by nature. Moral hazard present another disadvantage of consumer arbitration, wherein both arbitrators and businesses possess hidden motives and superior power positions over consumers. The process of having parties select arbitrators implies the danger that companies, as repeat players in arbitration, will be able to select familiar arbiters who are likely to favor them. That is in addition to an unconscionability argument where consumers contend for a better mechanism. These factors do affect arbitration, but counter-arguments were made to attest to the best available option for consumers in Saudi. Once the legal system itself reduces incentives for businesses to assume responsibility for their wrongdoings, it creates a toxic environment wherein it is highly challenging for consumers to seek justice.

Studying the practices of other legal systems might offer initial guidance to the Saudi legal system to, at minimum, avoid the problems that have sometimes accompanied the introduction of arbitration and start de novo with a feasible solution. This paper ultimately argues that neither the current conservative nor the liberal view of consumer arbitration vis-à-vis class action is appropriate in Saudi Arabia. Protection should not solely target consumers or businesses; rather, the law must protect the rights of both parties to encourage a prosperous economy.⁶¹¹ By ensuring an equal treatment under the law, no party can claim disproportionate bargaining power. This goal could be achieved by defaulting to an arbitration clause alongside an opt-out mechanism and implementing a viable class action instrument.

⁶¹⁰ *Supra* note at 369.

⁶¹¹ See, “Law can effectively reshape preferences and coordinate expectations about how others will behave, serving as a focal point. In this way, law can act as a signpost—an expression—to guide people on how to act when they have several options, or (in economic terms) in the presence of multiple equilibria.” World Bank Group, World Development Report 2017: Governance and the Law (2017).

Some arguments against mandatory arbitration agreements have emphasized that consumers lack the power to negotiate any terms or exit the agreement. However, this paper has not assumed this position. Despite opposition to arbitration, an arbitration clause with an effective opt-out option can be favorable for consumers. However, without the support of arbitral awards enforcement by the Saudi courts, the public policy defense will remain an obstacle to implementing a constructive consumer arbitration mechanism. Accordingly, it is important to prepare the entire legal system to work together to ensure a harmonized approach to solving disputes, whether through courts or arbitration.

The bulk of the US–anti-arbitration arguments revolve around central concepts. That arbitration is private and thus safeguard businesses from public eyes. That the arbitration clause is binding with no opt-out option for consumers to seek other forums, and that it bars class action. And, that there is no appeal mechanism.⁶¹² To counter these arguments, the proposals of this paper align with refusing mandatory arbitration and It also refuse to prevent consumers from utilizing class action. And putting into consideration that Saudi Arabia judicial system is somewhat private there is no points to be given to courts over arbitration. The finality of the award might not be as frightening as prescribed. In fact, it could be benefit consumers as it might make the time-line of the process shorter.

A meme can offer a symbolic explanation of the business and consumer roles. The meme illustrates a group of kids who are trying to watch a baseball game over a fence.⁶¹³ The tallest one is capable of viewing the field clearly, while the shorter two are struggling to see it. Businesses are like the tallest kid, as they have the upper hand in terms of resources. Meanwhile, consumers cannot pursue their claims adequately because of their less dominant position. By encouraging arbitration as a first choice, businesses gain the peace of mind that they must choose an option other than the formal Saudi judicial system. An arbitration forum provides an opportunity to have legally based arbitrators resolve consumer disputes. Although consumer arbitration can generate advantages for both sides, it grants consumers an equitable advantage only when it permits a class action mechanism. As economic actors, consumers might benefit from initiating a class action procedure in consumer disputes. And that multiplicity of actions will be decreased because of having a collective action mechanism that will ease access to justice.

Realistically, resolving the economic condition due to depending on oil prices is not likely to conclude with the reform of arbitration enforcement laws. Nevertheless, from an optimistic perspective, the numerous flaws in the overall system in Saudi Arabia present substantial opportunities for positive changes, though they are long overdue.

Given that the Shura Council can discuss general plans for economic and social development, review laws and regulations, and interpret laws, the Shura Council might be a suitable site to advocate for these amendments. A member of the Shura Council can propose a bill that permits class action as a mechanism. Furthermore, the Ministry of Justice can propose a bill to the prime minister to study it. The bill should also include a comparative

⁶¹² Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More.*, The New York Times, November 14, 2018, <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html>.

⁶¹³ Craig Froehle, *The Evolution of an Accidental Meme – Craig Froehle – Medium* Medium (2016), <https://medium.com/@CRA1G/the-evolution-of-an-accidental-meme-ddc4e139e0e4>

analysis of the proposal with other legal systems.⁶¹⁴ These recommendations give an opportunity to design a system that could at least partly ease the apprehension that stems from concerns about the judicial system among investors. It can provide consumers with a safe haven in which disputes can be efficiently addressed in a timely process. In addition, it could provide a professional legal system to ensure that both businesses and consumers benefit from its reliability.

The scope of this paper did not permit an analysis of the issues involved in choosing an arbitral tribunal or the decision making of consumers or businesses. Future research could explore the procedural rules that should be followed throughout the process in addition to funding. The paper also did not examine who exactly may file a claim in a class action context. The fitting entity and admissibility procedures are other topics that warrant future analysis. Forum shopping, litigation abuse are other essential topics for collective action that were not investigated in this paper. The central research question focused on the notion of implementing a viable method of arbitration and class action in consumer disputes.

As for the limitations of this paper, it is important to note that dealing with the Saudi legal system is in itself a constraint. For one thing, there is very little published case law⁶¹⁵, which limits the scope of the research to the limited accessible data. But at the same time, there are extensive records of statutes and laws that position Sharia' compliance as an exception without actually specifying the exact meaning. And since the research's object is to study different approaches of consumer arbitration along with collective action mechanisms in several jurisdictions; the main hindrance is figuring the best method to apply in Saudi Arabia. These factors possess a difficulty because they construct an uncertain environment, which is not appealing to businesses or consumers.

Economic actors have emphasized a working legal system, and at least at the current time, private justice might offer a superior alternative. This matter is even more critical for the weaker party – consumers – because it represents access to justice. Both parties should expect a level of legal impartiality that can be found in arbitration. For Saudi Arabia to mitigate the risks of its current court system, it must promote arbitration as an aid in the process of boosting growth and prosperity. Committing to enforcing independent awards from arbitral tribunals could be more logical than trying to reform the current system. By then, there will be a higher chance of attracting capital to the Kingdom. At the end, this paper takes a position that arbitration can be an instrument to foster economic development in Saudi Arabia.

⁶¹⁴ 12661 / ب / 7 / الرقم, dated 17/03/1424 Hijri.

⁶¹⁵ Though the Ministry of Justice has been recently publishing yearly folders of cases, arbitration-related cases are not widely available.

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