An Examination of the Role of Shariah in the Recognition and Enforcement of Arbitral Awards in Saudi Arabia

Submitted by Abdullah Mohammed Al-abdullah to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law in December 2016

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature: .................................................................
Abstract

This thesis explores the challenges encountered by parties seeking to have arbitral awards recognised and enforced within the Kingdom of Saudi Arabia. Specifically, this thesis critically assesses the impact of Shariah on the enforcement of international awards within the Kingdom and aims to suggest actionable reforms to further develop the Saudi arbitration framework, and build on the modernisation efforts initiated through the Saudi Arbitration Law and Enforcement Law, both issued in 2012.

This study aims to examine issues around the treatment and enforcement of domestic and international awards under the Saudi legal system and dispute settlement machinery. Particular focus will be directed to the differences between the enforcement of domestic and foreign awards, and the challenges that arise therein. By way of critical analysis, this thesis explores the history and development of arbitration law and procedure in Saudi Arabia, focusing on the role of Shariah principles in contract construction and dispute resolution. By bringing Saudi arbitration procedures into greater alignment with international standards and practices, and curtailing the power of local courts, the New Arbitration Law has been widely welcomed as establishing a more hospitable arbitration environment for commercial actors, foreign and domestic.

While the New Saudi Arbitration Regime aimed to bring much-needed certainty and predictability to Saudi-based commercial arbitration awards, the Saudi legal system is still in its infancy and struggling to balance its Shariah roots with secular practices. As this thesis explores, the Saudi model of contract construction and dispute resolution is not yet embedded in a settled or ‘gapless’ body of legal principles, in large part because of on-going contestation among Islamic scholars over the scope and meaning of Shariah principles. While the new law significantly curtails the review power of local courts, judicial authorities in Saudi Arabia continue to enjoy broad discretion to reopen a final non-localised arbitral award issued elsewhere and to subject it to review on the merits. The grounds for annulment, revision or refusal to enforce include any agreement deemed to contravene Shariah law, Saudi public policy and prior Saudi court decrees, in addition to other public policy related defences.
In the final analysis, the proposed thesis will consider the potential impacts of Shariah on arbitral award enforcement proceedings initiated in Saudi Arabia. At the level of conceptual analysis, the proposed research reflects on the familiar tension between international regulations, which is principally achieved through harmonisation of applicable arbitral procedures and the domestic enforcement of applicable national (substantive) laws on arbitration. From these premises, the proposed thesis will critically evaluate the extent to which Saudi arbitration law has reconciled the modernising ambitions of an ‘commerce friendly’ arbitration regime and where progress is still needed to achieve efficient and effective award enforcement.
Acknowledgements

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### List of Islamic Legal Terms

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<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Al-Mutaqaddimum</td>
<td>Habit of the ancient jurists to remain silent.</td>
</tr>
<tr>
<td>Fatwa</td>
<td>Interpretations of Islamic religious opinions.</td>
</tr>
<tr>
<td>Fiqh</td>
<td>Collective body of Islamic jurisprudence literature.</td>
</tr>
<tr>
<td>Gharar</td>
<td>Uncertainty</td>
</tr>
<tr>
<td>Haad</td>
<td>Fixed punishment</td>
</tr>
<tr>
<td>Hadith</td>
<td>The practices and teachings of Islam by the Prophet Muhammad (also known as Sunna’h).</td>
</tr>
<tr>
<td>Hakam</td>
<td>Third-party arbitrator</td>
</tr>
<tr>
<td>Hanbali</td>
<td>Hanbali School of religious thought. The most popular in Saudi Arabian law.</td>
</tr>
<tr>
<td>Harbi</td>
<td>Non-Muslim</td>
</tr>
<tr>
<td>Hasan</td>
<td>Morally right action.</td>
</tr>
<tr>
<td>Ijima</td>
<td>Islamic legal scholars</td>
</tr>
<tr>
<td>Ijma</td>
<td>Secondary religious sources.</td>
</tr>
<tr>
<td>Isharat Al-Nass</td>
<td>Alluded, contextual meaning</td>
</tr>
<tr>
<td>Jahallah</td>
<td>The unknown facts of a case.</td>
</tr>
<tr>
<td>Maslaha</td>
<td>Public interest</td>
</tr>
<tr>
<td>Qabih</td>
<td>Morally wrong action.</td>
</tr>
<tr>
<td>Qiasa</td>
<td>Justifiable retaliation</td>
</tr>
<tr>
<td>Qiyas</td>
<td>The process of analytical reasoning by a group of scholars based on the primary sources of Shariah law.</td>
</tr>
<tr>
<td>Riba</td>
<td>Charged interest</td>
</tr>
<tr>
<td>Shafi’i School</td>
<td>Another major school of religious interpretation popular with other Arab nations.</td>
</tr>
<tr>
<td>Siyasa Shar’iyya</td>
<td>Governance in accordance with divine law.</td>
</tr>
<tr>
<td>Takhim</td>
<td>Negotiated self-help resolution mirroring mediation.</td>
</tr>
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</table>
# LIST OF RELEVANT TREATIES AND LEGISLATIONS

<table>
<thead>
<tr>
<th>Treaty/Regulation</th>
<th>Reference</th>
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<tbody>
<tr>
<td><em>Commercial Court Act</em></td>
<td>Royal Decree No. 32 of 15 Moharram 1350 (H), arts 49-54</td>
</tr>
<tr>
<td><em>New York Convention</em></td>
<td>The Recognition and Enforcement of Foreign Arbitral Awards in 1958</td>
</tr>
<tr>
<td><em>Saudi Arbitration Regulation of 1983</em></td>
<td>Saudi Arbitration Regulation of 1983</td>
</tr>
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CHAPTER 1: INTRODUCTION

1.1 Introduction

In a globalised age where commerce continues to grow and expand, both domestically and internationally, so too has the need for an effective means of resolving commercial disputes. Saudi Arabia has taken note that arbitration has become widely recognized by commercial contracting parties as one of the most popular modes of dispute resolution.¹ In response to the increased use of this alternative form of dispute resolution, the Kingdom has undertaken to reform its domestic arbitration law and evaluated its position in light of prevailing international arbitral instruments, such as the New York Convention on the Recognition and Enforcement of Arbitral Awards. Saudi Arabia’s attempts to modernize its arbitration regime have focused on accommodating the commercial preference for arbitration and providing efficient means for obtaining the recognition and enforcement of arbitral awards.

It has become apparent that arbitration is well-suited for the commercial transaction environment and is able to adeptly handle disputes involving both foreign and domestic parties.² In contrast to formal court-based litigation procedures, arbitration provides the parties with significant autonomy to make

¹ For the purpose of this thesis, it would be helpful to interpret foreign investors and international commercial parties as international contracting parties because this thesis attempt to analysis the challenges confronted by both contracting parties, by nature, more arbitral orientated than business.

choices about who will preside over their dispute as arbitrators, what procedural rules will be used, what substantive governing law will apply, and where the seat of the arbitration proceedings will be located. However, arguably one of the most important factors that contributes to the success of arbitration are the procedures put in place to ensure the recognition and enforcement of arbitral awards. This is crucial in situations where a party to a domestic arbitration is attempting to hide assets in another country or an arbitration involving a foreign party that maintains the majority of its assets in its home country. In effect, arbitration proceedings carry little weight if the ultimate award is rendered unenforceable. Thus, it is imperative that there be a reliable and predictable means for enforcing such arbitral awards.

During the process of attempting to enforce an arbitral award through the courts, and in particular the enforcement courts of Saudi Arabia, it has become apparent that the courts may differ from the approach of the arbitrators in


4 The term recognition in arbitration is when an arbitral tribunal/institution issue an award in an arbitral dispute. The winning party will seek a leave from the enforcing state’s court to recognise the arbitral award to allow enforcement against respondent. For example, in the Kingdom of Saudi Arabia, the winning party will seek a leave before the Saudi local courts as stipulated in Article 53 of the Saudi Arbitration 2012, before enforcing the arbitral awards, irrespective of whether the awards are made in the same jurisdiction as the enforcement court or made abroad. This thesis will analysis the challenges confronted for international arbitral parties in the procedure for enforcement of international arbitral awards in Saudi Arabia. See H Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International, 2010).

5 The term enforcement in arbitration is when an arbitral award has been recognized by the jurisdictional enforcing state’s court and the arbitral award can be subsequently enforced. However, in some enforcing states, the winning party must carry out a legal procedure before the jurisdiction’s courts to enforce the award. For example, in the Kingdom of Saudi Arabia, the winning party must make an application under Article 53 of the Enforcement Law 2012, before the Saudi Enforcement Circuit to enforce the recognised arbitral award. This will be further examined and analysed in this thesis to determine the reasons for these procedures and challenges confronted by arbitral parties during the enforcement process. See MB Holes, ‘Enforcement of Annulled Arbitral Awards: Logical Fallacies and Fictional Systems’ (2013) 79(3) Arbitration 244-55; see also Kronke et al (n 4).

6 For the purpose of this thesis, an international arbitral award includes an international commercial arbitral award and international investment arbitral award, as there is a difference in the arbitral procedures in rendering these arbitral awards. For example, when rendering international commercial arbitral awards, an arbitral tribunal would assess the arbitral parties’ rights and obligations as stipulated in the international commercial agreement or arbitral agreement between the contracting parties. See T Childs, ‘Enforcement of International Arbitral Awards: Should a Party Be Allowed Multiple Bites at the Apple?’ (2015) 26 ARIA 269, 269-80; see also J Kirby, ‘What Is an Award Anyway?’ (2014) 31(4) Journal of International Arbitration 475, 475-484.
evaluating the public policy impacts of the awards. Provisions exist under both domestic and international arbitration laws addressing enforcement that permit an enforcing state’s court to refuse to recognise an arbitral award on the grounds that it violates that state’s public policy.\(^7\) Therefore, it is essential that both the parties and the arbitrators have an understanding of the arbitration laws and public policy considerations of the states in which any resulting award is likely to be enforced to ensure that the courts will not set aside the award on public policy grounds.\(^8\) For arbitral awards to be effectively enforced, the parties’ exercise of their autonomy must be done in a manner that is consistent with the states in which the arbitration will be located or any award is to be submitted for recognition and enforcement. Further, arbitrators must also be aware of these considerations and restrictions when rendering arbitral awards to ensure that the awards will be able to subsequently be enforced and benefit the prevailing parties. While public policy often has a specific set of connotations that can be used to guide compliance, the situation differs in Islamic states that have laws based on Shariah traditions and principles. In these states, for an award to be consistent with Islamic public policy, the award may not run afoul of Shariah principles.

Considering the nuances created by Saudi Arabia’s subscription to a Shariah-based legal system, this thesis offers a critical analysis of the enforceability of arbitral awards within Saudi Arabia. Understanding that investment takes


various forms, this thesis considers both domestic and foreign or international arbitrations in undertaking this analysis, including highlighting notable differences between the two processes where applicable. This study particularly seeks to evaluate the extent to which the Saudi government has been successful at encouraging foreign investment, following reforms to its arbitration framework. In taking up this issue, this study focuses on the impacts of the Saudi Arbitration Act 2012 and Enforcement Law 2012, analysing three key aspects of the regulatory framework on arbitration: the parties’ choice to submit disputes to arbitration, including evaluating their authority to enter into arbitration agreements; the parties’ choice of applicable law; and the potential for recognition and enforcement of arbitral awards. As a corollary, this thesis will also consider the attitudes of the Saudi government toward the recognition and enforcement of foreign arbitral awards as a contracting state of the New York Convention of 1958 and how the Kingdom incorporated these principles into its domestic arbitration law reform. Finally, this thesis will offer recommendations on how to further reform the Saudi arbitration regime to enhance the legal certainty, fairness, and effective functioning of the existing legal framework, thereby addressing the various challenges confronted by contracting parties who seek to resolve commercial disputes by means of arbitration in Saudi Arabia.

1.2 Contribution of Thesis

Saudi Arabia is one of the most rapidly growing countries in the Middle East\(^9\) and is the largest producer and exporter of petroleum to international oil markets.\(^{10}\) Its activities in the oil and energy sector generates about half of the Saudi economies GDP.\(^{11}\) This economic growth has brought with it significant commercial contracts among both domestic parties and foreign investors.\(^{12}\) As mentioned above, savvy businesses recognise the benefits of arbitration and

\(^9\) The Kingdom of Saudi Arabia enjoys a monarchy ruling system, where the King is the head and supreme ruler of Saudi Arabia. Saudi Arabia is an Islamic State. Its religion is Islam and its constitution is the Holy Qur’an and Sunna’h of the Prophet Mohammad and its governance is based on Islamic (Shariah) law. It follows the teachings of the Hanbali School.


\(^{11}\) Ibid.

are turning to it more frequently to resolve their arbitral disputes. While much attention has been given to the impact of Shariah law on arbitration proceedings and in the development of the domestic Saudi arbitration laws, little research has been done to explore the recognition and enforcement of arbitral awards within the Kingdom under the reformed Saudi arbitration regime. These significant reforms were instituted to facilitate commercial arbitration within the Kingdom and attract more foreign investment and trade activities into Saudi Arabia. However, for such a regime to be effective, the resulting awards from arbitral proceedings must be enforceable within the Saudi courts.

This study goes beyond simply examining how Shariah law impacts commercial contracts, but also the role that Shariah plays in defining the underlying public policy grounds on which the enforcement courts can refuse to recognise and enforce both domestic and foreign arbitral awards. This study addresses the normative issues of equating Saudi public policy with all aspects of Shariah law for enforcement purposes and the practical difficulties parties may face given that Shariah is subject to various interpretations by lawyers, scholars, arbitrators, and judges. This study further analyses the onus placed on all involved in arbitral proceedings to have the foresight to consider the potential countries for enforcement, and when that country is Saudi Arabia, the additional considerations that need to be kept in mind to ensure the enforceability of the arbitral award. Finally, this study provides practical recommendations that can be further studied and implemented to reduce the potential for an enforcement court refusing to recognise and enforce an arbitral award on public policy grounds.

By considering this analysis and implementing these changes, the Saudi government can improve the Kingdom’s access to international capital markets, thereby attracting additional foreign direct investment and creating more

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commercial opportunities for Saudi businessmen. By creating a more predictable recognition and enforcement regime, Saudi Arabia can acquire the necessary confidence of both domestic and international contracting parties in the Kingdom’s legal, judicial, and arbitral systems when it comes to resolving business disputes.

1.3 Literature Review

To situate this study within the existing relevant literature, the following provides a literature review broken down by primary topic areas. As there is little research that specifically addresses the issue of recognition and enforcement of arbitral awards under the new arbitration regime in Saudi Arabia in light of Shariah’s public policy impacts, consideration is given to those studies that have provided a foundation of the relationship between Shariah and commercial arbitration upon which the current research can be built. This literature review first considers those sources that apply specifically to Shariah principles, then concludes by looking at the relevant arbitration literature.

1.3.1 The Role of Shariah in Contract Law Construction and Theory

In the above regard, it is frequently commented that international contracting parties lack a proper understanding of Shariah-governed Saudi law, given the distinct nature of Saudi substantive law as compared with other common and civil legal systems. A number of scholars such as Al-Baqme have exposed the significant difference between Shariah and Western laws. For instance, Shariah law is believed to be divine law, which cannot be changed. By way of

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16 For example, Duderija outlines how the development of the canonical Hadith literature as law during the first four generations of Muslims. See A Duderija, ‘Evolution in the Canonical Sunni Hadith Body of Literature and the Concept of an Authentic Hadith During the Formative Period of Islamic Thought as based on Recent Western Scholarship’ (2009) 23 ALQ 389-415.


18 Why does a Muslim believe the Holy Qur’an as Divine law? Several attempts have been made to explain this question. However, Watt remarks that the Holy Qur’an is the speech of the God Allah to his messenger, the Prophet Muhammad, and Muslims believes certain ideas, which have been preached by
contrast, Western laws are flexible and can be amended or modified.\textsuperscript{19} Therefore, it is necessary to clarify how the Islamic jurisprudence has developed in Saudi Arabia and in the Islamic world more generally, as well as to examine its sources and issues around which there is interpretative dispute.\textsuperscript{20}

Islamic jurisprudence addresses two important points, the religious and Islamic Schools.\textsuperscript{21}

On the same subject, Lew outlines why there is no uniform interpretation of religious-based law, regardless of the nature of the legal system or its source of authority whether based on legislation or on immutable and interpretatively ‘open’ religious principles.\textsuperscript{22} He further points out that the common law countries mainly rely on the skill of advocates to interpret the law in a case.\textsuperscript{23} Yet, in civil law countries, judges are vested with the power to interpret the law as applied to the facts in rendering a legal decision.\textsuperscript{24} It is here that we find a fundamental difference between Islamic and Western legal systems. For instance, Black et al. explains the key differences in the interpretative methods used in Islamic legal systems as compared with common and civil law systems.\textsuperscript{25} Drawing on the writings of Joseph Schacht, the aforementioned scholars contend that:

\begin{quote}
Islamic law represents an extreme case of ‘jurists law’; it was created and developed by private specialists; legal science, and not the state, plays the part of a legislator, and
\end{quote}
scholarly handbooks have the force of law. Islamic law is therefore neither common nor civil law, but is juristic law.\textsuperscript{26} 

The above offers a backdrop against which one can understand the complex nature of the Saudi legal system. Most Western legal systems converge around common and international recognised law and customs of commercial contract law, many of which are reflected in the major international arbitration treaties.\textsuperscript{27} 

More generally, Islamic contract law is far more prescriptive than modern theories of contract law and construction in the West.\textsuperscript{28} While Western theories of private law are founded upon the principles of party autonomy and freedom of contract, Islamic principles constrain the freedom of contractors by limiting the sorts of transactions and contractual exchanges to which individuals can enter into.\textsuperscript{29} In this regard, Foster has suggested that the Western model of law is based on theories of liberalism in which a distinction is maintained between public life and private sphere of religious beliefs.\textsuperscript{30} While scholars such as Foster have correctly identified that Islamic legal systems are at odds with liberal rule of law theories, this thesis argues that such accounts fail to offer a nuanced understanding of the role of Shariah law and Islamic Schools in commercial transactions.\textsuperscript{31} Absent a more careful assessment of the distinct and varying ways in which Islamic principles have been interpreted by scholarly authorities, and of their legitimate role and application in Saudi Arabia’s legislative and judicial processes, such accounts are unable to fully grasp and identify the challenges faced by international contracting parties.\textsuperscript{32} Rather, one can argue that the Islamic Hanafi School’s interpretation of Shariah is contrary to the received wisdom favourable to commerce, even if as some have argued, Saudi Arabia has embraced Western models of finance law precisely in order to

\textsuperscript{26} Ibid.  
\textsuperscript{27} See MM Iqbal, ‘Prohibition of Interest and Economic Rationality’ (2010) 24\textit{ALQ} 293-308.  
\textsuperscript{28} Al-Fadhel (n 14).  
\textsuperscript{31} Foster (n 30) 273-307.  
\textsuperscript{32} Ibid.
become a more attractive venue for foreign investment.\textsuperscript{33} However, there remain challenges, as to the legitimate expectations of foreign contractors who do business in Saudi Arabia, specifically with respect to the lack of consistency and certainty in the interpretation of Shariah principles and the role of the courts in dispute resolution. As Foster emphasises:

\begin{quote}
[S]cholarly work is still patchy and is particularly deficient, with a few notable exceptions, in foundational questions. We cannot yet, therefore, speak of any consensus view, or even a fully informed debate, concerning Islamic perspectives on the law of business associations in the modern world. We will need to wait and see how the field develops in the next few years.\textsuperscript{34}
\end{quote}

While, Foster’s argument is persuasive, it is arguably too sweeping. More crucially, Western analysis of the Islamic legal system often fails to account for important differences in scholarly interpretations of Shariah on questions of arbitration and contract construction between the four major Islamic Schools.\textsuperscript{35} Instead, emphasis is placed on the absence of effective legal and regulatory mechanisms aimed at protecting the rights of foreign contractors and the difficulties international and foreign commercial entities face in understanding and interpreting principles of Shariah in the context of international arbitration and dispute resolution.\textsuperscript{36} Situated against this background, this study will attempt to address ‘gaps’ in the extant literature, specifically by offering a detailed and critical investigation of the jurisprudential perspectives of the four main Islamic Schools in relation to commercial transactions. The purpose of this analysis of Islamic jurisprudence is to gain a deeper understanding of the many modern legal issues implicated by complex international commercial transactions and dispute settlement in an ever-globalising world.\textsuperscript{37}

\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
\textsuperscript{36} Stipanowich (n 29) 297-394.
Further, as scholars such as Al-Sheikh have documented, a significant portion of the existing literature is based on the common assumption that the law of Shariah is unclear on the obligatory nature of arbitration for the contracting parties.\(^{38}\) These scholars have remarked on the efforts of all major Islamic schools to simplify the principles applicable to arbitration under Shariah.\(^{39}\) This means that more effort must be made to examine the role of Shariah in the Saudi arbitration framework. Thus, the current study will consider how the Saudi government can address these concerns toward the implementation of a more efficient arbitration regime.

In view of the above, Al-Ammari and Martin attempted to identify the reasons why international contracting parties are confronted with difficulties when using Saudi arbitration,\(^{40}\) as governed by the Saudi Arbitration Act 2012 and Enforcement Law 2012.\(^{41}\) Importantly, this strand of scholarship offers a comparative analysis of the provisions of the old Saudi Arbitration Act 1983 with the current arbitration act, while highlighting the impact of Shariah on the new arbitration framework and enforcement law.\(^{42}\) Notably, Al-Ammari and Martin emphasise that despite the reforms, international commercial parties and foreign investors still confront challenges when seeking recognition and enforcement of their arbitral awards in Saudi Arabia.\(^{43}\)

The Saudi Arbitration Act 2012 is based on harmonised international arbitration procedures as embodied by the UNCITRAL Model Law.\(^{44}\) The UNCITRAL rules are widely regarded as a crystallisation and codification of Western (non-Islamic) international law principles and arbitration procedures.\(^{45}\) Yet, it is difficult to ignore the peremptory status of Shariah in Saudi domestic law. One might assume that Shariah defences to recognition and enforcement would, in

\(^{38}\) Alsheikh (n 8) 367-400.
\(^{39}\) Ibid.
\(^{40}\) Al-Ammari & Martin (n 2) 387-408.
\(^{41}\) Ibid.
\(^{42}\) Ibid.
\(^{43}\) Ibid.
\(^{45}\) AK Aldohni, ‘The Emergence of Islamic Banking in the UK: A Comparative Study with Muslim Countries’ (2008) 22 *ALQ* 180-198.
principle, prevail over international law.\textsuperscript{46} What remains open to question is who decides what is or is not compliant with Shariah—national courts or international or delocalised arbitration bodies? A larger problem is the trend of inconsistent and arbitrary interpretations of Islamic religious opinions or ‘Fatwas’ or the invocation of public policy defences.\textsuperscript{47}

This thesis argues several challenges plague the recognition and enforcement of international arbitral awards in the Kingdom of Saudi Arabia. Accordingly, the choice of law is a vitally important issue in international arbitral process.\textsuperscript{48} This is because contracting parties and arbitrators usually rely on the choice of law for governing and interpretation of international arbitration agreement due to divergence in national law across the national legal systems of contracting parties; however, Shariah may supersede those choices in practice.\textsuperscript{49}

\textbf{1.3.2 The Importance of Choice of Law in Arbitration}

As previously mentioned, many international commercial disputes that are referred to arbitration are determined by the arbitrators' application of the chosen governing law.\textsuperscript{50} However, courts in different jurisdictions may have different perspectives on the applicable law to the international arbitral agreement and may well interpret the relevant points of law to reach different outcomes.\textsuperscript{51} As parties to international commercial agreements rely on consistency and predictability around legal outcomes, any risk that an arbitral award will not be upheld or enforced by local authorities, or that the underlying contract will be subject to review on the merits and even voided, is a disincentive to future investment in that country.\textsuperscript{52}

\textsuperscript{46} Al-Fadhel (n 14).
\textsuperscript{47} MM Billah, ‘The Prohibition of Riha and the Use of Hiyal by Islamic Banks to Overcome the Prohibition’ (2014) 28(4) ALQ 392-408.
\textsuperscript{48} See Alsheikh (n 8) 367-400; see also A Garnuszek, ‘The Law Applicable to the Contractual Assignment of an Arbitration Agreement’ (2016) 82(4) Arbitration 348-55.
\textsuperscript{49} See Alsheikh (n 8) 367-400; see also Garnuszek (n 48) 348-55; Abu-Manneh, Stefanini & Holden (n 3) 65-69.
\textsuperscript{50} See, eg, Redfern et al (n 3) 1; see also Alsheikh (n 8) 367; Rutledge (n 2) 1; Choi (n 7) 121-29.
\textsuperscript{52} MO Farooq, ‘Qard Husan, Wadi ah/Amanah and Bank Deposits: Applications and Misapplications of Some Concepts in Islamic Banking’ (2011) 25 ALQ 115-46.
In this respect, the author of this thesis will draw on Milhaupt and Pistor’s claims to argue that the Saudi government needs to embrace a more liberal approach to interpreting the provisions of Shariah. It is also argued that Saudi Arabia should simplify its legislation and enhance consistency in judicial processes toward promoting stable expectations of investors and other commercial actors in the formation of contracts and resolution of contractual disputes. Such measures will enable international contracting parties to have a better understanding of Saudi legislation.

Before deciding whether to do business in a state, a commercial actor often will consider its ability to choose the law that will apply to a transaction agreement. Following on from the argument above, Feldman has argued that:

‘[L]aw is not the only manifestation of the conformity norm, but the creation of new laws is an effective way of signalling the government’s acquiescence to a particular aspect of Western influence’.  

In fact, international contracting parties are more likely to trade, transact, and invest in countries in which a prospective law is applied consistently. More generally, as suggested above, international contracting parties will largely rely on the existence of stable and functioning dispute settlement machinery that is free from arbitrary state or judicial intervention. It is equally important for international contracting parties to understand the enforcing state’s arbitration legal framework before entering into agreements, including arbitration...

53 Milhaupt and Pistor endorse for an effective legal regulation and governance is a sound growth in a country’s economy, is reduced to the following equation: ‘good law + good enforcement = good economic outcomes’. See CJ Milhaupt & K Pistor, Law and Capitalism (University of Chicago Press, 2008) 5.
57 See for example, Acomb & Jones (n 55) 63-74; see also, Farooq (n 52) 115-46; JH Dasteel, ‘Is It Time to Awaken the New York Convention’s Dormant General Reciprocity Clause?’ (2015) 26(4) ARIA 539-52.
agreements.\textsuperscript{59} As suggested above, Redfern et al. posit that the enforcing state’s arbitration law plays a vital role in recognising and enforcing international commercial arbitral awards.\textsuperscript{60} It is little wonder then that foreign investors or commercial actors will be reluctant to do business in legal systems in which they are exposed to legal risks, including the unpredictable or arbitrary overturning or non-recognition of arbitral awards.\textsuperscript{61} In the Saudi legal system, however, this may be the inescapable consequence of vague and inconsistent interpretations of Shariah or indeed, politically-motivated invocations of public policy defences to non-enforcement.\textsuperscript{62}

\textbf{1.3.3 Shariah Law in the Muslim World}

The remainder of the thesis will shift focus to emphasise the theories of law and contract in the Muslim\textsuperscript{63} world, such as that of Saudi Arabia. Peters and Bearman, for instance, offer an explanation on the nature and scope of the Shariah in the Muslim world.\textsuperscript{64} They argue that the nature of Shariah ‘gives rise to a different experience of law than that understood by subjects of a common-law or civil-law system’.\textsuperscript{65} Scholars working in this area acknowledge the importance of legal culture and diversity, and argue that Shariah should be understood not merely as a mechanical set of rules or rule-making processes but as the expression of socio-cultural norms and traditions.\textsuperscript{66} However, scholars such as Peters and Bearman also emphasize the similarities between Islamic and Western legal traditions.\textsuperscript{67} Drawing on the writings of Yanagihashi, it is suggested that fundamental principles of private law, notably the principle of good faith and freedom of contract also have a firm basis in Shariah law.\textsuperscript{68}

\textsuperscript{60} A Redfern et al (n 3) 1-2.
\textsuperscript{61} Ibid.
\textsuperscript{62} Farooq (n 52) 115-46.
\textsuperscript{63} Muslim means one who believes in the one God is Allah and submits his will to God. For a thoughtful study on Islam, see J Wynbrandt, A Brief History of Saudi Arabia (2nd Second edition, Facts on File, 2010) 32.
\textsuperscript{64} Peters & Bearman (n 18) 2.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
\textsuperscript{68} See H Yanagihashi, ‘Socio-Economic Justice’, in Peters & Bearman (n 18) 151.
Rather, the novelty or distinguishing feature of Shariah lies not in the ‘content’ of Islamic principles but in the disputed nature of their meaning and interpretation:

[T]he texts of Qur’an and Sunna’h, however, are the raw materials of the Shariah and not immediately ready for use. They need interpretation and reasoning in order to formulate the rules that they were meant to convey.\(^69\)

As the above quote suggests, there is a lack of consensus over the meaning of Shariah principles.\(^70\) The tendency of religious authorities to apply ad hoc or inconsistent rulings, phenomena known as Fatwa shopping,\(^71\) is precisely the reason why commercial actors might be reluctant to invest in Saudi Arabia.\(^72\) Not only do commercial actors fear that their contracts will be voided or annulled by local courts, or that a valid award overturned on related public policy grounds, they are also faced with disagreement between different Islamic School’s thought about the correct meaning and application of Shariah.\(^73\) Furthermore, since there is no system of precedent in Shariah-based reasoning, different advisory boards may arrive at conflicting opinions about whether a particular aspect of an agreement is unlawful under Islamic law.\(^74\) This is problematic because a determination of the validity or legality of a contract or private act presupposes a sophisticated and scholarly understanding of the sources and purposes of Shariah law.\(^75\) It is useful here to point out that this study will examine some of the key issues and conflicts around the interpretation and application of Shariah law.

\(^{69}\) Peters & Bearman (n 18) 1.


\(^{73}\) Ibid.

\(^{74}\) Ibid.

\(^{75}\) For example, Duderija shows the function and value of Hadith literature in Islamic thought to understand the Shariah. See A Duderija, ‘A Paradigm Shift in Assessing/Evaluating the Value and Significance of Hadith in Islamic Thought: From ‘ulumu-l-Isnad/rijal to ‘usulu-l-Fiqh’ (2009) 23 ALQ 195-206.
In this context, Siddiqui outlines the history of the literature of Islamic jurisprudence (*Fiqh*), and its modern development.\textsuperscript{76} She argues that logical reasoning will help to bring clarity to law.\textsuperscript{77} Siddiqui also points out that:

\begin{quote}
[L]aw is not only illustrative of the legal norms of a culture but provides an insight into those very ideas and institutions which a civilization accepts and those which it rejects.\textsuperscript{78}
\end{quote}

Siddiqui also concludes by offering her own findings as how to best to bring greater clarity in understanding and interpreting Shariah law.\textsuperscript{79}

Along similar lines, El-Malik outlines how the provisions of Shariah law have developed and began as the law of the state.\textsuperscript{80} Interestingly, he points widespread differences of opinion on Islamic legal issues of constitutional importance and the unlimited potential for ‘judge made’ law.\textsuperscript{81} These challenges expose the inherent pluralism of Islamic law-making and norm-creating processes.\textsuperscript{82} As El-Malik remarks ‘it is impossible to speak of Islamic law as a single system of law. There are as many expressions of Islamic law as there are states in the Muslim world’.\textsuperscript{83} The scholar Hoecke affirms this point:

\begin{quote}
[A]n ahistorical approach considers the Shariah to be immutable and to be understood exactly as in the early times after the Prophet’s death. The historical approach accepts the need for adapting rules to changed circumstances in the course of history. Translated into the Western wording of the debate one could present it as the question to what extent divine law coincides with
\end{quote}

\textsuperscript{76} M Siddiqui, ‘Clarity or Confusion – Classical *Fiqh* and the Issue of Logic’, in Nielsen & Christoffersen (n 18) 18.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} El-Malik (n 18).
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid 4.
human law or whether natural law may coincide with positive law.\textsuperscript{84}

Additionally, Hoover analysed the work of Ibn Taymiyya, a great scholar and theologian from the Hanbali School.\textsuperscript{85} Hoover’s thought is that early scholars and commentators used the term of Shariah law in the wrong sense, misconstruing or neglecting the role of rational arguments in Islamic interpretive and norm-creating processes.\textsuperscript{86} As such, Islamic scholars and commentaries have focused singularly on literal interpretations of scripture and divine revelations.\textsuperscript{87} This strand of scholarship has also examined the pre-modern study on Shariah law as perhaps more appropriately called theological jurisprudence (\textit{Fiqh}).\textsuperscript{88} In this regard, Hoover states:

[[I]bn Taymiyya may thus be seen as a theological jurist responding to inquiries and challenges concerning what should rightly be said about God. The apologetic and philosophical quality of this \textit{Fiqh} arises in as much as he deems it permissible, constructive or even necessary to take up rational reflection and argumentation in theological matters.\textsuperscript{89}

This thesis will highlight the contested areas and issues that are produced by Shariah law and its impact on the foreign actor’s understanding of Saudi arbitration law and proceedings, including their ability to enforce arbitral awards and the need for Shariah compliance.

\textbf{1.3.4 Shariah and Commercial Transactions}

\textsuperscript{84} M van Hoecke, ‘Islamic Jurisprudence and Western Legal History’, in Nielsen & Christoffersen (n 18) 46.
\textsuperscript{85} J Hoover, \textit{Ibn Taymiyya’s Theodicy of Perpetual Optimism} (Brill Publishers, 2007) 25.
\textsuperscript{86} Ibid; see also YY Haddad & BF Stowasser (eds), \textit{Islamic Law and the Challenges of Modernity} (AltaMira Press, 2004).
\textsuperscript{87} Hoover (n 85) 25.
\textsuperscript{88} Ibid.
\textsuperscript{89} Ibid.
Islamic contracts share commonalities with conventional commercial arrangements in commercial transactions; however, there are fundamental differences between the two. For example, in conventional contracts, contracting parties can freely determine the terms of the contract, provided that the specific contractual terms do not contravene the ordinary law. Most contracts are intended as an exchange of goods or services, and the underlying motive is that the seller will profit from the transaction. By way of contrast, an Islamic contract is permissible only where it is free from the following impurities: uncertainty (Gharar) in the contractual obligation and addition to other prohibitions on interest (Riba) in the financial obligations.

In this regard, Razali posits that the use of the Internet as a medium of communication has widened the scope for contract formation among the contractual parties. In fact, the majority of the commercial transactions are conducted through the Internet for which the contracting parties’ physical presence is not required. Razali next relies on the provisions of Shariah to point out that e-contracts might render a contract null and void because an e-contract may be uncertain, lacking any direct knowledge of the existence of the commodity, and neither party sees each other or has direct communication with the other. However, Razali draws on the opinion of the Hanafi School to find

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93 Bashayreh (n 91) 59-103.
95 Jusic and Ismail assess how the principle of Riba can infect a contract. See A Jusic & AM Ismail, ‘Islamic Finance in the Western Balkans: Prospects and Regulatory Challenges’ (2012) 26(2) ALQ 193-210; see also Billah (n 47) 392-408; H Harasani, ‘Analysing the Islamic Prohibition on Riba: A Prohibition on Substance or Form?’ (2013) 27(3) ALQ 289-296.
97 Razali (n 72) 213.
98 Ibid 207.
99 Ibid 213.
that e-contracts are deemed compliant with Shariah only when the buyer has given the right of inspection of the commodity.\textsuperscript{100}

In respect of the more theoretical aspects of this doctoral research, this thesis will draw on a highly variable and evolving tradition of Islamic jurisprudence. In Shariah law, the boundary distinction between public and private law maintained in classic (liberal) theory does not hold.\textsuperscript{101} Shariah regulates all areas of life as a moral system of governance, thereby constraining the rights and freedoms of individuals to enter into certain kinds of contracts, for instance those which included interest based clauses or penalties.\textsuperscript{102} The distinctive nature of Islamic contract law principles casts into significant doubt the search for a all-encompassing, general, or universal theory of contract law.\textsuperscript{103} Pluralistic theories of contract law, which emphasise respect for remedies for unjust enrichment or losses, redistributive justice and paternalism would appear, therefore, better suited to the religious and legal conditions which prevail in Saudi Arabia.\textsuperscript{104} However, if such a theory is applied to the practical context of the Saudi legal system, it would serve to further undermine, rather than enhance, the legitimate expectations of private parties, particularly foreign commercial parties, by creating more, rather than less, uncertainty around arbitral outcomes.\textsuperscript{105} A more viable approach is to find a middle ground between unitary and pluralistic theories of contract law and its dispute resolution.\textsuperscript{106}

1.3.5 Arbitration and Award Enforcement

When it comes to the literature on arbitration within Saudi Arabia, there is a breadth of research conducted on the framework set out by old Arbitration Law promulgated in 1983; however, little research has been done to critically analyse the arbitration framework after the implementation of the New

\textsuperscript{100} Ibid 216.


\textsuperscript{102} Saleh (n 101) 347-352; see also Fayyad (n 90) 203-229.

\textsuperscript{103} See Ahamat & Kamal (n 37) 423-439.


\textsuperscript{105} Ibid.

Arbitration Law in 2012. Despite the relative dearth of work on the current regime, past work remains insightful for the purposes of the present analysis. This section aims to highlight key texts addressing the issues facing the Saudi arbitration regime that the new law aimed to address.

First, the work of Saleh analysed the arbitration laws of Arab countries, including Saudi Arabia, giving due consideration to the judicial decisions and key legislations of each jurisdiction. His work was published prior to the enactment of the new law, but provides a core analysis of understanding the Islamic approach to arbitration and situating Saudi Arabia within the environment of the Arab world. Similarly, El-Ahdab considered the various approaches to Shariah involvement in arbitration proceedings throughout the Middle East, giving due focus to Saudi Arabia. Specifically, El-Ahdab also took up the issue of arbitration from the perspectives of the various schools of Islamic thought and touched on the interpretational issues that the varying perspectives introduce into the arbitration environment in the Kingdom.

Additionally, there are two doctoral theses that have touched on some of the issues relevant to this study. First, Al Eisa conducted a critical analysis of how the New Saudi Arbitration Law compared to the Old Arbitration Law, paying particular focus to the recognition and enforcement of arbitral awards in the Kingdom. This thesis builds upon that author’s conclusion that the New Arbitration Law does not resolve the main legal problems in the Saudi system for recognising and enforcing arbitral awards and aims to dive deeper into the inherent conflicts between a Shariah-based domestic system and the desire to modernise as part of a secular international arbitral environment.

Second, another doctoral study by Almutawa undertook a comparative study to examine the challenges of enforcing arbitral awards in GCC states and what steps could be taken to create a uniform approach to enforcement within the

Islamic region. What is notable from his research is that while the GCC is made of up of Islamic countries, they do not all utilise Shariah in their legal systems in the same way. Some, like Saudi Arabia, rely on Shariah as the primary source of the nation’s laws, while others like Kuwait refer to it as a source of law, but not the main source of law. This has allowed some GCC states to better integrate international norms and treaty obligations into their legal systems, while others like Saudi Arabia are facing an accidental creation of legal pluralism in that it now needs to define those laws that apply to domestic and international parties as a single regime is proving insufficient to be effective for both.

In addition to these Saudi specific sources, this work also situates itself within the principled research and detailed works of leading arbitral scholars such as Born, Fouchard, and Redfern. Their conceptions of fundamental international arbitration practices and trends are used to define the Western-based model with which Saudi Arabia is attempting to integrate.

1.4 Statement of Issues

In recent decades, the resulting Saudi legal framework for arbitration has achieved progressively greater practical understanding and acceptance in the international community. Saudi Arabia is in the process of modernising its domestic arbitration framework, has acceded to the New York Convention, adopted the UNCITRAL Model Law on Arbitration, and enacted the Saudi Arbitration Act of 2012 and the Enforcement Act 2012. However, despite these modernisation attempts, there continues to be an inherent struggle between the generally accepted arbitration principles, such as full party autonomy, and the necessary application of Shariah law to all arbitral enforcement activities in the Kingdom. It has also been noted that there is a severe lack of knowledge among international contracting parties and

111 Born (n 2).
112 Al-Fadhel (n 14).
arbitrators in respect of the Saudi arbitration framework.\textsuperscript{113} Foreign commercial actors and international arbitration regimes have demonstrated their ignorance or misinterpretation of Shariah law and the role it plays in the Saudi arbitration framework, resulting in unenforceable arbitral awards.\textsuperscript{114}

It is difficult to deny the significant practical challenges faced by international contracting parties in the achievement of recognition and enforcement of international commercial arbitral awards in Saudi Arabia.\textsuperscript{115} It is in this context that there is no shortage of theories and arguments as to the limits and novelties of Saudi law and the Saudi arbitration process. However, there has been a shortage of agreed solutions as to how to overcome the challenges faced by foreign private contractors and the difficulties of harmonising Islamic law principles with the Western model of contract construction and dispute resolution.\textsuperscript{116} This thesis will attempt to offer some recommendations as the basis on which to further improvements and developments to the new arbitration regime can be made to increase the effectiveness of the recognition and enforcement of arbitral awards in Saudi Arabia.

1.5 Objectives and Aims

The primary aim of this thesis is to identify the main challenges for arbitral parties attempting to enforce domestic and foreign arbitral awards within Saudi Arabia in light of the Kingdom’s public policy positions on Shariah law. In order to understand how the enforcement courts review arbitral awards, the research must first explore the development of arbitration practices within the Kingdom as well as the legal rules and features of the existing arbitration system. The culmination of this research is an exploration of the possibilities for developing a new regime for the recognition and enforcement of commercial arbitral awards.

\textsuperscript{113} For example, Al-Humaidhi assessed that ‘in many circumstances, an international arbitrator, mediator, or negotiator may fail to take into consideration the impact cultural and religious underpinnings may have on the process. This creates a higher sense of detachment, ambiguity and uncertainty within their dealings’. See H Al-Humaidhi, ‘Sulh: Arbitration in the Arab-Islamic World’ (2015) 29(1) ALQ 92; see also T Koraytem, ‘Two Surprising Aspects of Islamic Saudi Liberalism in Public and Private Law’ (2013) 27(1) ALQ 87-95.


\textsuperscript{115} Al-Ammari & Martin (n 2).

\textsuperscript{116} di Brozolo (n 105) 27-33.
in Saudi Arabia that will further limit and refine the bases on which binding
awards can be refused. To accomplish this aim, this research is structured into
two primary objectives.

The first objective is to map the current Saudi arbitration framework, as well as
its recent developments in light of the reforms to both Saudi legislative and
judicial systems, with an emphasis on the processes in place under both
domestic law and international legal instruments pertaining to the recognition
and enforcement of commercial arbitral awards. The idea behind this
examination of the current Saudi arbitration framework is to explore the internal
debate among Muslims jurists, as it constitutes an integral part of the Saudi
legal and political landscape. This internal debate demonstrates the competing
aspirations of the Saudi government in implementing the new Saudi arbitration
framework, which seeks to reconcile its modernising ambition to bring Saudi law
into line with international standards without compromising the integrity of its
local laws and traditions. This thesis seeks to reveal and analyse the above-
mentioned challenges, with a special focus on the challenges confronted by
international contracting parties in using international arbitration in Saudi Arabia.

Second, this thesis acknowledges the need for greater tolerance and
understanding of the implications of Saudi regulations, specifically the
application of Shariah, in enforcement proceedings. Such consideration is
crucial step on the path toward encouraging international contracting parties to
embrace the Saudi arbitration regime and consider its limitations when entering
into arbitral agreements and enforcing arbitral awards. It is here that this
research offers recommendations to further develop the Saudi regime for
recognising and enforcing commercial arbitral awards in the Kingdom.

Third, this thesis seeks to dissect the arbitral award enforcement process in
Saudi Arabia to identify the practical challenges that foreign parties face when
attempting to have their awards recognised and enforced by the Saudi courts.
This thesis will look at how such awards are often treated homogenously with
domestic awards and the implications such treatment has on the ultimate
enforceability of secular foreign arbitral awards within the Kingdom.
Fourth, this thesis will identify how Saudi Arabia has attempted to modernise its approach to arbitration by becoming a party to international arbitral conventions and integrating model provisions derived from the UNCITRAL Model Law into its revised Arbitration Law.

Finally, this thesis will consider the key legal and policy obstacles that are preventing parties from achieving recognition and enforcement of their arbitral awards and the possible for solutions for how the Saudi government can remove those obstacles. The suggested recommendations aim to increase the overall effectiveness and efficiency of arbitral award enforcement in the Kingdom while also supporting Saudi Arabia’s transition into a more arbitration-friendly jurisdiction.

1.6 Research Questions

To achieve the aims and objectives outlined above, specifically the impact of Shariah public policy on the recognition and enforcement of arbitral awards under the New Saudi Arbitration Law and coexisting regime, a number of more specific research questions are used to guide the lines of inquiry. These are as follows:

1. How has arbitration developed in Saudi Arabia and what is the current status of the Saudi arbitration framework?
2. How does the Saudi arbitration framework align with or differ from the principles embodied in international arbitration instruments?
3. What role does Shariah law play in the Saudi arbitration law framework for commercial arbitrations and the recognition and enforcement of both domestic and foreign arbitral awards?
4. What are the issues facing arbitral parties, arbitrators, and the Kingdom’s government and courts in applying Shariah law to enforcement proceedings?
5. How is Shariah law interpreted and applied generally and more specifically in the arbitral context?
6. What influence have international arbitration instruments had on the Saudi approach to arbitration and recognising and enforcing arbitral awards?

7. Can Shariah be separated from the Kingdom’s conception of public policy?

8. Is it possible to reconcile Shariah applicability and international arbitration principles?

9. What actionable steps can be taken to improve the efficiency and effectiveness of recognition and enforcement proceedings for both domestic and foreign arbitral awards under both the international arbitration instruments and within the Saudi arbitration framework?

1.7 Methodology

This study uses a number of key research methodologies to conduct its analysis. The first methodology is that of legal research. This study utilises and analyses primary source legal documents, such as acts of legislation, treaties, and other government documents, such as implementing rules and decrees to outline the current Saudi arbitration framework and reveal the challenges experienced by contracting parties attempting to enforce arbitral awards. The author also supplemented these primary sources with a wide variety of secondary sources, such as commercial arbitration journals and publications, the Saudi government website, which tracks the Royal Decrees and regulations, and the commentaries of arbitration scholars to ensure that the principles and trends analysed reflect the most up-to-date approaches to arbitral award enforcement, both within Saudi Arabia and in the broader international commercial arbitration setting.

Further, this author engages in a doctrinal analysis and legal textual interpretation of the applicable Saudi legislations, international conventions, and Shariah provisions. By dissecting these texts, this study is able to draw conclusions about the intent and effects of such provisions within the arbitral context. This analysis also allows gaps between the two systems to be identified with the hope that they can be reconciled in the future.

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Finally, this research engages in a certain degree of comparative analysis by examining the different approaches to arbitration proceedings and award enforcement under the generally-accepted international arbitration principles and under the current Saudi arbitration regime. Specifically, this thesis highlights the areas in which Saudi Arabia’s approaches differ from the Western traditions with which most international contracting parties are familiar and identifies the nuances implicated by the applicability of Shariah law.

1.8 Limitations of the Study

The primary line of inquiry for this research is the impact that Shariah, and as a result the interpretation of all Shariah as public policy by the Kingdom of Saudi Arabia, has on the recognition and enforcement of arbitral awards in the Kingdom. However, there are a number of notable limitations that require mentioning at the beginning of this study.

The first limitation is that the current Saudi arbitration framework is relatively new. Saudi Arabia is in a period of judicial and legislative reform. The court system was reformed in 2007, creating enforcement courts that are responsible for hearing cases for the recognition and enforcement of arbitral awards, and the Saudi Arbitration Law was reissued in 2012, marking the first changes to the law since 1983. Thus, this system has yet to find its footing and achieve any notable level of operational efficiency or best practices among the various bodies involved in the arbitral process. This makes analysing the regime and assessing the extent to which it has achieved its stated goals difficult. However, to overcome this limitation, the New Arbitration Law and the other Saudi reform efforts can be viewed as an attempt to correct the errors of history in the Saudi arbitration environment. This study will consider the extent to which these changes have adequately accounted for the issues of the past and speculate on the likelihood that they will resolve these issues and, if not, what further actions should be taken to ensure that Saudi Arabia is an arbitration-friendly environment.

The second limitation of this study is the relative dearth of literature on this subject. Much has been written about Saudi arbitration in the past and the
issues arising under the old arbitration regime; however, little consideration has been given to how issues of Shariah public policy come into play under the new Saudi arbitration regime. To construct this study, this thesis relies on foundational literature to identify the issues that existed within the old Saudi arbitration regime related to the recognition and enforcement of arbitral awards and considers how the changes made through the New Saudi Arbitration Law and adoption of international conventions has attempted to overcome these issues. The study then examines whether these steps are likely to be effective in addressing the root causes of the issues and offers proposals for how the recognition and enforcement processes can be improved.

The third limitation of this study is the somewhat foreign nature of Shariah involvement in the field of arbitration more generally. Shariah typically becomes implicated only in Islamic states, but has marked effects on both domestic arbitrations within an Islamic state and foreign arbitrations that need to be enforced in an Islamic state. From an enforcement perspective, Shariah does not differentiate between Muslim and non-Muslim parties, subjecting them all to its requirements when attempting to enforce an arbitral award before the courts. Thus, it is important to note that this study considers both domestic arbitrations within Saudi Arabia and foreign arbitrations that must be enforced in Saudi Arabia, as the impositions of Shariah on the procedures in both processes run parallel. In addition to the lack of familiarity of certain parties with Shariah law, there is also the implicit challenge of applying and interpreting Shariah. Shariah is not a code in and of itself, but a system of principles derived from primary sources of Islamic law, the Quran and the Sunnah. These sources are then interpreted by judges and scholars from the various schools of Islamic thought. While the government generally emphasises the Hanbali School for legislative and judicial purposes, judges and government officials are not required to follow this approach and can inject their own interpretations of Shariah into their actions. This creates an issue for accurately defining the scope of Shariah for determining public policy parameters as in many cases the various schools of thought may have different interpretations of Shariah’s rules and applicability. Thus, it is crucial that those involved with a Shariah system have a clear understanding of the way in which Shariah is interpreted and applied, an issue which is thoroughly addressed by this thesis in chapter four.
1.9 Thesis Structure

This research consists of seven chapters.

Chapter 1 consists of this introductory chapter that outlines the aims, objectives, and methodology for this study. It also provides an extensive literature review to situate this study within the relevant academic work on issues related to the understanding the underpinnings of arbitral award enforcement in Saudi Arabia from the normative and policy perspectives.

Chapter 2 provides a foundational overview of the development of arbitration within Saudi Arabia, both before and after the birth of Islam, leading up to the current Saudi arbitration regime. This chapter further provides a brief background on the Saudi legislative and judicial systems and the recent reforms that have taken place. Finally, this chapter considers the arbitral procedures under the New Saudi Arbitration Law promulgated in 2012. The discussion aims to clarify whether the current Saudi arbitration regime is effective and efficient to use for resolving commercial disputes and enforcing the resulting arbitral awards.

Chapter 3 discusses the basics of commercial arbitration award enforcement. It examines the scope of fundamental sources of commercial transactions and clarifies that choice of law can have a significant impact on the ultimate enforceability of an arbitral award within the Kingdom. Moreover, this chapter illustrates the challenges contracting parties confront when their awards are subject to enforcement in Saudi Arabia by identifying the main legal issues that will be explored in the subsequent chapters.

Chapter 4 assesses the role that Shariah plays in Saudi arbitration proceedings and ultimate award enforcement. Grounding the discussion in the provision of the New Saudi Arbitration Law, this chapter seeks to identify the challenges for understanding Saudi arbitral procedures in the context of international arbitration. It specifically identifies the ways in which Shariah law impacts the arbitral process in both domestic and foreign arbitral proceedings and
encourages full legal compliance by international contracting parties and arbitrators when Saudi arbitration provisions are involved to ensure the enforceability of any resulting award.

Chapter 5 examines the role of Islamic jurisprudence and explicitly details the challenges confronted by contracting parties and arbitrators when attempting to interpret the Saudi regulations or apply Shariah principles in the international arbitration context. This chapter also clarifies the role of the Islamic Schools in developing Islamic jurisprudence, and highlights the challenges that varying interpretations present for the enforcement of both domestic and foreign arbitral awards. This chapter also includes a discussion of the enduring role of Shariah law in the interpretation of Saudi regulations.

Chapter 6 then turns its focus to the enforcement of arbitral awards in practice. It first considers the foundations of domestic enforcement upon which foreign arbitral award enforcement is based. The chapter then explores foreign award enforcement in greater detail, considering the influence of international instruments, such as the New York Convention and the UNCITRAL Model Law on Arbitration, to determine the reasons underlying the challenges confronted by international contracting parties attempting to enforce their arbitral awards in the Kingdom. This further assesses the applicable exemptions available to Saudi courts under Article V of the New York Convention, to illustrate the extent to which Saudi courts can exercise their judicial discretionary powers to refuse to recognise and enforce international arbitral awards on public policy grounds.

Chapter 7 ultimately concludes with a summary of the key findings of this research study, along with a number of practical recommendations that can be implemented to improve the Kingdom’s efficiency in recognising and enforcing arbitral awards and eliminating the challenges the system presents for parties seeking its assistance. The recommendations represent those actions that this author believes can make the most significant impact toward developing a more harmonised arbitral enforcement regime within the Kingdom both in the near and long terms.
CHAPTER 2:
BACKGROUND OF ARBITRATION IN THE KINGDOM OF SAUDI ARABIA

2.1 Introduction

Unlike many of its MENA neighbours that have created favourable environments for parties seeking to resolve disputes and enforce arbitral awards, Saudi Arabia has been unsuccessful at gaining the trust of foreign and local investors in its commercial arbitration practices.\textsuperscript{117} The New Saudi Arbitration Law was an attempt to change investors’ perceptions of the Kingdom in relation to arbitration and strengthen its governing framework. To understand the impact of recent legislative reform attempts in Saudi Arabia with regards to arbitration, it is important to first understand the historical development and underpinnings of arbitration generally within the Kingdom.

This chapter focuses on the development and evolution of Saudi arbitration procedures and laws prior to the most recent reforms. This background will establish the foundation upon which the arbitration reforms are based and provide a framework for evaluating the distinct features and rules governing the recognition and enforcement of arbitral awards in the Kingdom of Saudi Arabia. After providing a brief history of arbitration in the Kingdom, this chapter critically reviews contemporary literature on the limits and possibilities of utilizing the Saudi arbitration framework to obtain and successfully enforce arbitral awards in disputes involving both domestic and foreign parties. The goal of this research is ultimately to identify the challenges confronted by parties seeking to enforce arbitral awards rendered within the Kingdom, a foreign jurisdiction, or by an international arbitral institution in Saudi courts and to suggests solutions to these problems.\textsuperscript{118}

Despite extensive academic commentary on arbitration in Saudi Arabia generally, the existing scholarship fails to fully uncover and test the intricacies of

enforcing arbitral awards within the Saudi legal system and its arbitration framework or propose effective solutions where gaps in the system are identified.\footnote{119} By focusing on the procedural features of conducting the actual arbitration under the new Saudi Arbitration Law, the existing scholarship has diverted attention away from the more pressing question of whether Saudi law offers a normatively appropriate and effective means for enforcing and satisfying arbitral awards and achieving the effective settlement of international commercial disputes involving either Saudi or international contracting parties.

To understand the practical effects of the New Arbitration Law requires a careful examination of the Saudi legislative and judicial systems. Only through an evaluation of the roles these systems have played can one determine the extent to which Saudi authorities have been successful at cultivating a welcoming legal environment that protects and accommodates the rights of parties in commercial disputes, including through effective and enforceable arbitral proceedings.\footnote{120} Further, in addition to the implications of the New Arbitration Law for domestic arbitral awards, this chapter also considers the relationship between the Saudi Arbitration Law and international arbitration practices to examine the tensions that arise when attempts are made to enforce foreign arbitral awards in local courts.\footnote{121}

This chapter proceeds in three main parts. First, it chronicles the history and development of arbitration in Saudi Arabia, both before and after the birth of Islam in the region, up through the present-day arbitration law framework. Next, it explores the Saudi legislative and judicial systems and their impact on the development of the Saudi arbitration regime. Finally, the chapter closes by assessing the scope of impact that Saudi arbitration principles have on international contracting parties.

\section*{2.2 Growth of Saudi Arbitration}

\footnote{119}Tarin (n 114) 131-54.\footnote{120}See Al-Fadhel (n 14).\footnote{121}Tarin (n 114) 131-54.
The development of arbitration in Saudi Arabia can be best examined in two phases—before the birth of Islam and after. Each of these periods is discussed in turn, demonstrating the evolution of Saudi Arabia’s arbitration regime as it evolved toward the modern framework.

2.2.1 Arbitration Before the Birth of Islam

The use of private means of dispute resolution to settle conflicts between contracting parties in commercial transactions has been practised in the Arabian Peninsula since before the birth of the Islamic religion.\(^{122}\) Referred to in the region as Takhim, this was a form of negotiated self-help resolution that mirrored mediation.\(^{123}\) Should that fail to resolve the dispute, would involve a third-party arbitrator, referred to as a Hakam, to oversee the dispute applying procedures developed through customary commercial laws in the respective trade, similar to the lex mercatoria, or Merchant Law,\(^{124}\) that was prominent in the Western part of the world.\(^{125}\)

Let us first consider how arbitral proceedings were conducted in the ancient Arab world.\(^{126}\) The literature suggests that most Arab tribes and foreign traders conducted business in Mecca and the resolution of any disputes took place within the traditional marketplaces.\(^{127}\) These disputes were resolved according to local trade practices and norms\(^{128}\) by an appointed third party, who was also a trader that possessed significant knowledge and experience in trade.\(^{129}\) These practices were used long before the birth of Islam.\(^{130}\) In fact, even the Quraysh tribe adopted this practice to resolve their commercial disputes, as there was not any other organized form of judicial system at that time.\(^{131}\) The arbitration

\(^{122}\) P Crone, *Meccan Trade and the Rise of Islam* (Basil Blackwell Ltd, 1987); see also Baamir (n 18).
\(^{123}\) El-Ahdab (n 108) 11.
\(^{125}\) Y Dutton, *The Origins of Islamic Law, The Qur’an, the Muwatta, and Madinan Amal* (Curzon, 1999).
\(^{126}\) Crone (n 122) 114.
\(^{127}\) See Ahamat & Kamal (n 37) 423-39.
\(^{128}\) Foster (n 30) 273-307.
\(^{129}\) Crone (n 122).
\(^{130}\) Foster (n 30) 273-307.
\(^{131}\) Baamir asserts that ‘arbitrators were not bound by any certain rules apart from a number of customs, such as the obligation to hear the disputing parties on an equal basis and to bear in mind the customary rules of the tribe when examining proofs presented by the parties’. See Baamir (n 18) 47.
Proceedings were simple. The individual bringing the claim before the arbitrator was the applicant and the person against whom the claim was made was the respondent. First, the arbitrator would ask the parties to take an oath ‘in front of one of the scared idols of the tribe or village, or, in some cases, in front of the main Arab idols’. If the respondent refused to take such an oath, the arbitrator would find in favour of the applicant. If both parties took the oath, the proceedings would continue. During this process, the applicant had the burden of proof to prove the allegations giving rise to his claim. In time, having witnessed the success of this process, the people began to use an appointed third party to resolve both their commercial and non-commercial disputes, regarding this process as a fair, unbiased and knowledgeable means of settling conflicts.

2.2.2 Arbitration After Birth of Islam

After the birth of the Islamic religion, the followers (Muslims) began to adopt the principles formulated in the Holy Qur’an, which ultimately formed the basis of their principles of daily life and served as a backdrop to the legal system. The Qur’an authoritatively provided that disputes were most appropriately decided by God, and this included disputes arising from their domestic and international commercial dealings. For example, Verse 4:59 of the Holy Qur’an preached that:

O ye who believe! Obey God, and obey the Prophet, and those charged with authority among you. If you differ in anything among yourselves, refer it to God and His Prophet, if you do believe in God and the Last Day: That is best and most suitable for final determination.

Using this precept, Muslim traders managed to conduct their trading activities among themselves without disputes in their commercial transactions for lengthy

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132 Ibid 46.
133 WH Bowen, The History of Saudi Arabia (Greenwood Press, 2008).
134 Al-Ammari & Martin (n 2) 387-408.
135 Baamir (n 18) 46.
periods of time. In fact, Muslims traders enjoyed the influence of the Islamic law in their commercial transactions, as its provisions constituted a uniform set of trade rules. For example, when entering into a transaction, the parties knew that the principles of Gharar (uncertainty) and Riba (interest) were both prohibited under Islamic law and could not be involved in the agreement. However, despite the level of comfort felt by Muslim traders applying these principles, foreign contracting parties often had little knowledge of how these principles would impact performance and the validity of contracts entered into with Saudi nationals or commercial entities, which by their nature were governed by Shariah law.

To avoid these challenges many non-Muslims began to adopt Islamic trading customs in their dealings with Saudi citizens and businesses, including a willingness to submit their disputes to the Islamic arbitration system. This concept of integrating the trade customs of where you are doing business is generally known as the concept of lex mercatoria or ‘merchant law’. Adjudication proceedings before merchant law tribunals were simple and were governed by trade customs and business practices. As a result, these informal dispute resolution mechanisms did not suffer from the lengthy adjournments of modern litigation as the proceedings were brief and conducted orally. For a period of time, merchant law formed the basis of an internationalised and quasi-unitary system of trade law and dispute resolution in which disputes were governed by the practices of the local environment.

However, as trade continued to expand and become more globalised, foreign traders experienced significant cultural and legal differences when confronted

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136 Dutton (n 125).
139 Brand analyses the characteristics of Law Merchant as ‘the concept of a special lex mercatoria combined the rules of overland, trade merchant fairs and maritime commerce, developing distinct characteristics: The Law Merchant governed a special class of people (merchant) in special places (fairs, market, and seaports). It was distinct from local, feudal, royal, and ecclesiastical law. Its special characteristics were that 1) it was transnational; 2) its principal source was mercantile custom; 3) it was administered not by professional judges but by merchants themselves; 4) its procedure was speedy and informal; and 5) it stressed equity, in the medieval sense of fairness, as an overriding principle’. RA Brand, Fundamentals of International Business Transactions (Kluwer law International, 2000) 9-10.
with Islamic trade practices, specifically those governed by principles of Shariah law. This in turn lead to an increase in disputes. Further, due to changes in the seventeenth century, the courts began taking the place of merchant law in the West for resolving disputes. As both national and local laws began to develop governing trade practices, merchant law was no longer the sole determinant in commercial disputes. This lead to complex and divergent trade laws across and between states and nations. This brought the need for a form of alternative dispute resolution back to the forefront.

Returning to the Qur’an and the teachings of the Prophet, one can find passages and examples that support the use of arbitration for resolving disputes. Historical accounts reveal that the Prophet himself also accepted the decisions of arbitrators and encouraged others to arbitrate their disputes as well. For instance, the Prophet himself resorted to the appointment of a Takhim to resolve his dispute with the Banu Qurayza tribe. Yet, the use of arbitration predates even the Prophet. If one traces the roots of the Treaty of Medinah, which was signed in 211 A.D. and was an accord between Muslims, non-Muslims Arabs, and the Jews, it called for disputes to be resolved through arbitration. While arbitral practice has only received international attention in the last few centuries, its principles have permeated the long economic history of the Arabian region. These examples demonstrate that the use of arbitration is consistent with the principles of Islam. Further, the Ijima, Islamic legal scholars, have also confirmed that arbitration is acceptable as an Islamic dispute resolution tool, resolving any concerns that doing so may be contradictory to the principles of Islam. The one caveat to this is that while arbitration in principle is acceptable, the arbitral award must also be Shariah compliant to be enforceable within the Kingdom.

142 Brand (n 139) 10-12; see also Trakman (n 140) 25.
143 Berger (n 138) 91-102.
144 Foster (n 30) 273-307.
145 El-Ahdab (n 108) 11.
147 El-Ahdab (n 108) 11.
148 Ibid.
2.2.3 The Modern History of Arbitration in Saudi Arabia

Given the compatibility of arbitration with Shariah principles, arbitral proceedings were used from the early days of oil exploration up until the 1950s as the primary means of resolving disputes between Saudi entities and between Saudi entities and foreign companies. However, the ARAMCO arbitration in 1958 caused a drastic change in the Kingdom’s attitude toward arbitration.

To provide a brief overview of the ARAMCO case, during the 1930s ARAMCO entered into an exploration contract with the government of the Kingdom of Saudi Arabia.\(^\text{149}\) Under the concession agreement, the Kingdom of Saudi Arabia conferred exclusive rights to ARAMCO to explore, prospect, extract, treat, manufacture, transport and export petroleum from the Kingdom of Saudi Arabia over a duration of sixty years. During the term of the contract, ARAMCO discovered one of the largest oil fields in the world in Saudi Arabia.\(^\text{150}\)

In the 1950s, the owner of a leading shipping company approached the Saudi government requesting that the government sign a concession agreement to transport oil from Saudi Arabia.\(^\text{151}\) The Kingdom of Saudi Arabia imposed certain obligations through the concession agreement on shipping company, including that the company build a maritime school at Jeddah for educating Saudi people, develop the Saudi port and west coast and maintaining a fleet of tankers under the Saudi Arabia flag.\(^\text{152}\) In return, the shipping company was granted tax incentives and a right of priority in the transportation of oil from Saudi Arabia for a thirty year period. This contract was subsequently ratified by a Saudi Royal Decree, giving it the force of law and requiring the compliance of all oil companies in Saudi Arabia.\(^\text{153}\)

ARAMCO contested the Royal Decree of the shipping concession agreement on the ground that the rights of priority conferred violated ARAMCO’s rights to

\(^{149}\) Ibid.


\(^{151}\) Schwebel (n 150) 245.

\(^{152}\) Ibid 245.

\(^{153}\) Tarin (n 114) 131-54.
exclusivity assigned to it under a separate concession entered into with the Saudi government.\textsuperscript{154} ARAMCO refused to comply with the Royal Decree and alleged that the Kingdom was in breach of contract, having violated ARAMCO’s exclusive right of to export domestic oil reserves to foreign markets. ARAMCO argued that this exclusive right to export was materially connected to rights of transportation.\textsuperscript{155} The Saudi government was unable to negotiate the ARAMCO and shipping concession agreements, and ultimately, the dispute between ARAMCO and the Saudi government was referred to arbitration per the concession agreement terms.\textsuperscript{156}

The Kingdom submitted that the terms of the concession agreement did not explicitly grant ARAMCO exclusive rights to transport oil to foreign markets, drawing on sovereignty principles from French administrative law to argue that a state has the right to exercise its regulatory powers to control and safeguard the economic interests of Saudi Arabia.\textsuperscript{157} It was further argued that Aramco did not export the oil found in the concession area with its own oil tankers; rather buyers sent their own oil tankers to export the oil from the Saudi seashore. This was deemed material since buyers had no rights under the Aramco concession agreement. The counsel for Saudi Arabia further contended that the contract with the shipping company did not conflict with ARAMCO’s concession agreement because the agreement clause did not mention exclusive right of transportation of oil to foreign destinations. Finally, and crucially, the Saudi government had not agreed to a stabilisation clause.\textsuperscript{158}

ARAMCO rejected the arguments presented by the Saudi government’s counsel, arguing that the content of the concession agreement clause clearly showed the ARAMCO was granted exclusive legal rights to export and transport oil found in the concession area to foreign markets. ARAMCO’s counsel based their argument on the interpretation of the word ‘transport’ and emphasised, ‘the right to use all means and facilities for transport and export, including the

\textsuperscript{154} Ibid.
\textsuperscript{155} Schwebel (n 150) 245.
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
\textsuperscript{158} Tarin (n 114) 131-54.
terminal and port facilities it had constructed’. 159 ARAMCO further denied the Saudi contention that buyer’s exported oil through their own tankers contending, ‘in order to secure the flow of oil and its products to world markets, the Company had used forms of sale recognized by maritime law’. 160 They strongly argued that the concession agreement did not include any provisions permitting the Kingdom to unilaterally modify the dispositive terms of the agreement or to materially alter or restrict the exclusive rights assigned to ARAMCO under contract. Ultimately, ARAMCO argued that the Royal Decree was ‘incompatible with the Concession Agreement and the obligations assumed by the Government in exercise of its sovereignty’. 161

An arbitral tribunal of three arbitrators was established to determine the real intention of the contracting parties in the ARAMCO Concession agreement. In deciding the dispute, the arbitral tribunal referred to ‘the law of Saudi Arabia and to its Hanbali School, which contained no precise rules about mining concessions and a fortiori about oil concessions’. 162 The arbitration panel held that under the oil concession the entered into by the government granted exclusive rights to ARAMCO to explore and extract oil and petroleum in the concession area, but that the title of the land rested with the government. Further, the arbitral tribunal interpreted as follows:

[A] Regime of mining Concessions based on contract, a solution not contrary to Islamic law. The Concession is compatible with two fundamental principles of Islamic law: The principle of Liberty to contract and the principle of respect for contracts. 163

In this view, the arbitral tribunal held that the Saudi government was party to the concession agreement with a private person and that the essence of the principle of freedom of contract and party autonomy is that both parties with

159 Schwebel (n 150) 248.
160 Ibid.
161 Schwebel (n 150) 248.
162 Ibid 249-50.
163 Ibid.
contractual rights be afforded equal rights and footing, regardless of the sovereign status and authority of one party.\textsuperscript{164}

The arbitral tribunal reasoned that Islamic law did not mandate siding with the arguments presented by the Saudi government. Conversely, it found that the principle of party autonomy is fully recognised under the provisions of Shariah law.\textsuperscript{165} Extrapolating from this, the arbitral tribunal held that the Kingdom of Saudi Arabia had no capacity to grant concession to the shipping company.\textsuperscript{166}

What was notable about this decision is that the tribunal found there to be a legislative gap and filled that gap by referring to the Aramco concession agreement.\textsuperscript{167} However, it was difficult for the Saudi government to accept this view because the contracting parties agreed to resolve disputes arising from the concession agreement by referring to principles of Shariah law. While the tribunal did not definitively resolve the scope and applicability of Shariah in the interpretation of concession contracts, the arbitrators did propose that Islamic scholarly opinion be treated as an interpretative tool when there are gaps in the legislation.\textsuperscript{168} Yet, in this case, they simply drew on the ARAMCO concession agreement to determine the dispute.

There was no question that Saudi Arabia was dissatisfied with the arbitral tribunal's decision and the principles that were applied in resolving the dispute.\textsuperscript{169} Nonetheless, the Saudi government complied with the arbitral tribunal's verdict and did not attempt to exercise the shipping agreement.\textsuperscript{170} However, this decision adversely impacted the attitude of the Saudi government towards international arbitration.

\begin{footnotes}
\footnote{Tarin (n 103114) 131-15454.}
\footnote{Schwebel (n 150) 250.}
\footnote{El-Malik (n 18).}
\footnote{Schwebel (n 150) 250.}
\footnote{El-Malik (n 18).}
\footnote{Saudi’s posit that the general principles of law should not have been considered by the arbitral tribunal in interpreting the content of contract because the word transport was clear in determining the will of the contracting parties. Moreover, the arbitral tribunal ruled out consideration of the provisions of the Saudi legislation on the basis of a lack of knowledge of the trade customs applicable to international commercial transactions.}
\footnote{Tarin (n 114) 131-54.}
\end{footnotes}
In light of arbitral decision in ARAMCO, in 1963, the Saudi government forbade all agencies from undertaking arbitrations to resolve disputes without first receiving approval from the Council of Ministers. This is a policy that continues to apply to the government until this day, despite the nation’s adopted of the International Convention for the Settlement of Investment Disputes between States and Citizens of another State. Yet despite this prohibition, the government found itself resorting to arbitration on multiple occasions, forcing the state to make exceptions to this prohibition. Ultimately, Saudi Arabia continued to pursue adoption of various international treaties that authorized the State to engage in arbitral proceedings.

It should be noted that the chilling effect of the ARAMCO decision on arbitration was not restricted to the government level; there was a distaste among Saudi society for arbitration in light of the decision. After ARAMCO, private sector arbitration was governed by the Commercial Court Act. This Act governed ad hoc arbitration taking place to resolve commercial disputes within the Kingdom or involving Saudi parties. The use of ad hoc arbitration eventually gave rise to the use of institutional arbitration within the Kingdom. This was developed by applying the Rules of the Chamber of Commerce; specifically, ‘[m]erchants may agree to appoint the Chamber as arbitrator and entrust it with the mission of settling their commercial disputes which might arise between them.’ Eventually the implementing rules and regulations for the Chamber of Commerce and Industry Act were promulgated and these governed all arbitrations held by the Chamber.

2.3 The Role of Arbitration in Settling Commercial Disputes

The importance of arbitration in resolving commercial disputes should not be underestimated. Arbitral proceedings are assumed to be a mechanism that is

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172 See Ahdab El-Ahdb (n 108) 605.
173 Law issued by Royal Decree No. 32 of 15 Moharram 1350 (H), arts 49-54.
174 Ibid art 3.
175 Official Gazette ‘Umm Al-Qura’ No. 2865, dated Jun. 13, 1401 Hejra.
176 Redfern outlines the importance of arbitration in international commercial transactions. See Redfern et al (n 3) viii.
independent from national court proceedings to resolving commercial disputes. In response to market concerns, and in the spirit of harmonisation and modernisation of Saudi Arabia’s national arbitration rules and procedures, the 2012 New Arbitration Law draws on elements of the UNCITRAL Model Law and other leading international arbitration regimes, including rules codified by the International Chamber of Commerce (ICC), as the basis for sound reform. In keeping with best international arbitration practices, parties are afforded considerable freedom to select the rules and procedures applicable to arbitral proceedings. Such reforms reflect and embody the established principles and values of modern commercial law, including freedom of contract, arbitral finality and party autonomy.

There are a number of opinions on what the true purposes of international arbitration are in settling international commercial disputes. Some suggest that international commercial parties prefer the delocalised procedures and ‘choice of rules’ of institutionalised arbitration regimes because it is assumed they will achieve higher levels of consistency, neutrality and predictability in dispute resolution procedures. Moreover, in many instances, international contracting parties prefer to resolve their dispute through arbitration rather than litigation. The goal is to bypass state interference in private contracts which contradict the consent and will of both parties, for instance through the

177 Nakagawa and Magraw point out the role of confidentiality in international commercial arbitration in their work, as ‘Confidentiality is now assumed to be a common feature and advantage of international arbitration and has basically existed for the comfort and convenience of one or both parties in an arbitral proceeding. It presents the disclosure of allegations made by a party, which may be distressing or even offensive to the other. It allows a party to make arguments in private which it may hesitate to make in a forum open to public access’. See Nakagawa (n 2) 16.

178 Lew sketches why arbitration should be appreciated in resolving international commercial disputes rather than the national courts. Lew remarks that, ‘the court’s aims are public policy considerations which are more applicable in the context of a national court. While justice is an important concern in arbitration, it is justice for the private parties to the dispute’. Lew, Mistelis & Kroll (n 2) 4.

179 Tarin (n 114) 131-54.
181 Ibid.
183 Sayen (n 171) 920-921.
invalidation of contracts through application of mandatory national laws or invocations of public policy defence. More generally, foreign contractors may seek to avoid the additional expense of dealing with unfamiliar legal systems and procedures. Uncertainty may also arise from language barriers involved in proceedings in foreign courts applying foreign law. By way of contrast, international or delocalised arbitration is seen as preferable because it affords broad freedoms to international contracting parties to choose the arbitrators and venue of the arbitration. Most importantly, contracting parties are accorded a wide measure of discretion to select the choice of law and procedures that will apply in the event of a dispute with a contracting party. Most often, it seems that international contracting parties choose arbitration because they seek enhanced consistency and predictability in their dispute resolution procedures.

However, other scholars have focused not only on the legal virtues of arbitration, which are assumed to champion the rights and will of contracting parties against arbitrator or political interference by state courts or legislator, but equally extol its pragmatic value as a means of resolving disputes in an efficient and non-adversarial manner. To the above point, it has been argued that international contracting parties agree to arbitration on the expectation that arbitrators will ‘split the difference and reform the contract so that both parties may continue in business on reasonable terms’. Though similar to that of judicial authority, arbitration does differ from litigation in some important respects. The role of the arbitrator is to determine the facts of the disputes and

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185 Ibid.
186 Ibid.
188 Paulsson asserts that international arbitration plays a very important role in resolving the disputes arising from the contractual clauses because the idea of arbitration clause is bidding resolution of disputes as parties accepted to choose their decision-makers. See J Paulsson, The Idea of Arbitration (Oxford University Press, 2013) 1.
189 Sayen (n 171) 920-21.
190 Ibid.
render the awards as stipulated in the arbitration agreement in accordance with the intent of the parties and the terms of the contract.\textsuperscript{193}

Notably, international contracting parties often seek to choose an arbitration forum, that is most favourable to their interests should a dispute arise.\textsuperscript{194} However, international contracting parties need to consider the specific reasons for selecting a particular arbitration forum prior to the occurrence of disputes.\textsuperscript{195} The procedural rules of the enforcing state should be given special consideration prior to the formation of a contract, allowing the parties to anticipate challenges around the future recognition and enforcement of international commercial arbitral awards before national courts.\textsuperscript{196}

2.3.1 How Do National Courts View Arbitration Practices

Regardless of the particular reasons why a party chooses to opt for arbitration, the underlying point is that they are making a conscious decision to opt-out of litigation proceedings. An important inquiry then becomes how the national courts respond to the development of arbitration.\textsuperscript{197} As Lew, Mistelis and Kroll point out:

\begin{quote}
[I]n the 19\textsuperscript{th} century and at the beginning of the 20\textsuperscript{th} century, the development of modern international arbitration practice began. However, it was based on national laws. The approach of these national laws was directly reflective of the attitude of most national courts. The law and the courts were reluctant to recognize that the commercial world was agreeing to arbitration as part of their business decisions.\textsuperscript{198}
\end{quote}

In essence, the substantive law was the same but the forum was different. National courts would often view arbitration as a rival and, in many ways, they

\textsuperscript{194} van Dam (n 182) 363-370.
\textsuperscript{195} Brand (n 139) 542-44.
\textsuperscript{196} Ibid.
\textsuperscript{197} Van Dam (n 182) 363-70.
\textsuperscript{198} Lew, Mistelis & Kroll (n 2) 18-19.
continue to do so.\textsuperscript{199} This is in some sense a consequence of the contractual autonomy enjoyed by parties to choose their arbitration process, thereby bypassing the control functions of national courts.\textsuperscript{200} However, the two processes are not completely separate—the national courts were vested with judicial power to closely supervise the arbitration process, particularly when it comes to the recognition and enforcement of arbitral awards.\textsuperscript{201}

\textbf{2.3.2 Perceptions of Arbitral Practice}

As indicated in the foregoing discussion, the arbitration plays an increasingly important role in the resolution of the growing number of disputes with a commercial nature and international or transnational dimension.\textsuperscript{202} Moreover, states increasingly rely on international commercial arbitration and national arbitration law to participate in the system of world trade.\textsuperscript{203}

As world trade expanded, the need to create a mechanism for international recognition and enforcement of both arbitration agreements and awards in relation to international commercial agreements was of paramount importance. To facilitate arbitration, two Hague Conventions were concluded in 1899 and in 1907, both entitled The Hague Convention for the Pacific Settlement of International Disputes. These conventions created the Permanent Court of Arbitration, which still exists and functions today.\textsuperscript{204}

Due to the successful operation and implementation of international conventions for the development of arbitration, several other international treaties, regulations and conventions were adopted. For example, The Geneva Conventions of 1923 and 1927, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958,\textsuperscript{205} were

\textsuperscript{199} Ibid.
\textsuperscript{200} Ibid.
\textsuperscript{201} Ibid.
\textsuperscript{202} See Packeiser (n 191) 371-91.
\textsuperscript{203} Ibid.
\textsuperscript{204} Lew, Mistelis & Kroll (n 48) 18-19.
\textsuperscript{205} T Pasipanodya, ‘Government Regulation on Trial: Expropriation Claims against Latin American States at ICSID’ (2015) 14(3) LAPE 407-16; see also R Wolff (ed), \textit{New York Convention, Convention on the...
ratified among the world’s leading trading nations, the building the foundation for quasi-harmonisation and a uniform system for adjudicating international commercial disputes. Following these conventions, arbitral institutions like the International Chamber of Commerce and the London Court of International Arbitration were established with the precise aim providing an efficient, flexible and impartial model of arbitration.

In contrast to these more global developments, many countries in the Middle East and other Muslim states were resistant to the growing trend toward the harmonisation and internationalisation of arbitration proceedings. One primary reason concerned the state’s right to exercise its sovereignty and public autonomy by refusing to recognise laws or procedural arbitration regimes that undermined legitimate differences in local laws, culture, and values.

The heart of the problem is that any degree of regulatory diversity or pluralism fosters uncertainty over the applicable laws. By way of example, many argue that religion and customary principles are difficult to apply in resolving international commercial disputes, as each member state has its own religious beliefs and customary laws. Moreover, regulatory diversity may even dilute or impair the rights and protections of commercial actors that are otherwise subject to that national legal regime. In practice, states or local courts may abuse their public powers by asserting the supremacy of state law without reasoned justification or respect for procedural due process. These issues raise legitimate concerns over the appropriate role and function of international rules and regimes on both international and domestic arbitration.


206 Wolff (n 205).
209 See Stipanowich & Ulrich (n 8).
212 Stipanowich (n 29).
213 El-Ahdab asserts why Muslim commercial parties have strong belief in the principles of Islam. El-Ahdab argues by relying on views of the Hanbali scholars that the sources of Shariah law ‘are not unalterable and do not constitute an exception to the universal rule that the laws must change over the times. Indeed, the Shari’a is not static and rigid and it is only bound by the Koran, the Sunna, the Idjma and the Qiyas’. See El-Ahdab (n 108) 18.
To the above point, El-Ahdab outlines the scope of arbitration by referring to the verse 58 of the Holy Qur’an, which stipulates:

[I]t follows from this that if one is authorized to judge, one is authorized to make judgment with a binding character. An arbitral decision settles disputes and thus must be binding upon the parties. It follows from this that the authority in charge of arbitration must be appointed in such a manner as to be able to settle the dispute, namely the decision must be taken by a majority if unanimity is not possible consequently, the number of arbitrators must be odd.214

The above illustrates the importance of arbitration in the Shariah tradition. It is worth mentioning that ‘the potential wealth of Shariah is still unexploited by most modern Arab legislators’.215 Thus, it is pertinent to examine the provisions of Shariah to understand the relationship of its principles to arbitration when resolving international commercial disputes.

In assessing this relationship, one must consider the views of the Islamic schools of thought on arbitration. According to the Hanafi School, the approach of arbitration is liberal since:

[The Hanafi School] allows more cases to go to arbitration than the Maliki, Shafii or Hanbali schools. The Hanafi School teaches that arbitration is valid in all cases, which do not involve legally fixed punishment (Haad) and retaliation (Qiasa), although the inarbitrability of qisas is contested by a minority of Hanafi scholars.216

214 Ibid 17.
215 S Saleh, Commercial Arbitration in the Arab Middle East (Graham & Trotman, 1984) 44.
In contrast, the Maliki school vests the Qadi (Judge) with broad discretionary powers and jurisdiction to discover the truth in relation to the disputes.  

Taken together, it appears that the divergence of opinions among the schools adds a layer of complexity to understanding the role of arbitration in Islamic society. For example, it has been shown that Western arbitration regimes have a shared cultural and legal heritage. As such, one can argue that international arbitration standards are already a reflection and codification of the norms, procedures and practices that are already recognised and observed by their national legal system and societies. However, in Muslim practising states, there is an entirely different historical context and legal culture.

What is clear at this stage is that the differences of interpretation provided by the Islamic schools on the scope of arbitration may pose challenges in utilising international arbitration to resolve disputes arising from international commercial transactions because the parties come from different jurisdictions and employ different practices and customs in resolving their domestic commercial disputes. Applying these practices when interpreting transnational laws also poses challenges. In this light, a lawyer has to be well aware of the substantive issues emerging from a transaction, which may often be determined by a referring to procedural rules. Thus, it becomes even more imperative to understand the legal regime of international commerce because the parties sometimes use the term law to denote more than the objective norms enacted

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217 El-Ahdab (n 108) 9.
219 Packeiser (n 191) 371-91.
222 Foster (n 30) 273-307.
223 Redfern and team assert the difference between international law and transnational law. Redfern pinned down ‘the applicable or substantive law of the contract may not necessarily be a given national system of law. It may be international law; or a blend of national law and international law; or even an assemblage of rules of law known as international trade law, transnational law, the “modern law merchant” (the so-called lex mercatoria) or by some other convenient title. Finally, because most international arbitrations take place in a “neutral” country—that is to say, a country which is not that of the parties—the system of law which governs recognition and enforcement of award of the arbitral tribunal will usually be different from that which governs the arbitral proceedings themselves’. See Redfern et al (n 3) 2.
224 Brand (n 139) 545.
by the legislative branches of the government.\textsuperscript{225} For example, arbitration allows for broader considerations to be heard by the tribunal than is permitted in the traditional judicial process because courts can only base their decisions on accepted legal sources.\textsuperscript{226}

On the other hand, it is also necessary to understand the power and scope of an arbitrator in international commercial arbitration, which is more limited than that of the national courts or judge.\textsuperscript{227} For instance, arbitral awards rendered by arbitral tribunals are recognised under national laws, but an award cannot be enforced without the assistance of the national courts.\textsuperscript{228} Further, if the parties fail to mention the scope of issues that can be arbitrated or the applicable arbitral procedural laws are not clear from the contract, then the local arbitration law, or the \textit{lex arbitri}, may be applied when conducting the arbitration proceedings.\textsuperscript{229}

Consider this scenario that demonstrates the important of arbitral law in international arbitration proceedings. There is a cross-border transaction involving international contracting parties that broadly negotiate with two or more business parties undertaking the same business, such as a manufacturing agreement and investment agreement.\textsuperscript{230} In this process, the parties often might be in the process of negotiating their contractual obligations under the agreement and dealing with issues arising out of those transaction agreements.\textsuperscript{231} At this stage, the parties may fail to formulate explicit contractual clauses governing, for instance, relief or remedies within the terms of their arbitration agreement.\textsuperscript{232} In those circumstances, the arbitral tribunal may have little choice but to consider, or give weight to, the relevant arbitration

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\textsuperscript{225} Goode et al (n 211) 5.
\textsuperscript{226} Park (n 184) 1-38.
\textsuperscript{227} Redfern et al (n 3) 2.
\textsuperscript{228} El-Ahdab (n 108) 47.
\textsuperscript{229} Lew, Mistelis & Kroll (n 2).
\textsuperscript{230} Dasteel (n 57) 539-52.
\textsuperscript{231} FN Botchway, ‘Can the Law Compel Business Parties to Negotiate?’ (2010) 3(3) \textit{JWELB} 286-303.
rules or applicable national law to determine the types of remedies available to resolve the dispute.\(^{233}\)

Within this context, international contracting parties need to have prior understanding and knowledge of their contractual rights and obligations under the national laws rather than relying solely on the application of international conventions, transnational laws of the parties choice of law to govern all aspects of the dispute.\(^{234}\) Notably, some trade nations have made specific reservations when implementing the provisions of international conventions.\(^{235}\) Goode states that ‘conventions should be innovative and create the devices needed in international trade’.\(^{236}\) This would encourage states to adopt them without modification. Others argue that trade nations could enact special legislation to simplify and protect the commercial and contractual interests of international contracting parties in resolving their disputes.\(^{237}\)

However, the critical question becomes whether the Saudi government would have succeeded in gaining the confidence of international contracting parties in its arbitration framework, particularly for recognition and enforcement of international arbitral awards in Saudi Arabia, without becoming a party to such international arbitral instruments. Further, given the Kingdom’s public policy stance with regard to Shariah application, it remains unclear what level of confidence parties currently maintain. To begin to answer this question, it is necessary to examine the modern Saudi Arbitration framework to assess the arbitration procedures as stipulated in the Saudi Arbitration Act and identify any difficulties relating to the use of international arbitration in the resolution of disputes.

2.4 The Modern Saudi Arbitration Law

\(^{233}\) D Jones, ‘The Remedial Armory of an Arbitral Tribunal: The Extent to which Tribunals Can Look Beyond the Parties ‘Submissions’’ (2012) 78(2) CIArb 102-03.
\(^{234}\) T Mizushima, ‘The Role of the State after an Award is Rendered in Investor-State Arbitration’, in Lalani & Lazo (n 59) 274-92.
\(^{235}\) Ibid.
\(^{236}\) Goode et al (n 211) 197.
\(^{237}\) Mizushima (n 234) 274-292.
After the Saudi government became a party to the prevailing international arbitration conventions and treaties, such as the New York Convention and the International Centre for Settlement of Investment Disputes Convention, it realized that it needed to reform its arbitration procedures.\textsuperscript{238} A first attempt at arbitral reform was the Saudi Arbitration Regulation of 1983. Up until this point, there was a severe lack of clear procedures and judicial support for arbitration within the Kingdom and private arbitration attempts were sporadic at best.\textsuperscript{239} One particular difficulty was the lack of provisions on how awards were to be enforced, particularly when those awards were made outside of the Kingdom.

The Saudi Arbitration Regulation attempted to address these concerns by providing a uniform set of rules that would govern arbitrations related to person, entities or activities in the Kingdom that would be easily accessible to both foreign and domestic parties.\textsuperscript{240} The goal of the law was to demonstrate the judicial and legislative support for commercial arbitration in the Kingdom to alleviate the fears of contracting parties. However, this law was not completely party focused; it also granted the government a significant degree of control over arbitration procedures including vesting agencies and the courts with supervisory authority, typically the CSCD, the Board of Grievances and, to a certain extent, the Chambers of Commerce and Industry.\textsuperscript{241}

Throughout practice under the 1983 Arbitration Law, three concerns persisted. First, despite the law’s willingness to recognise the validity of an arbitration clause in a contract, it was unclear how a party could be compelled to participate if that party refused to cooperate. Second, there was an on-going debate over the extent to which Saudi law was required to be applied to the substance of the dispute. Finally, the law did not specify the grounds, if any, on which the competent court or authority could refuse to enforce an arbitral award.\textsuperscript{242}

\textsuperscript{238} Wolff (n 205); see also AR Parra, \textit{The History of ICSID} (Oxford University Press, 2012).
\textsuperscript{239} Sayen (n 171) 910-11.
\textsuperscript{240} Regulation on Arbitration, Royal Decree M/46 of 7/12/1403 AH (April 25, 1983).
\textsuperscript{241} Allam, ‘Saudi Arabia/Arbitration in the Kingdom: The New Implementation Rules’ (1985) August \textit{Middle East Executive Reports} 9, 11.
\textsuperscript{242} Sayen (n 171) 912-13.
In 2012, Saudi Arabia took action to remedy the concerns witnessed over the preceding three decades. In fact, with the enactment of the new Saudi Arbitration Act, the Kingdom has witnessed notable developments in its arbitration procedures, particularly by addressing the old problems of inconsistent and unintended interpretations of Shariah provisions in arbitral procedures.\(^{243}\) This new law represents an attempt at achieving a more comprehensive and independent approach to arbitration that provides significantly more procedural clarity and, in reality, it seems to be working. Early numbers suggest that more foreign commercial actors have opted for arbitration in Saudi Arabia rather than in foreign forums after the promulgation of the new law.\(^{244}\) This attempt to simplify the dispute resolution process in the Kingdom and bring it more in-line with global arbitration trends, such as those preponed by UNCITRAL, were intended to increase protections for foreign businesses and investors.

The New Arbitration Law remains anchored in the Hanbali school of thought, but simultaneously modernises this dispute resolution mechanism. For instance, parties are no longer required to bring their arbitral awards before the Board of Grievances for enforcement, removing much of the unpredictability associated with its decisions and allowing parties to directly seek the assistance of specialized judges on the Enforcement Circuit.\(^{245}\)

Despite these attempts to create a more welcoming environment, some commentators suggest that international contracting parties are still dissatisfied with the Saudi arbitration procedures.\(^{246}\) Notwithstanding the clarifications and additions in the New Arbitration Law, it also created thirty-three additional articles, nearly doubling the number of applicable provision to navigate than those contained in its predecessor legislation.\(^{247}\)

\(^{243}\) Al-Ammari & Martin (n 2) 387-408.
\(^{246}\) Tarin (n 114) 131-54.
\(^{247}\) Al-Ammari & Martin (n 2) 387-408.
Scholars argue that international contracting parties challenge the provisions of the new law because of uncertainty, particularly with regard to their interpretation and application in international arbitration. For example, Article 14 of the New Arbitration Act stipulates certain requirements for appointment of arbitrators, including that they have sufficient capacity to serve, are of good moral conduct and maintain an education in Shariah law.\(^{248}\) It is fair to say that international contracting parties may be uneasy with Saudi government’s failure to provide detailed guidance on how terms such as ‘good conduct’ are defined, among others. The development of clear guidance on the use of such terms is essential because the New Arbitration Law promises to modernise the Saudi arbitration regime ‘by recognising for the first time parties’ autonomy to tailor their arbitration procedure in certain important respects, including by explicitly recognising the adoption of institutional arbitration rules’.\(^{249}\) For the party to effectively exercise this autonomy, it is imperative that they understand the terms with which their decisions must comply to able to subsequently enforce any future award without challenges to its validity.

While the isolated goals of the New Arbitration Law are laudable, it is just one piece in a larger modernisation and reform effort taking place in the Kingdom. In order for the provisions of this law to be effective, the legislature and the judiciary must also be healthy and able to serve in their supportive capacities. Thus, it is necessary to probe beneath the formal text of the New Arbitration Law to assess the ‘real’ objectives behind this reform from the KSA’s perspective. To further explore these concerns, the following attempts to clarify the manner in which Saudi legislation is enacted and the foundational sources from which Saudi lawmakers derive their authority and legitimacy,\(^{250}\) followed by a comparable explanation of the Saudi judicial process. In each section, the discussion is intended to focus of the Saudi government’s position on the recognition and enforcement of international arbitral awards, particularly when the enforcement of those awards implicate matters of religious concern or other public order norms.

\(^{248}\) Saudi Arbitration Law 2012, art 14; see also Al-Ammari & Martin (n 2) 387-408.


\(^{250}\) BG Weiss, The Spirit of Islamic Law (University of Georgia Press, 1998).
2.5 Saudi Legislative System

The Saudi legislative system itself has a unique history. Historically, Saudi Arabia has been reluctant to codify its laws, but this approach has changed under the current king. This section looks at the background of the Saudi legislative system and the legislative reforms that are taking place within the Kingdom, including the reform of the Saudi arbitration law.

2.5.1 Background of Saudi Legislative System

The Kingdom of Saudi Arabia has evolved over three phases. First, from 1744 to 1818, the Kingdom of Saudi Arabia was formed as an alliance between Muhammad Ibn Abdel Wahab, the religious leader, and Muhammad Ibn Saud, the political leader.251 During this period Ibn Abdel Wahab helped Ibn Saud spread ideas of societal unification and socio-religious reform by preaching they would restore the correct Islamic rituals and beliefs.252 However, in the early nineteenth century Al-Saud conquered the Kingdom of Saudi Arabia253 and from 1824 to 1891, Turki Ibn Abdullah established the Kingdom of Saudi Arabia with Riyadh as its capital city. Following a long conflict amongst his descendants, the Kingdom was conquered once again by Al-Rashid in 1891.254 The third stage began in 1932 and has continued until the present. King Abdulaziz Al-Saud formed the modern constitution of the Kingdom of Saudi Arabia on September 23, 1932. King Abdulaziz attempted to accommodate societal interests by establishing a modern independent government to achieve recognition on the international stage and obtain the confidence of foreign investors necessary to encourage investment in Saudi Arabia.255 Regarding arbitration, King Abdulaziz attempted to codify the teachings of the four Islamic schools to clarify the procedural and substantive rules applicable to arbitration. These reforms were instituted to enable international contracting parties to more effectively resolve

252 See, eg, Duderija (n 16) 393-437; see also Baamir (n 18) 25.
254 Ibid.
255 Baamir (n 18) 17.
their international commercial disputes. However, this step was strongly opposed by the traditional Shariah scholars.\textsuperscript{256} For example, Baamir express that ‘the fear that the expansion of civil jurisdiction might come at the expense of Shariah and might lead, in the end, to the application of laws unrelated to Shariah.’\textsuperscript{257} The primary argument advanced by scholars was that Shariah law is a divine law and as such takes priority over man-made laws.\textsuperscript{258} Some conservative Muslim scholars have been resistant to any attempt to codify provisions of Shariah, owing to fears that this would lead to interpretative errors, or illegitimate revisions to timeless and immutable divine commands. This resistance to innovation in traditional Islamic jurisprudence continues despite the demand for new laws and juristic interpretations which can more effectively reflect changes in Islamic societies in contexts of globalisation and financial integration.\textsuperscript{259}

Levelling a challenge to rigid approach of traditional jurisprudence, Bramsen persuasively argues that the divine law of Shariah has been subject to multiple interpretations over the centuries.\textsuperscript{260} To eliminate divergence in scholarly opinions, Bramsen and other scholars examine the problems and possibilities of codifying Shariah principles in legislative documents like a written constitution.\textsuperscript{261} Many have acknowledged the apparent limitations of this approach insofar as attempts to codify Shariah law may result in the formulation of binding rulings or doctrines based on subjective interpretations of principles which are indeterminate and subject to competing meanings.\textsuperscript{262} Nonetheless, Bramsen and others draw on the writings of prominent Islamic jurists such as the great Hanbali Scholar Ibn Taymiyya.\textsuperscript{263} Indeed, Taymiyya endorsed a jurisprudential approach that brings into harmony both the demand for formal methods of legal interpretation that can be seen as faithful to the literal text of

\textsuperscript{256} Ibid 1.
\textsuperscript{257} Ibid 30.
\textsuperscript{258} Aljloud (n 70) 85-98.
\textsuperscript{260} Bramsen (n 18) 157-58.
\textsuperscript{261} Ibid.
\textsuperscript{262} A Bin M Ibrahim, Sources and Development of Muslim Law (Malayan Law Journal Ltd, 1965).
\textsuperscript{263} Bramsen (n 18) 157-58.
the Qur’an with a more purposive or teleological reading of the applicable law as one that best reflects the needs and demands of the society in which its enforced.\textsuperscript{264} Taymiyya developed this idea into the concept of \textit{siyasa shar’iyya}, a doctrine that has purpose even today.\textsuperscript{265} Simply put, ‘\textit{Siyasa shar’iyya} represents governance in accordance with the divine law, and it called for a harmonization between the law and procedures of Islamic jurisprudence, ‘\textit{Fiqh}’, and the practical demands of governance, \textit{siyasa}.\textsuperscript{266}

Yet, the Islamic world today still debates how to best balance the demands for formal compliance with modern day treaty-based and other commercial law instruments with international instruments, such as the New York Convention and the UNCITRAL Model Law with the requirements of Islamic divine law.\textsuperscript{267} The question becomes how successful has the Saudi legislative system been in reconciling the requirements of international transactions with local norms and traditions, not least the constitutionally mandated provisions of Islamic law.\textsuperscript{268}

\textbf{2.5.2 The Position of the Saudi Legislative System}

To assess the issues identified above, it is necessary to discuss whether the Islamic schools of thought had any role in influencing the enactment of Saudi legislation. The Islamic schools continue to play a vital role in the development of legislation generally in Islamic states,\textsuperscript{269} and their role in Saudi Arabia is no different.\textsuperscript{270} The schools interpret the provisions of Shariah law, and their opinions must be considered before any particular piece of Saudi legislation can be enacted.\textsuperscript{271} This stems from the belief that ‘the disciple of legal

\textsuperscript{264} Ibid.
\textsuperscript{265} L. Rosen, \textit{The Justice of Islam, Comparative Perspectives on Islamic Law and Society} (Oxford University Press, 2000).
\textsuperscript{266} Bramsen (n 18) 157-58.
\textsuperscript{267} See, eg, MM Billah, \textit{Applied Islamic Law of Trade and Finance, A Selection of Contemporary Issues} (3rd edn, Sweet & Maxwell Asia, 2007); see also Shabana (n 13).
\textsuperscript{268} M Rohe & G Goldbloom (trans), \textit{Islamic Law in Past and Present Vol 8} (Brill, 2015).
\textsuperscript{269} AA An-Na’im, \textit{Islam and the Secular State, Negotiating the Future of Shari’a} (Harvard University Press, 2008).
\textsuperscript{270} SS Al-Sa’ddan, \textit{Stages of Issuing Law in the Kingdom of Saudi Arabia} (1st edn, King Fahd National Library Cataloging-in-Publication Data Al Sa’ddan, 2012).
understanding is the discipline of the derivation of rulings of the divine law, or, in other words, the disciple of the procedure of such derivation.\textsuperscript{272}

With respect to the position of the Saudi legislative system, King Abdulaziz Al-Saud was a follower of the Hanbali School and adopted the Hanbali scholars’ (Hanbalies) teachings in his government.\textsuperscript{273} These beliefs and teachings were reflected in his Royal Decrees. The teachings of the Hanbali School are conservative in nature. Hanbalies strongly base their views and reasoning on the Holy Qur’an and Sunna’h, thereby giving little weight to secondary sources such as \textit{Ijma} and \textit{Qiyas}. As a result, the teachings of the Hanbali School are comparatively strict on religious issues as compared to other Islamic schools. However, their teachings on commercial and financial transactions are in practice found to be relatively flexible and tolerant.\textsuperscript{274}

It is commonly assumed that the Saudi King plays a vital role in the legislation process; however, other bodies such as the Shura council and the Council of Ministers also play a significant role in the Saudi legislative system. The head of state, or King, is under a constitutional obligation\textsuperscript{275} to consult with an expert body, such as the Shura Council (also known as Al-Shura), before adopting decisions or issuing new legislation. This consultation requirement stems from the belief that Al-Shura is ‘not exclusive to the government system, but deals with all fields and levels of life, particularly the social’.\textsuperscript{276} The Al-Shura represents a democratic mechanism of law-making because it allows Saudi citizens to participate directly in the administration of state policies.\textsuperscript{277} The Al-Shura also is empowered to determine how best to reconcile the interests of the nation with the principles of Islam as stipulated in the Shariah.\textsuperscript{278}

Return attention to the New Arbitration Law, it is necessary to consider whether the Saudi legislative system has been effective in reconciling Shariah provisions

\textsuperscript{272} MD As-Sadr, \textit{Lessons in Islamic Jurisprudence} (Oneworld Publications, 2007) 36.
\textsuperscript{273} Baamir (n 18) 17.
\textsuperscript{274} Ibid.
\textsuperscript{275} Article 1 of the Shura Council Law explains the compliance to involve in the Saudi governance.
\textsuperscript{276} NM Al-Assaf (trans), \textit{The Shura Council, a Historical Perspective} (Department of Information and Public Relation, 2004) 4.
\textsuperscript{277} See Shura Council Law.
\textsuperscript{278} Al-Assaf (n 276) 4.
with international instruments, particularly the New York Convention and the UNCITRAL Model Law, with regard to providing a sound arbitral legal framework. Answering this question requires first analysing the impact of the Saudi legislative reforms. This in turn will shed greater light on the Saudi government’s attitudes toward modernising the Saudi arbitration framework, particularly with regard to the recognition and enforcement of international arbitral awards in Saudi Arabia.

2.5.3 Reformation of Saudi Legislative System

After the enactment of the Basic Law of Governance in the year 1992, the Council of Ministers, the Al-Shura councils and the Saudi King shared Saudi legislative responsibilities for promulgating new laws. Since this structure was implemented, it has been suggested that the reformation of the Saudi legislative system is needed. The key reform proposals include further simplification of the Saudi law-making processes and additional clarity over the scope and applicability of Shariah. Through such reforms, the Saudi government will be better positioned to promote private sector growth and stability, as well as improve foreign relationships at the international level.

Set against these broader geopolitical and economic shifts—including a growing population, religious sectarianism, regional conflicts with neighbouring Iran and volatility and growth in the oil markets—the Saudi legal system has undergone a period of transformation and change over the last four decades. Pertinent to the foregoing analysis, the Council of Ministers was established precisely to formalise and simplify the relationship between religious bodies and the King. By establishing a Council of Ministers, the Saudi political establishment has

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280 See Basic Law of Governance.
282 Tarin (n 114) 131-54.
283 Al-Ammari & Martin (n 2) 390.
284 Ibid.
285 KE Young, The Emerging Interventionists of the GCC (LSE Middle East Centre, 2013).
286 Sulaiman, Abdul Majeed, Ash-Shura in Islam and Its Contemporary System in the Kingdom of Saudi Arabia, A Comparative Study, (Dar Al Nahdah Al Araba, 1994) (this source is available in Arabic language); see also Al-Safi (n 271) 15.
taken important measures to make Saudi laws more investment and commerce friendly, while remaining compliant with Shariah law.\textsuperscript{287}

Yet, it is undeniable that Saudi legislation affords normative primacy to their national principles in their international commercial transactions, which is often at odds with the implied or express terms of the arbitration agreement, including through inclusion of mandatory international arbitration or stabilisation clauses.\textsuperscript{288} The application of Shariah principles may also implicate issues around the validity, operation and enforcement of a contractual agreement in a manner that adversely impacts a foreign contractor’s economic interests or rights under the contract.\textsuperscript{289}

To counter some of these concerns, the Council of Ministers is comprised of highly qualified and educated individuals who are appointed from diverse fields or sectors, including the fields of health, science, economics, culture and religion, among others.\textsuperscript{290} The Council is empowered to implement the objectives of international conventions and treaties in the Saudi legislation to improve efficiency of Saudi economic performance.\textsuperscript{291} Such measures are intended to ensure that international contracting parties have confidence in the Saudi systems.

However, it is important to mention that Saudi legislative reform confers absolute legislative power to the Council of Ministers and to the ultimate arbiter, the King.\textsuperscript{292} The Al-Shura cannot issue any legislation or regulation without the approval of the Saudi King.\textsuperscript{293} Furthermore, the Basic Law of Governance stipulates that the Saudi legislation and regulations should be derived from the Holy Qur’an and the Sunna’h.\textsuperscript{294} In the above light, it is necessary to examine

\begin{itemize}
\item\textsuperscript{287} Tarin (n 114) 131-54.
\item\textsuperscript{288} Securities Commission Malaysia (n 221).
\item\textsuperscript{289} MM Billah, \textit{Applied Islamic Law of Trade and Finance, A Selection of Contemporary Issues} (3rd edn, Sweet & Maxwell Asia, 2007).
\item\textsuperscript{291} See \textit{Ibid}.
\item\textsuperscript{292} See Basic Law of Governance.
\item\textsuperscript{293} Al-Muhanna (n 281).
\item\textsuperscript{294} See Basic Law of Governance, arts 7-8.
\end{itemize}
the impact of these reforms on the Saudi legislative system itself.

2.5.4 The Impact of the Reformation on Saudi Legislative System

As previously mentioned, in recent decades, the Saudi government has accorded greater priority to policies promoting free trade, liberalisation and expansion of its commercial markets. The Kingdom of Saudi Arabia has also become more proactive in international economic development by joining the World Trade Organization in 2005 and ratifying several international conventions and treaties. For example, the Kingdom has begun to invest in other sectors for long-term development. It also ‘insist[s] that oil process must be stabilized so that they can not only invest in productive capacity to meet future increases in demand but also invest in alternative renewal sources of energy’. The Saudi Kingdom has been among the best performing countries in the Group of Twenty (G-20) leading industrialized countries and emerging markets.

It is arguable that the reformation of the Saudi legislative system has been key to the success and growth of the Saudi economy. In this vein, many scholars have reflected on aspects of legal reform which will be necessary to building trust in the Saudi legal system and its dispute settlement mechanisms. Long and Maisel, for instance, that ‘the key to good governance is public participation, not process, and how a society participates is based to a great extent on its cultural and social norms and values’. It is notable, here, that Saudi Arabia practices the traditional political process of public participation through Al-Shura and the Council of Ministers, while at the same time emphasising the importance of modernization without secularization. Moreover, Saudi governance has evolved from a traditional culture to a modern giant within the world oil economy; yet, Saudi governance remains subject to

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295 Al-Muhanna (n 281) 31.
298 Foster (n 30) 273-307.
299 Long & Maisel (n 297) 142.
Islamic law.\textsuperscript{301}

2.6 Position of the Saudi Judicial System

Having explored the impacts of reform on the legislative system, it is also important to consider the effects on the Saudi judicial system, particularly given the necessary role it plays in the recognition and enforcement of arbitral awards.

2.6.1 Before the Reformation of the Saudi Judicial System

It comes as no surprise that the Saudi judicial system requires compliance with Shariah principles to fulfil its judicial obligations under Saudi law.\textsuperscript{302} As Article 46 of the Basic Law of Governance stipulates, Saudi judges are obliged to apply the Holy Qur’an and the Sunnah, along with the relevant rules derived from Saudi legislation, when deciding cases or adjudicating matters of justice.\textsuperscript{303} Prior to ratifying the New York Convention in 1996, and before the reforms made to the Saudi judicial system in 2007,\textsuperscript{304} the Board of Grievances\textsuperscript{305} had jurisdiction\textsuperscript{306} over the recognition and enforcement of arbitral awards and foreign judgements, regardless of the nature of the disputes, whether civil, commercial, administrative\textsuperscript{307} or labour related.\textsuperscript{308} Notably, the Board of Grievances was not willing\textsuperscript{309} to recognize or enforce commercial arbitral awards resulting from disputes resolved under foreign procedural and

\textsuperscript{301} Ibid.
\textsuperscript{302} Basic Law of Governance explains the Saudi Judicial System is an independent authority.
\textsuperscript{303} Article 46 of the Basic Law of Governance explains the Saudi Judicial System is an independent authority.
\textsuperscript{304} The Saudi Kingdom enacted the Law of the Judiciary to transform the Saudi judicial system in the Royal Decree No M/78 on 19 Ramadan 1428H (1 October 2007).
\textsuperscript{305} Article 1 of the Law of the Board of Grievances, 1992, explains, ‘The Board of Grievances is an independent administrative judicial commission responsible directly to His Majesty the King. Its seat shall be the city of Riyadh when needed, branches may be established by a decision of the president of the Board’. Which was established by the Royal Decree No M/51, 17 Rajab 1402 (10 May 1982).
\textsuperscript{306} See Law of the Board of Grievances, art 8.
\textsuperscript{307} Law of the Board of Grievances, 1992 arts 4-5.
\textsuperscript{309} Baamir asserts that the ‘Courts did not recognize the arbitration clause because they doubted its validity under Shari’a (most arbitrations at that time were rejected on the ground of uncertainty’). Baamir (n 18) 123.
substantive laws because the awards typically contradicted the provisions of Shariah law and this was deemed a matter of public policy.\textsuperscript{310}

Through Saudi Arabia’s ratification of international treaties and conventions, which the Kingdom has indicated its acceptance of in principle, the Kingdom has bound itself to new legal obligations, such as those imposed by the New York Convention of 1958, including a duty to recognise and enforce international arbitral awards.\textsuperscript{311} However, the Convention’s provisions continue to offer Saudi judges a measure of interpretative discretion to refuse to recognise or enforce an international arbitral awards—on the grounds of public policy.\textsuperscript{312} This exception carved out by the New York Convention in effects permits the behaviour of the local courts to refuse recognition of domestic or international arbitral awards found to be in conflict with Shariah principles. Naturally, this might create challenges for international contracting parties because the Article V ‘safe harbour’ clause does not provide clear guidance or threshold legal criteria for determining whether national mandatory law or public policy has been breached.\textsuperscript{313} This is all the more problematic because Saudi courts have historically adopted a strict interpretation of Shariah in justifying the courts’ non-recognition and enforcement of awards and judgments issued outside of Saudi Arabia or in accordance with the law of a legal system other than that of Saudi Arabia.\textsuperscript{314}

Indeed, it is difficult to find any decision where the Saudi judicial authorities, previously the Board of Grievances and with the new Enforcement Regulations the newly-appointed Enforcement Judges, have been willing to execute an

\textsuperscript{310} Ayad outlines the difficulty of interpreting the doctrine of public policy, as ‘the problem herein lies in the fact that domestic public policy can never adequately address international concerns, and what is needed is a mutually agreed upon concept of a transnational public policy which is understand similarly by judges of differing jurisdictions and which reflects similar values and principles from one jurisdiction to the next. A review of prominent court cases of various jurisdiction by the author reveals that the danger of public policy as it applies to the New York convention is that it is usually interpreted as domestic public policy and certainly the threat that it shall be interpreted solely as domestic public policy in the narrow sense of individual jurisdictional sensibilities remains as long as the phrase is not reworded or defined clearly’. See MB Ayad, ‘The Doctrines of Public Policy and Competence in Investor–State Arbitration’ (2013) 27 ALQ 299.
\textsuperscript{312} Saudi Arbitration Act 2012, ch VI.
\textsuperscript{313} Blavi (n 8) 2-15.
\textsuperscript{314} Foster (n 30) 273-307.
order or award issued in a country of origin other than Saudi Arabia.\textsuperscript{315} In light of
the above, it is necessary to consider the current position of the Saudi judicial
system on recognising and enforcing international arbitral awards in Saudi
Arabia.

\subsection*{2.6.2 After the Reformation of the Saudi Judicial System}

In 2007, the Saudi judicial system was reformed and modernised.\textsuperscript{316} The Law of
the Judiciary was enacted, resulting in the comprehensive reorganisation of the
existing judicial framework and the adoption of new rules governing the
jurisdiction of Saudi courts.\textsuperscript{317} Article 9 of the Law of the Judiciary established
the new structure and hierarchy of the courts, which are composed of three
levels: the Supreme Court, the Court of Appeals and the First Instance Courts.
Further, these courts are classified as general, penal, family, commercial and
labour courts.\textsuperscript{318} The Court of Appeals operates and functions through
specialized panels.\textsuperscript{319}

Despite these reforms, there is still uncertainty over the jurisdictional authority of
Saudi courts to refuse recognition of arbitral awards. The only glimpse of
guidance is contained in Article 25, which mandates:

\begin{quote}
Without prejudice to the provisions of the Law of the Board of
Grievances, the courts shall have jurisdiction to decide all cases in
accordance with the rules governing the jurisdiction of courts set
forth in the Law of Procedure before Shariah Courts and the Law
of Criminal Procedure.\textsuperscript{320}
\end{quote}

\textsuperscript{315} Saudi Arbitration Act 2012, ch VI.
\textsuperscript{316} Al-Jarbou (n 118) 177-202.
\textsuperscript{317} Ibid.
\textsuperscript{318} See Law of the Judiciary, art 9.
\textsuperscript{319} See Ibid art 15.
\textsuperscript{320} Ibid art 25 (explaining the scope of court jurisdiction).
Thus, the Law of the Judiciary, fails to provide clarity around the recognition of arbitral awards, and instead reinforces that Saudi courts are under a legal duty to observe and enforces aspects of Shariah law.  

2.7 Enforcement Circuit

In another set of important reforms, the Saudi judicial council established the Enforcement Circuit, which is governed under the Enforcement Law 2012. The purpose of this circuit is to enforce arbitral awards in Saudi Arabia. Notably, the Enforcement Law of 2012 contains relatively detailed provisions regarding recognising and enforcement of arbitral awards in Saudi Arabia.

However, the enactment of Enforcement Law arguably fails to address the challenges confronted by international contracting parties who seek to enforce arbitral awards in Saudi Arabia. One reason for this is that the prevailing party is still required to submit a petition to the competent Saudi court before an award will be recognised. During this process, the judge must ensure that the arbitral award does not contravene the mandatory principles of Shariah law, contradict any existing judgment or decision of a competent court or infringe on any royal decrees issued by the Saudi king.

Notwithstanding the above, Articles 2 through 7 of the Enforcement Law set out the powers and jurisdiction of enforcement judges to enforce arbitral award in Saudi Arabia. These articles entrust enforcement judges with the power of compulsory enforcement and the supervision of enforcement officers subject to the usual proviso that such award do not contravene Saudi legislation or Shariah principles. The law also makes clear that enforcement judges are not part of the recognised judicial authority; nevertheless, they play an important

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321 See Basic Law of Governance, art 8.
322 See Royal Decree No. M/53, dated 13.8.1453 AH.
323 Ibid.
324 Tarin (n 114) 131-54.
325 Al-Ammari & Martin (n 2) 390.
326 Ibid.
328 Ibid.
role in the enforcement of arbitral awards. However, before a party can seek the assistance of an enforcement judge, the arbitral award must first be recognised by a competent court. This creates tension within the Saudi arbitration framework as the proper law for governing recognition and enforcement of arbitral awards continues to remain uncertain and subject to the discretionary justice of national courts.

While the Saudi government has made significant efforts to modernise its judicial system, particularly with regard to the recognition and enforcement of arbitral awards, the new legislative regulations do not provide complementary provisions on these topics to guide the judges. Instead, the Enforcement Circuit has simply replaced the Board of Grievances as governed under the now partially repealed Rules of Civil Procedure, 1989. With the reforms made to the Saudi court structure, the Enforcement Circuit is now part of the Saudi General Courts and has broad jurisdiction to supervise and enforce foreign and domestic arbitral awards, subject to Shariah principles and existing legislation. This offers room for further development of a new arbitration regime for the recognition and enforcement of arbitral awards in Saudi Arabia.

2.8 International Contracting Parties

This thesis has primarily focuses on contract-based commercial arbitration, and as such does not address the finer points of treaty-based investment arbitration, specifically Bilateral Treaty Investments (BITs). Nonetheless, this study’s assessment of the Saudi governments attempts to establish a more business  

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329 Al-Ammari & Martin (n 2) 387-408.
330 Saudi Arbitration Act 2012, Article 53 stipulates, ‘The competent court, or designee, shall issue an order for enforcement of the arbitration award. The request for enforcement of the award shall be accompanied with the following: (1) the original award or an attested copy thereof. (2) A true copy of the arbitration agreement (3) An Arabic translation of the arbitration award attested by an accredited authority, if the award is not issued in Arabic (4) A proof of the deposit of the award with the competent court, pursuant to Article 44 of this law’.
332 Tarin (n 114) 131-54.
333 See Royal Decree No. M/53, dated 13.8.1453 AH.
335 See Ibid.
friendly environment, and the ways in which Sharia may intersect with these issues, would be incomplete without briefly mentioning the impact of foreign direct investment in Saudi Arabia’s economy.

As conventional wisdom has it, the globalization of the world economy has helped international contracting parties expand their businesses around the world. Foreign commercial parties are investing in the Saudi economy and increasingly demanding protective laws to guard their investments. The mindset of foreign commercial parties is readily apparent. They are motivated primarily by the pursuit of immediate and high returns on their investments. As a result, they seek to stabilise their expectations through the application of clear and predictable laws.

This begs the question, to what extent are the rights of foreign commercial or investor parties protected in Saudi Arabia? While this thesis deals primarily with commercial arbitration, it is worth briefly reflecting on the implications for foreign direct investment in the Kingdom. While this thesis has focused on arbitration among private parties, it is worth keeping in mind that the Saudi government’s attitude to arbitration has been largely informed by Aramco, a dispute which involved the Saudi government and a private party. This raises wider questions

336 For example, Edwards pinned down that globalization is still at an early stage. For a thoughtful analysis of globalization on International trade, see M Edwards, Future Positive International Co-operation in the 21st Century (Earthscan Publications Ltd London, 1999). Zekos also asserts that the recent growth of Foreign Direct Investment (FDI) into low-income countries by relying to the World Bank report. From 1990 the FDI was $2.6 billion, which increased to $9 billion in 2001 and subsequently increase to $162 billion over the same period. See GI Zekos, Economics and Law on Competition in 21st Century Globalization (Nova Science Publishers, 2014) 51-52.

337 Al-Hejailan idea was that the objective of foreign investment in the Saudi economy, as ‘we realize that the ultimate objective of all foreign investment is to earn profits, the Saudis are now adjusting their policies to accept such an objective-provided it is on the basis of long-term partnership, rather than the short-term “quick buck” approach that some contractors had adopted in construction and procurement’. See WM Ballantyne & HL Stovall, Arab Commercial Law: Principles and Perspectives (American Bar Association, 2002) 4.

338 Milhaupt and Pistor asserts that the challenges raised by foreign investors to protect their investment under the provision of law, as ‘the demand for law is also affected, because globalization puts pressure on different constituencies within a given system that may benefit or lose from market integration and capital flows. It also adds new constituencies, in particular, foreign strategic and portfolio investors, whose demand for formal legal solutions to governance issues may differ from that of domestic constituencies’. See CJ Milhaupt & K Pistor, Law and Capitalism (University of Chicago Press, 2008) 45.

339 Nadar argues, ‘The development of law often follows the development of a new industry as to provide the supporting legal framework designed to address the new concerns that arise from the operation of the new industry’. A Nadar, ‘Islamic Finance and Dispute Resolution’ (2009) 23(1) ALQ 7-8.

340 Edwards (n 339) 5-6.

341 Zekos (n 337) 52.

about how certain disputes involve state parties, including state controlled companies, are classified under Saudi Law. As Goode notes, ‘investor’s rights are classified as “intermediary and only contractual” [while] in other [agreements], there may be a fiduciary relationship’. Moreover, the Saudi government’s treatment of wider issues around its treaty obligations under various investment agreements will have implications for all aspects of enforcement of foreign awards, including in the area of commercial arbitration.

The wider point being made here is a deceptively simply one. International contracting parties to understand their rights and liabilities under the law of the enforcing state if they are to secure and protect their investments and commercial interests. As has been previously mentioned, the provisions of Shariah play a vital role in Saudi legislation. The provisions of Shariah law mandate that parties respect and undertake their obligations as agreed in their contract. For example, the verse of the Holy Qur’an states:

[O] Ye who believe, respect your contractual undertakings’ and ‘He authorized what he did not forbid’. Consequently, that which is not forbidden is not wrong and what is not wrong is valid.

By extension, and using the above Islamic precept as our guide, the Saudi government must fulfil its obligations under Sharia, while bringing its laws into line with international customs and practices. To do this it will have to implement certain measures to protect foreign investors contractual rights, including by satisfying the criteria identified under the applicable investment treaties. Such internationally-recognised standards may include fair and equitable treatment, non-discrimination, or a prohibition against the denial of justice and the

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343 Goode et al (n 211) 489.
344 Trakman posits that the parties should be aware of both the marketplace because ‘continuing experience in world trade provides a tested environment in which merchants can interact freely, choosing their trade partners and contract terms with an expanding awareness of both the marketplace and of one another. Together, market, agreement and time allow business instruments to evolve into uniform codes and documents, comprehensive in their terms and farsighted in their application to an ever-changing business world’. See LE Trakman, The Law Merchant: The Evolution of Commercial Law (Fred B. Rothman & Co, 1983) 2.
345 Edwards (n 337) 5-6.
346 El-Ahdab remarks, ‘the development of law often follows the development of a new industry as to provide the supporting legal framework designed to address the new concerns that arise from the operation of the new industry’. See El-Ahdab (n 108) 24-25.
requirement for equivalent protection of foreign contracting parties under national law.\textsuperscript{347}

Many of foreign investors' concerns may be overcome by first simplifying the interpretation of national laws and, second, by harmonising national laws with the rules and principles of international law to avoid conflicts between international commercial parties as to the applicable procedural and substantive laws.\textsuperscript{348} To this point, many have argued for the need to simplify the standards or principles governing the interpretation of contractual rights in investment contracts.\textsuperscript{349} Under an investment contract, investor parties are vested with two sets of rights in the investment agreement: rights under international law conferred by the investment treaty and rights conferred under domestic law arising from the investment agreement.\textsuperscript{350} However, challenges remain over the nature of rights in the dispute; for instance, whether the rights are derived from a contract governed by the municipal law of the host state or are otherwise regulated under a particular bilateral or multilateral investment treaty.\textsuperscript{351} Another significant issue concerns the rise in treaty shopping by foreign investors. Here, foreign investors assert the jurisdiction of courts in which they are most likely to obtain a favourable decision or otherwise take advantage of national laws that best protect their economic interests.\textsuperscript{352} The growing practice in treaty shopping however presents a problem for the following reasons:

[T]reaty shopping breaches the reciprocity of a treaty and alters the balance of concessions attained therein between the two contracting states. When a third-country resident ‘shops’ into a treaty, then the treaty concessions are extended to a resident, whose state has not participated in this arrangement and may not reciprocate with corresponding benefit (e.g. exchange of

\textsuperscript{348} Nadar (n 339) 1-29.
\textsuperscript{349} Goode et al (n 211) 489.
\textsuperscript{350} Ibid.
\textsuperscript{351} ME O’Connell, \textit{International Dispute Resolution Case and Materials} (Carolina Academic Press, 2006).
\textsuperscript{352} AYS Reuven & CHJI Panayi, \textit{Rethinking Treaty Shopping: Lessons for the European Union} (Amsterdam, 2010).
information). The usual quid pro quo of the treaty is therefore compromised and the process subverted.\footnote{Ibid.}

Furthermore, every legal system recognises the right of parties to exercise some degree of freedom of contract and party autonomy in their international commercial transactions.\footnote{Trakman asserts that in international commercial transactions, ‘merchants decide with whom they wish to contract and upon what terms; they determine the limits of their own requirements; and they establish the parameters of their obligations. They do so themselves. The law does not fulfill such functions for them. Within this context, the sanctity of their bargain is not merely a legal privilege; it is a commercial necessity. The business agreement, construed against the background of similar international agreements, is the most effective means towards interpersonal harmony in international trade. The contract is devised as a matter of the free will of the parties; it is reciprocal in intent; and it is adaptable in its scope of application’. See Trakman (n 347) 1.} As previously mentioned, parties are accorded broad freedom to choose their governing law in the contract, under the New Arbitration Law provisions, which are themselves founded on international standards developed under the ambit of the UNCITRAL rules.\footnote{C Croft, C Kee & J Waincymer, \textit{A Guide to the UNCITRAL Arbitration Rules} (Cambridge University Press, 2013) 1-5.} The principles of party autonomy have the important function of enabling contracting parties to understand their contractual rights and obligations.\footnote{Park (n 184) 1-38; see also, MT Grando, \textit{Evidence, Proof, and Fact-Finding in WTO Dispute Settlement} (Oxford University Press, 2009).} Nonetheless, in so far as parties are bound by the terms of their contract it is important that they take extra caution while drafting their international commercial contracts.\footnote{Berman (n 192).} More particularly, international contracting parties should take due account of ‘mandatory laws outside the lex contractus which are dictated by the public policy of the states involved’.\footnote{N Horn & CM Schmitthoff, \textit{The Transnational law of International Commercial Transactions Vol 2} (Kluwer Law and Taxation Publishers, 1982) 10.} Further contracting parties must be cognisant of the fact that the ‘applicable contract law itself may contain mandatory rules which cannot be contracted out’.\footnote{Ibid.}

At this juncture, it is necessary to mention the measures taken by the Saudi government to protect foreign investors contractual rights. To put it briefly, Saudi Arabia has taken some necessary measures in protecting the contractual and economic interests of foreign investors, including by acceding to
international treaties with the contracting states. For example, the Saudi Arabian General Investment Authority (SAGIA) was to provide commercial and financial guidance and a safe environment for both Saudi and foreign investors to trade in Saudi Arabia. A specific regulation has been enacted for this purpose, the Foreign Investment Act, which relaxes and liberalises the capital retention and shareholding requirements that foreign investors must meet before they can invest in the Kingdom. The SAGIA plays a vital role by issuing licences to foreign investors for permanent or temporary investments in the Kingdom. Similarly, the Saudi government has enacted the Foreign Investment Act & Executive Rules of 2000, strengthening the corporate rights of foreign investors over their assets. Likewise, the Saudi Real Estate Law of 2000 allows foreigners to own, sell and invest in the Saudi real estate market.

Through these liberalising reforms, it appears that the Saudi government has issued several economic policies and regulations to facilitate stable and efficient macroeconomic growth in all sectors of the Saudi economy. One notable example in which the Kingdom of Saudi Arabia plays a major role is the energy sector, namely by exporting its oil resources to the world market. These measures offer another example of how Saudi Arabia has attempted to protect both its own sovereignty over natural resources and the vested rights and interests of international contracting parties in the Saudi economy.

While not explicitly related to the focus of this study, which is to examine the recognition and enforcement of domestic and international awards, and differences in treatment of these two types of awards, Saudi Arabia’s evolving attitudes to the rights of foreign parties necessarily feeds into the wider discussion on enforcement of awards involving private parties. The above

364 Article 2 deals with foreign capital investment in Saudi Arabia: ‘The Authority is authorized to issue a license for foreign capital investment in the Kingdom for any investment activity whether permanent or temporary with the exception of the activities excluded under the third article of the Act’. See Ibid.
366 Wilson & Other (n 363).
367 KE Young, The Emerging Interventionists of the GCC (LSE Middle East Centre, 2013).
discussion tends suggests the willingness of the Saudi government, in recent years, to enact laws and measures aimed at protecting the contractual rights of international parties, including by implementing standards provided for under international conventions and treaties without contradicting Shariah law. The following chapters will explore the tension between such international instruments and the application of Shariah principles in greater detail.

2.9 Conclusions

This chapter examined the history and development of the Saudi arbitration framework and overall related Saudi reform efforts. The discussion notes that the Saudi arbitration system has evolved through the modernisation of the Saudi legislative system in 1992, the KSA’s ratification of the New York Convention of 1958, its membership in the World Trade Organisation in 2005, and its continuing substantive reforms. Recent reforms include the enactment of the new Saudi Arbitration Act of 2012 and the Enforcement Act of 2012, which have assisted both domestic and international contracting parties to understand the essential requirements for the recognition and enforcement of commercial arbitral awards in Saudi Arabia. To complement its legislative activities, the Saudi government also reformed the judicial system in 2007 to facilitate court proceedings, specifically with the establishment of the Enforcement Circuit that maintains jurisdiction over actions to for enforce arbitral awards.

Yet, academics and experts on continue to maintain different opinions about whether the current law of Saudi Arabia has been adequately modernised when compared with Western arbitration models and mechanisms of resolving international commercial disputes. For example, the United Kingdom’s legislative system is secular and adopts a more liberal approach to its economic and social policies. However, the Saudi legislature adopts a more religious and conservative stance when enacting legislation and the Saudi government justifies this approach on the grounds that the law of the land is primarily based

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on the principles of the Holy Qur’an and Sunnah and secondarily on the source of Ijma, Qiyas and Ijtihad, which are also applied to commercial disputes. Many traditional Islamic scholars continue to fully defend absolute conformity with the requirements of Shariah, or divine law as it has been practiced and interpreted over centuries, but scholars suggest that a strict interpretation of Islamic sources may be ill-suited, under-developed and insufficiently adapted to deal with the complexities of modern commercial instruments. Yet, many others comment on how deeply embedded Islamic principles and values are in the life and practices of the modern Muslim. As Nasr has remarked:

[I]slam is not only an ideal, although it is of course an ideal, especially as far as the ethical norms exemplified by the Blessed Prophet and the great figures of the religion are concerned. But for ordinary Muslims it is also a reality with which they live day and night. Therefore, in many cases they make use of religious teachings to solve family problems, to further economic or social goals, or even for the exercise of power.

Similarly, modern Islamic scholars have expressed the view that the Kingdom of Saudi Arabia has made significant reforms to legislative and judicial processes during the last half-century. It is evident that the Saudi Kings have afforded top priority to reforming the traditional arbitral system, particularly through the enactment of New Arbitration Law and the related legislative and judicial reforms. Of course, one should acknowledge that the New Arbitration Law adheres to the multiple sources of Shariah principles, including the Holy Qur’an and Sunnah, as well as with the widely accepted UNCITRAL Model Law. The Saudi government has also taken a more proactive approach toward establishing greater stability in relevant markets and through improved rights protections for both domestic and international commercial parties.

371 Ibid 21-22.
372 Al-Jarbou plausibly asserts that ‘the impact of globalization and international trade and relations will not allow Saudi Arabia to remain isolated from the rest of the world by relying only on traditional ideas’. See Al-Jarbou (n 118) 198.
373 Baamir remarks that ‘Saudi Arabia concluded an investment promotion and protection agreement with the following 17 countries: Italy, Germany, Belgium, Taiwan, China, France, Malaysia, Luxembourg,
Nonetheless, the application of Saudi arbitration law to foreign investments and international commercial arbitral disputes appears to remain at odds with the main reason for resorting to international arbitration in the first place as a more flexible, faster and cheaper dispute resolution mechanism.

Therefore, it is no wonder that international arbitration has become a generally accepted method of dispute settlement among international contracting parties in relation to commercial transactions. Saudi Arabia must now apply those modernisation efforts and account for similar considerations regarding the recognition and enforcement of international commercial arbitral awards by bringing its interpretations of national law provisions in-line with those of the UNCITRAL Model Law and the New York Convention. Moreover, agents involved in international arbitration, whether arbitrators, parties or advisers, need to familiarise themselves with national laws before integrating international arbitration into their agreement, insofar as they are not represented in the majority of national legal systems. In other words, an international arbitral award is valid only by virtue of its recognition by a national law. Interestingly, some trading nations have developed a separate regime for arbitration of domestic and trans-national commercial disputes, for example, the London Court of International Arbitration.

While the Saudi government has relaxed its attitude toward international arbitrations, and has proven to be accepting of the recognition and enforcement of international commercial arbitral awards in Saudi Arabia, controversy remains among academics. There is no easy solution to the problem identified above,

Spain, Turkey, India, Republic of Korea, Philippines, Switzerland, Egypt, Singapore, and Austria. These agreements aim to promote and protect the investments of nationals and the enterprises of one contracting party in the territory of another by providing an appropriate legislative environment in which to stimulate and increase investment, trade and industrial activity’. Baamir (n 18) 114.

376 Al-Ammari and Martin remark, ‘both the New Arbitration Law and the Enforcement Law require that Shariah is not violated in the arbitration agreement, the arbitration process and the issued award. The requirements under these two new laws still present a challenge to international companies seeking to enforce their arbitral awards in Saudi Arabia. However, well prepared parties and arbitrators should be able to manage those issues. That can be done by taking the requirements of Shariah and these new Saudi laws into consideration throughout the arbitration process’. Al-Ammari & Martin (n 2) 408. Similarly,
particularly as it relates to the development of a newer, more comprehensive regime for the recognition and enforcement of international arbitral awards in Saudi Arabia. However, this study aims to address why and how international contracting parties are experiencing a variety of challenges relating to the recognition and enforcement of international commercial arbitral awards in Saudi Arabia and determine whether a new regime can be established and promoted for the Saudi arbitration system that can reconcile Shariah principles with global arbitral trends.

Baamir expresses that ‘the enactment of a new law will not necessarily mean the end for these existing problems’. Baamir (n 18) 49.
CHAPTER 3:
THE BASICS OF COMMERCIAL ARBITRATION AWARD ENFORCEMENT

3.1 Introduction

The previous chapter focused on the development of arbitration practices within the Saudi legal framework, including the provisions of the most recent arbitration and enforcement regulations, and then general reforms happening in the legislative and judicial branches.

This chapter shifts focus to discussing how an award reaches the point of recognition and enforcement in Saudi Arabia once issued by the tribunal and the issues faced in enforcing such awards in Saudi Arabia, whether foreign or domestic. This section will first consider the sources commercial transactions that give rise to the disputes and highlight the applicable contractual theories that pose challenges for non-Muslims and international commercial parties to getting an award recognized and enforced in Saudi Arabia. This chapter also distinguishes between the enforcement of domestic versus foreign arbitral awards and begins to identify the grounds on which the Saudi courts can refuse to recognize or enforce an award.

3.2 The Applicable Law in Commercial Contracts and Dispute Settlement

The law of arbitration, as it has evolved beyond the state and internationally, establishes a distinction between law of the contract and the governing law of the Arbitral Tribunal. In accordance with the principle of party autonomy, the contracting parties have freedom to nominate which national laws will govern the substantive law applicable to the contract, the curial law applicable to arbitration proceedings and the law of the seat of arbitration (the law of forum).\(^{377}\) In international commercial arbitration, the choice of law can be implied by the terms of the agreement. In deciding what rules ought to apply in the event of a conflict, a properly constituted arbitral may be called upon to

decide among the laws of the relevant legal systems to arrive at a decision. \(^{378}\) The law applicable to the contract will have a significant impact on the tribunal's interpretation of the rights and obligations arising from the contract in dispute. \(^{379}\) The law of the seat of the arbitration or *lex arbitri* is generally determined in accordance with the governing procedures of the tribunal. These procedures may be *ad hoc* (informal or pre-arbitration procedures), or institutionalised. \(^{380}\) In the latter of the above examples, tribunals are given wider latitude to autodetermine their own competency and jurisdiction to consider the admissibility and merits of a dispute referred to them. \(^{381}\)

It is also worth mentioning the law of the arbitration agreement. While the law of the arbitration agreement is usually the same as the substantive law of the contract, this is not always the case. In most cases, the applicable law of the contract is the same as the substantive law of the arbitration agreement. In exceptional circumstances, however, there may be a variance between specific clauses and the law governing the arbitration agreement. The next sections will examine the cases in which the applicable choice of law of an arbitration, and the underlying contract, in Saudi-seated arbitration interacts or even collides with other key principles of international commercial law and dispute settlement. \(^{382}\)

The law of contracts underpins all commercial transactions. In common law jurisdictions, contractual parties enjoy the autonomy to determine the terms of the contract to which they are bind and the laws that will govern a case should a dispute arise. \(^{383}\) The choice of law plays an important role in arbitration


\(^{380}\) For example, the London Court of International Arbitration (LCIA) recommends: ‘Any disputes arising out of connection with this contract, including any questions regarding its existence, validity or termination, shall be referred to a finally resolved arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause’.

\(^{381}\) For example in art. 16 (1) of the Model Law: ‘The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.’


procedure. Thus, to the extent that the Saudi Arbitration Law is implicated as either the procedural or substantive law governing a dispute or the law governing the enforcement of an arbitral award, it is crucial to have a sound understanding the Saudi arbitration law’s provisions and its relationship with the more widespread international arbitration law and procedures.  

When contemplating using arbitration as a means for resolving commercial disputes, it is important that the parties consider their rights, and any impediments to enforcing those rights, created by the substantive and procedural laws governing both the arbitration proceedings themselves and later enforcement efforts. Where there is lack of clarity over the applicable choice of law, this can create challenges for the recognition and enforcement of arbitral awards due to ‘the traditional notion in some legal systems that submission to a national court involves the implied acceptance of its substantive law’.  

In conventional contract law practice and theory, a contract is formed when there is a meeting of minds between two or more parties who demonstrate a clear intention to enter into a contract. To avoid disputes over the meaning of contractual clauses, contracting parties should make their intentions clear and memorialized in writing before concluding a commercial contract, particularly an international one, precisely because different legal systems may apply different standards and tests for determining the will of the contracting parties. For example, in certain jurisdictions, a contractual term can be read together with other provisions of the state’s own substantive law and may result in a specific definition or qualification of a particular term or clause in the disputed contract. This is particularly relevant in Islamic legal systems, wherein contracts containing non-Shariah compliant terms and provisions, including interest

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386 Fayyad (n 90) 204.
387 Ibid.
related or future clauses, may be rendered void and the offending contractual provision consequently nullified, in whole or in part.  

Many scholars have argued that state regulators should develop clear rules and principles of contractual law and regulation, thereby enabling commercial parties to exercise their contractual rights and obligations in all of their foreign and domestic commercial transactions. However, in the absence of a uniform international standard of contract interpretation, courts across variegated legal systems will often determine their willingness to enforce an award arising from an arbitral dispute in accordance with that jurisdiction’s applicable rules, often resulting in different legal outcomes from one state to another. Although it is not always possible at the contract drafting stage, the parties should give due consideration to the jurisdictions where assets are located and any future arbitral award may need to be enforced, and to effectively address any foreseeable impediments to enforcement when negotiating the terms of the transaction. This is a necessary measure for commercial actors who seek to eliminate uncertainty or conflict over the recognition and enforcement of arbitral awards.

This raises the important issue of the applicability and legitimate scope of national arbitration laws, including contract regulation and other mandatory laws in international commercial transactions because the successful party may seek recognition and enforcement of their arbitral awards in national courts. Some international treaties, such as the New York Convention, have been ratified by member states, including Saudi Arabia, to achieve harmonisation in international arbitration, particularly with regard to the recognition of arbitral awards by the enforcing member states' courts. However, in practice,

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389 For more extensive argumentation and references, see R Nygh, Autonomy in International Contracts (Oxford University Press, 1999); see also, Zakariyah (n 388) 255-285.
390 Nygh (n 383); see also D Choi, ‘The Tension Between Validation and Implied Intent Approaches in Finding the Law for the Agreement to Arbitrate’ (2016) 19(5) International ALR 121-29.
392 Nygh (n 383) 2.
394 Ibid.
diversity in national arbitration laws often defeats the application of these intended uniform standards governing the recognition and enforcement of international commercial arbitral awards.\textsuperscript{395} Where such model standards are silent on issues impacting the rights and standing of parties under national laws, such as the waiver of grounds for refusal of recognition and enforcement of international arbitral awards before the national courts, state regulators should seek to reform their arbitration regimes.\textsuperscript{396}

Reform of national arbitration law should aim to close gaps in the law in a manner that best reflects the harmonising aims of international arbitration regimes, while eliminating the potential for conflict between national and international rules on the finality, arbitrability and separability of arbitration awards, disputes and contractual clauses.\textsuperscript{397} By bridging this gap, disputing parties will benefit from strengthened guarantees in the enforcement of their rights, even when the implied or express terms of contract are unclear or contested. In short, the goal of reform is to ensure the effective enforcement of the final decision of the arbitrating body, in accordance with the applicable law of the contract.\textsuperscript{398}

Karton argues that in international arbitration the arbitral tribunal applies a law that is different from that which is applied by national court judges in the resolution of commercial disputes.\textsuperscript{399} In contrast, Zekos argues that there is no difference in the method of resolving a dispute between a court and an arbitral tribunal.\textsuperscript{400} He suggests that ‘a judge derives his authority from the sovereign, while an arbitrator derives his authority from the sovereign, but his nomination depends on the parties’ agreement’.\textsuperscript{401}

Yet, it has been argued that courts consider arbitration as a competitor of judicial trials. The is because arbitrators do not typically act like courts. For example, the

\textsuperscript{395} Ibid.
\textsuperscript{396} Ibid.
\textsuperscript{397} Garnuszek (n 48) 348-55.
\textsuperscript{398} Wolff (n 205) 470.
\textsuperscript{400} Zekos (n 337) 3.
\textsuperscript{401} Ibid.
control function of courts endows them with broad powers and competence to
determine matters of justice, including by balancing the rights of contracting
parties and the public interest in accordance with the wider objectives of national
law and policies.\textsuperscript{402} In contrast, arbitrators have a narrower mandate and more
strictly defined function. More specifically, they will generally be expected to
adhere the express terms of the contract as faithfully as possible. \textsuperscript{403} The
important point is that arbitration, as a mode of dispute settlement, imbues in
contractual parties the autonomous freedom to determine the terms of contract
that bind them, including where and how disputes are to be resolved. Further,
arbitrators will seek to apply the relevant choice of law, which has been chosen
by the contracting parties.\textsuperscript{404} Conversely, judicial authorities are obliged to have
regard for the rule of law of the state in which the court is seated.\textsuperscript{405} In practice,
this means that a country will apply its national arbitration rules when
contemplating the recognition or enforcement of any arbitral award, international
or domestic.

It should be emphasised, however, that the mere use of arbitration mechanisms
does not necessarily eliminate uncertainty over the meaning and usage of
contractual terms, or conflicts over the best theory or method of contract
interpretation in the case of dispute.\textsuperscript{406} Indeed, the prevailing view has been that
the law of contract will in most cases be assessed in accordance with the
‘closest connection rule’, which is typically the law of the place in which the
contract was made and performed. As Nye writes: ‘[T]he general rule is, in
conformity to the presumed intention of the parties, that the contract, as to its
validity, nature, obligation, and interpretation, is to be governed by the law of the
place of performance’.\textsuperscript{407}

It is therefore necessary to examine how the decision to arbitrate disputes arises
to enable further enquiry into whether contracting parties in their commercial

\textsuperscript{402} Ibid.
\textsuperscript{403} Ibid.
\textsuperscript{404} Ibid.
\textsuperscript{405} For a general discussion see R.J. Weintraub, International Litigation and Forum Non Conveniens,
\textsuperscript{406} S Sucharitkul, ‘The Role of the International Law Commission in the Decade of International Law’, in
M Brus, S Muller & S Wiemers (eds), The United Nations Decade of International Law, Reflections on
\textsuperscript{407} Nygh (n 383) 6.
agreements are able to exercise their autonomy in practice under Saudi arbitration law.408

3.3 The Parties’ Autonomy

Some argue that there is no freedom of contract or true party autonomy between the contractual parties in international commercial transactions.409 Rather, the ‘strong were able to impose unfair and oppressive bargains upon those who were weak and vulnerable’.410 To address this issue, state legislatures have on occasion intervened to limit the freedom of contracting parties to form their contract as a check on this power imbalance.411 While this goes against the traditional notions of party autonomy, one can defend of the intervention of state legislature’s in the private contract sphere on the grounds that dispute resolution and enforcement together form a necessary mechanism by which states are able to protect their political prerogatives and the public interest.412 In fact, contractual parties often attempt to avoid unfavourable legal consequences stemming from the contract by seeking protection from national contract regulations of contract on issues like unfair contract terms, equitable relief, and the like.413

Every legal system provides parties with the freedom to decide the terms of their own contracts in relation to their international commercial transactions. Once the terms are agreed to, the contract is binding on the parties. However, the burden is on the parties to understand how their chosen dispute resolution structure will play out in practice, including the effects of any applicable substantive, curial and mandatory provisions of national law (i.e. public policy or public order norms). Hence, the parties need to take extra care when drafting their commercial agreements and should take into consideration the prevailing

408 Park (n 184) 1-38.
410 Ibid 648.
411 Ibid 647.
positions of the implicated jurisdictions when developing their dispute resolution plan. For instance, currently, it should come as no surprise to a party that anticipates having to enforce an arbitral award in Saudi Arabia that the award needs to comply with Shariah law, even if this was not a requirement of the substantive law governing the dispute.

Horn and Schmitthoff further elaborate that contractual parties do not have to take into account mandatory laws in the *lex contractus* (the law of the contract); however, the contractual parties should be aware of the mandatory rules dictated by the public policies of the states whose laws governing the substantive contract and the enforcement of the ultimate arbitral award.\(^{414}\) Moreover, one can argue that in reality, parties’ autonomy in freely entering into contracts is limited mainly by the public policy rules of the state under whose law the arbitral awards are eventually recognised and enforced.\(^{415}\) In this regard, it has been persuasively argued that the nature of parties’ autonomy in international transactions as ‘a hierarchy of dependence, not independence, in which the individual’s bargaining position had become inferior to that of the organisation with which he was obliged to deal, whether as employee or client’.\(^{416}\)

In light of the above, one can question whether the principle of party autonomy is actually upheld in the resolution of international commercial disputes. Experience demonstrates that this principle is largely respected in dispute resolution proceedings. However, when the parties’ autonomy and the law conflict, it usually stems from the need to enforce an award in an unexpected jurisdiction. Different legal systems take different approaches to the interpretation of rights and duties of parties engaged in international commercial transactions governed by commercial contracts.\(^{417}\) When contractual parties draft their agreements, they are often unable to anticipate all potential disagreements over terms, changes in circumstance or other matters resulting

\(^{414}\) Horn & Schmitthoff (n 358) 10.  
\(^{415}\) N Natov, ‘The Autonomy of Arbitrators in Determining the Law Applicable to the Merits of a Case’, in Belohlavek & Rozehnalova (n 410).  
in future disputes relating to the performance and conclusion of the contracts should a dispute arises in the future.\textsuperscript{418}

Parties typically seek effective tools and remedies to enforce their rights or settle matters as disputes arise, giving them flexibility to allow for continuation, modification or termination of the contract as necessary, including providing for the remedies available when contractual terms are breached.\textsuperscript{419} This approach is consistent with the policy principles underlying the concept of party autonomy, which is ‘to provide flexibility in the negotiation of security agreements rather than restricting them to a uniform set of rules’.\textsuperscript{420} Flexibility can be introduced, as Akseli argues, through ‘minimal use of mandatory rules to achieve transparency and predictability of rights’.\textsuperscript{421}

However, when both international and national laws begin to intersect at the various stages of resolving a commercial arbitration dispute, concerns are raised suggesting that the national law should not govern international commercial contracts. Instead, international commercial law or transnational law should govern all phases of resolving the dispute. The benefit of this approach would be that the common usages of standard contract law terms and their definition as embodied by the accepted legal norms are more likely to give effect to the contractual terms and obligations agreed by the contracting parties.\textsuperscript{422} This enables international contractual parties to utilise contract agreements as their means of planning and controlling their future outcomes.\textsuperscript{423} While an ideal approach that allows for phases of dispute resolution to be governed by laws chosen by the parties, this fails to address the procedural mechanics of recognition and enforcement and the often lack of compatibility between the laws from one jurisdiction to another.

\textsuperscript{420} Akseli (n 417)114.
\textsuperscript{421} Ibid.
\textsuperscript{422} GC Moss, International Commercial Contracts, Applicable sources and Enforceability (Cambridge University Press, 2014) 61.
\textsuperscript{423} Greig & Davis (n 416) 27.
The idea of applying national law during dispute resolution involving international commercial transactions has always been contentious because the sources of national law are primarily structured to govern domestic transactions.\(^{424}\) This underlines the importance of having a national law that reflects current global trends in commercial arbitration and expressly contemplates the need to recognise and enforce both foreign and domestic arbitral awards. However, when it comes to addressing the substance of the dispute, an alternative to identifying a substantive national governing law under the choice of law rules would be to allow the arbitrators to resolve the dispute in accordance with the *lex mercatoria*. Under this approach, the arbitrator would determine the disputes in accordance with the intention of the contractual parties by using *lex mercatoria*, as it consists of the general principles of law of contract and customs and usages of merchants in their commercial transactions. In this way, national laws are used to effectuate those awards, providing as much credence to the law governing the substance of the dispute as is possible.\(^{425}\)

Looking at the scope of party autonomy, it is apparent that the applicability of the choice-of-law (national legislation) rules and *lex mercatoria* represent radically different approaches to the same problem in international commercial transactions.\(^{426}\) However, the purview of these two options is limited to substance of the dispute. The closest thing to *lex mercatoria* when it comes to the recognition and enforcement of arbitral awards is the New York Convention, but it is still often modified by or subject to the member state’s domestic laws and policies.

### 3.4 How National Law Affects Both Domestic and International Arbitrations

The principle of sovereign autonomy contends that law making authority is within the exclusive purview of the state. The context of arbitration and

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\(^{425}\) Ibid.

enforcement law, national arbitration laws often are primarily developed or
enacted to deal with local or domestic problems.\textsuperscript{427} When it comes to dealing
with a national arbitration law, international commercial actors seek to limit their
exposure to arbitrary interventions by the state, including unfair or unilateral
modification of contract terms by state parties justified on public policy
grounds.\textsuperscript{428} For example, one concern is that a government may amend the
governing law to its advantage after the contract is made as was the context for
the Aramco dispute.\textsuperscript{429} The underlying concern in such situations is the
perpetual uncertainty over how a dispute relating to international commercial
transactions will be resolved.\textsuperscript{430} It should be emphasized that these concerns
are not just limited to dealings with the state. The possibility that a state will
amend its laws can also significantly affect future enforcement efforts within a
particular jurisdiction.

When a prevailing party from an arbitration submits their arbitral award before
the national courts for recognition and enforcement, the national courts are
required to give effect to the mandatory rules of the governing state on
enforcement matters.\textsuperscript{431} It is at this point that a national court may seek to set
aside a final arbitral award, which was decided based on foreign national or
international rules, on the grounds that it violates the public policy principles or
mandatory provisions of the national law of the enforcing state.\textsuperscript{432} On the whole,
it is evident that the rights of international commercial parties are most
effectively safeguarded when they have a working knowledge of the rules that
will apply to the operation of a contract and the resolution of a dispute. This
knowledge will allow them to take measures to protect their contractual rights.\textsuperscript{433}

Considering the above, it becomes clear that that the choice of law governing
the substance of the dispute is inseparable policies national laws on
enforcement. The two must be aware of the other’s existence and any award

\textsuperscript{427} O Lando, ‘The Lex Mercatoria in International Commercial Arbitration’ (1985) 34(4) \textit{ICLQ} 754.
\textsuperscript{429} Lando (n 427) 748.
\textsuperscript{430} Ibid.
\textsuperscript{431} P Freeman, ‘\textit{Lex Mercatoria: A Legal Basis for the Resolution of International Disputes}’, in de Zylva
& Harrison (n 220) 121.
\textsuperscript{432} Lando (n 427) 747.
\textsuperscript{433} PC Jessup, \textit{Transnational Law} (Yale University Press, 1956) 106-07.
must take into account the jurisdictions in which it is to be enforced for any award to be effective. The goal of such foresight is to reduce legal uncertainty in international commercial transactions.\(^{434}\) Bearing this in mind it is appropriate to briefly discuss the scope of choice of law in international commercial transactions. This will help to clarify the importance of choice of law in international arbitration, particularly for recognition and enforcement of international arbitral awards in the enforcing state. Rules governing the choice of law in international commercial contracts are designed to fill any gaps in the applicable legislation or indeterminate principles related to the contract, therefore bringing about a more effective and stable system for resolving of any disputes that arise between the contractual parties.\(^{435}\)

### 3.5 Effect of Choice of Law on Recognition and Enforcement of Arbitral Awards

Choice of law is a fundamental principle in international commercial contracts.\(^{436}\) By prioritizing the parties’ choice of law in international commercial transactions, the arbitrators are able to refrain from undertaking a conflict of laws analysis.\(^{437}\) The ability to choose the law governing the dispute is often a large draw for parties when deciding to commit to an arbitration clause, but practically speaking, the contractual parties cannot determine with absolute certainty every rule that will be applicable in resolving their contractual disputes in international commercial transactions.\(^{438}\) For example, when applying the chosen procedural and curial law for governing the dispute, it is imperative that the arbitrator understands what powers the arbitration agreement or arbitration clause attempts to confer upon him because such a clause might be invalid under the chosen law.\(^{439}\) In this sense, the arbitrator should not only give effect to parties’

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\(^{438}\) Gertz (n 432) 172.

autonomy, but also understand how choice of law operates in the international arbitration setting, as a failure to properly abide by the chosen governing law may be the reason why a national court could refuse to recognise or enforce an arbitral awards issued elsewhere.\textsuperscript{440}

Thus, in international arbitrations the arbitrator invariably applies the parties' chosen law,\textsuperscript{441} rather than the rules of national law or private international law.\textsuperscript{442} Neither does the arbitrator rely on the solutions available from trade usage under the \textit{lex mercatoria} in resolving the dispute.\textsuperscript{443} The combined application of the rules of national law and the principles of \textit{lex mercatoria} in international arbitration is highly controversial, especially where there are no generally accepted rules of an arbitrator’s liability in rendering an arbitral award.\textsuperscript{444} Since the arbitrator derives his powers from the parties’ autonomy, the arbitrator is also bound to resolve the disputes according to the authority conferred upon him by the arbitration agreement or the procedural rules chosen by the parties.\textsuperscript{445} Consequently, if the disputes relates to matters that exceed the scope of the arbitration agreement or are otherwise non-arbitral under the chosen substantive law, the relevant national courts to which the award is submitted for recognition may deem the award invalid and unenforceable.\textsuperscript{446}

Some scholars suggest that as long as national arbitral laws differ, the arbitrator must submit to the scope of jurisdiction from the parties’ choice of law when

\textsuperscript{440} Lando (n 423) 747.
\textsuperscript{441} Ibid.
\textsuperscript{442} It is a branch of the State legislation. The main source of the private international law consists of domestic laws enacted by the State legislation; the judgments rendered by the State judicial system; treaties and uniform laws. Generally, it is interpreted when the court deal with the foreign elements. It should be noted that the scope of private international law is different from State to State.
\textsuperscript{443} B Goldman, 'Lex Mercatoria' (1983) 3 \textit{Forum Internationale} 1; see also Lando (n 427); B Goldman, ‘The Applicable Law: General Principles of Law- The Lex Mercatoria’, in Lew (n 439) 117.
\textsuperscript{445} Jarvin (n 439) 52-53.
\textsuperscript{446} Lew (n 435) 73; see also KS Rokison, ‘The Sources and Limits of the Arbitrator’s Powers in England’ in JDM Lew (ed), \textit{Contemporary Problems in International Arbitration} (Matinus Nijhoff Publishers, 1987), 86. Khalil emphasises that domestic courts have a great role to play in international commercial transactions. See Khalil (n 428) 2.
determining the validity of the arbitration agreement.\textsuperscript{447} For example, arbitrators do not have the power to determine a dispute that is outside the scope of his authority, unless the contractual parties agree to confer the arbitrator with special jurisdiction to decide that particular dispute.\textsuperscript{448} If such a provision has not been consented to by the contracting parties, the award may not have a binding effect.\textsuperscript{449} This presents challenges that may directly impact the recognition and enforcement of arbitral awards in national courts. Many of these challenges stem from the fact that arbitration clauses have a contractual character that obliges the parties to arbitrate their disputes before pursuing other legal remedies through the courts.\textsuperscript{450} Thus, one cannot overstate how crucial it is that the arbitrator and arbitral parties understand the substantive law of the enforcing state, particularly with respect to any mandatory laws with which the parties are required to comply in the course of transacting the agreement or executing their contractual duties.\textsuperscript{451}

Having spoken about choice of law generally, let us now return the focus to Saudi Arabia and the legal tests used to determine the applicability of foreign or international laws as judged by the Saudi-mandated system of Shariah law. Shariah law is not only embedded in Saudi legislation, but is treated by Saudi authorities and subjects as a supreme source of divine law.\textsuperscript{452} As such, from the Saudi perspective, it trumps the applicability of all other legislation. Given the importance of the parties understanding the law of the enforcing state, we once again confront the perennial challenge of how to improve foreign parties’ and arbitrators’ understanding of Saudi arbitration law and its relationship with international law.\textsuperscript{453}

\textsuperscript{447} Lew, Mistelis & Krol (n 2).
\textsuperscript{448} See Gaillard (n 218).
\textsuperscript{449} Rokison (n 446) 90.
\textsuperscript{450} Ibid.
\textsuperscript{451} Allen (n 220) 51.
\textsuperscript{452} For example, Schacht says Shariah is a sacred law. See J Schacht, \textit{An Introduction to Islamic Law} (Oxford University Press, 1964) 1. For a more detailed analysis of the scope of Shariah law also see K Dajaraouane & CJ Serhal, ‘Choice of Governing Law in Islamic Finance Agreements’ (2009) 2 IBlJ 115.
3.6 Understanding the Recognition and Enforcement of Awards in Saudi Arabia

Up to this point, the discussion has focused on the development of arbitration practices in Saudi Arabia, the general reforms taking place within the arbitration landscape in the Kingdom and the relationship that Shariah principles have in various arbitration environments. This section shifts the focus to the practical mechanics of arbitral award recognition and enforcement in light of the foregoing discussion.

3.6.1 Differentiating Between Domestic and International Arbitration

The first important aspect for assessing the applicability of the laws on the recognition and enforcement of arbitral awards is to determine what constitutes a domestic arbitral award versus an international arbitral award. Prior to the 2012 law, there was significant debate among scholars over the status of arbitration proceedings involving Muslim and non-Muslim parties. Generally speaking, any arbitration that takes place between Saudi individuals or businesses within Saudi Arabia will constitute domestic arbitration proceeding and will result in a domestic arbitral award. Additionally, an arbitration taking place between a Saudi party and a foreign party seated in Saudi Arabia and applying Saudi law would constitute a domestic award. Further, if an arbitration relates to a contract performed in Saudi Arabia between two foreign parties and the arbitration is seated in Saudi Arabia and governed by Saudi arbitration law, this would result in a domestic arbitral award.

Defining what constitutes an international, or foreign, arbitral award is a bit more complex. There are a number of circumstances that arguably give rise to a foreign arbitral award under Saudi law. First, there is the classic definition of a foreign arbitration—an arbitration taking place outside of Saudi Arabia between two foreign parties. Under these circumstances, any attempt to enforce the foreign arbitral award would likely relate to one party having assets that could

454 Saudi Arbitration Law (‘SAL 2012’) issued by Royal Decree No. (34/m) dated 24/05/1433 H. (corresponding to 16/04/2012), Kingdom of Saudi Arabia Bureau of Experts at the Council of Ministers.
be attached to satisfy the award within the Kingdom. Similarly, if the arbitration takes place within Saudi Arabia, but all of the parties are foreigners or non-Muslim citizens, the arbitration may be deemed a foreign arbitration and result in a foreign award, depending on the procedural (curial) and substantive laws applied in forum of arbitration. Further, it has also been accepted that an arbitration taking place abroad between two Saudi parties, even if governed by Saudi and Shariah law, may also result in a foreign arbitral award.

The passage of the New Arbitration Law of 2012, helped clarify how the Kingdom would view such matters and delineated the circumstances under which an arbitration would be international or foreign, thereby resulting in a foreign arbitral award. Article 3 of the New Arbitration Law provides that an arbitration shall be international if the dispute relates to international commerce and one of the following occurs: if the parties have their head offices in more than one country at the time the arbitration agreement is concluded; if the parties have their office in the same country but either the arbitration venue is outside of that country, the place where the contract is performed is outside of that country, or the place most connected to the subject matter of the dispute is outside of that country; both parties agree to submit the dispute to an arbitral institution outside of Saudi Arabia; or finally if the dispute covered by the arbitration agreement is connected to more than one country.\textsuperscript{455}

The importance of this distinction relates to the national judge’s power in reviewing and enforcing an arbitral award. In the case of foreign awards, the judge is limited to considerations of whether the law complies with the Shariah provisions of Islamic law. If the law does not comply with the prohibitions or authorizations adhered to in Saudi society, a judge may refuse to enforce the award on public policy grounds. The standards that are generally accepted for public policy refusals is if the award represents a flagrant injustice or is contrary to Islamic morals. If the award is a domestic award, the judge has slightly broader authority in that the underlying proceedings would have been governed by Shariah law and the award should also be Shariah compliant. If the award is

\textsuperscript{455} Saudi Arbitration Law 2012, art 3.
not compliant, then the court can set aside the award under the New Saudi Arbitration Law.

3.6.2 When Does the Saudi Arbitration Law Apply?

Simply put, the New Saudi Arbitration law applies by default to any arbitration taking place within the Kingdom of Saudi Arabia and to any international commercial arbitration should the parties agree to submit to Saudi law. This latter circumstance is a possibility that the old arbitration law did not contemplate.456

Article 2 of the New Arbitration Law delineates when arbitral proceedings are subject to Saudi Law. It is important to note that Shariah law always take precedence over codified laws. Specifically, Article 2 provides that the terms of the law are ‘[w]ithout prejudice to provisions of Islamic Sharia’. The article then further provides that the arbitration law’s provisions are also subject to any ‘international conventions to which the Kingdom is a party’. In essence, this delineates the hierarchy of applicable law to be Shariah, followed by international conventions,457 then Saudi national arbitration law. Accordingly, while Article 49 of the new Saudi Arbitration Law implies that awards are final and non-appealable, it nevertheless establishes methods for setting certain awards aside. For instance, Article 8 allows awards in international commercial arbitration to be reviewed by a competent Riyadh Court of Appeals (unless agreed to otherwise). In practice, this means that Shariah law and the Saudi Arbitration Law will apply to domestic arbitrations; whereas foreign arbitrations will be subject to the parties’ choice of law coupled with international treaties, then subject to Shariah to the extent that a party seeks to enforce an arbitral award within the Kingdom.

456 Implementing Regulations, art 2. Royal Decree No. M/53 dated 13 Sha’baan 1433H, corresponding to 3 July 2012G. The Enforcement Law was published in the official gazette, Um Al-Qura in Issue No. 4425, Year 90, 13 Shawal 1433H, corresponding to 31 August 2012G. The Implementing Regulations of the Enforcement Law were published on 17 Rabi II 1434H corresponding to 28 February 2013G
In determining the circumstances in which Saudi national law will apply, Article 2 holds that: ‘[T]his Law shall apply to any arbitration regardless of the nature of the legal relationship of the dispute, if [the] arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this law.’ Thus, it is now possible for parties conducting arbitrations outside the Kingdom to choose to apply Saudi law to facilitate the easier enforcement of arbitral awards within Saudi Arabia. However, while the law applies generally to commercial matters, there are certain commerce subject matters where the Arbitration Law does not apply. These include personal status matters, criminal matters, public matters and administrative law matters—circumstances that the Kingdom has determined are not suitable for referral to arbitration.

One marked difference between the old Saudi arbitration law and the new law, is the old arbitration law subjected arbitration to the supervision of Saudi national courts, thus involving the judiciary in proceedings that by their nature are intended to private and autonomous. The two most common phases of dispute resolution in which the courts would become involved were at the initiation of proceedings and the enforcement of awards. The court’s involvement was founded on the argument that it was responsible for ensuring the compliance of the proceedings with Shariah law. In reality, this often resulted in a full review of the dispute by the courts. Under the New Arbitration Law, this scope of review has been tailored. While the courts still perform a supervisory role to some extent, the permissible lines of inquiry are limited as explained in the following section.

459  See H.Mohd. Sharif Al Mulla, Conventions of Enforcement of Foreign Judgments in the Arab States, 14 ARAB L. Q. 33, 55 (1999) (who explains that judicial authority has no warrant to examine merits of the case when enforcement is sought under the Arab League Convention).
3.6.3 Key Aspects of the New Arbitration Law

While Chapter 2 focused on the reasons for Saudi arbitration reform, this section explores some of the key aspects of the new arbitration law. The 2012 Arbitration Law represents a more comprehensive approach to governing arbitration in Saudi Arabia than has ever existed in the past. Primarily, the New Arbitration Law simplified the dispute resolution process and streamlined the process and requirements for enforcing arbitral awards. The current Saudi Arbitration line aligns itself with many global trends in commercial arbitration, which is no doubt the result of the legislature taking heavy inspiration from the UNCITRAL Model Law.

Among the more ADR friendly provisions contained in the New Arbitration Law are: affording greater independence to the arbitral process; enhancing and clarifying the procedural powers of the arbitral tribunal; and streamlining the process for the enforcement of arbitration agreements and arbitral awards through the national courts. Among other important features, the new law permits the separability of an arbitration agreement from the remainder of the commercial contract and expressly recognizes the parties’ autonomy to make decisions regarding the applicable procedural and substantive laws, the venue, arbitral tribunal composition and other procedural matters. However, all actions taken, and decisions made, during the arbitral process must still comply with Shariah principles. This modernisation of the arbitration framework was an attempt to harmonise the Islamic jurisprudence of the Hanbali school with the prevailing developments in the world of modern commercial arbitration.

With regard to arbitral awards specifically, the New Arbitration Law provides clear legal guidelines for the nullification of arbitral awards. This change helped close a significant gap in the prior arbitration law that did not address

464 Kaggiani (n 310) 16.

465 Article 1 of the Basic Law of Government which delineates the powers of state organs, and sometimes described the Constitution states that its legal system is founded upon ‘the Book of God (the Quran) and the Sunnah of his Prophet. The Basic Law partially fulfills the role of the Constitution as it organizes the rules of power’.
nullification. Under the old law, award nullification was considered on a case-by-cases basis, taking into account the form and merits of the award. This process often added significant time and expense to the arbitral process. This new nullification procedure clarifies the bases on which an award can be invalidated and brings the Saudi arbitration regime in line with contemporary arbitral standards.

Next, the law has addressed the circumstances under which an award be appealed. As suggested above, Article 49 of the New Arbitration Law provides that an award can only be appealed on the grounds that the award is invalid. The law further elaborates on these grounds by delineating the reasons for which an award can be declared invalid in Article 50. Part of the appeal process is asking that the court set aside the award on the grounds that the award is invalid. Yet, notably under Article 54 of the new law, a challenge to validity of the award does not result in an automatic stay of enforcement proceedings. This is an instance where the court is provided with broader discretion to determine whether the request to set aside the award or the request to stay enforcement are based on ‘serious reasons’. Unfortunately, the law does not define what constitutes a ‘serious reason’, but one scholar suggests that any reason to believe an award violates Shariah or public policy would likely be sufficient to warrant a stay of enforcement.  

3.6.4 How Awards Are Rendered

Once arbitral tribunals have been initiated, there is typically a timeframe within which the arbitral tribunal must issue the arbitral award. While this will vary depending on the procedural rules governing the arbitral proceedings, under the New Saudi Arbitration Law the tribunal has twelve months from the start of the proceedings to issue an award, with the ability to extend this deadline for an additional six months if needed. If an award is not rendered within the designated time period, either party may request that the arbitration

467 Ibid 29.  
proceedings be terminated and jurisdiction over the dispute transferred to the courts.

Additionally, there are requirements on the number of arbitrators that must agree on the outcome of the proceedings for an award to be made. Under the UNCITRAL Model Law, the parties are permitted to agree on how the arbitrators may issue the award.\textsuperscript{469} However, the New Arbitration Law requires that a majority of the arbitrators agree on the award and the parties are unable to override this provision by agreeing otherwise.\textsuperscript{470}

Further, both foreign arbitration laws and the New Arbitration Law set forth certain requirements that must be met with regard to the form and contents of the arbitral award. Those under the New Arbitration Law are actually more formal than those required by the UNCITRAL Model Law and most other jurisdictions. First, the arbitral awards must be in writing and signed by the arbitrators.\textsuperscript{471} The award must also clearly state the reasons upon which the award is issued in all proceedings, the parties may not opt out of this requirement.\textsuperscript{472} Finally, the New Arbitration Law requires the following details to be clearly presented in the arbitral award: the date and place of issuance of the award; the names and addresses of the parties; the names, titles, addresses, and nationalities of the arbitrators; a summary of the arbitration agreement, the parties’ oral and written pleadings, applications, documents, and any expert reports; the verdicts; and the arbitrators’ fees, arbitration expenses, and the allocation of these expenses among the parties.\textsuperscript{473}

Once the award is drafted and signed by the arbitrators, the award must be delivered to the parties within fifteen days of its issuance. Further, the award may not be published unless the parties expressly agree to its publication in writing.\textsuperscript{474}

\begin{itemize}
\item \textsuperscript{469} UNCITRAL Model Law, art 29.
\item \textsuperscript{470} Saudi Arbitration Law 2012, art 39.
\item \textsuperscript{471} Ibid art 42.
\item \textsuperscript{472} Ibid.
\item \textsuperscript{473} Ibid.
\item \textsuperscript{474} Ibid art 43.
\end{itemize}
3.6.5 Finality of Arbitral Awards

Part of the appeal of arbitration proceedings is that arbitral decisions are final. The New Saudi Arbitration Law recognizes this principle to a certain extent, providing that ‘[a]rbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law’. Such an action to nullify is essentially a limited form of appeal of the arbitral decision to competent courts. In determining the appropriate court to file an appeal, Article 8 provides that ‘[t]he court of appeal originally deciding the dispute shall have jurisdiction to consider an action to nullify the arbitration award and matters referred to the competent court pursuant to this Law’. Further, when an international commercial arbitration is involved, ‘the court of appeal originally deciding the dispute in the city of Riyadh shall have jurisdiction, unless the two parties to arbitration agree on another court of appeal within the Kingdom’. The limited grounds on which an action to nullify award can brought include: the lack of or invalidity of an arbitration agreement; a party’s lack of capacity when entering into an arbitration agreement; insufficient notice to a party to the arbitration to allow him to present a defence; if the tribunal failed to apply the rules agreed upon by the parties; if the appointment of arbitrators is inappropriate and in violation of the arbitration law; if the award exceeds the scope of the issues presented for arbitration; or if the award is made without regard to conditions affecting its substance or as the result of void arbitration proceedings.

3.6.6 Enforcement of Arbitral Awards

The Enforcement of Arbitration Awards is governed by Chapter 7 of the New Arbitration Law. Specifically, it provides that an ‘arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be

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475 The principle of finality of the award and authority of a tribunal to determine their own competence to decide issues is partially codified in Article 19 of the 1975 ICC Rules and Article 25 (1) of the 1998 ICC Rules.
476 Ibid art 49.
477 Ibid art 8(1).
478 Ibid art 8(2).
479 Ibid art 50.
To enforce an arbitral award, ‘a party must file a request for enforcement with the competent court and the competent court shall issue an order for enforcement accompanied by an original or attested copy of the award, a true copy of the arbitration agreement, an Arabic translation of the award if not issued in Arabic, and proof of deposit of the award with the competent court’.  

Additionally, Article 55 of the new law sets forth three conditions that must be met and verified by the competent court before an arbitral award will be enforced. First, the award must not contradict any award or decision rendered by a court, board or committee having jurisdiction over the settlement of the dispute in Saudi Arabia. Second, the award must not violate Shariah or any other form of public policy in the Kingdom. Finally, the party against whom the award is to be enforced must have been properly notified. These requirements mirror the provisions of the arbitration laws of neighbouring Middle Eastern countries, including the UAE and Qatar.

3.6.6.1 Enforcement of Domestic Arbitral Awards

In a domestic arbitration, a Saudi court will consider and apply the provisions of the national arbitration law, in this case the New Arbitration Law, along with Shariah principles when determining whether to recognize or enforce the arbitral award. When an arbitral award is issued through proceedings conducted in accordance with national arbitration laws, most schools hold that these awards are de facto enforceable. However, the issue with enforcement is that arbitrators themselves do not have the authority or ability to enforcement the award or compel the parties to comply. Thus, award enforcement necessitates the cooperation of competent national courts to effectuate arbitral awards in the event a part does not voluntarily comply. As a general rule, the newly established enforcement judge is limited in what it may consider during

480 Ibid art 52.
481 Ibid.
483 Ahdab & El-Ahdab (n 253) 49.
recognition and enforcement proceedings.\textsuperscript{484} Article 2 of the new Enforcement Law, authorizes the Enforcement Tribunal to review and enforce such awards related to commercial, private, and international matters. Notably, Article 10 provides allows for any decision of the Enforcement Judge to be appealed to the Supreme Administrative Body of the Board.\textsuperscript{485} The review jurisdiction of the enforcement judge is not clear, and a degree of uncertainty surrounds the basis on which the Judge can refuse to enforce a judgment deemed to contravene Shariah law.\textsuperscript{486} One possible reading is that while a judge may not use an enforcement action as an opportunity to review and opine on the substantive merits or reasonableness of the arbitral award it is, however, authorised the scrutinise the procedural conditions in determining the validity of the award.\textsuperscript{487} This includes considering whether there was a valid agreement to arbitrate, whether the award was, in fact, rendered by the arbitrators, and whether the award deals with the subject of the dispute. If there the judge finds procedural defects or issues with the arbitral proceedings, the judge may refuse to recognise or enforce the arbitral award.\textsuperscript{488} In fact, depending on the circumstances, a judge may even completely set aside the award if he determines that it amounts to a flagrant error, an injustice to the parties, or is contrary to public policy.\textsuperscript{489}

\textsuperscript{484} The execution judge now assumes review functions once reserved for Board of Grievances, was only recently introduced New Enforcement laws which came into effect on March 2013 by issue of Royal Decree No. M/53 (the ‘Enforcement law 2013’ hereinafter) in parallel to the Saudi Arbitration Law 2012. Under the 2007 Board of Grievances Law, parties who sought enforcement of arbitral awards before the Board were often exposed to entire retrials of an original dispute based on the merits of Shariah law. Article 13(g), The Board of Grievances Law 2007.

\textsuperscript{485} The New Enforcement Law, Royal Decree No. M/53 of Sha’ban 1433 Hejra corresponding to July 3, 2012, Georgian.

\textsuperscript{486} Article 11 of the new Enforcement Law states that the Enforcement Judge may enforce a foreign arbitral award only on the basis of principles of reciprocity and if the party seeking enforcement can ensure that (i) Saudi courts, specifically the commercial courts of Board of Grievance, do not have jurisdiction with regards to the dispute, (ii) the award was rendered following proceedings in compliance with the requirements of due process, (iii) the award is in final form as per the law of the seat of the arbitration, (iv) the award does not contradict a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in Saudi Arabia, and (v) the award does not contain any clauses which contradict Saudi public policy.

\textsuperscript{487} See, e.g., N. B. Turck, Resolution of Disputes in Saudi Arabia, (1991) 6 Arab L.Q. 3, 4 (explaining that Saudi Arabian courts continue to asset general jurisdiction over any commercial dispute before them);

\textsuperscript{488} Ibid. For general reference see Board of Grievance Case No. 944/1/Q of 1983 (1403 AH), decision of the Review Committee No. 116/T/1 of 1988 (1408 AH).

\textsuperscript{489} Ala Eddine, Muine Al-Mahakkam (1973) 25.
Exercised appropriately this judicial enforcement review authority is intended to serve a supervisory function over domestic arbitral proceedings to ensure that they are being conducted in compliance with the governing national laws. However, in practice, judges have difficulty limiting their scope of consideration with regard to the issues presented before them and often engage in a review of the merits in making their determinations. We might draw an analogy from US law to argue that this amounts to an impermissible ‘second level of jurisdiction’ over the arbitral award.\textsuperscript{490}

\textbf{3.6.6.2 Enforcement of International Arbitral Awards}

Increasingly, there little support for the argument that enforcement of a foreign arbitration award should be set aside on public policy grounds.\textsuperscript{491} In the US, for instance, the enforceability of both foreign arbitral awards and agreements to arbitrate is widely upheld, even though public policy exceptions are frequently invoked.\textsuperscript{492} US courts have consequently enforced foreign awards involving non US parties, even when ‘a contrary result would be forthcoming in a domestic context’.\textsuperscript{493} The US jurisdiction consequently is a paradigmatic example of a jurisdiction which favours arbitration agreements, regardless of whether these contravene the procedural and substantive policies a state.\textsuperscript{494}

\textsuperscript{490} For a general discussion, see Cedric Ryngaert, ‘A Reasonable Exercise In Jurisdiction’ in \textit{Jurisdiction In International Law} (2\textsuperscript{nd} Edition Oxford University Press, 2015) 14.
\textsuperscript{491} Most national jurisdictions have enacted or amended their national arbitration law with the aim of substantially limiting the grounds on which an award can be set aside. This trend notwithstanding, many jurisdictions do provide warrant for national courts to challenge awards on grounds of lack of jurisdiction or procedural irregularities. In English law, courts may hear appeals against an award on the merits (e.g. on a point of law) However, even in the UK, natural justice remedies, including judicial review of arbitral awards, may, nonetheless, be excluded from an arbitration agreement with the consent of all parties. Civil jurisdictions have followed suit. For instance, Belgium amended its Uniform Law of 1972 in 1985, which significantly the grounds on which an arbitral award issued in a delocalized forum to be set aside (which were limited to those procedures where a party with a connection to Belgium was party to the dispute). See generally, A. Samuel, \textit{Jurisdictional problems in International commercial arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West Germany}, (Schulthess polygraphischer Verlag, Zurich, 1989) p.2-8.
International arbitral awards bring with them a dichotomous struggle for the courts in Islamic states. Many Middle Eastern countries have begun to construct public policy defences more narrowly in respect of enforcement proceedings.\(^{495}\) Lebanon, a prime example of a country which has made significant efforts in this direction, has incorporated a provision in its national arbitration which provides a more limited exception of ‘international public policy’.\(^{496}\) The implication that the invocation of a public policy defence as the basis for refusal or non-enforcement would only stand if the awards were found to infringe international norms of morality and justice, including customary principles of sanctity of contract or *pacta sunt servanda*\(^{497}\) (in addition to other international norms or rules of treaty interpretation such as *rebus sic stantibus*).\(^{498}\)

Let us now consider the perspective of Saudi Arabia. Islamic laws recognise that non-Muslims are free to conduct their business relationship as they please and are not limited to the religious values and prohibitions contained under Shariah law.\(^{499}\) However, if a Muslim becomes a party to the contract, then Shariah law is implicated and the contract must comply with its provisions.\(^{500}\) In practice this means that non-Muslims can enter into contracts that would be prohibited between Muslims or if a Muslim was a party to the contract. Yet, the implications of Shariah go beyond applicability to the contract itself and are implicated when attempting to enforce an international arbitral award within the Kingdom regardless of whether Shariah was applicable to the substance of the

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\(^{497}\) This refers to the principle of ‘changed circumstances’ The *rebus sic stantibus* doctrine is regarded as a general principle of international law, as embodied by Article 62 of the Vienna Convention on the Law of Treaties of 1969, see Gabčíkovo–Nagymaros Project (Hung./Slov.), 1997 ICJ 92 (Sept. 25), *Other* emerging norms of the international community, including access to justice, including rules on the protection of aliens, access to justice, fundamental human rights.

\(^{498}\) In *Sapphire Int’l Petroleum Ltd. V. National Iranian Oil Co.*, 35 ILR 136 (1963) at ¶ 51, the tribunal averred that sanctity of contract is a ‘fundamental principle of law which is constantly being proclaimed by international courts, that contractual obligation undertaken must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship’.


dispute. This stems from the requirement of Shariah compliance with all actions taken by the court, including in enforcement activities.

Foreign or international arbitral awards are enforced in Saudi Arabia pursuant to its status as a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Saudi Arabia became a party to the New York Convention on April 19, 1994. The Convention requires that all signatory states must recognize the arbitration agreements and awards issued by other member states.⁵⁰¹ By acceding to the Convention, the Kingdom hoped to increase its position in the modern international commercial community.⁵⁰² This served as a signal to the world that Saudi Arabia was abandoning its mere tolerance of arbitration in the aftermath of the ARAMCO proceeding and becoming more welcoming to commercial arbitration practices within the Kingdom.⁵⁰³ The hope was that its adoption of the New York Convention would increase foreign investors’ confidence in engaging in commercial activities in the KSA because they would know that the Saudi courts would honour a dispute adjudicated by a non-Saudi tribunal.⁵⁰⁴ However, in practice this is not always the case. In contrast with other ‘arbitration friendly’ Middle Eastern jurisdictions, Saudi Arabia adopts a more ambivalent approach as to the public policy standards that may be considered on review during enforcement proceedings.⁵⁰⁵ Notably, prior to its accession to the New York Convention, Saudi Arabia asserted it sovereign right to require petitioners seeking enforcement of their foreign arbitral awards to allow for domestic review of entire merits of the dispute.⁵⁰⁶

3.6.6.3 Reasons for Refusing to Enforce an Arbitral Award

⁵⁰⁴ Ibid.
Despite the binding nature of arbitral awards, there are limited circumstances under which the competent court may refuse to recognise or enforce an arbitral award, either foreign or domestic. The most commonly used grounds for refusing to enforce an arbitral award is that the award violates Saudi Arabia’s public policy.

3.6.6.3.1 Refusing to Enforce Domestic Awards

There are two points at which the courts can refuse to enforce an arbitral award. The first is when a party brings an action to nullify the award. Under the New Arbitration Law, ‘[t]he competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom’.\textsuperscript{507} The second circumstance is when a party attempts to enforce an arbitral award. When filing the request for enforcement with the competent court, the court can evaluate the awards compliance with Shariah principles and may \textit{sua sponte} refuse to recognise or enforce any arbitral award that violates public policy.

In Saudi Arabia, public policy equates to Shariah laws and principles.\textsuperscript{508} This is supported by a passage in the \textit{Hadith} that state ‘Muslims must comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized’. Taymiya further explains this quote, stating that ‘[t]he rule in contracts and provisions is that anything is permitted which is valid and that only what is forbidden or annulled by the text of by \textit{Qiyas} (reasoning by analogy) is forbidden’.\textsuperscript{509} Simple examples of contracts or awards that would violate public policy include ones that contain \textit{gharar} or \textit{riba}.

3.6.6.3.2 Refusing to Enforce Foreign Awards

As noted in the preceding section, Saudi Arabia’s accession to the New York Convention commits the Kingdom to cooperating with the enforcement of

\textsuperscript{507} Saudi Arbitration Law 2012, art 50(2).
\textsuperscript{508} Hassan Mahasni, ‘Islamic Law is a Main Part of Saudi Public Policy’ (Conference in Jeddah, January 20, 1977).
\textsuperscript{509} The Fatawa of Ibn Taymiya, III, 263.
foreign arbitral awards with the KSA. However, the New York Convention provides that a contracting state can refuse to recognise or enforce a foreign arbitral award when doing so would violate that state’s public policy if the state makes a reservation to the Convention under Article V(2)(b). Saudi Arabia is such a state. Thus, under the New York Convention, Saudi Arabia is within its rights to refuse to enforce an arbitral award it deems contrary to public policy, which generally means contrary to Shariah principles.

In practice, Saudi Arabian courts have engaged in the *de novo* review of commercial disputes via public policy objections to the awards. While normative principles require that the Convention’s public policy exception be narrowly construed, Saudi Arabia has routinely used a broad interpretation to justify its refusal to enforce foreign arbitral awards. This practice has caused the New York Convention to lose much of its force within the Kingdom and is a contributing factor in why Saudi Arabia continues to come under scrutiny in the realm of arbitration. One troubling aspect of the 2012 Arbitration Law is that it does not constrict the national courts’ ability to interject itself to evaluate the substance of the award, but the process of legislative and judicial reform provides a clean slate for the Kingdom to create new practices and interpretations.

### 3.7 Conclusion

Based on the foregoing, it is imperative that the principles of party autonomy and respect for both national and foreign laws should be balanced in international commercial transactions, particularly in resolving international commercial disputes. The mere freedom to choose the applicable law is not sufficient to protect the rights and autonomy of states, their citizens and their investors. To combat the problem of legal uncertainty arising from the legal risk of non-enforcement of foreign awards, both parties to a contract need to gain a clear and complete understanding of the state’s regulation of contracts. They will also have to take particular care to rule out any ambiguity over the express or implied meanings of any terms that are open to interpretative dispute,

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thereby ensuring that any provisions or language used in the arbitration agreement reflects the objectives or intent of the parties when a dispute arises. Arbitrators are tasked with resolving these disputes without infringing the provisions of either the choice of law governing the dispute or the mandatory law, contractual or regulatory, of the enforcement state. Absent consideration of the latter, parties face the risk that the award rendered, whether by a Saudi seated or foreign arbitral body, will not be enforced.

As to the remaining challenges, it has been noted that there is still a degree of hesitation and confusion among international contracting parties about the application of both Shariah law and the national Saudi Arbitration Law in resolving international commercial disputes. This chapter explained how a better understanding on the part of these foreign parties would result in a more effective approach to international commercial arbitration, and one with a higher probability that non-Saudi seated or choice-of-law governed arbitral awards will be recognised and enforced by Saudi courts. It is well recognised commercial parties have sought to exclude Saudi legal system as the applicable ‘choice of law’, precisely because of the fear that local courts and authorities will apply Shariah to the arbitration, or underlying contract. Instead, these foreign parties may prefer to rely exclusively on non-Saudi arbitral law or international law. However, this often creates problems when some aspect of the dispute relates to Saudi Arabia. As emphasised earlier in this chapter, when arbitrators and the courts are tasked with determining disputes relating to international commercial contracts, the choice of law by international contracting parties plays a vital role. As such, when it is foreseeable that an award will need to be enforced in Saudi Arabia, the contract should be construed reasonably by the arbitral tribunal according to the Saudi regulations for recognition and enforcement of international arbitral awards.

As far as the notion of parties’ autonomy in international commercial transactions is concerned, this chapter posits that international contracting parties are not able to enjoy absolute freedom in their international contracts.

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under any circumstances due to the impositions imposed by the states in which they need to enforce an arbitral award. Further, intervention by the state through regulations could limit the parties’ autonomy for the simple fact that state reserves in the right to take any measures necessary to protect its sovereign prerogatives and the wider public interest, including by refusing to enforce an award, domestic or foreign, on public policy or Sharia related grounds.

The purpose of this lengthy discussion of autonomy and the relationship between the choice of law governing the arbitration to the law of the enforcement jurisdiction is to demonstrate the importance of understanding the state’s relevant substantive law before the international commercial parties choose it as the applicable contract law. The examples in this chapter illustrate that international contracting parties’ and arbitrators often have fail to recognize or fully understand how Shariah principles apply in the context of arbitration disputes involving Saudi Arabia or enforcement within the Kingdom. This emphasises that the real challenge to effective recognition and enforcement of international arbitral awards in Saudi Arabia may actually lie in the misunderstanding or incorrect interpretation of Saudi regulations in international arbitration.

Having explored in detail the nature of commercial contracts, party autonomy and the relationship of the substantive choice of law to recognition and enforcement, this chapter then turned to an analysis of issues arising in enforcement within Saudi Arabia. First, a discussion was had on the basic implications of Shariah and the role it plays in the background of all disputes that are in someone tied to the Kingdom, whether through one of the parties, the performance of the contract or the need to enforce an award within the Kingdom. Next, the chapter began to breakdown the provisions of the New Arbitration Law and demonstrated the differences in the applicability of laws to foreign and domestic arbitrations and the different instruments under which arbitral awards are enforced in domestic versus foreign arbitrations. This section ended by touching on the public policy reasons that Saudi Arabia can refuse to enforce an arbitral award. The following chapter will explore this grounds for non-enforcement in greater detail, with the hope of ultimately being able to
make actionable suggestions to contracting parties about how to account for Shariah principles when drafting their contracts and arbitration agreements.
4.1 Introduction

Shariah law is ingrained in all aspects of the arbitral process in Saudi Arabia. From the development of Saudi arbitration laws to the conducting of domestic arbitral proceedings to the enforcement of foreign arbitral awards, Shariah compliance remains a prominent issue for consideration by both the parties and the arbitral tribunal when rendering arbitral awards. This reflects the immutable nature of Shariah in all aspects of Muslim life, such that it has achieved the status inviolable public policy.

The goal of this chapter is to explore the role of Shariah in arbitration proceedings and ascertain the impact that it has for both domestic and foreign arbitral awards. This chapter begins with a discussion of why understanding the role of Shariah in Saudi arbitration practice is important. It then looks at how Shariah is incorporated into the various aspects of domestic arbitration proceedings and those international arbitration proceedings that voluntarily subject themselves to the application of Saudi Arabia’s arbitration law. It is necessary to understand how Shariah law intersects with the Saudi arbitration law because in order for any arbitral award, domestic or foreign, to be enforceable in the Saudi courts, that award must comply with Shariah principles. By understanding how the courts evaluate awards within their domestic system, one can ascertain the aspects of Shariah law that are weighted the most heavily that will likely translate over into the enforcement of international arbitral awards within the Kingdom. Finally, this chapter considers whether Shariah should be an area of concern for foreign investors or whether it is just another form of public policy that must be contended with as the world continues to become a globalized and boundless market.
4.2 Why Understanding the Role of Shariah Is Important

One of the unique aspects of the New Saudi Arbitration Law, which makes it different from other recent Saudi legislative modernization attempts, is that it not only seeks to bring the Kingdom’s arbitration laws in-line with prevailing arbitral trends worldwide, but also to harmonize the need for modernization with the immutable principles of Shariah Law.\(^{512}\) Over the recent decades, parties are turning more and more frequently to the use of arbitration as the preferred method for resolving their disputes. However, the Islamic world has created an enigma for the Western conception of arbitration.

The influence of Shariah in Islamic states and its effects of the acceptance and interpretation of arbitration agreements has added another lawyer of complexity to arbitration with which practitioners and parties must contend. Given the implicit nature of Islamic principles to the Saudi way of life, Shariah is more than just a different set of legal regulations; rather, it serves as a primary source of law and a guide for all aspects of daily life in the Islamic world. As such, compliance with Shariah has become recognized as a regarded form of public policy in Islamic states. As economies in the Middle East continue to grow and develop\(^{513}\) and foreign commercial actors and businesses continue to seek opportunities in the region, it has become more important than ever for non-Islamic parties to possess a functional understanding of the implications of Shariah for arbitral proceedings.\(^{514}\)

4.3 The Shariah Roots of Arbitration Proceedings in Saudi Arabia

Shariah and its role in the resolution of disputes through arbitration long pre-date the development of the first codified Saudi arbitration laws.\(^{515}\) The foundation for arbitration procedures in Saudi Arabia, regardless of time or

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\(^{515}\) Harb & Leventhal (n 483) 114.
cultural setting, is the application of the provisions of Shariah law.\textsuperscript{516} For the Islamic believer, it is a religious duty to learn and observe Shariah law in all human endeavours, including international arbitration.\textsuperscript{517} Muslim states have a special duty to adhere to the Islamic religion by integrating Shariah and \textit{Fiqh} into their laws and regulations.\textsuperscript{518} It has been suggested that Muslim states avoid civil strife and advance the public interest (\textit{Maslaha})\textsuperscript{519} because the provisions of Shariah provide a pervasive system of norms by which legal, political, commercial, or religious discourse can be regulated, but must be critically analysed by \textit{Fiqh}.\textsuperscript{520}

To function in a modern world, most Muslim states have created centralised and secular legal systems similar to the civil and common law models adopted in most Western countries.\textsuperscript{521} However, by doing so, the language of the statutes and implementing regulations often fail to adhere to and even contravene the provisions of Shariah, creating conflicts that engender uncertainty and must be resolved.\textsuperscript{522}

When the modern Muslim state courts endeavour to apply a law exclusively based on Shariah procedure to resolve disputes, the courts often encounter difficulties in adjudicating the disputes because the majority of Shariah-trained counsel and judges have limited experience in understanding and interpreting modern secular state law.\textsuperscript{523} For example, An-Na’im contends that Muslims hold Shariah as a guide for developing their social and political relationships, but

\begin{footnotes}
\footnotetext{516} Article 7 of the Basic Law of Governance explains, ‘Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunna’h of his Messenger, both of which govern this law and all the Laws of the State’. See the Royal Order no (A/91), 1 March 1992, Published in Umm al-Qura Gazette No 3397.
\footnotetext{517} Mathews argues that Islam is not a part of the world; it is a ‘way of life’. His idea was that Muslim believers treat the preaching of Islam, in a more pervasive and important sense, not as a religion, which is how it is understood in the typical Western World. See C Mathews, \textit{Understanding Religious Ethics} (Wiley-Blackwell, 2010) 65.
\footnotetext{520} Ibid.
\footnotetext{521} NJ Brown, ‘Shari’a and State in the Modern Muslim Middle East’, in Baderin (n 490) 47.
\footnotetext{522} Ibid.
\footnotetext{523} Ibid.
\end{footnotes}
these Shariah principles do not rise to the level of a legal code.\footnote{524} Similarly, Mitchell points out that Shariah law ‘was never understood as an abstract code settling limits within which ‘behaviour’ was to be confined, but rather as a series of commentaries on particular practices, and of commentaries upon those commentaries.’\footnote{525} It appears that the concept of the modern Muslim state is a postcolonial innovation based on a ‘European model of the state and a totalitarian view of law and public policy as instruments of social engineering by the ruling elites’.\footnote{526} Yet, Shariah predates everything manifested by the modern secular state and thus maintains its dominance in any conflict between the two.\footnote{527}

4.4 The Effects of Shariah in Practice in Arbitral Proceedings

Having acknowledged the important role that Shariah plays in Saudi arbitration, this section shifts focus to look at how Shariah manifests in different aspects of arbitral practice and procedure. This section will highlight various crucial aspects of the arbitral process and identify how Shariah intersects with these areas, with the goal of raising awareness of the matters that foreign parties should concern themselves with if they will ultimately seek to have an arbitral award recognized and enforced in Saudi Arabia.

4.4.1 Arbitration Clause

The arbitration clause is the provision of a commercial contract in which the parties agree to submit any dispute arising from the contract to arbitration. The arbitration clause may also specify the seat of the arbitration, along with the substantive and curial laws that will govern the dispute. For an arbitration to

\footnote{524}{See An-Naim (n 269) 21.}
\footnote{525}{T Mitchell, \textit{Colonising Egypt} (Cambridge University Press, 1988) 101.}
\footnote{526}{An-Na’im (n 269) 7. For example, Benton outlines that cultural intermediaries were challenges within the legal order. He further points out that ‘colonies were not distinctive because they contained plural legal orders but because struggles within them made the structure of the plural legal order more explicit’. L Benton, \textit{Law and Colonial Cultures, Legal Regimes in World History, 1400-1900} (Cambridge University Press, 2002) 9. Similarly, Maoz mentions that the changes in the global balance of political power and uncertainty regarding rules of conduct in such systems are reasons for challenges to understanding Shariah. Z Maoz, ‘Regional Security in the Middle East: Past Trends, Present Realities and Future Challenges’, in Z Maoz, \textit{Regional Security in the Middle East, Past Present and Future} (Frank Cass, 1997) 1.}
\footnote{527}{BD Mor, ‘The Middle East Peace Process and Regional Security’, in Maoz (n 497) 172.}
proceed and for any award resulting from the arbitration proceedings to be upheld, it is crucial that the arbitration clause be valid.

There are a number of ways that an arbitration clause could be found invalid under Shariah law. First, the clause cannot provide for the appointment of non-Muslim arbitrators. The Saudi Shariah Courts have argued that permitting non-Muslims to arbitrate a dispute may render an arbitration clause as invalid. Second, it is contrary to the provisions of Shariah law for the arbitration clause to restrict the parties’ rights and obligations under the contract.\textsuperscript{528} Third, if the arbitration clause contains any uncertainties (gharar), the clause would violate Shariah principles and be held invalid. Finally, the arbitration clause cannot be immoral or violate public policy. The Hanbali doctrine explains, ‘any clause which accompanies the contract is valid unless it is impossible or contrary to public order or good morals’.\textsuperscript{529} This is similar to Western commercial laws in which contract clauses can be stricken under most regimes if found to violate public policy.\textsuperscript{530}

Prior to the creation of a regulated arbitration regime in Saudi Arabia, it was common practice for contractual parties to orally agree to submit a dispute to arbitration after a dispute had arisen during a transaction.\textsuperscript{531} This was primarily because many Muslims were unable to read and write during the first century of Islam and contracts and other commercial transactions were performed by a witnessed exchange of words, which were deemed sufficient for the parties when referring a dispute to the judiciary.\textsuperscript{532} If the Muslim parties executed contractual clauses in their international commercial transaction agreements that were not practised in their trade customs and practices, these would likely

\begin{itemize}
\item \textsuperscript{528} Securities Commission Malaysia (n 221).
\item \textsuperscript{529} Baamir (n 18) 75.
\item \textsuperscript{530} Section 2-302. Unconscionable Contract or Clause: (1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. See DF Rolewick, ‘Unconscionability Under the Uniform Commercial Code - Two Trends in Cases Decided on Unconscionability Grounds’ (1970) 1 Loyola University of Chicago Law Journal 313-327.
\item \textsuperscript{531} Mohammed (n 279) 98.
\item \textsuperscript{532} El-Ahdab (n 108).
\end{itemize}
not be recognised under the provisions of Shariah law. Today, most arbitration agreements are in written form to avoid any confusion and guide the resolution of potential future disputes. Written evidence is deemed essential for adjudicating a dispute before the judiciary. The Saudi arbitration regulations have made clear that agreements must be in writing to be recognized by the competent court absent a stipulated agreement by the parties.

Article 9(3) of the Saudi Arbitration Act 2012 explains the scope of arbitration agreement:

[A]n arbitration agreement shall be deemed written if it is included in a document issued by the two parties or in an exchange of documented correspondence, telegrams or any other electronic or written means of communication. A reference to a contract or a mention therein of any document containing an arbitration clause shall constitute an arbitration agreement. Similarly, any reference in the contract to the provisions of a model contract, international convention or any other document containing an arbitration clause shall constitute a written arbitration agreement, if the reference clearly deems the clause as part of the contract.

Notably, there has been some tension around the inclusion of arbitration agreements in Saudi contracts at the outset of the transaction. While Saudi Arabia has become more welcoming to the use of arbitration clauses, their inclusion at the outset still creates a risk that an award may be overturned or not enforced. The Saudi appellate courts have jurisdiction to consider contract awards, whether they are foreign or domestic. When a case is brought before the appellate tribunal, the court considers the case de novo. During this review, the court may reconsider all of the evidence in the case as if it were a court of first impression. If the court determines that the parties undertook to

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533 Shabana (n 13).
534 Saudi Arbitration Act 2012, art 9(3).
535 Ibid.
536 Tarin (n 114) 131-54.
537 Ibid.
resort to arbitration before the existence of a dispute, a proposition that cannot be reconciled with Shariah principles, then the Saudi court may refuse to recognise or enforce the arbitral award. This significantly impacts commercial transaction because arbitration is quickly becoming the preferred method of dispute resolution and arbitration clauses generally are included in the original contract before the existence of a dispute.

This is just one example of the broad powers that the courts have to refuse to recognize or enforce an arbitral award. In all instances, Saudi Arabia applies the principles of Shariah law when understanding the terms of the arbitration agreement. Any lack of clarity in the agreement or potential uncertainty, are deemed to run afoul of Shariah. In fact, the Shariah courts have refused to recognize arbitration agreements that failed to contain the arbitrator’s names.

The Shariah courts afford themselves very wide jurisdiction and powers to set aside or revoke an arbitration clause, on both procedural and policy grounds. However, the New Arbitration Law attempts to use legislative provisions to curtail this jurisdiction to a certain extent. Clearly, striking down a clause because it does not contain the arbitrator’s name, a common practice in arbitration proceedings as the need for the arbitrators does not arise until the existence of the dispute, goes beyond matters of public policy or Shariah compliance. The question then becomes how effective is the New Arbitration Law in effectively limiting the courts’ jurisdiction, such that if the arbitration clause is consistent with the procedural requirements laid down in the arbitration regulations, the local Shariah courts would not have authority to submit the arbitration clause to further review before the commencement of arbitration proceeding or refuse recognition of the final award.

Continuing with the example of the arbitration clause, it should be noted that there was no clear definition of the arbitration clause in the 1983 Saudi

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538 Nafa (n 216) 49.
540 Al-Jarbou (n 118) 177- 202.
541 Ibid.
Arbitration Act. The Act simply required that the parties agreed to ‘resort to arbitration with regard to a specific, existing dispute [subject to which] it may also be agreed beforehand to resort to arbitration is any dispute that may arise as a result of the execution of a specific contract’. However, the New Saudi Arbitration Law simplified the definition of arbitration agreements under Article 1 and Article 9 respectively. Article 1(1) of the New Arbitration Law states that an arbitration agreement:

[I]s 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.  

Article 9(1) then further clarifies the basis on which arbitration can be invoked, providing that ‘the arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract’.

These Articles are both consistent with traditional Western arbitration practice. The question then is whether and to what extent judges applying Shariah law will override these provisions and refuse to enforce any judgement based thereon. If they are upheld and enforced, then Saudi arbitration practice on the international level dovetails nicely with standard international practice.

4.4.2 The Absence of an Arbitration Agreement

Commercial parties that seek to resolve their disputes amicably to protect their business relationships will frequently refer to the applicable state laws in their

545 See Ibid art (1).
arbitration agreements.\textsuperscript{547} With respect to this practice, it has been observed that ‘when parties agree to arbitrate, they often are opting out of a system of government-created rights and obligations into an arbitration system in which privately created rights and duties are substituted.’\textsuperscript{548}

To effectuate the mutual desires of the parties, tribunals and courts encourage commercial parties to resolve their disputes by means of arbitration.\textsuperscript{549} For instance, the under Article 25(2) of the New Saudi Arbitration Law, the arbitral tribunal has the authority to adjudicate arbitral disputes in the absence of an arbitration agreement.\textsuperscript{550} Further, Article 38(2) of the Law empowers the courts to consider and enforce a settlement award entered into amicably by the parties.\textsuperscript{551}

\textbf{4.4.3 Appointment of Arbitrators}

When it comes to the appointment of arbitrators, Shariah law does not address the appointment of arbitrators by way of an arbitration clause. This silence on the subject is because during the pre-Islamic period, arbitrators sat ‘almost permanently at trade fairs and adjudicated disputes which arose out of commercial transactions as well as the incidents arising from the public gatherings at a trade fair.’\textsuperscript{552} There was no need to appoint the arbitrators for a specific dispute, as the parties would simply refer their dispute to the sitting arbitrators at the trade fairs.

After Shariah law was adopted throughout the Kingdom and the formal court system was created, judges or \textit{qadis} were then involved to decide arbitral disputes. These judges become known officially as arbitrators and their role was

\textsuperscript{548} E. Branet, R.E.RE Speidal, J.R.JR Sternlight & S.J.SJ Ware, ‘\textit{Arbitration Law in America, a critical Assessment}, \textit{A Critical Assessment}’ (Cambridge University Press, 2006,) 10.
\textsuperscript{549} P Rosher, ‘\textit{Adjudication in Construction Contract}’ (2016) 5 IBLJ 497-510.
\textsuperscript{550} Article 25 (2) of Saudi Arbitration Act, 2012, explains, ‘in the absence of such an agreement, the arbitration tribunal may, subject to the provisions of Sharia and this law, decide the arbitration proceedings it deems fit’.
\textsuperscript{551} Article 38 (2) emphasises, ‘if the two parties to arbitration expressly agree to authorize the arbitration tribunal to settle the dispute amicably, it may rule on the dispute in accordance with the rules of equity and justice’.
\textsuperscript{552} Saleh (n 215) 46.
to facilitate the resolution of the dispute in accordance with the parties’ agreement. Similar to its prerequisites for judges, Shariah law imposes certain requirements that arbitrators must meet to be eligible for appointment to preside over a dispute, as discussed below.

4.4.3.1 The Arbitrator Must Be a Practising Muslim and Familiar with Shariah Law

The first requirement is that the arbitrator must be a practising Islamic individual that is familiar with Shariah law. The rationale for this requirement is that appointing an arbitrator who is qualified and experienced in Shariah law, as well as is a practising Muslims, would allow the arbitrator to understand the cause of action and interpret the principles of Islam correctly when resolving the disputes.\textsuperscript{553} The Muslim arbitrator ‘must have a knowledge of the Shariah and capacity to define legal rules. This condition is useful for the efficiency of arbitration in order to avoid the arbitrator’s award being set aside as contrary to public order’.\textsuperscript{554}

However, there is a limited exception to the ‘setting aside’ rule in the international context. Many modern Islamic scholars have emphasized the importance of the verses of the Holy Quran and mentioned that they may permit the appointment of a non-Muslim arbitrator under certain circumstances. For instance, when a commercial dispute is arbitrated in a non-Muslim country and the governing law is as per the foreign territory.\textsuperscript{555} In this case, if a Muslim resides outside the Islamic territory, he might choose a non-Muslim arbitrator to adjudicate his dispute. This choice appears to be permissible based on the text of the Holy Qur’an, that:

\begin{quote}
[A]uthorizes a dying person to have two Muslims as witnesses, or two non-Muslims if he resides in a non-Muslim country. This exception which is permitted by the Koran, and which is based on
\end{quote}

\textsuperscript{553} El-Ahdab (n 208).
\textsuperscript{554} Saleh (n 215) 40.
\textsuperscript{555} Ibid 41.
necessity or urgency, may be extended to an arbitration taking place in a non-Muslim country.\textsuperscript{556}

It should also be noted that modern Islamic scholars from the Hanafi School have expressed the view that the legal system may ‘accept the jurisdiction of a non-Muslim judge over Muslim litigants as valid in financial, civil or commercial cases.’\textsuperscript{557}

\textbf{4.4.3.2 Arbitrators Can Be Chosen Only After a Dispute Has Arisen}

Some traditional Islamic legal scholars have argued that Western arbitration procedures that permit the appointment of arbitrators under the provisions of arbitration clauses in their commercial agreements should not be recognized the Shariah law, observing that ‘[i]n dealing with arbitration they refer consistently to the appointment of arbitrators and the commencement of the arbitration after a dispute has arisen between the parties’.\textsuperscript{558} The rationale for this failure to recognise pre-dispute specific appointments is that Shariah contract principles require that all parties to the contract need to give their consent. When the contracting parties consent to the appointment of a specific arbitrator to resolve any disputes arising out of the contract in the arbitration agreement, this is insufficient because the consent of the specific arbitrator(s) is missing. Invoking contract principles, the arbitrators consent to preside over the dispute must also be considered before the execution of an arbitration agreement.\textsuperscript{559} This is in stark contrast to other Saudi arguments that posit an arbitration agreement that does not name the arbitrators specifically could be refused by the courts under Shariah law as being uncertain and, therefore, invalid. These interpretational challenges are the subject of the following chapter.

The rigidity of legal scholars who strictly applying Shariah principles to modern arbitration suggests that these highly respected beliefs in religious rules cannot

\textsuperscript{556} Ibid 41.
\textsuperscript{557} Nafa (n 216) 36.
\textsuperscript{558} Saleh (n 215) 48-49.
be overridden by modern rules and practices when conducting arbitration proceedings.\textsuperscript{560} In fact, Muslim arbitrators in Saudi Arabia may go beyond the text of the new regulations and apply principles of Shariah and their adopted Shariah interpretations to the dispute as a non-legislated condition of enforcing the contract.\textsuperscript{561} This approach is further support and reflected by the Saudi Kingdom subscription to the teachings of the Hanbali School. By adopting these teachings in enacting the Saudi Arbitration Law, the Hanbali School does not allow ‘the application to the arbitration process held in dar al-Islam of any substantive and procedural laws other than mandatory Shariah tenets and Saudi statutes’.\textsuperscript{562} This creates a clear tension between the modern tenets of party autonomy under the UNCITRAL Model Law and prevailing arbitration rules and the Shariah influence on the Saudi Arbitration Law.

### 4.4.3.3 Only Men Can Be Arbitrators

Whether women can serve as arbitrators in either domestic or foreign arbitrations in Saudi Arabia is a highly controversial issue—perhaps the most controversial issue in the Islamic arbitration system.\textsuperscript{563} The relevant verse of the Holy Qur’an provides that ‘the testimony of a single man is equivalent to the testimony of two women’.\textsuperscript{564}

Taken literally, Shariah compliance would be achieved simply by appointing two women as arbitrators. However, critics of this approach point out the obvious: even with two women as arbitrators, ‘it is unlikely that the courts in Saudi Arabia will accept an arbitration where a woman has acted as arbitrator. Some justify this exclusion by explaining that women “were considered less knowledgeable than men in [the field of business matters]”’.\textsuperscript{565}

\textsuperscript{560} F Opwis, ‘Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal Theory’, in A Amanat & F Griffel (eds), Shari’a Islamic Law in the Contemporary Context (Stanford University Press, 2007) 62-82.

\textsuperscript{561} Ibid.

\textsuperscript{562} Saleh (n 107) 428.

\textsuperscript{563} For example, see M Bydoon, ‘Reservations on the “Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)”. Based on Islam and its Practical Application in Jordan: Legal Perspectives’ (2011) 25 ALQ 51-69.

\textsuperscript{564} Al-Fadhel (n 14).

\textsuperscript{565} Ibid.
Yet, at least theoretically, the appointment of women is not specifically excluded under the provisions of Saudi law. The New Arbitration Law has clarified the eligibility requirements that pertain to the appointment of an arbitrator. Under Article 14(3), the New Arbitration Law stipulates that an arbitrator shall ‘be a holder of at least a university degree in Shariah or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meet such requirements.’ Article 14 remains silent on the gender of the arbitrator, which leaves room for legal debate on the appointment of women as arbitrators in the Saudi arbitration system, which is becoming more of an accepted possibility as women are now being permitted to practice before the courts within the Kingdom.

### 4.4.4 Legal Requirements for Appointment of Arbitrators

The New Arbitration Law sets forth certain requirements for the appointment of arbitrators in addition to the matters discussed above. In particular, the Law requires that the potential arbitrator possess three things: legal capacity; good conduct; and qualifications in Shariah law.

The imposition of these requirements takes into account that the selection of arbitrators is a key issue in arbitration.\(^{566}\) By complying with these requirements for appointment, the New Arbitration Law helps provide increased certainty into the acceptability of proceedings when Shariah law is implicated as well as for the likelihood of recognition and enforcement of any resulting arbitral award.\(^{569}\) By utilising arbitrators that are qualified not only from an arbitration perspective, but from a Shariah perspective, these provisions are aimed to prevent parties from detrimentally violating the rules of Saudi and Shariah law, particularly

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568 Born outlines that the contracting parties enjoy the freedom to select the arbitrators in international arbitration but the challenges arise when the contracting parties select an inexperienced, inattentive, or incompetent tribunal because national courts, and substantive standards of national arbitration legislation, also play a limited role in the selection and removal of international arbitrators. See Born (n 2) 1642; see also Clippel, Eliaz & Knight, ‘On the Selection of Arbitrators’ (Discussion paper no 8724, Centre for Economic Policy Research, 2011).
569 See di Brozolo (n 105).
those that would jeopardize the recognition and enforcement of arbitral awards within the Kingdom.\textsuperscript{570}

Specifically, Article 14 of the New Arbitration Law imposes certain conditions, such as legal status and educational qualifications, for determining the eligibility of an arbitrator.\textsuperscript{571} Notably, the Law incorporates standards for selecting arbitrators with which Shariah law is familiar. The most identifiable of these is that the arbitrator must be of full legal capacity, have a good reputation, as well as be educated in the area of Shariah.\textsuperscript{572} The Law makes it obligatory that arbitrators decide disputes according to principles established in Shariah;\textsuperscript{573} however, the New Arbitration Law’s adoption of the Hanbali School’s liberal interpretation of Shariah in contract law has significantly simplified arbitration proceedings.\textsuperscript{574}

\section*{4.4.4.1 Legal Capacity}

The first requirement for arbitral appointment is that the arbitrator must have legal capacity. With the passage of the New Arbitration Law, there has been controversy over the concept of arbitrators’ capacity in adjudicating the arbitral disputes because the Saudi regulations are silent on the arbitrator’s ethical duties. For instance, the Hanbali scholars have asserted that an arbitral decision has the same binding nature as one made by the judicial court.\textsuperscript{575} However, other scholars argue that if this is the case, the arbitrator then

\begin{flushleft}
\textsuperscript{570} Ibid.
\textsuperscript{571} Saudi Arbitration Act 2012, art 14.
\textsuperscript{572} Weiss (n 250).
\textsuperscript{573} Ibid.
\textsuperscript{574} For example, Rayner points out that recently a few attempts have been made by Islamic scholars and academics to produce general theories and regulations formulated by the early Islamic jurists and scholars on specific contracts. He further draws on the writings of Ibn Taymiyya to say ‘if proper fulfillment of obligations and due respect for covenants are prescribed by the Lawgiver, it follows that the general rule is that contracts are valid. It would have been meaningless to give effect to contracts and recognize the legality of their objectives, unless these conditions were themselves valid’. His idea was that not to limit the scope of contracts by affirming to the jurists’ treaties, instead the scope of contract should be determined as valid contract unless it is forbidden by rule of law, or contravene to Shariah or public policy. See SE Rayner, \textit{The Theory of Contracts in Islamic Law: A Comparative Analysis With Particular Reference To The Modern Legislation In Kuwait, Bahrain and The United Arab Emirates} (1st edn, Graham & Trotman, 1991) 94; see also T Koraytem (n 113) 87.
\textsuperscript{575} Billah (n 267).
\end{flushleft}
necessarily must have the same qualifications as a judicial court judge. On this view, it seems that the role of arbitrators in is similar to the ordinary courts when the arbitrator has the capacity to carry out judicial functions. For instance, the arbitrator may have authority and competence to determine whether the arbitration agreement is valid and, if so, the proper laws, including mandatory national laws that should be applied in reaching a decision.

Yet, in the Law itself, there are no affirmative functions of an arbitrator in arbitration proceedings. However, through bilateral and multilateral treaties and conventions under the political influence of the state, the responsibilities of arbitrators have been determined and affirmative functions have arisen. Indeed, it is emphasised that the role of an arbitrator in is significant and far-reaching. For example, Glossner claims that the arbitrator's function is not only professional, but rather, it is conciliatory as well:

[A]lthough there are institutions, which train arbitrators more referring to the non-lawyer, as the arbitrator must not be a lawyer. He can be just as well as technical expert, ...but he must be a person of knowledge and high moral standards. He must be able to appease parties who may quarrel over a contract. Possibly he has to see that the parties agree to a settlement. It is only natural that the parties listen more intensely to somebody who speaks to them from a higher elevation of experience, knowledge, and reputation.

Undoubtedly, the capacity of an arbitrator is vital to resolving arbitral disputes effectively and efficiently. However, it is difficult to determine the capacity of an arbitrator on some points that may be stipulated in the regulations. One

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576 El-Ahdab (n 208).
580 Ibid.
581 Ibid.
cannot simply generate legal capacity; instead, man is subject to gradual
development, and experience is needed to reach the required level of
standards.\textsuperscript{583} It has been suggested that ‘the increasing professionalization of
arbitration has brought along demands for concrete ethics codes – demands
which started in the 1970s and which have become more pressing to the
present day – and for an independent professional association (the
International Bar Association)’.\textsuperscript{584}

Thus, there is support for the suggestion that the real challenge for arbitration is
the informal character of arbitration practices.\textsuperscript{585} The purpose of the legal
capacity requirement is to ensure that arbitrators are appointed who can
balance the relative lack of formalities of the proceedings with the inherent
standards of the law that must be taken into account. Requiring arbitrators to
have specific knowledge and greater capacity for understanding the arbitral
procedures and skills to interpret the substantive laws to resolve the disputes,
thereby enables effective and efficient recognition and enforcement of arbitral
awards in the enforcing states’ court.\textsuperscript{586}

\textbf{4.4.4.2 Good Conduct}

The second requirement imposed on potential arbitrators is that they must be of
good conduct. Article 14 of the New Arbitration Law explains that an arbitrator
shall be of good conduct and reputation in order to act as arbitrator in arbitration
proceedings.\textsuperscript{587} This prompts the question of how to analyse the conduct of an
arbitrator to determine whether the arbitrator has conducted his duties fairly and
soundly.\textsuperscript{588} The contracting parties frequently choose their arbitrator on the
basis of their prior professional, business, or commercial expertise, and their

\textsuperscript{583} Billah (n 267).
\textsuperscript{584} See R Michaels, ‘Roles and Role Perceptions of International Arbitrators’, in W Mattli & T Dietz (ed),
\textit{International Arbitration and Global Governance, Contending Theories and Evidence} (Oxford University
Press, 2014) 61.
\textsuperscript{585} Ibid 47.
\textsuperscript{586} Park (n 549)1-38.
\textsuperscript{587} Saudi Arbitration Law 2012, art 14(2).
\textsuperscript{588} RM Rauber, ‘The Impact of Ethical Rules for Counsel in International Commercial Arbitration- Is
There a Need for Developing International Ethical Rules?’ (2014) 17(1) \textit{International ALR} 17-36.
impartiality in adjudicating disputes.\textsuperscript{589} There is no rigid rule or practice as to how the contracting parties need to choose their arbitrator.\textsuperscript{590} Rather, it is a matter of discussion and negotiation between the contracting parties and their advisors when choosing an arbitrator.\textsuperscript{591} Yet, arbitrators as professionals do not enjoy the same discretion as a judge in resolving disputes. Their authority does not extend beyond the arbitration agreement under which they operate.\textsuperscript{592} As Redfern aptly comments, ‘some standard forms of international contracts, and particularly those used in the shipping and commodity trades and the insurance and reinsurance industries, identify the kind of arbitrator to be chosen in the event of a dispute’.\textsuperscript{593}

The idea behind having an abstract standard is that it would be futile to list specific good conduct requirements to be possessed by an arbitrator because it is understood that arbitration is intended to be a flexible method for resolving the disputes, not merely a mirror of court proceedings.\textsuperscript{594} Further, it is unwise to make an advance determination on qualifications in choosing an arbitrator before a dispute has risen because the nature of the particular dispute will often inform the desirable traits for the arbitrator.\textsuperscript{595}

In modern practice, some national arbitral regulations stipulate the requirements for arbitrators to participate in arbitration.\textsuperscript{596} However, the lack of such provisions to determine the qualifications of arbitrators does not seem to be a practical problem. In fact, many governments have elected to remove from a shortlist of potential arbitrators any person invited to act as arbitrators ‘to whom objection might be taken’.\textsuperscript{597}

If these approaches are employed correctly, it would likely lead to the efficient selection of arbitrators in both domestic and foreign arbitrations. Within this

\textsuperscript{590} Redfern et al (n 3) 222.
\textsuperscript{591} Ibid.
\textsuperscript{592} HW Davey, \textit{Situation Ethics and the Arbitrator’s Role} (Industrial Relations Centre, 1979) 5.
\textsuperscript{593} Redfern et al (n 3) 230.
\textsuperscript{594} Rauber (n 559) 17-36.
\textsuperscript{595} Redfern et al (n 3) 230.
\textsuperscript{596} JL Simpson & H Fox, \textit{International Arbitration, Law and Practice} (Stevens & Sons, 1959) 87.
\textsuperscript{597} Ibid 90.
context, it is crucial to emphasise the importance of understanding national arbitral regulations before appointing an arbitrator in international arbitration. An arbitrator’s failure to meet national regulations, particularly if there is public policy component such as Shariah, could lead to the failure of national courts to recognise and enforce the arbitral award.\textsuperscript{598}

\textbf{4.4.4.3 Qualified in Shariah}

The third and final requirement for a potential arbitrator is that he must be qualified in Shariah law. This is one of the primary areas where the national arbitration law exerts itself with regard to the selection of arbitrators in both domestic and international arbitration.\textsuperscript{599} While there is a large degree of autonomy for international arbitration proceedings, they remain subject to national legal systems.\textsuperscript{600} Their autonomy extends only as far as the parameters of the national legal system within which they are involved, either as the \textit{lex arbitri} or the enforcement state. States’ attitudes toward international arbitration have evolved as awards have more commonly needed to be enforced in states whose laws were not considered during the arbitration proceedings. Di Brozolo explains that this tension between autonomy and state laws have resulted in ‘to the recognition of the central role of party autonomy in all aspects of arbitration, and to a retrenchment of the powers of national courts to control both the process and its outcomes’.\textsuperscript{601} Part of this retrenchment has been the states attempts to set aside awards that do not meet the public policies standards asserted in their national arbitration legislation.

Turning to the domestic law of Saudi Arabia, scholars disagree on the nature of the relationship between Shariah and state legislation.\textsuperscript{602} As a general principle of Shariah law, a judge or similar effective power is bound by Shariah to loyally

\begin{itemize}
\item \textsuperscript{598} Park (n 549) 3.
\item \textsuperscript{600} di Brozolo (n 105) 40.
\item \textsuperscript{601} Ibid 41.
\item \textsuperscript{602} For example, Schacht explains that there are ‘three different kinds of legal subject-matter, leaving aside the cult and ritual and other purely religious duties, according to the degree to which the ideal theory of the shari’a succeeded in imposing itself on the practice’. Schacht (n 448) 76; see also M Fadel, ‘State and Sharia’, in Peters & Bearman (n 18) 93.
\end{itemize}
and effectively discharge his duties, either in person or by delegating his authority to his appointed officials. In this respect, it has been suggested that a judge must satisfy certain conditions to enable him to rule on cases effectively and defend the faith preached in the Holy Qur’an. Some of the conditions that scholars believe allow a judge to perform his duties include engaging in the strong administration of justice, according to the verses of the Holy Qur’an; knowledge of Islamic traditions; and the ability to make independent decisions on the points of law.

Some scholars argue that judges must enjoy judicial independence from all other institutional influence and interference, but many Islamic jurists, and courts, disagree. After the fall of the Ottoman Empire, the Ulama (Islamic scholars) criticised and rejected any laws that were derived from the Ottomans. This attitude of the courts toward the laws can be observed throughout the Islam-practising states. Further, considering the separation of powers between different branches of government, judicial independence ensures the judge’s power to review legislative acts and strike down any awards or acts that prove unconstitutional. However, such authority may become challenging for the recognition and enforcement of international arbitral awards by the Shariah courts. The stems from Prophet Muhammad’s preaching that expressly affirm the importance of qualification in Shariah to judge and decide disputes.

### 4.4.5 Choice of Forum

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604 Ibid 29.
605 Al-Jarbou explains the term judicial Independence ‘is not words written into the constitution or legislation, but it is a principle that must live in the conscience of the people. When society believes in such a principle, it will stand up against any encroachment on judicial independence by political bodies’. See AM Al-Jarbou, ‘Judicial Independence: Case Study of Saudi Arabia’ (2004) 19(1) *ALQ* 10.
606 Ibid 24.
607 Ibid 1.
608 Ibid. Al-Jarbou emphasises that the Prophet Muhammad said ‘Judges are three: two in the Fire and one in Paradise. A man who is ignorant, and judges according to his ignorance – he is in the Fire. A man who has knowledge, and judges by something other than his knowledge – he is in the Fire’. He also said, ‘God is with the judge as long as he does not commit injustice. When he commits injustice then He leaves him, and Satan attends him’. See Ibid 16.
The choice of forum for an arbitration is relatively challenging when the contracting parties are from or accustomed to different legal systems. The challenge lies in the fact that (1) the parties to the commercial transaction must agree to a single forum; and (2) even when they do agree, the designated forum must itself be legally obligated to enforce the arbitrator’s decision. For instance, the regulations of particular states contain relatively detailed provisions regarding what matters can and cannot be determined in arbitration. While the arbitration may be acceptable in the state in which it was being arbitrated, the award may not be enforceable on the grounds of public policy in a state that prohibits the arbitration of such matters. In the Saudi context, contracting parties can exercise their freedom of contract to give authority to an arbitrator to decide disputes between them, however, if the arbitration itself is inconsistent with national law or Shariah law, the Saudi courts will not recognize the arbitral award.

To maintain continuity in an understanding of the general situation of Saudi arbitration procedures in international arbitration, it is reiterating the importance of the choice of forum. Permitting the parties to choose the forum for resolving their disputes makes the parties’ contractual relationship more predictable, as they are better able to assess their contractual rights and duties in relation to the particular and unique laws of the lex arbitri. Recognizing the importance of this choice, some suggest that contracting parties include either a forum selection clause or an arbitration agreement as a standard component of their commercial transaction documents to reduce the uncertainties that accompany commercial dispute resolution.

Where forum selection becomes problematic is when the contracting parties can select their preferred forum, but the rules of the selected forum turn out not

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610 Park (n 549).
611 Brengesjo (n 580) 43-57.
612 Redfern et al (n 3) 295.
614 Ibid.
615 Ibid.
to be binding and enforceable in the state of enforcement.\textsuperscript{616} Cordero-Moss commented on this topic, explaining that ‘the governing law will be chosen on the basis of the connecting factor generally applicable to contracts, without regard to the drafting style of the contract’.\textsuperscript{617} In practice this means that the law applied to the dispute or the enforcement will be the one connected to the proceedings themselves and can override the selection of the parties in certain circumstances.

Thus, when contracting parties neglect to understand the enforcing states’ arbitral regulations their choice of forum may lead to unexpected results or force them to confront challenges with regard to the recognition and enforcement of their arbitral awards in the enforcing state’s courts.\textsuperscript{618} Understanding the designated countries’ legal and religious laws is thus crucial. Redfern particularly highlighted this fact, stating:

\begin{quote}
[T]he nationality of the parties must be taken into account, since the general practice is to hold an arbitration in a country that is ‘neutral’, in the sense that it is not the country of any of the parties to the dispute. The usual residence (or place of business of) the parties will have to be taken into account too, because of the need to cut down as far as possible on the expense and inconvenience of travelling. There are political factors, such as the general acceptability to the parties of some countries and, in particular, the question of whether any restrictions are likely to be imposed on the entry of the parties, their advisers and witnesses.\textsuperscript{619}
\end{quote}

There is no question that arbitration lawyers can, and should, exercise almost complete freedom on the part of the contracting parties to choose the arbitration forum or institution and applicable law that will provide the best likelihood of

\begin{footnotesize}
\textsuperscript{616} Cordero-Moss (n 135) 37.
\textsuperscript{617} Ibid 43.
\textsuperscript{618} Behrman & Pechincha (n 7) 11-13.
\textsuperscript{619} Redfern, Hunter, Blackaby and Partasides\textsuperscript{619} Redfern et al (n 1213) 321-32222.
\end{footnotesize}
reaching the desired outcomes at the lowest cost. However, this must be tempered by the reality that the initial appeal of some forums may quickly fade when attempting to enforce the arbitral award if due consideration was not given to the regulations and rules of the enforcing state.

4.4.6 Jurisdiction of the Tribunal

When a dispute arises between the parties, the first issue that must be confronted is that of jurisdiction. Specifically, a determination must be made about whether the courts have jurisdiction to hear the dispute or if the dispute must be submitted to arbitration. Generally speaking, when an arbitration clause exists, the courts will refer the dispute to arbitration. Some national legislatures even go so far as mandating a referral to arbitration upon scrutinising the documents submitted by the contracting parties. If the national court finds that the contracting parties are bound by an arbitration agreement or arbitration clause in their transaction agreement, then the national court must refer the dispute to arbitration without considering the contracting parties requests.

Some scholars argue ‘jurisdictional preoccupations in international business will often eclipse the functionally related questions of choice of law and the enforcement of judgments’. However, in arbitration practice this is not the case. Jurisdiction within arbitration refers to the entity that can hear the case and regardless of what entity serves as the adjudicator, they are bound to apply the law chosen by the parties. This eliminates the need for forum shopping frequently witnessed in litigation proceedings.

620 For example, Paulsson outlines the scope of the jurisdiction of courts as ‘there are no international civil courts of compulsory jurisdiction; the defendant’s consent is required. It is unusual for parties of different nationalities to agree to the jurisdiction of a national court’. See J. Paulsson, ‘The Idea of Arbitration’, Oxford University Press, 2013, 174; Similarly, Buhring-Uhle emphasises that ‘one way to prevent multiple litigations is through stipulation of an unambiguous choice of forum clause. This possibility, however, exists only in the context of contractual disputes-expect in the rare case where the parties to an existing dispute are able to reach an agreement on where to litigate’. See Buhring-Uhle (n 2) 15; see also, J Karton, The Culture of International Arbitration and the Evolution of Contract Law (Oxford University Press, 2013) 63.
622 Ibid.
623 Park (n 549) 9.
624 Ibid 11.
4.4.7 Choice of Substantive Law

Consistent with the autonomy accorded to the parties in other aspects of the arbitral process, the contracting parties may also agree on the law that will govern the substance of the dispute. However, for arbitrations seated in Saudi Arabia, whether domestic or international, or in situations where a foreign arbitral award will need to be enforced in Saudi Arabia, it is incumbent that that the law chosen to govern the substance of the dispute not violate Shariah law. In the event that the substantive law chosen by the parties is contrary to Shariah law in an arbitration taking place in Saudi Arabia, that law will not apply. This is explained in Article 5 of the New Arbitration Law which provides that:

Where the parties to arbitration have agreed to subject their relationship to the provision of a certain document (a model contract, an international convention or others), the provision of said document, including those specific for arbitration, shall apply unless contrary to Shariah law. 625

Additionally, these constraints again appear in Article 38 of the Saudi New Arbitration Law of 2012, which permits the parties to choose the substantive law that will apply to their transaction and any disputes arising from it. This article requires the arbitrator to apply the substantive law chosen by the parties, providing that it is ‘[w]ithout prejudice to the provisions of the Shariah law and the Kingdom’s public policy’. 626 Similarly, the courts enforcing an arbitral award rendered on the basis of a substantive law that violates Shariah would be deemed against public policy by the Saudi courts and the award would be refused. This demonstrates that while parties are accorded autonomy, that autonomy remains subject to the core values of the Kingdom in which the arbitration is conducted, or the awards enforced.

In fact, some believe that the influence of an enforcing state’s arbitration law deprives arbitral parties of choosing their jurisdiction in commercial

626 Ibid, art 38.
Thus, there is a practical question of how to address the divergence in the legal framework for arbitral proceedings from those of the enforcing state. Whether the enforcing state’s rules and laws pre-empt or conflict with the agreed arbitration procedure and choice of jurisdiction will depend on the nature of enforcing state’s arbitration law. This, of course, presents challenges for contracting parties seeking to manage and control their contractual options and rights consistent with the administration of state and religious sovereignty and public power. Put succinctly, Tang states:

[T]he forum, which has been designated by the parties, may not be able to accept the prorogated power because accepting such power might infringe the sovereignty of another state or because exercising this power is impractical.

In brief, it becomes clear that contracting parties do not enjoy absolute freedom of contract to choose authority or binding arbitral tribunal authority to resolve their international commercial disputes. However, the attitude toward dispute resolution agreements has changed substantially in the international commercial world in the last several decades. In light of the international recognition of arbitration, individual countries are now much more inclined to

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627 Garnuszek (n 48) 348-55; see also Castagna (n 580) 409-14; D Joseph, ‘Publication Review Jurisdiction and Arbitration Agreements and Their Enforcement’ (2016) 132 (Oct) LQR 686-88.

628 Ostrove, Salomon & Shifman (n 163) 1. For example Cavers emphasises that ‘the conflict of laws rule may make the choice of jurisdiction depend on the “nature” of the domestic law whose application is in question. A significant instance of such a rule is the familiar doctrine that the forum’s rules of procedure will always be employed’. See DF Cavers, ‘A Critique of the Choice-of-Law Problem’ (1993) 47(2) Harvard Law Review 185. Furthermore, Brand and Jablonski outline that the factor such as administrative inconvenience in hearing the case in a particular forum, as well as issues of complex applicable law analyses. See RA Brand & SR Jablonski, Forum Non Conveniens, History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements (Oxford University Press, 2007) 112; see also RA Brand & P Herrup, The 2005 Hague Convention on Choice of Court Agreements, Commentary and Documents (Cambridge University Press, 2008); R Michaels, ‘Roles and Role Perceptions of International Arbitrators’, in W Mattli & T Dietz (ed), International Arbitration and Global Governance, Contending Theories and Evidence (Oxford University Press, 2014) 47.

629 ZS Tang, Jurisdiction and Arbitration Agreements in International Commercial Law (Routledge, 2014).

630 Ibid.

631 Ibid 2.

632 Garnuszek (n 48) 348-355.

specify in their laws whether and to what extent dispute resolution agreements will be honoured and enforced.\textsuperscript{634}

It is perhaps necessary to clarify the grounds for a challenge to jurisdictional law applied to the dispute.\textsuperscript{635} The conflicts between the laws are often related to the basic elements of an arbitration clause. For example, when one of the contractual parties challenges the scope and jurisdiction of an arbitral clause over the particular dispute in question.\textsuperscript{636} In this connection, Buhring-Uhle claims:

\begin{quote}
[S]ince uniform international standards about the assertion of jurisdiction do not exist, different bases of jurisdiction and different interpretations of the same bases can lead to multiple lawsuits in different jurisdictions when the defendant decides to launch a counter-suit in a different forum.\textsuperscript{637}
\end{quote}

Given the complexity of issues related to the substantive and jurisdictional laws, it is important for contracting parties to seek legal advice from a Saudi lawyer or arbitrator when a Saudi party is involved, or an award may foreseeably need to be enforced within the Kingdom. It is important to understand the Saudi arbitration regulations before referring the dispute to arbitration.\textsuperscript{638} By doing so, they can ensure that their arbitral award will be recognised and enforced in Saudi courts.

\section*{4.4.8 Conducting the Arbitration Proceedings}

As part of the increased grants of party autonomy, the New Arbitration Law allows the parties to choose the procedural laws and rules that will govern the arbitration proceedings. However, the parties’ choices remain subject to compliance with Shariah principles and due process. If the parties are unable to

\begin{footnotesize}
\textsuperscript{634} See Abu-Manneh, Stefanini & Holden (n 3) 65-69; see also, Tang (n 600) 2.
\textsuperscript{635} D Choi, ‘The Tension Between Validation and Implied Intent Approaches in Finding the Law for the Agreement to Arbitrate’ (2016) 19(5) International ALR 121-29.
\textsuperscript{636} Redfern et al (n 3) 295.
\textsuperscript{637} Buhring-Uhle (n 2) 13.
\textsuperscript{638} Brengesjo (n 580) 43-57.
\end{footnotesize}
agree on procedural rules or do not wish to make the decision, Article 4 of the New Arbitration Law permits the parties to designate a third party, such as the arbitrator or arbitral tribunal, to designate the procedural law and rules. This allows for the parties to seek the assistance of an arbitral institution with conducting the proceedings; however, the institution remains subject to implementing procedural rules that do not run afoul of Shariah principles. Article 25 of the New Arbitration Law relates to this decision by providing that the parties can agree to submit the dispute to any procedure, including that of an arbitral institution, so long as the procedures chosen do not violate the provisions of public policy and Shariah.

In practice, this means that parties are given the opportunity to voluntarily contract out of the application of the default procedural rules of the New Saudi Arbitration Law by exercising their autonomy to choose a set of procedural rules or an arbitral institution with which to submit the dispute. However, the parties’ autonomy is limited by public policy concerns because the chosen procedures must still be Shariah complaint. Further, reflecting the inherent fairness principles embodied in Shariah, the chosen procedural rules must respect due process and treat both parties equally, providing them each with a chance to fully present or defend their case.

### 4.4.9 Issuance and Enforcement of Arbitral Awards

While the general consensus throughout the arbitration field is that arbitral awards are binding and carry the same weight when it comes to enforcement as a court judgment, it is important to consider the impact that Shariah has when it comes to the issuance and enforcement of arbitral awards.

When it comes to the rendering of an arbitral award, the arbitrator or tribunal must be mindful is the details of an arbitral award if they are aware that the award will need to be enforced in an Islamic state, such as Saudi Arabia. By this point we have established that an award must be consistent with the Kingdom’s

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public policy to be enforceable and that this includes compliance with Shariah law. Where this becomes tricky for the tribunal is when the traditional practices of disputes resolution themselves run afoul of Shariah principles. The most common example of this is the assessment of interest on a debt. Interest on a repayment of debt or the satisfaction of a judgment is a common feature in many business relationships, and interest often forms part of the arbitral award. However, the Qur'an prohibits the assessment of interest. It specifically states that, ‘O you who have believed, fear Allah and give up what remains [due to you] of interest, if you should be believers’. Thus, while interest may be permitted under the substantive laws of the arbitration, the laws of the seat of the arbitration, or the arbitral rules, such an award of interest risks the entire award being unenforceable in the Saudi Courts as being against public policy. To ensure the enforcement of the award, it is important that parties aware of the potential venues for enforcement and take proactive measures to educate the tribunal on the restrictions that must be complied with; otherwise, the award rendered is futile.

The exception to this is where the portion of the award that violates Shariah can be separated from the remainder of the award. In some instances, the Saudi courts may set aside the non-compliant portion and enforce the remainder of the award. Specifically, Article 55(2)(b) of the New Arbitration Law provides that ‘[i]f the award is divisible, an order for execution of the part not containing the violation may be issued’. However, one should note that this is a permissible and not mandatory provision and is not binding on the courts. Thus, it will be the decision of the particular judge to determine the separability of the award from the underlying contract and whether or not the award shall be enforced.

In most circumstances, an enforcement proceeding is not an opportunity to review the merits of the case or to evaluate the validity of the arbitration proceedings absent an appropriate challenge from the parties; however, the public policy analysis involved in enforcing an award in an Islamic state creates a partial exception to this approach. The Saudi courts must conduct a limited

641 Holy Qur’an, Surat Al-Baqarah, verse 278.
judicial review in fulfilling their function of ensuring that arbitral awards do not violate public policy and Shariah. They must determine whether the award was issued consistently with Shariah law and whether any provision of the award itself violates principles of Islamic law. The courts are not permitted to review the merits of the dispute, but they can scrutinize aspects of the arbitration agreement and actions taken by the arbitrator that would be outside the purview of consideration for courts in non-Islamic states. The last point notwithstanding, the court cannot simply refuse to enforce the award because the arbitrator followed a different view other than Islamic jurisprudence—there must be an identifiable violation of Shariah for the award to be set aside on public policy grounds.

4.5 Conclusion

This chapter highlights the many complexities and potential pitfalls that a party unfamiliar with Saudi law and arbitration regulations may face in commercial arbitration proceedings. As discussed through the foregoing, the primary issue for non-Islamic parties is the substantial uncertainty regarding the recognition and enforcement of arbitral awards on the basis that the arbitration proceedings or the provisions of the arbitral award contravene Saudi public policy or Shariah law. Further, even within the Kingdom itself, it is recognized that there are differences of opinions among Islamic scholars and jurists in developing the sources of Shariah as it applies to the modern world, arbitration procedures, awards and enforceability. These differences of opinion and interpretation will be discussed in greater detail in the following chapter. As a result, one can see that it is challenging for contracting parties to grasp the

644 Ibid.
645 For example, Born points out ‘the uncertainty surrounding the subject of a procedural law is unfortunate and does not contribute to the stability or efficacy of the international arbitral process’. See Born (n 2) 1632-32. Interestingly, Buhring-Uhle outlines the consequence of uncertainty of the choice of law in arbitration proceedings. He argues, ‘if the Lawyers don’t understand that international commercial arbitration is something different from jury litigation, they will ruin arbitration’. See Buhring-Uhle (n 2) 42; see also ML Moses, The Principles and Practice of International Commercial Arbitration (2nd end, Cambridge University Press, 2012) 59.
applicable Saudi regulations and their use and applicability in commercial arbitration.\textsuperscript{646}

Given these uncertainties, contracting parties face challenges with respect to the recognition and enforcement of their commercial arbitral awards effectively and efficiently in Saudi Arabia. The goal of this chapter was to highlight the areas of the arbitral process where recognition and enforcement could be jeopardized if the parties are not familiar with the nuances of the Saudi legal system and approach. Indeed, there are notable differences between Saudi arbitration proceedings and other non-Islamic arbitration regulations, particularly when contracting parties choose their arbitrators or refer their arbitral disputes to an arbitration institution or tribunal.

It is here that the intersections between Islamic legal theory and state authority have created an unattainable ideal, since there has been sufficient attempt to clarify, delineate or even codify the fundamental principles and theories of Islamic contract law and dispute resolution. As such no developed jurisprudence on Shariah as the applicable law of an arbitration, or underlying contract, has evolved to complement development of the Saudi economy and its growing position in the global market.\textsuperscript{647} Nor is it clear what is mandated by Saudi law in all respect of the religious aspects of its public policy.

The religious law of Islam, according to some more liberal Islamic jurists, has developed not in connection with the practices of the emerging Muslim state, but rather in direct ‘opposition to it’.\textsuperscript{648} The question begged is how is this

\textsuperscript{646} Akseli argues, ‘there is a debate as to whether states accept obligations for the protection of individuals or whether individuals are the recipients of rights which they can enforce. What ever view is preferred, where a State has entered into a treaty on behalf of an individual, or a group of individuals, it is self-evident that those individuals have an interest in its performance or non-performance’. Akseli (n 414) 343; Interestingly, Redfern et al posit that ‘rules of arbitration often provide an outline of the various steps to be taken; but the detailed regulations of the procedure to be followed are established either by agreement of the parties or by directions from the tribunal-or a combination of the two. The one thing that is certain is the at counsel should not bring the rule books from their home courts with them’. Redfern et al (n 3) 314.

\textsuperscript{647} Schacht outlines the influence of the legal theory and practice of the Shariah. He noted, ‘it may be said that, as far as popular conscience is concerned, the sacred law is observed, even in the field of purely religious duties, to the extent to which custom demands it, so that essential duties are often neglected, non-essential practices faithfully observed, and even formalities which are unknown to the Shari’a imposed by custom’. See Schacht (n 448) 78.

\textsuperscript{648} B Messick, ‘The Judge and the Mufti’, in Peters & Bearman (n 18) 95.
possible? After all, for Muslim jurists and followers, the tenets of the Qu’ran and Sunnah are unquestionably divine in origin, to be preached and exercised by his followers in their way of life.\textsuperscript{649} At the same time, Islamic law is by its nature pluralistic, in that it there is no single or authoritative school of Islamic jurisprudence. Instead, debates now emerge around the five recognised schools of Islamic law.\textsuperscript{650} For critics of the more literal variants of classic Islamic jurisprudence, which may include the more conservative Hanbali school of law, the study and practice of Shariah has become highly fragmented, while growing ever more distant from the tradition of innovation and creativity in the interpretation of religious law, an ideal embodied by principles such as \textit{ijtihad}. After the death of Prophet Mohammed, these scholars argue, the application of Shariah law and principles of \textit{ijtihad} allow for the cultivation of new rules and judgments which are more suited to new legal realities and contexts.\textsuperscript{651}

It can be affirmed that Shariah is not static or rigid in understanding or interpreting the law or in resolving disputes because its main source is bound to the Holy Qur’an and the Sunnah.\textsuperscript{652} Generally, arbitration disputes should be concluded by the free and valid will of the contracting parties because Shariah law requires the contracting parties to discharge their contractual obligations with \textit{bona fide} intention.\textsuperscript{653} For example, the Holy Qur’an verse V: I preaches ‘\textit{O you who believe! Fulfil your contracts}’\textsuperscript{654} This simply means that ‘Allah makes whatever judgments He wills about lawfulness and other things and there is no opposing that’.\textsuperscript{655}

Undoubtedly, in recent decades Saudi arbitration has achieved enormous popularity because of a certain measure of standardization of its arbitration framework. For example, enacting Saudi Arbitration Act of 2012 and establishment of the Saudi Centre for Commercial Arbitration in Riyadh.
there is no clear guidance as to how these Saudi arbitral proceedings should be understood and implemented, efforts continue to be made. The writer believes firmly that there is room for developing a Saudi arbitration procedure that complies with both Shariah and international arbitration law to provide effective and efficient Saudi arbitration regime.
CHAPTER 5:
HOW DIFFERING INTERPRETATIONS OF SHARIAH LAW AFFECT
COMMERCIAL ARBITRATION

5.1 Introduction

The previous chapter looked at the importance of Shariah law in Saudi arbitration and the practical implications that Shariah has for both domestic and foreign arbitral proceedings. This chapter looks to dive deeper into the Islamic jurisprudence that drives the application of Shariah principles by considering the roles of the Islamic schools of thought and Saudi legislation and policy. By identifying the internal tensions with the interpretation and application of Shariah law, one can better understand how the resulting principles are applied with the goal of achieving a comprehensive assessment of their interpretative methodology in arbitration practice. As Wakim succinctly argues: ‘The “religious variable” may affect either substantive or procedural analyses. As arbitrators interpret public policy, calculate limitation periods, or determine interest awards, cultural particulars may influence the result’. 656

First, it is imperative to remember that Shariah has no codified authoritative body of law on which legal practitioners, both legislators or the judiciary, can rely. 657 Instead, Shariah law is derived from a variety of primary and secondary sources that are then interpreted through various schools of thought. The result is scholars of the same religion, in the same country, proposing different applications of the same underlying principle to the same set of facts. In fact, there are four classical schools of Islamic thought that will be touched on throughout this chapter—Hanafi, Maliki, Shafi’, and Hanbali, the latter being the official school of the state. While the legislature adopts the principles and interpretations of the Hanbali school in drafting Saudi laws, the courts are not obligated to follow the Hanbali approach. Indeed, they have discretion to apply any of the schools of thought to the facts, so long as their reasoning is based on


Shariah principles. This creates an inherent tension between the legislature and the courts, with the latter not enforcing the law in such a way that will necessarily uphold the legal provisions’ intent.

This lack of uniformity in approach and significant gap between legislation and enforcement is further compounded in arbitration practice. On one hand there is the New Arbitration Law, based on the Hanbali approach, that is intended to govern and guide parties, foreign and domestic, on complying with Shariah principles during the arbitral process. However, when it comes to the recognition and enforcement of the arbitral award, the parties are, in reality, vulnerable to the subjective judgments of the judge overseeing their enforcement request, which may or may not comport with the Hanbali approach. This can result in awards being set aside based on lesser-known interpretations of Shariah provisions, which inevitably frustrates the parties and makes navigating arbitrations connect to Saudi Arabia uniquely difficult. This chapter explores how these differing legislative interpretations arose and how they function in practice to better understand the implications that these disparities have when it comes to the enforcement of arbitral awards.

5.2 Why Are There Challenges with Interpreting Saudi Legislation?

Interpretation of the Holy Qur’an and the Sunna’h stem primarily from Islamic Fiqh (jurisprudence). The Arabic Fiqh means ‘deep understanding’ or ‘full comprehension;’ it refers to the body of Islamic law that scholars extract from detailed Islamic sources, which they study in accordance with the principles of Islamic jurisprudence, and the process of gaining knowledge of Islam through legal jurisprudence.

Despite this extensive study, Islamic jurisprudential challenges continue to persist. These challenges arise primarily with regard to the understanding and application of Shariah law when there is no clear precedent or reference in the Holy Qur’an or Sunna’h on the proper application of Fiqh in addressing the

658 Duderija (n 16) 393-437.
659 Mohammed (n 278) 95-110.
660 Shaharuddin (n 70) 292-304.
particular matter. Thus, it is necessary to analyse the role of the Islamic schools of thought in interpreting Saudi legislation to comprehend the various approaches that may be taken to resolve the same issue. Most Islamic experts believe that *Fiqh* constitutes ‘the Canon Law of Islam and the common law of the whole Islamic world’, yet this canon itself contains contradictory opinions depending on the school of thought deciding the issue.

5.2.1 The Role of Islamic Schools of Thought

The Islamic schools of thought include the Hanafi, Maliki, Shafi’i, and Hanbali schools and they play an important role in the formation of legislation as they guide the drafters in ensuring Shariah compliance. The Islamic Schools also contribute their views and interpretations of the Holy Qur’an and Prophet's Sunna’h, collectively known as Islamic jurisprudence, to the continued development of *Fiqh*. The object and scope of *Fiqh* is to define the procedural principles of Shariah law. *Fiqh* has a very wide scope of application in many spheres, namely legal, religious, social, political, administrative, business, and


662 Baamir (n 18) 7.

663 Why were the Islamic schools established? Wynbrabdt attempted to answer this in his work, stating ‘The first Muslim schools, or traditions, of law were established in Mesopotamia and Syria before the end of the Umayyad dynasty in 750. During the Umayyad reign, early laws were established under Arab Islamic governors by qadis who melded accepted local traditions and rules with their own opinion and Qur’anic principles on an ad hoc basis. Governors were appointed by the caliph, and they in turn appointed the qadis’. See J Wynbrandt, *A Brief History of Saudi Arabia* (2nd edn, Facts on File, 2010) 88.

664 Wynbrandt mentions how the Hanifa School was founded. He remarks, ‘the chief advocate of this view was al Numan ibn Thabit, also known as Abu Hanifa (d.767). A merchant and grandson of a Persian slave who lived in Kufa and Baghdad, he was Islam’s first and most influential legal scholar and founder of the largest and most tolerant school of Islamic law’. See Ibid 89.

665 Wynbrandt mentions how the Maliki School was founded. His remark is that ‘the Maliki School was founded by Malik ibn Anas (ca. 715-795), a practicing qadi. The Maliki School placed its emphasis on the Hadith as an interpretive tool’. See Ibid.

666 Wynbrandt mentions how the Shafi’i School was founded. He noted, ‘Muhammad ibn Idris al-Shafi’i (767-820) founded the school that bears his name. A member of Arabia’s powerful Qur’aysh tribe born in Gaza, al-Shafi’i studied under Malik in Medina’. Ibid 89.

667 Wynbrandt mentions how the Hanbali School was founded. He points outs that ‘Another student of Malik founded the fourth of the recognized adherence to a literal interpretation of schools of Islamic law. Ahmad ibn Hanbali (780-855) took a more conservative view than Malik, espousing unwavering the Hadith’. Ibid 90.

668 Baamir asserts that, ‘*Fiqh* literally means “deep understanding”; terminologically, *Fiqh* is the process of deducing and applying Shari’a principles and injunctions in real or hypothetical cases or situations’. See Baamir (n 18) 8; see also J Schacht, ‘Pre-Islamic Background and Early Development of Jurisprudence’, in WB Hallaq & LI Conrad (eds) *The Formation of Islamic Law* (Ashgate Variorum, 2004) 29-58.
This reflects the notion that Shariah principles permeate all aspects of Islamic daily life.

One must be mindful of the differences between interpretation of Shariah law and *Fiqh*. For example, if an international commercial party is subject to an injunction by the courts interpreting the provisions of Shariah law, then that injunction is not amendable or negotiable under Shariah law. On the other hand, if an international commercial party obtained an injunction by the Shariah courts interpreting the provisions of *Fiqh* based on a particular school of thought, then it is flexible and amendable in accordance with the circumstances and fact of the case. Much like American or English common law jurisprudence that focus on equity within the context of a particular dispute, the circumstances of the particular situation and the party’s customs and practices would be considered by the court, unless those interpretations contradicted the provisions of Shariah.

In this regard, it is also necessary to understand the scope of *Hadith*, which are the practices and teachings of Islam by the Prophet Muhammad (also known as Sunna’h) to interpret the scope and meaning of Shariah principles. For example, Goldziher relies on the *Hadith* as interpreted by Ibn Taymiya to ascertain that ‘deeds are judged according to intentions; each man’s accounts are drawn up according to his intentions’. Goldziher urges that interpretation of Shariah law should prevail over the interpretation of *Fiqh*. He does so because he draws on the preaching’s of the *Hadith*, which states, ‘God says: Come, meet me with your intentions, not with your deeds’.

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670 Aljloud (n 70) 85-98.
671 Mohammed (n 2) 95-110.
672 Ibrahim (n 262).
673 Baamir (n 18) 8.
675 Ignaz Goldziher was a Hungarian scholar considered the founder of modern Islamic studies in Europe.
676 Goldziher (n 644) 42.
677 Ibid.
678 Ibid.
In reality, during the early ninth century, there was no clear difference in the technique of interpretation of Hadith among Islamic scholars because the Hadith was practised and recited orally. Yet, Mohammad Al-Bukhari, scholar and student of the Hanbali School, attempted to simplify this issue through a collection of evidence of the Hadith from the Prophet Muhammad’s companions, followers, and believers.

Ibn Al-Hajjaj succeeded Al-Bukhari in gathering all the evidence of the Hadith. This enabled Islamic scholars to better understand the scope of the Hadith in interpreting the Holy Qur’an. In this way, the development of the Hadith by the theocratic kings and local scholars created contradictions in interpreting the Shariah. Eventually, there were two groups of people with two different opinions and interpretations on the Hadith. One group was known as Ahl ‘ar-ra’y (Ahl al-Dirayah,) which was rationalist and modernist in their approach, whereas the second group, known as Ahl ar-hadith (Ahl ar-Riwayah), mostly disagreed with the Ahl al-Dirayah interpretation. This clash of viewpoints contributed to the creation of great confusion among Muslims.

At the same time, the Islamic Schools adopted more rigorous forms of methodology. They classified Fiqh as a science and divided it into two categories. The first, ‘ijma’, meant a group of scholars from all four Islamic schools agreeing on a common consensus, whether at a domestic or an

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679 Ibid 43.
680 Siddqui (n 76).
681 Schacht (n 638) 29-58.
683 Ibrahim (n 262).
684 For further reading on the role of hadith in interpretation of the Shariah law, see JAC Brown, Islamic History and Civilization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon (Brill Academic Publishers, 2007) 47-98.
685 Goldziher (n 644) 47; see also Ibrahim (n 262).
686 Siddiqui (n 76) 18.
687 Liebesny (n 652).
688 Siddiqui (n 76) 18.
689 Schumpeter argues that ‘a Science is any kind of knowledge that has been the object of conscious efforts to improve it, such efforts produce habits of mind – methods or ‘techniques’ – and a command of facts unearthed by these techniques which are beyond the range of the mental habits and the factual knowledge of everyday life. Hence we may also adopt the practically equivalent definition: a science is any field of knowledge that has developed specialized techniques of fact-finding and of interpretation or inference (analysis)’. JA Schumpeter, History of Economic Analysis (Routledge, 1997) 7.
690 Goldziher (n 644) 44.
The second, or ‘Qiyas’, referred to the process of analytical reasoning by a group of scholars based on the primary sources of Shariah—the Holy Qur’an and Sunnah. These two categories, *ijma* and *Qiyas*, are considered secondary sources of legal interpretation.

A third form, *Ijtihad*, is also regarded as a secondary source. Under *Ijtihad*, individual, independent scholars started expressing their views and interpretations of Shariah law. This in turn led to further confusion among the Shariah courts in considering the interpretations of Shariah law, because each *Ijtihad* scholar gave a different interpretation in relation to legal issues. In a sharp rebuke of this confusion from the eleventh century onward, the Shariah courts have stopped considering the *Ijtihad* scholars’ interpretations.

In short, it appears that issues of recasting the disciplines of Muslim thinkers in interpretation of *Fiqh* are classified into two camps: one is the modernist thinker who advocates for intellectual, cultural, philosophical and ontological approaches similar to Western thought, while the other are the conservative thinkers who rely on elements of traditionalist thought to address problems from the context of occidental philosophy.

It is important to observe here that the idea of *Fiqh* is to provide general, specific or absolutely qualified indications, commands or principles in the interpretation of the Holy Qur’anic text and Sunnah. When a scholar studies the principles of the Holy Qur’anic text or Sunnah, he should conclude his rules of interpretation with internal and external evidence, which would help the scholar of *Fiqh* to determine the ruling on a certain matter when the principles of

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691 Schacht (n 638) 29-58.
692 Baamir (n 18) 9.
693 Here are several different opinions on the term *Ijtihad*. For example, a section of Sunni ‘ulama’ believes that *‘ijtihad* means making effort and endeavor in order to achieve presumption (zann) regarding a *hukm* (law) of the Shariah. The same definition is also found in the writings of some Shi’I ‘ulama’. But this interpretation was first proposed by a group of Sunni ‘ulama’. See Al-Islam website, <http://www.al-islam.org/printpdf/book/export/html/23216> accessed 29 August 2014.
695 Ibid.
696 Baamir (n 18) 10.
697 Dodeen (n 639) 262-77.
Fiqh are applied to a particular fact to discover the contextual meaning. This would advance the goal of a clearer understanding of the differing viewpoints espoused.

Legal interpretation has been a matter of great controversy for many centuries and, for that reason, the issue of legal interpretation has continued to be discussed by great scholars, academics and experts. It has been argued that issues of interpretation have arisen because of the difference of legal sub-disciplines developed by lawyers and judges to investigate the contextual

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700 Ibid.
701 For example, Yasutomo et al point out that the issue of legal interpretation occurred in 18th-century Europe, when judges developed the concept of public reason to adjudicate the case. They emphasise that this, however, might be problematic. When the judges developed ‘finding reasonable solutions through legal interpretation, reading reason into the law was mainly a pre-18th century practice. In contrast, what developed in the 18th century was the replacement of reason by authority’. Yasutomo et al also draw on Hobbes theory to say ‘authority, not reason, made the law. The power of absolutist kings controlled the judiciary, and directed them to follow the wishes of the sovereign; the concept of authority was this firmly rooted in this century, and the scope for judicial interpretation became increasingly narrower’ See M Yasutomo, M Stolleis & JL Halperin, Interpretation of Law in the Age of Enlightenment, From the Rule of the King to the Rule of Law (Springer, 2011) viii. Similarly, Smith draws on the philosophy of Hobbes to simplify the scope of interpretation. He outlines that ‘good and evil are terms of individual imposition; by tacit agreement one may say they are left to a personal interpretation; there is no common rule of good and evil to be taken from the nature of the objects themselves’ WG Pogson Smith, Hobbes’s Leviathan, reprinted from the edition of 1651 (Oxford University Press, 1909) xv. Furthermore, Stolleis outlines that ‘all texts are ambiguous, be they divine commandments or human norms; simple directions or instruction manuals’. He further states that ‘modern law can be seen as a product of an evolving parliamentarianism, and the legislature, which can enact the law’. See M Stolleis, ‘Judicial Interpretation in Transition from the Ancient Regime to Constitutionalism’, in M Yasutomo, M Stolleis & JL Halperin, Interpretation of Law in the Age of Enlightenment, From the Rule of the King to the Rule of Law (Springer, 2011) 3, 7. Interestingly, Pollock observes that the combination of the laws of nature and laws of man still have a resemblance and criticism within the field of action to which they apply. He posits that ‘constancy, compared with the partial and uncertain obedience given to human ordinances, has in all times presented itself to men as the perfect fulfilment in another region of that which the lawgiver can only strive to attain. By laws we can, more or less, make men behave in particular ways; the constraints of express enactment or customary rules are sufficient to some extent, but not altogether, to determine their acts and forbearance. But the powers of nature always behave in the same ways, and this readily suggests to our mind a constraint which is always present and always efficient’. F Pollock, ‘Laws of Nature and Laws of Man’, in F Pollock, Essays in Jurisprudence and Ethics (London MacMillan & Co, 1882) 43. It is also noted that Bottomley and Bronitt hold that the scope of the interpretation of legal context is to achieve pre-determined results in social and economic arenas. Their idea was that ‘laws, once enacted, are thus regarded as somehow independent of their political and social contexts. This is sometimes reinforced in legal education, which tends to focus on teaching the legal rules (their meaning and scope) and overlooks the context of their enforcement’. They also point out that the issue of interpretation of legal texts lies in defining the legislative rules as it might have quite different effects in reality. See S Bottomley & S Bronitt, Law in Context (4th edn, The Federation Press, 2012) 329. On this point, Fiss notes that legal interpretation ‘is a dynamic interaction between reader and text, and meaning the product of that interaction. It is an activity that affords a proper recognition of both the subjective and objective dimensions of human experience; and for that reason, has emerged in recent decades as an attractive method for studying all social activity’. See OM Fiss, ‘Objectivity and Interpretation’, in JL Coleman (ed), Constitutional Law and its Interpretation, Vol 3 (Garland Publishing) 433.
meaning of the substantive law.\textsuperscript{702} However, the development of legal rules for interpretation at different stages would lead to variations in interpreting the legal texts, which would in turn affect the way in which jurisprudential contributions are developed and this is inconsistent with the study of Islamic jurisprudence.\textsuperscript{703}

It is also suggested that the interpretation issues of legal texts be confronted and, where possible, resolved because this failure to harmonize Saudi legal texts with international law inhibits international trade.\textsuperscript{704} This means the uniformity of the new Saudi laws must be harmonised with the idiosyncrasies of individual Islamic judges interpreting and applying Shariah.\textsuperscript{705} This, of course, leaves unanswered the question whether a single uniform set of rules and principles would aid in achieving a more effective and efficient Saudi arbitral regime.

In moving toward a clarity of understanding through consistent interpretation, the issue of legal interpretation initially arises from the highly theoretical approach taken by so called ‘ivory tower’ scholars who do not sit in the trenches of modern day international trade.\textsuperscript{706} For example, Ramic claims that ‘a scholar concerned with the interpretation of text has the responsibility of uncovering all its possible meanings, and of employing every method of interpretation that is linguistically acceptable’.\textsuperscript{707}

Principles and doctrines approached in this fashion, while appropriate for scholastic study, provide little or nothing to the practical reasoning and analysis of the facts of a modern day international arbitral dispute, in which the parties simply want to determine their contractual and legal rights and move on.\textsuperscript{708} Unlike substantive law enacted by the state, such as the law of property, labour law, welfare law or civil rights law, which consists of sets of applicable rules to

\textsuperscript{702} P Wahlgren, The Purpose and Usefulness of Jurisprudence (Stockholm Institute for Scandinavian Law, 2010) 507.
\textsuperscript{703} Ibid 507.
\textsuperscript{704} Gaillard (n 218).
\textsuperscript{705} Ibid.
\textsuperscript{707} Ramic (n 669) 3.
determine the facts of the case, Shariah theory is beyond the interest or understanding of the normal, everyday trader.\footnote{R Calnan, \textit{Principles of Contractual Interpretation} (Oxford University Press, 2013).}{709} Indeed, some scholars suggest that the purpose of the law and legislative regimes is to guide men’s conduct toward one another by defining what is off limits and thus not permitted.\footnote{Ibid 45.}{710} In this view, Pollock says that ‘laws are not statements of what will happen: they are statements of what does not happen’.\footnote{Ibid 48.}{711} If a law cannot be understood, or if it has many different interpretations, the ordinary citizen or businessman cannot find the guidance he requires to act responsibly in the field of commerce.\footnote{DF Forte, \textit{Studies in Islamic Law, Classical and Contemporary Application} (Austin & Winfield Publishers, 1999).}{712} Accordingly, it is the judge’s duty to give effect to the intention of law-makers by interpreting the legislative instruments to given them clarity to all who must know them.\footnote{J Bell & G Engle, \textit{Cross Statutory Interpretation} (Butterworths, 1987) 13.}{713} This act of clarity also serves to advance the state’s exercise of its sovereignty by specifying the exact meaning of legal instruments with which its citizens and foreign actors must comply.\footnote{Lord Norton of Louth, ‘Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process’, in A Brazier, \textit{Parliament, Politics and Law Making: Issues and Developments in the Legislative Process} (Hansard Society, 2004) 5. Interestingly, Waller emphasises that the state enjoys the sovereignty over the rule of law. He further posits that ‘the state is a legal person, indeed the most important entity in any legal system, vested with law-making powers which when exercised will affect the lives of every other legal person in the community’. L Waller, \textit{Derham, Maher and Waller, An Introduction to Law} (8th end, LBC Information Services, 2000) 67; see also H Bull, \textit{Intervention in World Politics} (Oxford University Press, 1984); FAR Bennion, \textit{Bennion on Statutory Interpretation, A Code} (5th edn, LexisNexis, 2008).}{714}

Bell and Engle draw on the writings of Bennion\footnote{Bennion (n 684).}{715} to further address the subject matter of statutory interpretation.\footnote{Bell and Engle (n 683).}{716} They explain that the handling of legislative texts by judges is essentially analytical and interpretive; judges are the only persons constitutionally empowered to interpret such text authoritatively.\footnote{Ibid; see also Bennion (n 684).}{717}
In this instance, a challenge arises when Muslim and non-Muslim authors are somewhat selective in their treatment of the relevant topics concerning the interpretation of *Fiqh* in English, with the effect that certain subjects are ignored in discussions in their work.\(^718\) It appears that some of these topics require rules of interpretation because of technicalities drawing on the use of Arabic terminology.\(^719\) In other words, meaning can be lost in translation.

One explanation for these translation issues is that the rules of the Islamic *Fiqh* are derived from the Holy Qur’an and Sunna’h with a body of principles and methods that apply to the subject matter.\(^720\) These methods of interpretation are of primary concern to the Islamic *Fiqh* because of the lack of uniformity practised by Muslim scholars in developing the Islamic *Fiqh*.\(^721\)

Some scholars argue that the Islamic *Fiqh* is simply a methodology of law, but this argument is incomplete.\(^722\) The methodology of *Fiqh* must be fluid. It must ‘remain open to further adaption and refinement in order to respond to changing needs of society and civilisation’.\(^723\) Hence, the question might be posed as to whether the Islamic Schools have any influence on the current Saudi legislation.

The answer to this question is yes. Though the Saudi legislature does not operate in the same manner as the secular governments in Western countries, the Saudi legislature must adhere to the principles of Shariah.\(^724\) In practice, of course the situation is rather more complex. This is because Saudi Arabia follows the Hanbali School when enacting legislation, whilst Shariah scholars

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\(^{719}\) Ibid.

\(^{720}\) In his words, ‘this is borne out in the definition of *Fiqh*, which is knowledge of the practical rules of Shariah acquired from the detailed evidence in the sources. The knowledge of the rules of *Fiqh*, in other words, must be acquired directly from the sources, a requirement which implies that the *Fiqh* must be in contact with the sources of *Fiqh*. Consequently, a person who learns *Fiqh* in isolation from its sources is not a *Fiqh*. The *Fiqh* must know not only the rule that misappropriating the property of others is forbidden, but also the detailed evidence for it in the source, that is, the Qur’anic ayah (2:188) which states: ‘Devour not each other’s property in defiance of the law’. See Kamali (n 689) 2.

\(^{721}\) See, eg, A Shaharuddin, ‘Defining Harmonisation of Shariah Rulings in Islamic Finance’ (2016) 30(3) ALQ 292-304; see also Kamali (n 689) 2.

\(^{722}\) Ibid 1-2.

\(^{723}\) Ibid 2.

and judges from different Muslim countries do not have a uniform approach to interpretation.\textsuperscript{725}

For example, some Muslim states follow the work of the Shafii School, accepting and following directly the work of ash-Shafii.\textsuperscript{726} The Shafii school of thought was headed by Imam Muhammad ibn Idris Al-shafii who lived from 150H.\textsuperscript{727} Born in Hijaz, Egypt at the time of the Fatimid Dynasty his teachings were taught and given wide acceptance at Al-azhar University.\textsuperscript{728} However, Salah Al-Din Al-ayyubi disagreed violently with his views, banning it in Al-azhar and resurrecting the other madhahib including that of Imam Shafi'i, who was killed in Egypt in 198H.\textsuperscript{729}

By contrast, the followers of the Hanbali School are conservative when it comes to accepting the work of the Hanbali School, because they reject the idea of human reason in the development of Islamic Fiqh.\textsuperscript{730} It was later observed that the Hanbalis accepted the validity of Qiyas.\textsuperscript{731} Many of the disagreements stemming from this acceptance resulted in armed confrontations, killings and violence.

Despite this troubled history, the late King Fadh bin Abdulaziz of the Kingdom of Saudi Arabia issued royal decrees to modernise the Saudi legislation, such as the Basic Law of Governance, the Provincial Councils’ law and the Majlis Ash-Shura law.\textsuperscript{732} This was done purposefully, to ensure that the Shura council could cope with the rapid developments the country had experienced in recent years in all sectors.\textsuperscript{733}

\textsuperscript{726} Ibid.
\textsuperscript{727} MI Dien, Islamic Law, From Historical Foundations to Contemporary Practice (Edinburgh University Press, 2004) 19-20.
\textsuperscript{728} Ibid.
\textsuperscript{729} Ibid.
\textsuperscript{730} YY Haddad & BF Stowasser (eds), Islamic Law and the Challenges of Modernity (AltaMira Press, 2004) 85-98.
\textsuperscript{731} Penner (n 696) 30.
\textsuperscript{732} See the Royal decree of the new Majlis Ash-Shura Law in 27/8/1421 H.
\textsuperscript{733} See the official website of Shura Council, \url{<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>} accessed 1 August 2015.
The Consultative Assembly of the Shura Council was given a vital role in enacting the Saudi legislation in which Islamic experts and scholars advised the Saudi government on the application of Shariah.\textsuperscript{734} However, one should note that the consultative assembly cannot pass or enforce laws, as that right that is reserved exclusively for the King of Saudi Arabia. It is thus necessary to ask: what is the purpose of challenging and analysing the differing interpretations of the pertinent legal text relating to international arbitration law?

5.2.2 Analysing and Challenging Differing Interpretations of the Legal Text of Shariah as Applied to Saudi Arbitration Law

Before analysing the challenges experienced in interpreting the legal text of Shariah as applied to Saudi Arbitration Law, it is essential to understand the purpose of focusing on these interpretations in the first place.\textsuperscript{735} The interpretation of legal texts ‘embodies a necessary inference which accompanies the meaning, and this represents the principal theme and purpose of the text’.\textsuperscript{736}

The purpose of providing a correct interpretation of a legal text is to ascertain the contextual meaning of the language of the text so that a reasonable person would understand the meaning of the text and identify any ambiguity as to its true meaning and content.\textsuperscript{737} In other words, contextual meaning of the law should be understood without increasing or decreasing its meaning because it is not an intended meaning but rather an indication of text’s meaning.\textsuperscript{738} For example, it has been suggested that legal principles need to be stressed in the interpretation and construction of legal text to determine the contextual legal meaning because every individual act passed by a law-giver is incomplete law.\textsuperscript{739}

\textsuperscript{734} Penner (n 696) 31.
\textsuperscript{735} Haddad & Stowasser (n 701).
\textsuperscript{736} Ramic (n 669) 11.
\textsuperscript{738} Ramic (n 669) 11.
\textsuperscript{739} Ibid 5.
Conversely, the enforcement of legal principles and rules does not always involve in fact arguments, and rarely involves a rigorous journey to ascertain the contextual legal meaning of the text.\(^{740}\) Day to day trade contracts and international trade are much more practical. Of course, it is inevitable that lawyers, arbitrators and judges have and will continue to have different disciplinary perspectives, each embracing different definitions and different approaches to interpretation based on their own particular disciplinary assumptions and methodologies.\(^{741}\) This is simply the way in which life, trade and legal practice functions. For example, Bottomley and Bronitt claim that ‘the rules are made by those with experience and expertise in the field and, so it is assumed, compliance with the rules is therefore more likely’.\(^{742}\) This is a fair assessment because rules can be changed and updated easily as setting forth minimal standards of conduct for professionals operating in the pertinent legal arena.\(^{743}\) Indeed, Stone asserts that the process of legal reasoning or legal rules should not be concealed by its pretence,\(^{744}\) stating ‘the legal rules are never clear it cannot be said that the legal process is the application of known rules to divers facts … the rules change as the rules are applied’.\(^{745}\)

Notwithstanding his somewhat unique view, it has been argued that a lawyer has an ethical obligation to ascertain the subject matter and interpret the legislation.\(^{746}\) For example, Wendel says that ‘the content of legal entitlements cannot simply be read directly from legal texts. Rather, the content of many legal entitlements can be discerned only with some effort and with the use of judgement’.\(^{747}\) Of course, when there is a lacunae in the legislation, this uncertainty creates opportunities for abuse by a clever lawyer who might manipulate the interpretation of law into meanings that do not actually exist in


\(^{741}\) Ibid 343.

\(^{742}\) Ibid 345.

\(^{743}\) Ibid.


\(^{745}\) Ibid. Interestingly, Reid sketches issues of the rule’s determination of textual meaning. He explained that the rules ‘reduce sensitivity to the circumstances of individual events; they preclude, at least partially, full attention to the context in which legal decisions are made; and they block empathy with particular claimants and particular victims’. See JP Reid, *Rule of Law, the Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois University Press, 2004) 81.


\(^{747}\) Ibid 154.
the case at hand. This can lead to practical problems because of the lack of uniformity in interpreting the legislation and the unpredictability in the outcome of commercial transactions, both domestic and international.

5.2.2.1 Lack of Uniformity

Shariah suffers from a wide diversity of interpretation, from one Islamic court to the next, and from one Islamic country to the next. Some scholars argue that ‘[c]omplexities and difficulties arise in part from the very fact that the law is embodied in authoritative written form and not in oral tradition or the precedents of courts’.

It is difficult to find the precise points of distinction that give individuality and character to the legal context of written legislation. Many legal texts are unclear in their contextual meaning, and this lack of certainty often requires judicial interpretations. Here it appears that the rise of the parliamentary system in modern states has served to simplify the process of legislation by employing the principles of judicial review to adjudicate and resolve problems in legal interpretation with finality—the judicial decision provides the final word that all must thereafter follow.

Conversely, it appears that all states have systems of law to interpret the substantive context of the written law. This is generally known as legal jurisprudence. Yet, there is a controversy on the scope and nature of jurisprudence in interpreting the legislation. This is because the subject matter involved and issues of jurisprudence in interpreting law are of two central

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748 Ibid.
749 An-Na’im (n 269).
750 TFT Plucknett, Statutes & Their Interpretation in the First Half of the Fourteenth Century (Cambridge University Press, 1922) xiv.
751 Ibid.
752 Ibid.
753 Ibid.
754 Penner (n 696).
755 In a thoughtful discussion, Perry posits that ‘jurisprudence gives rise to special methodological problems because it has both philosophical and descriptive aspirations; it attempts both to analyse the reason giving dimension of social practices and at the same time to give a descriptively accurate characterization of an existing type of social institution’. See SR Perry, ‘Interpretation and Methodology in Legal Theory’, in A Marmor (ed), Law and Interpretation, Essays in Legal Philosophy (Oxford University Press, 1995) 97.
strands—the philosophy of law, on the one hand, and legal theory on the other. The distinction between the two can be defined as follows:

[Legal philosophy proposes and considers theories of law, theories about the very thing that the law is, whereas legal theory proposes and considers theories about the law, theories, which reveal, interrogate, and refine our various beliefs about law.]

Concept and belief of course can and do differ in the minds of different interpreters. For example, the philosopher of law would look to the concept of law to understand issues in the law and build a theory to show how the law can be seen as a form of communal and practical reasoning. Whereas, by contrast, a legal theorist would look to conceptual analysis to understand the law to reveal new truths about law and to integrate present beliefs about the law. It appears that the philosophy of law is thus the construction of a theory of the nature of morality, not a theory of law, in which the law is used as a model for understanding morality.

In this respect, it has been argued that law is just a tool employed by a society to attain certain goals. Certainly in some respects this is true. If so, perhaps scholarship on the law should be considered like rules because the concepts and doctrines of law are created by the non-law concepts and social doctrines of the society.

Now, what is the nature of the Saudi legislation? As has been previously discussed, Saudi legislation is based on the principles of the Holy Qur’an and

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756 Penner (n 696).
757 Ibid.
758 Ibrahim (n 262).
759 An-Na’im (n 269).
760 Penner (n 696) 4-5.
761 This reason was that ‘man, using his reason, and possibly with the help of the revelation of the gods or God, could come to understand how he should act rightly in respect of his fellow man, and this was understood as a kind of ‘higher law’, a law above and superior to the laws men set for themselves’. See Penner (n 696) 11.
763 Ibid 4.
Sunna’h (Shariah law). It was also noted that in the Muslim concept, the Shariah is quite simply a law.\textsuperscript{764}

Given this premise, it is fair to say that the principles of Fiqh are essential to understanding the legal philosophy of Islam, because the source of Shariah is treated as sacred law and exclusive in the sense of a rule of law.\textsuperscript{765} Keeping this in mind, the role of the domestic courts in the application of interpretation is one of the most of highly debated issues in contemporary international legal doctrine.\textsuperscript{766} For example, Aust outlines the issue of lack of uniformity that lies at the heart of applying international law by domestic courts with respect to determination and interpretation.\textsuperscript{767} The idea is that different legal cultures and forms of education necessarily impact the way international lawyers and domestic courts reason on questions of international law.\textsuperscript{768} Domestic courts are merely actors who translate requirements from international law into domestic terminology. In this view, the law should be interpreted in a manner to bring uniformity first, then it must progress to reflecting the needs and demands of contemporary society.\textsuperscript{769}

Some scholars suggest that lack of uniformity occurs when lawyers and courts fail to adopt generally accepted rules of interpretation, even when uniform rules of interpretation are very much in the self-interest of domestic courts when

\textsuperscript{764} An-Na‘îm (n 269).
\textsuperscript{765} For a thoughtful analysis, see Kamali (n 689).
\textsuperscript{766} For example, Salmond outlines the sources of jurisprudence as the form of law, which is extracted from characteristics of civil society, and a product of civil government. His idea was that jurisprudence is the science of civil law and its aim is to give a true, complete and systematic account of all the facts falling within the meaning of the term civil law. He thought the subject matter of jurisprudence is capable of division: formal and material jurisprudence. He explains, ‘formal jurisprudence deals with the contents of the idea of law; material jurisprudence deals with the contents of system of law’. To put this slightly more elaborately, formal jurisprudence is a general examination of material jurisprudence, which is closely connected with politics and ethics of the political society. Within this context, it is necessary to understand the nature of State jurisprudence because theory of law must be based on the theory of the State. See JW Salmond, \textit{The First Principles of Jurisprudence} (Stevens & Haynes Law Publishers, 1893) 1-9. Lorimer emphasises that ‘as civilization advances, and social arrangements become more complicated, a division of labour becomes inevitable, by which the judicial is separated from the sacerdotal office, but their original connection ought never to be forgotten by the lawyer who would duly appreciate the dignified and sacred character of the profession which it is his privilege to exercise’. See J Lorimer, \textit{The Institutes of Law: A Treatise of the Principles of Jurisprudence, as determined by Nature} (T&T Clark, Law Publishers, 1872) 23.
\textsuperscript{768} Ibid 81.
\textsuperscript{769} Ibid 81-82.
applied to the international rules of interpretation. For example, Pollock observes:

[A]s the man of science has to predict what will happen under new conditions from what is known to have happened under more or less similar conditions, so the man of law must predict the decision of a new case from what is known to have been decided in more or less similar cases.

It can be seen, therefore, that rules of interpretation should be conceived as a precise guideline from which eminent lawyers and judges should make their inductions from general propositions to express their opinions. That being the case, the judge must understand the statutory text in the usual spirit of the subject matter of the legislation, although the intention of Parliament is important in determining the meaning of a statutory text contained in one or more documents.

Some, however, find it difficult to accept this argument, because the role of judge is not to determine the intention of legislative body but rather the meaning of its enactment (though American judges are called upon to interpret legislative intent routinely, as part of American jurisprudence).

Regardless of legislative intent issues of lack of uniformity still arise when the lawyers and judges only apply the rules of interpretations to determine the contextual and literal meaning of a law. Still, different people with different backgrounds and from different schools of thought interpret the same law—the same language—differently. A restricted interpretation might defeat the scope of the literal wording of the statute, thereby advancing one agenda or policy

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770 Pollock (n 679) 243.
771 Ibid.
772 Ibid.
773 Bell and Engle (n 683) 20.
774 Ibid 22.
776 Weiss (n 250).
objective, whereas a broad interpretation might aid to extend the law, according to its *mens* or ‘ratio’, thereby advancing another agenda or policy objective. In Western jurisprudence, such differences are taught in law school and occur in reported court decisions every day.\(^{777}\)

Similarly, some argue that the principles and teachings of the Islamic Schools further differ from each other because of political and economic events.\(^{778}\) The problem posed here is of a different order than differing interpretations of Shariah as applied to legislation or contracts.\(^{779}\) But to understand how political and economic events can shape general principles of law of jurisprudence, it is necessary to first clarify the methodology of interpretation adopted by the four Islamic Schools.\(^{780}\)

Rahim discusses the methodologies adopted by the four Islamic Schools in their process of interpreting the sources of Shariah law to develop Islamic jurisprudence.\(^{781}\) As he does with each, he examines the teachings of Imam Abu-hanifah, who founded the Hanifa School.\(^{782}\) Abu-hanifafa acquired

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\(^{777}\) Schroder (n 747).

\(^{778}\) For example, Diamanticles and Gearey outline the issues in the hybridity of modernity and religion for the benefit of political reasons. He identifies that ‘Muslims articulate their belonging to the political communities that they find themselves in many different ways. Hence it is misleading to suggest that there is something essentially incompatible between modernity, human rights and Islamic religion’. See M Diamanticles & A Gearey (ed), *Islam, Law and Identity* (Routledge, 2012) 1. Black et al assert that some Islamic law rules and principles are based on facts and circumstance that existed many centuries ago and that need to be revisited to address concepts and issues in the modern Islamic legal tradition. Similarly, ‘the modern concept of Islamic law, which includes the various *tribal* and moral norms of different Muslim societies, is different from traditional or pure theoretical Shariah’. Their idea was that to encourage *ijtihad* to revisit traditional Islamic law rules and principles according to the modern times. They thought, ‘*Ijtihad* in modern times may require collaboration between religious leaders and scholars from related disciplines. It is a collective effort leading to various opinions and options’. See Black, Esmaeili & Hosen (n 25) xii, 3; Ghazi also suggests that ‘any modification or adjustment might be made in the Qur’anic injunctions or the model example of the Prophet (peace be upon him [PBUH]) what is meant is that a fresh interpretation is needed of those concepts and practices that were developed by the early doctors of Islam in the context of the political and economic realities of their own respective eras. These concepts and practices were based on the early doctors’ understanding of the divine text and on their interpretation of the model example of the Prophet (PBUH). To set priorities for the restructuring of Muslim society and institutions, today’s Muslims have to be guided by a more profound understanding of both the scriptural foundations of Islam relevant to politics and statecraft, as well as the contemporary political and constitutional paradigm’. See MA Ghazi, *Islam International Law and the World Today, Concept of State, international Relations, Minorities, War and Jihad* (Institute of Policy Studies, 2011) 1-2; see also A Rahim, *The Principles of Islamic Jurisprudence, According to the Hanafi, Maliki, Shafi’i and Hanbali Schools* (2\(^{nd}\) rev edn, Kitab Bhavan, 1994); Ramic (n 669).


\(^{780}\) Liebesny (n 652).

\(^{781}\) Rahim (n 750).

\(^{782}\) Ibid 24; see also Ramic (n 669) 18.
remarkable powers of reasoning and a clear understanding of the source of the Holy Qur’an and Sunna’h.\textsuperscript{783} Abu-hanifah teachings depended less on the source of Shariah law in reaching legal conclusions compared to other jurists because some of the jurists were upholders of the source of Shariah law, whereas others were upholders of private opinion.\textsuperscript{784} Abu-hanifah’s principles, by contrast, were confined within a narrow focus on the source of Shariah from which a rule of law might be legitimately deduced.\textsuperscript{785}

In the case of the Malik School, it appears the teachings of Malik were based more upon the source of Shariah and ‘the usages of the Prophet and the precedents established by his Companions’.\textsuperscript{786} It has been argued that the usages and customs practised at Madina have had great influence in understanding the source of Shariah law, because they must have been transmitted from the time of the Prophet Mohammed.\textsuperscript{787}

Interestingly, Muhammad ibn Idris Al-shafi’i, founder of the Shafi’i School, adopted the methodologies of both Hanifa and Maliki in his teachings, when considering the use of the source of Shariah and the analogy of jurists.\textsuperscript{788} He allowed accorded greater respect to individual jurists’ opinions to create a more liberal outlook in the interpretation of the sources of Shariah law.\textsuperscript{789} His idea was to create a balance between strict judgements and the moderation of views, drawing on the preaching of Prophet as validation: ‘My people will never agree in an error’.\textsuperscript{790}

\textsuperscript{783} An-Na’im (n 269).
\textsuperscript{784} Rahim (n 750) 24; see also, Ramic (n 669) 18.
\textsuperscript{785} Rahim (n 750) 24; see also, Ramic (n 669) 18.
\textsuperscript{786} Ramic (n 669) 26.
\textsuperscript{787} Rahim (n 75) 26.
\textsuperscript{789} For example, Khan asserted that in the teachings of Shafi’i the Prophetic Sunna’h was an essential source of law to understand the Holy Qur’an, because it clarified matters contained in the Divine text. He relied on the verses of the Holy Qur’an to explain that believers follow the Prophet Mohammed; ‘You who believe, obey God and the Messenger, and those in authority among you’, (4:59); and “whoever obeys the Messenger obeys God” (4:80). See JDH. Khan, \textit{Practitioner’s Guide, Islamic Law} (International Network to Promote the Rule of Law, 2013) 20-21. Furthermore, Schacht emphasizes the contribution of the Shafi’i School in the development of legal theory. He mentions that Shafi’i ‘carried it to a degree of competence and mastery that had not been achieved before and was hardly equaled and never surpassed after him’. See Schacht (n 638) 1.
\textsuperscript{790} Rahim (n 750) 27.
However, the teachings of Imam Ahmad Ibn Hanbal, founder of the Hanbali School, appear to be more learned in the sources of Shariah than in the analogy of law.\textsuperscript{791} Hanbal adhered rigidly to the source of Shariah in his teachings and allowed a narrow margin to the doctrines of analogy and other jurists’ opinion.\textsuperscript{792} It is also noted that during the time of Hanbal, the age of independent jurists (\textit{Ijtihad}) came to an end, and the work that has been done since then in developing the laws and legal science has been mainly supplementary.\textsuperscript{793}

Further, it has been argued the scope of analogy is an exercise in jurisprudence (\textit{Fiqh}).\textsuperscript{794} For example, Hoover draws on the philosophy of Ibn Taymiyya to say that:

\begin{quote}
 Basic religious and ethical truths are also known by reason. Reason knows that the Creator must be the sole object of worship and that nothing may be associated with Him. Reason also knows which human actions are good (\textit{Hasan}) and which are bad (\textit{Qabih}). This is because good and bad reduce to the difference between suitability, pleasure, profit and benefit for the agent on one hand and unsuitability, incompatibility, pain, harm and detriment on the other.\textsuperscript{795}
\end{quote}

The wider point to be noted here is that tradition and rational arguments would marginalise the role of analogy.\textsuperscript{796}

Returning the above discussed issue of legal interpretation of legislative acts or instruments, it has been persuasively argued that the scholars who carry out an investigation to obtain \textit{isharat al-nass} (alluded meaning) of the context have different levels of understanding and ability.\textsuperscript{797} When scholars rely on the rulings derived from the alluded meanings, it establishes a correlation with the explicit

\begin{itemize}
\item \textsuperscript{791} Ibid 28.
\item \textsuperscript{792} Ibid.
\item \textsuperscript{793} Ibid 29.
\item \textsuperscript{794} Hoover (n 85) 34.
\item \textsuperscript{795} Ibid.
\item \textsuperscript{796} Ibid 21.
\item \textsuperscript{797} Ramic (n 669) 12.
\end{itemize}
meaning. The correlation between the explicit and alluded meaning would become apparent only when the deeper opinions of an independent scholar (Ijtihad) are considered because understanding alluded meaning can sometimes be achieved quickly, whereas understanding explicit meaning needs deeper and more critical opinions of scholars. That is not in the nature or intention of alluded meaning to convey the meaning of the text; rather, it is used to supplement meanings of the words, but not necessarily intended to relay them.

Conversely, scholars suggest that the controversy over the reinterpretation of legal rules by scholars and Ijtihad is simply an elaboration of legal rules of a certain status. For instance, arguably the establishment of the four Islamic Schools made it no longer possible for the Ijtihad to perform its function. This is so, because were then required operate within the standards of one of the four Schools when expressing their views and opinions.

This historical phenomenon then evolved into a problem of uncertainty in interpreting the Shariah, because scholars and modern legislative bodies mostly ignored methodologies practiced by traditional scholars to interpret the source of the Shariah. Instead, they chose whichever law from any of the four schools went in the direction they wanted to go. It is important to bear in mind that ‘as man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated’, all whilst still serving his perceived needs.

In fact, this lack of uniformity leads to challenges for international contracting parties and arbitrators, as well as practitioners interpreting the Islamic

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798 Ibid 12.
799 See An-Na’im (n 269) 19. See also Ramic (n 669) 12.
800 Ramic (n 42) 12.
802 An-Na’im (n 269) 19.
803 Vikor (n 773) 146-47.
804 See, eg, An-Na’im (n 269) 19; see also DF Forte, Studies in Islamic Law, Classical and Contemporary Application (Austin & Winfield Publishers, 1999); Schacht (n 638) 29-58.
805 Vikor (n 773) 146-17.
806 PC Jessup, Transnational Law (Yale University Press, 1956) 8.
jurisprudence and Saudi legislation in international arbitration. In this sense, Saeed recommends having uniformity between Shariah and Islamic public policy concerns:

[...] Muslims must develop institutions that are unquestionably Islamic and in opposition to the practices and values being imposed by the West – that Shariah should be brought into the public sphere in a significant way, influencing the political, economic, social, cultural, intellectual, and financial life of Muslims.

Of course, language has a significant influence on the abilities of the actors to understand, interpret and apply the law, from the vantage point of their own social and cultural backgrounds. How then does language become an issue in interpreting the Saudi legislation?

As previously discussed in this Chapter, the conservative Hanbali School is the official school of Saudi Arabia. It provides the doctrines and principles that must be used in properly interpreting Saudi legislation. In this connection, it is important remind readers that the role of law in the Saudi society differs from

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807 For example, As-Sadr advocates that the form of *ijtihad* has become the cause of disagreement among the jurists because it creates obscurity and confusion. He even points out the word *ijtihad* has been used to express the idea of a process of derivation, which amounts to lack of uniformity in interpreting the Shariah law. See As-Sadr (n 272) 47. Similarly, Mustafa outlines that the practice of *taqlid* means following the views of someone whose opinion was not it considered a proof, and this might be a reason for uncertainty in interpreting Shariah law. He points out that the practice of *taqlid* was used in an attempt to solidify religious law and prevent it from interfered with political authority. This, however, might be problematic. It would prevent an ordinary Muslim, who wishes to seek for some clarification in legal loopholes from the various schools of law. Instead, the doctrine of *taqlid* institutionalism would compel an ordinary Muslim to obtain legal rulings from a particular school of law. Mustafa assets that ‘the rise of *taqlid* was a result of the desire of the scholarly class to limit the discretionary powers of legal officials at the bottom of the legal hierarchy, by obliging them to adhere to a particular school of law. Yet other argues that the emergence of a regime of *taqlid* was an inevitable result of the pressures that push all legal systems towards greater institutionalisation’. This idea of institutionalisation was protested by some members of the Islamic Schools; for example, in Saudi Arabia, ‘the anti-taqlid stance of the majority of the Hanbali religious elite, there have been calls from some members of that elite for a set of codified laws that all judges would be obliged to follow’. See AR Mustafa, *On Taqlid, Ibn al Qayyim’s Critique of Authority in Islamic Law* (Oxford University Press, 2013) 6-7.


809 For example, Venzke asserts, ‘for the language of international law this means not to look at the sources of the law but at its practice in search of what the law is. The common narrative of international lawmaking tells quite to the contrary, however, that international legal norms are based on the consent of those subject to them-in international law it has for long been rather clear that those subjects of the legal order are unitary states’. See I Venzke, *How Interpretation Makes International Law, On Semantic Change and Normative Twists* (Oxford University Press, 2012) 1; Buhring-Uhle (n 2).
that which is familiar to Westerners.\textsuperscript{810} As previously discussed, unlike secular-based Western law, the legal theories behind Saudi law faithfully adhere to the belief that Islamic law serves, and is the expression of, God’s will.\textsuperscript{811}

Again, as opposed to Western legal regimes where religion and state are separated constitutionally, in Muslim countries like Saudi Arabia Islamic law ‘provides its adherents with the knowledge of their duties so that they might more properly conduct this life and prepare for the next, and enforces God’s will that one do what is morally proper and refrain from doing what is morally wrong.’\textsuperscript{812} Indeed, the sources of Shariah law preach that God would not permit his believers to do wrong in the first place.\textsuperscript{813}

But aside from theory there is, some would say, the reality of daily life. Modern Islamic scholars or theorists from the liberal Islamic Schools put theory aside and express concern more with settling the day-to-day disputes of their followers than plunging into the depths of esoteric Islamic theory.\textsuperscript{814} Their approach is not acceptable to the conservative Hanbali School, thus creating a rift in viewpoints and approaches.\textsuperscript{815}

Conversely, Halim draws on the works of al-nawawi\textsuperscript{816} to point out the challenges of achievement of authenticating historic hadith (jurisprudence) reports as respects legal work and interpretation.\textsuperscript{817} He critically recounts the habit of the ancient jurists (al-mutaqaddimum) to remain silent regarding the hadith,\textsuperscript{818} and then progressively formulates their approach as follows:

\begin{quote}
[T]hey quoted in their works, without indicating from whom the hadith is narrated, and without specifying whether the hadith they
\end{quote}

\begin{footnotes}
\textsuperscript{810} Venzke (n 781) 6.
\textsuperscript{811} Ibid 1.
\textsuperscript{812} Ibid 6.
\textsuperscript{813} Feldman (n 20).
\textsuperscript{814} Brand (n 139) 4.
\textsuperscript{815} As-Sadr (n 272).
\textsuperscript{816} Yahya b. Sharaf al-Nawawi, a great scholar in the Shafi’i School of Law. For thoughtful analysis of his work, see FA Halim, Legal Authority in Premodern Islam, Yahya b. Sharaf al-Nawawi in the Shafi’i School of Law (Routledge, 2015).
\textsuperscript{817} Ibid.
\textsuperscript{818} Ibid.
\end{footnotes}
used was sound or weak, except for a few, despite the fact that they were known as hadith scholars, because it was sufficient for them to refer to the books that they knew (i.e. the book of Fiqh or hadith collections), to the point where people no longer paid attention to what is in the book.\footnote{819}

This lack of attention, or blind acceptance leaves modern actors uncertain of the reliability of ancient interpretations in identifying which hadith was strong and which were weak.\footnote{820} This can be observed in Hanbal’s masa’il collections about the quality of the hadith whenever there was disagreement over a legal position.\footnote{821} It appears therefore that the contribution offered by the Islamic Schools was and is to accommodate the need of Muslims to anchor law in certain authority.\footnote{822} At least in this way, legal certainty is constructed and legal judgment established from its divine sources.\footnote{823}

\section{5.3 The Relevance of Sharia Perspectives on Arbitration}

This section will attempt to bridge the divide between the interpretation of legislative instrument and intent, as applied to new arbitration law and public policy defences, and the domain of private law and principles. In general, Shariah sets forth a number of principles on contract and enforcement, including rules requiring mutual consent, capacity, agreed upon terms and conditions and agreed upon price or benefit between both parties.\footnote{824} Consensus and fair contractual terms are foundational concepts in Islamic theories of contract law and construction. Under Islamic Shariah, moreover, a contract is only valid if devoid of ‘Muhrram’ (an issue forbidden under Shariah law).\footnote{825} Exemplars of Muhrram, or clauses not permitted by Shariah, include

\footnote{819}{Ibid 38.}  
\footnote{820}{Ibid.}  
\footnote{821}{Ibid.}  
\footnote{822}{It is notable in the work of Ignaz Goldziher that ‘old Arabic mentality which Muhammed felt such a powerful call to influence are being made more readily available to us through current philological work; but they do not give satisfactory information about religious matters’. See SM Stern & H Dabashi (ed), Ignaz Goldziher Muslim Studies (Transaction Publishers, 2006) 12.}  
\footnote{823}{Halim (n 788) 40-41.}  
\footnote{824}{J. Otto, Shariah Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present (The University of Chicago Press 2010) 167.}  
\footnote{825}{Quran, 4:29.}
riba (usury)\textsuperscript{826} and gharar (speculation, deception or excessive risk)\textsuperscript{827}. Contracts that contain facid or fayed (are unfairly one-sided, or obstructionist in nature) clauses may also provide grounds for invalidating a contract.\textsuperscript{828}

The constitutive elements of private law doctrines of Islamic law and jurisprudence are wide-ranging and complex, and accordingly fall beyond the scope of this thesis. Nonetheless, it is worth highlighting some key features of Islamic arbitration law. The validity of arbitration is well established in Islamic history and recognised under the four sources of the Shariah, namely the Qu’ran, Sunnah, Idjma’ (consensus of opinion) and Qiyas (reasoning by analogy).\textsuperscript{829}

The Qu’ran states the following: ‘But no, by your Lord, they can have no Faith, until they make you (O Muhammad SAW) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission’.\textsuperscript{830} Notwithstanding the authority and recognition afforded to it under the hierarchy of Islamic sources, many scholars continue to dispute the very concept of arbitration, with the binding effect and finality of arbitral awards a point of contention among various schools of Islamic thought.

For some jurists, arbitration is best understood as a non-binding form of dispute resolution.\textsuperscript{831} In line with this juristic perspective, a decision rendered by the arbitrator is neither final nor binding on the parties, and does not have the authority or weight of a court judgement. This is a highly significant area of controversy among Islamic jurists, since it implies that an arbitrator’s decision does not have final jurisdiction to settle disputes, absent the parties’ consent.\textsuperscript{832}

In this sense, Islamic law upholds the principle of party autonomy. Yet, one can

\textsuperscript{826} Holy Quran verses: 2:275-280, 3:130, 4:161, and 30:39.
\textsuperscript{831} A. H. El-Ahdab, Arbitration with the Arab Countries, (The Hague: Kluwer Law International, 1999), at p.16.
also see how this might present challenges at the level of enforcement of domestic or foreign awards, by the mere fact that an arbitrator does not have an inherent jurisdiction over the dispute and arbitration agreements can be revoked or overturned. Scholars who support this view will often invoke the following verse from the Qu’ran: ‘If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allâh will cause their reconciliation. Indeed, Allâh is Ever All Knower, Well Acquainted with all things’.833 Jurists in the Islamic world have increasingly disregarded the above position as obsolete and ill founded.834

It is increasingly accepted, among all schools, that an arbitration agreement that parties should be bound by the decision of the arbitrator(s), thereby approving a conception of arbitration which is closer to its modern form. In this view, an arbitrator has authority not only to resolve a dispute; this authority also empowers him to issue awards that bind both parties. In support of this claim, jurists will cite the following Quranic verse: ‘Verily! Allâh commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice’.835 Indeed, authorities on Islamic models of arbitration have stated that that respect and recognition for arbitral awards is not only compatible with Islamic Shariah, but in fact required by it. In justification of this view, scholars directly apply verses of the Qu’ran that demand parties abide by their contractual undertakings in good faith and ‘…fulfil every agreement, for every engagement….836

It is interesting to note that this interpretative controversy stems from the different meanings attributed to the Arabic word for arbitration or ‘Hakam’, which can be translated to have the broader meaning of empowering an authorised person to settle disputes among parties and to dispose of rights, or a narrower definition which places the arbitrator in a more conciliatory role aimed at enabling parties to reach a mutually amicable decision.837

833 The Holy Qu’ran: 4: 35.
835 The Holy Qu’ran: 4:58.
836 A. Al-Mawardi, Adab al-Qadi, (Cairo: Saadah Publication 1327H) at p.383.
For the proponents of the Hanafi school of Islamic jurisprudence, arbitration is closer in character to conciliation than it is to a binding award. It should be emphasised, however, that Hanafi scholars accept that a disputing party cannot avoid its obligation to comply with the award since an agreement to resort to arbitration binds the parties in the same ways as any other contract. More importantly, Hanafi scholars will emphasise the duty of disputing parties to uphold and enforce the terms of any agreement they have entered into, in good faith. Going further still, advocates of the Shafi school recognise arbitration as legal practice, with binding effects, irrespective of whether the decision has been heard by a judge in the forum of dispute.838

Nonetheless, jurists of the Shafi school also consider the arbitrators to have less decisional autonomy and authority than judges, without notable consequences for our understanding of Islamic conceptions of the (final) authority of local courts in the enforcement of awards, domestic or foreign. Indeed, the Shafi school appears to suggest that a court who revokes or annuls an award issued by an arbitrator acts within its lawful powers, as defined by Shariah.839 Strikingly, it is the Hanbali school, the school of Islamic law that is unofficially adopted as the constitutional foundation of the Saudi legal system, which has advanced a concept of arbitration that more closely conforms to modern international practice. Pursuant to the Hanbali school, an award or decision rendered by an arbitrator is assumed to have the same binding force and effect as a court judgment.840

Consequently, an award issued by an arbitrator must be adhered to by both parties, subject only to the requirement of mutual consent of both parties to arbitration. A further condition imposed by the Hanbali school is that the arbitrator possess the religious expertise and qualifications as those required of

839 Ibid.
judges. It should be noted that the final school of Islamic jurisprudence, the Maliki school, has developed the most pro-arbitration position. The Malikis, for instance, posit that an arbitrator can be chosen by one party to the dispute, even without the consent of the other party. The reasoning employed by the Maliki jurists is that a dispute can only be settled with the mutual trust and good faith of both parties. The counter-party should therefore seek to enter into arbitration arrangements in good conscience to resolve their disputes. In contrast with the other schools discussed above, the Malikis school stresses that any award should be upheld and enforced in good faith, and should not be revoked after the commencement of the arbitration proceedings.

One issue yet to be addressed, but central to this subject matter of this thesis, is whether certain clauses, including arbitration clauses themselves, are valid under mainstream juristic interpretations of Shariah. Under the doctrinal analysis of the existing schools, the decision to refer to future disputes is viewed, by classic scholars, to infringe the Islamic injunction on uncertainty and future clauses in contracts. The Islamic tradition has developed its own conception of the freedom of contract principle, which deviates significantly from its mainstream definition and usages. In the Islamic tradition, parties have autonomy to determine the terms of their contract, providing these do not violate God's commands. This rule extends to the inclusion any clauses incorporating interest or riba.

The inclusion of arbitration clauses in contracts did not present a significant challenge in early Islam, for the simple fact that commercial realities of the time did not lend themselves to the widespread use of such provisions. In today's commercial environment, Islamic scholars find themselves grappling with an increasingly advanced and mobile economy. Foreign parties who wish to do business in Saudi Arabia will often include interest-based or arbitration clauses in their contracts, and the relevant legal system will have to adapt to such

regularities or otherwise risk being imprisoned by rigid fidelity to certain interpretative traditions. Yet, the answer to this ‘gap’ between classic principles of Islamic Shariah and contemporary commercial realities may be found within the religion itself. As alluded to above, some principles of Islamic law, such as the good faith enforcement of contractual undertakings, ought to be respected and enforced as mandatory law. Other legal principles can be revised and adapted to account for new economic and social realities, as required by the interpretative principle of *ijtihad*, described above.

It is here that we can draw a connection between theoretical perspectives on the interpretation of public or statutory acts of law-making, discussed above, and the development of a Shariah compliant private law, in Saudi Arabia and in the Islamic world more generally. Indeed, Islamic law is no different from any other legal system in that it must adapt to meet the needs and demands of Islamic societies, or any party whose rights are diminished because of inflexible or dogmatic application of existing laws. There is a misconception that Shariah is unyielding and static, but the Islamic schools do not have a monopoly on its development or interpretation. Indeed, Muslims are bound only by the Qu’ran, Sunnah, and to a lesser extent the *Idjma*’ and *Qiyas* (analogy).

Islamic principles of contract law emphasize good faith, honour and equity in the enforcement of private agreements, and require that parties honour their debts and do not impose an unfair financial burden on the other party. In an authenticated *hadith*, the Prophet Mohamed states, ‘Believers should honour

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847 The *Quran* prescribes believers ‘not to devour your assets among yourselves in vanity, except in trading by your consent’.
848 In this regard, the Prophet Mohammed has said, ‘*la darar wala dirar fi alislam,*’ the translation of which is that the law should not oblige or enforce individuals to endure harm, injustice or unfair loss. Surrah narrated by Ibn Majah *Hadith* No 341.
849 Under Islamic principle of contract law, a judge that applies Islamic contract principles is empowered to modify or adapt the parties’ obligations in a manner that balances between the rights and interests of both parties. Verses of *Quran* aver that *Allah* does not wish to place undue burdens on parties to a contract, and seeks to relieve them of excessive physical or economic hardships. The below verses of the *Quran* can be cited in the above regard. *Allah* intends ever facility for you; He does not want to put to difficulties *Quran* 2:185. On no soul does *Allah* place a burden greater than it can bear, *Quran* 2:286.
their engagements...'.850 A plain reading of the Prophet's message would suggest that arbitration agreements are no different from other agreements, and consequently binding on both parties in accordance with their own free and valid will. Viewed in this light, one can argue that arbitration clauses, and the awards that result from them, are necessary elements of a contract, and should be enforced, thus giving effect to the will and intent of both parties. Indeed, in the context of international contracts, arbitration clauses are consistent with the Islamic idea of swift justice in the benefit of both parties. There appears to be no obvious reason why the effective enforcement of arbitration clauses, and resulting awards, should be deemed in contradiction to public policy, since the realisation of these aims do not violate God's commands.851

It should be noted, finally, that the Maliki, Shafi and Hanbali Schools accept as valid the decision by a non-Muslim party to nominate a non-Islamic legal system as the applicable law of the arbitration.852 The authority of this position is made evident by the fact that a growing number of Islamic countries have become party to the New York Convention and thereby implicitly accept the validity of delocalised arbitration agreements. While the above discussion suggests that the trend in Islamic debate is to embrace a more open attitude to non-localised arbitration, the Saudi position is that an award issued by a non-Islamic legal system is valid only if the rules to be applied to the contract do not clearly infringe on the express provisions of Qu’ran or Sunna.853 This remains a sticking point and the basis on which local courts may elect to refuse recognition of a foreign award issued on the basis of a non-Islamic law. But what does it mean to speak of Islamic public policy?

The only guidance we have is that all aspects of legislative law, and indeed all private contracts, should respect the spirit and text of the Qu’ran and Sunnah. Two ideals come into conflict: the first is that all individuals must honour their

850 Sunan Ibn Majah Hadith No 341.
851 Under Islamic law, every lawful contract must be fulfilled and performed in good faith. This principle is supported by the following verse from the Holy Quran: ‘Oh you who believe, observe covenants’. For a historical record see Al-Tabari, Tafsir VI, 33 (1905–12); Al-Qurtubi, Al-jami’li Ahkam Aq-Qurania VI, 33 (1935).
852 A Razak Al-Sanhury, Masader Al-Haq, (Dar Al-Nahza Al-Arbia, 1968) at p. 80.
obligations under contract, but in doing so they must also refrain from entering into agreements which are forbidden by Islam. The remaining sections will consider how these two principles or ideals can be reconciled from within the Saudi legal system.

5.4 The Role of Shariah Law in Interpreting Saudi Legislation

Saudi legal thinking and interpretation of legislation are essentially influenced by the source of Shariah, as it constitutes the Saudi equivalent of the U.S. Constitution: supreme over all laws and all actions in society.\(^{854}\) However, as has been previously discussed, Islamic legal theories as a whole never directly interfere in the processes of the court system.\(^{855}\) Instead, legal theories are simply a powerful structure of the judicial system and independent from any state regulations.\(^{856}\)

Shariah allows individual jurists and theorists to determine for themselves what is good and what is bad behaviour, by applying their wisdom and knowledge of Islamic religious values.\(^{857}\) Within this ambit, some scholars suggest that the Holy Qur’an and Sunnah, as primary sources of the Islamic tradition, are uniformly recognised and implemented by peripheral Muslims groups in political, legal, social and other realms thus discounting any worry that its application would be problematic.\(^{858}\)

\(^{854}\) For example, Hallaq asserts, ‘the theological postulate that sustained most legal theories, of Ash’arite inspiration, states that man’s intellectual capabilities are thought to be insufficient to determine the rationale behind God’s revelation. God’s wisdom, deeply embedded in His Shari’ah, is simply incomprehensible for humans. Thus, the rationales of rules in the revealed texts were to be sought solely in the inner structures of these texts: only what God chose to declare explicitly to be the *ratio legis* of a case was to be taken thus, and what He decided merely to allude to was to be subjected to an interpretive enquiry that was deemed to result in a probable judgment. But nothing more was to be attributed to God’s motives and rationale’. See Hallaq (n 37) 207; see also Ahdab & El-Ahdab (n 253) 610.

\(^{855}\) Feldman (n 20).

\(^{856}\) A Iqbal, *Diplomacy in Islam, An Essay on the Art of Negotiation as Conceived and Developed by the Prophet of Islam* (Institution of Islamic Culture, 1965).

\(^{857}\) For example, Khadduri also assessed that ‘it is the framework of Islam itself. For although religion describes what the ideal life should be, the law indicated the right road to follow (indeed the term shari’ah bears this meaning) in order to arrive at the ideal life’. See M Khadduri, *Islamic Jurisprudence Shafi’i is Risala, Translated with an Introduction, Notes, and Appendices* (The Johns Hopkins Press, 1961) 3.

\(^{858}\) A Duderija, *Constructing a Religiously Ideal “Believer” and “Woman” in Islam, Neo-Traditional Salafi and Progressive Muslims’ Methods of Interpretation* (Palgrave Macmillan, 2011).
Against this background, it seems that the sources of Shariah fulfil an important role in interpreting Saudi legislation. Initially, Shariah is dominated in the Islamic tradition by law and religion, thus historically tying them together.\textsuperscript{859} As a result, in Islamic society there is no separation of religion and law compared to other, particularly Western, societies and nations because a majority of Islamic jurisprudence works are concerned with the sources of Shariah, and because the practical basis for Shariah was developed early in the Islamic caliphate.\textsuperscript{860} That is why was Shariah exerts a great influence in the domestic laws of many Muslim countries, such as Saudi Arabia, Malaysia, and other Islamic states.\textsuperscript{861} In many Muslim countries, great belief and faith is placed in Islamic tradition as a source of law and legislation, unlike Western countries where the state and religion are separate, with a constitutional emphasis on freedom of religion and protection of individual rights.\textsuperscript{862}

Interestingly, the source of Shariah was frozen in the time of Prophet Mohammed and the first caliphs.\textsuperscript{863} The ‘jurists felt obligated to cite the works of earlier scholars to justify their own interpretations, the possibility of formulating novel legal interpretations limited’.\textsuperscript{864} It seems that the legal concepts and theories developed during that period have remained unchanged in the modern Islamic World.\textsuperscript{865}

This, of course can be problematic. Regardless of the timeless precepts espoused by Shariah, the world is hardly the same as it was at the time of the Prophet, whose edicts guide not only the practical law but moral, social behaviour.\textsuperscript{866} At the time, reflecting the simplicity of the era, most of the legal concepts were drawn very narrowly. Especially as regards legislation, they did

\textsuperscript{859} Black, Esmaeili & Hosen (n 25).
\textsuperscript{860} See S Siyar, \textit{The Islamic Law of Nations} (The Johns Hopkins Press, 1966); see also Black, Esmaeili & Hosen (n 25) 67-68.
\textsuperscript{861} As Shabana assessed ‘following the legal reforms that were undertaken in the majority Muslim nation-states, the status of custom as a source of law has been consolidated. Most of these reforms have listed custom as one of the main sources of law, even in some cases before Shariah itself. The majority of these legal reforms were inspired by modern Western legal codes and they echoed the theoretical paradigms that sharpened these Western legal codes’. Shabana (n 13) 1.
\textsuperscript{862} Black, Esmaeili & Hosen (n 25) 70-71.
\textsuperscript{863} See Shabana (n 13).
\textsuperscript{864} BA Ergene, ‘Qanun and Sharia’, in Peters & Bearman (n 18) 111.
\textsuperscript{865} Ibid 109.
\textsuperscript{866} Ibrahim (n 262).
not provide much guidance; nor did they offer easily implemented prescriptions for government administration.\textsuperscript{867}

This undoubtedly created challenges for modern jurists and scholars to develop Islamic jurisprudence to interpret the regulations, keeping in mind that ‘political leaders do not possess any legislative authority but are responsible solely for enforcing the divine will as reflected in jurisprudential principles.’\textsuperscript{868} In this context, it is important to mention that there exists significant disagreement amongst traditional and modern scholars on the nature of the relationship between Shariah law and foreign law.\textsuperscript{869}

With respect to this disagreement it appears that modern Islamic regulations (for example, Saudi legislation) are composed of two main elements, Shariah and foreign law.\textsuperscript{870} On the one hand the Holy Qur’an and Sunna'h are mandatory in the application of Shariah and are treated as an indivisible component of Saudi legislation.\textsuperscript{871} On the other, modern scholars want to interpret and apply modern regulations to facilitate domestic and international trade in a modern world of many religions and political regimes.\textsuperscript{872}

The traditional and modern views thus come into conflict. Modern views sensitive to the needs of non-Muslims and Western legal structures are generally not tolerated by traditionalist Muslim scholars and theorists, especially those following the teachings of the more traditional and literal perspective endorsed by the Hanbali School.\textsuperscript{873} That school stresses the sanctity of obligations incurred towards a *Harbi* (non-Muslim) regardless of the place and source of obligations on the Muslim party.\textsuperscript{874}

\textsuperscript{867} Ergene (n 806) 111.
\textsuperscript{868} Ibid 109.
\textsuperscript{869} Ibid.
\textsuperscript{870} Saleh (n 253) 397-99.
\textsuperscript{871} Ibid.
\textsuperscript{872} For example, As-Sadr sketches the nature of Islamic jurisprudence did not emerge until the fourth century. He mentions that ‘jurisprudence was the threshold between law and theology, which was often called *usul ab-din*, the “roots of religion” just as jurisprudence was “the roots of law.” Thus, this paved the way for rigidity and uncertainty in the application of general jurisprudential theories to the new subject matter. See As-Sadr (n 272) 18.
\textsuperscript{873} Khadduri (n 799).
\textsuperscript{874} Saleh (n 253) 397-399.
Given that the Hanbali School is the official view in Saudi Arabia, it has wisely been suggested that international contracting parties and lawyers need to understand the role of Shariah in interpreting Saudi legislation.\textsuperscript{875} Regardless of international conventional provisions, Saudi legislation has been developed alongside and with strong influences from the provisions of Shariah.\textsuperscript{876} Its provisions will thus directly impact interpretation, application and enforcement of the new Saudi Arbitration Act, as regards both domestic and international arbitral proceedings and awards.

5.5 Effect of Differing Interpretations on Enforcement of Arbitral Awards

Once an arbitral award is rendered, that award still must be recognized by the courts to be enforced. For awards that are enforced in Saudi Arabia, the courts are required to confirm that ‘there is nothing to prevent [the award’s] execution legally’.\textsuperscript{877} In this context, the word legally is translated from the Arabic word shar’an, which literally means ‘according to the Shariah’.\textsuperscript{878} In making this determination, there is nothing in the rules or regulations that limit the judiciary’s scope of review or impose any standards that it must apply. Further, there is no requirement that the judiciary even apply the interpretations of a particular school of thought in making its determination. As a result, the judge has the discretion to evaluate the award’s compliance with Shariah principles through whatever interpretation of the law he sees fit. If could be the interpretation he personally subscribes to or the one that best addresses the facts of the case, but there are no parameters imposed. In practice, this creates a significant degree of uncertainty given that the primary reason for the refusal to enforce an arbitral award is on the basis of public policy when the award runs afoul of Shariah law.

However, despite this lack of interpretive requirements, in practice, the Hanbali school is the only madhhab consulted by the Saudi courts.\textsuperscript{879} This makes the issue of interpretation more theoretical than practical, but what Saudi Arabia

\textsuperscript{875} Shabana (n 13).
\textsuperscript{876} Saleh (n 253) 397-399.
\textsuperscript{877} Royal Decree M/46, art 20.
\textsuperscript{878} Sayen (n 171) 917.
\textsuperscript{879} Harb & Leventhal (n 483) 115.
should be concerned about is the stigma that such uncertainty can create for those outside of the state who are trying to contend with the implications of Shariah law. Further, while this focus on the Hanbali school is the observation of scholars, the lack of reported case law in Saudi Arabia makes this fact difficult to confirm.

5.6 Conclusion

It is essential to understand the purpose of interpreting of legal texts rather than simply disagreeing with legal principles. As has been discussed in this chapter, the four Islamic views represent different schools of thought. Their disciplines and methodologies often diverge as to the proper interpretation of Shariah with regard to new subject matter, capacity and public policy.

For example, regarding the New Saudi Arbitration Law, Chapter 3 of this thesis discussed and analysed controversial Saudi arbitral procedure, such as the manner of appointment of arbitrators and the nature of arbitral disputes, among other things.\textsuperscript{880} This presents challenges for international contracting parties and arbitrators who are required to interpret the Saudi legislations in the context of international arbitration.

The majority of Muslim jurists from the Hanafi, Maliki and Shafi’i Schools appear to be liberal in interpretations of the sources of Shariah with regard to new subject matter.\textsuperscript{881} This favours adoption of modern commercial arbitral methods. On the other hand, Muslim jurists from the Hanbali School—the official Saudi School—are conservative in their interpretation of the source of Shariah considering the Holy Qur’an and Sunna’h to be the only primary sources of Shariah.\textsuperscript{882} Compounding this the controversy is the Hanbali School’s application \textit{Ijma} (consensus) and \textit{Qiyas} (legal reason) as the sources of Shariah.\textsuperscript{883} Strong criticism by non-Hanbalis is levelled at this approach

\textsuperscript{880} G Jones-Pauly, ‘Gender Relations’, in Peters & Bearman (n 118) 137.
\textsuperscript{881} Kamali (n 689) 19-33.
\textsuperscript{882} Rohe & Goldbloom (n 268).
\textsuperscript{883} YY Haddad & BF Stowasser (eds), \textit{Islamic Law and the Challenges of Modernity} (Altamira Press, 2004).
because *ijma* and *Qiyas* were developed after the death of Prophet Mohammed, thus diminishing its value in their eyes.\(^{884}\)

This chapter demonstrates that there is a lack of clear understanding and consensus in modern Islamic thought about the concurrent roles of modern legislation like the new Saudi Arbitration Act 2012, and Shariah. With more and more scholars, jurists and actors entering the stage to speak on Islam, the implications of new subject matter being considered uniformly in the Islamic legal system are problematic.\(^{885}\)

Challenges exist for jurists, international contracting parties and arbitrators as to the proper interpretation and application of the Saudi regulations, particularly in the international arbitration arena, where so many different social, political and legal views converge. For this reason, it would be extremely beneficial and convenient to for all of them to come together to develop a set of clear, uniform ethical principles to which Islamic *Fiqh* (Islamic jurisprudence) should adhere to interpret the provisions of Saudi legislation without prejudice to the divine sanctity of Shariah or the important commercial interests of foreign actors and non-Muslims.\(^{886}\) In the end, in an Islamic nation such as Saudi Arabia, neither the legislative bodies nor court can invent justice; justice can only be discovered by application of the underlying divine sources—the Holy Qur’an and Sunna’h.\(^{887}\)

It must be firmly remembered that the features of Islam are not only about religion or moral ethics to be followed by the Muslims, but also about a legal system that is needed by Muslim rulers and nations in their administration justice to achieve the will of God.\(^{888}\) When the Holy Qur’an is silent on any new

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\(^{884}\) Ibid.

\(^{885}\) Kramer (n 530) 21.

\(^{886}\) For example, see R Ahmed, *Narratives of Islamic Legal Theory* (Oxford University Press, 2012); see also MS Berger, ‘*Sharia and the Nation State*’, in Peters & Bearman (n 18) 223; K Kalongs, ‘*Sharia and Modernity*’, in Peters & Bearman (n 18) 277.

\(^{887}\) Kramer (n 530) 20-37; Weiss strongly stresses that Muslims believe that ‘God’s sovereignty derives from his status as creator and requires no further justification beyond sheer creatorship. The ultimate power in the universe is the power to create, and that is possessed by God alone. Ultimate authority and ultimate power are thus coterminous. Before the Creator, man us powerless; his affairs and his destiny both in the world and the next are entirely in the creator’s hands’. See Weiss (n 250) 24; see also Berger (n 828) 223.

\(^{888}\) El-Malik (n 18).
subject matter or the resolution of a legal issue made unclear under the teachings of the Sunna’h, Muslim rulers or state government may draw on customary law or enact new laws to address the ‘gaps’.\textsuperscript{889} This provides an opening where international commercial laws, norms and guidelines can legitimately take root within a Muslim country and in particular Saudi Arabia. These differing interpretations can result in disparate outcomes depending on the particular beliefs of the presiding judge.

In the above light, one can conclude that the Saudi government needs to consider these discretionary powers, which are vested under the provision of Shariah to develop its Islamic jurisprudence and bring in into the modern age.\textsuperscript{890} Doing so, while also honouring Shariah will enable Saudi legislation and jurists to provide an effective and efficient arbitral regime for international contracting parties to resolve their commercial disputes through predictable recognition and enforcement of international arbitral awards in Saudi Arabia.

The following chapter turns the discussion to the range of international conventions and treaties that have shaped Saudi arbitration practices with regard to recognition and enforcement of arbitral awards, in particular the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards known popularly as the New York Convention.

\textsuperscript{889} Ibid.
\textsuperscript{890} For example, Kamali assessed that ‘the Islamic concept of constitutional law remains open to development and reform without necessarily negating its own religious and ideological heritage’. Kamali (n 689) 20.
CHAPTER 6:
RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN SAUDI ARABIA

6.1 Introduction

The preceding sections have outlined the arbitration award enforcement framework within the Kingdom of Saudi Arabia for both domestic and foreign arbitral awards. While each arbitration proceeding may be subject to different procedural and substantive laws, the enforcement of awards in Saudi Arabia all take place in front of the Saudi courts that are governed by Saudi Arabia's domestic laws, the international instruments the Kingdom has adopted, and, above all else, an application of Shariah law to ensure award compliance.

As can be seen in the preceding chapters, there are fundamental issues that arise from the inherent conflict between the exercise of party autonomy and the imposition of Shariah law as a means of de facto merit review during the recognition and enforcement of arbitral awards. As previous chapters have discussed the interaction between Shariah law and the arbitral process at length, this chapter aims to situate this discussion with the contemporary debates within the broader arbitration landscape.

Ultimately, the recognition and enforcement of arbitral awards by the courts in Saudi Arabia are impacted by the interaction of four legal forces, both domestic and international: (1) the New Saudi Arbitration Law; (2) international conventions and treaties to which Saudi Arabia has become a party, such as the New York Convention; (3) interpretation of the foregoing by the Saudi enforcement courts; and (5) the application of Shariah law for assessing an awards compliance with Saudi public policy. This section will first explore these issues within the context of enforcing domestic arbitral awards, then examine the influence of international instruments on the enforcement of foreign arbitral awards, and finally will consider these enforcement issues within the broader context of arbitration policy.
6.2 Recognition and Enforcement of Domestic Arbitral Awards

Each country has their own nuances that must be accounted for during arbitration proceedings taking place within the country and attempts to enforce the resulting award within its borders. For Saudi Arabia, this is the country’s basis on Shariah law and its impact on the development and issuance of the New Saudi Arbitration Law in 2012.

6.2.1 Respecting the Finality of Arbitral Awards

As detailed in Chapter 3, an award issued by the arbitral tribunal is final and the award is not subject to appeal or review on the merits by any other entity. The only limited form of appeal for an arbitral award in a domestic Saudi arbitration falls under the challenge provisions of the New Arbitration Law. One of the primary criticisms of Saudi Arbitration Law of 1983 was that it was ambiguous with regard to which courts were competent to hear arbitral award challenges and on what bases such challenges could be made.891 Additionally, there were concerns over the extent to which the court could engage in a review of the merits when deciding these challenges.892 To address these concerns, the New Saudi Arbitration Law included a chapter specifically addressing a parties’ ability to challenge the validity of an arbitral award. 893 The articles contained in this chapter specify the limited grounds on which an award can be challenged and the process for determining the competent court to hear the challenge.894 However, the Saudi legislature has made clear that any expansion of these provisions will not be permitted and they cannot be used as a method for bypassing the finality of an arbitral award.895

892 Ibid.
894 Ibid.
895 AlEisa (n 109) 123.
6.2.2 Enforcing a Domestic Award

Once an award is final and is not otherwise challenged pursuant to the provisions of the New Saudi Arbitration Law, the prevailing party can then seek to enforce the award before the Kingdom’s courts. This section first considers the enforcement of domestic awards as this is the foundation upon which the enforcement of foreign arbitral awards is built.

6.2.2.1 Extent of Judicial Review during Arbitral Award Enforcement

Under the New Arbitration Law, the courts' role is much more limited than the broad supervision accorded to the judiciary under the 1983 law. Under the 1983 law, the parties would often experience delays in award enforcement due to the courts becoming overly involved in the merits of the disputes as opposed to simply performing its execution functions. To remedy this involvement and further refine the courts' supporting role for enforcing arbitral awards, the 2012 law emphasised the res judicata nature of the arbitral award and the enforcing court’s lack of jurisdiction to consider the merits of the dispute. Further, the law provided that all that is necessary for the court to enforce the award is receipt by the court of all necessary documents to enforce the award and confirmation that award does not violate the rules of Shariah law and public policy.

6.2.2.2 Promulgation of the Saudi Enforcement Law

In addition to the changes under the New Saudi Arbitration Law, the Saudi Enforcement Law also comes into play in enforcing arbitral awards. This was yet another effort to streamline enforcement processes, not only for arbitral awards, but for the execution of all judgments rendered within the Kingdom. Article 9(2) of the Enforcement law specifically states that arbitral awards along

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897 See Decision No 57/1414 (1994); Decision No 18/1416 (1996).
899 Ibid art 50(4).
900 Ibid art 53.
901 Ibid art 55.
902 Royal Decree No M/53 (3 July 2012).
with their enforcement orders are to be enforced in accordance with the Law of Arbitration.\textsuperscript{903} Under the Enforcement Law, the enforcement circuit courts are created that specifically focus on the enforcement of judgments and awards. The enforcement circuit forms part of the general court as defined under Article 19 of the Saudi Judicial Law, and consolidates enforcement measures to a particular circuit, as opposed to the broad discretion of the Board of Grievances and other competent courts. While Saudi Arabia is yet to have a specialised arbitration court as some scholars have suggested,\textsuperscript{904} the enforcement courts are certainly a step in the right direction to ensuring that decisions are rendered in a timely manner by the enforcement judges and in accordance with the New Arbitration Law.

\subsection*{6.2.3.3 Equation of Shariah Law to Public Policy}

One difficulty that the New Arbitration Law’s provisions present is an equation in the eyes of the law of Shariah and public policy. Specifically, Article 55(2)(b) states that the enforcing court must verify that ‘[t]he award does not violate the provisions of Shariah and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued’.\textsuperscript{905} This is reflective of the Islamic respect for the inviolability of Shariah law; it is so intrinsically intertwined with their laws and systems that it cannot be violated by the courts in enforcing an award even if they did not make the determination. The impact of Shariah and public policy on both domestic and foreign awards will be addressed in a following section on the common enforcement challenges.

\subsection*{6.3 Recognition and Enforcement of Foreign Arbitral Awards}

Whereas the enforcement of domestic arbitral awards is governed by the New Saudi Arbitration Law, the recognition and enforcement of foreign arbitral awards by the Saudi courts stems from the Kingdom’s adoption of international

\textsuperscript{903} Saudi Arbitration Law 2012, art 9(2).
\textsuperscript{905} Saudi Arbitration Law 2012, art 55(2)(b).
convention obligations and their integration into the domestic legal and judiciary systems. This section explores how foreign arbitral awards are enforced within the Kingdom and identifies the grounds on which an award could be set aside.

6.3.1 The Influence of International Conventions

When a country adopts or becomes a signatory to an international convention, their domestic arbitration framework must be revisited to ensure compliance with the country’s obligations under these international instruments.\(^{906}\) As previously mentioned, the development of international conventions and agreements have helped refine the environment of international arbitration and secured its position as often the most suitable dispute resolution mechanism in the international commercial community.\(^{907}\) When it comes to the recognition and enforcement of arbitral awards, the purpose of such international conventions is to create a set of uniform standards among the member states to provide the contracting parties with confidence that the resolution of their dispute will be enforceable without the intervention (or at least excessive intervention) of the member’s state courts.\(^{908}\) However, it would be remiss not to note that there are differences that come into play with how member states implement these instruments and fulfil their obligations, and these differences must be analysed to better understand the foreign arbitral award enforcement landscape.

Some scholars argue that member state courts have eschewed a more formal approach to treaty interpretation in respect of recognition and enforcement of international arbitral awards, in favour a more policy-orientated or teleological approach. In this view, member states’ courts tend to favour national legislative provisions over the objectives of the various international conventions, thus

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\(^{908}\) Baetens (n 849) 319-341.
undermining uniformity and predictability.\textsuperscript{909} From this perspective, member states’ arbitration regulations might then allow the unsuccessful arbitral party to challenge the arbitral award before the enforcing court on grounds outside of and not recognised by the international arbitral scheme.\textsuperscript{910} This adds a layer of complexity in adopting international conventions by the member states, a complexity that will be further analysed in this chapter.

Though international instruments have certain influence on domestic arbitration legislation, ultimately the mandate of national/domestic arbitration remains very much a creature of the member states and of their particular legal systems.\textsuperscript{911} The reason for this is that an international instrument, such as the New York Convention, does not dictate how member states should deal with arbitration, no doubt out of deference to national sovereignty.\textsuperscript{912} Instead, it simply lays down the ground rules for setting aside or refusing to honour arbitral awards by the member states’ courts.\textsuperscript{913} As a result, member states enjoy considerable latitude in how these exceptions will be applied, thus potentially undermining predictable, effective recognition and enforcement of international arbitral awards in member states.\textsuperscript{914} In this regard, Slaughter and White observe that ‘states can be part of the international legal system to the degree they chose to remain apart, asserting their own sovereignty and eschewing international involvement’.\textsuperscript{915}

However, the international legal system must be able to influence the domestic state political policies and objectives to be effective in applying the international legal rules that influence and shape domestic legislation.\textsuperscript{916} Within this context, it is clear that however a state deals with its own policies and objectives will impact the efficacy of international rules and conventions designed to foster

\textsuperscript{911} Di Brozolo (n 105) 27-33.
\textsuperscript{912} Montt (n 482).
\textsuperscript{913} Di Brozolo (n 105) 27-33.
\textsuperscript{914} Ibid.
\textsuperscript{916} Ibid 328-52.
international trade.\textsuperscript{917} The encroachment of member states’ courts ‘on international arbitration can be ignored abroad and therefore be ineffective, and on occasion may even lead to liability under international law for their state... [as such] they might become more amenable to abide by the more generally accepted standards in their treatment of arbitration’.\textsuperscript{918} Further, ‘each state is sovereign, independent, and on the same level of equality with the others. Each is free to act internationally and subject to the same duties’.\textsuperscript{919}

The laws of nature declare every independent state free and independent of others; in this sense, a nation is free to deal with others in whatever it sees fit, just as it is also free to determine what is actually binding on it in its mutual dealings with foreign citizens and international commercial parties.\textsuperscript{920} Of course, how a particular power manages its sovereignty, and whether and to what extent it recognises international law and conventions, will greatly impact its success in the international trade arena.\textsuperscript{921}

Toward this end, it appears that provisional gaps must be bridged over the course of time by the evolution of state practice and the future of treaty making.\textsuperscript{922} As a consequence, ‘the substantive international law would evolve in line with the actual practices of states, which after all is ultimately the source of the whole of international law’.\textsuperscript{923} However, practically speaking the burden of proof lies on the claimant to establish his case within the penumbra of the extant national rule of law in order to be entitled for relief, with a judge deciding whether the claimant has proved his case or not.\textsuperscript{924} This is where problems can arise for foreign investors and international parties.\textsuperscript{925} A legal system is

\begin{itemize}
\item \textsuperscript{917} Ibid 483.
\item \textsuperscript{918} Di Brozolo (n 105) 27-33.
\item \textsuperscript{919} L. Markun, ‘Principles of International Law’ (Haldeman-Julius Publications 2005) 26.
\item \textsuperscript{920} Ibid 14.
\item \textsuperscript{921} Ibid 19.
\item \textsuperscript{923} Ibid 75.
\item \textsuperscript{924} Slaughter & White (n 857) 328-52.
\item \textsuperscript{925} Lord Neuberger emphasises the importance of rule of law in arbitration. He mentions that ‘arbitrators perform an essentially contract-based function for specific parties in private, whereas judges carry out a constitutional function for everyone in public, so the rule of law can be said to be central to the role of judges in a way that it is not for arbitrators. However, that does not mean that arbitrators have no part to
\end{itemize}
something different than a dispute resolution mechanism, as the legal system is vested with the power and duty to discover and create substantive principles of justice that apply effectively across a spectrum of social life. 926

The matter of influence of international conventions on domestic legislation cannot be considered fully resolved, as there remains doubt about the validity of international conventions in many of the member states’ legal system. 927 As a result, there is little uniformity in incorporating international law into municipal legal systems. In fact, the application of international law by national courts always turns on the particular and peculiar decisions made with the respective domestic legal systems, which can widely vary. 928

With these general observations in mind, one can effectively analyse the influence and impact of the New York Convention on the recognition and enforcement of international arbitral awards within the member states legal systems and the Saudi Arabian legal system in particular.

6.3.1.1 The New York Convention

It appears that the lack of a uniform interpretation of the New York Convention by member states has undermined the object and purpose of the Convention. In this context, it is argued that ‘the unification of interpretation by means of the comparative case law method is unable to bridge the gap between the diverging interpretations or to fill a lacuna of the Convention… [such that] … the question of a revision in the form of a Protocol will be considered’. 929 This leaves unanswered the question of whether the protocol would create a pathway for

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926 Neff (n 864) 66.
927 For example, Conforti plausibly states that international rules are created by the Member States of international organisations based on custom, treaties and by binding resolutions, and should be treated on the same footing as unilateral municipal law. He points out the implication of international law is in the people involved in legal affairs, especially legislators, public administrators and judges. He further suggests ‘it is a question of persuading this people to use all means and mechanisms provided by municipal law, and to perfect them, in order to endure compliance with international rules’. See B Conforti, ‘Notes on the Relationship between International Law and National Law’ (2001) 3(1) International Law Forum du Droit International 18.
the application of the New York Convention as a means for effective recognition and enforcement of arbitral awards in the member states.

Given the radical differences between member states in terms of moral, political, economic, and religious beliefs, all of which impact the adoption of international conventions in the respective legal systems, the answer to the foregoing question requires a careful and accurate reading of the New York Convention. 930 For instance, it has been argued that the norms of international law are valid for all states, but are not binding unless they fulfil the conditions under which they claim to be binding.931 Difficulties inherent in the problem of drawing a line between the material spheres of validity of international law and that of national law are not easy to reconcile between states.932 On one hand, a matter might properly be regulated by international law if it is similarly regulated by a rule of customary or international conventional law.933 On the other hand, national law alone could regulate a matter even though it contradicts international protocol.934

In seeking reconciliation, a good place to start as a general proposition is that every member state has a legal obligation to respect the norms of other member states.935 Recognising this, certain member states have managed to enact specific legislation addressing the implementation of the New York Convention, to clarify or complement the convention as the courts refer to the rules based on the enabling legislation.936 For example, with regard to the interplay between international convention and English law, Lowe claims, ‘treaties cannot create rights or duties in English law unless they are given effect by statute’.937 The same is true for attempting to implement the provisions

931 H Kelsen, Principles of International Law (Rinehart & Company Inc 1952) 188.
932 Ibid 191.
933 Ibid.
934 Ibid.
935 Ibid 188.
936 Berg (n 871) 5.
of international conventions within the Shariah and civil based legal system of Saudi Arabia.

It may be suitable to observe here that individuals seek international rules to shield or protect themselves against unwanted or unpredictable actions by the member state.\footnote{Ibid 125-139.} National courts are generally mandated to uphold domestic legal order, not the rule of customary international law.\footnote{Ibid. Campbell’s idea was similar to Lowe. However, he relies on the dictum of Lord Hoffman to emphasis the impact of international conventions on the Member States court in interpreting the Acts of Parliament. As Lord Hoffman explains, ‘in the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those, which exist in countries where the power of the legislature is expressly limited by a constitutional document’. T Campbell, ‘Incorporation through Interpretation’, in T Campbell, KD Ewing & A Tomkins (eds), Skeptical Essays on Human Rights (Oxford University Press) 79.} Thus, it would be paradoxical and profoundly unsatisfactory for international lawyers to assume that international conventions will override the constitutions, statutes and public policy of any particular state just because convention rules create needed uniformity and predictability in the international arena.\footnote{Lowe (n 879) 125-39.}

That being said, it appears wise for member states to allow traders the freedom to nurture autonomous business relationships outside the boundaries of their own respective country.\footnote{Pietro & Platte (n 872) 11.} For them to do this effectively, commercial traders feel ‘the need for a dispute resolution system detached from national courts, and therefore capable of providing the litigants with the highest possible degree of neutrality and understanding of the specific issues’.\footnote{Ibid. It is affirmative that international commercial arbitration would aid commercial parties, lawyers, arbitrators, and judges to resolve highly sophisticated and complex issues beyond the domestic legal framework through endeavouring to identifying prescriptive solutions in the international conventions and treaties. However, it is also argued that national court judges are often ill suited to international commercial disputes because of lack of experience and expertise in complex international business controversies.} In this regard, it could even be argued that the essence of arbitration and arbitration agreements in international commercial transactions should not be concerned as much with reduced expenses or cost-savings, but rather, with determining critical issues arising in the international commercial context.
Given the foregoing, it is necessary to encourage the member states to resort to an arbitration framework with the purpose of harmonising and unifying the law of international trade, as stipulated in international instruments.\textsuperscript{943} For example, the New York Convention and UNCITRAL Model Law were formed to bring international trade modernisation and harmonisation of rules on international business dispute resolution, particularly for the effective recognition and enforcement of international and domestic arbitral awards by member states, without any discrimination against the arbitral parties. The following sections consider how Saudi Arabia has implemented the provisions of these international instruments within the structure of its domestic arbitration framework.

6.3.2 Refusal to Recognise and Enforce Foreign Arbitral Awards under the New York Convention

The concept of refusal of recognition and enforcement of foreign arbitral awards is not a novel concept within the Saudi system.\textsuperscript{944} In fact, many judicial systems around the world struggle with the grounds on which enforcement can be refused. International contracting parties have long debated and experienced the challenges in securing enforcement of their arbitral awards by national courts given their different interpretations of their obligations under the conventions.\textsuperscript{945} While the existing literature has explored the bases on which arbitral awards are enforceable under the Shariah system of governance, relatively little discussion has been devoted to the grounds on which


\textsuperscript{944} Woolf asserts that the New York Convention, 1958, has managed to strike a balance between international arbitration and the protection of the legal principles of the Member States. However, the Convention also imposes a certain general obligation for the Member States to safeguard their basic principles of the legal system for which they are sought. See Wolff (n 205) 9.

\textsuperscript{945} For example, Berg stresses that the significance of the New York Convention for international commercial arbitration would be achievable only when the Member States courts interpret uniformly. He further suggests that it would be achievable by the unification of judicial interpretation by means of the comparative case law method. His idea was that ‘this approach has as objective to formulate one possibly acceptable interpretation on the basis of a comparison of the court decisions given in respect of the Convention, which interpretation could be followed by the courts in the Contracting States’. However, he maintains the uniform interpretation of the Convention would be achievable only by the revision in the form of a Protocol. See Berg (n 871) 2.
enforcement of final arbitral award may be refused by the courts under the current Saudi Arbitration Law.\textsuperscript{946}

When it comes to the enforcement of foreign arbitral awards, the New Saudi Arbitration Law does not delineate any specific grounds on which a court can refuse enforcement of an award issued in accordance with the applicable law of another state or by an arbitral tribunal located abroad.\textsuperscript{947} However, the law does mandate that the arbitral award should not contradict the Shariah.\textsuperscript{948} This lack of clarity as to the scope and content of Shariah rules, and the extent to which these rules can establish grounds for the non-enforcement of non-compliant arbitral awards, is suggestive of a wider problem.\textsuperscript{949}

As has been discussed previously, the application of the domestic laws of the member states can defeat the uniform treatment of international arbitral awards, as there is no harmonised worldwide interpretation.\textsuperscript{950} In every case of an international award, the winning party must undergo challenges in the losing party’s national court proceedings to obtain recognition and enforcement of its arbitral award in the country in which the award must be fulfilled.\textsuperscript{951} This issue is an important one in the context of the New York Convention because the very objective of New York Convention is to provide effective and efficient international arbitral procedures, particularly for recognition and enforcement of international arbitral awards in member states.

As a preliminary matter, it has been argued that the New York Convention is itself uncertain and lacks uniform administration of jurisdictional activity. This in turn further leads to controversy among international commercial parties,

\textsuperscript{946} Al-Fadhel (n 14) 415-26.
\textsuperscript{947} Ibid.
\textsuperscript{948} DW Brown, \textit{Rethinking Tradition in Modern Islamic Thought} (Cambridge University Press, 1996).
\textsuperscript{949} Ibid.
\textsuperscript{950} Wei asserts that the judicial jurisdiction plays a vital role in international arbitral proceedings and enforcement of arbitral awards. He classified the judicial control into two types, ‘the first type of judicial control occurs in the proceedings of setting aside arbitral awards while the second type of judicial control occurs in the proceedings of enforcing foreign awards’. His idea was that the degree of judicial control in the setting aside of arbitral proceedings is reflected in the nature and statutory grounds on the national laws which contain fewer grounds for vacating arbitral awards. He thought that dual judicial control, nonetheless, gives rise to tremendous uncertainties, and also causes conflicts of interest and inherent inefficiencies in practice. See S Wei, \textit{Rethinking the New York Convention, a Law and Economics Approach} (Intersentia, 2013) 129.
\textsuperscript{951} Wolff (n 205).
lawyers and arbitrators as to the proper application of the Convention. Thus, it becomes imperative that international contracting parties and lawyers analyse the attitude of the jurisdiction in which the arbitral award will be enforced toward the problem at hand.\footnote{952}{Pietro & Platte (n 872) 30.}

Ideally, the text of the Convention would be uniformly determined and applied by the member states’ courts.\footnote{953}{Berg (n 871).} However, this is not the practical reality. Turning to Saudi Arabia in particular, the Saudi courts exert legal exemptions under the Convention allowing them to refuse to recognise and enforce certain foreign arbitral awards. These exemptions include the following: (1) the lack of subject matter jurisdiction; (2) the invalidity of the arbitration agreement or provisions contained therein to resolve the dispute by arbitration; and (3) the public policy issues found in an international arbitral award not grounded in Saudi law or Shariah law, which is of most importance to current inquiry. Let us consider this third exemption in greater detail.

\section*{6.3.2.1 Exemption for Awards the Violate Public Policy}

Article V(2)(b) of the New York Convention provides that:

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:

\begin{itemize}
\item[(b)] The recognition or enforcement of the award would be contrary to the public policy of that country.\footnote{954}{New York Convention, art V.}
\end{itemize}

This is the most important, yet difficult to define, exemption for refusing to recognise and enforce a foreign arbitral award. This safe harbour provision permits member states to challenge or refuse to enforce arbitral awards on the basis that the recognition or enforcement of the award would be contrary to that
country’s ‘public policy’.\textsuperscript{955} It is not difficult to see how such a provision could defeat the treaty’s very objective.\textsuperscript{956} Broadly formulated, this safe harbour clause lacks determinate contours, leaving it up to states to decide what laws or issues fall under the rubric of ‘public policy’ and the threshold at which such issues are deemed sufficiently serious in scope or nature to permit a challenge against an award.\textsuperscript{957} This, in turn, may provide grounds for a local court to reopen a dispute for review on the merits, leading to the potential annulment of the award or, in the worst case scenario, a nullification of the underlying contract.\textsuperscript{958} It is not difficult to see how such a provision may further destabilise the legitimate expectations of private parties or imbue the state with unilateral power to decide which awards they will enforce, which they will not, and on what grounds.\textsuperscript{959} As was mentioned above, this becomes particularly problematic in Islamic states like Saudi Arabia in which Shariah law is deemed to rise to the level of public policy. Thus, any award that is to be enforced in Saudi Arabia must comply not only with the laws governing the contract and rendering of the arbitral award, but also Shariah law.

A matter which is left ambiguous under the existing provisions of the New York Convention occurs when the laws utilised to make determinations under the arbitration agreement are at odds with the provisions of a member state’s law, such as the implication of Shariah. This conflict can call into question the arbitrability of certain agreements in Saudi law. By way of example, under Article V(1)(a) of the New York Convention, the capacity of parties to decide the validity, execution and operation of arbitration should be determined according to ‘the law applicable to them’.\textsuperscript{960} However, the New York Convention fails to specify the applicable law.\textsuperscript{961} While the arbitrators will ultimately make the determination of applicable law during the arbitration proceedings, Saudi Arabia may elect to apply Shariah at the enforcement stage when determining the capacity of parties, or more importantly the grounds for incapacity. The effect

\textsuperscript{955} Ibid.
\textsuperscript{956} See Rau (n 510) 47-188.
\textsuperscript{957} New York Convention, art V.
\textsuperscript{958} Evans (n 369); Rau (n 510) 47-188.
\textsuperscript{959} Evans (n 369) 295-305.
\textsuperscript{960} Ibid.
\textsuperscript{961} Rau (n 510) 47-188.
may be the determination of incapacity at odds with the methods and laws applied in non-Islamic jurisdictions.⁹⁶²

When it comes to the enforcement of arbitral awards in Saudi Arabia, nearly all exemptions come back to roots in Shariah principles and public policy; however, it is the public policy exemption that provides the Kingdom’s courts with the explicit authority to invoke Shariah as a stand-alone ground for refusing to recognise and enforce an arbitral award.

The controversial views of international contracting parties, lawyers, arbitrators and judges are often widely debated by the member states courts in regards to the notion that public policy can constitute a ground for refusal of recognition and enforcement of foreign arbitral awards.⁹⁶³ It is reasoned that the concept of public policy is of principal concern for the member states’ courts when evaluating whether the arbitral award at issue involves the violation or fulfilment of important public values, as opposed to unimportant or transitory ones.⁹⁶⁴ However, from the Saudi perspective, there is no question that Shariah compliance is a non-violable public value.

There appears to be a general consensus that the concept of public policy is grounded in the root of law, which takes shape when the state authority starts to use models and methods from the political economy that have been applied to international relations.⁹⁶⁵ To support this view, it is necessary to understand how national public policy is set, and how state actions determine that public policy.⁹⁶⁶ It has been suggested that governmental agendas and policies are set by actors in the political system in given policy areas.⁹⁶⁷ These actors, it is

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⁹⁶² Al-Fadhel (n 14) 415-426; see also Rau (n 510) 47-188.
⁹⁶⁴ CE Cochran et al, American Public Policy, an Introduction (9th edn, Cengage Learning, 2009).
⁹⁶⁵ Ibid.
⁹⁶⁶ Ayad (n 311) 297-341.
argued, fix their attention on the particular problem because of group pressure or other expressions of preferences that may gain prominence as an issue.\textsuperscript{968}

It appears that the general framework of public policy is extremely broad in scope as to the implementation of any particular proposed policy. At the same time, it is also important to bear in mind that the concept of policy is set by the government for determination and calculation of facts with the strict logic with which policy is to be selected.\textsuperscript{969} This can again be problematic because there is no clear boundary and universal definition of public policy, nor is there likely to be one in the foreseeable future.\textsuperscript{970}

It is fair to suggest Article V is the most important provision of the New York Convention, as it sets the grounds for refusal of recognition and enforcement of international arbitral awards by the member state's courts.\textsuperscript{971} However, this position creates challenges for the member state to implement its regulations because the concept of public policy is ambiguous and unique to different member states.\textsuperscript{972}

Furthermore, the most common ground for refusing to recognise or enforce an arbitral award is that the award violates public policy.\textsuperscript{973} Some scholars suggest that the member states defeat the objective of the New York Convention by asserting a public policy disqualification because the scope and function of public policy is to safeguard the fundamental moral convictions of the forum.\textsuperscript{974}

It is also necessary to distinguish between the concepts of domestic and international public policy. On the one hand, domestic public policy draws attention to the member state's policies and agendas pertaining to matters of that particular policy, or any action contrary to the fundamental principles of the

\textsuperscript{968} Ibid114.
\textsuperscript{969} Ibid114.
\textsuperscript{970} KB Smith & CW Larimer, The Public Policy Theory Primer (Westview Press, 2009).
\textsuperscript{971} Wolff (n 205).
\textsuperscript{972} Ibid.
\textsuperscript{973} Ibid.
\textsuperscript{974} Ibid 22.
laws of the country. The number of matters considered to fall under public policy in international cases is smaller than domestic cases and the scope of public policy on the international scale is narrower than in the direct application of domestic law. This will be discussed in greater detail below.

In light of this, one should also then consider what, if any, role the UNCITRAL Model Rules on Arbitration have in the recognition and enforcement of international arbitral awards in Saudi Arabia.

6.3.3 Implication of UNCITRAL Model Law for Award Enforcement

Most often when discussing the role of UNCITRAL commentators and scholars have focused their attention on the harmonisation of national and international arbitration law. This is because the United Nations established a commission whose objective was to propose a model system of laws setting forth uniform arbitration regulations. Theoretically, this would provide international contracting parties with a reliable system of effective and efficient arbitration enforcement procedures without any discrimination between the member states. However, in practice, member states undermine these objectives by adopting a multiplicity of different interpretations and applications of the uniform laws in each of their respective legal systems, often arising from nation-specific public policy or constitutional and/or religious mandates like those espoused in Shariah.

Interestingly, UNCITRAL affords little flexibility for the member states to customise the Model Law to fit their own needs. The reason such changes are discouraged is the perceived need for harmonisation. To achieve greater

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975 Berg (n 871) 360.
976 Ibid.
979 Castello (n 920) 1405.
980 PJ Pettibone, ‘The Scope of the Public Policy Exception to the Recognition and Enforcement of Foreign Arbitral Awards in Russia’ (2014) 25(1) ARIA 105-16.
harmonisation, it requires greater cooperation and compliance from the member states, and greater sacrifice or modification of their own domestic laws, policies and procedures. In this regard, some scholars suggest that UNCITRAL’s commission should undertake concerted efforts to consider inalienable rights, such as sovereignty, of the member states in the development of an acceptable uniform international arbitration regime.

Yet, as stated above, the provisions of New York Convention do not prevent the member states from restricting the grounds for refusal of recognition and enforcement of international arbitral awards. Few member states have adopted arbitration regulations providing narrower grounds for refusal of recognition and enforcement of international arbitral awards.

In this instance, UNCITRAL should address suggestions for a model interpretation of the Convention’s provisions or perhaps the adoption of guidelines for interpreting domestic laws in the Convention’s language. Given that UNCITRAL remains silent on the grounds for the refusal of recognition and enforcement of international arbitral awards by member states’ courts, it has been suggested that the member states’ courts and arbitrators follow the provisions of the New York Convention for interpreting the legal context for the recognition and enforcement of international arbitral awards in international arbitration as closely as possible.

Therefore, it is fair to say that the role of UNCITRAL is a welcome, complementary development and promises important support for the harmonisation of international arbitration law; however, the degree of change in practice remains unclear. The main challenge faced in international arbitration is thus to balance the conflict of interest presented by the public policies of differing member states as related to each other and the uniform Conventional

982 Mbengue (n 58) 207-48.
983 Croft, Kee & Waincymer (n 981).
984 Lew, Mistelis & Kroll (n 2) 700.
985 Croft, Kee & Waincymer (n 981).
986 Ibid.
987 Lew, Mistelis & Kroll (n 1552) 700.
988 P Binder, Analytical Commentary to the UNCITRAL Arbitration Rules (Sweet & Maxwell, 2013).
laws. In this sense, the recent reformation of the arbitration regime in the Kingdom of Saudi Arabia clearly appears to be part of a broader and continuing reorganisation of Saudi’s judicial system toward this very purpose.

On its face, the new Saudi arbitration regulations show that the Saudi government has made a serious attempt to adopt provisions from both the New York Convention and the UNCITRAL Model Law to more closely align itself with international arbitration norms. For example, Article 9 of the New Arbitration Law stipulates that the contracting parties may include an agreement to arbitrate certain disputes prior to the occurrence of the dispute, which was not practised under the provisions of Shariah law. Further, Article 38 of the New Saudi Arbitration Law allows the arbitral parties to choose non-Saudi regulations as their applicable law to resolve the subject matter of the dispute. This is a significant departure from Shariah principles. Yet, despite these attempts to integrate international norms into domestic Saudi law, enforcement of international arbitral awards must still be in compliance with the Shariah law, which for anyone seeking arbitral award enforcement in Saudi Arabia is the hobgoblin.

990 Tarin (n 114) 131-54.
991 Binder (n 930).
992 Article 9(1) The arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract. The arbitration agreement may also be concluded after the occurrence of a dispute, even if such dispute was the subject of an action before the competent court. In such a case, the agreement shall determine matters included in the arbitration; otherwise, the agreement shall be void. (2) The arbitration agreement shall be in writing; otherwise, it shall be void. (3) An arbitration agreement shall be deemed written if it is included in a document issued by the two parties or in an exchange of documented correspondence, telegrams or any other electronic or written means of communication. A reference in a contract or a mention therein of any document containing an arbitration clause shall constitute an arbitration agreement. Similarly, any reference in the contract to the provisions of a model contract, international convention or any other document containing an arbitration clause shall constitute a written arbitration agreement, if the reference clearly deems the clause as part of the contract. See Ibid.
993 Article 38(1) Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following: a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise. b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute. c. When deciding the dispute, the arbitration tribunal shall take into account the terms of the contract subject of the dispute, prevailing customs and practices applicable to the transaction as well as previous dealings between the two parties. (2) If the two parties to arbitration expressly agree to authorize the arbitration tribunal to settle the dispute amicably, it may rule on the dispute in accordance with the rules of equity and justice. See Ibid.
994 See Ibid.
Within this context, Saudi scholars point out that Article 50\textsuperscript{995} of the Saudi Arbitration Act is consistent with New York Convention provisions. However, Article 50 invalidates any arbitral award that violates public policy, which in Saudi Arabia is set forth in the constitutionally controlling Shariah.\textsuperscript{996} It is fair to say that the New Saudi Arbitration Law has achieved a high degree of advancement in line with international tenets of arbitration law, even though embedded with Shariah as its source, with the New York Convention and UNCITRAL both providing valid structure.

6.3.4 Saudi Arabia’s Position on Recognising and Enforcing Foreign Arbitral Awards

The New Saudi Arbitration Law represents a clear legislative mandate by Saudi lawmakers to modernise Saudi Arabia’s standards for arbitration and move these standards into the modern world of international arbitration.\textsuperscript{997} This law was a bona fide attempt to harmonise the general features of both domestic and

\textsuperscript{995} Article 50: (1) An action to nullify an arbitration award shall not be admitted except in the following cases: a. If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term; b. If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity; c. If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control; d. If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute; e. If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties; f. If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, and then nullification shall apply only to parts not subject to arbitration. g. If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it. (2) The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law. (3) The arbitration agreement shall not terminate with the issuance of the competent court decision nullifying the arbitration award unless the arbitration parties agree thereon or a decision nullifying the arbitration agreement is issued. (4) The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute. See Official website of Bureau of Experts at the Council of Ministers: <https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=123&VersionID=270#search1> accessed 1 October 2016. See Ibid.

\textsuperscript{996} Article 10. (1) An arbitration agreement may only be concluded by persons having legal capacity to dispose of their rights (or designees) or by corporate persons. (2) Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law. See Ibid.

\textsuperscript{997} Harb & Leventhal (n 483) 113-30.
international arbitral procedures with the immutable principles articulated by the Hanbali school of thought in relation to arbitration proceedings.\textsuperscript{998}

For instance, the Saudi Arbitration Act seems to ‘decrease the courts’ supervisory role, leaving the arbitral institution to play such a role depending on the content of the arbitral procedure chosen by the parties’.\textsuperscript{999} In this regard, the New Saudi Arbitration Law embodies several arbitration-friendly principles of the UNCITRAL Model Law, while at the same time seeking to harmonise these provisions with the principles of Shariah. The ultimate goal is to liberalise arbitration proceedings by allowing more freedom for the arbitral parties to choose their own procedures when resolving their international commercial disputes.\textsuperscript{1000}

Given the different views of national courts on the recognition and enforcement of international arbitral awards, it would behove any party to international arbitration to first obtain competent legal advice from an experienced lawyer who practices in the particular jurisdiction where the arbitral award will seek to be enforced.\textsuperscript{1001} This is especially important given the varying approaches to award enforcement by different member nations or even within the courts of member nations.\textsuperscript{1002} It appears that national arbitration laws in many countries, particularly in countries that have become major players in international trade

\textsuperscript{998} Ibid.
\textsuperscript{999} Ibid. To put this in perspective, Born’s ideas seemed to be the opinion of essential objective of international arbitration. He points out that involvement of the national courts in resolving international commercial disputes would be a challenge for international commercial parties. Born mentions, ‘it is a harsh, but undeniable, fact that some national courts are distressingly inappropriate choices for resolving international commercial disputes. In some states, local courts have little experience or training in resolving international transactions or disputes and can face serious difficulties in fully apprehending the business context and terms of the parties’ dispute’. See Born (n 2) 80.
\textsuperscript{1000} Harb & Leventhal (n 483) 129-30.
\textsuperscript{1001} Redfern et al held that an arbitral tribunal is limited in its powers to enforce its own arbitral award. In consequence, the winning party must seek the national court at the place the enforcement of arbitral awards takes place. It is affirmed that the procedures rules adopted by the national courts vary from country to country. For example, ‘where a court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available. Enforcement goes a step further than recognition. A court that is prepared to grant enforcement of an award will do so because it recognises the award as validly made and binding upon the parties to it and, therefore, suitable for enforcement. In this context, the terms recognition and enforcement do run together. One is a necessary part of the other’. Redfern et al (n 3) 514-16.
such as Saudi Arabia, still offer room for improvement and thus require careful professional insight.\textsuperscript{1003}

That being said, there are still complexities in the Saudi legislation with respect to the challenges for the recognition and enforcement of foreign arbitral awards in the Kingdom, especially as applied by the Saudi enforcement courts.\textsuperscript{1004} Thus, the question continues to be how best harmonise the New Saudi Arbitration Law together with the New York Convention and the UNCITRAL Model Rules with the principles of Shariah.

6.4 Ineffectiveness of Saudi Arbitral Reform Efforts for Increased Efficiency in the Recognition and Enforcement of Awards

Many praised the New Saudi Arbitration Law as a big step forward toward modernising the Saudi arbitration regime and bringing into line with international standards, and there were some significant improvements. For instance, the New Arbitration Law did away with the prior law’s requirement that the parties obtain the consent of the competent court prior to initiating arbitration proceedings.\textsuperscript{1005} The 2012 version completely removed this requirement and, in fact, now requires that the courts must decline jurisdiction of a dispute when a valid arbitration clause exists.\textsuperscript{1006} This change represents an example of one of the various ways Saudi Arabia revised its arbitration law to be more consistent with the UNCITRAL Model Law\textsuperscript{1007} in its attempt to become a more arbitration-friendly environment. In the same vein, the New Arbitration Law now also permits an arbitral tribunal to decide on its own jurisdiction,\textsuperscript{1008} another change influenced by the UNCITRAL Model Law\textsuperscript{1009} that was not addressed by the old arbitration law.

\textsuperscript{1003} Ibid 589.
\textsuperscript{1004} Harb & Leventhal (n 483) 119-30.
\textsuperscript{1005} Saudi Arbitration Law 1983, arts 5-6.
\textsuperscript{1006} Saudi Arbitration Law 2012, art 11.
\textsuperscript{1007} UNCITRAL Model Law, art 8.
\textsuperscript{1008} Saudi Arbitration Law 2012, art 12.
\textsuperscript{1009} UNCITRAL Model Law, art 16.
However, despite these positive advancements in Saudi arbitration law, or for that matter any law or rules governing the substantive or procedural aspects of an arbitral proceedings, are rendered moot to the extent that they conflict with Shariah law—and this result is of major concern. Within the international arbitration sphere, party autonomy is the pinnacle of the arbitral process, and many scholars believe that mandatory domestic rules limiting this autonomy should be rejected.\footnote{Lew, Mistelis & Kroll (n 2) 1-11; Loukas Mistelis, ‘Mandatory Rules in International Arbitration: Too Much Too Early or Too Little Too Late?’ in George Bermann & Loukas Mistelis (eds), \textit{Mandatory Rules in International Arbitration} (Juris 2011) 291, 294.} In considering the extent to which an arbitral tribunal must take into consideration the mandatory rules of a particular jurisdiction, the US Supreme Court held that an ‘international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence it has no direct obligation to vindicate their statutory dictates’.\footnote{Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc, 473 US 614 (1985).} By incorporating such mandatory compliance rules into its enforcement efforts, the KSA is effectively restraining party autonomy.\footnote{Charles Brower, ‘Arbitration and Antitrust: Navigating the Contours of Mandatory Law’ (2011) 59 \textit{Buffalo Law Review} 5.} Thus, the question becomes how can Saudi Arabia reconcile its international treaty obligations with its domestic law?

\section*{6.5 Reconciling Treaty Obligations with the Application of Shariah Principles}

One issue that all Islamic states must face, including Saudi Arabia, is how to reconcile their international treaty obligations, such as those imposed by the New York Convention, with the guiding principles of Shariah that are broadly applicable domestically. Under the present circumstances, ideally the New York Convention should govern the enforcement of international arbitral awards with refusals and exemptions on Shariah grounds being the exception and not the rule. However, in practice Shariah often prevails under the Kingdom’s broad reading of ‘public policy’ as implicated in the exemptions contained in Article V of the New York Convention. The result has been a notable level of confusion among parties as to what an outcome will be when attempting to enforce their awards within the Saudi court system.
To gauge parties’ perceptions as to which would prevail when Shariah and the New York Convention come into conflict, 53.13% thought the New York Convention would prevail, while 46.88% believed that Shariah would determine the outcome.\(^{1013}\) Of the survey respondents, only two correctly commented that ideally there should be no conflict between the two.\(^{1014}\) Here it is important to point out that different GCC countries take varying approaches to their integration of Shariah into their legal systems. For instance, in Kuwait, Shariah is considered as one source of legislation, but not the main source.\(^{1015}\) As such, it faced significantly less difficulty in reconciling its treaty obligations under the New York Convention with its domestic laws and adoption of Shariah in principles. Roy explains that the primary reason that Kuwait was able to minimise its conflicts was because ‘Kuwait’s general rule of civil procedure was to recognize international arbitration agreements and to subordinate the Kuwaiti legal system to the rules of the arbitration tribunal’.\(^{1016}\)

However, Saudi Arabia has taken a much different approach. Within the Kingdom, the sources of Shariah law—the Quran and Sunnah—are prescribed by the Basic Law of Governance as the constitution of Saudi Arabia.\(^{1017}\) The Shariah is the main source of legislation in the Kingdom and the government’s position is that the Shariah is equivalent to the Kingdom’s public policy. Thus, the Saudi government subordinates international arbitral awards to the Shariah in practice, by ensuring the compliance of the arbitral proceedings and the contents of the award before recognising or enforcing the award within the Kingdom. Specifically, when looking at recognition and enforcement proceedings, there is no distinction between domestic or foreign/international awards or parties,\(^{1018}\) all awards are subject to compliance with Shariah ‘as

\(^{1013}\) Almutawa (n 110) app II.

\(^{1014}\) Ibid.

\(^{1015}\) Ibid 61.


\(^{1017}\) Basic Law of Governance, art 1.

\(^{1018}\) Baamir (n 18) 77 (‘Islamic law pays no attention to states, borders and other concepts such as nationality and domicile…’).
enforced in Saudi Arabia’. This position has not changed with the passage of the New Arbitration Law.

This focus on subjecting foreign awards to the same compliance scrutiny of domestic arbitral awards raises the important question of how the Kingdom is defining ‘public policy’ for the purposes of its obligations under the New York Convention. There are two ways to approach this analysis. The first is considering Saudi Arabia’s compliance with its treaty obligations from a legal perspective, while the second looks at the inherent tension between domestic and international public policy and which should be applied.

6.5.1 Legal Requirements for Fulfilling Treaty Obligations

There are a number of sources of obligation that one can consult that would require Saudi Arabia to comply with its treaty obligations in good faith. Part of that good faith means attempting to act in accord with the spirit and intent of the treaty, not to use inherent vagaries to its advantage and allow its domestic law to remain supreme.

First, one can look to the principles of the Shariah itself. Consider the following passage from the Quran, ‘O ye who believe! fulfil (all) obligations’. Often used to support the contention that all Muslim must uphold their contractual obligations, this would also be applicable to a Shariah based government. As such, the government is responsible for meeting its obligations under all treaties and international contracts of which it becomes a part. Similarly, one can also look to general principles of international law to support the Kingdom’s obligations as a signatory. For instance, the principle of *pacta sunt servanda* is similar to the principle of the Quran in that all agreements must be kept. Furthermore, as a party to the Vienna Convention on the Law of Treaties, Saudi Arabia also has a requirement to interpret the treaty and perform its obligations

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1020 Quran, Al-Ma’ida 5:1.
in good faith,\textsuperscript{1022} taking into consideration ‘any relevant rules of international law applicable in the relations between the parties’.\textsuperscript{1023}

Thus, Saudi Arabia has an obligation to interpret the treaty language and perform its obligations in a manner consistent with the intent of the treaty, not to perpetuate its own rule of law or agenda. Where this becomes difficult to parse is in the definition of public policy, which is considered more fully below.

\textbf{6.5.2 Defining Public Policy}

It has been recognised that there are in effect two different types of public policy practiced by nations—domestic public policy and international public policy. As explored in previous chapters, public policy comes into play as an exemption to the New York Convention upon which the Kingdom can refuse to recognise and enforce an international arbitral award.\textsuperscript{1024} This is also mirrored in the language of the New Arbitration Law, rendering Saudi arbitral awards subject to the same limitation.\textsuperscript{1025} The difference is that the New Arbitration Law specifically mentions Shariah compliance in its provision on public policy, whereas the term is left relatively undefined by the New York Convention.\textsuperscript{1026} The text specifically allows a country to refuse to recognise or enforce an arbitral award that is ‘contrary to the public policy of that country’.\textsuperscript{1027} Without any additional context or interpretive information, it is easy to see how this can become the basis for subjective uses and controversy in the enforcement realm. As some scholars have keenly noted, ‘[t]his clause has the effect of relegating the ultimate decision on the efficacy of the Convention to the good faith of the Contracting States...Basically, the judge may refuse recognition and enforcement if he finds that it would be contrary to the public policy of his country.’\textsuperscript{1028}

\begin{thebibliography}{99}

\bibitem{1023} ibid.
\bibitem{1024} New York Convention, art V(b)(2).
\bibitem{1025} Saudi Arbitration Law 2012, art 50.
\bibitem{1026} Mark Wakim, ‘Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21 \textit{New York International Law Review} 1, 50 (‘The interpretation of “public policy” as used in the New York Convention is neither defined nor settled law.’).
\bibitem{1027} New York Convention, art V(b)(2).

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One should also note that there is a stark difference between the intentions of the public policy provisions of domestic legislations and the New York Convention. The public policy provision of the New York Convention is permissive, rather than mandatory. Compliance is not a condition that must be met for an award to be enforced, but rather it serves as the basis to refuse to enforce an award when doing so would be contrary to the country’s public policy.\textsuperscript{1029} Conversely, the language contained in domestic legislation, such as the New Saudi Arbitration law, sets for public policy and Shariah compliance as a condition that must be met before an award can be enforced.\textsuperscript{1030} The latter is a more expansive provision than that of the Convention and is contrary to custom to interpret the Convention’s exemptions narrowly.\textsuperscript{1031} It is a careful balance to be struck by the courts that they do not conflate the intended purposes of the two provisions; each award must be considered in light of the regime under which it is being enforced.

However, to the extent that public policy is implicated, there remains the question of how public policy should be defined. While public policy is widely recognised to vary dramatically from country to country, Shariah adds an additional layer of complexity as an interpretive system that can result in differences from court to court or even judge to judge within the Kingdom.\textsuperscript{1032} It has been established that Saudi Arabia takes public policy a step further than most Western countries and equates it with Shariah principles.\textsuperscript{1033} Thus, any attempt to enforce an award in Saudi Arabia is in effect subject to three layers of public policy. The first is the provision in the Saudi domestic legislation that requires public policy compliance as a condition to enforcement under the traditional notions of good morals and protecting the public order. The second is the implication of Shariah’s broad scope and various interpretations to the award and the underlying arbitration proceedings. Finally, the third is the

\textsuperscript{1029} New York Convention, art V(2).
\textsuperscript{1030} Saudi Arbitration Law 2012, art 50.
\textsuperscript{1031} Almutawa (n 110) 116.
\textsuperscript{1032} Ariel Ezrahi, ‘Arbitration in the Arab Middle East, a Snapshot’ (2005) 20-11 Measley’s International Arbitration Reports 17 (“[T]he Shari’a compliance requirement, therefore, appears to provide yet another layer in addition to the exception to enforcement of a foreign arbitration award as found in the New York Convention”).
\textsuperscript{1033} Almutawa (n 110) 116.
applicability of the public policy exemption under the New York Convention. This creates an interpretative nightmare for a party unfamiliar with the Saudi system, leading to an often ineffective and inefficient for enforcing an arbitral award.

Returning to the dichotomy of domestic versus international public policy, many countries have made a distinction to public policy as applied within its borders and the public policy that is to be applied when dealing with matters of foreign relations. Arbitration scholars have gone as far to say that domestic public policy is the internal policy that relates to the enforcement of domestic arbitral awards, whereas public policy for the enforcement of international awards pursuant to Article (V)(2)(b) of the New York Convention should only consider the ‘international public policy of the [enforcing] jurisdiction’, as opposed to its conception of domestic public policy.

In this context, a country’s international public policy represents the parallel standards it holds those outside its borders to, when interacting with the country’s legal system. The motivation for having an international public policy is to increase foreign relations, be viewed as friendlier to arbitration, and fairly evaluate those awards that have little to do with the domestic legislative system beyond gaining satisfaction through a judicial order. In fact, Levi-Tawil notes that ‘the courts of most nations have chosen not to use their domestic public policies to refuse to recognize and enforce a foreign arbitral award, and will enforce the arbitral award as long as it is not contrary to international public policy’. Yet, Saudi Arabia has not subscribed to this approach. It continues to subject both foreign and domestic parties and awards to the same Shariah compliance standards. As such, an important step for the Kingdom on its path to modernisation would be to consider to what extent differentiating between domestic and international public policy could improve its efficiency in enforcing arbitral awards the perceptions of those outside the Kingdom on engaging with

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the Saudi legal system. One possible method for addressing this issue would be the adoption of some degree of legal pluralism in the Kingdom with regard to international arbitration. As will be discussed in further detail in the following chapter, legal pluralism essentially occurs when a legal system, either intentionally or unintentionally, creates two different conceptual legal frameworks for contrasting aspects—\(^{1037}\)—in this case it would be the enforcement of domestic versus foreign arbitral awards.

In addition to the need to define public policy, to the extent the public policy implicates Shariah, there is an inherent impetus of good faith embodied in the Shariah principles that cannot be ignored in their application. In this regard, if Shariah is to be applied as public policy, the application of Shariah should not be arbitrary and left simply to the discretion of whichever enforcement judge is presiding over a case; indeed, its application should be based on a clear and determinate policy. Clarity in the application of Shariah principles would eliminate the tendency to engage in shrouded use of public policy to avoid international treaty obligations. Such consistency and predictability in application would also prevent parties from engaging in enforcement forum shopping as explained in the follow section.

### 6.5.3 Encouraging Enforcement Forum Shopping

As companies continue to globalise, it becomes increasingly likely that they will hold assets in different enforcement jurisdictions. If Saudi Arabia continues to boldly refuse to enforce arbitral awards on public policy grounds for lack of Shariah compliance, particularly when interpretational issues are at hand, this will likely encourage enforcement forum shopping by foreign parties seeking to enforce arbitral awards. Such forum shopping is made possible by the more favourable right provision under Article VII of the New York Convention.\(^{1038}\) Article VII of the New York Convention can be implicated when a non-domestic arbitral award rendered within an Islamic country, such as Saudi Arabia, is

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\(^{1038}\) New York Convention, art VII.
refused enforcement in that country under Article V(2)(b). This provision allows for a subsequent attempt to enforce the arbitral award in another country in which the Shariah laws are more favourable and would find the arbitral award to be enforceable. It should be noted that there is not a global consensus on how the most favourable right provision can be applied, and the argument here is speculative rather than empirical, but it is something that the Kingdom should take into consideration as it attempts to modernise into an arbitration-friendly jurisdiction.1039

6.6 A Lacking Judiciary System

In addition to the legislative conflicts that arise between Saudi domestic laws and international instruments, Saudi Arabia also faces struggles within its judiciary system when it comes to the recognition and enforcement of foreign arbitral awards.

First, the structure of the Saudi domestic courts for handling recognition and enforcement proceedings is not conducive to efficiency. The Saudi judiciary bifurcates the process for obtaining recognition and enforcement to different benches. An arbitral award must first be recognised by a court of competent jurisdiction. Once the award is recognised, a sixty-day period commences within which the respondent can challenge the enforcement of the award. Once that period has passed, the enforcement judge then has full authority to enforce the award with the weight of a final judgment.

This two-step process creates a significant barrier between the rendering of the arbitral award and its ultimate enforcement—recognition. Under the Enforcement Law enacted in 2013, recognition and enforcement were consolidated to both being handled by enforcement judges. Article 11 of the new law places significant restrictions on the circumstances within which an enforcement judge can recognise an arbitral award. First, the enforcement

judge must confirm that the award must be from a jurisdiction with reciprocity. Then the judge must verify the following: that no local court has jurisdiction over the dispute, and the foreign tribunal issuing the award had jurisdiction according to its own conflict of law rules; that litigants were duly summoned, properly represented, and defended themselves; that the award is final as to the law of the issuer; that the award does not contradict another award, judgment, or order issued on the same subject from a judicial authority within a competent jurisdiction in the Kingdom; and that the award does not contradict the Kingdom’s public policy of Shariah.\textsuperscript{1040} This recognition stage is where Saudi court most often engage in additional judicial review beyond what is normally deemed acceptable for awards with the status of res judicata.

The issue of judicial review by Saudi courts within the context of recognising and enforcing arbitral awards has been a persistent issue within the Kingdom. Under the Old Arbitral Law, the parties could broadly challenge an arbitral award before the competent court.\textsuperscript{1041} This often resulted in the domestic courts engaging in a merits review of a case and overturning the award.\textsuperscript{1042} This issue was one that the New Law specifically attempted to address by restricting the grounds for setting aside an arbitral award to a specific set of circumstances, which were primarily derived from those outlined in the New York Convention.\textsuperscript{1043} However, when piecing together the provisions of New Arbitration Law, the Enforcement Law, and the public policy exertions under the New York Convention, the implication of Shariah as public policy open awards to significant review by the enforcement courts.

Furthermore, when it comes to foreign awards, the Enforcement Law has significant gaps in some instances and overlapping jurisdiction in other instances that pose a constant challenge to parties and the courts. First, one can argue that under Article 11, any treaties that provide for reciprocal recognition would take precedence over the domestic laws of Saudi Arabia. In the event that no treaty is applicable, one would then turn to the verification

\textsuperscript{1040} Enforcement Law 2013, art 11.
\textsuperscript{1041} Saudi Arbitration Law 1983, art 19.
\textsuperscript{1043} Saudi Arbitration Law 2012, art 50; New York Convention, art V.
factors listed above.\textsuperscript{1044} However, this scholarly approach is contradictory to the conjunctive nature of the two provisions upon a plain language reading. Specifically, Article 11 provides that enforcement is made on the basis of reciprocity \textit{and} the verification factors.

In turning to an examination of the verification factors more specifically, one could argue that they require that the Saudi courts have no jurisdiction over the subject matter for an award to be enforced.\textsuperscript{1045} However, if one were to read this factor in such a manner, then the Saudi courts could ultimately not enforce any foreign award arising from a dispute in which the Saudi courts could have had jurisdiction. Arguably, this is remedied by the courts being required to respect the parties’ exercise of autonomy in entering into an arbitration agreement, effectively removing the case from the jurisdiction of the courts and into that of the arbitral tribunal. The ambiguity in the Enforcement Law’s language, and its incomplete integration of the New York Convention and UNCITRAL Model Law principles, creates inconsistency in application and confusion among both enforcement judges and parties that could be reconciled by addressing the issue of foreign award enforcement under the Convention more directly.

\textbf{6.7 Conclusion}

As demonstrated in this chapter, the recognition and enforcement of international arbitral awards in Saudi Arabia is impacted by the interaction of the Saudi Arbitration Law, the New York Convention, the UNCITRAL Model Law, the decisions made by Saudi courts applying Hanbali interpretation, and the Shariah.

Article V of the New York Convention has clearly set out certain exclusive grounds on which the member states can refuse to recognise and enforce international arbitral awards. Though jurisdictional exclusions like improper subject matter, incapacity and invalidity tend to be construed narrowly and

\begin{flushright}
\textsuperscript{1044} Nicolas Bremer, ‘Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries’ (2017) 3 McGill Journal of Dispute Resolution 37, 55.
\textsuperscript{1045} Enforcement Law, art 11 (holding that Saudi courts were not competent to decide on the subject matter of the dispute).
\end{flushright}
consistently there remains the exception of public policy. However, Saudi Arabia has taken a distinctively broad approach to public policy, contending that any aspect of the arbitration agreement, proceedings, or award that is in contravention to Shariah principles is therefore against the Kingdom’s public policy. This is further compounded by the reality that even different courts within Saudi Arabia may interpret Shariah differently, particularly as applied to the New York Convention and the recognition and enforcement of arbitral awards. Public policy is, in a way, in the eyes of the beholder, in this case the particular Shariah judge or court. It is vague and broad, if the desire exists, can be used to invalidate or refuse to enforce virtually any award that seems out of line with Shariah.

However, as far as the attitude of Saudi government is concerned, it appears that the government has made tremendous strides in reforming its arbitration framework. It is certainly fair to say that the New Saudi Arbitration Law has improved considerably its arbitration practices and procedures. Saudi Arabia is on the path toward endorsing a modern arbitration framework for effective and efficient international arbitration, notwithstanding that some Saudi arbitration procedures diverge from the New York Convention and UNCITRAL Model Law, especially where Shariah is concerned. It is these divergences that may continue to present challenges for international contracting parties to obtain predictable recognition and enforcement of international arbitral awards in Saudi Arabia. The following section will explore how further progress can be made toward reconciling these laws.

CHAPTER 7:
CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The aim of this thesis has been to understand the role of Shariah in the recognition and enforcement of both domestic and foreign arbitral awards and to appreciate the challenges it creates for commercial contracting parties.\textsuperscript{1047} As Saudi Arabia attempts to modernise its arbitration regime through becoming a party to prevailing international arbitral conventions and promulgating a new arbitration law, it continues to struggle with its intrinsic historic Shariah roots. This thesis’s contribution to the research in this field has been to explore the impact that Shariah continues to have on the recognition and enforcement of arbitral awards despite the reformations taking place within the Kingdom. This research has demonstrated that while Saudi Arabia has made significant progress in bringing elements of international arbitral trends into its domestic arbitration regime that there is still room for improvement within the Saudi arbitration laws to achieve the effective and efficient enforcement of the recognition and enforcement of arbitral awards within the Kingdom.\textsuperscript{1048}

As ascertained through an exploration of the literature, much controversy exists over the Saudi arbitration system with regard to the rules that govern the recognition and enforcement of arbitral awards, particularly foreign arbitral awards.\textsuperscript{1049} However, there is little comprehensive reporting of arbitration enforcement efforts in Saudi Arabia.\textsuperscript{1050} As a result of the lack of publicly available statistics on enforcement efforts and the relative paucity of current post-arbitration law reform literature, this study has largely focused on the merits and demerits of the Saudi Arbitration Law’s award recognition and enforcement system.\textsuperscript{1051}

\textsuperscript{1047} See Chapter 2.
\textsuperscript{1048} Ibid.
\textsuperscript{1049} See Chapters 1-2.
\textsuperscript{1050} See Chapters 1-2.
\textsuperscript{1051} Ibid.
Notwithstanding the above stated methodological challenges, this thesis concludes that arbitration remains an underutilised method of dispute resolution in Saudi Arabia as a result of the potential challenges relating to the enforcement of arbitral awards.\textsuperscript{1052} The New Saudi Arbitration Law promised to modernise the Saudi arbitration system, bringing much needed certainty around the rules applied to award enforcement in Saudi Arabia—and to a certain degree it has been moderately successful.\textsuperscript{1053} Among the most innovative of its reforms, the New Arbitration Law’s provisions are more harmonised with international norms and best practices derived from its adoption of the UNCITRAL Model Law and becoming a party to the New York Convention.\textsuperscript{1054} Additionally, the revised law attempts to limit the Saudi domestic courts’ purview to review arbitral awards, on which the old law was silent, and the principle of party autonomy is, for the first time, given formal recognition under Saudi law.\textsuperscript{1055} However, this autonomy remains tempered by the broad provision of the New Arbitration Law that requires the enforcement courts to verify that an arbitral award is consistent with Shariah and Saudi public policy prior to enforcement.\textsuperscript{1056}

\textbf{7.2 Summary of the Research}

Chapter 1 of this thesis outlined the aims and objectives of this research, primarily to investigate the impact of Shariah law on the recognition and enforcement of both domestic and foreign arbitral awards.

Chapter 2 examined the Saudi legal framework and the sources of its legislation. It explored the two fundamental aspects of the Saudi legal system: the recent modernisation of the Saudi arbitration framework and the challenges confronted by commercial contracting parties with obtaining recognition and enforcement of their arbitral awards by the Saudi enforcement courts.\textsuperscript{1057} This chapter sought to analyse the extent of the Saudi arbitration framework’s

\textsuperscript{1052} Ibid.
\textsuperscript{1053} See Chapter 4.
\textsuperscript{1054} See Chapters 2, 4.
\textsuperscript{1055} See Chapter 3.
\textsuperscript{1056} Ibid.
\textsuperscript{1057} See Chapter 2.
effectiveness and efficiency in enforcing arbitral awards and whether further improvements to this regime should be made.

This chapter was inspired in part by the successes and failures of Saudi Arabia’s domestic arbitral reform and the adoption of the New York Convention within the context of Saudi Arabia’s national arbitration framework. At the outset, it seems that some of the essential legal requirements of Shariah law might not support a legal regime that regularly recognised and enforced both domestic and international commercial arbitral awards as international awards were not the result of proceedings governed by a Shariah system. As Chapter 2 sought to document and assess, foreign commercial parties still face a number of uncertainties with getting their awards recognised and enforced within the Kingdom. Further, the New Saudi Arbitration Law does not directly address issues of entirely foreign arbitrations and does not definitely resolve important questions around the finality and enforcement of arbitrations involving Saudi parties but that are, nonetheless, administered under foreign arbitration rules. The Saudi government has long remained a difficult jurisdiction in which to enforce foreign awards and it is not yet clear whether the new Saudi arbitration regulations mark a departure point in the Saudi government’s attitude to delocalised arbitration.

The future of recognition and enforcement efforts within the Kingdom will depend significantly on how the courts interpret the text of the implementing rules. In practice, a foreign party seeking to enforce an arbitral award against a party domiciled in Saudi Arabia may face significant barriers. From the standpoint of the foreign party, the principal limitation of arbitration in Saudi Arabia is the application of mandatory norms of Shariah, in view of the Islamic foundation of Saudi Arabia’s legal constitution. For example, Article 1 of the Basic Law of Governance stipulates that the Holy Qur’an is the constitution of the country, and the Holy Qur’an and Sunna’h are the sources of Saudi legislation. In the absence of codified and consistently applied norms of Shariah, the Saudi legal system may seem, to onlookers at least, to offer a
discretionary model of justice in which the courts play a highly interventionist role that conflicts with the underlying purposes and principles of a modern system of arbitration, namely party autonomy, finality and sanctity of contract.\textsuperscript{1061} Saudi judicial bodies, for instance, are in practice afforded wide discretion to reopen an award and review its merits if there is a question as to the awards Shariah compliance.\textsuperscript{1062} This was one of the key issues that the arbitral community hoped would be resolved by the New Arbitration Law, but is one that continues to linger given the broad applicability of Shariah as a form of Saudi public policy.\textsuperscript{1063}

Chapter 3 then shifted focus from the structural aspects of the Saudi arbitration framework to the practical aspects of arbitral award enforcement. One primary takeaway from this analysis is that all parties, domestic and foreign, contemplating arbitration as a means of resolving their disputes with a Saudi national or needing to enforce an award within the Kingdom should be cognisant of scope and application of Shariah in the arbitral context. Beyond this, the parties should also seek to gain a fuller understanding of the formal and substantive contractual and policy elements of Saudi Arabia’s Shariah-governed legal system, as the courts will evaluate arbitral awards to see whether they were rendered consistent with Shariah principles.\textsuperscript{1064} For instance, a party that will need to enforce their awards in Saudi Arabia must keep in mind that the enforcement courts continue to exercise broad review power through the ability to verify Shariah compliance. A competent court is not only empowered to scrutinise arbitration agreements to ensure that that these meet formal requirements of the New Arbitration Law, such as with regard to admissibility, capacity and eligibility requirements, it may also decide on its own motion to set aside the award on the grounds that it contravenes the provisions of Islamic Shariah or Saudi Arabia’s public policy.\textsuperscript{1065}

The central focus of Chapter 3 was the need for greater clarity and understanding of how public policy issues represented through Shariah

\textsuperscript{1061} See section 1.3.2.
\textsuperscript{1062} See Chapters 2, 6.
\textsuperscript{1063} See Chapter 2.
\textsuperscript{1064} Ibid.
\textsuperscript{1065} See Chapters 3, 6.
applicability may have bearing on arbitrations administered under foreign or host state ‘choice of law’ clauses in Saudi Arabia.\textsuperscript{1066} In view of the broader debates on forum shopping and the wider developments in international investment law, Chapter 3 identified the ways in which arbitration clauses may be voided or rendered ineffective under existing Shariah-based Saudi regulations.\textsuperscript{1067} To combat these challenges, foreign contractors engaging in arbitration must maintain a working understanding of Shariah and its potential impact when drafting a workable arbitration clause for contracts that at some point may be subject to recognition and enforcements Saudi law. Thoroughness and specificity in the drafting of arbitration clauses may reduce the risk of an award being set aside.

Further, this chapter also explored how an attempt to circumvent Shariah by invoking foreign arbitral rules or laws often prove futile.\textsuperscript{1068} While the exercise of autonomy in choosing the procedural and substantive laws and rules applicable to the proceedings may generate a favourable award, that award means little if it is unable to be enforced. During arbitral award enforcement proceedings in Saudi Arabia, there is little to stop the enforcement court from reopening the award, or examining the underlying contract, to assess its compliance with Shariah law, regardless of the inclusion of contractual forum selection clause, stabilisation clauses or other references to delocalised institutional arbitration rules. Chapter 3 argues that the rights of foreign contractors are most secure when the governing law of the contract is Saudi law as its domestic law already accounts for the nuances of Shariah.

Building on the arbitration framework basics delineated in Chapters 2 and 3, Chapter 4 then critically examines the role of Shariah in the various stages and aspects of arbitration proceedings with the goal of highlighting the plethora of instances where a deviation from Shariah principles could result in the failure of Saudi courts to recognize or enforce an arbitral award. This analysis recognises that foreign contractors and investors are, perhaps understandably, reluctant to choose Saudi law as the law of the contract and dispute resolution as a result of

\textsuperscript{1066} See Chapter 3, \textsuperscript{1067} Ibid. \textsuperscript{1068} See Chapters 3-4.
their lack of familiarity with Shariah principles; however, it is crucial that they take Shariah applicability into consideration as it becomes an issue at the enforcement stage.\(^\text{1069}\)

The reticence toward Shariah often stems from an unfamiliarity with its principles as well as an emphasis on the areas in which it deviates from established Western commercial practices. In many instances, parties will look to opt out of a legal system based on traditions and principles that are substantially different from their own.\(^\text{1070}\) Those unfamiliar with Islamic legal systems may also raise concerns as to the certainty, predictability and fairness of Saudi arbitration processes.\(^\text{1071}\) The larger problem is that the Saudi arbitration system currently lacks a settled body of legal principles—contractual and regulatory—that can be effectively applied to resolve arbitral disputes.\(^\text{1072}\)

This is a result of both the developing nature of the Saudi arbitration framework and the interpretational nature of Shariah practice.

The mutual antipathy between Islamic legal systems and international arbitration regimes has a long and turbulent history. The apparent conflicts between Islamic and Western models of arbitration were first placed into contention in the Aramco arbitration case.\(^\text{1073}\) As demonstrated in Chapter 3, the Aramco dispute in particular provides the historical background against which Saudi Arabia adopted its law banning governmental ministers from entering into arbitration agreements, a policy that has survived the reforms of the New Arbitration Law.\(^\text{1074}\) Once based on a crude mercantilism, Islamic legal systems had now taken on many features of advanced capitalistic states. Now exporters and not just importers of capital investment in the new globalised economy, Saudi Arabia ratified major international conventions and treaties, specifically the New York Convention, as did several other Islamic countries. Saudi Arabia, along with other commercial hubs, most notably Dubai, have signalled their

\(^{1069}\) Ibid.
\(^{1070}\) See Chapter 4.
\(^{1071}\) Ibid.
\(^{1072}\) Ibid.
\(^{1073}\) See Chapter 3.
\(^{1074}\) See Ibid.
intention to continue along this path, chiefly through enactment of arbitration friendly national legislation.¹⁰⁷⁵

Situated against this background, Chapter 4 considered the role of foreign arbitration in the treatment of commercial contracts under Saudi domestic arbitration law. From these premises, Chapter 4 concluded that Saudi Arabia may yet be a long way from fully embracing either the principles of international law or the Westernised system of international arbitration.¹⁰⁷⁶ Yet, this moment in history may also provide the Kingdom of Saudi Arabia with an impetus for reform.

Chapter 5 attempted to demystify Islamic law and emphasise the positive aspects of the Islamic model of arbitration, which often are not as divorced from traditional principles as one may first think. It is often falsely assumed that Islamic legal systems are rudimentary in character and therefore lack effective contract laws¹⁰⁷⁷ and this chapter sought to challenge this characterisation. As denoted in the primary texts of Islam, contracts are considered sacred. The Quran is explicit on the matter: ‘O ye who believe! Fulfil your undertakings’.¹⁰⁷⁸ Such is the primacy afforded to the good faith execution of a contract that in the priority of obligations assumed by the practicing Muslim, only devotion to God ranks higher than the fulfilment and satisfaction of obligations owed pursuant to a binding agreement.¹⁰⁷⁹ Moreover, no distinction is made between public and private contracts or between international treaties or domestic contracts. All are pacts entered are witnessed by Allah and must be observed as an exercise of religious duty.

¹⁰⁷⁶ Baamir (n 18) 91 ‘Arbitration loses its objective of settling disputes if arbitral awards lack enforceability.’ In a survey, respondents view judges in the GCC as being unfamiliar and ill-equipped to deal with international agreements, and especially so with regard to ICSID Conventions (3.78 out of 10) which has had very little history in the GCC states. The respondents also rated the judges’ familiarity with the New York Convention (5.86 out of 10) and the judges’ familiarity with the UNCITRAL Model Law (4.97 out of 10).
¹⁰⁷⁷ See Chapter 5.
¹⁰⁷⁸ Mohammed (n 278) 98.
¹⁰⁷⁹ Baamir (n 18) 46.
One distinguishing feature of Shariah lies in the informal nature of its development, which has evolved principally through processes of experimentation and jurisprudential debate in place of a codified or systematic theory of private law and autonomy. In this respect, Islamic canon law bears a certain degree of resemblance to the contract laws of common law jurisdictions. Under Shariah, the Islamic scholars interpret the Shariah principles and apply them as factual situations arise. Further, the principles of freedom and sanctity of contract occupy a privileged position in both legal systems, albeit applied and interpreted in different ways. Additionally, Islamic law systems adopt the same basic definitions or governing criteria as common law systems in determining whether a contract has been formed, specifically with respect to capacity, consideration, and offer and acceptance.

Chapter 6 then united the analyses delineated in the previous chapters to assess the challenges for recognition and enforcement of arbitral awards in Saudi Arabia. This chapter examined the notable aspects of the domestic enforcement regime upon which any attempts to recognise and enforce foreign arbitral awards are based. This chapter then turned to an exploration of the challenges presented for enforcing foreign arbitral awards. Within this scope, consideration was first given to the influence of international instruments, such as the New York Convention, on the Saudi arbitration regime. Despite the ‘pull’ toward procedural harmonisation of national laws to leading international arbitration regimes, the jurisprudential foundation of arbitration law remains, to a large extent, national. This chapter further explored the application of Article V of the New York Convention and the exemptions that Saudi Arabia can invoke and define through its national arbitration laws to refuse to recognize or enforcement of international arbitral awards. For example, the most common grounds for invalidating international arbitral awards are: incapability of the subject matter of the dispute to be resolved in arbitration; invalidity of the underlying arbitration agreement; and arbitral awards that are contrary to the public policy of the enforcing state. It also noted that there is no proper interpretation of the term public policy in the national legislation and that in

\[1080\] See Chapter 5.
Saudi Arabia, Shariah law is equated to public policy. It appears that the enforcing courts within the Kingdom interpret these grounds for refusal very broadly, not hesitating to exercise their power to ensure Shariah compliance.\textsuperscript{1081}

The tension between international enforcement principles and Saudi Arabia’s rooting in Shariah tradition lies at heart of the Saudi Arabian arbitration framework, itself a reflection of the 2012 Saudi Arbitration Law’s competing, aims—its obligations under international law to uphold, recognize, and enforce awards absent a valid justification for refusing to do, and the formal demand for Shariah compliant laws.\textsuperscript{1082} This chapter further considered the many and varied ways in which the conflicts of law, values and rights play out in the context of the Saudi legal system, arguing in favour of national arbitration laws that reconcile the demand for effectiveness and legitimacy. Otherwise put, the legitimacy and effectiveness of Saudi Arabia’s newly reformed arbitration regime will largely depend on the extent to which it is viewed as achieving a more just and stable balance between the public policy prerogatives of the sovereign state and the rights and legitimate expectations of private persons who are made subject to its law.\textsuperscript{1083}

To further illustrate its attempt at a harmonised approach, this chapter also assessed the provisions of the UNCITRAL Model Law and Rules as related to the New Saudi Arbitration Law. Despite attempts to implement UNCITRAL provisions, some provisions of the Saudi Arbitration Law are divergent from those of UNCITRAL. For example, the Saudi government has constitutional obligations as stipulated in the Basic Law of Governance that all Saudi regulations should be derived from the source of Holy Quran and Sunnah.\textsuperscript{1084} This illustrates that there are still gaps that need to be reconciled for Saudi Arabia to become fully aligned with the overarching trends in international arbitration and establish an efficient and modern arbitration framework for

\textsuperscript{1081} See Chapter 6.
\textsuperscript{1082} Peter W Wilson & Graham Douglas, Saudi Arabia: The Coming Storm (1994) 201.
\textsuperscript{1083} For a critical analysis, see Gus Van Harten, ‘The Public Private Distinction in the International Arbitration of Individual Claims against the State’ (2007) 56 International and Comparative Law Quarterly 371.
\textsuperscript{1084} See Ministry of Foreign Affairs,
domestic and international arbitration. Yet, this author remains hopeful that Saudi Arabia may yet become a regional centre for arbitration in the coming decades. As other regional powers compete for foreign investment, Saudi Arabia, like other GCC countries, has strong economic incentives to develop laws and procedures which are more investor friendly, and less rooted in its cultural and religious traditions.\textsuperscript{1085}

However, this thesis argues that Islamic law and business friendly arbitration need not been seen as mutually exclusive. By first drawing on interpretative theories of law, the thesis argues for a constructive ‘best light’ interpretation of Shariah law in the face of the increasing complexities of modern commercial practice, toward the further advancement of a ‘gap-less’ and coherent system of Saudi law, rooted in principles of justice and rule of law, as opposed to being governed primarily by religious principles.\textsuperscript{1086}

Finally, the thesis concludes that conflicts between laws and legal system present an exciting opportunity for mutual learning and accommodation between Islamic and non-Islamic legal systems and models of contract construction and dispute resolution.\textsuperscript{1087} By extension, this thesis has argued that Shariah principles need not be seen as an impediment to doing business in Saudi Arabia, but, rather that Islamic arbitration law is ripe for innovation, and has garnered respect for the emphasis it places on risk mitigation, fairness and equitable distribution of benefits and obligations in the conclusion of contracts.

In light of the above, this thesis makes the following recommendations for further developing the Saudi arbitration regime with regard to the recognition and enforcement of arbitral awards within the Kingdom.

7.3 Recommendations

As demonstrated by the preceding chapters, religion and culture, as well as international norms, have a significant effect on the arbitral award enforcement

\textsuperscript{1085} See Chapter 6.
\textsuperscript{1086} Iqbal (n 27).
\textsuperscript{1087} Liebesny (n 652) 18.
process. This study has carefully examined the impact of Shariah on the enforcement of arbitral awards and the particular challenges its implication presents for foreign parties attempting to enforce their arbitral awards before the Kingdom’s courts. Specifically, the core focus of this work is reconciling Shariah to Saudi public policy and what this means for Saudi judges when recognising and enforcing arbitral awards. The ambiguity of the principle of public policy under the New York Convention, and among the various players in the international arbitral sphere, has permitted Saudi Arabia’s enforcement courts to far exceed the normal discretion accorded to national courts when enforcing arbitral awards.\(^{1088}\) This expansion of the definition of public policy beyond that derived from international norms allows enforcement judges to substantively review arbitral awards for Shariah compliance on the basis of an exemption to the recognition and enforcement framework to which the KSA has subscribed. In order to curb the impact of Shariah, the following recommendations propose ways in which Saudi Arabia can further develop its arbitral enforcement regime to achieve the efficient and effective enforcement of arbitral awards.

7.3.1 Embrace Legal Pluralism

One approach for reconciling the conflicts inherent between Shariah and the enforcement of international commercial arbitral awards under the New York Convention would be to complete introducing the idea of a dualistic legal system. Engaging in this type of legal pluralism creates a situation in which the population observes more than one body of law.\(^{1089}\) These scenarios most often arise in contemporary societies when the legal system currently in place cannot effectively manage the interrelations with other legal systems when cultural boundaries are crossed.\(^{1090}\) Further, as Hooker explains, legal pluralism can naturally result from a particular society’s attempt at modernization.


\(^{1090}\) Ibid.
Multiple obligation arises in those state which have voluntarily adopted Western laws with the motive of modernizing themselves... A legal plurality here arises quite simply because the original is by no means displaced in whole or in part by the introduced law... The result is a conflict of principle which is settled in a number of different ways or, more often than not, left unsolved.\footnote{Barry Hooker, \textit{Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws} (Clarendon Press, 1985) 3.}

This is the position in which Saudi Arabia currently finds itself. It has adopted international and conventions and norms to attempt to modernise its approach to prevailing arbitral practice and award enforcement, yet its domestic laws and structure still maintain incompatible ties with its Shariah roots. Marar aptly notes that this is what in effect happens when Saudi Arabia ‘borrows’ legal concepts from developed countries that do not share the same legal system without revising or adapting its existing laws.\footnote{Marar n 979) 92.}

However, by engaging intentionally in a degree of legal pluralism, Saudi Arabia could develop a dualistic, parallel approach to arbitral award enforcement that would account for domestic arbitrations consistent with the prevailing Shariah provisions alongside a more secular and legal principle-based system that would apply to foreign awards. As Marar notes in his research, the Saudi Arabian government has begun to undertake this process in some respects with regard to financial transactions.\footnote{Ibid 107.} Under such an approach, Shariah maintains its place as the primary source of law in Saudi Arabia, while the government simultaneously permits a Western-based commercial law system familiar to most foreign parties to operate in conjunction with the existing Islamic laws.\footnote{Ibid 92.}

Implementing such as dualistic legal system that relies on concepts of legal pluralism would be no easy task. In fact, as Marar notes ‘the Saudi legal system is in need of ‘legal surgery’ and re-engineering of the legal architecture’.\footnote{Ibid 92.} And

\footnotesize
\begin{itemize}
  \item 1092 Marar n 979) 92.
  \item 1093 Ibid 107.
  \item 1094 Ibid 92.
  \item 1095 Ibid 92.
\end{itemize}
to some extent, the recent legislative and judicial reform efforts taken by the Saudi government demonstrates its agreement; however, the way in which such reforms have been undertaken in a piecemeal manner are not necessarily effective for a lasting and harmonised legal framework. This is issue is not limited to the realm of arbitration law and is indicative of the broader challenges facing the Saudi legal system. To rectify this issue would require an overhaul of the existing arbitration regime. Ideally this would start with the development of a specialised Shura Council committee on arbitration as discussed in the following section that could examine Saudi Arabia’s domestic approach to arbitration, both domestic and foreign, in light of the limitations imposed by the Shariah framework and these Kingdom’s obligations under its international instruments. Then, only after considering the larger picture of these issues that often go overlooked from a nation-centred approach, can a new law be drafted that will account for the enforcement needs of both foreign and domestic parties before the Saudi enforcement courts.

7.3.2 Create an Arbitration-Specific Shura Council

One area in which Saudi Arabia struggles relates to the interpretational challenges faced by Shariah and the simultaneous attempts to reconcile Shariah law with legislative provisions. To assist with the legislative process, the Shura Council was created as the formal advisory entity within the Saudi government. 1096 The Shura Council is empowered to draft and propose laws to the King and to interpret laws that have already been issued. 1097 To further assist with the development and interpretation of the Kingdom’s laws, the Shura Council was initially divided into eight specialised committees, which has increased to its present thirteen committees. 1098 The topics for these specialised committees currently include: Islamic, Judicial Affairs; Social, Family, and Youth Affairs; Economic Affairs and Energy; Security Affairs; Educational and Scientific Research Affairs and many others. 1099

1099 Ibid.
As can be inferred, these committees correlate with the primary issues facing the Kingdom’s development and reformed over the last ninety years. These committees serve an invaluable purpose by being able to hone in on a particular area of specialty and provide thoughtful and reasoned guidance on how the Kingdom should handle its legislative affairs and how to best achieve its goals through legislative promulgations and interpretations. In light of the contemporary reform efforts taking place within the arbitration regime and the Kingdom’s focus on changing the world’s perception of it to an arbitration friendly nation, the Kingdom should consider that creation of a specialised Shura Council committee on arbitration and alternative dispute resolution. The committee could guide the King with further refining the Kingdom’s arbitration laws by assisting with identifying challenges for both foreign and domestic parties at the legislative stage and proposing language that would bridge the existing gaps and be specific enough to address these concerns. This committee would also be unique in that it would need to liaise with other committees, such as the Islamic, Judicial Affairs Committee and the Foreign Affairs Committee to effectively address matters such as international award enforcement and the integration of treaty obligations.

7.3.3 Create a Specialised Arbitral Enforcement Court

While the relegation of enforcement matters to a specialised enforcement circuit was a significant advancement in streamlining the recognition and enforcement of arbitral awards, this could be further improved through the creation arbitration-specific enforcement court As Pouget has argued, highly specialised courts have been significantly more effective in handling commercial arbitral awards when compared to general judicial enforcement proceedings in a number of jurisdictions and, as a result, this has become a growing trend.


Creating a specialised arbitral enforcement court that only hears arbitral issues would further the Saudi government’s attempts to enhance the efficiency of the Kingdom’s judicial system and ensure certainty of the overall legal system.1102 Having a specific court dedicated to arbitral enforcement would result in a small pool of expert judges, familiar with arbitration practice and commercial dealings, as well as versed in the applicability of Shariah law to arbitral award enforcement, to hear recognition and enforcement cases within the Kingdom. The use of specialist judges would ensure that cases are being interpreted in line with the prevailing principles of arbitration and with a respect for party autonomy. Additionally, having a limited pool of specialist judges would also increase consistency in recognition and enforcement decisions, leading to a greater predictability for parties seeking satisfaction of their arbitral awards.

7.3.4 Encourage Consistency in Judicial Enforcement Proceedings

As illustrated in Chapter 5, there are various interpretations of Shariah law as well as what constitutes public policy that would merit setting aside an arbitral award. For the Saudi arbitral enforcement regime to be efficient and inspire the confidence of those engaging with the system, there must be increased consistency in enforcement proceeding practice. This section considers some of the ways in which consistency could be introduced into the current regime. That being said, these recommendations would work best in conjunction with the development of the Shura Council committee and specialised enforcement court suggested above.

7.3.4.1 Clarify Legislative Terminology

Consistency in enforcement proceedings first starts with a certain degree of precision in legislative terminology. The arbitration laws must be carefully and intentionally drafted using clear and unambiguous language to avoid ambiguities in the meanings and applications of these terms or interpretative gaps during recognition and enforcement efforts. The rationale behind this focus

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1102 Marar (n 979) 124.
on clarity is that when these gaps arise the Saudi courts’ tendency is to fill these gaps using principles of Shariah law and principles of public policy, introducing additional elements that could result in the refusal of an award, which could have otherwise been avoided had the language not been open to subjective interpretation. Further, clarity in legislative terminology will also result in increased confidence by parties that will need to ultimately enforce their arbitral awards within the Kingdom. When the governing laws are not a source of ambiguity, they can be certain their arbitration clauses, claims, and proceedings are structured in such a way that any grounds for challenge or refusal can be minimised to the extent possible.

7.3.4.2 Clarify the Laws Applicable to Enforcement

When it comes to the enforcement of domestic arbitral awards, there is no question that the Saudi domestic arbitration laws apply to the enforcement proceedings. But is this the case with foreign arbitral awards? Arguably, all awards being enforced within the Kingdom are subject to Saudi law; however, there is also a strong argument that foreign awards should be enforced only within the scope of the international instruments to which Saudi Arabia has subscribed, like the New York Convention. Thus, it would behove the Kingdom to expressly clarify what law sets out the conditions for the recognition and enforcement of foreign arbitral awards. One scholar suggests excluding foreign awards from the purview of domestic law and including a provision within the Kingdom's domestic law that states ‘[t]he conditions to the enforcement of a domestic arbitral award shall not apply to a foreign or international arbitral award’. A survey conducted by the same scholar confirmed that the majority of respondent’s agreed with this provision and that it accurately described the ideal scenario for the interaction between the domestic arbitration law and the enforcement of foreign arbitral awards.

7.3.4.3 Limit the Scope of Judicial Review

1103 Almutawa (n 110) 318.
1104 Ibid.
Another distinct aspect of Saudi enforcement proceedings that needs to be addressed is the relatively unfettered ability for the enforcement courts to review an arbitral award on the basis that they must verify that an award is consistent with Shariah as a matter of domestic public policy. As discussed in Chapter 6, there is a notable difference between domestic law which requires verification of Shariah compliance versus the language of international conventions, like the New York Convention, that views public policy evaluation as a permissive grant of authority to be used judiciously.

As it currently stands, the courts apply the domestic Shariah compliance standard to all arbitral award enforcement proceedings under the umbrella of public policy analysis. An important part of limiting the scope of this judicial review will be to reconceptualise what constitutes public policy for the purposes of enforcing a domestic or foreign arbitral award. This would ideally be achieved through implementing a dualistic legal system as discussed above and refining the Kingdom’s conception of public policy that is discussed below.

Once the relative standards are implemented for domestic and foreign arbitral awards respectively, the language of the Arbitration Law should be revised to reflect this dichotomous structure and guide judges in making recognition and enforcement determinations.

7.4 Recategorise Prohibited Award Elements into Permissible Forms

The most often cited ground for the refusal to recognise or enforce an arbitral award on public policy grounds is that contents of the award violates principles of Shariah law and that it would thus be against the Kingdom’s public policy to enforce the arbitral award. One way to avoid an award being refused on the grounds of Shariah violations would be careful crafting of the award to delineate its elements in a way that is compliant with the Shariah as opposed to against it.
Consider for instance the issue of interest, which is one of the most common award elements that violate Shariah when granted by the arbitral tribunal to the prevailing party. The Quran prohibits all kinds of interest, but does not provide specific reasons for the basis of this prohibition. To understand how a recharacterisation could overcome this prohibition it is important to understand the basis for why interest is prohibited. Beyond the proscriptions of the Quran, Gotanda explains that Muslims believe that interest encourages the accumulation of wealth in the hands of a few, thereby diminishing an individual’s concern for his fellow man, creates a financial gain without a corresponding risk of potential loss; and is selfish in that it is an accumulation of wealth at the expense of another as opposed to through one’s own hard work.

However, unlike awards of interest that are prohibited, the Saudi courts have acknowledged a legal right to claim and recover damages under Shariah law when the damages arise from a breach of the underlying contract including lost profits. When an arbitrator issues an arbitral award that includes interest, one can argue that the award is not intended to be an accumulation of additional wealth for the prevailing party, but rather as a compensation for damages suffered as a result of the breach. However, it should be noted that the ability to award and enforce such damages is limited under Saudi law when compared to Western common law or civil legal systems. Specifically, Shariah only permits restoring a party to the position it was in before the breach of the contract occurred and not to the position that party would have occupied if both parties had performed their obligations under the contract. In the latter instance, this would be a speculative award, which is unenforceable under Shariah law.

When recategorising interest as an alternative form of compensation to a party as a result of a contract breach, the arbitral tribunal has a number of options.

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1105 See, eg, Quran, Surat al-Bawara 3:275 ‘Allah has permitted trading and forbidden Riba (usury)’.  
1107 AlEisa (n 109) 185.  
1109 Al-Ammari & Martin (n 2) 406.
First, lost profits can be reconceptualised as compensation for missed opportunities.\textsuperscript{1110} Unlike lost profits that are compensation for events that did not yet occur and constitute possible future damage, compensation for missed opportunities can represent non-speculative, definite future damage caused by the breach of contract. This present damage arises because of the obligations to the breaching party, preventing the non-breaching party from being able to profit from pursuing other opportunities. As such, this compensation would be obligatory rather than representing an unrealized probability.\textsuperscript{1111} Such an approach would be consistent with those taken the Saudi courts in interpreting damages awards.\textsuperscript{1112}

Second, the arbitrators could also make the argument that the additional compensation added to the award is compensation for the time value of money or inflation compensation.\textsuperscript{1113} Shariah scholars have contended that the Shariah permits compensation for the time value of money in commercial contracts, but not for loans.\textsuperscript{1114} Given that most commercial arbitrations result from contractual disputes, it would seem that this approach could be a viable option for consideration by the tribunal. What becomes difficult when undertaking this analysis is determining how to justifiably calculate the damages amount. As Khan notes, ‘[t]here is...nothing against realizing the time value of money as long as it is not claimed as a predetermined value.’\textsuperscript{1115} Thus, a contract cannot have a set interest rate that it is seeking to enforce by the tribunal; instead, as a precursor to characterising an additional sum as inflation compensation, there must not be a contractually agreed interest rate and, as some argue, the amount of total compensation to be paid under the contract is also not contractually agreed.\textsuperscript{1116} However, this walks a fine line as without these terms a contract more easily can be ruled speculative absent a specific means for

\textsuperscript{1110} AlEisa (n 109) 187.
\textsuperscript{1111} Ibid.
\textsuperscript{1112} See, eg, Board of Grievances Decision No 235/T (1994); Board of Grievances, Decision No 89/1415 (1994); Board of Grievances, Decision No 202/1420 (1999).
\textsuperscript{1113} AlEisa (n 109) 188-89.
\textsuperscript{1114} M Fahim Khan, ‘Time Value of Money and Discounting in Islamic Perspective (1991) 1(2) Review of Islamic Economics 35, 35.
\textsuperscript{1115} Ibid 45.
\textsuperscript{1116} AlEisa (n 109) 189.
determining the price to be paid at a later date, such as the then existing fair market value.\textsuperscript{1117}

Finally, to the extent a breach of contract arises from the non-payment of a party, interest calculated as part of the damages could be characterised as compensation for the debtor’s delay in repaying his debts. In Islamic law, a party cannot delay of payments on a debt or obligation for no reason.\textsuperscript{1118} If a party fails to pay their contractual obligations without cause or stops paying their obligations due to being embroiled in the arbitration of a contractual dispute, it arguably would be permissible for the arbitral tribunal to award the prevailing party additional compensation for the debtor’s procrastination in making his payments.\textsuperscript{1119} This basis for additional compensation is derived from the Prophet’s \textit{hadith} that states, ‘procrastination (delay) in paying debts by a wealthy man is injustice’.\textsuperscript{1120} Thus, to the extent that a party that is able to make payments does not, the non-breaching party would be rightfully entitled to damages.

The idea of recharacterising impermissible elements of an arbitral award in a way that complies with Shariah and Islamic public policy extends beyond the concept of \textit{riba}. For instance, there may be means for reconciling other issues such as \textit{gharar} (uncertainty) and \textit{Jahallah} (the unknown) that would preserve the underlying contract, the arbitral proceedings, and the resulting award when viewed through a lens of preserving competing and more pressing Shariah concerns. However, this area has not been studied at length and would serve as an interesting point of discussion for how to harmonise Shariah practice with international commercial norms in light of contemporary international trade practices.

\textsuperscript{1117} Board of Grievances Decision No 29/1401 (1981). Holding that ‘due to a defendant’s failure to allow the contractor to initiate the required work, the plaintiff would be compensated for the increase in the market value of materials due to inflation…An increase in the market value of materials and wages would have been avoided if the defendant had performed the contractual obligation, as intended at the signing of the contract’. (emphasis added).
\textsuperscript{1119} AlEisa (n 109) 190.
\textsuperscript{1120} \textit{Hadith} 3:486, Al Bukari.
7.3.5 Develop a Refined Conception of Public Policy

This study has demonstrated that the Saudi approach places Shariah compliance as a paramount consideration for public policy analysis under both the domestic arbitration law and for the purposes of exemption under the New York Convention. However, as explored in Chapter 6, there is an ongoing debate over whether Shariah should in fact rise to the level of public policy and, more generally, how public policy should be defined in various circumstances.

In considering how Shariah fits into a public policy analysis, Ayad makes an interesting point that despite the aim of Shariah to preserve public policy, there are circumstances in which Shariah and the Kingdom’s public policy could come into conflict.\textsuperscript{1121} This no doubt creates a risk for parties involved in arbitrations needing enforcement in Saudi Arabia how and to what extent the courts will seek to implicate public policy and/or Shariah principles. Instead of forcing parties into the assumption that under all circumstances Shariah constitutes the Kingdom’s public policy for the purposes of award enforcement, the Saudi government should delineate the extent to which Shariah is in fact distinct from public policy and the circumstances under which Shariah conflicts with public policy and will not be enforced. This would require a rethinking by judges of the implicit hierarchy applied to cases which begins with a Shariah analysis, followed by legislative regulation, custom, then equity.\textsuperscript{1122}

To remedy this supremacy of Shariah in all circumstances, the link between inherent link between public policy and Shariah should be reconsidered. Instead of using Shariah in place of public policy considerations, an analysis should be made of what underlying principles of Shariah law rise to the level of public policy as the term is used in the broader arbitration landscape. These principles should then be identified as public policy grounds for the refusal to recognise or enforce an arbitral award without reference to Shariah law. This would provide increased predictability for parties and judges during enforcement proceedings.


\textsuperscript{1122} Ibid.
while also upholding the intended narrow application of the public policy exemption contained in international instruments.

Further, regardless of how Saudi Arabia handles the link between Shariah and public policy, the Kingdom should contemplate defining both its domestic and international public policy. As discussed above, this would be a measure of legal pluralism in which the public policy analysis for international awards would be based on the Kingdom’s determination of what matters are of utmost concern specifically within the award enforcement context when foreign parties are involved. This would not prevent the Kingdom from continuing to mandate Shariah compliance for all domestic arbitral awards. Al-Fadhel notes that a number of arbitration countries have adopted such an approach of having international public policy that applies to international arbitrations to further a country’s goals of being perceived as arbitration friendly and attracting foreign investment.1123 Saudi Arabia would be keen to give due consideration to this approach.

7.5 Contribution of this Study

This study has made a unique and impactful contribution to the field of arbitral award recognition and enforcement in Saudi Arabia. Specifically, it has addressed how the modernisation efforts of the Saudi arbitration regime have not yet resolved the concerns of Shariah’s in the enforcement of arbitral awards, specifically international arbitral awards.

Through its doctrinal and empirical analyses, this study has identified the main challenges for parties in enforcing arbitral awards within the Kingdom both under the domestic Saudi Arbitration Law of 2012 and international agreements, such as the New York Convention. This work has critically explored how the Saudi courts are able to use the ambiguity surrounding ‘public policy’ to apply Shariah to all enforcement proceedings, opening up the ability for the enforcement court to review both the award and underlying case from a merit based perspective.

1123 Al-Fadhel (n 14) 255.
Further, this thesis also provided significant attention to the role that Islamic schools of thought have in defining public policy—in practice the application of Shariah—and the challenges that stem from an interpretative system. These challenges are further compounded when attempting to reconcile Saudi Arabia’s treaty obligations with its domestic practices. In light of these challenges, this thesis provided actionable recommendations that the Kingdom could implement in both the short and long term to further develop its arbitral regime and be a more appealing jurisdiction in the international arbitral sphere.

7.6 Areas for Further Research

The goal of this thesis was to bring attention to the issues inherent with the application of Shariah principles with regard to the recognition and enforcement of arbitral awards and to propose solutions that the Kingdom could pursue to help remedy these concerns. However, given the constraints of this thesis, many topics were only briefly discussed and would prove to be prime grounds for further research and development.

First, additional research should be done into the concept of legal pluralism as it would apply to arbitration within the Kingdom. Arguably, some measure of this may already be inherent within the arbitration framework, and if the Kingdom is to intentionally embrace such a duality it will be crucial for there to be an assessment of the current status and what an idea parallel system for enforcement would look like going forward. This would entail examining both the arbitration-based principles and the conceptions of public policy to be applied in the respective domestic and international contexts.

Second, further structural reform analysis should be undertaken to determine how specialised arbitral government entities, such as a Shura Council committee or enforcement court, could be integrated within the existing Saudi legal system. This would include determining how these entities would be created, the prerequisites for serving in such an entity, and the rules and regulations governing their actions.
Third, in light of the need for further clarity in legislative terminology and the curtailing of enforcement court review, a doctrinal analysis should be undertaken to dissect the provisions of the Saudi Arbitration Law and Enforcement Law, as well as the Kingdom’s international obligations, with the goal of making legislative proposals for how the laws can be further developed to fill these gaps.

Finally, additional research should be done on how the arbitral tribunal itself can avoid having its awards set aside on public policy grounds by issuing awards in a Shariah compliant manner. This chapter touched on some of the ways that *riba* could be recharacterised and there is certainly room to explore how other prohibited elements could be transformed into Shariah compliant damages through intent and careful drafting of the arbitral award.

### 7.7 Conclusion

As this thesis has demonstrated, the issue of enforcing arbitral awards within the Kingdom of Saudi Arabia is complex and requires a detailed understanding of the interplay between Shariah law and the arbitral enforcement regime.\(^{1124}\) For parties that are unfamiliar with Shariah foundations, its procedures, or its nuances, they may not appreciate the extent to which the Saudi system has been largely modernised.\(^ {1125}\) However, Saudi Arabia still needs to take action to bridge the gaps between its domestic arbitral approach and that of the international arbitration sphere wherever possible. Through continued education and dialogue, it is this author’s hope that greater synergy can be achieved between Saudi and international; arbitral principles. It may not be easy, but it can be done.

Indeed, this thesis’s recommendation for the establishment of a Shura Council Committee on Arbitration is an affirmative and highly positive step toward the development and harmonisation of Islamic jurisprudence as it is related to international commerce and trade.\(^ {1126}\) By identifying opportunities to harmonise

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\(^{1124}\) See Chapters 3-4.
\(^{1125}\) See Chapter 3.
\(^{1126}\) See Chapter 5.
Saudi Arabia’s Shariah-based approach with international arbitration trends,¹¹²⁷ these recommendations will constitute positive, affirmative steps towards developing a new Saudi arbitration regime that synchronises with international arbitration norms, thus benefitting Saudi trade and commerce.¹¹²⁸

Further, by implementing the broader changes to the Kingdom’s conception of public policy and the language used in its governing arbitration laws, Saudi Arabia’s international arbitration framework can continue to develop and evolve. Such advances will be key to changing the perceptions of Saudi Arabia from ‘traditionally hostile’¹¹²⁹ to arbitration to a country that is arbitration friendly for both domestic and foreign parties.

¹¹²⁷ See Chapters 2-3.
¹¹²⁸ See Chapter 2.
¹¹²⁹ Wakim (n 968) 1.
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